I. L. R. (2010) M.P.

R.N. of N. P. MPBIL/2009/32366
Postal Regn. No. L4/N.P./2010-12
Jabalpur M. P.

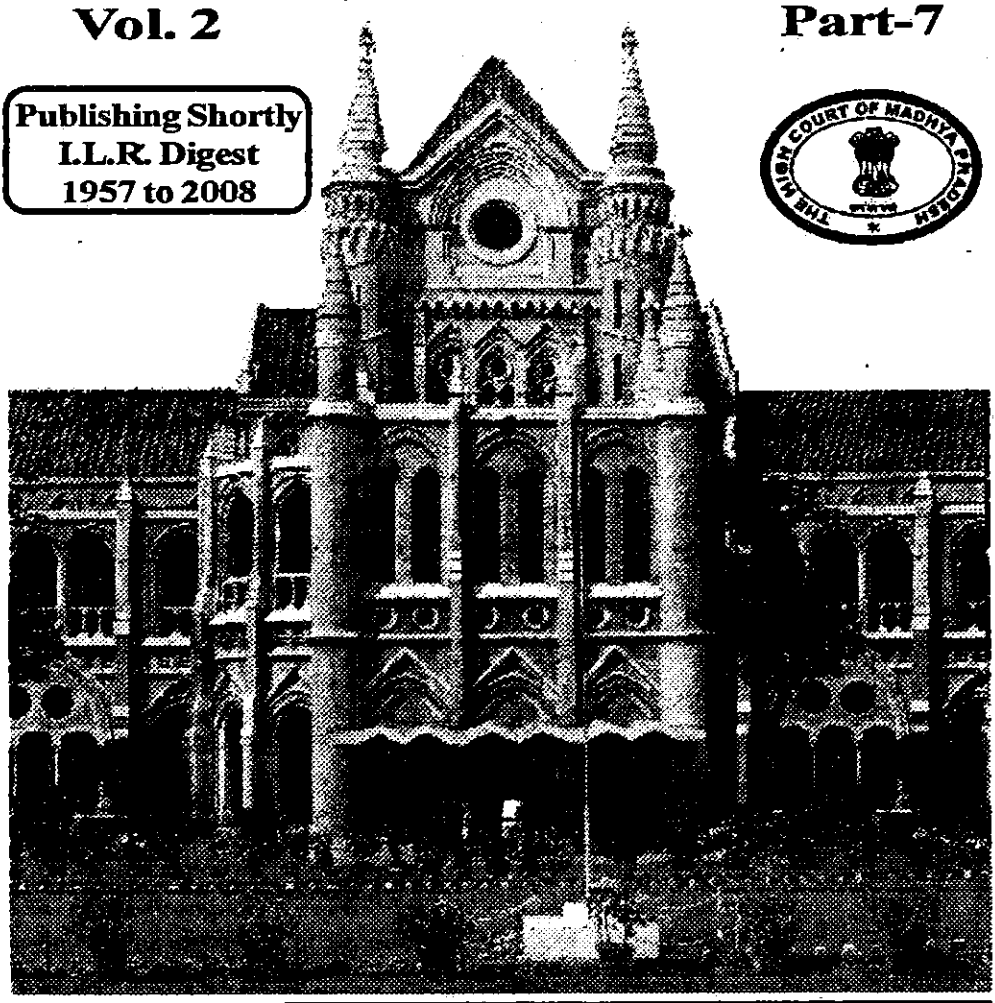
THE INDIAN LAW REPORTS

CONTAINING M. P. SERIES

CASES DECIDED BY THE SUPREME COURT OF INDIA AND
THE HIGH COURT OF MADHYA PRADESH

Vol. 2 **Part-7**

Publishing Shortly
I.L.R. Digest
1957 to 2008



July **(Single copy Rs.30)** **2010**
(pp.1505 to 1684)

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NOTES OF CASES SECTION

Short Note

(11)

P.K. Jaiswal, J

BHAGWANDAS YADAV
Vs.
ROHIT TIWARI

A. Civil Procedure Code (5 of 1908), Section 11, Succession Act, 1925, Section 372 - *Rejection of application for grant of Succession Certificate - Revision filed - Earlier, applicant's claim petition u/s 166 of Motor Vehicle Act was dismissed on the ground that the relationship of deceased with the applicant not proved - Held - Decision of M.A.C.T. would not operate as res judicata because M.A.C.T. had not exclusive jurisdiction to decide question of grant of Succession Certificate.* AIR 2000 SC 2301, AIR 1981 Orissa 117, AIR 1997 SC 2652 (ref.).

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 11, उत्तराधिकार अधिनियम, 1925, धारा 372 – उत्तराधिकार प्रमाण पत्र प्रदान करने के आवेदन की खारिजी – पुनरीक्षण दाखिल की गयी – पूर्व में याची का मोटर यान अधिनियम की धारा 166 के अन्तर्गत आवेदन इस आधार पर खारिज कर दिया गया कि आवेदक के साथ मृतक की नातेदारी साबित नहीं हुई – अभिनिर्धारित – मोटर दुर्घटना दावा अधिकरण का विनिश्चय पूर्व न्याय के रूप में प्रवर्तित नहीं किया जायेगा क्योंकि मोटर दुर्घटना दावा अधिकरण को उत्तराधिकार प्रमाण पत्र प्रदान करने के प्रश्न को विनिश्चित करने की अनन्य अधिकारिता नहीं थी। AIR 2000 SC 2301, AIR 1981 Orissa 117, AIR 1997 SC 2652 (संदर्भित).

B. Evidence Act (1 of 1872), Section 114 - *Where a man and woman are proved to have lived together as man and wife, the law will presume, unless contrary be clearly proved that they were living together in consequence of a valid marriage, and not in a state of concubinage.* 2008 AIR SCW 4113 (ref.)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 114 – जहाँ किसी पुरुष और महिला का, पुरुष और पत्नी के रूप में साथ–साथ रहना साबित हो जाता है, वहाँ विधि उपधारित करेगी, जब तक इसके प्रतिकूल स्पष्ट रूप से साबित नहीं किया जाए, कि वे विधिमान्य विवाह के परिणामस्वरूप साथ–साथ रह रहे थे न कि उपपत्नीत्व की अवस्था में। 2008 AIR SCW 4113 (संदर्भित).

C. Succession Act (39 of 1925), Section 372 - *The enquiry for grant of certificate is to be made summarily.*

ग. उत्तराधिकार अधिनियम (1925 का 39), धारा 372 – प्रमाण पत्र प्रदान करने की जाँच संक्षिप्त होनी चाहिए।

D. Succession Act (39 of 1925), Section 372 - *Deceased and applicant lived together as husband and wife for long years proved - Non-disclosure of factum of marriage in service record would not destroy the presumption of marriage - Held - Applicant is person entitled to collect the estate of deceased - Order rejecting application for grant of succession certificate set-aside - Revision allowed.* AIR 2000 SC 2301 (ref.)

घ. उत्तराधिकार अधिनियम (1925 का 39), धारा 372 – मृतक और आवेदक

पति–पत्नी के रूप में कई वर्षों तक साथ–साथ रहे होना साबित – सेवा अभिलेख में विवाह के तथ्य का अप्रकटीकरण विवाह की उपधारणा को नष्ट नहीं करेगा – अभिनिर्धारित – आवेदक मृतक की सम्पदा संकलित करने का हकदार व्यक्ति है – उत्तराधिकार प्रमाण पत्र प्रदान करने का आवेदन नामंजूर करने वाला आदेश अपास्त – पुनरीक्षण मंजूर। AIR 2000 SC 2301 (संदर्भित).

Vipin Yadav, for the applicant.

Sanjay Agrawal, for the non-applicant No.1.

M.S. Bhatti, for the non-applicant No.2.

V.S. Choudhary, for the non-applicant No.3.

***C.R. No.53/2008 (Jabalpur), D/- 27 January, 2010.**

Short Note

(12)

R.S. Jha, J — CHANDRABHAN SINGH RAJPUT

Vs.

STATE OF M.P.

Service Law - ***Dismissal - Delay in challenge - Effect - Held*** - *Petitioner's services were dispensed with on account of irregularities and he did not take any proceeding for assailing dismissal from service and for seeking reinstatement for a period of nineteen years - Petitioner has not filed any filed order passed by High Court or any order passed by the Tribunal along with the petition in which similarly situated employees were granted benefit - Petitioner not entitled to any relief.* (2006) 11 SCC 464, (1992) 3 SCC 136 (ref.)

सेवा विधि – बर्खास्तगी – चुनौती देने में विलम्ब – प्रभाव – अभिनिर्धारित – याची को अनियमितताओं के कारण सेवा से हटाया गया और उसने सेवा से बर्खास्तगी को चुनौती देने और बहाल किये जाने की माँग करने के लिए उन्नीस वर्ष की कालावधि तक कोई कार्यवाही नहीं की – याची ने याचिका के साथ उच्च न्यायालय द्वारा पारित कोई नत्थी किया गया आदेश या अधिकरण द्वारा पारित कोई आदेश फाइल नहीं किया जिसमें उसके समान कर्मचारियों को लाभ दिया गया हो – याची किसी अनुतोष का हकदार नहीं। (2006) 11 SCC 464, (1992) 3 SCC 136 (संदर्भित).

L.S. Tiwari, for the petitioner.

***W.P. No.4376/2010 (Jabalpur), D/- 19 April, 2010.**

NOTES OF CASES SECTION

Short Note
(13)

Rajendra Menon, J

K.N. SHARMA & anr.
Vs.
STATE OF M.P. & anr.

A. Criminal Procedure Code, 1973 (2 of 1974), Section 313 - *Accused statement - Statement made in defence by accused can only be taken as an aid to lay credence to evidence led by prosecution - Such statement cannot be made the basis for conviction.* AIR 1953 SC 247, (2002) 10 SCC 236, AIR 2007 SC 848 (ref.)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 313 – अभियुक्त कथन – अभियुक्त द्वारा प्रतिरक्षा में किया गया कथन अभियोजन द्वारा करायी गयी साक्ष्य पर विश्वास करने के लिए केवल सहायता के रूप में ग्रहण किया जा सकता है – ऐसा कथन दोषसिद्धि के लिए आधार नहीं बनाया जा सकता है। AIR 1953 SC 247, (2002) 10 SCC 236, AIR 2007 SC 848 (संदर्भित).

B. Evidence Act (1 of 1872), Section 45 - ***Evidence of Handwriting Expert*** *- Expert's opinion must always be received with great caution and it is unsafe to pass a conviction solely on the expert opinion without substantial corroboration.* AIR 1977 SC 1091, AIR 1996 SC 2184 (ref.)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 45 – हस्तलेख विशेषज्ञ की साक्ष्य – विशेषज्ञ की राय सदा ही बड़ी सावधानी से ग्रहण करनी चाहिए और यह असुरक्षित है कि एकमात्र विशेषज्ञ राय पर सारवान सम्पुष्टि के बिना दोषसिद्धि पारित की जाए। AIR 1977 SC 1091, AIR 1996 SC 2184 (संदर्भित).

C. Penal Code (45 of 1860), Sections 420, 467 & 468 - ***Failure to repel*** *- Suspicion, howsoever strong, created against an accused person, and his failure to repel the same is not sufficient to record a conviction.* AIR 1980 SC 499 (ref.)

ग. दण्ड संहिता (1860 का 45), धाराएँ 420, 467 व 468 – खंडन करने में असफलता – अभियुक्त के विरुद्ध सृष्ट संदेह, चाहे वह कैसा ही प्रबल क्यों न हो, और उसका खंडन करने में उसकी असफलता दोषसिद्धि अभिलिखित करने के लिए पर्याप्त नहीं है। AIR 1980 SC 499 (संदर्भित).

Surendra Singh with *A.K. Dubey,* for the applicants.

Puneet Shroti, Panel Lawyer, for the non-applicant/State.

A. Usmani, for the complainant Govinddas.

***Cr.R. No.1476/2008 (Jabalpur), D/- 8 March, 2010.**

NOTES OF CASES SECTION

Short Note

(14)

R.S. Garg & P.K. Jaiswal, JJ

RAMLAL JHARIA

Vs.

STATE OF M.P. & ors.

Excise Act, M.P. (2 of 1915), Section-64 - *Recovery on account of loss to the Government due to re-auction of licence for liquor shop - Petitioner was highest bidder in auction but department proceeded with re-auction as bid was below reserve price - Re-auction also failed - Within 15 days i.e. validity of offer, department accepted petitioner's offer - On failure to execute agreement by petitioner, department re-auctioned the shop and initiated proceeding for recovery of loss suffered - Held - In terms of clause of auction, the offer of petitioner was valid for 15 days and during that period the same can not be withdrawn by petitioner and later on offer of petitioner was accepted within validity period - It can not be said that since there was no concluded contract between the parties, the amount can not be recovered - Order of recovery not void - Petition dismissed.* AIR 1975 SC 1121, (1974) 2 SCC 169, (2004) 8 SCC 671, (1994) 6 SCC 651, AIR 1995 SC 1221 (ref.)

आबकारी अधिनियम, म.प्र. (1915 का 2), धारा 64 – मदिरा दुकान के लायसेंस की पुनः नीलामी से सरकार को हुई हानि के कारण वसूली – याची नीलामी में सबसे ऊँची बोली लगाने वाला व्यक्ति था, किन्तु विभाग पुनः नीलामी के लिए अग्रसर हुआ क्योंकि बोली आरक्षित मूल्य से नीचे की थी – पुनः नीलामी भी असफल रही – 15 दिन अर्थात् प्रस्ताव की विधिमान्यता के भीतर, विभाग ने याची का प्रस्ताव स्वीकार किया – याची द्वारा करार निष्पादित करने में विफलता पर विभाग ने दुकान की पुनः नीलामी की और कारित हानि की वसूली के लिए कार्यवाही प्रारम्भ की – अभिनिर्धारित – नीलामी के खण्ड के निबंधनों के अनुसार याची का प्रस्ताव 15 दिन तक विधिमान्य था और उस कालावधि के दौरान उसे याची द्वारा वापस नहीं लिया जा सकता है और तत्पश्चात् याची का प्रस्ताव विधिमान्य कालावधि के भीतर स्वीकार किया गया – यह नहीं कहा जा सकता कि चूंकि पक्षकारों के बीच कोई निर्णायक संविदा नहीं थी इसलिए रकम वसूल नहीं की जा सकती – वसूली का आदेश शून्य नहीं – याचिका खारिज। AIR 1975 SC 1121, (1974) 2 SCC 169, (2004) 8 SCC 671, (1994) 6 SCC 651, AIR 1995 SC 1221 (संदर्भित).

Sanjay K. Agrawal, for the petitioner.

Naman Nagrath, Addl.A.G., for the respondent/State.

***W.P. No.9222/2005 (Jabalpur), D/- 8 February, 2010.**

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interferes with the course of investigation (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc. These grounds are illustrative and not exhaustive. Rejection of bail stands on one footing but cancellation of bail is a harsh order because it interferes with the liberty of the individual and hence it must not be lightly resorted to.

18. Relying on the above citations, it is submitted that none of the above grounds specified are available for cancellation of bail granted to respondent.

19. Considering the above legal position and totality of the facts and circumstances of the case, I find no ground for cancellation of bail. Accordingly, application is dismissed.

Application dismissed.

I.L.R. [2010] M. P., 1505
SUPREME COURT OF INDIA
Before Mr. Justice G.S. Singhvi & Mr. Justice Asok Kumar Ganguly
24 February, 2010*

JANE MERRY @ JAYA MERRY ... Appellant
Vs.
MERLYN & ors. ... Respondents

Civil Procedure Code (5 of 1908), Section 100 - ***Second Appeal - Suit for partition and possession alleging that suit property was purchased by father from retiral benefits - Dismissal of suit by trial Court and appellate Court - Held - Burden of proof to establish source of consideration amount was on plaintiff - High Court overlooked the onus of proof - Finding recorded by trial Court and lower appellate Court that plaintiff failed to prove that suit property was purchased from retiral benefits of father was pure finding of fact - High Court erred in reversing the same merely because it felt that different view was possible - Judgment of High Court set-aside - Appeal allowed.*** (Para 8)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – द्वितीय अपील – विभाजन और कब्जे के लिए वाद यह अभिकथन करते हुए कि वादग्रस्त सम्पत्ति पिता द्वारा सेवानिवृत्ति लाभों से क्रय की गयी – विचारण न्यायालय और अपीलीय न्यायालय द्वारा वाद की खारिजी – अभिनिर्धारित

C.A. No.7106-7108/2002

– प्रतिफल की रकम के स्रोत को साबित करने के सबूत का भार वादी पर था – उच्च न्यायालय ने प्रमाण भार को अनदेखा किया – विचारण न्यायालय और निम्न अपीलीय न्यायालय द्वारा अभिलिखित निष्कर्ष कि वादी यह साबित करने में असफल रहा कि वादग्रस्त सम्पत्ति पिता के सेवानिवृत्ति लाभों से क्रय की गयी, शुद्ध तथ्य का निष्कर्ष था – उच्च न्यायालय ने केवल इसलिए कि उसने अनुभव किया विभिन्न दृष्टिकोण संभव थे, उसे उलटने में त्रुटि की – उच्च न्यायालय का निर्णय अपास्त – अपील मंजूर।

ORDER

These appeals are directed against judgment dated 11.2.2002 of the learned Single Judge of Madhya Pradesh High Court whereby he allowed Second Appeal Nos.139, 348 and 701 of 1999 preferred by the parties to Suit No.12-A/1992 filed by respondent No.1 and declared that the appellant and respondent Nos.1 to 4 herein will have 1/5th share in the suit property.

2. Victor Richardson (husband of the appellant and father of respondent Nos. 1 to 4) was employed in the railways. He contracted two marriages. He first married Josephin and from her he had two children - a son, namely, John Richardson and a daughter (respondent No.1 - Smt. Merlyn). After the death of Josphin, Victor Richardson married the appellant and they had three children, Smt. Liliyan (respondent No.2), Smt. Mari (respondent No.3) and Garnet (respondent No.4). Victor Richardson is said to have retired from service and died on 30.8.1947. After his death, the appellant purchased suit property bearing Mourisi No.198 admeasuring 19 acres 30 decimals with one house situated in village Kulhards, Tehsil Harda District Hoshangabad (M.P.) for a sum of Rs.7000/- vide sale deed dated 4.8.1948 in her name and the names of John Richardson and Garnet Richardson.

3. After 27 years of purchase of suit land by the appellant, respondent No.1 filed Suit No.12-A/1992 for partition and possession. She pleaded that the suit property was purchased from the retiral benefits received by Victor Richardson and, as such, all his children are entitled to equal share. Respondent No.1 further pleaded that the appellant cannot claim any right in the property of Victor Richardson because she had remarried. In her written statement, the appellant pleaded that after the death of Victor Richardson, she was looking after the children of both the marriages along with the son of her brother Anthony Francis, whose wife had died. The appellant further pleaded that Victor Richardson was habitual drunkard and whatever amount was received after his retirement had been spent on his medicines and repayment of loan and that the suit property was purchased by her from the money provided by her brother Anthony Francis. According to her, the names of two sons were included in the sale deed out of sheer love and affection. She also claimed that even though the names of two sons were included in the sale deed, she was the exclusive owner and no other person has a right to receive share in the property. Garnet Richardson (respondent No.4 herein), who was impleaded as defendant in the suit pleaded that he is entitled to 2/3rd share in the property.

4. On the pleadings of the parties, the trial Court framed the following issues:

No.	Issues
1.	Whether suit land Khasra No.198 was purchased by defendant No.5 on 4.8.48 their money of her former husband Victor Richardson's money and of her own and in the name of John and Garnet? If yes, then effect ?
1b.	Whether suit land Khasra No.198 was purchased by defendant No.4 with money given by her brother Anthony Francis and that of her own and in the name of John and Garnet? If yes, then effect?
2.	Whether defendant No.5 has title in this suit land, if yes, then whether rights of defendant No.5 got extinguished due to second marriage with Antony Michel?
3a.	Whether defendant No.3 has continuous unobstructed possession over the suit land for a period of 30 years?
3b.	If yes, then whether defendant No.3 has become owner of the suit land in accordance with principle of adverse possession?
4.	Whether suit is not maintainable being beyond limitation.
5a.	Whether defendant No.5 is absolute owner of suit land?
5b.	Whether John Richardson had title in the suit land? If yes then to what extent?
5c.	After death of John Richardson who were legal representatives of his portion?
6.	What are the shares of plaintiff, defendant Nos.1 to 3 in the suit land?
7.	Relief and costs

5. After considering the rival pleadings and evidence, the trial Court held that the plaintiff has not been able to prove that Victor Richardson had received the particular amount by way of retiral benefits and the suit property was purchased from the amount allegedly received by him. The trial Court further held that defendant No.5 (appellant herein) had been able to prove that the suit property was purchased from her own money and she cannot be said to have lost her right over the property only on account of performing second marriage. The trial Court rejected the plea of respondent No.4 that he had acquired title by prescription but, at the same time, held that appellant cannot claim to be absolute owner of the suit property.

6. The lower appellate Court dismissed the appeals preferred by the parties and confirmed the decree passed by the trial Court by recording the following observations:

> "It is clear from the aforesaid analysis that suit property has been acquired by defendant No.5 Jane Mary only by purchase and she alone has title over it. She has only voluntarily got name of her step-son John and defendant No.3 Garnet who were minor at that time as children in the sale deed and said John and Garnet do not acquire any interest and title therefrom. Suit property being of exclusive ownership of defendant No.5 her counter claim deserves to be decreed and respective suit and counter claim of plaintiff and defendant No.1 deserves dismissal with costs."

7. The original plaintiff Smt. Liliyan did not challenge the appellate judgment but respondent No.1 did so by filing two Second Appeals bearing Nos. 139/1999 and 348/1999. Respondent No.4 Garnet Richardson also filed Second Appeal No. 709/1999. By the impugned judgment, the High Court allowed all the appeals and granted declaration to which reference has been made in the opening paragraph of this judgment. Although, the learned Single Judge did not find any patent error or perversity in the appreciation of evidence made by the trial Court and the lower appellate Court, he accepted the plea put forward by respondent No.1 by relying upon the oral statements made by three sisters i.e., respondent Nos. 1, 2 and 3 that the suit property was purchased from the retiral dues of their father Victor Richardson. The learned Single Judge also gave importance to the alleged failure of the appellant to prove that her brother Anthony Francis was an affluent person and he could provide money to her for purchasing the suit property. In the opinion of the learned Single Judge, inclusion of the names of late John Richardson and Garnet Richardson in the sale deed was indicative of the fact that Anthony Francis had not gifted the property to his sister i.e., the appellant.

8. We have heard learned counsel for the parties and carefully scanned the record. In our view, the impugned judgment is liable to be set aside because the High Court committed a jurisdictional error by reversing the concurrent findings of fact recorded by the trial Court and the lower appellate Court on the issue of source of money from which the suit property was purchased in the names of the appellant, John Richardson and Garnet Richardson. The two Courts analysed the oral and documentary evidence produced by the parties and concluded that the plaintiff (respondent No.1 herein) failed to prove that the suit property was purchased from the retiral benefits received by Victor Richardson. In paragraph 10 of its judgment, the trial Court made a pointed reference to the contents of notice Ex. P1 got issued by plaintiff-respondent No.1 wherein she claimed that her father had purchased the suit property during his life time, constructed bungalow

and used and enjoyed the agricultural land with his family and observed that the said assertion is falsified by the contents of the sale deed (Ext. P10), which was executed on 4.8.1948 i.e., after almost one year of the death of Victor Richardson. The lower appellate Court independently evaluated the pleadings and evidence of the parties and agreed with the trial Court that the plaintiff has failed to prove the factum of purchase of property from the retiral dues of Victor Richardson. The learned Single Judge overlooked that the onus to prove issue No.1 was on plaintiff-respondent No.1 which she had miserably failed to discharge inasmuch as no document was produced to prove that as a sequel to his retirement, Victor Richardson had received a particular amount and the said amount was used for purchasing the suit property. Notwithstanding this, the learned Single Judge reversed the findings of fact by simply relying upon the oral testimony of the three daughters of Victor Richardson (respondent Nos.1, 2 and 3 herein). This was clearly impermissible in view of the plain language of Section 100 of the Code of Civil Procedure as amended by Act No.104/1976 in terms of which the High Court is required to frame substantial questions of law and decide the same. The finding recorded by the trial Court and the lower appellate Court that the plaintiff failed to prove that the suit property was purchased from the retiral benefits of Victor Richardson was pure finding of fact and the learned Single Judge was legally not entitled to overturn the same merely because he felt that a different view was possible. The so called failure of the appellant to adduce the concrete evidence to prove that the money for purchase of the suit property was made available by her brother Anthony Francis also could not be made basis for reversing the judgments and decrees of the two Courts.

9. In the result, the appeals are allowed. The impugned judgment is set aside and those of the trial Court and the lower appellate Court are restored. However, the parties are left to bear their own costs.

Appeal allowed.

I.L.R. [2010] M. P., 1509
WRIT APPEAL
Before Mr. Justice Arun Mishra & Mr. Justice S.C. Sinho
23 February, 2010*

LAXMI NARAYAN MISHRA ... Appellant
Vs.
STATE OF M.P. & ors. ... Respondents

A. Land Acquisition Act (1 of 1894), Sections 39 & 40 - *Acquisition of land for Company for establishing Mega Cement Plant - In notification, it has been mentioned, as against column of public purpose for which the*

*W.A. No.462/2009 (Jabalpur)

acquisition has been made is for establishing Mega Cement Plant - Acquisition is for Company. (Para 6)

क. भूमि अर्जन अधिनियम (1894 का 1), धाराएँ 39 व 40 – मेगा सीमेंट प्लांट स्थापित करने के लिए कम्पनी के लिए भूमि का अर्जन – अधिसूचना में लोक प्रयोजन जिसके लिए अर्जन किया गया है के सामने के खाने में यह उल्लिखित किया गया है मेगा सीमेंट प्लांट स्थापित करने के लिए है – अर्जन कम्पनी के लिए है।

B. Land Acquisition Act (1 of 1894), Sections 39 & 40, Land Acquisition (Companies) Rules, 1963, Rule 4 - *Acquisition of land for Company - Report of Collector u/s 40 shows provisions of Rule 4 stood complied with and due enquiry has been held - Acquisition held valid - Petition dismissed.* (Para 10)

ख. भूमि अर्जन अधिनियम (1894 का 1), धाराएँ 39 व 40, भूमि अर्जन (कम्पनी) नियम, 1963, नियम 4 – कम्पनी के लिए भूमि का अर्जन – धारा 40 के अन्तर्गत कलेक्टर की रिपोर्ट दर्शाती है कि नियम 4 के उपबंधों का अनुपालन किया गया और सम्यक् जाँच की गयी है – अर्जन विधिमान्य अभिनिर्धारित – याचिका खारिज।

Cases referred :

(2008) 1 SCC 728, (2005) 7 SCC 627.

Raghvendra Kumar & Hitendra Singh, for the appellant.

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

R.P. Agarwal with *Sanjay Agarwal*, for the respondent/Bhilai J.P. Cement Ltd.

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :–Challenge in the writ appeals is to legality of the Order dated 8.4.09 passed by the single Bench dismissing the writ petitions challenging the land acquisition for establishing Mega Cement Plant by M/s Bhilai J.P.Cement Ltd. Land which has been acquired is situated in village Sakariya and Birouhali of Tahsil-Raghurajnagar, District-Satna. Provision of Chapter VII were complied with and thereafter notification under Section 4(1) of Land Acquisition Act was issued on 9.7.2008.

2. For establishing a Mega Cement Plant with the production capacity of 2.2. million tones of cement per year, the land admeasuring 235.59 acres had been acquired. About 72.77 acres of land could not be purchased because of unwillingness of respective owners. The said land is situated in between the area already purchased by private negotiations by Company. Therefore, the State Govt. resorted to acquire the same under the provisions of Land Acquisition Act,1894. State Govt. wrote a letter (R-3/2) to the Collector on 27th December, 2007 pointing out the aforesaid fact that the Company had purchased 139.49 acres land by

private negotiations out of 211.22 acres which was required. Remaining 76.22 acres of land could not be purchased as the land owners did not agree to sell their land to the Company. The propriety of land acquisition was ordered to be examined. Collector, in turn, wrote a letter (R-3/3) on 7.1.2008 to the SDO, Raghurajnagar, District-Satna sending a copy of the aforesaid letter (R-3/2) and to submit the report by 12.01.2008. The SDO directed Tahsildar, Raghurajnagar to collect the information and send the same. Collector wrote a letter (R-3/4) on 27.2.2008 to send the report by 1.3.2008 with respect to the land in question. Tahsildar, Raghurajnagar sent report (R-3/5) dated 1.3.2008 pointing out 19 aspects in the report. The inquest of spot inspection was prepared. The inquest indicated that land was situated in midst of the land purchased by M/s Bhilai JP Cement Ltd. and the land was useful to them, it was un-irrigated land, map of it also tallied and found to be correct, panchnama and the report were forwarded by the SDO to the Collector vide letter (R-3/6) on 1.3.2008. The Collector, called for the information from Deputy Director, Agriculturists Welfare and Agricultural Development, District-Satna who vide letter (R-3/8) dated 5.3.2008 written to the Collector intimated that land was cultivable and was fertile, department was not having any objection in acquisition of the land in case the agriculturists were not having any objection. Crux of the report was that department was not having any objection, however, the agriculturists had not agreed for sale as such the proceedings under Chapter VII were initiated and report was called as envisaged under rule 4 of the Land Acquisition (Companies) Rules, 1963 (hereinafter referred to as "the Rules of 1963"). The Collector sent the report to the State Government vide letter (R-3/7) on 5.3.2008. After examining the report, the State Government wrote a letter (R-3/9) on 14.5.2008 for execution of the agreement under Section 41 of the Land Acquisition Act. Thereafter agreement was entered into between the State and the Company, and the State Government issued notification under Section 4 and a declaration under Section 6 of the Land Acquisition Act. Notification under Section 4 was issued on 30th June,2008 and declaration under Section 6 was issued on 8.8.2008. In the notification under Section 4 the purpose for the acquisition was specified as acquisition for establishment of Mega Cement Plant of M/s Bhilai J.P.Cement Ltd. The writ petitions were preferred before the single Bench assailing the acquisition of the land. Single Bench has dismissed the writ petitions. Aggrieved thereby, the instant writ appeals have been preferred.

3. Shri Raghvendra Kumar and Shri Hitendra Singh, learned counsel appearing for appellants have submitted that acquisition could not be for a public purpose and for a company at the same time. Notification under section 4 and declaration under Section 6 suffers with illegality inasmuch as public purpose has been defined as acquisition for establishment of Mega Cement Plant of M/s Bhilai J.P.Cement Ltd., acquisition for a company could not be treated as a public purpose. Learned counsel have further submitted that rule 4 of the Rules of 1963 has not been

complied with in its pith and substance. Due enquiry was not held as contemplated into the various aspects envisaged under the aforesaid rule. The enquiry got conducted through Collector was merely an eye-wash, report of Tahsildar was obtained and it was forwarded to the State Government, therefore, it could not be said that the enquiry was made in terms of the rule 4 of the Rules of 1963.

4. Shri R.P.Agarwal, learned Sr.Counsel appearing with Shri Sanjay Agarwal for M/s Bhilai J.P.Cement Ltd.and Shri Samdarshi Tiwari, learned GA appearing for State/respondents have supported the acquisition and have submitted that provision of Chapter VII of the Land Acquisition Act has been duly followed. Substantial part of the land which was required for the purpose of Company was purchased by Company through private negotiations, however, the owners of 76.22 acres of the land did not agree for selling their land in private negotiations as such communication was made to the State Government for acquisition of the land, pursuant thereto the State Government directed holding of enquiry under rule 4. The rule 4 was duly complied with in the instant case. In the notification under Section 4 and declaration under Section 6 purpose for which the acquisition has been made has been specified. Acquisition had been made for a company, it is a method of describing the acquisition for the Company M/s Bhilai J.P.Cement Ltd. Thus, there was no illegality in the notification under Section 4 or declaration under Section 6 of the Land Acquisition Act. They have also referred to the correspondence made between the State Government and Collector (R-3/2 to R-3/7) to contend that provision of rule 4 has been complied with. There is no merits in the appeals, the decision rendered by the single Bench deserves affirmance.

5. The first question for consideration is whether notification under Section 4 and declaration under Section 6 can be said to be illegal as against column of public purpose acquisition has been mentioned for company.

6. Shri Raghvendra Kumar and Shri Hitendra Singh, learned counsel appearing for appellants have relied upon decision of Apex Court in *Devinder Singh and others vs. State of Punjab and others* (2008) 1 SCC 728 in which the Apex Court has laid down that a declaration has to be made either for a public purpose or for a Company, it cannot be for both. However on facts, we find in the instant case that notification under Section 4 and declaration under Section 6 were for acquisition for the Company.

When we peruse the notification issued under prescribed proforma of Section 4 it has been mentioned,as against column of public purpose for which the acquisition has been made is for the establishment of Mega Cement Plant of M/s Bhilai J.P.Cement Ltd. In our opinion, it is clearly mentioned by naming company that acquisition is for said Company. It is a method of description in the prescribed proforma of issuance of notification under section 4 that as against public purpose column, the acquisition is for a Company, has been mentioned by naming said

Company. Similar is the position with respect to declaration under Section 6 of the Land Acquisition Act, thus, acquisition has been clearly mentioned to be for the purpose of Company. It could not be said that it was not mentioned in the aforesaid notification and declaration issued under Section 4 and 6 of the Act respectively that acquisition was not for Company. It was for a company has been clearly specified and it is not in dispute that provision of Chapter VII were resorted to.

7. In the instant case, it appears that provisions of Chapter VII were complied with. The challenge is that enquiry was not held in terms of rule 4 of the Rules of 1963 as such there was violation of said rule 4 while making the acquisition for a Company. M/s Bhilai J.P.Cement is a Ltd.Co. As per the case set up by the respondent/M/s Bhilai J.P.Cement Ltd. it has been established in collaboration with Steel Authority of India Ltd. Whatever that may be,we find that the provision of rule 4 of the Rules of 1963 stands complied with.

8. It is apparent from the communication placed on record that effort was made by the Company to acquire the land by private negotiations, however, out of total requirement of 211.22 acres, Company could purchase 134.49 acres by private negotiations, remaining land owners of 76.22 acres land did not agree for selling the property by way of private negotiations and to execute the sale deeds, as such request was made by the Company through MP TRIFAC for acquisition of the land as such the State Govt. directed the Collector, District-Satna to send a report as to desirability to acquire the land in accordance with the rules. Addl.Collector, Satna had in turn asked the report from SDO, Raghurajnagar vide letter (R-3/3) dated 7.1.08. On that SDO had asked the Tahsildar to conduct inquiry on the points which were specified and to send other relevant informations. It appears that report was not sent by 12.1.08 as such another letter (R-3/4) was written by the Joint Collector to SDO, Raghurajnagar to submit the report by 1.3.2008. On 1.3.2008, after conducting the spot inspection, Tahsildar had sent a detailed report containing the information on 19 points. The spot inspection was also made on 18.1.2008. In inquest it was mentioned that crop was sown by the owners, the land was situated in the midst of land already purchased by M/s Bhilai J.P.Cement Ltd. by way of private negotiations. The land was un-irrigated. Map tallied with the situation of the spot. Collector had also called for the report (R-3/8) from the Office of Deputy Director, Agriculturists Welfare and Agricultural Development, District-Satna in which it was mentioned that land was cultivable and fertile, however, it was not controverted as mentioned in the Panchnama that land was un-irrigated. Agriculture Department was not having any objection in case agriculturists were not having any objection. Objection of agriculturists was not material as they did not agree for the sale of the land by private negotiations as such the procedure envisaged under chapter VII of the Land Acquisition Act was resorted to and followed. The report was forwarded by the Collector along with

the letter of the Deputy Director, Agriculturists Welfare and Agricultural Development, District-Satna. The State Government on the basis of report after due satisfaction that it was necessary to acquire the land has directed acquisition of the land vide communication (R-3/9) dated 14.5.2008 and directed execution of the agreement under Section 41 of the Land Acquisition Act. Said agreement was also executed is not in dispute.

9. Section 39 of the Land Acquisition Act provides that previous consent of appropriate Government and execution of agreement is necessary. The provisions of section 6 to 16 (both inclusive) and section 18 to 37 (both inclusive) shall not be put in force in order to acquire land for any company unless the consent of the appropriate Government has been obtained and unless the Company has executed the agreement provided under Section 41 of the Act. Section 40 also provides that such consent shall not be given unless the appropriate Government , either on the report of the Collector under section 5A, sub-section (2) or by an enquiry held as provided in the section. Once an agreement is entered into under Section 41, it is required to be published under Section 42.

10. It was submitted that Rule 4 of the Rules of 1963 has been violated. Rule 4 of the Rules of 1963 read as under :-

> **"4. Appropriate Government to be satisfied with regard to certain matters before initiating acquisition proceedings** – (1) Whenever a company makes in application to the appropriate Government for acquisition of any land, that Government shall direct the Collector to submit a report to it on the following matters, namely-
>
> (i) that the company has made its best endeavour to find out lands in the locality suitable for the purpose of acquisition;
>
> (ii) that the company has made all reasonable efforts to get such lands by negotiation with the persons interested therein on payment of reasonable price and such efforts have failed;
>
> (iii) that the land proposed to be acquired is suitable for the purpose;
>
> (iv) that the area of land proposed to be acquired is not excessive;
>
> (v) that the company is in a position to utilize the land expeditiously; and
>
> (vi) where the land proposed to be acquired is good agricultural land that no alternative suitable site can be found so as to avoid acquisition of that land.
>
> (2) The Collector shall, after giving the company a reasonable opportunity, to make any representation in this behalf, hold an

inquiry into the matters referred to in sub-rule (1) and while holding such enquiry, he shall-

(i) in any case where the land proposed to be acquired is agricultural land, consult the Senior Agricultural Officer of the district whether or not such land is good agricultural land;

(ii) determine, having regard to the provisions of Sections 23 and 24 of the Act, the approximate amount of compensation likely to be payable in respect of the land, which, in the opinion of the Collector, should be acquired for the company; and

(iii) ascertain whether the company offered a reasonable price (not being less than the compensation so determined), to the persons interested in the land proposed to be acquired.

Explanation- For the purpose of this rule "good agricultural land" means any land which, considering the level of agricultural production and the crop pattern of the area in which it is situated, is of average or above average productivity and includes a garden or grove land.

(3) As soon as may be after holding the enquiry under sub-rule (2), the Collector shall submit a report to the appropriate Government and a copy of the same shall be forwarded by the Government to the Committee.

(4) No declaration shall be made by the appropriate Government under Section 6 of the Act unless-

(i) the appropriate Government has consulted the Committee and has considered the report submitted under this rule and the report, if any, submitted under Section 5-A of the Act; and

(ii) the agreement under Section 41 of the Act has been executed by the Company."

Rule 4 provides that Company can make an application to the appropriate Government for acquisition of any land and Collector has to submit a report on the aforesaid matter enumerated under rule 4(1)(i) to (vi),i.e., to say ; the Company has made its best endeavour to find out the lands in the locality suitable for the purpose of acquisition, the Company has made all reasonable efforts to get such lands by negotiations, the land proposed to be acquired is suitable for the purpose and is not excessive, Company can utilize the land expeditiously and lastly where the land proposed to be acquired is good agricultural land that no alternative suitable

site can be found so as to avoid acquisition of that land. Rule 4(2) of the Rules of 1963 provides that Company has to be given a reasonable opportunity to make any representation in this behalf while holding an inquiry into the matters referred to in sub-rule (1). The Collector shall also consult the Senior Agricultural Officer of the district whether or not such land is good agricultural land. Collector has also to consider under Rule 4(2)(ii) and has to opine as to approximate amount of compensation likely to be payable in respect of the land. He has further to ascertain under Rule 4(2)(iii) whether Company offered a reasonable price to the persons interested in the land which is proposed to be acquired.

In the instant case, enquiry has been held under Rule 4 and the matters enumerated under section 40 and rule 4 have been duly taken care of in the report sent by the Collector to the State Government. When we consider the report (R-3/5), the objective of the Company, its constitution and other details were mentioned, the purpose for which the acquisition was proposed had also been mentioned to be in the interest of public. It was also mentioned that company had made all possible efforts to purchase the land by private negotiations, it has already purchased the land on the basis of mutual agreement, on the basis of prevailing guidelines, at the rate of Rs.3 Lacs per acre, approximately 155.10 acre had been purchased by getting the sale deeds executed. Remaining owners claimed higher value of their land as such land admeasuring 75.63 acres could not be purchased as such there was necessity for acquisition of land. As to the aspect whether Company was in a position to utilize the land, it was opined that the land was urgently required and effective functioning of the plant was adversely affected and it would not be possible to complete the work without acquisition of land in question. The report sent by Collector also contained the information on the aspect whether there was any other alternative land available and suitability of the disputed land. It was mentioned in the report that disputed land was situated in the midst of the land already purchased by the Company and adjacent to it . The map of the land was annexed with report and there was no other alternative land available considering the situation of the land. The land was un-irrigated one. The spot inspection was made before sending the report. As per guidelines effort was made to offer reasonable compensation for purchase of land by private negotiations. Value of the irrigated land was Rs.2,18,623 per acre and that of un-irrigated land was Rs.1,21,457. Company had proposed a sum of Rs.3,00,000 per acre to the owners, but they did not accept the reasonable offer made by the Company. Company has to offer employment to one of the member of the family as per policy. The Company was agreeable to deposit the compensation and 10% additional amount in advance in cash for acquisition of the land. The Public at large would not be put at inconvenience in any manner by the proposed acquisition. Land was not used by public at large for the purpose of Nistar, land admeasuring 75.63 acre was not available nearby the land in question. The land which was available was

insufficient considering the requirement of which a separate case was prepared.Other informations were also submitted. Report of the Agricultural Officer as envisaged under Rule 4(2) was also obtained and forwarded to the State Govt. Thus, it is apparent that the provision of Rule 4 stood complied with in the instant case, due enquiry as to the relevant aspects envisaged under Rule 4 has been held.

11. Learned counsel for appellants have relied upon decision of Apex Court in *Devinder Singh and others vs.State of Punjab and Ors.* (supra) so as to contend that provision of Rule 4 is required to be complied with, unless it is complied with acquisition has to be quashed. In the said decision no enquiry whatsoever under Rule 4 was conducted. In the instant case, due enquiry has been held in all the aspects as envisaged under Rule 4 as apparent from the report. Thus, applying the aforesaid decision in the instant case we cannot quash the notification/ declaration as provision has been complied with. Appellants' counsel also placed reliance on a decision of Apex Court in *Hindustan Petroleum Corpn.Ltd. vs. Darius Shapur Chenai and others* (2005) 7 SCC 627 in which it was held that decision making process pursuant to enquiry has to be by applying the mind by the appropriate Government. In the instant cases, we find that mind has been duly applied and only thereafter Government has ordered acquisition of the land in accordance with law.

12. Resultantly, we find dismissal of the writ petitions by the single Bench to be proper. The appeals are found to be merit less, they are hereby dismissed. No costs.

Appeal dismissed.

I.L.R. [2010] M. P., 1517
WRIT APPEAL
Before Mr. Justice S.K. Gangele & Mr. Justice S.S. Dwivedi
26 April, 2010*

GHANSHYAM TIWARI & anr. ... Appellants
Vs.
STATE OF M.P. & ors. ... Respondents

A. Cooperative Societies Rules, M.P. 1962, Rule 41(2) - *Procedure for election of members of the Committee - Maintainability of the writ petition against an election dispute - Held - Generally in an election dispute writ petition under Article 226 of the Constitution is not maintainable - However, the right to contest an election and holding free and fair election is a valuable right in a democratic society and if that civil right has been denied to a person or if the whole election procedure is only an eye-wash, in those*

*W.A. No.229/2007 (Gwalior)

circumstances, the Court cannot lay down its hand on the ground of availability of alternative remedy. (Para 17)

क. सहकारी सोसाइटी नियम, म.प्र. 1962, नियम 41(2) – समिति के सदस्यों के निर्वाचन की प्रक्रिया – निर्वाचन विवाद के विरुद्ध रिट याचिका की पोषणीयता – अभिनिर्धारित – सामान्यतः किसी निर्वाचन विवाद में संविधान के अनुच्छेद 226 के अन्तर्गत रिट याचिका पोषणीय नहीं है – तथापि, चुनाव लड़ने और स्वतंत्र और निष्पक्ष निर्वाचन कराने का अधिकार लोकतंत्रात्मक समाज में एक मूल्यवान अधिकार है और यदि उस नागरिक अधिकार से किसी व्यक्ति को इंकार किया गया है या सम्पूर्ण निर्वाचन प्रक्रिया केवल निरर्थक है तो उन परिस्थितियों में, न्यायालय वैकल्पिक उपचार की उपलब्धता के आधार पर अपने हाथ नहीं छोड़ सकता है।

B. Constitution, Article 226 - *Writ of Certiorari - Alternative remedy - Held - It is a well settled principle of law that for issuance of a writ of certiorari the availability of alternative remedy is no bar.* (Para 17)

ख. संविधान, अनुच्छेद 226 – उत्प्रेषण की रिट – वैकल्पिक उपचार – अभिनिर्धारित – विधि का यह सुस्थापित सिद्धांत है कि उत्प्रेषण की रिट जारी करने के लिए वैकल्पिक उपचार की उपलब्धता कोई वर्जन नहीं है।

Cases referred :

1989 MPLJ 208, (2006) 8 SCC 200, W.P. No.2020/2007 decided on 13.03.2007, W.P. No.1968/2007 decided on 13.03.2007, 2003(4) MPLJ 206, (2006) 8 SCC 487, 2002(5) MPLJ 246, (1998) 4 SCC 529, 1986 MPLJ 329, AIR 1952 SC 64, (1978) 1 SCC 405, AIR 1977 SC 1703, AIR 1998 SC 66, AIR 1988 SC 616, (1998) 8 SCC 703, (2004) 12 SCC 73, (2005) 8 SCC 383, W.A. No.18/2008 decided on 30.01.2008.

H.D. Gupta with *M.K. Jain*, for the appellants.

Vivek Khedkar, G.A., for the respondents Nos.1 to 3.

Deeksha Mishra, for the respondent Nos.7, 9, 10, 11, 14 to 23.

Akshay Jain, for the respondent Nos.26 to 34.

J U D G M E N T

Appellants have filed this writ appeal against the order dated 14.02.2007 passed by the learned Single Judge of this Court in Writ Petition No. 811/2007.

2. Appellants are the members of Primary Agriculture Credit Cooperative Society Maryadit, Rajpur, Hinota, Tehsil Kurwai, District Vidisha. The State Government had taken a decision to hold elections of the Primary Agriculture Credit Cooperative Societies, consequently, the Returning Officer of Primary Agriculture Credit Cooperative Society Maryadit, Rajpur, Hinota, issued an election-programme under Section 41 (2) of the M.P. Co-operative Societies Rules, 1962. The Returning Officer fixed the date, 5th February 2007 for submitting nomination

papers; 6th February 2007 for scrutiny of the nomination papers and 7th February 2007 for withdrawal of nomination papers. In pursuance to the afore said notification 43 candidates, who were members of the society, including the original petitioners, 11 in number, submitted their nomination forms on 05.02.2007. The Returning Officer rejected the nomination forms of all the candidates, except 11 candidates, including general category and reserved category candidates. The petitioners on the very next day, i.e. on 06.02.2007 submitted a complaint to the Collector, Vidisha, mentioning the fact that they submitted their nomination papers to Returning Officer, Mr. Vijay Singh Raghuvanshi, and on the next day, i.e. on 06.02.2007 scrutiny of the nomination papers had to take place, however, Mr. Vijay Singh Raghuvanshi, Returning Officer, did not attend the office of the Society on 06.02.2007 and he had been sitting on the aforesaid date at the residence of a B.J.P. leader, Mr. Prem Narain Tiwari, and on his instructions the returning officer rejected all the nomination papers, except nomination papers of 11 candidates. The petitioners requested the Collector, Vidisha to take appropriate action against the Returning Officer and re-notify the election of the society. A Panchnama was also prepared to this effect by the petitioners. When no action was taken within a period of two days i.e. on 08-02-2007 the original petitioners, 11 in number, filed a writ petition before this Court, which was registered as Writ Petition No. 811/2007. The learned Single Judge of this Court vide order dated 14.02.2007 dismissed the writ petition after holding that the election process had been going on and during election process the Court could not interfere in the election disputes.

3. Learned Senior counsel, appearing on behalf of the appellants, has submitted that there is no election in the eyes of law. The Returning Officer rejected all the nomination papers, except 11 nomination papers, on the instructions of the local ruling party member. There is gross violation of the provisions of the M.P. Co-operative Societies Rules, 1962, hence the learned Single Judge has committed an error of law in rejecting the writ petition. The learned Senior Counsel further argued that in the facts of the case the writ petition is maintainable and the election of the society is liable to be quashed. In support of his contentions learned Senior Counsel relied on the following judgments :-

(1) Radhey Shyam Sharma V. Chairman, Sewa/Vriha Sahakari Samiti Lashkar, Gwalior and others, 1989 MPLJ 208;

(2) Jayrajbhai Jayantibhai Patel V. Anilbhai Nathubhai Patel and others, (2006) 8 SCC 200;

And unreported judgments of the Division Bench of this Court passed in -

(3) Writ Petition No. 2020/2007, Ravishankar Shukla Vs. State of M.P. and others, and

(4) Writ Petition No. 1968/2007, Ratan Singh Thakur Vs. State of M.P. and others,

4. Contrary to this, learned counsel appearing on behalf of elected candidates, respondents, No. 9 to 19, has contended that the order passed by the learned Single Judge is as per law. The writ petition filed by the appellants before this Court is not maintainable due to availability of alternative remedy under Section 64 of the M.P. Cooperative Societies Act, 1960. Learned counsel further submitted that the disputed questions of facts are involved in the writ petition filed by the original petitioners before the writ Court and those could not be examined under Article 226 of the Constitution of India. In support of her contentions learned counsel relied on the following judgments :-

M.P. State Industrial Co-operative Federation Limited Vs. Uttam Singh and others, 2003 (4) MPLJ 206;

Avtar Singh Hit Vs. Delhi Sikh Gurdwara Management Committee and others, (2006) 8 SCC 487;

Ganesh and others V. State of M.P. and others, 2002 (5) MPLJ 246;

Umesh Shivappa Ambi and others V. Angadi Shekara Basappa and others, (1998) 4 SCC 529.

5. Undisputed facts of the case are – that after publication of the election programme by the Returning Officer nearby 43 candidates of the society submitted their nomination forms. On the very next day the Returning Officer rejected all the nomination forms except nomination forms of 11 candidates. Thereafter a complaint was made to the Collector, Vidisha, as mentioned earlier in this order, and Deputy Registrar, Cooperative Societies. The Commissioner, Cooperative Societies vide order dated 13.02.2007 stayed the election process of the society and ordered that a fresh election be held. Before that the Deputy Registrar, Cooperative Societies submitted his report on 08.02.2007 to the Collector, copy of the report has been filed as Annexure P-14 in the appeal. In the afore said report the Deputy Registrar, opined that the whole procedure with regard to rejection of nomination forms by the Returning Officer was illegal and his action was not proper. He also recommended for suspension of the Returning Officer Mr. Vijay Singh Raghuvanshi. In spite of this order passed by the Registrar dated 13.2.2007, subsequently, the final order was passed by the Registrar dated 14.02.2007 by which he directed to complete the election process of the society and consequently the election process was completed by the Returning Officer and all the 11 candidates, whose nomination forms were found proper, have been declared elected unopposed on the post of Board of Directors of the Society. Thereafter, these persons have further been elected office bearers of the Society.

6. The questions for determination before this Court is that whether, in the facts and circumstances of the present case, a writ petition is maintainable under Article 226 of the Constitution of India and whether the election of the society as held by the Returning Officer is as per law ?

7. Rule 41 of the M.P. Co-operative Societies Rules, 1962 prescribes procedure for election of members of the committee. Rule 41 (9) thereof prescribes nomination papers duly received shall be scrutinised and rejection of nomination papers. The relevant rule 41(9) is as under :-

> "41. Procedure for election of members of the Committee .(1)....
>
> (9)(a) Nomination papers duly received shall be scrutinized by the Returning Officer on the date fixed for the scrutiny under clause © of sub-rule (2):
>
> (b) It shall be open to the persons filling the nomination paper to be present at the time of scrutiny:
>
> (c) The Returning Officer shall not reject any nomination paper on the ground of any defect which is not of a material character nor shall it be rejected on the ground of any irregularity in respect of a nomination form, if the candidate has been duly nominated by means of another nomination form, in respect of which no irregularity has been committed:
>
> (d) The Returning Officer shall for reasons to be recorded in writing, reject a nomination paper only on the following grounds :-
>
> (i) if the nomination paper is not in accordance with the preceding sub-rules:
>
> (ii) if the candidate is dis-qualified to be elected or proposer / seconder is dis-qualified to vote by or under the Act, rules or bye-laws of the society:
>
> (e) The Returning Officer shall prepare a list of valid nominations, if in the list more than one nomination papers are found valid for one post, then first valid nomination of the candidate shall be accepted and he will sign the list in token of its correctness and shall publish and affix on the notice board of the society."

8. It is clearly mentioned in Rule 41 (9) (2) (a) and (b) that the persons filing the nomination papers to be present at the time of scrutiny and the nomination papers shall be scrutinized by the Returning Officer on the date fixed for the scrutiny. The allegation in the writ petition is that the Returning Officer was not present in the office of the society and he rejected all the nomination papers, accept nomination papers of 11 candidates, at the behest of one Mr. Prem Narain Tiwari and the Returning Officer was present at the residence of Mr. Prem Narain

Tiwari, who was the member of B.J.P., then ruling party. On the very next day, i.e. on 06.02.2007 all the petitioners, 11 in number, filed a complaint before the Collector, Vidisha and thereafter they filed a writ petition before this Court on 8th February 2007.

9. With regard to the question of maintainability of the writ petition in election disputes, it is an admitted fact Section 64 (2) (v) prescribes remedy for filing election disputes, which is as under :-

> **"64. Disputes .-(1)...**
>
> (2) For the purpose of sub-section (1), a dispute shall include -
>
> (i) ...
>
> (v) any dispute arising in connection with the election of any officer of the society or representative of the society or of the composite society;"

10. A Division Bench of this Court in *Thaneshwar Shyam Bihari Mishra V. Jila Sahakari Kendriya Bank Maryadit Mandla*, reported in 1986 MPLJ 329, has considered the question of maintainability of writ petition under Article 226 of the Constitution of India in view of availability of alternative remedy under Section 64 of the M.P. Cooperative Societies Act, 1962 and held as under :-

> "3. The learned Government Advocate appearing for the respondent No.5 and the learned Advocate appearing for respondent No.1, have raised a preliminary objection to the tenability of the present petition on the ground that efficacious alternative remedy under Section 64 of the M.P. Co-operative Societies Act, 1961 (hereinafter referred to as the 'Act'), will be available to the petitioner after the elections have been held. Reliance has been placed on a Full Bench decision of this Court in *Malam Singh v. Collector, Sehore* (1971 MPLJ 531). It is true that section 64(2)(v) of the Act provides that "any dispute arising in connection with the election of any officer of the society or representative of the society or of composite society", can be referred to the Registrar by any of the parties to the dispute and the decision of the Registrar on the said dispute shall be final and not liable to be called in question in any Court, Proviso to the aforesaid sub-clause, however, prohibits the Registrar to entertain any dispute"during the period commencing from the announcement of the election programme till the declaration of result." Apparently, therefore, the petitioner could challenge the validity of these elections by filing a dispute under the aforesaid clause after elections have been held. In *Malam Singh's case* (supra), the

Full Bench of this Court was considering the provisions of section 357 (1) of M.P. Gram Panchayats Act, 1962, which provided that "no election under the Act can be called into question except by a petition presented to the prescribed authority."The Full Bench held that though there is no constitutional bar to the exercise of writ jurisdiction in respect of elections, it is desirable to resolve election disputes speedily through the machinery of election petitions, and the Court should not exercise its discretion in the matter. After *Malam Singh's case* (supra), the matter came to be considered on several occasions by this Court and the view taken always was that wherever efficacious alternative remedy of election petition is available, the writ jurisdiction of this Court shall not be exercised. The Court, however, carved out certain exceptions to this general rule with a view to do justice between the parties. In *Sheo Dayal vs. K.P. Rawat* (1975 MPLJ 243), a Division Bench of this Court held that though generally this Court will direct the party to take resort to election petition, it can interfere and decide a writ petition in exceptional cases "in order to enable the petitioner to exercise his valuable civil right of contesting an election, which right was denied to him on altogether wrong premises". This view appears to have been followed in subsequent cases in *Bhupendra Kumar v. Y.S. Dharmadhikari* (1976 MPLJ 223) and *Brij Bihari Gupta v. L.L.Khare* (AIR 1976 MP 156). In *Brij Bihari Gupta's case* (supra), the Division Bench considered the provisions of section 64 of the Act and held that once a writ petition has been admitted for hearing and stay granted, it will not be proper to throw the same out on the ground of alternative remedy after the declaration of election results. It is, therefore, clear that the rule of alternative remedy does not create an absolute bar to the exercise of power under Article 226 of the Constitution. It is merely a circumstance enabling the High Court to refuse exercise of this extraordinary and discretionary power. If the facts of the case so require, considering facts of the case, we do not think it proper to accept the preliminary objection and reject the petition on that score."

11. From the aforesaid judgment of the Division Bench of this Court, it is clear that in order to enable a person to exercise his valuable civil right of contesting an election, which right was denied to him on altogether a wrong premises, the writ petition is maintainable.

12. The Hon'ble Supreme Court in *Avtar Singh Hit v. Delhi Sikh Gurdwara Management Committee and others,* (2006) 8 SCC 487, has considered in detail

in regard to maintainability of writ petition in election disputes. The Hon'ble Supreme Court has discussed entire case laws on the aforesaid subject and previous decisions of the Supreme Court reported in (1) *N.P. Ponnuswami v. Returning Officer,* 1952 SCR 218 : AIR 1952 SC 64; (2) *Mohinder Singh Gill v. Chief Election Commissioner,* (1978) 1 SCC 405 : AIR 1978 SC 851; (3) *K.K. Shrivastava v. Bhupendra Kumar Jain,* (1977) 2 SCC 494 : AIR 1977 SC 1703; (4) *Gujarat University v. N.U. Rajguru,* 1987 Supp. SCC 512 : AIR 1988 SC 66; (5) *S.T. Muthusami v. K. Natarajan,* (1988) 1 SCC 572 : AIR 1988 SC 616; (6) *C. Subrahmanyam v. K. Ramanjaneyullu* (1998) 8 SCC 703; (7) *Ashok Kumar Jain v. Neetu Kathoria* (2004) 12 SCC 73; (8) *Umesh Shivappa Ambi v. Angadi Shekara Basappa* (1998) 4 SCC 529 and (9) *Harnek Singh v. Charanjit Singh* (2005) 8 SCC 383, and after analyzing the judgments the Hon'ble Supreme Court has clearly held that exceptional or extraordinary circumstances would justify recourse to the extraordinary remedy under Article 226 of the Constitution of India. The relevant findings are as under :-

> "29. As discussed earlier, the pleadings of the parties show that the dispute raised was purely factual in nature as to whether some confusion had been created regarding the date fixed for holding of the meeting of the Committee for electing the office-bearers of the Executive Board. The dispute could more appropriately be resolved by examination of oral evidence to be led by the parties. The writ petitioner Avtar Singh Hit claimed that on account of the confusion in dates he could not attend the meeting though he was very keen to participate in the meeting and contest for the office of the President of the Executive Board. In view of the nature of the dispute raised, the proper remedy for the petitioner was to file an election petition as provided in Section 31 of the Act where parties could have got opportunity to lead oral evidence. No exceptional or extraordinary circumstances were disclosed which could justify recourse to the extraordinary remedy under Article 226 of the Constitution and for not availing the remedy provided by the statute. We are, therefore, of the opinion that on the facts and circumstances of the present case, the writ petitions ought not to have been entertained for resolving the dispute relating to election and on this count alone the writ petitions were liable to be dismissed."

13. In the aforesaid judgment *Avtar Singh Hit* (supra) Hon'ble the Supreme Court relied on the earlier judgment of the Hon'ble Supreme Court *Ashok Kumar Jain v. Neetu Kathoria* (2004) 12 SCC 73, wherein the Hon'ble Supreme Court has considered the maintainability of the writ petition in an election dispute under the provisions of Madhya Pradesh Krishi Upaj Mandi Adhiniyam, 1972. Hon'ble

the Supreme Court has specifically held in the aforesaid judgment that â€œExcept in some exceptionally extraordinary circumstances, normally remedy under Article 226 of the Constitution, challenging the election by filing a writ petition would not be available to the petitioner."

14. A Division Bench of this Court in an unreported judgment passed in Writ Petition No. 1968/2007, *Ratan Singh Thakur V. State of M.P. and others*, decided on 13.03.2007, has held, after relying on the earlier judgment of this Court in *Radhey Shyam Sharma V. Chairman, Sewa/Vriha Sahakari Samiti Lashkar, Gwalior and others*, 1989 MPLJ 208, that if the election process is so vitiated that it cannot be said to be an election held in accordance with the law, a petition is maintainable. The relevant findings are as under :-

> "10. In *Radhey Shyam Sharma V. Chairman, Sewa/Vriha Samiti, Lashkar, Gwalior and others*, 1989 MPLJ 208, a Division Bench of this Court has held that the High Court will not interfere in an election dispute in respect of election of a co-operative society unless and until it is shown that the election process is so vitiated that it cannot be said to be an election held in accordance with law. This is one such case where the election is a sham election and not an election in the eyes of law."

15. The same principle has been reiterated by the same Division Bench in another order passed in Writ Petition No. 2020/2007, *Ravishankar Shukla v. State of M.P. and others*, decided on 13.03.2007.

16. From the aforesaid principle of law laid down by Hon'ble the Supreme Court in the above mentioned judgments, it is clear that ordinarily a remedy of petition under Article 226 of the Constitution is not available to a person to challenge the election dispute or election process. However, in exceptional or extraordinary circumstances the petition under Article 226 of the Constitution is maintainable. That view has been further elaborated by the Division Bench of this Court in *Thaneshwar Shyam Bihari Mishra V. Jila Sahakari Kendriya Bank Maryadit Mandla*, reported in 1986 MPLJ 329, that if a valuable civil right of contesting an election of a person has been denied to him on altogether wrong premises the writ petition is maintainable. A Division Bench of this Court further in an unreported judgment, Writ Appeal No. 18/2008, *Brajraj Singh Tomer v. State of M.P. and others*, decided on 30-01-2008, held that if there is no election in the eyes of law and it is a sham election, the petition is maintainable.

17. We are clear in our mind that in generally in an election dispute writ petition under Article 226 of the Constitution is not maintainable, however, where there is no election at all and number of persons have been denied their valuable civil right to contest the election by fraudulent measures by the Authorities whether in those circumstances also a petition under Article 226 of the Constitution be thrown

away on the premises of availability of alternative remedy ? Our answer is 'No'. Because, in our opinion, the right to contest an election and holding free and fair election is a valuable right in a democratic society and if that civil right has been denied to a person or if the whole election procedure is only an eye-wash, in those circumstance, in our opinion, the Court can not lay down its hand on the ground of availability of alternative remedy because it is a well settled principle of law for issuance of a writ of certiorari the availability of alternative remedy is no bar.

18. Hon'ble the Supreme court in *Jayrajbhai Jayantibhai Patel V. Anilbhai Nathubhai Patel and others*, (2006) 8 SCC 200, has considered number of authorities on the point of interference by the Court in the matter of administrative action and the Hon'ble Supreme Court has held as under :-

> "18. Having regard to it all, it is manifest that the power of judicial review may not be exercised unless the administrative decision is illogical or suffers from procedural impropriety or it shocks the conscience of the court in the sence4 that it is in defiance of logic or moral standards but no standardised formula, universally applicable to all cases, can be evolved. Each case has to be considered on its own facts, depending upon the authority that exercises the power, the source, the nature or scope of power and the indelible effects it generates in the operation of law or affects the individual or society. Though judicial restraint, albeit self-recognised, is the order of the day, yet an administrative decision or action which is based on wholly irrelevant considerations or material; or excludes from consideration the relevant material; or excludes from consideration the relevant material; or it is so absurd that no reasonable person could have arrived at it on the given material, may be struck down. In other words, when a court is satisfied that there is an abuse or misuse of power, and its jurisdiction is invoked, it is incumbent on the court to intervene. It is nevertheless, trite that the scope of judicial review is limited to the deficiency in the decision-making process and not the decision.
>
> 19. The following passage from Professor Bernard Schwartz's book Administrative Law, (3rd Edn.) aptly echoes our thoughts on the scope of judicial review:
>
> > "Reviewing courts, the cases are now insisting, may not simply renounce their responsibility by mumbling an indiscriminate litany of deference to expertise. Due deference to the agency does not mean abdication of the duty of judicial review and rubber-stamping of agency action: We must

accord the agency considerable, but not too much deference; it is entitled to exercise its discretion, b ut only so far and no further."

Quoting Judge Leventhal from *Greater Boston Television Corpon. v. FCC*, 444 F 2d 841. 851 (DC Cir 1970) he further says :

"...the reviewing court must intervene if it 'becomes aware ... that the agency has not really taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making...." .

20. Tested on the touchstone of the above principle, we are of the view that on the facts in hand the High Court was fully justified in exercising its power of judicial review and set aside the election of the appellant."

19. The facts of the present case are sufficient to establish that the Returning Officer has acted in utter disregard to the statutory Rules of 1962. He did not follow the procedure properly and his intention was to give benefit to certain persons and elect them by way of rejecting all the nomination papers of other members of the Cooperative Societies so that only 11 persons could be declared as elected unopposed. On the very next day i.e. on 6th February 2007 a complaint was lodged to this effect by 11 persons, who submitted their nomination forms, to the Collector, Vidisha. The matter was also investigated by the Deputy Registrar and he found the conduct of the Election Officer suspicious and further recommended his suspension. We have perused the record and particularly the order passed by the Returning Officer on the back of the nomination papers with regard to rejection of the nomination papers. In all the cases, he rejected the nomination papers on some technical ground. In some of the nomination papers there are some over writings and even though the signatures of the candidates have been scored out. It appears that it has been done deliberately to benefit other persons. Some of the nomination papers have been rejected on the ground that the contesting candidate did not submit nomination papers. However, there is evidence to show that the contesting candidates had been confronted the aforesaid fact by the Returning Officer. The allegation is that the Returning Officer was not present in the office of society and he had rejected the nomination papers at the residence on the instructions of Mr. Prem Narain Tiwari, who was a member of B.J.P. then ruling party. That appears to be true.

20. The conduct of the Returning Officer and the manner of holding election of the Society shocked the conscience of this Court, and, in our opinion, in the facts and circumstances of the case, these are extraordinary and exceptional circumstances under which the writ petition is maintainable, to save the civil right of the petitioners to contest the election and also up hold the purity of holding

elections, which is the soul of a vibrant democracy. In our opinion, the learned Single Judge has committed an error of law in rejecting the writ petition of the appellants.

21. Consequently, the appeal filed by the appellants is allowed. The order passed by the learned Single Judge is hereby set aside. We declare the election of the candidates of Primary Agriculture Credit Cooperative Society Maryadit, Rajpur, Hinota, Tehsil Kurwai, District Vidisha, is vitiated and direct that the election process in the case of Primary Agriculture Credit Cooperative Society Maryadit, Rajpur, Hinota be restarted by a new Returning Officer afresh from the stage of scrutiny of nomination papers in accordance with law. No order as to cost.

Appeal allowed.

I.L.R. [2010] M. P., 1528

WRIT PETITION

Before Mr. Justice R.S. Garg & Mr. Justice K.S. Chauhan

3 February, 2010*

MAHAVIR TRADERS. ... Petitioner

Vs.

DIVISIONAL RAILWAYS MANAGER & ors. ... Respondents

A. Railways Act (24 of 1989), Section 65 - *Railway receipt - Receipt not bearing endorsement that goods have not been weighed - In absence of endorsement, receipt shall be taken to be prima facie evidence of weight of consignment.* (Paras 7 & 8)

क. रेल अधिनियम (1989 का 24), धारा 65 – रेल रसीद – रसीद पर यह पृष्ठांकन नहीं कि माल तौला नहीं गया है – पृष्ठांकन के अभाव में, रसीद को प्रेषित माल के भार के प्रथम दृष्ट्या साक्ष्य के रूप में लिया जायेगा।

B. Railways Act (24 of 1989), Section 73 - *Punitive charges for overloading - Dispute of overloading raised after delivery of goods - Demand for recovery without hearing or enquiry - Held: Every step was taken by Railways behind the back of petitioner - Petitioner was never afforded any opportunity of hearing - Demand notice quashed - Petition allowed.* (Paras 10 to 14)

ख. रेल अधिनियम (1989 का 24), धारा 73 – अधिक भार के लिए दण्डात्मक प्रभार – माल की सुपुर्दगी के बाद अधिक भार का विवाद उत्पन्न हुआ – वसूली की माँग सुनवाई या जाँच के बिना – अभिनिर्धारित – रेलवे द्वारा प्रत्येक कार्यवाही याची के पीठ पीछे की गयी – याची को सुनवाई का कोई अवसर कभी नहीं दिया गया – माँग का सूचनापत्र अभिखंडित – याचिका मंजूर।

Akshay Dharmadhikari, for the petitioner.

N.S. Ruprah, for the respondent/Railway Administration.

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*W.P. No.16763/2006 (Jabalpur)

JUDGMENT

The Judgment of the Court was delivered by R.S. GARG, J. :–The petitioner being aggrieved by the demand notice dated 1/7/2006 (two in number) has filed the present petition on the ground that such demand is absolutely illegal and is based upon no evidence or is based upon alleged evidence which has been collected behind the back of the petitioner and the respondents have reached to a conclusion against the interest of the petitioner without providing him any opportunity of hearing.

2. The short facts necessary for disposal of the present petition are that the petitioner for transportation of the coal from Akaltara Bilaspur Division (Chhattisgarh) to Jhukehi in Satna Division (Madhya Pradesh) had booked certain Railway wagons. At least on eleven occasions the petitioner transported coal from Akaltara to Jhukehi. It is to be noted that at the place of loading of the coal, facility of weighbridge is not available with the railways and similarly, facility of weighbridge at Jhukehi is also not available. It appears that after the coal was loaded in the wagons, the wagons were weighed at Chmapa where the railway authorities have facility of a weighbridge. It does not appear from the records that at the time of weighment of consignment any notice was given to the petitioner or his representatives that the entire consignment would be weighed at Chmapa and on basis of the said weight, the charges/freight would be recovered from the petitioner. It appears that the consignment reached the destination right in time and the delivery was taken by the consignee. It also appears from the records that on 1.7.2006, the respondents issued two notices to the petitioner that on the weighment of consignment it was found that the weight of coal was more than what was shown in the railway receipt. The railway authorities, therefore, demanded a sum of Rs. 17,22,777/- in the first notice and a sum of Rs. 3,75,371/- in the second notice. Immediately after receiving the notices, the petitioner raised the dispute. The respondents thereafter supplied a copy of the weighing receipt to the petitioner and stood on their stand and confirmed the demand. The petitioner, thereafter, issued notice (Annexure-P/5) on 8.10.2006 and yet another notice dated 22.10.2006 (Annexure-P/6) and submitted that in absence of the weighbridge facility at a particular loading station, a party is entitled to fill the wagon up to the mark as appended inside the wagon and such filling of the wagon is taken to be of that particular weight. His submission is that in the present matter, the petitioner was never informed prior to the weighment nor any notice of hearing was given to him and the authority straightway issued a notice for recovery. The submission in fact is that the entire action on the part of the railway authorities is exparte, lopsided and is contrary to law.

3. Shri Dharmadhikari, learned counsel for the petitioner submitted that from perusal of Section 65 and Section 73 of the Indian Railways Act, 1989, it would

clearly appear that a railway receipt shall be prima facie evidence of the weight and the number of packages referred to in the railway receipt. His submission is that in case the weighment is to be re-checked or the number of packages are to be recounted then a notice to the petitioner is required. Referring to Section 73 of the Act, it is submitted that if there is any dispute regarding the weighment and number of packages then in such a case the dispute should be resolved before the delivery of the goods. The submission is that in the present matter, the consignments were booked between 21.12.2005 and 11.5.2006, the consignments were eleven in number and within a period of 2/4 days the delivery of the goods were taken by the petitioner/consignee and, therefore, issuance of the notice on 1.7.2006 is absolutely illegal.

4. Shri N.S. Ruprah, learned counsel for the Railway Administration submitted that in absence of a facility for weighing the consignment either at Akaltara or at Jhukehi, the respondents were entitled to weigh the consignment at the first available opportunity at Chmapa station and if in this case the consignment has been weighed at Chmapa railway station, the respondents cannot be held to be wrong.

5. Sections 65 and 73 of the Indian Railways Act, 1989 read as under:-

"**65. Railway receipt.-**

(1) A railway administration shall.-

(a) in a case where the goods are to be loaded by a person entrusting such goods, on the completion of such loading; or

(b) in any other case, on the acceptance of the goods by it, issue a railway receipt in such form as may be specified by the Central Government.

(2) A railway receipt shall be prima facie evidence of the weight and the number of packages stated therein:

Provided that in the case of a consignment in wagon-load or train-load and the weight or the number of packages is not checked by a railway servant authorized in this behalf, and a statement to that effect is recorded in such railway receipt by him, the burden of proving the weight or, as the case may be, the number of packages stated therein, shall lie on the consignor, the consignee or the endorsee.

73. Punitive charge for over-loading a wagon.-

Where a person loads goods in a wagon beyond its permissible carrying capacity as exhibited under sub-section (2) or sub-section (3), or notified under sub-section (4) or Section 72, a railway administration may, in addition to the freight and other charges,

recover from the consignor, the consignee or the endorsee, as the case may be, charges by way of penalty at such rates, as may be prescribed, before the delivery of the goods:

Provided that it shall be lawful for the railway administration to unload the goods loaded beyond the capacity of the wagon, if detected at the forwarding station or at any place before the destination station and to recover the cost of such unloading and any charge for the detention or any wagon on this account.

6. From a fair reading and understanding of Section 65, it would clearly appear that a railway receipt shall be prima facie evidence of the weight and the number of packages stated in the railway receipt. The proviso appended to Section 65 provides that in the case of a consignment in wagon-load or train-load and the weight or the number of packages is not checked by a railway servant authorized in this behalf and a statement to that effect is recorded in such railway receipt by him, the burden of proving the weight or the number of packages stated therein, shall lie on the consignor, the consignee or the endorsee.

7. A fair interpretation of proviso to Section 65 would show that in case a railway servant so authorized makes a statement in the railway receipt that the goods have not been weighed or the packages have not been counted then the burden to prove the weight or to prove the number of packages would be upon the consignor, the consignee or the endorsee.

8. In the present matter, the receipts which have been filed on record do not have such endorsement. In absence of endorsement, sub-section (2) of Section 65 of the Railways Act, 1989 would come into operation and the railway receipt shall be taken to be prima facie evidence of the weight of the consignment.

9. Section 73 provides that the railway administration may recover additional charges and penalty, in case it is found proved that the consignment was more than the weight shown or so. However, such dispute is to be resolved before the delivery of the goods.

10. In the present matter, undisputedly the delivery of the goods was taken at Jhukehi (Satna Division) much before such dispute was raised by the respondents. It is also not in dispute nor does it appear from the records that before issuing the demand notice dated 1.7.2006, any notice of hearing was given to the petitioner or any inquiry was made after giving due opportunity of hearing to the petitioner.

11. On the other hand, it appears that after issuance of Annexures-P/5 and P/6, the respondents had simply supplied copy of the weighment record to the petitioner. Undisputedly, every step was taken by the railways behind the back of the petitioner. The petitioner was never afforded any opportunity of hearing or to prove that he was not liable to pay the excess amount as demanded by the respondent/administration.

12. The principles of audi alteram partem or the principles of natural justice require in the minimum that when an action or an order is likely to have civil and evil consequences then the person against whom such action is to be taken or such an order is to be passed, is issued a notice is afforded an opportunity of hearing and only thereafter such order is passed.

13. In the present matter, the respondents have violated the principles of natural justice and have recorded the findings to suit their own case and cause.

14. For the reasons stated above, we quash the demand notice(both dated 1.7.2006) but however with liberty in favour of the railway administration that if they are still interested in demanding the money then they are obliged to issue notices to the petitioner, give him an opportunity of hearing and opportunity to lead evidence and only thereafter pass final order in the matter.

15. The petition, to the extent indicated above, is allowed. There shall be no order as to costs.

Petition allowed.

I.L.R. [2010] M. P., 1532
WRIT PETITION
Before Mr. Justice Shantanu Kemkar
23 February, 2010*

CHHOTELAL RAI ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Service Law - Constitution, Article 226 - *Petitioner was allowed to work till his retirement on the basis of entry of date of birth recorded in service record - Recovery of amount after retirement on the finding of wrong entry of date of birth - Held - Finding regarding petitioner's date of birth was behind his back - It is not open for respondents to have recovered the salary paid to petitioner for period during which he was allowed to continue in service - Recovery quashed - Petition allowed.* (Para 5)

सेवा विधि – संविधान, अनुच्छेद 226 – याची को सेवा अभिलेख में अभिलिखित जन्म तारीख की प्रविष्टि के आधार पर उसकी सेवानिवृत्ति तक कार्य करने दिया गया – जन्म तारीख की गलत प्रविष्टि के निष्कर्ष पर सेवानिवृत्ति के बाद रकम की वसूली – अभिनिर्धारित – याची की जन्म तारीख के सम्बन्ध में निष्कर्ष उसकी पीठ पीछे था – प्रत्यर्थी याची को उस कालावधि के लिए प्रदत्त वेतन को वसूल करने के लिए स्वतंत्र नहीं हैं जिसके लिए उसे सेवा में बने रहना अनुज्ञात किया गया – वसूली अभिखंडित – याचिका मंजूर।

Cases referred :
(1995) 1 SCC 18, (1994) 2 SCC 521, (2006) 1 SCC 709.

*W.P. No.338-2009(S) (Indore)

Manoj Manav, for the petitioner.
Vivek Patwa, Dy.G.A., for the respondents.

ORDER

SHANTANU KEMKAR, J. :–Petitioner was working on the post of Assistant Sub-Inspector of Police in the Home (Police) Department of the State Government. He was retired from service on attaining the age of superannuation w.e.f. 31.12.2005 treating his date of birth to be 04.12.1945.

2. On 17.10.2006 the fourth respondent requested to the second respondent to approve the petitioner's date of birth to be 04.12.1945 in view of the entry made in the service book recording his date of birth as 04.12.1945. However, the third respondent informed the fourth respondent vide letter dated 24.09.2007 (Annexure P-6) that the petitioner has wrongly been continued upto 31.12.2005 treating his date of birth to be 04.12.1945, whereas his date of birth as per the Higher Secondary Certificate is 21.5.1945 and in the circumstances he ought to have been retired w.e.f 31.05.2005. In the circumstances recovery of the amount of salary paid to the petitioner for the period between June, 2005 to December, 2005, was ordered. Aggrieved the petitioner has filed this petition.

3. The case of the petitioner is that his actual date of birth is 04.12.1945 which was recorded in his service book and was treated to be correct during his entire service period. He submits that on the basis of the said date of birth he was allowed to continue in service till 31.12.2005 and he having worked till that date the order of recovery of salary for the period between June, 2005 to December, 2005 is illegal. He placed reliance on the judgment passed by the Supreme Court in the case of *Sahibram Vs. State of Haryana and others* (1995 Supp (1) SCC 18), *Shyambabu Verma and others Vs. Union of India and others* (1994 (2) SCC 521) and *Col. B.J. Akkara (Retd.) Vs. Govt. of India and ors.* (2006) 11 SCC 709.

4. The respondents have filed reply and have stated that on the basis of the academic certificate submitted by the petitioner, it was found that his actual date of birth is 21.05.1945 and not 04.12.1945 as was recorded in the service book. According to the respondents, the petitioner ought to have been retired on 31.05.2005 instead of 31.12.2005. In the circumstances he worked for 7 months more than his scheduled period of retirement and as such recovery of salary of the said period has rightly been ordered.

5. Having heard learned counsel for the parties and after perusal of the documents filed by them, it is revealed that the respondents have ordered recovery of the salary paid to the petitioner for the period of 7 months during which he was allowed to work on the basis of entry of date of birth recorded in his service book. The respondents have recorded the finding that the petitioner's correct date of birth is 21.05.1945 and not 04.12.1945 behind his back that too much after his

retirement. It is not the case of the respondents that the petitioner had defrauded the department by giving a false date of birth. The petitioner was allowed to work and superannuate on the basis of date of birth recorded in his service book. In the circumstances, it was not open for the respondents to have recovered the salary paid to him for the period during which he was allowed to continue in service. Undisputedly, through-out his service tenure the respondents treated his date of birth to be 04.12.1945 and allowed him to continue and retire on the basis of the said date of birth. Having regard to these facts and in view of the law laid down by the Supreme Court in the case of *Sahibram Vs. State of Haryana and others* (supra), *Shyambabu Verma and others Vs. Union of India and others* (supra) and *Col. B.J. Akkara (Retd.) Vs. Govt. of India and ors.* (supra) the action of the respondents in recovering the amount of salary paid to the petitioner for the period during which he was allowed to work cannot be said to be justified.

6. Accordingly, the impugned order of recovery dated 24.11.2008 (Annexure P-12) deserves to be and is hereby quashed. The respondents are directed to refund the recovered amount to the petitioner within three months failing which the petitioner would be entitled for interest @ 6% per annum from the date of recovery till payment.

7. The petition stands allowed. No orders as to the costs.

Cc within seven days.

Petition allowed.

I.L.R. [2010] M. P., 1534
WRIT PETITION

Before Mr. Justice Viney Mittal & Mr. Justice Prakash Shrivastava
12 March, 2010*

HANISH KUKREJA ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, M.P. (21 of 2007), Section 13, Admission (Reservation to Non-resident Indian) Regulations, 2009 - ***Education - Admission in engineering under the Non Resident Indian quota - Eligibility*** *- Petitioner was given provisional admission in engineering under the NRI quota subject to verification of documents - His sponsorer was his first cousin - Admission cancelled as first cousin as a sponsorer was not covered - Court directed the State Government to decide the issue of first degree relationship as the same was not defined in the regulation - Held - Sponsor of the petitioner i.e. the first cousin of the petitioner (Mausi's son) is not covered*

*W.P. No.6915/2009 (Indore)

under the definition and, therefore, he is not an eligible NRI sponsor - No error has been committed in rejecting the admission of the petitioner against NRI quota on the ground that he has not been sponsored by the NRI covered by the provisions of the Regulation. (Para 16)

निजी व्यावसायिक शिक्षण संस्था (प्रवेश का विनियमन एवं शुल्क का निर्धारण) अधिनियम, म.प्र. (2007 का 21), धारा 13, प्रवेश (अनिवासी भारतीय के लिए आरक्षण) विनियम, 2009 – शिक्षा – अनिवासी भारतीय कोटे के अन्तर्गत इंजीनियरिंग में प्रवेश – पात्रता – याची को दस्तावेजों के सत्यापन के अधीन अनिवासी भारतीय कोटे के अन्तर्गत इंजीनियरिंग में अनंतिम प्रवेश दिया गया – उसका प्रायोजक उसका फर्स्ट कजिन / मौसेरा भाई था – प्रवेश रद्द किया गया क्योंकि फर्स्ट कजिन प्रायोजक के रूप में समाविष्ट नहीं था – न्यायालय ने राज्य सरकार को निदेशित किया कि प्रथम श्रेणी नातेदारी के विवाद्यक को विनिश्चित करे क्योंकि विनियम में उसे परिभाषित नहीं किया गया है – अभिनिर्धारित – याची का प्रायोजक अर्थात् याची का फर्स्ट कजिन (मौसी का पुत्र) परिभाषा के अन्तर्गत समाविष्ट नहीं है, इसलिए वह पात्र अनिवासी भारतीय प्रायोजक नहीं है – याची का इस आधार पर कि उसे विनियम के उपबंधों में समाविष्ट अनिवासी भारतीय द्वारा प्रायोजित नहीं किया गया है, अनिवासी भारतीय कोटे में प्रवेश नामंजूर करने में कोई त्रुटि नहीं की गई है।

T.N. Singh with *Hemlata Gupta*, for the petitioner.
Rashmi Pandit, Dy.G.A., for the respondent Nos.1 & 2.
Meena Chaphekar, for the respondent Nos.3 & 4.
Vivek Sharan, A.S.G., for the respondent No.5.

JUDGMENT

The Judgment of the Court was delivered by PRAKASH SHRIVASTAVA, J. :–IN this writ petition, the petitioner has prayed for a direction for holding his NRI sponsorship to be valid and further holding his admission in B.E. course under Non Resident Indian (NRI) quota as valid.

2. The petitioner had made an application for admission in B.E. first year course in the respondent No.5 Institute of Engineering and Technology, Indore against NRI quota. The petitioner was offered provisional admission against NRI quota on 14/08/2009. The petitioner was sponsored by his first cousin i.e. his mother's sister's son, who is an NRI. His admission was later on cancelled. The petitioner alleges that the cancellation was not communicated to him. He, therefore, approached this Court by way of the present writ petition.

3. The writ petition was opposed by the respondents No.3 and 4 i.e Rajeev Gandhi Technical University and Engineering Courses Counseling Authority (ECCA), by taking the plea that the admission offered by the respondent No.5 to the petitioner was provisional admission and on verification, it was found that the petitioner was not eligible under the NRI category as the first cousin is not covered under NRI's who can stand sponsor as per admission (Reservation to Non-Resident

Indian) Regulation 2009. They stated that the petitioner was informed about the rejection of his admission vide notice dated 20/08/09.

4. The respondent No.5 by submitting the reply before this Court took the stand that the name of the petitioner was included in the provisional list of admission subject to production and verification of documents and on verification respondent No.4 ECCA had rejected the petitioner's case.

5. Learned counsel appearing for the petitioner submitted that the first cousin, of the petitioner who is an NRI was eligible to sponsor the petitioner and rejection of admission of the petitioner against the NRI quota is unsustainable. He further submitted that the rejection order was not communicated to the petitioner.

6. Learned counsel appearing for the respondents submitted that the admission of the petitioner was provisional and on scrutiny of the documents, he was not found entitled to get admission under the NRI quota, therefore, the admission was rejected. They further submitted that the first cousin is not covered as eligible sponsor NRI.

7. We have heard learned counsel for the parties and perused the record.

8. The Admission (Reservation to Non-Resident Indian) Regulation, 2009 (NRI Regulation 2009 for short) have been framed under Section 13 of the Madhya Pradesh Niji Vyavsayik Shikshan (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, 2007 and have been published in the M.P. Gazette extra ordinary dated 15th July, 2009. The applicability of these regulations is not disputed by the petitioner.

9. The regulation 3 which is relevant for the present controversy provides that:-

> **"3. Applicability.- These regulations shall be applicable to students who are seeking admissions against 15% seats reserved for non-resident Indian subject to the following conditions:-**
>
> **(a) At least one of the parents of such students should be non-resident Indian and shall ordinarily be residing abroad as non-resident Indian;**
>
> **(b) The persons who sponsors the student for admission should be a first degree relation of the student and should be ordinarily residing abroad as an non-resident Indian;**
>
> **(c) If the student has no parents or near relatives or taken as a ward by some other nearest relative such students also may be considered for admission provided the guardian has bonafide treated the student as a ward and such guardian shall file an affidavit indicating the interest shown in the**

education affairs of the student and also his relationship with the student and such person also should be a non resident Indian and ordinarily residing abroad."

10. Undisputedly, the claim of the petitioner is not covered by Clause (a) and (c) of regulation 3. The petitioner has based his claim upon Clause (b) of the regulation 3.

11. The Clause (b) of regulation 3 though states that the sponsor should be a first degree relation of the student, but the regulation nowhere provides the relations which are covered under the "first degree relation" for the purpose of the regulation.

12. The regulation 10 provides for reference to the State Government, if any question arise relating to interpretation of the regulation and it further provides that the decision of the State Government there on will be final.

13. Since the first degree relation has not been defined under the NRI Regulation of 2009, therefore, this Court had passed the following order dated 19/01/2000, referring the matter to the State Government, for its decision on the question of interpretation of the words "first degree relation of the student":-

"The admission Rules were published in the State Gazette dated July 15, 2009 known as Admission (Reservation to Non Resident Indian) Regulations, 2009. Regulation no.10 provides that if any question arises relating to the interpretation of those regulations, the same shall be referred to the State Government, whose decision thereon shall be final.

In the present matter, the question of interpretation of the words "first degree relation of the student" has cropped up, therefore, taking into consideration the scope and effect of the Rules, we refer the matter to the State Government for its decision.

The petitioner and the respondents No.3,4 and 5 shall appear before the respondent No.2 on January 27, 2010 with a copy of this order and their respective pleadings with a request to the competent officer to decide the issue within ten days from the date of their appearance and send the same to this Court without loss of any time.

The matter be listed for consideration after the decision of the State Government is received."

14. In pursuance to the aforesaid directions of this court, a committee was constituted. The committee defined the first degree relationship as under:-

"प्रथम डिग्री नातेदारी के संबंध में यह निर्णय लिया गया था कि अभ्यार्थी के माता, पिता, सगे भाई/बहन एवं अभ्यार्थी के माता/पिता के माता–पिता, सगे भाई/बहन ही प्रथम डिग्री की नातेदारी हेत मान्य होगें । अर्थात अभ्यार्थी के दादा, दादी, नाना, नानी माता, पिता सगे भाई/बहन, चाचा/ताया, बुआ, मामा एवं मौसी ही अभ्यार्थी के प्रथम डिग्री नातेदार के रूप में मान्य होंगें । प्रथम डिग्री नातेदारी संबंधितों की अंकसूची/पासपोर्ट/वोटर पहचानपत्र आदि के माध्यम से स्थापित की जा सकती है ।"

The Directorate of Technical Education of the State thereafter, passed the order dated 02/02/2010, accepting the aforesaid definition of first degree relationship given by the committee.

15. In view of the definition of first degree relationship given by the committee and accepted by the State following relations are covered under the "first degree relationship":-

(a) Father and Mother of the candidate.

(b) Real brother and sister of the candidate.

(c) Father and Mother of father/mother of the candidate.

(d) Real brother and sister of father/mother of the candidate.

16. In the present case, the sponsor of the petitioner i.e. the first cousin of the petitioner (Mausi's son) is not covered under the above definition and, therefore, he is not an eligible NRI sponsor and consequently, no error has been committed by the respondents in rejecting the admission of the petitioner against NRI quota on the ground that he has not been sponsored by the NRI covered by the provisions of the regulation.

17. It is also worth noting that by the notice dated 14/08/09, Annexure P/1, only provisional admission was granted. It was mentioned in the notice that the candidate will be allowed admission on producing all necessary documents and on subsequent verification of documents by ECCA, Rajeev Gandhi Prodhyogic Vishwavidhyalaya Bhopal. The petitioner also gave an undertaking that the admission offered to him was purely provisional, which did not bind the institute to confirm the admission and that the admission will be verified by ECCA Bhopal and if the petitioner's case is not considered, the admission will be treated to be withdrawn. The record also indicates that the petitioner after cancellation of his admission in the respondent No.5 College, participated in the counseling conducted in the respondent No.4 College and took admission in the respondent No.4 College on 23/09/09, therefore, in the changed circumstances also his claim does not survive.

18. The contention of the learned counsel for the petitioner that the petitioner was not informed about the cancellation of admission is not correct Annexure R3/

1, dated 20/08/09, filed along with reply of respondents No.4 and 5, indicates that a general notice was issued by the respondent No.5, containing the names of the candidates in NRI category whose admission after scrutiny was approved or rejected by ECCA Bhopal. The petitioner's name figures in the list of candidates whose admissions were rejected. The said notice was duly published and no other candidate has come forward making a complaint of non publication of such a notice, therefore, the grievance of the petitioner in this regard, cannot be accepted.

19. In view of the aforesaid analysis, we do not find any merit in this writ petition and the petition is accordingly dismissed.

No orders as to cost.

Petition dismissed.

I.L.R. [2010] M. P., 1539
WRIT PETITION

Before Mr. Justice Viney Mittal & Mr. Justice Prakash Shrivastava

12 March, 2010*

SAURABH & ors. ... Petitioners

Vs.

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

Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, M.P. (21 of 2007), Section 13, Admission (Reservation to Non-resident Indian) Regulations, M.P. 2009, Regulation 3(b) - *Under the regulations, the person sponsoring the student for admission is required to be first degree relation of student - Committee defined first degree relation as father & mother, real brother & sister, father & mother of father/mother, real brother & sister of father/mother - Candidates are either niece, nephew or cousin of sponsors - Not covered by regulation and do not satisfy the requisite conditions for admission against NRI quota - Petition dismissed.* (Paras 12 to 14, 18, 19 & 27)

निजी व्यावसायिक शिक्षण संस्था (प्रवेश का विनियमन एवं शुल्क का निर्धारण) अधिनियम, म.प्र. (2007 का 21), धारा 13, प्रवेश (अनिवासी भारतीय के लिए आरक्षण) विनियम, म.प्र. 2009, विनियम 3(बी) – विनियमों के अन्तर्गत प्रवेश के लिए छात्र को समर्थित करने वाला व्यक्ति छात्र का प्रथम श्रेणी का नातेदार होना चाहिए – समिति ने प्रथम श्रेणी के नाते को पिता व माता, सगे भाई व बहन, पिता/माता के पिता व माता, पिता/माता के सगे भाई व बहन के रूप में परिभाषित किया है – अभ्यर्थी या तो समर्थक के भतीजी, भतीजे, भांजे/भांजियाँ हैं या चचेरे/ममेरे/मौसेरे/फुफेरे भाई/बहन हैं – विनियम के अन्तर्गत नहीं आते हैं और एनआरआई कोटे के अन्तर्गत प्रवेश की अपेक्षित शर्तों को पूरा नहीं करते हैं – याचिका खारिज।

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*W.P. No.760/2010 (Indore)

SAURABH Vs. STATE OF M. P.

Cases referred :

2008(2) MPLJ 450, W.P. No.9390/2008 Prateek Garg Vs. State of M.P. & ors., W.P. No.5852/2009 Nitin Saxena Vs. State of M.P., W.P. No.6915/2009 Hanish Kukreja Vs. State of M.P. & ors., AIR 1986 SC 1448, AIR 1987 SC 2305.

A.M. Mathur with *Abhinav Dhanodkar,* for the petitioners.
Rashmi Pandit, Dy.G.A, for the respondent Nos.1 & 2/State.
S.C. Bagadiya with *Meena Chaphekar,* for the respondent Nos.3 & 4.
None, for the respondent No.5.

O R D E R

The Order of the Court was delivered by PRAKASH SHRIVASTAVA, J. :–THIS order will also govern the disposal of Writ Petition No.759 of 2010 [Karan s/o Sanjeev Gagrani v/s State of M.P. and others]. The main order is being passed in Writ Petition No.760 of 2010.

2. In this writ petition the communications even dated 20.08.2009 [Annexures-P/15 and P/16] and the letter dated 09.09.2009 [Annexure- P/18] by which the petitioners were informed that they were ineligible for admission under Non Resident Indian (NRI) quota in B.E. Courses are under challenge.

3. The brief facts are that the Respondent No.5, which is an autonomous Institute duly affiliated with Respondent No.3 Rajeev Gandhi Technical University had issued an advertisement for admission in B.E. course in NRI quota on 27.05.2009. The last date for submission of application was extended up to 12.08.2009. The petitioners had applied for admission in pursuant to advertisement. They had also submitted letters / undertaking from their respective NRI sponsors to claim admission against the NRI seats. After the Counseling, on 13.08.2009, provisional list of selected candidates under the NRI/NRI sponsors category was published containing the names of 27 candidates including the names of the present petitioners. It is the case of the petitioners that on the publication of the provisional list, they deposited some amount and were issued admissions slips and had also completed the other formalities.

4. The Respondent No.5 Institute had initially prepared a list of 27 candidates found eligible for admission against NRI quota but later on vide impugned communication dated 20.08.2009 [Annexure P/15] Respondent No.5 forwarded the names of 11 candidates excluding the names of the petitioners by mentioning that only 11 candidates satisfy the criteria of NRI sponsored. Thereafter a fax [Annexure P/16] to the same effect was sent by the Coordinator stating that only 11 candidates were found to be eligible by ECCA and 19 remaining vacant seats to be included in the general pool quota.

5. On the representation by the Respondent No.5 – College, the Engineering Course Counseling Authority (ECCA) sent communication dated 09.09.2009

[Annexure P/18] stating that individual case of each candidate was scrutinized and 11 candidates were found fulfilling the requirements and remaining 19 vacant seats were merged into general pool seats. Aggrieved with these communications, the petitioners have approached this Court by way of present writ petitions.

6. Learned counsel appearing for the petitioners submitted that the petitioners have wrongly been held ineligible for admission against the NRI quota, whereas they are covered within the meaning of NRI category students. He submitted that the case of the petitioners is covered by the judgment of this Court in the matter of *Anshul Tomar v/s State of M.P. and others*, reported in 2008 (2) M.P.L.J. 450. He has also placed reliance upon the order dated 12.08.2008 passed by the Division Bench of this Court in Writ Petition No.9390 of 2008 in the matter of *Prateek Garg v/s State of Madhya Pradesh and others*, and submitted that the power to cancel admission lies with the Fee Regulation Committee. In support of his submissions, he also placed reliance upon the order dated 07.08.2009 passed by the Division Bench of this Court in Writ Petition No.5852 of 2009 in the matter of *Nitin Saxena v/s State of Madhya Pradesh.*

7. Learned counsel appearing for the Respondents No.3 and 4 submitted that the petitioners do not fulfill the eligibility conditions for admission against the NRI quota inasmuch as they have not been sponsored by NRI covered for the said purpose. He further submitted that since only the provisional admission was granted to the petitioners, therefore, no right accrued to the petitioners. In support of his submissions, he placed reliance upon the Regulations and the Instructions which have been issued from time to time in this regard.

8. The Respondent No.5 in its reply before this Court has taken the stand that on the verbal instructions of Respondents No.3 and 4, only names of 11 students were sent and that all 27 candidates are eligible for admission against the NRI quota.

9. We have heard learned counsel for the parties and perused the record.

10. The question that arises for consideration in these writ petitions is whether the NRI sponsors of the present petitioners are covered within the eligible NRI relations ?

11. At the outset we may state that the petitioners in the writ petitions have pleaded that the Respondent No.5 – College is an Autonomous Institute. This fact has not been disputed by any of the Respondents.

12. The State Legislature has enacted Madhya Pradesh Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, 2007 ["Adhiniyam, 2007" hereafter]. This Adhiniyam is applicable to deemed universities or constituent units thereto, imparting professional education, other than those promoted and maintained by the Central or State Government; and the private unaided professional educational institutions affiliated to a university established

under the Central or Madhya Pradesh Act. So far as the Adhiniyam, 2007 is concerned, it only provide that the non-resident Indian for the purpose of Adhiniyam will have the same meaning as assigned to it in Section 115C (c) of the Income-tax Act but it does not provide the relationship which an NRI sponsor should have with the candidate. The Admission Rules, 2008 provide for 15% quota for NRI candidates in accordance with the regulations notified for the purpose.

13. Under Section 13 of Adhiniyam, 2007, the State has framed Regulations called Admission (Reservation to Non-resident Indian) Regulations, 2009. The issue of applicability of NRI Regulation, 2009 for academic session 2009-10 had come up before this Court in Writ Petition No.5852 of 2009 in the matter of *Nitin Saxena v/s State of Madhya Pradesh and others*, and the Division Bench of this Court by order dated 07.08.2009 rejected the contention that these regulations will not apply to academic session 2009-10.

14. By the order dated 11.08.2009 issued by the State, the NRI Regulations, 2009 have been made applicable to the autonomous (declared by the State), aided private, autonomous and self finance university institutes. This order is not under challenge.

15. The NRI Regulations, 2009 provides for the conditions which a candidate is required to fulfill for taking admission against NRI quota. The Regulation 3 in this regard provides as under :-

> "**3. Applicability.--** These regulations shall be applicable to students who are seeking admissions against 15% seats reserved for non-resident Indian subject to the following conditions :-
>
> (a) At least one of the parents of such students should be non-resident Indian and shall ordinarily be residing abroad as non-resident Indian;
>
> (b) The persons who sponsors the student for admission should be a first degree relation of the student and should be ordinarily residing abroad as an non-resident Indian;
>
> (c) If the student has no parents or near relatives or taken as a ward by some other nearest relative such students also may be considered for admission provided the guardian has bona fide treated the student as a ward and such guardian shall file an affidavit indicating the interest shown in the education affairs of the student and also his relationship with the student and such person also should be a non-resident Indian and ordinarily residing abroad."

16. Under the Regulation 3 (b) of the NRI Regulations, 2009, the person sponsoring the student for admission is required to be "a first degree relation of the student". The first degree relation of the student has not been explained

under the Regulations. This Court by order dated 19.01.2010 passed in the connected Writ Petition No.6915 of 2009, *Hanish Kukreja v/s The State of Madhya Pradesh and others*, had referred the matter to the State to interpret the word "first degree relation of the student".

17. In pursuance to the aforesaid directions of this court, a committee was constituted. The committee defined the first degree relationship as under:-

> "प्रथम डिग्री नातेदारी के संबंध में यह निर्णय लिया गया था कि अभ्यार्थी के माता, पिता, सगे भाई/बहन एवं अभ्यार्थी के माता/पिता के माता–पिता, सगे भाई/बहन ही प्रथम डिग्री की नातेदारी हेतु मान्य होगें । अर्थात अभ्यार्थी के दादा, दादी, नाना, नानी माता, पिता सगे भाई/बहन, चाचा/ताया, बुआ, मामा एवं मौसी ही अभ्यार्थी के प्रथम डिग्री नातेदार के रूप में मान्य होंगें । प्रथम डिग्री नातेदारी संबंधितों की अंकसूची/पासपोर्ट/वोटर पहचानपत्र आदि के माध्यम से स्थापित की जा सकती है ।"

The Directorate of Technical Education of the State thereafter, passed the order dated 02/02/2010, accepting the aforesaid definition of first degree relationship given by the committee.

18. In view of the definition of first degree relationship given by the committee and accepted by the State following relations are covered under the "first degree relationship":-

(a) Father and Mother of the candidate.

(b) Real brother and sister of the candidate.

(c) Father and Mother of father/mother of the candidate.

(d) Real brother and sister of father/mother of the candidate.

19. In the present matter the candidates are either niece, nephew or cousin (uncle's son) of the sponsors, therefore, sponsors of the petitioners are not covered under "first degree relation" of the student. It is also not their case that they are covered by Regulation 3 (a) or 3 (c) of NRI Regulations, 2009. Therefore, the petitioners do not satisfy the requisite conditions for admission against NRI quota in terms of the NRI Regulations, 2009.

20. Learned counsel appearing for the petitioners has raised the argument that the NRI Regulations, 2009 will not be applicable since the regulations were notified on 15.07.2009; whereas the advertisement for admission in the present case was issued on 27.05.2009. Even if such a contention is accepted, than also the case of the petitioners does not become better because the process of admission had commenced under the Conduct of Examination and Admission Rules, 2009 [for short "Admission Rules, 2009] issued by the Madhya Pradesh Professional Examination Board applicable to declared autonomous, private aided, autonomous and self finance institute. The Respondent No.5 institute is stated to be an autonomous institute and the Admission Rules, 2009 are applicable to the

autonomous institute. Under these rules which are in the nature of instructions, for admission against NRI seat the candidate himself or his father/mother should be NRI. The criteria adopted in the Admission Rules, 2009 was much more stringent. This criteria was later on relaxed by applying the NRI Regulations Rules, 2009 to institutions covered by Admission Rules, 2009 by order dated 11.08.2009.

21. Learned counsel appearing for the petitioners has placed reliance upon the Division Bench judgment of this Court in the matter of *Anshul Tomar* (Supra) but that judgment has no application for the admission in the B.E. Course for academic session 2009-10 because when that judgment was delivered on 08.04.2009 the NRI Regulations, 2009 were not framed. After framing of NRI Regulations, 2009 and after they have been made applicable to Respondent No.5 - Institute, the admission is governed by the conditions provided in the Regulations. Therefore, in the present case which is for this academic sessions, the judgment of Division Bench in the matter of *Anshul Tomar* (Supra) will have no application. Even otherwise the said judgment was based upon the judgment of the Supreme Court in the matter of *P.A.Inamdar* (Supra), wherein the Supreme Court has clearly held that firstly, the NRI seats should be utilized bona fide by NRIs and for their children or wards only; and secondly, within this quota, merit should not be given a complete go-bye. The Supreme Court had further directed that to prevent misutilisation of such quota or any malpractice referable to NRI quota seats suitable legislation or regulation needs to be formulated and the Committees constituted pursuant to the direction in Islamic Academy was to regulate till the regulations are framed.

22. It is worth mentioning that in the present case the Respondents No.4 and 5 in their reply have given a chart showing the rank of the petitioners in PEPT, 2009. The chart indicates that the rank of all these petitioners in the merit list was much below the last candidate admitted in the respective branch.

23. Learned counsel appearing for the petitioners has also placed reliance upon the Division Bench judgment of this Court passed on 07.08.2009 in Writ Petition No.5852 of 2009 in the matter of Nitin Saxena v/s State of Madhya Pradesh and others, wherein this Court while dealing the case of a private unaided professional college had directed the Admission and Fee Regulatory Committee constituted under the Adhiniyam, 2007 to scrutinize the admission of NRI quota. But in the present case learned counsel appearing for the petitioners could not point out that the Adhiniyam, 2007 is applicable to the Respondent No.5 institute. The Respondent No.5 is undisputedly an autonomous institute; whereas the Adhiniyam, 2007 is applicable to deemed universities or constituent units thereto other than those promoted and maintained by the Central or State Government and also to private unaided professional educational institutions affiliated to a university established under the Central or Madhya Pradesh Act.

24. Learned counsel appearing for the petitioners referring to the judgments in

the matter of *Rajendra Prasad v/s Karnataka University* (AIR 1986 SC 1448) and *A. Sudha v/s University of Mysore and another* (AIR 1987 SC 2305) submitted that since the petitioners have already completed their First Semester, therefore, they should be allowed to complete the course.

25. The aforesaid judgments relied upon by the petitioners have no application in the facts of the present case. In the present case the petitioners had participated in the Counseling held on 13.08.2009 but the Respondent No.5 – College while forwarding the names of the candidates by letter dated 20.08.2009 [Annexure P/15] had sent only names of 11 candidates who had satisfied the criteria under the NRI sponsored as per guidelines. The names of the petitioners were not sent as they were not found eligible. The petitioners were allowed to attend the classes as interim measure by order dated 16.09.2009 passed by this Court but on 13.10.2009 this Court had clarified that the petitioners will not claim any equity because of the interim order passed by this Court.

26. In the matter of *Rajendra Prasad* (Supra) the students were allowed to continue their studies because the students were pursuing course for about four years under the orders of the High Court and Supreme Court and colleges giving admission were found responsible for wrongful admission but that is not the position in the present case. In the matter of *A. Sudha* (Supra) the candidate had completed First MBBS, he was found to be innocent having acted upon the representation of the college authorities that he was eligible for admission. But in the present case the college itself had not recommended the names of the petitioners for admission and immediately after the Counseling the petitioners had come to know about their ineligibility under the requisite guidelines.

27. Thus, in view of the above analysis, we do not find any merit in these writ petitions and the same are accordingly dismissed without any orders as to costs.

28. A copy of this order be placed in the record of connected writ petition, as particularized above, for ready reference.

Petition dismissed.

I.L.R. [2010] M. P., 1545
WRIT PETITION
Before Mr. Justice S.C. Sharma
15 March, 2010*

PUSHPA USGAONKAR (SMT.) ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Service Law - *Promotion - Illegal denial - Grant of back wages - Petitioner illegally denied promotion and juniors were promoted - Petitioner*

*W.P. No.1882/2005(S) (Gwalior)

given retrospective promotion from the date her juniors were given promotion but without any back wage for the reason she did not actually work on the promoted post - Held - Petitioner was denied promotion for no fault on her part and at any point of time, the petitioner has not stated that she is not willing to work on the promotional post - Petitioner is entitled for back wages along with all monetary benefits including enhanced pension and arrears on account of promotion to the post of Principal. (Paras 9 & 10)

सेवा विधि – पदोन्नति – अवैध इंकारी – पिछले वेतन का अनुदान – याची को अवैध रूप से पदोन्नति से इंकार किया गया और उसके कनिष्ठों को पदोन्नत किया गया – याची को उस तारीख से भूतलक्षी पदोन्नति दी गयी जिस तारीख से उसके कनिष्ठों को पदोन्नति दी गयी थी, किन्तु इस कारण से कि उसने वास्तविक रूप से पदोन्नत पद पर कार्य नहीं किया, पिछले वेतन से इंकार किया गया – अभिनिर्धारित – याची को उसकी ओर से किसी त्रुटि के बिना पदोन्नति से इंकार किया गया और किसी भी समय याची ने यह नहीं कहा कि वह पदोन्नत पद पर कार्य करने की इच्छुक नहीं है – याची प्राचार्य के पद पर पदोन्नति के कारण बढ़ी हुई पेंशन और बकाया को सम्मिलित करते हुए सभी आर्थिक लाभों के साथ पिछले वेतन की हकदार है।

Cases referred :

2008(5) MPHT 291, 2010(1) MPHT 81.

Jitendra Sharma, for the petitioner.

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

J U D G M E N T

S.C. Sharma, J. :–The petitioner before this Court has filed this present petition claiming promotion to the next higher post of Principal. The contention of the petitioner is that she was appointed to the post Upper Division Teacher on 20th December, 1967 and was later on promoted to the post of Lecturer on 22.11.1975 in the pay scale of 350-600. The petitioner has further stated that no adverse A.C.R., at any point of time, was received by her and in the year 2005 cases for grant of promotion were considered by respondents and by an order dated 09.05.2005, respondent no.4, who is admittedly junior to the petitioner was promoted to the next higher post of Principal. The petitioner has categorically stated that respondent no.4 has initially joined as Upper Division Teacher on 16.1.1968 and as the petitioner started her service career on 25th December, 1967, she is admittedly senior to respondent no.4. The petitioner has immediately preferred this writ petition challenging her supersession on 27.06.2005.

2. Notices were issued by this Court on 6.7.2005 and time was granted to respondents/State on 30.10.2006, 20.8.2007, 14.11.2007, 28.11.2008. This Court, as no reply was being filed in the matter, has even directed personal appearance of the District Education Officer on 28.11.2008. On 6.1.2009, the District Education Officer has informed this Court that the matter regarding promotion of the petitioner is under process and again time was granted. Case was thereafter

listed on 24.2.2009, 26.2.2009, 22.4.2009, 18.6.2009, 20.7.2009, 16.9.2009, 23.10.2009, 4.12.2009, 16.12.2009 and 25.1.2010. In spite of repeated opportunities, no reply was filed by the respondents except by stating that the matter is under process and this Court vide order dated 8.3.2010 directed personal appearance of the Commissioner, Bhopal. The respondents have, now, filed a reply on 13.3.2010 and in the reply, the respondents have stated that they have granted promotion to the petitioner with retrospective effect from 9.5.2005.

3. Learned counsel appearing on the behalf of the petitioner has vehemently argued before this Court that the respondents have deliberately delayed the the matter relating to the promotion of the petitioner and the petitioner has also attained the age of superannuation during the pendency of the present writ petition. He has vehemently argued before this Court that the petitioner was not promoted on account of the fault on the part of the respondents, and therefore, she is entitled for back wages as well as all other consequential benefits.

4. Learned Deputy Advocate General appearing on behalf of the respondents argued before this Court that the petitioner is not entitled for back wages as she has not worked on the higher post of Principal.

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

6. In the present case, the petitioner was superseded on 09.05.2005 and the petitioner has filed this present petition on 27.06.2005. The respondents/State though has held a review D.P.C. in the matter and has granted promotion to the petitioner to the post of Principal with effect from 09.05.2005, however have passed an order of promotion dated 03.02.2010 after a lapse of time of five years. The respondents/State took almost five years to hold the review D.P.C. and an order of promotion of the petitioner has been passed only when this Court has directed personal appearance of Commissioner, Public Instructions. So far as the order of promotion dated 03.02.2010 is concerned, as the petitioner has been promoted with retrospective effect i.e. with effect from 9.5.2005, it does not warrant any interference as the petitioner has been promoted with retrospective effect. However, on the question of back wages, matter deserves consideration.

7. A Division Bench of this Court in the case of *R.B. Gube Vs. State of Madhya Pradesh,* 2008(S) M.P.H.T.291 in paragraphs 10, 11, 12, 13,14 has held as under:-

> "10. The Paragraph 5 of the Government Circular dated 25-4-1974 does not take into consideration the contingency as provided in Fundamental Rule 31-A rather running contrary to Fundamental Rule 31-A it provides that where promotion of a Government servant is delayed due to assignment of wrong position in the gradation list which after due consideration is revised and proper place is assigned in the gradation list, he should be deemed to

have been promoted to the higher post with effect from the date his junior was promoted. Upto this point, Paragraph 5 of the Government order dated 25-4-1974 runs in accordance with law but when it starts saying that such person would be entitled to the higher salary with effect from the date of the order of promotion and such person would not be entitled to pay arrears of pay and allowances during the period for which they did not perform the duties of the higher post on the basis of principle of 'No work No Pay', it starts running contrary to F.R. 31-A.

11. The Paragraph 5 of this Government order appears to be an inroad into the rights of such persons who were firstly denied the promotion right in time because of the wrong placement in the seniority list and are also being denied the pay and other allowances though the lapses are on the part of the Government. If such a person was promoted right in time then he would have been entitled to every monetary benefit from the date he was promoted. The Paragraph 5 of the Government order runs contrary in its parts, on one side it says that the employee would be entitled to the promotion from the date his junior was promoted but at the same time it denies him the benefit of the higher post. In our opinion that part of the Paragraph 5 of the Government order dated 25-4-1974 runs contrary to Fundamental Rul3 31 -A and cannot be approved.

12. The principles of 'No Work No Pay' shall not apply to a case where the lapses are on the part of the Government in not promoting a particular person. A proper and correct seniority list is to be maintained by the Government and if a particular person is not assigned correct position in the seniority list then again the lapses would be on the part of the State Government. The learned Single Judge was unjustified in holding that a juxtapose reading Fundamental Rule 31-A and Paragraph 5 of the government order dated 25-4-1974 can be treated to be a statutory rule.

13. The statutory rule is Fundamental Rule 31-A while the circular/ order is issued by the Government under the authority flowing in their favour from Rule 31-A. If a wrong order/circular is issued misinterpreting the Fundamental Rule then such wrong order would not partake the character of the Fundamental Rule. In our opinion, the appellant would be entitled to the monetary benefit with effect from 30th April, 1994.

14. It will also be necessary to observe that there would be a

vast distinction between an 'erroneous' promotion as referred to in Fundamental Rule 31-A and case of 'non-promotion' as referred to in Paragraph 5 of the Government order dated 25.4.1974. If the benefits are flowing from erroneous promotion then the Government certainly would be entitled to recover the money which has been wrongly paid to its employees but Government, in case of non-promotion which is found to be bad in the eyes of law cannot refuse to pay the rightful dues to its own employee. If Paragraph 5 of Government order dated 25-4-1974 is allowed to be read in favour of the Government then it will lead to an impossible situation because the Government in such case would become arbitrator in its own case and would arbitrarily deny the benefits to the persons who are rightfully entitled to the claim. Hypothetically, we take a case, 'a person who because of wrong placement in the seniority list is denied his promotion , comes to the Court and the Court finds that he was wrongly denied the promotion; can in such a case Court refuse to extend the benefits'. The answer certainly would be "No'."

8. A Division Bench of this Court in the case of *Anand Mohan Saxena Vs. State of Madhya Pradesh* (2010 (I) M.P.H.T.81) in paragraphs 3,4,6,7,8,9,10,11, 12 has held as under:-

"3. The contention of the learned Counsel for the appellant is that the appellant has actually worked in the Department but could not be given promotion without any fault on his part, hence, he should be allowed the back wages. In support of his argument, Shri O.P. Saxena, learned Counsel for the appellant relied on a judgment of Apex Court in the case of *Union of India, etc. Vs. K.V. Jankiraman, etc.*, AIR 1991 SC 2010, in which the Apex Court has held that if an employee is wiling to work on a particular post; is deprived of the same due to illegal order passed by the employer; and the employee could not discharge his work due to erroneous order passed by the employer, then the employee is entitled to consequential including the monetary benefits and the normal principle of 'no work no pay' is not applicable in such case. This judgment is passed by three Judge Bench of the Apex Court.

4. In reply to this argument, Shri Vivek Khedkar, learned Govt. Advocate appearing on behalf of respondent-State relied on a judgment of the Apex Court in the case of *State of Haryana and others Vs. O.P. Gupta, etc.*, AIR1996 SC 2936, which is a judgment delivered by two Judge Bench of the Apex Court in

which the Apex Court has distinguished the case of *K.V. Jankiraman* (Supra), on the ground that in the case of *O.P. Gupta* (supra),the seniority list itself was not finalized due to which the employees could not be promoted. In such circumstances, the Apex Court has held that in absence of seniority list there was no certainty about the promotion of the employees and, therefore, for the reason, the back wages were denied.

6. Similar situation is in the case of *Union of India and others Vs. Jaipal Singh,* (2004) 1 SCC 121. In that case also, the promotion was delayed due to conviction of the employee by the Criminal Court. Thus, for this reason,there was delay in making the promotion.

7. Another judgment is in the case of *Baldev Singh Vs. Union of India and others,* (2005) 8 SCC 747. From the perusal of the said judgment, the same position is also arising. In that case also,the employee was convicted for commission of offence under Section 302, read with Sections 34 and 452 of IPC.

8. In the case of *Commissioner, Karnataka Housing Board Vs. C. Muddaiah* (2007) 7 SCC 689, the two Judge Bench of the Apex Court has denied the back wages on the ground that same is against the public interest. From the perusal of the said judgment, we find that it was a case arising out of Contempt of Court and not a writ petition, challenging the order whereby the juniors to the respondent employee were promoted.

9. Another judgment is in the case of *Union Territory, Chandigarh Vs. Brijmohan Kaur,* (2007) SCC 488. From the perusal of the said judgment, it appears that in that case the respondent employee was absent from duty and has not discharged the duties during the period for which he was claiming the arrears. Hence, he was denied monetary benefits of the principle of 'no work no pay'. This judgment was also delivered by two Judge Bench of the Apex Court.

10. Thus, all the aforesaid judgments relied by Shri Vivek Khedkar, learned Government Advocate for the respondents-State, were delivered by two Judge Bench of the Apex Court while the judgment in case of *K.V. Jankiraman*(Supra), relied by learned Counsel for the appellant, was decided by three Judge Bench of the Apex Court and therefore, is binding on this Court.

11. Apart from that in the instant case, the State Government

could not justify or assign any reason whatsoever why the case of the present appellant was not considered in the year 1999 when the juniors to the petitioner were promoted and why his promotion was delayed by 4 years.

12. If the arrears of pay are denied to the employee by arbitrary action of the higher officers without justifying or assigning any reason whatsoever for delaying in promotion to the employee then that will amount to the arbitrariness of the officers of the State Government which is not permissible in the eyes of law."

9. In the present case, the petitioner was denied promotion in the year 2005 for no fault of her part and it is not the case of the respondent that, at any point of time, the petitioner has stated that she is not willing to work on the promotional post. In fact, the petitioner right from the year 2005, has made all the sincere efforts before the respondents claiming promotion to the next higher post as she was illegally superseded and was not at all considered for promotion.

10. Resultantly, the writ petition filed by the petitioner is allowed. This Court is of the considered opinion that the petitioner is entitled for back wages in the matter. The respondents are directed to grant all monitory benefits to the petitioner including back wages. As the petitioner has attained the age of superauunation, she shall also be entitled for enhanced pension and arrears on account of her promotion to the post of Principal. The aforesaid exercise for grant of all monitory benefits and arrears of pension to the petitioner shall be completed within a period of three months from the date of receipt of a certified copy of this order. The respondents/State, however, is free to recover the said amount of arrears from the erring Officers are responsible for non grant of promotion to the petitioner without any reason, after conducting a proper inquiry into the matter.

9. With the aforesaid directions, this writ petition stands allowed and disposed of.

Petition allowed.

I.L.R. [2010] M. P., 1551
WRIT PETITION
Before Mr. Justice Rajendra Menon
17 March, 2010*

GURMIT SINGH VIKHU ... Petitioner
Vs.
PUNJAB & SIND BANK & ors. ... Respondents

A. Service Law - Constitution, Article 226 - *Departmental proceeding - During pendency of departmental proceeding, order of acquittal*

*W.P. No.8625/2008(S) (Jabalpur)

passed in criminal case - Allegation in departmental proceeding relating to wilful damage or attempt to cause damage to the property of Bank and negligence - Charge-sheet in criminal case pertains to offence of criminal breach of trust, cheating, forgery - Held - Evidence adduced in D.E. is entirely different than the one led in criminal case - Acquittal in criminal case is not on merit instead benefit of doubt is granted to petitioner - Since criminal case and D.E. are not based on identical set of circumstances, the acquittal in criminal case is not relevant for consideration in D.E. - Petition dismissed. (Paras 16 & 18 to 20)

क. सेवा विधि – संविधान, अनुच्छेद 226 – विभागीय कार्यवाही – विभागीय कार्यवाही लम्बित रहने के दौरान दाण्डिक मामले में दोषमुक्ति का आदेश पारित किया गया – विभागीय कार्यवाही में बैंक की सम्पत्ति को जानबूझकर क्षति या जानबूझकर क्षति कारित करने के प्रयत्न और उपेक्षा का आरोप – दाण्डिक मामले में आरोप पत्र आपराधिक न्यासभंग, छल, कूटरचना के अपराध से सम्बन्धित – अभिनिर्धारित – विभागीय जाँच में पेश की गयी साक्ष्य दाण्डिक मामले में करायी गयी साक्ष्य से पूर्णतः भिन्न है – याची की दाण्डिक मामले में दोषसिद्धि गुणदोषों पर नहीं है बल्कि उसे संदेह का लाभ दिया गया है – चूंकि दाण्डिक मामला और विभागीय जाँच परिस्थितियों के समान समूह पर आधारित नहीं हैं इसलिए दाण्डिक मामले में दोषमुक्ति विभागीय जाँच में विचार के लिए सुसंगत नहीं है – याचिका खारिज।

B. **Constitution, Article 226** - ***Departmental Enquiry*** - *Non-supply of documents* - *Petitioner failed to show prejudice caused and the effect on findings of guilt by Inquiry Officer - Merely on the basis of vague allegations that documents called for are not produced or circulars are not taken note of, interference into matter can not be made - Petition dismissed.* (Para 23)

ख. संविधान, अनुच्छेद 226 – विभागीय जाँच – दस्तावेज प्रदाय न किया जाना – याची कारित पूर्वाग्रह और जाँच अधिकारी द्वारा दोषी होने के निष्कर्ष पर उसके प्रभाव को साबित करनें में असफल रहा – केवल इन अस्पष्ट अभिकथनों के आधार पर कि बुलाये गये दस्तावेज पेश नहीं किये गये या परिपत्रों को ध्यान में नहीं लिया गया, मामले में हस्तक्षेप नहीं किया जा सकता – याचिका खारिज।

C. **Constitution Article, 226** - ***Departmental Enquiry*** - *Witness examined in criminal case not examined in departmental proceeding - Statement of witness recorded in criminal case is not relevant for consideration in departmental enquiry.* (Para 29)

ग. संविधान, अनुच्छेद 226 – विभागीय जाँच – साक्षी जिसकी दाण्डिक मामले में परीक्षा की गयी, की विभागीय कार्यवाही में परीक्षा नहीं की गयी – दाण्डिक मामले में अभिलिखित साक्षी का कथन विभागीय जाँच में विचार के लिए सुसंगत नहीं है।

Cases referred :

(2007) 1 SCC 566, (2006) 5 SCC 446, (1997) 4 SCC 385, 1997 AIR SCW 3659, (2006) 5 SCC 255, AIR 2008 SC 1162, (2009) 9 SCC 24, 1972 SLR 355,

(1999) 5 SCC 762, (2007) 10 SCC 561, (2006) 6 SCC 366, (2006) 1 SCC 275, (2006) 2 SCC 584, (2006) 9 SCC 172, (2008) 3 SCC 729, (1999) 3 SCC 679, ILR [2010] M.P. 77, (1999) 7 SCC 739, (2001) 1 SCC 65.

Sanjay Sanyal, for the petitioner.

Ajay Mishra with *D.K. Bohrey,* for the respondents.

ORDER

RAJENDRA MENON, J. :–Challenging the order of dismissal from service, annexure A-17 dated 16/04/07 passed by the disciplinary authority, on the basis of finding of guilt recorded against the petitioner in a departmental enquiry and the appellate order annexure A-19 dated 03/04/08, petitioner has filed this writ petition.

2. Petitioner was working as a Officer-cum-Teller in the respondents' bank, he was initially appointed as a Clerk on 03/04/1978 in the Khar Branch Office, Mumbai, he was transferred to Branch Office Jabalpur in February, 1984 on passing the appropriate examination of banking conducted by the C.A.I.I.B., petitioner was made an Officiating Officer & Teller in the year 1985, vide annexure P-16. It is the case of petitioner that his work was to be supervised by respondent No.4 in accordance to the requirement of para 2.6 of the Staff Circular, annexure P-1. It is said that while working at Branch Office, Jabalpur, petitioner has submitted various complaints with regard to non-payment of officiating allowance to him by the concerned officer of the Branch, annexure A-2 dated 13/03/1990 is one such complaint filed by the petitioner. It is stated that from Branch Office Jabalpur he was transferred to Branch Office Maharjpur in June, 1990 and on the ground of certain fraud committed, petitioner was suspended on 23/06/1990. A F.I.R. was lodged, after a complaint was also registered with the Bureau of Economic Offences, Bhopal, in which no action was taken. By placing reliance on annexure P-5 dated 18/07/1990, communication made by the Economic Offences Bureau to the Sessions Judge Bhopal it is the case of petitioner that the Bureau had clearly indicated that no case is made out against the petitioner for proceeding in the matter. Reliance in this regard is made on another communication of the Bureau available on record as annexure P-6 dated 25/12/1990. However, it is the case of petitioner that subsequently a FIR was also lodged, inspite of the opinion of the State Economic Offences Bureau. On the basis of FIR lodged, it is the case of petitioner that a criminal case was registered against him for offences under Section 408, 420, 468 & 471 being Criminal Case No.2191/01, however without waiting for a final adjudication on the criminal case that was pending in the Court of Judicial Magistrate First Class, Jabalpur, petitioner was charge-sheeted on 22/02/1993, on the same set of allegations, which constituted his prosecution in the criminal case and after conducting a departmental enquiry in total disregard to and in violation to the provisions of Clause 19.4 of the Bipartite Settlement annexure P-9, petitioner was dismissed from service on 29/02/1996. Petitioner challenged

the said dismissal in a writ petition, W.P. No.2515/97 and the said writ petition was decided in favour of petitioner vide order dated 21/06/2005 by a learned Single Bench of this Court. However, on a writ appeal being filed by the Bank, W.A. No.901/2006, a Division Bench of this Court remanded the matter back to the appellate authority for deciding the case of the petitioner without being influenced by a report of the hand writing expert. Available on record are copies of the judgment passed by the learned Single Judge in W.P. No.2515/97 and by the Division Bench in W.A. No.901/06. On remand made by the Division Bench vide order dated 25/01/2007, it is stated that petitioner submitted further representations on 06/03/07, 30/03/07 & 01/04/07, vide annexures P-12, P-13 & P-15 along with certain documents annexure P-14 & P-16. However, without considering the same the disciplinary authority again by the impugned order annexure P-17 dated 16/04/07 rejected the plea of the petitioner, without proper consideration in accordance to the direction issued by the Division Bench in its order passed on 25/01/07. An appeal filed by the petitioner vide annexure P-18 on 16/02/08 having being dismissed by the impugned appellate order annexure P-19 dated 03/04/08, petitioner has again filed this writ petition.

3. Even though various grounds are raised in this writ petition, but during the course of argument, three main contentions were advanced by Shri Sanjay Sanyal, learned counsel for the petitioner and he has also filed a written argument on behalf of petitioner emphasizing three points, which were canvassed by him during the course of hearing. It is the case of petitioner that after his dismissal from service initially in the year 1997 i.e. on 29/02/1996 and while pendency of the first writ petition W.P. No.2515/97, he was acquitted of the criminal charges by order dated 30/10/2001, annexure P-10, accordingly, placing reliance on the said judgment and order of acquittal passed by JMFC, Jabalpur and placing reliance on the judgment of the Supreme Court in the case of *Jasbir Singh Vs. Punjab & Sind Bank & Others*, (2007) 1, SCC, 566 and in the case of *G.M. Tank Vs. State of Gujrat & Others*, (2006) 5 SCC, 446. The first ground of attack made by learned counsel for the petitioner is that acquittal in the criminal case is enough to hold the action taken by disciplinary authority and appellate authority to be unsustainable. It is argued by learned counsel that the objections with regard to constructive res-judicata in not raising this ground in the first writ petition is unsustainable, as this ground was not available when the first writ petition was filed in the year 1997. Contending that acquittal of the petitioner by the criminal court on 30/10/02 is a clear acquittal on merit and the disciplinary authority and appellate authority by ignoring the findings of the criminal court have imposed the punishment, which is unsustainable, interference into the matter is sought for. Taking me through the findings of the criminal court, Shri Sanjay Sanyal tried to emphasize that action taken in the matter after acquittal of the petitioner is unsustainable. It was also emphasized by him that when the Bureau of Economics Offences has refused to

register the case, then proceedings in the matter was totally unsustainable. Emphasizing that the charges in the criminal case, the departmental proceedings held and the charge-sheet issued are similar and on the same set of circumstances petitioner cannot be held guilty in the departmental proceeding when he is already acquitted in the criminal case, it is argued that the orders in question, annexure P-17 dated 16/04/07 and annexure P-19 dated 03/04/08 are passed without taking note of the acquittal. Accordingly, the first ground of attack is based on the illegality committed by the respondents in proceeding with the matter and imposing penalty after acquittal of the petitioner in the criminal case.

4. The second ground urged is to the effect that departmental enquiry is void-ab-initio, it has been initiated without any complaint from the legal heirs of the original account holder, Late Nand Singh from whose account amount is said to be misappropriated and further placing reliance on a statement of Smt. Indra Shrivastava and the statement of account produced in the criminal case learned counsel emphasized that guilt of the petitioner is not established and, therefore, the entire departmental enquiry stands vitiated. It is stated by the petitioner that all the disputed five payments were counter signed by respondent No.4 Shri Subhash Kwatra, the passing officer, who did not detect any defect or fraud in the cheques and, therefore, the charges of misconduct are not proved, these facts have been ignored by the disciplinary and appellate authority. It is stated that enquiry stands vitiated as findings are perverse and unsustainable. It is further stated that documents demanded for by the petitioner on 22/07/1994 and 07/07/1995 vide annexures P-23 & P-24 were not supplied during the enquiry, the action taken is contrary to clause 19.10 and 19.12 of the Bipartite Settlement. The subsequent order of punishment passed by the disciplinary and appellate authority is ignoring the findings of the criminal court. The second ground raised is that the enquiry is vitiated and consequently the punishment is unsustainable.

5. The third ground is to the effect that Bureau of Economics Offences, Jabalpur having refused to register any criminal case against the petitioner, action taken by the respondents is unsustainable and the litigation before criminal courts accounts to vexattious litigation and unsustainable, accordingly on the aforesaid grounds Shri Sanjay Sanyal prays for interference into the matter and grant of relief.

6. Shri Ajay Mishra, learned senior counsel for the respondents' bank took me through the findings recorded by criminal court, the witnesses examined in the criminal case, the charges considered by the criminal court, the charges levelled against the petitioner in the departmental proceeding and argued that the departmental enquiry and the criminal case are entirely different. Charges in both the cases are different, allegations are founded on different circumstances, witnesses and findings are different and, therefore, there is no bar in proceeding with the enquiry. Taking me through the principles laid down in the case of *Jasbir*

Singh (supra) and *G.M. Tank* (supra) relied upon by Shri Sanjay Sanyal, Shri Ajay Mishra, tried to emphasize that the acquittal in the criminal case will not help the petitioner, as the acquittal is not an exoneration of petitioner on merit, but he is acquitted by granting benefit of doubt. Taking me through various findings recorded by the criminal court in the order passed on 30/10/2001, Shri Ajay Mishra emphasized that in the criminal case petitioner was acquitted not on merit, but because the prosecution did not produce the relevant witnesses and documents to establish the guilt of the petitioner beyond reasonable doubt. It was emphasized by him that in the criminal case certain important witnesses like one Shri I.P.S. Chandok, who had made an entry with regard to the dead account of Late Nand Singh were not examined and, therefore, benefit of acquittal in the criminal case cannot be granted to the petitioner. Taking me through the law laid down by the Supreme Court in the case of *Union of India Vs. Bihari Lal Sidhana,* 1997 (4), SCC, 385, *Union of India V. R. Swaminathan* 1997, AIR, SCW, 3659, *Sanjay Sitaram Khemkar v. State of Maharashtra & Others* (2006) 5, SCC, 255, *Management, West Bokaro Colliery of M/s. TISCO Ltd. v. Ram Pravesh Singh,* AIR 2008; SC, 1162 and *Southern Railway Officers Association & Another vs. Union of India & Others,* (2009) 9, SCC, 24 and the principles laid down in the judgment relied upon by Shri Sanjay Sanyal in the case of *Jasbir Singh* (supra) and *G.M. Tank* (supra), Shri Ajay Mishra emphasizes that mere acquittal of petitioner in the criminal case is not a ground for interference into the matter, when the law is that both criminal case and the departmental proceedings may continue when both are based on different set of evidence and material. It was emphasized by Shri Ajay Mishra that the law even permits initiation of departmental enquiry after acquittal in a criminal case and, therefore, it was argued that the contentions advanced by Shri Sanjay Sanyal is not correct. Emphasizing that the nature and scope of interference and consideration in a criminal case and in departmental proceeding are entirely different, Shri Ajay Mishra, accordingly, submitted that the first ground of attack is unsustainable.

7. So far as declaring the enquiry to be illegal and vitiated on the ground of non-examination of Smt. Indra Shrivastava is concerned, Shri Ajay Mishra argued that Smt. Indra Shrivastava was not a necessary witness and the Bank in the departmental enquiry did not deem it appropriate to examine this witness. If the petitioner wanted to examine this witness, then petitioner should have called her as a defence witness and examine her, for reasons best known to the petitioner, he did not do so. It is stated by Shri Ajay Mishra that statement of Smt. Indra Shrivastava recorded in the criminal case by JMFC, Jabalpur cannot be relied upon for exoneration of the petitioner in the departmental enquiry. Placing reliance on a judgment of *Union of India Vs. Sardar Bahadur,* 1972 SLR, 355, Shri Ajay Mishra, learned Sr. Advocate argued that statement of witnesses recorded in the criminal case is not relevant for consideration in the departmental enquiry. It was

emphasized by Shri Ajay Mishra that except for contenting that the enquiry was vitiated and documents sought for vide annexures P-23 & P-24 have not been produced, nothing is pointed out as to how, in what circumstances and on what basis the non-production of these documents caused prejudice to the petitioner and how the enquiry is vitiated. Relying to the findings recorded by the learned Division Bench in W.A. No.901/06, Shri Ajay Mishra emphasized that now the petitioner cannot challenge the procedure followed in the enquiry as in the earlier round of litigation this Court did not find any error in the enquiry conducted. That apart, it was argued by him that scope of judicial review in such matters are very limited and this Court cannot sit over the findings of the Inquiry Officer, as if it is exercising appellate jurisdiction. Placing reliance on a judgment of Supreme Court in the case of *Bank of India V. Degala Suryanarayana* 1999(5), SCC, 762, Shri Ajay Mishra emphasized that the matter stands concluded with regard to the scope of judicial review, as indicated hereinabove and the observations made by the Division Bench in para 10, 11 & 12 of the judgment passed on 25/01/2007, as contained in annexure P-11 and now petitioner cannot challenge the enquiry on the second ground and canvassed at the time of hearing.

8. So far as proceeding in the matter after the letter of the Bureau is concerned, Shri Ajay Mishra, taking me through the so called letters of the Bureau available on record as annexure P-8, points out that the Economic Offences Bureau had only intimated that on going through the complaints, the Bureau finds that no Economic Offences within the purview of the Bureau is made out and, therefore, bank is at liberty to lodge the FIR and prosecute the petitioner, apart from taking departmental action against him. Contending that communication of the Bureau with regard to complaint made by bank is of no consequence and will not help the petitioner, Shri Ajay Mishra refuted each and every contentions advanced and sought for dismissal of the writ petition.

9. In reply to the averments made, Shri Sanjay Sanyal, learned counsel further made the following contentions by way of rejoinder, arguments Shri Sanjay Sanyal had tried to seek interference on the ground of perversity of finding by the enquiry officer and the appreciation of evidence done by the enquiry officer and argued that the charges are not proved.

10. Having heard learned counsel for the parties and on consideration of the fact that have come on record it is clear that the main ground of challenge now in this writ petition is the effect of acquittal of the petitioner in the criminal case and subsequent action of the respondents' bank in ignoring the same, as alleged by the petitioner in punishing the petitioner by the impugned orders.

11. During the course of hearing of this writ petition a objections was raised by learned counsel for the respondents Shri Ajay Mishra to the effect that the earlier writ petition of the petitioner W.P. No.2515/97 was decided by learned Single

Bench on 21/06/05 and before that, petitioner was already acquitted in the criminal case on 30/10/01. That being so, it was emphasized that the petitioner should have raised this ground in the earlier round of litigation and the ground having not being raised, now the principles of constructive res-judicata debars the petitioner from raising the aforesaid ground.

12. Admittedly, the first writ petition was filed by the petitioner in the year 1995 and in that writ petition challenge was made to the original order of dismissal dated 29/02/1996 and 06/02/1997, when these orders were passed acquittal of the petitioner was not recorded. However, petitioner was acquitted on 30/10/2001 and before, the writ petition was heard on 27/04/05 and the judgment pronounced on 21/06/05, the acquittal was already recorded and, therefore, Shri Ajay Mishra, Sr. Counsel may be right in contending that the petitioner could raise the ground by amending the petition. However, considering the fact that the acquittal had not came into force when the earlier writ petition was filed in the year 1995, merely because petitioner did not amend the writ petition and raises the ground which was available to him it is not in the interest of justice to throw out the petition merely on the ground of constructive res-judicata. Interest of justice requires that the matter may be looked into on merit, in the facts and circumstances of this case when on an remand ordered by a Division Bench, the orders of dismissal is passed afresh. Accordingly, on the preliminary objection raised by Shri Ajay Mishra, this Court does not deem it appropriate to dismiss the writ petition. That being so, all the three grounds urged at the time of hearing are to be considered.

13. So far as the first ground is concerned, the same pertains to taking action against the petitioner inspite of his acquittal in the criminal case, to appreciate and consider this ground it is necessary to take note of the allegation levelled against the petitioner in the departmental enquiry and the criminal case and thereafter proceed to assess the matter.

14. A perusal of the impugned order of punishment dated 16/04/07, the charge-sheet issued and the other material with regard to the departmental enquiry conducted against the petitioner indicates that one Shri Nand Singh had opened an account bearing S.B. A/c. No.41 in the Branch Office of respondents' bank at Jabalpur on 03/07/1991. The account was opened by initial cash deposit of Rs.101/-, the said account holder Nand Singh expired on 27/12/1981 and this fact of his death is duly noted in the ledger under signature of the banks' officiating officer, allegation against the petitioner is that while working as a officiating officer cum teller between the period 17/02/1986 to 17/04/1986 five withdrawals were permitted by the petitioner on the basis of signed instruments presented under the signature of Late Nand Singh and verified and payment made by the petitioner. It is stated that the five withdrawals were made on 07/02/1986 for Rs.500/-, on 14/04/1986 for Rs.3,000/-, on 15/04/1986 for Rs.3,000/- on 17/04/1986 of Rs.3,000/- and again

on 17/04/1986 for Rs.3,000/-. The first withdrawal on 17/02/1986 was on a withdrawal form and the remaining four were made on cheque forms, which were loose cheque issued from the branch. It is stated that all these instruments were issued on the dates when the withdrawal were made, they were allegedly containing the forged signature of Nand Singh, whose death was already recorded in the ledger book, the withdrawals were received and payment were made by the petitioner after verifying the signatures and the person to whom the amount was paid. On the aforesaid allegations departmental enquiry was conducted and after the first dismissal was ordered on 21/02/1996 a learned Single Bench of this Court quashed the same, the matter was agitated before a Division Bench in W.A. No.901/06 and the Division Bench found that certain reliance placed by the disciplinary authority and findings recorded on the basis of a report of a handwriting expert is unsustainable and, therefore, direction issued by the Division Bench was to ignore the report of the handwriting expert and proceed in the matter afresh. From the allegation levelled against the petitioner it is seen that the allegation pertains to negligence in the performance of his duty, improper verification of the signature of the account holder, not going through the records properly and taking note of entries made in the ledger with regard to death of Shri Nand Singh on 27/12/1981 and making the payment in the name of a deceased account holder, on the basis of forged and fabricated documents. The allegations were further to the effect that it is the petitioner as teller officer, who has issued loose cheque and withdrawal, he had verified the signature of Nand Singh on withdrawal and the payments were made by the petitioner without proper verification, which amounts to negligence in the performance of his duties.

15. The main thrust of petitioner's argument was that the allegations in the charge-sheet and the criminal case are identical. In the present petition neither the charge-sheet or the findings of the Inquiry Officer, nor the challan papers, which were filed in the criminal case are produced. However the original records of the first writ petition W.P. No.2515/97 are available and in the said record the charge-sheet dated 22/02/1993 is annexuer P-5 and the report of the enquiry officer is annexuer P-29, a perusal of the charge-sheet indicates that the allegations levelled against the petitioner reads as under :

Charge-sheet

"2. Shri Nandsingh had opened S.B.A/c. No.41 at Napier Town Branch on 03/07/1981 with an initial cash deposit of Rs.101-00. He died on 27/12/1981 and this fact was duly noted in the ledger under the signature of an official of the Bank.

3. In this deceased account you are Teller allowed withdrawal of amounts as under :

Date of withdrawal	Amount Withdrawn
17.02.1986	Rs.500-00
14.04.1986	Rs.3,000-00
15.04.1986	Rs.3,000-00
17.04.1986	Rs.3,000-00
17.04.1986	Rs.3,000-00

You have signed all the instruments for having made payments and have also verified the signature of Shri Nandsingh. The first instrument was made out on a withdrawal form and the remaining four were made on cheque forms which were issued in loose. On all these instruments forged signatures of deceased Nandsingh appear as Drawer and also as person receiving payment. Thus you forged all the five instruments in the name of deceased Nandsingh both as drawer and receiver of the proceeds of the instruments.

Your above acts amount to misconduct under the provisions of Bipartite Settlement especially under Clause 19.5(d) and 19.5(j) which are reproduced hereunder :-

19.5(d) willful damage or attempt to cause damage to the property of the bank or any of its customers;

19.5(j) doing any act prejudicial to the interst of the bank or gross negligence or negligence involving or likely to involve the bank in serious loss;

You are directed to submit your reply to the Charge Sheet within 15 days of the receipt of the same. In case no reply is received within the stipulated period, it shall be presumed that you have nothing to state and the bank shall proceed accordingly.

16. The allegation against the petitioner in the criminal case pertains to offences under Sections 408, 420, 468 & 471 of IPC. So far as the allegations in the charge-sheet are concerned, they relates to willful damage and attempt to cause damage to the property of bank and its customer and acting in manner prejudicial to the interest of the bank, gross negligence or negligence involving or likely to involve serious loss to the bank, in the said charges levelled in the departmental proceeding there is no element of fraud, cheating or misapproriation as alleged by the petitioner, whereas charges in the criminal case pertains to offences of criminal breach of trust, cheating, forgery and using as genuine a forged documents. The ingredients necessary for constituting these offences in criminal case and allegations in the charge-sheet in the Departmental Enquiry are entirely different and, therefore, the contentions of the petitioner that the charge-sheet and the allegations in criminal case are identical and similar is not correct.

17. In support of the allegations levelled in the charge-sheet, the disciplinary

authority and the enquiry available have placed heavy reliance on the statement of two witnesses one is MW-1 Shri I.P.S. Chandok and another is M.W-2 Shri Subhas Kwatra, it is, therefore, clear from the proceedings of the departmental enquiry that the charges levelled against the petitioner in the departmental enquiry does not relates to the act of committing forgery or cheating, but it relates to improper conduct of duties. Petitioner issued blank loose cheque to unauthorized person without proper verification and effected payments of the cheque in an illegal manner and conducted his officiating duty in a manner which is prejudicial to the interest of bank and unbecoming of an officer. The witness relied upon for holding petitioner guilty in the departmental enquiry are MW-1 I.P.S. Chandok and M.W-2 Subhash Kwatra, if the impugned order of penalty annexure P-17 and appellate authority order annexure P-19 are taken note of, it would be seen that the findings are recorded by these authorities by taking note of the working of the petitioner as teller, in the branch office Jabalpur, the manner in which he issued the loose cheque, himself received the instruments, passed the payment, particularly two payments of Rs.3,000/- on the same date on 17/04/1986 to the same person, because withdrawal on loose cheque beyond Rs.3,000/- is not permissible. In this regard the findings recorded by disciplinary authority indicates that petitioner was a senior officer and he knew that on a loose cheque withdrawal of more than Rs.3,000/- is not permissible, but by issuing two different loose cheques on the same date on 17/04/1986 two payments of Rs.3,000/- each i.e. consolidated payment of Rs.6,000/- was made straight away, which was a material irregularity and the same amounts to milking the depositors account and committing fraud with the bank. It is, therefore, clear that the allegations levelled in the charge-sheet and the material on the basis of which the finding of guilt is recorded, mainly on the illegality committed by the petitioner in discharging his duties and the finding of the Inquiring Officer are mainly based on the statement of Shri I.P.S. Chandok and Subhash Kwatra. In the backdrop of the above, if the proceeding of criminal case is perused, it would be seen that petitioner has not placed on record the charge-sheet to show the similarity or identical nature of proceedings held in the criminal case and in the departmental enquiry, the petitioner has only relied upon the judgment of criminal court annexure P-10 dated 30/10/01 and, therefore, this Court is required to examine the proceeding in the criminal case only on the basis of the judgment of the criminal court. The judgment of the criminal court indicates that petitioner was charged with the offence under Section 408, 420, 468, 471 & 204 of IPC and in the criminal case the witnesses examined and the documents relied upon are entirely different, neither Shri Chandok, nor Shri Kwatra are examined in the enquiry. The witnesses examined in the enquiry are P.W-1 Tejender Singh Sabarwal, P.W.-2 Jitendra Singh, P.W.-3 Amarjeet Singh Mukkar, P.W.-4 Santosh Kumar Tiwari, P.W-5 Ishdatt Shukla and P.W-6 M.P. Pandey and petitioner examined one Smt. Indra Shrivastava as D.W-1. It is, therefore, clear

that the witness examined in the enquiry do not include the two persons namely I.P.S. Chandok and Subhash Kwatra, on whose evidence the departmental enquiry proceedings are passed and the disciplinary authority and appellate authority have placed reliance to hold the petitioner guilty of the charges. These two persons are the officers who have actually witnessed the procedure followed by the petitioner in the entire transaction. If the findings recorded by criminal court with regard to issue No.3 & 4 and other issues are evaluated, it would be seen that in various portions of the judgment the learned Court has taken note of the fact that the documents are not produced nor the proper witness examined, for eg. in para 8 it is recorded by the learned court that certain reports with regard to action taken are not produced by the police station Omti and benefit is granted to the petitioner, report of the State Examiner of documents and the action taken by ASI Tripathi are not produced. It is also seen that the learned court below has recorded a finding that death of the account holder Late Nand Singh on 27/12/1981 and entry made in the ledger book are not proved. The witness examined in this regard P.W-3 Amarjeet Singh Mukkar was not possessed of the knowledge with regard to death of the account holder and, therefore, consequently it is held that the knowledge of petitioner with regard to death of account holder is not established in the absence of proper evidence. Whereas in departmental enquiry Shri I.P.S. Chandok, who had made the entry in the ledger book about death of Late Nand Singh between 07/11/1981 and 01/07/1983 was examined and the findings recorded is that before 01/07/1983 i.e. before the actual payment of five instruments, death of account holder is recorded in the ledger. Similarly, in various other places like para 9, the learned court has held that the evidence and material to prove the guilt are not produced and, therefore, the allegations are not proved beyond reasonable doubt by the prosecution and the benefit is extended to the petitioner. It is, therefore, a case where apart from the fact that acquittal of the petitioner is not on merit completely but is by extending benefit of doubt due to non-examination of witnesses and documents, the material produced before the criminal court and the departmental enquiry are entirely different it is, therefore, keeping in view the aforesaid difference in both the proceeding, the principles of law laid down for taking action on acquittal in the criminal case and a departmental enquiry to be taken note of. In this regard the principle laid down in various cases reflects the following factual scenarios.

In the case of *G.M. Tank* (supra) in para 32 the matter is so dealt with:

> "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."

Again in the case of *Divisional Controller, Gujarat SRTC Vs. Kadarbhai J. Star,* (2007)10, SCC, 561, the matter is so dealt with:

"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."*

Again in the case of *Uttaranchal Road Transport Corporation Vs. P* (2006)6 SCC, 366, the observations made by the Supreme Court reads as under :

10. The position in law relating to acquittal in a criminal case, its effect on departmental proceedings and re-instatement in service has been dealt with by this Court in *Union of India and Anr. v. Bihari Lal Sidhana* (1997 (4) SCC 385). It was held in paragraph 5 as follows:

"5. It is true that the respondent was acquitted by the criminal court but acquittal does not automatically give him the right to be re-instated 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. Re-instatement would be a charter for him to indulge with impunity in misappropriation of public money."

11. The ratio of Anthony's case (supra) can be culled out from paragraph 22 of the judgment which reads as follows:

"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 involves 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 vindicated and in case he is found guilty, the administration may get rid of him at the earliest."

In the case of *State of Orissa and Others Vs. Mohd. Illiyas,* (2006)1 SCC, 275, in para 12 the matter is so dealt with :

"12. When the allegation is of cheating or deceiving, whether the alleged act is wilful or not depends upon the circumstances of the concerned case and there cannot be any strait jacket formula. The High Court unfortunately did not discuss the factual aspects and by merely placing reliance on earlier decision of the Court held that pre-requisite 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 Ors.* (AIR 1968 SC 647) and *Union of India and Ors. v. Dhanwanti Devi and Ors.* (1996 (6) SCC 44). 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 Act of Parliament. In *Quinn v. Leathem* (1901) AC 495 (H.L.), Earl of Halsbury LC 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 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."

In the aforesaid case it is laid down that reliance on a decision has to be made after considering the factual background of a particular case, the principle laid down is that the decision is a precedent of its own fact. That being so, if the three judgments

relied upon by Shri Sanjay Sanyal i.e.. in the case of *Jasbir Singh* (supra), *G.M. Tank* (supra) and *Paul Anthony* (supra) are considered, on the basis of the aforesaid principle, it would be seen that in the case of *Jasbir Singh* (supra) the bank had filed a civil suit against the employee, the civil suit was dismissed and the findings of the civil suit operated against the bank. As the departmental enquiry and the civil suit were based on the same set of facts and evidence, Supreme Court interfered in the matter. It was held that the bank having invited adverse finding against them by filing a Civil Suit, which had attained finality cannot effect the recovery. Finding the evidences and material in the Civil Suit to be the same as that was adduced in the departmental enquiry, interference was made. Likewise in the case of *Capt. M. Paul Anthony* (supra) and *G.M. Tank* (supra) also interference was made only because the material in the criminal case and the departmental enquiry were identical and similar.

In the case of *South Bengal State Transport Corporation Vs. Sapan Kumar Mitra and others* (2006)2 SCC, 584, the matter is so dealt with :

"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 Mods v. Union of India,* [(1992) 4 SCC 711 : 1993 SCC (L&S) 13 : (1993) 23 ATC 382] 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* [(1997) 11 SCC 239 : 1998 SCC (L&S) 124] the view expressed in *Nelson Motis v. Union of India1* 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."

In the case of *N. Selvaraj Vs. Kumbakonam City Union Bank Ltd. & Another*, (2006)9 SCC, 172, following is held by the Supreme Court :

"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 backwages 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 law that the standard of proof between the criminal trial and the departmental proceedings are quite different. In criminal trial the standard of proof is proved beyond all reasonable doubt, whereas in the departmental proceedings it is preponderance as 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 above, the suspension of the appellant is continuing subject to the final decision that may be made on the basis of second enquiry. It is now well settled principle of law that pay and allowances including backwages will depend on the outcome of the second enquiry to be decided by the disciplinary authority in accordance with relevant financial Rules. See

(*Managing Director ECII, Hyderabad and Ors. Vs. B. Karunakar & Ors.* 1993(4)SCC 727)".

And finally in the case of *West Bokaro Colliery (TISCO Ltd.) Vs. Ram Pramesh Singh,* (2008) 3, SCC, 729, in para 17 the matter is so dealt with :

> "17. After going through the order of the Industrial Tribunal, we are 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 behavior of the respondent towards his superiors. The Management witnesses who were present at the scene of occurrence have unequivocally deposed about the misbehavior 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."

18. Similar principles are laid down by the Supreme Court in the case of *Biharilal Sinha* (supra) and *Southern Railway Officers Association* (supra) relied upon by Shri Ajay Mishra, learned Senior counsel. If the cases are scrutinized and if the principles therein are taken note of, it would be clear that mere acquittal of an employee in the criminal case by itself does not preclude the employer from taking disciplinary action for misconduct committed in discharging of duties, it has been consistently held that the field of operation, the nature of evidence required for holding the person guilty in a criminal case and taking action in departmental proceedings are different and that one does not come in the way of proceedings in another matter, even after acquittal in criminal case the law permits an employer to proceed and take departmental action after such acquittal. However, the only exemption to the normal rule can be made out from the principles laid down in *G.M. Tank* (supra) and in the case of *Capt. M. Paul Anthony v. Bharat Gold Mines Ltd. & Another* (1999) 3 SCC, 679 they are to the effect that if the evidence and material in the criminal proceeding and departmental proceeding are the same and identical, then on the same set of material and identical evidence two different proceedings cannot be taken. In the case of Paul Anthony (supra), the decision in the criminal case and the departmental enquiry were passed on the same set of material facts and evidence and it was for these circumstances it was held that after acquittal in criminal case proceedings in the departmental enquiry is not permissible, but when the material, the evidence and documents in the departmental enquiry and the material produced in the criminal case and material considered

are different, the law permits proceeding in the matter, even if in the criminal case employee have been acquitted and no action taken. This principle is recently upheld and followed by this Court in *Sunil Pillai Vs: State of M.P. & Others,* ILR, 2010, M.P. 77, if the case in hand is evaluated in the back-drop of principle laid down in the said case, it would be seen that the allegations in the criminal case pertains to offences of cheating and fraud, whereas in the departmental proceeding the allegations against the petitioner were with regard to misconduct committed in discharging of his duties, improper performance of duty in the matter of verification of signature, passing the cheque's and making their payment, issuing loose cheque contrary to norms and regulations available in the bank's circular and discharging duties in a manner which is unbecoming of an officer and contrary to settled norms, the evidence adduced in the departmental enquiry is entirely different than the one led in the criminal case and there is no acquittal on merit in the criminal case instead benefit of doubt is granted to the petitioner. That being so, on scrutinizing the totality of circumstances, I am of the considered view that criminal case and departmental enquiry are not based on identical set of circumstances and facts, the evidence and material produced in both the cases are different and principle in this regard laid down in the case of *Paul Anthony*(supra) and *G.M. Tank* (supra) and Jasbir Singh (supra) are distinguishable and will not apply in the facts and circumstances of the case. In the present case even before the criminal case came to an end and the acquittal was recorded, the departmental enquiry had concluded and on the basis of evidence that has came in departmental enquiry, petitioner was dismissed in the year 1997.

19. The main charges against the petitioner in the charge-sheet dated 22/02/1993 pertains to willful damage or attempt to cause damage to the property of the bank and its customers and acting in manner prejudicially to the interest of the bank, gross negligence or negligence involving or likely to involve serious loss to the bank. The allegations in the charge-sheet are, therefore, pertaining to certain misconduct in discharging the duties by the petitioner and the allegation in the criminal case are pertaining to cheating and fraud. The charge-sheet issued to the petitioner is for certain misconduct under clause 19.5(d) and 19.5(j) of the Bipartite Settlement and are not similar to the charges in the criminal case.

20. Accordingly, in the facts and circumstances of the present case, I am of the considered view that acquittal of petitioner in the criminal case is of no consequence and the departmental proceeding having proceeded in the matter of taking action on the basis of finding of guilt recorded in the departmental enquiry, the acquittal of petitioner in the criminal case, does not in any manner whatsoever help the petitioner.

21. Accordingly, I am of the considered view that the first ground of attack made by the petitioner is unsustainable.

22. So far as the second ground with regard to declaring the departmental enquiry as void-ab-initio and interference into the matter is concerned, apart from making statement to the effect that enquiry is vitiated, no specific procedural illegality is pointed out by learned counsel for the petitioner. Learned counsel for the petitioner has not referred to the proceedings of the enquiry and has not specified as to what is the procedural impropriety or illegality committed. The only alleged illegality is that documents called for vide annexuer P-23 and P-24 on 27/07/94 and 07/07/95 were not supplied, the procedure followed under Bank's Law Circular i.e. annexure P-25 was not followed and the disciplinary authority has violated clause 19.10 of the Bipartite Settlement in not keeping the entire record of criminal proceeding before passing the orders impugned. Apart from the aforesaid illegalities nothing is pointed out to hold the eqnuiry to be vitiated.

23. So far as supply of documents called for vide annexures P-23 & P-24 are concerned, petitioner has not pointed out as to how and in what manner these documents are relevant and how their non-production adversely effected the right of petitioner for defending him in the departmental proceeding, before seeking to challenge a departmental enquiry to be vitiated, petitioner is not only required to show as to what is the illegality committed, but the consequential prejudice caused thereof and its effect on the final outcome of entire proceedings has to be pleaded and demonstrated before this Court, the said principle is laid down by Supreme Court in the case of *State Bank of Patiala V. S. K. Sharma* 1996 (3), SCC, 364. In the present case petitioner has not pointed out any such prejudice caused nor has he demonstrated its effect on the findings of guilt recorded by the Inquiry Officer. That being so, merely on the basis of vague allegations that documents called for are not produced or the circulars are not taken note of, interference into the matter cannot be made by this court.

24. There is another aspect of the matter with regard to procedural impropriety alleged by the petitioner. In the earlier round of litigation, which culminated in passing of the order by the Division Bench on 25/01/07 in W.A. No.901/06. If the order passed is taken note of, it would be seen that there is nothing to hold that the proceedings stood vitiated due to any procedural impropriety. If the enquiry stood vitiated due to any procedural impropriety, the same being a subject matter of the earlier round of litigation, then in the earlier proceedings this Court would have interfered with the departmental enquiry on any such procedural illegality, that being so, now petitioner cannot be permitted to raise the aforesaid ground.

25. As far as the assessment of evidence and consideration of the finding of the enquiry officer and appreciation of the same by the learned Single Judge is concerned, the Hon'ble Division Bench did not find any defect in the finding of the enquiry officer, nor did it interfere with the action on the procedural impropriety. The only defect found was that the report of the handwriting expert was not

supplied to the petitioner and that has caused prejudice to him, in this regard the observations made by the Division Bench in para 12, 13 & 14 may be taken note of, which reads as under:

> "12. It is not disputed before us that the report of the handwriting expert was taken into consideration by the disciplinary authority while recording his finding of guilt against the respondent in the order dated 29/02/1996. It, however appears from the order dated 29/02/1996 of the disciplinary authority that the opinion of the handwriting expert was obtained because of the objection of the respondent that the signatures on the exhibited document were not put by the respondent and the disciplinary authority held in the order dated 29/02/1996 that the opinion of the handwriting expert that the signatures on the documents were put by the respondent corroborates the finding of the Inquiry Officer on the charge. Thus, the opinion of the handwriting expert was not the sole basis on which the disciplinary authority had come to the conclusion that the signatures on the exhibited documents were put by the respondent. Besides the opinion of the handwriting expert the Inquiry Officer had also given the finding that the signatures on the relevant documents were put by the respondent. Since copy of the report of the handwriting expert was not made available to the respondent and the handwriting expert is not available for cross-examination, the opinion of the handwriting expert has to be left out of the consideration. Accordingly, we direct that the disciplinary authority will exclude the report of the handwriting expert and will record a finding afresh as whether or not the signatures on the relevant documents were put by the respondent or whether the respondent was guilty of any of the charges.
>
> 13. Since we are remitting the matter to the Disciplinary Authority, we would not like to express any opinion on the other findings of the Disciplinary Authority which have not found favour with the learned Single Junde in the impugned order. The fact remains that witnesses have been examined in the enquiry on various charges against the respondent and some documents have been produced and the Disciplinary Authority has to record a fresh finding whether or not the charges against the respondent stand proved. Suffice it to say that the learned Single Judge has exceeded his jurisdiction under Article 226 of the Constitution inasmuch as he has re-appreciated the evidence and has come to the conclusion that the charges against respondent have not been proved. As has been held by the Supreme Court in *State of Andhra Pradesh v. Sree*

Ram Rao and Yoginath D. Bagde v. State of Maharashtra (supra). The High Court while exercising its power of judicial review under Article 226 of the Constitution does not sit as an appellate authority over the finding of the disciplinary authority or the Inquiry Officer and conclusion reached by the disciplinary authority or the Inquiry Officer could be interfered with only if thee is no evidence on record in support of the conclusion.

14. For the aforesaid reasons, we set aside the impugned order dated 21/06/2005 of the learned Single Judge in W.P. No.2515/97 and quash the order dated 29/02/1996 of the Disciplinary Authority and the order dated 06/02/1997 of the appellate authority and remit the matter to the Disciplinary Authority to record a finding on the charges against the respondent after excluding the opinion of the handwriting expert and after affording on opportunity to the respondent to make further representations against the findings of the Inquiry Officer in the enquiry. Since the respondent has remained out of service since 1996, this exercise will be completed by the Disciplinary Authority within a period of three months from the date of receipt of the certified copy of this order from the respondent. The appeal is accordingly disposed of."

(Emphasis Supplied)

26. It would be clear from the aforesaid that the learned Division Bench has recorded a opinion that the learned Single Judge while deciding W.P. NO.2515/97 has exceeded his jurisdiction under Article 226 of the Constitution in re-appreciating the evidence and has come to the conclusion that the charges against the petitioner are not proved. The finding with regard to scope of judicial review under Article 226 of the Constitution and appreciation of evidence as observed by the learned Division Bench, negates the contention advanced by Shri Sanjay Sanyal now with regard to enquiry being void-ab-initio, on the ground that the findings are perverse. The scope of judicial review in the matter as canvassed by Shri Ajay Mishra on the basis of principles laid down in *Bank of India* (supra) and the principles laid down in the case of *Yoginath D. Badge Vs. State of Maharashtra* (1999) 7 SCC, 739, relied upon by the Division Bench and *Union of India Vs. K.A. Kittu,* 2001 SCC, 65, clearly lay's down the principles that this Court cannot sit over the decision of the appellate authority and the disciplinary authority as if it is exercising further powers of appellate authority, re-appreciate the evidence and record a different findings, this Court can only review the decision making process, not the decision itself and if the evidence available on record is evaluated on the basis of a prudent man's approach interference is not warranted.

27. So far as the finding of the enquiry officer is concerned, the enquiry officer

has considered the material adduced before him by Shri Jamohan Tuteja, Presenting Officer, the two witnesses I.P.S. Chandok and Subhash Kwatra and it is found that in the ledger-sheet an entry is made with regard to death of Shri Nand Singh and the said entry is found to be made between 17/11/1981 to 01/07/1983. That apart, the signature of Late Nand Singh is found to be improperly verified by the petitioner and conduct of petitioner in issuing loose cheque is also held to be contrary to the banking norms and regulations. It is, therefore, clear that the findings in the departmental enquiry is based on due appreciation of material and evidence available.

28. Accordingly in the present case it has to be held that the findings recorded by the disciplinary authority in the impugned order annexure P-17 and the reasons given by the authority for disagreeing with the representation of petitioner and holding the petitioner guilty are based on material available on record, they are neither perverse, nor contrary to a prudent man's approach warranting interference now in this writ petition, accordingly, the second ground of attack is also unsustainable.

29. So far as the prayer made by the petitioner for interfering in the matter after appreciating the statement of DW-1 Smt. Indra Shrivastava recorded in the criminal case before the JMFC, Jabalpur is concerned, it may be suffice to conclude that Smt. Indra Shrivastava was not examined by the petitioner as a defence witness and if she had appeared in the enquiry as a defence witness, she could be avaiable for cross-examination by the Bank, this having not being done, her statement cannot be considered. Further in view of the law laid down in *Sardar Bahadur* (supra) the said contention cannot be accepted.

30. So far as the third ground with regard to the in-action of exoneration of petitioner by Economic Offences Bureau is concerned, the communication of the Bureau only indicates that the Bureau had expressed their reluctants to proceed the matter as no economic offence is made out, merely because the Economic Offences Bureau did not interfere in the matter, it is not a ground for this Court to interfere in the matter now.

31. Accordingly, finding no case for interference on the grounds raised, the petition is dismissed without any order so as to costs.

Petition dismissed.

I.L.R. [2010] M. P., 1574
WRIT PETITION
Before Mr. Justice Ajit Singh
18 March, 2010*

SUNIL @ SANNU ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Rajya Suraksha Adhiniyam, M.P. 1990 (4 of 1991), Section 6(c) [As amended w.e.f. 05.09.2006], Public Gambling Act, 1867, Section 4-A - *Order of externment on the ground of involvement in gaming activities and repeated conviction u/s 4-A of Act, 1867 between 2004 and 2008 - Held - S. 4-A of Act, 1867 inserted in its application to State of M.P. w.e.f. 05.09.2006 by M.P. Rajya Suraksha (Sanshodhan) Adhiniyam, 2006 - Petitioner was convicted thrice u/s 4-A of Act, 1867 in the year 2004 and despite that continued his gaming operation and convicted in year 2007 and 2008 - District Magistrate did not commit any illegality in considering the conviction in respect of cases prior to 2006 while passing order of externment - Petition dismissed.* (Paras 5, 6 & 10)

राज्य सुरक्षा अधिनियम, म.प्र., 1990 (1991 का 4), धारा 6(सी) [05.09.2006 से यथा संशोधित], सार्वजनिक द्यूत अधिनियम, 1867, धारा 4–ए – जुआ क्रियाकलापों में अन्तर्ग्रस्त होने और 2004 एवं 2008 के बीच अधिनियम, 1867 की धारा 4–ए के अन्तर्गत पुनरावृत्त दोषसिद्धि के आधार पर निर्वासन का आदेश – अभिनिर्धारित – अधिनियम, 1867 की धारा 4–ए म.प्र. राज्य में उसके लागू होने के लिए म.प्र. राज्य सुरक्षा (संशोधन) अधिनियम, 2006 द्वारा अंतःस्थापित की गयी – याची को अधिनियम, 1867 की धारा 4–ए के अन्तर्गत तीन बार दोषसिद्ध किया गया और इसके बावजूद अपना जुआ कारोबार चालू रखा और वर्ष 2007 एवं 2008 में दोषसिद्ध किया गया – जिला मजिस्ट्रेट ने निर्वासन का आदेश पारित करते समय 2006 के पूर्ववर्ती मामलों के सम्बन्ध में दोषसिद्धि को विचार में लेकर कोई अवैधता नहीं की – याचिका खारिज।

Cases referred :

AIR 1961 SC 307, 2008(4) MPLJ 621 = ILR [2009] MP 377.

Ashok Chakraverti, for the petitioner.
D.S. Purba, G.A., for the respondents.

O R D E R

AJIT SINGH, J.:–By this petition, under Article 226 of the Constitution, the petitioner has prayed for quashing of order dated 30.3.2009, Annexure P2, passed against him for externment by the District Magistrate, Raisen (respondent no.3) and the appellate order dated 20.8.2009, Annexure P1, of the Commissioner, Bhopal Division (respondent no.2) rejecting his appeal.

*W.P. No.9573/2009 (Jabalpur)

2. Briefly stated the facts giving rise to this petition are that on 27.6.2008 the Superintendent of Police, Raisen, submitted a report to the District Magistrate about the gaming activities, committed by the petitioner from 2004, with a request that an externment order be passed against him in exercise of powers under section 6(c) of the Madhya Pradesh Rajya Suraksha Adhiniyam, 1990 (in short, "the Adhiniyam 1990"). The State then also examined Station Officer Kotwali G. L. Ariwal, Assistant Sub-Inspector Kotwali Ram Singh Thakur and Govind Singh Raghuvanshi in support of its case. All these witnesses stated that petitioner was involved in gaming activities and despite his repeated conviction under section 4-A of the Public Gambling Act, 1867 (in short, "the Act") he is continuing to engage himself in gaming activities. Being prima facie satisfied with the allegations of gaming activities made against the petitioner, the District Magistrate served a show cause notice dated 21.11.2008 on him as required under section 8(1) of the Adhiniyam 1990. The petitioner submitted his reply dated 5.1.2009 to the show cause notice and denied the allegation of involvement in gaming activities. He, however, did not examine any witness in support of his defence and also did not make a request to cross-examine the witnesses examined by the State. The District Magistrate, on coming to a conclusion that Chief Judicial Magistrate, Raisen, has convicted the petitioner in five different cases under section 4-A of the Act and despite conviction petitioner is continuing to engage himself in gaming activities, directed his externment for a period of one year from District Raisen and contiguous districts such as Bhopal, Vidisha, Sagar, Sehore, Hoshangabad and Narsinghpur. The order of externment was passed under section 6(c) of the Adhiniyam 1990. Aggrieved, the petitioner preferred an appeal before the Commissioner but it was dismissed vide order dated 20.8.2009.

3. The learned counsel for the petitioner has argued that there was no material before the District Magistrate for passing the order of externment under section 6(c) of the Adhiniyam 1990 and the District Magistrate committed an illegality in relying upon conviction of cases under section 4-A of the Act against the petitioner which were registered prior to 2006 because section 4-A was included in section 6(c) of the Adhiniyam 1990 with effect from 5.9.2006.

4. The relevant extract of section 6 of the Adhiniyam 1990, reads as under:

> "**6. Removal of persons convicted of certain offences.-** If a person has been convicted -
>
> (a) of an offence,-
>
> (i) under chapter XII, XVI or XVII or under Section 506 or 509 of the Indian Penal Code, 1860 (45 of 1860); or
>
> (ii) under the Protection of Civil Rights Act, 1955 (22 of 1955); or

(b) twice, of an offence under the Suppression of Immoral Traffic in Women and Girls Act, 1956 (104 of 1956); or

(c) thrice, of an offence within a period of three years under section 3 or 4 or 4-A of the Public Gambling Act, 1867 (3 of 1867), in its application to the State of Madhya Pradesh;

the District Magistrate may, if he has reason to believe that such person is likely again to engage himself in the commission of an offence similar to that for which he was convicted direct such person by an order to remove himself outside the district or part thereof or such area and any district or districts or any part thereof, contiguous thereto by such route and within such time as the District Magistrate may order and not to enter or return to the District or part thereof or such area and such contiguous district or part thereof, as the case may be, from which he was directed to remove himself."

5. From the perusal of the above quoted section, particularly section 6(c), it becomes clear that if a person has been convicted thrice of an offence within a period of three years under section 3 or 4 or 4-A of the Act in its application to the State of Madhya Pradesh, the District Magistrate, if he has reason to believe that such person is likely to engage himself in the commission of an offence similar to that for which he has been convicted, direct such person by an order to remove himself outside the district and such contiguous districts as the District Magistrate may order. Section 6 of the Adhiniyam 1990 was amended because the State felt that the principal Act did not contain sufficient provision to initiate effective preventive steps against Worli Matka (Satta) or other form of gaming operators, which creates hardship in the maintenance of public order, and inserted section 4-A of the Act in its application to the State of Madhya Pradesh with effect from 5.9.2006 by the Madhya Pradesh Rajya Suraksha (Sanshodhan) Adhiniyam, 2006.

6. The record reveals that Chief Judicial Magistrate, Raisen, convicted the petitioner in five different cases under section4-A of the Act between 2004 and 2008 and out of these cases, three were of 2004. According to petitioner, if the District Magistrate had not taken into account the conviction of three cases, which were prior to 2006, he could not have passed the externment order under section 6(c) of the Adhiniyam 1990 on the basis of merely two cases of conviction under section 4-A of the Act. The question, therefore, which calls for consideration is whether the District Magistrate committed any illegality in considering the conviction of petitioner in respect of cases prior to 2006 while passing the order of externment.

7. The rule of construction in such cases is well narrated in the Principles of Statutory Interpretation by G. P. Singh 12th Edition 2010 page 551 which reads as follows:

"No man has such a vested right in his past crimes and their consequences as would entitle him to insist that in no future legislation shall any regard whatever be had to his previous history. It was, therefore, held that if a statute increased penalty on second conviction of an offence, a conviction before commencement of the statute could be taken into account [See *R. v. Austin*, (1913) 1 KB 551, p.556]. Similarly, if the object of a statute is not to inflict punishment but to protect the public from the activities of undesirable persons who bear the stigma of a conviction or misconduct on their character, the conviction or misconduct of such a person before the operation of the statute may be relied upon [See *Queen v. Vine*, (1875)10 QB 195]."

8. In *State of Bombay v. Vishnu Ramchandra* AIR 1961 SC 307, which is a direct authority on the point, the question was whether a person convicted in 1949 of theft could be directed to remove himself outside a specified area under section 57 of the Bombay Police Act, 1951, which authorised removal of a person who 'has been convicted' of certain offences including theft. The contention raised was that the conviction being prior to the Act, no removal could be founded on such a conviction. In overruling the High Court, where the above contention had found favour, Hidayatullah, J. for the Supreme Court stated: "Section 57 of the Bombay Police Act, 1951, does not create a new offence nor makes punishable that which was not an offence. It is designed to protect the public from the activities of undesirable persons who have been convicted of offences of a particular kind. The section only enables the authorities to take note of their convictions and to put them outside the area of their activities, so that the public may be protected against a repetition of such activities. An offender who has been punished may be restrained in his acts and conduct by some legislation, which takes note of his antecedents; but so long as the action taken against him is after the Act comes into force, the statute cannot be said to be applied retrospectively."

9. Recently, similar view has also been taken by Sanjay Yadav, J. in *Bhola v. State of M. P.* 2008 (4) M.P.L.J.621.

10. The petitioner has admittedly been convicted thrice under section 4-A of the Act in the year 2004 and despite that he continued his gaming operation and was again convicted twice of the same offence in 2007 and 2008. In view of the settled legal position on the point discussed above, I have no hesitation in holding that the District Magistrate did not commit any illegality in considering the conviction of petitioner in respect of cases prior to 2006 while passing the externment order against him.

11. The learned counsel for petitioner also argued that petitioner was not given proper opportunity of hearing before the impugned order was passed and, therefore, the entire proceedings resulting into his externment deserves to be quashed. I am

not impressed with this submission. The show cause notice was admittedly served on the petitioner as required under section 8(1) of the Adhiniyam 1990. The petitioner submitted his reply to the show cause notice and, except for denying the allegation of his involvement in gaming activities, he did not examine any witness and also did not make a request to cross-examine the witnesses examined by the State. It is also not the case of petitioner that record of the externment proceedings was not made available to him for examining the same. Thus, it cannot be held that proper opportunity of hearing was not given to the petitioner.

12. For these reasons, I find no merit in the petition. The petition fails and is dismissed.

Petition dismissed.

I.L.R. [2010] M. P., 1578
WRIT PETITION
Before Mr. Justice Shantanu Kemkar
22 March, 2010*

RATAN BAI ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Service Law - *Recovery from Family Pension - Petitioner was paid excess pension than the pension order and the same was sought to be recovered in installments from future family pension admissible to her - Action challenged - Held - When the amount was wrongly paid more than the Pension Payment Order for which only the petitioner was entitled it has rightly been ordered to be recovered - Recovery of the amount has been ordered after giving opportunity of hearing to the petitioner - Action in ordering recovery cannot be said to be illegal or arbitrary.* (Para 9)

सेवा विधि – परिवार पेंशन की वसूली – याची को पेंशन आदेश से अधिक पेंशन का भुगतान किया गया और उसको स्वीकार्य भावी परिवार पेंशन से उसे किश्तों में वसूल करना चाहा गया – कृत्य को चुनौती दी गयी – अभिनिर्धारित – जब धनराशि का पेंशन भुगतान आदेश, केवल जिसके लिए याची हकदार था, से अधिक भुगतान गलत रूप से कर दिया गया तब उसे वसूल करने का आदेश उचित रूप से दिया गया – धनराशि की वसूली का आदेश याची को सुनवाई का अवसर देने के बाद दिया गया – वसूली का आदेश देने का कृत्य अवैध या मनमाना नहीं कहा जा सकता है।

Cases referred :

(1994) 2 SCC 52, (1994) 2 SCC 521, W.A. No.163/2006(S), W.P. No.2452/2003(S) decided on 19.09.2006 and W.P. No.1597/2005(S) decided on 19.04.2007.

S.L. Gwaliory, for the petitioner.
S.S. Garg, G.A., for the respondent Nos.1 to 4.
R.C. Singhal, for the respondent No.5.

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*W.P. No.3730/2009(S) (Indore)

RATAN BAI Vs. STATE OF M. P.

ORDER

SHANTANU KEMKAR, J. :–With consent, heard finally.

Petitioner claims to be widow of one Narendra Singh Gehlot who was working in the Higher Education Department of the State Government. She was getting pension through the fifth respondent Bank in pursuance to the letter dated 29.12.1990 (Annexure A-1) issued by the District Treasury Officer, Ratlam on the basis of Pension Payment Order No.PA 3/F/7065.

2. The fifth respondent State Bank of Indore vide order dated 17.01.2007 (Annexure A-2) informed the petitioner that she has been paid excess pension as she should have been paid family pension at the rate of Rs.1275/- per month, whereas she has wrongly been paid pension at the rate of Rs.1483/- per month, hence a recovery of Rs.34,468/- at the rate of Rs.1,000/- per month was ordered from her future pension.

3. Feeling aggrieved by the said letter/order dated 17.1.2007 (Annexure A-2) the petitioner had approached this Court by filing a writ petition No.4515/2008 (s). The said writ petition was disposed of by this Court vide order dated 18.12.2008 directing the respondents to consider and decide the petitioner's grievance and till her representation is decided the interim order passed on 04.09.2008 staying the further recovery was directed to remain in force.

4. In pursuance to the directions given by this Court on 18.12.2008 in W.P.No. 4518/2008 (s) the fifth respondent Bank considered the petitioner's representation (Annexure A-5) and rejected the same vide order dated 23.05.2009 (Annexure A-8). Aggrieved the petitioner has filed this petition.

5. The case of the petitioner is that she was being paid the pension in terms of the letter dated 29.12.1990 (Annexure A-1) and in the circumstances no recovery could have been ordered from the pension amount payable to her. It has been further stated that in view of the law laid down by the Supreme Court in the case of *Sahibram v. State of Haryana* (1994 (2) SCC 52) and in case of *Shyambabu Verma v. Union of India* (1994 (2) SCC 521 and also in the light of the order passed by the Division Bench of this Court in the case of *Dr. N.C.Jain v. District Treasury Officer and ors.* [Writ Appeal No.163/06(s)] the recovery of excess payment of Rs.34,468/- at the rate of Rs.1,000/- per month as has been ordered by the fifth respondent cannot be sustained.

6. Shri S.S.Garg, learned Govt. Advocate and Shri R.C.Singhal, learned counsel for the respondent No.5 Bank on the other hand justified the impugned recovery. It has been argued by the learned counsel for the respondents that the Pension Payment Order No.PA 3/F/7065 (Annexure R-1) which has been issued in favour of the petitioner is containing a specific mention that the amount of monthly pension payable to the petitioner shall be at the rate of Rs.480/- per month plus relief w.e.f

19.10.1989 to 18.10.1996 and thereafter at the rate of Rs.375/- per month plus relief. In the circumstances, according to the respondents in view of the Pension Payment Order (Annexure R-1) amount of Rs.480/- per month plus relief as mentioned in the letter dated 29.12.1990 (Annexure A-1) was payable to the petitioner only upto 18.10.1996 and thereafter she was to be paid at the rate of Rs.375/- per month plus relief. However, the fifth respondent erroneously continued to pay Rs.480/- per month plus relief even after 18.10.1996 overlooking the Pension Payment Order (Annexure R-1).

7. According to the respondents the petitioner was not eligible and could not have been paid amount excess to the amount mentioned in the Pension Payment Order (Annexure R-1). However, due to the mistake committed by the fifth respondent who was disbursing the pension as a Banker, the petitioner was paid excess amount. On noticing the mistake on the basis of the audit objection the fifth respondent corrected the same and started making payment to the petitioner in pursuance to the Pension Payment Order by ordering the recovery of the amount which was wrongly paid to the petitioner in excess of her entitlement as per Pension Payment Order (Annexure R-1). It has been stated by the respondents that keeping in view that the amount of pension payable to the petitioner instead of lump sum recovery of Rs.34,468/- a recovery by installments of Rs.1,000/- per month was ordered.

8. According to the respondents the judgments of the Supreme Court on which reliance has been placed by the petitioner have got no relevance and applicability to the facts of the case as in the present case at no point of time the respondents No.1 to 4 had ordered for fixation of the pension at the rate at which it has been paid by the Bank after 18.10.1996. According to them in the Pension Payment Order itself the amount was specified and the petitioner was not and is not eligible for getting any amount in excess to the said Pension Payment Order.

9. Having heard learned counsel for the parties, I find that though the petitioner was required to have been paid the amount strictly in accordance with the Pension Payment Order (Annexure R-1) at the rate of Rs.480/- plus relief per month from 19.10.1989 to 18.10.1996 and thereafter at the rate of Rs.375/- plus relief per month but due to inadvertence on the part of the fifth respondent Bank even after 18.10.1996 the petitioner was paid at the rate of Rs.480/- per month. In the circumstances, when the amount was wrongly paid more than the Pension Payment Order for which only the petitioner was entitled it has rightly been ordered to be recovered. The judgments of the Supreme Court and the Division Bench of this Court relied upon by the petitioner are based upon different footing and have no applicability to the facts of this case. The recovery of the amount has been ordered by the impugned order passed by the fifth respondent after giving opportunity of hearing to the petitioner. At no point of time the State Government had fixed the

pension which was paid by the fifth respondent mistakenly after 18.10.1996. In the circumstances, the action of the fifth respondent in ordering recovery cannot be said to be illegal or arbitrary. On the other hand the action is fully justified keeping in view the Pension Payment Order. The respondents have not ordered for recovery of the amount by charging any interest on the excess amount paid but have ordered recovery of only the excess amount paid that too in the installments. In some what similar circumstances a learned Single Judge of this Court in the case of *Smt. Leela Bai Vs. State of M.P. and others* in Writ Petition No.2452/2003 (s) vide order dated 19.09.2006 and also in the case of *Smt.Meera Bai Shinde Vs. State of M.P. and others* in Writ Petition No.1597/2005 (s) vide order dated 19.04.2007 was pleased to hold the action of recovery of such excess amount to be justified.

10. Thus, keeping in view the entire facts and circumstances of the case, I am not inclined to interfere into the order of recovery, however, I am inclined to modify the amount of installment for recovery from the petitioner from Rs.1000/- per month to Rs.750/- per month. The fifth respondent is permitted to make recovery of the arrears of excess payment made to the petitioner without interest at the rate of Rs.750/- per month in place of Rs.1000/- per month till realisation of the arrears.

11. With the aforesaid modification in the order dated 17.01.2007 (Annexure A-2) and the order dated 23.05.2009 (Annexure A-8) in regard to the amount of installment for the recovery of arrears, the petition is disposed of.

Cc within three days.

Petition disposed of.

I.L.R. [2010] M. P., 1581
WRIT PETITION
Before Mr. Justice R.K. Gupta
29 March, 2010*

BADRI PRASAD YADAV ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Section 26, State Mandi Board Service Regulations, 1998, Regulation 35 - *Petitioner holding post of Assistant Sub-Inspector - Order of suspension by Dy. Director - S. 26 of Act authorizes Board to frame regulations with regard to service conditions of members of State Mandi Board Services - By virtue of amended Regulation 35 power to place an employee under suspension to the category of Assistant Sub-Inspector is vested with Dy. Director - Held - Order suspending petitioner not without jurisdiction - Petition dismissed.* (Paras 8 to 13)

*W.P. No.3103/2010 (Jabalpur)

BADRI PRASAD YADAV Vs. STATE OF M. P.

कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धारा 26, राज्य मण्डी बोर्ड सेवा विनियम, 1998, विनियम 35 – याची सहायक उपनिरीक्षक का पद धारित करता है – उपसंचालक द्वारा निलंबन का आदेश – अधिनियम की धारा 26 राज्य मण्डी बोर्ड सेवा के सदस्यों की सेवा शर्तों के सम्बन्ध में विनियम विरचित करने के लिए बोर्ड को प्राधिकृत करती है – संशोधित विनियम 35 के आधार पर सहायक उपनिरीक्षक की श्रेणी के किसी कर्मचारी को निलम्बन के अधीन रखने की शक्ति उपसंचालक में निहित है – अभिनिर्धारित – याची को निलम्बित करने का आदेश अधिकारिता विहीन नहीं – याचिका खारिज।

Adarsh Muni Trivedi with *Sushil Kumar Mishra*, for the petitioner.
Purushaindra Kaurav, for the respondent Nos.2 & 3.

ORDER

R.K. Gupta, J. :–The present petition is filed by the petitioner challenging the order dated 7.1.2010 (Annexure P/6) by which the respondents have directed to place the petitioner under suspension in exercise of their powers vested with the competent authority under Regulation 35 of the State Mandi Board Service Regulations, 1998.

2. It is contended on behalf of the petitioner that the order is without any jurisdiction as the same has not been passed by the appointing authority. Counsel for the petitioner relied upon regulations framed by the Board which are known as State Mandi Board Service Regulations, 1998 (Annexure P/8). It is contended that by virtue of Regulation 35, the power to place an employee under suspension is vested with the appointing authority and, therefore, the power of suspension could only be exercised by the appointing authority because there is no delegation provided under these regulations that the powers can also be exercised by any other authority to whom such delegation is permissible.

3. It is contended on behalf of the petitioner that under regulation 35 though the authority other than the appointing authority i.e. Disciplinary authority can issue the charge sheet within a period of 90 days but issuance of the charge sheet in exercise of the powers which are vested with the Disciplinary authority under Regulation 35 does not mean that such Disciplinary authority would also have power to place an employee under suspension.

4. On behalf of the respondents, it is contended that the Board has already passed a resolution on 18.6.98 in its 62nd meeting wherein the power to place under suspension to the category of employees holding the post of Assistant Sub Inspector, Mandi Accountant and Grade-II had been entrusted to the Dy. Director of the Division and the relevant documents in this regard has been filed as Annexure R/1 to the return. On this basis, it is contended that once the Board has passed a resolution wherein the power to place an employee belonging to the said categories, under suspension by the Dy. Director then the power as such can be validly exercised by such an authority to whom the power of suspension has been vested.

5. The rival submissions so made on behalf of the parties are considered.

6. Before considering the rival submissions made by the parties, it would be profitable to refer Section 26 of M.P. Krishi Upaj Mandi Adhiniyam, 1972 which is as under:-

> "26. CONSTITUTION OF STATE MANDI BOARD SERVICE:
>
> 1. For the purpose of providing officers and employees to the Board and the Market committee there shall be constituted, a service by the board to be called the State Mandi Board Services.
>
> 2. The Board shall make regulations in respect of recruitment, qualification, appointment, promotion, scale of pay, leave, leave salary, acting allowance, loan, pension, gratuity, annuity, compassionate appointment fund, provident fund, dismissal, removal, conduct, other departmental enquiry, punishment, appeal and other service conditions of the members of the State Mandi Board Services.
>
> 3. The salary, allowances, gratuity and other payments required to be made to the members of the State Mandi Board service who are working under the control of the market committee shall be a control of the market committee shall be a charge on the Market Committee Fund.
>
> 4. The officers and employees appointed or absorbed under any rules or regulations and belonging to the State Marketing Board Service, Board Service and Nakedars (Assistant Sub-Inspector) of Market Committee Service immediately before the constitution of the State Mandi Board service under sub0-section (1) shall be treated as members of the State Mandi Board Services."

7. On the basis of the same, it is clear that by virtue of Section 26 of the Act, it is for the Mandi Board to make regulations in respect of recruitment, qualification, appointment, promotion, scale of pay, leave, leave salary, acting allowance, loan, pension, gratuity, annuity, compassionate appointment fund, provident fund, dismissal, removal, conduct, other departmental enquiry, punishment, appeal and other service conditions of the members of the State Mandi Board Services and accordingly under the Act, the final authority of making the regulation is the Board itself.

8. It is seen that initially when the regulations were made in the year 1998 by virtue of Regulation 35, though the power was vested with the appointing authority to place an employee under suspension but subsequently after its 62nd Meeting held on 18.6.98, regulation 35 has been amended and the power to place an

employee under suspension to the category of Assistant Sub Inspector is vested with the Dy. Director of the Division.

9. In view of the aforesaid, it is clear that initially there is no dispute that the power to place an employee under suspension though was vested with the appointing authority but by way of subsequent resolution of the Board dated 18.6.98, the said power is vested with the Dy. Director to the class of employees those who have referred in Annexure R/1.

10. The petitioner, being an Assistant Sub Inspector and according to the resolution, annexure R/1, he can be placed under suspension by a Disciplinary authority who is the Dy. Director of the Division in terms to the said resolution. It is thus the submission made by the petitioner that in the absence of any delegation in the regulations, the power to place an employee under suspension cannot be delegated to any other authority then the appointing authority looses its importance in the light of the subsequent resolution dated 18.6.98.

11. It is also seen that in the present case, by virtue of the powers vested with the Board under Section 26 of the Act, ultimately the power is vested with the Board to frame regulations with regard to service conditions of an employee including the manner and procedure to be adopted for taking a disciplinary action against such an employee. The Board has already passed a resolution on 18.6.98 and the resolution as such is in conformity with Section 26 of the Act, therefore, I do not find any substance in the submission so made on behalf of the petitioner that he could only be placed under suspension by the appointing authority and not by any other authority sub-ordinate to the appointing authority or otherwise.

12. Section 26 of the Act itself empowers the Board to make a regulation and the Board, in exercise of its powers conferred under Section 26 of the Act has already framed its regulation. Thus, I do not find any substance in the submission so made by learned counsel for the petitioner that the principle of "Delegatus & Non-delegary" shall apply i.e. in the absence of any delegation in the regulations, no powers can be delegated to other authority other than the appointing authority. The principle as such has no application in the present case in view of Section 26 of the Act.

13. In view of the aforesaid, I do not find any case to hold that the order of suspension passed against the petitioner in the present case is bad in law. Accordingly, the writ petition stands dismissed.

14. No other point is argued.

15. In view of the dismissal of the writ petition, the order of stay passed by this Court on 15.3.2010 also stands vacated.

Petition dismissed.

I.L.R. [2010] M. P., 1585
WRIT PETITION
Before Mr. S.R. Alam, Chief Justice & Mr. Justice Alok Aradhe
31 March, 2010*

K.K. JHARIYA ... Petitioner
Vs.
STATE OF M.P. ... Respondent

Excise Act, M.P. (2 of 1915), Section 39(c) - *Renewal of licence for sale of liquor was denied on basis of violation of terms & conditions of the licence - The petitioners who were granted licence in individual capacity were partners of the Company - Certain liquor belonging to Company was seized and fine of Rs.1,00,000/- was imposed on the petitioners - The petitioners contended that for breach of licence conditions committed by Company the petitioners cannot be penalized - Held - Right to renewal of existing licence is not a statutory right, but a right created under the policy which is in the nature of executive instructions - Petitioners do not have any indefeasible right to seek renewal of licence.* (Para 9)

आबकारी अधिनियम, म.प्र. (1915 का 2), धारा 39(सी) – लायसेंस के निबंधनों और शर्तों के उल्लंघन के आधार पर मदिरा विक्रय के लायसेंस के नवीनीकरण से इंकार किया गया – याची, जिन्हें व्यक्तिगत हैसियत में लायसेंस अनुदत्त किये गये, कम्पनी के भागीदार थे – कम्पनी से सम्बन्धित कतिपय मदिरा अभिग्रहीत की गयी और याचियों पर 1,00,000/– रुपये का जुर्माना अधिरोपित किया गया – याचियों ने प्रतिवाद किया गया कि कम्पनी द्वारा किये गये लायसेंस की शर्तों के भंग के लिए याचियों को दण्डित नहीं किया जा सकता – अभिनिर्धारित – वर्तमान लायसेंस के नवीनीकरण का अधिकार कानूनी अधिकार नहीं है, बल्कि नीति, जिसकी प्रकृति कार्यपालक अनुदेशों की है, के अन्तर्गत सृष्ट अधिकार है – याची लायसेंस के नवीनीकरण की माँग करने का कोई अजेय अधिकार नहीं रखते हैं।

Cases referred :

AIR 1978 MP 116, AIR 1972 SC 1863, (2004) 11 SCC 26.

P.R. Bhave with *Bhanu Pratap Yadav*, for the petitioners.
Naman Nagrath, Addl.A.G., for the respondents.

ORDER

Heard on the question of admission.

2. Petitioners in the instant writ petition have impugned the legality and validity of the orders dated 16.2.2010 contained in Annexures P/1 to P/2 by which petitioners have been informed that District Excise Committee has taken a decision not to renew the existing licence of the petitioners to run the liquor shops. By the aforesaid orders petitioners have been further debarred from participating in the tender proceedings.

*W.P. No.2416/2010 (Jabalpur)

3. Admittedly, petitioners were partners of one Vaibhav and Company, which was granted licence to run the liquor shops for the year 2008-09. However, for the subsequent .year i.e. 2009-10, petitioners were granted separate licences in their individual names. On 23.4.2009, 9,500 bulk litres of illicit liquor was seized on the eve of elections. In the course of enquiry, aforesaid illicit liquor was found to be belonging to Vaibhav and Company of which the petitioners were admittedly the partners.

4. Collector, Narsinghpur issued a show-cause notice dated 12.1.2010 to the petitioners on tht ground that the stock of illicit liquor which has been seized, belongs to M/s Vaibhav and Company and petitioners are partners of the aforesaid company. It was further stated that petitioners are running various liquor shops in the year 2009-10. The Collector by the aforesaid notice asked the petitioners to submit their explanation within a period of seven days regarding violation of the terms and conditions of the licence granted to them. Pursuant to the aforesaid notice, petitioners submitted their reply in which inter-alia it was alleged that petitioners have no concern with the stock of illicit liquor which has been seized on 23.4.2009. It was further stated in the reply that petitioners were partners of M/s. Vaibhav and Company prior to 31.3.2009. Accordingly, a prayer was made that proceedings be dropped against the petitioners.

5. Collector vide order dated 27.2.2010 (Annex. P/7) found that the explanation submitted by the petitioners was not satisfactory. The petitioners have violated Clause 5(Kha) of the terms and conditions of the licence and Section 39 (c) of the M.P. Excise Act, 1915. Accordingly, a fine of Rs.1,00,000/- was imposed on the petitioners.

6. District Committee thereafter vide orders contained in Annexure P/1 to P/3 held that petitioners are not entitled for renewal of their licence under Clause 9 (i) and Clause 11 (c) of the policy and the petitioners were further debarred from participating in the tender process.

7. Clause 9 (i) of the Excise Policy provides that licence of those .existing licencees shall be renewed who are not involved in serious irregularities. Clause 11 of the policy provides for disqualification of the persons from participating in the process of tender. Clause 11 (c) provides that an existing licensee shall be disqualified from participating in the process of tender if his conduct as a licensee is not satisfactory in the opinion of the District Committee.

8. Shri Bhave, learned senior counsel vehemently contended that the illicit liquor which was seized belonged to M/s Vaibhav and Company and petitioners had ceased to be the partners of M/s Vaibhav and Company and, therefore, petitioners had no concern, with the stock of illicit liquor which was seized. It was further argued that petitioners were granted licence in their individual capacity for subsequent year i.e. 2009-10. It was further contended that for the breach of

licence conditions committed by Vaibhav and Company, the petitioners cannot be penalized.

9. On 23.4.2009, 9,500 bulk litres of illicit liquor belonging to Vaibhav and Company was seized on the eve of elections of which admittedly the petitioners were the partners. It is not in dispute that a fine of Rs.1,00,000/- has been imposed on the petitioners. In this connection, it is relevant to notice that right to renewal of existing licencee is not a statutory right, but a right created under the policy which is in the nature of executive instructions. The petitioners therefore do not have any indefeasible right to seek the renewal of their licence. In AIR 1978 MP 116 *Mohd. Hafeez Khan v. STAT, Gwalior*, Full Bench of this Court while dealing with nature of partnership held as follows:

> "We have first to examine as to what is he legal connotation of 'partnership'. Their Lordships of the Supreme Court in *Mrs. Bacha F. Guzdar v. Commr. of Income Tax, Bombay* AIR 1955 SC 74 have observed that partnership is merely an association of persons for carrying on the business of partnership and in law the firm name is a compendious method of describing the partners, while in the case of a company it stands as a separate juristic entity distinct from its share-holders."

10. It is relevant to mention here that petitioners in their reply to the show cause notice filed before the Collector, did not file any document in support of their contention that on 23-4-2009, Vaibhav and Company was not in existence and that petitioners were not the partners of the said firm. Even before this Court no such documents have been filed.

11. Apart from this, it is a matter of common knowledge that on account of consumption of illicit liquor, many people have lost their lives and it has created havoc in the society. In the instant case, illicit liquor was seized in huge quantity. In the absence of any document on record to show that M/s Vaibhav and Company was not in existence on 23-4-2009 or that the petitioners were not the partners of the aforesaid firm, it cannot be held that petitioners had no connection with illicit liquor which was seized on 23-4-2009.

12. At this stage it is also relevant to mention that Constitution Bench of Supreme Court in *Har Shankar and others vs. The Deputy Excise and Taxation Commissioner and others*, AIR 1975 SC 1121 while dealing with the right to deal in business of intoxicants held that there is no fundamental right to do the business or deal in intoxicants. The Supreme Court in case of *Amar Chandra Chakraborty v. Collector of Excise, Government of Tripura*, AIR 1972 SC 1863 while considering the question whether section 43 of Bengal Excise Act under which the licence of a liquor contractor was withdrawn had violated the constitutional provisions under Articles 14 and 19(1)(g) of the Constitution,

repelled the contention with regard to violation of Article 14 and held that in view of injurious effect of excessive consumption of liquor on health, this trade or business must be treated as a class by itself and it cannot be treated on the same basis as other trades while considering the challenge on the ground of Article 14. Another Constitution Bench of Supreme Court in *State of Punjab and another vs. Devans Modern Breweries Ltd. and another,* (2004) 11 SCC 26 held that permissive privilege to deal in liquor is not a right at all.

13. We are of the considered opinion that District Level Committee which consists of the Collector, S.P., Dy. Commissioner of Excise, Zila Panchayat Oficer and Assistant/District Excise Officer has rightly come to the conclusion that petitioners are not entitled to renewal of their existing licence. We also cannot lose sight of the fact that right to seek renewal under the policy is dependant on terms and conditions laid down in the excise policy. The petitioners have been found to be not entitled to renewal on the basis of material available on record with District Committee. The decision of District Committee can neither be said to be arbitrary nor based on no material.

14. In view of the aforesaid discussion, we are of the view that the action of the respondents in refusing to renew the licence in favour of the petitioner is neither arbitrary nor is violative of the constitutional guarantee contained in Article 14 of the Constitution. The action of the respondents in refusing to renew the licences of the petitioners are based on justifiable grounds. Hence, no case is made out for interference in exercise of powers under Article 226 of the Constitution of India.

15. Consequently, the writ petition deserves to and is hereby dismissed.

Petition dismissed.

I.L.R. [2010] M. P., 1588
WRIT PETITION

Before Mr. Justice R.S. Garg & Mr. Justice K.S. Chauhan
6 April, 2010*

SHYAMA PRASAD DATTA & ors. ... Petitioners
Vs.
ARUN KUMAR VASUDEO & ors. ... Respondents

A. Civil Procedure Code (5 of 1908), Section 11 - *Res judicata* - *In earlier suit by Trust question of title, execution of gift deed was directly in issue and Courts decided the said issue against the Trust - In the present suit, plaintiffs are claiming title through Trust without impleading Trust - Held - If issues now can not be raised by the Trust then any person claiming*

*W.P. No.4222/2010(I) (Jabalpur)

under Trust now can not file suit - Suit barred by principles of res judicata - Suit dismissed - Petition allowed. (Para 16)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – पूर्व न्याय – न्यास द्वारा दाखिल पूर्ववर्ती वाद में स्वत्व का प्रश्न, दान विलेख का निष्पादन प्रत्यक्षतः विवाद्य था और न्यायालय ने उक्त विवाद्यक न्यास के विरुद्ध विनिश्चित किया – वर्तमान वाद में वादी न्यास को पक्षकार बनाए बगैर न्यास के माध्यम से स्वत्व का दावा कर रहे हैं – अभिनिर्धारित – यदि अब न्यास द्वारा विवाद्यक नहीं उठाये जा सकते हैं तब न्यास के अन्तर्गत दावा कर रहा कोई व्यक्ति वाद दाखिल नहीं कर सकता है – वाद पूर्व न्याय के सिद्धांतों से वर्जित है – वाद खारिज – अपील मंजूर।

B. Civil Procedure Code (5 of 1908), Section 11, Order 7 Rule 11 - *If on the given facts the suit appears to be barred under some law that is on application of principles of res judicata then the Court would be entitled to dismiss the suit applying the provisions contained under Order 7 Rule 11(c).* (Para 19)

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 11, आदेश 7 नियम 11 – यदि दिये गये तथ्यों पर वाद किसी विधि के अन्तर्गत अर्थात् पूर्व न्याय के सिद्धांत के लागू किये जाने पर वर्जित होना प्रतीत होता है तब न्यायालय आदेश 7 नियम 11(सी) के अन्तर्गत अन्तर्विष्ट उपबंधों को लागू कर वाद खारिज करने के लिए हकदार होगा।

C. Constitution, Article 227, Civil Procedure Code, 1908, Section 115 - *Rejection of application under Order 7 Rule 11 CPC - Though revision could be maintainable - High Court has to exercise its powers under Article 226/227 and has to strike with the sword of its power against each and every illegality.* **(Para 19)**

ग. संविधान, अनुच्छेद 227, सिविल प्रक्रिया संहिता, 1908, धारा 115 – सि.प्र.सं. के आदेश 7 नियम 11 के अन्तर्गत आवेदन की नामंजूरी – यद्यपि पुनरीक्षण पोषणीय हो सकती थी – उच्च न्यायालय को अनुच्छेद 226/227 के अन्तर्गत अपनी शक्तियों का प्रयोग करना चाहिए और प्रत्येक अवैधता के विरुद्ध अपनी शक्ति की तलवार से प्रहार करना चाहिए।

Rajesh Pancholi, for the petitioners.
R.K. Verma, for the respondent Nos.1 to 3.
Sunil Verma, for the respondent Nos.4 to 9.
Vivek Agrawal, for the respondent No.10/State.

JUDGMENT

The Judgment of the Court was delivered by **R.S. GARG, J.** :–The petitioners/defendants no. 1 to 3 being aggrieved by the order dated 18.2.2010 passed by learned VIth Civil Judge, Class I, Jabalpur in Civil Suit No.2-A of 2009 (Arun Kumar Vasudeo and others Vs. Shyama Prasad Datta and others) rejecting the plaintiffs application filed under Order 7 Rule 11 C.P.C refusing to decide the question of resjudicata at the initial stage has come

to this Court with a submission that the order passed by the learned Court below is patently illegal and deserves to be set aside.

2. The short facts necessary for disposal of the present writ petition are that respondents no. 1 to 3 Arun Kumar Vasudeo, Dulichand Bhai Palan and Purushottam Sanghi in their capacity as trustees of the Pinjra Pole Goushala Charitable Registered Public Trust filed a civil suit for declaration and injunction. It was contended in the plaint that one P.C. Bose had executed a registered gift deed on 28.11.1912 in relation to disputed land Survey No.44/1 admeasuring 1.890 hectare of Village Polipather and in view of the said gift deed the plaintiffs are entitled to declaration that the present petitioners (defendants no. 1 to 3) have no right, title or interest in the property. They also prayed that a declaration be granted in favour of the plaintiffs that the sale deeds executed in favour of defendants no.4 to 9 on different dates, were null an void and they do not have any right title or interest in favour of the said defendants. It was also prayed that the defendants no.4 to 9 be restrained from selling the land in dispute or raising any construction on the same. After notices were issued the present petitioners have filed an application under Order 7 Rule 11 C.P.C while the defendants no.5 to 9 preferred a separate application under Order 7 Rule 11 C.P.C. Read with Section 11 C.P.C for rejection of the plaint and/or in the alternative dismiss the suit because of the bar contained under Section 11 of the Code of Civil Procedure. It was contended by the said defendants that on an earlier occasion the Trust itself had filed civil suit on 26.3.1996 which was later on numbered as Civil Suit No. 171-A of 2001 and was decreed by IXth Civil Judge, Class I, Jabalpur on 29.11.2001. The said judgment and decree were challenged by the present petitioners, Rakesh Agrawal (respondent no. 9) and Amit Sharma (respondent no.7)in Regular Appeal No.39-A/2004 which was allowed by XIIth Additional District Judge, Fast Track Court, Jabalpur on 18.3.2005 and suit of the trust was dismissed. It is now undisputed before us that the trust had filed Second Appeal No-489/2005 which was dismissed by the High Court on 30.11.2006 and it was held that the Trust had failed in proving that the property could be gifted to them or the trust became the owner of the property or the trust was in possession of the property however, the High Court was also of the opinion that the claim of the trust that it had acquired Bhumiswami rights by prescription/adverse possession was also not justified. Undisputedly the judgment delivered in Second Appeal No.479/2005 was challenged in S.L.P. of 2008 but the S.L.P came to be dismissed by the Supreme Court on 4.4.2008 on the ground of limitation. It also came on the record that one B.K. Tiwari had filed Writ Petition No.6195/2007 in the public interest but however, that petition was dismissed by the High Court on 4.2.2008. The said judgment delivered by the High Court was challenged by B.K. Tiwari in Special Leave to Appeal (Civil) 2008 but the petition for Special Leave was withdrawn on 5.9.2008. In view of these admitted facts it was contended before

the learned trial Court that the suit now cannot have any cause of action. The suit was barred by limitation, the suit was hit by the provisions of resjudicata and was liable to be dismissed. The plaintiffs opposed the application and contended that question of resjudicata and limitation on the facts of the present case were mixed questions of fact and law and therefore, these questions should be decided as preliminary issues or along with other issues.

3. The trial Court after hearing the parties came to the conclusion that for disposal of an application filed under order 7 Rule 11 C.P.C the plaint allegations only are to be seen and for purposes of application of principles of resjudicata which would a question of fact and law, the parties should be given appropriate opportunity and only thereafter the issue should be decided.

4. The defendants no. 1 to 3 have come to this Court with the submissions that the trial Court was absolutely unjustified in continuing with the suit less realizing that the trustees would have no independent rights, in a matter of a public trust. If the public trust itself has lost in the litigation then the trustees cannot claim independent rights because they claim through the Trust only. It was also submitted that if the documents are indisputable and incontrovertible then in light of the said documents and in view of the earlier judgments delivered by the Civil Courts and High Court in favour of the present petitioners, the present suit could not be continued. It was however, also submitted that a perusal of the plaint would show that the plaintiffs are claiming the relief as referred to above but they have not chosen to join the Trust as party plaintiff probably because the plaintiff knew that if the Trust was joined as a party then the plaintiffs will have to seek a declaration that the earlier judgments is not binding upon the trust. It was also submitted that the suit prima facie is not maintainable because any decree passed in the present suit would run contrary to the earlier decree passed by the High Court. It was also submitted that in cases of the present nature the Court has to nip in the bud so that infructuous, malicious and misconceived suits are dismissed at the threshold.

5. Shri R. K. Verma, learned counsel for the respondents no. I to 3 submitted that in the earlier suit the gift deed was not filed, probably the other trustee who was looking after the management of the Trust had joined hands with the present petitioners that in the earlier suit the sale deeds were also challenged but because the copy of the trust deed was not filed the Trust could not secure anything. It was also contended that a collusion between the erstwhile trustee viz. Bal Krishna Agrawal and the present petitioners is apparent because the said Bal Krishna Agrawal did not make appropriate efforts for tracing the trust deed or file certified copy of the same with the Court. To get rid of the argument of Shri Pancholi, learned counsel for the petitioners, it was contended that an application filed under Order 7 Rule 11 C.P.C has to be decided on the strength of the plaint averments and not on basis of the defences raised by the defendants. For application of

principles of resjudicata it was contended that unless the evidence is recorded and facts are brought on the record the question of resjudicata cannot be decided by the Court. Making a passing reference to Rule 2 of Order 14 of the Code of Civil Procedure, it was contended that if the facts are indisputable and incontrovertible then too such issue cannot be decided as a preliminary issue because the issue relating to resjudicata cannot be decided at a stage like present. It was also submitted that the present petition under Article 227 of the Constitution of India is not maintainable because if the relief prayed for by the petitioners are granted, the suit of the respondents no. 1 to 3 would terminate and under the circumstances the petitioners should have filed a Civil Revision under Section 115 C.P.C. It was also contended that the Court below was not unjustified in deferring the decision on the questions raised in the separate applications filed by the parties.

6. Shri Verma, learned counsel for the respondents no. 1 to 3 lastly contended that present is not the stage where the High Court is required to interfere in the matter. He prays for dismissal of the petition.

7. We have heard the parties at length and have gone through the documents appended to the petition and filed along with the application dated 5.4.2010.

8. To put the facts straight it would be necessary to observe that Pinjra Pole Goushala Charitable Registered Public Trust through its erstwhile President Shri Bal Krishna Agrawal had filed a civil suit on 26.3.1996. The said suit was re-numbered as Civil Suit No. 171-A of 2001 and was finally decreed by the IXth Civil Judge, Class I, Jabalpur holding that the trust was the owner of the property, the present petitioners had no right, title or interest in the property. The Court also observed that the mutation order passed by the Naib Tahsildar, Jabalpur was contrary to law, the property in dispute belonged to the plaintiff/trust and an injunction was also granted against all the defendants.

9. From the records it also appears that the five defendants of the said suit had filed Civil Appeal No.39-A/2004 which was finally disposed of by the learned XII th Additional District Judge, Fast Track Court, Jabalpur on 18.3.2005. The first appellate Court came to the conclusion that the said plaintiff could not prove that Rai Bahadur P.C. Bose had the authority to gift the property, in absence of production of the gift deed the gift was not proved, the plaintiffs were not in possession of the property and that the order passed by the Naib Tahsildar was absolutely justified. The learned First Appellate Court dismissed the suit.

10. It is not in dispute that against the said judgment and decree passed by the learned First Appellate Court said Pinjra Pole Goushala Charitable Registered Public Trust filed Second Appeal No.479/2005, the appeal was dismissed on 30.11.2006. The learned single Judge of this Court had observed that the plaintiffs' witnesses admitted that the gift was executed in writing but the document of gift was not filed. The Court also observed that another requirement for a valid gift

was acceptance of the gift. The learned single Judge observed that there was no evidence on the record that the possession was delivered or the gift was accepted. The learned single Judge also observed that when the evidence which could be produced but is not produced, the inference would be that if it is produced it will go against the interest of the party withholding it. The learned single Judge observed that the said plaintiffs also failed in proving acquisition of right by adverse possession. The High Court confirmed the finding recorded by the two Courts that the plaintiff/trust was not in possession of the suit property. In light of the said findings the High Court after a long drawn litigation of 10 years dismissed the plaintiffs suit. Undisputedly, S.L.P against the judgment of the High Court was dismissed as barred by limitation.

11. At this stage, we would be justified in observing that for the said Trust the judgment delivered by the four Courts have become final. The judgment delivered in the earlier suit cannot now be challenged by the Trust and if the Trust cannot challenge the earlier judgment which has attained finality any person claiming through the Trust in our considered opinion cannot be allowed to challenge the correctness, validity and propriety of the said judgments.

12. It is also not in dispute before us that one B.K.Tiwari had filed Public Interest Litigation Writ Petition No.6195/2007. The said petition came to be dismissed on 4.2.2008. It is to be noted that Pinjra Pole Goushala Charitable Registered Public Trust was made respondent no. 1 and was represented by Shri B.K. Agrawal, the person who had filed the earlier suit. The High Court while dismissing the Public Interest Litigation held that the public interest litigation was misconceived and at the instance of the petitioner who does not have any interest in the trust such petition could not be maintained.

13. It would be noteworthy that the Division Bench while dismissing the Public Interest Litigation observed that refusal on the part of the High Court to entertain the petition at the instance of the said petitioner will not be a bar for the respondent no. 1 (the trust) to pursue its remedies available under the law against the judgment and decree dated 30.11.2006 passed in Second Appeal No.479/2005. No liberty was reserved in favour of any trustee. To pursue the remedies against the said judgment and decree passed in Second Appeal No.479/2005 if no liberty was reserved in favour of the trustees or the present respondent no. 1/plaintiffs then the trust should have come forward and should have taken some action.

14. It would be necessary to see that the present suit has been filed by Arun Kumar Vasudeo, Dulichand Bhai Palan and Purshottam Sanghi claiming themselves to be trustees of the public trust. Shri R.K. Verma, learned counsel for the respondents no. 1 to 3, on a question put by the Court as to why the trust was not joined as party was at pains to give reply from the side of the plaintiffs. If the trustees are claiming any relief that too for and on behalf of the Trust then

such Trust had to be joined as party plaintiff. According to Shri Verma because of collusion in the earlier suit the documents were not filed therefore, the said judgment would not operate as resjudicata, however and unfortunately the present trustees have no where pleaded that the earlier suit filed in the name of trust and fought by Bal Krishna Agrawal was dismissed as a result of collusion and, therefore the said judgment does not bind the trust. Even as on today such relief cannot be claimed by the Trust. In so far as the question relating to non-filing of the gift deed in the earlier proceedings is concerned the Trust after being joined as party in the Public Interest Litigation could at least obtain copy of the trust deed and produce the same before the appropriate authority. Unfortunately the Trust is not coming forward to do anything and the trustees who are claiming from and under the authority of the trust are trying to blow their trumpet by saying that but for the plaintiffs all others were dishonest. We are unable to accept the contention raised by Shri R.K. Verma that the earlier suit was dismissed as a result of collusion.

15. If the present suit is held to be maintainable at the instance of some of the trustees and is finally dismissed then some day or the other some other trustee without joining the trust would again come to the Civil Court and would start blowing their trumpet that present set of the trustee was also dishonest. After all litigation has to come to an end. The Court has to nip at the bud and tell the parties that after all enough is enough. The parties cannot be allowed to litigate unnecessarily and in perpetuity.

16. It is to be seen that provisions of Section 11 of the Code of Civil Procedure would apply not only to the parties who were litigating earlier but, it shall apply to a case where the present dispute in the earlier suit was directly and substantially in issue, it was between the same party or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit. In such matter subsequent suit would be barred because of the findings in the earlier suit and the suit has been disposed of or decided in favour of or against some party. Undisputedly the earlier suit was filed by the Trust. The present plaintiffs are not claiming independently or in their personal rights. They are claiming under the Trust which on an earlier occasion had filed the suit and lost. The phrase "between the parties under whom they or any of them claim" is not an empty formality. If the earlier suit was between same parties and it had come to its concluding end then any person claiming under that party which had earlier lost would not be allowed to raise the pleas or the issues which have already been decided by the earlier Courts. In the earlier suits if the question of title, execution of the gift deed and competence of Rai Bahadur P.C. Bose in executing the gift deed was directly in issue and the Courts decided the said issue against the trust. If the said issues now cannot be raised by the said trust then any person claiming under the trust now cannot file the suit.

17. At this stage it would also be necessary to refer to the definition of a trust as given under Section 2(7) of Madhya Pradesh Public Trust Act, 1951. According to the said clause "Trustee" means a person in whom either alone or in association with other persons, the trust property is vested and includes a manager.

18. In the earlier suit Bal Krishna Agrawal claiming himself to be the President of the Trust had filed the suit, the maintainability of the suit was upheld by the Courts because the Managing Trustee/working trustee or the President of the Trust could certainly file a suit for and on behalf of the public trust.

19. In so far as Shri Verma's argument relating to Order 7 Rule 11 C.P.C is concerned, true it is that while deciding an application filed under Order 7 Rule 11 C.P.C the Court only has to see the pleadings in the plaint but at the same time it cannot be lost sight of that if on the given facts rather admitted facts the suit appears to be barred under some law that is on application of principles of resjudicata then the Court would be entitled to dismiss the suit applying the provisions contained under Order 7 Rule 11 (c) of the Code of Civil Procedure. Yet another argument that petition under Article 227 of the Constitution of India is not maintainable is only to be mentioned for its rejection. There are two questions before us one whether application under Order 7 Rule 11 could be rejected at the threshold or could the suit be dismissed because of the bar of resjudicata. True it is that a revision against such order could be maintained but there would be no bar against the High Court for exercising its jurisdiction under Article 227 of the Constitution of India. The High Court has to exercise its powers under Article 226/227 of the Constitution of India and it has to strike with the sword of its power against each and every illegality where ever it is and when ever it is brought to the notice of the Court.

20. Taking into consideration the totality of the circumstances and the undisputed facts, we are of the opinion that the learned Court below was absolutely unjustified in deferring the decision on the question of maintainability of the suit and application of principles of resjudicata.

21. For the reasons aforesaid, we hold that the suit of the plaintiff is barred under Section 11 of the Code of Civil Procedure and is also not maintainable because of the bar contained under Order 7 Rule 11 C.P.C.

22. The suit being not maintainable deserves to and is accordingly dismissed.

23. The petition filed by the petitioners is allowed however, there shall be no order as to costs.

Petition allowed.

I.L.R. [2010] M. P., 1596
WRIT PETITION
Before Mr. Justice S.C. Sharma
7 April, 2010*

AMAR DAS BAIRAGI ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Service Law - *Appointment - Age relaxation - Entitlement - Petitioner is orthopaedically handicapped person to the extent of 40% and his candidature for appointment to the post of Peon was rejected for the reason that he was over 40 years of age - Action challenged - Held - Orthopaedically handicapped persons cannot be denied age relaxation in the matter of appointment as disabled persons are entitled to age relaxation of 10 years as per the policy decision of the State Government as per the provisions of S. 38 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.* (Para 6)

सेवा विधि – नियुक्ति – आयुसीमा में छूट – हकदारी – याची 40 प्रतिशत सीमा तक अस्थिबाधित विकलांग व्यक्ति और भृत्य के पद पर नियुक्ति के लिए उसकी अभ्यर्थिता इस कारण नामंजूर की गयी कि वह 40 वर्ष की आयु से अधिक का था – कार्यवाही को चुनौती दी गयी – अभिनिर्धारित – अस्थिबाधित विकलांग व्यक्तियों को नियुक्ति के मामले में आयुसीमा में छूट से इंकार नहीं किया जा सकता क्योंकि निःशक्त व्यक्ति, (समान अवसर, अधिकार संरक्षण और पूर्ण भागीदारी) अधिनियम, 1995 की धारा 38 के उपबंधों के अनुसार राज्य सरकार के नीति–निर्णय के अनुसार आयुसीमा में 10 वर्ष की छूट के हकदार हैं।

Alok Sharma, for the petitioner.
Nidhi Patankar, Dy.G.A., for the respondent/State.
S.K. Jain, for the respondent No.3.

JUDGMENT

S.C. Sharma, J. :–The petitioner before this Court an Orthopaedically handicapped person has filed this present writ petition being aggrieved by the action of the respondents in rejecting an application preferred by the petitioner for appointment to the post of peon on account of his being over age. The contention of the petitioner is that he is a member of other backward class category and is also more than 40% orthopaedically handicap. He has further stated that he was appointed on the post of peon on daily wages on 16-12-1992 in the services of Town Improvement Trust and later on the Town Improvement Trust was abolished and his services were merged into Municipal Council, Guna and the petitioner became an employee of the Municipal Council Guna. The petitioner has further

*W.P. No.53/2007(S) (Gwalior)

stated that the State of M.P. has issued a policy for discontinuing the services of daily wagers appointed after 31-12-1988 and the case of the petitioner was also reviewed by the Municipal Council, Guna in the light of the circular issued by the State of Madhya Pradesh, his services have been put to an end w.e.f. 13-01-2000 by the. Municipal Council, Guna. The petitioner has further stated that an advertisement was issued as contained in Annexure P/7 by the Municipal Council, Guna inviting applications for the post of peon and the petitioner being a member of other backward class category has also submitted an application and he was directed vide letter dated 14-06-2007 to appear before the Chief Municipal Officer along with all relevant documents. The petitioner as directed by the Chief Municipal Officer, appeared before the Chief Municipal Officer along with his caste certificate, his medical certificate, however his candidature has turned down as he was more than 40 years of age. The petitioner's solitary grievance is that he is a physically disabled person and is entitled for age relaxation of 10 years by virtue of the policy decision of the State Government as contained in Annexure P/11 dated 07-07-1988 and therefore, the respondents in all fairness should have considered,the candidature of the petitioner on merits. Learned counsel for the petitioner has informed that this Court while issuing notice on 04-01-2007, has directed the respondents to permit the petitioner to participate in the process of selection and the Municipal Council has permitted the petitioner to participate in the process of selection, however, the result has not been declared by the Municipal Council in the light of the interim order passed by this Court on 04-01-2007. The petitioner has prayed for issuance of an appropriate writ, order or direction, directing the respondents to consider the case of the petitioner by granting age relaxation in the matter by virtue of the policy decision of the State Government.

2. A reply has been filed on behalf of the Municipal Council, Guna and the contention of the learned counsel for the respondent No. 3 is that the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 is not applicable in case of Municipal Council, Guna and therefore, the question of granting age relaxation does not arise. It has also been stated that the upper age limit as provided in the advertisement was 40 years and as the petitioner was aged about 42 years he was held to be ineligible for the post of peon. The respondent has prayed for dismissal of the present writ petition.

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

4. In the present case, the petitioner before this Court is an orthopedically handicapped person having more than 40% disability. Not only this he belongs to other backward class category as notified by the State of Madhya Pradesh. The petitioner was initially appointed as a peon on daily wages basis on 16-12-1992 in the services of Town Improvement Trust and later on the Town Improvement Trust was abolished and his services were merged into Municipal

Council, Guna and the petitioner became an employee of the Municipal Council Guna. The petitioner has further stated that the State of M.P. has also issued a policy for discontinuing the services of daily wagers appointed after 31-12-1988 and the case of the petitioner was also reviewed by the Municipal Council, Guna in the light of the circular issued by the State of Madhya Pradesh and his services were put to an end w.e.f. 31-01-2000 by the Municipal Council, Guna. The respondent Municipal Council has subsequently issued an advertisement dated 27-06-2006 inviting application for the post of peon and one post was reserved for other backward category. The upper age limit as provided under the advertisement was 40 years. The petitioner he is an Orthopaedically handicapped persons having more than 40% disabled submitted his candidature keeping in view the age relaxation granted by the State Government by virtue of the policy decision as contained in Annexure P/11 by which 10 years age relaxation was granted w.e.f. 12-02-1981 vide order dated 09-10-2006 and the application of the petitioner was turned down as he was more than 40 years of age. In the present case, the respondent Municipal Council, Guna has discontinued the services of the petitioner w.e.f. 13-01-2000 based upon the executive instructions issued by the State of Madhya Pradesh and now for the purposes of granting age relaxation, the respondent Council is coming with a case that the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 is not applicable in case of Municipal Council, Guna. It is really very unfortunate that while terminating the employees executive instructions of the State Government are being looked into and for appointing the persons, the executive instructions issued by the State Government in respect of the handicapped persons are not being looked into by the Council. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 was enacted in order to provide the following to the disabled persons.

"STATEMENT OF OBJECTS AND REASONS:

The meeting to launch the Asian and Pacific Dacade of the Disabled Persons 1993-2002 convened by the Economic and Social Commission for Asian and Pacific Region held at Beijing on 1st to 5th December, 1992 adopted the Proclamation on the Full Participation and Equality of People with Disabilities in the Asia and the Pacific region. India is a signatory to the said proclamation and it is necessary to enact a suitable legislation to provide for the following:

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

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

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

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

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

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

5. Section 38 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 reads as under:-

"38. Scheme for ensuring employment of persons with disabilities:- (1) The appropriate Governments and local authorities shall by notification formulate schemes for ensuring employment of persons with disabilities, and such schemes may provide for-

(a) the training and welfare of persons with disabilities;

(b) the relaxation of upper age limit;

(c) regulating the employment;

(d) health and safety measures and creation of a non-handicapping environment in places where persons with disabilities are employed;

(e) the manner in which and the persons by whom the cost of operating the schemes is to be defrayed; and

(f) constituting the authority responsible for the administration of the scheme.

6. The State of Madhya Pradesh as per the provisions of Section 38 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 has issued the executive instructions and the same are very much applicable in case of Municipal Council, Guna also being a State and being a body owned and controlled by the State Government and once the State of Madhya Pradesh has issued the executive instructions to grant reservation to physically handicapped person and to grant relaxation by 10 years, the Municipal Council, Guna cannot take a contradictory stand which is in contravention with the statutory provisions of law and which is also in contravention with the provisions

of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. It is pertinent to note that the petitioner was granted permission by this Court to participate in the selection and petitioner has also participated in the process of selection. Resultantly, this Court is of the considered opinion that the petitioner was entitled for age relaxation of 10 years and therefore, the respondents are directed to consider the case of the petitioner and in case he is found fit for appointment, shall be conferred with the benefit of appointment on the post of peon in the services of Municipal Council, Guna. Resultantly the present writ petition is allowed and disposed of with the following directions:-

(a) The impugned order dated 09-10-2006 rejecting the candidature of the petitioner and account of over age is hereby quashed.

(b) The respondents are directed to grant 10 years age relaxation to the petitioner in the light of the policy decision of the State Government as contained in Annexure P/11 read with the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

(c) The respondents shall pass an appropriate order in case, the petitioner is found fit for appointment to the post of peon positively with a period of 60 days from the date of receipt of certified copy of this order.

7. With the aforesaid directions, the present writ petition is allowed and disposed of. No order as to costs. Certified copy as per rules.

Order accordingly.

I.L.R. [2010] M. P., 1600
WRIT PETITION
Before Mr. Justice S.K. Gangele & Mr. Justice I.S. Shrivastava
20 April, 2010*

SUNITA GUPTA (SMT.) ... Petitioner
Vs.
NAGAR PALIKA PARISAD, SABALGARH & anr. ... Respondents

A. Industrial Disputes Act (14 of 1947) [As amended by Industrial Disputes (Amendment) Act, 1964 w.e.f. 19.12.1964], Sections 25-B, 25-A - *Oral termination of workman - Petitioner worked for more than 240 days in 12 months from date of termination - Held - It is not necessary that an employee must have in employment during the preceding 12 calendar months*

*W.P. No.3224/2004(S) (Gwalior)

in order to qualify within terms of S. 25-B - It is sufficient, if the workman has actually worked for not less than 240 days in a period of 12 months - Petitioner has established that she has worked for more than 240 days in 12 months from date of termination - Termination without following S. 25-F void - Petitioner entitled for reinstatement - Petition partly allowed. (Para 10)

क. औद्योगिक विवाद अधिनियम (1947 का 14) [औद्योगिक विवाद (संशोधन) अधिनियम, 1964 द्वारा यथासंशोधित 19.12.1964 से यथाप्रभावी], धारा 25–बी, 25–ए – कर्मकार की मौखिक सेवा समाप्ति – याची ने सेवा समाप्ति की तारीख से 12 महीनों में 240 दिवस से अधिक कार्य किया – अभिनिर्धारित – यह आवश्यक नहीं कि धारा 25–बी के निबंधनों के अन्तर्गत अर्हित होने के लिए कर्मचारी को पूर्ववर्ती 12 महीनों के दौरान नियोजन में रहा होना चाहिए – यह पर्याप्त है, यदि कर्मकार ने 12 महीने की कालावधि में 240 दिवस से कम वास्तविक रूप से कार्य न किया हो – याची ने साबित किया कि उसने सेवा समाप्ति की तारीख से 12 महीनों में 240 दिवस से अधिक कार्य किया है – धारा 25–एफ़ का अनुसरण किये बिना सेवा समाप्ति शून्य – याची यथापूर्वकरण के लिये हकदार – याचिका मंजूर।

B. Industrial Disputes Act (14 of 1947), Section 25-F - *Termination of petitioner quashed being without following S. 25-F - Petitioner worked only for 300 days on daily wages basis - It would not be just and proper to grant back wages.* (Para 12)

ख. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25–एफ – याची की सेवा समाप्ति धारा 25–एफ का अनुसरण न होने के कारण अभिखंडित – याची ने दैनिक वेतन के आधार पर केवल 300 दिवस कार्य किया – पिछला वेतन प्रदान करना न्यायसंगत और उचित नहीं होगा।

Cases referred :

2005(II) MPJR 236, (2005) 8 SCC 750, 2006(4) MPLJ 294, 1981(I) LLJ 386, (2003) 8 SCC 334, (2008) 8 SCC 664.

M.P.S. Raghuvanshi, for the petitioner.

P.D. Agarwal, for the respondent No.1.

ORDER

Heard.

1. The petitioner has filed this petition challenging the award, Annexure P-1, dated 20.07.2004 passed by the Labour Court in Case No. 45/I.D.Act/ 2001(Reference).

2. The petitioner was engaged as daily wager employee w.e.f. 01.09.1998. She pleaded that she had been working as Moharrir up to 1st May 1999. Thereafter, she was transferred to health branch and worked up to October 1999. She was again transferred to Revenue Branch and where she worked up to 13.03.2000. Thereafter, her services were orally terminated by the Chief Municipal Officer. The petitioner made a complaint to the appropriate Government against her termination from service. The matter was ceased in conciliation and after failure

of conciliation proceedings the Deputy Labour Commissioner vide order dated - 7.03.2001 made a reference to the Labour Court under Section 10(1) of the Industrial Disputes Act, 1947.

3. In her deposition before the Labour Court the petitioner stated that she was engaged on daily wage basis on 01.09.1998 and worked as Moharrir. Thereafter, she was transferred to health branch and revenue branch and by an oral order her services were terminated w.e.f. 13.03.2000. She also produced copy of the service-book as Ex.P-1, in which it was certified that the petitioner had been working as Clerk from 01.09.1998 to 26.07.99. The Chief Municipal Officer also issued a certificate, Ex.P-2 certifying that the petitioner had been working w.e.f. 23.09.98 to 26.07.99. Similar certificate was issued by the Municipal Council, Ex.P-2 and as per note-sheet, Ex.P-6, it is clear that the petitioner had been in the employment of respondent No.1 in June 1999. On the basis of aforesaid evidence, the Labour Court has held that the petitioner had worked up to 26th July 1999, however, the Labour Court further held that the petitioner had worked only for four months w.e.f. 14.03.99 to 26.07.99, hence the petitioner has failed to prove that the petitioner had worked for 240 days in twelve months prior to 13.03.2000, therefore, there is no violation of Section 25-F of the Industrial Disputes Act. Consequently, the Labour Court answered the reference against the petitioner.

4. Learned counsel for petitioner has submitted that the petitioner has worked for more than 240 days in a calendar year, hence the findings of the Labour Court that there is no violation of the provisions of Section 25-F of the Industrial Disputes Act are perverse. In support of his contentions learned counsel relied on the judgment of the Hon'ble Supreme Court in the cases of *Surendra Nagar District Panchayat Vs. Daghyabhai Amarsinh*, (2005) 8 SCC 750, and *General Manager, Haryana Roadways Vs. Rudhan Singh*, 2005 (II) MPJR 236.

5. Contrary to this, learned counsel for respondent No.1 has submitted that the petitioner did not work 240 days in a calendar year, hence the finding of the Labour Court that there is no violation of Section 25-F of the Industrial Disputes Act is in accordance with law. In support of his contentions learned counsel relied on a judgment of the Hon'ble Supreme Court in the case of *Rajasthan Tourism Development Corporation Ltd. and another Vs. Intejam Ali Zafri*, 2006 (4) MPLJ 294.

6. From the findings of fact which is based on the documentary and oral evidence, it is clear that the petitioner was engaged on 01.09.1998 and the findings recorded by the Labour Court is that she was in the employment up to 26.07.99 is accepted. The aforesaid fact has been mentioned in the service-book of the petitioner, copy of the service-book of the petitioner is Ex.P-1 and also a certificate issued by the Chief Municipal Officer are Exs.P-2, P-5 and P-6. From the aforesaid evidence, it is clear that the petitioner had been working continuously from 01.09.98

up to 26.07.99 and she has worked for about ten months, meaning thereof she had worked near about for 300 days. As per section 25-B of the Industrial Disputes Act, it is necessary that the workman or a person has to work for 240 days in preceding twelve months.

7. Hon'ble the Supreme Court in *General Manager, Haryana Roadways Vs. Rudhan Singh,* 2005 (II) MPJR 236, has held as under with regard to continuous service as per Section 25-B of the Industrial Disputes Act, 1947 :-

> "**Held :** Act 36 of 1964 has drastically changed the position. S.2(eee) has been repealed and S.25-B(2) now begins with the clause "where a workman is not in continuous service...for a period of one year." These changes brought about by Act 36 of 1964 appear to be clearly designed to provide that a workman who has actually worked under the employer for not less than 240 days during a period of twelve months shall be deemed to have been in continuous service for a period of one year whether or not he has in fact been in such continuous service for a period of one year. It is enough that he has worked for 240 days in a period of 12 months' it is not necessary that he should have been in the service of the employer for one whole year. ...."

8. Same principle has been laid down by Three Judges Bench of the Hon'ble Supreme Court in the case of *Surendra Kumar Verma and others v. Central Government Industrial Tribunal, New Delhi,* 1981 I LLJ 386, where the Hon'ble Supreme Court has held as under :-

> "After the Amendment Act of 1964, it is not necessary that an employee must have been in employment during the preceding period of 12 calendar months in order to qualify within the terms of S.25B. It is sufficient if the workman has actually worked for not less than 240 days in a period of 12 months."

9. Hon'ble the Supreme Court in *U.P. Drugs & Pharmaceuticals Co. Ltd. Vs. Ramanuj Yadav and others,* (2003) 8 SCC 334 has analyzed the position after amendment of Section 25-B by Industrial Disputes (Amendment) Act, 1964, which came in to force w.e.f. 19.12.1964. The Hon'ble Supreme Court has held as under :-

> "8. Section 25-B was, however, substituted by the Industrial disputes (Amendment) Act, 1964 (36 of 1964) w.e.f. 19.12.1964 and the same reads as under :
>
> "25-B. Definition of continuous service .- For the purposes of this Chapter.-
>
> (1) a workman shall be said to be in continuous service for a

period if he is, for the period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lockout or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer -

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than -

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than -

(i) ninety-five days, in the case of a workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case.

Explanation .- For the purpose of clause (2), the number of days on which a workman has actually worked under an employer shall include the days on which -

(i) he has been laid off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under this Act or under any other law applicable to the industrial establishment;

(ii) he has been on leave with full wages, earned in the previous year;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity

leave; so however, that the total period of such maternity leave does not exceed twelve weeks."

9. The amending Act of 1964 deleted Section 2 (eee), having incorporated in Section 25-B itself the definition of "continuous service". It also brought in the concept of preceding twelve calendar months. The earlier definition did not mention "preceding"with reference to the period of twelve calendar months. It appears that the decision of this Court in *Sur Enamel and Stamping Works Ltd. v. Workmen,* AIR 1963 SC 1914 : (1964) 3 SCR 616, interpreting Sections 2 (eee) and 25-B led to the amendments made by the amending Act of 1964. In Sur Enamel interpreting Sections 2 (eee) and 25-B, it was held that twin conditions were required to be fulfilled before a workman can be considered to have completed one year of continuous service in an industry. It must be shown first that the workman was employed for a period of not less than twelve calendar months and next that during those twelve calendar months, he had worked for not less than 240 days. In that case, the workman had not been employed for a period of twelve calendar months. Therefore, the Court held that it was unnecessary to examine whether actual days of work were 240 or more more than in any case the requirements of Section 25-B would not be satisfied by the mere fact of number of working days being not less than 240 days. The effect was that if a workman completes actual 240 or more days of work in less than twelve cale4ndar months, he would not be entitled to the benefit of beneficial legislation. This anomaly led to the amendment of the ID Act in the manner above stated."

10. From the aforesaid principle of law laid down by the Hon'ble Supreme, it is clear that after the amendment in Section 25-B of the Industrial Disputes Act, 1947 by Amendment Act of 1964, it is not necessary that an employee must have in employment during the preceding 12 calendar months in order to qualify within the terms of Section 25-B. However, it is sufficient if the workman has actually worked for not less than 240 days in a period of 12 months. In the present case, the petitioner has clearly established that she has worked for more than 240 days in 12 months from the date of her termination of her services. In such circumstances, the termination of the services of the petitioner without following the provisions of Section 25-F of the Industrial Disputes Act, 1947 is void ab initio. Consequently, the petitioner is entitled reinstatement.

11. With regard to grant of back wages, Hon'ble the Supreme Court in the case of State of *Maharashtra v. Reshma Ramesh Meher,* (2008) 8 SCC 664, has held as under :-

"24. It is true that once the order of termination of service of an employee is set aside, ordinarily the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back wages, which is independent of reinstatement. While dealing with the prayer of back wages, factual scenario, equity and good conscience, a number of other factors, like the manner of selection, nature of appointment, the period for which the employee has worked with the employer etc., have to be kept in view. All these factors and circumstances are illustrative and no precise or abstract formula can be laid down as to under what circumstances full or partial back wages should be awarded. It depends upon the facts and circumstances of each case."

12. In the present case, the petitioner worked only for a brief period near about 300 days. The petitioner had been engaged on daily wage basis. In such circumstances, in our opinion, it would not be just and proper to grant back wages to the petitioner.

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

(1) The impugned award dated 20.07.2004 passed by the Labour Court in Case No. 45 /I.D.Act/2001 (Reference) is hereby quashed.

(2) It is held that the petitioner is entitled reinstatement without back wages.

(3) The reference made to the Labour Court by the Deputy Labour Commissioner is answered accordingly.

(4) Looking to the facts of the case, parties are directed to bear their own costs.

Petition partly allowed.

I.L.R. [2010] M. P., 1606
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
13 January, 2010*

KANTILAL ... Appellant
Vs.
SMT. SURAJBAI & ors. ... Respondents

A. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(b) - ***Sub-letting*** - *Respondent No.8 was inducted as tenant of non-residential*

*S.A. No.509/2001 (Indore)

accommodation who sub-let the same to appellant - Non-production of rent note executed by landlord in favour of respondent No.8 - Shall have no effect because it was not the case of appellant that in the rent note appellant was also shown as tenant - Respondent No.8 did not appear in witness box to submit that rent note was executed for business of family or appellant was also shown as tenant - Decree u/s 12(1)(b) upheld - Appeal dismissed. (Para 10)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(बी) – उपभाड़ेदारी – प्रत्यर्थी क्र. 8 अनिवासिक स्थान के भाड़ेदार के रूप में अधिवासित हुआ जिसने उसे अपीलार्थी को उपभाड़े पर दिया – भूस्वामी द्वारा प्रत्यर्थी क्र. 8 के पक्ष में निष्पादित किरायानामा पेश नहीं किया गया – इसका कोई प्रभाव नहीं होगा क्योंकि अपीलार्थी का यह मामला नहीं था कि किरायानामा में अपीलार्थी को भी भाड़ेदार के रूप में दर्शाया गया – प्रत्यर्थी क्र. 8 कठघरे में उपस्थित नहीं हुआ यह पेश करने के लिए कि किरायानामा परिवार के कारबार के लिए निष्पादित किया गया या अपीलार्थी को भी भाड़ेदार के रूप में दर्शाया गया – धारा 12(1)(बी) के अन्तर्गत डिक्री पुष्ट – अपील खारिज।

B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(b) - *Sub-letting* - *Evidence shows that appellant and respondent No.8 are living separately and have separate business - No documentary evidence that business of appellant is business of undivided joint family - Rent was paid by appellant on behalf of respondent No.8 - Held - Courts below rightly found sub-letting by respondent No.8 to appellant - Appeal dismissed.* (Para 10)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(बी) – उपभाड़ेदारी – साक्ष्य दर्शाती है कि अपीलार्थी और प्रत्यर्थी क्र. 8 पृथक–पृथक रह रहे हैं और पृथक कारबार रखते हैं – कोई दस्तावेजी साक्ष्य नहीं कि अपीलार्थी का कारबार अविभाजित संयुक्त परिवार का कारबार है – अपीलार्थी द्वारा प्रत्यर्थी क्र. 8 की ओर से भाड़ा अदा किया गया – अभिनिर्धारित – निम्न न्यायालयों ने प्रत्यर्थी क्र. 8 द्वारा अपीलार्थी को उपभाड़े पर देना उचित रूप से पाया – अपील खारिज।

Cases referred :

1993 JLJ 654, AIR 2008 SC 1749, 2007(II) MPWN 90, 1983 MPWN Note 36, 1999(1) AIRCJ 30, 1994(I) MPWN SN 94, 2008(II) MPACJ 1, 1995(II) AIRCJ, 2007(2) JLJ 432, 2007(II) MPWN 90, 1998(2) AIRCJ 305.

S.M. Dagaonkar, for the appellant.

S.M. Sanyal, for the respondent Nos.1 to 7.

JUDGMENT

N.K. Mody, J. :–Being aggrieved by the judgment dated 1.9.2001 passed by Additional District Judge, Indore in Civil Appeal No.21/2001 whereby the judgment dated 14.2.2001 passed by VIIth Civil Judge Class I, Indore in Civil Suit No.12-A/99, whereby the suit filed by the respondents No.1 to 8 was allowed and a decree of eviction was passed against respondent No.9 and appellant, which was maintained, the present appeal has been filed.

2. The appeal was admitted for final hearing by this Court vide order dated 17.7.2003 on the following substantial questions of law:-

"(1)Whether lower appellate Court was justified in confirming the decree under Section 12(1)(b) of the M.P.Accommodation Control Act ?

(2) Whether a ground under Section 12(1)(b) namely sub-letting by Mangilal to Kantilal-defendant No.1 to defendant No.2 is made out within the meaning of Section 12(1)(b) of the Act ?

(3) In view of notice served on the defendants Ex.D/2-C and D/3-C dated 8.8.79 and 21.8.75 respectively, can it be held that even assuming there existed a sub-tenancy, the same was condoned by acquiescence by plaintiff because of filing a suit almost after twelve years from the date of these notices ?

(4) Whether in view of peculiar relationship between defendant No.1 and defendant No.2 i.e.Nephew and Uncle, a finding of sub-letting is sustainable ?"

3. Short facts of the case are that the predecessor-in-title of respondents No.1 to 7 Shankarlal Joshi filed a suit for eviction against the appellant and respondent No.8 on 23.12.87 for eviction alleging that respondent No.8 is the tenant in the suit accommodation situated at 5, Kanoongo Bakhal, Indore @ Rs.120/- per month. It was alleged that tenancy of respondent No:8 was for non-residential purposes. It was alleged that respondent No.8 has removed the possession and has inducted the appellant as sub-tenant in the suit accommodation for carrying on the business in the name and style of M/s K.P.Bottles. It was alleged that respondent No.8 is carrying on his business at Vrindavan Colony, Indore in the name and style of M/s Paras Bottle Agency. It was further alleged that status of the appellant in the suit accommodation is of sub-tenant. Further case of the predecessor-in-title of respondents No.1 to 7 was that the respondent No.8 is in arrears of rent w.e.f.1.1.1985, which was not paid inspite of service of demand notice. On the basis of these pleadings it was prayed that the suit filed by the predecessor-in-title of respondents No.1 to 7 be allowed and decree of eviction be passed against the respondent No.8 and appellant.

4. The suit was contested by the respondent No.8 and the appellant by filing a joint written statement, wherein the plaint allegations were denied. It was also denied that respondent No.8 is in arrears of rent. It was also denied that appellant is sub-tenant in the suit accommodation. It was alleged that the family of respondent No.8 and the appellant was undivided joint Hindu family and the business which was being carried in the name of K.P.Bottles is of the partnership firm of the family. It was alleged that appellant was never treated as sub-tenant. The rent was being paid by the appellant, which was duly accepted by the predecessor-in-

title of respondents No.1 to 7. It was prayed that suit filed by the predecessor-in-title of respondents No.1 to 7 be dismissed.

5. After framing of issues and recording of evidence suit filed by the respondents No.1 to 7 was allowed in part by passing a decree under Section 12(1)(b) of the Act. It was also found that ground under Section 12(1)(a) of the Act was made out but by giving protection of Section 12(3) of the Act no decree of eviction was passed under Section 12(1)(a) of the Act. Being aggrieved by the judgment passed by the learned trial Court an appeal was filed by the appellant but the same was dismissed, hence this appeal.

6. Shri S.M.Dagaonkar, learned counsel for the appellant argued at length and submits that judgment passed by the learned Courts below is illegal and deserves to be set aside. Learned counsel submits that learned Courts below committed error in not taking into consideration the material piece of the evidence, which is the demand notice dated 08/08/1979 Ex.D/2. It is submitted that the said notice was issued to respondent No.8 through the appellant and in which respondent No.8 was asked to disclose the name of sub-tenant. In the notice issued by the predecessor-in-title of respondent No.1 to 7 it was nowhere stated that the appellant is sub-tenant, while the notice was sent to respondent No.8 through appellant. Learned counsel submits that rent was also accepted from the appellant after the notice Ex.D/2 for years together from time-to-time, which goes to show that appellant was never treated as sub-tenant. Learned counsel submits that alleged notice Ex.D/2 is of the year 1979, while the suit was filed in the year 1987 after a long period of 12 years. Learned counsel further submits that the tenancy of the appellant and respondent No.8 was not oral as the predecessor-in-title of respondents No.1 to 7 have admitted in cross-examination that the rent note was executed by the respondent No.8 and the rent note is in possession of predecessor-in-title of respondents No.1 to 7. It is submitted that the best documentary evidence was available with the respondents No.1 to 7 but the same was not filed for the best reasons known to the respondents No.1 to 7. It is submitted that in the facts and circumstances of the case without taking into consideration the material evidence the learned Courts below committed error in passing a decree of eviction against the appellant. It is submitted that the findings recorded by the learned Courts below are perverse and deserves to be set aside. Learned counsel for the appellant submits that since material evidence has not been taken into consideration, therefore, in second appeal interference is permissible. For this contention reliance is placed on a decision of this Court in the matter of *Ibrahim Vs. Abdul Jabbar* JLJ 1993 654 wherein this Court has held that interference in second appeal is permissible when material evidence is not considered and view taken is not reasonable and correct principles of law not applied. Reliance is also placed on a decision in the matter of *Kashmir Singh Vs. Harnam Singh* AIR 2008 SC 1749 wherein the Hon'ble Apex Court has held that the general rule is that High Court

will not interfere with concurrent findings of the Courts below but it is not an absolute rule. Some of the well recognized exceptions are where (i) the Courts below have ignored material evidence or acted on no evidence, (ii) the Courts have drawn wrong inferences from proved facts by applying the law erroneously or (iii) the Courts have wrongly cast the burden of proof. It was further observed that the 'Decision based on no evidence', not only means cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the findings. So far as sub-tenancy is concerned, reliance is placed on a decision in the matter of *Smt. Nirmal Kanta (D) by L.Rs. Vs. Ashok Kumar* AIR 2008 SC 1768 wherein the suit was filed by on account of creation of sub-tenancy alleging that the tenant allowed respondent, alleged sub-tenant to sit, fix and operate sewing machine inside tenanted shop room and evidence showing that respondent was assisting tenant in his cloth business by helping customer to assess amount of cloth required for their particular purposes, the Hon'ble Apex Court held that tenant thus had not parted with exclusive possession of tenanted premises, their creation of sub-tenancy and/or grant of sub-lease cannot be said to be established. It was further observed that the sub-tenancy given at best be said to be licensee.

7. On the strength of aforesaid position of law and in the facts and circumstances of the case, learned counsel for the appellant submits that the appeal filed by the appellant be allowed and the impugned judgment passed by learned Courts below be set-aside.

8. Shri S.M.Sanyal, learned counsel for the respondents No.1 to 7 submits that no illegality has been committed by the learned Courts below in passing a decree against the appellant and respondent No.8. Learned counsel submits that the original tenant is respondent No.8, who has not preferred any appeal against the judgment passed by the learned trial Court as well as by the learned appellate Court. It is submitted that the suit is based on the demand notice dated 25.7.87 Ex.P/1. It is submitted that even if it is assumed that tenancy was in writing and the rent note has not been filed, then too, no adverse inference can be drawn against the respondents No.1 to 7. It is submitted that all the allegations were made against the respondent No.8 and inspite of that respondent No.8 did not appear in witness box. In the facts and circumstances of the case learned Courts below has rightly passed the decree under Section 12(1)(b) of the act. Learned counsel submits that since both the Courts below have found that status of the appellant in the suit accommodation is of sub-tenant and findings recorded by learned Courts below are the concurrent findings of fact, therefore, the same cannot be interfered in second appeal. For this contention reliance is placed on a decision in the matter of *Shyam Kant Nigam Vs. Nawab Ahmad Yar Jahangeer Khan* 2007 (II) MPWN 90 wherein this Court has held that in a suit for eviction on the ground of sub-tenancy pure finding of facts based on appreciation of evidence

cannot be assailed in second appeal. Reliance is also placed on a decision in the matter of *Madanlal Vs. Mittubai* 1983 MPWN note 36 wherein this Court has held that finding of facts recorded by appellate Court based on appreciation of evidence which do not suffer from infirmity are binding on this Court in second appeal. Reliance is also placed on a decision in the matter of *Shyam Sunder Chowdhury Vs. N.C. Batabyal* 1999 (1) AIRCJ 30 wherein in an eviction petition on the ground of sub-letting Calcutta High Court held that concurrent finding of facts that there was subletting by Courts below, High Court in second appeal not to interfere. Reliance is also placed on a decision of Hon'ble Apex Court in the matter of *O.T.M.O.M. Meyyappa Chettiar Vs. O.T.M.S.M. Kasi Vishwanathan Chettiar* 1994 (I) MPWN SN 94 wherein Hon'ble Apex Court has observed that High Court is not entitled to re-appraise evidence by merely saying that findings recorded by Court below are perverse.

9. So far as status of appellant in the suit accommodation as sub-tenant is concerned, learned counsel submits that both the Courts below found that respondent No.8 has no control over the suit accommodation and it is appellant who is in occupation of the suit accommodation. For this contention reliance is placed on a decision in the matter of *Vaishakhi Ram Vs. Sanjeev Kumar Bhatiani* 2008 (II) M.P.A.C.J. 1 wherein it was found that tenant has no legal control over the suit shop and sub-tenants were in exclusive possession of suit shop and were carrying on a different independent business in the suit shop, Hon'ble Apex Court held that eviction of tenant is justified. Learned counsel submits that it is true that rent was accepted by predecessor-in-title of respondents No.1 to 7 from the appellant but that acceptance of rent was on behalf of the respondent No.8. It is submitted that even if, it is assumed that rent was accepted by predecessor-in-title of respondents No.1 to 7 from the appellant, then too, it is not waived the rights of respondents No.1 to 7 to evict on the ground of sub-tenancy. For this contention reliance is placed on a decision in the matter of *Tek Chand Vs. Bali Ram All India Rent Control Journal* 1995 (II) wherein Punjab and Haryana High Court held that acceptance of rent continuously for 18 years from subtenant, does not amounts to waiver of right of landlord to get the suit accommodation vacated on the ground of sub-letting. It was further observed that it cannot take the place of consent in writing of landlord. Learned counsel submits that on the basis of arguments advanced by counsel for the appellant it goes to show that status of the appellant in the suit accommodation is of sub-tenant only. It is submitted that appellant is not the member of family under Section 2 (e) of the Act. For this contention reliance is placed on a decision in the matter of *Sunil Vs. Smt. Vimlabai* 2007 (2) JLJ 432 wherein this Court has held that brother of tenant is not a family member. It is submitted that it is difficult to prove the sub-tenancy by direct evidence as the landlord is kept out of scene. Reliance is also placed on a decision in the matter of *Shyam Kant Nigam Vs. Nawab Ahmad Yar Jahangeer Khan* 2007

(II) MPWN 90 wherein this Court held that negative burden is on tenant, landlord not required to prove payment of consideration. Reliance is also placed on a decision of Hon'ble Apex Court in the matter *Mohammedkasam Haji Gulambhai Vs. Bakerali Fatehali (D) by L.Rs.* 1998 (2) AIRCJ 305 wherein the premises let out to a tenant who carried on business as sole proprietor and converted business into partnership with his sons and subsequently the tenant was retired and sons carried on business in same premises while rent was being paid by the partnership firm of sons and the rent receipts were issued in favour of tenant, Hon'ble Apex Court has held that facts do not show that tenant could exercise his power throughout suit premises at his pleasure. It was also observed that in fact he did not continue to exercise control over premises. It was also held that occasional visit by tenant to premises does not amount to exercising rights over premises. It was also held that tenant completely divested himself of premises as well as business and there is nothing on record to support plea that tenant had taken premises on lease for benefit of family, therefore, act of the tenant amounted to unlawful subletting and landlord entitled to eviction. On the strength of aforesaid position of law and in the facts and circumstances of the case, it was prayed that the appeal be dismissed.

10. Keeping in view the aforesaid position of law and after re-appreciating the evidence, this Court finds that due to following reasons no interference is called for :-

(i) It is true that Shankerlal/landlord predecessor-in-title of respondents No.1 to 7 has admitted in his evidence that rent-note was executed at the time of induction of respondent No.8 and same has not been filed by the respondents No.1 to 7 but appellant is not entitled for any advantage of it because it was not the case of the appellant that in the rent-note appellant was also shown as tenant or rent-note was executed by respondent No.8 for the business of family.

(ii) Even otherwise on account of failure on the part of respondents No.1 to 7 in filing the rent-note no advantage can be given to the appellant as the respondent No.8 did not choose to appear in witness-box to submit that the rent-note was executed by him for the business of family or appellant was also shown as tenant.

(iii) In the evidence it has come that appellant and respondent No.8 are living separately and respondent No.8 is carrying on his business alongwith his sons separately while business of the appellant is separate.

(iv) No documentary evidence has been produced by the appellant to prove that business which is being carried out by the appellant

is the business of Undivided Joint Hindu Family which includes the respondent No.8. The documentary evidence which has been produced by the appellant and also by respondents No.1 to 7 goes to show that rent was paid by the appellant on behalf of respondent No.8.

(v) It is true that in the notice Ex.D/2 which was issued by the deceased/Shankerlal Joshi to respondent No.8, it is mentioned that respondent No.8 has removed his possession from the suit accommodation and business of M/s K.P. Bottles and M/s Prakash Company are being carried out which are not the firms of respondent No.8 and in the said notice respondent No.8 was asked to disclose the name of sub-tenant. In the said notice name of appellant was not alleged as sub-tenant and the notice was also sent to respondent No.8 through appellant, and thereafter for a considerable time the rent was accepted from appellant but on the basis of this it cannot be said that status of appellant in the suit accommodation is of tenant.

11. This Court is of the opinion that the learned Courts below were justified in decreeing the suit under Section 12 (1) (b) of the Act against the respondent No.8 and also against appellant and on the basis of Ex.D/2 and D/3 dated 08/08/1979 and 15/05/1975 it cannot be said that sub-tenancy was condoned by predecessor-in-title of respondents No.1 to 7 because of filing of the suit after a long period of 12 years. In view of this, the appeal has no force and is hereby dismissed. No order as to costs.

Appeal dismissed.

I.L.R. [2010] M. P., 1613
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
13 January, 2010*

TULSIDAS HEMNANI (DIED) THROUGH L.RS. SHAMLAL & ors. ... Appellants
Vs.
MADAN LAL ... Respondent

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(h) - *Decree u/s 12(1)(h) was passed and no time limit was stipulated for raising the construction - Premises demolished but new construction not raised - Trial Court directed delivery of the possession of vacant land but lower appellate Court reversed it - Held - Since the accommodation has been*

*S.A. No.97/2002 (Indore)

demolished, therefore, in execution the possession of open land upon which the suit accommodation was constructed was given to the appellants - Since tenancy subsists and appellants were having a right of re-entry u/s 18(3) of Act - Judgment of the lower appellate Court set aside. (Paras 7 & 8)

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एच) – धारा 12(1)(एच) के अन्तर्गत डिक्री पारित की गयी और निर्माण करने के लिए कोई समय सीमा नियत नहीं की गयी – परिसर गिरा दिया गया किन्तु नया निर्माण नहीं किया गया – विचारण न्यायालय ने रिक्त भूमि का कब्जा सुपुर्द करने का निदेश दिया किन्तु निम्न अपीलीय न्यायालय ने उसे उलट दिया – अभिनिर्धारित – चूंकि स्थान गिरा दिया गया है, इसलिए निष्पादन में खुली भूमि का कब्जा जिस पर वाद स्थान का निर्माण किया गया, अपीलार्थियों को दिया गया – चूंकि किरायेदारी अस्तित्व में है और अपीलार्थियों को अधिनियम की धारा 18(3) के अन्तर्गत पुनःप्रवेश का अधिकार था – निम्न अपीलीय न्यायालय का निर्णय अपास्त किया गया।

Cases referred :

AIR 1991 Ker 55, AIR 1996 Bom 389, 1990 JLJ 123, 1984 MPWN Note 378, 1969 JLJ 552.

A.K. Sethi with *Rahul Sethi*, for the appellants.
M.S. Dwivedi, for the respondent.

J U D G M E N T

N.K. Mody, J. :–Being aggrieved by the judgment dated 04/12/01 passed by Additional District Judge, Indore in Civil Regular Appeal No.30/01 whereby the order dated 28/02/01 passed by learned X Civil Judge, Class-II, Indore in MJC No.5/99 was set aside, the present appeal has been filed, which has been admitted by this Court on the following substantial question of law vide order dated 15/07/02:-

> 1. Whether lower appellate Court was justified in reversing the judgment passed by the trial Court which had allowed the application made by appellant (tenant) under Section 18(3) of M.P. Accommodation Control Act?
>
> 2. Whether in the facts and circumstances of the case, appellant (tenant) has made out a case for grant of mandatory order as contemplated under Section 18(3) of the Act to be passed against the landlord?

2. Short facts of the case are that the respondent filed a suit for eviction against the appellant under Section 12(1)(a)(f) & (h) of M.P. Accommodation Control Act (which shall be referred hereinafter as an "Act") on 05/08/91 alleging that the appellant is tenant in the suit accommodation @ Rs.200/- per month. The suit was contested by the appellants on all the grounds. After framing of issues and recording of evidence, suit filed by the respondent was dismissed under Section

12(1)(a) & (f) of the Act. However, decree of eviction was passed against the appellants under Section 12(1)(h) of the Act. Against the judgment and decree passed by the learned trial Court appeal was filed by the appellant which was dismissed vide judgment dated 14/05/97 and the judgment and decree passed by the learned trial Court was maintained. In the appeal cross-objections were also filed by the respondent, wherein it was prayed that the learned trial Court committed error in not passing the decree under Section 12(1)(a) & (f) of the Act. While dismissing the appeal cross-objections were also dismissed. Against the decree passed by the learned Appellate Court second appeal was filed by the appellants before this Court, which was numbered as SA. No.248/97 and was dismissed on 02/09/98 with a further direction to the appellants to handover the possession to the landlord / respondent within a period of three months from the date of judgment.

3. Instead of handing over the possession appellants moved an application before this Court for clerification that no time has been fixed for completion of construction, therefore, respondent be directed to complete the construction within the stipulated time. This application was filed on 10/11/98 and was numbered as MCC No.608/98. Since the application could not be disposed of before the date when the possession was to be handed over as per the order of this Court, therefore, appellants handed over the possession of suit accommodation on 30/11/98. Thereafter the application filed by the appellants which was numbered as MCC No.608/98 and was dismissed on 05/03/99 with an observation that after handing over the possession appellants shall be at liberty to move an appropriate application before the learned trial Court under Section 18(3) of the Act. Thereafter in the month of March, 1998 appellants moved an application before the learned trial Court under Section 18(3) of the Act wherein it was prayed that since no construction has been raised by the respondent, therefore, appellants be given possession of the suit accommodation.

4. The application was opposed by the respondent. After holding a summary enquiry the application was allowed and vide order dated 28/02/01 it was directed that possession of the appellants be restored. Against the order passed by the learned trial Court first appeal was filed by the respondent which was allowed vide order dated 04/12/01. During pendency of the appeal, in compliance of execution of the order passed by the learned trial Court, possession of the suit accommodation was taken by the appellants through Court on 03/08/01. Thereafter, appeal filed by the respondent was allowed vide judgment dated 04/12/01. An effort was made by the respondent for restitution of possession. However, the same was stayed by this Court while admitting the appeal.

5. Mr. AK. Sethi, learned senior counsel for the appellants argued at length and submits that the impugned judgment passed by the learned Appellate Court is illegal, incorrect and deserves to be set aside. It is submitted that the

decree was obtained by the respondent under Section 12(1)(h) of the Act fradulently. It is submitted that no action was taken by the respondent for raising the construction while it was mandatory on the part of respondent to construct the shop as per decree. It is submitted that the only ground on the basis of which the appeal filed by the respondent was allowed was that the suit accommodation has been demolished, therefore, there is nothing of which the possession can be restored. It is submitted that it is true that the accommodation which was constructed over the suit land was removed by the respondent after obtaining the possession, but the vacant land was there and the appellants are in occupation of land by putting the tin shade over the suit property. It is submitted that Section 108 of Transfer of Property Act protects the right of appellants / tenant. It is submitted that respondent can not be benefited for his own wrong. It is submitted that if the respondent was not in a position to get the sanctioned map renewed, then the respondent was not required to take possession of the suit accommodation from the appellants and ought not to have demolish. It is submitted that the act of respondent was with full of malafides. Learned counsel further submits that since the decree was passed under Section 12(1)(h) of the Act, therefore, the tenancy of the appellants was not terminated, but was suspended for the time being, so as to enable the respondent to raise the construction over the suit property. Learned counsel placed reliance on a decision of Kerala High Court in the matter of *George J. Ovungal Vs. Peter,* AIR 1991 Kerala 55 wherein it was held that destruction of leased house or shop-room does not by itself determine lease of the land on which it stands and put an end to the landlord-tenant relationship. Further reliance is placed on a decision in the matter of *Hind Rubber Industries Pvt. Ltd. Vs. Tayebhai Mohammedbhai Bagasarwalla,* AIR 1996 Bombay 389 wherein Bombay High Court has held that lessee's rights in leased property do not come to an end automatically unless lessee exercises such option. Reliance is also placed on a decision in the matter of *Vithalrao Vs. Gangaram,* 1990 JLJ 123 wherein landlord instead of re-construction occupying the premises, this Court has observed that it is the Court to ensure that a landlord having contained a decree under Section 12(1)(h) does not violate the statutory condition on any grounds or on equity and if it is done, then the object of the Act and Section 18(3) of the Act will be frustrated. It was also observed that even because of some financial stringency when the landlord could commence his re-construction and after retirement he has occupied the accommodation, as the tenant has exercised his opinion for re-entry, the Court has no option but to direct re-delivery of possession. No question arises of payment of compensation as the tenant has not chosen to opt for compensation instead of re-entry. Lastly reliance is placed on a decision of Hon'ble Apex Court in the matter of *Ved Singh Vs. Prem Mohan,* 1984 MPWN, Note-378 wherein Hon'ble Apex Court has directed that the landlord should not be allowed to play delaying tactics and four weeks time was fixed for return of

possession granted. In the facts and circumstances of the case and keeping in view the law laid down, learned counsel submits that the appeal filed by the appellants be allowed and the impugned judgment be set aside.

6. Mr. MS. Dwivedi, learned counsel for respondent submits that after passing of the decree respondent has demolished the property wherein the suit accommodation was situated, but because of financial crises could not construct the house. It is submitted that since the suit property is no more in existence, therefore, question of reentry does not arise and the learned Appellate Court has rightly set aside the judgment passed by the learned trial Court. Learned counsel placed reliance on a decision in the matter of *Shrikrishnadas Vs. Radhabhai*, 1969 JLJ 552 wherein building let out demolish, this Court has held that under Section 18(3) of the Act Court can not redeliver possession to tenant under inherent powers. It was also observed that inherent powers cannot be so exercised as to set at naught the specific provisions of the Civil Procedure Code or any other statute, as there is a specific provision in Section 18(3) of the M.P. Accommodation Control Act, 1961. The Court cannot exercise inherent power to redeliver possession when the requirements of that section are not fulfilled. Learned counsel submits that in the facts and circumstances of the case, appeal filed by the appellants be dismissed.

7. From perusal of the record it is evident that in the suit filed by the repsondent decree of eviction was passed against the appellants under Section 12(1)(h) of M.P. Accommodation Control Act and in Second Appeal vide judgment dated 02/09/98 appellants were directed to handover the possession within three months. In compliance of that possession was handed over by the appellants on 30/11/98. MCC filed by the appellants was dismissed on 05/03/09 with a liberty to move an appropriate application before the learned trial Court under Section 18(3) of M.P. Accommodation Control Act after handing over the possession of the suit accommodation. In compliance of that, application was filed by the appellants under Section 18(3) of M.P. Accommodation Control Act. The application was allowed and vide judgment dated 28/02/01 learned trial Court directed the respondent to give vacant possession of the suit accommodation. Since the accommodation has been demolished by respondent, therefore, in execution the possession of open land upon which the suit accommodation was constructed was given to the appellants. Since tenancy subsists and appellants were having a right of reentry under Section 18(3) of M.P. Accommodation Control Act and the accommodation could not be constructed for no fault of the appellants, therefore, neither appellants can be punished nor respondent can be rewarded for his own fault. Since no time limit was fixed by this Court for construction of house while deciding the appeal, therefore, the appellants were having a doubt about the bonafides of the respondent. Therefore, only before delivery of possession, application was filed by the appellants before this Court.

8. In the opinion of this Court, learned Appellate Court was not justified in reversing the order passed by the learned Trial Court. In view of this, appeal filed by the appellants is allowed and the impugned judgment passed by the learned Appellate Court is set aside and the order passed by the learned trial Court is restored.

9. With the aforesaid observations, appeal stands disposed of. No order as to costs. C.C. as per rules.

Appeal disposed of.

I.L.R. [2010] M. P., 1618
APPELLATE CIVIL
Before Mr. Justice Sanjay Yadav
25 March, 2010*

BASANT KUMAR & ors. ....Appellants
Vs.
SMT. PREMWATIBAI & ors. ... Respondents

Civil Procedure Code (5 of 1908), Section 11 - *Res judicata - Lower appellate Court in a suit for declaration & permanent injunction held that the plaintiffs therein are entitled for 1/5th share of the suit property - Said finding of the appellate Court attained finality - Respondents brought a suit for partition in respect of the same suit property - Trial Court rejected the suit as barred by principle of res judicata but the lower appellate Court set aside the judgment & decree of the trial Court and remitted the suit for decision on merits - Held - Lower appellate Court overstepped its power under Order 41 Rules 23 & 23A CPC and thus the judgment & decree passed by it set aside.* (Paras 18 & 19)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – पूर्व न्याय – निम्न अपीलीय न्यायालय ने घोषणा और स्थायी व्यादेश के वाद में अभिनिर्धारित किया कि उस वाद के वादी वाद सम्पत्ति के 1/5 भाग के हकदार हैं – अपीलीय न्यायालय का उक्त निष्कर्ष अंतिम हो गया – प्रत्यर्थियों ने उसी वाद सम्पत्ति के संबंध में विभाजन के लिए वाद प्रस्तुत किया – विचारण न्यायालय ने वाद पूर्व न्याय के सिद्धांत से वर्जित होना मानकर नामंजूर किया परन्तु निम्न अपीलीय न्यायालय ने विचारण न्यायालय का निर्णय तथा डिक्री अपास्त की और वाद को गुणदोषों पर विनिश्चय के लिए भेज दिया – अभिनिर्धारित – निम्न अपीलीय न्यायालय ने सि.प्र.सं. के आदेश 41 नियम 23 व 23ए के अन्तर्गत अपनी शक्ति का अतिक्रमण किया और इसलिए उनके द्वारा पारित निर्णय एवं डिक्री अपास्त।

K.B. Bhatnagar, for the appellant.

Amrit Ruprah, for the respondent Nos.1 & 2.

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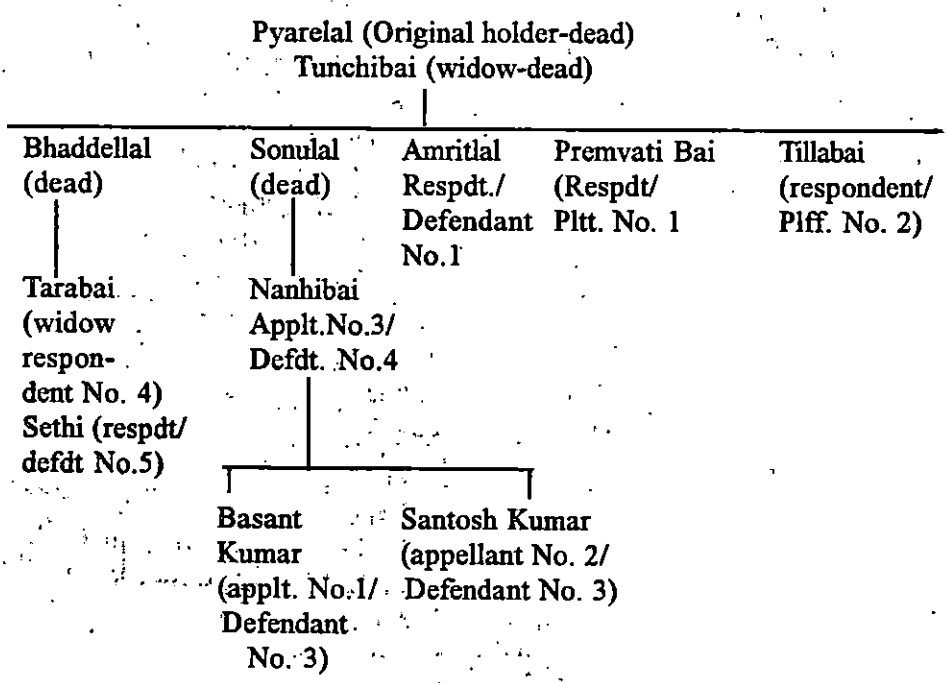
*M.A. No.4727/2009 (Jabalpur)

ORDER

SANJAY YADAV, J. :–Appellant/Defendant Nos. 2 to 4 herein this appeal calls in question the legality of order dated 30.9.2009 passed by the District Judge, Dindori in Civil Appeal No. 62 A/2009 which arose of judgment/decree dated 19.7.2007 in Civil Suit No. 14 A/2007dismissed on the ground that the cause propitiated in the suit at the instance of respondent Nos. ! and 2/plaintiffs was hit by principle of res judicata. The lower appellate Court while setting aside the judgment/decree remitted the whole suit for retrial on merits.

2. Few facts which are not in controversy: The appellant and respondents, leaving the State of Madhya Pradesh, are the legal representatives of one Pyarelal, the details whereof is delineated hereunder:



3. Pyarelal owned about 49.45 acres of land at village Subakhar, Revenue Circle Dindori. During his lifetime Pyarelal partitioned the property amongst his sons who were physically placed in their respective shares of the property.

4. Pyarelal died some time in 1984. Subsequent thereof his wife also died. Subsequent to the death of the widow of Pyarelal, the daughter, viz., Premvatibai and Tillabai, respondent Nos. 1 and 2, brought a suit for declaration and permanent injunction on the basis of will dated 30.8.1988, allegedly executed by their mother in respect of land admeasuring 23.58 out of total holding of the deceased Pyarelal.

5. The trial Court vide judgment/decree dated 5.2.1997 dismissed the suit, holding that, the plaintiff having failed to prove the will are not entitled for any

share on the basis of said will. In an appeal, the appellate court vide its judgment/ decree dated 20.11.1998 upheld the verdict of trial court recording the finding about the will. However, in respect of the suit property admeasuring 23.58, the first appellate Court recorded that the plaintiffs would be entitled for 1/5th share each. The decree was accordingly modified.

6. This judgment/decree dated 20.11.1998, as is admitted at bar has not been challenged and is allowed to attain finality.

7. When the matter stood thus, the respondents herein, brought the suit for partition forming subject matter of C.S. 10 A/2007. The plaintiffs/respondent Nos. 1 and 2 claimed therein the partition of the entire property belonging to Pyarelal. It is in this suit that, an objection was raised by the defendants who are appellants herein regarding maintainability on the ground that, the relief sought was hit by res judicata under Section 11 Explanation IV CPC. The application found favour with the trial court which dismissed the suit on 9.7.2007.

8. This order, i.e., order dated 9.7.2007 being put to challenge in appeal under Section 96, Code of Civil Procedure, the appellate court vide judgment/decree dated 30.9.2009 set aside the judgment/decree by the trial court and remitted the whole suit for retrial on merit.

9. It is this order which is being appealed against on the ground that the lower appellate Court committed grave folly in misconstruing the entire facts.

10. It is urged that, the property of the Pyarelal being partitioned during his life time and in respect of the share of widow of Pyarelal, i.e., mother of Bhaddelal, Sonulal, Amritlal, Premwatibai and Tillabai being delineated by the appellate court vide its judgment/decree dated 20.11.1998, and the order being not challenged, no property in fact remained for being partitioned, as would lead to a maintain an action for partition at the instance of daughters of Pyarelal. It is contended that the trial court appreciating the fact in true perspective rightly held that, the suit was hit by the principle of res judicata. It is urged that the lower appellate court committed grave folly in setting aside the judgment decree and by remitting the whole suit for retrial. It is averred that no cause as such was alive for trial.

11. The respondents, viz., respondent Nos. 1 and 2 on their turn, however, supports the appellate order under challenge. It is contended, inter alia that, the appellate court did not commit any mistake in setting aside the judgment-decree and in directing the trial court to decide the issue of res judicata along with other issues.

12. The question is whether in the given facts of present case, the first appellate court was justified in its approach.

13. Indisputably, Pyarelal in his lifetime had partitioned the property amongst his sons. The daughters had no claim in the coparcenars property at that stage

because of the limitation implicit in the Hindu Succession Act, 1956, whereunder Sections 6, 8, 9 and 10 it is stipulated

> **6. Devolution of interest of coparcenary property.-** When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:
>
> Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.
>
> *Explanation I:* For the purposes of this section, the interest of Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.
>
> *Explanation 2:* Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

14. (Section 6 is now substituted by Act 39 of 2005 w.e.f. 9.9.2005; however, since the dispute relates to period prior to 9.9.2005, old Section 6 is being relied upon).

> **"8. General rules of succession in the case of males.-** The property of male Hindu dying intestate shall devolve according to the provisions of this Chapter –
>
> (a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;
>
> (b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;
>
> (c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and
>
> (d) lastly, if there is no agnate, then upon the cognates of the deceased."

"9. **Order of succession among heirs in the Schedule.**- Among the heirs specified in the Schedule, those in class I shall take simultaneously and to the exclusion of all other heirs; those in the first entry in class II shall be preferred to those in the second entry; those in the second entry shall be preferred to those in the third entry; and so on in succession."

10. Distribution of property among heirs in class I of the Schedule.- The property of an intestate shall be divided among the heirs in class I of the Schedule in accordance with the following rules :-

Rule 1- The intestate's widow, or if there are more widows than one, all the widows together, shall take one share.

Rule 2- The surviving sons and daughters and the mother of the intestate shall each take one share.

Rule 3- The heirs in the branch of each pre-deceased son or each pre-deceased daughter of the insteatate shall take between them one share.

Rule 4- The distribution of the share referred to in Rule 3-

(i) among the heirs in the branch of pre-deceased son shall be so made that his widow (or widow together) and the surviving sons and daughters get equal portions; and the branch of his predeceased sons gets the same portion;

(ii) among the heirs in the branch of the pre-deceased daughter shall be so made that the surviving sons and daughters get equal portions.

15. The respondent Nos. 1 and 2, however, were justified in their action in filing a suit regarding their share through their mother, the widow of Pyarelal, which was rightly decreed by the appellate court on 20.11.1998; whereby they were held entitled for 1/5th share in the property which fell to the share of their mother. This decree has not been challenged and is allowed to attain finality.

16. Now, in the background of these facts does any cause survive regarding partition of the property of Pyarelal? The answer is in negative. Therefore, the trial court was justified in its approach.

17. Section 11 of the Code of Civil Procedure, 1908 and Explanation IV thereunder stipulates

"11. **Res judicata.**- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or

between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation IV.- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

18. In *Ramchandra Dagdu Sonavane (Dead) by L.Rs. & Ors. V. Vithu Hira Mahar (Dead) by L.Rs. & Ors.* [2009 AIR SCW 7329], their lordships were pleased to observe:

33. When the material issue has been tried and determined between the same parties in a proper suit by a competent court as to the status of one of them in relation to the other, it cannot be again tried in another suit between them as laid down in *Krishna Behari Roy vs. Bunwari Lal Roy* reported in [1875 ILR (IC-144)], which is followed by this Court in the case of *Ishwar Dutt Vs. Land Acquisition Collector & Anr.* [(2005) 7 SCC 190], wherein the doctrine of 'cause of action estoppel' and 'issue estoppel' has been discussed. It is laid down by this Court, that if there is an issue between the parties that is decided, the same would operate as a res-judicata between the same parties in the subsequent proceedings. This court in the case of *Isher Singh vs. Sarwan Singh,* [AIR 1965 SC 948] has observed :

"11. We thus reach the position that in the former suit the heirship of the respondents to Jati deceased (a) was in terms raised by the pleadings, (b) that an issue was framed in regard to it by the trial Judge, (c) that evidence was led by the parties on that point directed towards this issue, (d) a finding was recorded on it by the appellate court, and (e) that on the proper construction of the pleadings it would have been necessary to decide the issue in order to properly and completely decide all the points arising in the case to grant relief to the plaintiff. We thus find that every one of the conditions necessary to satisfy the test as to the applicability of Section 11 of the Civil Procedure Code is satisfied."

34. So far as the finding drawn in the suit for injunction in O.S. No.104 of 1953, regarding adoption would also operate as a res-judicata in view of the judgment of this Court in the case of *Sulochana Amma Vs. Narayanan Nair* [(1994) 2 SCC 14]. It is observed:

"The decision in earlier case on the issue between the same parties or persons under whom they claim title or litigating under the same title, it operates as a res-judicata. A plea decided even in a suit for injunction touching title between the same parties, would operate as res-judicata.

It is a settled law that in a Suit for injunction when title is in issue, for the purpose of granting injunction, the issue directly and substantially arises in that suit between the parties when the same is put in issue in a later suit based on title between the same parties or their privies in a subsequent suit, the decree in injunction suit equally operates as a res-judicata."

37. In a suit for injunction, the issues and the decision would be confined to possessory aspect. If the right to possession of property cannot be decided without deciding the title to the property and a person, who approaches the Court, his status itself is to be adjudicated then without declaring his status, the relief could not be granted. In earlier suit Vithu claimed his right as an adopted son. Therefore, since he did not prove the adoption, there was no subsisting right or interest over the immovable property and as such the issue on adoption was a relevant issue in 1953 suit and, therefore, the said issue which has been decided in earlier suit and which has been confirmed in the regular second appeal and the issue decided therein was whether he was an adopted heir of Watandar was binding on the parties. The similar question has to be decided by the S.D.O. to decide the claim, right or interest in respect of the hereditary office. Therefore, the issue was raised and it was decided and it is binding on the parties."

19. The outcome of the above analysis is that, the lower appellate Court overstepped its powers under Order 41 Rule 23 and 23 A CPC.

20. In the result the order dated 30.9.2009 is hereby set aside and the judgment decree dated 19.7.2007 passed in Civil Suit No. 14 A /2007 is restored.

21. The appeal is allowed to the extent above; however, no costs.

Appeal allowed.

I.L.R. [2010] M. P., 1625

APPELLATE CIVIL

Before Mr. Justice Abhay M. Naik

8 April, 2010*

ISHWAR DAYAL ... Appellant

Vs.

MOHAN SINGH & ors. ... Respondents

A. **Evidence Act (1 of 1872), Section 21** - ***Proof of admissions against persons making them, and by or on their behalf - Relevancy*** - *Held - Person claiming independently and not through predecessor is not bound by the admissions of predecessor.* (Paras 12 & 13)

क. साक्ष्य अधिनियम (1872 का 1), धारा 21 – स्वीकृतियों का उन्हें करने वाले व्यक्तियों के विरुद्ध, उनके द्वारा या उनकी ओर से सबूत – सुसंगतता – अभिनिर्धारित – स्वतंत्र रूप से न कि पूर्वाधिकारी द्वारा दावा करने वाला व्यक्ति पूर्वाधिकारी की स्वीकृतियों से आबद्ध नहीं है।

B. **Criminal Procedure Code, 1973 (2 of 1974), Section 146** - ***Duties of receiver*** - *Held - Supurdagidar having not received directions from SDM under the order of Supurdagi is required either to seek instructions or to look after agricultural land by proper cultivation.* (Para 17)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 146 – प्रापक के कर्तव्य – अभिनिर्धारित – सुपुर्दगीदार को सुपुर्दगी के आदेश के अन्तर्गत एस.डी.एम. से निदेश प्राप्त न होने पर अपेक्षित है कि या तो निर्देश की माँग करे या समुचित खेती द्वारा कृषि भूमि की देखभाल करे।

C. **Mesne Profits** - ***Entitlement of a person whose property was attached and was under the custody of a receiver - Remedy available*** - *Held - Person entitled to mesne profits/damages may file a separate suit against Supurdagidar, who has not deposited the same or has not accounted for it.* (Paras 15 to 17)

ग. अंतःकालीन लाभ – उस व्यक्ति की हकदारी जिसकी सम्पत्ति कुर्क की गयी और प्रापक की अभिरक्षा के अधीन थी – उपलब्ध उपचार – अभिनिर्धारित – अंतःकालीन लाभ/नुकसानी का हकदार व्यक्ति सुपुर्दगीदार, जिसने उसे जमा नहीं किया है या उसका लेखा नहीं दिया है, के विरुद्ध पृथक वाद फाइल कर सकता है।

D. **Criminal Procedure Code, 1973 (2 of 1974), Section 146** - ***Duties of receiver on termination of proceedings*** - *Held - On termination of proceedings, Supurdagidar can not deliver back the possession contrary to the outcome of the proceedings and without obtaining specific permission.* (Para 15)

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*S.A. No.86/2001 (Gwalior)

ISHWAR DAYAL Vs. MOHAN SINGH

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 146 – कार्यवाहियों की समाप्ति पर प्रापक के कर्तव्य – अभिनिर्धारित – कार्यवाहियों की समाप्ति पर, सुपुर्दगीदार कार्यवाहियों के परिणाम के प्रतिकूल और विनिर्दिष्ट अनुज्ञा अभिप्राप्त किये बिना कब्जा वापस सुपुर्द नहीं कर सकता।

Cases referred :

AIR (39) Nag 253, AIR 1962 SC 21, AIR 1977 Pat 226, 2004(1) MPHT 109, AIR 1953 BOM 105, AIR 1978 ALL 73.

R.S. Rathore, for the appellant.
K.S. Shrivastava, for the respondent Nos.1 & 2.
R.P. Rathi, G.A., for respondent No.4/State.

J U D G M E N T

ABHAY M.NAIK, J. :–This judgment disposes of S.A.No.86/2001 and S.A.No.38/2001 since both the appeals arise out of the common judgment and decree dated 21.11.2000 passed by the Court of Additional District Judge, Lahar, District Bhind in Civil Appeal No.24/97.

2. There situated a land bearing survey Nos.1472, 1480, 1486, 1482, 1811, in total area of 3.354 hect. in village Devri Kalan, Tahsil Lahar, District Bhind, which belonged to Sughar Singh, father of plaintiff No.1 and husband of plaintiff No.2. After the death of Sughar Singh in 1968, said land devolved upon the plaintiffs being son and widow of the deceased. They continued to occupy the said land as Bhumiswami upto year 1970. Original defendant No.1, namely - Seel Dulaiya submitted an application under Section 145 of Cr.P.C. before the Sub Divisional Magistrate, Lahar, which was registered at Misc. Criminal Case No.106/70. Seel Dulaiya wrongly asserted possession over the said land for more than 12 years. It was stated in the application that on 5.7.1970, plaintiffs Mohan Singh and Mst.Gendarani alias Parvati tried to forcibly occupy the suit land. As it was found that there was apprehension of dispute, consequently, an attachment order was passed on 21.7.1970 and the suit land was handed over to original defendant No.3, namely – Ishwar Dayal Patel on the same date as Supurdagidar. Application under Section 145 of Cr.P.C. was dismissed in default of appearance, however, S.D.M. Lahar did not direct in specific for release of the suit land from attachment. On 3.12.1975, plaintiffs submitted an application before S.D.M. for restoration of possession of the suit land. They also prayed that crops harvested by the Supurdagidar may also be handed over to the plaintiffs. In response to this application, defendant No.1 (Seel Dulaiya) submitted the reply that she had already received possession of the disputed land on 23.3.1974 and is also in receipt of accounts for the intervening period from Ishwar Dayal. Identical reply was also submitted by Ishwar Dayal. Plaintiffs insisted that at the time of Supurdagi, possession was obtained from the plaintiffs, therefore, the same is liable to be

restored to them. S.D.M. Lahar, vide his order dt.19.2.1979 found that there was no evidence on record to ascertain any specific party from whom the possession of the suit land was obtained at the time of attachment. This being so, plaintiffs were directed to approach Civil Court, however, it was also equally found that Ishwar Dayal had committed criminal breach of trust and was liable to be prosecuted. Criminal Revision bearing No.14/79 was submitted before the Sessions Judge, who vide his order dt.14.7.1980 quashed the order of prosecution. Aggrieved by the aforesaid, Misc. Criminal Case Nos.759/80 and 812/80 were submitted, which were dismissed by this Court.

3. With the aforesaid pleadings, plaintiffs instituted civil suit for declaration of title, restoration of possession and mesne profits against Seel Dulaiya, Kamta Prasad and Ishwar Dayal.

4. Seel Dulaiya, the original defendant No.1, submitted her written statement refuting thereby the claim of the plaintiffs. She inter alia stated that the suit land was wrongly recorded in the name of the plaintiffs. The same was occupied by her and, therefore, the application for mutation in her favour was rightly submitted. Suit land was attached in proceedings under Section 145 of Cr.P.C. by virtue of the order of S.D.M. Lahar. Possession of the same was obtained from her at the time of attachment and therefore she has received it back alongwith mesne profits from Ishwar Dayal on dismissal of application under Section 145 of Cr.P.C. Plaintiffs or Sughar Singh were neither Bhumiswami nor in possession of the suit land.

Ishwar Dayal, the defendant No.3, submitted his written statement. He inter alia pleaded that after dismissal of the proceeding under Section 145 of Cr.P.C., he handed over back the possession of the suit land to defendant No.1 on 23.3.1974. He has also deposited the mesne profits with accounts with defendant No.1. He has not committed any kind of breach and is not liable to plaintiffs in any manner, whatsoever. He denied that he is liable to pay mesne profits as claimed by the plaintiffs.

5. During pendency of the suit, Kamta Prasad, original defendant No.2, died and his son namely – Rajaram was brought on record as defendant No.2. Likewise, Malti Bai was also brought on record as daughter of plaintiff No.2 on account of death of latter. Defendant No.1, namely – Seel Dulaiya also died, which was reported to the trial court vide application dt. 19.7.1989. Since the plaintiffs were the legal representatives of Seel Dulaiya, the prayer was made for deletion of her name from the cause title. Consequently, application was allowed and name of Seel Dulaiya was deleted from the cause title.

6. Learned trial Judge vide judgment and decree dated 7.10.1997 found that plaintiffs are Bhumiswami of the suit land and they were entitled to its possession, however, the relief against Supurdagidar was denied.

7. Aggrieved by the aforesaid, Civil Appeal No.24/97 was preferred by the plaintiffs, whereas Civil Appeal No.25/97 was preferred by Rajaram, defendant No.2, which was dismissed for want of substance. Civil Appeal No.24/97 was partly allowed. Plaintiffs in addition to restoration of possession are found entitled to damages to the tune of Rs.40,000/- on payment of court fees.

8. Aggrieved by the aforesaid, Ishwar Dayal (original defendant No.3) has preferred S.A.No.86/01, whereas plaintiffs Mohan Singh and Smt.Malti Bai have submitted S.A.No.38/01.

It is informed during arguments by Shri K.S.Shrivastava, learned counsel that Rajaram had preferred S.A.No.106/01, which has already been dismissed in default of appearance.

9. **S.A.No.86/2001** is heard on the following substantial questions of law :-

"1. Whether the plaintiffs being successors and heirs of late Sheel Dulyia are bound by the admission made by her regarding receipt of profit and possession from the appellant ?

2. Whether the findings of the learned First Appellate Court are perverse, illegal and unsustainable ?"

Likewise, **S.A.No.38/2001** is heard on the following substantial questions of law :-

"1. Whether the courts below are justified in directing payment of court fee on the ground of mesne profit to be collected and for the purpose of auction by the S.D.O. ?

2. Whether the learned First Appellate Court has correctly decided the rate of mesne profit in accordance with the evidence available on record ?"

10. Shri R.S.Rathore and Shri K.S.Shrivastava, learned counsel for the parties made their respective submissions.

11. It has been contended by Shri Rathore that Receiver had handed over possession to Seel Dulaiya after dismissal of application under Section 145 of Cr.P.C., which was admitted by Seel Dulaiya in her written statement. Similarly, the money earned by way of income from the disputed property by the Receiver was also handed over to Seel Dulaiya, as was admitted by her, in her written statement. Plaintiffs are legal heirs of Seel Dulaiya and are bound by her admissions. This being so, it has been contended that the plaintiffs are, thus, in receipt of possession as well as mesne profits through Seel Dulaiya and no decree can be legally granted for the same in favour of plaintiffs.

12. Admissions, as per provisions of the Indian Evidence Act, 1872, are statements by the persons, if they are made during the continuance of the interest

of the persons making the statements. In the instant case, plaintiffs stated that they alone are Bhumiswami and Seel Dulaiya had no right, title or interest in the suit land. It has also been found by the courts below that the plaintiffs alone were the Bhumiswami and Seel Dulaiya had no title to it. Thus, the statement about receipt of possession and mesne profits does not amount to admissions for the purpose of binding the plaintiffs. Moreover, plaintiffs sued with the specific avermrents that they alone were Bhumiswami of the suit land and Seel Dulaiya had encroached upon it without right, title or interest. They instituted the suit on the basis of their own rights. They did not claim through Seel Dulaiya. Therefore, name of Seel Dulaiya was sought to be deleted. Their prayer was accepted and Seel Dulaiya's name was omitted from the cause title. Plaintiffs did not step into shoes of Seel Dulaiya. They did not claim title through Seel Dulaiya. They were specific on this issue that they alone were Bhumiswami and Seel Dulaiya without any right forcibly occupied the suit land.

13. Courts below have concurrently found that plaintiffs being the sole Bhumiswami were entitled to possession. Thus, they did not claim through Seel Dulaiya and the statement of Seel Dulaiya contained in written statement acknowledging the receipt of possession and mesne profits from the Receiver Ishwar Dayal obviously did not bind them. There is no specific admission of plaintiffs that Seel Dulaiya did receive mesne profits from the Receiver and the plaintiffs did receive the same from Seel Dulaiya on her death. Moreover, it may be seen that Receiver was not directed either by the SDM or by the Civil Court to hand over possession and mesne profits to Seel Dulaiya. Alleged act of the Receiver of handing over the mesne profits to Seel Dulaiya was obviously not an authorised act. Neither under the order of supurdagi nor under any other order, the Receiver was directed to hand over it to Seel Dulaiya. This being so, accountability of the Receiver vis a vis the plaintiffs in respect of mesne profits did not cease merely by virtue of the statement of Seel Dulaiya contained in the written statement about receipt of mesne profits from the Receiver.

14. In the proceedings under Section 145, the SDM is well empowered to appoint Supurdagidar/Receiver for preservation of the property for the benefit of the person, who is found in possession on the date of initiation of the proceeding or within a period of two months preceding such initiation. Such appointment may be made by the Court on an application of an interested party or even suo motu. Nagpur High Court (predecessor of this Court) in the case of *Ganpat Pralhad v. Pralhad Madhoba* [A.I.R.(39) Nagpur 253], has clearly held :-

> "There is nothing in O.40, R.1 of the Code which limits the power of the Court to appoint a receiver only to cases in which an application is made to it by a party to the suit. Ordinarily, of course, a Court would act only when a party to the suit invokes its powers.

> But as the law allows it to act even 'suo motu', it is obvious that for preserving the suit property it can act also on the application of a person interested in the preservation of the property."

The general ground on which a Court appoints a Receiver is ultimately in every case the protection or preservation of property for the benefit of persons who have an interest in it.

15. Proceeding under Section 145 Cr.P.C. was dismissed for want of prosecution. Supurdagidar was not discharged by the SDM by any specific order. There is no provision of law, including the Code of Civil Procedure, which prescribes for termination of the office of receivership. The law on the point was briefly summarized by the Apex Court long back in the case of *Hiralal Patni v. Loonkaran Sethiya* (AIR 1962 SC 21) as follows :-

> "(1) If a receiver is appointed in a suit until judgment, the appointment is brought to an end by the judgment in the act on (2) If a receiver is appointed in a suit, without his tenure being expressly defined, he will continue to be receiver till he is discharged. (3) But, after the final disposal of the suit as between the parties to the litigation, the receiver's functions are terminated, he would still be answerable to the court as its officer till he is finally discharged. (4) The court has ample power to continue the receiver even after the final decree if the exigencies of the case so require."

Thus, in the instant case, Supurdagidar was neither discharged nor absolved from his liability to submit accounts. He was handed over the suit agricultural land in area 3.354 hectare, which definitely must have yielded crops. Position and duties of a Receiver was explained by Patna High Court in the case of *Bihari Singh v. Tipan Singh* (AIR 1977 Patna 226), which were further relied upon by this Court in the case of *Naresh Maravi v. C.Mudliyar* [2004 (1) M.P.H.T. 109] as under :-

> "(i) The receiver comes in possession of a property as an officer of the Court by virtue of his appointment by the Court in that behalf.
>
> (ii) Such property is custodia legis concomitant with the appointment of the receiver.
>
> (iii) The dependence of a suit in a Trial Court, unless there be a specific order of the Court to the contrary, sanctions the continuance of a receiver to remain in possession of such property even after its disposal by the Trial Court until he is discharged.

(iv) The liability of rendering accounts after the disposal of the suit in the Trial Court does not cease ipso jure.

(v) The receiver being an officer of the Court and being in possession of the estate in a fiduciary capacity, the Trial Court has jurisdiction even after disposal of the suit to compel him to submit accounts of his dealings with the estate."

16. It has been contended by Shri Rathore, that the S.D.M., who appointed the Supurdagidar, himself could have asked the Receiver to submit accounts and deposit the money. It can not be done in a separate suit like the present one.

This submission is also misconceived in view of the decision of the Bombay High Court in the case of *Jekisondas Maganlal v. Nanabhai Jhinabhai* (AIR 1953 Bombay 105), wherein it has been held :-

"The expression 'Court' as used in R.4 of O.40 can only mean the Court which appointed the receiver and not the Court which entertains and passes a decree in respect of any liability of the receiver for his default or negligence. The liability of a receiver declared in a suit can obviously be enforced by execution of the decree by the Court which passed the decree, which may not necessarily be the Court which appointed the receiver."

17. It is further contended by Shri Rathore, learned counsel that the Supurdagidar i.e. Ishwar Dayal, was not directed to cultivate the suit land and was further not directed to submit the accounts and deposit income from such land.

Aforesaid submission is also not liable to be accepted because the Supurdagidar is obviously appointed for protection and preservation of the property. He is obviously required to take reasonable care and proper precaution for preservation of the property in the manner as is expected from the owner himself. No agriculturist would allow the land to remain uncultivated. Receiver is definitely accountable for his own fault and gross negligence. In case, if the order of appointment of Supurdagidar was silent on this issue, Supurdagidar ought to have sought instructions/directions from the SDM. In the absence of any constraint, Supurdagidar was obviously under an obligation to cultivate the suit agricultural land and to make earnings therefrom. Legal effect of an order appointing Receiver has been explained by the Division Bench of Allahabad High Court in the case of *S.A.Jawwad v. Maqsood Jahan* (AIR 1978 Allahabad 73), in following words :-

"The legal effect of an order appointing a Receiver is that the property becomes custodia legis. It, therefore, follows that even where an order of appointment of Receiver is not exhaustive and explicit with regard to the conferment of a particular duty or function

but it is necessarily implied in such order, it is the duty of the Receiver to perform such functions in the course of management and preservation of the property, but in such cases it is imperative for him to obtain the previous leave of the court for discharging such duties and incurring any expenses or liability on that account."

18. In view of the aforesaid discussion, it is observed that the plaintiffs having not claimed through Seel Dulaiya are not bound by the admissions made by her with regard to mesne profits and the Supurdagidar has been rightly held liable vis a vis plaintiffs by the courts below. Moreover, it has been stated by the Receiver himself in his written statement that he has deposited the mesne profits with Seel Dulaiya. His this statement clearly goes to show that he had produced crops on the suit agricultural land. Thus, his accountability vis a vis plaintiffs can not be doubted at all. Substantial questions of law No.1 and 2 in S.A.No.86/01 are accordingly answered against the appellants in the said S.A.

19. As regards Substantial Question No.1 in S.A.No.38/01, Shri K.S.Shrivastava, learned counsel appearing for the plaintiffs/appellants stated at bar that the plaintiffs have prayed for mesne profits arising during the period prior to institution of the suit. He further fairly accepted the plaintiffs' liability to pay the courts fee on the amount of mesne profits. Substantial question of law No.1 is answered accordingly.

As regards, substantial question No.2, it has been submitted that the rate of mesne profits has been fixed by the learned lower appellate Judge on lower side. However, it is admitted by Shri K.S.Shrivastava, learned counsel that there is no contrary, cogent evidence, so as to warrant interference in the findings of facts with regard to rate of mesne profits. Learned counsel has been unable to point out non consideration of any contrary cogent evidence or consideration of any inadmissible evidence by the lower appellate court while granting mesne profits. This being so, the finding of facts arrived at by the learned lower appellate court in respect of mesne profits are not found to have suffered from any infirmity. This substantial question is accordingly answered against the plaintiffs.

20. In the result, both the appeals fail and are hereby dismissed. No order as to costs.

Petition dismissed.

I.L.R. [2010] M. P., 1633

APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saksena & Mr. Justice K.S. Chauhan

21 December, 2009*

RAMESH THETE ... Appellant

Vs.

STATE OF M.P. ... Respondent

A. Prevention of Corruption Act (49 of 1988), Section 13(1)(d) - *Tape recording of conversation - When cassette was played before Court, except a noise of fan, nothing was found discernible - The transcript of tape recorder, provided by trap party, cannot be accepted as a substitute of tape recording.* (Para 12)

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – बातचीत की टेप रिकॉर्डिंग – जब न्यायालय के समक्ष कैसेट चलाई गयी, पंखे की आवाज के सिवाय स्पष्ट कुछ नहीं पाया गया – पकड़ दल द्वारा मुहैया करायी गयी टेप रिकॉर्डर की अनुलिपि, टेप रिकॉर्डिंग के स्थानापन्न के रूप में स्वीकार नहीं की जा सकती है।

B. Prevention of Corruption Act (49 of 1988), Section 13(1)(d) - *Acceptance of money - It is essential for holding the possession and acceptance of the bribe money by the accused that it was voluntary and conscious.* (Para 22)

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – धन का प्रतिग्रहण – अभियुक्त द्वारा रिश्वत के धन का कब्जा धारित करने और उसके प्रतिग्रहण के लिए यह आवश्यक है कि यह स्वेच्छया और सचेतन हो।

C. Prevention of Corruption Act (49 of 1988), Section 13(1)(d) - *Acceptance of money - Prosecution failed to prove that appellant was in voluntary and conscious possession of tainted money recovered from room of a hotel - Explanation given by accused that currency notes were planted either by complainant or by any of member of trap party could not be ruled out.* (Para 24)

ग. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – धन का प्रतिग्रहण – अभियोजन यह साबित करने में असफल रहा कि अपीलार्थी होटल के कमरे से बरामद अनुचित धन के स्वेच्छया और सचेतन कब्जे में था – अभियुक्त द्वारा दिया गया स्पष्टीकरण कि करेंसी नोट या तो परिवादी द्वारा या पकड़ दल के किसी सदस्य द्वारा रखे गये, वर्जित नहीं किया जा सकता।

Cases referred :

AIR 1992 SC 644, (2006) 12 SCC 277, (2004) 6 SCC 488, (1995) 3 SCC 567, AIR 1979 SC 1191, 2001 AIR SCW 241, (1995) 3 SCC 351.

*Cr.A. No.865/2007 (Jabalpur)

S.C. Datt with *Siddharth Datt,* for the appellant.
Aditya Adhikari, for the respondent/SPE, Lokayukta.

JUDGMENT

The Judgment of the Court was delivered by RAKESH SAKSENA, J. :–Appellant has filed this appeal against the judgment dated 12.4.2007, passed by Special Judge (Prevention of Corruption Act), Bhopal, in Special Case No.06/2005, convicting him under Sections 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 and sentencing him to rigorous imprisonment for two years and fine of Rs.5000/- and rigorous imprisonment for two years and fine of Rs.5000/-, on each count respectively.

2. Facts of the case are that on 18.2.2002 and before, appellant Ramesh Thete, IAS, was posted as Director, Employment and Training, at Jabalpur. Complainant N.R.Borle was posted as Incharge Principal of the Industrial Training Institute, Betul. It is undisputed that the appellant was a public servant. On 16.2.2002, complainant N.R.Borle made a complaint to Lokayukta that on 1.9.2001 he had withdrawn Rs.1,72,372/- from the State Bank of India, Branch Betul, for distributing the salary of the employees, but the same could not be disbursed, as the accountant had gone on leave. Since there was no alternative, he deposited the aforesaid amount in his personal account in Nagrik Bank, Betul and as it was Sunday on 2.1.2001, he took out the aforesaid amount from the Bank on 3.1.2001 and distributed the salary of the employees. Excess cash was kept in the cash box with the accountant of the Institution. Some persons made a complaint against him to the effect that he had misused the Government money. An enquiry was ordered by the Collector. Sub Divisional Magistrate, Betul conducted the enquiry, but found nothing against him. However, it was held that he should not have deposited the aforesaid amount in his personal account. On 1.2.2002, accused made a phone call to him saying that he would suspend him. He summoned him to Jabalpur. On 6.2.2002, when he met accused at his residence, he told that he had issued a notice to him and that he should arrange Rs.1 lac, otherwise he will have to face the consequences. He further asked him to bring Rs.1 lac, from Kewate (PW-15) also. Again on 11.2.2002 and 13.2.2002 accused threatened him on telephone that if Rs.1 lac is not given to him, he would be suspended. Since he did not wish to give the bribe and wanted the accused to be caught red handed, he managed an amount of Rs.1 lac by obtaining loan from the State Bank of India, Branch Betul on 16.2.2002 and submitted a written complaint (Ex.P/7) to Superintendent of Police, Special Police Establishment, Bhopal. Supdt. of Police, Lokayukta, requisitioned two witnesses viz. Dr. D.C. Pyasi, Veterinary Surgeon and Dr. Shrivastava. On 17.2.2002, complainant was asked to contact the accused on mobile phone for fixing the place for delivering the bribe money. This talk was arranged by way of conference and was recorded in a micro cassette recorder.

Its transcript was prepared and seized vide seizure memo Ex.P/10. Accused asked complainant to come to Bhopal on 18.2.2002 and meet him in Mantralaya, Vallabh Bhawan, Bhopal. Thereafter police registered a case under Section 7 of the Prevention of Corruption Act against the accused.

3. On 18.2.2002, a trap was arranged. The numbers of currency notes of Rs.500/- denomination were noted by Dy.S.P., M.S. Nain (PW-21). Currency notes were treated with phenolphthalein powder and were kept in the pocket of complainant. He was given necessary instructions. A mini tape recorder was also provided to him with a direction to record the conversation taking place between him and the accused at the time of handing over the bribe money. Again, for fixing the place for giving the bribe money when complainant made a call to accused on his mobile phone, accused asked him to come to hotel Nisarg situated in M.P. Nagar, Bhopal, where he was staying in Room No.204. This conversation was again recorded and a transcript was prepared as memorandum Ex. P/17.

4. Complainant went to hotel Nisarg in an auto. The trap team followed him in a private vehicle. Complainant knocked the door of the room No.204, which was opened by the accused. He went in the room and informed the accused that he had brought the money. Accused asked him that he had to bring Rs.2 lacs. Complainant replied that Kewate did not give money, therefore, he brought only Rs.1 lac. Accused, instead of taking money in his hand or speaking, indicated him by gesture to put the money on a stool kept in the room. Accused then asked him to go and send his driver viz. Yadav. Complainant went out and gave prearranged signal, on which members of the trap party went at the door of the room No.204, which was closed from inside. Driver Yadav also reached there and ringed the bell. Accused opened the door and Dy.S.P., M.S. Nain (PW-21) and other members of the trap party entered the room. After introducing themselves, they washed the hands of the accused with sodium carbonate solution. The solution gave negative result. The tape recorder was obtained from the complainant and its transcript was prepared and translated in Hindi, as, according to the complainant, the conversation had taken place in Marathi. The memorandum of transcript was Ex.P/50. When Dy.S.P., M.S. Nain, removed the pillow kept on the stool, the bundles of currency notes were found kept on it. The numbers of the currency notes tallied with the preliminary memorandum. The pillow was washed with sodium carbonate solution, the solution turned pink. The currency notes were seized vide seizure memo Ex.P/35 and the memorandum of the proceedings (Ex.P/42) was drawn. After seizing the documents i.e. service record of the accused, records of the hotel etc. and after obtaining the requisite sanction from the Government of India (Ex.P/77), charge sheet was filed under Section 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act.

5. Accused abjured his guilt and pleaded false implication. According to him,

the employees of the Industrial Training Institute, Betul had made complaints against the complainant, which was enquired by Joint Director, R.N. Thakur and alongwith enquiry report dated 5.2.2002, a recommendation was sent to remove the complainant from the post of Incharge Principal. Therefore, apprehending his removal by the accused, complainant concocted a false case. He neither demanded bribe, nor he obtained or accepted the same. Complainant wanted to meet him personally for discussing the matter of transfer of some employees. After attending the meeting of Lok Sewa Samiti at Vallabh Bhawan, Bhopal, when he was in the hotel and was taking meals, complainant had come to meet him for discussing about the list of employees under transfer. When he came back from bathroom after washing hands, complainant asked his permission to go. He asked him to send his driver. After 15-20 minutes, when driver came and he opened the door, trap party entered the room and enquired about taking bribe from him. When he denied, members of the trap party washed his hands and picked up a pillow from the stool and found the bundles of currency notes. According to him, either complainant had planted the aforesaid money when he was in the bathroom for washing his hands or any member of the trap party had kept it, when his hands were being washed by the Dy.S.P..

6. To substantiate its case, prosecution examined 22 witnesses and exhibited the documents Ex. P/1 to P/126. In his defence, the accused examined R.N. Thakur (DW-1), the then Joint Director, Industrial Training Institute, Bhopal, and exhibited the documents Ex.D/1 to D/11.

7. Learned trial judge, mainly relying on the evidence of complainant N.R. Borle (PW-3), Dr. D.C.Pyasi (PW-6) and Dy. Supdt. of Police, M.S. Nain (PW-21), held the accused guilty and convicted and sentenced him as mentioned above.

8. Shri S.C. Datt, learned senior counsel for the appellant/accused submitted that the evidence of complainant N.R. Borle (PW-3) was wholly unreliable. The trial Court erred in holding that the demand of bribe by the accused was proved beyond doubt. Except the sole evidence of complainant, there was no corroborating evidence. The complainant entertained a grudge against the accused, as he apprehended action of his removal at his hands, as there were number of complaints by the employees against him and there was recommendation of his removal by the Joint Director of the Department. The evidence of tape recording of the conversation was itself disbelieved by the trial Court, as no intelligible sounds were found in the tape recorder, when played before the Court. During the trap proceeding, no shadow witness was kept, who could have given the correct account of the conversation which took place between complainant and the accused. It was admitted by the complainant that he had written letter to MLA Mr. Daga about the transfer of employees of the department without obtaining permission from the officers for the reason that he suspected that accused would favour the employees, who opposed him. Counsel submitted that the seizure of money kept

on the stool under a pillow indicated that the accused had not accepted the money and had no knowledge of the same. It could not be held that he was in conscious possession of the money. It was established that he did not touch the money even when he was all alone in the room, which was proved by the fact that the solution of the sodium carbonate did not turn pink when his hands were washed with. On the other hand, Shri Aditya Adhikari, learned counsel for the S.P.E., Lokayukta, submitted that the evidence of complainant was wholly reliable. Since it was established that there had been a telephonic talk between complainant and the accused and it was categorically stated by the complainant that accused had made demand, it was established that accused made demand of bribe. Merely by seizure of currency notes from the stool, it could not be held that the money was not accepted by the accused. It was proved by the complainant that accused had asked the complainant to put the bundles of notes on the stool. According to him, the finding of conviction recorded by the trial Court was fully justified.

9. We have heard the learned counsel for the parties and perused the impugned judgment and evidence on record carefully.

10. Before us, learned counsel for the appellant has not challenged the validity of the sanction order (Ex.P/77). This order was proved by Under Secretary Shri D.P. Khatri (PW-13). Admittedly, the accused was an I.A.S. Officer of M.P. Cadre and he could have been removed only by Government of India. The sanction order (Ex.P/77) was passed by the Under Secretary to the Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training. It was by order and in the name of the President of India. After going through the sanction order, we find that the Union Government had granted valid sanction for prosecution of the accused. It is not disputed that at the relevant time the accused was a public servant.

11. Shri S.C. Datt, learned senior counsel, appearing for the appellant, submitted that the evidence of N.R.Borle (PW-3), bribe giver, was not reliable. He was an interested witness having grudge against the accused. There was no corroboration with regard to the alleged demand of bribe by the accused and since the bribe money was recovered lying on a stool under the pillow even untouched by the accused, the explanation given by the accused that he was innocent and the money was planted by the complainant or any other member of the trap party appeared reasonable and probable. This was further reinforced by the fact that the hands of accused did not turn red when washed with chemical solution of sodium carbonate. He placed reliance on *Ayyasami v. State of T.N.*-AIR 1992 SC 644.

12. On examining the evidence of complainant N.R.Borle (PW-3) in respect to acceptance of bribe, we find that firstly when he made a call to accused, he called him at Mantralaya, Vallabh Bhawan and after some time when he again talked to him, he called him to the Room No.204 of Hotel Nisarg. B.R. Vishwakarma

(PW-2) Dy. Secretary of Technical Education and Training Department stated that on 18.2.2002 a meeting of Lok Lekha Committee was called in the Department of Education Mantralaya, Vallabh Bhawan. Accused and other officers of Technical Education were invited in the meeting. Meeting was held in the room of the Secretary, Technical Education. It appears quite improbable that the accused would have asked complainant to handover bribe money to him in Vallabh Bhawan where the meeting of officers was being held. It also seems unnatural that accused, who asked the complainant to bring money, did not take the money in his hand and directed the complainant by gesture to put it on the stool without even touching it. According to complainant (PW-3), he twice asked the accused whether he should put the money on the table, but he did not speak and merely asked him to call Yadav, his driver. Admittedly, there was no shadow witness, who could have heard or seen what transpired between the accused and the complainant at that juncture. Though a micro cassette recorder was provided to complainant to record the conversation, taking place between him and the accused, but when the said cassette was played before the Court, except a noise of fan, nothing was found discernible. This throws a thick cloud of suspicion on the veracity of the evidence of complainant. Probably, because of the fact that there was a tape recorder, which was recording the conversation going on in the room, the complainant gave the story that accused did not speak and only made a gesture. This part of his evidence finds no corroboration from any other piece of evidence. The transcript of the tape recorder, prepared by the trap party, cannot be accepted as a substitute of the tape recording itself.

13. Another fact, which goes against the prosecution, is that the hands of the accused were not found containing traces of phenolphthalein. According to complainant, when he left the room of accused and went to call driver Yadav, then, after receiving his signal, trap party came and he, Yadav and the members of the trap party asked the accused to open the door. As soon as door was opened and the trap party was introduced to accused, hands of accused were washed and the tape recorder was taken from complainant by the Dy. S.P., M.S. Nain (PW-21) and they all became busy in playing the tape recorder and preparing the script. The complainant got so busy that he even did not sign the final memorandum of the proceeding. After some time, the pillow was removed from the stool and the currency notes were found. It cannot be assumed that when complainant had left the room and accused had closed the door from inside, he would not touch the money and let it lie there where the complainant had kept the same. He would have certainly taken care of the money and kept it somewhere as soon as the complainant had gone and before he expected his driver to come. D.C. Pyasi (PW-6) stated that when he alongwith the trap party entered the room of the hotel and asked the accused about the bribe money, he did not say anything, then all the members of the trap party searched everywhere in the room and

when Dr.V.B. Shrivastava removed the pillow, they found two bundles of currency notes on a stool. Dr. V.B. Shrivastava, who is said to have removed the pillow, was not examined before the Court. Dr. D.C.Pyasi (PW-6) admitted that about 10-12 persons of the trap party had entered the room and they had not given their search before their entering the room. According to him, the complainant himself pointed out the place where the money was kept. There appears discrepancy in the evidence of this witness, at one place he stated that the members of the trap party searched for money at all places in the room whereas at another place he stated that the complainant pointed out where the money was kept. Similar statement was given by Dy.S.P., M.S. Nain (PW-21). M.S.Nain admitted that though he had directed Dr.D.C. Pyasi (PW-6) to accompany the complainant when the money was delivered to accused and to hear the conversation, but Dr. D.C. Pyasi (PW-6) did not do it. He also admitted that after about half an hour after their entering in the room he asked about the bribe money and that before the pillow was picked up from the stool, the hands of members of the trap party and the complainant were already washed. This gives some idea about the gap of time between their entry in the room and actual recovery of money.

14. In *Ayyasami* (supra) the Apex Court observed:

> "We have heard learned counsel for parties. There is no independent evidence to show that the appellant demanded Rs.100/- as bribe from the complainant. The chemical solution did not inculpate him. The money was recovered from the drawer. There is no evidence apart from the complainant to show that the money was placed in the drawer by the complainant at the asking of the appellant. Under the circumstances we agree with."

15. Learned counsel for the State placing reliance on *B.Noha v. State of Kerela*-(2006) XII SCC 277 argued that if the evidence shows that when complainant told to accused that he had brought the money, as directed by the accused, the accused asked him to take a cut and give the same to him and when it was proved that there was voluntary and conscious acceptance of money, there was no further burden cast on the prosecution to prove by direct evidence, the demand or motive. It had only to be deduced from the facts and circumstances obtained in a particular case. He further placed reliance on the case of *State of A.P. vs. Jeevratnam*-(2004) VI SCC 488, where the complainant had booked a room and money was handed over to accused in the room of the hotel. In that case, complainant deposed that the accused asked whether he had brought the money demanded as a bribe, he then opened his bag and offered the marked currency amounting to Rs.10,000/-, but the accused asked him to put the money into the briefcase and, therefore, he put the amount into the briefcase. Accused took the briefcase and was about to leave the room when he gave the prearranged signal and CBI nabbed the accused.

In those circumstances, the Apex Court held that by the evidence it was clearly established that accused demanded and accepted the money.

16. In *M.W. Mohiuddin v. State of Maharashtra*-(1995) 3 SCC 567 also situation was somewhat similar. Accused had asked the complainant to wrap the money in the handkerchief and to keep the money so wrapped in a bag. Bag was kept on a cot in front of room. Apex Court held that the accused had obtained the money as it was under the hold and control of the accused.

17. In all the aforesaid cases the testimony of complainant was found reliable and stood corroborated either by the evidence of a shadow witness or some other kind of evidence, but the situation in the present case appeared otherwise.

18. In *Pannalal Damodar Rathi v. State of Maharashtra*-AIR 1979 SC 1191, the Apex Court had held that:

> "There could be no doubt that the evidence of the complainant should be corroborated in material particulars. After introduction of Section 165-A of the IPC making the person who offers bribe guilty of abetment of bribery, the complainant cannot be placed on any better footing than that of an accomplice and corroboration in material particulars connecting the accused with the crime has to be insisted upon."

19. In *State of T.N. Vs. Krishnan & another*- 2001 AIR SCW 241, the Apex Court observed:

> "That apart, it is an admitted case that the amount of Rs.4000/-, tainted money, which is alleged to have been demanded, was recovered from under a pair of trousers from the cot in room No.19 at Tilak Lodge by the trap party. According to respondent No.1, he was in bathroom and, when he came out, he found PW-1,2 and 3 sitting on the cot when the raid party suddenly appeared and picked up the amount of Rs.4000/- from under a pair of trousers. The fact that PW-1,2 and 3 were already sitting on the cot where the pair of trousers was lying from underneath which the amount was recovered is not disputed. Under these circumstances, it does probablize the defence version given by the respondents that the bribe money was planted by PW-1,2 and 3, who were engaged in illicit distillation and sale of Arrack, to falsely trap the respondents, who were serving in the Prohibition Wing of the Police, by placing the amount under the trousers of the respondent No.1."

20. Distinguishing *Pannalal Damodar Rathi* (supra) in *M.O.Shamsudhin v. State of Kerala*-(1995)3 SCC 351 the Apex Court held that:-

> "The person offering a bribe to a public officer is in the nature of

an accomplice in the offence of accepting illegal gratification but the nature of corroboration required in such a case should not be subjected to the same regorous tests which are generally applied to a case of an approver. Though bribe-givers are generally treated to be in the nature of accomplices but among them there are various types and gradations. In cases under the Prevention of Corruption Act the complainant is the person who gives the bribe in a technical and legal sense because in every trap case wherever the complaint is filed there must be a person who has to give money to the accused which in fact is the bribe money which is demanded and without such a giving the trap cannot succeed.....

In trap cases if any of the witnesses are accomplices who are particeps criminis in respect of the actual crime charged, their evidence must be treated as the evidence of accomplices is treated; if they are not accomplices in that sense but are only partisan or interested witnesses who are concerned in the success of the trap, their evidence must be tested in the same way as other interested evidence is tested which may vary from case to case and the corroboration in the case of such interested witnesses can be in a general way and not as one required in material particulars as in the case of an approver. .....in such cases at the most he can be treated as an interested witness and whether corroboration is necessary or not will be within the discretion of the court depending upon the facts and circumstances of each case. However, as a rule of prudence, the court has to scrutinise the evidence of such interested witnesses carefully."

Thus, the complainant can be treated as and interested witness and his evidence has to be scrutinized carefully. If the evidence of complainant is found reliable and finds some corroboration, it can be acted upon.

21. The factual situation in the present case is somewhat different. Here, according to the complainant, though money was kept on a stool on the indication of the accused, but except the uncorroborated testimony of the complainant, there is no other evidence in that regard. Though the conversation, which took place between accused and the complainant, was allegedly recorded in a micro cassette recorder, but that was not found containing any such conversation. Even though a shadow witness was instructed to accompany the complainant, but that was not done and, apart from all that, the trap party entered the room and without giving its search, after about half an hour, after their entry in the room, on the pointing of the complainant, recovered the tainted currency notes from a stool kept underneath a pillow.

22. It is essential for holding the possession and acceptance of the bribe money by the accused that it was voluntary and conscious.

23. Shiv Sagar Rai (PW-14), Purchase Manager of Hotel Nisarg, who proved various bills of the hotel to establish that accused had stayed in his hotel on 18.2.2002, admitted that on that day lunch was served to accused on 13.23 hours in room No.204. His bill was Ex.P/49, which was prepared by the computer. The bill (Ex.P/49) contained the signature of the accused also. This fact probablizes the explanation furnished by the accused that at about 1.23 p.m. he had taken meals. The burden on the accused to prove his explanation or the defence is not the same as lie on the shoulders of the prosecution. If the explanation furnished by the accused is substantiated to probablize his defence, it discharges the burden of accused.

24. After carefully appreciating the evidence of complainant N.R. Borle (PW-3), Dr. D.C. Pyasi (PW-6) and Dy.S.P., M.S. Nain (PW-21), we are unable to hold that the tainted money recovered from the room of the hotel could be deemed to be in the voluntary or conscious possession of the accused. In these circumstances, the possibility that the explanation given by the accused that the currency notes were planted by the complainant or any of the member of the trap party, when he had gone in the bathroom for washing his hands after taking meals, could not be ruled out.

25. As far as question of demand of bribe by the accused is concerned, again there is sole evidence of complainant (PW-3). We have already discussed that there was no shadow witness in the case. Therefore, whether any demand was made by the accused at the time of delivery of bribe money to accused, except the evidence of complainant (PW-3), there is no other evidence. Though, according to prosecution, complainant was given a micro cassette recorder and he recorded the conversation, which took place between him and the accused, yet the said tape was not found audible. In the absence of the said tape recorded version, the transcript prepared by the investigating officer and other witnesses cannot be accepted.

26. According to complainant, (PW-3), since he had deposited the amount of salary of the employees in his personal account, a complaint was made against him, which was enquired on the orders of Collector, Betul. This enquiry was done by ADM Mr. Shrivastava on 4.9.2001. After about one month of that, accused telephoned him that he had misused the money of employees, therefore, he would suspend him. Despite the fact that he tried to pursue him that there was no fault on his part, the accused told that there would be an enquiry. On 6.2.2002, when he went to Jabalpur and met accused, he demanded Rs.1 lac and he further asked him to bring Rs.1 lac from Security Officer S.R.Kewate also. When he asked Kewate for Rs.1 lac, he refused to give. According to complainant, again on 11.2.2002, accused telephoned him and made a demand of money. When he

replied that he could not arrange the same, accused threatened him that he will have to face consequences, he then went to Bhopal to make a complaint in the office of Lokayukta. He arranged Rs.1 lac by borrowing loan from the Bank and went to Bhopal and submitted a written complaint (Ex.P/7). In cross-examination, complainant (PW-3) stated that in fact the accused had telephoned him after about 2-3 months of 1.9.2001. His earlier version that accused telephoned him after about one month of 4.9.2001 was not correct. It is quite possible that the phone might have come in the month of December and for the first time after receiving the phone from the accused, he had gone to Jabalpur on 6.2.2002. On 6.2.2002, accused told him that he would be suspended. Again he stated that accused had told about his suspension on 1.2.2002. He admitted that since before 6.2.2002 complaints were being made against him by the employees of his department and, an enquiry was being done by the Joint Director. Complainant (PW-3) repeated that accused had made demand of Rs.1 lac on 1.2.2002. However, the fact that the accused made demand of money on 1.2.2002 was found absent in the complaint (Ex.P/7) and his police statement (Ex.D/5). On being confronted with the aforesaid previous statements, complainant (PW-3) stated that on 2.2.2002 accused had told him that he should meet him at his residence, otherwise he would take action against him, but it was not correct that on 2.2.2002 he demanded Rs.1 lac from him. At a later stage, again he stated that he had informed to police that demand of Rs.1 lac was made on 2.2.2002 and on his not doing so accused had told him that he would be suspended, but these facts were found missing in Ex.P/7 and Ex.D/5. The evidence of this witness is discrepant pertaining to above fact because every time he changed his version. He ultimately said that the demand of Rs.1 lac was made on 6.2.2002.

27. Learned counsel for the appellant submitted that this witness [N.R. Borle (PW-3)] was telling so many lies that it was not safe to place reliance on his statement. In para-19 of his statement, he stated that he had gone to Jabalpur for meeting the accused on 4.2.2002 and had come back to Betul on 6.2.2002. According to him, from 4th February 2002 to 6th February 2002 he was not present in his office at Betul. However, in the attendance register (Ex.D/1), his initials were found on 5th and 6th February 2002, but, subsequently, by overwriting, the words 'O.T.' (On tour) were recorded. He denied the suggestion that he made manipulations in the original attendance register (Ex.D/1) after the trap of the accused was conducted. Though he manipulated his initials of attendance on 6th February 2002, yet at another place from 'C to C' his initials were intact, which were made after checking the attendance of other employees. He admitted that he did not submit any TA bill for 6.2.2002. He was unable to say whether it was some official work, though he spent fare of Rs.100/- on each side and stayed for three days in a hotel in Jabalpur. He even did not remember the name of hotel. He did not submit any TA bill because he had gone to Jabalpur on some oral orders.

He admitted that though whenever he went on tour, he obtained a certificate from the Directorate in proof of attendance, but he did not obtain any certificate in respect of 5th and 6th February 2002. On 6.2.2002, he met accused at his bungalow where he made demand of Rs.1 lac from him and also instructed him to bring Rs.1 lac from Kewate. According to this witness, he did not ask the accused as to for what purpose he should bring Rs.1 lac from Kewate. According to him, he asked Kewate that Rs.1 lac was demanded by accused from him, but Shantaram Kewate (PW-15) denied that N.R. Borle (PW-3) told anything to him.

28. On close examination of the evidence of complainant, N.R. Borle (PW-3), we find that his evidence in respect to demand of Rs.1 lac by way of bribe by the accused is discrepant and contradictory.

29. R.N. Thakur (DW-1), Joint Director of the Industrial Training Institute, proved the documents Ex.D/2 and Ex.D/3, which were respectively the applications for grant of casual leave and permission to leave the headquarter on 11th and 12th February 2002. According to R.N.Thakur (DW-1), N.R. Borle sent an application for grant of casual leave and another for grant of permission to leave the headquarter on 11th and 12th February 2002. He had sanctioned the leave as well permission to leave the headquarter.

30. Learned counsel for the appellant submitted that from the record, the evidence of complainant that accused talked to him on phone on 11.2.2002 when he was at his house at Betul and demanded money stands belied. Though the accused tried to explain that he had gone on leave only for one day i.e. on 11.2.2002 and had got his leave for 12.2.2002 cancelled, yet merely by making a phone call by accused, it is not established that accused demanded bribe from him on telephone. At, all the steps in the case, there is only sole testimony of complainant in regard to making of demand of bribe by the accused. There is absolutely no independent corroboration. Even if the complainant, the bribe giver, is an accomplice, yet, in our opinion, in view of the proposition given by the Apex Court in *M.O.Shamsuddin* (supra) he should be categorized as an interested witness. The testimony of an interested witness can be accepted if it is unbiased and reliable. R.N. Thakur (PW-25) deposed that a letter (Ex.P/25) was issued by the accused on 7.2.2002 directing all the principals of the institutions to furnish information about the employees, who were posted at one place since last 10 years. This information was sought for the transfer of such employees. He also proved number of complaints made against Mr. Borle in respect of which accused had ordered enquiry against him. R.N. Thakur had also recommended that on the post of head of the institution only such person should be appointed, who was not inferior to the cadre of Superintendent, Mr. N.R.Borle was an employee of lower cadre. In these circumstances, it can readily be inferred that N.R. Borle (PW-3) must have entertained some grudge against the accused, as he would have expected some

action at his hands against him. In such circumstances, the evidence of complainant N.R.Borle (PW-3) could not be held to be wholly reliable in the absence of some kind of independent corroboration. Though, these circumstances on one hand may furnish evidence of motive on the part of accused to make a demand of bribe, yet they also probablize that the complainant might have cooked up a false story of demand of bribe with a view to save himself from any kind of action against him at the hands of accused. It is well settled that if two inferences are possible from a set of evidence, the inference favouring the accused has to be accepted. In the fact situation of the present case, we do not find it safe to rely on the evidence of complainant N.R. Borle (PW-3) on the question of demand of bribe allegedly made by the accused.

31. We are of the view that the trial Court has not appreciated the evidence on record in proper and correct perspective while recording the finding of conviction of accused. The prosecution has failed to establish beyond reasonable doubt that accused/appellant demanded and accepted the bribe.

32. For the reasons aforesaid, this appeal is allowed. The impugned judgment of conviction and sentence passed by the trial court is set aside. Appellant is acquitted.

Appeal allowed.

I.L.R. [2010] M. P., 1645
APPELLATE CRIMINAL
Before Mr. Justice S.L. Kochar & Mr. Justice S.K. Seth
5 January, 2010*

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

A. **Penal Code (45 of 1860), Section 302 - *Murder - Blood - Simple blood was found on axe, clothes - Presence of simple blood cannot be used as conclusive and substantive evidence against appellant.*** (Para 9)

क. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – रक्त – कुल्हाड़ी, कपड़ों पर साधारण रक्त पाया गया – साधारण रक्त की उपस्थिति को अपीलार्थी के विरुद्ध निश्चायक और सारभूत साक्ष्य के रूप में प्रयुक्त नहीं किया जा सकता।

B. **Penal Code (45 of 1860), Section 302 - *Murder - Circumstantial evidence - Wife was seen lastly in the company of accused - No explanation given by accused regarding whereabouts of his wife - Accused also cremated body of his wife without informing anybody - No explanation given by***

*Cr.A. No.1304/2000 (Indore)

accused in this regard - Only inference could be drawn is that appellant committed murder of his wife - Appeal dismissed. (Para 13)

क. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – परिस्थितिजन्य साक्ष्य – पत्नी अंतिमतः अभियुक्त के साथ देखी गयी – अभियुक्त द्वारा अपनी पत्नी के पते के सम्बन्ध में कोई स्पष्टीकरण नहीं दिया गया – अभियुक्त ने किसी को सूचना दिये बिना अपनी पत्नी के शरीर का दाहसंस्कार भी कर दिया – अभियुक्त द्वारा इस सम्बन्ध में कोई स्पष्टीकरण भी नहीं दिया गया – केवल यह निष्कर्ष निकाला जा सकता था कि अपीलार्थी ने अपनी पत्नी की हत्या की – अपील खारिज।

Case referred :

(2007) 3 SCC (Cri) 716.

Sanjay Sharma, for the appellant.
Girish Desai, Dy.A.G., for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by **S.L. Kochar, J. :–**The appellant has filed this appeal against the judgment and order of conviction and sentence passed by the learned IInd Additional Sessions Judge, Mandsaur in Sessions Trial No.115/2000 by which the appellant stands convicted under Section 302 & 201 of the IPC and sentenced to undergo life imprisonment with fine of Rs.500/- with defaulting clause of imprisonment of six months RI and three years RI respectively

2. According to the prosecution case, Pooralal (PW/5), Choukidar of village Dhandi, police station Suwasara had given information to concerned police station on 18.04.2000 in the morning at 06.00 A.M that he was informed by his brother in the night that wife of the appellant had died and appellant alone took her dead body to the cremation ground and cremated. On the basis of this report, Marg report 7/2000 (Ex.P/3) was recorded. The Station House Officer of the police station Shri Anand Kumar Yadav (PW/8) had gone to the village and after recording the statements of the witnesses prepared Dehati Nalisi Ex.P/13 as well as spot map Ex.P/14. Appellant was arrested and in presence of the witnesses interrogated by Shri Yadav. Appellant gave statement for recovery of axe and the same was recovered at his instance through seizure memo Ex.P/7. Ex.P/5 is his memorandum of statement. Appellant made extra judicial confession before Gamersingh (PW/1) and Bapulal (PW/2) saw the appellant while beating his wife in the evening preceding the evening of lodging of Dehati Nalisi. The Station House Officer has also seized the ash and bones through memorandum of statement Ex.P/6 and seizure memo Ex.P/9. From inside the house blood stained and controlled earth were also seized. Blood stained shirt of the appellant was also seized by the investigating officer. Exs.P/15 and P/16 are the photographs of the house of the appellant and cremation ground of the village. All seized articles were sent to the Forensic Science Laboratory and its report is Ex.P/17. On due

investigation, appellant was charge sheeted for commission of offence under Sections 302 & 201 of the IPC.

3. Appellant refuted the charges and pleaded innocence. He examined Ramesh (DW/1), his brother, in his defence. According to Ramesh, he was informed by the villager when he reached in the village that wife of the appellant had committed suicide by consuming poisonous substance (Choohe Ki Dawa) and the cremation was performed by the villagers. Learned trial Court found the prosecution case proved against the appellant; convicted and sentenced him as indicated herein above.

4. We have heard learned counsel for the parties and also perused the entire record thoroughly. Learned counsel for the appellant has submitted that prosecution has failed to prove its case beyond reasonable doubt and learned trial Court without any positive evidence gave finding in paragraph-21 of the impugned judgment regarding proof of circumstantial evidence that appellant was having doubt on the character of his wife, prior to her death they were having verbal altercation and appellant gave beating to her, appellant cremated the body without any intimation to the police or any other responsible authority and recovery of blood stained axe, soil and shirt at the instance of the appellant.

5. On the other hand learned counsel for the State has supported the impugned judgment and finding of the learned trial Court.

6. It is clear from the record that prosecution case was based on circumstantial evidence and the first circumstance which was found proved by the learned trial Court that appellant was having doubt on the chastity of his wife is not proved at all by the prosecution. There is not an iota of evidence in this regard but there is positive evidence on record that appellant was seen lastly in the company of his wife in his house and he was beating her. This has been established from the statement of Bapulal (PW/2), who gave information in this regard to his brother. In cross examination of this witness nothing substantial has come to corod his testimony.

7. Learned trial Court sought corroboration to the circumstantial evidence as found proved mentioned in para-21 from the evidence of Gamersingh (PW/1) regarding extra judicial confession but in our considered view the statement of this witness on this aspect cannot be accepted upon because in cross examination he has specifically stated that he did not disclose about the extra judicial confession made to him by the appellant to police or anybody in the village or even to his family members meaning thereby for the first time he had given statement in this regard before the Court, therefore, his testimony is not worthy placing reliance for extra judicial confession made to him by the appellant. It is clear from the statement of Bapulal (PW/2) and Pooralal (PW/5) village Choukidar that deceased was seen lastly in the house of the appellant in his company and there is absolutely no direct or circumstantial evidence showing the fact that wife of the appellant

was assaulted by anybody else or taken away by anybody or eloped and not traceable. No such report was lodged by the appellant or his relatives or even village Choukidar. On the contrary there is positive admission of Gamersingh (PW/1) in cross examination (paragraph-5) on suggestion given by defence counsel that on the date of incident wife of the appellant reached at his house from her parents' house.

8. Pooralal (PW/5), village Choukidar, has deposed that after receiving information of death of wife of the appellant and cremation of the dead body by the appellant on cremation ground, he immediately reached the cremation ground and saw burning of one dead body. He immediately went to police station and lodged report Ex.P/3. Thereafter investigating officer Shri Yadav (PW/8) reached the village and recorded the statements of the witnesses as well as interrogated the appellant.

9. On the basis of the memorandum of statement Ex.P/5 given by appellant regarding hiding of axe inside the house, the axe was seized vide seizure memo Ex.P/7. From inside the house blood stained and controlled earth were also seized vide seizure memo Ex.P/8. All these documents and evidence have been properly proved by Pooralal (PW/5) and investigating officer Shri Yadav (PW/8). On axe, earth and on the shirt of the appellant simple blood was found. The.presence of simple blood cannot be used as a conclusive and substantive evidence against the appellant.

10. The appellant has not taken any positive defence regarding death of his wife and merely suggestion given to the prosecution witness in cross examination that his wife committed suicide would not be sufficient to accept. The Supreme Court in the case of *Rajkumar Prasad Tamarkar Vs. State of Bihar and another* (2007) 3 SCC (Cri.) 716 has held that "when at the time of occurrence only the wife and the husband were present in the house and when there was homicidal death and there was no possibility of entrance of anybody else in the house and causing of injury to the wife by any other person, the burden lies on the accused husband to explain as to how his wife has died."

11. In the instant case in accused statement recorded under Section 313 of the Cr.P.C, appellant has not given any explanation and simply denied or expressed his ignorance regarding circumstances appearing against him. Even he has not stated that his wife was alone in the house and he had gone somewhere else.

12. The statement of defence witness Ramesh (DW/1), brother of the appellant, is not admissible in evidence being hit by law of hearsay evidence as per the provisions under Section 60 of the Evidence Act regarding information received by him from villagers that wife of the appellant committed suicide, therefore, his evidence is of no assistance to the defence of denial of the appellant.

13. It is well settled legal position that when accused is seen lastly in the company of the deceased and no explanation has been given by the accused regarding the whereabouts of the deceased then reasonable presumption would be that he committed murder of the deceased. In the instant case, appellant has also cremated body of his wife and no reasonable and plausible explanation has been given by him in his accused statement, therefore, the only inference that can be drawn against him is that he committed murder of his wife. In our opinion, prosecution has proved the case beyond reasonable doubt against the appellant on the basis of the above mentioned circumstances.

14. Thus we do not find any merit in this appeal. The appeal is hereby dismissed.

Appeal dismissed.

I.L.R. [2010] M. P., 1649
APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saksena & Mrs. Justice Sushma Shrivastava
27 January, 2010*

CHARAN SINGH & anr. ... Appellants
Vs.
STATE OF M.P. ... Respondent

Evidence Act (1 of 1872), Section 32 - ***Dying declaration*** - *Deceased stated that she was forcibly taken to Atari by all family members including accused persons and set fire to her - Investigating Officer deposed that there was no regular staircase for going into Atari and there was only a ladder by which at a time only one person could climb up or down - Held - It appears improbable and impossible that accused persons could have taken a healthy woman forcibly on Atari by climbing ladder - Possibility that out of frustration and infuriation deceased might have committed suicide and because she decided to end her life, due to insulting behaviour of accused persons, out of rancour, she might have made accusation of setting fire by them cannot be ruled out - Appeal allowed.* (Paras 11 to 14)

साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – मृतक ने कथन किया कि अभियुक्त व्यक्तियों सहित परिवार के सभी सदस्यों द्वारा उसे बलपूर्वक अटारी पर ले जाया गया और उसे आग लगा दी – अन्वेषण अधिकारी ने कथन किया कि अटारी में जाने के लिए कोई सामान्य सीढ़ियाँ नहीं थीं और केवल एक नसैनी थी जिसके द्वारा एक बार में केवल एक व्यक्ति ऊपर चढ़ या उतर सकता था – अभिनिर्धारित – यह असंभाव्य और असंभव प्रतीत होता है कि अभियुक्त व्यक्ति एक स्वस्थ स्त्री को बलपूर्वक नसैनी पर चढ़ाकर अटारी पर ले जा सकते थे – आशंका कि हताशा और क्रोध द्वारा मृतक आत्महत्या कर सकती थी और क्योंकि अभियुक्त व्यक्तियों के अपमानजनक

*Cr.A. No.2151/2003 (Jabalpur)

व्यवहार के कारण उसने अपना जीवन समाप्त करने का निश्चय किया, विद्वेषवश वह उनके द्वारा आग लगाने का दोषारोपण कर सकती थी, वर्जित नहीं की जा सकती है – अपील मंजूर।

Cases referred :

AIR 1976 SC 2199, AIR 1976 SC 1994.

Madan Singh, for the appellants.

S.K. Rai, G.A., for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by RAKESH SAKSENA, J. :–Appellants have filed this appeal against the judgment dated 18.11.2003 passed by Second Additional Sessions Judge, Damoh in Sessions Trial No. 226/2002, convicting the appellants under Section 302 read with Section 149 and Section 147 of the Indian Penal Code and sentencing them to imprisonment for life with fine of Rs. 1000/- and rigorous imprisonment for two years , on each count respectively.

2. In short, the prosecution case is that on 18.4.2002, Durga Bai (deceased) was brought to District Hospital Damoh in burnt condition. She was examined by Dr. Y.P.Patel (PW8). Dr. Patel sent a requisition to Station Officer of City Kotwali, Damoh to get the dying declaration of Durga Bai recorded. Naib Tahsildar/ Executive Magistrate O.P.Sharma (PW7) went to hospital for recording the dying declaration and after obtaining the certificate from Dr.Rakesh Rai (PW13) that Durga Bai was fit to give her statement recorded her dying declaration (Ex.P/9) on the same day at about 7.40 P.M. Durga Bai stated that when she asked her husband and father-in-law to arrange for a separate house for her living, they maltreated her; Charan Singh, her husband; Shiv Singh father-in-law; her mother-in-law; Jithani Sheelabai and Halki Chachi took her to `Atari' and set her on fire. As a result of burn injuries, on 22.4.2002 Durga Bai died. Dr. P.K.Jain (PW9) conducted the postmortem examination and found 65% burn injuries on her body. A merg was registered, and the case was sent for investigation to police station, Nohta. Police registered the first information report under Section 302/34 of the Indian Penal Code against all the six accused persons. During investigation, S.D.O. Police M.B.S. Jaggi (PW12) prepared the spot map (Ex. P/4) and seized the burn clothes, quilt, kerosene kuppi etc. from the spot. Since accused Sheela Bai, Jamuna Bai, Bhuri Bai and Gudda remained absconding, only the appellants were tried.

3. Before the trial Court, prosecution examined 13 witnesses and adduced the dying declaration (Ex. P/9) recorded by Naib Tahsildar/Executive Magistrate O.P.Sharma (PW7). Accused persons pleaded false implication. According to them, Durga Bai had committed suicide by self igniting her. They also examined Munna singh (DW1) in their defence. Relying only on the evidence of dying declaration, learned trial Judge held the appellants guilty and convicted and sentenced them as mentioned above.

4. Shri Madan Singh, learned counsel for the appellants submitted that before the trial Court the father, mother and brother of deceased did not support the prosecution story. According to them, the relations between the deceased and the accused persons were cordial. There was no motive for the accused persons to set fire to deceased. The dying declaration given by Durga Bai was not true, in fact she had committed suicide because of the frustration and misbehavior done to her by the accused persons. It was not possible or probable for the accused persons to have forcibly taken the deceased to 'Atari' i.e. upper story of the house because there was no regular staircase. It was not possible for the deceased to have made the dying declaration because of 75% burn injuries on her body. Trial Court committed error in placing implicit reliance on the alleged dying declaration.

5. On the other hand, Shri S.K.Rai, learned counsel for the State submitted that the evidence of dying declaration was wholly reliable, it suffered with no infirmity. It was made by Durga Bai when she was in fit state of mind to make the statement. He justified the finding of conviction and sentence of the appellants recorded by the trial Court.

6. We have heard the learned counsel of both the parties and perused the impugned judgment and record of the trial Court carefully.

7. Dr.Y.P.Patel (PW8) deposed that on 18.4.2002, he was posted as Assistant Surgeon in District Hospital Damoh. On that day, at about 5 P.M. Durga Bai was brought to the hospital. She was fully conscious. She had superficial burn injuries on her face, neck, forearms, chest, abdomen and whole back side of the body. There were blisters and her hair were singed. Smell of kerosene was emanating from her body. He had given his report Ex. P/10. From the evidence of Dr. Patel, it is evident that on 18.4.2002, Durga Bai had suffered burn injuries.

8. Hari Singh (PW1), Chhitar Singh (PW2) and Neema Bai (PW3) deposed that due to burn injuries Durga Bai died. A merg intimation Ex. P/12 was recorded by Head Constable Purshottam (PW10), according to which, Durga Bai died in the hospital on 22.4.2002. Dr. P.K. Jain (PW9) deposed that he conducted the postmortem examination of the body of Durga Bai and found burn injuries on her face, front and back side of body and forearms. There were 65% burns on her body. The cause of her death was secondary infection due to burn injuries. From the above evidence, it is proved that Durga Bai died on 22.4.2002, due to burn injuries, she suffered on 18.4.2002.

9. The next question before us is that who caused burn injuries to Durga Bai. No eye witness account is available in the case. According to prosecution, Durga Bai told to her family members that she was burnt because of the dispute about the room, but these witnesses viz. Hari Singh (PW1), Chhitar Singh (PW2), Neema Bai (PW3) and Bahadur (PW6) did not support the prosecution case. They deposed that Durga Bai did not tell them that the accused persons set fire to her. All these

witnesses were declared hostile. Apparently, prosecution did not get any help from the evidence of these witnesses. Thus there remained only the evidence of dying declaration (Ex. P/9) which was recorded by Executive Magistrate O.P.Sharma (PW7). According to O.P.Sharma, on 18.4.2002 he was posted as Naib Tahsildar at Damoh. He received a requisition from police Nohta for recording dying declaration of Durga Bai, wife of Charan Singh. He went to hospital and found Durga Bai on bed No.4 of the Government Hospital. He sought verification from the doctor that she was in a fit condition to give her statement. He, then recorded the dying declaration at about 7.40 P.M. In the dying declaration, Durga Bai stated that "the name of her husband was Charan Singh; she was resident of village Rohinikala; she was about 22 years of age. Her father-in-law Shiv Singh set fire to her because she asked him to get a separate house constructed for her as the room in which she was living was very small and all the people used to come in it. Her father-in-law abused and said to her that she should get her house constructed from her parents. When she asked why should they get the house constructed, her husband's younger brother Gudda ran after her to assault with shoes. Her father-in-law told that she was of no use and she should be burnt. They forcibly took her to 'Atari', where her husband Charan Singh and father-in-law Shiv Singh held her hands, mother-in-law poured oil, Jithani Sheela caught her legs and Halki Chachi set fire to her by matchstick. She did not know as to who witnessed the incident as she became unconscious." Her thumb impression was obtained by the Executive Magistrate O.P.Sharma (PW7) on Ex. P/9 and it was signed by him as well as by the doctor who gave verification certificate. In cross examination, this witness stated that since the hands of Durga Bai were burnt and she was unable to sign the dying declaration, he had obtained the thumb impression. According to him, he had obtained her left hand thumb impression though it was not recorded in Ex. P/9.

10. The evidence of Executive Magistrate O.P.Sharma (PW7) finds corroboration from the evidence of Dr. Rakesh Rai (PW13), who deposed that Durga Bai was admitted in surgery ward of District Hospital Damoh. At about 7.35 P.M., Executive Magistrate O.P.Sharma had come to record the dying declaration. Before recording her statement, he had examined Durga Bai and found that she was in a fit condition to give her dying declaration. He had endorsed his certificate in the dying declaration to that effect. He had also certified that she remained conscious throughout while the dying declaration was being recorded. He categorically denied that Durga Bai was unconscious or was not in a position to speak. Trial Court appreciated the evidence of these witnesses and found that the dying declaration Ex. P/9 was correctly recorded and Durga Bai was in a fit condition to make the aforesaid dying declaration. There appears no reason to suspect the veracity of Executive Magistrate and Dr. Rakesh Rai before whom the statement was made and recorded. Apart from that, there is nothing on record

to indicate that these witnesses had any animus against the accused persons or were otherwise interested in getting them prosecuted. On appreciating the evidence of Executive Magistrate O.P.Sharma (PW7) and Dr. Rakesh Rai (PW13), we are of the view that there was no infirmity in recording the dying declaration by them and the dying declaration Ex. P/9 was a correct and genuine document.

11. Learned counsel for the appellant argued that the dying declaration gave by Durga Bai was not correct and truthful version of the occurrence, in fact out of annoyance and frustration she committed suicide by self igniting her and out of rancour and animus made false accusation against the appellants. It was not possible for the accused persons to have carried her to the `Atari' forcibly where there was no staircase and only a ladder was used for climbing. He carried us through the evidence of Investigating Officer M.B.S. Jaggi (PW12) and also the statements of Hari Singh (PW1), Chhitar Singh (PW2) and Neema Bai (PW3). Investigating Officer (PW12) deposed that deceased resided in a `Kotha' situated on `Atari' i.e. upper floor, rest of the other family members and accused persons lived on the ground floor. Accused Shiv Singh resided at some distance from the residence of deceased. According to him, there was no regular staircase for going into upper `Atari'. There was only a ladder by which at a time only one person could climb up or down. In dying declaration Ex. P/9, Durga Bai stated that the `Kotha' in which she was living was very small and all the persons used to come in it, therefore, she told to her father-in-law for getting a separate house constructed for her, but her father-in-law abused and told her that she should ask her father and mother to get the house constructed. When she retorted that why should they construct the house, her husband's younger brother Gudda ran after her to assault by shoes and her father-in-law told that she was of no use and she should be burnt. They forcibly took her on the `Atari' (`Mujhe Jabardasti Upar Atari Me Pakad Kar Le Gaye') and all the family members including appellants and ladies of the house set fire to her. On strict scrutiny of this statement in the light of evidence of Investigating Officer, it appears improbable and impossible that the accused persons could have taken a healthy young woman forcibly on the `Atari' by climbing a ladder. This throws a thick cloud of suspicion on the truthfulness of the statement made by the deceased. It is also important to note that it was father-in-law Shiv Singh, who carried Durga Bai to hospital immediately after the occurrence. Dr. Y.P.Patel testified that Durga Bai was brought to hospital by her father-in-law and this fact finds place in the M.L.C. report Ex. P/10 also. Hari Singh (PW1), father of Durga Bai deposed that accused Shiv Singh and Charan Singh and other persons had taken Durga Bai to Damoh for the treatment and at that time, she was unconscious. He also disclosed that accused Shivsingh lived in a separate house which was situated about half a furlong from the house of Durga Bai.

12. It is well settled that the dying declaration ought to be treated with care and

caution since the maker of the statement cannot be subjected to any cross examination. In *Munnu Raja Vs. State of Madhya Pradesh*-AIR 1976 SC 2199, the Apex Court held that:

> " It is well settled that though a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subjected to cross examination, there is neither a rule of law nor a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated. Thus Court must not look out for corroboration unless it comes to the conclusion that the dying declaration suffered from any infirmity by reason of which it was necessary to look out for corroboration."

13. In *K.Ramachandra Reddy Vs. Public Prosecutor*- AIR 1976 SC 1994, the Apex Court observed that:

> " The dying declaration is undoubtedly admissible under S. 32 and not being a statement on oath so that its truth could be tested by cross examination, the Courts have to apply the strictest scrutiny and the closest circumspection to the statement before acting upon it. While great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person, yet the Court has to be on guard against the statement of the deceased being a result of either tutoring prompting or a product of his imagination. The Court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancour. Once the Court is satisfied that the dying declaration is true and voluntary it can be sufficient to found the conviction even without any further corroboration."

14. On a critical appreciation of the circumstances as narrated in the dying declaration Ex. P/9, it can be gathered that at the time of occurrence deceased must be in excessively agitated state of mind because her father-in-law had abused and asked her to get the house constructed for her from her parents and had said that she was a useless woman and the younger brother of her husband had ran after her to beat by shoes. In these circumstances, the possibility that out of frustration and infuriation Durga Bai might have committed suicide after going to her `Atari' and that because she decided to end her life, due to insulting behaviour of accused persons, out of rancour, she might have made accusation of setting fire by them, cannot be ruled out. Since the reliability and truthfulness of the dying declaration cannot be tested by the cross examination of the deceased, we were

constrained to apply the strict scrutiny and the close circumspection to the statement of deceased before acting upon it.

15. For the above reasons, we are not inclined to accept the dying declaration Ex. P/9 as a truthful version of the occurrence in which deceased suffered burn injuries in the absence of any independent corroboration, and in our opinion no implicit reliance can be placed on it. Accordingly, we hold that the finding of the trial Court that appellants caused the death of Durga Bai by setting fire to her is not justified and is, therefore, liable to be set aside.

16. In that view of the matter, the conviction and sentence of the appellants is set aside. The appeal stands allowed and the appellants are acquitted. They are in jail, they be set at liberty forthwith unless required in any other case.

17. Appeal allowed.

Appeal allowed.

I.L.R. [2010] M. P., 1655

APPELLATE CRIMINAL

Before Mr. Justice S.L. Kochar & Mr. Justice S.K. Seth

9 February, 2010*

CHAMPALAL & ors. ... Appellants

Vs.

STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Section 302 - ***Non-explanation of injuries on accused - Effect - If accused has suffered any injury, it is bounden duty of prosecution to explain it in a satisfactory manner - Appellant No. 4 suffered loss of right arm below elbow apart from two incised wounds on chest and parietal region - Appellant No.5 suffered compound fracture of 4th & 5th Metacarpal of left hand - None of prosecution witness has attempted to explain the injuries suffered by appellants - Prosecution story cannot be accepted as wholly reliable - Possibility of defence version that they had acted in private defence as they were attacked while returning from hand-pump cannot be dismissed - Appeal allowed - Appellants acquitted.*** (Paras 8 to 12)

दण्ड संहिता (1860 का 45), धारा 302 – अभियुक्त की क्षतियों का अस्पष्टीकरण – प्रभाव – यदि अभियुक्त को कोई क्षति हुई हो तो अभियोजन का यह बाध्यकारी कर्तव्य है कि उसे समाधानप्रद रूप से साबित करे – अपीलार्थी क्र. 4 को छाती और पार्श्विक क्षेत्र पर दो छिन्न घावों के अलावा कोहनी के नीचे दांये हाथ की हानि हुई – अपीलार्थी क्र. 5 बाँये हाथ की चौथी व पाँचवी करभास्थि (Metacarpal) के संयुक्त अस्थिभंग से पीड़ित हुआ – किसी भी अभियोजन साक्षी ने

*Cr.A. No.1171/2003 (Indore)

अपीलार्थियों को आयीं क्षतियों को स्पष्ट करने का प्रयत्न नहीं किया – अभियोजन कथा को पूर्णतया विश्वसनीय के रूप में स्वीकार नहीं किया जा सकता – प्रतिरक्षा पाठ कि उन्होंने प्राइवेट प्रतिरक्षा के रूप में कार्य किया क्योंकि हैण्ड पंप से लौटते समय उन पर आक्रमण किया गया था, की संभाव्यता खारिज नहीं की जा सकती – अपील मंजूर – अपीलार्थी दोषमुक्त।

Case referred :

AIR 1975 SC 2161.

Rahul Sharma, for the appellants.

G. Desai, Dy.A.G., for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by **S.K. Seth, J.** :–Twelve persons were placed before the 8th Additional Sessions Judge, Ujjain to take their trial under Sections 148;149;302;149:307 IPC and Sections 25,27 of the Arms Act. Seven of these persons have been acquitted and we are not concerned with them any longer but the remaining five have been found guilty, details of offences; convictions and sentences are as under :-

A-1 Champalal s/o Mangilal

A-2 Hazarilal s/o Mangilal

A-3 Gulabsingh s/o Mangilal

A-4 Shobharam s/o Mangilal

A-5 Bhagwansingh s/o Mangilal

Section 302/149 R.I. for life with fine of Rs. 1000/- to each with default stipulation;

Section 148 IPC one year rigorous imprisonment with fine of Rs.500/- with default stipulation to each;

Section 326 IPC 3 years' R.I. with fine of Rs. 1000/- with default stipulation to A-1 and A-3 for causing grievous hurt to Nanuram;

Section 25 r/w 27 of the Arms Act two years' R.I. and fine of Rs. 1000/- with default stipulation to A-1 Champalal and A-4 Shobharam.

Section 324 IPC six months' RI and fine of Rs. 500/- with default stipulation to A-1 Champalal for causing simple hurt to Pappu.

The sentences have been ordered to run concurrently. Against their convictions and sentences, the five appellants have appealed to this Court.

2. The occurrence took place at about 9-10 pm on July 17th 1997 in the village Mitikhedi, a small village under Police Station Badnagar in District Ujjain.

3. Admitted facts at this stage are as under. Deceased Ramchander and the acquitted accused Mangilal are nephew and uncle respectively. There was long pending dispute between them about one Bigha agriculture land leading to civil

litigation and acrimonious relationship. A ready and heady mix for homicidal results. It also appears that accused party had filed a counter-case against the complaint party alleging that they were victims of an attack by Ramchander (Deceased) and his henchmen. This is mentioned in paragraph 47 of the impugned judgment and from the memo of appeal it appears that the counter case was registered as S.T.No. 289/97 and both were tried by the Fast Track Court presided in by 8th ASJ, Ujjain and the counter-case resulted in conviction of Pappu (PW6) and other co-accused under Section 326 IPC. Surprisingly the certified copy of that judgment has not been placed on record of this appeal.

4. The case of the prosecution in brief is as follows: dispute relating to above land forms the motive which led to the fight between complainant party and assailants. Assailants as many twelve came variously armed and attacked the victim party at their house in the village at about 9.30 pm: at that time Ramchander, his son Pappu,(PW6), Ramchander's Brother Nannuram(PW5), wife Suganbai(PW-9) and Dhanaji (PW-10) co-brother-in-law of Ramchander were sleeping in the Parchi. FIR (Ex.P-23) was lodged by Suganbai at about 2 am in the early morning of 18.7.1997 at PS Badnagar. Injured eye witnesses (PW5) Nanuram;(PW6) Pappu; (PW10) Dhanaji and Ramchader were examined by Dr.S.K.Shrivastava(PW8) at Badnagar: their MLC reports are Ex. P-15 to Ex. P-17: Same doctor also examined injuries sustained by some of the assailants, and their MLC are Ex.D-4 (A-3 Gulabsingh); Ex.D-9(A-4 Shobharam) and Ex.D-10 (A-5 Bhagwansingh)Ex.D-13 is the medical report of A-5 Bhgawansingh showing compound fracture distal end of 4th and 5th metacarpal of left hand. Ex.D-14 is the X-ray report of A-4 Shobhram. Dying declaration (Ex.P.-13) of Ramchander was recorded by Tehsildar Bhagwan Singh Pekra(PW4).

5. Dr. Shrivastava referred Ramchander to the District Hospital, Ujjain, but he died on his way to Ujjain from Badnagar. At Ujjain autopsy was performed by Dr. C.S.Bhargava (PW1) and the post-mortem report is Ex.P.-2 wherein cause of death was shock due to grievous injuries. After completing investigation, Police filed charge sheet indicting twelve persons as mentioned above.

6. Appellants denied the charges, hence they were put to trial which led to their conviction and various sentences, and hence they are in appeal before us. The other seven accused were acquitted of all the charges.

7. In criminal cases the cardinal rule of law is that the prosecution has to prove its case in full and beyond any shadow of doubt. If the accused or any of them have suffered any injury, it is the bounden duty of the prosecution to explain it in a satisfactory manner. If this is not done, the natural consequence is to put a question mark on the credibility of the entire prosecution story. With this in mind, let us examine the injuries suffered by some of the appellants and whether these injuries stand explained by the prosecution.

8. Ex.D-4 is the medical report of A-3 Gulabsingh showing three abrasions. These need not detain us because of their insignificance. Another medical Report Ex.D.5 needs no discussion as it deals with acquitted accused Nathulal and speaks of two abrasions. We then come to Ex.D-9 medical report of A-4 Shobharam proved by Dr. S.K.Shrivastava (PW8). This document shows that apart from other injuries, this appellant suffered loss of the right arm below the elbow. He also suffered an incised wound on chest and another incised on the parietal region. We then come to A-5 Bhgawansingh. Ex.D-10 is the medical report while the X-Ray Report is Ex.D-13 showing compound fracture distal end of 4th and 5th metacarpal of left hand.

9. None of the prosecution eye witnesses examined has attempted to explain the injuries suffered by A-4 Shobaram and A-5 Bhagwansingh as described above. The eye witnesses examined by the prosecution further are partisan and closely related to the deceased Ramchander. This further makes their story suspect.

10. The eye-witnesses examined by the prosecution are PW 3 Paannalal who offers no explanation touching injuries suffered by A-4 Shobaram and A-5 Bhagwansingh. The same remark applies to Nanuram (PW5), real brother of the deceased. Pappu (PW 6) son of deceased denies that that their party was assailants. Kindly see paragraph 8 of his cross examination. He thus also fails to explain the injuries to A-4 and A-5 above. The eye-witness Sugnabai(PW9) also comes in the category of her son Pappu(PW6).Last eye-witness is Dhanaji(PW10) the co-brother-in-law of the deceased and he states in paragraph 13 of his cross-examination that he had not seen A-4 Shobaram and A-5 Bhagwansingh receiving any injury at the time they were allegedly attacking Ramchander and party. He also denies that A-4 Shobaram lost an arm at the time of incident.

11. In view of what has been discussed above, it is clear that the prosecution story cannot be accepted as wholly reliable. The possibility of the defense version that they or some of them were attacked while returning from a hand-pump bath and in self defense, retaliation took place, cannot be dismissed out of hand. In this connection examination of A-3 Gulabsingh, A-4 Shobaram and A-5 Bhagwansing under Section 313 of the Cr.P.C may be seen.

12. In cases of self defense the following observations of the Supreme Court are apposite "An accused pleading the right of self-defence need not prove it beyond reasonable doubt. It is enough if he establishes facts which on the test of preponderance of probabilities make his defence acceptable. In any event, the discarding of the prosecution story by us as respects the manner of the causing of the injuries on Swaran Kaur means that the whole story as to the manner of occurrence becomes very doubtful. In such a situation the benefit of doubt must go to the accused. See *Mohan Singh v. State of Punjab* AIR 1975 S.C. 2161.

13. In the result, the appeal deserves to be allowed and is hereby allowed giving

benefit of doubt to the appellants regarding major charge under Section 302 read with constructive liability sections.

14. But there is also the charge under Sections 25 and 27 of Arms Act, 1959 and conviction there under against A-1 Champalal and A-4 Shobaram as stated above. Both were armed with swords. The prosecution evidence proves Ex.P-40 which is statement of A-1 Champalal leading to 'discovery' of a sword and its subsequent seizure vide Ex.P-41 seizure memo. Similarly there is Section 27 Evidence Act statement of A-4 Shobaram (Ex.P-5)leading to 'discovery' of sword and its subsequent seizure per memo Ex.P-8. Both appellants in their examination under Section 313 Cr.P.C were content with bald denial of this part of the prosecution story hence it appears that only this part of the prosecution is worthy of credence and acceptance.

15. But the question still remains whether both the said appellants can be convicted either under Section 25 or Section 27 of the Arms Act,1959(hereafter mentioned as the Act.) It seems to us that the two swords in question would come within the definition of "Arms" given in Section 2(c) of the Act. The mere possession and use of these swords while exercising the right of self defense would not attract the mischief under Section 25 or Section 27 of the Act. Hence the convictions and sentences under Section 25 and 27 of the Act as against the said appellants are unsustainable and are hereby set aside. Fine if recovered be refunded.

16. In the final result, this appeal deserves to be and is hereby allowed. The conviction and sentence of the appellants passed by the trial Court are hereby set aside and the appellants 1 to 5 are hereby acquitted of all the charges leveled against them. Appellant No.1 Champalal and appellant No.3 Gulab Singh, who are in jail, are directed to be released forthwith if not required in any other criminal case. Appellants No.2, 4 & 5 are on bail. Their bail bonds shall stand discharged. Office is directed to send a copy of this judgment along with the record to the trial Court immediately.

Appeal allowed.

I.L.R. [2010] M. P., 1660
APPELLATE CRIMINAL
Before Mr. Justice R.C. Mishra
19 February, 2010*

GULAM @ FARUKH ... Appellant
Vs.
STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Section 451 - *Sentence - Incident took place 15 years back - Sentence of 6 months reduced to 3 months and fine of Rs.200.* (Para 7)

दण्ड संहिता (1860 का 45), धारा 451 – दण्डादेश – घटना 15 वर्ष पूर्व घटित हुई – 6 माह के कारावास का दण्डादेश घटाकर 3 माह का कारावास और 200 रुपये जुर्माना किया गया।

Cases referred :

1976 MPLJ 433, AIR 1917 Cal 824.

Sankalp Kochar, for the appellant.
Ajay Tamrakar, Panel Lawyer, for the respondent/State.

J U D G M E N T

R.C. Mishra, J. :–This appeal has been preferred against the judgment-dated 05.10.1998 passed by Additional Sessions Judge, Balaghat in S.T. No.106/1995 whereby the appellant, though charged with the offences under Sections 456 and 376 of the IPC, was convicted under Section 451 of the IPC and sentenced to undergo R.I. for 6 months and to pay fine of Rs.200/-and in default, to suffer R.I. for 1 month.

2. The prosecution story, in short, may be narrated as under–

(i) On 21.12.1994, Gaurishankar (PW2) had gone to Joudapat leaving his wife viz. the prosecutrix (PW1) and 8-year old son namely Kuldeep (PW6) at his house situated in village Kayadi. At about 6 p.m., the appellant came there and after ascertaining that Gaurishankar was not at home, asked Kuldeep to leave the place. Accordingly, Kuldeep proceeded towards his grandfather's house located in the same vicinity. The appellant then dragged the prosecutrix into inner room of the house and forcibly committed sexual intercourse with her and fled away. Shouts raised by the prosecutrix attracted attention of Phoolchand @ Mandari (PW3) and Sheelabai (PW8), her sister-in-law. Phoolchand called Gaurishankar who, in turn, took her the police station where a

*Cr.A. No.2487/1998 (Jabalpur)

case under Sections 456 and 376 of the IPC was registered against the appellant upon the FIR (Ex.P2) lodged by the prosecutrix.

(ii) The prosecutrix was sent to the hospital for medical examination. Dr. Santeega Totode (PW9), while expressing her inability to give any definite opinion as to commission of rape, prepared two slides from vaginal smear of the prosecutrix and also preserved her Sari for chemical analysis.

(iii) During investigation, the appellant was apprehended and was subjected to medical examination. Dr. S.K. Tiwari found him capable of performing sexual intercourse.

3. The appellant abjured the guilt and pleaded false implication due to animosity. According to him, the contract for running the stone quarry was awarded to him only and Gaurishankar, while working as his Munim, had misappropriated a huge amount collected on his behalf from various purchasers of crush stones. In support of his plea, one Dharamchand (DW1) was also examined.

4. To bring home the charges, the prosecution examined as many as 9 witnesses including the prosecutrix, her husband Guarishankar, Mandari @ Phoochand and the medical expert. Upon a critical appraisal of the entire evidence and for the reasons recorded in the judgment, learned trial Judge proceeded to acquit the appellant of the charge of rape. However, he further concluded that instead of the offence of lurking house-trespass, the offence of house-trespass in order to commit offence carrying custodial sentence was proved beyond a reasonable doubt.

5. Legality and propriety of the impugned conviction have been assailed primarily on the ground that it was not sustainable in view of a categorical finding of fact that the intercourse was consensual in nature. According to learned counsel, the trial Judge erred in convicting the appellant for the offence of house trespass despite the fact that he had entered into the house upon an invitation extended by the prosecutrix (PW1) only. However, fact of the matter is that the house belonged to Gaurishankar (PW2), the husband of the prosecutrix. Moreover, the acquittal in respect of the offence of rape was not based on the premise that the sexual act in question was not committed at all. Although, Dharamchand (DW1) came forward with the statement that Gaurishankar had failed to pay a total sum of Rs.20,000/-to the appellant yet, in absence of evidence of any purchaser of the road stone, his evidence did not inspire confidence.

6. A bare perusal of the judgment would reveal that learned trial Judge, after relying upon the incriminating pieces of evidence brought on record in the form of sworn testimony of the prosecutrix (PW1), a married woman aged about 40 years, her husband Gaurishankar (PW2), their 8-year old son Kuldeep (PW6) and neighbours viz. Mandari @ Phoolchand (PW3) and Gendlal (PW4) as trustworthy

and rejecting the defence as improbable, proceeded to hold that she was subjected to sexual intercourse by the appellant only. However, as rightly observed by him, the coitus, though not covered under the definition of rape, did amount to the offence of adultery, which is punishable with imprisonment for a term which may extend upto 5 years. Thus, the entry with the intention of committing adultery was culpable under Section 451 of the IPC. This view is fortified by the pronouncement of a Division Bench of this Court in *State of M.P. v. Thakur Prasad* 1976 M.P.L.J. 433 wherein the principle stated by Asutosh Mookerjee, J. in the leading case of *Karali Prasad Guru v. Emperor* AIR 1917 Cal 824 was quoted with approval. Accordingly, the conviction in question deserves to be affirmed as well-merited.

7. Coming to the question of sentence, it may be noted that a considerable period of more than 15 years has elapsed after the incident. Taking into consideration the social impact of the crime and other relevant circumstances of the case including that delay in disposal of appeal is contributorily attributable to frequent violations of conditions of bail by the appellant, interests of justice would be met that if the term of custodial sentence is reduced to 3 months.

8. In the result, the appeal is allowed in part. The impugned conviction and consequent sentence of fine are hereby maintained. However, the term of sentence of imprisonment is reduced from 6 months to 3 months.

Appeal partly allowed.

Appeal partly allowed.

I.L.R. [2010] M. P., 1662
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena & Mr. Justice R.S. Jha
26 February, 2010*

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

Penal Code (45 of 1860), Sections 100 & 302 - ***Right of private defence*** *- Deceased broke hedge of appellant for making passage - Altercation took place between appellant and deceased - Villagers reached the spot and stop the parties from fighting - When deceased was going back, appellant went to his house, brought spear and caused injury - Held - Incident took place in two parts - It cannot be said that blow was delivered by appellant in self defence or in the course of sudden quarrel - Right of private defence not available to appellant - Appeal dismissed.* (Paras 9 & 10)

दण्ड संहिता (1860 का 45), धाराएँ 100 व 302 – प्राइवेट प्रतिरक्षा का अधिकार – मृतक ने रास्ता बनाने के लिए अपीलार्थी की बाड़ी तोड़ दी – अपीलार्थी और मृतक के मध्य

*Cr.A. No.2769/2000 (Jabalpur)

कहा–सुनी हुई – ग्रामीण घटनास्थल पर पहुँचे और पक्षों को लड़ने से रोका – जब मृतक वापस जा रहा था, अपीलार्थी उसके घर गया, बरछा लाया और क्षति कारित की – अभिनिर्धारित – घटना दो भागों में घटित हुई – यह नहीं कहा जा सकता कि अपीलार्थी द्वारा आत्मरक्षा में या आकस्मिक झगड़े में प्रहार किया गया – अपीलार्थी को प्राइवेट प्रतिरक्षा का अधिकार उपलब्ध नहीं – अपील खारिज।

Cases referred :

(2007) 1 SCC (Cri) 66, 2005 SCC (Cri) 93, (2008) 1 SCC (Cri) 30, AIR 2004 SC 1264; (2006) 11 SCC 444.

Rajneesh Patel, for the appellant.

Prakash Gupta, Panel Lawyer, for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by **R.S. JHA, J.** :–This appeal has been filed by the appellant against his conviction for an offence punishable under Section 302 of the Indian Penal Code (hereinafter referred to as the IPC) by judgment dated 17-11-2000 passed by the Additional Sessions Judge, Maihar, District Satna in Sessions Trial No. 29 of 1995 and the consequent sentence of imprisonment for life and a fine of Rs.2,000/- and in default, R.I. for two years

2. The prosecution case against the accused/appellant Ramhit is that he and his father Dadoli were harvesting their crops in the afternoon of 13-11-94 in village Kalla when the deceased Lallu broke their hedge for making a passage for their bullock cart which led to an altercation between the appellant Ramhit, his father Dadoli and the deceased Lallu. On hearing the altercation villagers, specifically Ram Sumiran (PW-4) and Rambali (PW-5) and others reached the spot and stopped the parties from fighting. Thereafter, while the deceased Lallu and his brother Makholi (PW-3) were going to their house which was only at a short distance on way, the accused/appellant ran to his house, brought a spear (Ballam) and struck a single blow in front lower neck of the deceased Lallu which cut through his wind pipe and heart resulting in his death.

3. The trial Court on examining the oral and documentary evidence on record has held the appellant guilty of an offence punishable under Section 302 of the IPC but has acquitted his father Dadoli. Being aggrieved by his conviction under Section 302 of the IPC the appellant has filed the present appeal.

4. It is contended by the learned counsel for the appellant that his conviction by the trial Court is based on a misinterpretation and misreading of the oral documentary evidence on record inasmuch as the trial Court has failed to consider the evidence on record to the effect that both the parties fought on account of intrusion of the deceased and his brother Makholi (PW-3) on the property of the appellant and his father Dadoli which resulted in retaliation on their part and in the

ensuing fight the appellant's father Dadoli as well as the appellant received injuries which have not been explained properly by the prosecution. The appellant further submits that he and his father Dadoli were assaulted by the deceased Lallu and his brother Makholi and the appellant and his father retaliated in their defence. It is submitted that in the ensuing struggle the spear (Ballam) of the deceased Lallu himself, accidentally pierced into his throat resulting in his death. It is stated that in the aforesaid facts and circumstances of the case which have not been properly appreciated by the trial Court no offence under Section 302 of the IPC is made out against the appellant. In the alternative it is submitted that the single injury which resulted in the death of the deceased Lallu was caused in a fight which flared up suddenly and in such circumstances looking to the surrounding facts and the single injury caused to the deceased the offence if any committed by the appellant would at best be one under Part-II of Section 304 of the IPC and not Section 302 of the IPC as held by the trial Court. It is submitted that the finding recorded by the trial Court is perverse and deserves to be set aside. In support of his submissions the learned counsel appearing for the appellant has relied upon the judgments of the Supreme Court rendered in the cases of *Bunnilal Chaudhary v. State of Bihar,* (2007) 1 SCC (Cri) 66, *Shivapps Buddappa Kolkar v. State of Karnataka and others,* 2005 SCC (Cri) 93 and *Byvarapu Raju v. State of A.P. and another,* (2008) 1 SCC (Cri) 30.

5. Per contra, the learned counsel appearing for the State submits that the evidence on record including the evidence recorded regarding injuries on the person of the appellant and his father has duly been taken into consideration by the trial Court. It is stated that the trial Court has duly analysed the oral and documentary evidence on record and has rightly recorded a conclusion that a fight broke out between the appellant, his father Dadoli and the deceased Lallu but the parties were pacified by Ram Sumiran (PW-4) and others after which the deceased and his brother started going home; but the accused/appellant ran to his house, brought a spear along with him and struck a heavy blow by the said spear on the front of the lower neck of the deceased Lallu which resulted in his death on the spot and in such circumstances, the appellant has rightly been held guilty of an offence punishable under Section 302 of the IPC and convicted thereunder. The learned counsel for the respondent has placed reliance on a decision of the Supreme Court rendered in the case of *State of Rajasthan v. Dhool Singh,* AIR 2004 SC 1264 in support of his submissions.

6. We have gone through the impugned judgment as well as the oral and documentary evidence on record specifically that of Makholi (PW-3), Ram Sumiran (PW-4), Ramdas (PW-5), Dr. A.K.Awadhiya (PW-7) and Mahendra Singh Karchuli (PW-8) as well as the statements of Dr. R.KJain (DW-1), Dr. A.C.Khare (DW-3) and Sant Prasad Patel (DW-4).

7. From the statements of the aforesaid witnesses it is clear that a fight between the accused/appellant and his father Dadoli and the deceased Lallu occurred on account of the deceased removing a part of the hedge between the land of the appellant and the deceased and blows were exchanged by both the parties and the father of the accused appellant was thrown on the ground by the deceased Lallu as a result of which he suffered amongst others a simple injury on his head but at this stage Ram Sumiran (PW-4) and others reached the spot and counselled both the sides after separating them. Ram Sumiran (PW-4) in paragraph 17 of his statement has clearly stated that at this stage peace was brought about and that the parties started going to their separate ways. It is also evident from the statements of the witnesses specifically PW-4, Ram Sumiran (in paragraph 23) that thereafter the accused/appellant ran to his house and came back after five minutes with a spear (Ballam) and without saying anything struck the fatal blow in the front lower part of the neck of the deceased Lallu as a result of which he fell down and thereafter died on the spot. The offending blood stained weapon and blood stained clothes were also seized by the police from the accused.

8. In view of the aforesaid, it is apparent that the incident actually occurred in two parts, the first part when the parties exchanged blows inflicting simple injuries on each other and the second part when after being pacified the parties started going their home ways, the accused/appellant ran to his house which was nearby, brought a spear and struck the fatal blow.

9. The plea of self defence or of accidental death in sudden fight taken by the appellant deserves to be rejected as in the instant case it is clear that when the sudden fight broke out between the parties the offending weapon was not carried by the accused/appellant and that in the sudden fight both the parties grappled with each other resulting in simple injuries to both of them including the injury on the head of Dadoli, father of the accused/appellant. It is also clear that at this stage villagers including PW-4, Ram Sumiran intervened and the parties were separated. It is also clear from the evidence that after being separated the deceased along with his brother started going back to their home and it is at this stage that the accused/appellant ran to his house and came back after arming himself with the spear in about five minutes and dealt the fatal blow on the front of the lower neck of the deceased which cut through his wind pipe as well as the top part of the heart resulting in his death on the spot and, therefore, it cannot be said that the blow was delivered by the accused/appellant in self defence or in the course of a sudden quarrel by using whatever weapon he was carrying along with him or that the deceased suffered the injury in the heat of the moment without their being any knowledge or intention on the part of the accused/appellant.

10. On the contrary, from the evidence it appears that after the sudden fight between the parties was over the appellant ran to his house, brought the spear,

delivered the blow with considerable amount of force on the vital part of the body of the deceased with the knowledge and intention of causing the death of the deceased. It is also clear from the facts of the case that after the parties having been separated and pacified and were going their own separate ways, the accused/ appellant with deliberate intent ran to his house and came back and delivered the fatal blow on a vital part of the body with the premeditated intent of causing death of the deceased with the spear.

11. The judgments of the Supreme Court on which reliance has been placed by the learned counsel for the appellant to contend that in all cases where a single injury is caused as a result of sudden fight, the case would fall under Part-I or Part-II of Section 304 of the IPC are not applicable to the present case as the facts of the present case clearly indicate that the fatal blow was not delivered by the appellant during and in the course of a sudden fight which erupted between the parties but was delivered after both the parties were separated and pacified and they started going their separate ways and that the appellant who was unarmed till that point of time went to his house, armed himself with a spear, came back and delivered the fatal flow.

12. The law as to whether in such circumstances the offence is one under Section 302 or Part-I or Part-II of Section 304 of the IPC has been duly summarized by the Supreme Court in the case of *Pulicherila Nagaraju alias Nagaraja Reddy v. State of A.P.*, (2006) 11 SCC 444 and it has been specifically held in paragraphs 21 and 26 that the contention that in all cases where the death is on account of single blow the offence falls under Section 304 and not Section 302 of the IPC cannot be accepted. It was further held in paragraph 29 :-

> "29. Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters plucking of a fruit, straying of a cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no pre-meditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under section 302, are not converted into offences punishable under section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder

punishable under section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body-, (iv) the amount of force employed in causing injury: (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre-meditation; (vii) whether there was any prior enmity or whether the deceased was a stranger: (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation: (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. Be that as it may."

13. The judgment of the Supreme Court in the case of *State of Rajasthan v. Dhool Singh,* AIR 2004 SC 1264 (supra) is also to the same effect.

14. From the aforesaid law laid down by the Supreme Court it is clear that the Court has to examine the question of intention in each case with care and caution to decide as to whether the case falls under Section 302 or Section 304 (Part-I) or (Part-II) of the IPC and while doing so the Court has to take into consideration the factors mentioned in paragraph 29 quoted above apart from the other evidence on record in individual case.

15. In the aforesaid facts and circumstances and the law laid down by the Supreme Court we are of the considered opinion that the trial Court while analysing the evidence specifically in paragraphs 19 to 21, has committed no error as is apparent from the oral and documentary evidence on record and in recording a conclusion to the effect that the appellant is guilty of an offence punishable under Section 302 of the IPC. We are also of the considered opinion that the sentence and conviction imposed upon the appellant are in accordance with law and the submissions made to the contrary deserve to be rejected.

16. In view of the aforesaid, the appeal being sans merit accordingly is dismissed. The appellant who is in jail, shall undergo the sentence as imposed upon him by the trial Court.

Appeal dismissed.

I.L.R. [2010] M. P., 1668
APPELLATE CRIMINAL
Before Mr. Justice R.K. Gupta
17 March, 2010*

RAJENDRA PRASAD ... Appellant
Vs.
SUKLESHWAR ... Respondent

A. Negotiable Instruments Act (26 of 1881), Section 138 - *Liability - Explained.* (Para 10)

क. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – दायित्व – स्पष्ट किया गया।

B. Negotiable Instruments Act (26 of 1881), Section 138 - *Dishonour of cheque - Appellant alleged that plot which was sold to him earlier by respondent was re-sold to another person without his knowledge and a cheque of Rs. 75,000 was issued by respondents - Held - It is not a case of appellant that respondents had agreed to pay Rs. 75,000 - Cheque cannot be said to be issued in discharge of liability - Appeal dismissed.* (Para 11)

ख. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – चेक का अनादरण – अपीलार्थी ने अभिकथन किया कि भूखण्ड, जो प्रत्यर्थी द्वारा उसे पूर्व में विक्रय किया गया, उसकी जानकारी के बिना किसी अन्य व्यक्ति को पुनःविक्रय कर दिया गया और प्रत्यर्थियों द्वारा 75,000 रुपये का एक चैक जारी किया गया – अभिनिर्धारित – अपीलार्थी का यह मामला नहीं है कि प्रत्यर्थी 75,000 रुपये अदा करने को सहमत हुए थे – चैक दायित्व के निर्वहन में जारी किया जाना नहीं कहा जा सकता है – अपील खारिज।

Cases referred :

(1951) 2 All ER 984 (CH), AIR 1959 Punj 328, AIR 1951 Orissa 105, AIR 1971 Del 45, AIR 1959 Bom 363.

Ravindra Bisen, for the appellant.
K.L. Pandey, for the respondent/State.

O R D E R

R.K. GUPTA, J. :–The present appeal is directed against the order of acquittal recorded by the trial Court by its judgment dated 21st January 2008 in criminal case no. 56/2004, wherein the trial Court has acquitted the respondent and the complaint has been dismissed.

2. The facts leading to the present case are that the appellant filed a complaint u/s 138 of the Negotiable Instrument Act, 1881 on the ground that the cheque which was issued by the respondents on 25/08/2003 for a sum of Rs. 25,000/-

*Cr.A. No.328/2009 (Jabalpur)

was presented to the bank but the same was not honoured by the bank as there were no sufficient funds in the account of the respondent.

3. The appellant purchased plot from the respondent by registered deed and possession of the said plot was also handed over to the appellant. Subsequently the appellant came to know that the aforesaid plot has been resold to someone by the respondents. The appellant objected the same and according to the complaint allegations the respondents issued a cheque of Rs. 75,000/- on 25/08/2003, the same was dishonoured. A notice was also given on 24/09/2003 but no other cheque was issued and ultimately when cheque was presented to the bank on 06/10/2003 for its encashment then the same was not honoured.

4. The Trial Court has dismissed the complaint on the ground that after when the cheque was submitted again to the bank on 06/10/2003 and the same was not honoured then it was necessary for the complainant to give notice. The aforesaid reasoning is not correct but the case has to be decided by giving different reason.

5. The question in the present case is whether the offence u/s 138 of the Negotiable Instrument Act, 1881 is complete ? For the purposes of convenience Section 138 is reproduced as under:-

> **"138. Dishonour of cheque for insufficiency, etc, of fund in the account:-**Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with find which may extend to twice the amount of the cheque, or with both:
>
> Provided that nothing contained in this section shall apply unless-
>
> (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
>
> (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque [within thirty days] of the receipt of information by

him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

6. In this reference, it is to be seen that when the complainant entered into witness box and gave his statement before the Court in paragraph 2 of his statement he has not stated that the said plot which was earlier sold to the appellant was resold to someone with his consent. In paragraph 3 of the complaint he only states that the aforesaid plot was resold to another person without the knowledge of the present appellant. In paragraph 2 of the statement he also corroborates that the plot which was sold to the present appellant by the respondent resold to some one without his knowledge and a cheque of Rs. 75,000/- was issued by the respondents which was not honoured.

7. The question in the present case is that whether the cheque which was issued by the respondent was in discharge of any debt or other libility. The burden was on the complainant to prove that the cheque which was issued was to dishcarge the debt or other liability. The statement of the complainant does not show that the cheque of Rs. 75,000/- which issued to the appellant by the respondent was in relation to the discharge of any debt or other liability. It may be a different thing that in the present case the respondent has committed a fraud by reselling the property which was already sold to the appellant but for the purposes of making out an offence u/s 138 of the Negotiable Instrument Act, 1881 the burden lies on the appellant to prove that cheque of Rs. 75,000/- was issued by the appellant in relation to the discharge or other liability.

8. On the basis of the facts enumerated in the complaint it does not show that the cheque was issued by the respondents to discharge a debt or any other liability.

9. The only question relates whether the cheque as such was issued to discharge any liablity. It is not a case of the appellant before the Court that the respondent agreed to pay a sum of Rs. 75,000/- as the plot as such was resold to someoneelse without his knowledge. The word liability has not been defind under the Act of 1881.

10. The word liability does not include any time bassed debt, as such a debt is not existing liability and the court has no jurisdiction to order the admission to proof of any statute-barred debt. *Re Art Reproduction Cp. Ltd* (1951) 2 AII ER 984 (CH) [*Companies Act* (1 of 1956) Sec. 468 (1)]:-

(a) The term liability is of large and comprehensive significance,

and when construed in its usual and ordinary sense, in which it is commonly employed, it expresses the state of being under obligation in law or in justice. *First National Bank Ltd. V. Seth Saut Lal,* AIR 1959 Punj 328, 330 (companies Act, 1913, Sch. I Table A regn. 28).

(b) The expression 'liability' in S. 21(b) of the Act must necessarily be other than the penalty contemplated by the Act. It would include to have the execution case dismissed for want of proper permit as required by S.13 and therefore that liability would continue by virtue of S.21 notwithstanding the expirty of the Act. *Krishna Chandra Misra Vs. Sushila Mitra,* AIR 1951 Orissa 105 [Orissa House Rent Control Act 5 of 1947]

(c) It is a broad terms of large and comprehensie significance and means-legal responsibility or obligation to do a thing. *Mohd. Yagule Vs. The Union of India and others,* AIR 1971 Del 45, 48 (FB) [Punjab Reorganisation Act (31 of 1966), Sec. 67].

(d) The word liability in its widest import means an obligation or duty to do something or to refrain from doing something. Parliament intended to include in the word 'liability' not only a financial obligation but also obligations of every other kind, including one of reinstating a government servant wrongly dismissed. *W.W.Joshi Vs. State of Bombay,* AIR 1959 Bom 363, 365 (State Reorganisation Act, 1956 Ss. 87, 88].

11. Since the word liability has received consideration by the Courts, therefore it has to be understood with reference to the different judicial pronouncement. It is not a case of the appellant that after reselling of the property against the knowledge and wishes of the appellant the appellant agreed to pay Rs. 75,000/-. Paragraph 2 of the statement of the complaint does not state so. The cheque which was issued for a sum of Rs. 75,000/- on 25/08/2003 can neither be treated to discharge the debt nor the liability.

12. In view of the aforesaid, I do not find any case to interfere. Accordingly Appeal stands dismissed.

Appeal dismissed.

SOHANLAL Vs. SMT. MANJU

I.L.R. [2010] M. P., 1672
CIVIL REVISION
Before Mr. Justice Piyush Mathur
5 April, 2010*

SOHANLAL ... Applicant
Vs.
SMT. MANJU ... Non-applicant

A. Civil Procedure Code (5 of 1908), Order 9 Rule 13 - *Setting aside decree ex parte against the defendant - When can be exercised - A perusal of Rule 13 of Order 9 of CPC reveals that there exist certain exigencies, in which a Court can pass an order of setting aside an exparte order/decree, where firstly the Court has to record its satisfaction that the summons was not duly served and secondly that the defendant/litigant was prevented by any sufficient cause from appearing before the Court, however in other situations also, the Court can pass suitable orders for setting aside the decree on such terms and costs which the Court may deem fit.* **(Para 8)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 13 – प्रतिवादी के विरुद्ध एकपक्षीय डिक्री को अपास्त करना – कब प्रयोग किया जा सकता है – सि.प्र. सं. के आदेश 9 के नियम 13 के अवलोकन से प्रकट होता है कि उसमें कतिपय अत्यावश्यकताएँ विद्यमान हैं जिनमें न्यायालय एकपक्षीय आदेश/डिक्री को अपास्त करने का कोई आदेश पारित कर सकता है, जहाँ प्रथमतः न्यायालय को अपना समाधान अभिलिखित करना होगा कि समन की तामील सम्यक् रूप से नहीं हुई थी और द्वितीयतः कि प्रतिवादी/वादकारी न्यायालय के समक्ष उपस्थित होने से किसी पर्याप्त कारण से निवारित था, तथापि अन्य परिस्थितियों में भी न्यायालय ऐसे निबंधनों और खर्चों पर, जो न्यायालय उचित समझे, डिक्री अपास्त किये जाने का उपयुक्त आदेश पारित कर सकता है।

B. Civil Procedure Code (5 of 1908), Order 9 Rule 13 - *Setting aside decree ex parte against the defendant - How can be exercised - No appeal preferred against ex parte decree of divorce - Summons not properly served - Held - No appeal was preferred against the ex parte decree by the wife and the Court not only on account of irregularity in the service of summons exercised powers under Order 9 Rule 13 of CPC, but it has exercised its powers, while liberally construing the provisions, while setting aside the ex parte decree of divorce.* **(Para 8)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 13 – प्रतिवादी के विरुद्ध एकपक्षीय डिक्री को अपास्त करना – कैसे प्रयोग किया जा सकता है – विवाह विच्छेद की एकपक्षीय डिक्री के विरुद्ध कोई अपील पेश नहीं की गयी – समन की उचित रूप से तामील नहीं हुई – अभिनिर्धारित – पत्नी द्वारा एकपक्षीय डिक्री के विरुद्ध कोई अपील पेश नहीं की गयी और न्यायालय ने विवाह विच्छेद की एकपक्षीय डिक्री अपास्त करते समय न केवल समन की तामील में

*C.R. No.56/2008 (Gwalior)

अनियमितता के कारण सि.प्र.सं. के आदेश 9 नियम 13 के अन्तर्गत शक्तियों का प्रयोग किया, बल्कि उसने उपबंधों का उदारतापूर्वक अर्थ लगाते समय अपनी शक्ति का प्रयोग किया।

C. Civil Procedure Code (5 of 1908), Order 9 Rule 13 - *Setting aside decree ex parte against the defendant - Powers of the Court - Held - Court will have ample jurisdiction to set aside the ex parte decree subject to the statutory interdict and there exists no statutory bar in setting aside an ex parte decree in Order 9 Rule 13 of CPC.* (Para 9)

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 13 – प्रतिवादी के विरुद्ध एकपक्षीय डिक्री को अपास्त करना – न्यायालय की शक्तियाँ – अभिनिर्धारित – न्यायालय को कानूनी निषेधादेश के अध्यधीन एकपक्षीय डिक्री को अपास्त करने की व्यापक अधिकारिता होगी और सि.प्र.सं. के आदेश 9 नियम 13 के अन्तर्गत एकपक्षीय डिक्री को अपास्त करने में कोई कानूनी बाधा नहीं है।

D. Civil Procedure Code (5 of 1908), Order 9 Rule 13 - *Setting aside decree ex parte against the defendant - Principles of natural justice - Held -Principles of natural justice could not be pressed into service at the touchstone of statutory provisions of the CPC but all the Courts would be having power to set aside an ex parte order on the ground of failure of principle of natural justice -Wife had been proceeded ex parte right from the inceptive stage of the divorce proceedings, the principle of natural justice of audi alteram partem have been violated as the Wife has not been afforded an opportunity of hearing.* (Para 10)

घ. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 13 – प्रतिवादी के विरुद्ध एकपक्षीय डिक्री को अपास्त करना – नैसर्गिक न्याय के सिद्धांत – अभिनिर्धारित – नैसर्गिक न्याय के सिद्धांत सि.प्र.सं के कानूनी उपबंधों की कसौटी पर तामील में बाध्य नहीं किये जा सकते किन्तु सभी न्यायालयों को नैसर्गिक न्याय के सिद्धांत की विफलता के आधार पर एकपक्षीय आदेश अपास्त करने की शक्ति होगी – पत्नी विवाह विच्छेद कार्यवाहियों के प्रारम्भिक प्रक्रम से ही एकपक्षीय हो गयी थी, दूसरे पक्ष को भी सुनो का नैसर्गिक न्याय के सिद्धांत का उल्लंघन हुआ क्योंकि पत्नी को सुनवाई का अवसर नहीं दिया गया।

Cases referred :

(2008) 7 SCC 663, (2003) 1 SCC 557.

Manish Sharma, for the applicant.

H.K. Shukla, for the non-applicant.

ORDER

Piyush Mathur, J. :–The Husband has preferred this Revision Petition by challenging the correctness and legality of an Order passed by the Family Court Gwalior, in Civil M.J.C. No.05/2007 on Date 16.10.2007 whereby the Application preferred by the Wife, under Order 9 Rule 13 of the Civil Procedure Code, seeking

setting aside of an ex parte Decree of Divorce, has been allowed, on the ground that technical attitude should not be adopted in a Matrimonial Dispute, while entertaining an Application under Order 9 Rule 13 of CPC.

2. Smt. Manju Ratnakar and Sohanlal Ratnakar are the married couple and Husband Sohanlal had submitted an Application seeking divorce from his Wife, which was registered as Case No.309-A/05, and the notice was issued to the Wife, which allegedly was served upon her and on account of her absence in the proceedings, an order was passed for proceeding ex parte against the Wife and later on an ex parte Decree of Divorce was drawn by the Family Court in favour of the Husband on Date 01.03.2006. Soon upon receiving the intimation of the passing of the ex parte Decree, from her own Mother-in-Law, the Wife had obtained a Certified Copy of the Judgment & Decree and had approached the Family Court by preferring an Application under Order 9 Rule 13 of CPC alongwith an Application under Section 5 of the Indian Limitation Act.

3. The Family Court had permitted the parties to adduce evidence on the Application preferred under Order 9 Rule 13 of C.P.C. The Husband has examined the Process Server, who initially deposed that he knows the Wife and has effected the service upon her, however during cross-examination, he failed to establish the identity of the Wife, which created a doubt in the mind of the Family Court, however on account of the marking of signature of Wife, on the Process Report, the Court found that notice of Divorce Petition was properly served upon the Wife. The Family Court further found that the Wife had approached the Family Court with utmost bona fides and looking to the reasons assigned in the Application seeking condonation, the delay in preferring the Application was condoned. The Family Court had further opined that in a Matrimonial Dispute, no technical attitude should be adopted, while entertaining an Application preferred under Order 9 Rule 13 of CPC, as these provisions should be utilized liberally and in view of the principle of natural justice, both the Parties should be afforded an adequate opportunity of hearing. The Family Court has ordered for setting aside the Ex parte Decree of Divorce by the Impugned Order passed on Date 16.10.2007, which has been challenged by the Husband before this Court through this Civil Revision.

4. I have heard Shri Manish Sharma, Learned Counsel for the Petitioner and Shri H. K. Shukla, Learned Counsel for the Respondent and perused the Record.

5. A perusal of the statements recorded during consideration of Application (U/Or. 9 Ru.13 CPC) demonstrate that the Wife and Husband were living together and she was discharging her matrimonial obligations, when suddenly the mother of her Husband disclosed to her on Date 27.04.2007 that an ex-parte Decree of Divorce has been obtained by her Husband on Date 01.03.2006. The Wife has categorically denied the service of Notice as also the signature on the Notice,

which the Husband allegedly claims to have properly served upon her although it was found by the Court that the Husband had miserably failed to adduce any evidence in rebuttal that the signature marked on the Notice is made by his Wife Smt. Manju Ratnakar herself. The record also reveals that Smt. Manju Ratnakar was confined in jail for sometimes even when the present Revision was pending before this Court.

6. The Husband had moved an application I.A.No. 18616/07 before the High Court (in the present matter) for securing service of Notice upon his Wife, through Jailor, on the ground that she is confined in the State Prison (in relation to some other matter) and the service should be effected through the Superintendent of Jail, Shajapur. This fact has no relevance so far as the bye-parte evidence adduced regarding setting aside of the ex-parte Divorce Decree is concerned, however Learned Counsel for the Respondent has made much stress on this fact to demonstrate that adequate opportunity was not available to the Wife, on being confined in jail.

7. The Family Court while examining the issue regarding service upon the Wife has reached a conclusion that the Wife has failed to establish that some irregularities were committed in effecting service of summon upon her and the Counsel for the Petitioner has made much stress upon this observation of the Court that upon finding the service to be proper, the Family Court was not justified in setting aside the ex-parte Decree.

8. A perusal of Rule 13 of Order 9 of C.P.C. reveal that there exist certain exigencies, in which a Court can pass an order of setting aside an ex parte order/ decree, where firstly the Court has to record its satisfaction that the summons was not duly served and secondly that the defendant/litigant was prevented by any sufficient cause from appearing before the Court, however in other situations also, the Court can pass suitable orders for setting aside the decree on such terms and costs which the Court may deem fit. The two Proviso appended to Rule 13 certainly put fetters on the powers of the Court, but in the considered opinion of this Court, none of these Proviso shall have any application to the facts of the present case, in as much as neither the decree is of such a nature, which should not be or could not be set aside, nor an appeal was preferred against the ex-parte Decree by the Wife and further it was not a case where only on account of irregularity in the service of summons, the Court has exercised powers under Order 9 Rule 13 of CPC, but it has exercised its powers, while liberally construing the provisions, while setting aside the Ex parte Decree of Divorce.

9. The Supreme Court while analyzing the scope and the power of a Court to set aside a Decree has observed in a case reported as *Rabindra Singh Vs. Financial Commr.* (2008) 7 SCC 663 that the Court will have ample jurisdiction

to set aside the ex parte decree subject to the statutory interdict and since there exists no statutory bar in setting aside an ex parte decree in Order 9 Rule 13 of CPC, therefore no jurisdictional error seems to be have been committed by the Family Court in setting aside the ex parte decree.

10. Although the Principles of Natural Justice could not be pressed into service at the first instance, while adjudicating the controversy, at the touchstone of statutory provisions of the Code of Civil Procedure, however in some of the Judgments of the Supreme Court, it has been observed that all the Courts would be having power to set aside an ex parte Order on the ground of failure of principle of natural justice and since in the present matter, the Wife had been proceeded ex parte right from the inceptive stage of the divorce proceedings, it could be gathered from the facts of the case that the principle of natural justice of audi alteram partem would be violated, in case the Wife is not afforded an opportunity of hearing. Although the Legislature has not envisioned utilization of power of setting aside an ex-parte Order under Order 9 of the Code of Civil Procedure, by applying the principle of natural justice, however a Judgment of the Supreme Court reported as (2003) 1 SCC 557, *Canara Bank v. Debasis Das* provides useful observation about the concept of natural justice and its application to a variety of litigation and this dictum of the Supreme Court would be beneficial for the purposes of adjudication of such matters, where the application of the principle of natural justice would facilitate meeting the ends of justice. The relevant Paragraph 19 of this judgment of the Supreme Court is quoted herein below ;

> 19. Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. The expression "civil consequences" encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life."

11. Therefore in view of the facts of the present matter, as also in view of the Judgement of the Supreme Court, it is crystal clear that the Order passed by the Family Court, whereby the ex-parte Decree of Divorce has been set aside,

deserves no modification or correction at the hands of this Court. The Order does not suffer from any infirmity of fact or law. Therefore the Revision fails and is hereby dismissed.

Revision dismissed.

I.L.R. [2010] M. P., 1677
CRIMINAL REVISION
Before Mr. Justice K.S. Chauhan
3 February, 2010*

BHIMRAJ MAHAR ... Applicant
Vs.
STATE OF M.P. ... Non-applicant

Wild Life (Protection) Act (53 of 1972), Sections 39, 51 (Proviso) - ***Sentence - Trophy of leopard which is included in Schedule I seized from possession of applicant - Minimum sentence is provided therefore, applicant cannot be released on the period already undergone - Sentence of 4 years and fine of Rs. 20,000 reduced to 3 years and fine of Rs. 10,000.*** (Paras 11 & 12)

वन्य जीव (संरक्षण) अधिनियम (1972 का 53), धाराएँ 39, 51 (परन्तुक) – दण्डादेश – तेंदुए की खाल जो अनुसूची एक में सम्मिलित है आवेदक के कब्जे से अभिग्रहीत की गयी – न्यूनतम दण्डादेश उपबंधित है इसलिए पूर्व में भुगती जा चुकी कालावधि पर आवेदक को मुक्त नहीं किया जा सकता – 4 वर्ष और 20,000 रुपये के जुर्माने का दण्डादेश घटाकर 3 वर्ष और 10,000 रुपये जुर्माना किया गया।

Surendra Verma, for the applicant.
R.P. Tiwari, G.A., for the respondent/State.

ORDER

K.S. Chauhan, J. :–This criminal revision under Section 397 read with Section 401 of the Code of Criminal Procedure has been preferred being aggrieved by the judgment dated 6/10/2008 passed by the First Additional Sessions Judge, Balaghat in Criminal Appeal No. 183/2008 arising out of the judgment, finding and sentence dated 7/8/2008 passed by the Chief Judicial Magistrate, Balaghat in Criminal Case No.332/2007, whereby the applicant has been convicted under Section 39 read with Section 51 (Proviso) of the Wild Life (Protection) Act, 1972 (hereinafter referred to as the "Act, 1972") and sentenced to RI. for 4 years with fine of Rs.20,000/-, in default SI for 120 days.

2. Prosecution case in short is that on 4/2/2007 Sanjay Singh, Sub Inspector, Police Station Bharveli received information that three persons are coming towards Amerha having tiger trophy to hand over to the smuggler. He recorded this

*Cr.R. No.5/2009 (Jabalpur)

information on Rojnamcha Sanha and proceeded to the spot for verifying such information. After sometimes three persons viz. Bhimraj, Pardesi and Gendlal came there. A search was conducted. The applicant was found having possession of tiger trophy in a plastic bag, which was seized from him. They were arrested. Disclosure statement of Pardesi was recorded and in pursuance thereof an iron cutter used in removing trophy was seized. FIR was recorded whereby Crime No. 10/07 was registered against the accused persons under Sections 9, 49-B and 51 of the Act, 1972. Spot map was prepared. Statements of witnesses were recorded. The seized trophy was sent for chemical examination to Wildlife Institute of India, Dehradun from where report received. After completing the usual investigation, a charge sheet was filed in the Court of Additional Chief Judicial Magistrate, Balaghat.

3. The accused persons were charged under Section 39 read with Section 51 of the Act, 1972. This applicant was further charged under the proviso of Section 51 of the Act, 1972. The charges were read over and explained to the accused persons. They abjured the guilt and claimed to be tried. Prosecution examined as many as 10 witnesses. Accused persons did not examine any witness. After appreciating the evidence, trial Court acquitted the accused persons from the charges under Section 39 read with Section 51 of the Act, 1972, but this applicant was found guilty under Section 39 read with Section 51 (Proviso) of the Act, 1972 and sentenced thereto. Being aggrieved by the judgment, finding and sentence he preferred Criminal Appeal No. 183/2008 before the Sessions Court, which was dismissed. Being aggrieved by the impugned judgment, finding and sentence, instant revision has been preferred on the grounds mentioned in the memo of revision.

4. Shri Surendra Verma, learned counsel for the applicant submitted that the offence as alleged has not been proved beyond reasonable doubt against the applicant. Two accused persons have been acquitted from the same set of evidence, therefore the similar standard ought to have been applied in the case of present applicant. The independent witnesses have not supported the prosecution case. The finding of guilt is erroneous which deserves to be set aside and applicant is entitled for acquittal.

5. On the contrary Shri R.P.Tiwari, learned counsel appearing on behalf of the respondent/State supported the impugned judgment mainly contending that the prosecution has proved the case beyond reasonable doubt against the applicant. The applicant has been rightly convicted and sentenced, hence does not call for any interference.

6. The main point for consideration in this revision is that whether the Courts below have committed an illegality in convicting and sentencing the applicant under Section 39 read with Section 51 (Proviso) of the Act, 1972.

7. Sanjay Singh (PW-8) has deposed that tiger trophy was seized from the possession of this applicant vide seizure memo (Ex.P-4) and the FIR (Ex.P-11) was recorded. The seized trophy was sent for chemical examination to Wildlife Institute of India, Dehradun from where report received. This witness has been subjected to lengthy and piercing cross examination but his evidence is intact on the material point.

8. Ravishankar Singrauli (PW-2), Pramod Kumar (PW-3) and Nishikant Sharma (PW-4) have given the evidence in support of Sanjay Singh (PW-8). Seizure witnesses Sunil Kumar Maravi (PW-1) and Sagar (PW-7) have not supported the prosecution case, but the evidence of Sanjay Singh (PW-8) and other witnesses is sufficient to prove that the tiger trophy was seized from the possession of this applicant. There is nothing to disbelieve their statements. There is no reason to falsely implicated this applicant. The Courts below after relying upon their evidence found that tiger trophy was seized from the possession of this applicant. The seized trophy was examined by three DFOs viz. Sujoy Majumdar (PW-5), Ramayan Pratap Singh (PW-6) and Kirti Shah Netam (PW-9), who found that it was the trophy of leopard. The Panchanama (Ex.P-9) was prepared which contains their signatures.

9. Chandra Prakash Sharma (PW-10) who was the Laboratory Technician in the Wildlife Institute of India, Dehradun has given the evidence that the trophy was examined and it was found of leopard.

10. Thus it is established that the trophy which was seized from the possession of this applicant was of leopard and this animal is included in Schedule-1. In the aforesaid circumstances, the Courts below have not committed any illegality in finding the applicant guilty under Section 39 read with Section 51 (Proviso) of the Act, 1972. There is no scope of re-appreciation of evidence at the revisional stage. Finding of the Courts below is not perverse or contrary to the evidence available on record, therefore does not call for interference. The finding of guilt under Section 39 read with Section 51 (Proviso) of the Act, 1972 is hereby affirmed.

11. So far as sentence is concerned, learned counsel submitted that the applicant has suffered substantial part of jail sentence, therefore he be released on the period already undergone. But this prayer is not acceptable for the simple reason that the minimum sentence is provided for this offence. However the sentence being excessive deserves to be reduced.

12. Consequently this criminal revision succeeds and is partly allowed. The conviction passed under Section 39 read with Section 51 (Proviso) of the Act, 1972 by the Courts below is hereby maintained. However, the sentence is reduced to 3 years' RI and fine to Rs.10,000/-, in default of payment of fine he shall undergo SI for 60 days. The applicant is reported to be in jail serving out the sentence.

Revision partly allowed.

I.L.R. [2010] M. P., 1680
MISCELLANEOUS CIVIL CASE
Before Mr. Justice U.C. Maheshwari
4 March, 2010*

REKHA (SMT.) @ RICHA DEWANI ... Applicant
Vs.
KAILASH DEWANI ... Non-applicant

Civil Procedure Code (5 of 1908), Section 24 - ***General power of transfer and withdrawal*** - *Wife having a young child of 1½ years of age staying with old ailing parents aged about 80 years - She filed application for transfer of case on the said ground that she is not able to attend the Court in Jabalpur - Held - Applicant is residing with her infant baby aged near about 1½ years with her father who is 80 years old and there is no any other in the family who can come with her to Jabalpur for contesting the case - Such averments are not specifically denied by the husband in the reply - Petition transferred to Bhopal.* (Para 6)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 24 – अंतरण और वापस लेने की सामान्य शक्ति – पत्नी अपने 1½ वर्ष के बच्चे सहित लगभग 80 वर्ष के वृद्ध बीमार पिता के साथ रह रही – उसने उक्त आधार पर मामले के अंतरण के लिए आवेदन पेश किया कि वह जबलपुर में न्यायालय में उपस्थित होने में समर्थ नहीं है – अभिनिर्धारित – आवेदक अपने लगभग 1½ वर्ष के नवजात शिशु के साथ अपने पिता, जिनकी उम्र 80 वर्ष है, के साथ रह रही है और परिवार में कोई दूसरा नहीं है जो उसके साथ मामला लड़ने के लिए जबलपुर आ सके – पति द्वारा अपने जवाब में इन प्रकथनों से विनिर्दिष्ट रूप से इंकार नहीं किया – याचिका भोपाल को अंतरित।

Cases referred :
2007(2) MPLJ 377, 2007(2) MPLJ 269, (2006) 9 SCC 197.

V.S. Trivedi, for the applicant.
Chandrapal Singh, for the non-applicant.

ORDER

U.C. MAHESHWARI, J. :–This petition is preferred by the applicant/wife under section 24 read with section 151 of the CPC for transferring the Civil Original Suit No.77-A/09 filed by the respondent under section 13(1)(A) of the Hindu Marriage Act, 1955 in the Court of IV th Addl. District Judge, Jabalpur, from such Court to the competent court at Bhopal where the applicant is residing with her infant baby.

2. Although, this petition is preferred for transferring the case by mentioning so many grounds , out of them, according to para-7 of the petition the applicant is having an infant baby in her lap who was born on 26.10.08. As per further averments, she is residing with her in her parental home at Bhopal under the

*M.C.C. No.1433/2009 (Jabalpur)

compelling circumstances created by the non-applicant. As per other grounds, she did not have any source of earning to meet the expenses and she is fully dependent on her 80 years old father who is running a flour mill. In such premises, it is also stated that she herself or her father are not in a position to meet the expenses for attending and contesting the case at Jabalpur. The ground regarding distance of Jabalpur to Bhopal i.e 300 Km is also taken and it is stated that it is not possible for her to come with an infant baby for attending the case as no any other person is available to come with her to contest the aforesaid matter at Jabalpur. The petition is also supported by an affidavit of the applicant.

3. In reply of the respondent, the grounds of the petition stated by the applicant are denied. In addition it is stated that if applicant comes to attend . the case at Jabalpur then respondent is ready and willing to pay the expenses for the same and, in such premises, prayer for dismissal of the petition is made.

4. The applicant's counsel by referring the facts stated in the petition argued that the applicant being woman having an infant baby in lap, her convenience should be considered with liberal approach and, insuch premises, prayed for transfer of the case from Jabalpur to Bhopal.

5. The aforesaid prayer is opposed by the respondent's counsel by referring the averments of the reply and also said that respondent is ready and willing to afford the expenses and, in such premises, in view of the decision of this Court in the matter of *Deepak Kuttapan Vs. Anil Rajan*-2007(2)MPLJ-377 and in the matter of *Rakhi Mishra Vs. Sanjay Mishra*-2007(2) MPLJ-269 prayed for dismissal of the petition.

6. Having heard, keeping in view the arguments, after perusing the papers placed on the record and also the aforesaid cited cases, I am of the considered view that the present petition deserves to be allowed. In the present matter, the applicant is residing with her infant baby aged nearabout 1½ years with her father and as per the case of the applicant her father is 80 years old and there is no any other in the family who can come with her to Jabalpur for contesting the aforesaid matter. .Such averments are not specifically denied in reply of the respondent. In the aforesaid cited case, the concerning applicant, the wives, were not having infant baby and considering such circumstances, the petitions filed by the wife under section 24 were dismissed. Both cited cases are based on the decision of the Apex Court in the matter of *Anindita Das Vs. Srijit Das*-2006(9) SCC 197, in which the child of that woman was aged 6 years and her parents were available to lookafter him but, in the present matter, looking to the age of the father of the applicant and, also the age of infant baby of the applicant, it does not appear possible for the applicant to .come and attend the case at Jabalpur, therefore, the aforesaid cited cases are not helping ro the respondent in the present matter.

Although this court did not have any dispute with the principle laid down in the aforesaid cited cases.

7. Apart the above, it is settled proposition of the law that in the rnatter of difficulties and convenience in comparison of men, women requires lenient consideration.

8. In view of the aforesaid discussion, taking into consideration the convenience and the difficulty of the applicant, I deem fit to allow this petition. Accordingly, the same is allowed and Civil Original Suit No.77-A/09 pending in the court of IVth Addl. District Jabalpur *(Kailash Devani Vs. Smt Rekha alias Richa Dewani)* is hereby ordered to be transferred from such Court to the Court of principal judge family court Bhopal for its trial and adjudication. It is made clear if the principal judge of the family court Bhopal is not functioning then this matter be sent to the District Judge Bhopal for adjudication. Such Courts shall be at liberty to make-over the case to some other court having the territorial jurisdiction for its adjudication. Let aforesaid all the courts be intimated in this regard.

9. The petition is allowed as indicated above.

C.c. as per rules.

Petition allowed.

I.L.R. [2010] M. P., 1682
MISCELLANEOUS CRIMINAL CASE
Before Mrs. Justice S.R. Waghmare
8 March, 2010*

SANGITA ... Applicant
Vs.
STATE OF M.P. ... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 439 - *Bail -* *Applicant accused in case of murder of 2 small children and their mother - Offence was committed by husband and close relative of applicant and applicant was involved in conspiracy - Held - Merely because applicant is a lady and is having 2 small children, she is not entitled for bail - An offender, a party to the conspiracy is equally liable for the offence that is committed - Bail rejected.* (Para 5)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 – जमानत – आवेदक 2 छोटे बच्चों और उनकी माता की हत्या के मामले में अभियुक्त – अपराध आवेदक के पति और नजदीकी नातेदार द्वारा किया गया और आवेदक षड्यंत्र में सम्मिलित थी – अभिनिर्धारित – केवल इसलिए कि

*M.Cr.C. No.663/2010 (Indore)

SANGITA Vs. STATE OF M. P.

आवेदक एक महिला है और उसके 2 छोटे बच्चे हैं, वह जमानत की हकदार नहीं है – अपराधी, षड्यंत्र का कोई पक्षकार, किये गये अपराध के लिए समान रूप से दायी है – जमानत नामंजूर।

P.K. Shukla & M.S. Chouhan, for the applicant.
Devendra Singh, for the non-applicant/State.
Prakash Verma, for the objector.

ORDER

S.R. WAGHMARE, J. :–By this application filed u/s 439 of the Cr.P.C., the applicant Sangita w/o Ashutosh Shukla has moved the application for grant of bail being implicated in Range case No. 930/2009 registered by City, District Dewas for offence under Sections 302, 394, 201 and 120-B of the IPC.

2. Counsel for the applicant has vehemently argued that it was a case of false implication. Even if the prosecution allegations are considered, Counsel has stated that the applicant is not named in the FIR and the case is based purely on circumstantial evidence. Even if the basis for which the applicant has been implicated is considered, witness Ajit Sachan had merely seen the co-accused and it cannot be presumed that the co-accused have conspired for murder. Merely because the applicant Sangita was evicted from the premises by the husband of the deceased, which has been stated to be the reason for the cause of murder, Counsel urged that it is quite far-fetched. Counsel has also urged that the applicant is 45 years old lady and she had two children aged 7 and 4 years, who are students and there is nobody to look after them at the moment; since, the husband and her brother have already been arrested and made co-accused in the case. Even if the prosecution allegations are considered, Counsel countered that offence under Section 120-B of the IPC for conspiracy can only be levelled against the applicant and there is not evidence on record to implicate the present applicant. Hence, Counsel has prayed for grant of bail.

3. Counsel of the objector has raised strong objections for grant of bail,stating that the lower Court itself had rejected the bail application of the present applicant thrice. So also Counsel has stated that no sympathy should be wasted on the present applicant for her being a lady or the fact that two children are dependent on her since the applicant is the mastermind behind the triple murder of Manju Jaiswal, Rishika and Devanshu,who were murdered in most brutal way by Ashutosh Shukla, the husband of the applicant and Narendra Solanki, the close relative of the present applicant. Moreover, Counsel has stated that the objector, the husband of the deceased Mr. Rajesh Jaiswal was receiving threats from the relatives and members of the family of the present applicant and he has duly filed complaint before the police station and authorities concerned, copies of which are filed along with the objection. Moreover, Counsel has stated that the objector has lost his wife and his two children and there was ample evidence on record to prove the

same. He has vehemently stressed the fact that for offence under Section 120-B of the IPC, a person, who is a party to the criminal conspiracy is equally liable for the offence committed i.e. murder in the present case. Hence, Counsel stated that the applicant does not deserve any sympathy and he has prayed for dismissal of the application.

4. Counsel for the respondent State, on the other hand, has opposed the submissions of the Counsel for the applicant and has stated that the applicant has been implicated on the basis of the statements of witness Ajit Sachan, who is categorically made a statement that he had seen all the accused including the applicant together on the date of incident. Moreover Counsel has submitted that the trial is well under progress and the case is listed for evidence in the week commencing from 8th March, 2010. Hence, Counsel has prayed for dismissal of the applicant since the applicant has been arrested only on 9/10/2009.

5. On considering the above submissions and on perusal of the impugned judgment and looking to the nature of allegations, I find that it is not a fit case for grant of bail merely on the ground that the applicant is a lady and she has two small children dependant on her, whereas in opposition she herself is responsible for the death of two small children and their mother. Even if the contentions of the Counsel for the applicant are considered that the applicant could only be liable for offence under Section 120-B of the IPC, then an important fact that cannot be marginalized or blinked away is that the offender a party to the conspiracy is equally liable for the offence that is committed and the manner in which three brutal murders have been committed do not warrant any sympathy. Then under these circumstances, I do not find any merit in this application and the same is dismissed as being devoid of merit.

C.c.as per Rules.

Application dismissed.
