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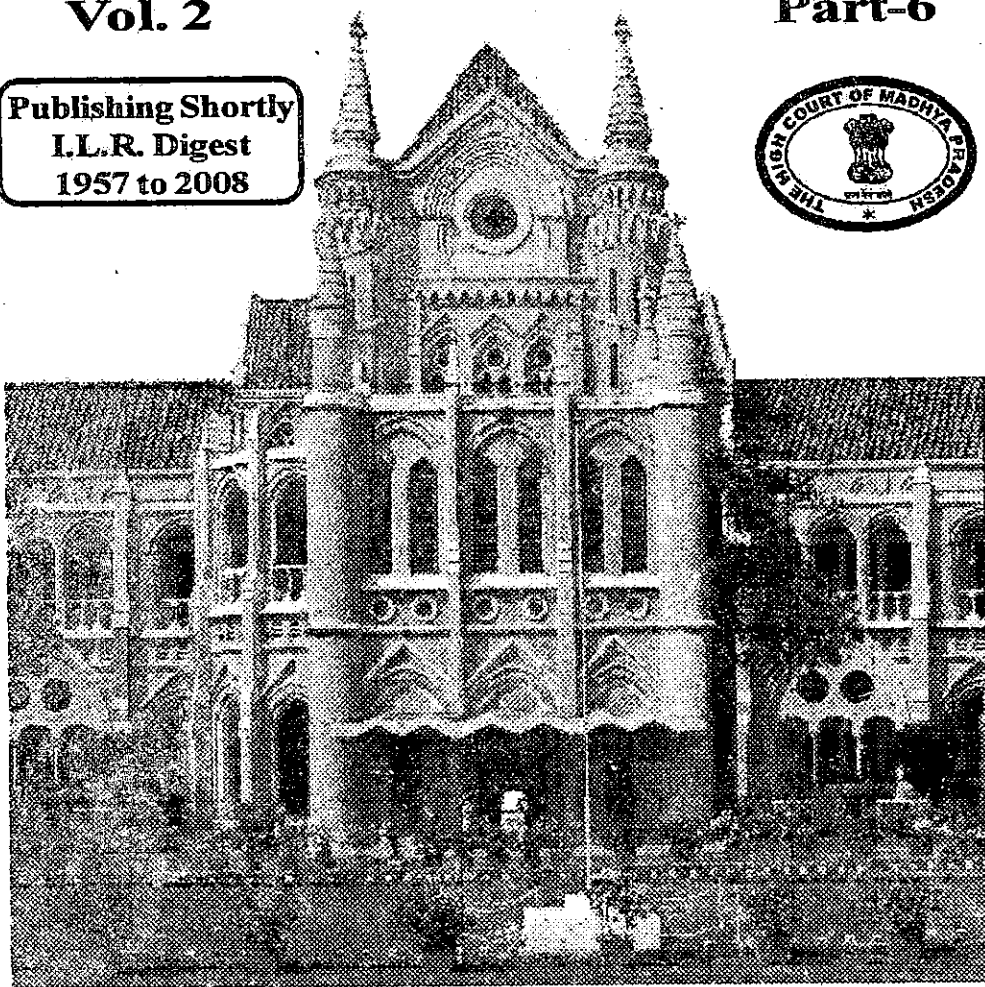
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Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(d) - *Suit for eviction alleging that accommodation has not been used without reasonable cause by appellants - Evidence shows that appellants were not allowed by respondents to carry on their business in the suit accommodation - Held - Courts below were not justified in not considering the reasonable cause of appellants in not running the business in the suit accommodation due to mala fide of respondents who restrained appellants to run the business - Suit for eviction dismissed - Appeal allowed. [Mazhar Khan v. Shyamkishore] ...1435*

Accommodation Control Act, M.P. (41 of 1961), Section 23A & 23J - Landlord - What amounts to - Premises were given on rent by the predecessor in title and not the present landlord who is a retired government servant - Plea raised that such person is not covered under the definition of landlord u/s 23J of the Act - Held - Every retired government servant is a landlord within the meaning of S. 23J of the Act - The provision can not be read to add qualifiers to it. [Ramkishore v. Gyanchandra Jain] ...1481

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Burden of proof and onus of proof - Distinction - Held - Burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. [Rajshree Minerals v. Karamvir Singh] ...1441

Civil Procedure Code (5 of 1908), Section 97 - Appeal from final decree where no appeal from preliminary decree - Meaning - Held - Provisions of S. 97 attained finality to a preliminary decree in respect of the matters decided by it - A party aggrieved by a preliminary decree does not appeal from it then he is precluded from disputing its correctness in an appeal from the final decree. [Ishaque Mohammad v. Smt. Saini Begum] ...1465

Civil Procedure Code (5 of 1908), Section 100 - Concurrent finding of fact - If erroneous could be interfered - Held - Concurrent findings of fact based on evidence even the same are erroneous could not be interfered u/s

(Note An asterisk (*) denotes Note number)

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(डी) — यह अभिकथन करते हुए बेदखली के लिए वाद कि अपीलार्थियों द्वारा युक्तियुक्त कारण के बिना स्थान का उपयोग नहीं किया गया है — साक्ष्य दर्शाती है कि प्रत्यर्थियों द्वारा अपीलार्थियों को वादग्रस्त स्थान में अपना कारबार नहीं करने दिया गया — अभिनिर्धारित — निम्न न्यायालय का वादग्रस्त स्थान में प्रत्यर्थियों, जिन्होंने अपीलार्थियों को कारबार करने से अवरुद्ध किया, के असदभाव के कारण कारबार नहीं करने के अपीलार्थियों के युक्तियुक्त कारण पर विचार न करना न्यायसंगत नहीं — बेदखली का वाद खारिज — अपील मंजूर। (मज्हर खान वि. श्यामकिशोर) ...1435

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सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 — तथ्य का समवर्ती निष्कर्ष — यदि त्रुटिपूर्ण हो हस्तक्षेप किया जा सकता है — अभिनिर्धारित — साक्ष्य पर आधारित तथ्य के समवर्ती निष्कर्ष त्रुटिपूर्ण होने पर भी सि.प्र.सं. की धारा 100 के अन्तर्गत द्वितीय अपील के प्रक्रम

100 CPC at the stage of second appeal unless the same are involved any substantial question of law. [Ram Manohar Patel v. Ram Prasad Patel]... 1461

Civil Procedure Code (5 of 1908), Section 100 - Concurrent finding of fact in respect of adverse possession - Held - Question of adverse possession being finding of fact could not be interfered in a second appeal. [Ram Manohar Patel v. Ram Prasad Patel] ... 1461

Civil Procedure Code (5 of 1908), Section 100 - Concurrent finding of fact in respect of possession - Held - The concurrent finding with respect of possession of the property based on appreciation of evidence being finding of fact could not be interfered in a second appeal. [Ram Manohar Patel v. Ram Prasad Patel] ... 1461

Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 - Ancestral property - Suit for declaration and injunction - Application for temporary injunction - Rejection on the ground of deed of family settlement - Held - Family settlement not signed by all co-sharers therefore cannot be relied - However, plaintiff acting upon said deed sold part of suit property, it would not be open to him to question the deed of family settlement - Facts regarding partition is a question of fact hence can not be interfered - However, if interim order is passed, purchaser will not be able to utilize the property, therefore, would suffer irreparable loss and injury - Purchaser would be permitted to carry out construction activities but shall be restrained from alienating or transferring property during pendency of civil suit. [Narendra Kante v. Anuradha Kante] SC... 1227

Civil Procedure Code (5 of 1908), Order 41 Rule 22 - Upon hearing, respondent may object to decree as if had preferred separate appeal - Petitioner preferred an appeal for enhancement and the same was dismissed on the ground of limitation - In an appeal preferred by the owner, cross-objection was filed within time and the Court while dismissing the appeal filed by the owner, allowed the cross-appeal and enhanced the compensation - Held - Order of the Court was well within the four corners of the stipulations contained under Order 41 Rule 22 of CPC because the appeal preferred by the claimant was dismissed on limitation and not on merits - There was no adjudication on merits to bar the consideration of cross-objection. [Sushila Gupta v. Rajendra Kumar] ... 1423

Civil Procedure Code (5 of 1908), Order 41 Rule 22 - Upon hearing, respondent may object to decree as if had preferred separate appeal - Pleadings - Non-disclosure of a relevant fact - The petitioner preferred an appeal for enhancement and the same was dismissed on the ground of limitation - In an appeal preferred by the owner, cross-objection was filed within time and the Court on while dismissing the appeal filed by the owner, allowed the cross-appeal and enhanced the compensation but dismissal of

पर हस्तक्षेप नहीं किया जा सकता जब तक कि उसमें विधि का कोई सारवान प्रश्न अन्तर्वलित न हो। (राम मनोहर पटेल वि. राम प्रसाद पटेल) ...1461

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सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 22 - सुनवाई पर प्रत्यर्थी डिक्री का विरोध कर सकता है मानो पृथक अपील पेश की गयी हो - अभिवचन - सुसंगत तथ्य का अप्रकटीकरण - याची ने वृद्धि के लिए अपील पेश की और वह परिसीमा के आधार पर खारिज कर दी गयी - स्वामी द्वारा पेश अपील में समय के भीतर प्रत्याक्षेप फाइल किये गये और न्यायालय ने स्वामी द्वारा फाइल की गयी अपील खारिज करते समय प्रत्याक्षेप मंजूर किये और प्रतिकर में वृद्धि की किन्तु पूर्ववर्ती अपील की खारिजी का प्रत्याक्षेप में उल्लेख नहीं किया गया - अभिनिर्धारित - याची प्रत्याक्षेप करते समय परिसीमा के आधार पर अपील की खारिजी का उल्लेख करने में असफल

the earlier appeal was not mentioned in the cross-objection - Held - Petitioner while moving cross-objection failed to mention the dismissal of appeal on the ground of limitation but non-disclosure of this fact will not cause any change in law as it stands. [Sushila Gupta v. Rajendra Kumar] ...1423

Civil Services (Medical Attendance) Rules, M.P. 1958, Rules 2 & 8 - See - Service Law [Prasanna Kumar Shrama v. State of M.P.] ...1271

Constitution, Articles 14 & 16 - Temporary employee - In case of appointment on temporary basis, a servant who is so appointed does not acquire any substantive right to the post and even if order is silent, it is an implied term of such appointment that it may be terminated at any time without notice. [Vijay Singh Yadav v. State of M.P.] ...1275

Constitution, Articles 14 & 19 - Condition of second NIT restricting the supply of tender forms to those intending tenderers, who had obtained blank forms, pursuant to first NIT but did not submit - The incorporation of a restriction in the shape of a condition requires a reference to the incorporation of a similar condition in the previous NIT, because unless the intending tenderers are warned/alarmed about the future events; on account of their non-participation or non-submission of tender forms, it appears to be quite an unreasonable restriction/condition on such tenderers who had no idea about the disability being subsequently attached or found in their previous conduct - As the same puts fetters/restrictions on the fundamental right of a citizen, in violation of constitutional guarantee enshrined in Article 19(1)(g) - Condition No.12 of the NIT quashed - Petition allowed. [Gyan Singh Sisodia v. State of M.P.] ...1317

Constitution, Article 226 - Judicial review - When an entirely illegal condition is being imposed, with an intention to either include or exclude some individuals with ulterior motives, inferable from the record of the case, the Court can interfere in a contractual matter, where tender condition seems to have been incorporated by way of punishment or a penalty, without complying with the principles of natural justice. [Gyan Singh Sisodia v. State of M.P.] ...1317

Constitution, Article 226 - See - Service Law [Anand Selot v. Chief Secretary, Govt. of M.P.] ...1357

Constitution, Article 226 - Writ of Quo warranto - Order granting charge of Engineer-in-Chief challenged - Petitioner at the fag end of his career and after 10 months, challenged the action - Held - Writ of Quo warranto is an extraordinary remedy - Court is required to consider the motive, conduct of applicant, delay & laches and the public interest likely to be served or damaged in granting or refusing the writ - Petition dismissed. [Anand Selot v. Chief Secretary, Govt. of M.P.] ...1357

रहा किन्तु इस तथ्य का अप्रकटीकरण प्रचलित विधि में कोई परिवर्तन कारित नहीं करेगा। (सुशीला गुप्ता वि. राजेन्द्र कुमार) ...1423

सिविल सेवा (चिकित्सीय परिचर्या) नियम, म.प्र. 1958, नियम 2 व 8 — देखें — सेवा विधि (प्रसन्न कुमार शर्मा वि. म.प्र. राज्य) ...1271

संविधान, अनुच्छेद 14 व 16 — अस्थायी कर्मचारी — अस्थायी आधार पर नियुक्ति की दशा में, कोई कर्मचारी जो इस प्रकार नियुक्त होता है, पद के लिए कोई सारभूत अधिकार अर्जित नहीं करता है और यदि आदेश मौन भी हो, तो भी यह ऐसी नियुक्ति का विवक्षित निबंधन है कि यह बिना किसी सूचना के किसी भी समय समाप्त की जा सकती है। (विजय सिंह यादव वि. म.प्र. राज्य) ...1275

संविधान, अनुच्छेद 14 व 19 — द्वितीय निविदा आमंत्रण सूचना की शर्त उन आशयित निविदाकारों को निविदा प्रारूपों के प्रदाय की निर्बंधित करती है जिन्होंने प्रथम निविदा आमंत्रण सूचना के अनुसरण में रिक्त प्रारूप अभिप्राप्त किये थे किन्तु प्रस्तुत नहीं किये — शर्त के रूप में किसी निर्बंधन का सम्मिलित किया जाना पूर्ववर्ती निविदा आमंत्रण सूचना में स.श शर्त को सम्मिलित किये जाने का सन्दर्भ अपेक्षित करता है, क्योंकि जब तक आशयित निविदाकारों को उनके भाग न लेने या निविदा प्रारूप प्रस्तुत न करने के कारण भविष्य की घटनाओं के बारे में चेतावनी/संकेत नहीं दिया जाता, यह ऐसे निविदाकारों पर नितान्त अयुक्तियुक्त निर्बंधन/शर्त होना प्रतीत होता है जिन्हें बाद में जोड़ी जाने वाली या उनके पूर्ववर्ती आचरण में पायी जाने वाली निर्याग्यता के बारे में कोई कल्पना नहीं थी — चूंकि यह अनुच्छेद 19(1)(जी) में सुरक्षित संवैधानिक गारंटी के उल्लंघन में किसी नागरिक के मूल अधिकार पर बाधा/निर्बंधन लगाती है — निविदा आमंत्रण सूचना की शर्त क्र. 12 अभिखण्डित — याचिका मंजूर। (ज्ञान सिंह सिसोदिया वि. म.प्र. राज्य) ...1317

संविधान, अनुच्छेद 226 — न्यायिक पुनर्विलोकन — जब कोई पूर्णतः अवैध शर्त मामले के अभिलेख से अनुमित अंतरस्थ हेतु से या तो कुछ व्यक्तियों को सम्मिलित करने या अपवर्जित करने के आशय के साथ अधिरोपित की जा रही हो, तब न्यायालय संविदात्मक मामले में वहाँ हस्तक्षेप कर सकता है जहाँ निविदा शर्त नैसर्गिक न्याय के सिद्धांतों का पालन किये बिना दण्ड या शास्ति के रूप में सम्मिलित की जाना प्रतीत होती है। (ज्ञान सिंह सिसोदिया वि. म.प्र. राज्य) ...1317

संविधान, अनुच्छेद 226 — देखें — सेवा विधि (आनंद सेलट वि. चीफ सेक्रेटरी, गवर्मेन्ट ऑफ एम.पी.) ...1357

संविधान, अनुच्छेद 226 — अधिकार पृच्छा की रिट — प्रमुख अभियंता का प्रभार देने वाले आदेश को चुनौती — याची ने अपने कार्यकाल के अंतिम छोर पर और 10 माह बाद कृत्य को चुनौती दी — अभिनिर्धारित — अधिकार पृच्छा की रिट एक असाधारण उपचार है — न्यायालय को आवेदक के हेतु, आचरण, विलम्ब और गफलत एवं पूरा किया जाने वाला लोक हित या रिट प्रदान करने या इंकार करने में हानि पर विचार करना आवश्यक है — याचिका खारिज। (आनंद सेलट वि. चीफ सेक्रेटरी, गवर्मेन्ट ऑफ एम.पी.) ...1357

Constitution, Article 311 - Termination simplicitor - Court has to see that whether allegations made against employee was motive for passing order of termination or it was the foundation for the order terminating him. [Vijay Singh Yadav v. State of M.P.] ...1275

Constitution, Article 311 - Termination simplicitor - Stigma - Services of the petitioner were terminated as no longer required - Respondents in the return stated that petitioner had committed serious irregularities and violated conditions of appointment and also criminal case has been registered - Held - Termination order does not contain any reason - Order is not based upon any findings arrived at by respondents in any ex parte enquiry but is based upon allegations of irregularities and violation of conditions of appointment as well as registration of offence - Such allegations are only motive for passing the order - By lifting the veil, it cannot be held that the order of termination was stigmatic in nature. [Vijay Singh Yadav v. State of M.P.]...1275

Constitution, Seventh Schedule, Union List, Entry 89 and State List, Entry 56 - Entry 89 of Union List provides for terminal tax on goods or passengers carried by railway, sea or air - It does not contemplate any terminal tax on goods or passengers carried by road or on inland water - Entry 89 of Union List and Entry 56 of State List operates in different fields. [Northern Coal Fields Ltd. v. State of M.P.] ...1304

Criminal Procedure Code, 1973 (2 of 1974), Section 157 - Copy of FIR to Magistrate - Merely because I.O. could not specify that when copy of FIR is dispatched to concerning Magistrate, no ground to reject entire prosecution story. [Balkishan (Deleted) v. State of M.P.] ...1473

Criminal Procedure Code, 1973 (2 of 1974), Sections 320 & 482, Penal Code, 1860, Section 498-A - Compromise - Applicants facing trial for offence punishable u/s 498-A of IPC - Parties have already compromised the matrimonial and other disputes - Held - No useful purpose would be served if criminal proceedings continue in this background against applicants u/s 498-A of IPC and S. 4 of Dowry Prohibition Act - Proceedings quashed - Application allowed. [Bhavuk Sharma v. Smt. Anju Sharma] ...1493

Criminal Procedure Code, 1973 (2 of 1974), Sections 439 & 439(2) - Cancellation of bail - Grounds - Cancellation of bail granted to N.A. I sought on the ground that bail of co-accused already rejected - Held - Rejection of bail in a non-bailable case at initial stage and cancellation of bail already granted, have to be considered and dealt with on different basis - Very cogent and overwhelming circumstances are necessary for cancellation of bail. [Dashrath Singh v. Banti] ...1501

Debts Recovery Tribunal (Procedure) Rules, 1993, Rule 5A - See - Recovery of Debts Due to Banks and Financial Institutions Act, 1993, Section 22(2)(e) [Suresh Sharma v. Punjab & Sindh Bank] ...1371

संविधान, अनुच्छेद 311 — केवल सेवा समाप्ति — न्यायालय को यह देखना चाहिए कि क्या कर्मचारी के विरुद्ध किया गया अभिकथन सेवा समाप्ति का आदेश पारित करने के लिए हेतु था या यह उसकी सेवा समाप्त करने के आदेश का आधार था। (विजय सिंह यादव वि. म.प्र. राज्य) ...1275

संविधान, अनुच्छेद 311 — केवल सेवा समाप्ति — कलंक — याची की सेवाएँ समाप्त की गयीं क्योंकि अब आवश्यक नहीं थीं — प्रत्यर्थियों ने रिटर्न में कथन किया कि याची ने गम्भीर अनियमितताएँ की थीं और नियुक्ति की शर्तों का उल्लंघन किया था तथा दाण्डिक मामला भी पंजीबद्ध किया गया है — अभिनिर्धारित — सेवा समाप्ति के आदेश में कोई कारण अन्तर्विष्ट नहीं — आदेश प्रत्यर्थी द्वारा किसी एकपक्षीय जाँच में निकाले गये किसी निष्कर्ष पर आधारित नहीं है बल्कि अनियमितताओं और नियुक्ति की शर्तों के उल्लंघन के अभिकथनों तथा अपराध के पंजीबद्ध होने पर आधारित है — ऐसे अभिकथन आदेश पारित करने के लिए केवल हेतु हैं — पर्दा उठाकर यह अभिनिर्धारित नहीं किया जा सकता कि सेवा समाप्ति के आदेश की प्रकृति कलंकात्मक थी। (विजय सिंह यादव वि. म.प्र. राज्य) ...1275

संविधान, सातवीं अनुसूची, राज्य सूची, प्रविष्टि 89 एवं राज्य सूची, प्रविष्टि 56 — संघ सूची की प्रविष्टि 89 रेल, समुद्र या वायु द्वारा वहन किये गये माल या यात्रियों पर सीमा कर का उपबंध करती है — यह सड़क द्वारा या अन्तर्देशीय जलमार्ग पर वहन किये गये माल या यात्रियों पर कोई सीमा कर अपेक्षित नहीं करती — संघ सूची की प्रविष्टि 89 और राज्य सूची की प्रविष्टि 56 विभिन्न क्षेत्रों में प्रवर्तित होती हैं। (नार्दन कोल फ़िल्ड्स लि. वि. म.प्र. राज्य) ...1304

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 157 — मजिस्ट्रेट को एफ.आई. आर. की प्रतिलिपि — केवल इसलिए कि अनुसंधान अधिकारी यह विनिर्दिष्ट नहीं कर सका कि सम्बन्धित मजिस्ट्रेट को एफ.आई.आर. की प्रतिलिपि कब प्रेषित की गयी, सम्पूर्ण अभियोजन कथा को नामंजूर करने के लिए कोई आधार नहीं। (बालकिशन (डिलीटेड) वि. म.प्र. राज्य) ...1473

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 320 व 482, दण्ड संहिता, 1860, धारा 498-ए — समझौता — आवेदकों पर भा.द.सं. की धारा 498-ए के अन्तर्गत दण्डनीय अपराध का विचारण — पक्षकारों ने पूर्व में ही विवाह विषयक और अन्य विवादों में समझौता कर लिया — अभिनिर्धारित — कोई उपयोगी प्रयोजन पूरा नहीं होगा यदि इस पृष्ठभूमि में आवेदकों के विरुद्ध भा.द.सं. की धारा 498-ए और दहेज प्रतिषेध अधिनियम की धारा 4 के अन्तर्गत दाण्डिक कार्यवाहियाँ जारी रखी जाती हैं — कार्यवाहियाँ अभिखण्डित — आवेदन मंजूर। (मावुक शर्मा वि. श्रीमति अंजू शर्मा) ...1493

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 439 व 439(2) — जमानत का रद्दकरण — आधार — अनावेदक क्रमांक 1 को दी गई जमानत का रद्दकरण इस आधार पर चाहा गया कि सह-अभियुक्त की जमानत पहले से नामंजूर की जा चुकी है — अभिनिर्धारित — गैर-जमानतीय मामले में प्रारम्भिक प्रक्रम पर जमानत की नामंजूरी और पूर्व में प्रदत्त जमानत के रद्दकरण पर विभिन्न आधारों पर विचार और व्यवहार किया जाना चाहिए — जमानत के रद्दकरण के लिए अत्यंत तर्कपूर्ण और दुर्दमनीय परिस्थितियाँ आवश्यक हैं। (दशरथ सिंह वि. बन्दी) ...1501

ऋण वसूली अधिकरण (प्रक्रिया) नियम, 1993, नियम 5ए — देखें — बैंकों और वित्तीय संस्थाओं को शोध्य ऋण वसूली अधिनियम, 1993, धारा 22(2)(ई) (सुरेश शर्मा वि. पंजाब एण्ड सिंध बैंक) ...1371

Educational Service (Collegiate Branch) Recruitment Rules, M.P. 1967, Rule 12(5) - See - Service Law [State of M.P. v. Dr. Smt. Sandhya Prasad] ...1259

Evidence Act (1 of 1872), Section 3 - Chance witness - Testimony of witness cannot be discredited merely because he is a chance witness. [Balkishan (Deleted) v. State of M.P.] ...1473

Evidence Act (1 of 1872), Section 3 - Independent witness - Even if independent witnesses were not examined by I.O., it would not be a sole ground to discard the testimony of eye-witnesses. [Balkishan (Deleted) v. State of M.P.] ...1473

Evidence Act (1 of 1872), Section 3 - Interested witness - Testimony of witnesses if found trustworthy, reliable and cogent cannot be discarded only on the basis that they are alleged to be interested witness. [Balkishan (Deleted) v. State of M.P.] ...1473

Evidence Act (1 of 1872), Section 31 - Admission is the best evidence that an opposite party can rely upon. [Parmal Singh v. Hallu] ...1456

Evidence Act (1 of 1872), Section 109 - Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent - During pendency of litigation, counsel for a party purchased suit property by a registered sale deed - Held - In view of the provisions of S. 109 of the Act, the burden was on the respondents to prove that no litigation was pending on the date when the sale deed took place, which they utterly failed to do so. [Amar Singh v. Balmukund] ...1427

Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Section 9(3) Proviso, Municipal Corporation Act, M.P. 1956, Sections 135 & 136 - Recovery of property tax from Krishi Upaj Mandi Samiti - In view of proviso to S. 9(3) of Act, 1972 the area of market yard and market committee are outside the limit of Municipal Corporation - Corporation has no authority to recover property tax from market committee - Demand notice and recovery quashed - Petition allowed. [Secretary, Krishi Upaj Mandi Samiti, Jabalpur v. Administrator, Municipal Corporation, Jabalpur] ...1420

Limitation Act (36 of 1963), Section 5 - Condonation of delay - Application under Order 9 Rule 13 CPC filed after a delay of 1 year 10 months - Application rejected and appeal also rejected as barred by time - First Appeal against decree was also filed after delay of 948 days - Appeal was also dismissed as barred by time - Reason for delay was shown to be that O.I.C. was negligent and did not inform the senior officers about the progress of the case - No action taken against O.I.C. except issuing show cause notice seeking his explanation - Same person continues to be O.I.C. in S.L.P. also - Record shows that O.I.C. was not negligent as petitioner had

शैक्षणिक सेवा (महाविद्यालय शाखा) भर्ती नियम, म.प्र. 1967, नियम 12(5) — देखें —सेवा विधि (म.प्र. राज्य वि. डॉ. श्रीमति संध्या प्रसाद) ...1259

साक्ष्य अधिनियम (1872 का 1), धारा 3 — संयोगी साक्षी — साक्षी के परिसाक्ष्य पर केवल इसलिए अविश्वास नहीं किया जा सकता कि वह संयोगी साक्षी है। (बालकिशन (डिलीटेड) वि. म.प्र. राज्य) ...1473

साक्ष्य अधिनियम (1872 का 1), धारा 3 — स्वतंत्र साक्षी — यद्यपि अनुसंधान अधिकारी द्वारा स्वतंत्र साक्षियों की परीक्षा नहीं करायी गयी तथापि यह प्रत्यक्षदर्शी साक्षियों के परिसाक्ष्य को अमान्य करने के लिए एकमात्र आधार नहीं होगा। (बालकिशन (डिलीटेड) वि. म.प्र. राज्य) ...1473

साक्ष्य अधिनियम (1872 का 1), धारा 3 — हितबद्ध साक्षी — साक्षियों का परिसाक्ष्य यदि भरोसे लायक, विश्वसनीय और अकाट्य पाया जाए तो केवल इस आधार पर अमान्य नहीं किया जा सकता कि वे हितबद्ध साक्षी होना अभिकथित हैं। (बालकिशन (डिलीटेड) वि. म.प्र. राज्य) ...1473

साक्ष्य अधिनियम (1872 का 1), धारा 31 — स्वीकृति सर्वोत्तम साक्ष्य है जिस पर विरोधी पक्ष विश्वास कर सकता है। (परमल सिंह वि. हल्लू) ...1456

साक्ष्य अधिनियम (1872 का 1), धारा 109 — भागीदारों, भूस्वामी और किरायेदार, मालिक और अभिकर्ता के मामलों में सम्बन्ध के बारे में सबूत का भार — वाद के लम्बित रहने के दौरान, एक पक्षकार के अधिवक्ता ने रजिस्ट्रीकृत विक्रय विलेख द्वारा वादग्रस्त सम्पत्ति क्रय कर ली — अभिनिर्धारित — अधिनियम की धारा 109 के उपबंधों को दृष्टिगत रखते हुए यह साबित करने का भार प्रत्यर्थियों पर था कि उस तारीख को कोई वाद लम्बित नहीं था जब विक्रय विलेख किया गया, जो वे ऐसा करने में पूर्ण रूप से असफल हो गये। (अमर सिंह वि. बालमुकुन्द) ...1427

कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धारा 9(3) परन्तुक, नगर पालिक निगम अधिनियम, म.प्र. 1956, धाराएँ 135 व 136 — कृषि उपज मण्डी समिति से सम्पत्ति कर की वसूली — अधिनियम, 1972 की धारा 9(3) के परन्तुक को देखते हुए मण्डी प्रांगण और मण्डी समिति का क्षेत्र नगर पालिक निगम की सीमा के बाहर हैं — निगम को मण्डी समिति से सम्पत्ति कर वसूल करने का कोई प्राधिकार नहीं है — माँग का सूचनापत्र और वसूली अभिखंडित — याचिका मंजूर। (सेक्रेटरी, कृषि उपज मंडी समिति, जबलपुर वि. एडमिनिस्ट्रेटर, म्युनिसिपल कारपोरेशन, जबलपुर) 1420

परिसीमा अधिनियम (1963 का 36), धारा 5 — विलम्ब माफी — सि.प्र.सं. के आदेश 9 नियम 13 के अन्तर्गत आवेदन 1 वर्ष 10 माह के विलम्ब के बाद फाइल किया गया — आवेदन नामंजूर किया गया और अपील भी समय वर्जित मानकर नामंजूर की गयी — डिफ्री के विरुद्ध प्रथम अपील भी 948 दिन के विलम्ब के बाद फाइल की गयी — अपील भी समय वर्जित मानकर खारिज की गयी — विलम्ब के लिए कारण यह होना दर्शाया गया कि प्रभारी अधिकारी उपेक्षावान था और उसने वरिष्ठ अधिकारियों को मामले की प्रगति के बारे में सूचित नहीं किया — प्रभारी अधिकारी के विरुद्ध उसका स्पष्टीकरण चाहते हुए कारण बताओ सूचना पत्र जारी करने के सिवाय कोई कार्यवाही नहीं की गयी — वही व्यक्ति विशेष अनुमति याचिका में भी प्रभारी अधिकारी होना जारी रखा गया — अभिलेख दर्शाता है कि प्रभारी अधिकारी उपेक्षावान नहीं था क्योंकि याची ने राज्य सरकार को भूमि

returned the land to the State Govt. and had requested to defend the case - Not clear that how the petitioner could return the land to State Govt. specifically when it was not placed in possession - Why petitioner after having requested State Govt. to defend the cases decided to file S.L.Ps. - petitioner also failed to produce any title deed, grant of possession certificate - Cause shown for delay is wholly inadequate and unsatisfactory - Petition dismissed with costs. [M.P. Matsya Mahasangh v. Sudheer Kumar] SC...1243

Limitation Act (36 of 1963), Sections 64 & 65 - Adverse possession
- Suit for declaration of title and injunction on the basis of adverse possession - In evidence, plaintiff admitted to have obtained possession from defendants for cultivation and execution of documents in this respect - In further cross-examination after 6 months plaintiff resiled from his earlier version merely about execution of document - Held - Plaintiff failed to prove how and when did his permissible possession become adverse - Suit on the basis of adverse possession liable to be dismissed. [Parmal Singh v. Hallu] ...1456

Mines and Minerals (Development and Regulation) Act (of 1957)
- See - Municipal Corporation Act, M.P., 1956, Section 132(6)(n) & (o) [Northern Coal Fields Ltd. v. State of M.P.] ...1304

Motor Vehicles Act (59 of 1988), Sections 96(i), (xxi), (xxii), 117, 138(2)(e), Motor Vehicles Rules, M.P. 1994, Rules 203 & 204 - Order of District Magistrate passed as Chairman of Bus-Stand Monitoring Committee prescribing maintenance charges to be paid in respect of motor vehicle halting in bus-stand - Rule 204 empowers only the Regional Transport Authority for taking decision for purposes of maintenance of bus-stand by prescribing fees to be paid by private bus operators - Bus-Stand Monitoring Committee constituted by an administrative order of which the District Magistrate is the Chairman can not be equated with Regional Transport Authority even though the Regional Transport Authority may be a member of committee - Order cannot be held valid - Order quashed - Petition allowed. [Anil Jain v. State of M.P.] ...1380

Motor Vehicles Act (59 of 1988), Sections 149 & 166 - Driver of offending vehicle was driving Government vehicle and was on official duty when accident occurred - Tribunal found driver personally liable as photocopy of driving license was produced and driver did not take any steps to bring on record the original - Held - In the course of employment accident occurred - State Vicarious liable to pay compensation - Appeal Allowed. [Mohanlal Mishra v. Chief Medical & Health Officer] ...1445

Motor Vehicles Act (59 of 1988), Section 166 - Deceased 16 years of age and unmarried - Taking loss of annual dependency as 50% of notional income and applying multiplier of 18 compensation enhanced to Rs. 91,000 - Appeal allowed. [Mohanlal Mishra v. Chief Medical & Health Officer]... 1445

वापस कर दी थी और मामले में प्रतिरक्षा करने का अनुरोध किया था — स्पष्ट नहीं कि याची कैसे राज्य सरकार को भूमि वापस कर सकता था विशिष्टतः जब वह कब्जे में नहीं रखी गयी — याची ने राज्य सरकार से मामलों में प्रतिरक्षा करने का अनुरोध करने के बाद विशेष अनुमति याचिकाएँ फाइल करने का निर्णय क्यों लिया — याची कोई हक विलेख, कब्जा प्रदान करने का प्रमाण पत्र पेश करने में भी असफल रहा — विलम्ब के लिए दर्शित कारण पूर्णतः अपर्याप्त और असंतोषजनक है — याचिका खर्चों सहित खारिज। (एम.पी. मत्स्य महासंघ वि. सुधीर कुमार) SC...1243

परिसीमा अधिनियम (1963 का 36), धाराएँ 64 व 65 — प्रतिकूल कब्जा — प्रतिकूल कब्जे के आधार पर स्वत्व घोषणा और व्यादेश के लिए वाद — साक्ष्य में वादी ने खेती के लिए प्रतिवादियों से कब्जा अभिप्राप्त करना और इस सम्बन्ध में दस्तावेजों का निष्पादन स्वीकार किया — 6 माह बाद अतिरिक्त प्रतिपरीक्षा में वादी केवल दस्तावेज के निष्पादन के बारे में अपने पूर्ववर्ती बयान से पीछे हट गया — अभिनिर्धारित — वादी साबित करने में असफल हो गया कि कैसे और कब उसका अनुज्ञेय कब्जा प्रतिकूल हो गया — प्रतिकूल कब्जे के आधार पर वाद खारिज किये जाने योग्य। (परमल सिंह वि. हल्लू) ...1456

खान और खनिज (विकास और विनियमन) अधिनियम (1957 का)— देखें — नगर पालिक निगम अधिनियम, म.प्र., 1956, धारा 132(6)(एन) व (ओ) (नार्दन कोल फील्ड्स लि. वि. म.प्र. राज्य) ...1304

मोटर यान अधिनियम (1988 का 59), धाराएँ 96(i), (xii), (xxii), 117, 138(2)(ई), मोटर यान नियम, म.प्र. 1994, नियम 203 व 204 — जिला मजिस्ट्रेट का बस-स्टेण्ड परिवीक्षण समिति के अध्यक्ष के रूप में पारित आदेश बस-स्टेण्ड में रुकने वाले मोटर वाहन के सम्बन्ध में अदा किया जाने वाला अनुरक्षण शुल्क विहित करता है — नियम 204 बस-स्टेण्ड के अनुरक्षण के प्रयोजनों के लिए निजी बस संचालकों द्वारा अदा किया जाने वाला शुल्क विहित करके निर्णय लेने के लिए केवल क्षेत्रीय परिवहन प्राधिकारी को सशक्त करता है — बस-स्टेण्ड परिवीक्षण समिति जो एक प्रशासनिक आदेश द्वारा गठित की गयी, जिसका जिला मजिस्ट्रेट अध्यक्ष है, क्षेत्रीय परिवहन प्राधिकारी के बराबर नहीं मानी जा सकती, यद्यपि क्षेत्रीय परिवहन प्राधिकारी समिति का सदस्य हो सकता है — आदेश को विधिमन्य नहीं ठहराया जा सकता — आदेश अपास्त — याचिका मंजूर। (अनिल जैन वि. म.प्र. राज्य) ...1380

मोटर यान अधिनियम (1988 का 59), धाराएँ 149 व 166 — दोषी वाहन का चालक शासकीय वाहन चला रहा था और जब दुर्घटना हुई तब सरकारी कर्तव्य पर था — अधिकरण ने चालक को वैयक्तिक रूप से दायी पाया क्योंकि ड्रायविंग लायसेंस की फोटो प्रतिलिपि पेश की गई और चालक ने मूल को अभिलेख पर लाने के लिए कोई कार्यवाही नहीं की — अभिनिर्धारित — नियोजन के अनुक्रम में दुर्घटना हुई — राज्य प्रतिकर का भुगतान करने के लिए प्रतिनिधिक रूप से दायी — अपील मंजूर। (मोहनलाल मिश्रा वि. चीफ मेडिकल एण्ड हेल्थ ऑफिसर) ...1445

मोटर यान अधिनियम (1988 का 59), धारा 166 — मृतक 16 वर्ष का अविवाहित — वार्षिक आश्रितता की हानि काल्पनिक आय का 50 प्रतिशत लेकर और 18 का गुणक लागू कर प्रतिकर बढ़ाकर 91,000 रुपये किया गया — अपील मंजूर। (मोहनलाल मिश्रा वि. चीफ मेडिकल एण्ड हेल्थ ऑफिसर) ...1445

Motor Vehicles Rules, M.P. 1994, Rules 203 & 204 - See - *Motor Vehicles Act, 1988, Sections 96(i), (xxi), (xxii), 117, 138(2)(e)* [Anil Jain v. State of M.P.] ... 1380

Municipal Corporation Act, M.P. (23 of 1956), Section 132(6)(n) & (o), Mines and Minerals (Development and Regulation) Act, 1957, Terminal Tax (Assessment and Collection) on the Goods Exported from Madhya Pradesh Municipal Limits Rules, 1996, Rule 3 - *Terminal Tax on export of goods outside Municipal Corporation area - There is no provision in Act, 1957 which expressly or by implication deal with such tax as imposed by Corporation or by the State - The goods are dumped in the Municipal Corporation area for long/indefinite time - Terminal tax can be exacted - S. 132(6)(n) & (o) of Municipal Corporation Act and Rule 3 of Rules, 1996 can not be said to be ultra vires.* [Northern Coal Fields Ltd. v. State of M.P.] ... 1304

Municipal Corporation Act, M.P., (23 of 1956), Sections 135 & 136 - See - *Krishi Upaj Mandi Adhiniyam, M.P., 1972, Section 9(3) Proviso* [Secretary, Krishi Upaj Mandi Samiti, Jabalpur v. Administrator, Municipal Corporation, Jabalpur] ... 1420

Municipalities Act, M.P. (37 of 1961), Section 41A - *Removal of President of Nagar Palika - Allegations of publication of advertisements, calling for tenders and payment - Held - Decisions were made by entire council - State failed to establish loss caused - Decision of removal by State can not be sustained - Appeal allowed.* [Sharda Kailash Mittal v. State of M.P.] SC... 1248

Municipalities Act, M.P. (37 of 1961), Section 41A - *Removal of President - The exercise of power has serious civil consequences - Such power can be invoked by State only on very strong and weighty reason - The provision has to be construed in strict manner because the holder of office occupies it by election and he/she is deprived of office by an executive order in which the electorate has no chance of participation.* [Sharda Kailash Mittal v. State of M.P.] SC... 1248

National Security Act (65 of 1980), Section 3(2) - *Detention - When warranted - Held - The acts of the detenu should amount to causing disturbance of the public order as the degree and extent thereof should result in panic and terror to the persons of the locality or affect the public at large.* [Sheeba Malik (Smt.) v. Union of India] ... 1410

Notary Rules, 1956, Rule 7 - *Appointment of Notary - Recommendation of Competent Authority - After not receiving any objection from the Bar Association, the Competent Authority recommended the names of candidates for appointment of Notary in order of seniority without making any inquiry as regards eligibility and competence as contemplated in Rule 7(3) - Held - Division Bench while affirming the findings of the learned Single Judge held that Competent Authority has failed to act as per the mandate of*

मोटर यान नियम, म.प्र. 1994, नियम 203 व 204 — देखें — मोटर यान अधिनियम, 1988, धाराएँ 96(i), (xii), (xxii), 117, 138(2)(ई) (अनिल जैन वि. म.प्र. राज्य) ...1380

नगर पालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 132(6)(एन) व (ओ), खान और खनिज (विकास और विनियमन) अधिनियम, 1957, मध्य प्रदेश नगर सीमाओं से निर्यातित माल पर सीमा कर (निर्धारण और संग्रहण) नियम, 1996, नियम 3 — नगर निगम क्षेत्र के बाहर माल के निर्यात पर सीमा कर — अधिनियम, 1957 में कोई उपबंध नहीं है जो अभिव्यक्त रूप से या विवक्षा द्वारा निगम या राज्य द्वारा अधिरोपित ऐसे कर के सम्बन्ध में कार्यवाही करता हो — माल नगर निगम क्षेत्र में लम्बे/अनिश्चित समय के लिए रखा जाता है — सीमा कर आहरित किया जा सकता है — नगर निगम अधिनियम की धारा 132(6)(एन) व (ओ) तथा नियम, 1996 का नियम 3 अधिकारातीत नहीं कहे जा सकते। (नार्दन कोल फील्ड्स लि. वि. म.प्र. राज्य) ...1304

नगर पालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएँ 135 व 136 — देखें — कृषि उपज मण्डी अधिनियम, म.प्र. 1972, धारा 9(3) परन्तुक (सेक्रेटरी, कृषि उपज मंडी समिति, जबलपुर वि. एडमिनिस्ट्रेटर, म्युनिसिपल कारपोरेशन, जबलपुर) 1420

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 41ए — नगापालिका के समापति का हटाया जाना — विज्ञापनों के प्रकाशन, निविदाओं के आमंत्रण और भुगतान के अभिकथन — अभिनिर्धारित — निर्णय सम्पूर्ण परिषद द्वारा लिये गये — राज्य कारित क्षति स्थापित करने में असफल रहा — राज्य द्वारा हटाये जाने का निर्णय कायम नहीं रखा जा सकता — अपील मंजूर। (शारदा कैलाश मित्तल वि. म.प्र. राज्य) SC...1248

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 41ए — समापति का हटाया जाना — शक्ति के प्रयोग से गम्भीर सिविल परिणाम होते हैं — राज्य द्वारा ऐसी शक्ति अवलंब केवल मजबूत और महत्वपूर्ण कारण पर लिया जा सकता है — उपबंध का कठोरता से अर्थ लगाना चाहिए क्योंकि कार्यालय का धारक उसमें निर्वाचन द्वारा अधिमोग करता है और वह कार्यपालिका आदेश द्वारा कार्यालय से वंचित किया जाता है जिसमें निर्वाचक मण्डल को भाग लेने की कोई संभावना नहीं है। (शारदा कैलाश मित्तल वि. म.प्र. राज्य) SC...1248

राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(2) — निरोध — कब आवश्यक है — अभिनिर्धारित — निरुद्ध व्यक्ति के कार्य लोक व्यवस्था में इस प्रकार विघ्न डालने की कोटि में आने चाहिए कि उसकी कोटि और विस्तार के परिणामस्वरूप क्षेत्र के व्यक्तियों को भयभीत और आतंकित करना चाहिए या जन सामान्य को प्रभावित करना चाहिए। (शिबा मलिक (श्रीमति) वि. यूनियन ऑफ इंडिया) ...1410

नोटरी नियम, 1956, नियम 7 — नोटरी की नियुक्ति — सक्षम प्राधिकारी की सिफारिश — सक्षम प्राधिकारी ने अधिवक्ता संघ से कोई आपत्ति प्राप्त न होने के बाद नियम 7 में अनुध्यात पात्रता और सक्षमता के बारे में कोई जाँच किये बिना नोटरी की नियुक्ति के लिए वरिष्ठता क्रम में अभ्यर्थियों के नामों की सिफारिश की — खण्ड न्यायपीठ ने विद्वान एकल न्यायाधीश के निष्कर्षों की पुष्टि करते समय अभिनिर्धारित किया कि सक्षम प्राधिकारी नियम 7(3) की आज्ञा के अनुसार कार्य

Rule 7(3), which amounted to arbitrariness in the process of selection for appointment of Notary. [Rajendra Kumar Chaudha v. Ayaz Ahmad Khan]... 1265

Notary Rules, 1956, Rule 7 - Appointment of Notary - Recommendation of Competent Authority - Cardinal principles - Held - It was incumbent upon the Competent Authority to have send the names arranged in order of suitability of the incumbents whom he has considered to be appropriate having due regard to knowledge and experience, extent of practice and fitness in accordance of Rule 7(3). [Rajendra Kumar Chaudha v. Ayaz Ahmad Khan] ... 1265

Penal Code (45 of 1860), Section 302 - Murder - Conflict between oral evidence and medical evidence - Law discussed. [Balkishan (Deleted) v. State of M.P.] ... 1473

Penal Code (45 of 1860), Section 376 - Evidence of prosecutrix - Under what circumstances the solitary statement of prosecutrix without corroboration can be believed - Law discussed. [Bharat v. State of M.P.]... 1469

Penal Code (45 of 1860), Section 498-A - See - Criminal Procedure Code, 1973, Sections 320 & 482 [Bhavuk Sharma v. Smt. Anju Sharma]... 1493

Pensioner's Welfare Fund Rules, M.P. 1997, Rule 3 (a) - See - Service Law [Prasanna Kumar Sharma v. State of M.P.] ... 1271

Pleadings - No alternative accommodation suitable for the need of plaintiff available pleaded in the plaint - Held - Landlord is obliged under the law to put forth the account of available alternate accommodation of his own and regarding unsuitability of the same for the alleged need in the pleadings - In absence of such pleading in view of availability of such alternate accommodation with the landlord the alleged need of the landlord regarding disputed premises could not be held to be bona fide or genuine for passing the decree of eviction against the tenant. [Ramkishore v. Gyanchandra Jain] ... 1481

Public Works Department Engineer-in-Chief and Chief Engineers Recruitment and Conditions of Service Rules, M.P. 1983, Rule 6(1) - See - Service Law [Anand Selot v. Chief Secretary, Govt. of M.P.] ... 1357

Recovery of Debts Due to Banks and Financial Institutions Act (51 of 1993), Section 22(2)(e), Debts Recovery Tribunal (Procedure) Rules, 1993, Rule 5A - Review - Respondent Bank filed application for review of order passed by Appellate Tribunal along with application for condonation of delay - Appellate Authority not only condoned delay but reopened the original ex parte order - Appellate Authority has taken into consideration certain documents which were not filed in original suit and before DRT - Appellate Tribunal has taken into consideration the award of arbitration which was passed after the order of DRT - Held - Power of review can be

करने में असफल हो गया, जो नोटरी की नियुक्ति के लिए चयन की प्रक्रिया में मनमानेपन की कोटि में आता है। (राजेन्द्र कुमार चौदहा वि. अयाज अहमद खान) ...1265

नोटरी नियम, 1956, नियम 7 - नोटरी की नियुक्ति - सक्षम प्राधिकारी की सिफारिश - मुख्य सिद्धांत - अभिनिर्धारित - सक्षम प्राधिकारी बाध्य था कि पदधारियों की उपयुक्तता के क्रम में व्यस्थित नामों को भेजता जिन्हें उसने नियम 7(3) के अनुसार ज्ञान और अनुभव, व्यवसाय की सीमा और उपयुक्तता पर सम्यक् ध्यान देकर उपयुक्त होना विचारित किया है। (राजेन्द्र कुमार चौदहा वि. अयाज अहमद खान) ...1265

दण्ड संहिता (1860 का 45), धारा 302 - हत्या - मौखिक और चिकित्सीय साक्ष्य के मध्य विरोध - विधि की विवेचना की गयी। (बालकिशन (डिलीटेड) वि. म.प्र. राज्य) ...1473

दण्ड संहिता (1860 का 45), धारा 376 - अभियोक्त्री की साक्ष्य - किन परिस्थितियों के अन्तर्गत अभियोक्त्री के एकमात्र कथन पर बिना सम्पुष्टि के विश्वास किया जा सकता है - विधि की विवेचना की गयी। (भारत वि. म.प्र. राज्य) ...1469

दण्ड संहिता (1860 का 45), धारा 498-ए - देखें - दण्ड प्रक्रिया संहिता, 1973, धाराएँ 320 व 482 (भावुक शर्मा वि. श्रीमति अंजू शर्मा) ...1493

पेंशनभोगी कल्याण निधि नियम, म.प्र. 1997, नियम 3 (a) - देखें - सेवा विधि (प्रसन्न कुमार शर्मा वि. म.प्र. राज्य) ...1271

अभिवचन - वादी की आवश्यकता के लिए उपलब्ध किसी उपयुक्त वैकल्पिक स्थान का अभिवचन वादपत्र में नहीं किया गया - भूस्वामी अभिवचनों में उसके स्वयं के उपलब्ध वैकल्पिक स्थान का और कथित आवश्यकता के लिए उस स्थान की अनुपयुक्तता के सम्बन्ध में विवरण देने के लिए विधि के अन्तर्गत बाध्य है - ऐसे अभिवचनों के अभाव में वादी के पास ऐसे वैकल्पिक स्थान की उपलब्धता को देखते हुए विवादग्रस्त परिसर के सम्बन्ध में भूस्वामी की कथित आवश्यकता को किरायेदार के विरुद्ध डिक्री पारित करने के लिए सद्भावी या वास्तविक होना अभिनिर्धारित नहीं किया जा सकता। (रामकिशोर वि. ज्ञानचंद्र जैन) ...1481

लोक निर्माण विभाग प्रमुख अभियंता और मुख्य अभियंता भर्ती और सेवा की शर्तें नियम, म.प्र. 1983, नियम 6(1) - देखें - सेवा विधि (आनंद सेलट वि. चीफ सेक्रेटरी, गवर्मेन्ट ऑफ एम.पी.) ...1357

बैंकों और वित्तीय संस्थाओं को शोध्य ऋण वसूली अधिनियम (1993 का 51), धारा 22(2)(ई), ऋण वसूली अधिकरण (प्रक्रिया) नियम, 1993, नियम 5ए - पुनर्विलोकन - प्रत्यर्था बैंक ने अपीलीय अधिकरण द्वारा पारित आदेश के पुनर्विलोकन के लिए आवेदन विलम्ब माफी के आवेदन सहित फाइल किया - अपीलीय प्राधिकारी ने न केवल विलम्ब माफ किया बल्कि मूल एकपक्षीय आदेश पर भी नये सिरे से विचार किया - अपीलीय प्राधिकारी ने कतिपय दस्तावेजों को विचार में लिया जो मूल वाद में और ऋण वसूली अधिकरण के समक्ष फाइल नहीं किये गये थे - अपीलीय अधिकरण ने माध्यस्थता के अधिनिर्णय को विचार में लिया जो ऋण वसूली अधिकरण के आदेश के बाद पारित किया गया - अभिनिर्धारित - अधिकरण और अपीलीय अधिकरण द्वारा

exercised by the Tribunal and Appellate Tribunal in the same manner as are vested in civil courts under CPC while trying suits - Order of review is arbitrary and de hors the provisions - Order set-aside - Petition allowed. [Suresh Sharma v. Punjab & Sindh Bank] ...1371

Representation of the People Act (43 of 1951), Section 28A - Order of suspension and disciplinary action issued by Commissioner (Admn) during election duty of petitioner - Held - Any person appointed to conduct election shall be on deputation to Election Commission for period commencing on and from the date of notification calling for such election and ending with the date of declaration of result - During the period, the officer shall be subject to control, superintendence and discipline of Election Commission - Order of suspension by Commissioner (Admn) during that period is not permissible - Petition allowed. [K.P.Dubey v. State of M.P.] ...1301

Service Law - Appointment - Challenge to selection process when not justified - Petitioner undergoing the selection process and after being unsuccessful in the process challenging the condition of the advertisement - Held - If a candidate is of the opinion that the advertisement and selection process were not in accordance with the rules, he was required to challenge the advertisement and selection process without participating in the selection process - Petitioner has participated in the process of selection with open eyes; and therefore, he is estopped from challenging the same in respect of the alleged irregularity in respect of the qualifications. [Padam Singh (Dr.) v. M.P.P.S.C.] ...1331

Service Law - Central Civil Services (Pension) Rules, 1972, Rule 54 - Family pension - Whether payable to a dependant after attaining the age of 25 years - The pension of the dependant who was mentally challenged was stoped after he attained 25 year of age for the reason he got married - Held - A person who is mentally challenged is a perpetual minor, and therefore, he would never attain the age of 25 years - The family pension shall be paid to such person for the life. [Union of India v. Smt. Begum Bee] ...1340

Service Law - Civil Services (Medical Attendance) Rules, M.P. 1958, Rules 2 & 8 - Medical assistance - Petitioner an employee of High Court after his retirement employed on contract basis and his application for medical assistance was rejected as the treatment undergone by him was not in a recognized hospital of the respondents - Held - Rule 2(b) of Rules, 1958 provides that the Rules shall apply to government servants employed on contract basis - Petitioner, after his retirement, has been employed on contract basis and during such employment he suffered a massive heart attack and was required to perform open heart surgery in a hospital which has recognition under Rules, 1958 - Petitioner could have applied for reimbursement in Form I u/R 8(1) of Rules, 1958 and his application for

पुनर्विलोकन की शक्ति का प्रयोग उसी ढंग से किया जा सकता है जैसी कि वादों के विचारण के समय सि.प्र.सं. के अन्तर्गत सिविल न्यायालयों में निहित होती है - पुनर्विलोकन का आदेश मनमाना और उपबंधों से असंबद्ध है - आदेश अपास्त - अपील मंजूर। (सुरेश शर्मा वि. पंजाब एण्ड सिंध बैंक)...1371

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 28ए - आयुक्त (प्रशासन) द्वारा याची के निर्वाचन कार्य के दौरान निलम्बन और अनुशासनिक कार्यवाही का आदेश जारी किया - अभिनिर्धारित - निर्वाचन कराने के लिए नियुक्त कोई व्यक्ति ऐसे निर्वाचन की माँग करने की अधिसूचना की तारीख से आरम्भ होने वाली और परिणाम की घोषणा से समाप्त होने वाली कालावधि के लिए निर्वाचन आयोग में प्रतिनियुक्ति पर होगा - इस कालावधि के दौरान अधिकारी निर्वाचन आयोग के नियंत्रण, अधीक्षण और अनुशासन के अध्वधीन होगा - आयुक्त (प्रशासन) द्वारा उस कालावधि के दौरान निलम्बन का आदेश अनुज्ञेय नहीं है - याचिका मंजूर। (के.पी. दुबे वि. म.प्र. राज्य) ...1301

सेवा विधि - नियुक्ति - चयन प्रक्रिया को चुनौती कब न्यायोचित नहीं - याची ने चयन प्रक्रिया में भाग लिया और प्रक्रिया में असफल होने के बाद विज्ञापन की शर्त को चुनौती दी - अभिनिर्धारित - यदि अन्यथा की यह राय हो कि विज्ञापन और चयन प्रक्रिया नियमों के अनुसार नहीं थी तो उसे चयन प्रक्रिया में भाग लिये बिना विज्ञापन और चयन प्रक्रिया को चुनौती देना अपेक्षित था - याची ने जानकारी के साथ चयन की प्रक्रिया में भाग लिया है और इसलिए वह अर्हताओं के सम्बन्ध में कथित अनियमितताओं के बारे में उसे चुनौती देने से बिबन्धित है। (पद्म सिंह (डॉ.) वि. एम.पी.पी.एस.सी.) ...1331

सेवा विधि - केन्द्रीय सिविल सेवा (पेंशन) नियम, 1972, नियम 54 - परिवार पेंशन - क्या किसी आश्रित को 25 वर्ष की आयु प्राप्त करने के बाद देय है - आश्रित, जिसे मानसिक रूप से चुनौती दी गई, की पेंशन उसके 25 वर्ष की आयु प्राप्त करने के बाद इस कारण से रोक दी गयी कि उसने विवाह कर लिया था - अभिनिर्धारित - कोई व्यक्ति जिसे मानसिक रूप से चुनौती दी गई है शाश्वत अवयस्क होता है, और इसलिए वह 25 वर्ष की आयु कभी प्राप्त नहीं करेगा - ऐसे व्यक्ति को परिवार पेंशन जीवन पर्यन्त प्रदत्त की जाएगी। (यूनियन ऑफ इंडिया वि. श्रीमति बेगम बी) ...1340

सेवा विधि - सिविल सेवा (चिकित्सीय परिचर्या) नियम, म.प्र. 1958, नियम 2 व 8 - चिकित्सीय सहायता - याची उच्च न्यायालय का कर्मचारी उसकी सेवानिवृत्ति के बाद संविदा आधार पर नियोजित किया गया और उसका चिकित्सीय सहायता का आवेदन इसलिए खारिज कर दिया गया क्योंकि उसके द्वारा कराया गया उपचार प्रत्यर्थियों के मान्यताप्राप्त चिकित्सालय में नहीं था - अभिनिर्धारित - नियम, 1958 का नियम 2(बी) उपबन्धित करता है कि नियम संविदा आधार पर नियोजित शासकीय सेवकों को भी लागू होंगे - याची उसकी सेवानिवृत्ति के बाद संविदा आधार पर नियोजित किया गया है और ऐसे नियोजन के दौरान उसे बड़ा हृदयाघात हुआ और उस चिकित्सालय में ओपन हार्ट सर्जरी करना आवश्यक था जो नियम, 1958 के अन्तर्गत मान्यता रखता हो - याची नियम, 1958 के नियम 8(1) के अन्तर्गत प्रारूप I में प्रतिपूर्ति के लिए आवेदन कर सकता था और प्रत्यर्थियों द्वारा उसका प्रतिपूर्ति का आवेदन उसकी विधि अनुसार जाँच के बाद मंजूर किया जा सकता

reimbursement could have been allowed by the respondents after its scrutiny in accordance with law - Petitioner directed to apply for reimbursement under Rules of 1958 and same directed to be decided within a period of 3 months. [Prasanna Kumar Sharma v. State of M.P.] ...1271

Service Law - Constitution, Article 226 - Delay and laches - *Petitioner claimed stepping up of pay and placement above respondent No.5 in gradation list as respondent No.5 was junior to him but was promoted earlier - Writ Petition filed after 17 years of supersession despite knowledge - Held - Delay cannot be condoned in approaching the Court on the ground of submitting large numbers of representation from time to time - Delay of 17 years is not a reasonable delay - Petitioner is not entitled for any relief - Petition dismissed. [Ram Babu Rajak v. M.P. Madhya Kshetra Vidyut Vitran Co. Ltd.]* ...1351

Service Law - Constitution, Article 226, Public Works Department Engineer-in-Chief and Chief Engineers Recruitment and Conditions of Service Rules, M.P. 1983, Rule 6(1) - Current charge of post of Engineer-in-Chief due to administrative difficulties - Held - Even though respondent No.3 does not fulfil the requisite qualification as prescribed under Recruitment Rules but when it is an officiating or incharge arrangement, it is not recognition of his right to the post then it may not be in the interest of justice to issue a writ of Quo warranto - Petition dismissed. [Anand Selot v. Chief Secretary, Govt. of M.P.] ...1357

Service Law - Disciplinary proceedings - Natural justice - *Complainant not produced in the enquiry and could not be cross-examined - Held - Non-examination of complainant tantamount to violation of principle of natural justice. [Vijay Jalali (Smt.) v. HMT Limited]* ...1405

Service Law - Disciplinary proceedings - Sexual harassment at work place - Dismissal - Quantum of punishment - *The petitioner making complaints regarding sexual harassment at work place against the complainant at whose behest the D.E. was initiated against the petitioner - Prior to the initiation of D.E., no action was taken against such a complaint of the petitioner by the management - Held - Behaviour and attitude of the petitioner of slapping by Chappal and abusing the complainant was not irritating in any manner - Since the petitioner was sexually harassed in the past and complaints were made by her but no action was taken thereupon and on the date of incident also the sexual harassment was practiced on her, therefore, it cannot be said that the petitioner was unjustified in defending herself against the sexual harassment - Order of dismissal set aside with a direction to reinstate the petitioner with 75% back wages. [Vijay Jalali (Smt.) v. HMT Limited]* ...1405

Service Law - Educational Service (Collegiate Branch) Recruitment

था - याची को निदेश दिया गया कि 1958 के नियमों के अन्तर्गत प्रतिपूर्ति के लिए आवेदन करे और 3 माह की कालावधि के भीतर उसका विनिश्चय करने का निदेश दिया गया। (प्रसन्न कुमार शर्मा वि. म.प्र. राज्य) ...1271

सेवा विधि - संविधान, अनुच्छेद 226 - विलम्ब और गफलत - याची ने वेतन बढ़ाने और पदक्रम-सूची में प्रत्यर्थी क्र. 5 के ऊपर स्थान देने का दावा किया क्योंकि प्रत्यर्थी क्र. 5 उससे कनिष्ठ था किन्तु उसकी पदोन्नति पूर्व में हो गयी - रिट याचिका जानकारी के बावजूद अधिक्रमण के 17 वर्ष बाद फाइनल की गयी - अभिनिर्धारित - न्यायालय से निवेदन करने में हुआ विलम्ब समय-समय पर कई अभ्यावेदन पेश करने के आधार पर माफ नहीं किया जा सकता - याची किसी अनुतोष का हकदार नहीं - याचिका खारिज। (राम बाबू रजक वि. एम.पी. मध्य क्षेत्र विद्युत वितरण कं. लि.) ...1351

सेवा विधि - संविधान, अनुच्छेद 226, लोक निर्माण विभाग प्रमुख अभियंता और मुख्य अभियंता भर्ती और सेवा की शर्तें नियम, म.प्र. 1983, नियम 6(1) - प्रशासनिक कठिनाईयों के कारण प्रमुख अभियंता के पद का वर्तमान प्रभार - अभिनिर्धारित - यद्यपि प्रत्यर्थी क्र. 3 भर्ती नियमों में विहित आवश्यक अर्हता पूरी नहीं करता है किन्तु जब यह स्थानापन्न या कार्यभारी व्यवस्था हो, यह पद के प्रति उसके अधिकार की मान्यता न हो तब यह न्यायहित में नहीं हो सकता कि अधिकार पृच्छा की रिट जारी की जाए - याचिका खारिज। (आनंद सेलट वि. चीफ सेक्रेटरी, गवर्मेन्ट ऑफ एम.पी.) ...1357

सेवा विधि - अनुशासनिक कार्यवाहियाँ - नैसर्गिक न्याय - जॉच में परिवादी को पेश नहीं किया गया और उसकी प्रतिपरीक्षा नहीं की जा सकी - अभिनिर्धारित - परिवादी की परीक्षा न की जाना नैसर्गिक न्याय के सिद्धांत के उल्लंघन के समान है। (विजय जलाली (श्रीमति) वि. एच. एम.टी., लिमिटेड) ...1405

सेवा विधि - अनुशासनिक कार्यवाहियाँ - कार्यस्थल पर लैंगिक परिपीड़न - बरखास्तगी - दण्ड की मात्रा - याची ने कार्यस्थल पर लैंगिक परिपीड़न के सम्बन्ध में परिवादी के विरुद्ध शिकायतें कीं जिसके निवेदन पर याची के विरुद्ध विभागीय जॉच प्रारम्भ की गयी - विभागीय जॉच प्रारम्भ किये जाने के पूर्व प्रबंधन द्वारा याची की ऐसी शिकायत के विरुद्ध कोई कार्यवाही नहीं की गयी - अभिनिर्धारित - याची का चप्पल से मारने और परिवादी को गाली देने का आचरण और मनोवृत्ति किसी भी ढंग से संतापकारी नहीं था - चूंकि याची को पूर्व में लैंगिक रूप से परेशान किया गया और उसके द्वारा शिकायतें की गयीं, किन्तु उन पर कोई कार्यवाही नहीं की गयी और घटना की तारीख को भी उसके साथ लैंगिक परिपीड़न किया गया, इसलिए यह नहीं कहा जा सकता कि याची लैंगिक परिपीड़न के विरुद्ध स्वयं की प्रतिरक्षा करने में अन्यायपूर्ण थी - बरखास्तगी का आदेश इस निदेश के साथ अपास्त किया गया कि याची को 75 प्रतिशत पूर्व वेतन के साथ पुनर्नियुक्त किया जाए। (विजय जलाली (श्रीमति) वि. एच.एम.टी., लिमिटेड) ...1405

सेवा विधि - शैक्षणिक सेवा (महाविद्यालय शाखा) भर्ती नियम, म.प्र. 1967, नियम

Rules, M.P. 1967, Rule 12(5) - Emergency appointment - Higher pay scale - Whether past services rendered in emergency appointment would be counted for grant of higher pay scale - Held - Yes - The appointment were made after following the procedure prescribed u/R 12(5) which provided for emergency appointment and subsequently the services of employees were regularized - State Government has taken the decision vide circular dated 12.02.1992 for counting of such services for the purpose of higher pay scale and for selection pay scale, the benefit of which could not have been denied to the employees. [State of M.P. v. Dr. Smt. Sandhya Prasad] ...1259

Service Law - Pension - Annuity - Date when its gets crystallized - Held - Right of the employees to receive the annuity and the quantum of the annuity gets crystallized at the time of purchase of the annuity and once they have retired the connection between the trust and the fund of the retirees are served and the LIC under law is obliged to make payment as promised. [R.S. Shastri v. M.P. State Ware House Corporation] ...1386

Service Law - Pensioner's Welfare Fund Rules, M.P. 1997, Rule 3 (a) - Medical assistance - Petitioner's application for medical assistance was rejected as the treatment undergone by him was not in a recognized hospital of the respondents - Held - Treatment undergone by the petitioner was not in the approved hospital list of the respondent and thus rejection for the medical assistance can not be said to be unjustified - It appears that under some misconception the petitioner approached to the respondents seeking 'assistance' under Rules of 1997. [Prasanna Kumar Sharma v. State of M.P.] ...1271

Service Law - Policy decision - Judicial review - Held - Courts would be slow in interfering with matters of government policy except where it is shown that the decision is unfair, mala fide or contrary to any statutory directions - Courts will not dictate the decision of the statutory authority in exercise of its discretion and formulation of its policies - Court will not direct the statutory authority to exercise the discretion in a particular manner not expressly required by law. [Y.L. Chopra v. Rani Durgawati Vishwavidyalaya] ... 1280

Service Law - Reversion of a probationer - Whether punitive in nature - Held - The petitioner's work was under observation during the probation period and he was given repeated opportunity to improve his performance for which purpose his probation was extended for a further period of one year - The competent authority did not find him fit for confirmation on the promotional post because during probation period his services were unsatisfactory - The order of reversion not punitive in nature. [Phool Singh Kushwaha v. Food Corporation of India] ...1343

Service Law - Teaching staff and library staff - Distinction - The teaching staff has to do some research work, deep study in their respective subjects and to make preparations for the daily lectures in the class rooms

12(5) - आकस्मिक नियुक्ति - उच्चतर वेतनमान - क्या आकस्मिक नियुक्ति में दी गयीं पूर्व सेवाएँ उच्चतर वेतनमान प्रदान करने के लिए गिनी जाएंगी - अभिनिर्धारित - हाँ - नियुक्तियाँ नियम 12(5) के अन्तर्गत विहित प्रक्रिया का पालन करने के बाद की गयीं जो आकस्मिक नियुक्ति का उपबंध करता है और तत्पश्चात् कर्मचारियों की सेवाएँ नियमित कर दी गयीं - राज्य सरकार ने उच्चतर वेतनमान और सिलेक्शन वेतनमान के प्रयोजन के लिए ऐसी सेवाएँ गिनने के लिए परिपत्र तारीख 12.02.1992 द्वारा निर्णय लिया है, जिसका लाभ कर्मचारियों को देने से इनकार नहीं किया जा सकता था। (म.प्र. राज्य वि. डॉ. श्रीमति संध्या प्रसाद) ...1259

सेवा विधि - पेंशन - वार्षिकी - तारीख जब इसे निश्चित कराया जाता है - अभिनिर्धारित - कर्मचारियों का वार्षिकी प्राप्त करने का अधिकार और वार्षिकी की मात्रा वार्षिकी क्रय किये जाते समय निश्चित करायी जाती है और जब वे सेवानिवृत्त हो गये हों तब न्यास और सेवानिवृत्तों की निधि के बीच सम्बन्ध पूरा हो जाता है और जीवन बीमा निगम वचन के अनुसार विधि के अन्तर्गत संदाय करने के लिए बाध्य है। (आर.एस. शास्त्री वि. एम.पी. स्टेट वेयर हाउस कारपोरेशन) ...1386

सेवा विधि - पेंशनभोगी कल्याण निधि नियम, म.प्र. 1997, नियम 3 (a) - चिकित्सीय सहायता - चिकित्सीय सहायता के लिए याची का आवेदन नामंजूर किया गया क्योंकि उसके द्वारा कराया गया उपचार प्रत्यर्थियों के मान्यताप्राप्त चिकित्सालय में नहीं था - अभिनिर्धारित - याची द्वारा कराया गया उपचार प्रत्यर्थी की अनुमोदित चिकित्सालय सूची में नहीं था और इस प्रकार चिकित्सीय सहायता की नामंजूरी अन्यायपूर्ण नहीं कही जा सकती - ऐसा प्रतीत होता है कि किसी भ्रम वश याची ने 1997 के नियमों के अन्तर्गत 'सहायता' चाहते हुए प्रत्यर्थियों से निवेदन किया। (प्रसन्न कुमार शर्मा वि. म.प्र. राज्य) ...1271

सेवा विधि - पॉलिसी निर्णय - न्यायिक पुनर्विलोकन - अभिनिर्धारित - न्यायालय शासकीय पॉलिसी के मामलों में हस्तक्षेप करने में वहाँ के सिवाय जल्दी नहीं करेंगे जहाँ यह दर्शाया जाता है कि निर्णय अनुचित, असदभावी या कानूनी निदेशों के विपरीत है - न्यायालय कानूनी प्राधिकारी के अपने विवेक के प्रयोग में और उसकी पॉलिसियों के निर्माण में लिए गए निर्णय को नहीं लिखवाएँगे - न्यायालय कानूनी प्राधिकारी को किसी विशिष्ट ढंग से विवेक का प्रयोग करने का निदेश नहीं देंगे जो विधि द्वारा अभिव्यक्त रूप से अपेक्षित नहीं है। (वाय.एल. चोपरा वि. रानी दुर्गावती विश्वविद्यालय) ...1280

सेवा विधि - परिवीक्षाधीन व्यक्ति का प्रतिवर्तन - क्या प्रकृति दण्डात्मक है - अभिनिर्धारित - याची का कार्य परिवीक्षा अवधि के दौरान अवलोकन के अधीन था और उसे अपना कार्य सुधारने के कई अवसर दिये गये जिस प्रयोजन के लिए उसकी परिवीक्षा एक वर्ष की कालावधि के लिए आगे बढ़ायी गयी - सक्षम प्राधिकारी ने पदोन्नत पद पर स्थायीकरण के लिए उसे उपयुक्त नहीं पाया क्योंकि परिवीक्षा अवधि के दौरान उसकी सेवाएँ असंतोषजनक थीं - प्रतिवर्तन के आदेश की प्रकृति दण्डात्मक नहीं। (फूल सिंह कुशवाहा वि. फुड कारपोरेशन ऑफ इंडिया) ...1343

सेवा विधि - अध्यापन कर्मचारीवृंद और पुस्तकालय कर्मचारीवृंद - विभेद - अध्यापन कर्मचारीवृंद को अपने-अपने विषयों में कुछ अनुसंधान कार्य, गहन अध्ययन करना पड़ता है और कक्षाओं में दैनिक व्याख्यानों के लिए तैयारियाँ करनी पड़ती हैं और अन्य शैक्षिक कार्य करने

and other academic work while this is not so in the case of library staff - The experience of library staff is totally different from the one which is required for the teaching staff - Working pattern of the two sets of employees cannot be said to be identical so as to claim parity between the library staff and the teaching staff. [Y.L. Chopra v. Rani Durgawati Vishwavidyalaya] ... 1280

Service Law - Vishwavidyalaya Adhiniyam, M.P. (22 of 1973), Section 52 - Teacher - Whether a Librarian is a teacher - Held - A Sport Teacher stands on different footing than a Librarian and no status has been conferred on the Librarians treating them as teachers in as much as they belong to a different class altogether and the State Government has conferred them the benefit by a circular which is within its domain but it can be construed that they have been given the benefit because they are equated with teachers. [Y.L. Chopra v. Rani Durgawati Vishwavidyalaya] ... 1280

Service Law - Warehousing Corporation Act (58 of 1962), Section 42, State Warehousing Corporation Employees Pension Scheme, M.P. 1996 - Pension - Liability to pay - A pension scheme was introduced and trust deed was entered into between Warehousing Corporation and LIC India - Under the scheme a corpus was created which was an amount equivalent to 1.8% of the month's salary for each qualifying year of service, subject to a maximum equivalent of 45 months' salary - This corpus could exceed 45 months salary due to excess income that may be generated from the investment of the fund by the Corporation - For the purpose of creation of this fund, the employees and employer's contribution was computed @ 10% of the basic pay with DA and the premium was fixed which contained the relevant details with regard to the corpus fund of an employee, his date of retirement, last pay drawn, pension payable and the amount of commutation - Employees were getting the pension till March 2002 and the same was stopped for the reason that LIC had made excess payment in regard to commutation, it seems that it had made excess payment in regard to commutation of pension and there had been reduction in the annuity rate due to lowering of interest in the financial market - Held - LIC having accepted the annuity and having effected monthly payments can neither reduce the annuity amount nor can refund it to the detriment of the retirees since the annuity has already crystallized and no change can be made in such annuity - LIC has an obligation under law to fulfill the promise given by it to the retirees, who are assured under the annuity scheme. [R.S. Shastri v. M.P. State Ware House Corporation] ... 1386

Stamp Act (2 of 1899), Sections 33, 35, 38 & 40, Schedule 1-A, Articles 5 & 23 - Stamp duty payable on an instrument on which a recital of possession is mentioned - Whether an agreement or conveyance - Held - In light of the explanation appended to Article 23 of Act, in the case of an agreement to sell immovable property there is a recital that possession of immovable property is transferred to the purchaser at the time of execution

पड़ते हैं जबकि पुस्तकालय कर्मचारीवृंद के मामले में ऐसा नहीं है — पुस्तकालय कर्मचारीवृंद का अनुभव उससे पूर्णतः भिन्न है जो अध्यापन कर्मचारीवृंद के लिए अपेक्षित है — पुस्तकालय कर्मचारीवृंद और अध्यापन कर्मचारीवृंद के मध्य समानता का दावा करने के लिए कर्मचारियों के दोनों वर्गों का कार्य ढाँचा समरूप नहीं कहा जा सकता। (वाय.एल. चोपरा वि. रानी दुर्गावती विश्वविद्यालय)...1280

सेवा विधि — विश्वविद्यालय अधिनियम, म.प्र. (1973 का 22), धारा 52 — अध्यापक — क्या पुस्तकालय अध्यक्ष एक अध्यापक है — अभिनिर्धारित — खेल शिक्षक को पुस्तकालय अध्यक्ष की तुलना में भिन्न आधार पर रखा जाता है और पुस्तकालय अध्यक्षों को उन्हें अध्यापक मानकर कोई प्रास्थिति प्रदत्त नहीं की गयी है क्योंकि वे पूर्णतया भिन्न वर्ग से सम्बन्धित हैं और राज्य सरकार ने उन्हें एक परिपत्र द्वारा, जो उसके अधिकार क्षेत्र के भीतर है, लाभ प्रदान किया है किन्तु यह अर्थ लगाया जा सकता कि उन्हें इसलिए लाभ दिया गया है क्योंकि वे अध्यापकों के बराबर माने जाते हैं। (वाय.एल. चोपरा वि. रानी दुर्गावती विश्वविद्यालय) ...1280

सेवा विधि — भांडागारण निगम अधिनियम (1962 का 58), धारा 42, राज्य भांडागारण निगम कर्मचारी पेंशन योजना, म.प्र. 1996 — पेंशन — अदा करने का दायित्व — एक पेंशन योजना पुरःस्थापित की गयी और भांडागारण निगम और भारतीय जीवन बीमा निगम के मध्य न्यास विलेख किया गया — योजना के अन्तर्गत संग्रह सृष्ट किया गया जो सेवा के प्रत्येक अर्हता वर्ष के लिए माह के वेतन के 1.8 प्रतिशत के बराबर एक धनराशि थी — यह संग्रह अतिरिक्त आय, जो निगम द्वारा निधि के निवेश से उत्पन्न की जा सकती है, के कारण 45 माह के वेतन से अधिक नहीं हो सकता — इस निधि के सृजन के लिए कर्मचारियों और नियोक्ता का योगदान महँगाई भत्ते सहित मूल वेतन का 10 प्रतिशत निर्धारित किया गया और प्रीमियम नियत किया गया जिसमें कर्मचारी की संग्रह निधि, उसकी सेवानिवृत्ति की तारीख, अंतिम बार निकाला गया वेतन, देय पेंशन और सारांशीकरण की राशि के बारे में सुसंगत विवरण अन्तर्विष्ट है — कर्मचारी मार्च 2002 तक पेंशन प्राप्त कर रहे थे और यह इस कारण से रोक दी गयी कि जीवन बीमा निगम ने सारांशीकरण के सम्बन्ध में अतिरिक्त संदाय किया था और वित्तीय बाजार में ब्याज निम्न होने के कारण वार्षिकी दर में कमी हुई थी — अभिनिर्धारित — जीवन बीमा निगम वार्षिकी स्वीकार करने और मासिक संदाय करने के बाद न तो वार्षिकी रकम कम कर सकती है और न ही सेवानिवृत्तों की हानि के लिए उसे वापस कर सकती है चूंकि वार्षिकी पहले से ही निश्चित की जा चुकी है और ऐसी वार्षिकी में कोई परिवर्तन नहीं किया जा सकता — जीवन बीमा निगम का विधि के अन्तर्गत यह दायित्व है कि उसके द्वारा सेवानिवृत्तों, जिन्हें वार्षिकी योजना के अन्तर्गत बीमात किया गया है, को दिये गये वचन का पालन करे। (आर.एस. शास्त्री वि. एम.पी. स्टेट वेयर हाउस कारपोरेशन) ...1386

स्टाम्प अधिनियम (1899 का 2), धाराएँ 33, 35, 38 व 40, अनुसूची 1-ए, अनुच्छेद 5 व 23 — किसी लिखत पर देय स्टाम्प शुल्क जिस पर कब्जे का कथन उल्लिखित है — करार है या हस्तांतरण — अभिनिर्धारित — अधिनियम के अनुच्छेद 23 से जुड़े स्पष्टीकरण के प्रकाश में, स्थावर सम्पत्ति विक्रय करने की दशा में यह कथन हो कि स्थावर सम्पत्ति का कब्जा ऐसे करार के निष्पादन के समय क्रेता को हस्तांतरित कर दिया गया है या कि कब्जा उसके सम्बन्ध में

of such agreement or that possession would be delivered in future without executing a conveyance in respect thereof, then such agreement to sell shall be deemed to be a conveyance and stamp duty thereon shall be leviable. [Umesh Kumar v. Rajaram] ...1290

State Warehousing Corporation Employees Pension Scheme, M.P. 1996 - See - Service Law [R.S. Shastri v. M.P. State Ware House Corporation]... 1386

Terminal Tax (Assessment and Collection) on the Goods Exported from Madhya Pradesh Municipal Limits Rules, 1996, Rule 3 - See - Municipal Corporation Act, M.P., 1956, Section 132(6)(n) & (o) [Northern Coal Fields Ltd. v. State of M.P.] ...1304

Vishwavidyalaya Adhiniyam, M.P. (22 of 1973), Sections 14(3) & (4) - Non-supply of documents - Show cause notice issued to appellant u/s 14(3) of the Act - Documents forming part of show cause notice not supplied - Appellant demanded the documents but were not supplied - Observation of High Court that appellant never asked for inspection nor applied for copies of documents amounts to begging the question - Liberty given to appellant that he can seek inspection or obtain copies of the record of University has nothing to do with appellant's grievance that he had not been supplied copies of documents forming part of show cause notice - S. 14(4) casts duty upon Chancellor to give reasonable opportunity - Omission on the part of appellant to seek inspection or apply for copies of documents was inconsequential - Principles of Natural Justice violated - Order removing appellant from the post of Vice-Chancellor bad in law - Order quashed - Appeal allowed. [A.D.N. Bajpai (Prof.) v. State of M.P.] SC...1235

Vishwavidyalaya Adhiniyam, M.P. (22 of 1973), Sections 14(3) & (4) - Reasonable opportunity of hearing - Rules of Natural Justice in context of Ss. 14(3) & (4) mean that Vice-Chancellor is made aware of specific allegations on which inquiry is proposed - He is also informed about material/evidence sought to be used against him - Vice-Chancellor can also ask for an opportunity to lead evidence - Chancellor is required to evolve an appropriate mechanism by which Vice-Chancellor gets an effective opportunity to challenge the grounds enumerated in show cause notice. [A.D.N. Bajpai (Prof.) v. State of M.P.] SC...1235

Vishwavidyalaya Adhiniyam, M.P. (22 of 1973), Section 52 - See - Service Law [Y.L. Chopra v. Rani Durgawati Vishwavidyalaya] ...1280

Warehousing Corporation Act (58 of 1962), Section 42 - See - Service Law [R.S. Shastri v. M.P. State Ware House Corporation] ...1386

WORDS & PHRASES :

Impound - Meaning - Held - A true understanding of the word 'impound' would only mean to authorize the Court to keep document in the

कोई हस्तांतरण दिलेख निष्पादित किये बिना भविष्य में सौंपा जाएगा, तब ऐसा विक्रय करार हस्तांतरण समझा जाएगा और उस पर स्टाम्प शुल्क उद्ग्रहीत किया जाएगा। (उमेश कुमार वि. राजाराम) ...1290

राज्य भांडागारण निगम कर्मचारी पेंशन योजना, म.प्र. 1996 - देखें - सेवा विधि (आर.एस. शास्त्री वि. एम.पी. स्टेट वेयर हाउस कारपोरेशन) ...1386

मध्य प्रदेश नगर सीमाओं से निर्यातित माल पर सीमा कर (निर्धारण और संग्रहण) नियम, 1996, नियम 3 - देखें - नगर पालिक निगम अधिनियम, म.प्र., 1956, धारा 132(6)(एन) व (ओ) (नार्दन कोल फील्डस् लि. वि. म.प्र. राज्य) ...1304

विश्वविद्यालय अधिनियम, म.प्र. (1973 का 22), धाराएँ 14(3) व (4) - दस्तावेज प्रदाय न करना - अपीलार्थी को अधिनियम की धारा 14(3) के अन्तर्गत कारण बताओ सूचना पत्र जारी किया गया - कारण बताओ सूचना पत्र के अंगभूत दस्तावेज प्रदाय नहीं किये गये - अपीलार्थी ने दस्तावेजों की माँग की किन्तु प्रदाय नहीं किये गये - उच्च न्यायालय की टिप्पणी कि अपीलार्थी ने निरीक्षण की माँग कमी नहीं की और न ही दस्तावेजों की प्रतिलिपियों के लिए आवेदन किया, प्रश्न को टालने की कोटि में आता है - अपीलार्थी को दी गई स्वतंत्रता ने कि वह निरीक्षण की माँग कर सकता है या विश्वविद्यालय के अभिलेख की प्रतिलिपियाँ अभिप्राप्त कर सकता है, अपीलार्थी की व्यथा कि उसे कारण बताओ सूचना पत्र के अंगभूत दस्तावेजों की प्रतिलिपियाँ प्रदाय नहीं की गयीं थीं, के लिए कुछ नहीं किया है - धारा 14(4) कुलाधिपति पर यह कर्तव्य डालती है कि युक्तियुक्त अवसर प्रदान करे - अपीलार्थी की ओर से निरीक्षण की माँग करने या दस्तावेजों की प्रतिलिपियों के लिए आवेदन करने का लोप आप्रासंगिक था - नैसर्गिक न्याय के सिद्धांतों का उल्लंघन हुआ - अपीलार्थी को कुलपति के पद से हटाने का आदेश विधि विरुद्ध - आदेश अभिखंडित - अपील मंजूर। (ए.डी. एन. बाजपेयी (प्रो.) वि. म.प्र. राज्य) SC...1235

विश्वविद्यालय अधिनियम, म.प्र. (1973 का 22), धाराएँ 14(3) व (4) - सुनवाई का युक्तियुक्त अवसर - धाराओं 14(3) व (4) के संदर्भ में नैसर्गिक न्याय के नियम का अर्थ है कि कुलपति को विनिर्दिष्ट अभिकर्त्यों से अवगत कराया जाता है जिन पर जाँच प्रस्तावित है - उसे उसके विरुद्ध प्रयुक्त करना चाही गयी सामग्री/साक्ष्य के बारे में भी सूचित किया जाता है - कुलपति साक्ष्य पेश करने के अवसर की भी माँग कर सकता है - कुलाधिपति को एक समुचित यंत्र रचना विकसित करना आवश्यक है जिसके द्वारा कुलपति को कारण बताओ सूचना पत्र में प्रगणित आधारों को चुनौती देने के लिए प्रभावी अवसर मिले। (ए.डी.एन. बाजपेयी (प्रो.) वि. म.प्र. राज्य) SC...1235

विश्वविद्यालय अधिनियम, म.प्र. (1973 का 22), धाराएँ 52 - देखें - सेवा विधि (वाय.एल. चोपरा वि. रानी दुर्गावती विश्वविद्यालय) ...1280

भांडागारण निगम अधिनियम (1962 का 58), धारा 42 - देखें - सेवा विधि (आर. एस. शास्त्री वि. एम.पी. स्टेट वेयर हाउस कारपोरेशन) ...1386

शब्द और वाक्यांश

परिबद्ध करना - अर्थ - अभिनिर्धारित - शब्द 'परिबद्ध करना' का सही बोध केवल न्यायालय को दस्तावेज अभिरक्षा में रखने के लिए प्राधिकृत करने के अर्थ में होगा क्योंकि न्यायालय

custody because the Court is of the opinion that the document is either suspected or is insufficiently stamped. [Umesh Kumar v. Rajaram] ...1290

Stale - Meaning - Held - The word 'stale' means not fresh and, therefore, unpalatable, overused and no longer interesting or original, lacking in energy and out of date etc. [Sheeba Malik (Smt.) v. Union of India]...1410

Workmen's Compensation Act (8 of 1923), Section 2(1)(n), Schedule II, Clause (viii) - Workman - Eligibility - Section 2(1)(n)(ii) of Act stipulate that workman would be a person employed in any such capacity as is specified in Schedule II - Sub-clause (a) of Clause (viii) of Schedule II further stipulates that building in which a person is employed for the purpose of construction, maintenance, repair or demolition must be designed to be or is or has been more than one story in height above the ground or twelve feet or more from the ground level to the apex of the roof. [Rajshree Minerals v. Karamvir Singh] ...1441

की यह राय है कि दस्तावेज या तो शंकास्पद है या अपर्याप्त रूप से स्ताम्पित है। (उमेश कुमार वि. राजाराम) ...1290

अतिकालिक - अर्थ - अभिनिर्धारित - शब्द 'अतिकालिक' का अर्थ है नया नहीं और इसलिए अभक्ष्य, अतिउपयोग और अब रुचिकर या मौलिक नहीं, ऊर्जा में कमी और अप्रचलित आदि। (शिबा मलिक (श्रीमति) वि. यूनियन ऑफ इंडियो) ...1410

कर्मकार प्रतिकर अधिनियम (1923 का 8), धारा 2(1)(एन), अनुसूची II, खण्ड (viii) - कर्मकार - पात्रता - अधिनियम की धारा 2(1)(ii) बताती है कि कर्मकार ऐसी किसी क्षमता में नियोजित व्यक्ति होगा जैसा कि अनुसूची II में विनिर्दिष्ट है - अनुसूची II के खण्ड (viii) के उपखण्ड (a) आगे यह बताता है कि भवन जिसमें कोई व्यक्ति निर्माण, अनुरक्षण, मरम्मत या विनष्टीकरण के प्रयोजन के लिए नियोजित किया जाता है, जमीन के ऊपर ऊँचाई में एक मंजिल से अधिक या भू-तल से छत के शीर्ष तक बारह फुट या अधिक हो, परिकल्पित हो या की जानी चाहिए। (राजश्री मिनिरल्स वि. कर्मवीर सिंह) ...1441

NARENDRA KANTE V. ANURADHA KANTE

a power under section 408, there is no such embargo on the Sessions Judge to see as to whether the trial of the case or the hearing of an appeal, as the case may be, has commenced or not". In this case, provisions of section 408 Cr.P.C are applicable. So it is fundamental importance that the case is only to be transferred when it is expedient for the ends of justice.

10. In case of *Ajeem Vs. State of U.P. and Another* 2006 CRI.L.J 2956 major part of evidence was recorded by Special Judge and thereafter, he was posted as Third Additional Sessions Judge in the same District, then the case was transferred to his Court considering the ground that the major part of evidence was recorded before him.

11. In the light of above legal position, it is specific that in the present case, the trial is on the verge of conclusion and was fixed for final arguments and then at that stage, case was transferred to the Court of Third ASJ, Shivpuri and nothing is apparent from the record that the case was transferred because, it was expedient for the ends of justice. Hence, the impugned order passed by learned Sessions Judge Shivpuri is not sustainable in the eyes of law. Hence, the order dated 27.1.2010 passed Sessions Judge, Shivpuri is set-aside. Case is sent back to the Court of Sessions Judge, Shivpuri for further proceedings.

Order accordingly.

I.L.R. [2010] M. P., 1227
SUPREME COURT OF INDIA

Before Mr. Justice Altamas Kabir & Mr. Justice Cyriac Joseph
 15 December, 2009*

NARENDRA KANTE

... Appellant

Vs.

ANURADHA KANTE & ors.

... Respondents

Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 - Ancestral property - Suit for declaration and injunction - Application for temporary injunction - Rejection on the ground of deed of family settlement - Held - Family settlement not signed by all co-sharers therefore cannot be relied - However, plaintiff acting upon said deed sold part of suit property, it would not be open to him to question the deed of family settlement - Facts regarding partition is a question of fact hence can not be interfered - However, if interim order is passed, purchaser will not be able to utilize the property, therefore, would suffer irreparable loss and injury - Purchaser would be permitted to carry out construction activities but shall be restrained from alienating or transferring property during pendency of civil suit. (Paras 21 to 26)

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सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 - पैतृक सम्पत्ति - घोषणा और व्यादेश के लिए वाद - अस्थायी व्यादेश के लिए आवेदन - पारिवारिक व्यवस्थापन के विलेख के आधार पर नामंजूरी - अभिनिर्धारित - पारिवारिक व्यवस्थापन सभी सहभागीदारों द्वारा हस्ताक्षरित नहीं किया गया इसलिए उस पर विश्वास नहीं किया जा सकता - तथापि, वादी ने उक्त विलेख पर कार्यवाही करते हुए वादग्रस्त सम्पत्ति का हिस्सा विक्रय कर दिया, वह पारिवारिक व्यवस्थापन के विलेख को प्रश्नगत करने के लिए स्वतंत्र नहीं है - विभाजन संबंधी तथ्य, तथ्य का प्रश्न है इसलिए उसमें हस्तक्षेप नहीं किया जा सकता - तथापि, यदि अंतरिम आदेश पारित किया जाता है, क्रेता सम्पत्ति का उपयोग करने के लिए सक्षम नहीं होगा, इसलिए, उसे अपूर्तनीय हानि और क्षति होगी - क्रेता को निर्माण क्रियाकलाप चलाने की अनुमति दी जाएगी किन्तु वाद के लम्बित रहने के दौरान सम्पत्ति को अन्यसंक्रांत या हस्तांतरित करने से विवर्जित होगा।

Cases referred :

(1972) 4 SCC 1, 1976(3) SCC 119, (2008) 11 SCC 1, (2009) 5 Scale 229.

J U D G M E N T

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

2. This appeal is directed against the judgment and order dated 13th October, 2008, passed by the Gwalior Bench of the Madhya Pradesh High Court dismissing Miscellaneous Appeal No.478 of 2007 filed by the appellant herein. The said Miscellaneous Appeal had been preferred by the appellant against the order dated 14th February, 2007, passed by 5th Additional District Judge, Gwalior, in Civil Suit No.08A of 2006 filed by the appellant rejecting the appellant's application under Order 39 Rules 1 and 2 of the Code of Civil Procedure.
3. The appellant herein had filed the above-mentioned suit for declaration and permanent injunction and also mandatory injunction in respect of the suit property situated at Nadigate Jayendra Ganj, Lashkar, Gwalior, bearing Survey No.37/903 on the ground that the suit property was the ancestral property of his father, Babu Saheb Kante, who had died intestate on 13th May, 1976. The application for ad-interim injunction had been filed in the suit which was rejected by the Trial Court on the ground that a partition had been effected between the legal heirs of Babu Saheb Kante. It was also held that a Family Settlement had been effected between the heirs of Babu Saheb Kante, whereby Smt. Putli Bai and Surendra Kante, the widow and son of Babu Saheb Kante, acquired a 50% share of House No.95/21. The Respondent Nos.1 and 2 herein are the widow and daughter of late Surendra Kante, and after his death their names were recorded in the Municipal records.
4. At this juncture it may be pertinent to mention that Babu Saheb Kante is said to have had two wives, Smt. Putli Bai and the mother of Jai Singh Rao. The appellant herein is one of the sons of Babu Saheb Kante through his wife, Smt. Putli Bai. When, after the death of Babu Saheb Kante a son by his second wife,

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Jai Singh Rao, came to claim a share in his estate, a family settlement was arrived at by which the properties of Bapu Saheb Kante were divided amongst the heirs by a Family Arrangement dated 8th February, 1967, by metes and bounds. Under the said arrangement, Jai Singh Rao was allowed to retain possession of plot No.25/528 and after his death on 15th June, 1971, his wife and children were allowed to live in the said premises. However, since the concession granted to them was misused, Surendra Kante filed a suit against them for possession in respect of the property in dispute and the same was partly decreed on 14th September, 1993.

5. First Appeal No.76 of 1993 was filed by the legal heirs of Jai Singh Rao, wherein it was sought to be asserted that no partition had at all been effected in respect of the properties of late Bapu Saheb Kante and that the alleged document of partition could not be acted upon since the same had not been registered and was not, therefore, admissible in evidence. In the First Appeal it was held that there was a previous oral partition which was reduced into writing later on, on 8th February, 1967, which could in fact be said to be a Memorandum of Partition in the eyes of law. It was observed that while a document of partition does require registration, the Memorandum of Partition subsequently executed after an oral partition entered into on the basis of a mutual agreement could not be said to be inadmissible on account of non-registration, since the same did not require registration within the meaning of Section 17 of the Registration Act, 1908.

6. The High Court accepted the contention that a partition had been effected between the heirs of Bapu Saheb Kante and that a document had been executed in that regard on 8th February, 1967, and that it was not open to the defendants, as well as to the predecessor-in-title of Jai Singh Rao, to wriggle out of the said agreement which had been admitted by the defendants. The First Appeal filed by Surendra Kante was allowed and the other appeal filed by the predecessor-in-interest of Jai Singh Rao was dismissed. A Letters Patent Appeal was filed by Jai Singh Rao questioning the judgment and decree passed by the Trial Court, which was also dismissed by the Division Bench of the High Court upon holding that the partition deed dated 8th February, 1967, is a Memorandum of Partition pertaining to a previous oral partition.

7. In the present suit filed by the appellant herein an attempt has been made to make out a case that the alleged partition deed of 8th February, 1967, was executed only with the intention of giving a separate share to Jai Singh Rao and the rest of the properties remained joint as there was no partition by metes and bounds. Accordingly, the Respondents Nos.1 and 2 had no right to execute an agreement and Special Powers of Attorney in respect of the suit property in favour of the Defendant Nos.8 and 9 on 27th November, 2004, nor did the Defendant Nos.8 and 9 have any right to execute a sale deed in favour of

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Defendant No.10 on 31st March, 2006. The appellant herein prayed for a decree of permanent injunction against the defendants not to deal with the property without a partition having been effected and also prayed for a mandatory injunction on the defendants to remove the wall which had been erected in the disputed property. The appellant herein also prayed for a grant of temporary injunction which was rejected by the Trial Court on 14th February, 2007, upon holding that a partition had been effected between the legal heirs of Bapu Saheb Kante and that the Family Settlement had been reduced into writing on 8th February, 1967.

8. Before the High Court proof of partition and the Family Settlement, which was also accepted by the appellant herein without any objection, were produced, as was the decision of the High Court in First Appeal No.9 of 1994 in which the learned Single Judge had held that the documents of 8th February, 1967, had been held to be a Family Settlement for which no registration was required under Section 17 of the Registration Act, 1908. It was also urged that since the disputed property had come to the share of Surendra Kante, and, thereafter, to the Respondents Nos.1 and 2, they had the right to transfer their share in favour of the transferees and that the defendant No.10 was a bona fide purchaser for value. It was also pointed out that the decision of the learned Single Judge had been upheld by the Division Bench.

9. The High Court in the Miscellaneous Appeal observed that the matter of grant of temporary injunction had been considered in detail by the Trial Court which had exercised its jurisdiction in refusing to grant temporary injunction to the appellants. It also observed that in case injunction was granted, it would be the defendants who would suffer irreparable loss and injury. It was observed that the defendant No.10, the transferee from Respondents/defendant Nos.1 and 2, had acquired a right to the suit property. He was, therefore, allowed to carry out construction activities over the disputed land, but was restrained from alienating or transferring the property in question or from creating any third party rights during the pendency of the civil suit. The Trial Court was, however, directed to decide the suit expeditiously and to dispose of the same within six months from the date of appearance of the parties before the Trial Court.

10. Questioning the aforesaid decision of the High Court, Mr. Vivek Kumar Tankha, learned Senior Advocate, submitted that the High Court had erred in accepting the stand taken on behalf of the defendants/respondents herein that a valid partition had taken place by metes and bounds, on account whereof the Respondents/defendant Nos.1 and 2, as the heirs of Surendra Kante, had acquired title to his share in the suit property and were, therefore, competent to dispose of the same in favour of Defendant No.10. Mr. Tankha urged that a partition of joint family property could be effected only by metes and bounds and by delivery of actual possession. In the absence of the same, it could not be contended

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that a partition had, in fact, been effected between the co-sharers. Mr. Tankha urged that both the Trial Court, as well as the High Court, had erred in pre-supposing a partition between the parties simply on the basis of the Deed of Family Settlement executed on 8th February, 1967. It was submitted that in the absence of evidence of partition by metes and bounds, the learned Courts below had erred in refusing to grant ad-interim injunction as prayed for by the appellant since once the portion of the property allegedly transferred in favour of Respondent No.9 was permitted to be developed, the very object of the suit would stand frustrated.

11. Apart from the above, Mr. Tankha urged that the learned Courts below had erred in acting upon the Deed of Family Settlement executed on 8th February, 1967, which, in fact, was a Deed of Partition and could not have been acted upon without being executed by all the co-sharers and without being registered as provided for under Section 17 of the Registration Act, 1908. Mr. Tankha submitted that if the Deed of Family Settlement was to be acted upon, as has been done by the Courts below, it must also be held that partition had been effected thereby and, therefore, the same required registration. In the absence thereof, the Courts had wrongly placed reliance on the same in refusing to allow the appellant's prayer for grant of temporary injunction pending the hearing of the suit. In support of his aforesaid submissions, Mr. Tankha referred to and relied upon the decision of this Court in *M.N. Aryamurthy vs. M.D. Subbaraya Setty (dead) through LRs.* [(1972) 4 SCC 1], wherein in the facts of the case it was held by this Court that under the Hindu Law if a family arrangement is not accepted unanimously, the Family Settlement has to fail as a binding agreement.

12. Mr. Tankha urged that there could be little doubt that in the facts of this case, the balance of convenience and inconvenience lay in favour of grant of temporary injunction during the pendency of the suit, as prayed for by the appellant herein as otherwise the appellants would suffer irreparable loss and injury.

13. Mr. Anoop G. Chaudhary, learned Senior Advocate, appearing for the Respondent No.6, while supporting Mr. Tankha's submissions, reiterated that the Deed of Family Settlement had not been acted upon as would be evident from the Deed of Settlement itself. It would be clear therefrom that one of the co-sharers, Sau. Pratibha, who was shown as the eighth executant of the Deed of Settlement dated 8th February, 1967, had, in fact, not signed the said document. She was not also made a party in the First Appeal, although, admittedly she was one of the daughters of Bapu Saheb Kante through his first wife.

14. On the other hand, Mr. Ranjit Kumar, learned Senior Advocate, appearing for the Respondent Nos.1, 2, 8, 9 and 10, reiterated that the family settlement of 8th February, 1967, had been duly acted upon, as would be evident from the sale deeds executed by Narendra Kante, which have been exhibited by

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Narendra Kante in the suit pertaining to the suit property. Mr. Ranjit Kumar also referred to a copy of the agreement made Annexure P-1 to the Special Leave Petition, which is an agreement alleged to have been executed by Udai Kante, Narendra Kante and Surendra Kante in favour of one Ram Bharose Lal Aggarwal regarding Municipal House No.15/642, known as "Kante Saheb Ka Bara". Reference was also made to a suit, being Case No.32A of 1991, filed by Ram Bharose Lal Aggarwal in the Court of Third Additional District Judge, Gwalior, for specific performance of the agreement dated 8th February, 1967.

15. Similarly, several other documents were also referred to by Mr. Ranjit Kumar, which were also executed during the hearing of the suit, in order to establish the fact that the parties, including the present appellant, had acted in terms of the said Deed of Settlement and had dealt with the properties which had fallen to their respective shares.

16. Mr. Ranjit Kumar submitted that as far as the second question raised on behalf of the appellant was concerned, it was well-settled that a Deed of Family Settlement which was reduced into writing was not required to be registered under Section 17 of the Registration Act, 1908. Learned counsel submitted that when an oral settlement had been arrived at and acted upon and a subsequent document was prepared only for the purpose of recording such settlement, the provisions of Section 17 of the Registration Act were not attracted, since except for recording a settlement, no actual transfer takes place by virtue of such document.

17. In support of his aforesaid submission, Mr. Ranjit Kumar firstly relied on the decision of the Three Judge Bench in *Kale vs. Dy. Director of Consolidation* [(1976 (3) SCC 119)] in which the question of registration of a family arrangement had fallen for consideration. Their Lordships held that a family arrangement may be even oral in which case no registration is necessary. Registration would be necessary only if the terms of the family arrangement are reduced into writing but there also a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere Memorandum prepared after the family arrangement had already been made, either for the purpose of recording or for information of the Court for making necessary mutation. In such a case, the Memorandum itself does not create or extinguish any right in the immovable properties and, therefore, neither does it fall within the mischief of Section 17(2) of the Registration Act nor is it compulsorily registrable. Their Lordships went on further to conclude that a document, which was no more than a memorandum of what had been agreed to, did not require registration.

18. While holding as above, Their Lordships also indicated that even if a Family Arrangement, which required registration was not registered, it would operate as a complete estoppel against the parties, which had taken advantage thereof.

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19. Learned counsel urged that as had been held by this Court in *Mandali Ranganna vs. T. Ramachandra* [(2008) 11 SCC 1], while considering an application for grant of injunction, the Court has not only to take into consideration the basic elements regarding existence of a prima face case, balance of convenience and irreparable injury, it has also to take into consideration the conduct of the parties since grant of injunction is an equitable relief. It was observed that a person who had kept quiet for a long time and allowed another to deal with the property exclusively, ordinarily would not be entitled to an order of injunction. Mr. Ranjit Kumar also referred to the recent decision of this Court in *Kishorsinh Ratansinh Jadeja vs. Maruti Corpn. & Ors.* [(2009) 5 Scale 229], in which the observation made in *Mandali Ranganna's case* (supra) was referred to with approval.

20. From the submissions made on behalf of the respective parties and the materials on record, we have to see whether the Courts below, including the High Court, were justified in refusing the appellant's prayer for grant of interim orders pending the hearing of the suit. Though the Deed of Family Settlement has been heavily relied upon by the Courts below and the Respondents herein, it will have to be considered whether reliance could have been placed on the same since the same was not registered, though it sought to apportion the shares of the respective co-sharers. It has also to be seen whether the document could at all be relied upon since all the co-sharers were not signatories thereto.

21. As far as the first point is concerned, since the same is a question of fact and has, on a prima facie basis, been accepted by the Courts below, we are not inclined to interfere with the prima facie view taken that an oral partition had been effected which had been subsequently reduced into writing as a Memorandum and not as an actual Deed of Partition. Of course, these observations are made only for the purpose of disposal of the Special Leave Petition and not for disposal of the suit itself.

22. As far as the second question is concerned, a Deed of Family Settlement seeking to partition joint family properties cannot be relied upon unless signed by all the co-sharers. In the instant case, admittedly, the Respondent No.8, Sau. Pratibha, was not a signatory to the Deed of Settlement dated 8th February, 1967, although, she is the daughter of Bapu Saheb Kante by his first wife. As was held in the case of *M.N. Aryamurthy* (supra), under the Hindu Law if a Family Arrangement is not accepted unanimously, it fails to become a binding precedent on the co-sharers. Both Mr. Vivek Tankha and Mr. Anoop G. Chaudhary, learned Senior Advocates, brought this point to our notice to indicate that all the co-sharers had not consented to the Deed of Family Settlement which could not, therefore, be relied upon. The argument would have had force had it not been for the fact that acting upon the said Settlement, the appellants had also executed

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sale deeds in respect of the suit property. Having done so, it would not be open to the appellants to now contend that the Deed of Family Settlement was invalid.

23. Now, coming to the question of balance of convenience and inconvenience and irreparable loss and injury, it has to be kept in mind that the Respondent No.10 has already acquired rights in respect of the share of the Respondent Nos.8 and 9 to the suit property and in the event an interim order is passed preventing development of the portion of the property acquired by it, it would suffer irreparable loss and injury since it would not be able to utilize the property till the suit is disposed of, which could take several years at the original stage, and, thereafter, several more years at the appellate stages. The appellant herein has been sufficiently protected by the order of the High Court impugned in this appeal. While the Respondent No.10 has been permitted to carry out construction activities over the disputed land, it has been restrained from alienating or transferring the property or from creating any third party right therein during the pendency of the suit.

24. As mentioned hereinabove, there is yet another question which goes against the case made out by the appellant, viz., that after the Deed of Family Settlement, even the appellant has executed Conveyances in respect of portions of the suit property, thereby supporting the case of the respondent that the Deed of Family Settlement dated 8th February, 1976, had not only been accepted by the parties, but had also been acted upon.

25. In such circumstances, we are not inclined to interfere with the order passed by the High Court, but we are also concerned that the suit should not be delayed on one pretext or the other, once such interim order is granted.

26. We, accordingly, dispose of the appeal by directing the Trial Court to dispose of the pending suit within a year from the date of communication of this judgment. In the meantime, the co-sharers to the suit property shall not create any third party rights or encumber or transfer their respective shares in the suit property in any manner whatsoever and all transactions undertaken in respect thereof shall be subject to the final decision in the suit.

27. There will be no order as to costs.

Order accordingly.

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SUPREME COURT OF INDIA

Before Mr. Justice G.S. Singhvi & Mr. Justice Asok Kumar Ganguly

12 January, 2010*

A.D.N. BAJPAI (PROF.)

... Appellant

Vs.

STATE OF M.P. & ors.

... Respondents

A. Vishwavidyalaya Adhinyam, M.P. (22 of 1973), Sections 14(3) & (4) - Reasonable opportunity of hearing - Rules of Natural Justice in context of Ss. 14(3) & (4) mean that Vice-Chancellor is made aware of specific allegations on which inquiry is proposed - He is also informed about material/evidence sought to be used against him - Vice-Chancellor can also ask for an opportunity to lead evidence - Chancellor is required to evolve an appropriate mechanism by which Vice-Chancellor gets an effective opportunity to challenge the grounds enumerated in show cause notice. (Para 10)

क. विश्वविद्यालय अधिनियम, म.प्र. (1973 का 22), धाराएँ 14(3) व (4) - सुनवाई का युक्तियुक्त अवसर - धाराओं 14(3) व (4) के संदर्भ में नैसर्गिक न्याय के नियम का अर्थ है कि कुलपति को विनिर्दिष्ट अभिकथनों से अवगत कराया जाता है जिन पर जाँच प्रस्तावित है - उसे उसके विरुद्ध प्रयुक्त करना चाही गयी सामग्री/साक्ष्य के बारे में भी सूचित किया जाता है - कुलपति साक्ष्य पेश करने के अवसर की भी माँग कर सकता है - कुलाधिपति को एक समुचित यंत्र रचना विकसित करना आवश्यक है जिसके द्वारा कुलपति को कारण बताओ सूचना पत्र में प्रगणित आधारों को चुनौती देने के लिए प्रभावी अवसर मिले।

B. Vishwavidyalaya Adhinyam, M.P. (22 of 1973), Sections 14(3) & (4) - Non-supply of documents - Show cause notice issued to appellant u/s 14(3) of the Act - Documents forming part of show cause notice not supplied - Appellant demanded the documents but were not supplied - Observation of High Court that appellant never asked for inspection nor applied for copies of documents amounts to begging the question - Liberty given to appellant that he can seek inspection or obtain copies of the record of University has nothing to do with appellant's grievance that he had not been supplied copies of documents forming part of show cause notice - S. 14(4) casts duty upon Chancellor to give reasonable opportunity - Omission on the part of appellant to seek inspection or apply for copies of documents was inconsequential - Principles of Natural Justice violated - Order removing appellant from the post of Vice-Chancellor bad in law - Order quashed - Appeal allowed. (Paras 13 to 15)

ख. विश्वविद्यालय अधिनियम, म.प्र. (1973 का 22), धाराएँ 14(3) व (4) - दस्तावेज प्रदाय न करना - अपीलार्थी को अधिनियम की धारा 14(3) के अन्तर्गत कारण बताओ सूचना पत्र जारी किया गया - कारण बताओ सूचना पत्र के अंगभूत दस्तावेज प्रदाय नहीं किये गये

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— अपीलार्थी ने दस्तावेजों की माँग की किन्तु प्रदाय नहीं किये गये — उच्च न्यायालय की टिप्पणी कि अपीलार्थी ने निरीक्षण की माँग कभी नहीं की और न ही दस्तावेजों की प्रतिलिपियों के लिए आवेदन किया, प्रश्न को टालने की कोटि में आता है — अपीलार्थी को दी गई स्वतंत्रता ने कि वह निरीक्षण की माँग कर सकता है या विश्वविद्यालय के अभिलेख की प्रतिलिपियाँ अभिप्राप्त कर सकता है, अपीलार्थी की व्यथा कि उसे कारण बताओ सूचना पत्र के अंगभूत दस्तावेजों की प्रतिलिपियाँ प्रदाय नहीं की गयीं थीं, के लिए कुछ नहीं किया है — धारा 14(4) कुलाधिपति पर यह कर्तव्य डालती है कि युक्तियुक्त अवसर प्रदान करे — अपीलार्थी की ओर से निरीक्षण की माँग करने या दस्तावेजों की प्रतिलिपियों के लिए आवेदन करने का लोप अप्रासंगिक था — नैसर्गिक न्याय के सिद्धांतों का उल्लंघन हुआ — अपीलार्थी को कुलपति के पद से हटाने का आदेश विधि विरुद्ध — आदेश अभिखंडित — अपील मंजूर।

Cases referred :

1967(2) SCR 625, 1973 (3) S.C.C. 333.

ORDER

1. Leave granted.
2. This appeal is directed against order dated 7.1.2008 passed by the Division Bench of Madhya Pradesh High Court whereby it dismissed the appeal preferred by the appellant against the order of the learned Single Judge who declined the appellant's prayer for quashing order dated 25.1.2007 passed by the Kuladhipati (Chancellor) of Awadesh Pratap Singh Vishwavidyalaya, Rewa (hereinafter described as 'the University') under Section 14(3) of the Madhya Pradesh Vishwavidyalaya Adhiniyam, 1973 (for short, "the Act").
3. The appellant was appointed as Vice-Chancellor of the University on 15.9.2003 for a period of four years. Upon receipt of complaints/information relating to administrative, financial and academic irregularities allegedly committed by the appellant, the Chancellor passed order dated 23.9.2006 whereby he constituted a three member committee under Section 14(3) of the Act to inquire into the matter and submit report within six weeks.
4. The committee issued notice to the appellant to enable him to represent his cause but instead of appearing before the committee, the appellant deputed some officers of the University, who produced the records. At the conclusion of inquiry, the committee submitted report dated 22.11.2006 with the finding that ten out of the seventeen allegations were prima facie established against the appellant. Thereafter, the Chancellor issued notice dated 6.12.2006 to the appellant in terms of Section 14(4) of the Act and called upon him to show cause as to why an order may not be passed for his removal from the post of Vice-Chancellor on the ground of his failure to perform duties in accordance with clauses (i), (ii) and (iii) of Section 14(3) of the Act. In paragraph 8 of the notice, the Chancellor indicated that if the appellant wants to inspect any of the documents relating to the University or obtain copies thereof for the purpose of his defence, then he may submit a list of such documents to the Registrar of the University.

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5. The appellant challenged the show cause notice in Writ Petition No. 18479/2006 which was dismissed by the learned Single Judge of the High Court. Thereafter, the appellant submitted reply dated 10.12.2006 stating therein that first an inquiry should have been held under Section 10 and only thereafter an action could be taken under Section 14 of the Act. He also claimed that copies of the records enclosed with the show cause notice were not supplied to him and in the absence thereof, it was not possible for him to know whether any record was enclosed with the report. Simultaneously, he reserved the right to submit reply to the show cause notice after receipt of the enclosed records. This is evinced from the following extract of the reply:

“Copies of the records reportedly enclosed in the Show Cause Notice of the Hon’ble Chancellor dated 6.12.2006 should have been provided to me with the Show Cause Notice but these have not been provided to me with the Show Cause Notice. In the absence of these, examination of the records is not possible because it is not in my knowledge that if there is any record also enclosed with the Enquiry Report.

I reserve my right to give reply to the Show Cause Notice on receipt of the enclosed records, and have been submitting the reply of the Enquiry Report...”

6. The Chancellor rejected the appellant’s plea that an inquiry should have been held under Section 10 as a condition precedent to the initiation of action under Section 14 of the Act and passed order dated 25.1.2007 requiring him to relinquish the post of Vice-Chancellor with effect from 27.1.2007.

7. The appellant challenged order of the Chancellor in Writ Petition No. 1606/2007, which was dismissed by the learned Single Judge. The same was the fate of Writ Appeal No.1718/2007 filed by the appellant. Both, the learned Single Judge and the Division Bench held that holding of an enquiry under Section 10 was not necessary for passing an order under Section 14(3) of the Act. The learned Single Judge did advert to the appellant’s plea that copies of the documents enclosed with the show cause notice were not made available to him but rejected the same by observing that he had not demanded inspection or copies of the documents in terms of paragraph 8 of the show cause notice.

8. We have heard learned counsel for the parties and perused the records. Although, the appellant had questioned order dated 25.1.2007 before the High Court on several grounds set out in the writ petition and the memo of writ appeal, which have been reiterated before this Court, we do not consider it necessary to delve upon the same because in our considered view, the order passed by the Chancellor is liable to be set aside only on the ground of non-compliance of the mandate of Section 14(4) of the Act, which represents statutory embodiment of the one of the facets of the rules of natural justice and fairness. Section 14(3) of

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the Act, which enables the Chancellor to make an inquiry for satisfying himself about the truthfulness or otherwise of the allegations levelled against the Vice-Chancellor in the context of clauses (i), (ii) and (iii) thereof and Section 14(4), which is couched in negative form and casts a duty upon the Chancellor to communicate to the Vice-Chancellor the particulars of the grounds on which action is proposed to be taken and give him a reasonable opportunity of showing cause against the proposed order, read as under:

- "14. (1) xxx xxx xxx
 (2) xxx xxx xxx
 (2-A) xxx xxx xxx

(3) If at any time upon representation made or otherwise and after making such enquiries as may be deemed necessary, it appears to the Kuladhipati that the Kulapati :

(i) has made default in performing any duty imposed on him by or under this Act; or

(ii) has acted in a manner prejudicial to the interests of the University; or

(iii) is incapable of managing the affairs of the University the Kuladhipati may, notwithstanding the fact that the terms of office of the Kulpati has not expired, by an order in writing stating the reason therein, require the Kulpati to relinquish his office as from such date as may be specified in the order.

(4) No order under sub-section (3) shall be passed unless the particulars of the grounds on which such action is proposed to be taken are communicated to the Kulpati and he is given a reasonable opportunity of showing cause against the proposed order.

(5) xxx xxx xxx

(6) xxx xxx xxx"

9. An analysis of Section 14(3) of the Act makes it clear that upon receipt of representation or otherwise and after making such inquiry as he may deem necessary, the Chancellor can make an order and ask the Vice-Chancellor to relinquish his office from a particular date. Section 14(4) of the Act, which incorporates the procedure to be followed for making an order under Section 14(3) thereof, lays down that no order under that sub-section shall be passed unless the particulars of the grounds on which action is proposed to be taken are communicated to the Vice-Chancellor and he is given a reasonable opportunity of showing cause against the proposed order.

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10. The expression 'reasonable opportunity of hearing' has not been defined in the Act. Therefore, the same has to be interpreted keeping in view the fact that an order made under Section 14(3) of the Act has grave adverse impact not only on the image, reputation and integrity of the person holding the high office of the Vice-Chancellor, but also the institution of which he is the academic and administrative head, and in consonance with the expansive meaning given by the courts to the rule of audi alteram partem. The rules of natural justice in the context of Section 14(3) and (4) of the Act would mean that the Vice-Chancellor is made aware of the specific allegations on which an inquiry is proposed to be made and he is also informed about the material/evidence sought to be used against him at such inquiry and is given an opportunity to controvert/rebut such material/evidence. The Vice-Chancellor can also ask for an opportunity to lead evidence to prove that the allegations levelled against him are false and baseless and that he is innocent. The Chancellor is required to evolve an appropriate mechanism by which the Vice-Chancellor gets an effective opportunity to challenge the grounds enumerated in the show cause notice. After receiving reply of the Vice-Chancellor, the Chancellor has to consider the entire record of inquiry as well as the defence put forward by the Vice-Chancellor and then pass a speaking order.

11. In *State of Orissa v. Binapani Dei* 1967 (2) SCR 625, this Court considered the question whether the respondent, who was due to retire on 10.4.1968, could be deemed to have retired on 15.7.1963 by making an alteration in her recorded date of birth. The High Court quashed the retirement of the respondent on the ground that she was not given reasonable opportunity of showing cause against the proposed action. While dismissing the appeal preferred by the State, this Court held:

"The State was undoubtedly not precluded, merely because of the acceptance of the date of birth of the first respondent in the service register, from holding an enquiry if there existed sufficient grounds for holding such enquiry and for re-fixing her date of birth. But the decision of the State could be based upon the result of an enquiry in manner consonant with the basic concept of justice. An order by the State to the prejudice of a person in derogation of his vested rights may be made only in accordance with the basic rules of justice and fairplay. The deciding authority, it is true, is not in the position of a Judge called upon to decide an action between contesting parties, and strict compliance with the forms of judicial procedure may not be insisted upon. He is however under a duty to give the person against whom an enquiry is held an opportunity to set up his version or defence and an opportunity to correct or to controvert any evidence in the possession of the authority which

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is sought to be relied upon to his prejudice. For that purpose the person against whom in enquiry is held must be informed of the case he is called upon to meet, and the evidence in support thereof. The rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would therefore arise from the very nature of the function intended to be performed: it need not be shown to be super-added. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case."

The Court then referred to the inquiry conducted by the Additional Director of Family Planning, Dr. S. Mitra, and observed:

"In the course of the enquiry before Dr S. Mitra the letter was shown to the first respondent but she declined "to make any comments thereon". Thereafter on September 28, 1962 there was a notice from the Secretary in the Department of Health stating that according to the school admission register her date of birth was August 22, 1906, and according to the first year class admission register it was April 1907, and it was intended to treat the latter date as the date of her birth, and the first respondent was called upon to show cause why that date should not be accepted. The report which Dr S. Mitra had submitted to the State was not disclosed to the first respondent. It may be recalled that there were four different dates before the State authorities: (1) the entry in the Ravenshaw Girls' School admission register showing the date of birth as August 22, 1906; (2) the entry in the admission register of the first year class showing the date of birth as some date in April, 1907; (3) the report of the Principal, Lady Hardinge medical college, Delhi, showing the date of birth as April 4, 1908, as recorded in the medical college Admission Register; and (4) the first respondent's statement supported by her father's statement at the time when she joined the service in 1938 giving her date of birth as April 10, 1910. If an enquiry was intended to

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be made, the State authorities should have placed all the materials before the first respondent and called upon her to explain the discrepancies and to give her explanation in respect of those discrepancies and to tender evidence about her date of birth."

(emphasis supplied)

12. In *Sayeedur Rehman v. State of Bihar* (1973) 3 SCC 333, a three-Judge Bench of this Court, while considering the question whether the President of the Board of Secondary Education could partially review the order passed him in favour of the appellant and direct that instead of full salary, dearness allowance and increments from the date of suspension, he will be entitled only to subsistence allowance without giving him notice and opportunity of hearing, observed as under:

"We are, however, clear that if the order, dated April 22, 1960, is to be reconsidered then the appellant must be afforded adequate opportunity of hearing and presenting his case. This unwritten right of hearing is fundamental to a just decision by any authority which decides a controversial issue affecting the rights of the rival contestants. This right has its roots in the notion of fair procedure. It draws the attention of the party concerned to the imperative necessity of not overlooking the other side of the case before coming to its decision, for nothing is more likely to conduce to just and right decision than the practice of giving hearing to the affected parties. The President of the Board of Secondary Education would be deciding a controversy affecting the rights of the parties before him if and when he chooses to reconsider the order, dated April 22, 1960, whatever be the source of his power to do so — a point left open by us. He is required to decide in the spirit and with a sense of responsibility of a tribunal with a duty to mete out even-handed justice. The appellant would thus be entitled to a fair chance of presenting his version of facts and his submissions on law as his rights would be directly affected by such proceeding. The omission of express requirement of fair hearing in the rules or other source of power claimed for reconsidering the order, dated April 22, 1960, is supplied by the rule of justice which is considered as an integral part of our judicial process which also governs quasi-judicial authorities when deciding controversial points affecting rights of parties."

(emphasis supplied)

13. In the present case, the three member committee appointed by the Chancellor issued notice to the appellant but, he chose not to appear and felt contented by deputing the officers of the University, who produced records before the committee. The committee examined the records and submitted report with

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the finding that the majority of the allegations levelled against the appellant are correct. The Chancellor accepted the report and issued notice dated 6.12.2006 specifying therein the grounds on which an order in terms of Section 14(3) of the Act was proposed to be made. A copy of the inquiry report was also supplied to the appellant, but documents forming part of the show cause notice were not made available to him. In other words, the complete inquiry report was not supplied to the appellant, who on the first available opportunity made a specific grievance on this score. However, without adverting to his grievance regarding non-supply of copies of documents forming part of the show cause notice and without even recording a finding that the documents were not relevant or were not being relied upon for taking action prejudicial to him, the Chancellor passed order dated 25.1.2007 and asked the appellant to demit the office of the Vice-Chancellor 7 months before completion of his tenure and that too in the backdrop of the allegations of misdemeanour. It is thus clear that the action initiated against the appellant did not suffer from any infirmity till the stage of submission of inquiry report but the follow up action taken by the Chancellor was vitiated due to violation of the mandate of Section 14(4) of the Act and the rule of *audi alteram partem* inasmuch as the appellant was not supplied with copies of the records which formed part of the show cause notice and on that account he could not submit effective reply in the context of the order proposed to be passed against him. Not only this, specific grievance made by the appellant on this score remained unattended. To put it differently, the appellant did not get a reasonable opportunity of hearing within the contemplation of Section 14(4) of the Act.

14. Learned counsel for the Chancellor argued that the appellant's complaint on the ground of violation of the rules of natural justice should not be entertained because he did not approach the Registrar of the University for inspection of the documents and/or for supply of copies of the documents. This argument is meritless and deserves to be rejected. What the show-cause notice dated 6.12.2006 envisaged was that the appellant could inspect the record of the University or obtain copies thereof for the purpose of preparing his defence, but this has nothing to do with the issue raised in the writ petition, writ appeal and this appeal i.e., non-supply of the documents which formed part of the show cause notice sent to the appellant. Without those documents, the show cause notice was incomplete and inchoate. In other words, the foundation of the final action taken against the appellant was defective. There cannot be any doubt that the order passed by the Chancellor affected the image, reputation, integrity and career of the appellant. Therefore, before passing the order, the Chancellor ought to have ensured fullest compliance of the principles of natural justice which have been treated fundamental to the rule of law in a democratic polity like ours.

15. The learned Single Judge of the High Court committed serious error when he brushed aside the appellant's plea that he was denied reasonable opportunity

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of hearing by simply observing that he had neither asked for inspection nor applied for copies of the documents in terms of paragraph 8 of the show cause notice. In our view, this amounts to begging the question. What the Chancellor had indicated in paragraph 8 of the show cause notice was that the appellant that he can seek inspection or obtain copies of the records of the University. This had nothing to do with the appellant's grievance that he had not been supplied copies of the documents forming part of the show cause notice. That apart, in view of the plain language of Section 14(4) of the Act, which casts a duty upon the Chancellor to give a reasonable opportunity of hearing to the Vice-Chancellor before an order can be passed under Section 14(3), omission on the appellant's part to seek inspection or apply for copies of documents of the University was inconsequential and the High Court should have treated the violation of the mandate of Section 14(4) of the Act as sufficient for invalidating the order passed by the Chancellor.

16. Before concluding, we deem it necessary to observe that we have not expressed any opinion on the correctness of the procedure adopted by the committee appointed by the Chancellor because the appellant had not appeared before it despite notice. In an appropriate case, the Court may consider whether the committee appointed under Section 14(3) of the Act can record prima facie finding of guilt against the Vice-Chancellor without recording oral and documentary evidence by associating the concerned person.

17. In the result, the appeal is allowed. The impugned order of the Division Bench as also the one passed by the learned Single Judge are set aside. As a corollary, the writ petition filed by the appellant is allowed and order dated 25.1.2007 passed by the Chancellor of the University is quashed. The parties are left to bear their own costs.

Appeal allowed.

**I.L.R. [2010] M. P., 1243
 SUPREME COURT OF INDIA**

Before Mr. Justice R.V. Raveendran & Mr. Justice K.S. Radhakrishnan
 12 January, 2010*

M.P. MATSYA MAHASANGH
Vs.

... Petitioner

SUDHEER KUMAR & anr.

... Respondent

Limitation Act (36 of 1963), Section 5 - Condonation of delay - Application under Order 9 Rule 13 CPC filed after a delay of 1 year 10 months - Application rejected and appeal also rejected as barred by time - First Appeal against decree was also filed after delay of 948 days - Appeal was also dismissed as barred by time - Reason for delay was shown to be

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that O.I.C. was negligent and did not inform the senior officers about the progress of the case - No action taken against O.I.C. except issuing show cause notice seeking his explanation - Same person continues to be O.I.C. in S.L.P. also - Record shows that O.I.C. was not negligent as petitioner had returned the land to the State Govt. and had requested to defend the case - Not clear that how the petitioner could return the land to State Govt. specifically when it was not placed in possession - Why petitioner after having requested State Govt. to defend the cases decided to file S.L.Ps. - petitioner also failed to produce any title deed, grant of possession certificate - Cause shown for delay is wholly inadequate and unsatisfactory - Petition dismissed with costs.

(Paras 6 to 10)

परिसीमा अधिनियम (1963 का 36), धारा 5 - विलम्ब माफी - सि.प्र.सं. के आदेश 9 नियम 13 के अन्तर्गत आवेदन 1 वर्ष 10 माह के विलम्ब के बाद फाइल किया गया - आवेदन नामंजूर किया गया और अपील भी समय वर्जित मानकर नामंजूर की गयी - डिफ्री के विरुद्ध प्रथम अपील भी 948 दिन के विलम्ब के बाद फाइल की गयी - अपील भी समय वर्जित मानकर खारिज की गयी - विलम्ब के लिए कारण यह होना दर्शाया गया कि प्रभारी अधिकारी उपेक्षावान था और उसने वरिष्ठ अधिकारियों को मामले की प्रगति के बारे में सूचित नहीं किया - प्रभारी अधिकारी के विरुद्ध उसका स्पष्टीकरण चाहते हुए कारण बताओ सूचना पत्र जारी करने के सिवाय कोई कार्यवाही नहीं की गयी - वही व्यक्ति विशेष अनुमति याचिका में भी प्रभारी अधिकारी होना जारी रखा गया - अभिलेख दर्शाता है कि प्रभारी अधिकारी उपेक्षावान नहीं था क्योंकि याची ने राज्य सरकार को भूमि वापस कर दी थी और मामले में प्रतिरक्षा करने का अनुरोध किया था - स्पष्ट नहीं कि याची कैसे राज्य सरकार को भूमि वापस कर सकता था विशिष्टतः जब वह कब्जे में नहीं रखी गयी - याची ने राज्य सरकार से मामलों में प्रतिरक्षा करने का अनुरोध करने के बाद विशेष अनुमति याचिकाएँ फाइल करने का निर्णय क्यों लिया - याची कोई हक विलेख, कब्जा प्रदान करने का प्रमाण पत्र पेश करने में भी असफल रहा - विलम्ब के लिए दर्शित कारण पूर्णतः अपर्याप्त और असंतोषजनक है - याचिका खर्चों सहित खारिज।

ORDER

The Order of the Court was delivered by R.V. RAVEENDRAN, J. :- Twenty suits were filed by the respective respondents in these special leave petitions in the year 2001 before the District Court, Bhopal claiming declaration of title in regard to their respective portions of Khasra No. 39/1 Kotra Sultanbad, Bhopal which in all admeasures 6.80 acres and for consequential permanent injunction.

2. The plaintiffs in the twenty suits (respective respondents in these SLPs) claimed that the said land originally belonged to one Shahida Bano who sold it to Hakim Hamidullah Kureshi on 28.5.1953; that it was inherited by his niece Razia Bano. They all traced their title to the said Razia Bano, under various sale deeds. The petitioner resisted the said suits contending that the land was a part of a Government land adjoining a fishery area fenced and transferred to MP Fisheries

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Development Corporation, who in turn delivered it to the petitioner in or about the year 1999. According to the petitioner, the respondents were encroachers of government land. After, receiving the evidence let in by both sides and hearing arguments, the suits were decreed in the year 2002. However, on appeals by the petitioner, by judgment dated 26.12.2004, the decrees were set aside and suits were remanded for fresh disposal within a fixed time frame. On such remand, the cases were listed for further evidence by the IV Addl. District Judge, Bhopal on 17.1.2005. The petitioner was represented by its counsel up to 9.4.2005. The suits were adjourned to 4.5.2005 at the request of petitioner by levying costs. From the next date of hearing viz. 4.5.2005, the petitioner's counsel ceased to appear and petitioner was represented by its officer-in-charge of the cases - Mr. Chandrakant Nikam, Assistant Engineer. But the said officer-in-charge also failed to appear during subsequent hearings and the costs levied were also not paid. Therefore the petitioner (defendant in the suits) was placed ex parte on 2.7.2005, noting that the High Court had directed disposal within eight months, and defendant was continuously absent. Thereafter the trial court, after considering the evidence on record, decreed the suits on 29.8.2005 by a detailed judgment.

3. On 16.6.2007, about one year and ten months later the petitioner filed applications under Order 9 Rule 13 of CPC for setting aside the ex parte decrees. It was alleged by the petitioner that its officers in the lower level had failed to discharge their duties and did not take action for defending the suits and that the petitioner became aware of the ex parte decrees only when one of the plaintiffs submitted a representation dated 28.5.2007. The said applications filed by the petitioner for setting aside the ex parte decrees were dismissed on 29.8.2007. The appeals against the said dismissals were dismissed by the High Court on 16.5.2008. The petitioner sought review and the review petitions were rejected on 23.7.2008. The petitioner filed SLPs which were also dismissed on 17.11.2008 with an observation that it was open to the petitioner to urge its contentions before appropriate forum (as the petitioner had by then filed appeals against the judgment dated 29.8.2005).

4. The regular appeals filed by the petitioners on 31.7.2008, under section 96 CPC, against the decrees dated 29.8.2005 were heard and dismissed by the High Court on 5.12.2008, on the ground of 948 days delay in filing the appeals. The High Court also referred to the facts briefly, to avoid any failure of justice, and found that the defence of the petitioner was without any basis. Leave is sought in these special leave petitions to challenge the said judgments and decrees. On notice being issued, the respondents have appeared and opposed grant of leave.

5. As noticed above, the only explanation given in the applications filed under Order 9 Rule 13 CPC for seeking condonation of delay was a vague statement that the officers at the lower level had failed to discharge their duties and had not

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taken timely action for defending the rights of the petitioner. However, in the memoranda of regular appeal filed before the High Court under Section 96 CPC and the applications for condonation of delay filed alongwith the appeals, the reason assigned by the petitioner to explain the delay of 948 days was that after the remand on 26.12.2004, the cases were entrusted to its Assistant Engineer Chandarkant Nikam as the officer-in-charge of the cases with instructions to keep the senior officers of the petitioner informed of the developments, but he failed to defend the cases and abandoned them without informing the senior officers; and that therefore the petitioner was unaware of the dates fixed for trial or about the ex parte decrees in the suits.

6. The explanation for the delay of one year and ten months in filing the applications under Order 9 Rules 13 CPC was found to be unsatisfactory resulting in the petitions under Order 9 rule 13 being dismissed and the same being affirmed by the High Court. When the appeals under Section 96 were filed there was a delay of 948 days. The High Court examined the reason assigned for the delay and found that the delay was not satisfactorily explained. It also held that there was no explanation as to why and how the appellant stopped participating in the proceedings before the trial court from June 2005 and why the petitioner did not file the appeals even when the applications under Order 9 Rule 13 CPC were dismissed.

7. As there is no satisfactory explanation for the neglect and delay, we put a specific question to the learned counsel for the petitioner as to what action had been taken with reference to the alleged negligence on the part of Chandrakant Nikam and why no material had been placed before the High Court in that behalf. The learned counsel for the petitioner had no specific answer, but handed over a copy of a letter dated 16.8.2007, said to have been addressed by the petitioner to Chandrakant Nikam referring to his 'failure to intimate the progress of the suit on a regular basis' and calling for his explanation. The learned counsel for petitioner was however not in a position to explain what happened after such show cause notice. Thus petitioner in a vague manner has sought to place the entire blame on one of its officers, namely, Chandrakant Nikam, but without initiating any disciplinary proceedings or without taking other action to fix the responsibility. Significantly the records of these SLPs show that Chandrakant Nikam, Assistant Engineer of petitioner continues to be the officer-in-charge of all these cases even now. An application (IA No.7-8) filed by the petitioner, as late as 7.10.2009, seeking permission to file additional documents in supported by an affidavit sworn to by Chandrakant Nikam as the officer-in-charge of these cases as on 6.10.2009. This clearly shows that the petitioner did not consider him to be negligent, but found him fit to continue as the officer in-charge of these cases. The learned counsel had no explanation for this strange conduct on the part of the petitioner.

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8. But we found the explanation to this strange conduct, in the copies of certain correspondence produced by the respondents with their counter affidavit filed in these matters. We find that on 2.8.2005, the Managing Director of petitioner wrote to the Collector of Bhopal as follows (a rough translation provided by respondent) :

"Sub: With regard to entrustment of land khasra NO. 39/1 rakba 6.80 acre adjoining Fishery Area, Bhadbhada to revenue department/District Magistrate, Bhopal.

Please take notice of letter no. 3758 dated 22.3.2005 addressed to Principal Secretary, govt. of M.P. Pisciculture Department, Bhopal wherein the fact of returning back of land of 6.80 acre given to MP Fishery General Union (co-operative) Ltd. to Govt. of MP. This land is hereby returned back to the Govt.

The dispute relating to this land is pending in various courts since last 10 yrs. and presently also this matter is pending before the court of Sri Rajesh Gupta, IV Additional District Judge, Bhopal and 3.8.2005 is fixed as next date of hearing.

In these cases the Govt. Advocate is to defend the case on behalf of the Govt. The proceeding is urgent. Hence it would be proper to give necessary instructions to Govt. Advocate for next date of hearing. It is also expedient to issue direction that the name of M.P. Fishery General Union (co-operative) Ltd. may be deleted from the array of parties in the above cases".

It is thus evident that the petitioner had 'returned' back the land bearing Khasra No. 39/1 measuring 6.80 acres adjoining the Fishery Area, Bhadbhada to the State Government and that in view of it, wanted the Government Advocate to defend the cases thereafter. The petitioner also informed the Collector that the next date of hearing before the District court was 3.8.2005. Therefore the reason for Mr. Nikam's absence after April, 2005 was not any negligence on his part, but because petitioner had by then had nothing to do with the land having returned the land in dispute in the 20 suits (that is 6.80 acres of land) to the Government vide letter dated 22.3.2005 and had requested the Government to defend the matter thereafter. It also shows that the petitioner was aware of the hearing dates after it was placed ex-parte and before the suits were decreed and had consciously chose not to defend the cases any further. Therefore it was rather uncharitable on the part of the petitioner to allege negligent conduct on the part of his own officer Chandrakant Nikam, but at the same time continue him even now to be the officer-in-charge of these cases. We may mention that in the rejoinder affidavit filed by the petitioner, there is no denial of the said letter dated 2.8.2005.

9. There are several unexplained loose ends. First is how could petitioner 'return' back, the disputed land which was and is in the possession of plaintiffs in

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the suit. Evidently, when the said land was 'entrusted' to petitioner in 1999, actual possession was not delivered to it. Second is, having given up its claim to the land and having requested the Government to defend the cases, why did the petitioner suddenly decided to challenge the decrees in a series of costly litigation. The third is the failure of the petitioner to produce any title deed, grant or possession certificate in support of its claim. Be that as it may.

10. We find that the cause shown for the delay is wholly inadequate and unsatisfactory, bordering on suppression and misrepresentation of facts to the courts, in regard to knowledge of order placing it ex parte and the subsequent ex parte decrees. We find that the High Court was justified in refusing to condone the delay of 948 days. It is, therefore, unnecessary to examine the matter with reference to the merits.

11. The petitions are dismissed as no ground is made out to grant leave. In view of its deprecable conduct, we levy costs of Rs. 2000/- in each of these cases payable by the petitioner to the respective respondent. We however, make it clear that if Government of Madhya Pradesh has any claim over the land in question, this will not come in the way of the Government establishing its title in appropriate proceedings.

Petition dismissed with costs.

I.L.R. [2010] M. P., 1248

SUPREME COURT OF INDIA

Before Mr. K. G. Balakrishnan, Chief Justice of India & Mr. Justice P. Sathasivam
12 January, 2010*

SHARDA KAILASH MITTAL

Vs.

STATE OF M.P. & ors.

... Appellant

... Respondents

A. Municipalities Act, M.P. (37 of 1961), Section 41A - Removal of President of Nagar Palika - Allegations of publication of advertisements, calling for tenders and payment - Held - Decisions were made by entire council - State failed to establish loss caused - Decision of removal by State can not be sustained - Appeal allowed. (Paras 20 & 21)

क. नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 41ए - नगरपालिका के समापति का हटाया जाना - विज्ञापनों के प्रकाशन, निविदाओं के आमंत्रण और भुगतान के अभिकथन - अभिनिर्धारित - निर्णय सम्पूर्ण परिषद द्वारा लिये गये - राज्य कारित क्षति स्थापित करने में असफल रहा - राज्य द्वारा हटाये जाने का निर्णय कायम नहीं रखा जा सकता - अपील मंजूर।

B. Municipalities Act, M.P. (37 of 1961), Section 41A - Removal of President - The exercise of power has serious civil consequences - Such

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power can be invoked by State only on very strong and weighty reason - The provision has to be construed in strict manner because the holder of office occupies it by election and he/she is deprived of office by an executive order in which the electorate has no chance of participation. (Para 18)

ख. नगरपालिका अधिनियम, म.प्र. (1961 का 37). धारा 41ए - सभापति का हटाया जाना - शक्ति के प्रयोग से गम्भीर सिविल परिणाम होते हैं - राज्य द्वारा ऐसी शक्ति अवलंब केवल मजबूत और महत्वपूर्ण कारण पर लिया जा सकता है - उपबंध का कठोरता से अर्थ लगाना चाहिए क्योंकि कार्यालय का धारक उसे निर्वाचन द्वारा अधिमोग करता है और वह कार्यपालिका आदेश द्वारा कार्यालय से वंचित किया जाता है जिसमें निर्वाचक मण्डल को भाग लेने की कोई संभावना नहीं है।

Case referred :

(2001) 6 SCC 260.

J U D G M E N T

The Judgment of the Court was delivered by P. SATHASIVAM, J. :-Leave granted.

2. This appeal is directed against the judgment rendered by a Division Bench of the High Court of Madhya Pradesh at Jabalpur dismissing W.A. No. 253 of 2008 filed by the appellant herein against the order of the learned single Judge dated 25.04.2008 in W.P. No. 4894 of 2007 whereby the learned Judge dismissed the writ petition filed by the appellant challenging the order dated 04.10.2007 passed by the Principal Secretary, Department of Local Administration and Development, Government of Madhya Pradesh.

3. The facts giving rise to the filing of this appeal may be briefly stated as follows:

The appellant was elected as President of Nagar Palika, Jora, District Muraina in the year 2004. On 15.09.2006, a show cause notice was issued to the appellant under Section 41-A of the Madhya Pradesh Municipalities Act, 1961 (hereinafter referred to as the "Act"). Charge No. 1 leveled by the respondent against the appellant was that she has caused monetary loss to the Panchayat by publishing advertisements for more than Rs.1500/-. In Charge No.2, it was alleged that the appellant had struck off her signature from the minutes dated 27.12.2005 and the then Chief Municipal Officer signed the minutes, which has been accepted by the respondent. Charge No.3 against the appellant was that she had shown undue haste in appointing Shri Harishankar Sharma as the Chief Municipal Officer and compelled him to make various payments to the tune of Rs. 8,12,783/-.

4. On 27.04.2007, Smt. Sharda Kailash Mittal, the appellant filed a detailed

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reply to the show cause notice refuting the charges leveled against her. In relation to charge No.1 while denying the same she asserted that she had not issued any direction for publishing the advertisements or messages in the newspapers. The then Chief Municipal Officer, Shri A.K. Bansal, has given the advertisement. The matter was placed before the Council and by resolution No. 48 dated 23.07.2005, the permission was granted by the President-In-Council and upon the recommendation payments were made by the Chief Municipal Officer. She denied Charge No.2 stating that no alteration had been done in the proceedings register. According to her, on 21.12.2005, at the instance of the Chief Municipal Officer, Sh. A.K. Bansal, upon the disturbance being caused by the Vice-Chairman Shri Surya Narain Jain and some of the Councilors and upon their mis-behaviour she postponed the meeting till 26.12.2005. In the postponed meeting, after discussing proposal Nos. 103 to 112, the resolution was passed. The same was entered in the proceedings register and duly signed by the appellant and the Chief Municipal Officer. Again on 27.12.2005, after discussing proposal Nos. 113 to 150 the resolutions were passed. All those subjects were thoroughly discussed and resolutions were passed and recorded as resolution Nos. 100 to 135 in the proceedings register. In this way all the actions were approved by the Council. Regarding Charge No. 3, she asserted that she came to know that after the transfer of the In-charge CMO Shri A.K. Bansal to Muraina Shri A.K. Vashisht, Revenue Inspector was posted in the Municipality of Zora on interim basis. She heard that it would take 5 to 7 days to get the new C.M.O. In order to settle down the salary for the month of January to the employees of the Corporation and ensuing Moharam and Basant Panchami festival as well as the contractors were pressing for settlement since they had completed their work, the Council authorized Shri Hari Shankar Sharma, Revenue Inspector as the C.M.O.

5. By order dated 4.10.2007, the Chief Secretary, City Administration and Development Department, found that Smt. Mittal has violated the provisions of Section 51 of the Act. It is also stated that being the Chairman, it was her duty that she should supervise the financial and executive administration of the council and does not deserve to remain on the post of the Chairman. Basing such conclusion, the said authority under Section 41-A of the Act removed the appellant from the post of the Chairman of the Nagar Palika, Zora.

6. The said order of removal was challenged by the appellant before the High Court of M.P. Gwalior in W.P. No. 4894 of 2007. By order dated 25.4.2008, the learned single Judge, after finding no ground for interference with the order passed by the State Government dismissed her writ petition.

7. Aggrieved by the dismissal of the writ petition, the appellant filed W.A. No. 253 of 2008 before the Division Bench of the High Court of M.P. at Jabalpur. By the impugned order dated 20.6.2008, the Division Bench confirmed the order

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of the learned single Judge and dismissed the writ petition. Hence the present appeal before this Court by way of special leave petition.

8. We have heard Mr. Ravindra Kr. Srivastava, learned senior counsel, appearing for the appellant and Mr. Sushil Kr. Jain, learned counsel, for respondent No.3 and Mr. B.S. Banthia, learned counsel for respondents 1 & 2.

9. It is not in dispute that election for Nagar Palika, Zora was held and the appellant was elected as President of the Nagar Palika which is a reserved seat for woman under Section 29-B of the Act. Before considering the specific charges leveled against the appellant, it is useful to refer Section 41-A of the Act which refers the removal of President or Vice-President or Chairman of a Committee:-

"41-A. Removal of President or Vice-President or Chairman of a Committee - (1) The State Government may, at any time, remove a President or Vice-President or a Chairman of any Committee, if his continuance as such is not in the opinion of the State Government desirable in public interest or in the interest of the Council or if it is found that he is incapable of performing his duties or is working against the provisions of the Act or any rules made thereunder or if it is found that he does not belong to the reserved category for which the seat was reserved.

(2) As a result of the order of removal of Vice-President or Chairman of any Committee, as the case may be, under sub-section (1) it shall be deemed that such Vice-President or a Chairman of any Committee, as the case may be, has been removed from the office of the Councilor also. At the time of passing order under sub-section (1), the State Government may also pass such order that the President or Vice-President or Chairman of any Committee, as the case may be, shall be disqualified to hold the office of President or Vice-President or Chairman, as the case may be, for the next term:

Provided that no such order under this section shall be passed unless a reasonable opportunity of being heard is given."

The above Section 41-A vests the State Government with power to remove the President, Vice-President or a Chairman of any Committee, if his continuance in the office is not found desirable in public interest or in the interest of the Council. A conjoint reading of other provisions such as Sections 20, 22 and 41-A as also the Article 243-ZG of the Constitution of India would make it amply clear that resort to Section 41-A can be had to remove a person from the office only after he/she is duly elected and his/her conduct in office is otherwise found prejudicial to public interest or in the interest of the Council.

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10. Let us consider the charges leveled against the appellant, procedure followed in her case and the ultimate decision by the State Government under Section 41-A of the Act. Though four charges have been pressed into service in the show cause notice dated 15.09.2006, admittedly Charge No.4 has not been established, hence we are concerned with Charge Nos. 1-3 only. They are as follows:

"Charge No.1

That by getting published advertisements/best wishes messages in various newspapers of more than Rs.1500/- each she has caused financial loss to the Municipality of Zora.

Charge No.2

On 27.12.2005, after the meeting of the council in the end of the details of the proceedings Smt. Sharda Kailash Mittal had put her signatures which have been cut and after the signatures so cut, Smt. Mittal has herself signed it again alongwith this on the sea of the Chief of the Chief Municipal Officer are the signatures of Sh. Hari Shankar Sharma who is not authorized to carry on any duty by the administration or senior officer of the Chief Municipal Officer.

Charge No.3

In sequence to the order dated 06.02.2006 for the transfer of Sh. A.K. Bansal, the then Chief Municipal Officer, on the same day he was discharged and automatically on the same day irregularly Sh. Hari shankar Sharma was given the charge of the Chief Municipal Officer and an irregular payment of Rs.3,12,783/- was made by him."

11. The substance of the Charge No.1 was that the appellant has caused monetary loss to the Municipality by publishing advertisements for more than Rs.1500/-. We have already pointed out and it was also not in dispute that the appellant-the President had submitted her detailed explanation with reference to the same. According to her, the payment for such publications had been approved by the President-in-Council, and the request for making the payment was expressed by the Chief Municipal Officer. However, the State pointed out that the appellant being the President of the Nagar Palika, ought to have proceeded on the basis of the prevalent Rules. It was further pointed out that by spending more than Rs.1500/- the appellant has not followed the Rules laid down in that regard and as such she is guilty of the said charge. In the explanation to the said charge, the appellant has pointed out that though the charge leveled against her relates to causing financial loss to the Nagar Palika, on the contrary, according to her, the order states that the appellant was guilty of not following the Rules while making the payment,

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which was never framed against her. It is also relevant to mention that the Rules filed by the respondent and heavily relied on by the State Government provides that the expenditure on "welcome" shall not be more than Rs.1500/-. In the present case, it was pointed out more than one place that the expenditure was with regard to the advertisement and not with regard to the "welcome" expenses alone. Though this was highlighted in the explanation to the charge, it was not properly considered by the Government. The materials placed, particularly, Annexures 1 & 2, show that the office of Nagar Palika, Zora, invited tenders for purchase of goods relating to water supply for various wards and asserted that those tenders were to be out only after due deliberation by the Nagar Palika Committee. In the light of the above factual details, the actual contents of charge and the relevant rules, we are satisfied that the conclusion arrived at by the State Government cannot be accepted.

12. Charge No.2 relates to the allegation that the appellant had struck off her signature from the minutes dated 27.12.2005 and the then Chief Municipal Officer had signed the minutes, which has been accepted by the respondent. It was pointed out by the appellant that absolutely there was nothing on record to show that either the appellant herself struck off her signature or that the appellant had permitted or compelled the then Chief Municipal Officer to affix his signatures on the said minutes. It was pointed out by her that even if assuming to be so, it was not so grave in nature so as to attract Section 41-A of the Act. On going through her specific explanation and assertion and the relevant records, there is no reason to reject her claim and the State Government took it seriously without any acceptable material in order to take action under Section 41-A of the Act more particularly, she being the President of the opposite party.

13. Charge No.3 relates to the allegation that the appellant had shown undue haste in appointing one Harishankar Sharma as the Chief Municipal Officer and compelled him to make various payments to the tune of Rs.8,12,783/-. In the explanation, it was pointed out that out of the total amount of Rs.8,12,783/-, Rs.5,08,890/- was spent towards the disbursement of the salary of the workers and other officers of the Corporation and the remaining of Rs.3,03,890/- was disbursed to various contractors for payment and wages to their daily wage workers. It was highlighted that the said payment to the contractor was made in part keeping in view the ensuing two festivals of Muharram and Basant Panchami. It was further highlighted that the vouchers of all the said payment were prepared and approved by the then Chief Municipal Officer - Shri A.K. Bansal and the appellant and were duly and properly audited, as such, there was no illegality in such disbursement. Copy of the report of the Chief Municipal Officer, Zora dated 09.03.2006 has been placed as Annexure P-8. The appellant has also pointed out that her political opponents sent a complaint to the Chief Minister making bald allegations of corruption against her. A copy of the letter dated 12.05.2006 has been included as Annexure P-9.

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14. Apart from the above complaint, the appellant has also highlighted certain communications between the local leaders and the State Government seeking the Government's intervention in taking action against her for one reason or the other.

15. The analysis of these materials, particularly, the background shows that the State Government failed to appreciate that the decisions for publication of advertisements, calling for tenders and payment of salaries were made by the entire council and the President-appellant could not be singled out for those decisions taken by the Council. The High Court failed to appreciate that removal under Section 41-A of the Act could be resorted to only under grave and exceptional circumstances which were not present in the appellant's case. No charge of causing financial loss to the Nagar Palika could be established by the State Government.

16. As directed earlier, Section 41-A of the Act gives power to the State Government to remove the President, Vice-President or Chairman of a Committee on four broad grounds, namely, (a) Public interest; (b) Interest of the Council; (c) Incapability of performing his duties; and (d) Working against the provisions of the Act or rules made thereunder. In addition, under Section 41 - A (2), the State Government at the time of removal from office may also pass an order disqualifying the person from holding the office of President, Vice-President or Chairman for the next term. The question to be determined is what is the scope of the application of Section 41-A and what is the nature of power of the Government?

17. In *Tarlochan Dev Sharma v. State of Punjab and Ors* (2001) 6 SCC 260, this Court while dealing with the removal of a President of the Council under Punjab Municipal Act of 1911, held in Paragraph 6 as under:

"In a democracy governed by rule of law, once elected to an office in a democratic institution, the incumbent is entitled to hold the office for the term for which he has been elected unless his elections set aside by a prescribed procedure known to law... Removal from such an office is a serious matter. It curtails the statutory term of the holder of the office a stigma is cast on the holder of the office in view of certain allegations having been held proved rendering him unworthy of holding the office which he held."

In Paragraph 11 this Court observed as under:

"A singular or causal aberration or failure in exercise of power is not enough ; a course of conduct or plurality of aberration or failure in exercise of power and that too involving dishonesty of intention is... The legislature could not have intended the occupant of an elective office, seated by popular verdict, to be shown exit for a single innocuous action or error of decision."

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The same consideration must be taken into account while interpreting Section 41-A of the Act. The President under the M.P. Municipalities Act, 1961 is a democratically elected officer, and the removal of such an officer is an extreme step which must be resorted to only in grave and exceptional circumstances.

18. For taking action under Section 41-A for removal of President, Vice-President or Chairman of any Committee, power is conferred on the State Government with no provision of any appeal. The action of removal casts a serious stigma on the personal and public life of the concerned office bearer and may result in his/her disqualification to hold such office for the next term. The exercise of power, therefore, has serious civil consequences on the status of an office bearer. There are no sufficient guidelines in the provisions of Section 41-A as to the manner in which the power has to be exercised, except that it requires that reasonable opportunity of hearing has to be afforded to the office bearer proceeded against. Keeping in view the nature of the power and the consequences that flows on its exercise it has to be held that such power can be invoked by the State Government only for very strong and weighty reason. Such a power is not to be exercised for minor irregularities in discharge of duties by the holder of the elected post. The provision has to be construed in strict manner because the holder of office occupies it by election and he/she is deprived of the office by an executive order in which the electorate has no chance of participation.

19. In the present case, the actions of the appellant, even if proved, only amount to irregularities, and not grave forms of illegalities, which may allow the State Government to invoke its extreme power under Section 41 - A.

20. From the materials placed before us, we are satisfied that the advertisements, tenders calling for attending day-to-day work of the Municipality such as provision for drinking water, sanitation etc. were duly put out only after due deliberation by the Council of Nagar Palika and no decision was taken by the appellant herself. The appellant has also established that due to transfer of Chief Municipal Officer, the salaries of workers of the Nagar Palika remained unpaid for the month of January, 2006 leading to possibility of unrest in the area, therefore, it was requested to the appellant by the Councilors that necessary arrangements be made for immediate payment of salaries in view of the ensuing festivals of Muharram and Basant Panchami. The materials placed by the appellant before the State Government as well as before the High Court show that the tender had been put out after due deliberation by the Council and all works had been completed after satisfying the conditions prescribed therein. The appellant had pointed out that out of the amount of Rs.8,12,783/-, an amount of Rs.5,08,890/- was disbursed towards salaries of the workers and other officers of the Nagar Palika and the remaining Rs. 3,03,890/- was paid to various contractors for payment of salaries to their daily wage workers. The vouchers of all the said payments were prepared

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and approved by the then Chief Municipal Officer-Shri A.K. Bansal and the appellant and those accounts were duly audited and as such there is no valid reason to reject the stand taken by the appellant. It is also relevant to point out that though the State Government erroneously mentioned the expenses on advertisement as Rs.2.46 lacs subsequently they themselves filed an application for amendment to correct the amount of Rs.2.46 lacs to be read as Rs.24,600/-. The learned single Judge as well as the Division Bench not only failed to consider all the above circumstances and the exigencies under which the appellant was compelled to make the appointment of one Shri Harishankar Sharma as Chief Municipal Officer and also ignored the fact that the appointment was actually made for payment of salaries and to make the payments to the contractors who pressed for disbursement of the same to their workers. In the light of the above conclusion and in the absence of a finding that any loss was caused, the decision of the State Government can not be sustained.

21. In the light of the above discussion, we set aside the order of the State Government removing the appellant as President of the Nagar Palika, Zora, District Muraina under Section 41-A of the Act and consequential orders dated 25.04.2008 passed by the learned single Judge in W.P. No. 4894 of 2007 and of the Division Bench dated 20.06.2008 in W.A. No. 253 of 2008. In view of the fact that her tenure has come to an end and fresh election was also conducted, we are not disturbing the subsequent events. However, we make it clear that in view of the present order, the disqualification of the appellant is expunged and the appellant would be free to contest the elections in future.

22. With the above conclusion and observation, the appeal is allowed. There shall be no order as to costs.

Appeal allowed.

I.L.R. [2010] M. P., 1256

SUPREME COURT OF INDIA

Before Mr. Justice R.V. Raveendran & Mr. Justice Aftab Alam

19 January, 2010*

S. PAL & COMPANY

Vs.

STATE OF M.P. & anr.

... Appellant

... Respondents

Arbitration Act (10 of 1940), Sections 30 & 33 - Grounds for setting-aside award - Scope of interference in regard to award is limited - Court does not sit in appeal over findings of arbitrator - In absence of any allegation of misconduct, an award can be interfered only when there is an error apparent on face of the award or if there is any apparent inconsistency in award. (Para 3)

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माध्यस्थम् अधिनियम (1940 का 10). धाराएँ 30 व 33 – अधिनिर्णय अपास्त करने के आधार – अधिनिर्णय के सम्बन्ध में हस्तक्षेप का क्षेत्र सीमित है – न्यायालय, माध्यस्थ के निष्कर्षों पर अपील की तरह कार्यवाही नहीं कर सकता – अवचार के किसी अभिकथन के अभाव में, किसी अधिनिर्णय में केवल तब हस्तक्षेप किया जा सकता है जहाँ अधिनिर्णय के देखने से ही कोई त्रुटि प्रकट होती हो या यदि अधिनिर्णय में कोई प्रत्यक्ष असंगति हो।

ORDER

The appellant claims that it was appointed as a sole selling agent for sale of "Narmada Lottery Tickets" under the State Lottery Scheme of the Government of Madhya Pradesh under Agreements dated 20/10/1983, 28/12/1984 and 17/04/1985. Certain disputes between the parties were referred to arbitration. Before the arbitrator the appellant's claims consisted of; (i) compensation for losses suffered on account of several acts of the respondents; and (2) excess amount realised by way of adjustment. The State disputed the said claims. The State made the following counter claims: (i) balance amount due in regard to tickets supplied (relating to 1994, 1995 and 1996 draws); (ii) excess and wrong realisation by the appellant; and (iii) losses incurred on account of breaches by appellant. The arbitrator by his award dated 25/08/1990 rejected the claims of the appellant and allowed the counter claim of the respondent in part for a sum of Rs.34,05,888.15 (Rupees Thirty four lakhs five thousand eight hundred eighty eight and paise fifteen only).

2. Feeling aggrieved, the appellant filed a petition under Sections 30 and 33 of the Arbitration Act, 1940 challenging the award. The said petition was dismissed and the award was made a rule of the court. The appeal filed by the appellant before the High Court was dismissed by the impugned order dated 27.04.2001. The appellant is aggrieved by rejection of its claim and award of the counter claim.

3. The scope of interference in regard to arbitration awards is limited. The Court examining an award under Section 30 and 33 of the Act does not sit in appeal over the findings of the arbitrator. It cannot reappreciate or reassess the evidence. In the absence of allegation of Arbitrator misconducting himself or the proceedings, an award can be interfered only if there is an error apparent on the face of the award or if there is any apparent inconsistency in the award. The courts below have examined the award in the correct perspective and rejected the challenge thereto.

4. In so far as the rejection of the claims of the appellant is concerned, the learned counsel for the appellant was not able to make out any ground. On a perusal of the award we find no error apparent on the face of it nor any inconsistency.

5. However, in regard to the counter claims, it was contended that the award was based on documents production whereof was illegal. It was submitted that

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the appellant on taking inspection of the records of arbitration, before the trial court in the proceedings under Sections 30 and 33 of the Act had found a bunch of about 100 documents filed by the State Government before the arbitrator after the conclusion of the hearing before the Arbitrator without furnishing the copies thereof to the appellant. It is submitted that the appellant did not even have notice of the filing of the said documents and therefore did not have any opportunity to challenge them. It is submitted that the arbitrator misconducted himself and misconducted the proceedings in receiving documents from the State Government after the conclusion of the hearing, and relying upon them without granting an opportunity to the appellant to have its say in regard to those documents. He, therefore, submits that award of the arbitrator, in favour of the respondent State is liable to be set aside.

6 We find that the last date of hearing before the arbitrator was 16/07/1990. On that day the respondents filed documents consisting mainly of Statement of Accounts, in the presence of appellant. There is nothing to show that the appellant objected to the filing of the said documents. The arbitrator has recorded the permission to the respondent to file such documents. Therefore, the contention that the documents were filed without giving an opportunity to the appellant to verify and object to the same is not correct. The appellant next contended that their objection was not in regard to the documents which were filed on 6.7.1990 but in regard to another bunch of 100 documents, which were found in the records of the arbitrator, when they took inspection of the arbitration records in the proceedings under Section 33 of the Act. Their contention is that the said documents, the filing of which does not find reference in the proceedings of the arbitrator, renders the award invalid. But the learned counsel for the appellant fairly conceded that having gone through the entire records of arbitrator which has been summoned to this court, he did not find the said 100 documents in file. It is also clear that the said 100 documents were not found in the file when the matter was heard in the High Court. The High Court has recorded a finding in para 9 of its judgment, that the contention of the appellant that certain documents were filed before the arbitrator, without supplying copies to the appellant was not borne out from the record. The appellant was also not in a position to point out any reference to the alleged 100 documents or any of the them in the award of the arbitrator. Therefore, the position is as follows: (a) the record of the arbitrator in fact does not contain the 100 documents allegedly filed by the respondent; and (b) the arbitrator has not referred to them or relied upon any such document while making the award. Thus, the claim of the appellant that 100 documents were filed before the arbitrator without its knowledge and they were relied upon by the Arbitrator is baseless. It is quite probable that the person who took the inspection thought that the documents which were filed in the presence of the appellant on 6/7/1990, as documents which were filed without notice. Be that as it may. Having

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regard to the clear finding by the High Court that no such documents were filed, the question of arbitrator's award being challenged on the ground that the award was passed on the basis of such documents cannot be accepted.

7. No other ground is urged. The appeal is dismissed as having no merit.

Appeal dismissed.

I.L.R. [2010] M. P., 1259

WRIT APPEAL

Before Mr. Justice Arun Mishra & Mr. Justice S.C. Sinho

11 February, 2010*

STATE OF M.P. & anr.

... Appellants

Vs.

DR. SMT. SANDHYA PRASAD & ors.

... Respondents

Service Law - Educational Service (Collegiate Branch) Recruitment Rules, M.P. 1967, Rule 12(5) - Emergency appointment - Higher pay scale - Whether past services rendered in emergency appointment would be counted for grant of higher pay scale - Held - Yes - The appointment were made after following the procedure prescribed u/R 12(5) which provided for emergency appointment and subsequently the services of employees were regularized - State Government has taken the decision vide circular dated 12.02.1992 for counting of such services for the purpose of higher pay scale and for selection pay scale, the benefit of which could not have been denied to the employees. (Para 8)

सेवा विधि - शैक्षणिक सेवा (महाविद्यालय शाखा) भर्ती नियम, म.प्र. 1967, नियम 12(5) - आकस्मिक नियुक्ति - उच्चतर वेतनमान - क्या आकस्मिक नियुक्ति में दी गयीं पूर्व सेवाएँ उच्चतर वेतनमान प्रदान करने के लिए गिनी जाएंगी - अभिनिर्धारित - हाँ - नियुक्तियाँ नियम 12(5) के अन्तर्गत विहित प्रक्रिया का पालन करने के बाद की गयीं जो आकस्मिक नियुक्ति का उपबंध करता है और तत्पश्चात् कर्मचारियों की सेवाएँ नियमित कर दी गयीं - राज्य सरकार ने उच्चतर वेतनमान और सिलेक्शन वेतनमान के प्रयोजन के लिए ऐसी सेवाएँ गिनने के लिए परिपत्र तारीख 12.02.1992 द्वारा निर्णय लिया है, जिसका लाभ कर्मचारियों को देने से इनकार नहीं किया जा सकता था।

Case referred :

2006(1) MPLJ 217.

Deepak Awasthy, G.A., for the appellants/State.

Ajay Mishra, K.K. Trivedi, Praveen Verma, Alok Pathak, Nirmala Raikwar, Sheel Nagu, M. Chansoriya, S.S. Tripathi, D.K. Mishra, A. Rajeshwar, Bhanu Pratap Yadav, Madhu Shukla, S. Tripathi, T.K. Khadka & R.P. Mishra, for the respondents.

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O R D E R

The Order of the Court was delivered by ARUN MISHRA, J. :- In writ appeals and the writ petition which have been preferred the question arises for consideration is whether the period of service rendered as emergency appointee pursuant to the appointment having been made under Rule 12(5) of M.P. Educational Service (Collegiate Branch) Recruitment Rules, 1967 (hereinafter referred to as "the Rules of 1967") could have been ordered to be counted for conferring the benefit of higher pay scale.

2. It is not in dispute that the concerned employees were appointed under Rule 12(5) of the Rules of 1967. Rule 12(5) of the Rules of 1967 provides that if Commission's panel of selected candidates is not available, the posts may be filled by Govt. by emergency appointments, by issuing advertisement inviting applications under the prescribed form, qualifications have also been prescribed. It is provided that as and when the candidates are available duly selected by PSC, such appointees will be removed without notice. Appointment order indicates that appointment was made in the pay scale of Rs.2200-75-2800-100-4000. It is also not in dispute that the services of concerned employees were ultimately regularized. The State Government did not count the period spent by the employees as emergency appointee for the purpose of grant of higher pay scale, the benefit of which was extended by circular dated 11th of October, 1999 bearing no.F-1/233/99/38-1/99.

3. Earlier the cases were filed before the Tribunal. : OA No.1763/2000 filed by Dr.(Smt.) Seema Raizada which was decided vide Order dated 26.2.2001, it was allowed in terms of circulars dated 12.2.92 and 11.10.99. In the matter of Padma Shrivastava (OA No.1764/2000) decided on 26.2.2001, similar decision was rendered by the Tribunal and benefit was ordered to be extended with effect from the date of initial appointment. Case of Seema Raizada travelled to the Division Bench of this Court in WP No.4863/2001, same was dismissed vide Order dated 10.8.2005 by the Division Bench comprising of My Lord Hon'ble the Chief Justice R.V.Raveendran (as he then was) and Shantanu Kemkar, J. The decision in the case of Padma Shrivastava was assailed before this Court in WP No.295/2002. Another Division Bench of this Court comprising of Hon'ble Mr. Justice Deepak Verma (as he then was) and Mr. A.K.Saxena, J. dismissed the writ petition vide Order dated 26.9.05. Another WP No.1017/02 was also dismissed. These were preferred against the decision rendered by the State Administrative Tribunal, the decision of Tribunal was upheld. There are some other decisions rendered by Division Bench. Single Judge sitting at Gwalior in WP No.6350/06(s) vide Order dated 28.3.08 has also allowed the writ petition filed by Dr.Brijesh Kumar Sharma giving him the similar benefit treating the period spent as emergency appointee for the purpose of grant of higher pay scale. As against which the writ appeal preferred by State bearing no.528/08 was dismissed by Division Bench of this Court comprising of Shri S. Samvatsar and A.P. Shrivastava, JJ vide order dated

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7.5.09. Reliance was placed on various decisions and it was held that there is difference between the conferral of seniority and in concept of counting of the services for the purpose of grant of senior pay scale and the selection grade. The benefit of higher pay scale has to be given counting the service from the date of initial appointment as the appointment was as per rules and has been later on regularized. Yet another Division Bench at Gwalior has also dismissed the writ appeal 65/10 on 1.2.2010. The State of MP has preferred SLP before the Apex Court. The Apex Court dismissed the SLP on the ground of delay in filing the petitions, question of law was left open in the order passed on 12th March, 2008.

4. Though the matter is covered by large number of decisions of this Court, but Shri Deepak Awasthy, learned GA has urged this Court to re-examine the question as the question of law is left open by the Apex Court. He has submitted that once seniority cannot be granted, it follows that the employees were not born in the cadre of regular service, thus, the period spent by them as emergency appointee could not have been counted for the purpose of grant of higher pay scale as such employees could not be said to be members of regular services, it could not be said that they were born in the regular services, before their services were regularized and they came to the service of the State under the rules. He has relied upon decision of this Court in *Saroj Goswami vs. State of M.P. and others* 2006 (1) MPLJ 217. He has also submitted that on the basis of circulars relied upon by the Tribunal, the relief could not have been extended.

5. Shri Ajay Mishra, Sr. Advocate, Shri K.K. Trivedi, Shri Praveen Verma, Shri Alok Pathak, Ku. Nirmala Raikwar, Shri Sheel Nagu, Shri M. Chansoriya, Shri S.S. Tripathi, Shri D.K. Mishra, Shri A. Rajeshwar, Shri Bhanu Pratap Yadav, Ms. Madhu Shukla, Shri S. Tripathi, Shri T.K. Khadka and Shri R.P. Mishra, and Shri Piyush Dharmadhikari, learned counsel appearing for employees have submitted that the employees are entitled for the benefit of higher pay scale after counting their services with effect from their appointment under Rule 12(5) of the Rules of 1967, as per circular dated 12.2.92 such benefit is clearly available. Apart from that they have also relied upon MP Public Service Commission DO dated 25th December, 1998 filed in WP No. 14827/08 in which it has been ordered by the Commission that it has decided to include service rendered in adhoc capacity for counting of past service for placement in Senior Scale/Selection Grade, provided that three conditions are fulfilled. The adhoc service was of more than one year duration; the incumbent was appointed on the recommendation of duly constituted Selection Committee, and the incumbent was selected to the permanent post in continuation to the adhoc service, without any break.

They have also relied upon various aforesaid decision rendered by this Court time to time.

6. No doubt about it that this Court has consistently taken the view that such

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appointees are entitled for the benefit of higher pay scale by counting the services spent as emergency appointee. Emergency appointments are made under Rule 12(5) of the Rules of 1967 which reads thus :-

"12(5) : Emergency Appointments :- If Commission's panel of selected candidates is not available, the posts may be filled by emergency appointments in the following manners:-

- (a) an advertisement shall be issued by Government;
- (b) Applications for emergency appointments shall be submitted in the form prescribed in Schedule V.
- (c) Applications received shall be registered and tabulated according to the following criteria -

Category

Qualifications

.....

.....

The names will be arranged in each sub-category according to the marks secured by the candidates at the MA/M.Sc./M.Com. Examination:

Provided if and when Public Service Commission panel for these subjects is available, these teachers will be liable to be removed without notice."

7. It is not in dispute that advertisement was issued, selection committee was formed which has considered the cases of the employees, they were duly qualified for being appointed, their appointments have continued till their regularization and they were holding the similar pay scale in which they were regularized. Appointment was made in the pay scale not on fixed pay and there was no brake, they were not appointed as against any leave vacancy, the appointment was not on purely adhoc basis without following the procedure, the appointment was made under the aforesaid rule 12(5).

8. In the light of the aforesaid undisputed facts when we consider circular dated 12.2.92 issued by the State Government which has been relied upon by the Tribunal while rendering decision in case of Seema Raizada and Padma Shrivastava, a close reading of the circular dated 12.2.92 indicates that prior service rendered has to be counted for the purpose of grant of higher pay scale and selection grade pay scale on following conditions;

(i) that the post held must be equivalent and carrying the same pay scale;

(ii) the qualifications of the post held should not be less than the prescribed qualification by the UGC for the post of lecturer;

(iii) at the time of appointment on the earlier post of which

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service is to be counted an incumbent must possess the minimum qualification prescribed by the UGC;

(iv) appointment on the post must have been made by the prescribed selection procedure by the State Government; and

(v) the appointment should not be purely adhoc or as against leave vacancy for less than one year.

When we apply the aforesaid five conditions in the instant case, one by one, it is not disputed that appointment of the employees was on the same post and in the same pay scale. Thus, the first condition stands satisfied. When we come to second condition as to the qualifications prescribed for the post, the post held was the same post and the qualifications possessed by incumbents were not less than that prescribed by the UGC, it is not the case of State that qualifications prescribed in advertisement were less. Thus, second condition also stands fulfilled. When we come to IIIrd condition, the incumbent was holding the minimum qualification prescribed by UGC at the time of appointment on emergency basis, they were holding the qualifications has also not been disputed. When we come to fourth condition it is admitted that selection was made as prescribed under Rule 12(5) of the Rules of 1967, since the appointment was made under Rule 12(5), the aforesaid IVth condition also stands satisfied. When we examine fifth and last condition it is apparent that appointment was made on emergency basis not on purely adhoc basis, it was not against any leave vacancy. For the purpose of appointment, prescribed procedure under Rule 12(5) was followed, appointment was made under the rules. Rules provide for emergency appointment and prescribed the procedure for that which was followed and ultimately the services were regularized. The State Government has taken the decision vide circular dated 12.2.92 for counting of such services for the purpose of higher pay scale and for selection pay scale, the benefit of which could not have been denied to the employees, thus, relief has to be given on the basis of the aforesaid circular dated 12.2.92. Though it is not necessary to go into the DO of the MP PSC in view of circular dated 12.2.92, but MP PSC has clearly mentioned in its DO dated 25.12.98 thus :-

“ The Commission after seeking legal opinion on clause 1(e), has decided to include service rendered in adhoc capacity for counting of past service for placement in Senior Scale/Selection Grade, provided that the following three conditions are fulfilled :-

“(a) The adhoc service was of more than one year duration;

(b) the incumbent was appointed on the recommendation of duly constituted Selection Committee, and

(c) The incumbent was selected to the permanent post in continuation to the adhoc service, without any brake.”

The Commission has taken the above decision.

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The aforesaid three requirements also stand satisfied in the instant case. The instant case stand on better footing as the service rendered was not purely adhoc, but it was under the rules as an emergency appointee, even adhoc appointee in case has continued for more than one year duration and was selected by duly constituted selection committee and was later on selected to the permanent post in continuation to the adhoc service without any brake, his services has to be counted for placement in Senior Scale/Selection Grade as per aforesaid decision of PSC. In the instant case, the case of employees is much better. Thus, they could not have been denied the benefits of counting of their services rendered as emergency appointee and their past services ought to have been counted for the placement in Senior Scale/Selection Grade, we find that decision rendered by the single Bench to be in accordance with law and we do not find any ground to differ from the view taken by different Division Benches of this Court in several matters dismissing the writ appeals assailing the order passed by the single Bench or the writ petition preferred against the order passed by State Administrative Tribunal.

9. Shri Deepak Awasthy, learned GA has relied upon Division Bench decision of this Court in *Saroj Goswami vs. State of M.P. and others* (supra) in which petitioner was appointed on adhoc basis on a fixed pay of Rs.700/-. Division Bench of this Court held that fixed pay happened to be equivalent to the initial pay in a time scale, i.e. Rs.700/-Rs.1600/- does not mean that adhoc service was on a time scale. It was laid down by Division Bench of this Court that an incumbent is neither entitled for benefit of seniority nor pay scale. In the instant case ratio of the aforesaid decision is not at all attracted as seniority has not been given in any of the order passed by the single Bench, the benefit given is that of counting of the past services for the purpose of placement in the Senior Scale/Selection Grade and the said benefit is available as per Government circular dt. 12.2.1992. In the aforesaid decision of *Saroj Goswami vs. State of M.P. and others* (supra) the appointment was made on adhoc basis which was not under the rules whereas the appointment in the instant cases was under the Rules of 1967 and ultimately incumbents have been regularized. The appointment in the instant case was also on the pay scale, in the aforesaid decision appointment was on fixed pay, thus, decision is distinguishable. Even after following the aforesaid decision in its pith and substance, no dent is caused to the employees of the instant case as the relief is totally different, thus, ratio of said decision is not attracted.

10. Resultantly, we find no merits in the writ appeals preferred by the State Government. The same are dismissed. They are bound to count the services rendered by the employees as emergency appointee for placement of Senior Scale/Selection Grade. WP No. 24503/03 stands allowed. No costs.

Order accordingly.

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I.L.R. [2010] M. P., 1265

WRIT APPEAL

Before Mr. Justice Arun Mishra & Mr. Justice S.C. Sinho

19 February, 2010*

RAJENDRA KUMAR CHAUDHA

... Appellant

Vs.

AYAZ AHMAD KHAN

... Respondent

A. Notary Rules, 1956, Rule 7 - Appointment of Notary - Recommendation of Competent Authority - After not receiving any objection from the Bar Association, the Competent Authority recommended the names of candidates for appointment of Notary in order of seniority without making any inquiry as regards eligibility and competence as contemplated in Rule 7(3) - Held - Division Bench while affirming the findings of the learned Single Judge held that Competent Authority has failed to act as per the mandate of Rule 7(3), which amounted to arbitrariness in the process of selection for appointment of Notary. (Paras 13 to 17)

क. नोटरी नियम, 1956, नियम 7 - नोटरी की नियुक्ति - सक्षम प्राधिकारी की सिफारिश - सक्षम प्राधिकारी ने अधिवक्ता संघ से कोई आपत्ति प्राप्त न होने के बाद नियम 7 में अनुध्यात पात्रता और सक्षमता के बारे में कोई जाँच किये बिना नोटरी की नियुक्ति के लिए वरिष्ठता क्रम में अभ्यर्थियों के नामों की सिफारिश की - खण्ड न्यायपीठ ने विद्वान एकल न्यायाधीश के निष्कर्षों की पुष्टि करते समय अभिनिर्धारित किया कि सक्षम प्राधिकारी नियम 7(3) की आज्ञा के अनुसार कार्य करने में असफल हो गया, जो नोटरी की नियुक्ति के लिए चयन की प्रक्रिया में मनमानेपन की कोटि में आता है।

B. Notary Rules, 1956, Rule 7 - Appointment of Notary - Recommendation of Competent Authority - Cardinal principles - Held - It was incumbent upon the Competent Authority to have send the names arranged in order of suitability of the incumbents whom he has considered to be appropriate having due regard to knowledge and experience, extent of practice and fitness in accordance of Rule 7(3). (Paras 13 to 17)

ख. नोटरी नियम, 1956, नियम 7 - नोटरी की नियुक्ति - सक्षम प्राधिकारी की सिफारिश - मुख्य सिद्धांत - अभिनिर्धारित - सक्षम प्राधिकारी बाध्य था कि पदधारियों की उपयुक्तता के क्रम में व्यस्थित नामों को भेजता जिन्हें उसने नियम 7(3) के अनुसार ज्ञान और अनुभव, व्यवसाय की सीमा और उपयुक्तता पर सम्यक् ध्यान देकर उपयुक्त होना विचारित किया है।

Cases referred :

1998(1) MPLJ 490, AIR 2000 MP 260.

R.P. Agrawal with Sharad Gupta, A.M. Trivedi, U.K. Sharma, K.S. Baghel, R.K. Verma, Udayan Tiwari, Anil Dwivedi, O.P. Dwivedi, for the petitioners.

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

V.S. Shrotri with Vikram Johri, for the District Judge.

Kaushlesh Pandey & K.K. Gautam, for other respondents.

ORDER

The Order of the Court was delivered by **ARUN MISHRA, J.** :- The writ appeals have been preferred as against the order passed by Single Bench remitting the case to the competent authority to make the recommendations to the State Government in accordance with Rule 7 of the Notary Rules, 1956 (hereinafter referred to as the Rules).

2. The brief facts are that by notification dated 12.10.2007, 11 posts of Notary were notified for Katni District which include 4 posts for Katni, 1 for Dheemarkheda, 2 for Bohri band, 1 for Rithi, 2 for Badwara and 1 for Barhi. The District Judge was asked by the State Government to send a panel along with the memorial of eligible local Advocates in accordance with Rule 6 and 7 of the Rules. 77 candidates had filed the applications from Katni, 5 from Dheemarkheda, 9 from Bohriband, 10 from Rithi, 14 from Badwara and 9 from Barhi.

3. The District Judge forwarded the list on 25.1.2008 to the Principal Secretary of the Law and Legislative Department of State Government. The State Government approved names of respondents No. 5 to 15 out of the list and short listed them for appointment as Notary in the aforesaid Tehsils of Katni District. Petitioners submitted representations objecting to selection mode and failing to get redress filed the writ petitions.

4. It was submitted by the petitioners that while selecting respondents No. 5 to 15, Rule 7 of the Rules has not been complied with. Respondents No. 7, 11 and 12 were not eligible for being appointed on the post of Notary.

5. In the return filed by respondents No. 5, 6 and 7 in the writ appeals, it is contended that the District Judge is not bound to record any reasons as to why the particular persons are recommended. Since all the applicants included in the panel prepared by the competent authority, have equal suitability and there can be no preferential treatment, the selection made by the State Govt. cannot be said to be arbitrary or discriminatory. No objection was sent by the Bar Association, therefore, competent authority was not bound to hold an enquiry in terms of Rule 7(1) of the Rules. All the candidates were suitable, as such all the names were recommended.

6. The learned Single Judge has allowed the writ petitions and has held that the District Judge has failed to perform the duty enjoined upon him under the Rules. Consequently, matter has been remitted back to the competent authority to send a fresh report to the Government after complying with the provisions contained under rule 7 of the Rules. Reports dated 25.1.2008 sent by District Judge in respect

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of Tahsil Barhi, Rithi, Dheemarkheda, Bohriband, Badwara and Katni have been set aside and selection made of respondents No. 5 to 15 as Notary has also been quashed. Aggrieved thereby the instant writ appeals have been preferred.

7. Learned Counsel appearing on behalf of appellants have submitted that there was due compliance of Rule 6 and 7 of the Rules. Objections were invited from the Bar Association. No objection was submitted. All the persons were eligible as such their names were recommended by the District Judge to the State Government. District Judge has discharged his duties as enjoined under the Rules, hence interference made by the learned Single Judge by quashing the appointments and directing fresh preparation of panel as per Rule 7 was uncalled for.

8. Shri V.S. Shroti, learned Sr. Counsel with Shri Vikram Johri appearing on behalf of District Judge has submitted that objections were invited from the Bar Association. No objection was received. The persons who had applied and were found to be eligible, the list of eligible candidates was forwarded to the State Government. He has also attracted attention of this Court to the amended rules. The amendment has been effected since 24.9.2009. The amended Rule 7(1) provides that competent authority can conduct an enquiry as he thinks fit and after giving the applicant an opportunity of making his representations against the objections, if any, received within the time fixed under sub-rule (2) of rule 6. He has to submit a report to the appropriate government and the State Government has power to constitute an Interview Board under Rule 7-A of the Rules for selection of candidates. Learned Counsel has submitted that it be clarified that in case further enquiry is necessary and fresh recommendations have to be made, the District Judge can conduct an enquiry under the amended Rules.

9. Shri Samdarshi Tiwari, learned Government Advocate has supported the case of the appellants. He has submitted that the appointments were duly made by the State Government, hence the order passed by the learned Single Judge be set aside.

10. Shri K.K. Pandey and Shri K.K. Gautam have submitted that the order passed by the learned Single Judge is in accordance with law. No case for interference in the writ appeal is made out.

11. Rule 6 of the Notary Rules, 1956 provides that the competent authority shall examine every application received by him and if he is satisfied that the application is not complete in all respects or the applicant does not possess the qualifications specified in rule 3, or that any previous application of the applicant for appointment as a notary was rejected within six months before the date of the application, shall reject it summarily and inform the applicant accordingly. In case applications are not rejected under sub-rule (1) of rule 6, in that case there is duty enjoined upon the District Judge to call for the views of the Bar Association, Bar Council, Incorporated Law Society or other authority as the case may be. Rule 7(1) as it stood prior to amendment is as follows :-

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7. Recommendation of the competent authority. - (1) The competent authority shall, after holding such inquiry as he thinks fit and after giving the applicant an opportunity of making his representations against the objections, if any, received within the time fixed under sub-rule (2) of rule 6, make a report to the appropriate Government recommending either that the application may be allowed for the whole or any part of the area to which the application relates or that it may be rejected.

After amendment rule 7(1) reads thus :-

7(1): The competent authority shall, after holding such inquiry as he thinks fit and after giving the applicant an opportunity of making his representations against the objections, if any, received within the time fixed under sub-rule (2) of rule 6, make a report to the appropriate Government recommending that the applicant may be allowed to appear before the Interview Board.

12. There is a change in the procedure with respect to the appointment. Now the competent authority has to make report to the appropriate government recommending that the applicant may be allowed to appear before the Interview Board. Earlier constitution of Interview Board at State level was not provided, thus there is procedural change brought about by the amendment incorporated in rule 7(1) and also by rule 7-A which provides for constitution of the Interview Board by the State Government and thereafter appointment has to be made. It is not disputed that provision of amended Rule 7(1) and 7-A being procedural, have to be followed with respect to the pending applications also. Even otherwise it is settled proposition of law that there is no vested right in the procedure part. The conditions of eligibility have not been changed.

13. Rule 7(3) provides that while making the recommendations under Rule 7(1), the competent authority shall have due regard to the matters enumerated therein from clause (a) to (e). The matters which have been enumerated are of importance and it is imperative to the competent authority to apply its mind having due regard to the matters enumerated in clause (a) to (e) of sub-rule 3 of rule 7 of the Rules. Mind has to be applied as to residence of the person where he resides and in which area he proposes his practice as notary, as provided under rule 7(3)(a). Due regard has to be given to requirement of notary by considering under Rule 7(3)(b) the number of existing notaries practicing in the area, whether it is necessary to appoint additional notary. As per rule 7(3)(c) the competent authority has to apply his mind to the knowledge and experience of commercial law of the incumbents and thereafter has to make his recommendation with respect to fitness of the person. The competent authority in case of a legal practitioner has to consider the extent of practice of an incumbent and to find out whether the applicant is fit

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to be appointed as a notary. The District Judge before placing an incumbent in the panel has to form an opinion on the basis of knowledge and experience, extent of practice and fitness of a person to be appointed as a notary. Merely sending of names in order of seniority as has been done in the instant case, is absolutely dereliction of duty enjoined upon the District Judge. The purpose of recommending under Section 7(3) is that names of only fit and deserving persons having knowledge and experience of commercial law are included in panel. Due regard has to be given to the extent of practice, integrity, fitness etc.

14. In *Ashok Kumar Choudhary Vs. State of M.P. And others* - 1998(1) MPLJ 490 it has been opined by this Court that the District Judge is not supposed to act as a post office and forward the papers to the State Government. If there are more than one applications, then District Judge has to make recommendation for appointing notary indicating the name of applicant who is more suitable than other applicants, in the order of suitability names have to be forwarded. From the file it should appear that enquiry as provided under rule 7(3) has been made by District Judge and District Judge has prepared the panel considering the knowledge and experience of each applicant and their suitability for appointment as a notary. It is necessary for the District Judge to resort to the aforesaid aspect as job of notary is a responsible job and they cannot be permitted to act in arbitrary manner on pick and choose manner by the State Government by forwarding all the applications of eligible candidates. Recommendation has to be made duly considering the requirement of rule 7 of the Rules. Enquiry has also to be made as to honesty and integrity of the applicants before recommending their names to be appointed as notary. It is not open to the State Government to make any appointment without District Judge determining the question as to person who is more suitable for appointment under Rule 7(3). The act of bypassing rule 7(3) of the Rules, would amount to arbitrariness in the process of appointment of Notary.

15. In *Suryakant Chandrakar Vs. State of M.P.* - AIR 2000 MP 260, it has been opined by this Court thus :-

A plain reading of Rule 7(1) of the Rules makes it clear that the competent authority is required to make recommendation either that the application may be allowed for the whole or any part of the area to which the application relates or that it may be rejected. Under Rule 7(3) of the Rules, the competent authority while making recommendation is required to give due regard to various aspects enumerated in clauses (a) to (e). After the report of the competent authority, the appropriate Government is required to consider the same and make appointment of Notaries. The State Government while making appointment of a Notary is required to consider the report. Here, in the present case, the competent authority has stated

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in clear terms that he did not make any recommendation. From the letter of competent authority dated 2nd of March 1998, it is apparent that he has just forwarded the memorials of 7 persons including respondents 3 to 5 along with the other documents to the State Government for appropriate action. The original records have been produced before me by Mr. Ghildiyal and a perusal thereof also does not show that the competent authority had made any recommendation as required under Rule 7 of the Rules. In fact, he has forwarded memorials of all the applicants along with the documents. Such a recommendation was obliged to be made by the competent authority under Rule 7 of the Rules. Non-rejection of the memorials under Rule 6 of the Rules and forwarding the same along with the documents of the respective memorialists, in my opinion, cannot be construed as recommendation of the competent authority. He has thus failed to discharge his statutory obligation. That being so, appointment of respondents No. 3 to 5 as Notaries suffers from procedural ultra vires and cannot be allowed to stand. The view which I have taken finds support from the judgment of this Court in case of *Ashok Kumar Choudhary* (supra).

16. In the instant matters what District Judge has done that he has invited the objections from the Bar Association, no objection was received and thereafter has forwarded the list of all the persons arranged in order of seniority to the State Government. The District Judge has totally failed to act as per the mandate of Rule 7(3) of the Rules. It was incumbent upon the District Judge to send the names arranged in order of suitability of the incumbents whom he has considered to be appropriate having due regard to knowledge and experience, extent of practice and fitness, which has not been done in the instant case. Thus the learned Single Judge is justified in quashing the consequential action taken on the basis of violation of Rule 7(3) of the Rules.

17. Shri V.S.Shroti, learned Sr. Counsel has submitted that the District Judge should be permitted to conduct oral interview of the incumbents. We do not go to that extent as oral interview is contemplated in the next stage after recommendation is made by the competent authority to the State Government, however, in order to ascertain the suitability, it is open to him to make such inquiry as he deems fit. He is free to call the candidates to find out the suitability as per Rule 7 of the Rules but simply calling a candidate to elicit an information would not amount to interviewing him, it would only be step in aid in order to form an opinion under Rule 7(3) of the Rules. When the competent authority applies the mind to the requirement of Rule 7(3), which may be applicable in the case, it should appear

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from the noting of the file that the competent authority has made the recommendation after due compliance of Rule 7 of the Rules. He is not supposed to act in a mechanical manner. The appointment of notary, as already mentioned, is an important job and names of only honest persons with integrity should be recommended by the District Judge, not the names of all the incumbents in order of their seniority or category wise as done in the instant case. The eligibility of an incumbent is a different aspect than assessing the suitability. Arranging the names in order of seniority cannot be said to be as per suitability. A person's suitability has to be adjudged on the basis of objective criteria as laid down in the Rules. It has been considered, must reflect from the file. The competent authority cannot shirk from its significant responsibility enjoined upon him under the Rules to ensure that incompetent and dishonest incumbents are not appointed as notary on political basis and eliminated at grass root level. Recommendation of the District Judge serves the purpose of weeding out such elements from the zone of consideration who are not otherwise fit and suitable as per the requirements of the Rules. The District and Session Judges are expected to rise to the occasion, select the persons for recommending the names as per the criteria which has been laid down under the Rules and not to oblige every incumbent by sending the entire list to the State Government which amounts not only shirking from duty but tantamounts to flagrant violation of the rules at the end of the competent authority which cannot be tolerated even for a moment. Thus District and Session Judges to be careful in future in making the recommendation. It has to be ensured that only the names of suitable persons be recommended as per requirements of Rules.

18. Resultantly, we find no merit in these writ appeals. Writ appeals are hereby dismissed. No costs.

Appeal dismissed.

I.L.R. [2010] M. P., 1271

WRIT PETITION

Before Mr. Justice Shantanu Kemkar

14 December, 2009*

PRASANNA KUMAR SHARMA

... Petitioner

Vs.

STATE OF M.P. & anr.

... Respondents

A. Service Law - Pensioner's Welfare Fund Rules, M.P. 1997, Rule 3 (a) - Medical assistance - Petitioner's application for medical assistance was rejected as the treatment undergone by him was not in a recognized hospital of the respondents - Held - Treatment undergone by the petitioner was not in the approved hospital list of the respondent and thus rejection for

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the medical assistance can not be said to be unjustified - It appears that under some misconception the petitioner approached to the respondents seeking 'assistance' under Rules of 1997.

(Para 8 & 9)

क. सेवा विधि - पेंशनभोगी कल्याण निधि नियम, म.प्र. 1997, नियम 3(a) - चिकित्सीय सहायता - चिकित्सीय सहायता के लिए याची का आवेदन नामंजूर किया गया क्योंकि उसके द्वारा कराया गया उपचार प्रत्यर्थियों के मान्यताप्राप्त चिकित्सालय में नहीं था - अभिनिर्धारित - याची द्वारा कराया गया उपचार प्रत्यर्थी की अनुमोदित चिकित्सालय सूची में नहीं था और इस प्रकार चिकित्सीय सहायता की नामंजूरी अन्यायपूर्ण नहीं कही जा सकती - ऐसा प्रतीत होता है कि किसी भ्रम वश याची ने 1997 के नियमों के अन्तर्गत 'सहायता' चाहते हुए प्रत्यर्थियों से निवेदन किया।

B. Service Law - Civil Services (Medical Attendance) Rules, M.P. 1958, Rules 2 & 8 - Medical assistance - Petitioner an employee of High Court after his retirement employed on contract basis and his application for medical assistance was rejected as the treatment undergone by him was not in a recognized hospital of the respondents - Held - Rule 2(b) of Rules, 1958 provides that the Rules shall apply to government servants employed on contract basis. - Petitioner, after his retirement, has been employed on contract basis and during such employment he suffered a massive heart attack and was required to perform open heart surgery in a hospital which has recognition under Rules, 1958 - Petitioner could have applied for reimbursement in Form I u/R 8(1) of Rules, 1958 and his application for reimbursement could have been allowed by the respondents after its scrutiny in accordance with law - Petitioner directed to apply for reimbursement under Rules of 1958 and same directed to be decided within a period of 3 months.

(Para 9 & 10)

ख. सेवा विधि - सिविल सेवा (चिकित्सीय परिचर्या) नियम, म.प्र. 1958, नियम 2 व 8 - चिकित्सीय सहायता - याची उच्च न्यायालय का कर्मचारी उसकी सेवानिवृत्ति के बाद संविदा आधार पर नियोजित किया गया और उसका चिकित्सीय सहायता का आवेदन इसलिए खारिज कर दिया गया क्योंकि उसके द्वारा कराया गया उपचार प्रत्यर्थियों के मान्यताप्राप्त चिकित्सालय में नहीं था - अभिनिर्धारित - नियम, 1958 का नियम 2(बी) उपबंधित करता है कि नियम संविदा आधार पर नियोजित शासकीय सेवकों को भी लागू होंगे - याची उसकी सेवानिवृत्ति के बाद संविदा आधार पर नियोजित किया गया है और ऐसे नियोजन के दौरान उसे बड़ा हृदयाघात हुआ और उस चिकित्सालय में ओपन हार्ट सर्जरी करना आवश्यक था जो नियम, 1958 के अन्तर्गत मान्यता रखता हो - याची नियम, 1958 के नियम 8(1) के अन्तर्गत प्रारूप I में प्रतिपूर्ति के लिए आवेदन कर सकता था और प्रत्यर्थियों द्वारा उसका प्रतिपूर्ति का आवेदन उसकी विधि अनुसार जाँच के बाद मंजूर किया जा सकता था - याची को निदेश दिया गया कि 1958 के नियमों के अन्तर्गत प्रतिपूर्ति के लिए आवेदन करे और 3 माह की कालावधि के भीतर उसका विनिश्चय करने का निदेश दिया गया।

Anand Agrawal, for the petitioner.

Rashmi Pandit, Dy.G.A., for the respondents.

PRASANNA KUMAR SHARMA Vs. STATE OF M.P.**ORDER**

SHANTANU KEMKAR, J. :-Being aggrieved by the order dated 24.01.2009 (Annexure P-1) passed by the second respondent Commissioner Pension, General Provident Fund and Insurance Government of M.P. Finance Department the petitioner has filed this petition under Article 226 of the Constitution of India.

2. Briefly stated the petitioner was working on the post of Assistant Grade-I in the establishment of the High Court of M.P. Bench at Indore. He on attaining the age of superannuation was retired from Government service w.e.f. 31.10.2006. After his retirement from Government service he was employed by the State Government on contract basis.

3. The case of the petitioner is that on 05.05.2007 while he was working in the High Court on the basis of his contract employment he suffered a massive heart attack. He was taken to CHL Apollo Hospital, Indore where on the advise of the treating doctors open heart surgery was performed on him on 12.05.2007.

4. The petitioner being a pensioner submitted an application (Annexure P-6) for 'assistance' in the prescribed Form-A as provided under M.P. Pensioner's Welfare Fund Rules, 1997 (for short Rules of 1997). His application for 'assistance' was rejected by the second respondent vide order dated 08.01.2008 on the ground that the CHL Apollo Hospital, Indore where he was treated and operated is not a recognised hospital for treatment of retired Government servants. Aggrieved the petitioner had filed a writ petition No.1416/2008 (s) before this Court. The said writ petition was allowed by quashing the order dated 08.01.2008 by which the petitioner's claim was rejected with a direction to the second respondent to reconsider the petitioner's case in the light of the Circular dated 03.04.2006 issued by the first respondent Department of Public Health and Family Welfare Government of M.P. in regard to the recognition of CHL Apollo Hospital, Indore.

5. In terms of the order dated 21.10.2008 passed by this Court in Writ Petition No.1416/08(s) the petitioner's application for 'assistance' was reconsidered by the second respondent and the same has been rejected by the impugned order dated 24.01.2009 (Annexure P-1) holding that the recognition granted to CHL Apollo Hospital, Indore vide order dated 03.04.2006 (Annexure P-7) under M.P. Civil Services (Medical Attendance) Rules, 1958 (for short Rules of 1958) is not applicable in the case of retired Government employee. Aggrieved by the said order dated 24.01.2009 (Annexure P-1) the petitioner has once again approached this Court.

6. Shri Anand Agrawal, learned counsel appearing for the petitioner has argued that when the State Government has granted recognition to CHL Apollo Hospital, Indore for the purposes of Rules of 1958 it was necessary for the State Government to have treated the said hospital to be a recognised hospital for the purposes of retired Government servants/pensioners. He argued that on account of emergency

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the petitioner was required to be admitted in the CHL Apollo Hospital, Indore where the emergency open heart surgery was performed upon him. In the circumstances, the rejection of application for 'assistance' is illegal.

7. Smt. Rashmi Pandit, learned Dy. Govt. Advocate on the other hand argued that Rule 1 (3) of Rules of 1958 clearly provides that these Rules shall not apply to 'retired Government servants'. In the circumstances according to her the recognition of CHL Apollo Hospital, Indore for the purposes of Rules of 1958 will not automatically give recognition of the said hospital for the purposes of Rules, 1997 which provides list of 'approved hospitals' for the purposes of said rules.

8. It is not in dispute that the petitioner had submitted his application for 'assistance' in Form 'A' under Rules of 1997 treating himself to be an 'applicant' as defined under Rule 3 (a) of Rules of 1997. On going through the Rules of 1997, I find that Appendix -1 of Rules of 1997 provides for list of approved hospitals. The list given in Appendix -1 does not contain name of CHL Apollo Hospital, Indore as an approved hospital for the purposes of Rules of 1997. In the circumstances, the recognition of CHL Apollo Hospital, Indore by the State Government for the purposes of Rules of 1958 which is applicable to Government servants cannot automatically bring the said hospital in the list of 'approved hospitals' under Rules of 1997. In the circumstances, the impugned rejection order dated 24.01.2009 (Annexure P-1) is perfectly legal and justified and the same needs no interference.

9. However on a close scrutiny of Rules of 1958, I find that Rule 2 (b) of Rules of 1958 provides that the Rules shall apply to 'Government servants employed on contract basis'. It is not in dispute that after his retirement the petitioner has been employed on contract basis and during such employment he suffered a massive heart attack and was required to perform open heart surgery in CHL Apollo Hospital, Indore which has recognition under Rules of 1958. In these circumstances, the petitioner could have applied for reimbursement in Form I under Rule 8 (1) of Rules of 1958 and his application for reimbursement could have been allowed by the respondents after its scrutiny in accordance with law. It appears that under some misconception the petitioner approached to the respondents seeking 'assistance' under Rules of 1997.

10. Be that as it may. Having regard to the fact that after his retirement the petitioner was employed by the State Government on contract basis and during the said employment he received heart attack and was required to go for open heart surgery, in my view the petitioner's case requires consideration in terms of Rules of 1958. Accordingly, I am inclined to dispose of this petition with liberty to the petitioner to submit application in Form I of Rules of 1958 within 2 months from the date of receipt of copy of this order. The documents which the petitioner has already submitted along with his application in Form 'A' of Rules of 1997 shall

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be treated to be part of the application under Form I of Rules of 1958. On receipt of such application under Rules of 1958 the competent authority of the respondents shall examine the same and shall take appropriate decision on it on merits treating the same to be within time and keeping in view the Circular dated 03.04.2006 (Annexure P-7) issued under Rules of 1958 which though is not applicable for retired Government servant but is applicable to Government servants employed on contract basis in view of Rule 2 (b) of Rules of 1958. On scrutiny of the said application if it is found that the petitioner is entitled for reimbursement under Rules of 1958 the monetary benefits be extended in his favour within a period of 3 months from the date of receipt of said application.

11. With the aforesaid observations and directions, this petition stands disposed of.

Petition disposed of.

I.L.R. [2010] M. P., 1275

WRIT PETITION

Before Mr. Justice Prakash Shrivastava

24 December, 2009*

VIJAY SINGH YADAV

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

A: Constitution, Article 311 - Termination simplicitor - Court has to see that whether allegations made against employee was motive for passing order of termination or it was the foundation for the order terminating him.
(Para 8)

क. संविधान, अनुच्छेद 311 - केवल सेवा समाप्ति - न्यायालय को यह देखना चाहिए कि क्या कर्मचारी के विरुद्ध किया गया अभिकथन सेवा समाप्ति का आदेश पारित करने के लिए हेतु था या यह उसकी सेवा समाप्त करने के आदेश का आधार था।

B. Constitution, Article 311 - Termination simplicitor - Stigma - Services of the petitioner were terminated as no longer required - Respondents in the return stated that petitioner had committed serious irregularities and violated conditions of appointment and also criminal case has been registered - Held - Termination order does not contain any reason - Order is not based upon any findings arrived at by respondents in any ex parte enquiry but is based upon allegations of irregularities and violation of conditions of appointment as well as registration of offence - Such allegations are only motive for passing the order - By lifting the veil, it cannot be held that the order of termination was stigmatic in nature.
(Para 12)

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ख. संविधान, अनुच्छेद 311 - केवल सेवा समाप्ति - कलंक - याची की सेवाएँ समाप्त की गयीं क्योंकि अब आवश्यक नहीं थीं - प्रत्यर्थियों ने रिटर्न में कथन किया कि याची ने गम्भीर अनियमितताएँ की थीं और नियुक्ति की शर्तों का उल्लंघन किया था तथा दाण्डिक मामला भी पंजीबद्ध किया गया है - अभिनिर्धारित - सेवा समाप्ति के आदेश में कोई कारण अन्तर्विष्ट नहीं - आदेश प्रत्यर्थी द्वारा किसी एकपक्षीय जाँच में निकाले गये किसी निष्कर्ष पर आधारित नहीं है बल्कि अनियमितताओं और नियुक्ति की शर्तों के उल्लंघन के अभिकथनों तथा अपराध के पंजीबद्ध होने पर आधारित है - ऐसे अभिकथन आदेश पारित करने के लिए केवल हेतु हैं - पर्दा उठाकर यह अभिनिर्धारित नहीं किया जा सकता कि सेवा समाप्ति के आदेश की प्रकृति कलंकात्मक थी।

C. Constitution, Articles 14 & 16 - Temporary employee - In case of appointment on temporary basis, a servant who is so appointed does not acquire any substantive right to the post and even if order is silent, it is an implied term of such appointment that it may be terminated at any time without notice. (Para 16)

ग. संविधान, अनुच्छेद 14 व 16 - अस्थायी कर्मचारी - अस्थायी आधार पर नियुक्ति की दशा में, कोई कर्मचारी जो इस प्रकार नियुक्त होता है, पद के लिए कोई सारभूत अधिकार अर्जित नहीं करता है और यदि आदेश मौन भी हो, तो भी यह ऐसी नियुक्ति का विवक्षित निबंधन है कि यह बिना किसी सूचना के किसी भी समय समाप्त की जा सकती है।

Cases referred :

(1999) 2 SCC 21, (1999) 3 SCC 60, AIR 1968 SC 1089, 1967(1) LLJ 718, AIR 1961 SC 177, AIR 1991 SC 309, AIR 1991 SC 101, (1986) 3 SCC 277, (1995) 1 SCC 638.

Amit Agrawal, for the petitioner.

R. Pandit, Dy.G.A., for the respondents/State.

ORDER

Prakash Shrivastava, J. :- THIS writ petition has been filed by the petitioner challenging the order dated 23.04.99, by which the services of the petitioner were terminated on the ground that his services were no longer required.

2. The brief facts are that the petitioner was appointed as salesman by order dated 01.04.93, by the Collector, Dhar, temporarily for the retail sale of the country liquor in the country and foreign liquor shop run by Government departmentally. The appointment of the petitioner was continued by giving him subsequent appointments for period of 89 days and he was allowed to work subsequently in that capacity. A criminal case was registered against the petitioner under Section 34 of the Excise Act on 15.04.99. Thereafter, the order dated 23.04.99 was passed terminating the services of the petitioner. Aggrieved with the same, the petitioner has approached this court by way of the present writ petition.

3. Learned counsel appearing for the petitioner submitted that the reply filed by the respondents indicates that the termination order of the petitioner was founded

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on the misconduct alleged in the reply, therefore, by lifting the veil, it can be seen that the termination order was stigmatic in nature. He further submitted that the persons appointed later in point of time have been retained, therefore, the termination of the petitioner cannot be sustained.

4. Learned counsel appearing for the respondents supported the order of termination and opposing the writ petition submitted that there was delay in filing the writ petition and that the petitioner was given an opportunity of hearing before passing the order of termination, therefore, no interference is required.

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

6. So far as the objection of the respondents in respect of the delay in filing the writ petition is concerned, it is noticed that this writ petition has been received on transfer from the Tribunal. The impugned order is dated 23.04.99. The petitioner had filed the original application before the Tribunal on 04.09.2000, along with application for condonation of delay under Section 21 (3) of the Administrative Tribunals Act, 1985, and the Tribunal by order dated 12.09.2000 had allowed the application and condoned the delay. Even otherwise, on transfer, it has been registered as writ petition and for writ petition, there is no prescribed period of limitation. The petitioner has approached the court within a reasonable time. The matter was entertained in 2000 itself, therefore, at this stage, the writ petition cannot be dismissed on the ground of delay.

7. On merit the impugned order of termination is an order of termination simpliciter. The services of the petitioner have been terminated by stating that his services are no longer required. In the reply, the respondents have stated that the petitioner had committed serious irregularities and violated the conditions of appointment, therefore, his services were terminated. The respondents have also referred to the criminal case No. 455/99, dated 15.04.99, which was pending against the petitioner. Thus, the issue, which arises for consideration is whether in view of the stand taken by respondents in the return, the impugned order is stigmatic in nature?

8. For examining the stigmatic nature of termination order, the court is required to see if the allegation made against employee was the "motive" for passing the order of termination or it was the "foundation" for the order terminating him. It will be a case of motive if the master, after gathering some prima facie facts, does not wish to go into their truth but decides merely not to continue a dubious employee but it will be a case of foundation if he conducts an enquiry only for the purposes of proof the misconduct. Employee is not hurt, if an enquiry was not held and no finding was arrived at and the employer was not inclined to conduct an enquiry, but at the same time, he did not want to continue the employee against whom there were complaints, such a case would only be a case of motive and the termination order would not be bad on the ground of being stigmatic or punitive. In

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such a case, the allegations would be motive and not foundation for passing the order and simple order of termination would be valid.

9. The aforesaid aforesaid preposition of law is supported by the judgment of the Supreme Court in the matter of *Radhey Shaym Gupta Vs. U.P. State Agro Industries Corporation Ltd. and Another* reported in [1999] 2 SCC 21 wherein the Supreme Court has held that the termination of services of a temporary servant on the basis of an assessment that his work is not satisfactory is not punitive since in such a case assessment is not done with the object of finding out any misconduct on the part of the officer, but it was done only with a view to decide if he is to be retained in service. Even if the preliminary enquiry was held or regular departmental enquiry was initiated and dropped and thereafter simple order of termination is passed such an order is not punitive because no finding is recorded against him. Such an order is not based or founded upon misconduct.

10. Similarly in the matter of *Dipti Prakash Banerjee Vs. Satyendra Nath Bose National Centre For Basic Science, Calcutta and Others* reported in [1999] 3 SCC 60, the Supreme Court has held that if findings are arrived at in an enquiry as to misconduct behind the back of the officer or without a regular departmental enquiry, simple order of termination is to be treated as "founded" on the allegation and will be bad. However, if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and order would not be bad.

11. In the matter of *State of Punjab and another Vs Sukh Raj Bhadur* reported in AIR 1968 SC 1089 and in the matter of *A.G. Benjamin Vs. Union of India* reported in 1967 1 LLJ 718 (SC), though the departmental enquiry was initiated but it was later on dropped and order of termination simpliciter was passed, the Supreme Court upheld such an order of termination. In the matter of *The State of Orissa and Another Vs. Ram Narayan Das* reported in AIR 1961 SC 177, the termination on the ground of unsatisfactory performance was not found to be stigmatic in nature.

12. Applying the aforesaid position of law in the facts of the present case, it is noticed that impugned order of termination does not contain any reason for termination except mentioning that the services of the petitioner were no longer required. The order of termination is not based upon the findings arrived at by the respondents in any ex parte enquiry, but it is based upon the allegations of irregularities and violating the conditions of appointment. It is undisputed that before passing the order of termination a criminal case was registered against petitioner under Section 34 of the Excise Act, therefore, if the respondents have passed the order of termination simpliciter considering these circumstances, then, such an order cannot be said to be an order founded on such allegation, but such allegations

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are only motive for passing the order of termination, therefore, by lifting the veil, it can not be held that the order of termination was stigmatic in nature.

13. Learned counsel appearing for the petitioner has placed reliance upon the judgment of the Supreme Court in the matter of *Shrawan Kumar Jha and Others Vs. State of Bihar and Others* reported in AIR 1991 S.C 309, but the said judgment does not help the petitioner, since it was a case of cancellation of appointment and the counsel for the petitioner also could not point out that the petitioners in the said judgment were temporary employees. Reliance of the Counsel for the petitioner on the judgment of the Supreme Court in the matter of *Delhi Transport Corporation Vs. D.T.C Mazdoor Congress and Others* reported in AIR 1991 S.C 101 is also misplaced, since that is a case where Supreme Court has examined the right of the employer to terminate services of permanent employee without holding enquiry, whereas in the present petitioner was only a temporary employee.

14. Learned counsel for the petitioner has also submitted that the termination of the petitioner cannot be sustained because his juniors have been retained. In support of his submission learned counsel for the petitioner has placed reliance upon paragraph 35 of the judgment of the Supreme Court in the matter of *Jarnail Singh and Others Vs State of Punjab and Others* reported in (1986) 3 SCC 277. The said judgment does not help the petitioner, since the case of the petitioner stands on different footing. The petitioner has been terminated after giving an opportunity of hearing and even after lifting the veil, it is not found that the termination order in the case of the petitioner was stigmatic or punitive. The petitioner being a temporary employee had otherwise no right to claim continuance on the post on which he was appointed, therefore, considering the circumstances of the present case, no relief can be granted to the petitioner only on the ground that one person allegedly appointed for 89 days by order dated 15.07.96 has been allowed to continue.

15. It is also worth noting that the respondents had issued the show cause notice dated 12.04.99 to the petitioner pointing out the irregularities committed by him in the performance of his duty and, therefore, before passing the order of termination simpliciter, the petitioner was duly informed about the lapse on his part and given an opportunity.

16. It is worth noting that the appointment of the petitioner was not permanent in nature. He was given the appointment for the period of 89 days though he was allowed to continue thereafter. The appointment order indicates that in terms of the appointment order no right had accrued to the petitioner to continue on the post on which he was appointed. In the case of appointment on temporary basis, a servant who is so appointed does not acquire any substantive right to the post and even if the order is silent it is an implied term of such an appointment that it may be terminated at any time without notice and in such a case, it is not necessary

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to follow the formalities contemplated by Article 311 of the Constitution and such as appointee has no right of hearing before termination. Same is the view taken by the Supreme Court in the matter of *Madhya Pradesh Hasta Shilpa Vikas Nigam Ltd Vs. Devendra Kumar Jain and others* reported in (1995) 1 SCC 638.

17. The respondents have also taken the stand in the reply that the appointment of the petitioner can at the most be held to be an appointment as contingency paid employee. His appointment was not against the regular post, therefore, the M.P. Civil Services (General Condition of Services) Rules, 1961, will not be applicable to the petitioner in view of the definition of post given under the said Rules, therefore, no enquiry under the said rules could be held.

18. It is also worth noting that admittedly, the petitioner was appointed as salesmen in the country liquor shop since the State Government had under taken a scheme for running various country and foreign liquor shops in certain Districts of Madhya Pradesh, departmentally without auctioning the rights thereof to trade the foreign liquor in favour of private contractor. The reply shows that w.e.f. financial year 2001-2002, the departmentally operated liquor shops have been auctioned to private contractors, therefore, in the change circumstances also no relief can be granted to the petitioner.

19. Even otherwise, the order dated 23.03.01 indicates that only those salesmen, who were appointed in the liquor shop prior to 31.12.88 have been kept in service and those who were appointed thereafter have not been kept in service, therefore, in terms of the said circular also the petitioner has not right to continue in service.

20. In view of the aforesaid analysis, I find no reason to interfere in the impugned termination order dated 23.04.99. There is no force in the writ petition and the petition is accordingly, dismissed.

No orders as to costs.

Petition dismissed.

I.L.R. [2010] M. P., 1280

WRIT PETITION

Before Mr. Justice P.K. Jaiswal

18 January, 2010*

Y.L. CHOPRA

... Petitioner

Vs.

RANI DURGAWATI VISHWAVIDYALAYA & anr.

... Respondents

A. Service Law - Vishwavidyalaya Adhiniyam, M.P. (22 of 1973), Section 52 - Teacher - Whether a Librarian is a teacher - Held - A Sport Teacher stands on different footing than a Librarian and no status has been

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conferred on the Librarians treating them as teachers in as much as they belong to a different class altogether and the State Government has conferred them the benefit by a circular which is within its domain but it can be construed that they have been given the benefit because they are equated with teachers.

(Para 10)

क. सेवा विधि — विश्वविद्यालय अधिनियम, म.प्र. (1973 का 22), धारा 52 — अध्यापक — क्या पुस्तकालय अध्यक्ष एक अध्यापक है — अभिनिर्धारित — खेल शिक्षक को पुस्तकालय अध्यक्ष की तुलना में भिन्न आधार पर रखा जाता है और पुस्तकालय अध्यक्षों को उन्हें अध्यापक मानकर कोई प्रास्थिति प्रदत्त नहीं की गयी है क्योंकि वे पूर्णतया भिन्न वर्ग से सम्बन्धित हैं और राज्य सरकार ने उन्हें एक परिपत्र द्वारा, जो उसके अधिकार क्षेत्र के भीतर है, लाभ प्रदान किया है किन्तु यह अर्थ लगाया जा सकता कि उन्हें इसलिए लाभ दिया गया है क्योंकि वे अध्यापकों के बराबर माने जाते हैं।

B. Service Law - Teaching staff and library staff - Distinction - The teaching staff has to do some research work, deep study in their respective subjects and to make preparations for the daily lectures in the class rooms and other academic work while this is not so in the case of library staff - The experience of library staff is totally different from the one which is required for the teaching staff - Working pattern of the two sets of employees cannot be said to be identical so as to claim parity between the library staff and the teaching staff.

(Para 12)

ख. सेवा विधि — अध्यापन कर्मचारीवृंद और पुस्तकालय कर्मचारीवृंद — विभेद — अध्यापन कर्मचारीवृंद को अपने-अपने विषयों में कुछ अनुसंधान कार्य, गहन अध्ययन करना पड़ता है और कक्षाओं में दैनिक व्याख्यानों के लिए तैयारियाँ करनी पड़ती हैं और अन्य शैक्षिक कार्य करने पड़ते हैं जबकि पुस्तकालय कर्मचारीवृंद के मामले में ऐसा नहीं है — पुस्तकालय कर्मचारीवृंद का अनुभव उससे पूर्णतः भिन्न है जो अध्यापन कर्मचारीवृंद के लिए अपेक्षित है — पुस्तकालय कर्मचारीवृंद और अध्यापन कर्मचारीवृंद के मध्य समानता का दावा करने के लिए कर्मचारियों के दोनों वर्गों का कार्य ढाँचा समरूप नहीं कहा जा सकता।

C. Service Law - Policy decision - Judicial review - Held - Courts would be slow in interfering with matters of government policy except where it is shown that the decision is unfair, mala fide or contrary to any statutory directions - Courts will not dictate the decision of the statutory authority in exercise of its discretion and formulation of its policies - Court will not direct the statutory authority to exercise the discretion in a particular manner not expressly required by law.

(Para 12)

ग. सेवा विधि — पॉलिसी निर्णय — न्यायिक पुनर्विलोकन — अभिनिर्धारित — न्यायालय शासकीय पॉलिसी के मामलों में हस्तक्षेप करने में वहाँ के सिवाय जल्दी नहीं करेंगे जहाँ यह दर्शाया जाता है कि निर्णय अनुचित, असदभावी या कानूनी निदेशों के विपरीत है — न्यायालय कानूनी प्राधिकारी के अपने विवेक के प्रयोग में और उसकी पॉलिसियों के निर्माण में लिए गए निर्णय

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को नहीं लिखवाएँगे – न्यायालय कानूनी प्राधिकारी को किसी विशिष्ट ढंग से विवेक का प्रयोग करने का निदेश नहीं देंगे जो विधि द्वारा अभिव्यक्त रूप से अपेक्षित नहीं है।

Cases referred :

W.P. No.5709/2002 decided on 18.03.2009, (1998) 2 SCC 502, (2003) 2 SCC 111.

Sujoy Paul, for the petitioner.

P. Shankaran, for the respondents.

ORDER

P.K. JAISWAL, J. :-The short question that arises for consideration in this writ petition is whether the petitioner who is a qualified Librarian employed in Rani Durgawati Vishwavidyalaya, Jabalpur is entitled to parity between professional library staff and the teaching staff of the University and he can be treated as a "Teacher" and is entitled to be superannuated on attaining the age of 62 years.

2. The petitioner was initially appointed as University Librarian on 16.7.1983. His appointment was made by the then Vice-Chancellor under section 52 of M.P. Vishwavidyalaya Adhiniyam, 1973 (for short 'the Adhiniyam') as at the relevant time there was no Executive Council. He is still working on the same post in the Professor's pay scale of Rs.16440-22400 (UGC). The respondent No. 1 in its Executive Council meeting held on 14.6.1994 decided to open Master Degree in Library & Information Science (M.Lib.I. Sc.) from the session 1994-95. The proposal of the Executive Council of respondent No. 1 was sent to the respondent No. 2 with the Draft Ordinance No.90 for approval. Draft Ordinance No.90 was approved by the Co-ordination committee in its 57th meeting held on 19.3.1998. Respondent No. 1 thereafter wrote a letter dated 30.7.1996 (Annex.P-1) to the respondent 2 proposing the scheme of M.Lib. I. Sc. Course wherein in Column No.12 the teachers of subjects described as Librarian and Assistant Librarian and the name of the petitioner in the said Scheme is mentioned as "Teacher". The State Government as well as Co-ordination Committee granted permission to open M.Lib. I. Sc. course. The new course of M.Lib. I. Sc. began in 1998-99 and the petitioner was appointed as Member and Chairman of "Board of Studies in Library & Information Science" under Statute 2 (1) of the Adhiniyam by order dated 5.12.1998. On 8.3.1999, the petitioner was appointed as Head of the Department of Library Science by the respondent no.1. On 21.7.2000 the petitioner was further appointed as member of Academic Council and his name was mentioned in the list of affiliated colleges and university teaching department which includes the Department of Library and Information Science published by the respondent no.1. The petitioner being HOD of Library Science Department is imparting instructions to the students and for this work of imparting instructions, the petitioner has rendered his services as a Professor. As per UGC pay-scale the librarian is getting same scale which is being granted to a University Professor (Annexure-P-23).

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3. The definition of 'Teacher' is mentioned in Section 2(xx) of the Adhiniyam which reads as under:

“2(xx). “Teachers of the University” means Professors; Readers, Assistant Professors, Lecturers and such other persons as may be appointed for imparting instructions or conducting research with the approval of the Academic Council in the University or any other college or institution maintained or recognized by the University.”

4. The 62nd meeting of Co-ordination Committee was held on 29.5.2000. The Vice-Chancellors of various universities of Madhya Pradesh opined that since the Supreme Court has declared the post of Sports Officer as “Teacher”, in view of this decision, the post of Director, Physical Education and also Librarian shall be declared as academic posts. It was also mentioned that in the University where B. Lib, M. Lib, B.P. Ed. and M.P. Ed. Courses are going on, the post of Director, Physical Education and Librarian be declared as “Teacher” and be deleted from statute 20. The Co-ordination Committee in its meeting dated 29.5.2000 decided that in those universities where Physical Education/Library Science courses are going on and where appointments of Director, Physical Education and Librarian are made under Statute 49 there these posts shall be treated as “Teacher” and be deleted from Statute 20. The UGC in its letter dated 20th April, 1999 mentioned that the post of University Library be treated as “Non-vocational Teacher”. On 4.8.2000, the Higher Education Department directed that the post of Librarian be treated as “Teacher” and be deleted from Statute 20. On 19.3.2001 the Executive Council of respondent No. 1 had taken a decision that decision of Co-ordination Committee dated 29.5.2000 and the consequential order of Higher Education Department dated 4.8.2000 are required to be followed as a policy, but the case of the petitioner was rejected on the ground that he was appointed under Statute 20 and not under Statute 49 and, therefore, the petitioner does not fall within the definition of “Teacher”. Thereafter vide order dated 12.10.2001 name of the petitioner was deleted from the seniority list of 2001 as “Teacher” on the ground that the petitioner was not appointed under Statute 49 and was appointed under Statute 20. Against the said order petitioner made a representation which was rejected vide order dated 20.9.2002 (Annexure-P-21-A).

5. It is submitted by learned counsel for the petitioner that the impugned orders are violative of Article 14 of the Constitution of India and contrary to the provisions of the Adhiniyam. He further submitted that once policy decision has been taken by the respondents to treat the “Librarian” as a “Teacher” on 29.5.2000, then they cannot turn down the same on the ground that the appointment of the petitioner was made under Statute 20 and not under Statute 49 of the Adhiniyam. His further submission was that the petitioner was not appointed under Statute 20, but was

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appointed under section 52 of the Adhiniyam and the method of appointment of Teachers or of officers is identical and the method of appointment is described in Statute 49. He further submits that the petitioner was treated as a "Teacher" under statute 2 (1) of the Adhiniyam and the petitioner was appointed as Member and Chairman of "Board of Studies", it is not open to the Vishwavidyalaya to still treat the petitioner as not Teacher. Learned counsel for the petitioner further submits that petitioner and Dr. B.K. Sahu both were appointed under section 52 of the Adhiniyam by the then Vice-Chancellor and his case is identical to Dr. B.K. Sahu who was subsequently confirmed as Officer by the Vishwavidyalaya by order dated 17.5.1989 and his case has been accepted by the respondent No. 1 in its Executive Council meeting held on 19.3.2001 whereas the case of the petitioner was turned down inter alia on the ground that his appointment was made under Statute 20 of the Adhiniyam. The action of the respondent No. 1 is arbitrary and discriminatory. The submission of learned counsel for the petitioner was that Dr.B.K. Sahu who was appointed on the post of Project Officer in Adult Education by the University has been confirmed as 'Officer'. With the above submissions, learned counsel for the petitioner prayed for quashing the impugned orders and directing the respondents to treat the petitioner as a "Teacher" and give him all consequential benefits arising thereto.

6. The respondent No. 1 in its return denied the averments made in the petition and inter alia contended that petitioner cannot be treated as a "Teacher" because his appointment was made under Statute 20 and Statute 20 speaks about the appointment of "other officers of the University" whereas Statute 49 speaks about "teaching post" in the University. There is lot of difference between Statute 20 under which petitioner was appointed and Statute 49 under which a "Teacher" is appointed. Service condition, selection procedure etc. are also different for these two categories. The petitioner after being appointed as Librarian under Statute 20 cannot claim equality to that of a Teacher who is appointed under Section 49 of the Adhiniyam. In respect of proposal (Annex.P-1), it is submitted that under Clause 12 it has been mentioned that one Librarian and one Assistant Librarian will hold the classes and it was accepted by the Co-ordination Committee. Accordingly, the petitioner was given the work of teaching along with one Shri Shrivastava, Assistant Librarian who conducted the course. In respect of Dr. B.K. Sahu, it is submitted that he was appointed as Project Officer, through a duly constituted selection committee by the Vice-Chancellor under the provisions and powers vested in him under section 52 of the Adhiniyam. This post is not covered under Statute 20. It is further contended that decision taken on 19.3.2001 is neither arbitrary nor unjust or unreasonable. The petitioner cannot be treated to be appointed under Statute 49 of the Adhiniyam, nor his retirement can be extended up-to 62 years unless and until it is decided by the respondent No. 2.

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7. It has been emphatically stated by the respondent No.1 that the nature of work, duties and responsibilities as well as the type of experience and the period of work of the two sets of employees i.e. Librarian and Teacher are altogether different and that both these categories can on no account be equated.

8. Learned counsel for the petitioner took pains in persuading me that Librarians play a vital role in the development of the institution of higher learning and they are of real and immense help to research work and advance studies. The educational qualifications of the two sets of employees are also the same and, therefore, there is no reason to treat them differently and with discrimination. He submitted that the petitioner has acquired a vested right to have the scale of the pay at par with the teaching staff of the University and its colleges which authority had been given to them earlier on sound academic consideration and after due deliberation and there was no justification with the respondents not to treat them at par and equate the petitioner with the teacher.

9. In the present case, I find that there is no judicial or quasi judicial duty or any obligation imposed on the respondents to equate the Librarian with the Teacher nor it can be said that the respondents did not act fairly or acted mala fide so as to call for any interference by this Court invoking power of judicial review.

10. The question whether a Librarian can be regarded as a "Teacher" has been considered by the Division Bench of this Court in W.P.No.5709/2002 (*Ram Sajeewan Maurya v. The State of M.P. and others*) decided on 18.3.2009 wherein it has been held that a Sport Teacher stands on different footing than a Librarian and no status has been conferred on the librarians treating them as teachers inasmuch as they belong to a different class altogether and the State Government has conferred them the benefit by a circular which is within its domain but it can be construed that they have been given the benefit because they are equated with teachers and held that Librarian cannot be treated as a "Teacher". Paras 6 to 11 wherein it has been held read as under :-

"6. In view of the aforesaid factual scenario, the analysis by us has to be restricted with regard to the facet whether by virtue of coming into force of the rules, a Librarian can be regarded as a teacher. The rule which we have reproduced, defines a teacher. Under the definition a teacher means a government servant by whatever designation called, appointed for the purpose of teaching any Government Educational Institution including Technical or Medical Institutions, in accordance with the recruitment rules applicable to such appointment and shall also include the teacher who is appointed to an Administrative post by promotion or otherwise and who has been engaged in teaching for not less than

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20 years provided he holds a lien on a post in the concerned School/Collegiate/Technical/Medical Education service. If the definition is understood in proper perspective, we are inclined to think that it only covers a teacher who is appointed for the purpose of teaching in a Government Educational Institution which includes Technical or Medical Institutions.

7. We have been apprised at the bar that there is a set of rules, namely, M.P. Educational Service (Collegiate Branch) Recruitment Rules, 1990. On a scrutiny of said rules, it appears that the post of Librarian is reflected in Schedule III. On a perusal of the same, it does not reflect that he is a teacher or assigned any kind of teaching.

8. In this context, Mr. Kumaresh Pathak has commended us to the decision rendered in case of *State of Madhya Pradesh Vs. Kshetra Pal Sharma* 1992 Madhya Pradesh Service Times 719. In the said case, the Apex Court has observed as under :-

“Having accepted the appointment to the post of librarian and having taken benefit of higher pay scale till the date of his superannuation, he cannot be allowed to turn round and claim benefit of service conditions as a teacher. We are, therefore, of the opinion that he was rightly retired at the age of 58 years on 30th April, 1986 and the Tribunal was wrong in concluding that he was entitled to the benefit of the service condition of teacher. We are, therefore, of the view that the Tribunal committed an error in thinking that the applicant was working as a librarian in his capacity as a teacher. We, therefore, allow this appeal set aside the order of the Tribunal and dismiss the original application which has given rise to this appeal.”

Submission of Mr. Rajendra Tiwari, learned senior counsel and the other counsel appearing for the petitioners is that said decision cannot be treated as a precedent under Article 141 of the Constitution of India for the purpose of holding that a Librarian is not a Teacher.

9. Learned counsel for the petitioners have also commended us to the decision rendered in *P.S. Ramamohana Rao Vs. A.P. Agricultural University and another* AIR 1997 SC 3433 wherein it has been held as under :-

“10. From the aforesaid affidavit it is clear that a Physical Director has multifarious duties. He not only arranges

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

Thereafter, their Lordships proceeded to state as follows :

20. We are unable to agree. It may be that the Physical Director gives his guidance or teaching to the students only in the evening after the regular classes are over. It may also be that the University has not prescribed in writing any theoretical and practical class for the students so far as physical education is concerned. But as pointed out by us earlier, among various duties of the Physical Director, expressly or otherwise, are included the duty to teach the skills of various games as well as their rules and practices. The said duties bring him clearly within the main part of the definition as a 'teacher'. We, therefore, do not accept the contention raised in the additional counter affidavit of the University.

21. For the aforesaid reasons the appeal is allowed and judgment of the High Court is set aside and it is declared that appellant was entitled to continue in service till he completed 60 years of age. Now that he has retired he is entitled to the emoluments payable to him for the remaining period of the service up to the completion of 60 years deducting the period for which he worked as

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Physical Director beyond 58 years pursuant to stay order granted by the High Court. His retiral benefits shall also be computed on the basis that his age of retirement was 60 years. The appeal is allowed and disposed of accordingly.”

10. On a careful reading of the aforesaid decision and the analysis made by their Lordships, we are of the considered view that a Sports Officer stands on a different footing than a Librarian. Nothing has been brought on record that Librarian carries on any kind of teaching. Once the definition has been brought into existence, Librarians do not fit into the compartment of definition even in the remotest sense. It will be extremely difficult to confer the benefit of teacher on them as far as date of retirement is concerned. It is worth noting that the State Govt. issued a circular on 30th September, 2008. The English translation of the said circular would be as under :-

“1. The State Government has decided to increase the age of superannuation from the date of 60 years to 62 years for Sports Officer/Librarian working in all the Government Colleges. In pursuant thereto the age of superannuation of Sports Officer/Librarian has increased from the age of 60 years to 62 years.

2. The same is confirmed by order no.KR/2010/08/rules/four dated 8.12.2008.

3. The aforesaid order will come into effect from the date of order.”

If the language of the said circular is understood, it can be stated without any fear of contradiction that no status has been conferred on the librarians treating them as teachers inasmuch as they belong to a different class altogether and the State Govt. has conferred them the benefit by a circular which is within its domain but it cannot be construed that they have been given the benefit because they are equated with teachers.

11. In view of the aforesaid analysis, we do not perceive any merit in these writ petitions and accordingly they stand dismissed without any order as to costs.”

11. It is true that in the year 1983 the petitioner was appointed under section 52 of the Adhiniyam because at the relevant time there was no Executive Council. It is also true that appointment of the Librarian is to be made under Statute 20

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whereas Statute 49 speaks about appointment of teaching post in the University. There is lot of difference between Statute 20 under which "other officers of the University" were appointed and Statute 49 under which a "Teacher" is appointed. Service condition, selection procedure etc. are also different for these two categories. Thus the petitioner who has been appointed as Librarian cannot claim equality to that of a teacher who is appointed under Statute 49 of the Adhiniyam. It is not in dispute that at the relevant time when the University started new course, University had sent proposal to the Co-ordination Committee regarding staff vide Annex.P-1. In Clause 12 of the said proposal it has been mentioned that one Librarian and one Assistant Librarian will hold classes and it was accepted by the Co-ordination Committee and accordingly the petitioner was given the work of teaching along with one Shri Shrivastava and they were also paid honorarium of Rs.100/- per lecture, over and above their salary for additional work done by way of teaching class. The case of Dr. B.K. Sahu, who was appointed as Project Officer through a duly constituted committee by the Vice-Chancellor under the provisions and powers vested in him under section 52 of the Adhiniyam. This post is not covered under Statute 20 and he continued to hold this post till 21.1.2001. The case of the petitioner is altogether different from the case of Dr. B.K. Sahu and he has no parity with him. The decisions cited by learned counsel for the petitioner in *Dr. Ashok Kumar Maheshwari v. State of U.P. and another* (1998) 2 SCC 502 and *Bhavnagar University v. Palitana Sugar Mill (P) Ltd. and others* (2003) 2 SCC 111 are altogether different and the same would not be applicable in the facts and circumstances of the present case. Division Bench decision of this Court in the case of *Ram Sajeewan Maurya v. The State of M.P. and others* (supra) is an authority and the issue decided in the said case is same and will be fully applicable in the facts and circumstances of the present case.

12. After a serious and anxious consideration on the submissions made by the learned counsel for the petitioner, according to me there appears to be no rationale or any justification in the claim of parity between the teaching staff and the library staff in respondent No.1 University and its colleges for the simple reason that the two sets of employees belonged to different categories of employees who stand on a different footing. The nature of duties, workload, experience and responsibilities of the two sets of employees in question are totally different from each other. The teaching staff has to do some research work, deep study in their respective subjects and to make preparations for the daily lectures in the classrooms and other academic work while this is not so in the case of library staff. The experience of library staff is totally different from the one which is required for the teaching staff. Working pattern of the two sets of employees cannot be said to be identical so as to claim parity between the library staff and the teaching staff. As a matter of fact the courts would be slow in interfering with matters of government policy except where it is shown that the decision is unfair, mala fide

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or contrary to any statutory directions. There will be no justification for this court to interfere with the policy of the Government and it is matter of policy of the Government and it is not for the courts to interfere with such policy decisions of the Government. Normally the courts will not dictate the decision of the statutory authority in exercise of its discretion and formulation of its policies. The court will not direct the statutory authority to exercise the discretion in a particular manner not expressly required by law. In the present case I find that there is no obligation imposed on the Government to equate library staff and the teaching staff and treat the library staff as teaching staff.

13. For the reasons stated above I find no merit in any of the submissions made by the learned counsel for the petitioner. The petitioner who is working as a Librarian cannot be treated as a Teacher. The learned authorities have not committed any legal error in passing the impugned orders dated 12.10.2001 (Annexure-P-19) and dated 28th September, 2002 (Annexure-P-21-A). The petition filed by the petitioner has no merit and is accordingly dismissed but without any order as to costs.

Petition dismissed.

I.L.R. [2010] M. P., 1290

WRIT PETITION

Before Mr. Justice R.S. Garg & Mr. Justice Prakash Shrivastava

19 January, 2010*

UMESH KUMAR

... Petitioner

Vs.

RAJARAM

... Respondent

A. Stamp Act (2 of 1899), Sections 33, 35, 38 & 40, Schedule 1-A, Articles 5 & 23 - Stamp duty payable on an instrument on which a recital of possession is mentioned - Whether an agreement or conveyance - Held - In light of the explanation appended to Article 23 of Act, in the case of an agreement to sell immovable property there is a recital that possession of immovable property is transferred to the purchaser at the time of execution of such agreement or that possession would be delivered in future without executing a conveyance in respect thereof, then such agreement to sell shall be deemed to be a conveyance and stamp duty thereon shall be leviable. (Para 17)

क. स्टाम्प अधिनियम (1899 का 2), धाराएँ 33, 35, 38 व 40, अनुसूची 1-ए, अनुच्छेद 5 व 23 - किसी लिखत पर देय स्टाम्प शुल्क जिस पर कब्जे का कथन उल्लिखित है - करार है या हस्तांतरण - अभिनिर्धारित - अधिनियम के अनुच्छेद 23 से जुड़े स्पष्टीकरण के प्रकाश में, स्थावर सम्पत्ति विक्रय करने की दशा में यह कथन हो कि स्थावर सम्पत्ति का कब्जा ऐसे

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करार के निष्पादन के समय क्रेता को हस्तांतरित कर दिया गया है या कि कब्जा उसके सम्बन्ध में कोई हस्तांतरण विलेख निष्पादित किये बिना भविष्य में सौंपा जाएगा, तब ऐसा विक्रय करार हस्तांतरण समझा जाएगा और उस पर स्टाम्प शुल्क उद्ग्रहीत किया जाएगा।

B. Words & Phrases - Impound - Meaning - Held - A true understanding of the word 'impound' would only mean to authorize the Court to keep document in the custody because the Court is of the opinion that the document is either suspected or is insufficiently stamped. (Para 10)

ख. शब्द और वाक्यांश - परिबद्ध करना - अर्थ - अभिनिर्धारित - शब्द 'परिबद्ध करना' का सही बोध केवल न्यायालय को दस्तावेज अभिरक्षा में रखने के लिए प्राधिकृत करने के अर्थ में होगा क्योंकि न्यायालय की यह राय है कि दस्तावेज या तो शंकास्पद है या अपर्याप्त रूप से स्ताम्पित है।

Case referred :

AIR 2007 MP 268.

Amit Purohit, for the petitioner.

B.I. Mehta, for the respondent No.1.

Rashmi Pandit, Dy.G.A., for the respondent No.2.

ORDER

Yesterday, when the matter was taken up for hearing, Shri Ashok Kutumbale, who is otherwise holding the Office of Additional Advocate General, appeared in the matter and there was no representation from the side of the State Government, therefore, we recorded the proceedings and referred the copies of the same to the Advocate General for making appropriate arrangements for representation of the State in the matter where the duty and penalty is recoverable on a document and the amount is to go to the coffers of the State Government.

2. Today, Shri A.S. Kutumbale is not appearing in the matter, but Shri Amit Purohit appears for the petitioner, Shri B.I. Mehta appears for respondent No.1 while Smt. Rashmi Pandit appears under the authorization by the Advocate General for the State Government.

3. The petitioner / plaintiff Umesh Kumar being aggrieved by the order dated 28.03.2008 passed by the learned District Judge, Mandleshwar on 28.03.2008 impounding the document in question and requiring the plaintiff to pay the duty and penalty on the document in dispute in light of the explanation appended to Article 23 of the Indian Stamp Act in its application to the State of Madhya Pradesh, requiring the plaintiff to pay 7½% stamp duty on the face value of the document and pay ten times penalty.

4. The short facts necessary for disposal of the present writ petition are that plaintiff Umesh Kumar filed a civil suit for specific performance of the contract / agreement dated 2nd January, 2001 with a further submission that possession of

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the property was handed over to him and a document evincing the agreement between the parties and delivery of possession was executed on 02.06.2001. The defendant, after putting in his appearance in the matter, raised various pleadings. The trial Court framed certain issues and thereafter, required the parties to lead their evidence.

5. The plaintiff produced the document dated 02.06.2001 before the Court with a submission that the same be admitted in evidence, but defendant raised an objection submitting inter-alia that the document contained a recital that possession was delivered to the plaintiff, therefore, the document would be a conveyance and under Clause 23 of the Schedule appended to the Indian Stamp Duty, 1899, the document was required to be executed upon appropriate stamps and as the document was not on appropriate stamps, it was liable to be impounded with a further direction to the plaintiff to pay duty and penalty, in accordance with Sections 33, 35 and 38 of the Indian Stamp Act. The plaintiff, however, submitted before the Court that the document in question was a simple agreement and in accordance with Article 5 of the Indian Stamp Act, appropriate stamp duty has been paid, therefore, the document was admissible in evidence. After hearing the parties and after going through the contents of the documents, the trial Court observed that as the document recited that possession of the property was handed over to the plaintiff the document would become a conveyance and the plaintiff was required to pay 7½% the stamp duty on market value of such document. The Court accordingly, impounded the document and observed that the plaintiff was to pay 7½% stamp duty on the face value of the document (on Rs.3,01,000/-) and pay 10 times penalty and if the said amount was deposited in the Court within one month from the date of the order, the document would become admissible in evidence. Being aggrieved by the said order, the plaintiff has approached to us under Article 227 of the Constitution of India.

6. Yesterday, the matter was argued before us and today arguments have been reiterated to submit that the document was appropriately stamped and penalty was not required to be imposed. Placing reliance upon a single Bench judgment of this Court in the matter of *Satyannarayan N. Gaud Vs. Ramsingh* reported in AIR 2007 MP 268, learned counsel for the petitioner submitted that in every case when a document is produced before the Court, the matter has to be referred to the Stamp Collector and the Stamp Collector has to look into the duty chargeable on the document and decide the question relating to the duty and penalty. After taking us through Sections 33, 35, 38 and 40, it was submitted that the order passed by the learned Court below was patently illegal and was suffering with latent defects. It was submitted that the Court below had no jurisdiction to decide the question relating to the stamp duty payable and the question of penalty to be imposed. According to him, the matter was to be referred to the Stamp Collector, who in his turn, in accordance with Section 40 of the Indian Stamp Act, was to

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decide the matter. Shri Mehta, learned counsel for respondent No.1, however, submitted that a perusal of Sections 33, 35 and 38 would make it clear that whenever a document is impounded and is proposed to be produced in the evidence, then the Court which has impounded the document has to decide the question of duty and penalty recover the same from the person producing the document, admit the document in evidence and thereafter, in accordance with provisions of law, send to the Collector an authenticated copy of such instrument together with a certificate in writing, stating the amount of duty and penalty levied and also forward the amount so recovered to the Collector. His submission is that in the present matter, the document was produced in evidence and if at that time, objection regarding admissibility on the ground of insufficient stamps was raised, the Court was obliged to decide the question relating to the duty and penalty.

7. Smt. Rashmi Pandit, learned counsel for the State while supporting the arguments raised by Shri Mehta also referred to Section 40 and submitted that the Collector can impound the documents, which are sent to him under Section 38 (2) of the Act, and as in the present matter, the document was not required to be forwarded to the Collector for impounding and deciding the question of duty and penalty, the Court was justified in dealing with the documents under Sections 33, 35 and 38 of the Act.

8. We have heard the learned counsel for the parties at length.

9. For proper appreciation of the dispute, we are obliged to refer to the provisions contained in Sections 33, 35, 38 and 40 of the Act and are also required to refer to Article 5 of Schedule I-A dealing with agreement or memorandum of an agreement and Article 23 dealing with the stamp duty to be levied on conveyances:

“33. Examination and impounding of instruments (1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same:

Provided that nothing contained in this sub-section shall be deemed to authorise the Collector to impound any instrument which has not been executed but is brought to him under section 31 for determining the duty with which the instrument is chargeable or any instrument which he is authorised to endorse under section 32.

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him in order to ascertain whether it is stamped with a stamp of the

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value and description required by law in force in India when such instrument was executed or first executed:

Provided that -

- (a) nothing herein contained shall be deemed to require any Magistrate or Judge of a criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898;
- (b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf.

(3) For the purposes of this section, in cases of doubt,-

- (a) the State Government may determine what offices shall be deemed to be public offices; and
- (b) the State Government may determine who shall be deemed to be persons in charge of public offices.

35. Instruments not duly stamped inadmissible in evidence, etc. -No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped.

Provided that

- (a) any such instrument not being a receipt, a bill of exchange or promissory note, shall, subject to all just exceptions, be admitted in evidence on payment of duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;
- (b) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him then such receipt shall be admitted

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in evidence against him on payment of a penalty of one rupee by the person tendering it;

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

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

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

(f) any such instrument not being a bill of exchange or promissory note shall, subject to all just exceptions, be registered or authenticated on payment of the duty with which the same is chargeable, or in the case of an instrument insufficiently stamped, of the amount required to make up such duty.

38. Instruments impounded, how dealt with.

(1) When the person impounding an instrument under section 33 has by law or consent of parties authority to receive evidence and admits such instrument in evidence upon payment of a penalty as provided by section 35 or of duty as provided by section 37, he shall send to the Collector an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, and shall send such amount to the Collector, or to such person as he may appoint in this behalf.

(2) In every other case, the person so impounding an instrument shall send it in original to the Collector.

40. Collector's power to stamp instruments impounded. -

(1) When the Collector impounds any instrument under section 33, or receives an instrument sent to him under section 38, sub-section (2), not being a receipt a bill of exchange or promissory note, he shall adopt the following procedure:

(a) if he is of opinion that such instrument is duly stamped,

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or is not chargeable with duty, he shall certify by endorsement thereon that it is duly stamped, or that it is not so chargeable, as the case may be;

(b) if he is of opinion that such instrument is chargeable with duty and is not duly stamped, he shall require the payment of the proper duty or the amount required to make up the same, together with a penalty of five rupees; or, if he thinks fit, an amount not exceeding ten times the amount of the proper duty or of the deficient portion thereof, whether such amount exceeds or falls short of five rupees;

Provided that, when such instrument has been impounded only because it has been written in contravention of section 13 or section 14, the Collector may, if he thinks fit, remit the whole penalty prescribed by this section.

(2) Every certificate under clause (a) of sub-section (1) shall, for the purposes of this Act, be conclusive evidence of the matters stated therein.

(3) Where an instrument has been sent to the Collector under section 38, sub-section (2), the Collector shall, when he has dealt with it as provided by this section, return it to the impounding officer.

SCHEDULE I-A**5. Agreement or memorandum of an agreement -**

(a) if relating to the sale of bill of exchange or to the sale of a Government Security or share in an incorporated Company or other body corporate-	Re.1 for every Rs.10,000 or part thereof, of the value of bill of exchange or security or share.
(b) if not otherwise provided for	Fifty rupees. [10.00]
23. Conveyance , not being a transfer charged or exempted under No.62 irrespective of market value of the property which is the subject matter of conveyance.	Seven and half per cent of such market value: Provided that if the the total amount of the duty payable is not a multiple of fifty paise, it shall be rounded off to the nearest rupee half of a rupee or over being counted as one rupee and less than half of a rupee being disregarded.

UMESH KUMAR Vs. RAJARAM**Exemptions**

Assignment of Copy-right under the Copy right Act, 1957 (No.14 of 1957), Section 18, Co-partnership deed, See Partnership (No.46).

Explanation – For the purpose of this article, where in the case of agreement to sell immovable property, the possession of any immovable property is transferred to the purchaser before execution or after execution of, such agreement without executing the conveyance in respect thereof then such agreement to sell shall be deemed to be a conveyance and stamp duty thereon shall be leviable accordingly:

Provided that, the provisions of Section 47-A shall apply mutatis mutandis to such agreement which is deemed to be a conveyance as aforesaid, as they apply to a conveyance under that section:

Provided further that where subsequently a conveyance is effected in pursuance of such agreement of sale the stamp duty, if any, already paid and recovered on the agreement of sale which is deemed to be a conveyance, shall be adjusted towards the total duty leviable on the conveyance, subject to a minimum of Rs.10.”

10. From a perusal of Section 33, it would clearly appear that when a person authorized under law or by consent of the parties have powers to receive evidence, then such person would be obliged to impound the document, when any document, which is insufficiently stamped is produced before him. The word 'impound' has not been defined in the Indian Stamp Act, however, in Wharton's Law Lexicon, 14th Edition, at page 496, defined the word to mean “to place a suspected document in the custody of the Law.” Stroud's Judicial Dictionary, 4th Edition, at page 1295, defines “a document is impounded when it is ordered by a court to be kept in the custody of its officer.” The word 'impound' does not mean that the Court, which is in possession of the document, has immediately to recover duty and

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penalty. A true understanding of the word 'impound' would only mean to authorize the Court to keep document in the custody because the Court is of the opinion that the document is either suspected or is insufficiently stamped.

11. Once a Court comes to the conclusion that the document is insufficiently stamped then it has to keep the document in its custody and then proceed in accordance with law.

12. Section 35 provides that a document chargeable with duty shall not be admitted in evidence for any purpose by any person having by law or consent of the parties authority to receive evidence, if such document is not properly stamped. Such document shall be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, and the amount required to make up such duty, together with a penalty of five rupees, or 10 times of the amount of proper duty or deficient portion thereof exceeds five rupees, penalty would be a sum equal to ten times such duty or portion. To be more simple, Clause (a) of Section 35 simply provides that if document is insufficiently stamped then duty and penalty would be recoverable. The duty would be amount which is less on the document and the penalty would be five rupees only, but in case, the ten times penalty exceeds five rupees, then such penalty shall be ten times the amount by which the document was required to be stamped.

13. Section 38 (1) if is read and understood in accordance with the scheme of the Act, it would appear that when a person impounding an instrument under Section 33 has to receive evidence and admits such instrument in evidence upon payment and penalty as provided by Section 35 or of duty as provided by Section 37, then the Court shall be entitled to admit the document in evidence if the party producing the document is ready and willing to pay the duty and penalty ten times. Once amount of duty and penalty is deposited by the person producing the document, then the document shall be admitted in evidence and then the person who is receiving the document (in the present case, the Court) shall send to the Collector an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty and shall also send such amount to the Collector or to such person as the Collector may appoint in this behalf. Sub Section (1) of Section 38 deals with the situation where the Court before receiving evidence decides the question of duty and penalty, the person desirous of producing the document in evidence is ready and willing to pay the duty and penalty and then thereafter duty and penalty is received and the document is admitted in evidence. In a case where the Court decides the question of duty and penalty, but the person, who is obliged to pay the said duty, does not pay the same, then the document would continue to be inadmissible in evidence, but as it has already been impounded by the Court, the Court has to refer the matter to the Collector under Sub-Section (2) of Section 38 of the Act.

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14. Section 40 of the Indian Stamp Act provides that whenever the Collector impounds any instrument under Section 33 or receives an instrument sent to him under Section 38 Sub Section (2), then he has to adopt a particular procedure. It is to be noted that powers of the Collector are different in different situation. When he himself is impounding the document under Section 33, then he has to consider the matter and when a document is referred to the Collector under Sub Section (2) of Section 38 by a Court, or by a person authorized to receive evidence under the law with consent of the parties, then the Collector has to decide the question whether the document is duly stamped or not. If the same is not duly stamped, then what duty and penalty is to be paid on the said document. When the document is produced in the Court and the Court impounds the same, the Collector would have no jurisdiction to impound the document under Section 33 of the Act but the Collector will have to receive the document from a Court and then proceed in accordance with law. Once the matter is referred to the Collector under Sub-Section (2) of Section 38 of the Indian Stamp Act, then he has to decide that the said instrument is duly stamped or not. Once he decides that the document is duly stamped, then he shall certify by endorsement thereon that the document is duly stamped or that it is not so chargeable with the duty. However, if the Collector comes to the conclusion that such instrument is chargeable with duty and is not duly stamped, he shall require the payment of the proper duty or amount required to make up the same, together with a penalty of five rupees; or, if he thinks fit, an amount not exceeding ten times the amount of the proper duty or of the deficient portion thereof, whether such amount exceeds or falls short of five rupees.

15. A sharp distinction is to be marked in the language of Section 38 and Section 40 of the Act. While Section 38 requires the Court to recover the duty and ten times penalty and nothing less than that, Section 40 authorizes the Collector (Stamps) to recover the duty so also recover penalty, which shall not exceed ten times the amount of proper duty. Discretion given to the Collector (Stamps) is to impose any amount of penalty, which should not necessarily be ten times, it can be less than that.

16. However, in the present matter, it is to be seen that the document is valued for Rs.3,01,000/-and it contains a recital that possession of the property at the time of execution of the document was handed over to the plaintiff. At this stage, it would be necessary to refer to Article 5 of the Indian Stamp Act, which deals with an agreement or memorandum of an agreement. If the agreement refers to the sale of bill of exchange or to the sale of a Government Security or share in an incorporated company or other body corporate, then the property stamp duty would be Re.1/-for every Rs.10,000/-or part thereof. However, clause (b) of Article 5 provides that if not otherwise provided for, then the stamp duty shall be Rs.50/-. If the agreement is in relation to the property or sale of the same, then ordinarily the stamp duty payable would be Rs.50/-, but in case, the document contains a recital that the possession of the property has already been transferred or handed over

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to the proposed purchaser, without executing a conveyance or it shall be handed over to the purchaser without execution of the conveyance in future, then the document shall come out of the definition of an 'agreement', but would become a 'conveyance', as provided under Article 23 of Schedule I-A.

17. The word 'conveyance' has already been defined in Clause 10 of Section 2. The definition is inconclusive definition, which says that 'conveyance' includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and which is not otherwise specifically provided for by Schedule I-A, as the case may be. In light of the explanation appended to Article 23 of the Indian Stamp Act, in the case of an agreement to sell immovable property there is a recital that possession of immovable property is transferred to the purchaser at the time of execution of, such agreement or that possession would be delivered in future without executing a conveyance in respect thereof, then such agreement to sell shall be deemed to be a conveyance and stamp duty thereon shall be leviable accordingly. In the present matter, findings of the Court below that the document would fall under the mischief of Article 23 of Schedule I-A cannot be found fault with, because the Court below was absolutely justified in holding that because of the recital in the document, the agreement stood converted into a conveyance and was chargeable with the duty of 7½% on the market value of the property.

18. The Court below was also justified in requiring the plaintiff to pay 7½% duty on the face value of the document and pay ten times penalty in accordance with Sections 33, 35 and 38 of the Indian Stamp Act. The order passed by the Court below is not bad. However, we make it clear that if the plaintiff is not ready and willing to pay the duty and penalty, as proposed by the Court below, then the Court which has impounded the document shall refer the matter to the Collector (Stamps) under Section 38 (2) of the Indian Stamp Act.

19. Any observations made by the learned single Judge in the matter of Satyanarayan Guad, which run contrary to the above observations are overruled.

20. For the reasons aforesaid, we find no reasons to interfere in the matter. The petition deserves to be and is dismissed.

There shall be no orders as to costs.

C. c. as per rules.

Petition dismissed.

K.P. DUBEY Vs. STATE OF M.P.

I.L.R. [2010] M. P., 1301

WRIT PETITION

Before Mr. Justice P.K. Jaiswal

21 January, 2010*

K.P. DUBEY

Vs.

... Petitioner

STATE OF M.P. & anr.

... Respondents

Representation of the People Act (43 of 1951), Section 28A - Order of suspension and disciplinary action issued by Commissioner (Admn) during election duty of petitioner - Held - Any person appointed to conduct election shall be on deputation to Election Commission for period commencing on and from the date of notification calling for such election and ending with the date of declaration of result - During the period, the officer shall be subject to control, superintendence and discipline of Election Commission - Order of suspension by Commissioner (Admn) during that period is not permissible - Petition allowed. (Paras 5 to 9)

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 28ए - आयुक्त (प्रशासन) द्वारा याची के निर्वाचन कार्य के दौरान निलम्बन और अनुशासनिक कार्यवाही का आदेश जारी किया - अभिनिर्धारित - निर्वाचन कराने के लिए नियुक्त कोई व्यक्ति ऐसे निर्वाचन की माँग करने की अधिसूचना की तारीख से आरम्भ होने वाली और परिणाम की घोषणा से समाप्त होने वाली कालावधि के लिए निर्वाचन आयोग में प्रतिनियुक्ति पर होगा - इस कालावधि के दौरान अधिकारी निर्वाचन आयोग के नियंत्रण, अधीक्षण और अनुशासन के अधीन होगा - आयुक्त (प्रशासन) द्वारा उस कालावधि के दौरान निलम्बन का आदेश अनुज्ञेय नहीं है - याचिका मंजूर।

Case referred :

1992 MPLJ 173.

A.K. Pathak, for the petitioner.

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

O R D E R

P.K. JAISWAL, J. :-With the consent of learned counsel for the parties, the matter is heard finally and disposed of by this order.

The petitioner is Assistant Engineer (Field), Narmada Development Division No.1, Dindori. He is holding the said post w.e.f. 2nd March, 2008. Prior to the said posting, he was working as Sub Divisional Officer, Rani Awanti Bai Lodhi Sagar Pariyojna, Katanga Colony Sub Division, Bargi Hills, Jabalpur. On 14.2.2008 he was posted in the office of Chief Engineer and the additional charge of Sub Divisional Officer was directed to be handed over to Shri P.K. Khare. On 2nd March, 2008, the petitioner was transferred as Assistant Engineer (Field), Narmada Development Division No.1, Dindori and the charge of Sub Divisional is directed

*W.P. No.14708/2008(S) (Jabalpur)

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to be handed over to one Shri R.S. Thakur, Assistant Engineer, Circle Office Narsinghpur. On 29.11.2008 he has been placed under suspension on account of making irregularities in maintenance and construction work of Government accommodation. The petitioner challenges the said suspension order dated 29.11.2008 whereby the Commissioner (Administration) Narmada Valley Development Authority, Bhopal has placed him under suspension and thereafter the respondent No.1 has issued him the charge sheet on 3.1.2009 (Annexure AR-2). The allegation against the petitioner is that without verifying measurement books of the Contractor and without proper measurement paid the amount to the Contractor.

2. Shri A.K. Pathak, learned counsel for the petitioner challenges the impugned order of suspension on the ground that he was engaged in Assembly election by order dated 27.10.2008 (Annexure P/8) and was appointed as Presiding Officer at Polling Centre No.81 at Mohni Mal, Primary School, Mohni (Shahpura) of 103-Shahpura Vidhan Sabha. The petitioner was directed to undergo training. After completion of training of first phase, second phase and third phase, he was appointed as Presiding Officer of Polling Booth No.81 vide order dated 25.11.2008 (Annexure P/9) and was on election duty till the result was declared on 9.12.2008. During those period, he was on deputation to the Election Commission from the date of notification calling for assembly election and ending with the date of declaration of the result of such election and during those period his disciplinary authority was Election Commission and the said authority is empowered to take disciplinary action against the petitioner during the period of election and on 29.11.2008 the respondent No.2 was not his disciplinary authority to take disciplinary action as the the same was vested only with the Election Commission during the election. In support of the said contention, he drew my attention to the Division Bench decision in the case of *Umesh Singh Yadav Vs. Collector/ District Returning Officer, Balaghat and others*, 1992 MPLJ 173. Thus the sole contention on behalf of the petitioner is that the respondent No.2 has no authority to pass the order of suspension.

3. On the other hand, Shri Samdarshi Tiwari, learned Government Advocate contended that the suspension order was passed after assembly polling and at that time the petitioner was not engaged in any election duty, the impugned order is legal and proper. He further submitted that the petitioner was placed under suspension on account of dereliction from duties, several irregularities in supervising construction work being carried out under his supervision in contemplation with departmental enquiry and departmental enquiry was proposed against him and, therefore, his headquarter was changed to the office of Superintending Engineer, Narmada Valley Circle No.10 Badwani vide impugned order dated 29.11.2008 and the mandate of Section 28-A of the Act does not operate upon the disciplinary action being taken by the competent authority or upon changing of headquarter of

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delinquent employee against whom departmental enquiry is proposed. He lastly urged that the model code of conduct operates only upon transfer of all officers/officials connected with the conduct of elections and prayed for dismissal of the writ petition.

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

5. Section 28-A of the Act, 1951 as introduced by Amendment Act No.1/1989, with effect from 15.3.1989 reads as under :

"28. A Returning officer, presiding officer, etc., deemed to be on deputation to Election Commission. The returning officer, assistant returning officer, presiding officer, polling officer and any other officer appointed under this Part, and any police officer designated for the time being by the State Government, for the conduct of any election shall be deemed to be on deputation to the Election Commission for the period commencing on and from the date of the notification calling for such election and ending with the date of declaration of the results of such election and accordingly, such officers shall, during that period, be subject to control, superintendence and discipline of the Election Commission."

6. From the perusal of the aforesaid provision, it is clear that the authority to take disciplinary action is vested only with the Election Commission during the period of election. Section 28-A clearly demonstrates that any person appointed to conduct election shall be on deputation to the Election Commission for the period commencing on and from the date of notification calling for such election and ending with the date of declaration of results. During that period, the officer shall be subject to control, superintendence and discipline of the Election Commission.

7. The contention of learned Government Advocate cannot be accepted that during those period no transfer can be made by the respondent No.1 and 2 but disciplinary authority is fully competent to take disciplinary action against the delinquent employee. The respondent No.1 and 2 could have approached the Election Commission for taking suitable action against the petitioner under Section 28-A of the Act of 1951.

8. On the date of suspension, the petitioner was on deputation to the Election Commission of India by virtue of duties assigned to him. The impugned order of suspension passed by the respondent No.2 is in violation to the provisions of Section 28-A of the Act of 1951 when the petitioner was deemed to be on deputation with the Election Commission of India with effect from 27.10.2008 to 9.12.2008 and the suspension of the petitioner by the Commissioner (Admn) during this period is not permissible.

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9. For these reasons and in view of the law laid down by the Division Bench of this Court in the case of *Umesh Singh Yadav Vs. Collector/ District Returning Officer, Balaghat and others* (supra), the impugned order of suspension dated 29.11.2008 is not sustainable in the eyes of law.

10. The election period is now over and the deemed deputation of the petitioner under Section 28-A of the Act has, therefore, also ended. The respondents are at liberty to take appropriate steps in the matter under the provisions of M.P. Civil Services (Classification, Control & Appeal) Rules, 1966.

11. In the result, the writ petition is allowed. The impugned order dated 29.11.2008 is quashed. No costs.

Petition allowed.

I.L.R. [2010] M. P., 1304

WRIT PETITION

Before Mr. Justice Arun Mishra & Mr. Justice S.C. Sinho

21 January, 2010*

NORTHERN COAL FIELDS LTD.

... Petitioner

Vs.

STATE OF M.P. & anr.

... Respondents

A. Municipal Corporation Act, M.P. (23 of 1956), Section 132(6)(n) & (o), Mines and Minerals (Development and Regulation) Act, 1957, Terminal Tax (Assessment and Collection) on the Goods Exported from Madhya Pradesh Municipal Limits Rules, 1996, Rule 3 - Terminal Tax on export of goods outside Municipal Corporation area - There is no provision in Act, 1957 which expressly or by implication deal with such tax as imposed by Corporation or by the State - The goods are dumped in the Municipal Corporation area for long/indefinite time - Terminal tax can be exacted - S. 132(6)(n) & (o) of Municipal Corporation Act and Rule 3 of Rules, 1996 can not be said to be ultra vires. (Paras 20, 21 & 24)

क. नगर पालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 132(6)(एन) व (ओ), खान और खनिज (विकास और विनियमन) अधिनियम, 1957, मध्य प्रदेश नगर सीमाओं से निर्यातित माल पर सीमा कर (निर्धारण और संग्रहण) नियम, 1996, नियम 3 - नगर निगम क्षेत्र के बाहर माल के निर्यात पर सीमा कर - अधिनियम, 1957 में कोई उपबंध नहीं है जो अभिव्यक्त रूप से या विवक्षा द्वारा निगम या राज्य द्वारा अधिरोपित ऐसे कर के सम्बन्ध में कार्यवाही करता हो - माल नगर निगम क्षेत्र में लम्बे/अनिश्चित समय के लिए रखा जाता है - सीमा कर आहरित किया जा सकता है - नगर निगम अधिनियम की धारा 132(6)(एन) व (ओ) तथा नियम, 1996 का नियम 3 अधिकारातीत नहीं कहे जा सकते।

B. Constitution, Seventh Schedule, Union List, Entry 89 and State

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List, Entry 56 - Entry 89 of Union List provides for terminal tax on goods or passengers carried by railway, sea or air - It does not contemplate any terminal tax on goods or passengers carried by road or on inland water - Entry 89 of Union List and Entry 56 of State List operates in different fields.
(Paras 13 & 14)

खा. संविधान, सातवीं अनुसूची, राज्य सूची, प्रविष्टि 89 एवं राज्य सूची, प्रविष्टि 56 - संघ सूची की प्रविष्टि 89 रेल, समुद्र या वायु द्वारा वहन किये गये माल या यात्रियों पर सीमा कर का उपबंध करती है - यह सड़क द्वारा या अन्तर्देशीय जलमार्ग पर वहन किये गये माल या यात्रियों पर कोई सीमा कर अपेक्षित नहीं करती - संघ सूची की प्रविष्टि 89 और राज्य सूची की प्रविष्टि 56 विभिन्न क्षेत्रों में प्रवर्तित होती हैं।

Cases referred :

AIR 1996 MP 116, (2004) 10 SCC 201, 1987 MPLJ 643, (1982) 1 SCC 125, (1995) 5 SCC 251, (1999) 3 SCC 290, AIR 1996 SC 2560, AIR 1981 SC 991, AIR 1958 SC 341, (1993) 1 SCC 333, AIR 1971 SC 870.

Rohit Arya with Aditya Adhikari & Greeshm Jain, for the petitioner.

R.D. Jain, A.G. with Purushendra Kaurav, Dy.A.G., for the respondents/ State.

Anshuman Singh, for the respondent/Municipal Corporation, Singrauli.

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :- In these writ petitions, petitioners; Northern Coal Fields Ltd. and M/s Hindalco Industries Limited and anr. Assailed the constitutional validity of the Rules known as the Terminal Tax (Assessment and Collection) on the Goods Exported from Madhya Pradesh Municipal Limites, Rules, 1996, inasmuch as Corporation is collecting the terminal tax @ Rs.5/- per ton.

2. It is averred in W.P. No.1729/03 filed by the Northern Coal Field Limited that the company is engaged in extraction and sale of coal, mainly to the core sectors for production and generation of electrical energy. Coal is extracted from the Coal bearing Areas acquired under Coal bearing Areas (Acquisition & Development) Act 1957. Section 11 of the Coal Bearing Areas Act empowers the Central Govt. to direct vesting of land or rights in Govt. Company. Section 9 of the Mines and Mineral (Development & Regulation) Act 1957, (hereinafter referred to as MMRD Act) provides that for payment of royalty. Petitioner submitted that MMRD Act occupies the entire field and the State Legislature is denuded of legislative competence to enact any law on the subject in view of declaration made in section 2 of the MMRD Act. Union List i.e. List-I Entry 54 which provides Regulation of mines and mineral development to the extent to which such regulation and development under the control of Union is declared by Parliament by law to be expedient in the public interest. Entry 97 of List-I of

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Seventh Schedule has also been relied upon which provides any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists. Entry 23 of List-II of the State List contained in Seventh Schedule has also been relied upon which provides regulation of mines and mineral development subject to the provisions of List-I with respect to regulation and development under the control of the Union. The Municipal Corporation has passed a resolution on 30.4.2002 by proposal No.13 and decided to impose terminal tax on coal @ Rs.5/- per ton. A letter (P/2) dated 30.8.2002 was sent to the petitioner. Petitioner wrote a letter (P/3) requesting to clarify whether the same is applicable to the petitioner company or not. In reply Municipal Corporation sent a letter (P/4) enclosing the copy of notification dated 27.5.1995 in which map was published showing the boundaries of Municipal Corporation, Singrauli. Petitioner objected to the action and sent a letter (P/5). Vide demand letter (P/6) dt.18.11.2002 petitioner was required to submit the details regarding export of coal and deposit money at the rate prescribed by the Corporation. Petitioner submits that the State Legislature is denuded of legislative competence under Entry 23 of List-II of the Seventh Schedule of the Constitution of India to impose any tax on minerals. With reference to rule 3 of the Rules of 1996 it is submitted that petitioner is neither engaged in export of the coal nor it sells coal for purpose of export. Purchasers are not obliged to export coal. The object of sale is not to export of coal outside the municipal limit. It is also submitted that section 132(6)(n) of Municipal Corporation Act 1956 authorizes the corporation to impose a Terminal Tax on goods or animals exported from the limits of the Corporation. As no export of coal is taking place tax cannot be collected. Rule 3 of the Rules of 1996 is arbitrary. Section 132, 133 of the Municipal Corporation Act so far as gives power to Municipal Corporation, Singrauli to collect any tax on coal are arbitrary and in direct conflicts with MMRD Act. Entry 89 of Union List provides for imposition of terminal tax on goods or passengers carried by Railways, Sea or Air, taxes on railway fares and freights. It is submitted that Entry 56 has to be read with Entry 52 of the List-II. Hence, petition has been preferred.

3. In the return filed on behalf of the State of M.P. it is contended that as per the provision of Article 243X Constitution of India, State is empowered to authorize municipalities to levy, collect and impose tax for the purpose of augmenting their revenue so that they can function as the unit of self-governance. Entry 56 of List-II of the Seventh Schedule of the Constitution of India empowers the State Legislature to make laws with respect to imposition of export/terminal tax on goods exported from the limits of the municipal corporation. Entry 5 of List-II of the Seventh Schedule empowers the State Legislature to make laws in respect of local government, their constitution and power etc. Thus, the State has rightly authorized to the Municipalities to impose levy and collect export/terminal tax on goods exported from the limit of the municipal corporation area. The imposition of

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terminal tax on goods operates in a totally different field than imposition of tax on the mining of minerals. In *ACC Vs. State of M.P. and ors.*, AIR 1996 MP 116 imposition of entry tax on mineral has been upheld. Entry tax is imposed by the State Legislature by enacting laws under Entry 54 of List-II of the Seventh Schedule of the Constitution of India and is a sister tax to export or terminal tax which the State Legislature has power to impose under Entry 56 of List-II of the Seventh Schedule. It is a tax on the export of goods from the local limits of the municipalities.

4. In the return and the additional return filed by the Municipal Corporation, Singrauli, Entry 56 of List-II of the Seventh Schedule has been relied upon and decision in M.P. No.4139/88 dt. 18.1.1999 rendered by the Division Bench has been relied upon. The stand taken by the State has been supported. It is also submitted that taxing event is movement of goods beyond the limits of Corporation and tax is payable by who causes or who is responsible for such a movement. The petitioner company has been directed only to collect tax on behalf of the Corporation.

5. In W.P. No.1588/2006 filed by M/s Hindalco Industries Limited and another in addition it is averred in para 5.9 that the Municipal Corporation is also demanding the tax on the coal purchased by the petitioner No.1 from the collieries situate outside the local limits of Municipal Corporation of Singrauli and being transported/transshipped through Singrauli. The Municipal Corporation is not authorized to levy and collect the tax on such coal since the Resolution dated 30.4.2002 clearly imposes tax on the coal mine by NCL from the mines situated in Singrauli. It is also averred that the provision of section 132(6)(n) of the said Act 1956 does not empower the Municipal Corporation to levy any such tax on export of coal bought by it from NCL and exported by petitioner No.1 to its Captive Power Plant situated at Renusagar, District Sonbhadra in the State of Uttar Pradesh. Earlier on the coal so purchased by petitioner No.1 from the collieries of NCL, CCL and BCCL terminal tax was never charged by the Municipal Corporation, Singrauli on the transportation of coal. The trucks were stopped at the check post/barrier put on by Municipal Corporation, Singrauli for recovery of terminal tax levied on coal by it. Section 132(6)(n) of Act of 1956 has no application in respect of coal in transit, thus demand of terminal tax on the check post and barriers on NH-75E is without jurisdiction and in excess of the power conferred under section 132 of the Act on the respondent No.2. Vires of section 132(6)(n) of Act of 1956 has been also assailed by way of incorporating amendment in the petition. In the reply filed by the respondents No.1 and 3 return filed in W.P. No.1729/2003 has been adopted.

6. In the return filed by the Municipal Corporation, Singrauli, in W.P. No.1588/06 inter alia, it is contended that the tax has been imposed on different field. Reliance has been placed on the decision of the Apex Court in *State of West*

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Bengal Vs. Kesoram Industries Ltd., (2004) 10 SCC 201. With respect to coal purchased by the petitioner from collieries situated outside the local limit of the answering respondent, it is submitted that the terminal tax is leviable by the answering respondent on any coal being taken out of the municipal limits of the answering respondent. The petitioner dumps the coal on the railway siding, or in its vicinity, having unloaded the same from the railway wagons. Thereafter the coal remains dumped for a considerable length of time and is later picked up by the petitioner by getting it loaded onto trucks for its transport to its captive power plant situated at Renusagar, Sonbhadra, U.P. The petitioner cannot avoid its liability to pay terminal tax on such coal inasmuch as the same is exigible to terminal tax having been dumped inside municipal limits for a long and uncertain periods of time. Thus, submission deserves to be rejected.

7. Shri Rohit Arya, learned Sr.counsel appearing on behalf of the petitioners has submitted that within the purview of section 132(6)(n) and 132(6)(o) of Act of 1956 the State is not empowered to levy the tax on the coal. M/s Hindalco Industries Limited purchases coal from NCL collieries situate within the municipal corporation limit at Singrauli and also from the other States and transport it to Renusagar. State Legislature or Municipal Corporation are not empowered to levy tax on coal. No entry in Seventh Schedule empowers to impose such tax by Corporation or State. Field is covered by Entry 89 of List-I i.e. Union List terminal tax on goods or passengers can be imposed by the Central Govt. Entry 52 of List-II i.e. State List authorizes the State Govt. to levy tax on entry of goods for consumption use or sale. As the goods are not consumed, used or sold within the corporation area, it is not permissible to impose the tax within the purview of Entry 54. Counsel has also submitted that the Entry 56 which provide for taxes on goods and passengers carried by road, inland water ways cannot be used so as to impose the tax on coal. The Entry 54 of List-II which provides taxes on sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I cannot be invoked for imposition of such a tax. Entry 92A of List-I provides taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce. Counsel has also submitted that the Division Bench of this Court in *Monji Kalyanji and ors. Vs. State of Madhya Pradesh*, 1987 MPLJ 643 has not taken the correct view inasmuch as it is held that imposition of terminal tax on import and export of goods by road is covered by Entry 56 of List II of Schedule VII of constitution of India and the State Legislature has the power to impose it. The aforesaid view taken by the Division Bench of this Court deserves to be reconsidered. Decision in *State of West Bengal Vs. Kesoram Industries Ltd.*, (supra) does not come in the way of the petitioner as in the instant case different entries are involved. It was laid down in the said decision that it was tax on the land and was covered under Entry 49 and 50 of List-II.

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8. Shri R.D. Jain, learned AG, appearing with Shri Purushendra Kaurav, Dy.AG, has submitted that by virtue of of Entry 5, 23 and 56 of List-II State/ Corporation is to frame the rules and consequently the Corporation could have imposed the tax, the field is not covered under Entry 89 of list-I. The imposition of the export tax in question is not covered under any of the Entry in the Union List. Reliance is also placed on Article 243W and Article 243X of the Constitution. Decision in *State of West Bengal Vs. Kesoram Industries Ltd.*, (supra) has been relied upon. Besides, it is submitted that u/s 132(6)(n) and 132(6)(o) of the Municipal Corporation Act, the rules have been framed and the aforesaid Entry 5, 23 and 56 of List-II have the different field to operate. Counsel has also submitted that there is no overlapping of legislation when pith and substance of legislation is seen.

9. Shri Anshuman Singh learned counsel appearing on behalf of the Municipal Corporation, Singrauli has submitted that the rules have been framed in exercise of power u/s 132(6)(o) not u/s 132(6)(n), on the basis of section 132(6)(n) which the petitions have been preferred. The aforesaid provision gives wider power for imposition of the tax. Rules are within the contemplation of provisions of section 132(6)(o) and Entry 50 and 56 of the List-II.

10- Entry 54 of List-I of Union List contained in VII Schedule of Constitution provides thus :

“54. Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.”

in the aforesaid Entry the regulation and development of mines and minerals is covered. Under Entry 89 of List-I Terminal taxes on goods or passengers, carried by railway, sea or air, taxes on railway fares and freights are covered. Entry 89 of List-I reads thus :

“89. Terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freights.”

Entry 5 of the List-II reads as under :

“5. Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.”

Article 243W specifies the powers, authority and responsibilities of Municipalities, etc. it intends to confer Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities

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upon Municipalities, subject to such conditions as may be specified therein. Article 243X provides power to impose taxes by, and Funds, of, the Municipalities, the legislature of a State may by law levy, collect and appropriate such taxes, duties, tolls and fees in accordance with, such procedure and subject to such limits. State may also assign to a Municipality such taxes, duties, tolls and fees levied and collected by the State-Government for such purposes and subject to such conditions and limits. State has also power to provide for making, such grants-in-aid to the Municipalities from the Consolidated Fund for the purpose specified in Article 243X(d).

Local self-government is contemplated under Entry 5 of List-II of the 7th Schedule. Entry 23 of List-II provides for regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the union. Under entry 23 in case field is occupied by central legislation power can be exercised in the field of regulation of mines and mineral development subject to such legislation not otherwise. In the instant case we are not concerned with regulation of mines and mineral development, but, we are concerned with the tax being levied on goods carried by road outside the municipal limit, Entry 89 of List-I does not cover the situation when the goods are carried out by road, the Entry 89 of List-I covers the terminal tax on goods or passengers, carried by railway, sea or air. Thus, Entry 56 has the different field to operate when tax is imposed on goods and passengers carried by roads.

11. Under Section 132(6)(n) of Act 1956 the Municipal Corporation has been authorized to impose terminal tax on goods or animals exported from the limits of the Corporation. Under section 132(6)(o) of Act 1956 the Corporation as authorized to impose any other tax which the State Government has power to impose under the constitution of India, with the prior approval of the State Government. Section 132(6)(n) and 132(6)(o) of Act 1956 are quoted below :

“132. Taxes to be imposed under this Act.

(6) In addition to the taxes specified in subsection (1), the Corporation may, for the purpose of this Act, subject to any general or special order which the State Government may make in this behalf, impose any of the following taxes, namely:-

(n) a terminal tax on goods or animals exported from the limits of the Corporation; and

(o) any other tax which the State Government has power to impose under the constitution of India, with the prior approval of the State Government.

12. Rule 3 of the Terminal Tax (Assessment & Collection) on the Goods Exported

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From Madhya Pradesh Municipal Limits, Rules of 1996 vires of which has been questioned is quoted below :

“3. Every person, businessman, establishment and the licence holder under the Madhya Pradesh Krishi Upaj Mandi Adhiniyam, 1971 (No.24 of 1973), shall be responsible to collect the terminal tax or the goods at the rate specified in the Schedule, if he himself exports any goods as shown in the Schedule or sale for the purpose of export.”

On the export of the goods terminal tax has been imposed which is to be collected by every person, businessman, establishment and the licence holder under the M.P. Krishi Upaj Mandi Adhiniyam, 1971 at the rate specified in the Scheduled in case of export of goods outside the municipal limits.

13. Coming to instant case the Union has not imposed any restriction by enacting any law on the power of the State with respect to imposition of such tax. There is no provision in MMRD Act which expressly or by implication deal with such tax as imposed by the Corporation or by the State. It is also settled even if two legislation under two different entries provide for imposition of two kind of taxes there would no conflict as scope of Entry 89 of list I is different from the scope of Entry-56 of List II of Seventh Schedule of Constitution, thus, there can be two different legislation in the field under aforesaid entries and there is no overlapping as they operate in two different field. Power to impose tax can be delegated by State Legislature to local authority has not been disputed.

14. It is clear that the tax which has been imposed clearly falls within the Entry 56 of List-II of the Seventh Schedule and no conflict is created by imposition of such tax with the power of the Union conferred under Entry 89 of List-I of Seventh Schedule of the Constitution. In *Monji Kalyanji & ors. Vs. State of Madhya Pradesh* (supra) the Division Bench of this Court has opined while considering *pari materia* section 127(1)(xvi) of the M.P. Municipalities Act which empowers a municipal council to impose terminal tax both on import and export is covered by Entry 56 of List II of the Seventh Schedule of the Constitution. Terminal tax on export of goods by road from within municipal limits, imposed by the Municipal Committee, under section 127(1)(xvi) of the M.P. Municipalities Act is valid. Such tax cannot fall under Entry 89 of List I inasmuch as the said entry contemplates only such goods or passengers which are carried by railway, sea or air. It does not contemplate any terminal tax on goods or passengers carried by road or on inland waterways.

15. In *State of W.P. Vs. Kesoram Industries Ltd.* (supra) it has been held by the Apex Court that the taxes on mineral rights lie within the legislative competence of the State Legislature “subject to” any limitation imposed by Parliament by law relating to mineral development. The Central legislation has not placed any

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limitation on the power of the States to legislate in the field of taxation on mineral rights. The challenge to constitutional validity of State legislation is founded on non-availability of legislative field to the State; it has not been the case of any of the writ petitioners that there are limitations enacted by the Central legislation and the State of West Bengal has breached or crossed those limits. The Apex Court has laid down the principles that power of "regulation and control" is separate and distinct from the power of taxation and so are the two fields for purposes of legislation. Taxation may be capable of being comprised in the main subject of general legislative head by placing an extended construction, but that is not the rule for deciding the appropriate legislative field for taxation between List I and List II. As the fields of taxation are to be found clearly enumerated in Lists I and II, there can be no overlapping. There may be overlapping in fact but there would be no overlapping in law. The subject matter of two taxes by reference to the two lists is different. Simply because the methodology or mechanism adopted for assessment and quantification is similar, the two taxes cannot be said to be overlapping. There is the distinction between the subject of a tax and the measure of a tax. The Apex Court further laid down that the nature of tax levied is different from the measure of tax. While the subject of tax is clear and well defined, the amount of tax is capable of being measured in many ways for the purpose of quantification. Defining the subject of tax is a simple task; devising the measure of taxation is a far more complex exercise and therefore the legislature has to be given much more flexibility in the latter field. The mechanism and method chosen by the legislature for quantification of tax is not decisive of the nature of tax though it may constitute one relevant factor out of many for throwing light on determining the general character of the tax. The entries in list I and II must be so construed as to avoid any conflict. If there is no conflict, an occasion for deriving assistance from non obstante clause "subject to" does not arise. If there is conflict, effort has to be made to reconciliation and pith and substance has to be seen. After determining the field of legislation it has to be decided can an incidental trenching upon another field of legislation be ignored. So long as a tax or fee on mineral rights remains in pith and substance a tax for augmenting the revenue resources of the State or a fee for rendering services by the State and it does not impinge upon regulation of mines and mineral development or upon control of industry by the Central Government, it is not unconstitutional. The Apex Court has emphasized that even if the methodology for working out the royalty payable and cess payable is the same, does not have any detrimental effect on the constitutional validity of the cess as one on mineral rights. As a tax the impugned levy of cess is clearly covered by Entry 5 of List II read with Entries 49 and 50 of List II. Central Legislation (MMRD Act, 1957) has not cast any limitation on the State Legislature's power to tax mineral rights, and the levy on mineral rights does not contravene any of the limitations imposed therein by Parliament, the

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impugned cess is valid. Assuming the impugned cess to be a fee, it can equally be upheld by reference to List II, Entry 66 r/w Entry 5. List II, entries 5, 23, 49, 50 and 66 provide adequate constitutional coverage to the impugned levy of cess. A tax on land would remain a tax on land and would not become a tax on the nature of its user. The West Bengal Taxation Laws (Amendment) Act, 1992 was held to be intra vires the Constitution.

16. In *Western Coalfields Ltd. Vs. Special Area Development Authority*, (1982) 1 SCC 125 it was held that the declaration contained in Section 2 of the MMRD Act does not have the effect of bringing the powers, duties and functions of the local authority within the purview of occupied field. The aforesaid decision was approved in *State of W.B. Vs. Kesoram Industries* (supra).

17. In *Municipal Commissioner of Dum Dum Municipality and ors. Vs. Indian Tourism Development Corporation and ors.*, (1995) 5 SCC 251 it has been laid down that the properties of Union of India vesting in statutory corporations or government companies are amenable to local authority as incidence of taxation is different and power of local authority conferred under different enactment. In *Western Coalfields Limited Vs. Municipal Council, Birsinghpur Pali and anr.*, (1999) 3 SCC 290 it was held that the property tax is leviable on buildings and lands owned by or vesting in Union Govt u/s 127-A(2) of M.P. Municipalities Act, 1961. In *The Associated Cement Companies Ltd., Vs. State of M.P. and ors.*, AIR 1996 MP 116 imposition of entry tax on lime which was brought to the factory was upheld as it was held that the factory is in local area.

18. M/s Hindalco purchased the goods from Northern Coal Fields Ltd. Collieries situated in Singrauli and transport it to different destinations, thus, it is clearly an export, thus, imposition of terminal tax is attracted.

19. In *P. Kannadasan etc.etc. Vs. State of Tamil Nadu and ors.*, AIR 1996 SC 2560 it has been laid down that taxes are raised for augmenting the general revenues of the State and not for any particular purpose, much less for rendering a particular service. In the instant case also for augmenting the revenue the aforesaid tax has been imposed. It cannot be said that it suffers with arbitrariness and Corporation is not rendering the service. Its purpose is to augment the revenue.

20. Thus, in our view, rule 3 of the Rules of 1996, section 132(6)(n) and 132(6)(o) of Act of 1956 cannot be said to be ultra vires nor action of the of the Municipal Corporation, Singrauli of imposition of terminal tax on export of goods.

21. Coming to the submission made by Shri Rohit Arya, learned Sr. counsel that the Corporation is also realizing the terminal tax on the goods which are brought from the outside and are taken out of the Municipal Corporation area immediately. He has submitted that in such event it is not permissible for the Municipal Corporation to exact terminal tax in the course of transit of goods. He has relied upon the decision of the Apex court in *Man Mohan Tuli & others Vs. Municipal*

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Corporation of Delhi & others, AIR 1981 SC 991 in which the Apex Court has laid down the following proposition.

“14. Thus, from a consideration of the cases cited above, the following propositions emerge:-

- (1) Terminal tax and octroi are similar kinds of levies which are closely interlinked with (1) destination of the goods, (2) the user in the local area on arrival of the goods. Where the goods merely pass through a local area without being consumed therein the mere fact that the transport carrying the goods halt within the local area for transshipment or allied purposes would not justify the levy of either the terminal tax or octroi duty. This is because the halting of the goods is only for an incidental purpose to effectuate the journey of the goods to the final destination by unloading, sorting and reloading them at a particular place.
- (2) There is a very thin margin of difference between a terminal tax and octroi. In the case of the former (terminal tax) the goods reach their final destination and their entry into the area of destination immediately attracts payment of terminal tax irrespective of their user. In the case of octroi, however the tax is levied on goods for their use and consumption.
- (3) But at the same time, the goods while halting at a local area should leave for their destination within a reasonable time which may depend on circumstances of each case and if the goods are kept within the area for such a long and indefinite period that the purpose of reaching the final destination lying in a different area is frustrated or defeated, they may be exigible to terminal tax.
- (4) Where the goods enter into a local area which is also the destination of the goods either temporarily or otherwise, the terminal tax would be leviable. For instance, if A consigns goods from Patna in Bihar to Delhi in the name of X and X after having received the goods at Delhi re-books or reloads the same on a transport for Chandigarh in the name of Y, terminal tax would be leviable by the Corporation at Delhi because the goods in the first instance was Delhi and that by itself would

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attract the imposition of terminal tax. The fact that X 904 rebooks them to Chandigarh would not make any difference because the act of rebooking by X at Delhi would constitute a fresh transaction by which the goods after having been carried into Delhi are further exported to Chandigarh. On the other hand, when there is one continuous journey of the goods from Patna to Chandigarh without any break, the final destination would be halted in Delhi for the purpose of unloading, sorting and reloading and may have to be kept in Delhi for a reasonable time. In such a case terminal tax would not be exigible."

The apex Court has laid down in case goods are in course transit, halting of the goods in municipal area is only for an incidental purpose to effectuate the journey of the goods to the final destination, tax cannot be levied. The Apex Court has also laid down that there is very thin margin of difference between a terminal tax and octroi. In the case of the terminal tax the goods reach their final destination and their entry into the area of destination immediately attracts payment of terminal tax irrespective of their user. In the case of octroi, however, the tax is levied on goods for their use and consumption. The 3rd proposition the Apex court has laid down that the goods while halting at a local area should leave for their destination within a reasonable time which may depend on circumstances of each case and if the goods are kept within the area for such a long and indefinite period that the purpose of reaching the final destination lying in a different area is frustrated or defeated, they may be exigible to terminal tax. The stand of the Corporation is that the goods are dumped in the Municipal Corporation area for long/indefinite time. Thus, it is a question of fact to be gone into each transaction. However, the decision of the Apex court is clear when tax can be exacted. In case there is halting for a long indefinite period, the Apex Court has laid down terminal tax can be exacted. In case any dispute is raised, it is the function of the concerned authority to adjudicate upon the transaction. The proposition of law has been made clear by the Apex Court in *Man Mohan Tuli's case* (supra).

22. The meaning of words "import and export" has been considered by the Apex Court in *The Central India Spinning and Weaving and Manufacturing Co. Ltd. v. The Empress Mills, Nagpur Vs. The Municipal Committee, Warda*, AIR 1958 SC 341. In the said case C.P. and Berar Municipalities Act and Terminal Tax Rules (Wardha) were considered. The Municipal Committee was authorized by Section 66 to impose a terminal tax on goods or animals imported into or exported from the limits of the municipality. The question was whether the goods passing in transit through the municipal limits, without the municipal limits was liable to the terminal tax. It was held that by giving to the words

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"imported into or exported from", their derivative meaning without any reference to the ordinary connotation of these words as used in the commercial sense, the decided cases in India have ascribed too general a meaning to these words which from the setting, context and history of the clause was not intended. To construe the words "import" and "export" as meaning "bring in" or "take out of or away from" and cover the goods in transit by the words "imported into" or "exported from", would make rail borne goods passing through a railway station within the limits of a Municipality liable to the imposition of the tax on their arrival at the railway station or departure therefrom or both which would not only lead to inconvenience but confusion, and would also result in inordinate delays and unbearable burden on trade both inter State and intra state. It is hardly likely that that was the intention of the legislature. Such an interpretation would lead to absurdity which has, according to the rules of interpretation, to be avoided. The word "export" has reference to taking out of goods which had become part and parcel of the mass of the property of the local and will not apply to goods in transit for the purpose of being transported out of it. If the intention was to tax such goods then the word used should have been "re-exported" which means to export imported goods again. "Re-exportation" means the exportation of imported goods. Shri Rohit Arya has also relied upon the decision of the Apex Court in *Indian Oil Corporation Vs. Municipal Corporation, Jullundhar and ors.*, (1993) 1 SCC 333 in which the Apex court has laid down that Entry of goods within the local for area for consumption, use or sale therein is made taxable by the state Legislature on the authority of Entry 52 of List and Corporation obviously cannot have any authority more extensive than the authority of the state Legislature. Since the state Legislature in view of Entry of goods for "consumption use or sale" into a local area, the municipality cannot under a legislation, enacted in exercise of the powers conferred by Entry 52 of List II cannot have the power to levy tax in respect of good brought into the local area for purposes other than consumption, use or sale. Section 113 of the Act has, therefore, reasonably to be read subject to the same limitation as are contained in Entry 52 of List II of schedule VII. The expression "imported into the city" used in section 113 of the Act, as meaning "imported into the city for any purpose and without any limitation", would amount to attributing to the legislature an intention to give a go-by to the restrictions contained in Entry 52 of List II. That is not permissible. The expression "imported into the city" in section 113, therefore, has to be interpreted as meaning "imported into the municipal limits for purpose of consumption, use or sale" only. thus, construed in the limited sense, section 113 of the Municipal Act is not ultra vires Entry 52 of List-II of Schedule VII. There is no dispute with aforesaid proposition. In the instant case the Entry attracted is different i.e. entry 56 of List II of VII Schedule of the Constitution.

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23. The Apex court in *Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and anr*, AIR 1971 SC 870 has laid down that demand of tax from corporation not levied under a valid law can be challenged by the Corporation being a person. It has also been laid down by the Apex Court that in case demand of tax is not backed by valid law, is a threat to property. The Apex court also dealt with Article 286(1)(b) of the Constitution r/w section 5(1) of the Central Sales Tax Act, restriction as to imposition of tax on sale or purchase of goods. The Apex court in the context of sale in the course of export laid down that essential, tests of determine, first sale of coffee by Coffee Board to its registered exporter within Madras State, second sale by registered exporter to foreign buyer having no connection with first sale by coffee Board, Sale by Coffee Board was held to be not in course of export within Article 286. But, the factual situation in the instant case is totally different. It cannot be said that the tax has not been imposed in the course of export.

24. In view of the aforesaid discussion, we find no merit in these petitions and hold that rule 3 of the Terminal Tax (Assessment and Collection) on the Goods Exported from Madhya Pradesh Municipal Limits, Rules of 1996 and section 132(6)(n) and 132(6)(o) of Municipal Corporation Act are intra vires to the Constitution. Petitions being devoid of merits deserve dismissal. Consequently, the petitions are hereby dismissed. No costs.

Petition dismissed.

I.L.R. [2010] M. P., 1317

WRIT PETITION

Before Mr. Justice S.K. Gangele & Mr. Justice Piyush Mathur

28 January, 2010*

GYAN SINGH SISODIA

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

A. Constitution, Articles 14 & 19 - Condition of second NIT restricting the supply of tender forms to those intending tenderers, who had obtained blank forms, pursuant to first NIT but did not submit - The incorporation of a restriction in the shape of a condition requires a reference to the incorporation of a similar condition in the previous NIT, because unless the intending tenderers are warned/alarmed about the future events; on account of their non-participation or non-submission of tender forms, it appears to be quite an unreasonable restriction/condition on such tenderers who had no idea about the disability being subsequently attached or found in their previous conduct - As the same puts fetters/restrictions on the

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fundamental right of a citizen, in violation of constitutional guarantee enshrined in Article 19(1)(g) - Condition No.12 of the NIT quashed - Petition allowed.
(Paras 29, 30 & 32)

क. संविधान, अनुच्छेद 14 व 19 – द्वितीय निविदा आमंत्रण सूचना की शर्त उन आशयित निविदाकारों को निविदा प्रारूपों के प्रदाय को निर्बंधित करती है जिन्होंने प्रथम निविदा आमंत्रण सूचना के अनुसरण में रिक्त प्रारूप अभिप्राप्त किये थे किन्तु प्रस्तुत नहीं किये – शर्त के रूप में किसी निर्बंधन का सम्मिलित किया जाना पूर्ववर्ती निविदा आमंत्रण सूचना में सदृश शर्त को सम्मिलित किये जाने का सन्दर्भ अपेक्षित करता है, क्योंकि जब तक आशयित निविदाकारों को उनके भाग न लेने या निविदा प्रारूप प्रस्तुत न करने के कारण भविष्य की घटनाओं के बारे में चेतावनी/संकेत नहीं दिया जाता, यह ऐसे निविदाकारों पर नितान्त अयुक्तियुक्त निर्बंधन/शर्त होना प्रतीत होता है जिन्हें बाद में जोड़ी जाने वाली या उनके पूर्ववर्ती आचरण में पायी जाने वाली निर्योग्यता के बारे में कोई कल्पना नहीं थी – चूंकि यह अनुच्छेद 19(1)(जी) में सुरक्षित संवैधानिक गारंटी के उल्लंघन में किसी नागरिक के मूल अधिकार पर बाधा/निर्बंधन लगाती है – निविदा आमंत्रण सूचना की शर्त क्र. 12 अभिखण्डित – याचिका मंजूर।

B. Constitution, Article 226 - Judicial review - *When an entirely illegal condition is being imposed, with an intention to either include or exclude some individuals with ulterior motives, inferable from the record of the case, the Court can interfere in a contractual matter, where tender condition seems to have been incorporated by way of punishment or a penalty, without complying with the principles of natural justice.* (Paras 27 & 28)

ख. संविधान, अनुच्छेद 226 – न्यायिक पुनर्विलोकन – जब कोई पूर्णतः अवैध शर्त मामले के अभिलेख से अनुमित अंतरस्थ हेतु से या तो कुछ व्यक्तियों को सम्मिलित करने या अपवर्जित करने के आशय के साथ अधिरोपित की जा रही हो, तब न्यायालय संविदात्मक मामले में वहाँ हस्तक्षेप कर सकता है जहाँ निविदा शर्त नैसर्गिक न्याय के सिद्धांतों का पालन किये बिना दण्ड या शास्ति के रूप में सम्मिलित की जाना प्रतीत होती है।

Cases referred :

(1994) 6 SCC 651, (1997) 1 SCC 738, (2009) 6 SCC 171, (2004) 11 SCC 458, (2005) 1 SCC 679, ILR [2009] MP 2576, (2008) 10 SCC 404, (2009) 1 MPHT 78, (2009) 2 SCC 198.

Brijesh Sharma, for the petitioner.

P.N. Gupta, G.A., for the respondent Nos.1 to 3/State.

M.P.S. Raghuvanshi, for the respondent No.4/Intervener.

J U D G M E N T

The Judgment of the Court was delivered by **PIYUSH MATHUR, J.** :—The Writ Petitioners Gyan Singh Sisodiya and M/s. Rajawat & Company have challenged in these two Writ Petitions the incorporation of Condition No. 12 in a Notice Inviting Tender (NIT) published by the Deputy Director (Archeology and Museum), Gwalior, due to which the Petitioners have been

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prevented from participating in the Second Short Term NIT Dated 27.10.2009 (Annexure P/1), merely on account of non-submission of Tenders in the Previous NIT Published for the similar work on Date 03.10.2009 (Annexure P/7). Since, the controversy involved in both the Petitions is identical, therefore, with the consent of the Parties, these Petitions were heard analogously and are being disposed of by this Common Order.

2. The facts of the matter revolve around Three Notice Inviting Tender Dated 3.10.2009 and 27.10.2009 which demonstrate that the Deputy Director (Archeology and Museum), Gwalior, has initially invited two Tenders Dated 03.10.2009 for a total of Eight independent Maintenance Works of the Archaeological Sites vide Annexures P/6 and P/7. The NIT No. 721/03.10.2009 (Annexure P/6) was issued for the maintenance and restoration work of four Sites and NIT No. 719 Dated 03.01.2009 was published for another Four Maintenance Works of another Archaeological Sites. For ready reference, the description of these Works are being give herein below:-

कार्यालय उपसंचालक, पुरातत्व अभिलेखागार एवं संग्रहालय

उत्तरी क्षेत्र, गूजरी महल संग्रहालय, किला गेट ग्वालियर म.प्र.

क्रमांक 719/अनु/12वे.वि.आ/नि./2009-10

ग्वालियर, दिनांक 3.10.09

निविदा आमंत्रण सूचना

अधोहस्ताक्षरकर्ता द्वारा निम्नलिखित कार्यो के लिए राज्य तथा केन्द्र शासन के निर्माण विभाग एवं शासकीय उपक्रम में वांछित श्रेणी में पंजीकृत ठेकेदारों/संस्थाओं से प्रपत्र बंध पर आयटम दर के अनुसार दो लिफाफा पद्धति में मुहरबंद निविदायें आमंत्रित की जाती हैं। मुहरबंद निविदायें दिनांक 27.10.09 को अपरान्ह 2.30 बजे तक इस कार्यालय में रखी निविदा पेटी में प्रस्तुत की जा सकेंगी, जो उसी दिनांक को अपरान्ह 3.00 बजे उपस्थित इच्छुक निविदाकर्ताओं/प्रतिनिधियों तथा निर्णायक समिति के समक्ष अधोहस्ताक्षरकर्ता द्वारा खोली जावेगी। यदि किसी कारणवश उक्त दिनांक को अवकाश घोषित हो जाता है तो निविदा प्रस्तुत करने एवं खोलने की कार्यवाही आगामी कार्यदिवस में की जावेगी। यह निविदा सूचना एन.आई.सी. की वेबसाईट www.mpnrc.in/services/opportunities पर प्रकाशित की गई है।

क्र.	कार्य का नाम	अनुमानित राशि रूपये	बयाने की राशि रूपये	निविदा प्रपत्र का मूल्य रूपये	ठेकेदारों की श्रेणी	कार्यावधि
01	गढ़कुण्डार का किला जिला टीकमगढ़ का अनुरक्षण कार्य	73,54,200/-	55,160/-	3,000/-	अ-3/समकक्ष एवं उच्च श्रेणी	8 माह
02	नरवर किला नरवर जिला शिवपुरी का अनुरक्षण कार्य	50,00,000/-	37,500/-	3,000/-	अ-2/समकक्ष एवं उच्च श्रेणी	6 माह
03	गूजरी महल, ग्वालियर का अनुरक्षण कार्य	32,89,550/-	24,670/-	3,000/-	अ-2/समकक्ष एवं उच्च श्रेणी	5 माह
04	सानौधा का किला सनौधा जिला सागर का अनुरक्षण कार्य	20,00,000/-	15,000/-	15,00/-	अ-1/समकक्ष एवं उच्च श्रेणी	5 माह

GYAN SINGH SISODIA V. STATE OF M.P.

“कार्यालय उपसंचालक, पुरातत्व अभिलेखागार एवं संग्रहालय
उत्तरी क्षेत्र, गूजरी महल संग्रहालय, किला गेट ग्वालियर म.प्र.

क्रमांक 978/अनु/12वे.वि.आ/नि./2009-10

ग्वालियर, दिनांक 27.10.09

द्वितीय अल्पकालीन निविदा आमंत्रण सूचना

अधोहस्ताक्षरकर्ता द्वारा निम्नलिखित कार्यों के लिए राज्य तथा केन्द्र शासन के निर्माण विभाग एवं शासकीय उपक्रम में वांछित श्रेणी में पंजीकृत ठेकेदारों/संस्थाओं से प्रपत्र 'ब' पर आयटम दर के अनुसार दो लिफाफा पद्धति में मुहरबंद निविदायें आमंत्रित की जाती हैं। मुहरबंद निविदायें दिनांक 10.11.09 को अपरान्ह 2.30 बजे तक इस कार्यालय में रखी निविदा पेटी में प्रस्तुत की जा सकेगी, जो उसी दिनांक को अपरान्ह 3.00 बजे उपस्थित इच्छुक निविदाकर्ताओं/प्रतिनिधियों तथा निर्णायक समिति के समक्ष अधोहस्ताक्षरकर्ता द्वारा खोली जावेगी। यदि किसी कारणवश उक्त दिनांक को अवकाश घोषित हो जाता है तो निविदा प्रस्तुत करने एवं खोलने की कार्यवाही आगामी कार्यदिवस में की जावेगी। यह निविदा सूचना एन.आई.सी. की वेबसाईट www.mpnic.in/service/opportunities पर प्रदर्शित की गई है।

क्र.	कार्य का नाम	अनुमानित राशि रूपये	बयाने की राशि रूपये	निविदा प्रपत्र का मूल्य रूपये	ठेकेदारों की श्रेणी	कार्यवधि
1	गढ़कुण्डार का किला जिला टीकमगढ़ का अनुरक्षण कार्य	73,54,200/-	55,160/-	3,000/-	अ-3/समकक्ष एवं उच्च श्रेणी	10 माह
2	गूजरी महल, ग्वालियर का अनुरक्षण कार्य	32,89,550/-	24,670/-	3,000/-	अ-2/समकक्ष एवं उच्च श्रेणी	6 माह
3	सानौधा का किला सनौधा जिला सागर का अनुरक्षण कार्य	20,00,000/-	15,000/-	15,00/-	अ-2/समकक्ष एवं उच्च श्रेणी	6 माह

3. The Record demonstrates that the Petitioner Gyan Singh Sisodiya and M/s. Rajawat & Company had submitted their respective Applications for the issuance of the Blank Tenders Forms on Date 24.10.2009 in terms of Clause-2 of NIT 03.10.2009 and after examination and screening of their Documents, the Blank Tender Forms were issued to them on Date 26.10.2009, for their submission back into the Office on Dates 27.10.2009 and 28.10.2009.

4. Shri Brijesh Sharma Learned Counsel appearing for the Petitioner Gyan Singh Sisodiya submits that the Petitioner had applied for obtaining Blank Forms in relation to NIT 719/03.10.2009 and the Blank Tender Forms were issued in the late evening hours on Date 26.10.2009 and since the filled up Forms along with Bids were required to be submitted within 24 hours on Date 27.10.2009, as per the Tender's Condition, it was possible for the Petitioners to have submitted only One Form in relation to work mentioned at Item No. 2 Narvar Fort, due to paucity of time and rest of the Forms for Garhkundhar Fort and Gujri Mahal Sanuadha Fort could therefore be not submitted. Shri Sharma submits that no Condition was prescribed in NIT No.719/03.10.2009 (Annexure P/7) that if the Forms are

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procured and are not submitted back, then Tenderer would be debarred in future, therefore, there was no occasion for the Department to have restricted the Entry or the Participation of the Petitioners at the time, when Second Short Term NIT No. 978 was published on Date 27.10.2009, wherein a restriction was imposed in relation to those Applicants/Tenderers who had obtained Blank Tender Forms in relation to the Previous NIT and failed to submit the filled up Tender Forms.

5. A perusal of the Impugned NIT (Annexure P/1) bearing No. 978/27.10.2009 demonstrate that at Serial No. 12 of the Conditions of NIT, the Department has specifically restricted the supply of the Blank Tender Forms to those intending Tenderers, who had obtained Blank Forms, pursuant to the NIT Dated 27.10.2009 (it should have been Date 03.10.2009) and as such a Condition in the shape of a restriction or a bar, incorporated in the Second NIT Dated 27.10.2009, without providing for such a Condition in the First NIT Dated 03.10.2009. Since both the cases are based upon Clause 12 of the Conditions of NIT, the same is being quoted:-

“12. दिनांक 27.10.2009 को आमंत्रित निविदाओं के निविदा प्रपत्र क्रय करके भी ना डालने वाले ठेकेदारों को उस कार्य के निविदा प्रपत्र इस बार प्रदाय नहीं किये जायेंगे।”

6. Shri Brijesh Sharma submits that when the Second NIT was published on Date 27.11.2009, the Petitioner had submitted three Applications on Date 05.11.2009 (Vide Annexure P/2, P/3 and P/4) for obtaining Blank Tender Forms for Garhkundhar Fort, Gujri Mahal and Sanaudha Fort but the Deputy Director subsequently informed the Writ Petitioner on Date 09.11.2009 that the prayer for issuance of Blank Forms has been rejected in terms of Clause 12 of Tender Conditions, as the Tender Committee has made an endorsement on the Three Applications regarding disability of the Writ Petitioners in procuring Tender Forms. In this facts situation, the Petitioner has questioned the legality and propriety of incorporation of Clause 12 as a restriction of his Fundamental Right to carry on his business freely, in violation of Article 19 (1) (g) of the Constitution of India and has sought quashment of this Condition/Restriction with the prayer to issue Direction for calling fresh NIT for the same works.

7. Shri P.N. Gupta learned Government Advocate has argued that since the Petitioner has not submitted the Tender Form in spite of receiving the Blank Tender Forms from the Department, he had violated the Tender Conditions and by creating a "Pool" with other Tenderers, he has deliberately not submitted the Tenders, just to facilitate the other participants as also with a view to delay execution of the Project. Shri Gupta submits that the Central Government has granted specific funds for the maintenance of the Archaeological sites, for restoration of Monuments and since the entire work is required to be completed up to Date 31.03.2010, the Department was left with no choice except to debar/restrict those Tenderers who

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had obtained Blank Forms pursuant to the First NIT. Shri Gupta has relied upon Minutes of the Tender Committee for demonstrating that work prescribed at Item No. 1 in relation to Garhkundhar Fort was given to one Contractor M/s. Mudgal Construction Company, Morena, and necessary recommendations have been made for awarding contract to this company and since this Court has passed interim Orders for not finalizing the Tender, therefore, the Work Order has not been issued.

8. Shri MPS Raghuwanshi appearing on behalf of the Intervener (who subsequently has been arrayed as the Respondent no.4) M/s. Mudgal Construction Company has initially submitted an intervention application alongwith an application for vacation of the interim order and upon being arrayed as a party respondent, a detailed reply has been filed by demonstrating that the Respondent no.4 has submitted its Tender and after evaluating the Bids/Documents the Department has found him to be eligible Contractor for being awarded contract and since the Tender Forms were obtained by the Petitioners of the two Writ Petitions and the same were not submitted maliciously and deliberately at the stage of First NIT, therefore, the Department has rightly imposed a Condition in the NIT for not supplying the Blank Forms to the Writ Petitioners.

9. We have heard Shri Brijesh Sharma, Learned Counsel for the Petitioner and Shri SPS Jadon, Learned Counsel for the other Petitioner and we have also heard Shri P.N. Gupta, Learned Government Advocate and Shri MPS Raghuwanshi, Learned Counsel appearing for the Respondent no.4 in Writ Petition No.5371/09 and have also perused the record of the case and have also perused the documents annexed by the Petitioners and the respondents alongwith their pleadings and have also given our thoughtful consideration of the matter.

10. A perusal of the First Two NITs Dated 03.10.2009 demonstrate that the Deputy Director (Archeology & Museum) had published the NIT for a total of 8 Archaeological Sites and as per Clause 2 of the NIT, very inadequate time was fixed for applying and supplying the Tender Forms, in as much as Date 24.10.2009 was fixed for submitting the applications for obtaining Blank Tender Forms and Date 26.10.2009 was fixed for supplying of the Blank Tender Forms to the applicants and Date 27.10.2009 was fixed (in NIT No.719) and Date 28.10.2009 as fixed (In NIT No.721) for the submission of the filled up Tender Forms alongwith the Bids of the Tenderers, which means that after supplying of the Blank Tender Forms on Date 26.10.2009, the Tenderers were having only 24 hours duration for making preparation for the filling up of the Tender Forms of the Bids, as the filled up Forms were required to be submitted at 3.00 Hours in the afternoon on Date 27.10.2009 and in this view of the matter, the arguments of Shri Brijesh Sharma, Learned Counsel for the Petitioner appears to be quite convincing that due to paucity of time, the Petitioner could submit only one Tender Form out of 3 Tender

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Forms, purchased by him, in relation to the 4 Sites mentioned in NIT No.719/ Dated 03.10.2009.

11. The incorporation of a restriction in the shape of a Condition at Sr. No.12 in NIT 978/Date 27.10.2008, certainly requires a reference to the incorporation of a similar Condition in the previous NIT, because unless the Intending Tenderers are warned/alarmed about the future events; on account of their non-participation or non-submission of the Tender Forms, it appears to be quite an unreasonable restriction/condition on such Tenderers who had no idea about the disability being subsequently attached or found in their previous conduct. Even if Condition No.12 is independently analyzed for its objective analysis, it requires reference to some previous declaration, without which it would not justify the incorporation of the Condition straightway at the time when the impugned Second NIT came to be published on Date 27.10.2009.

12. During the course of the arguments much stress was given by the Counsel appearing for the Writ Petitioners that Clause 12 is not properly drafted because it contemplate for an exigency of non-supply of the Tender Forms, which relates to the Tender published on Date 27.10.2009, whereas the two Tenders were published on Date 3.10.2009 and as such Clause 12 could have not been invoked for the purposes of denying the entry into the Tender Process, as the First Tender was not published on Date 27.10.2009, but was published on Date 03.10.2009.

13. The contention of the Learned Government Advocate Shri P.N. Gupta appears to be satisfactory in this regard, when he makes a reference to the date of the submission of the filled up Tenders on Date 27.10.2009, which was the date prescribed in the First NIT issued on Date 3.10.2009 and, therefore, we hold that the mention of Date 27.10.2009 in Clause 12 would be attributable to the date of the submission of the filled up Tender Forms of the First NIT.

14. The main argument of Shri Brijesh Sharma regarding incorporation of the restrictive Condition in Clause 12, on the basis of the publication of the Second NIT on Date 27.10.2009 itself, appears to be quite attractive when he demonstrate that when the last date for submission of the duly filled up Tenders in the First NIT was at 3.00 Hours in the afternoon on Date 27.10.2009, how the Department could have published the Second NIT on the very same Date 27.10.2009, without waiting for finalization or opening of the Tenders. This certainly creates a doubt against the Department as to how, without opening the sealed Tenders, a decision to re-tender 3 Archaeological Sites out of a total of 4 Archaeological Sites, could be taken on Date 27.10.2009 and how in such a short span, the NIT could be ordered to be published.

15. The Learned Government Advocate could not advance any argument to negative the contention of Shri Brijesh Sharma on this count, except to make a reference to the times of the submission of the Forms and publication of the Second

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NIT. This shows that the Department has acted in a very hasty and negligent manner in relation to the entertainment of the Application Forms, supply of the Blank Tender Forms and the proceeding of the filled up Forms and publication of the Second NIT, which has created a chaotic situation.

16. Shri MPS Raghuwanshi, Learned Counsel appearing for the Respondent no.4 submits that the Two Tender Forms were submitted on behalf of M/s. Mudgal Construction Company in relation to Garhkundhar Fort and Gujri Mahal and no Tender Form was obtained or submitted by him for the Third Archaeological Site, i.e., Sanaudha Fort, which stood re-advertised by the Third NIT Date 03.12.2009. He submits that when the Writ Petitioners had deliberately avoided submission of their Bids, the Department was left with no choice, but to re-advertise, by placing a restriction on such erring Tenderers, however, this Court is required to examine as to whether in the peculiar facts and circumstances of the case, such a Condition could have been incorporated in the Second NIT, without making any mention of the same in the First NIT.

17. The record reveals that when Petitioner Gyan Singh Sisodiya submitted three applications for 3 Archaeological Sites on Date 05.11.2009, the Tender Committee made an endorsement on the application itself that the Tender Forms cannot be supplied to him.

18. Shri Brijesh Sharma has vehemently argued that when the Petitioner had submitted the application on Date 05.11.2009 and the Tender Committee sat over the matter uptill the Date 09.11.2009, there was every occasion for the Department and the Tender Committee to have either invited the Writ Petitioner for personal hearing or could have sought clarification about the non-submission of the Tender Forms, before straightway Ordering for the non-supply of the Tender Form to the Petitioner by making a reference to Clause 12 of the Tender Condition.

19. This argument appears to be quite convincing, on being tested at the touchstone to the principles of natural justice, which provide for a hearing before passing of an adverse order, but in the facts of the case, it appears that when a Condition was already in existence in the Second NIT, the Tender Committee was having no opportunity to have either invited the Petitioner for a hearing or to have sought clarification regarding non-submission of the Tender pursuant to the First NIT, therefore, the argument based upon the principle of natural justice, seems to be not available, much less tenable in the eyes of Law, upon having no occasion of providing a hearing by the Department.

20. Shri Brijesh Sharma, Learned Counsel for the Petitioner has drawn our attention to the judgment of the Supreme Court reported as (1994) 6 SCC 651 *Tata Cellular v. Union of India*, wherein the Supreme Court has categorically provided for certain exigencies, in which the judicial review could be made in contractual matters and Para 94 of the Judgment contains the broad principles,

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upon which the issues relating to grant of contracts and the conditions of the Tender could be tested. For ready reference, Para 94 is quoted hereinbelow :-

"94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for any administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

21. Shri Brijesh Sharma while advancing the arguments about the ulterior motives, favouritism, malice and malafide has relied upon a judgment of the Supreme Court reported as (1997) 1 SCC 738, *Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd. and Others*, where in Para 10 of the Judgment, the Supreme Court has permitted the Judicial Review in relation to the Contractual Matters in the following terms;

"10. Therefore, though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the court that in the matter of award of a contract power has been exercised for any collateral purpose."

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22. The scope of Judicial Review has been further clarified in a recent Judgment of the Supreme Court reported as (2009) 6 SCC 171, *Meerut Development Authority v. Association of Management Studies & another*, where in the Paragraphs 26 and 28, the Supreme Court has observed that in the limited sphere of Judicial Review, the validity of the terms and condition of the Tender could be validly examined. The relevant extract of Paragraphs 26 and 28 are quoted hereinbelow ;

"26. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

28. It is so well settled in law and needs no restatement at our hands that disposal of the public property by the State or its instrumentalities partakes the character of a trust. The methods to be adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process."

23. Shri Brijesh Sharma, Advocate submits that Clause No.12 has been purposefully incorporated in the Terms of NIT, with a view to exclude participation of the present Writ Petitioners and for substantiating this submission, he refers to a Judgment of the Supreme Court reported as (2004) 11 SCC, 485, *Jespar I. Slong v. State of Meghalaya & Others*, which was a case based upon the exclusion of competition, where in Para 19 of the Judgment, the Supreme Court has observed in the following terms ;

"19. It goes without saying that the Government while entering into contracts is expected not to act like a private individual but should act in conformity with certain healthy standards and norms. Such actions should not be arbitrary, irrational or irrelevant. The awarding of contracts by inviting tenders is considered to be one of the fair methods. If there are any reservations or restrictions then they should not be arbitrary and must be justifiable on the basis of some policy or valid principles which by themselves should be reasonable and not discriminatory.

24. Shri Brijesh Sharma has also placed reliance on another Judgment of the Supreme Court reported as (2005) 1 SCC 679, *Association of Registration Plates v. Union of India & Others*, for advancing the analogy of discrimination, based upon Article 14 of the Constitution of India to demonstrate that the impugned

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condition was so Tailor-made that it has calculatedly ousted the present Petitioners. He relies upon Paragraphs 43 and 44 of this Judgment to substantiate his submissions. The Two Paragraphs are quoted hereinbelow ;

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

44. The grievance that the terms of notice inviting tenders in the present case virtually create a monopoly in favour of parties having foreign collaborations, is without substance. Selection of a competent contractor for assigning job of supply of a sophisticated article through an open-tender procedure, is not an act of creating monopoly, as is sought to be suggested on behalf of the petitioners. What has been argued is that the terms of the notices inviting tenders deliberately exclude domestic manufacturers and new entrepreneurs in the field. In the absence of any indication from the record that the terms and conditions were tailor-made to promote parties with foreign collaborations and to exclude indigenous manufacturers, judicial interference is uncalled for. "

25. To counter the arguments of the Counsel for the Petitioners, Shri P.N. Gupta, Learned Government Advocate has relied upon a Division Bench Judgment of this Court reported as ILR (2009) MP 2576, *Rakesh Kumar Naik v. State of M.P.*, to demonstrate that when the Terms of the NIT are not arbitrary, discriminatory or actuated by malice, the Court should not interfere. He has also relied upon a Judgment of the Supreme Court reported as (2008) 10 SCC 404, *United India Insurance Co. Ltd. v. Manubhai Dharmasinhbhai Gajera* to broadly demonstrate the fairness and reasonableness in the action of the Public Law Authorities and has prayed for non-interference in the Contractual Matter. Shri Gupta Learned Government Advocate has also drawn our attention to a Judgment of the Division Bench of this Court, reported as 2009 (1) MPHT 78 (DB), *Baldev Singh Yadav. v. Kalyan Singh* to demonstrate that the scope of the Judicial Review is limited in its application to the laying of the new Conditions.

26. Shri MPS Raghuwanshi, Learned Counsel for the Private Respondent has also relied upon the same Judgment of the Supreme Court reported as (1997) 1 SCC 738, *Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd. & Others*, with a view to impress upon the Court that on account of interference in the Contractual Matter, the cost of the Project escalates

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and from this point of view, he prayed for making no interference in the Conditions of the Notice Inviting Tender. He also relied upon another Judgment of the Supreme Court reported as (2009) 2 SCC 198, *B.P. Moideen Sevamandir v. A.M. Kutty Hassan* to impress upon us that the Court should not sit as an Appellate Authority over the decision of the Administrator or Subordinate Authorities.

27. Now the question for consideration regarding legality and correctness of the incorporation of the condition about placing restriction on the Tenders would attract its attention to the principles applicable in the field of inviting Tenders and grant of Contracts, where the Employer alone decide the Rules of Game and when the Employer happens to be a Government or its Agencies, it has to satisfy all the tests in relation to the conditions it incorporate/impose on the Tenders. This Court has no hesitation in observing that the framing of the Conditions certainly vest exclusively with the Central Government, State Government and the Other Authorities, inviting Tenders for their respective works, but it certainly obliges the Government to justify as to whether the condition incorporated in the N.I.T. passes the test of legality and reasonableness.

28. The Supreme Court of India had categorically stated in a series of judgments that the Courts should not make any interference in the contractual matters and should refrain itself from substituting the Conditions imposed in the Tenders as the same lie in the exclusive domain of the Employer, who intend to get its work done, but in the limited sphere of the jurisdiction available to the Court, the Supreme Court has also permitted interference, when an entirely illegal condition is being imposed, with an intention to either include or exclude some individuals with ulterior motives, inferable from the record of the case. The Supreme Court has also permitted entertainment of such matters where the Tender Condition seems to have been incorporated by way of punishment or a penalty, without complying with the principles of natural justice and we find that since the Writ Petitioners of the two Writ Petition had failed to submit the Tender Forms pursuant to the First NIT, the incorporation of the Condition (Clause 12) in the Second NIT would virtually constitute as a "Penal Clause" without there being an initial adjudication or extension of the right of hearing to the affected persons. Therefore, this seems to be a case where the petitioners, on account of purchasing the Blank Tender Forms, have been actually penalized from not participating at a subsequent stage, when the Second NIT was published for the same work and from this view of the matter, this Court feels inclined to make interference in this matter, where Clause 12 is incorporated virtually as a Penal Clause.

29. The entire Judgments, cited at the bar, on behalf of the Litigating Parties also demonstrate that there exist a narrow scope of interference by the Court of Law, while making Judicial Review of the matter, but these Judgments also empower the High Courts to analyse and examine the validity, legality, objectivity and

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justification of any such Condition in the Terms of the NIT, upon finding the same to be incorporated with a malicious intention or as a result of arbitrary exercise of Administrative Authority or actuated with a view to punish the alleged wrong doer, without applying the principles of natural justice. The present two cases clearly highlight the highhandedness of the State/Respondents in abusing their administrative power of laying down a Condition, in the shape of a restriction, with a view to take action against the wrong doers (based upon their previous conduct) without issuing any show-cause notice to them, before incorporating a Restrictive Condition regarding their participation in the tendering process. This Court has no sound material available on the record to observe that the same was actuated with a view to promote individual interest of the successful Bidder, but there exists sufficient material to demonstrate that the Department has incorporated the Condition, with a view to simply punish the Tenderers, who had not submitted the Tender Forms pursuant to the previously published NIT, which easily connect the two terminal event, relatable to the conduct of the Petitioners, for which a prior adjudication of the wrong was required to be adjudicated upon.

30. Had it been a case where soon after the discovery of the factum at the failure of the Tenderers, (who did not submit the Tender Forms, pursuant to the initial NIT) an explanation would have been sought and an order would have been passed by finding them guilty of non-submission of the Tender Forms, the Department would have been absolutely justified in putting the restriction in the shape of a Condition in the subsequently published NIT, but in absence of a clear Condition about the consequence of non-submission of the Tender in the First NIT the instant restriction at the stage of the Second NIT, would be nothing short of introducing a Penal Clause in the Terms of the NIT, as the same puts fetters/restrictions on the fundamental right of a citizen, in violation to the Constitutional guarantee, enshrined in Article 19 (1) (g) of the Constitution of India, and as such this Court has no hesitation to quash the Condition No.12 of the NIT, being violative of the Constitutional mandate enshrined in Articles 14 and 19 of the Constitution of India.

31. The contention about expiration of the time limit or lapses of the budget allocation after 31st March appears to be peculiar explanation applied on behalf of the State Government to justify or to cover up their hasty actions, in as much as the arguments about the inadequacy of time lie good in the mouth of the Writ Petitioners, because insufficient time was given to them for obtaining and submitting the tender form, but it does not lie good in the mouth of the State Authorities to have projected a hollow argument to foreclose the right of the intending tenderer by fixing shortest possible time for procuring and submitting the filed up tender form, as a perusal of Three NITs (Annexures P/1, P/6 & P/7) demonstrate that even when the tenders were published on Date 03.10.2009 and Date 27.10.2009, the Department has opted to issue blank tender forms only before 24 hours of the

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last date, prescribed for submitting the filed up tender form. Therefore, the arguments advanced on behalf of the State Government in relation to the conduct of the tenderer, for not submitting the tender in previous NIT could not be treated to be a convincing argument and would not work as a fatal circumstance against the Tenderer for drawing any inference based upon such conduct, which could disable them from grant of the desired relief from this Court and as such no adverse inference could be drawn on the basis of the conduct of the Tenderers in relation to the previous NIT, for justifying the incorporation of condition No. 12. It would not be out of place to mention that when Third N.I.T. was published on Date 07.12.2009, the restriction clause (12) was omitted from the Terms of N.I.T.

32. Therefore, in view of the aforesaid discussion, We find that the Department has incorporated condition No. 12 as a penal clause in the terms of NIT with a view to exclude the participation of the Writ Petitioners in the first NIT without adjudicating their alleged wrong, before incorporating the impugned condition/restriction in the subsequently issued NITs and as such, We hereby quash the Condition No. 12 of the impugned NIT Dated 27.10.2009 (Annexure P/1) as also the entire Tender proceeding initiated on the strength of the impugned N.I.T.

33. Consequently, both the Writ Petitions are allowed and the State Respondents are directed to invite fresh tender in relation to the same work for which the impugned NIT Dated 27.10.2009 was published, by permitting all the intending Tenderers to participate in the tender process, right from the stage of the grant of blank tender form to the stage of their actual participation in the tendering process without incorporating any such condition which would exclude the participation of the Writ Petitioners. Needless to observe that any step taken pursuant to the impugned NIT Dated 27.10.2009 which will include processing of the proposal of the respondent No. 4 would be treated to be meaningless and ineffective, in view of the quashment of the condition No. 12 as also entire tendering process initiated through NIT Dated 27.10.2009.

34. Therefore, both the Writ Petitions are allowed, however, there shall be no order as to costs.

Petition allowed.

PADAM SINGH (DR.) Vs M.P.P.S.C.

I.L.R. [2010] M. P., 1331

WRIT PETITION

Before Mr. Justice S.C. Sharma

3 February, 2010*

PADAM SINGH (DR.)

... Petitioner

Vs.

M.P.P.S.C. & ors.

... Respondents

Service Law - Appointment - Challenge to selection process when not justified - Petitioner undergoing the selection process and after being unsuccessful in the process challenging the condition of the advertisement - Held - If a candidate is of the opinion that the advertisement and selection process were not in accordance with the rules, he was required to challenge the advertisement and selection process without participating in the selection process. - Petitioner has participated in the process of selection with open eyes, and therefore, he is estopped from challenging the same in respect of the alleged irregularity in respect of the qualifications. (Para 14)

सेवा विधि - नियुक्ति - चयन प्रक्रिया को चुनौती कब न्यायोचित नहीं - याची ने चयन प्रक्रिया में भाग लिया और प्रक्रिया में असफल होने के बाद विज्ञापन की शर्त को चुनौती दी - अभिनिर्धारित - यदि अस्थायी की यह राय हो कि विज्ञापन और चयन प्रक्रिया नियमों के अनुसार नहीं थी तो उसे चयन प्रक्रिया में भाग लिये बिना विज्ञापन और चयन प्रक्रिया को चुनौती देना अपेक्षित था - याची ने जानकारी के साथ चयन की प्रक्रिया में भाग लिया है और इसलिए वह अर्हताओं के सम्बन्ध में कथित अनियमितताओं के बारे में उसे चुनौती देने से विवर्धित है।

Cases referred :

AIR 2008 SC 1913, AIR 2008 SC 148.

Pawan Dwivedi, for the petitioner.

R.D. Jain with S.K. Jain, for the respondent No.1.

Nidhi Patankar, Dy.G.A., for the respondent No.2.

Abhishek Mishra, for the respondent No.4.

Rakesh Narayan Dixit, for the respondent No.6 to 8.

ORDER

S.C. SHARMA, J. :-The petitioner before this Court has filed this present writ petition being aggrieved by his non-selection to the post of Assistant Professor (Geography). The contention of the petitioner is that he has obtained M.A. in 1st Division in the subject of Geography in the year 1990, and thereafter, in the year 1997 he was awarded Ph.D. degree in the subject of Geography. The petitioner has further stated that an advertisement was issued by the Madhya

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Pradesh Public Service Commission for filling-up the back log vacancies in respect of the Schedule Caste and the Schedule Tribe category and in all 28 posts of Assistant Professor (Geography) were advertised. The petitioner has enclosed advertisement dated 10.7.2003 as Annexure P/3. The petitioner has further stated that as per the advertisement, a candidate was required to have the qualifications for the post as fixed by the University Grants Commission and in case a candidate was holding a Ph.D. degree, he was exempted from passing National Eligibility Test (NET) or Madhya Pradesh State Level Eligibility Test (SLET) Examination. The petitioner has further stated that a corrigendum was issued by the respondents on 27.9.2003 wherein the educational qualification were relaxed and it was provided that the candidates who have not cleared National Eligibility Test (NET), Madhya Pradesh State Level Eligibility Test (SLET) or Ph.D. degree shall be entitled to submit their applications, however, they were required to obtain National Eligibility Test (NET) or Madhya Pradesh State Level Eligibility Test (SLET) or Ph.D. degree within a period of two years from the date of selection. The petitioner has further stated that the qualification for the post of Assistant Professor are prescribed under the Madhya Pradesh Educational Service (Collegiate Branch) Recruitment Rules, 1990 and the Schedule III appended of the aforesaid rules provides for passing of National Eligibility Test (NET) or Madhya Pradesh State Level Eligibility Test (SLET) or Ph.D. degree. The petitioner has further stated that the educational qualification prescribed under the Rules of 1990 are the essential qualifications and the same has been fixed as per the guidelines framed by the University Grants Commission from time to time. The petitioner has further stated that the respondent No.4 to 8 were not holding to their credit, the National Eligibility Test (NET) or Madhya Pradesh State Level Eligibility Test (SLET) or the Ph.D. degree, and therefore, they were not entitled to participate in the selection process. The petitioner has also relied, upon a letter issued by the University Grants Commission dated 9.12.2004, wherein it was clarified by the University Grants Commission that the exemption from passing National Eligibility Test (NET) shall be granted only when no National Eligibility Test (NET)/Madhya Pradesh State Level Eligibility Test (SLET) examination was conducted in the subject concerned and shall be granted only when National Eligibility Test (NET)/ Madhya Pradesh State Level Eligibility Test (SLET) qualified/exempted candidates are not available when interviews are held following due procedure. The petitioner's contention is that even though he is holding a Ph.D. degree, he was not called for the selection and, therefore the respondents/authorities have violated the norms framed by the University Grants Commission in not calling the petitioner for the interview and it was obligatory on the part of the respondents to call the petitioner in the first place for the interview as per the guidelines of the University Grants Commission. The petitioner has further stated that it was obligatory on the part of the respondents to first call the

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petitioner for interview and only thereafter, the candidates who are not holding National Eligibility Test (NET)/Madhya Pradesh State Level Eligibility Test (SLET) could have been called for the interview. The petitioner has prayed for issuance of appropriate writ or order or direction for quashing the selection process initiated by the Madhya Pradesh Public Service Commission.

2. A reply has been filed on behalf of respondent No.1/Madhya Pradesh Public Service Commission. The respondent No.2/State has adopted the reply filed by the respondent No.1/Madhya Pradesh Public Service Commission in the matter.

3. Learned Government Advocate appearing on behalf of the respondent No.2/State and learned senior counsel for the respondent No.1/Madhya Pradesh Public Service Commission have stated and argued before this Court, that in order to fill-up the backlog vacancies of the Schedule Caste and the Schedule Tribe categories, an advertisement was issued on 10.7.2003, and thereafter a corrigendum was issued on 27.9.2003, wherein it was mentioned that the candidates who have not cleared National Eligibility Test (NET), Madhya Pradesh State Level Eligibility Test (SLET) or Ph.D. degree can also participate in the selection process subject to a condition that they will have to acquire the aforesaid qualification within a period of two years from the date of their selection. The learned Senior counsel has also argued before this Court that the University Grants Commission has issued a notification dated 31st July, 2007 and the University Grants Commission itself has provided exemption/relaxation in respect of qualification as per the aforesaid notification, and also keeping in view the relaxation as provided under Rule 24 of the M.P. Educational Service (Collegiate Branch) Recruitment Rules, 1990 no illegality has been committed in the matter of filling-up the back log vacancies of the schedule caste and the schedule tribe candidates. He has also argued that the petitioner with open eyes has participated in the selection process and now is challenging the selection of the respondent No. 4 to 8 after he was declared as an unsuccessful candidate in the process of selection. The contention of the learned senior counsel appearing on behalf of the M.P.P.S.C., before this Court is that the petitioner cannot be permitted to challenge the rule of the game as has been done in the present case after the game is over. He has relied upon judgments delivered by the Hon'ble Apex Court in *Dhananjay Malik & Ors. V. State of Uttaranchal & Ors.* reported in AIR 2008 Supreme Court 1913 and *Trivedi Himanshu Ghanshyambhai V. Ahmedabad Municipal Corporation & Ors.* reported in AIR 2008 Supreme Court 148 and prayed for dismissal of the writ petition.

4. Learned counsel appearing for the respondent No. 4 has argued before this Court that he was fulfilling all the requisite qualifications as per the advertisement dated 27.9.2003 and he has rightly been selected by virtue of the selection process and the petitioner who was found less meritorious in the selection process for the

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post of Assistant Professor cannot claim the appointment as a matter of right. The respondent No.4 has also prayed for dismissal of the writ petition.

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

6. In the present case, the petitioner is holding a Ph.D. degree and has submitted an application in response to an advertisement issued by the M.P.P.S.C. on 10.7.2003 inviting applications for the post of Assistant Professor (Geography). A corrigendum was issued by the M.P.P.S.C. on 27.9.2003 (Annexure P-4) and as per the corrigendum, the essential qualifications required for the post of Assistant Professor were relaxed. It is pertinent to note that exemption/relaxation from National Eligibility Test (NET)/Madhya Pradesh State Level Eligibility Test (SLET)/Ph.D. degree was granted and a condition was imposed that a candidate selected will have to acquire National Eligibility Test (NET)/Madhya Pradesh State Level Eligibility Test (SLET)/Ph.D degree within a period of 2 years from the date of selection. The petitioner did not challenge the advertisement at the relevant point of time and participated in the process of selection which was exclusively held for the reserved category candidates. The petitioner has received 42 marks in the process of selection and as per the merit list prepared by the M.P.P.S.C., the last male category candidate has received 53 marks. In the waiting list candidates, the last candidate selected has received 46 marks and as the petitioner's name did not find place in the main list nor in the waiting list, as he has obtained less marks in the selection process, and therefore, he has filed the present writ petition.

7. In exercise of the powers conferred by proviso to Article 309 of the Constitution, the Governor, State of Madhya Pradesh has framed the recruitment rules relating to appointment on the post of Assistant Professors, known as the Madhya Pradesh Educational Service (Collegiate Branch) Recruitment Rules, 1990. Schedule III of Rules, 1990 provides for qualification in respect of the post of Assistant Professor and the same provides that the candidates are required to fulfill the criteria as framed by the University Grants Commission from time to time and it also provides that the candidates who have not passed National Eligibility Test (NET) or Madhya Pradesh State Level Eligibility Test (SLET) or have submitted P.H.D. thesis to the university in the concerned subject on or before 31st December, 2002 are exempted from appearing in the National Eligibility Test (NET) examination.

8. The University Grants Commission in exercise of the powers conferred by clause (e) & (g) of sub section (1) of Section 26 read with Section 14 of University Grants Commission Act 1956 has issued a notification in the year 2002 and the aforesaid notification dated 31st July, 2002 provides for exemption in respect of Ph.D. degree. Notification issued by the University Grants Commission reads as under:-

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NET shall remain the compulsory requirement for appointment as Lecturer even for candidates having Ph.D. Degree. However, the candidates who have completed M.Phil degree by 31st December, 1993 or have submitted Ph.D. thesis to the University in the concerned subject on or before 31st December 2002 are exempted from appearing in the NET examination. In case such candidates fail to obtain Ph.D. degree they shall have to pass the NET examination.

9. The aforesaid notification provides that candidates who are not holding the qualification of National Eligibility Test (NET) examination can participate in the process of selection for the post of Assistant Professor subject to certain terms and conditions, not only this, Rule 24 of the Madhya Pradesh Educational Service (Collegiate Branch) Recruitment Rules, 1990, empowers the Governor to relax the rules. In the present case, there were as many as 863 backlog vacancies of the post in question in respect of the Schedule Caste & the Schedule Tribe candidates in the State of Madhya Pradesh and under such circumstances, a policy decision was taken by the State Government to grant relaxation as one time measure for the Schedule Castes and Schedule Tribes candidates to participate in the process of selection, with a clear stipulation that they shall obtain National Eligibility Test (NET) or Madhya Pradesh State Level Eligibility Test (SLET) or Ph.D. degree within a period of two years from the date of their selection.

10. Learned counsel appearing for the petitioner has relied upon a letter issued by University Grants Commission dated 9.12.2004 to the State Government and the same has been issued after the Advertisement was issued by the State Government and therefore it is a subsequent development and the same provides that persons having National Eligibility Test (NET) or Madhya Pradesh State Level Eligibility Test (SLET) or Ph.D. degree holder shall be permitted to participate in the process of interview at the first instance, however, the subsequent letter issued by the UGC cannot affect the process of selection initiated in respect to the earlier advertisement issued by M.P.P.S.C., as a policy decision was taken by the State Government in the larger interest of the Scheduled Caste and the Scheduled Tribe category candidates to relax the rules and therefore, no case is made out for any interference in the matter. It is an admitted fact that the petitioner is all raising hue and cry after he has been declared as unsuccessful in the process of selection, and therefore, this Court is of the view that the petitioner as has never protested against any conditions imposed in the advertisement earlier and with open eyes, he has participated in the process of selection cannot challenge the same after he has been declared as unsuccessful.

11. The Hon'ble Apex Court in the case of *Trivedi Himanshu Ghanshyambhai* (supra) in para 8, 9, 10 & 11 has held as under:-

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"As noted herein-earlier, respondents 2 and 3 who had filed the writ petition before the High Court, challenging the appointment of the appellant were themselves unsuccessful in the examination, even though they claimed that they had passed the written examination but failed in the interview. Since the names of respondents 2 and 3, who were the writ petitioners before the High Court, did not figure in the merit list, in our view, it was not open to them to challenge the said selection list and the appointment of the appellant before the High Court.

It is not in dispute that the respondents 2 and 3 as well as the appellant were all found eligible, in the light of the marks obtained in the written test, to be called for the oral interview. Up to this stage, there was no doubt. The respondents 2 and 3 and the appellant appeared before the Committee constituted by the Corporation for conducting the oral interview. The respondents 2 and 3 could not clear the oral interview and were not selected whereas the appellant was found successful and accordingly, selected. Therefore, there cannot be any dispute that only because the respondents 2 and 3 could not get selected and named in the final merit list, as a result of their combined performance, both in the written test as well as in the oral interview, they challenged the appointment of the appellant and other selected candidates by moving the writ petition. Such being the position, we are of the view that the High Court was not justified in exercising its power under Article 226 of the Constitution by granting relief to the writ petitioners, who are now respondents 2 and 3 in this appeal. As we are of the opinion that the appellant did possess the administrative experience of ten years required for selection to the post of Assistant Manager in view of the varied nature of work performance by him while working as an X-Ray Technician, we do not find any reason to take a view, different from the one taken by the Corporation and the Selection Committee. Therefore, we are of the view that it was not open to the respondents 2 and 3 to challenge the appointment of the appellant and other selected candidates, as they were themselves unsuccessful in the test. In this connection, reliance can be placed on a decision of this Court in the case of *Madan Lal and Others v. State of J. & K. and Others* [(1995) 3 SCC 486].

Accordingly, we are of the view that the High Court was neither justified in interfering with the appointment of the appellant by

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holding that he did not possess the requisite administrative experience of ten years while working as an X-ray Technician nor was it open to the High Court to entertain the writ petition challenging the appointment of the appellant and other selected candidates at the instance of the unsuccessful candidates.

Before parting with this judgment, we may deal with a short submission of the learned counsel appearing on behalf of the learned counsel appearing on behalf of the respondents 2 and 3. It is an admitted position that although, the respondents 2 and 3 had passed the written examination conducted under the supervision of the Indian Institute of Management, Ahmedabad, they were unsuccessful in the oral interview. Therefore, according to the learned counsel for the respondents 2 and 3, they did have the locus standi to move the writ application for challenging the appointment of the appellant because they were successful in the written examination. In this connection, a decision of this Court in this case of *Alocious Fernandez v. Union of India*, reported in [JT 1990 SC 169] was strongly relied on. In that decision, this Court had laid down that an appointment in disregard to the rules is a matter not between the appointing authority and the appointee himself, but, all those who had similar qualification and could not apply as they did not possess the qualifications mentioned in the advertisement, are also affected. Neither do we accept this submission of the learned counsel for the respondents 2 and 3, nor can we rely on the decision of this Court in the case of *Alocious Fernandez* [supra], for the simple reason that in this case, admittedly, respondents 2 and 3 were not selected on the combined performance of the candidates in the written test and the oral interview. Although, the selection process itself was challenged before this High Court, it is to be noted that the learned Single Judge, while allowing the writ application, had turned down the argument of the respondents 2 and 3 holding that the entire selection process could not be said to be illegal or tainted with mala fides. So far as the Division Bench is concerned, we do not find any argument advanced by the respondents 2 and 3 challenging the selection process before it. That being the position, we are unable to hold that even though, the respondents 2 and 3 were unsuccessful in the test and could not figure in the merit list, they would be entitled to challenge the appointment of the appellant. Another decision of this Court in the case of *Atul Khuller and*

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Others V. State of J. & K. and others reported in [(1986) Suppl SCC 225] was also relied on by the learned counsel for the respondents 2 and 3 in support of the contention that it was open for an unsuccessful candidate to challenge an appointment by way of a writ petition. Learned counsel for the respondents 2 and 3 relied on paragraph 20 of the said decision in which it has been observed by this Court that the Selection Committee conducting the viva test should maintain the entire record, including the original worksheets on which marks were recorded by each member separately, for a minimum period of one year after the examination and failure to do so can strengthen an allegation of malafide against the Selection Committee. Since the Corporation could not produce the record before the High Court, the learned counsel for the respondents 2 and 3 submitted that a case of mala fide on the part of the Corporation for not producing the records before the High Court ought to have been found and therefore the appointment of the appellant ought to be cancelled as done by the High Court. In our view, this submission of the learned counsel for the respondents 2 and 3 cannot be accepted. It is true that the records relating to the marks obtained by the candidates in the written test as well as the oral interview could not be produced before the High Court because they were lost and thus not available. In our view, in the absence of any material on record, we are unable to accept the contention of the learned counsel appearing for the respondents 2 and 3 that the records were not produced by the Corporation due to mala fide intention. In this connection, the finding of the learned single Judge on the question whether an adverse inference could be drawn against the Corporation for non-production of the records before the High Court and whether for such non-production, a case of mala fide could be found, may be seen. The learned single Judge, while allowing the writ petition, on consideration of the entire materials on record, came to a finding that in the absence of any specific averment of malafides against the Members of the Committee holding the interview test, it was neither possible to strike down the result of the interview nor would it be proper to conclude that the Corporation had conducted the interview in an illegal or unlawful manner. We also endorse the same view and hold that only because the records could not be produced in view of the fact that they were lost and not available, the appointment

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of the appellant could not be cancelled, particularly when no mala fide had been attributed by the writ petitioner-respondents 2 and 3 in the writ petition.

12. From a perusal of the aforesaid judgment delivered by the Hon'ble Apex Court in the case of *Trivedi Himanshu Ghanshyambhai* (supra), it is evident that the Hon'ble Apex Court has declined to interfere in the selection process at the behest of the candidate who participated in the process of selection and after he was declared as fail in the process of interview.

13. The Hon'ble Supreme Court in the case of *Dhananjay Malik* (supra) in para 7 & 8 held as under:-

"It is not disputed that the writ petitioners-respondents herein participated in the process of selection knowing fully well that the educational qualification was clearly indicated in the advertisement itself as B.P.E. or -graduate with diploma in physical education. Having unsuccessfully participated in the process of selection without any demur they are estopped from challenging the selection criterion inter alia that the advertisement and selection with regard to requisite educational qualifications were contrary to the rules.

In *Madan Lal vs. State of J. & K.* (1995) 3 SCC 486, this Court pointed out that when the petitioners appeared at the oral interview conducted by the Members concerned of the commission who interviewed the petitioners as well as the contesting respondents concerned, the petitioners took a chance to get themselves selected at the said oral interview. Therefore, only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed writ petitions. This Court further pointed out that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the selection committee was not properly constituted. In the present case, as already pointed out, the writ petitioners-respondents herein participated in the selection process without any demur; they are estopped from complaining that the selection process was not in accordance with the Rules. If they think that the advertisement and selection process were not in accordance with the Rules they could have challenged the advertisement and selection process without participating in the selection process. This has not been done.

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14. The Hon'ble Apex Court in the case of *Dhananjay Malik* (supra) has held that (if a candidate was of the opinion that the advertisement and selection process were not in accordance with the rules, he was required to challenge the advertisement and selection process without participating in the selection process. In the present case, the petitioner has participated in the process of selection with open eyes, and therefore, he is estopped from challenging the same in respect of the alleged irregularity in respect of the qualifications as stated by him and therefore keeping in view the judgments delivered by the Hon'ble Apex Court in the case of *Trivedi Himanshu Ghanshyambhai* (supra) and *Dhananjay Malik* (supra) and also keeping in view the relaxation granted by the State Government for the Schedule Caste and the Schedule Tribe candidates in the present matter, no case is made out for any interference in the matter.

15. Resultantly, writ petition fails and is hereby dismissed. No order as to cost.

16. Certified copy as per Rules.

Petition dismissed.

I.L.R. [2010] M. P., 1340

WRIT PETITION

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

4 February, 2010*

UNION OF INDIA & ors.

... Petitioners

Vs.

SMT. BEGUM BEE

... Respondent

Service Law - Central Civil Services (Pension) Rules, 1972, Rule 54 - Family pension - Whether payable to a dependant after attaining the age of 25 years - The pension of the dependant who was mentally challenged was stoped after he attained 25 year of age for the reason he got married - Held - A person who is mentally challenged is a perpetual minor, and therefore, he would never attain the age of 25 years - The family pension shall be paid to such person for the life. (Para 8)

सेवा विधि - केन्द्रीय सिविल सेवा (पेंशन) नियम, 1972, नियम 54 - परिवार पेंशन - क्या किसी आश्रित को 25 वर्ष की आयु प्राप्त करने के बाद देय है - आश्रित, जिसे मानसिक रूप से चुनौती दी गई, की पेंशन उसके 25 वर्ष की आयु प्राप्त करने के बाद इस कारण से रोक दी गयी कि उसने विवाह कर लिया था - अभिनिर्धारित - कोई व्यक्ति जिसे मानसिक रूप से चुनौती दी गई है शाश्वत अवयस्क होता है, और इसलिए वह 25 वर्ष की आयु कभी प्राप्त नहीं करेगा - ऐसे व्यक्ति को परिवार पेंशन जीवन पर्यन्त प्रदत्त की जाएगी।

S.A. Dharmadhikari, for the petitioners.

S.K. Nagpal, for the respondent.

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J U D G M E N T

The Judgment of the Court was delivered by **R.S. GARG, J.** :-The petitioners/Union of India and its officers being aggrieved by the order dated 20.11.2008 passed by a Division Bench of Central Administrative Tribunal, Jabalpur in O.A. No. 319/2008 directing grant of family pension to Sheikh Ramjan Khan S/o deceased Abbas Khan on the ground that he is mentally challenged, has come to this Court submitting that the order passed by the Tribunal is patently illegal.

2. The undisputed facts are that one Abbas Khan working as Machine Operator with the petitioners died on 20.6.2001. Family pension was sanctioned in favour of Smt. Jattun Bee, widow of the deceased Abbas Khan. Said Jattun Bee died on 31.1.2002. After her death, Ramjan Khan, a minor son of Abbas Khan and Jattun Bee, made an application for grant of family pension. The application was accordingly allowed. However, after Ramjan Khan attained the age of 25 years Ramjan Khan S/o Abbas Khan made an application for grant of family pension on the ground that he was mentally challenged and was therefore entitled to the family pension under Rule 54 of CCS Pension Rules.. Alongwith the application, he had filed the medical certificate issued by Civil Surgeon-cum- Superintendent of the Government Hospital, Hoshangabad. The petitioners, however, vide their order dated 25/31.3.2008 informed the petitioners that as per the rule/provisions since Ramjan Khan was married he would not be entitled to family pension. The respondent/wife as guardian of Ramjan Khan came to the Central Administrative Tribunal with a submission that the order passed by the present petitioners was patently illegal and was running contrary to Rule 54. It appears that the present petitioners appeared before the Tribunal and submitted that in light of office circular dated 5.3.1998 (Annexure-P/5) and yet another office circular dated 21.7.1999 (Annexure-P/6), the respondent would not be entitled to family pension. The Tribunal, however, after referring to the provisions contained in Section 54 and the relevant provisions came to the conclusion that a person who is mentally derailed or is unable to look after his own interest even he is married, he would be entitled to family pension. The petitioners being aggrieved of the said order are before us.

3. Shri Dharmadhikari, learned counsel for the petitioners after taking us through Rule 54(6) (iii) clause-(i) and clause-(iv) submitted that the order passed by the learned Tribunal is patently illegal. It is also submitted by him that. the present petitioners were entitled to an opportunity of making any inquiry into the certificate and the fact that the person claiming family pension is handicapped to such an extent that he is unable to earn his or her livelihood and as in the present matter such opportunity has not been granted the order is patently illegal.

4. Shri Nagpal, learned counsel for the respondent on the other hand submitted that the circular contained in Annexures-P/5 and P/6 would not override Rule

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54 because the said Rules have been framed under Article 309 while Annexures-P/5 and P/6 are only departmental direction. It is also submitted by him that the petitioners have to thank themselves for not making an inquiry into the certificate and the physical condition/mental condition of the claimant in relation to his capacity to earn if they were simply harbouring upon the fact that the claimant being married was not entitled to pension.

5. We have heard the parties at length.

6. Sub-Rule 6 of Rule 54 refers the period for which the pension is payable. It provides for the priority in which the family pension is to be paid. Para-1 of the proviso appended to Clause-(iii) of sub-rule 6 of Rule 54 provides that if the son or daughter of a government servant is suffering from any disorder or disability of mind including, mentally retarded or is physically crippled or disabled so as to render him or her unable to earn a living even after attaining the age of 25 years the family pension shall be payable to such son or daughter for life subject to the conditions as contained in Clause-(i) of the proviso. Clause-(i) further says that the pension shall be initially payable to the minor children in the order set out in Clause (iii) of sub-rule (8) of Rule 54 and after such minor child attains the age of 25 years, family pension shall be resumed in favour of the person i.e. son or daughter who is suffering from disorder or disability of mind.

7. In the present matter, undisputedly Raffique Khan was a minor on the date of death of Smt. Jattun Bee, therefore, he was awarded pension up to the age of 25 years. Immediately thereafter the pension should have been paid to Ramjan Khan who was mentally derailed or challenged in accordance with Clause-(i) appended to the proviso appended to Clause-(iii) of sub-rule 6 of Rule 54. It appears that the present petitioners were simply submitting that the present respondent would not be entitled to family pension because he was already married.

8. In so far as question of marriage is concerned, that does not fall under Clause-(iii) of sub-rule 6 of Rule 54. Clause-(iii) simply provides the manner of award of the pension in favour of the claimants or the applicants. Even otherwise it is to be recorded that a person who is mentally challenged is a perpetual minor, and therefore, he would never attain the aged of 25 years. Probably taking that legal position in to consideration Clause-(i) appended to the proviso says that family pension shall be paid to such person for the life.

9. In the present matter, in our opinion, the question of marriage was foreign to the order made infavour of the claimant.

10. In so far as the alternative argument regarding opportunity to make enquiry is concerned, we are of the opinion that if the petitioners never thought of making any inquiry but were opposing the claim only on the ground of the marriage of the claimant then before this Court they cannot raise such a grievance.

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11. At this stage, we refuse to interfere in the order passed by the Tribunal but however, would grant liberty to the petitioners to make an inquiry in accordance with Clause-(iv) of sub-rule 6 of Rule 54 of the Pension Rules. While making such an inquiry appropriate opportunity of leading evidence and hearing shall be given by the petitioners/claimant through his guardian. It is, however, made clear that until adverse orders are passed, the claimant shall be entitled to family pension.

12. The petition is dismissed. There shall be no orders as to costs.

Petition dismissed.

I.L.R. [2010] M. P., 1343

WRIT PETITION

Before Mr. Justice P.K. Jaiswal

5 February, 2010*

PHOOL SINGH KUSHWAHA

... Petitioner

Vs.

FOOD CORPORATION OF INDIA & ors.

... Respondents

Service Law - Reversion of a probationer - Whether punitive in nature - Held - The petitioner's work was under observation during the probation period and he was given repeated opportunity to improve his performance for which purpose his probation was extended for a further period of one year - The competent authority did not find him fit for confirmation on the promotional post because during probation period his services were unsatisfactory - The order of reversion not punitive in nature. (Para 21 & 22)

सेवा विधि - परिवीक्षाधीन व्यक्ति का प्रतिवर्तन - क्या प्रकृति दण्डात्मक है - अभिनिर्धारित - याची का कार्य परिवीक्षा अवधि के दौरान अवलोकन के अधीन था और उसे अपना कार्य सुधारने के कई अवसर दिये गये जिस प्रयोजन के लिए उसकी परिवीक्षा एक वर्ष की कालावधि के लिए आगे बढ़ायी गयी - सक्षम प्राधिकारी ने पदोन्नत पद पर स्थायीकरण के लिए उसे उपयुक्त नहीं पाया क्योंकि परिवीक्षा अवधि के दौरान उसकी सेवाएँ असंतोषजनक थीं - प्रतिवर्तन के आदेश की प्रकृति दण्डात्मक नहीं।

Cases referred :

(2001) 9 SCC 319, (2001) 3 SCC 117.

Shobha Menon with A. Thomas, for the petitioner.

S.K. Rao with Ajit Agrawal, for the respondents.

ORDER

P.K. JAISWAL, J. :-The core issue in this writ petition under Article 226 of the Constitution of India is whether the reversion of a probationer-petitioner from

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the promotional post of Assistant Manager (Depot) to the post of Assistant Grade-I (Depot) was for unsatisfactory services or for a misconduct and is punitive in nature.

2. The petitioner while working on the post of AG-I (Depot) was promoted to the post of Assistant Manager (D) vide order dated 25/7/2001 (Annexure-R/1) and was posted in the Sagar Division vide order dated 20/8/2001 (Annexure-P/1). The promotion will be effective from the date he assume charge of the post at the station where he is posted on promotion. Clause-8 of the promotion order reads as under :

“8. The above officials will be on probation for a period of ONE YEAR with effect from the date they assumed the charge of the new post and this is extendable as per the provision of FCI (Staff) Regulations, 1971.”

3. The petitioner accordingly reported for duties at Sagar Plinth, Sagar Division. The petitioner was served with a show cause notice for certain irregularities committed by him vide letter dated 2/6/2002 (Annexure-P/3). The petitioner submitted his reply to the said show cause notice vide letter dated 5/6/2002 (Annexure-P/4). Since the reply was not found satisfactory, he was placed under suspension vide order dated 5/8/2002 (Annexure-P/7).

4. In exercise of powers conferred by Section 45 of the Food Corporation Act, 1964, the Food Corporation of India with the previous sanction of the Central Government, framed the Regulations known as “Food Corporation of India (Staff) Regulations, 1971” (hereinafter referred to as ‘the Regulations’). As per provisions contained in sub-para-(1) of Regulation-15 of the Regulations, the officials promoted from category-III to category-II post are placed under probation for a period of one year and are confirmed in promotional post subject to satisfactory completion of the probation period. Regulation-15 is relevant which reads as under :

“15. Probation :

- (1) Every person regularly appointed to any post in the Corporation under Sub-clause (a) of Clause (1) of Regulation 7 shall be required to be on probation for a period one year from the date of appointment. Provided further that there will be no probation for a person promoted from one grade to another grade within the same category except where the promotion involved a change in the category of post in the same cadre e.g. if an Asstt. Grade-III is promoted as Asstt. Grade-II (Category-III) or an Asstt. Grade I (Category III) is promoted as Asstt. Manager (Category-II) normal probation period shall be applicable. Similarly if an Asstt.

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Manager (Category II) is promoted as Deputy Manager (Category I) there will be normal period of probation and for persons promoted from Deputy Manager onwards, there will not be any probation.

(2) The appointing authority may in his discretion extend the period of probation by a further period not exceeding one year.

(3) During the period of probation an employee directly recruited shall be liable to be discharged from service without assigning any reason by giving him a notice of 30 days or pay and allowances in lieu thereof.

An employee promoted from a lower post to a higher post shall be liable to be reverted to the lower post without notice and without assigning any reason.

(4) An employee who has satisfactorily completed his probation in any post shall thereafter be confirmed.

(5).....

5. The petitioner was placed on probation for a period of one year w.e.f. 24/8/2001. The services of the petitioner were not found satisfactory as his promotion reports were not satisfactory. Moreover, he was also not free from vigilance angle and, therefore, vide order dated 19/12/2002 (Annexure-P/8), the competent authority decided to extend his probation period for a further period of one year more w.e.f. 24/8/2002 under Regulation 15(2) of the Regulations and, therefore, his probation period was extended. Relevant part of order dated 19/12/2002 reads as under :

“ On promotion to the post of Am(Depot) Shri P.S. Kushwaha was placed on probation for a period of one year w.e.f. 24/8/2001.

On consideration of his case for confirmation, it is observed that his Probation Reports were not satisfactory. Moreover he was also not free from vigilance angle. The competent authority has therefore decided to extend his Probation for a period of one year w.e.f. 24/8/2002.

The probation period of Shri P.S. Kushwaha, AM(D) is therefore extended for a further period of one year w.e.f. 24/8/2002 in terms of Regulation 15(2) of FCI (Staff) Regulation, 1971.”

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6. The petitioner was suspended on 5/8/2002 but no disciplinary action was initiated against him nor any memorandum of charge sheet was issued and, therefore, respondent No.3 vide order dated 3/2/2003 (Annexure-P/9) revoked the order of suspension and posted him in District Office, Satna. Vide letter dated 16/7/2003, the petitioner was communicated adverse remarks for the period ending 2002 and was asked to submit his representation within a period of six weeks vide letter dated 18/7/2003. The petitioner immediately on 30th August, 2003 submitted his representation before the competent authority of respondent No.1.

7. During the probation period, the petitioner's services were not found satisfactory and since he was not free from vigilance angle also and, therefore, the respondents vide order dated 22/8/2003 (Annexure-P/13) decided to terminate the probation period of the petitioner and, accordingly, while terminating the probation period, he was reverted to the post of AG-I (D) and the same was communicated to the petitioner vide order dated 23/8/2003 (Annexure-P/14) which reads as under :

“In pursuance of Z.O(W), Mumbai FAX 0/order No.ESTT/6(2)/2003/MP/WZ dated 22.8.2003 Shri P.S. Kushwaha, Asstt. Manager (Depot), DO, Satna stands reverted to the post of AG-I(D) with immediate effect due to his involvement in vigilance and unsatisfactory probation reports.

On reversion he is posted to DO, Satna.

The said original O/order meant for the officer is enclosed herewith.”

8. The law with regard to termination of the services of a probationer is well settled and it has been repeatedly held that such a power lies with the appointing authority which is at liberty to terminate the services of a probationer if it finds the performance of the probationer to be unsatisfactory during the period of probation. The assessment has to be made by the appointing authority itself and the satisfaction is that of the appointing authority as well. Unless a stigma is attached to the termination or the probationer is called upon to show cause for any shortcoming which may subsequently be the cause for termination of the probationer's service, the management or the appointing authority is not required to give any explanation or reason for terminating the services except informing him that his services have been found to be unsatisfactory.

9. The question for my consideration is on the facts and circumstances of this case, was the reversion of the petitioner punitive or a simpliciter? On reading of the order of reversion, it is clear that it is a reversion simpliciter, but Smt. Shobha Menon, learned senior counsel for the petitioner submits that if we read the order as a whole, it amounts to a stigmatic reversion and did not amount to reversion simpliciter. The said acts amounting to serious misconduct for which neither enquiry

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was held nor was any procedure contemplated under the Regulations adopted. Heavy reliance was placed on *Pavanendra Narayan Verma V. Sanjay Gandhi PGI of Medical Sciences and another*, (2002) 1 SCC 520.

10. On the other hand, Shri S.K. Rao, learned senior counsel for the respondents, drew my attention to clause-8 of promotion order and submitted that petitioner was promoted on probation and he was remain on probation for the specified period. The original probation period was extended because during that period his work and conduct had not been found to be satisfactory but there was no improvement during extended period of probation and his probation report for the extended period was not found satisfactory. Moreover, he is also not free from vigilance angle and he was suspended for the period from August, 2002 to 3rd February, 2003, the impugned order of reversion was passed which is neither a stigmatic nor a punitive in nature. In support of the said contention he referred to Regulation 15(1), (2) and (3) of the Regulations and added that such order could be passed without a full-fledged departmental enquiry. With the aforesaid submission, he prayed for dismissal of the writ petition.

11. Law in this question by now is well settled. The Apex Court in the case of *Krishnadevaraya Education Trust and another V. L.A. Balakrishna*, (2001) 9 SCC 319, while considering the similar situation in held thus :

"5. There can be no manner of doubt that the employer is entitled to engage the services of a person on probation. During the period of probation, the suitability of the recruit/appointee has to be seen. If his services are not satisfactory which means that he is not suitable for the job, then the employer has a right to terminate the services as a reason thereof. If the termination during probationary period is without any reasons, perhaps such an order would be sought to be challenged on the ground of being arbitrary. Therefore, naturally services of an employee on probation would be terminated, when he is found not to be suitable for the job for which he was engaged, without assigning any reason. If the order on the face of it states that his services are being terminated because his performance is not satisfactory, the employer runs the risk of the allegation being made that the order itself casts a stigma. We do not say that such a contention will succeed. Normally, therefore, it is preferred that the order itself does not mention the reason why the services are being terminated.

6. If such an order is challenged, the employer will have to indicate the grounds on which the services of a probationer were terminated. Mere fact that in response to the challenge the employer states that the services were not satisfactory would not

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ipso facto mean that the services of the probationer were being terminated by way of punishment. The probation is on test and if the services are found not to be satisfactory, the employer has, in terms of the letter of appointment, the right to terminate the services."

12. It is clear from the above that if the order of termination indicates that it is a termination simpliciter and does not cast any stigma on the employee by the said order of termination the mere fact that there was an inquiry into his conduct earlier would not by itself render the termination invalid. Applying the said principle, I see that the order of reversion in the present case is an order of reversion simpliciter. As per suspension order dated 5/8/2002, it reveals that earlier the respondent found some lacuna in the working of the petitioner and, therefore, he was suspended, but based on that no charge-sheet was served nor enquiry was conducted. However, the respondents came to the conclusion that his suspension from service is no longer necessary and, therefore, the order of suspension was revoked on 3/2/2003 with immediate effect against him and was posted at Satna. From the order of promotion, it is very clear that promotion was subject to satisfactory completion of probation period. Successful completion of probation is a condition precedent for confirmation as envisaged in Clause 15(2) & (3) of the Regulations. Since the petitioner failed to complete the satisfactory completion of probation period and, therefore, the period of probation was extended for a further period of one year and his probation report for the extended year was not found satisfactory and there was no satisfactory improvement, his probation was terminated and he was reverted to the post of AG-I (D) and while passing the order of reversion, it is observed that he was under suspension for a period of six months and he is also not free from vigilance angle. In the background, the mere fact that the petitioner was suspended for a period of six months and he is not free from vigilance angle which was not inquired into ipso facto does not lead to the conclusion that the order of reversion is colourable and in fact is a punitive order.

13. In *H.F.Sangati V. Registrar General, High Court of Karnataka*, (2001) 3 SCC 117, the Apex Court while considering the discharge of a probationary Munsif held as under :

"The impugned order does not cast any stigma on the appellants. All that has been said in the impugned order is that the appellants were unsuitable to hold the post of Munsif. The impugned order of discharge has been passed in strict compliance with the requirements of Rule 6. It does not cast any stigma on the appellants nor is it punitive. There was, thus, no requirement to comply with the principles of natural justice, much less to hold any formal proceedings of inquiry before making the order."

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14. This law laid down by a three-Judge Bench of the Apex Court also shows that if an employer discharges the services of a probationer on the ground that his services are unsuitable, it does not cast any stigma on the employee nor is it punitive, in such cases even the principle of natural justice does not apply and there is no need for formal proceedings of enquiry before making such order.

15. In *Pavanendra Narayan Verma V. Sanjay Gandhi PGI of Medical Sciences and another* (supra), the Apex Court while considering a similar case in para-21 held as under :

“21. One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full-scale formal enquiry (b) into allegations involving moral turpitude or misconduct which © culminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld.”

16. From the above, it is seen that in the absence of the three facts as mentioned therein, namely -

- a) a full-scale formal enquiry
- b) into allegations involving moral turpitude or misconduct which
- c) culminated in a finding of guilt the termination cannot be held to be bad.

17. The Apex Court in the said case of *Pavanendra Narayan Verma V. Sanjay Gandhi PGI of Medical Sciences and another* (supra), further held :

“It cannot be held that the enquiry held prior to the order of termination turned the otherwise innocuous order into one of punishment. An employer is entitled to satisfy itself as to the competence of a probationer to be confirmed in service and for this purpose satisfy itself fairly as to the truth of any allegation that may have been made about the employee. A charge sheet merely details the allegations so that the employee may deal with them effectively. The enquiry report in this case found nothing more against the appellant than an inability to meet the requirements for the post. None of the three factors catalogued above for holding that the termination was in substance punitive exists in the present case.

An affidavit cannot be relied on to improve or supplement an order. Equally, an order which is otherwise valid cannot be

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invalidated by reason of any statement in any affidavit seeking to justify the order."

18. As noticed above in the instant case, the petitioner having been promoted as a probationer and his working having been found not to the satisfaction of the employer. It was open to the management to revert his services. Assuming that there was an incident of misconduct or incompetency prior to his reversion from the post of Assistant Manager, the same cannot ipso facto be termed as misconduct requiring an inquiry. It may be a ground for the employer's assessment of the petitioner's efficiency and efficacy to retain him to the promotional post, unless, of course, the petitioner is able to satisfy that the management for reasons other than efficiency wanted to revert him by exercising its power of reversion.

19. From the aforesaid, it is clear that the performance of the petitioner was not found to be satisfactory. During probation period his probation was extended for further period of one year w.e.f. 24/8/2002 and the matter regarding irregularities committed at Sagar Plinth, Sagar Division during the suspension of the petitioner was under examination as such his suspension was revoked on 3/2/2003. The petitioner was suspended on account of the supervisory lapses on his part causing huge losses to the Corporation by way of misappropriation of food-grains stocks. Since the matter was under thorough examination which requires time, accordingly, keeping the case against the petitioner under contemplation, his suspension was revoked on 3/2/2003. The adverse remarks of the petitioner pertains to the annual confidential report in the year 2002 which was written by the District Manager, Sagar and has no bearing in his confirmation. As per procedure of the respondent-Corporation, in order to have a fair assessment of the performance of the petitioner, he was posted under the supervision of another officer, i.e. District Manager, Satna, who too vide his probation report for the period from 24/8/2002 to 23/8/2003, reported that the performance of the petitioner was not up to the mark/satisfactory which resulted into his reversion to the post of AG-I (D) from the post of Assistant Manager (D). It is not in dispute that even in absence of any vigilance case, the competent authority can revert any employee to the lower post without any notice as per Regulation 15.3 of the Regulations. The petitioner was informed about his deficiency from time to time and the period of probation was extended for a further period of one year so that he may improve himself but there was no improvement and, therefore, the competent authority of respondent No.1 was decided to revert him from the post Assistant Manager (D) to the post of AG-I (D) under the provisions of Regulation 15.3 of the Regulations.

20. The petitioner was promoted on probation for a particular period is only in order to test whether his conduct is good and satisfactory so that he may be retained. The remark in the assessment roll, merely indicate the nature of the performance put in by the officer for the limited purpose to determining whether

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or not his probation should be extended. These remarks were not intended to cast any stigma.

21. This Court has carefully considered all the circumstances and after reading the impugned order as a whole came to the conclusion that the petitioner's work was under observation during the probationary period and he was given repeated opportunity to improve his performance for which purpose his probation was extended for a further period of one year. The competent authority did not find him fit for confirmation on the promotional post because during probation period his services were unsatisfactory.

22. For the aforesaid reasons, I am of the view that there is no substance in this writ petition nor it can be said that the impugned order is punitive in nature. Nor does the impugned order of reversion carry any stigma.

23. The writ petition filed by the petitioner has no merit and is, accordingly, dismissed. No costs.

Petition dismissed.

I.L.R. [2010] M. P., 1351

WRIT PETITION

Before Mr. Justice S.C. Sharma

9 February, 2010*

RAM BABU RAJAK
Vs.

... Petitioner

M.P. MADHYA KSHETRA VIDYUT VITRAN
CO. LTD. & ors.

... Respondents

Service Law - Constitution, Article 226 - Delay and laches - Petitioner claimed stepping up of pay and placement above respondent No.5 in gradation list as respondent No.5 was junior to him but was promoted earlier - Writ Petition filed after 17 years of supersession despite knowledge - Held - Delay cannot be condoned in approaching the Court on the ground of submitting large numbers of representation from time to time - Delay of 17 years is not a reasonable delay - Petitioner is not entitled for any relief -
Petition dismissed.

(Paras 4 to 6)

सेवा विधि - संविधान, अनुच्छेद 226 - विलम्ब और गफलत - याची ने वेतन बढ़ाने और पदक्रम-सूची में प्रत्यर्थी क्र. 5 के ऊपर स्थान देने का दावा किया क्योंकि प्रत्यर्थी क्र. 5 उससे कनिष्ठ था किन्तु उसकी पदोन्नति पूर्व में हो गयी - रिट याचिका जानकारी के बावजूद अधिक्रमण के 17 वर्ष बाद फाइल की गयी - अभिनिर्धारित - न्यायालय से निवेदन करने में हुआ विलम्ब समय-समय पर कई अभ्यावेदन पेश करने के आधार पर माफ नहीं किया जा सकता - याची किसी अनुतोष का हकदार नहीं - याचिका खारिज।

RAM BABU RAJAK Vs. M.P. MADHYA KSHETRA VIDYUT VITRAN CO. LTD.**Cases referred :**

AIR 1996 SC 669, AIR 1990 SC 1308, AIR 2001 SC 2114, AIR 1996 SC 2520, (2007) 9 SCC 278, (2008) 10 SCC 115.

S.K. Sharma, for the petitioner.

Vivek Jain, for the respondent Nos.1 to 4.

J U D G M E N T

S.C. SHARMA, J. :-The petitioner before this Court has filed this present writ petition being aggrieved by the promotion order of the respondent No. 5 on the post of Daftary. He is also claiming seniority over and above the respondent No. 5. The contention of the petitioner is that he was appointed by the respondents vide an order dated 19-06-1978 on the post of peon on a fixed pay and thereafter vide an order dated 21-06-1980 he was granted a regular pay scale of Rs. 275-395/-. The petitioner has further stated that the respondent No. 5 was appointed on 20th December, 1980 as Class-IV employee and therefore, the respondent No. 5 was junior to the petitioner as Class-IV employee. The petitioner has further stated that the respondent No. 5 was promoted to the post of Daftary by an order dated 18-01-1988 and was also granted a higher pay scale and the petitioner being aggrieved by his supersession to the post of Daftary preferred a representation and the respondents after taking into consideration the representation preferred by the petitioner have promoted the petitioner to the post of Daftary vide an order dated 05-03-1990 in the pay scale of Rs. 970-1600/-. The petitioner's contention is that the respondent No. 5 was junior in the cadre of peon and now as both the persons have been promoted to the post of Daftary, the petitioner should be granted stepping up of pay and should also be placed over and above in the gradation list of Daftary. The petitioner has also submitted various representations before the authorities, however, nothing has been done in the matter. The petitioner has further stated that he has also by filing a rejoinder has brought on record representation dated 01-06-1989, representation dated 18-01-2007, the representation dated 14-09-2006 and representation dated 06-10-2006 submitted by him from time to time in respect of his supersession of the year 1988 and also in respect of stepping up his pay. Learned counsel for the petitioner has relied upon a judgment by the Apex Court in the case of *M.R. Gupta Vs. Union of India and others* AIR 1996 SC 669 wherein the Apex Court has held that the matter of fixation of pay is a continuing wrong of action and the question of limitation does not arise. Learned counsel for the petitioner has also relied upon a judgment delivered by Apex Court in the case of *The State of Madhya Pradesh Vs. Bani Singh and another* AIR 1990 SC 1308 and his contention is that the delay in filing the present writ petition is not a bar to grant relief to the petitioner as his representations were pending before the competent authority. The learned counsel for the petitioner has also relied upon a judgment delivered by the Apex Court in

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the case of *T. Aruna and others V. The Secretary, Andhra Pradesh, Public Service Commission* AIR 2001 SC 2114 wherein in the matter of promotion, the Apex Court has observed that as seniority list was published in the year 1996 and therefore, the effected parties have got a right to challenge the same, even though the promotions were of the year 1984. Learned counsel for the petitioner has also relied upon a judgment delivered by the Apex Court in the case of *J.N. Ganatra, Vs. Morvi Municipality. Morvi* AIR 1996 SC 2520 and his contention is that as the power has not been exercised by the M.P.S.E.B. following prescribed procedure, the matter can be entertained by this Court.

2. A reply has been filed on behalf of the respondents MPSEB and it has been admitted by the respondents that the petitioner was appointed as work charged peon on 19-04-1978 and the respondents have also admitted that he was absorbed in regular establishment on 21-06-1980 and the respondent No. 5 was appointed initially in regular establishment on 15-12-1980 on the post of Farrash. The respondents have also stated that the petitioner was superseded in the year 1988 and he has filed the present writ petition has been filed after about 19 years in the year 2007. The respondents have also stated that the panel was drawn in the year 1984 for promoting the persons to the post in question and on the basis of recommendation of panel of the year 1984, the respondent No. 5 was promoted on the post of Daftary on 18-01-1988. The respondents have stated that the petitioner was also promoted by an order dated 05-03-1990. The respondents have categorically stated that after a lapse of about 23 years from the date of drawal of panel as the record is not available, no comments can be offered as to why, the respondent No. 5 was found fit for promotion and as to why the petitioner was not granted promotion along with the respondent No. 5. Learned counsel for the respondents has relied upon a judgment delivered by the Apex Court in the case of *New Delhi Municipal Council vs. Pan Singh and others* (2007) 9 SCC 278. The contention of the learned counsel for the respondents is that in the light of the judgment delivered by the Apex Court in the aforesaid case, the question of exercising discretionary jurisdiction under Article 226 of the Constitution does not arise as the petitioner has approached this Court after a lapse of about 19 years. The respondents have prayed for dismissal of the present writ petition on the ground that the petitioner is filed this present writ petition after a lapse of about 19 years challenging his supersession.

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

4. The petitioner before this Court was appointed as peon on 19-04-1978 as work charged peon and was absorbed in regular establishment only on 21-06-1980. The respondent No. 5 was appointed initially in regular establishment on 15-12-1980 on the post of Farrash. A panel was prepared in the year 1984 and the respondent No. 5 was found fit for promotion to the post of Daftary and a promotion order was issued on 18-01-1988. The petitioner was also promoted later on by an

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order dated 05-03-1990 which is on record as Annexure P/3. Though the petitioner has stated in the writ petition that after the promotion of the respondent No. 5 dated 18-01-1988 he submitted representations claiming promotion at par with the respondent No. 5, however, the order promoting the petitioner dated 05-03-1990 does not reflect about the representation of the petitioner nor it does reflect that the petitioner is being promoted on account of the fact that a junior was promoted earlier to the petitioner. The order dated 05-03-1990 simply reflects that the petitioner has been promoted to the post of Daftary in the pay scale of Rs. 970-1600/-. Thus it is an admitted fact that the respondent No. 5 has been promoted much prior to the promotion of the petitioner on 18-01-1988. The petitioner as stated by him has submitted representation before the authority and finally a representation dated 24-07-2006 has been filed by the petitioner along with the writ petition. The petitioner has later on along with the rejoinder has enclosed representation representation dated 01-06-1989, the representation dated 18-01-2007, representation dated 14-09-2006, dated 06-10-2006 and from the representations enclosed along with the rejoinder, it is evident that the petitioner for first time has submitted a representation on 01-06-1989 prior to his promotion and later on he has submitted representation only in the year 2006. The respondents have categorically stated in the return that no record of the year 1984 panel is available with them. Not only this, the petitioner is challenging the supersession of the year 1988 in the present writ petition. The judgment relied upon by the learned counsel for the petitioner in the case of *J.N. Ganatra. Vs. Morvi. Municipality, Morvi* AIR 1996 SC 2520 was relating to a case wherein the Municipality in question has framed conduct, discipline, dismissal and appeal Rules for its employees provided under the Gujrat Municipalities Act, 1964 and the rules were not followed, whereas in the present case, there is no such allegation the recruitment rules was not followed by the respondents while considering the case of the respondent No. 5 to the post of Daftary in the year 1984. Not only this, the aforesaid case was a case relating to dismissal and it was not a case relating to supersession and therefore, the keeping in view the aforesaid, the judgment relied upon by the learned counsel for the petitioner is distinguishable on facts. The learned counsel for the petitioner has also relied upon a judgment delivered by the Apex Court in the case of *T. Aruna and others V. The Secretary. Andhra Pradesh. Public Service Commission* AIR 2001 SC 2114. In the aforesaid case, promotion to the post of Senior Assistant was done from two cadre namely Junior Assistant and typist and the ratio of 1:4 from the categories of Typists and Junior Assistants was adopted by the respondents therein for the purposes of the promotion and a seniority list was issued by the respondents therein in the year 1996 and in those circumstances the Apex Court has held as under:-

“11. The Counsel for the appellants urged that some of the appellants who were given promotion to the cadre of Senior

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Superintendents long back and subsequently to still higher cadres are to be reverted to lower category in view of the directions contained in the impugned judgment. It was submitted that promotions effected long back should not be disturbed as they were not challenged. Admittedly, the Commission was not following any rule and the promotions were effected based on a policy. No seniority list was either published. The affected parties got the opportunity to challenge these promotions only when a seniority list was published in 1996. Under the above circumstances, the reasons for delay, if any, cannot be put at the door of the respondents who were seriously affected by the way in which promotions were being done. We are however, told that seniority list has now been finalised after giving due consideration to the individual representation."

5. In the present case, the petitioner was very much aware about his supersession in the year 1988 and has approached this Court by filing the present writ petition only in the year 2007 i.e. after a lapse of about 17 years and after a lapse of about 24 years from the date of preparation of the panel and therefore, the petitioner is not entitled for any relief on the basis of the judgment relied upon by the learned counsel for the petitioner. Learned counsel for the petitioner has also relied upon a judgment delivered by Apex Court in the case of *The State of Madhya Pradesh Vs. Bani Singh and another* AIR 1990 SC 1308 and in the aforesaid case the screening committee met in the year 1979-80 and an application was preferred before the Administrative Tribunal under Section 19 of the Administrative Tribunals Act only 19-12-1986. In the aforesaid case the representation in the year 1980 was pending till 1986 and the Officer therein was representing the matter to the Government continuously and was also granted selection grade during the pendency of the representation w.e.f. 04-03-1982 and under those circumstances the Tribunal has declined to dismiss application on the ground of laches and has decided the case on merits. The Apex Court also keeping in view the aforesaid declined to interfere with the order of Tribunal on the ground of delay and laches. In the present case, the supersession is of the year 1988, the petitioner was very much aware of his supersession in the year 1988 and he was promoted on 05-03-1990 and has slept over the matter almost 17 years and therefore, keeping in view the judgment delivered by the Apex Court the petitioner is certainly not entitled for any relief on the ground of delay and laches. Learned counsel for the petitioner has relied upon a judgment by the Apex Court in the case of *M.R. Gupta Vs. Union of India and others* AIR 1996 SC 669 wherein the Apex Court has held that the matter of fixation of pay is a continuing wrong and the question of limitation does not arise. In the present case, the dispute certainly does not relate to fixation of pay. It is a simple case of supersession as

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the respondent No. 5 was promoted in the year 1988 and the petitioner was promoted on 05-03-1990 and therefore, the respondent No. 5 is bound to receive higher pay than the petitioner. It is not a case of erroneous fixation of pay and therefore, no case for interference is made out in the matter in the peculiar facts and circumstances of the case. The Apex Court in the case of *New Delhi Municipal Council vs. Pan Singh and others* (2007) 9 SCC 278 in paragraphs 17 and 18 has held as under:-

"17. Although, there is no period of limitation provided for filing a writ petition under Article 226 of the Constitution of India, ordinarily, writ petition should be filed within a reasonable time. (See Lipton India Ltd. vs. Union of India and M.R. Gupta v. Union of India.)

18. In Shiv Dass v. Union of India this Court held: (SCC p.277, paras 9-10)

"9. It has been pointed out by this Court in a number of cases that representations would not be adequate explanation to take care of delay. This was first stated in K.V. Rajalakshmiah Setty V. State of Mysore. There is a limit to the time which can be considered reasonable for making representations and if the Government had turned down one representation the making of another representation on similar lines will not explain the delay. In State of Orissa V. Pyarimohan Samantaray making of repeated representations was not regarded as satisfactory explanation of the delay. In that case the petition had been dismissed for delay alone. (See also State of Orissa V. Arun Kumar Patnaik)

10. In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in filing the petition. It would depend upon the fact of each case. If petition is filed beyond a reasonable period say three years normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years. The High Court did not examine whether on merit the appellant had a case. If on merits it would have found that there was no scope for interference, it would have dismissed the writ petition on that scope alone."

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6. Keeping in view the aforesaid judgment delivered by the Apex Court, the present writ petition certainly suffers from delay and latches and even though there is no period of limitation provided for filing the writ petition, the same should have been filed within the reasonable time. In the present case, the writ petition has not been certainly filed within a reasonable time and it has been filed after a lapse of about 17 years. The Hon.ble Apex Court in the case of *C. Jacob vs. Director of Geology and Mining and another*, (2008) 10 SCC 115 while dealing with the question of delay and latches in service matters has declined to grant a relief to a person who has approached the Court after two decades of termination. The apex Court while treating the case before it as a typical example of representation and relief has deprecated issuance of direction directing consideration of such State claims. In the present case, keeping in view the law laid down by the Apex Court in the case of *C. Jacob* (supra), the question of granting any relief in the present petition does not arise, resultantly, the present writ petition is dismissed. No order as to costs.

Petition dismissed.

I.L.R. [2010] M. P., 1357

WRIT PETITION

Before Mr. Justice Rajendra Menon

16 February, 2010*

ANAND SELOT

... Petitioner

Vs.

CHIEF SECRETARY, GOVT. OF M.P. & ors.

... Respondents

A. Service Law - Constitution, Article 226, Public Works Department Engineer-in-Chief and Chief Engineers Recruitment and Conditions of Service Rules, M.P. 1983, Rule 6(1) - Current charge of post of Engineer-in-Chief due to administrative difficulties - Held - Even though respondent No.3 does not fulfil the requisite qualification as prescribed under Recruitment Rules but when it is an officiating or incharge arrangement, it is not recognition of his right to the post then it may not be in the interest of justice to issue a writ of Quo warranto - Petition dismissed. (Para 16 to 18)

क. सेवा विधि - संविधान, अनुच्छेद 226, लोक निर्माण विभाग प्रमुख अभियंता और मुख्य अभियंता भर्ती और सेवा की शर्तें नियम, म.प्र. 1983, नियम 6(1) - प्रशासनिक कठिनाईयों के कारण प्रमुख अभियंता के पद का वर्तमान प्रभार - अभिनिर्धारित - यद्यपि प्रत्यर्थी क्र. 3 भर्ती नियमों में विहित आवश्यक अर्हता पूरी नहीं करता है किन्तु जब यह स्थानापन्न या कार्यभारी व्यवस्था हो, यह पद के प्रति उसके अधिकार की मान्यता न हो तब यह न्यायहित में नहीं हो सकता कि अधिकार पृच्छा की रिट जारी की जाए - याचिका खारिज।

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B. Constitution, Article 226 - Writ of Quo warranto - Order granting charge of Engineer-in-Chief challenged - Petitioner at the fag end of his career and after 10 months, challenged the action - Held - Writ of Quo warranto is an extraordinary remedy - Court is required to consider the motive, conduct of applicant, delay & laches and the public interest likely to be served or damaged in granting or refusing the writ - Petition dismissed. (Paras 21 to 23)

ख. संविधान, अनुच्छेद 226 - अधिकार पृच्छा की रिट - प्रमुख अभियंता का प्रभार देने वाले आदेश को चुनौती - याची ने अपने कार्यकाल के अंतिम छोर पर और 10 माह बाद कृत्य को चुनौती दी - अभिनिर्धारित - अधिकार पृच्छा की रिट एक असाधारण उपचार है - न्यायालय को आवेदक के हेतु, आचरण, विलम्ब और गफलत एवं पूरा किया जाने वाला लोक हित या रिट प्रदान करने या इंकार करने में हानि पर विचार करना आवश्यक है - याचिका खारिज।

Cases referred :

AIR 1965 SC 491, (2006) 11 SCC 731 (II), AIR 1993 SC 1873, 1978 MPLJ 14, 2003(2) MPLJ 147, (2009) 7 SCC 1.

Shobha Menon with Rahul Choubey, for the petitioner.

Samdarshi Tiwari, G.A., for the respondent Nos.1 & 2.

R.N. Singh with Sujoy Paul, for the respondent No.3.

ORDER

RAJENDRA MENON, J. :- Seeking a writ of Quo Warranto and challenging posting and the alleged appointment of respondent No.3 on the post of Engineer-in-Chief, in the Department of Public Works, Government of Madhya Pradesh, Bhopal, made vide order-dated 31.3.2009 - Annexure P/9, petitioner has filed this writ petition.

2. According to the petitioner, he is a Bachelor of Engineer (Civil) having acquired the Degree in the year 1971 and thereafter has passed the M.Tech (Foundation Engineering) and is at present a regularly appointed Engineer-in-Chief in the Department. It is stated that respondent No.3 had passed his Higher Secondary School Certificate Examination; thereafter had obtained a Diploma in Mechanical Engineering and a Degree i.e., BE in Mechanical Engineering, he does not possess a Degree in Civil Engineering. Petitioner claims to be the only Chief Engineer in the Department possessing a Degree in Civil Engineering. According to the petitioner appointment on the post of Engineer-in-Chief and Chief Engineers in the Madhya Pradesh Public Works Department are governed by the M.P. Public Works Department Engineer-in-Chief and Chief Engineers Recruitment and Conditions of Service Rules, 1983 (hereinafter referred to as 'Rules of 1983'). The method of appointment is contained in Rule 4 and the eligibility conditions are prescribed in Rule 6. It is the case of the petitioner that the aforesaid Rules are enacted in exercise of powers conferred on the State Government under Article 309 of the Constitution of India. It is stated that prior to 1999, for appointment to

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the post of Engineer-in-Chief or Chief Engineer and Chief Engineer (R&D), Degree in Civil Engineering was not an essential requirement. However, vide Gazette Notification dated 20.1.1999 – Annexure P/3, the Rules of 1983 have been amended by inserting sub-rule 1-a to Rule 6(1), whereby possessing a Degree in Civil Engineering is made an essential qualification for promotion/appointment on the post of Engineer-in-Chief, Chief Engineer and Chief Engineer (R&D).

3. It is the case of the petitioner that when this Rule was amended, respondent No.3 and various other employees of the Department filed petition before this Court being W.P.No.15576/2003 (*Devendra Singh Bhadoria and others Vs. State of Madhya Pradesh*) and the said writ petition was dismissed, the amendment to the Rules incorporated vide Annexure P/3 was upheld. It is the case of the petitioner that in the return and documents filed by the State Government in the said writ petition – W.P.No.15576/2003, averments were that respondent No.3 does not possess the minimum qualification of being a Graduate in Civil Engineering and, therefore, in the earlier litigation the stand taken was that respondent No.3 is not eligible for appointment on the post of Engineer-in-Chief. Inter alia contending that even though it was the stand of the State Government that respondent No.3 does not possess the requisite qualification for appointment on the post of Engineer-in-Chief in accordance to the Rules of 1983, now by the impugned action he is given charge on the post of Engineer-in-Chief by order-dated 31.3.2009, which is unsustainable. Accordingly, contending that respondent No.3 is not eligible to be appointed on the post of Engineer-in-Chief, he does not possess the requisite qualification to be appointed to the said post, a writ of Quo Warranto is sought for.

4. Taking me through the documents filed, particularly the return and pleadings made by the State Government in the earlier writ petition with regard to ineligibility of respondent No.3 for seeking appointment on the post of Engineer-in-Chief and further placing reliance on the judgment of the Supreme Court, in the case of *The University of Mysore Vs. C.D. Govinda Rao and another*, AIR 1965 SC 491, and the principle laid down by the Supreme Court in the case of *B. Srinivasa Reddy Vs. Karnataka Urban Water Supply & Drainage Board Employees' Association and others*, (2006) 11 SCC 731 (II), Smt. Shobha Menon, learned Senior Advocate, emphasized that the grounds on which a writ of Quo Warranto can be issued are available in the present case and, therefore, the appointment of respondent No.3 on the post of Engineer-in-Chief should be quashed. It is stated by her that respondent No.3 is appointed to a public office even though he does not fulfil the requisite statutory criteria laid down for appointment to the said post. Accordingly, contending that appointment of respondent No.3 on the post of Engineer-in-Chief is unsustainable, Smt. Shobha Menon, learned Senior Advocate, seeks for interference into the matter.

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5. Referring to the Fundamental Rule 49, instructions issued by the State Government in pursuance thereof on 5.7.1961 and the meaning of the word 'appointment' as defined in Blacks Law Dictionary, Smt. Shobha Menon, learned Senior Advocate, emphasized that even though respondent No.3 is shown to be granted current charge of the post in question, but infact it is an appointment to the post of Engineer-in-Chief, contrary to the statutory provisions and, therefore, liable to be interfered with. Placing reliance on a judgment of the Supreme Court, in the case of *Dr. Kashinath G. Jalmi and another Vs. The Speaker and others*, AIR 1993 SC 1873, learned Senior Advocate argued that there is no delay in filing this writ petition and contends that appointment of respondent No.3 be quashed and the reliefs claimed for be granted to the petitioner. Reliefs claimed for in paragraph 7, of the writ petition, read as under:

- I. To issue a Writ of Quo Warranto against respondent No.3;
- II. To quash the order-dated 31.3.2009/Annexure A-1, issued by State Government to the extent whereby, respondent No.3 has been given the additional charge of Engineer-in-Chief (under the garb of the said order, respondent No.3 is virtually discharging regular functions of Engineer-in-Chief) and declare all the actions/decisions taken by him in the capacity of Engineer-in-Chief null and void;
- III. To issue appropriate writ, directing respondents No. 1 and 2 for posting the petitioner as Engineer-in-Chief of the Public Works Department, who is the only regular Engineer-in-Chief of the department possessing the prescribed qualifications according to the Service Rules in vogue;
- IV. To grant all such consequential and ancillary reliefs as may be deemed just and necessary, in the facts and circumstances of the case and allow the writ petition with cost throughout."

6. Referring to the documents and other material available on record and emphasizing that having found and having contended earlier before this Court that respondent No.3 is not eligible to be appointed as Engineer-in-Chief, the State Government now has devised a peculiar method of giving benefit to respondent No.3 even though he is not eligible for appointment to the post in question. Making assertion to the effect that granting 'current charge or temporary assignment until further orders' by the impugned action amounts to appointment to the post in question and, therefore, a writ for Quo Warranto can be issued, learned Senior Advocate seeks for interference into the matter.

7. Shri Samdarshi Tiwari, learned counsel appearing for the State Government,

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submits that even though respondent No.3 does not possess the requisite qualification for appointment to the post in accordance to the recruitment rules, it is stated by him that infact this is not an appointment to the post in question. It is pointed out by the State Government that there are four posts of Engineer-in-Chief in the Department concerned. Petitioner is already promoted to one of the said post since 17.7.06, he is a regularly appointed Engineer-in-Chief in the Department, where he worked upto 30.1.2008, when he was sent on deputation to the General Administration Department as Chief Technical Examiner (Vig). According to the respondent, one Shri S.K. Dixit was the Engineer-in-Chief, he retired on attaining the age of superannuation in September 2008, he was granted six months extension upto March 2009 and after his retirement on 31.3.2009, as there as no regular person to hold the charge of Engineer-in-Chief on substantive basis, petitioner who was the senior most available Chief Engineer has been appointed in accordance to the policy and circular of the State Government – Annexure R/1 dated 22.7.2000, wherein current charge of the post is granted to respondent No.3. Contending that respondent No.3 is not appointed to the post of Engineer-in-Chief, but is only granted the current charge on administrative consideration being the senior most Chief Engineer in the department, respondents resist the claim of the petitioner. It is pointed out by the respondents that in the department concerned there are four posts of Engineer-in-Chief. After retirement of Shri S.K. Dixit one post is held by the petitioner and there are three vacant posts. There are 14 posts of Chief Engineer and only one post of Chief Engineer is filled up, 13 other posts are lying vacant. It is stated that respondent No.3 is the only Chief Engineer in the Department who can be granted current charge as per the circular – Annexure R/1 dated 22.7.07. It is further pointed out that there are 56 posts of Superintendent Engineer, only 16 posts are filled up and due to various litigations pending before the High Court and the Supreme Court and there being stay with regard to promotion on the post of Superintendent Engineer and Chief Engineer, respondents are unable to fill up the post on regular basis and therefore, as a stop gap arrangement, respondent No.3 is only granted current charge of the post to look after the day-to-day work. Accordingly contending that a writ of Quo Warranto cannot be issued in these circumstances when there is no substantive appointment to the post, respondents resist the claim of the petitioner.

8. It is further pointed out by the respondents that petitioner has filed this petition even though respondent No.3 was granted charge of the post on 31.3.2009, vide Annexure P/1. He did not challenge the appointment for more than 10 months. It is only in January 2010 i.e... on 6.1.2010, that this writ petition is filed and now when petitioner is to retire on 28.2.2010 i.e... after few days from now, even his posting as Engineer-in-Chief is not possible. Accordingly, contending that petitioner has filed this writ petition directly without representing to the State Government and without claiming his posting as Engineer-in-Chief after 31.3.2009 till filing of

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this writ petition on 6.1.2010, respondents submit that the discretion of interference by issuing a writ of Quo Warranto be not exercised.

9. Shri R.N. Singh, learned Senior Advocate, appearing for respondent No.3 with Shri Sujoy Paul adopted the arguments put forth by the State Government and emphasized the fact that under law there is no appointment of respondent No.3 on the post of Engineer-in-Chief, it was stated by Shri R.N. Singh, learned Senior Advocate, that respondent No.3 is only granted additional charge on the post of Engineer-in-Chief in the light of the policy and circular – Annexure R/1 dated 22.7.2004. Referring to the conditions stipulated in the order of appointment dated 31.3.2009 – Annexure P/1, impugned in this petition, and putting emphasis on the words ‘additional charge on temporary basis upto further orders alongwith his charge of Chief Engineer’ indicated in the order, learned Senior Advocate submitted that grant of additional charge, on temporary basis cannot be assailed in a petition seeking a writ of Quo Warranto. Referring to certain observations made by the Supreme Court in paragraph 43 of the judgment rendered in the case of *B. Srinivasa Reddy* (supra) and further placing reliance on judgments of this Court, in the cases of *Sudhir Kumar Mishra and others Vs. Municipal Corporation, Jabalpur and another*, 1978 MPLJ 14; and, *Ashok Jayant Vs. State of MP*, 2003(2) MPLJ 147; judgments of the Supreme Court in the cases of *State of Haryana Vs. S.M. Sharma and others*, 1993 Supp (3) SCC 252; and, *N. Kannadasan Vs. Ajoy Khose and others*, (2009) 7 SCC 1, Shri R.N. Singh, learned Senior Advocate, emphasized that no case is made out for granting the discretionary relief of Quo Warranto in the facts and circumstances of the case when there is serious administrative difficulties being faced by the State Government, their inability to fill up the posts of Superintending Engineer and Chief Engineer on regular basis, due to pendency of litigation and the right of the petitioner to claim appointment to the said post on the ground that he is to retire within 15 days from now. Accordingly, learned Senior Advocate submits that it is not a fit case where the discretion of issuing a writ of Quo Warranto should be exercised.

10. Having heard learned counsel for the parties at length and on consideration of the facts that have come on record, it is clear that petitioner is substantively holding the post of Engineer-in-Chief, in the Department concerned. He has been appointed to the said post on 17.2.2006 and worked as Engineer-in-Chief upto 30.1.2008. Thereafter he has been sent on deputation as Chief Technical Examiner (Vig), on which post he is working since 30.1.2008. When the order was passed on 31.3.2009 granting additional charge on the post of Engineer-in-Chief to respondent No.3, there is nothing on record to indicate that petitioner ever objected to or represented to the State Government and staked his claim or sought his posting on the said post of Engineer-in-Chief, which was vacated after retirement of Shri S.K. Dixit in March 2009. Not a single representation or communication is

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available on record, made by the petitioner between 1.4.2009 till filing of this writ petition on 6.1.2010. It is only by filing this petition on 6.1.2010 that petitioner has made his claim for appointment to the post. When this petition was filed on 6.1.2010, petitioner had hardly two months to go for his retirement, which is 28.2.2010 i.e... less than 15 days from now. That apart, respondents have brought on record various factual aspects of the matter, which have been to be taken note of by this Court. There are four posts of Engineer-in-Chief in the department, one post is held by the petitioner and there are three posts vacant. The feeder post for promotion to the post of Engineer-in-Chief is the post of Chief Engineer. In all there are 14 posts of Chief Engineer and only one post is filled up, which is held by respondent No.3, the remaining 13 posts are lying vacant. The State Government is unable to fill up the 13 posts due to litigations pending in the matter of seniority and promotion from the post of Superintending Engineer to the post of Chief Engineer. There are 56 posts of Superintending Engineer and only 16 posts are filled up. The respondents are unable to fill up the post of Superintending Engineer due to litigation for promotion from Executive Engineer to the post of Superintending Engineer. It is, faced with this peculiar situation that when the post of Engineer-in-Chief fell vacant, respondents resorted to the procedure of granting current charge of the post in accordance to the policy and circular – Annexure R/1. The policy and Circular – Annexure R/1 contains a system of granting current charge of a post, higher in grade, when the State Government is unable to fill up that post by regular appointment or promotion as per the Rules. According to this policy, the incumbent to be granted current charge of the higher post should be the senior most person in the department, no criminal case or departmental enquiry should be pending against him, no vigilance case or enquiry by the Lokayukta should be pending and he should have an unblemished service record. The policy further contemplates that in case of granting current charge on the post of Engineer-in-Chief, the senior most Chief Engineer will be considered and granted the charge and the order is to be passed by the State Government. When current charge on the post of Chief Engineer is to be given, then any other Chief Engineer working in the Department should be given charge of the said post and the order is to be passed by the State Government. If this is not possible, then the senior most Superintending Engineer as per the seniority in the State should be given the charge of Chief Engineer, on adhoc and current charge basis. Similarly, a provision is made for granting current charge for the posts of Superintending Engineer, Executive Engineer and Assistant Engineers. It is, therefore, clear that in the present case after retirement of Shri S.K. Dixit when the post of Engineer-in-Chief fell vacant, the only incumbent who could be granted charge on day-to-day basis for manning the said post was respondent No.3 and, therefore, the order-Annexure P/1 was passed and in the order various are stipulated: The order indicates that after retirement of Shri S.K. Dixit, petitioner being the senior most

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person is granted "additional charge as a temporary measure until further orders on the post of Engineer-in-Chief, in addition to his substantive post of Chief Engineer". It is, therefore, clear from this order that petitioner is not appointed to the post of Engineer-in-Chief substantively, but only the current charge of the post is granted to him.

11. The question, therefore, would be as to whether in making such a grant or arrangement of giving charge, the same can be termed as appointment on substantive basis to a post in question and, therefore, interference to be made in a petition seeking issuance of Quo Warranto.

12. The order – Annexure P/1 clearly indicates that respondent No.3 is not substantively appointed on the post of Engineer-in-Chief. He is only granted current charge i.e... he is officiating as a temporary measure. Normally, the word 'officiating' means and is used to indicate a position when an employee having held one permanent post or substantively holding one post is appointed to a post in higher grade, not permanently or substantively, but as a temporary measure retaining his lien in the substantive post. This is the meaning of the word 'officiating' as has been laid down by the Supreme Court, in the case of *Arun Kumar Chatterjee Vs. South Eastern Railway and others*, AIR 1985 SC 482.

13. In the case of *B. Srinivasa Reddy* (supra), the dispute before the Supreme Court was with regard to appointment of a person as a Managing Director of the Karnataka Urban Water Supply and Drainage Board contrary to the recruitment rules. In that case the incumbent was appointed on temporary basis until further orders. One of the question, apart from various other questions, that came up for consideration before the Supreme Court in the said case was as to whether appointment of an incumbent until further orders ousts the jurisdiction of the High Court in the matter of issuing a writ of Quo Warranto, even if it is found that the appointment was not in accordance with the provisions of law. The matter has been considered by the Supreme Court and in paragraph 43, it is so observed by the Supreme Court as under:

"Writ of Quo Warranto"

43. *Whether a writ of Quo Warranto lies to challenge an appointment made "until further orders" on the ground that it is not a regular appointment?* Whether the High Court failed to follow the settled law that a *writ of Quo Warranto* cannot be issued unless there is a clear violation of law? The order appointing the appellant clearly stated that the appointment is until further orders. The terms and conditions of appointment made it clear that the appointment is temporary and is until further orders. In such a situation, the High Court, in our view, erred in law in issuing a writ of Quo Warranto the rights under Article 226 can be

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enforced only by an aggrieved person except in the case where the writ prayed for is for Habeas Corpus.

(Emphasis supplied)

The aforesaid would clearly indicate that the Supreme Court has held that when the appointment is temporary and until further orders, in such a situation the High Court has committed error in issuing a writ of Quo Warranto. If that be the position, then in the present case also the writ of Quo Warranto cannot be issued for the simple reason that the appointment in question is also temporary until further orders. In this regard, if the circular dated 5.7.1961, relied upon by learned Senior Advocate is taken note even though the circular speaks about appointing an officer to hold the current charge, but the second paragraph would indicate that an incumbent appointed to the said post and performing the duty on current charge basis is only to exercise some administrative and financial powers, not the statutory powers which are derived from an Act of the Legislature or Rules and Regulations. The circular in question dated 5.7.1961 reads as under:

“ In this department’s memo referred to above, it was decided that an order appointing an officer to hold the current charge of the duties of another post should, in the absence of any specific directions to the contrary, be deemed to cloth the officer with all the powers vested in the full-fledged incumbent of the post, even though he may not get the full pay of the post.

The State Government has since been advised that the statutory functions attached to any designated post can be performed only by a person holding a post and not by one appointed to hold current charge of the duties of the post. An officer appointed to perform the current duties of a post can exercise administrative or financial powers vested in the full-fledged incumbent such as are granted by administrative orders, office memorandum and like. He cannot however exercise statutory powers, whether those powers are derived direct from an Act of the Legislature or Rules, Regulations or Bye-laws made under any Article of the Constitution (eg. Fundamental Rules, Civil Services Classification, Control and Appeal Rules, Civil Services Regulations, Rules regarding delegation of Financial Powers etc).”

14. Again, in the case of *N. Kannadasan* (supra), the Supreme Court while considering the principles governing issuance of a writ of Quo Warranto after taking note of all the previous judgments on the subject, has laid down the principles and the scope of judicial review so also the purpose and the nature for which the writ can be issued. The matter has been crystallized in paragraph 131, in the following manner:

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“131. Concededly, judicial review for the purpose of issuance of writ of quo warranto in a case of this nature would lie:

- (A) in the event the holder of a public office was not eligible for appointment;
- (B) processual machinery relating to consultation was not fully complied.

The writ of quo warranto proceedings affords a judicial remedy by which any person who holds an independent substantive public office is called upon to show by what right he holds the same so that his title to it may be duly determined and in the event it is found that the holder has no title he would be directed to be removed from the said office by a judicial order. The proceedings not only give a weapon to control the executive from making appointments to public office against law but also tend to protect the public from being deprived of public office to which it has a right. It is indisputably a high prerogative writ which was reserved for the use of the Crown. The width and ambit of the writ, however, in the course of practice, have widened and it is permissible to pray for issuance of a writ in the nature of quo warranto.”

15. Thereafter, the meaning and definition of ‘Quo Warranto’ as contained in Corpus Juris Secundum and the Law Lexicon by J.J.S. Wharton, has been explained and from paragraphs 134 onwards various judgments dealing with the question of issuance of Quo Warranto have been considered and finally the question of assessing public policy, interpretation, aim and purpose to be fulfilled in the matter of issuing the aforesaid writ is considered and in paragraph 147, the matter is so dealt with:

“147. Reliance in this behalf has been placed on *Manohar Nathurao Samarth v. Marotrao*, (1979) 4 SCC 83, wherein it has been held that Regulation 25 of the Life Insurance Corporation of India (Staff) Regulations, 1960 framed under the Life Insurance Corporation Act, 1956 and read with Section 15(g) of the City of Nagpur Corporation Act, 1948 provided for disciplinary action and not disqualificatory, observing: (SCC pp. 98-99, paras 11 & 13-14)

“11. ... No ground rooted in public policy compels us to magnify the disciplinary prescription into a disenfranchising taboo. To reverse the word to reverse the sense is to do injustice to the art of interpretation. Reed Dickerson quotes a passage from an American case to highlight the guideline:

‘The meaning of some words in a statute may be enlarged

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or restricted in order to harmonize them with the legislative intent of the entire statute.... It is the spirit ... of the statute which should govern over the literal meaning.'

* * *

13. It is quite conceivable, if the legislature so expresses itself unequivocally, that even in a law dealing with disciplinary control, to enforce electoral disqualifications provided the legislature has competence. The present provision does not go so far.

14. Even assuming that literality in construction has tenability in given circumstances, the doctrinal development in the nature of judicial interpretation takes us to other methods like the teleological, the textual, the contextual and the functional. The strictly literal may not often be logical if the context indicates a contrary legislative intent. Courts are not victims of verbalism but are agents of the functional success of legislation, given flexibility of meaning, if the law will thereby hit the target intended by the lawmaker. Here the emphasis lies on the function, utility, aim and purpose which the provision has to fulfil. A policy-oriented understanding of a legal provision which does not do violence to the text or the context gains preference as against a narrow reading of the words used. Indeed, this approach is a version of the plain meaning rule, and has judicial sanction. In *Hutton v. Phillips*, the Supreme Court of Delaware said:

'(Interpretation) involves far more than picking out dictionary definitions of words or expressions used. Consideration of the context and the setting is indispensable property to ascertain a meaning. In saying that a verbal expression is plain or unambiguous, we mean little more than that we are convinced that virtually anyone competent to understand it, and desiring fairly and impartially to ascertain its signification, would attribute to the expression in its context a meaning such as the one we derive, rather than any other; and would consider any different meaning, by comparison, strained, or far fetched, or unusual, or unlikely.' "

The abovesaid decision, thus, is an authority that in a given case, the disciplinary prescription may be magnified to a disenfranchising taboo, if any ground rooted in public policy is found therefore. Emphasis has been laid on policy-oriented understanding of a legal

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profession and not the strict literal meaning which may not often be logical if the context indicates a contrary legislative intent.

(Emphasis supplied)

16. An analysis of the aforesaid principle would clearly indicate that in a given case if the action of the executive is found to be grounded on certain public policy and the decision is taken keeping in view the aforesaid, it is indicative of the fact that a public oriented understanding should be evolved and the strict literal meaning, which may not often be logical, should be avoided. If that be so, then the literal meaning of the word 'appointed' as canvassed by the learned Senior Advocate for the petitioner cannot be given due effect to, instead it has to be considered and understood for the present case in the light of the fact that appointment of respondent No.3 is on current charge basis, he is not independently and substantively appointed to the post in question and the administrative difficulties indicated by the State Government, which compelled them to make the ad-hoc arrangement.

17. Even though learned Senior Advocate may be right in contending that respondent No.3 does not fulfil the requisite qualification as contemplated under the Recruitment Rules, but when it is an officiating or incharge arrangement, it is not recognition of his right to the post, respondent No.3 continues to hold his substantive posting in the lower post and is discharging the duty of a higher post essentially as a stop gap arrangement then it may not be in the interest of justice to issue a Writ of Quo Warranto. In this regard the principle laid down by the Supreme Court in the case of *Ramakant Shripad Sinai Adalpalakar Vs. Union of India and others*, 1991 Supp (2) SCC 733, may also be taken note of, where the arrangement, temporary in nature on officiating basis is explained in the following manner:

"5. The arrangements contemplated by this order plainly do not amount to a promotion of the appellant to the post of Treasurer. The distinction between a situation where a Government servant is promoted to a higher post and one where he is merely asked to discharge the duties of the higher post is too clear to require any reiteration. Asking an officer who substantively holds a lower post merely to discharge the duties of a higher post cannot be treated as a promotion. In such a case he does not get the salary of the higher post; but gets only that in service parlance is called a "charge allowance". Such situations are contemplated where exigencies of public service necessitate such arrangements and even consideration of seniority do not enter into it. The person continues to hold his Substantive lower post and only discharges the duties of the higher post essentially as a stop-gap arrangement.

6. In *Girja Shankar v. S.D.O., Harda*, AIR 1973 MP

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104 (FB) it was held that a "person appointed to be in charge of the current duties of the office" did not hold the rank and, therefore, could not discharge the statutory functions assigned to the post. In the present case appellant cannot, on the strength of the office order dated 30th August 1963, claim to have been promoted to the post of the "Treasurer". The first contention is, therefore, unsubstantial.

18. Taking into consideration all these principles governing 'officiating appointments', it has to be held that appointment of respondent No.3 is only a stop gap arrangement on officiating basis, he does not get any right to hold the post of Engineer-in-Chief and is not entitled to discharge any statutory functions of the said post also. As respondent No.3 is not substantively holding the post of Engineer-in-Chief, petitioner cannot question the said appointment, when it is not a substantive appointment to the post and seek a Writ of Quo Warranto.

19. The Allahabad High Court in the case of *Ram Shiromani Vs. State of UP and others*, decided by a Division Bench on 15.2.2008, after considering the principles of law in this regard, laid down in the case of *B. Srinivasa Reddy* (supra), has dealt with the matter in the following manner:

"8. ... We are of the view that a writ in the nature of quo warranto cannot be granted to the petitioner as respondent No.3 is holding the post of Managing Director on officiating capacity in stop-gap arrangement on the basis of an order dated 31.3.2007 issued by the State Government, which is the competent authority."

A copy of the said judgment rendered by the Division Bench of the Allahabad High Court has been produced by Shri R.N. Singh, learned Senior Advocate, for perusal of this Court.

20. If the judgment of the Supreme Court in the case of *B. Srinivasa Reddy* (supra) and *N. Kannadasan* (supra) and the Allahabad High Court alongwith the powers to be exercised by an incumbent holding post on current charge basis are evaluated in the light of the facts that have come on record, it is clear that a writ of Quo Warranto would not be maintainable in the case of such an appointment.

21. Apart from the aforesaid, the case in hand can be evaluated from a different aspect. The principles for issuing a writ of Quo Warranto is laid down in various cases. In the case of *University of Mysore* (supra), relied upon by learned counsel for the parties, the matter is so dealt with in paragraph 7:

" Broadly stated, the quo warranto proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise

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or liberty; if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of quo warranto ousts him from that office. In other words, the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right."

(Emphasis supplied)

The question of granting a writ of Quo Warranto is considered in the case of *B. Srinivasa Reddy* (supra) and again in the case of *N. Kannadasan* (supra). If the principles governing the issuance of a writ of Quo Warranto in the light of the aforesaid judgments are evaluated, it would be seen that a writ of Quo Warranto is an extra ordinary remedy, which the law does not permit to be used with liberal hands. It is to be used sparingly, with utmost care, caution and circumspection. It is not a writ of course, it is largely at the discretion of the Court either to grant it or refuse it considering the facts and circumstances of a particular case. The Court is required to consider the motive, conduct of the applicant; delay and laches if any, and the public interest likely to be served or damaged in granting or refusing the writ. If such grant results in confusion, disorder or anarchy in the matter of administration, the relief should not be granted. These are some of the broad principles that emerge if the principles laid down in the matter of granting Quo Warranto is taken note of. That apart, the grant is to be made when appointment is made to a post, public in nature, statutory in character so also substantive in nature. In the present case, there is no substantive appointment on the post of Engineer-in-Chief. As the grant of this writ is a discretionary relief, the facts of the case have to be evaluated and balance maintained with, in relation to public interest and other factors that are available on record.

22. The vacancy position and the peculiar situation exiting in the Department and the administrative difficulties being faced by the State Government is highlighted in the return. It is an admitted position that apart from the petitioner, there is no other incumbent available in the department, who can be substantively and permanently appointed to the post. Petitioner is to retire within a period of less than 15 days from now and, therefore, the situation is that there is nobody in the department who can be substantively and regularly posted and appointed to the post in accordance to the Recruitment Rules. It is to overcome such situations that the Circular – Annexure R/1 is issued on 22.7.2004 and provision is made for granting charge to a senior most person. As per this Circular, it is only respondent No.3, who can be granted the charge. If charge is not granted to respondent No.3, the day-to-day working with regard to various administrative and financial matters in the Department may result in being disrupted and dislocated. It is, therefore, the administrative exigency, which is to

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be co-related to public interest, which has to be taken note of in evaluating the question of exercising discretion and interfering with the power exercised by the State Government, in granting current charge on officiating basis to respondent No.3. If the principles governing grant of Quo Warranto and the discretion to be exercised in this matter are evaluated in the peculiar facts and circumstances, I am of the considered view that it is not a fit case where discretion should be exercised in the matter.

23. In case petitioner was really interested in holding the post, he should have immediately challenged the action when the order was passed more than 10 months back, on 31.3.2009. Silence on the part of the petitioner for more than 10 months in agitating the matter disentitles him from claiming the relief now, at the fag end of his career, when he has hardly 15 days left for his retirement on superannuation.

24. In that view of the matter, considering the totality of the facts and circumstances of the case and the material available on record, this Court does not find any ground for interference in the matter.

25. Accordingly, the petition is dismissed without any order so as to costs.

Petition dismissed.

I.L.R. [2010] M. P., 1371

WRIT PETITION

Before Mr. Justice A.K. Shrivastava & Mr. Justice R.S. Jha

19 February, 2010*

SURESH SHARMA

... Petitioner

Vs.

PUNJAB & SINDH BANK & ors.

... Respondents

Recovery of Debts Due to Banks and Financial Institutions Act (51 of 1993), Section 22(2)(e), Debts Recovery Tribunal (Procedure) Rules, 1993, Rule 5A - Review - Respondent Bank filed application for review of order passed by Appellate Tribunal along with application for condonation of delay - Appellate Authority not only condoned delay but reopened the original ex parte order - Appellate Authority has taken into consideration certain documents which were not filed in original suit and before DRT - Appellate Tribunal has taken into consideration the award of arbitration which was passed after the order of DRT - Held - Power of review can be exercised by the Tribunal and Appellate Tribunal in the same manner as are vested in civil courts under CPC while trying suits - Order of review is arbitrary and de hors the provisions - Order set-aside - Petition allowed. (Paras 10 to 12)

बैंकों और वित्तीय संस्थाओं को शोध्य ऋण वसूली अधिनियम (1993 का 51).

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धारा 22(2)(ई), ऋण वसूली अधिकरण (प्रक्रिया) नियम, 1993, नियम 5ए – पुनर्विलोकन – प्रत्यर्थी बैंक ने अपीलीय अधिकरण द्वारा पारित आदेश के पुनर्विलोकन के लिए आवेदन विलम्ब माफी के आवेदन सहित फाइल किया – अपीलीय प्राधिकारी ने न केवल विलम्ब माफ किया बल्कि मूल एकपक्षीय आदेश पर भी नये सिरे से विचार किया – अपीलीय प्राधिकारी ने कतिपय दस्तावेजों को विचार में लिया जो मूल वाद में और ऋण वसूली अधिकरण के समक्ष फाइल नहीं किये गये थे – अपीलीय अधिकरण ने माध्यस्थम् के अधिनिर्णय को विचार में लिया जो ऋण वसूली अधिकरण के आदेश के बाद पारित किया गया – अभिनिर्धारित – अधिकरण और अपीलीय अधिकरण द्वारा पुनर्विलोकन की शक्ति का प्रयोग उसी ढंग से किया जा सकता है जैसी कि वादों के विचारण के समय सि.प्र.सं. के अन्तर्गत सिविल न्यायालयों में निहित होती है – पुनर्विलोकन का आदेश मनमाना और उपबन्धों से असंबद्ध है – आदेश अपास्त – अपील मंजूर।

Cases referred :

(2008) 8 SCC 612, (2007) 6 SCC 769, (2004) 6 SCC 254 (Para 27), AIR 1976 SC 331.

Ravish Agrawal with Ashish Shroti, for the petitioner.

S.C. Sharma, for the respondent No.1.

None, for the respondent Nos.2 to 5.

Maindiretta, for the respondent Nos.6 & 7.

ORDER

The Order of the Court was delivered by **A.K. SHRIVASTAVA, J.** :—This petition under Article 227 of the Constitution of India has been filed on behalf of the petitioner seeking following reliefs:

“ In the facts and circumstances of the case, this Hon. Court may be pleased to issue a writ in the nature of :

(i) Certiorari quashing the order, dated 27/1/2009, (Annexure P/16) passed by Debt Recovery Appellate Tribunal in Appeal Sr. No.54 of 2007;

Any other order or orders that this Hon. Court deems fit and proper in the facts and circumstances of the case may also kindly be passed.”

2. The unfolded facts are as under :-

(A) 1-5-2008/Annexure P/1. Respondent/Bank filed a suit for recovery of Rs.64,09,718/- against respondent No.2 company and in that suit, present petitioner was arrayed as defendant No.4. The suit was transferred to the Debts Recovery Tribunal (hereinafter, referred to as “DRT”), on account of its establishment.

(B) 12-7-2004/Annexure P/2. Petitioner filed an application for setting aside ex parte judgment under section 22 (2)(g) of the

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Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter, referred to as the Act of 1993) on the ground of non-service of notice after transfer of the case to DRT.

(C) **October,2004/Annexure P/3.** Petitioner submitted an application for correction of the certificate under section 26(2) of the Act of 1993 on the ground that the petitioner had not executed any personal guarantee, and therefore, could not have been held personally liable to pay the amount due to the Bank.

(D) **13-11-2004/Annexure P/4.** The Bank filed reply and refuted the averments.

(E) **4-2-2005/Annexure P/5.** Application for setting aside ex parte judgment dismissed as no sufficient ground was made out to condone the delay.

Application for correction under section 26(2) rejected as prayer made is found to be beyond the scope of of section 26(2) of the Act of 1993. The DRT further observed that as no appeal or review of the judgment has been filed, no relief can be granted.

(F) **R.A.No.2 of 2005.February, 05/Annexure P/6.** Petitioner filed review of the judgment of DRT on the ground that since admittedly no personal guarantee is given by the petitioner, he could not be held jointly and severally (personally) responsible to pay the dues of the Bank.

(G) **9-7-1999/Annexure P/7.** Affidavit of Shashi Paul Lakhwara filed as the sole affidavit in the transfer application. In para 5. it has been stated that personal guarantee has been executed by defendants No.2,3 and 5.

(H) **May,2005/Annexure P/8.** Against the application for review, reply was filed by the Bank (Respondent No.1) alongwith two documents, they are :-

(i) Agreement, dated 10/4/1995 (D/1 -A) and

(ii) Memorandum of understanding (D/1-B).

These documents were not filed in the original suit in which ex parte decree was passed against the petitioner.

(I) **4-8-2005/ Annexure P/9.** Review petition was allowed by the DRT and the petitioner was absolved from personal liability. Above documents D/1-A and D/1-B held since they were not filed in Transfer application, cannot be relied upon by the Bank in review application (Paras 10 to 13 and 17).

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(J) **Appeal NO.593/05. 13-10/2005/Annexure P/10.** Appeal filed by the Bank before the Debts Recovery Appellate Tribunal against the order allowing review application by the DRT.

(K) **26-2-2007/Annexure P/12.** Appeal was dismissed bi-parte by the Debts Recovery Appellate Tribunal, further holding that the DRT justified in reviewing the judgment.

(L) **Appeal SR 54/07 (Review by the Bank) 5-4-2007/Annexure P/12.** The Bank filed review before the Debts Recovery Appellate Tribunal which was barred by time seeking relief upon the following documents Which were not even the part of Transfer Application (original suit) and they were not even filed before the Debts Recovery Appellate Tribunal also in the earlier appeal NO.593/05; they are:

- i. Resolution dated 31/5/199 authorising the petitioner to operate the account.
- ii. Order dated 14/11/1995 passed in Writ Petition No.939/95 (referred in the return of the respondent No.1.)
- iii. Letter dated NIL by the petitioner to M PS IDC.
- iv. Arbitration Award dated 19/6/2006 (referred in the return of respondent No.1.).

(M) **Annexure P/14.** Order sheets of Debts Recovery Appellate Tribunal, notice issued only on the application to condone the delay (order sheets dated 14/5/2007, 28/8/2007 and 9/10/2007).

(N) **Order Sheet dated 28-8-2007/Annexure P/14.** This order sheet of the Debts Recovery Appellate Tribunal mentions that the application to condone the delay in filing the review application is not on record and counsel wants time to go through the record. Order sheet dated 9-10-2007 of Debts Recovery Appellate Tribunal. Counsel indicates that the applicant (respondent No.1 herein this petition) stated that the applicant/Bank has moved an application to condone the delay.

(O) **12-2-2009/Annexure P/15.** Letter of Advocate. Arguments were heard only on the question of limitation.

(P) **27/1/2009./Annexure P/16.** Impugned order of the Debts Recovery Appellate Tribunal allowing the review application and remanding the case to DRT for fresh decision subject to conditions.

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3. The contention of Shri Ravish Agrawal, learned Senior Counsel appearing for the petitioner is that although the DRT rejected the application of the petitioner for setting aside the ex parte judgment under section 22 (2)(g) of the Act of 1993 as well as, another application for correction of certificate under section 26 (2) of the said Act, by order dated 4/2/2005 against which Review Application No.2/05 was filed by the petitioner on the averment that because on showing of the Bank itself present petitioner cannot be held jointly and severally (personally) liable to pay the dues of the Bank, since as per the affidavit of Officer of the Bank namely Shashi Pal Lakhwara other defendants No.2,3 and 5 executed the personal guarantee, and because, there was a mistake apparent on the face of record, the learned DRT rightly allowed the review application on 4/8/2005 (Annexure P/9) and rightly further held that the agreement dated 10/4/1995 (D/1-A); and memorandum of understanding (D/1-B) were not the part of the original suit, therefore, the Bank is not entitled for any relief on the basis of those two documents against the petitioner.

4. Further it has been contended by the learned Senior Counsel that the Bank preferred Appeal No.593/05 against the said order of DRT before the Debts Recovery Appellate Tribunal which was also admittedly dismissed on 26/2/2007 (Annexure P/12) holding that the learned DRT was justified in reviewing the judgment. Further it has been contended by the learned Senior Counsel that review application was filed by the Bank before the Debts Recovery Appellate Tribunal to review its order dated 26/2/2007 and in that review application, impugned order has been passed by the Debts Recovery Appellate Tribunal basing its decision on certain documents which were not filed in the original proceedings and which were even not filed before the Debts Recovery Appellate Tribunal also while hearing Appeal No.593/05 by the Bank, and which came in existence later on and, therefore, the impugned order which has been passed not only condoning the delay in filing the review application, but at the same time, further held that subject to conditions directing the petitioner to deposit fifty percent of the total amount shown in the recovery certificate, i.e. Rs.64,09,718 minus interest pendente lite and future and costs within the period stipulated in the impugned order (para 43) failing which review application filed by the Bank shall stand accepted and the ex parte order passed by the learned DRT on 1/5/2000 shall prevail. Further it has been observed in para 44 of the impugned judgment that last opportunity to file written statement was given to the petitioner. The contention of the learned Senior Counsel is that by passing such order, the learned Debts Recover Appellate Tribunal travelled beyond the scope of review and re-opened the original suit which was not permissible within the four corners of law. Learned Senior Counsel further submitted that this was not even the prayer made in the review application by the Bank. In support of his contention, learned Senior Counsel has placed heavy reliance on a decision of the Supreme Court in *State of West Bengal vs.*

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Kamal Sengupta, (2008) 8 SCC 612 (para 35) wherein the Supreme Court has given tests how the application of review is to be dealt with. On these premised submissions, it has been contended by the learned Senior Counsel that this petition be allowed and the order impugned be set aside.

5. Shri S.C.Sharma, learned counsel appearing on behalf of the respondent No.1/Bank has argued in support of the impugned order and inter alia raised an objection in respect of territorial jurisdiction of this Principal Bench since according to the learned counsel, the parties reside at Indore: the loan was taken at Indore and the civil suit was also filed at Indore which was later on transferred to DRT on account of its establishment and, therefore, the Indore Bench of this Court is having territorial jurisdiction.

6. Shri Maindiretta, learned counsel for the respondents No.6 and 7 submitted that he has nothing to say.

7. Having heard learned counsel for the parties, we are of the considered view that this petition deserves to be allowed.

8. So far as the objection of the learned counsel, for respondent No.1 about the territorial jurisdiction is concerned, according to us, this Principal Bench at Jabalpur is also having the territorial jurisdiction for the simple reason that although the suit was originally filed at Indore, but on account of establishment of DRT, it was transferred to Jabalpur where ex parte order was passed and the review application of the petitioner was also allowed. Against the order allowing the review application by DRT, an appeal before the Appellate Tribunal was filed by the Bank at Allahabad which was dismissed and later on the impugned order of review has been allowed. According to us, since part of cause of action had arisen at Jabalpur and further because directions are given by the Debts Recovery Appellate Tribunal to DRT to decide the matter which is at Jabalpur, therefore, this Principal Seat is having territorial jurisdiction. In this context, we may profitably place reliance on a decision of the Supreme Court in *Ambica Industries vs. Commissioner of Central Excise*, (2007) 6 SCC 769 (para 17), *Kusum Ignots & Alloys Ltd vs. Union of India and another*, (2004) 6 SCC 254 (para 27). We may also place reliance on an earlier decision of the Supreme Court in *Nasiruddin vs. STA Tribunal*, AIR 1976 SC 331 (para 36). Hence, we hereby overrule the objection raised by the learned counsel for respondent No.1 about the territorial jurisdiction by holding that the Principal Bench of this Court at Jabalpur is having the territorial jurisdiction.

9. Coming to the merits of the case, on bare perusal of the aforesaid admitted facts, this Court finds that respondent No.1/Bank who filed a civil suit for recovery of the loan amount against respondent No-2/Company which was transferred to DRT at Jabalpur and was decreed in ex parte on 1/5/2000 and the defendants including the petitioner were held jointly and severally liable to pay the amount.

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Petitioner filed an application for setting aside the ex parte judgment as well as for correction of certificate under section 22 (2)(g) and 26(2) of the Act of 1993, but both these applications were dismissed by the DRT on 4/2/2005. Petitioner again filed a review application on the averment that since the petitioner did not give any guarantee in personal capacity, he cannot be held jointly and severally (personally) responsible to pay the dues of the Bank. Affidavit of officer of the Bank namely Shashi Pal Lakhwara which was filed in the Transfer Application also indicates that personal guarantee was executed by defendants No.2,3 and 5. This review application was ultimately allowed by the DRT vide order dated 4/8/2005 (Annexure P/9) and the petitioner was absolved from personal liability. Further it has been observed by the DRT about the documents, D/1-A and D/1-B, which were filed by the Bank in reply to the review application, that they were not filed in Transfer Application (original suit).

10. Appeal No.593/05 filed by the Bank against the said review order of the DRT, was also dismissed on 26/2/2007. Against this order, which was passed on 26/2/2007, Bank filed review application (Appeal SR No.54/07) which was barred by time and an application to condone the delay was filed which was to be heard and order was to be passed. But by the impugned order (Annexure P/14), not only the delay has been condoned, but the original ex parte order has also been re-opened by directing the petitioner to deposit the amount as indicated in para 43 of the impugned judgment which we have also referred herein above. On going through the impugned order, we find that while allowing the review application, the learned Debts Recovery Appellate Tribunal has taken into consideration certain documents which are referred herein above in paragraph 2 of this order as (i) to (iv). These documents were neither part of Transfer Application (original suit) nor they were filed before the learned Debts Recovery Tribunal while hearing the review application. Not only this, while allowing the review application, the learned Tribunal has also taken into consideration the arbitral award passed by the sole Arbitrator dated 19/6/2006 which was passed after the review application filed by the petitioner was allowed by the DRT.

11. The procedure and powers of the Tribunal constituted under the Act of 1993 have been enacted in section 22 of the said Act. On bare perusal of sub-section (2) of section 22, this Court finds that powers of review can be exercised by the Tribunal and the Appellate Tribunal in the same manner as are vested in civil courts under Code of Civil Procedure, 1908 while trying suits. It would also be quite relevant to go through Rule 5-A of the Debts Recovery Tribunal (Procedure) Rules, 1993 which also speaks that when there is a mistake or error apparent on face of the record, review can be made. Hence, according to us, by passing the impugned order by the learned Debts Recovery Appellate Tribunal by taking into consideration certain documents which were not even earlier filed before the DRT or before the Appellate Tribunal while hearing appeal against the review,

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according to us, the impugned order appears to be arbitrary and *de hors* to the provisions of section 22 as well as Rule 5-A of the Act of 1993 and the rules made thereunder. The Supreme Court in the case of *Kamal Sengupta* {supra} while considering the powers of review conferred upon the Tribunals under section 22 (3) (f) of the Administrative Tribunals Act, 1985 has held that these powers are akin/analogous to the power of a civil court under section 114 read with Order 47 Rule 1 of the Code of Civil Procedure, 1908. The power vested in the civil courts under the Code of Civil Procedure, 1908 while trying suits has been conferred to the DRT as well as Debts Recovery Appellate Tribunal constituted under the Act of 1993 and clause (e) of sub-section (2) of section 22 includes reviewing of the decisions. Hence, powers of review as vested in civil court, as envisaged under section 114 and Order 47 Rule 1 of the Code of Civil Procedure, 1908 are squarely applicable on the DRT as well as Debts Recovery Appellate Tribunal. The Rules of 1993 are framed under the Act of 1993 and Rule 5-A is clear like a luminous day and by no stretch of imagination it can be said that even under the Rules, a different scope of review not akin/analogous to section 114 and Order 41 Rule 1 of the Code of Civil Procedure is there. We think it appropriate to quote para 35 of the above said judgment of the Supreme Court in *Kamal Sengupta* (supra) which reads thus :

“35. The principles which can be culled out from the above noted judgments are:

- (i) The power of the Tribunal to review its order/decision under Section 22(3)(f) of the Act is akin/ analogous to the power of a civil court under section 114 read with Order 47 Rule 1 CPC.
- (ii) The Tribunal can review its decision on either of the grounds enumerated in Order 47 Rule 1 and not otherwise.
- (iii) The expression “any other sufficient reason” appearing in Order 47 Rule 1 has to be interpreted in the light of other specified grounds.
- (iv) An error which is not self-evident and which can be discovered by a long process of reasoning, cannot be treated as an error apparent on the face of record justifying exercise of power under Section 23(3)(f).
- (v) An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- (vi) A decision/order cannot be reviewed under Section 22(3)(f) on the basis of subsequent decision/judgment

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of a coordinate or larger Bench of the Tribunal or of a superior court.

(vii) While considering an application for review, the tribunal must confine its adjudication with reference to material which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

(viii) Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier."

12. Judging from all the angles, we are unable to uphold the impugned order and, therefore, the same is hereby set aside and the order dated 4/8/2005 (Annexure P/9) passed by the DRT allowing the review application of the petitioner and the order passed in Appeal No.593/05 dated 13/10/2005 (Annexure P/10) are hereby restored.

13. However, on going through the averments made in the return as well as the order, we find that an award has been passed by the sole Arbitrator of Arbitral Tribunal dated 19/6/2006 (Annexure R/5) which was appointed by the Indore Bench of this Court under section 11 (5) of the Arbitration and Reconciliation Act, 1996, vide order dated 9/9/2002 passed in M.C.C.No.79/2001 which is between Avatarsingh Narang and Suresh Sharma (present petitioner), as well as some order in Writ Petition No-2858/07 of Indore Bench of this Court dated 29/6/2007 in which present petitioner is also a party. The petitioner shall abide the order and award passed by the Arbitral Tribunal if it had attained finality, as well as order Annexure R/4 passed by this Court at Indore Bench in Writ Petition No.2858/07 (*Avtarsingh Narang and others vs. Suresh Sharma and others*) dated 29/6/2007 and, by this order, they shall not be deemed to be nullified, nor would it preclude the respondents to take steps on that basis. We may further make it clear that this order has been passed only to resolve dispute arisen between the parties in the aforesaid circumstances in DRT.

14. Petition is allowed to the extent indicated herein above, with no order as to costs.

Petition allowed.

ANIL JAIN Vs. STATE OF M.P.**I.L.R. [2010] M. P., 1380****WRIT PETITION***Before Mr. Justice Ajit Singh*

9 March, 2010*

ANIL JAIN & ors.

... Petitioners

Vs.

STATE OF M.P. & ors.

... Respondents

Motor Vehicles Act (59 of 1988), Sections 96(i), (xxi), (xxii), 117, 138(2)(e), Motor Vehicles Rules, M.P. 1994, Rules 203 & 204 - Order of District Magistrate passed as Chairman of Bus-Stand Monitoring Committee prescribing maintenance charges to be paid in respect of motor vehicle halting in bus-stand - Rule 204 empowers only the Regional Transport Authority for taking decision for purposes of maintenance of bus-stand by prescribing fees to be paid by private bus operators - Bus-Stand Monitoring Committee constituted by an administrative order of which the District Magistrate is the Chairman can not be equated with Regional Transport Authority even though the Regional Transport Authority may be a member of committee - Order cannot be held valid - Order quashed - Petition allowed. (Paras 12 to 14)

मोटर यान अधिनियम (1988 का 59), धाराएँ 96(i), (xii), (xxii), 117, 138(2)(ई), मोटर यान नियम, म.प्र. 1994, नियम 203 व 204 - जिला मजिस्ट्रेट का बस-स्टेण्ड परीवीक्षण समिति के अध्यक्ष के रूप में पारित आदेश बस-स्टेण्ड में रुकने वाले मोटर वाहन के सम्बन्ध में अदा किया जाने वाला अनुरक्षण शुल्क विहित करता है - नियम 204 बस-स्टेण्ड के अनुरक्षण के प्रयोजनों के लिए निजी बस संचालकों द्वारा अदा किया जाने वाला शुल्क विहित करके निर्णय लेने के लिए केवल क्षेत्रीय परिवहन प्राधिकारी को सशक्त करता है - बस-स्टेण्ड परीवीक्षण समिति जो एक प्रशासनिक आदेश द्वारा गठित की गयी, जिसका जिला मजिस्ट्रेट अध्यक्ष है, क्षेत्रीय परिवहन प्राधिकारी के बराबर नहीं मानी जा सकती, यद्यपि क्षेत्रीय परिवहन प्राधिकारी समिति का सदस्य हो सकता है - आदेश को विधिमान्य नहीं ठहराया जा सकता - आदेश अपास्त - याचिका मंजूर।

H.C. Kohli, Sanjay Verma, Ashish Rawat, Brajesh Dubey, S. Ganguli & Subodh Pandey, for the petitioners.

Rahul Jain, Dy.A.G., Dildar Singh & Yogesh Dhande, G.Advs., for the respondents/State.

P.C. Chandak, P.K. Mishra & Uttam Maheshwari, for the respondent / M.P.R.T.C.

ORDER

AJIT SINGH, J. :-These writ petitions are being disposed of by this common order as they are of similar nature and were heard together.

2. The petitioners come from different districts of the State of Madhya Pradesh

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and are bus operators by profession. They are, thus, required to use the bus-stands for halting their buses. In these petitions, they have challenged the orders of different District Collectors/District Magistrates passed as Chairman of the respective Bus-Stand Monitoring Committee prescribing the maintenance charges to be paid in respect of motor vehicles halting in the bus-stands.

3. Briefly stated the facts giving rise to these petitions are that, as part of the proceeding for the closure of Madhya Pradesh Road Transport Corporation (in short, "the Transport Corporation") and for proper operation of bus-stands operated by the Transport Corporation, the State Government took a decision on 26.5.2007 to handover all the bus-stands of the Transport Corporation to the local municipal authorities (municipal corporation or municipal council). At the time of taking the decision there were 78 bus-stands which were managed by the Transport Corporation out of which 34 were under the management of municipal authorities and the rest were being managed by the Transport Corporation itself. On the same date the Government also decided that the Transport Corporation will handover the management of all the bus-stands to the concerned municipal authorities and it shall be the responsibility of municipal authorities to develop basic facilities necessary for the passengers and the vehicles such as cleanliness, clean drinking water, waiting room for passengers, place of stopping the bus (platform), toilet, etc. The local authorities shall be at liberty to take charges from the bus owners as per directions that will be separately issued by the Transport Commissioner. The decision of the State Government also provides that in every district there shall be a Bus-Stand Monitoring Committee of which Collector/District Magistrate shall be the Chairman whereas Superintendent of Police, Municipal Commissioner/Chief Municipal Officer, Regional/District Transport Officer and two representatives of passenger and vehicle owners' association will be its members and it shall be the function of such Committee to ensure basic facilities at the bus-stand.

4. Pursuant to the aforesaid decision a Bus-Stand Monitoring Committee has been constituted in different districts. In the districts with which I am concerned in these petitions, Bus-Stand Monitoring Committee through the District Magistrate as its Chairman has taken a decision that the Committee will recover maintenance charges of the bus-stand from the private bus operators in respect of their motor vehicles halting at bus-stand and different rates have been prescribed for different vehicles depending upon their sizes and duration of halt. The decision also provides that in the event of non-payment of such maintenance charges the halting of bus will be considered as unauthorized and the Regional Transport Officer shall cancel the licence of that bus operator.

5. The question which calls for consideration is whether the District Magistrate is empowered under the Motor Vehicles Act to direct for the recovery of

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maintenance charges of bus-stand from the private bus operators for halting their vehicles at bus-stand.

6. Section 96(1), which occurs in Chapter V of the Motor Vehicles Act, 1988 (in short, "the Act") empowers the State Government to make rules for the purposes of carrying into effect the provisions of the said chapter. Without prejudice to the generality of this power, section 96(2) authorizes the State Government to make rules on certain enumerated matters. Clauses (xxi) and (xxii) of section 96(2) read as follows:

"(xxi) prohibiting the picking up or setting down of passengers by stage or contract carriages at specified places or in specified areas or at places other than carriage to stop and remain stationary for a reasonable time when so required by a passenger desiring to board or alight from the vehicle at a notified halting place;

(xxii) the requirements which shall be complied with in the construction or use of any duly notified stand or halting place, including the provision of adequate equipment and facilities for the convenience of all users thereof, the fees, if any, which may be charged for the use of such facilities, the records which shall be maintained at such stands or places, the staff to be employed thereat, and the duties and conduct of such staff, and generally for maintaining such stands and places in a serviceable and clean condition."

7. Section 116, which occurs in Chapter VIII of the Act, deals with the power of the State Government or any authority authorized by it to erect traffic signs. Section 117 refers to parking places and halting stations and read as follows:

"117. Parking places and halting stations.- The State Government or any authority authorised in this behalf by the State Government may, in consultation with the local authority having jurisdiction in the area concerned, determine places at which motor vehicles may stand either indefinitely or for a specified period of time, and may determine the places at which public service vehicles may stop for a longer time than is necessary for the taking up and setting down of passengers."

8. Section 138(1) authorizes the State Government to make rules for carrying into effect the provisions of Chapter VIII. Section 138(2) empowers the Government to make rules on certain enumerated matters. The relevant clause (e) of section 138(2), being one of these matters, reads as under:

"(e) the maintenance and management of parking places and stands and the fees, if any, which may be charged for their use."

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9. The State Government, in exercise of powers conferred by different sections of the Act, has made Motor Vehicles Rules, 1994 (in short, "the Rules"). Rules 203 and 204, which are relevant in these petitions, read as follows:

"203. Maintenance and management of parking places.- (1)

The District Magistrate may, in consultation with the Superintendent of Police and the local body, by notification, in the official gazette or by the erection of appropriate traffic sign of the Schedule to the Act, declare any place as the parking place for motor vehicles. Different places may be declared as parking places for different category of vehicles.

(2) The District Magistrate may enter into an agreement with or grant a licence to any person or local body for the maintenance of the parking places under certain conditions. The agreement or licence may be terminated forthwith upon the breach of any conditions thereof.

(3) The maximum period for parking of a vehicle may be fixed by the District Magistrate.

(4) The District Magistrate shall prescribe fees for the use of the parking places. Uniform or different fee may be fixed for different vehicles."

"204. Maintenance and management of stands.- (1) The Regional Transport Authority by notification in the official gazette, or by the erection of appropriate traffic sign of the Schedule of the Act or both, may in respect of the taking up or setting down the passengers or both by public service vehicles or by specified class of public service vehicles:-

(a) Conditionally or unconditionally prohibits the use of any specified place or of any place of a specified nature or class, or

(b) Require that within the limit of any Municipal Corporation, Municipality notified area or cantonment, or with in such other limits as may be specified in the notification, certain specified stands only shall be so used:

Provided that no place which is privately owned shall be so notified except with the previous consent in writing of the owner thereof.

(2) Where a place has been notified or has been demarcated by traffic signs or both, as being stand for the purpose of this rule, then notwithstanding that the

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land is in possession of any person, the place shall subject to the provisions of these rules, may be deemed to be a public place within the meaning of the Act and the Regional Transport Authority may enter into an agreement with, or grant a licence to any person or local body or State Transport Undertaking for the purpose of maintenance of the building of works necessary thereto subject to the termination of the agreement or licence forthwith upon the breach of any condition thereof and may otherwise make rules or give directions:-

(i) Prescribing the fees to be paid by the owners of public service vehicle using the place and providing for the receipt and disposal of such fees;

(ii) Specifying the Public Service Vehicles or the class of public service vehicles which shall use the place which shall not use the place.

(iii) Appointing a person to be the manager of the place and specifying the power and the duties of the manager;

(iv) Requiring the owner of the land, or the local body or the State Transport Undertaking, as the case may be, to erect such shelters, lavatories and latrines and to execute such other works as may be specified in the rules or in the directions and to maintain the same in a serviceable clean and sanitary condition.

(v) Requiring the owner of the land or local body or the State Transport Undertaking as the case may be, to arrange for the free supply of drinking water for passengers including intending passengers;

(vi) Prohibiting the use of such place by specified persons or by other than specified persons.

(3) If the owner of the land, local body or State Transport Undertaking, as the case may be, fails to comply with any rule or direction made or given to him under this Rule, the Regional Transport Authority may prohibit the use of such place for the purpose of this rule."

10. The above quoted section 96(2) (xxi) and (xxii) and sections 117 and 138 of the Act are equivalent to sections 68(2) (r) and (s), 76 and 91 of the Old Motor Vehicles Act, 1939. In *T.B. Ibrahim V. Regional Transport Authority*, AIR

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1953 SC 79 and *Municipal Board, Pushkar V. State Transport Authority, Rajasthan*, AIR 1965 SC 458, the Supreme Court had the occasion to interpret these sections and while doing so it held that notified halting place or stand referred to in section 68(2)(r) and (s) meant a bus stand i.e. the place where the buses stand for commencing their transport services or where they stand after terminating their services. The Supreme Court further held that section 76 dealt with parking places, for all vehicles and halting stations for public service vehicles and it did not cover a bus stand dealt in section 68(2)(r) and (s). Further, in the case of *Municipal Board, Pushkar Vs. State Transport Authority, Rajasthan*, (Supra) the Supreme Court while interpreting Rule 134 of the Rajasthan Motor Vehicle Rules which is identical to the above quoted Rule 204 of the Rules held that the rule empowered the fixation or alteration of bus stand under section 68(2)(r) and (s) and did not refer to parking places or halting stations or stands dealt with in section 76 and section 91(2)(e). The Supreme Court in *T.B. Ibrahim Vs. Regional Transport Authority* (Supra) while referring to the expression duly notified stand as used in section 68(2)(r) and (s) observed that the expression is not defined in the Act "but it is reasonable to presume that a duly notified stand must be one which is notified by the Transport Authority and by none other".

11. Later, a Division Bench of this Court in *Madhya Pradesh State Road Transport Corporation Vs. State of Madhya Pradesh*, 1981 MPLJ 542, while referring to the decision of the Supreme Court in *Municipal Board, Pushkar Vs. State Transport Authority, Rajasthan* (Supra), after interpreting the old rule 239 of the Motor Vehicles Rules 1974 which is equivalent to the above quoted Rule 204 of the Rules held that the rule does not relate to parking places and halting stations or stands referred to in section 117 or 138 (2)(e). In this case the Division Bench also held that the State Government cannot delegate its power conferred under section 68(2)(r) and (s) to the District Magistrate and the power to notify any place as a bus stand can be conferred only on a Transport Authority. On these findings the Division Bench quashed the order issued by the District Magistrate made under Rule 239(2)(1) prescribing the fees to be paid in respect of motor vehicles halting in the bus-stand. It is interesting to note that the Division Bench even suggested the State Government to amend Rule 239 by vesting power under the Rule in the Regional Transport Authority instead of District Magistrate and that State Government should itself fix the fee in exercise of its power under section 68(2)(s). The State Government followed the advise while making the new Rule 204 and vested the power in the Regional Transport Authority instead of District Magistrate.

12. From the above discussion, I find the legal position well settled that notified halting place or stand referred to in section 96(2) (xxi) (xxii) of the Act means a bus-stand and section 117, which deals with parking places and halting stations, does not cover a bus-stand. It is also settled that Rule 204 of the Rules does not

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relate to parking places and halting stations or stands referred to in section 117 or 138(2)(e) or Rule 203.

13. Rule 204 of the Rules clearly empowers only the Regional Transport Authority for taking a decision for the purposes of maintenance of bus-stand by prescribing fee, etc. to be paid by the private bus operators. Regional Transport Authority is constituted under section 68 of the Act by the State Government by notification in the official gazette. A Bus-Stand Monitoring Committee constituted by an administrative order of which the District Magistrate is the Chairman cannot be equated with Regional Transport Authority even though the Regional/District Transport Officer may be a member of the Committee. The orders to collect maintenance charges of bus-stands challenged in these petitions have been issued by the District Magistrates as Chairman of the Bus-Stand Monitoring Committee. These orders cannot be construed to be orders issued by the Regional Transport Authority under Rule 204 and, therefore, the orders also cannot be held to be valid.

14. The petitions are allowed and the orders issued by different District Magistrates as Chairman of the respective Bus-Stand Monitoring Committee prescribing the maintenance charges to be paid by the private bus operators in respect of motor vehicles halting in the bus-stands are quashed. No order as to costs.

Petition allowed.

I.L.R. [2010] M. P., 1386

WRIT PETITION

Before Mr. Justice Rajendra Menon

22 March, 2010*

R.S. SHASTRI & ors.

... Petitioners

Vs.

M.P. STATE WARE HOUSE CORPORATION & ors.

... Respondents

A. Service Law - Warehousing Corporation Act (58 of 1962), Section 42, State Warehousing Corporation Employees Pension Scheme, M.P. 1996 - Pension - Liability to pay - A pension scheme was introduced and trust deed was entered into between Warehousing Corporation and LIC India - Under the scheme a corpus was created which was an amount equivalent to 1.8% of the month's salary for each qualifying year of service, subject to a maximum equivalent of 45 months' salary - This corpus could exceed 45 months salary due to excess income that may be generated from the investment of the fund by the Corporation - For the purpose of creation of this fund, the employees and employer's contribution was computed @

*W.P. No.4318/2002 (Jabalpur)

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10% of the basic pay with DA and the premium was fixed which contained the relevant details with regard to the corpus fund of an employee, his date of retirement, last pay drawn, pension payable and the amount of commutation - Employees were getting the pension till March 2002 and the same was stopped for the reason that LIC had made excess payment in regard to commutation, it seems that it had made excess payment in regard to commutation of pension and there had been reduction in the annuity rate due to lowering of interest in the financial market - Held - LIC having accepted the annuity and having effected monthly payments can neither reduce the annuity amount nor can refund it to the detriment of the retirees since the annuity has already crystallized and no change can be made in such annuity - LIC has an obligation under law to fulfill the promise given by it to the retirees, who are assured under the annuity scheme. (Para 20)

क. सेवा विधि - मांडागारण निगम अधिनियम (1962 का 58), धारा 42, राज्य मांडागारण निगम कर्मचारी पेंशन योजना, म.प्र. 1996 - पेंशन - अदा करने का दायित्व - एक पेंशन योजना पुरःस्थापित की गयी और मांडागारण निगम और भारतीय जीवन बीमा निगम के मध्य न्यास विलेख किया गया - योजना के अन्तर्गत संग्रह सृष्ट किया गया जो सेवा के प्रत्येक अर्हता वर्ष के लिए माह के वेतन के 1.8 प्रतिशत के बराबर एक धनराशि थी - यह संग्रह अतिरिक्त आय, जो निगम द्वारा निधि के निवेश से उत्पन्न की जा सकती है, के कारण 45 माह के वेतन से अधिक नहीं हो सकता - इस निधि के सृजन के लिए कर्मचारियों और नियोक्ता का योगदान महँगाई भत्ते सहित मूल वेतन का 10 प्रतिशत निर्धारित किया गया और प्रीमियम नियत किया गया जिसमें कर्मचारी की संग्रह निधि, उसकी सेवानिवृत्ति की तारीख, अंतिम बार निकाला गया वेतन, देय पेंशन और सारांशीकरण की राशि के बारे में सुसंगत विवरण अन्तर्विष्ट है - कर्मचारी मार्च 2002 तक पेंशन प्राप्त कर रहे थे और यह इस कारण से रोक दी गयी कि जीवन बीमा निगम ने सारांशीकरण के सम्बन्ध में अतिरिक्त संदाय किया था और वित्तीय बाजार में ब्याज निम्न होने के कारण वार्षिकी दर में कमी हुई थी - अभिनिर्धारित - जीवन बीमा निगम वार्षिकी स्वीकार करने और मासिक संदाय करने के बाद न तो वार्षिकी रकम कम कर सकती है और न ही सेवानिवृत्तों की हानि के लिए उसे वापस कर सकती है चूंकि वार्षिकी पहले से ही निश्चित की जा चुकी है और ऐसी वार्षिकी में कोई परिवर्तन नहीं किया जा सकता - जीवन बीमा निगम का विधि के अन्तर्गत यह दायित्व है कि उसके द्वारा सेवानिवृत्तों, जिन्हें वार्षिकी योजना के अन्तर्गत बीमाकृत किया गया है, को दिये गये वचन का पालन करे।

B. Service Law - Pension - Annuity - Date when its gets crystallized - Held - Right of the employees to receive the annuity and the quantum of the annuity gets crystallized at the time of purchase of the annuity and once they have retired the connection between the trust and the fund of the retirees are served and the LIC under law is obliged to make payment as promised. "

(Para 25)

ख. सेवा विधि - पेंशन - वार्षिकी - तारीख जब इसे निश्चित कराया जाता है - अभिनिर्धारित - कर्मचारियों का वार्षिकी प्राप्त करने का अधिकार और वार्षिकी की मात्रा वार्षिकी क्रय

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किये जाते समय निश्चित करायी जाती है और जब वे सेवानिवृत्त हो गये हों तब न्यास और सेवानिवृत्तों की निधि के बीच सम्बन्ध पूरा हो जाता है और जीवन बीमा निगम वचन के अनुसार विधि के अन्तर्गत संदाय करने के लिए बाध्य है।

Cases referred :

(2005) 8 SCC 404, AIR 1962 SC 633, (1974) 4 SCC 602, (1996) 11 SCC 1.

Rohit Arya with Sujoy Paul & Akash Choudhary, for the petitioners.

R.N. Singh with Manish Nigam, for the respondent Nos.1, 2, 3 & 6.

R.P. Agrawal with S.K. Tiwari, for the respondent Nos.4 & 5.

ORDER

RAJENDRA MENON, J. :-As common questions are involved in all these writ petitions and as claim made by each of the petitioner herein pertains to grant of pensionary benefit after retirement from the services of Madhya Pradesh State Ware Housing Corporation, all these petitions are being decided by this common order.

2. For the sake of convenience, pleadings made, documents filed and the material available in the record of Writ Petition No.4318/2002 is reflected in the order.

3. Petitioners herein were employees, who were working with the Madhya Pradesh State Ware Housing Corporation (for short referred to as 'MPSWHC or Ware Housing Corporation'). They have retired from service and a detailed chart showing the particulars of the petitioners, the post held by them, their date of retirement, the particulars of the pension payment orders issued to each of them and various other particulars are available in the charts annexed to each of the petitions.

4. It is the case of the petitioners that a pension scheme was formulated by the MPSWHC on the basis of the powers conferred on it under section 42 of the Ware Housing Corporation Act, 1962. Pension scheme is known as the M.P. State Ware-housing Corporation Employees Pension Scheme 1996 (for short referred to as 'Scheme'). The said Scheme came into force with effect from 1.4.1996. Various provisions are made in the said Scheme and according to the petitioners they were being paid pension under the aforesaid Scheme right from 1.1.1996 or from the date of their retirement upto 2002, when the dispute in question had arisen. Facts that have come on record indicates that in the year 1994 a decision was taken by the Management of MPSWHC to explore the possibility of introducing a pension scheme and for the said purpose it is stated that the Branch Manager of Life Insurance Corporation of India (for short referred to as 'LIC'), approached the Management of Ware Housing Corporation vide letter-dated 22.5.96, after certain initial negotiation. It was stated so in this letter that the pension scheme if introduced by the MPSWHC, would be viable and the total

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liability of the Ware Housing Corporation would not exceed 10% of the basic salary + DA allowance payable to the employees. This was the amount, which was already being paid towards contributory provident fund. Thereafter, two further letters making similar representations were made as is evident from Annexures R/2 and R/3 dated 11.7.96 and 14.8.96. Negotiations as are evident from the material available on record proceeded and keeping in view the representations in this regard made by the LIC to the Ware Housing Corporation, the Scheme for pension was formulated and accordingly a trust on the basis of a deed was brought into existence and in pursuance to the same the Ware Housing Corporation paid a sum of Rs.160 Lacs vide covering letter – Annexure R/5 dated 24.10.96.

5. On a request made by Branch Manager of LIC, the management of Ware Housing Corporation signed a formal proposal to enable issuance of a policy vide Annexure R/6. Acting on the basis of the said proposal, the earlier communications and verbal assurance, the Managing Director of the Ware Housing Corporation signed the proposal form on 20.1.96 and as per the policy requirement, the trust was constituted by the Management for implementation of the Scheme and a trust deed was duly executed in this regard on 20.2.1997 vide Annexure R/7. This deed of trust contained rules relating to implementation of the pension scheme. A copy of the trust deed according to the records was handed over to the concerned Branch Manager of the LIC, which was acknowledged. After receipt of the trust deed, LIC handed over the master policy on 15.3.97 – Annexure R/9. According to the petitioner, the pension scheme was implemented with effect from 1.4.99 and it worked smoothly without any hindrance till 2002 when pension was being paid to the petitioners in accordance to the said Scheme.

6. It is the case of the petitioners that under this Scheme a corpus was created, which was an amount equivalent to 1.8% of the month's salary for each qualifying year of service, subject to a maximum equivalent of 45 months salary. This corpus could exceed 45 months salary due to excess income that may be generated from the investment of the fund by the Corporation. For the purpose of creation of this fund, the employees and employer's contribution was computed @ 10% of the basic pay with DA and keeping in view the aforesaid, the premium was fixed. At the time of retirement of each employee, Pension Payment Order (PPO) was issued, which contained the relevant details with regard to the corpus fund of an employee, his date of retirement, last pay drawn, pension payable and the amount of commutation, if opted. According to the petitioners, in each of this petition, after the Scheme was brought into existence and after their retirement, PPO were issued in the case of each of the petitioners and in the chart filed by the petitioners alongwith the petitions, the particulars of the PPO, the corpus amount in each case, commuted amount, if any, and the monthly pension payable are indicated. It is further the case of the petitioners that after their retirement, pension as envisaged in the PPO were paid to them directly through cheques issued by

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LIC. There was no difficulty in receiving pension by each of the employee from 1.4.96 or after their date of retirement till March 2002, when the pension payment to the petitioners were stopped. On representations made by the petitioners to the LIC so also to the Ware Housing Corporation, it was informed by the LIC that the management of the Ware Housing Corporation vide letter-dated 17.4.2002 – Annexure P/2 has stopped the pension to the petitioners and in this regard the communication issued by LIC is Annexure P/7.

7. It was the case of the petitioners that their pension could not be stopped in the manner done either by the Ware Housing Corporation or by LIC and the conditions, which were made available to them on their date of superannuation and payments which were made to them with regard to their pension as per the PPO, could not be unilaterally changed to their detriment. It was the case of the petitioners that the LIC failed to honour their commitment and from the communications made by the Corporation, it seems that it had made excess payment in regard to commutation of pension and their had been reduction in the annuity rate due to lowering of interest in the financial market. It is the case of the petitioners that once the payment of pension was made and when as per the scheme they were getting the pension, then on the ground of reduction in the annuity rate or interest rate prevalent in the market, action taken for withdrawing their pension is unsustainable.

8. Accordingly, challenging the action of the respondents in acting in an manner detrimental to their interest in the matter of payment of their pension, these petitions were filed by the petitioners.

9. On notice being issued, respondents 1 to 3, the management of the Ware Housing Corporation, contending that under the pension scheme, the liability and responsibility to make payment of pension lies with the LIC and the management of the Ware Housing Corporation is not required to take action nor have they withheld the pension. They blame the LIC for the default. It has been further put forth by respondents 1 to 3 that initially petitioners were covered under the contributory provident fund scheme, but on representations made by LIC and its officials initially in the year 1994, negotiations and communications took place and finally the trust deed and the master policy as indicated hereinabove, were finalized and the pension scheme implemented with effect from 1.4.1996. According to the Ware Housing Corporation, the pension scheme worked satisfactorily without any hindrance right from 1.4.1996 till sometime in the financial year 1999-2000, when interest rates in the financial circuit were cut down, decreasing the interest rates to the LIC on the amount of corpus deposited with them, it is alleged that the LIC invented a novel method of blaming the Ware Housing Corporation and in this regard a communication was made to them on 17.8.1999 vide Annexure R/10. Thereafter, vide Annexure R/11 dated 14.11.99, it was suggested by the LIC that

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the rules and the Scheme contained in the trust deed were perused by them and it has come to light that Sections I and II of the Rules, pertained to 'defined contributory scheme' and not to the 'defined benefit scheme' to which the management of the Ware Housing Corporation had opted for. It was stated that the mistake has to be rectified and necessary amendment should be made in the Scheme and rules by a deed of variation as such according to the trust deed a variation deed has to be executed by the management and three of the trustees. In addition, approval of the Commissioner of Income Tax was to be taken. However, it is the case of the Ware Housing Corporation that without following the due process contemplated in the trust deed for modification or variation of the trust and without concurrence and approval of the management of the Ware Housing Corporation and without due approval of the Commissioner of Income Tax, a deed of variation was entered into by some of the trustees with the LIC in an illegal manner, vide Annexure R/2. It is the case of the Ware Housing Corporation that this variation deed did not have the sanction of law, as it was signed by only three of the trustees and some officials of the LIC.

10. It is the case of the Ware Housing Corporation that LIC was under a statutory and contractual obligation to provide benefit to the retired members and LIC had no authority to unilaterally change any of the conditions in the master policy. It is the case of the Ware Housing Corporation that the deed of variation was illegally created, and as LIC had granted some undue benefits to 137 retired employees as a result of which the corpus was adversely affected, reducing it consequently to the detriment of the retired employees. Under such circumstances, the management of the Ware Housing Corporation, on 18.1.2001, pointing out that they were making contribution of 10% of the basic salary, eligibility of some of the benefits is reduced from 15-20 years and they wanted to know if any extra burden would be incurred. The Branch Manager of LIC vide Annexure R/4 dated 19.1.2001 indicated that in such a event some additional one time contribution will be required to be made to get the annual contribution at 10%. Further communications took place and it is the case of the Ware Housing Corporation that LIC stopped the pension payment without any authority on the ground of non-payment of premium and other breach on the part of the Ware Housing Corporation, which is illegal. By attributing malafides to the LIC, the management of Ware Housing Corporation have refuted each and every contentions of the LIC. Various details in this regard are contained in the return and for the present it is not necessary to go into the details.

11. As far as respondent LIC i.e... respondents 4 and 5 are concerned, it was their case that the master policy, the trust deed and the Scheme was based on Employees Group Superannuation Benefit Purchase Scheme, which is otherwise known as 'defined benefit scheme' or 'benefit purchase scheme'. According to the LIC, the management of Ware Housing Corporation had infact made a proposal

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for purchasing this Scheme, but inadvertently with the trust deed certain annexures namely Sections II and III, of a different Scheme known as 'defined contribution scheme' was annexed in place of Sections II and III of the 'defined benefit scheme'. It was in order to rectify this mistake that the deed of variation – Annexure R/2 dated 18.7.2000 was executed between the parties. It is the case of LIC that the entire dispute is a result of this mistake. It was emphasized by LIC that the management of the Ware Housing Corporation had availed of the 'defined benefit scheme' and, therefore, the employees like the petitioners could only get the benefit as enumerated under the said scheme i.e... 'defined benefit scheme' and as by mistake the benefit under the 'defined contribution scheme' was annexed and granted, the deed of variation dated 18.7.2000 only corrected this mistake. After elaborating in detail the error so detected and the benefit granted inadvertently to many of the retired employees, it is the case of LIC that the deed of variation has been created in accordance to law and LIC further makes an averment blaming the Ware Housing Corporation for the same. It was the case of the LIC that if the management of the Ware Housing Corporation chose to change the 'defined benefit scheme' into a 'defined contribution scheme', it could be permissible only prospectively as per Rule 9(2) of the trust deed. It was further the case of LIC that the Scheme in question also got affected on account of the fall in the annuity rate from 12% to approximately 10% and they have tried to justify their action on this count. It is asserted by them that at the commencement of the Scheme, when the rate of annuity was 12%, the corpus amount matched the claim of salary for 45 months, but with the fall in the annuity rate from 12% to 10%, sometime in the year 2000, the benefit applicable to the petitioners became less. For payment of pension at the earlier rate, it is stated by the LIC that more corpus was required and due to some inadvertence the earlier rate of interest was applied to each of the petitioners inspite of fall in the rate of annuity and, therefore, it became necessary to recover certain excess amount which was paid to some of the petitioners. The stand of the LIC is that under the group 'defined benefit scheme', they do not deal with individual employees in respect of premium. It is the Ware Housing Corporation, which has to pay the premium on behalf of its employees for which LIC is not concerned and has no control. The actuarial valuation of premium is done on the basis of information and data supplied by Ware Housing Corporation. The actuarial valuation from 1.4.99 to 31.4.2001 was done as per the data supplied by Ware Housing Corporation and by filing detailed calculation and charts, LIC has tried to point out the error committed by the Ware Housing Corporation. It is further the case of the LIC that they are not concerned that the M.P. State Ware Housing Employees Pension Rules 1996, this was not binding on LIC, they are only bound by the policy issued and the scheme formulated under the 'defined benefit scheme'.

12. Accordingly, contending that they are acting in accordance to the policy of

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insurance obtained by the Ware Housing Corporation and it is the Ware Housing Corporation, which has not paid the premium amount and, therefore, they cannot be held responsible, LIC has resisted the claim of the petitioner.

13. A detailed written submission is made pointing out the difference between 'defined benefit scheme' and 'defined contribution scheme' and it is stated that the deed of variation is properly executed. Additional return and returns were filed and after analyzing the totality of the circumstances, a Bench of this Court disposed of the Writ Petition by an order passed on 8.4.2004, and issued various directions. Aggrieved by the order passed on 8.4.2004, some of the employees and the Ware Housing Corporation filed Writ Appeals and vide order-dated 13.8.2008, all the Writ Appeals were allowed, the orders earlier passed by this Court on 8.4.2004 was set aside and the matter has been remanded back with a direction to consider certain principles laid down in a judgment rendered by the Supreme Court, in the case of *Air India Employees Self-Contributory Superannuation Pension Scheme Vs. Kuriakose V. Cherian and others*, (2005) 8 SCC 404, and decide the matter. Accordingly, now this Court is required to consider the dispute in question in the light of the law laid down by the Supreme Court in the case of *Air India Employees* (supra) and decide the matter.

14. On the basis of the pleadings as indicated hereinabove Shri Rohit Arya, learned Senior Advocate, and Shri Sujoy Paul, learned counsel for the petitioners, emphasized that in the return filed by the LIC, the basic objection raised by them is based on their disability to continue with the payment of pension as was done between 1.4.1996 upto March 2002, due to fall in the interest rate resulting in subsequent decrease in the corpus. Referring to certain averments made by the LIC in paragraphs 23, 24, 25 of their return and again in paragraphs 37 to 39, Shri Sujoy Paul emphasized that now the entire matter stands concluded by the judgment rendered in the case of *Air India Employees* (supra) and by taking me through the said judgment, particularly the facts contained in paragraph 2 and the observations made in paragraphs 7, 8, 13, 26, 27, 34, 39, 40, 41 and finally in paragraphs 46, 47, 48 and 50, Shri Sujoy Paul argued that the stand of LIC cannot be accepted. On retirement of each of the petitioners herein, their right gets crystallized. It is stated by Shri Sujoy Paul that the right of the employees to receive the pension and the quantum of the annuity gets crystallized at the time of purchase of the annuity and after their retirement now in the light of the law laid down by the Supreme Court, LIC cannot refuse to pay pension. It is argued by him that the LIC is obliged to fulfil the promise given to each of the petitioners, who are assured of the annuity under the Scheme in question. Contending that the deed of variation has the effect of amending the entire Scheme, which is impermissible, Shri Sujoy Paul seeks for interference into the matter.

15. Shri R.P. Agrawal, learned Senior Advocate, tried to emphasize that there

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was purchase by the Ware Housing Corporation of the Scheme known as the 'defined benefit scheme' and not the 'defined contribution scheme'. It was argued by him and learned counsel tried to demonstrate before this Court that LIC is only enforcing the policy as was purchased by the Ware Housing Corporation and it is the Ware Housing Corporation, which was refusing to pay the premium in accordance to the requirement of the policy and the 'defined benefit scheme' as a result the dispute has arisen. Inter alia contending that the LIC cannot be held responsible for any such lapse as alleged, Shri R.P. Agrawal, learned Senior Advocate, resisted the claim of the petitioners.

16. Shri R.N. Singh, learned Senior Advocate, argued at length and submitted that the deed of variation brought about by LIC is illegal, it is contrary to the procedure contemplated under the trust deed and, therefore, the same cannot be permitted. It was further argued by him that LIC has unnecessarily created a dispute even though the Ware Housing Corporation has paid all the premiums and other dues as per the Scheme and is not liable to pay any further amount with respect to the pension to be granted to the present petitioners.

17. Placing reliance on the following two judgments, Shri R.N. Singh, learned Senior Advocate, submitted that the variation brought about in the deed is illegal. The judgments relied upon are: *L. Jankirama Iyer and others Vs. P.M. Nilakanta Iyer and others*, AIR 1962 SC 633; and, *M/s Shanti Vijay and Company and others Vs. Princess Fatima Fouzia and others*, (1974) 4 SCC 602.

18. I have heard learned counsel for the parties at length and perused the record.

19. From the records, it is clear that after the pension scheme was brought into force, each of the petitioners herein received benefit from the year 1.4.1996 or from the date of their retirement upto March 2003, when the dispute in question arose. According to the petitioners, LIC has unilaterally changed the Scheme by introducing the change and are refusing payment of their pension, which is not permissible in view of the law laid down in the case of *Air India Employees* (supra). The Management of the Ware Housing Corporation also in fact supports the case of the employees and challenges the manner in which the deed of variation is brought into force. However, LIC contends that by the deed of variation they have only brought the Scheme in line with the purchase made by the Corporation and they have only tried to correct a mistake, which does not make any change in the Scheme subscribed to by the Ware Housing Corporation. According to the LIC, it was because of the non-payment of premium in accordance with the requirement of the Scheme by the Ware Housing Corporation that the entire dispute has arisen.

20. Even though Shri Rohit Arya, learned Senior Advocate, with Shri Sujoy Paul for the petitioners; Shri R.N. Singh, Senior Advocate, for the Ware Housing Corporation; and, Shri R.P. Agrawal, learned Senior Advocate for the LIC, argued

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at length and tried to justify their relevant claims by referring to various correspondences, calculations, charts and datas available on record, I am of the considered view that the question as to whether the benefit, which was granted to each of the petitioners herein after their retirement and after the PPO is issued to them, can be withdrawn or changed in the manner done is no more in dispute and the entire law in this regard stands settled by the Supreme Court in the case of *Air India Employees* (supra). The case before the Supreme Court was also similar in nature and pertains to grant of benefit to employees retiring from service and amendment made by the LIC in a pension scheme, which was being enforced in the said case. In that case also, the Scheme under which pension was paid to the employees was known as the 'defined benefit scheme or plan' and not the 'definite contributory plan'. In the case before the Supreme Court also, certain employees were getting the benefit, but the benefit of pension, which was being received by them under the Scheme was stopped/withdrawn and excess payment recovered on the basis of certain amendment to the Scheme, made retrospectively. The petitions filed by the employees before the High Court having been allowed, matter travelled to the Supreme Court and the Supreme Court considered the matter and after taking note of the benefits accruing to the employees under the 'defined benefit scheme', it is held by the Supreme Court that a retired employee received what was receivable by them according to the existing Scheme on the date of their retirement. The scheme envisaged a 'definite benefit scheme' and it provides for allotting funds at the time of retirement of employees, which included the amount for which the annuity is purchased and the sum of pension to be paid. In the case before the Supreme Court, the amendment was necessitated because of certain deficiency in the corpus, which was to a considerable extend and to take care of the same and to rectify the defect, the amendment in the Scheme was brought into force so that the gap gets bridged by making recovery from those, who had already retired. While considering the meaning of the word annuity as appearing in the Scheme, it was held by the Supreme Court that the expression annuity means an obligation to pay a stated sum usually monthly or annually to a stated recipient. It is held by the Supreme Court that annuity is a right to receive 'de anno in annum' certain sum that may be given for life or for a series of year. It may be given either during a particular period or in perpetuity. It is held by the Supreme Court that the right of the employees to receive the annuity and the quantum of annuity gets crystallized at the time of purchase of the annuity. It is held that the moment the annuity is purchased the fund leaves the corpus and the relations between the two are snapped. The corpus to the extent required for purchase of annuity leaves the trust fund and all connections between the trust fund and the retirees are severed. It is held by the Supreme Court accordingly that once the annuity is purchased there remains no connection with the quantum of the fund and, therefore, the annuitants i.e., the retirees are in no way concerned

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with the financial position of the fund, for which the annuity was purchased. It is held that after their retirement and after the annuity is crystallized, no amount can be claimed from the retirees by making any amendment or retrospective change in the Scheme. It has been held by the Supreme Court that LIC having accepted the annuity and having effected monthly payments can neither reduce the annuity amount nor can refund it to the detriment of the retirees since the annuity has already crystallized and no change can be made in such annuity as stipulated by the impugned amendment. It is held that the LIC has an obligation under law to fulfil the promise given by it to the retirees, who are assured under the annuity scheme.

21. If the aforesaid principle laid down by the Supreme Court are analysed, it would be seen that in the case of each of the petitioners, who have retired and on their retirement the PPO were issued, the annuity had crystallized and, therefore, now in the light of the law laid down by the Supreme Court, the LIC cannot refuse to fulfil the obligations which is finalized and which it has promised to pay by issuance of the PPO.

22. In the case of *Air India Employees* (supra), the Supreme Court after taking note of the factual aspects of the matter in paragraph 13, has indicated that the crucial question requiring consideration is whether the benefit which the retired employees are getting can be curtailed because of reduction of the fund amount. Thereafter, in paragraph 25, various provisions of the trust deed are taken note of, which are similar to the one contained in the present case. In paragraph 26, contentions of the LIC has been taken note of and in paragraphs 26 and 27, the matter is so dealt with:

“26. Dealing now with the first contention as to the depletion of the fund amounts, case of the appellants is that the scheme was based upon actuarial valuation carried out in the year 1993/1994 on assumptions as under:

- (1) Basic pay and DA were taken as pre-revised scales.
- (2) Assumption that the contribution will start flowing on monthly basis from April, 1994.
- (3) Rate of interest was assumed at 12 per cent.
- (4) Contribution of Rs.350 per month was supposed to increase by 10% per annum.
- (5) Total number of members of the Scheme at any given time would remain constant i.e. retirees are replaced by recruits.

27. It is urged that when the Scheme was launched in 1996 none of the above assumptions were found to be in existence as evidenced from the following:-

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- (1) With the wage agreement in 1996, the salary scales were substantially revised.
- (2) Monthly deductions of contribution started only from September 1996 and arrears of contributions for the period April 1994 to August 1996 were received by the Trust from March 2000 only.
- (3) Rate of interest has been progressively declining.
- (4) The contribution of Rs.350 p.m. has not been escalated by 10% per annum.
- (5) Number of employees contributing to the Scheme has progressively declined in view of non-recruitment since 1995.”
(Emphasis supplied)

23. If the case in hand and the return submitted by the LIC is scanned, it would be seen that in the return filed respondents 4 and 5, have so stated in paragraphs 23, 24 and 25 of their reply:

- “23. The answering respondents are herewith enclosing a chart as regards pension which was payable prior to 1st July 2000 and which is payable after 1st July 2000. The variation shown is a result of the fall in the rate of annuity from 12% to 10% effective from 1st July 2000. A copy of such comparative chart is enclosed herewith as Document No.10.
24. That as stated above the fall in the rate of pension per month as regards the petitioner No. 2, 5, 6, 7 and 9 is on account of the fall in the rate of annuity with effect from 1st July 2000 in terms of clause 6 of the Master Policy (Document No.3) and Notes (i) of point No.11 of Deed of Variation (Document No.4).
25. It may further be stated here that at the commencement of the scheme when the rate of annuity was 12% per annum the corpus amount matched the quantum of salary of 45 months. With the fall of annuity from 12% per annum to 10% from 1st July 2000 to purchase the same amount of annuity, the required corpus exceeded 45 months salary. As the rules of the same restrict the corpus to 45 times, monthly pension payable to 2nd, 5th, 6th, 7th and 9th petitioner should have been less than the pension amount which was being paid to earlier retirees. For payment of the pension at the earlier rate more corpus

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was required and since through sheer inadvertence the earlier pension rates were applied to the aforesaid petitioners inspite of the fall in the rate of Annuities, it had become necessary to recover the excess amount which was so paid."

Again, in paragraphs 37, 38 and 39, it is so indicated by the LIC as under:

37. That the LIC has not stopped the payment of pension on its own. It was only pursuant to the direction of the respondent No.1 contained in Annexure P-2 that the pension was stopped. Whatever pension is payable under the Rules, the LIC has been paying and is still willing to pay.
38. That the petitioners were duly informed the basis of reduction of the pension to which the LIC hereby strictly sticks. The reduction in the pension was a result of the reduction in the interest rates in the financial market which the LIC could give effect to under Clause 6 of the Master Policy & Notes I of Clause 11 of Document No.4.
39. That according to the letter of respondent itself dated 24th October 1996 the corpus to be debited to the pension fund account would not exceed the 45 times of the last drawn salary. Due to lowering of the interest rate in the financial market the LIC of India also reduced its annuity rates with effect from 1st July 2000 vide circular No. P&GS 699 dated 14th June 2000 Document No.11. Due to reduction in annuity rates for making the same percentage as pension (45% last drawn salary or 1.8% of the last drawn salary x Number of completed years of service which ever is less) more amount of withdrawal from corpus fund was needed. During this process the condition given above (i.e., corpus should not exceed 45 times of last drawn salary) got omitted due to oversight. On discovery of the mistake of calculation the same needed to be rectified and accordingly the concerned petitioners were informed vide letter dated 20th April 2002 (10 days before due date of 1st monthly pension of 2002-2003) to deposit the excess amount paid."

(Emphasis supplied)

If the reasons given by LIC for their action and change is evaluated in the light of the reasons given before the Supreme Court, it would be seen that both are more or less similar or rather identical.

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24. As done in the case before the Supreme Court, both the parties, namely the Ware Housing Corporation and LIC, have given various calculations and have pointed out the flaws and irregularities in the calculation. Such calculation were put forth before the Supreme Court also and in paragraph 34, the Supreme Court has made certain observations with regard to the calculations, but took note of the fact that such fallacy in the scheme was never rectified from the very inception. In the present case, when the scheme was enforced in 1996 upto 2002, such fallacies and errors were not corrected. Thereafter, in paragraph 39, the distinction between the 'defined benefit plan' and the 'defined contributory plan' is taken note of and in paragraph 40, it is so held by the Supreme Court:

"40. The scheme envisages a defined benefit plan and not a defined contribution plan. It also envisages allocating funds at the time of retirement of employees, i.e. the amount for which the annuity is purchased. None has questioned the power of the trustees to amend the scheme prospectively from the date of amendment. We would also assume that there is a corpus deficiency which, to a considerable extent, has taken place as a result of gap between contribution and amount of annuity purchased. All the same, the basic question is whether by the amendment of the Scheme, this gap can be bridged by making recoveries from those who have already retired and are getting benefit from LIC as a result of purchase of annuity and/or from their heirs who would otherwise receive annuity amount after the demise of the retiree. This necessarily takes us to the second question as to the power to amend the Scheme retrospectively."

(Emphasis supplied)

Thereafter, the matter is so dealt with in paragraphs 46 to 48, as under:

"46. Besides the aforesaid clauses, learned counsel for the appellant have placed strong reliance on Clause 32 and Clause 33 of the Trust Deed. Clause 32 provides the power of the Trustee to review the availability of Funds of the Scheme annually or at such intervals as may be deemed fit by the Trustees and to decide any revision as to the rate of the member's contribution under the Scheme. Clause 33 i.e. power of review of benefits stipulates the Trustees right to review any limit the benefits payable to the beneficiaries including the right to reduce the benefits payable in accordance with the rules in the event of any or all the members ceasing or reducing to make contribution to the Fund.

47. None of the aforesaid clauses render any assistance to the appellants. The relied upon clauses deal with the members who

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continue to contribute to the Fund. The liability of the retiring member to make any such contribution ceases on retirement. It is nobody's case that after the retirement any contribution is made or required to be made by retired employees. The aforesaid clauses only show the right and power to review the Fund and the benefits payable to the continuing members/employees. Likewise, reliance on Rule 14 which stipulates that the member or his beneficiary shall not have any interest in the master policy taken out in respect of the members in accordance with the Rules of the Scheme but shall be entitled to superannuation benefits in accordance with the Rules, has no applicability. The retired employees are not claiming any interest in the master policy but are claiming right flowing from the annuity purchased on their retirement.

48. The rights of the employees to receive the annuity and quantum of the annuity get crystallized at the time of purchase of the annuity. (Emphasis supplied)

Thereafter the law laid down in the case of *Sasadhar Chakravarty Vs. Union of India*, (1996) 11 SCC 1, is considered, the ratio determined and the principle laid down reads as under:

“50. The decision was sought to be distinguished on the ground that in the said case, this Court was concerned with the scheme financed by the employer unlike the present scheme where employer's contribution was almost nil and that it was self-contributing scheme. We are, however, unable to accept this contention. The ratio decidendi of the case is that the moment annuity is purchased, the fund leaves the corpus and the relations between the two are snapped. The corpus to the extent required for purchase of annuity leaves the trust fund and all connections between trust fund and retirees are severed. Thus, once the annuity is purchased, there remained no connection with the quantum of the fund. Therefore, annuitants are in no way concerned with the financial position of the fund for which annuity was purchased. They cannot be asked to further contribute. That is the basic question in the present case. It matters little that the present case is of reverse position inasmuch as in the case of Sasadhar Chakravarty, this Court was considering the case of a retired employee who was seeking right in the improvement whereas in the present case the question is about reducing the benefits or rights of the retired employees.” (Emphasis supplied)

Again, it is so held by the Supreme Court, in paragraph 50, as under:

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"50..... In view of what we have said above there is neither any substance in the contention that contract was between LIC and the trustees nor is it of any consequence in view of our conclusion that the amount, on retirement of employees, leaves the fund for purchase of annuity and the rights of the retirees are crystallized on their retirement by purchase of annuity and thus no amount can be claimed from them by making applicable amendment dated 3rd April, 2002 with retrospective effect. Therefore, we find no substance in the second contention."

and, finally in paragraph 52, the matter is so dealt with:

"52. The LIC having accepted the annuity and having effected monthly payments can neither reduce the annuity amount nor refund it to the trust to the detriment of the retirees since the annuity has already crystallized and no change can be made in such annuity as stipulated by the impugned amendments. LIC has obligation to fulfil the promise given by it to the retirees, who are assured under the annuity scheme." *(Emphasis supplied)*

25. If the law laid down by the Supreme Court is scanned, I am of the considered view that once the PPO were prepared and benefit under the scheme was extended to the employees, who had retired, then LIC for the reasons as indicated by them herein cannot wriggle out of their liability to make the payment as per the promise made in the PPO and they are bound to make the payment. There is no iota of doubt in this regard as the Supreme Court has clearly held that the right of the employees to receive the annuity and the quantum of the annuity gets crystallized at the time of purchase of the annuity and once they have retired the connection between the trust and the fund of the retirees are severed and the LIC under law is obliged to make payment as promised.

26. In that view of the matter, none of the grounds raised by the LIC for refusing to pay pension to the petitioners can be accepted now. The changes proposed or the question of non-payment of premium etc by the management of Ware Housing Corporation may be taken as a ground for effecting changes prospectively in the case of other employees, but in the case of present petitioners, who have retired and in whose cases, the pensions were paid as per the PPOs prepared, LIC cannot refuse to make further payment on the grounds as are raised in this petition.

27. In the light of the law laid down by the Supreme Court and in view of the findings that are recorded hereinabove, it is not necessary now for this Court to go into various aspects of the matter, which were canvassed by Shri R.P. Agrawal, learned Senior Advocate, at the time of hearing. Once the PPOs were issued to the petitioners and once they started receiving the pension, then on the ground of non-payment of premium etc, LIC cannot take an about turn and refuse to fulfil

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their promise, which was made to the petitioners and which gets crystallized on the date of their retirement. All the objections raised and the arguments advanced by Shri R.P. Agrawal, learned Senior Advocate, for refusing the make payment of pension to the present petitioners cannot be accepted now in the light of the settled law, as indicated hereinabove as laid down by the Supreme Court in the case of *Air India Employees* (supra).

28. Apart from the above, it may be taken note of that the deed of variation in question is made by the LIC in a manner, which is contrary to the procedure contemplated under the trust deed i.e., Clause 8 thereof. Clause 8 of the trust deed deals with the power to amend the scheme, and in the present case it is an admitted position that the scheme is amended without the Ware Housing Corporation having approved the amendment and prior permission of the Commissioner of Income Tax. It was argued that the change was necessary to bring it in conformity with the master policy. Be that as it may, it has to be held that the deed of variation is not in accordance to law and has not been enforced in accordance to the requirement of law.

29. Apart from the above, detailed arguments were advanced by Shri R.P. Agrawal, learned Senior Advocate for LIC, with regard to non-payment of premium by the Ware Housing Corporation and their conduct in not paying the premium as per the policy. A perusal of the master policy and the annexures thereof would indicate that in the said master policy the portions pertaining to premium are kept blank. In the reply, LIC admits the same to be inadvertence and mistake. On a complete scrutiny of the scheme, the master policy, the proposal, the correspondence and the provisions for payment of premium therein, there seems to be various ambiguity in the matter of indicating the premium to be paid and various other aspects. It is clear from an analysis of the documents that in the master proposal form, it is clearly mentioned that the employees were under no obligation to contribute towards the premium. In the policy documents there is no clear stipulation with regard to the premium of the policy. There is serious ambiguity in the matter of indicating the premium payable in the master policy and the other documents available on record. That apart, once the question with regard to entitlement of the petitioners is found to be settled by the Supreme Court in the light of the facts as stated hereinabove, it is not necessary now for this Court to go into all these questions. Suffice it to say that the grounds raised by Shri R.P. Agrawal, learned Senior Advocate on behalf of the LIC, during the course of hearing justifying the action of the LIC now, in respect to the present petitioners, cannot be accepted in view of the principle of law, well settled by the Supreme Court as indicated hereinabove.

30. During the course of hearing, it has been pointed out that after the earlier order was passed in the Writ Petition and when the Writ Appeals were pending

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before this Court, certain subsequent developments have taken place and an application I.A.No.2901/2009 has been filed by the LIC in Writ Petition No.880/2003, and an agreement entered into between the LIC and the Ware Housing Corporation is brought on record. On the basis of the aforesaid agreement, it is now tried to be canvassed that the master policy has been withdrawn and out of the 131 retired employees, who are agitating the matter in these cases, five have died and their Legal Heirs have taken the entire corpus. One Shri K.M. Parihar has also taken his entire corpus. Annexure R/4 is filed in this regard. Of the 125 remaining employees, it is stated that 57 employees, whose names are contained in Annexure R/5 are taking regular pension; and, out of 68 employees remaining, 15 have refused to accept pension as per the 'defined contribution scheme'. Out of remaining 53, it is stated that five employees are dead, letters were written to them, but their claim papers are awaited from their nominees of Legal Heirs. It is stated that out of the remaining 48, in respect of 10 employees pension cheques sent to have been returned undelivered and no one has come forward to receive their pension. And, out of the remaining 38, in 14 cases the amount remaining with the LIC is very small as they have already taken the commuted value and, therefore, they have been advised to take their corpus back, but they are not responding. 24 persons have taken their commuted value, which is more than the defined value and, therefore, no pension is payable to said 24 persons. Their names are given in Annexure R/10. It is stated that now of the 131 employees, only 15-25 are contesting the matter and in view of the agreement, it is stated that now no further relief can be granted to them. The agreement in question is available on record and paragraphs 1 to 6 of the same reads as under:

- "1. The M.P. Warehousing & Logistics Corporation Bhopal and the Trustees do hereby surrender Master Policies No.GSCA 106880 to 106888 and the Life Insurance Corporation of India is agreeable to accept the proposal of surrender of the aforesaid Master Policy.
2. That, the Life Insurance Corporation of India will pay the pension to 131 retired employees of the Warehousing Corporation, the list of which is attached herewith as Annexure - A under the terms of Defined Contribution, as per balance available in their individual accounts and as per Court Order dated 08.04.2004 in W.P.No.4318/2002 and other connecting petitions passed by learned Single Judge and the amount requisite for payment of such pension to 131 employees on Defined Contribution basis shall be retained and the remaining amount available in annuities shall be refunded to the M.P. Warehousing & Logistics Corporation alongwith interest without any exit load.

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3. The excess payment made to the employees earlier shall be quantified and shall be placed before the Hon'ble Court for decision at a later date.
4. That on refund of the corpus as aforesaid, the Life Insurance Corporation of India shall not be responsible to pay any pension to any of its employees except 131 employees as mentioned in Schedule 'A' and the Master Policy referred above shall terminate for all practical and legal purpose. LIC will refund the entire corpus of rest of the employees alongwith interest to MPWLC without any exit load.
5. In case of ex-employees who have filed LPAs in the High Court, the corpus on the basis of Defined Contribution shall be retained by LIC until court cases are settled.
6. This agreement is subject to the approval of High Court."

31. On a perusal of the agreement, it is clear that the agreement is subject to approval by this court and infact the agreement is for the purpose of surrendering the master policy so that the future liability of existing employees and the employees other than the present petitioners are taken care of. Once on the basis of the law laid down by the Supreme Court it is held by this Court that the employees like the petitioners have a legal right to receive the benefit and the LIC cannot withdraw the benefit in the manner done, the right accruing to persons like the petitioners cannot be frustrated or taken away by any such agreement. That being so, merely because of the subsequent developments or the agreement as pointed out, the directions given for extending the benefit to the petitioners in the light of the law laid down by the Supreme Court in the case of *Air India Employees* (supra) cannot be refused. However, it is clarified that if any of the petitioners or their Legal Heirs have agreed to receive any benefit other than the one to which they are entitled to in accordance to the orders passed in these cases, LIC shall be free to enforce the same with respect to such of the petitioners in accordance with law. In the case of such petitioners, who have not agreed to any concession or waiver, LIC will be obliged and duty bound to pay to them the entire pension as per their entitlement on the basis of the PPOs issued to them and the agreement in question entered into during the pendency of these proceedings shall come as deterrent to any of these employees in claiming the benefit. All such petitioners or their Legal Heirs, who have not accepted the offer made by LIC either by their act or conduct, will be entitled to receive the benefits of this order.

32. Consequently, all the petitions stand allowed and disposed of with the aforesaid, without any order so as to costs.

Petition allowed.

VIJAY JALALI (SMT.) Vs. HMT LIMITED

I.L.R. [2010] M. P., 1405

WRIT PETITION*Before Mr. Justice R.K. Gupta*

29 March, 2010*

VIJAY JALALI (SMT.)

... Petitioner

Vs.

HMT LIMITED & ors.

... Respondents

A. Service Law - Disciplinary proceedings - Sexual harassment at work place - Dismissal - Quantum of punishment - The petitioner making complaints regarding sexual harassment at work place against the complainant at whose behest the D.E. was initiated against the petitioner - Prior to the initiation of D.E., no action was taken against such a complaint of the petitioner by the management - Held - Behaviour and attitude of the petitioner of slapping by Chappal and abusing the complainant was not irritating in any manner - Since the petitioner was sexually harassed in the past and complaints were made by her but no action was taken thereupon and on the date of incident also the sexual harassment was practiced on her, therefore, it cannot be said that the petitioner was unjustified in defending herself against the sexual harassment - Order of dismissal set aside with a direction to reinstate the petitioner with 75% back wages. (Paras 9 & 10)

क. सेवा विधि - अनुशासनिक कार्यवाहियाँ - कार्यस्थल पर लैंगिक परिपीड़न - बर्खास्तगी - दण्ड की मात्रा - याची ने कार्यस्थल पर लैंगिक परिपीड़न के सम्बन्ध में परिवादी के विरुद्ध शिकायतें कीं जिसके निवेदन पर याची के विरुद्ध विभागीय जाँच प्रारम्भ की गयी - विभागीय जाँच प्रारम्भ किये जाने के पूर्व प्रबंधन द्वारा याची की ऐसी शिकायत के विरुद्ध कोई कार्यवाही नहीं की गयी - अभिनिर्धारित - याची का चप्पल से मारने और परिवादी को गाली देने का आचरण और मनोवृत्ति किसी भी ढंग से संतापकारी नहीं था - चूँकि याची को पूर्व में लैंगिक रूप से परेशान किया गया और उसके द्वारा शिकायतें की गयीं, किन्तु उन पर कोई कार्यवाही नहीं की गयी और घटना की तारीख को भी उसके साथ लैंगिक परिपीड़न किया गया, इसलिए यह नहीं कहा जा सकता कि याची लैंगिक परिपीड़न के विरुद्ध स्वयं की प्रतिरक्षा करने में अन्यायपूर्ण थी - बर्खास्तगी का आदेश इस निदेश के साथ अपास्त किया गया कि याची को 75 प्रतिशत पूर्व वेतन के साथ पुनर्नियुक्त किया जाए।

B. Service Law - Disciplinary proceedings - Natural justice - Complainant not produced in the enquiry and could not be cross-examined - Held - Non-examination of complainant tantamount to violation of principle of natural justice. (Para 6)

ख. सेवा विधि - अनुशासनिक कार्यवाहियाँ - नैसर्गिक न्याय - जाँच में परिवादी को पेश नहीं किया गया और उसकी प्रतिपरीक्षा नहीं की जा सकी - अभिनिर्धारित - परिवादी की परीक्षा न की जाना नैसर्गिक न्याय के सिद्धांत के उल्लंघन के समान है।

VIJAY JALALI (SMT.) Vs. HMT LIMITED**Cases referred :**

AIR 2000 SC 277, AIR 1997 SC 3011.

H.K. Upadhyaya, for the petitioner.

None, for the respondents.

O R D E R

R.K. GUPTA, J. :-In this writ petition preferred under Article 226 of the Constitution of India the petitioner has challenged the order of penalty dated 31.3.1998, Annexure P-27 and the order contained in Annexure P-29 which has been passed by the appellate authority on 11.5.1998 whereby the appeal of the petitioner against the order of penalty has been dismissed and the order of penalty of removal from service has been affirmed.

2. The facts leading to the present petition are that the petitioner was employed with the respondents in their watch marketing division. The respondent No.1 is a Public Limited Company and is amenable to the writ jurisdiction of this Court. A charge sheet was issued against the petitioner which is contained in Annexure P-3 wherein allegations were levelled that the petitioner being a lady employee abused and gave a slipper (chappal) blow to one of the security guard. The incident was reported against the petitioner by making a complaint against her. The inquiry officer was appointed to inquire into the allegations and on basis of the findings of the enquiry report a penalty of removal from services has been imposed upon the petitioner.

3. Learned counsel appearing for the petitioner submitted that the inquiry which was conducted against the petitioner is bad for the following reasons:

I. The manner in which the enquiry has been conducted is unknown to law. No documents as demanded by the petitioner were supplied to the petitioner and list of the witnesses was also not supplied to the petitioner.

II. The complainant who was the victim of beating by the petitioner was also not examined.

III. In the present case there were complaints made by the petitioner against the security guard alleging sexual harassment and these complaints were also filed and proved in the enquiry but no action is taken against the security guard and action is taken against the petitioner which is bad in law.

IV. Lastly, it is submitted that the inquiry officer while giving the findings against the petitioner has also considered the aspect of sexual harassment of the petitioner by the security guard who was the victim of the incident and

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keeping in view the findings recorded by the inquiry officer and also in view of the conduct of the security guard it is a case where the punishment is disproportionate.

4. Upon consideration of the question with regard to non-supply of the documents and list of witnesses, I find that the petitioner has not been able to show that any request was made by her to the respondents or to the inquiry officer for supply of the documents and list of the witnesses. Annexure P-4 is the letter written by the petitioner where nothing is stated about the supply of the documents and the list of the witnesses so that it could be held that in spite of the fact that the petitioner demanded the documents, the same were not supplied. Thus, in the absence of any demand by the petitioner and particularly also keeping in view the fact that no prejudice is pleaded and argued because of non-supply of the documents and the list of the witnesses it is difficult to hold that the documents were not supplied to the petitioner.

5. As regards the question of non-examination of the complainant who was the victim, namely, Gulab Singh Yadav, is concerned. It is seen that the proceedings of the inquiry have been filed and the narration contained in page 163 of the paper book reveals that a request was made on behalf of the petitioner that Shri Gulab Singh Yadav should be called to ascertain the reality of the charge mentioned in letter dated 7.5.1994 that he was slapped with chappal. Whereupon, the Presenting Officer replied that the Management is unable to produce Shri Gulab Singh Chand who was a contract labour and they do not know his whereabouts but a written complaint of Gulab Singh Yadav was marked as document ME-16 which was taken into account. Counsel appearing for the petitioner vehemently relied upon the judgment passed by the Apex Court in *Hardwari Lal v. State of U.P. and others*, AIR 2000 SC 277. In the said case, a similar question i.e. non-examination of complainant had come up for consideration and in para-3 their Lordships laid down, thus:-

"Before us the sole ground urged is as to the non-observance of the principles of natural justice in not examining the complainant, Shri Virendra Singh, and witness, Jagdish Ram. The Tribunal as well as the High Court have brushed aside the grievance made by the appellant that the non-examination of those who persons has prejudiced his case. Examination of these two witnesses would have revealed as to whether the complaint made by Virender Singh was correct or not and to establish that he was the best person to speak to its veracity. So also, Jagdish Ram, who had accompanied the appellant to the hospital for medical examination, would have been an

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important witness to prove the state or the condition of the appellant. We do not think the Tribunal and the High Court were justified in thinking that non-examination of these two persons could not be material. In these circumstances, we are of the view that the High Court and the Tribunal erred in not attaching importance to this contention of the appellant."

6. On the basis of the aforesaid it is clear that a request was made to call the victim Shri Gulab singh Yadav but the Management did not produce him as the complainant as such was not available for the cross-examination by the petitioner. Thus, keeping in view the ratio laid down by the Apex Court in *Hardwar Lal* (supra), I am inclined to hold that there had been violation of the principles of natural justice.

7. Apart from the aforesaid, it is also observed that before the inquiry officer the petitioner has proved two letters at page 187 and 188/189 of the paper book to show that the petitioner did submit a complaint against Shri Gulab Singh prior to the incident for which the petitioner was charge-sheeted. A bare perusal of the said complaint makes it clear that Shri Yadav was making an attempt of sexual harassment of the petitioner. The complaint was made but no action was taken on the said complaint. Before the inquiry officer it was also stated by the petitioner while giving her statement that since the complaint was made against the attitude and behaviour of Shri Gulab Singh Yadav and the Management did not take any action, therefore, she was forced to take action against the same. Thereupon, the inquiry officer while submitting the report has made certain observations in the inquiry report which are contained at page 209 and 211 of the paper book. Relevant extract of those observations are reproduced as under:-

"Page 209:

.....CSE" narration that the showroom staff was against her and she had become the subject of general harassment appears to be correct.

The evidence of CSE letter dated 25.4.94 in absence of any reaction from PO is admitted; wherein she complained of guard usually misbehaving and abusing her.

Showroom officials seems to have ignored her complaint in practice. Had suitable action taken in response to his letter dated 25.4.94 the incidence of slapping the guard by chapple on 7.5.94 could have been averted. The showroom staff was in no way co-operative on the subject of harassment, the lady worker subjected to and the guard was instigated and encourage to misbehave by some staff. Her letter dated 14.11.94 (ME-6) further brings to the notice the fact that

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showroom official were not cooperative in receiving the communication and the lady worker had to send the same to Head Office at Bangalore....."

Page 211:

.....It is, therefore, proved that she has slapped with chapple the guard following him up to the of accounts officer, where he had gone to complained about the abuse ment attured on him by CSE Mrs. Vijaya Jalali and the incidence destribed in ME-3 is true.

Letter ME-3 However does not throw light on what made CSE to abuse the guard. In her statement she has charged that, as usual the guard came to retail counter, sat on the sofa and talked to her as "you look very beautiful in saree, your brests are big etc.." which irritated CSE leading to abuse ment by her.

If the showroom staff is unable to control guard in spite of written and oral complaints made by her (CSE) the CSE should not be treated as wrong in slapping the guard who was a casual worker misbehaving with the lady company employee....."

[The extract has been reproduced as it is, therefore, spelling mistakes have been left untouched].

8. On the basis of the aforesaid, the inquiry officer has also taken into account the fact in relation to excessive harassment and inquiry officer while considering the same has opined that if the showroom staff is unable to control the guard in spite of making complaint by the petitioner then the petitioner should not be treated as wrong in slapping the guard who was a casual worker for misbehaving with the company employee but simultaneously the inquiry officer held the petitioner guilty of the charge. However, it is not stated as to on what basis the finding of guilt has been arrived at by the inquiry officer when he has specifically observed that the petitioner being a lady employee herself had made complaint which are proved in the enquiry but no action was taken by the management. There are two complaints prior to the incident as referred in the charge-sheet but it is not the case of the management that any action was taken against complaint, Shri Gulab Singh Yadav on her complaint. On the date of incident also as per the story, Shri Gulab Singh, commented upon the petitioner which could not be tolerated by the petitioner.

9. The question with reference to punishment would also be relevant in the light of the findings arrived at by the inquiry officer. It is not a case that the petitioner after receiving the charge-sheet has made any complaint against the attitude and misbehaviour of Shri Gulab Singh Yadav but it is a case where prior

SHEEBA MALIK (SMT.) Vs. UNION OF INDIA

to the incident there were two complaints against the complainant but the management did not take any action against him. On the date of incident also the petitioner was sexually harassed by way of comment on her by the complainant therefore it could be understandable that the petitioner being a lady was left with no option but to take some action in her defence. The reliance can profitably had to the decision of the Apex Court rendered in *Vishaka and others vs. State of Rajasthan and others*, AIR 1997 SC 3011. Their Lordships of the Apex Court have held that sexual harassment of working woman amounts to violation of rights of gender equality and right to life and liberty. Applying the ratio laid down by the Apex Court, the present is not a case where the behaviour and attitude of the petitioner of slapping by chappal and abusing complaint Shri Gulab Singh was irritating in any manner. Since the petitioner was sexually harassed in the past and complaints were made by her but no action was taken thereupon and on the date of incident also the sexual harassment was practised on the petitioner, therefore, it cannot be said that the petitioner was unjustified in defending herself against the sexual harassment. These aspects have not been taken into account by the disciplinary authority as well as by the appellate authority, therefore, the impugned orders are unsustainable in the eyes of law.

10. For the reasons stated hereinabove, the impugned order of punishment passed by the disciplinary authority on 31.3.1998, Annexure P-27 and the order 11.5.1998 passed by the appellate authority as contained in Annexure P-29 are hereby set aside. The respondents are directed to reinstate the petitioner in service with 75% back wages. In the result, the writ petition stands allowed.

Petition allowed.

I.L.R. [2010] M. P., 1410

WRIT PETITION

Before Mr. Justice Rakesh Saxena & Mr. Justice S.C. Sinho

31 March, 2010*

SHEEBA MALIK (SMT.)

... Petitioner

Vs.

UNION OF INDIA & ors.

... Respondents

A. - National Security Act (65 of 1980), Section 3(2) - Detention - When warranted - Held - The acts of the detenu should amount to causing disturbance of the public order as the degree and extent thereof should result in panic and terror to the persons of the locality or affect the public at large.

(Para 21)

क. राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(2) - निरोध - कब आवश्यक है - अभिनिर्धारित - निरुद्ध व्यक्ति के कार्य लोक व्यवस्था में इस प्रकार विघ्न डालने

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की कोर्ट में आने चाहिए कि उसकी कोर्ट और विस्तार के परिणामस्वरूप क्षेत्र के व्यक्तियों को भयभीत और आतंकित करना चाहिए या जन सामान्य को प्रभावित करना चाहिए।

B. Words & Phrases - Stale - Meaning - Held - The word 'stale' means not fresh and, therefore, unpalatable, overused and no longer interesting or original, lacking in energy and out of date etc. (Para 14)

ख. शब्द और वाक्यांश – अतिकालिक – अर्थ – अमिनिर्धारित – शब्द 'अतिकालिक' का अर्थ है नया नहीं और इसलिए अमध्य, अतिउपयोग और अब रुचिकर या मौलिक नहीं, ऊर्जा में कमी और अप्रचलित आदि।

Cases referred :

(1983) 4 SCC 443, AIR 1985 SC 18, AIR 1987 SC 2332, AIR 1988 SC 74, (1974) 4 SCC 530.

Manish Datt, for the petitioner.

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

ORDER

The Order of the Court was delivered by **RAKESH SAKSENA, J.** :-By this petition under Article 226 of the Constitution of India, the petitioner prays for quashment of order dated 9th December, 2009 (Annexure P/4), passed by respondent no. 2/State of M.P. and to quash the order dated 30.9.2009, passed by respondent no.3/District Magistrate, Bhopal and to revoke the detention order of petitioner's husband Mukhtar Malik-detenu.

2. The facts as borne out from the petition as well as from the return submitted by the respondents, in brief, are that the petitioner's husband Mukhtar Malik son of Annu Malik has been detained by virtue of the order dated 30.9.2009, passed by respondent no.3/District Magistrate, Bhopal in exercise of powers conferred by sub section (2) of section 3 of the National Security Act (hereinafter referred to as the 'Act' for short). This order was confirmed by order Annexure P/4 passed by respondent no.2/State Government as per provision of under Section 12(1) of the Act.

3. The detention of the detenu Mukhtar Malik is based on the grounds referred to in Annexure P/3 which are as follows:

1. दिनांक 7.6.1982 को आपने अपने साथीदारन के साथ मिलकर फरियादिया केशरबाई पत्नी भगवान सिंह उम्र 22 साल नि. ग्राम चपलासिर थाना अब्दुल्लागंज जिला रायसेन को उसके गाँव चपलासिर ने एक राय होकर बलात्संग किया एवं जान से मारने की धमकी दी। आपके इस कृत्य से क्षेत्र में भय एवं आतंक व्याप्त हो गया।

2. दिनांक 14.06.83 को आपने अपने साथियों के साथ मिलकर फरियादी अंसार अहमद पुत्र इप्तेखार उम्र 40 साल नि. गौहरगंज जिला रायसेन को उसको एक राय होकर रास्ता रोककर मारपीट की जिससे क्षेत्र में भय एवं आतंक व्याप्त हो गया।

SHEEBAMALIK(SMT.) Vs. UNION OF INDIA

3. दिनांक 4.8.85 को आपने अपने साथियों के साथ मिलकर फरियादी मोहनलाल पुत्र मोंगीलाल खटिक उम्र 25 साल नि. खटिकपुरा बुधवारा थाना तलैया भोपाल को हमी. कालेज बाउण्ड्री वाल के पास घातक हथियारों से लैस होकर जान से मारने का प्रयास किया जिससे क्षेत्र में भय एवं आतंक व्याप्त हो गया ।
4. दिनांक 10.2.86 को आपने अपने साथियों के साथ मिलकर फरियादी केशव सिंह पुत्र बालकिशन उम्र 35 साल नि. अब्दुल्लागंज जिला रायसेन को कस्बा अब्दुल्लागंज में घातक हथियारों से लैस होकर प्राणघातक हमला किया जिससे क्षेत्र में भय एवं आतंक व्याप्त हो गया ।
5. दिनांक 1.8.87 को आपने जी. एस. शर्मा वन मण्डल अधिकारी अब्दुल्लागंज रायसेन को शासकीय कार्य में बाधा उत्पन्न करने एवं जान से मारने की धमकी दी आपके इस कृत्य से क्षेत्र में भय एवं आतंक व्याप्त हो गया ।
6. दिनांक 8.9.87 को आपने अपने साथियों के साथ मिलकर फरियादी किशोरीलाल पुत्र लालजीराम उम्र 42 साल नि. गोहरगंज थाना अब्दुल्लागंज जिला रायसेन को गोहरगंज में एक राय होकर रास्ता रोक कर गाली गलौज कर मारपीट की जिससे क्षेत्र में भय एवं आतंक व्याप्त हो गया ।
7. दिनांक 6.9.87 को आपने बाबूलाल पुत्र अमर सिंह लोधी नि. ग्राम डगरवारा थाना अब्दुल्लागंज जिला रायसेन को धामधूसर में रास्ता रोक मारपीट की जिससे क्षेत्र में भय एवं आतंक व्याप्त हो गया ।
8. दिनांक 3.2.88 को आपने अशोक कुलकर्णी पुत्र आर. एस. कुलकर्णी उम्र 39 साल नि. ई-7/155 अरेरा कालोनी भोपाल को कस्बा गोहरगंज में अपहरण कर लिया आपके इस कृत्य से क्षेत्र में भय एवं आतंक का वातावरण व्याप्त हो गया ।
9. दिनांक 2.5.88 को आपने अपने साथियों के साथ करन सिंह पुत्र तल सिंह उम्र 30 साल नि. चिकलौद थाना अब्दुल्लागंज जिला रायसेन को ग्राम चिकलौद में एक राय होकर मारपीट की जिससे क्षेत्र में भय एवं आतंक व्याप्त हो गया ।
10. दिनांक 29.2.89 को अनावेदक मुख्तयार मलिक पुत्र अन्नू मलिक अपने साथियों के साथ फरियादी रामनरेश तोमर पुत्र ओंकार सिंह उम्र 31 साल नि. सुल्तानपुर थाना सुल्तानपुर जिला रायसेन को ग्राम सुल्तानपुर में एक राय होकर रास्ता रोककर शासकीय कार्य में बाधा डालने एवं जान से मारने की धमकी देने पर फरि. की रिपोर्ट पर थाना सुल्तानपुर में अप. कं. 32/89 धारा 332, 353, 294, 341, 506 बी भादवि का थाना प्रभारी आर. एन. तोमर द्वारा पंजीबद्ध किया गया था । विवेचना पूर्ण होने पर प्रकरण में अभियोग पत्र कं. 32/89 दिनांक 20.5.89 तैयार किया जाकर जेएमएफसी न्यायालय गोहरगंज रायसेन में आरटी. एन. 189/88 पर पेश किया गया । जो माननीय न्यायालय में विचाराधीन है ।
11. दिनांक 28.2.89 को आपने अपने साथियों के साथ शांती बाई पतिन रामरतन हरिजन उम्र 20 साल नि. ग्राम गाठा थाना सुल्तानपुर जिला रायसेन को ग्राम गाठा में एक राय होकर रास्ता रोककर मारपीट करने, बलात्कार करने एवं जान से

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मारने की धमकी दी जिससे क्षेत्र में भय एवं आतंक व्याप्त हो गया एवं महिलायें अपने आप को असुरक्षित महसूस करने लगी ।

12. दिनांक 28.3.89 को आपने अपने साथियों के साथ रामरतन पत्र मिठूलाल नि. ग्राम गाठा थाना सुल्तानपुर जिला रायसेन के रिश्तेदार को ग्राम गाठा में एक राय होकर चारदीवारी के अन्दर बंद कर बलात्कार करने एवं जान से मारने की धमकी दी जिससे क्षेत्र में भय एवं आतंक व्याप्त हो गया ।

13. दिनांक 27.9.90 को आपने अपने साथियों के साथ राजपूत थाना प्रभारी थाना अब्दुल्लागंज को ग्राम चिकलौद में एक राय होकर शासकीय कार्यों में बाधा डाली एवं गाली गलौज कर प्राणघातक हमला करने का प्रयास किया आपके इस कृत्य से क्षेत्र में भय एवं आतंक व्याप्त हो गया ।

14. दिनांक 27.9.90 को आपने पर्वत सिंह पुत्र धर्म सिंह उम्र 40 साल नि. अब्दुल्लागंज को ग्राम सिंधी कैप के पास एक राय होकर गाली गलौज कर जान से मारने की धमकी दी जिससे क्षेत्र में भय एवं आतंक व्याप्त हो गया ।

15. दिनांक 19.2.91 को आपने अपने साथियों के साथ ग्राम कनौटा में कैपिटल बस के डायवर का अपहरण कर लिया जिससे क्षेत्र में भय एवं आतंक व्याप्त हो गया ।

16. दिनांक 27.10.91 को आपने मुतलिक पुत्र रफीक उल्ला उम्र 48 साल नि. म.न. 66 टोलवाली मस्जिद इब्राहिमपुरा रोड को टोलवाली मस्जिद के पास प्राणघातक हमला करने एवं हत्या करने का प्रयास किया । जिससे क्षेत्र में भय एवं आतंक व्याप्त हो गया ।

17. दिनांक 8.3.94 को आपने अपने साथियों के साथ बल्ली उर्फ सम्मसुल हसन पुत्र नजमुल हसन उम्र 35 साल नि. बाग फरहत आफजा जहाँगीराबाद को सिविल कोर्ट बंदी गृह में एक राय होकर धारदार हथियार से मारपीट की जिससे भय एवं आतंक व्याप्त हो गया ।

18. दिनांक 28.11.94 को आपने अपने साथियों के साथ नवाब खों पुत्र मोहम्मद खों नि. रेतघाट तलैया को चहक नर्सिंग होम के पास एक राय होकर रास्ता रोककर गाली गलौज कर जान से मारने की धमकी दी जिससे क्षेत्र में भय एवं आतंक व्याप्त हो गया ।

19. दिनांक 29.11.94 को आपने अनवर अली पुत्र फरमान अली नि. मछली मार्केट इतवारा को मछली मार्केट इतवारा में गाली गलौज कर जान से मारने की धमकी दी जिससे क्षेत्र में भय एवं आतंक व्याप्त हो गया ।

20. दिनांक 7.6.94 को आपने अपने साथियों के साथ फरियादी रईश पुत्र मजीद नि. पुरानी जेल भोपाल को जेल में एक राय होकर प्राणघातक हमला किया जिससे क्षेत्र में भय एवं आतंक व्याप्त हो गया ।

21. दिनांक 20.3.95 को आपने अपने साथियों के साथ फरियादी मेहमूद खों नि.

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अध्यक्ष आदर्श सहकारी समिति मर्यादित भोपाल को जाकनेर नदी ग्राम किरवाई के पास एक राय होकर नुकसान पहुंचाकर जान से मारने की धमकी दी जिससे क्षेत्र में भय एवं आतंक व्याप्त हो गया ।

22. दिनांक 26.3.95 को आपने अपने साथियों के साथ मुज्जफर हुसैन उर्फ मुन्ने पेन्टर पुत्र मुसरर्फ उम्र 45 साल नि. कमला पार्क थाना तलैया जिला भोपाल कल्लू बुआ मस्जिद के पास एक राय होकर प्राणघातक हमला किया जिससे क्षेत्र में भय एवं आतंक व्याप्त हो गया ।

23. दिनांक 3.7.95 को आपने लक्ष्मण पुत्र श्यामलाल उम्र 37 साल नि. ग्राम विनेमा थाना सुल्तानपुर जिला रायसेन को ग्राम विनेमा होटल के पास गाली गलौज कर जान से मारने की धमकी दी जिससे क्षेत्र में भय एवं आतंक व्याप्त हो गया ।

24. दिनांक 2.7.96 को आपने मुज्जफर हुसैन उर्फ मुन्ने पेन्टर पुत्र मुसरर्फ उम्र 45 साल नि. कमला पार्क को उसके घर के पास मोबाईल फोन पर जान से मारने की धमकी दी ।

25. दिनांक 10.7.96 को आपने अपने साथियों के साथ मुज्जफर हुसैन उर्फ मुन्ने पेन्टर पुत्र मुसरर्फ उम्र 45 साल नि. कमला पार्क को न्यायालय परिसर में षड्यंत्र पूर्वक घातक शस्त्रों से लैस होकर प्राणघातक हमला कर हत्या करने का प्रयास किया जिससे क्षेत्र में भय एवं आतंक व्याप्त हो गया

26. दिनांक 8.1.97 को आपने उनि. मोहम्मद निसार थाना अब्दुल्लागंज को खाड़िया के जंगल में प्राणघातक हमला करने का प्रयास किया जिससे क्षेत्र में भय एवं आतंक व्याप्त हो गया ।

27. दिनांक 27.9.09 को आपने अपने साथी सोहेल के साथ श्रीमती रोशनी पत्ति नारायण उम्र 47 साल निवासी म. नं. 211 प्रभू नगर ईदगाह हिल्स शाहंजहानाबाद को पूर्व में मोबाईल फोन कर धमकी दिया कि तुम्हारी बड़बई वाली जमीन हमने खरीद ली है तथा उसे गंदी गंदी गालिया देकर दस लाख रु. की माँग की न देने पर जान से मारने की धमकी दी जिससे क्षेत्र में भय एवं आतंक व्याप्त हो गया ।

28. दिनांक 29.9.09 को आपने अपने साथियों के साथ कु. सालनी मिहानी पुत्री बंसतमल मिहानी निवासी म. नं. 211 प्रभू नगर ईदगाह हिल्स शाहंजहानाबाद को कम्प्यूनिटी हाल के पास प्रभू नगर में एक राय होकर रास्ता रोककर रिवाल्वर सिर में रख कर दस लाख रुपये की माँग की न देने पर जान से खत्म करने की धमकी दी आपके इस कृत्य से क्षेत्र में भय एवं आतंक व्याप्त हो गया ।

4. It has also been mentioned in the detention order that the detention of the detenu is necessary for preventing his criminal activities, affecting the maintenance of public order and peace and tranquility of public at large.

5. Amongst other grounds, petitioner has challenged his detention mainly on two grounds; firstly that the grounds from number 1 to 26 were stale as they

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pertained to the offences alleged to have been committed by him since 7.6.1982 to 8.1.1997. They ought not to have been taken into consideration by the Detaining Authority for forming his subjective satisfaction for detention of the petitioner in the month of September, 2009 and, secondly that the grounds no. 27 and 28 were not of such nature as to disturb the public tranquility or affect the public at large. They merely pertained to the maintenance of law and order and not the public order, therefore, the detention of detenu was not valid.

6. Learned counsel for the petitioner submitted that there was no material on record from which it could be inferred that the District Magistrate or the State Govt. considered the material on record that the case against the detenu was such in which ordinarily penal law or the Code of Criminal Procedure could not be exercised and that it was imperative to use the provision of the Act. He submitted that the registration of two offences of the incident dated 27.9.2009 and 29.2009 was in fact because of business rivalry between detenu and the brother of two complainants namely Smt. Roshni and Ku. Shalini Mihani. Brother of these complainants is hardened criminal and had encroached upon the land belonging to detenu while he was in jail in connection with a case under Section 302 of the Indian Penal Code. When the talks were going on for getting the said land vacated, false report was lodged.

7. Per contra, in a joint return, respondent nos. 2, 3 and 4 submitted that the order of detention was passed by the District Magistrate, Bhopal after being satisfied that his detention under the provision of the Act was essential. The Advisory Board as well as the Govt. of M.P. Home Department confirmed the detention of detenu after appreciating the facts. Out of 28 cases, in six cases detenu has been acquitted and two cases have been compromised, but 20 cases were still pending before the Courts. From the pendency of most of the cases, it was apparent that public was afraid of either giving evidence against the detenu or was terrorized. The progress of disposal of these cases was slow.

8. It was contended on behalf of the State that it is common knowledge and experience that the detenu was engaged in extortion, rape, rioting, armed with deadly weapons, formation of unlawful assembly, obstructing the public servants in discharge of public function, murder, attempt to murder etc. which are serious offences against the public order and disturbance of peace and tranquility. Last two cases were under Sections 384, 294, 323, 506, 341, 385 and 386 read with Section 341 of the Indian Penal Code. These offences were relating to extortion by putting a person in fear of death or grievous hurt and by no stretch of imagination, these cases can be said to have resulted out of simple business rivalry. Since from the grounds, it was apparent that the detention of detenu was essential for preventing him from acting in any manner prejudicial to the maintenance of public order, therefore, petition filed on behalf of detenu deserved to be dismissed.

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9. In a rejoinder to the return of respondents, it was mentioned that out of 28 cases narrated in the grounds of detention, 26 cases were till the year 1997 and thereafter, from 1997 to 2009, there have been no instances of criminal cases being registered against detenu. Two cases registered in the year 2009 i.e. on 27.9.2009 and 29.9.2009 were got registered by sisters of one person namely Babloo @ Surendra Kumar Mehani, who is on inimical terms with detenu. As against Babloo @ Surendra Kumar Mehani, there were as many as 34 cases registered and an order of externment had also been passed. A copy of externment order has been filed as Annexure P/5.

10. Learned counsel for the petitioner submitted that the registration of two offences on 27.9.2009 and 29.9.2009 was in fact because of business rivalry between the husband of petitioner and the brother of two complainants namely Smt. Roshani and Ku. Shalini Mihani. From the facts as narrated in the grounds and also the first information reports of the aforesaid incident, it is apparent that these reports were false and concocted with some ulterior purpose and even if, they be taken as true, it could not be held that the act of detenu in any manner affected the maintenance of public order or disturbed the public tranquility at large, therefore, this petition deserved to be allowed and detention orders deserved to be quashed.

11. We have heard the learned counsel for the petitioner as well as learned counsel for the State and perused grounds and material on record.

12. In *Kamlakar Prasad Chaturvedi Vs. State of M.P.*- (1983) 4 SCC 443, the Apex Court held:

“It is not open to the Detaining Authority to pick up an old and stale incident and hold it as the basis of an order of detention under Section 3(2) of the Act. Nor is it open to the Detaining Authority to contend that it has been mentioned only to show that the detenu has a tendency to create problems resulting in disturbance to public order, or as a matter of fact it has been mentioned as a ground of detention.”

13. In case of *Ajay Dixit Vs. State of U.P. and others*-AIR 1985 SC 18, the Apex Court held:

“When a challenge is made to a detention on the grounds that the stale and irrelevant grounds were the basis for detention then the detenu is entitled to be released and to that extent the order is subject to judicial review not on the ground of sufficiency of the grounds nor the truth of the grounds but only about the relevancy of the grounds which would come under judicial scrutiny.”

14. From the above proposition, it is evident that an incident formulated as a

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ground cannot be made use of by Detaining Authority, if it has become stale. According to 21st Century Chambers Dictionary, the word 'stale' means not fresh and, therefore, unpalatable, overused and no longer interesting or original, lacking in energy and out of date etc. It reflects the lack of proximity and relevancy of the ground as a requirement for the use of provisions of the Act for detaining a person for preventing him from acting in any manner prejudicial to the maintenance of public order. If a ground is stale, it does not remain relevant for forming the subjective satisfaction of the Detaining Authority. In the instant case, when the detention order has been passed by the Detaining Authority on 30.9.2009, the instances of criminal activities of the detenu from 7.6.1982 to 8.1.1997 cannot be held to be relevant for reaching the subjective satisfaction by the District Magistrate. A gap of 12 years intervening between 26th and 27th-28th grounds renders all the grounds pertaining to instances forming the subject matter of ground no.1 to ground no. 26, stale. There appears no rhyme or reason why such stale grounds should have been taken into consideration by the Detaining Authority for reaching the subjective satisfaction for passing the detention order against detenu, which by efflux of time have become stale. No material was adduced by the Govt. to show any proximity of these stale grounds with the grounds no. 27 and 28, the crimes registered against detenu on 27.9.2009 and 29.9.2009. Thus, we hold that the District Magistrate was not justified to pass the detention order on the basis of aforesaid stale grounds.

15. However, in view of the provision of Section 5(A) of the Act, the detention order passed by the District Magistrate cannot be quashed merely on failure the aforesaid grounds as the order of detention shall be deemed to have been made separately on each of the grounds on which the detention order was passed. Now the question before us is whether the grounds no. 27 and 28 were sufficient and valid for making the order of detention.

16. It has now been well settled by several decisions by the Apex Court that public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order or it affects public order. In *Gulab Mehra v. State of U.P.* (AIR 1987 SC 2332) it was held that:

“ Act by itself is not determinant of its own gravity. In its quality it may not differ from another but its potentiality it may be very different. Therefore it is the impact, reach and potentiality of the act which in certain circumstances affect the even tempo of life

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of the community and thereby public order is jeopardized. Such an individual act can be taken into consideration by the detaining authority while passing an order of detention against the persons alleged to have committed the act.”

17. Ground no. 27 in the instant case pertains to a report lodged by Smt. Roshani on 27.9.2009 that detenu threatened her on mobile phone that he had purchased her land and demanded Rs. 10 lakhs from her and also threatened her that on not making the payment, she would be killed. It has been added in the ground that because of his holding out threat, a panic and terror was caused in the area. On bare reading of this ground, it is apparent that in no way the aforesaid incident could have created any terror or panic in the people of locality nor it could have affected in any manner the even tempo of life of the community. Similarly the ground no. 28 pertains to a report lodged by Ku. Shalini Mihani on 29.9.2009, who happens to be the sister of the complainant, who lodged the report on 27.9.2009. The residential address of both the complainants was House No. 211, Prabhu Nagar, Idgah Hills, Shahjahnabad. In this report also the allegation was that the detenu along with his associates stopped Ku. Shalini and by putting revolver on her head, demanded Rs. 10 lakhs and on not making the payment threatened to kill her. Again, it was added in the ground that by this act of detenu, a panic and terror was created in the locality. For appreciating the nature of the aforesaid incidents, it would be relevant to advert to the rejoinder to the return of the respondents wherein petitioner contended that the aforesaid two cases were got registered by sisters of one person namely Babloo @ Surendra Kumar Mehani, who is on inimical terms with him. As against Surendra Kumar Mehani, there were as many as 34 cases registered by the police including an order of externment passed in the year 2008. A copy of the said externment order has been filed as Annexure P/5.

18. Be that as it may, perusal of the aforesaid grounds clearly indicates that the aforesaid criminal acts of the detenu had nexus with some dispute about land between the complainants and the detenu. Since the act of detenu affected only the complainant and had no affect on the public or community at large, in our opinion, the aforesaid grounds cannot be held to have disturbed the public order. As such, the Detaining Authority was not justified to form these grounds the basis of detention order.

19. In *Subhash Bhandari v. District Magistrate, Lucknow and others*-AIR 1988 SC 74 on the facts of the case it was held that:

“ In the instant casethe alleged act of assault by fire-arms is confined to the complainant Surya Kumar and not to others. It is an act infringing law and order and the reach and effect of the act is not so extensive as to affect considerable members of the

SHEEBA MALIK (SMT.) Vs. UNION OF INDIA

society. In other words, this act does not disturb public tranquility nor does it create any terror or panic in the minds of the people of the locality nor does it affect in any manner the even tempo of the life of the community. This criminal act emanates from business rivalry between the detenus and the complainant, therefore, such an act cannot be the basis for subjective satisfaction of the detaining authority to pass an order of detention on the ground that the impugned act purports to affect public order i.e. the even tempo of the life of the community which is the sole basis for clamping the order or detention. Thus it is the degree and extent of the reach of the act upon the society which is vital for considering the question whether a man has committed only a breach of law and order or has acted in a manner likely to cause disturbance to public order.”

20. Similarly it was observed in *Golam Hussain @ Gama vs. The Commissioner of Police, Calcutta and others-* (1974) 4 SCC 530 that the nature of the act, the circumstances of its commission, the impact on people around and such like factors constitute the pathology of public disorder. The act cannot be isolated from its public setting but is to be taken with its total effect on the flow of orderly life. It may be a question of the degree and quality of activity of the sensitivity of the situation and the psychic response of the involved people.

21. When the facts and circumstances of the instant case are viewed, in perspective of the above proposition of law, it would appear that the acts of the detenu do not amount to causing disturbance of the public order as the degree and extent thereof do neither result in panic and terror to the persons of the locality nor affect the public at large.

22. After scanning the factual and legal aspects, we are of the view that this petition deserves to be allowed. The detention order passed against the detenu Mukhtar Malik on 30.9.2009 by the District Magistrate, Bhopal and the confirmation order dated 9th December, 2009, issued by the State Government are hereby quashed. Detenu-Mukhtar Malik is ordered to be set free unless required in connection with any other case.

23. Petition allowed.

Petition allowed.

SECY, K.U.M. SAMITI, JABALPUR V. ADM., MUNICIPAL CORPN., JABALPUR

I.L.R. [2010] M. P., 1420
MISCELLANEOUS PETITION

Before Mr. Justice R.S. Jha

1 April, 2010*

SECRETARY, KRISHI UPJ MANDI SAMITI, JABALPUR

... Petitioner

Vs.

ADMINISTRATOR, MUNICIPAL CORPORATION,

JABALPUR & anr.

... Respondents

Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Section 9(3) Proviso, Municipal Corporation Act, M.P. 1956, Sections 135 & 136 - Recovery of property tax from Krishi Upaj Mandi Samiti - In view of proviso to S. 9(3) of Act, 1972 the area of market yard and market committee are outside the limit of Municipal Corporation - Corporation has no authority to recover property tax from market committee - Demand notice and recovery quashed - Petition allowed. (Para 7)

कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धारा 9(3) परन्तुक, नगर पालिक निगम अधिनियम, म.प्र. 1956, धाराएँ 135 व 136 - कृषि उपज मण्डी समिति से सम्पत्ति कर की वसूली - अधिनियम, 1972 की धारा 9(3) के परन्तुक को देखते हुए मण्डी प्रांगण और मण्डी समिति का क्षेत्र नगर पालिक निगम की सीमा के बाहर हैं - निगम को मण्डी समिति से सम्पत्ति कर वसूल करने का कोई प्राधिकार नहीं है - माँग का सूचनापत्र और वसूली अभिखंडित - याचिका मंजूर।

Case referred :

(2008) 12 SCC 364.

Nitin Karan, for the petitioner.

Anshuman Singh, for the respondents.

ORDER

R.S. JHA, J. :-The petitioner, Krishi Upaj Mandi Samiti, Jabalpur has filed this petition praying for quashing the demand made by the Municipal Corporation, Jabalpur towards the recovery of the property tax, Safai tax, water tax, electricity charges, development charges from 21-7-1986 onwards. The petitioner has further prayed for a direction to the respondent Corporation not to encash the fixed deposit receipts submitted by the petitioner to prevent attachment of the property amounting to Rs.4,50,000/-. The petitioner has also prayed for refund of the excess amount of taxes paid by the petitioner.

2. The short and only issue raised by the petitioner in the present petition is that the petitioner Krishi Upaj Mandi Samiti does not fall within the area of the Municipal Corporation in view of proviso to Section 9 (3) of the M. P. Krishi Upaj Mandi Adhiniyam, 1972 and, therefore, the Municipal Corporation has no power or authority to levy any tax upon the petitioner.

SECY., K.U.M SAMITI, JABALPUR V. ADM., MUNICIPAL CORPN., JABALPUR

3. It is submitted by the learned counsel for the petitioner that in view of the aforesaid provision of the Mandi Adhiniyam, as the petitioner does not come within the area of the Municipal Corporation, notices as well as the recovery proceedings undertaken by the respondent Corporation be quashed and the amount having recovered from the petitioner be refunded to it. It is submitted that the respondent authorities have issued several notices seeking recovery of Rs.4,89,581.31 paise towards the property tax and other dues which notices were issued on 22-2-91, 31-7-91, 9-8-91, etc. It is submitted that on 5-8-91 the petitioner submitted Rs.50,000/- under protest and on 20-11-91 again deposited fixed deposit receipts of Rs.3 lakhs and Rs.1.5 lakhs before the respondent Corporation in spite of which the respondent initiated further recovery proceedings for recovery of the property tax, hence, the petitioner has filed the present petition in which this Court by order dated 21-1-1992 granted interim relief preventing the respondent from encashing the fixed deposit receipts. It is an undisputed fact between the parties that since then no proceedings for levy of property tax has been initiated by the respondent Corporation against the petitioner in respect of the market yard.

4. The learned counsel for the respondents submits that the Municipal Corporation area has been notified by the State Government and the Krishi Upaj Mandi fell within the Corporation area and in such circumstances the Corporation has the right to recover property tax and other taxes from the petitioner.

5. A similar issue came up before this Court in the case of *Krishi Upaj Mandi Samiti, Khandwa v. Khandwa Municipal Corporation*, M.P. No. 741 / 91 and this Court vide order dated May 1997, which is reported in 1998 (1) MPLJ 352, has held that in view of the proviso to Section 9 (30) of the M. P. Krishi Upaj Mandi Adhiniyam, 1972, the area of the market yard or sub- market yard or any other premises used for the purposes of the Board is not deemed to be included in the area of the Municipal Corporation and in such circumstances the Corporation has no power or authority to levy taxes in the following terms:

“13. From bare reading of this provision the Municipal Corporation is empowered to recover tax within its limits and it has no jurisdiction to recover tax beyond the limits of the city. The Corporation has no jurisdiction to recover the property tax in respect of the area which is beyond its jurisdiction. Article 265 of the Constitution of India prohibits imposition of tax without any authority of law. Unless the Municipal Corporation has an authority of law it cannot recover property tax. The proviso to sub-section (3) of Section 9 of the Act cannot be read in a limited sense but it is to be seen that the intention of legislature is to keep the area of market yard and market committee out of the limits of the Municipal Corporation.

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14. From the aforesaid discussion, the Municipal Corporation has no right to levy or collect property tax from the petitioner/Mandi Samiti. In the result, the petition succeeds and the notices of demand for property tax from the Mandi Samiti with effect from 21-7-1986 are quashed. The Municipal Corporation has power to recover tax prior to 2-1-1986 before insertion of proviso by the amendment in the Adhiniyam. There shall be no order as to costs."

6. Similarly in a case arising from this Court wherein levy of tax on a Krishi Upaj Mandi had been quashed by this Court and the matter travelled up to the Supreme Court in the case of *Nagar Palika Nigam v. Krishi Upaj Mandi Samiti and others* (2008) 12 SCC 364, the Supreme Court after considering the scope and impact of the proviso to Section 9 (3) of the M. P. Krishi Upaj Mandi Adhiniyam, upheld the order passed by this Court quashing the levy of taxes by the Municipal Corporation, Ratlam. It was held that in the absence of any challenge to the constitutional validity of the proviso to Section 9 (3) of the Act, no interference in the order passed by the High Court could be made.

7. In view of the aforesaid, it is clear that in view of the proviso to Section 9 (3) of the M.P. Krishi Upaj Mandi Adhiniyam, the premises used as a market yard or a sub-market yard shall not be deemed to be included in the limit of the Municipal Corporation and in such circumstances the Municipal Corporation cannot levy any property tax or other taxes on the area used for the aforesaid purposes. As a consequences of the aforesaid, the impugned notices and the recovery sought to be made by the respondent Corporation from the petitioner Krishi Upaj Mandi Samiti is hereby quashed and it is directed that the fixed deposit receipts be returned and any amount received from the petitioner be refunded to the petitioner Krishi Upaj Mandi Samiti. It is clarified that the aforesaid order made by this Court only relates to the premises used by the petitioner as a market yard or sub-market yard and no other premises.

With the aforesaid clarification, the petition filed by the petitioner stands allowed. In the facts and circumstances of the case, there shall be no order as to costs.

Petition allowed.

SUSHILA GUPTA Vs. RAJENDRA KUMAR

I.L.R. [2010] M. P., 1423

REVIEW PETITION*Before Mr. Justice Sanjay Yadav*

16 April, 2010*

SUSHILA GUPTA

... Petitioner

Vs.

RAJENDRA KUMAR

... Respondent

A. Civil Procedure Code (5 of 1908), Order 41 Rule 22 - Upon hearing, respondent may object to decree as if had preferred separate appeal - Petitioner preferred an appeal for enhancement and the same was dismissed on the ground of limitation - In an appeal preferred by the owner, cross-objection was filed within time and the Court while dismissing the appeal filed by the owner, allowed the cross-appeal and enhanced the compensation - Held - Order of the Court was well within the four corners of the stipulations contained under Order 41 Rule 22 of CPC because the appeal preferred by the claimant was dismissed on limitation and not on merits - There was no adjudication on merits to bar the consideration of cross-objection. (Para 4)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 22 - सुनवाई पर प्रत्यर्थी डिक्री का विरोध कर सकता है मानो पृथक अपील पेश की गयी हो - याची ने वृद्धि के लिए अपील पेश की और वह परिसीमा के आधार पर खारिज कर दी गयी - स्वामी द्वारा पेश अपील में समय के भीतर प्रत्याक्षेप फाइल किये गये और न्यायालय ने स्वामी द्वारा फाइल की गयी अपील खारिज करते समय प्रत्याक्षेप मंजूर किये और प्रतिकर में वृद्धि की - अभिनिर्धारित - न्यायालय का आदेश सि.प्र.सं. के आदेश 41 नियम 22 के अन्तर्गत अन्तर्विष्ट समस्त शर्तों के भीतर है क्योंकि दावेदार द्वारा पेश अपील परिसीमा पर खारिज की गयी न कि गुणदोषों पर - प्रत्याक्षेप के विचार को वर्जित करने के लिए गुणदोषों पर कोई न्यायनिर्णयन नहीं था।

B. Civil Procedure Code (5 of 1908), Order 41 Rule 22 - Upon hearing, respondent may object to decree as if had preferred separate appeal - Pleadings - Non-disclosure of a relevant fact - The petitioner preferred an appeal for enhancement and the same was dismissed on the ground of limitation - In an appeal preferred by the owner, cross-objection was filed within time and the Court on while dismissing the appeal filed by the owner, allowed the cross-appeal and enhanced the compensation but dismissal of the earlier appeal was not mentioned in the cross-objection - Held - Petitioner while moving cross-objection failed to mention the dismissal of appeal on the ground of limitation but non-disclosure of this fact will not cause any change in law as it stands. (Para 8)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 22 - सुनवाई पर प्रत्यर्थी डिक्री का विरोध कर सकता है मानो पृथक अपील पेश की गयी हो - अभिवचन - सुसंगत

SUSHILA GUPTA Vs. RAJENDRA KUMAR

तथ्य का अप्रकटीकरण – याची ने वृद्धि के लिए अपील पेश की और वह परिसीमा के आधार पर खारिज कर दी गयी – स्वामी द्वारा पेश अपील में समय के भीतर प्रत्याक्षेप फाइल किये गये और न्यायालय ने स्वामी द्वारा फाइल की गयी अपील खारिज करते समय प्रत्याक्षेप मंजूर किये और प्रतिकर में वृद्धि की किन्तु पूर्ववर्ती अपील की खारिजी का प्रत्याक्षेप में उल्लेख नहीं किया गया – अभिनिर्धारित – याची प्रत्याक्षेप करते समय परिसीमा के आधार पर अपील की खारिजी का उल्लेख करने में असफल रहा किन्तु इस तथ्य का अप्रकटीकरण प्रचलित विधि में कोई परिवर्तन कारित नहीं करेगा।

Cases referred :

AIR 1952 Bom 166, AIR 1955 Punjab 190.

Susheel Kumar Jha, for the petitioner.

ORDER

SANJAY YADAV, J. :-The petitioners, who were respondents in M.A.No.1116/2006 vide this review petition seeks reconsideration of order dated 24.2.2010 qua cross objection filed therein.

2. The Misc. Appeal in question was under section 173 of the Motor Vehicle Act 1988 at the instance of owner of offending vehicle involved in accident dated 5.9.2001 causing death of Kuldeep Gupta. The claim petition by the deceased's legal representatives, i.e., the petitioners herein, was allowed and a compensation of Rs.1,76,700/- was awarded.

3. It appears (as pleaded by the petitioner) that an appeal for enhancement filed by the petitioners herein, i.e., MA. No.175/2008, was dismissed on the ground of limitation on 26.3.2008. However, in an appeal preferred by the owner i.e. MA. No.1116/2006, cross objection was filed within time and this Court on 24.2.2001 while dismissing the appeal filed by the owner, allowed the cross appeal and enhanced the compensation by Rs.2,25,150.00.

4. This order in the considered opinion of this Court was well within the four corners of the stipulations contained under Order 41 Rule 22 of Code of Civil Procedure, 1908 because the appeal preferred by the claimants/petitioners herein, was not dismissed on merits but on limitation. There was thus no judicial determination as to bar the consideration of cross objection. Reference in the context can profitably be of judgments by two division Benches of High Court of Bombay and High Court of Punjab.

5. In *Mohd. Oomer Vs. S. M. Nooruddin* AIR 1952 Bombay 166, their Lordships while considering some what similar issues were pleased to observe :

“4. But a more interesting question has been raised and debated at the bar, and that is whether the learned Judge was right in coming to the conclusion that the cross objections preferred by the appellant were barred and not maintainable. Now, the view that the learned Judge has taken is that, when Mr. Justice Coyajee

SUSHILA GUPTA Vs. RAJENDRAKUMAR

dismissed the appellant's appeal, the order of the Registrar became merged in the order of the appellate Court and, therefore, it was not open to the appellant to re-agitate the same question by way of cross objections. Now with respect to the learned Judge, the learned Judge is in error when he takes the view that the judgment of the Registrar was merged in the order of dismissal passed by Mr. Justice Coyajee. A merger only takes place when the Court of appeal judicially determines the appeal pending before it. It is only on a judicial determination that the order of the lower court becomes merged in the decision of the Court of appeal. But no merger takes place when the Court of appeal does not judicially determine the appeal but dismisses it on any preliminary ground like, limitation or maintainability. Then on the dismissal by the appellate Court, the order that still stands is the order of the Lower Court and not the order of the Court of appeal. This position is clear as laid down by the Privy Council in *Abdul Majid V. Jawahir Lal*, 36 ALL. 350. In that case, His Majesty in Council dismissed an appeal for want of prosecution. This was an appeal from a preliminary decree for sale and the question was whether limitation began to run from the preliminary decree or from the order of the Privy Council dismissing the appeal from the preliminary decree; and the Privy Council held that limitation ran from the preliminary decree and not from the Order-in-Council. The reasons why the Privy Council came to this conclusion was that there was no judicial determination of the matter by His Majesty in Council.

8. Now, if one looks at the judgment, it is clear that the view taken by the Allahabad High Court of the dismissal of the defendant's appeal was that the dismissal was on merits, they took the view that, when a party withdraws his appeal and appeal is dismissed, the dismissal on merits and operate as *res judicata*. But it is rather significant to note in this case that the Allahabad High Court held that, although the plaintiff had cross objected and these cross objections been dismissed, inasmuch as the dismissal was not on merits, the plaintiff's own appeal was not barred. Although the subject matter of cross objections and the plaintiff's appeal was identical, because there was no judicial determination of the plaintiff's cross objections, his right to appeal was not held to be barred. Therefore, if any thing, this decision support the contention of Mr. Paikhiwala that without a judicial determination of the appeal of the appellant it can not be said that he has no right to have his cross objections judicially determined

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because the subject matter of the appeal and the cross objections happened to be identical. Therefore, in my opinion, cross objections under Order 41 Rule 22 are not barred, notwithstanding the dismissal of the appeal of the respondent, if that appeal was not dismissed on merits, although the subject matter of the respondent's appeal and cross objections might be identical. Therefore, in my opinion the learned Judge below was in error when he held that the cross objections of the appellant were not maintainable.

6. Similarly, in *Smt. Nripjit Kaur Vs. Sardar Satinder Singh*; AIR 1955 Punjab 190 their Lordships were pleased to observe :

"2. The suit was decided by a decree dated 10.8.1953 and the appeal was filed in this Court on 22.1.1954 by Nirpat Kaur in person. The application for leave to appeal in "forma pauperis" is within should have been filed within thirty days, but it was filed long after that period had elapsed, but Mr. Gurbachan Singh Bakhshi submits that his memorandum of appeal should be treated as cross objection and he relied on a Full Bench judgment of the Lahore High Court in --"*Labhu Ram and others V. Ram Pratap*" AIR 1944 Lah 76(A), where it was held that although cross objections cannot be presented after the expiry of thirty days from the date of service of the notice on the respondent, the right to submit cross objections accrues as soon as an order is made issuing notice of the date of hearing of the appeal to him and it is not necessary for him to wait until the service is actually effected on him. The respondent in such a case can appear on the date of hearing and present his objections though he is not served. At page 87 Din Mohammad J. said:

"In other words, could it be the intention of the Legislature in enacting O 41, R.22, to specify the point of time in which cross objections could be filed at both ends? After giving this matter my careful consideration, I have reached the conclusion that it could serve no purpose to restrict the right of a respondent to prefer his cross objections in the manner suggested. No doubt they can not be presented after the expiry of one month from the date of the service of the notice on him or his pleader, but the right to submit his cross objections, in my view accrues to a respondent as soon as an order is made issuing notice of the date of hearing of the appeal to him and it is not necessary for him to wait until the service is actually effected on him.

AMARSINGH Vs. BALMUKUND

It is even open to him to appear in a court of appeal on the date of hearing and present his objections there and then though not served at all. To put the restricted interpretation upon the provision of law would create situations which may look anomalous".

If the respondent could appear on the day when an appeal is admitted and cross object, is it not possible for him to ask after an appeal is admitted to treat his time barred appeal as cross objections. In my opinion, there is nothing in law which says to the contrary. As a matter of fact, it has been held in - "*Bhagat Ram V. Raghbar Dyal*" AIR 1925 Lah 57 (B) that a time barred appeal can be treated as cross objections. In this case - "*Bawa Singh V. Thakkar Singh*" AIR 1992 Lah 423 (c) was followed.

AIR 1925 Lah, 57 (B) was followed by Hilton J. in '*Milhan Singh V. Tilak Ram*, AIR 1934 Lah 273 (c). We are therefore of the opinion that this memorandum of appeal can be treated as cross objections and should be allowed to be so treated in the present proceedings.

7. Thus in view of above pronouncements and the principle imbibed under Order 41 Rule 22 of the Civil Procedure Code, 1908, no error apparent on the face of record is perceived in the order dated 24.2.2010.
8. True it is that, the petitioners herein while moving the cross objection failed to mention the dismissal of appeal, at their instance on limitation but a non-disclosure of this fact in the considered opinion of this Court will not cause any change in the Law as it stands.
9. In view of above no case is made out for recalling the order dated 24.2.2010.
10. In the result the review petition fails and is hereby dismissed. However no costs.

Petition dismissed.

I.L.R. [2010] M. P., 1427

APPELLATE CIVIL

Before Mr. Justice N.K. Mody

13 January, 2010*

AMAR SINGH & ors.

Vs.

BALMUKUND & ors.

... Appellants

... Respondents

A. Evidence Act (1 of 1872), Section 109 - Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent

AMARSINGH Vs. BALMUKUND

- During pendency of litigation, counsel for a party purchased suit property by a registered sale deed - Held - In view of the provisions of S. 109 of the Act, the burden was on the respondents to prove that no litigation was pending on the date when the sale deed took place, which they utterly failed to do so.

(Para 15)

क. साक्ष्य अधिनियम (1872 का 1), धारा 109 - भागीदारों, भूस्वामी और किरायेदार, मालिक और अभिकर्ता के मामलों में सम्बन्ध के बारे में सबूत का भार - वाद के लम्बित रहने के दौरान, एक पक्षकार के अधिवक्ता ने रजिस्ट्रीकृत विक्रय विलेख द्वारा वादग्रस्त सम्पत्ति क्रय कर ली - अभिनिर्धारित - अधिनियम की धारा 109 के उपबंधों को दृष्टिगत रखते हुए यह साबित करने का भार प्रत्यर्थियों पर था कि उस तारीख को कोई वाद लम्बित नहीं था जब विक्रय विलेख किया गया, जो वे ऐसा करने में पूर्ण रूप से असफल हो गये।

B. All India Bar Council (First Constitution) Rules, 1961, Rule 13 - Unlawful and void transaction - During pendency of litigation, counsel for a party purchased suit property by a registered sale deed - Held - Transaction was in violation of Rule 13 and thus was forbidden by law, unlawful and void.

(Para 16)

ख. अखिल भारतीय अधिवक्ता परिषद् (प्रथम गठन) नियम, 1961, नियम 13 - अविधिपूर्ण और शून्य संव्यवहार - वाद के लम्बित रहने के दौरान, एक पक्षकार के अधिवक्ता ने रजिस्ट्रीकृत विक्रय विलेख द्वारा वादग्रस्त सम्पत्ति क्रय कर ली - अभिनिर्धारित - संव्यवहार नियम 13 के उल्लंघन में था और इस प्रकार विधि द्वारा निषिद्ध, अविधिपूर्ण और शून्य था।

Cases referred :

1987 J LJ 44, AIR 1954 SC 577, AIR 1935 Lahore 49.

Brijesh Pandya, for the appellants.

A.S. Kutumble with Amit Purohit, for the respondents.

J U D G M E N T

N.K. Mondy, J. :-Being aggrieved by the judgment and decree dated 12/03/88 passed by Additional District Judge, Rajgarh (Biaora) in Civil Appeal No.12-A/81 whereby the judgment and decree dated 31/03/78 passed by Civil Judge, Class-II, Khilchipur in Civil Suit No.71-A/75 whereby the suit filed by deceased Raghunath Gupta predecessor in title of respondents was dismissed, was set aside and a decree was passed against the appellants, the present appeal has been filed.

2. The appeal was admitted for final hearing by this Court vide order dated 27/06/88 on the following substantial questions of law:-

1. *Whether on the facts and in the circumstances of the case, an advocate purchasing the suit property during the pendency of appeal against the order passed under Sections 250 and 190 of the M.P. Land Revenue Code, is illegal and invalid?*

AMARSINGH Vs BALMUKUND

2. *Whether on the facts and in the circumstances of the case, the sale-deed dated 23/08/1967, which was executed during the pendency of proceedings regarding the suit land is void under the provisions of Section 23 of the Contract Act?*
 3. *Whether on the facts and in the circumstances of the case, the alleged sale deed is illegal as it is against the provisions of Rule 13 of Chapter 3 Part 4-A of the High Court Rules and Orders and, therefore, illegal?*
 4. *Whether on the facts and in the circumstances of the case, the order of the lower Appellate Court is perverse against the facts on record and principles of law?*
3. Short facts of the case are that the deceased Raghunath Gupta predecessor in title of respondents filed a suit for possession against Bapulal, Hiralal and Banshilal (all sons of Shankar) who are the predecessor in title of appellants on 25/10/72 for possession. In the suit filed by deceased Raghunath Gupta it was alleged that the land bearing survey No.999/1 measuring 0.60 hectare situated at village Jirapur Tehsil Khilchipur is owned by him as he purchased the suit property from Fatehsingh Thakur vide registered sale deed dated 23/09/67. It was alleged that Fatehsingh was the Bhumi-swami of the suit land. Further case of deceased Raghunath Gupta was that Shankar predecessor in title of the appellants initiated proceedings before the Revenue Court and claimed for mutation alleging themselves to be Shikmi of Fatehsingh. It was alleged that the said application was dismissed by SDO vide order dated 06/12/69 and the appeal filed against the said order was also dismissed. It was alleged that Shankar who initiated the proceedings died in the year 1975. It was alleged that Bapulal Hiralal and Banshilal who are legal representatives of deceased Shankar had no right to retain the possession over the suit property. It was alleged that after acquiring the rights over the suit property by sale deed dated 23/09/67 deceased Raghunath Gupta issued notices on 29/01/74 and asked for possession, but the notice was not replied, hence the suit was filed wherein it was prayed that it be directed that possession be handed over to the deceased Raghunath Gupta and mesne profit be awarded @ Rs.400/- per year.
4. The suit was contested by predecessor in title of appellants wherein it was denied that the suit property has been purchased by Raghunath Gupta vide sale deed dated 23/09/67. It was alleged that the sale deed has been got executed by deceased Raghunath Gupta with an oblique motive. It was alleged that Raghunath Gupta is an Advocate and the act of deceased Raghunath Gupta to get the sale deed executed is illegal and immoral, as the deceased Raghunath Gupta was counsel of Fatehsingh. In the written statement it was alleged that Fatehsingh in his life time filed the suit against the predecessor in title of appellants for possession, in

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which he could not succeed. It was alleged that in the suit property no rights were left over to Fatehsingh, therefore, if any transaction is taken place, then it is of no effect. It was alleged that the suit property was leased out by previous owners Vijaysingh S/o Gangadhar and Gyarsibai W/o Devisingh to Shankar predecessor in title of appellants for a period of 99 years vide lease agreement dated 26/05/55 for a consideration of Rs.140/-. It was alleged that out of the consideration a sum of Rs.100/- was paid by predecessor in title of appellants and for the balance amount documentation took place. It was alleged that after execution of lease Fatehsingh filed a suit before Revenue Court on 01/10/63 under Section 250 of M.P. Land Revenue Code, which was dismissed on 08/09/64 and First Appeal was also dismissed by SDO vide order dated 31/08/65. It was further alleged that Second Appeal filed by Fatehsingh was also dismissed by Additional Revenue Commissioner, Bhopal vide order dated 30/03/66, thus, Fatehsingh could not succeed in taking the possession. It was alleged that thereafter Shankar predecessor in title of appellants moved an application for mutation in the Court of Nayab Tahsildar, Jirapur which was allowed vide order dated 24/06/69, against which an appeal was filed by Fatehsingh in the Court of SDO which was allowed vide judgment dated 06/12/69 on the ground that the relief which has been claimed by the predecessor in title of the appellants can not be granted as the application has been filed in a wrong section. It was further observed in the said order that the application ought to have been filed under Section 190 of M.P. Land Revenue Code. Being aggrieved by the order dated 06/12/69 passed by SDO an appeal was filed by predecessor in title of the appellants before Revenue Commissioner, Bhopal which is still pending. It was alleged that since the matter is pending before Revenue Court, therefore, suit itself is not maintainable. It was prayed that the suit be dismissed.

5. On the basis of pleadings of parties, learned trial Court framed the issues, recorded the evidence and dismissed the suit filed by deceased Raghunath Gupta, against which an appeal was filed by deceased Raghunath Gupta. During pendency of appeal Bapulal, Hiralal and Banshilal sons of Shankar died and their legal representatives were brought on record. Vide judgment dated 12/03/88 the appeal filed by deceased Raghunath Gupta was allowed whereby judgment and decree passed by learned trial Court was set aside and decree was passed in favour of deceased Raghunath Gupta, against which present appeal has been filed.

6. Mr. Brijesh Pandya, learned counsel for 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 sale deed was got executed by deceased Raghunath Gupta who was an Advocate by profession and was conducting various cases on behalf of Fatehsingh relating to the suit land. It is submitted that thus the sale transaction which took place between deceased Raghunath Gupta and Fatehsingh was hit by the provisions of High

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Court Rules and also was in violation of Section 23 of Indian Contract Act. It is submitted that learned Appellate Court committed error in holding that the transaction took place between deceased Raghunath Gupta and Fatehsingh was after completion of litigation. It is submitted that at the relevant time appeals were pending and the appeal is in continuation of litigation. It is submitted that the appeal in which deceased Raghunath Gupta was appearing on behalf of Fatehsingh were pending up to 1976. It is submitted that the transaction which took place is between Fatehsingh and deceased Raghunath Gupta was in violation of Section 23 of Indian Contract Act, 1972, as it was forbidden by law. Learned counsel placed reliance on a decision in the matter of *Nihal Singh Vs. Ram Bai*, 1987 J.L.J. 44 wherein this Court has held that in a case where the contract was void ab-initio as it was in violation of Article 13(2) of Constitution of India, therefore, was unenforceable. It was further observed that sale of a woman is prohibited and suit is not maintainable for refund of consideration paid for her purchase. Learned counsel further placed reliance on a decision in the matter of *Mr. 'G' a Senior Advocate of the Supreme Court*, AIR 1954 SC 577 wherein the agreement by an Advocate was to share the result of litigation, Hon'ble Apex Court observed that an Advocate of Supreme Court is bound to conduct himself in a manner befitting the high honourable profession to whose privileges he has so long been admitted, and if he departs from the high standards which that profession has set for itself and demands of him in professional matters, is liable to disciplinary action.

7. Learned counsel for appellants further submit that since the transaction itself was void, therefore, learned Appellate Court committed error in setting aside the judgment passed by the learned trial Court and decreeing the suit filed by deceased Raghunath Gupta. It is submitted that the appeal filed by the appellants be allowed.

8. Mr. AS. Kutumble, learned senior counsel appearing on behalf of respondents submit that no illegality has been committed by the learned Appellate Court in passing the judgment and decree in favour of respondents. It is submitted that undisputedly Fatehsingh was the owner of the suit property who has sold the suit property to the deceased Raghunath Gupta. It is submitted that even if it is assumed that deceased Raghunath Gupta was an advocate and has purchased the suit property during pendency of litigation, then too, no objection can be raised by the appellants. Learned counsel further submits that the learned Appellate Court after due appreciation of evidence on record has found that on the date of purchase of the suit property no litigation was pending, therefore, no professional misconduct has been committed by the deceased Raghunath Gupta. It is submitted that it is true that in the order dated 26/04/69 passed by Tehsildar there is an averment that the suit property was purchased by deceased Raghunath Gupta during pendency of litigation, but this order was set aside vide order dated 06/12/69 which is on record as Ex.P/5. It is submitted that in view of this no illegality has been committed by the learned Appellate Court in holding that no litigation was pending when the

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suit property was purchased by deceased Raghunath Gupta. It is submitted that in the facts and circumstances of the case, appeal filed by the appellants has no force and deserves to be dismissed.

9. From perusal of the record it is evident that undisputedly Fatehsingh was Bhumi-swami of the suit property. Some important dates which are relevant for just disposal of appeal are as under:

- i. 14/05/63 Application filed by Shankar predecessor in title of the appellants under Section 190 of M.P. Land Revenue Code was dismissed.
- ii. 08/09/64 Application filed by deceased Fatehsingh predecessor in title of respondents under Section 250 as dismissed.
- iii. 31/08/65 First Appeal filed by deceased Fatehsingh against the order dated 08/09/64 was dismissed by SDO, Rajgarh.
- iv. 30/03/66 Second Appeal filed by deceased Fatehsingh against the order dated 31/08/65 passed by SDO, Rajgarh was dismissed by Revenue Commissioner Bhopal.
- v. 23/09/67 Sale deed was executed by deceased Fatehsingh in favour of deceased Raghunath Gupta, advocate who is predecessor in title of respondents.
- vi. 26/04/69 Application filed by Shankar predecessor in title of appellants for recording the name as Sikmi was allowed by Nayab Tehsildar.
- vii. 06/12/69 Appeal filed by deceased Fatehsingh and deceased Raghunath Gupta against the order dated 26/04/69 was allowed by SDO, Rajgarh and the order dated 26/04/69 was set aside.
- viii. 07/08/72 Appeal filed by Shankar against the order dated 06/12/69 passed by SDO, Rajgarh was dismissed in default.
- ix. 28/05/75 Shankar died.
- x. 27/10/76 Restoration application for restoring the appeal which was dismissed vide order dated 07/08/72 was dismissed.

10. There are some important facts which were not taken into consideration by the learned Appellate Court while decreeing the suit which are as under:-

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- i. Ex.P/1 is the sale deed dated 23/09/67 whereby the suit property was purchased by deceased Raghunath Gupta, advocate from deceased Fatehsingh, wherein there is a recital that the suit property has been purchased for a consideration of Rs.125/-. It is also mentioned in the sale deed that the sale consideration was paid by purchaser prior to the execution of the sale deed and no consideration was paid in presence of Sub-Registrar when the document was executed.
- ii. In para-11 of the statement of deceased Raghunath Gupta he has stated that he does not remember that from where he has paid a sum of Rs.125/-. He has further stated that he does not remember whether the amount was paid at Khilchipur or Jirapur. He does not remember whether the amount was paid in presence of witness or not. In para-8 of his statement deceased Raghunath Gupta has further stated that he does not remember whether the litigation was pending between deceased Fatehsingh and the appellants or not. He has further stated that after going through the document Ex.D/1 also he can not say that the appeal Ex.D/1 was relating to the suit property or not, however later on he has improved his statement and has stated that appeal Ex.D/1 is relating to the suit property.
- iii. It is true that the order dated 26/04/69 Ex.D/5 passed by Nayab Tehsildar was set aside vide order dated 06/12/69 passed by SDO, Rajgarh (Ex.P/5), but the observations which were made by the Nayab Tehsildar to the effect that श्री फतेहसिंह ने मुकदमे के दौरान अपने वकील श्री रघुनाथ गुप्ता के संबंध में यह बताया कि उन्होंने इस झगड़े वाली भूमि को रजिस्ट्री द्वारा अपने वकील को बेच दिया है। इसलिये उन्हें इस भूमि से कोई संबंध नहीं रहा, बल्कि यह मामला शंकर और श्री आर. एल. गुप्ता साहब के दरमियान बाकी रहा। यह स्थिति कानूनी रूप से उचित नहीं थी क्योंकि श्री आर.एल. गुप्ता साहब एक वक्त में वकील और उज्रदार नहीं हो सकते थे जबकी वह शुरु से मामले की कार्यवाही कर रहे थे।
- iv. It is true that the learned Appellate Court has observed that on the date of sale i.e. 23/09/67 there is nothing on record that any litigation was pending, however enough evidence is on record that the dispute between Shankar

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predecessor in title of appellants and deceased Fatehsingh was going on right from prior to 1963 and which continued up to 1976.

- v. There is nothing on record to show that when the application was filed by Shankar to record his name as Shikmi, which was allowed vide order dated 26/04/69.

11. At the relevant time All India Bar Council (First Constitution) Rules, 1961 was in force. Rule 13 of the said Rules reads as under:-

Acquiring interest in litigation :- (a) No Advocate shall acquire in any manner whatever any interest in the subject-matter of the litigation which he is conducting.

(b) An Advocate shall either directly or indirectly bid for or purchase either in his own name or in any other name for his own benefit or for the benefit of any other, any property sold in the execution of a decree or order in any suit appeal or other proceeding, in which he was in any way professionally engaged. This prohibition does not prevent an Advocate from bidding for or purchasing for his client any property which his client may himself legally bid for or purchase provided the Advocate is expressly authorised in writing in this behalf.

12. Section 109 of the Indian Evidence Act, 1872 reads as under:-

Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent- When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden to proving that they do not stand, or have ceased to stand, to each other in those relationship respectively, is on the person who affirms it.

13. In the matter of *Hira Wazir Vs. M. Mohammad Ali Naqi*, AIR 1935 Lahore 49 Lahore High Court had an occasion to take into consideration Section 109 of evidence Act and it was observed that where the relationship of principal and agent is admitted, the burden of proving that they had ceased to stand to each other in this relationship is clearly on the person who affirms it.

14. Keeping in view the litigation of which the details are mentioned herein above, which shows that the dispute was going on between the parties right from 1963 and continued up to 1976 and also keeping in view the observation made by Nayab Tehsildar in the order Ex.D/5 the findings of the learned Appellate Court that no litigation was pending on the date when the sale deed was executed appears not to be correct.

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15. In the present case while holding that no litigation was pending on the date of execution of sale deed i.e. 23/09/67 in para-8 of its judgment learned Appellate Court has further held that appellants have failed to prove by adducing sufficient evidence that the litigation was pending in which deceased Raghunath Gupta was Advocate on behalf of Fatehsingh, while in view of the pendency of the litigation of which the details are mentioned herein above and keeping in view the provisions of Section 109 of the Indian Evidence Act, 1872 the burden was on the respondents to prove that no litigation was pending on the date when the sale deed took place.

16. In view of the aforesaid position of law and the facts and circumstances of the case, this Court is of the view that the suit property was purchased by deceased Raghunath Gupta vide sale deed dated 23/09/67, while the litigation was pending between deceased Shankar and Fatehsingh from whom the suit property was purchased by deceased Raghunath Gupta and he was the advocate in the said litigation appearing on behalf of Fatehsingh, which is in violation of Rule 13 of All India Bar Council (First Constitution) Rules, 1961. Since the sale deed dated 23/09/67 was forbidden by law, therefore, the said transaction was unlawful and was void.

17. In view of this, appeal filed by the appellants is allowed and the impugned judgment dated 12/03/88 passed by Additional District Judge, Rajgarh (Biaora) is set aside and the judgment dated 31/03/78 passed by Civil Judge, Class-II, Khilchipur in Civil Suit No.71-A/75 is restored.

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

Appeal allowed.

I.L.R. [2010] M. P., 1435

APPELLATE CIVIL

Before Mr. Justice N.K. Mody

13 January, 2010*

MAZHAR KHAN & anr.

... Appellants

Vs.

SHYAMKISHORE & ors.

... Respondents

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(d) - Suit for eviction alleging that accommodation has not been used without reasonable cause by appellants - Evidence shows that appellants were not allowed by respondents to carry on their business in the suit accommodation - Held - Courts below were not justified in not considering the reasonable cause of appellants in not running the business in the suit accommodation

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due to mala fide of respondents who restrained appellants to run the business - Suit for eviction dismissed - Appeal allowed. (Paras 11 & 12)

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(डी) – यह अभिकथन करते हुए बेदखली के लिए वाद कि अपीलार्थियों द्वारा युक्तियुक्त कारण के बिना स्थान का उपयोग नहीं किया गया है – साक्ष्य दर्शाती है कि प्रत्यर्थियों द्वारा अपीलार्थियों को वादग्रस्त स्थान में अपना कारबार नहीं करने दिया गया – अभिनिर्धारित – निम्न न्यायालय का वादग्रस्त स्थान में प्रत्यर्थियों, जिन्होंने अपीलार्थियों को कारबार करने से अवरुद्ध किया, के असद्भाव के कारण कारबार नहीं करने के अपीलार्थियों के युक्तियुक्त कारण पर विचार न करना न्यायसंगत नहीं – बेदखली का वाद खारिज – अपील मंजूर।

A.S. Kutumbale with B.S. Gandhi, for the appellants.

A. Siddiquee, for the respondent.

J U D G M E N T

N.K. Mody, J. :-Being aggrieved by the judgment dated 7.2.2009 passed by Ist Addl.District Judge, Shajapur in Civil Appeal No.36-A/2008, whereby the judgment dated 31.10.2008 passed by IInd Civil Judge Class I, Shajapur in Civil Suit No.1-A/2008, whereby a decree of eviction was passed against the appellants under section 12(1)(d) of M.P. Accommodation Control Act, 1961 (which shall be referred hereinafter as “the Act”) was confirmed, the present appeal has been filed.

2. The appeal is admitted on the following substantial questions of law:-

“(1) Whether the Courts below were justified in not considering the reasonable cause of the appellant No.1 in not running his business in the suit plot consistently due to the malafides of the respondents in not allowing him running his business therefrom ?

(2) Whether the Courts below were justified in misreading Ex.D/ 1, which is the statement of original plaintiff, Nandkishore, who had stated in para 14 therein that he had an objection if the appellant No.1 constructs the shade in the suit plot and runs his business therefrom ?

(3) Whether the Courts below were justified in misreading the decree passed in civil suit No.110-A/95 in which the trial Court had granted injunction against the respondents restraining them from interfering in the business of the appellant No.1 from the suit premises and allowing him to construct the shade over the suit plot ?”

3. Short facts of the case are that deceased Nandkishore predecessor in title of respondents filed a suit for eviction against the appellants on 8.12.2001 alleging that the appellants are tenant of the respondents on a piece of land situated at Nai

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Sadak, Jawahar Marg, Shajapur. It was alleged that the accommodation, which is in occupation of appellants are having a length of 45 feet from East to West and 50 feet from North to South. It was alleged that rent was Rs.20/- per month. It was alleged that suit accommodation was given to the appellants for carrying on the business of manufacturing and sale of furniture. It was alleged that appellants constructed a wooden shade and was doing the business of furniture in the name and style of M/s Malwa Furnitures. It was alleged that in the month of September, 1996 the structure, which was constructed by the appellants fell down. It was alleged that prior to 4-5 months of Sept., 1996 appellants closed the business and started same business in a shop of Habeeb Bohra at Nai Sadak. It was alleged that since then appellants are not using the suit accommodation for carrying on the business. Further case of the appellants was that since Spet., 1996 because of felling down of the structure the suit accommodation is lying vacant and the same is not being used for carrying on the business. It was alleged that appellants are not using the accommodation since Sept., 1996 for the purpose for which it was let out. Thus, the respondents are entitled for a decree of eviction against the appellants under Section 12(1)(d) of the Act. It was prayed that the decree of eviction be passed.

4. The suit was contested by the appellants by filing written statement, wherein it was not disputed that appellants are the tenant in the suit accommodation. It was also not disputed that the suit accommodation was a open piece of land on which wooden structure was raised by the appellants. It was alleged that in the month of Sept., 1996 the wooden structure constructed by the appellants felled down because it was damaged by the respondents and their sons. It was alleged that the material, which was kept in the shop was also removed by the respondents, so that the appellants could not carry on their business in the suit accommodation. It was denied that wooden structure constructed over the suit accommodation was in a dilapidated condition. It was also denied that appellants stopped the business over the suit accommodation prior to 4-5 months of Spet., 1996. It was also denied that appellants have shifted their business of manufacturing of furniture in the shop of Habeeb Bohra. Further case of the appellants was that appellants tried to renovate the structure but respondent and his sons created obstructions. It was alleged that appellant No.1 also filed a suit against the respondents for permanent injunction, which was numbered as Civil Suit No.110-A/95. It was alleged that appellant No.1 moved an application in the said suit, wherein misdeeds of the respondent were pointed out. It was alleged that the suit filed by the appellant No.1 was suitably amended by the appellant No.1 and vide judgment dated 30.4.2001 the learned trial Court found that respondents have created obstruction in constructing the structure over the suit land and the injunction was also passed in favour of the appellants, whereby respondents were restrained not to obstruct in raising the structure over the suit accommodation. It was alleged that against

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the said judgment an appeal was filed by the respondents, which was numbered as Civil Appeal No.28-A/91 and was dismissed by District Judge, Shajapur on 29.1.2002. It was prayed that in the facts and circumstances of the case the suit filed by the respondents be dismissed as no ground for eviction is made out. On the basis of the pleadings of the parties, learned trial Court framed the issues, recorded the evidence and decreed the suit filed by the respondents, against which the appeal was filed, which was also dismissed, hence this appeal.

5. Learned counsel for the appellants submit that judgment passed by both the Courts below are illegal and deserves to be set aside. It is submitted that learned Courts below committed error in not taking into consideration the fact that the appellants were carrying on the business in the suit accommodation by constructing the structure, which was removed by the respondents. It is submitted that respondent No.1 has specifically stated in his statement that he has objection in raising shade over the suit accommodation. This aspect of the case has not been taken into consideration by the learned Courts below. It is submitted that no ground for eviction is made out under Section 12(1)(d) of the Act. It is submitted that appeal filed by the appellants be allowed and the impugned judgment passed by both the Courts below be set aside.

6. Shri A.Siddiquee, learned counsel for the respondents submit that the suit for injunction was filed by the respondents in the year 1992 and the same was decreed in the year 2001. It is submitted that during pendency of the suit and thereafter no business was started by the appellants in the suit accommodation. Thus, the appellant No.1 did not use the accommodation for business for the purpose of which accommodation was letted out to the appellants. It is submitted that in the facts and circumstances no illegality has been committed by both the Courts below in passing the impugned judgment. Learned counsel submits that appeal filed by the appellants has no merits and the same be dismissed.

7. Chapter III of M.P.Accommodation Control Act deals with the eviction of tenants. Section 12(1)(d) of the Act reads as under:-

"12. Restriction on eviction of tenants. - (1) Notwithstanding anything to the contrary contained in any other law or contract, no suit shall be filed in any civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds only, namely:-

(d) that the accommodation has not been used without reasonable cause for which it was let, for a continuous period of six months immediately preceding the date of the filing of the suit for the recovery of possession thereof,"

8. To prove the case respondents have filed the documents Ex.P/1 to P/3. Ex.P/1 is the suit filed by the appellants on 16.3.92, which is numbered as Civil

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Suit No.110-A/95. Ex.P/2 is the judgment in the said suit dated 1.4.2001 and Ex.P/3 is the decree passed in the said suit. Apart from this respondents have examined Bherusingh PW-1, Laxman Gawali PW-2 and Ajay Kumar PW-3, while the appellants have filed the documents Ex.D/1 to D/16. Ex.D/1 is the statement of Nandkishore, who is landlord in Civil Suit No.110-A/95. Ex.D/2 is the judgment dated 29.1.2002 passed by the District Judge, Shajapur in Civil Appeal No.28-A/2001, whereby the judgment dated 30.4.2001 passed in Civil Suit No.110-A/95 was maintained. Ex.D/3 is the decree passed in the said suit. Ex.D/4 to D/7 are the copies of the complaints, which were lodged by appellant No.1 on 14.10.92, 1.2.94, 14.9.96 and 6.1.97 in the concerned Police Station. Ex.D/9 and Ex.D/10 are the order dated 8.1.2004 and 06/07/2000 passed by this Court in Second Appeal No.171/2000, whereby appeal filed by the respondents before this Court was admitted for final hearing. Ex.D/11 is the copy of the plaint dated 7.5.93 of Civil Suit No.63-A/93, which was filed by the respondents against the appellants for eviction on the ground of genuine requirement. Ex.D/12 is the written statement filed by the appellants in Civil Suit No.63-A/93. Ex.D/13 are the issues while Ex.D/14 is the judgment dated 15.11.99 passed in the said suit, whereby the suit filed by the respondent No.1 was decreed. Ex.D/15 is the certified copy of the decree passed in the said suit. Ex.D/16 is the copy of the judgment passed by Ist Addl.District Judge, Shajapur in Civil Appeal No.55-A/99, whereby the judgment passed by the learned trial Court, whereby the decree of eviction was passed, was set aside. Ex.D/17 is the copy of the decree in the said suit. Apart from documentary evidence appellants examined himself as DW-1.

9. From perusal of the record it is evident that respondent No.1 filed the suit for eviction on 07/05/93 against the appellants for eviction under Section 12(1)(f) of the Act. This Civil Suit was numbered as 63-A/93. In the said suit written statement was filed by the appellants, which is Ex.D/12 and is dated 25/11/93. The suit was frvtrrf on 15/11/99 which is evident from Ex.D/14 and in appeal the suit was dismissed vide judgment dated 04/04/2000 which is evident from Ex.D/16. Against this judgment Second Appeal was filed before this Court which was numbered as SA. No.171/2000 and was dismissed on 01/04/09. Ex.P/1 is the suit filed by appellant Mazhar Khan which is dated 16/03/92 which was numbered as Civil Suit No.110-A/95. This suit was decreed on 30/04/01 and a decree of permanent injunction was passed against the respondents to the effect that no obstruction should be created by the respondents in the use and occupation of the appellants. Respondents were also restrained not to create obstruction in raising temporary structure by the appellant Mazhar Khan.

10. For obtaining decree under Section 12(1)(d) of the Act a landlord is required to prove that the suit accommodation has not been used by the tenant without reasonable cause for which it was let. A landlord seeking eviction under Clause (d) has only to satisfy the court that he has pleaded and proved the non-user of

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the accommodation for a continuous period of six months immediately preceding the date of filing of the suit. If the plaintiff establishes his claim, the onus shifts on the tenant to establish that his default which rendered him liable to eviction was condonable by the court because of a "reasonable cause". It is not necessary for the landlord to plead that the non-user by tenant was "without reasonable cause".

11. In the present case sufficient evidence is on record by way of documentary evidence which goes to show that the appellants were not allowed to carry on their business in the suit accommodation and the appellants were constrained to approach the Court by way of filing of suit in which the injunction was issued against the respondents whereby the respondents were directed not to create obstruction in the use of the accommodation by the appellant Mazhar Khan. Respondent No.2 Ajay Kishore has examined himself as PW/3 who has shown his ignorance about the litigation which took place between the parties earlier. Ex.D/1 is the statement of Nandkishore, which was recorded in the year 2001 and in para-14 of his statement it has been specifically stated by him that if the appellant No.1 Mazhar Khan carries on his business on the suit accommodation by constructing the shade from his own expenses, then too, he is having the objection.

12. From perusal of the judgment passed by the learned Courts below it is evident that the learned Courts below have not taken into consideration the fact that the appellants are unable to carry on business in the suit accommodation with reasonable cause. In the facts and circumstances of the case, this Court is of the view that the learned Courts below were not justified in not considering the reasonable cause of the appellant No.1 in not running the business in the suit accommodation due to malafide of the respondents who restrained the appellant No.1 to run his business there from. This Court is also of the view that the learned Courts below were not justified in reading the statement of Nandkishore Ex.D/1 who has stated that he has an objection if the appellant No.1 construct the shade in the suit accommodation and runs his business. This Court is also of the view that the learned Courts below committed error in misreading the decree passed in Civil Suit No.110-A/95 whereby the injunction was granted against the respondents. In view of this, appeal filed by the appellants is allowed and the judgment and decree passed by the learned Courts below whereby decree of eviction was passed against the appellants under Section 12(1)(d) of the Act is set aside.

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

Appeal allowed.

RAJSHREE MINERALS Vs. KARMAVIR SINGH

I.L.R. [2010] M. P., 1441

APPELLATE CIVIL

Before Mr. Justice Sanjay Yadav

27 January, 2010*

RAJSHREE MINERALS

... Appellant

Vs.

KARMAVIR SINGH & ors.

... Respondents

A. Workmen's Compensation Act (8 of 1923), Section 2(1)(n), Schedule II, Clause (viii) - Workman - Eligibility - Section 2(1)(n)(ii) of Act stipulate that workman would be a person employed in any such capacity as is specified in Schedule II - Sub-clause (a) of Clause (viii) of Schedule II further stipulates that building in which a person is employed for the purpose of construction, maintenance, repair or demolition must be designed to be or is or has been more than one story in height above the ground or twelve feet or more from the ground level to the apex of the roof. (Paras 10 & 11)

क. कर्मकार प्रतिकर अधिनियम (1923 का 8), धारा 2(1)(एन), अनुसूची II, खण्ड (viii) - कर्मकार - पात्रता - अधिनियम की धारा 2(1)(n)(ii) बताती है कि कर्मकार ऐसी किसी क्षमता में नियोजित व्यक्ति होगा जैसा कि अनुसूची II में विनिर्दिष्ट है - अनुसूची II के खण्ड (viii) के उपखण्ड (a) आगे यह बताता है कि भवन जिसमें कोई व्यक्ति निर्माण, अनुरक्षण, मरम्मत या विनष्टीकरण के प्रयोजन के लिए नियोजित किया जाता है, जमीन के ऊपर ऊँचाई में एक मंजिल से अधिक या भू-तल से छत के शीर्ष तक बारह फुट या अधिक हो, परिकल्पित हो या की जानी चाहिए।

B. Burden of proof and onus of proof - Distinction - Held - Burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. (Para 13)

ख. सबूत का भार और प्रमाण भार - विभेद - अभिनिर्धारित - सबूत का भार उस व्यक्ति पर होता है जिसे कोई तथ्य साबित करना है और यह कभी स्थानांतरित नहीं होता, किन्तु प्रमाण भार स्थानांतरित हो जाता है।

Cases referred :

AIR 1964 SC 136.

Shailesh Mishra, for the appellant.

Arvind Shrivastava, for the respondent.

J U D G M E N T

SANJAY YADAV, J. :-Challenge in the present appeal filed under Section 30 of Workmen's Compensation Act, 1923 is to award dated 20.2.2007, whereby, the Commissioner Workmen's Compensation has allowed the application under Section 22 and awarded compensation of Rs.2,40,972/- inclusive of the interest and penalty in lieu of death of one Afsar Ali.

RAJSHREE MINERALS Vs. KARMAVIRSINGH

2. The appeal was admitted on the following substantive question of law:

“Whether the learned Commissioner for Workmen Compensation-Labour Court, Sagar committed grave error in holding the deceased Afsar Ali to be a workman defined under Section 2 (1) (n) of the Workmen Compensation Act, 1923. If so, its effect.”

3. The facts briefly are that deceased Afsar Ali during the course of his employment wherein he was detailed to carryout the work of construction of sheds/quarters for the employees M/s Rajshree Minerals & Chemicals Pvt. Ltd, the appellant herein, on 13.11.2002 fell down from the wall and succumbed to injuries. The legal representative of the said deceased, respondent herein, filed a claim petition before Commissioner, Workmen's Compensation for an amount of Rs.3,27,705/- on the anvil that the death was in course of and arising out of employment. The claim was duly contested by the appellant herein on the ground that said Afsar Ali was not the workman and the death was not arising out of and in course of employment.

4. The claimant in support of his case examined herself and one of the co-worker Anisa (AW 2) who in her deposition categorically stated that Afsar Ali was engaged for the purpose of construction of building/quarters for the workers and was engaged for welding purpose. She further stated that on 13.11.2002 at about 10.30 a.m. when said Afsar Ali was carrying out the welding work, fell down from the wall and later on he died due to the injuries sustained. The fact that Afsar Ali was working for the Rajshree Minerals & Chemicals is also borne out from the statement of Abdul Rehman (N.A.W 1) who stated that, Afsar Ali worked as a Helper on the said date. Furthermore, A.W. 2 and A.W. 3 (Mukesh Jain) the owner of factory also admitted the fact that Afsar Ali was engaged for welding purpose.

5. Commissioner, Workmen's Compensation taking into consideration the entire evidence on record and holding that Afsar Ali was a workman and died due to accident arising out of and in course of his employment awarded a compensation of Rs.2,40,972/- including the interest.

6. Questioning the legality of the award, it is contended by learned counsel for the appellant that merely because Afsar Ali was engaged to carry out some construction work, will not itself be sufficient unless criteria as is prescribed under the Act of 1923 and schedule therein are fulfilled:

7. To substantiate his submission, learned counsel for the appellant, placing reliance on evidence of various witnesses submits that, Afsar Ali fell down from the height of 8 feet and succumbed to the injuries. It is contended that unless a person engaged for the construction work of any building which is designed to be or is or has been more than one story in height above the ground or 12' or more from the ground level of the Apex of the roof cannot be construed as workman under 1923 Act. It is contended that the above condition having not been fulfilled

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the Commissioner, Workmen's Compensation fell into patent error in holding that workman was a workmen under the Act of 1923. It is urged that the Commissioner, Workmen's Compensation lost sight of the fact that Afsar Ali fell down from the height of 8'. It is, therefore, contended that there being a perversity of finding the award is liable to be set aside.

8. Learned counsel appearing for respondents, however, submits that there is no evidence on record that the construction work wherefor Afsar Ali was engaged was designed to the height of 8' only. It is contended that the servant quarters were being constructed and the services of Afsar Ali was taken for the purpose of Welding of iron pipes at roof level. It is contended that the Tribunal, therefore, did not commit any error in holding that Afsar Ali was a workman.

9. Considered the rival submissions and perused the record.

Section 2 (1) (n) defines Workmen in the following terms:

(n) "workman" means any person who is - (i) a railway servant as defined in clause (34) of section 2 of the Railways Act, 1989 (24 of 1989), not permanently employed in any administrative, district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule II, or (ia) (a) a master, seaman or other member of the crew of a ship,

(b) a captain or other member of the crew of an aircraft,

(c) a person recruited as driver, helper, mechanic, cleaner or in any other capacity in connection with a motor vehicle,

(d) a person recruited for work abroad by a company, and who is employed outside India in any such capacity as is specified in Schedule II and the ship, aircraft or motor vehicle, or company, as the case may be, is registered in India, or

(ii) employed in any such capacity as is specified in Schedule II, whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral or in writing; but does not include any person working in the capacity of a member of the Armed Forces of the Union; and any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependants or any of them.

10. Sub-clause (ii) of clause (n) of Sub-section 1 of Act of 1923 stipulates that workman would be a person employed in any such capacity as is specified in Schedule II. In the instant case admittedly Afsar Ali was engaged for the construction purpose. As such Clause 8 of Schedule II would be attracted which stipulates:

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“(viii) employed in the construction, maintenance, repair or demolition of - (a) any building which is designed to be or is or has been more than one story in height above the ground or twelve feet or more from the ground level to the apex of the roof; or

(b) any dam or embankment which is twelve feet or more in height from its lowest to its highest point; or

(c) any road, bridge, tunnel or canal; or

(d) any wharf, quay, sea-wall or other marine work including any moorings of ships;”

11. Sub clause (a) of clause (VIII) of Schedule II thus requires that building in which a person is employed for the purpose of construction, maintenance, repair or demolition must be designed to be or is or has been more than one story in height above the ground or twelve feet or more from the ground level to the apex of the roof.

12. In the case at hand, clear it is from the evidence on record that the staff quarters were being constructed and for that the structural work was in progress wherein Afsar Ali was engaged for the purpose of Welding. The appellant employer has not brought on record the design of the quarter which were being constructed as would have justified the stand that Afsar Ali was not a workman under Section 2 (1) (n) of the Act of 1923 and the Schedule II there under.

13. The claimant having discharged the onus of proof regarding Afsar Ali being engaged for the construction work, the burden of proof was shifted on the appellant employer. The Supreme Court while noting distinction between burden of proof and onus of proof in *A. Raghavamma and another v. A. Chenchamma and another* (AIR 1964 SC 136) was pleased to observe:

“(12) There is an essential distinction between burden of proof and onus of proof: burden of proof lies upon the person who has to prove a fact and it never shifts; but the onus of proof shifts, but the onus of proof shifts. The burden of proof in the present case undoubtedly lies upon the plaintiff to establish the factum of adoption and that of partition. The said circumstances do not alter the incidence of the burden of proof. Such considerations, having regard to the circumstances of a partition. The said circumstances do not alter the incidence of the burden of proof. Such considerations, having regard to the circumstances of a particular case, may shift the onus of proof. Such a shifting of onus is a continuous process in the evaluation of evidence. The criticism levelled against the judgment, of the lower Courts, therefore, only pertains to the domain of appreciation of

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evidence. We shall, therefore, broadly consider the evidence not for the purpose of revaluation, but to see whether the treatment of the case by the Courts below is such that it falls in the category of exceptional cases where this Court, in the interest of justice, should depart from its usual practice.”

14. In the case at hand since the appellant has failed to prove that the construction/building wherein the workman was engaged was designed to be or has been less than one story in height above the ground or less than 12 feet the Tribunal, therefore, did not err in holding that Afsar Ali was a workman.

15. In the result appeal fails and is hereby dismissed.

Appeal dismissed.

I.L.R. [2010] M. P., 1445

APPELLATE CIVIL

Before Mr. Justice Sanjay Yadav

28 January, 2010*

MOHANLAL MISHRA & ors.

... Appellants

Vs.

CHIEF MEDICAL & HEALTH OFFICER & ors.

... Respondents

A. Motor Vehicles Act (59 of 1988), Section 166 - Deceased 16 years of age and unmarried - Taking loss of annual dependency as 50% of notional income and applying multiplier of 18 compensation enhanced to Rs. 91,000 - Appeal allowed. (Para 9)

क. मोटर यान अधिनियम (1988 का 59), धारा 166 - मृतक 16 वर्ष का अविवाहित - वार्षिक आश्रितता की हानि काल्पनिक आय का 50 प्रतिशत लेकर और 18 का गुणक लागू कर प्रतिकर बढ़ाकर 91,000 रुपये किया गया - अपील मंजूर।

B. Motor Vehicles Act (59 of 1988), Sections 149 & 166 - Driver of offending vehicle was driving Government vehicle and was on official duty when accident occurred - Tribunal found driver personally liable as photocopy of driving license was produced and driver did not take any steps to bring on record the original - Held - In the course of employment accident occurred - State Vicarious liable to pay compensation - Appeal Allowed. (Para 15)

ख. मोटर यान अधिनियम (1988 का 59), धाराएँ 149 व 166 - दोषी वाहन का चालक शासकीय वाहन चला रहा था और जब दुर्घटना हुई तब सरकारी कर्तव्य पर था - अधिकरण ने चालक को वैयक्तिक रूप से दायी पाया क्योंकि ड्रायविंग लायसेंस की फोटो प्रतिलिपि पेश की गई और चालक ने मूल को अभिलेख पर लाने के लिए कोई कार्यवाही नहीं की - अभिनिर्धारित - नियोजन के अनुक्रम में दुर्घटना हुई - राज्य प्रतिकर का भुगतान करने के लिए प्रतिनिधिक रूप से दायी - अपील मंजूर।

MOHANLAL MISHRA Vs. CHIEF MEDICAL & HEALTH OFFICER**Cases referred :**

(2003) 7 SCC 484, (1999) 1 SCC 90, (2001) 8 SCC 197, 1996 ACJ 831 (SC), (2009) 6 SCC 121, (1995) 5 SCC 659.

Maninder Singh Bhatti, for the appellant.

J U D G M E N T

SANJAY YADAV, J.:—This order shall govern the disposal of M.A. No. 918/2005 and M.A. 1494/2005 as both these appeals arise out of an award dated 7.2.2005 passed by First Motor Accident Claims Tribunal in Claim Case No. 23/2004.

2. M.A. No. 918/2005 is at the instance of the Claimants who are dissatisfied with the quantum of compensation in lieu of death of Praveen Kumar, alias Pintu, aged 16 years who was run over on 7.11.2003 by the Ambulance bearing registration No. MKE-T5961; consequent whereof he succumbed to the injuries received. The ambulance was driven by respondent No. 3. The Claims Tribunal against the claim of Rs.10,52,000/- awarded the compensation of Rs.54,500/- by taking into consideration the notional annual income of Rs.15,000/- deducted 2/3rd and by applying the multiplier of 10 on the age of mother, who was 45 years, held the loss of dependency at Rs.50,000/- and by adding Rs.4500/- towards conventional head awarded the compensation of Rs.54,000/-.

3. M.A. 1494/2005 is at the instance of driver who was driving the ambulance when accident took place on 7.11.2003. The grievance is against the finding arrived at by the tribunal that on the fateful day the appellant was not having the valid driving licence, thereby holding him personally liable for the compensation.

4. Thus, the issue for determination in MA 918/2005 is the quantum of compensation whereas in M.A. No. 1494/2005 it is as to whether the Claims Tribunal was justified in holding that the appellant personally liable for not having valid driving license on 7.11.2003 when the accident took place while he was driving the offending vehicle.

5. In respect of quantum the tribunal did not err in taking into consideration the notional income of Rs.15,000/- per annum by treating the deceased as a non-earning member. However, the Claims Tribunal faltered by deducting 2/3rd towards personal expenses and by applying multiplier of 10.

6. In *State of Haryana v. Jasbir Kaur* [(2003) 7 SCC 484] it was observed by their Lordships:

“8. It is clear on a bare reading of the Tribunal's decision as affirmed by the High Court that no material was placed before the former to prove as to what was the income. As rightly contended by learned counsel for the appellants, there was not even any material adduced to show type of land which the deceased possessed. The

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matter can be approached from a different angle. The land possessed by the deceased still remains with the claimants as his legal heirs. There is however a possibility that the claimants may be required to engage persons to look after agriculture. Therefore, the normal rule about the deprivation of income is not strictly applicable to cases where agricultural income is the source. Attendant circumstances have to be considered. Furthermore, there was no material before the Tribunal to arrive at the figure of Rs. 4500/- per month. No reason has been indicated to arrive at this figure. In the light of what has been discussed above about "just compensation" the income cannot be estimated without any material to justify the estimation. In the normal course, we would have remitted the matter back to the Tribunal for fresh consideration. But considering the fact that one young person lost his life, and the matter was pending before the Tribunal and the High Court for some years, we feel it appropriate to take all relevant factors into consideration, and decide the matter. Gauging the relevant aspects, noted above, the monthly income is fixed at Rs. 3000/- per month, and after deducting Rs. 1,000/- for personal expenses, financial contribution so far as the claimants are concerned is fixed at Rs. 2,000/- per month. Worked out on the basis of multiplier of 18, the compensation is fixed at Rs. 4,32,000/-. The amount of Rs. 2,000/- awarded by the Tribunal for funeral expenses is not interfered with and thus the total compensation comes to Rs. 4,34,000/-. The rate of interest i.e. 9% per annum as fixed by the Tribunal and affirmed by the High Court is appropriate, and does not need any alteration. After adjusting the sum which was deposited pursuant to the order of this court dated 14-12-2001, the balance amount along with interest shall be deposited within three months from today before the Tribunal. On the deposit being made along with the amount already deposited, a sum of Rs. 3 lakhs shall be kept in the fixed deposit in the name of the claimants and a sum of Rs. 50,000/- shall be kept in fixed deposit in the name of Smt. Baldev Kaur, mother of the deceased. They shall be entitled to draw interest on the deposit, which shall be redeposited for further terms of five years. In case of urgent need, it shall be open to the claimants to move Tribunal for release of any part of the amount in deposit. The Tribunal shall consider the request for withdrawal and shall direct withdrawal in case of an urgent need and not otherwise of such sum as would meet the need. It shall be specifically indicated to the Bank where the

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deposits are to be made that no advance or withdrawal of any kind shall be permitted without the order of the Tribunal. It shall be open to the claimants to approach the Tribunal for variance of the order relating to deposit in fixed deposit, if any other scheme would fetch better returns and also would provide regular and permanent income."

7. In *New India Assurance Co. Ltd. v. Satender* (2006) 13 SCC 60 it was held:

7. In *Mallett v. McMonagle* 1970 (AC) 166, Lord Diplock analysed in detail the uncertainties which arise at various stages in making a rational estimate and practical ways of dealing with them. In *Davies v. Taylor* (1974) AC 207, it was held that the Court, in looking at future uncertain events, does not decide whether on balance one thing is more likely to happen than another, but merely puts a value on the chances. A possibility may be ignored if it is slight and remote. Any method of calculation is subordinate to the necessity for compensating the real loss. But a practical approach to the calculation of the damages has been stated by Lord Wright in *Davies v. Powell Duffryn Associated Collieries Ltd.* (1942) 1 All ER 657, in the following words:

"The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required to be spent for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase."

8. In *State of Haryana and Anr. v. Jasbir Kaur and Ors.* (2003(7) SCC 484) it was held as under : (SCC p.487, para 7)

"7. It has to be kept in view that the Tribunal constituted under the Act as provided in Section 168 is required to make an award determining the amount of compensation which is to be in the real sense "damages" which in turn appears to it to be "just and reasonable". It has to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. But at the same time it has to be borne in mind that the compensation is not expected to be a windfall for the victim. Statutory provisions clearly indicate that the compensation must be "just" and it cannot be a bonanza; not a source of

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profit; but the same should not be a pittance. The courts and tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be 'just' compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of 'just' compensation which is the pivotal consideration. Though by use of the expression "which appears to it to be just" a wide discretion is vested in the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression 'just' denotes equitability, fairness and reasonableness, and non arbitrary. If it is not so it cannot be just. (See *Helen C. Rebello v. Maharashtra SRTC* (1999(1) SCC 90))

9. There are some aspects of human life which are capable of monetary measurement, but the totality of human life is like the beauty of sunrise or the splendour of the stars, beyond the reach of monetary tape measure. The determination of damages for loss of human life is an extremely difficult task and it becomes all the more baffling when the deceased is a child and/or a non earning person. The future of a child is uncertain. Where the deceased was a child, he was earning nothing but had a prospect to earn. The question of assessment of compensation, therefore, becomes stiffer. The figure of compensation in such cases involves a good deal of guesswork. In cases, where parents are claimants, relevant factor would be age of parents.

10. In case of the death of an infant, there may have been no actual pecuniary benefit derived by its parents during the child's lifetime. But this will not necessarily bar the parent's claim and prospective loss will find a valid claim provided that the parents' establish that they had a reasonable expectation of pecuniary benefit if the child had lived. This principle was laid down by the House of Lords in the famous case of *Taff Vale Rly. V. Jenkins* (1913) AC 1, and Lord Atkinson said thus:

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".....all that is necessary is that a reasonable expectation of pecuniary benefit should be entertained by the person who sues. It is quite true that the existence of this expectation is an inference of fact -there must be a basis of fact from which the inference can reasonably be drawn; but I wish to express my emphatic dissent from the proposition that it is necessary that two of the facts without which the inference cannot be drawn are, first that the deceased earned money in the past, and, second, that he or she contributed to the support of the plaintiff. These are, no doubt, pregnant pieces of evidence, but they are only pieces of evidence; and the necessary inference can I think, be drawn from circumstances other than and different from them." (See *Lata Wadhwa and Ors. v. State of Bihar and Ors.* (2001) (8) SCC 197).

11. This Court in *Lata Wadhwa's case* [(2001) 8 SCC 197] while computing compensation made distinction between deceased children falling within the age group of 5 to 10 years and age group of 10 to 15 years.

12. In cases of young children of tender age, in view of uncertainties abound, neither their income at the time of death nor the prospects of the future increase in their income nor chances of advancement of their career are capable of proper determination on estimated basis. The reason is that at such an early age, the uncertainties in regard to their academic pursuits, achievements in career and thereafter advancement in life are so many that nothing can be assumed with reasonable certainty. Therefore, neither the income of the deceased child is capable of assessment on estimated basis nor the financial loss suffered by the parents is capable of mathematical computation."

8. In *Manju Devi and another Vs. Musafir Paswan and another* (supra) their lordships were pleased to observe:

"2. In the case of *U.P. State Road Trans. Corpn. V. Trilok Chandra*, 1996 ACJ 831 (SC), it has been held by this Court that there should be no departure from the multiplier method on the ground that payment being made is just compensation. It has been held that the multiplier method must be accepted method for determining and ensuring payment of just compensation as it is the method which brings uniformity and certainty to awards made all over the country. In view of this authority, it will have to be

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held that the award of compensation had to be made by the multiplier method.

3. As set out in the Second Schedule to the Motor Vehicles Act, 1988, for a boy of 13 years of age, a multiplier of 15 would have to be applied. As per the Second Schedule, he being a non-earning person, a sum of Rs.15,000/- must be taken as the income. Thus, the compensation comes to Rs.2,25,000/-.

4. We accordingly modify the award to be in a sum of Rs.2,25,000 with interest as awarded. The appeal stands disposed of accordingly. No order as to costs."

9. Recently, in *Sarla Verma (Smt.) and others v. Delhi Transport Corporation and another* (2009) 6 SCC 121, it has been observed by their Lordships:

"19 To have uniformity and consistency, the Tribunals should determine compensation in cases of death, by the following well-settled steps:

Step 1 (Ascertaining the multiplicand)

The income of the deceased per annum should be determined. Out of the said income a deduction should be made in regard to the amount which the deceased would have spent on himself by way of personal and living expenses. The balance, which is considered to be the contribution to the dependant family, constitutes the multiplicand.

Step 2 (Ascertaining the multiplier)

Having regard to the age of the deceased and the period of active career, the appropriate multiplier should be selected. This does not mean ascertaining the number of years he would have lived or worked but for the accident. Having regard to several imponderables in life and economic factors, a table of multipliers, with reference to the age has been identified by this Court. The multiplier should be chosen from the said table with reference to the age of the deceased.

Step 3 (Actual calculation)

The annual contribution to the family (multiplicand) when multiplied by such multiplier gives the "loss of dependency" to the family.

Thereafter, a conventional amount in the range of Rs.5000/- to Rs.10,000/- may be added as loss of estate. Where the deceased is survived by his widow, another conventional amount in the range

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of 5000 to 10,000 should be added under the head of loss of consortium. But no amount is to be awarded under the head of pain, suffering or hardship caused to the legal heirs of the deceased.

The funeral expenses, cost of transportation of the body (if incurred) should also be added.

Furthermore in respect of question regarding deduction for personal and living expenses their Lordships were pleased to observe

“31. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent (s) and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependant. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependants, because they will either be independent and earning, or married, or be dependent on the father.”

Regarding multiplier it has been held

“41. Tribunals/courts adopt and apply different operative multipliers. Some follow the multiplier with reference to Susamma Thomas set out in Column (2) of the table above; some follow the multiplier with reference to Trilok Chandra set out in Column (3) of the table above; some follow the multiplier with reference to Charlie set out in Column (4) of the table above; many follow the multiplier given in the second column of the table in the Second Schedule of the MV Act (extracted in Column (5) of the table above; and some follow the multiplier actually adopted in the Second Schedule while calculating the quantum of compensation set out in Column (6) of the table above. For example if the deceased is aged 38 years, the multiplier would be 12 as per Susamma Thomas, 14 as per Trilok Chandra, 15 as per Charlie, or 16 as per the multiplier given in Column (2) of the Second Schedule to the MV Act or 15 as per the multiplier actually adopted in the Second Schedule to the MV Act. Some tribunals, as in this case, apply the multiplier of 22 by taking the balance years of service with reference to the retiring age. It is necessary to avoid this kind of inconsistency. We are concerned with cases falling under

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Section 166 and not under Section 163-A of the MV Act. In cases falling under Section 166 of the MV Act, Davies method is applicable.

42. We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie, which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

Thus, keeping in view the law above and the facts of present case the deceased being 16 years of age and unmarried, therefore, by taking into consideration 50% of the notional income to be the loss of annual dependency and by applying multiplier of 18 the loss of total dependency comes to Rs.7500 x 18 = 1,35,000 and by adding Rs.10,000/- towards conventional head the total compensation comes to Rs.1,35,000 + Rs.10,000/- = Rs.1,45,000/-. The Claims Tribunal awarded Rs.54,000/- by deducting the same, the compensation in lieu of death of Praveen Kumar alias Pintu is enhanced by Rs.91,000/-. The appellant would be entitled for interest @ 6% per annum from the date of present appeal.

10. Next question is whether the Claims Tribunal is justified in concluding that the driver appellant in M.A. No. 1494/2005 was not having valid driving license on the date of accident, i.e., 2.12.2003 and, therefore, is personally liable for compensation or that the State whose employee he was and accident occurred during course of the employment, the vicarious liability would be of State.

11. The Claims Tribunal in paragraph 13 observed:

"13. अनावेक कमांक 03 रामलखन सोधिया ने अधिकरण के समक्ष शपथ पर यह कथन दिया है कि वर्ष 1986 से वह जिला चिकित्सालय सीधी में वाहन चालक के पद पर पदस्थ है। दिनांक 07.11.03 को वह शासकीय ऐबुलेंस वाहन कमांक एम.के.ई-टी-5961 में बैक्सीन दवाईयां भरकर सामुदायिक स्वास्थ्य केन्द्र चितरंगी जाने के लिये सी.एम.ओ. आफिस से दवाईयां भरकर जिला चिकित्सालय सीधी के लिये रवाना हुआ वह शासकीय वाहन को सावधानीपूर्वक चला रहा था। उसके वाहन से कोई दुर्घटना नहीं हुई। उसके पास ऐबुलेंस वाहन चलाने का वैध व प्रभावशाली लायसेंस है। अधिकरण द्वारा अपेक्षा किये जाने पर भी इस साक्षी ने मूल ड्राइविंग लायसेंस प्रस्तुत नहीं करते हुये फोटो प्रति जो सत्यापित भी नहीं है प्रस्तुत किया है। अतः ऐसी स्थिती में तो यही प्रकट है कि अनावेदक कमांक 03 रामलखन सोधिया ने अधिकरण द्वारा अपेक्षा किये जाने पर भी मूल ड्राइविंग

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लायसेंस इसलिये प्रस्तुत नहीं किया कि यदि वह यह ड्राइविंग लायसेंस प्रस्तुत करता तो वह ड्राइविंग लायसेंस इसके अनुकूल नहीं होता। अतः साक्ष्य अधिनियम की धारा 114(जी) के तहत अधिकारण द्वारा अपेक्षा किये जाने पर भी अनावेदक कमांक 03 रामलखन सौधिया द्वारा ड्राइविंग लायसेंस प्रस्तुत नहीं किये जाने से तो यही अवधारित है कि दुर्घटना के समय उसके पास कोई वैध व प्रभावशाली ड्राइविंग लायसेंस नहीं था।”

12. When the aforesaid observation is examined on the touchstone of the facts on record it is clear that except filing a Xerox Copy of driving license the appellant did not take any step to bring on record the original driving license to substantiate his claim that he was having a valid driving license when the accident occurred on 7.11.2003. The appellant despite of being given opportunity by the Claims Tribunal did not avail the same and, therefore, the presumption drawn by the Claims Tribunal under Section 114 (g) Evidence Act cannot be found fault with. The provision stipulates that:

“114. Court may presume existence of certain facts. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to be common course of natural events, human conduct and public and private-business, in their relation to the facts of the particular case.

(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.”

13. The question still remains as to whether the appellant in M.A. 1494/2005 who was driving a government vehicle and was on an official duty when the accident occurred on 7.11.2003 would personally be held liable for compensation or the State of Madhya Pradesh /Chief Medical and Health Officer who would be vicariously liable to compensate the death of praveen Kumar @ Pintu.

14. The question whether the State is vicariously liable for negligence of its servants in discharge of their official duties was answered affirmatively by the Supreme Court in *N.Nagendra Rao V. State of AP*: (1994) 6 SCC 205 wherein it was observed by their Lordships:

“33.....Public Policy requires the Court to exercise the power is private law to compensate the owner where the damage or loss is suffered by negligence of officers of the State in respect of cause of action for which suits are maintainable in civil Court.”

In *State of Maharashtra and others V. Kamachanwala Vijay Singh Shirke*: (1995) 5 SCC 659 the question that an employer though guilty of no fault himself, is liable for the damage done by the fault or negligence of his servant acting in the Course of his employment, was answered in the following way:

“18. So far the facts of the present case are concerned, the High Court has rightly come to the conclusion, on basis of the pleadings

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and evidence on record, that it was the year ending day i.e. 31-3-1980, and the clerks and officers were required to work during night time. This direction had been given by the appellant No. 2 who was in charge of the office. It further appears that after normal working hours of the office, the employees had gone to their homes and were required to come back after taking dinner. The jeep was used for bringing such employees to the office. In this background, there is no escape from conclusion that jeep was being used in connection with the affairs of the State and for official purpose. The High Court has also found that respondent who was the clerk in the office of appellant No. 2 was driving the vehicle under the authority of the driver who was in-charge of the said vehicle and as the driver had consumed more liquor on that day he permitted respondent to drive the vehicle that night. The facts of the present case disclose and demonstrate that an authorised act was being done in an unauthorised manner. The accident took place when the act authorised was being performed in a mode which may not be proper but nonetheless it was directly connected with "in the course of employment" - it was not an independent act for a purpose or business which had no nexus or connection with the business of the State Government so as to absolve the appellant-State from the liability.

19. The crucial test is whether the initial act of the employee was expressly authorised and lawful. The employer, as in the present case the State Government, shall nevertheless be responsible for the manner in which the employee, that is, the driver and the respondent executed the authority. This is necessary to ensure so that the injuries caused to third parties who are not directly involved or concerned with the nature of authority vested by the master to his servant are not deprived from getting compensation. If the dispute revolves around the mode or manner of execution of the authority of the master by the servant, the master cannot escape the liability so far third parties are concerned on the ground that he had not actually authorised the particular manner in which the act was done. In the present case, it has been established beyond doubt that the driver of the vehicle had been fully authorised to drive the jeep for a purpose connected with the affairs of the State and the dispute is only in respect of the manner and the mode in which the said driver performed his duties by allowing another employee of the State Government, who was also going on an official duty, to drive the jeep, when the accident took place.

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Once it is established that negligent act of the driver and respondent was 'in the course of employment', the appellant-State shall be liable for the same."

15. In the case at hand the driver, appellant in M.A.No.1494/2005 in course of his employment on 7.11.2003 caused an accident when the ambulance which he was driving carrying vaccine from office of Chief Medical Officer to Community Health Centre Chitrangi dashed at Praveen Kumar @ Pintu who succumbed to the injuries, will not exonerate the State from its vicarious liability to pay compensation in lieu of the victim.

16. In view whereof, the appeals are allowed to the extent above. However no costs.

Appeal allowed.

I.L.R. [2010] M. P., 1456

APPELLATE CIVIL

Before Mr. Justice Abhay M. Naik

8 February, 2010*

PARMAL SINGH & anr.

... Appellants

Vs.

HALLU & ors.

... Respondents

A. Limitation Act (36 of 1963), Sections 64 & 65 - Adverse possession - Suit for declaration of title and injunction on the basis of adverse possession - In evidence, plaintiff admitted to have obtained possession from defendants for cultivation and execution of documents in this respect - In further cross-examination after 6 months plaintiff resiled from his earlier version merely about execution of document - Held - Plaintiff failed to prove how and when did his permissible possession become adverse - Suit on the basis of adverse possession liable to be dismissed. (Paras 9 to 11 & 14)

क. परिसीमा अधिनियम (1963 का 36), धाराएँ 64 व 65 - प्रतिकूल कब्जा - प्रतिकूल कब्जे के आधार पर स्वत्व घोषणा और व्यादेश के लिए वाद - साक्ष्य में वादी ने खेती के लिए प्रतिवादियों से कब्जा अभिप्राप्त करना और इस सम्बन्ध में दस्तावेजों का निष्पादन स्वीकार किया - 6 माह बाद अतिरिक्त प्रतिपरीक्षा में वादी केवल दस्तावेज के निष्पादन के बारे में अपने पूर्ववर्ती बयान से पीछे हट गया - अभिनिर्धारित - वादी साबित करने में असफल हो गया कि कैसे और कब उसका अनुज्ञेय कब्जा प्रतिकूल हो गया - प्रतिकूल कब्जे के आधार पर वाद खारिज किये जाने योग्य।

B. Evidence Act (1 of 1872), Section 31 - Admission is the best evidence that an opposite party can rely upon. (Para 12)

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ख. साक्ष्य अधिनियम (1872 का 1), धारा 31 – स्वीकृति सर्वोत्तम साक्ष्य है जिस पर विरोधी पक्ष विश्वास कर सकता है।

Cases referred :

AIR 1985 SC 73, (2000) 3 SCC 708, AIR 1960 SC 100.

D.K. Katare with Arun Katare, for the appellants.

J.P. Mishra, for the respondent Nos.1 & 2.

R.P. Gupta, for the respondent Nos.3, 4, 6 & 7.

J U D G M E N T

ABHAY M. NAIK, J. :- Short facts involved herein are that plaintiffs/respondents No. 1 and 2 instituted a suit against respondents No.3, 4, 5 and father of respondents No.6 and 7 for declaration of title and perpetual injunction on the basis of adverse possession in respect of the suit land comprised in survey No. 512 in area 7 biswa, survey No.624 in area 5 bigha 7 biswa, and survey No.625 in area 4 bigha 7 biswa situated in village Didawam, Tahsil Picchore, District Shivpuri (M.P.) with allegations that the plaintiffs occupied the land on 04.02.1959 within the knowledge of the defendants openly and adversely and have been in cultivating possession since then with continuity. Thus, they acquired Bhumiswami Rights by virtue of adverse possession. On 02.07.1985, defendants tried to interfere into the plaintiffs' possession, hence, the suit.

2. Defendants denied the claim of the plaintiffs by submitting joint written statement. They stated that the plaintiffs had never been in possession. Khasra entries were disputed as concocted.

3. After raising the issues, learned trial judge recorded the evidence. Plaintiffs produced various revenue khasra entries marked as Ex.P/1 to Ex.P/8 and examined himself as PW-1 and one witness, namely, Chaulal as PW-2. Defendants did not produce oral or documentary evidence. Learned trial judge vide his judgment and decree dated 27.09.1989 dismissed the suit on merits. Aggrieved by it, Civil Appeal was preferred which was allowed by the learned lower appellate judge, hence, the present appeal which has been heard on the following substantial question of law:-

"Whether the 1st Appellate Court has erred in allowing the appeal filed by the plaintiffs/respondents No.1 and 2 and holding that plaintiffs have acquired adverse possession of the suit property ignoring the admission made by the plaintiff/PW-1 in para 2 of his statement?"

4. Learned counsel for the parties made their respective submissions which have been considered in the light of the material on record.

5. It is submitted by Shri Katare, learned counsel for the appellants, that the plaintiff in paragraph 2 of his statement on oath has clearly stated that the suit

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land was obtained by him from defendants for cultivation. He has not pleaded or proved overtact by which his possession could be said to have become adverse. There is no proof on record that how did his possession become adverse to the defendants. Thus, according to Shri Katare, learned counsel for the appellants, decree for declaration, on the basis of adverse possession could not be legally granted.

6. Shri J.P. Mishra, learned counsel for the plaintiffs/respondents, submitted that in paragraph 3 of his statement, the same plaintiff (PW-1) has resiled from his earlier version and the learned lower appellate judge taking the same into consideration has rightly granted a decree in favour of the plaintiffs about the acquisition of title by adverse possession since the cultivating possession of the plaintiffs for a period of more than 30 years is duly established by oral and documentary evidence.

7. Law with regard to adverse possession has been clarified by Hon. the Supreme Court of India at times and again. Earlier, in the case of *Thakur Singh (Dead), Appellant Vs. Arvind Kumar* (AIR 1985 SC 73), it has been observed :-

“.....The possession thus initially being permissive, the burden was heavy on the appellant to establish that it became adverse. A possession of a co-owner or of a licensee or of an agent or a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner. Mere possession for howsoever length of time does not result in converting the permissive possession into adverse possession.”

8. Relying upon the same, the Apex Court in the case of *Roop Singh (Dead) through L.Rs. Vs. Ram Singh (Dead) through L.Rs.* (2000) 3 SCC 708, has held that if a person gets possession of suit land under permission, then from the permissive possession, it is for him to establish by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of the real owner. It is further observed that mere possession for a long time does not result in converting permissive possession into adverse possession.

9. Plaintiff (PW-I) has clearly stated in paragraph 2 that he had obtained the suit land for cultivation from defendants about 30 years before. He has further stated that he had obtained it for cultivation from Mujiya, Betliya, Halka and Bhugiya (defendants No. 1 to 4). Possession was obtained in presence of other villagers. Aforesaid defendants visited the suit land for handing over possession on site. Documentation was made. Deed was prepared by Kanchedi which was witnessed by Surat Singh and Parwat Singh. He has further clearly stated that the document was kept at his residence. Aforesaid version has been disbelieved by the learned Appellate Judge on the basis of paragraph 3 of statement of PW-I wherein it was

PARMAL SINGH Vs. HALLU

stated that no documentation was made in respect of the suit land. It is further stated in paragraph 3 that PW-1 had not given any statement that any document was executed in respect of the suit land which was witnessed by Kanchedi. It was also not stated by him that Surat Singh had witnessed the said document.

10. Thus, what has been denied in paragraph 3 of the statement of PW-1 is that no document was made and the witness had not made any statement about execution of the document which was witnessed by Kanchedi and Surat Singh.

11. It is pertinent to note here that the plaintiff has not denied anywhere that he had obtained possession of the suit land from the defendants for cultivation. He has also not denied that possession was delivered to him by defendants. Thus, even if paragraph 3 of PW-1 is taken into consideration, factum of obtaining possession by the plaintiff from defendants is not vitiated at all. This version remained undisturbed despite the contents of paragraph 3. It amounted to admission on the part of the plaintiff that the possession of the suit land was obtained by him from defendants under a permission. There is no iota in the plaint about any overtact by which possession may be said to have been converted into adverse possession. Equally, the plaintiff has failed to plead and prove that how did his possession become adverse to that of defendants.

12. Shri J.P. Mishra, learned counsel, contended that the lower appellate court is final court of facts and the findings recorded by it cannot be disturbed in the absence of perversity. Learned counsel Shri Mishra is correct on this point. However, it may be seen that admission with regard to obtaining suit land from the defendants and delivery of possession by them of the suit land to the plaintiff has not been denied even in paragraph 3 which has been relied upon by the learned ADJ. Admission made in a particular case is best proof unless it has been successfully withdrawn or proved erroneous. In the present case, the admission of the plaintiff himself (PW-1) about obtaining possession from the defendants for cultivation and handing over of the suit land by them to the plaintiffs for cultivation is not proved erroneous even in paragraph 3 of his statement. Withdrawal of admission is merely in respect of the document and its execution including attestation. Rest of the admission made by the plaintiff remained intact. In the case of *Narayan Bhagwantrao Gosavi Balajiwale Vs. Gopal Vinayak Gosavi and others* (AIR 1960 SC 100), it has been clearly held:-

....An admission is the best evidence that an opposing party can rely upon, and though not conclusive is decisive of the matter, unless successfully withdrawn or proved erroneous.

13. At this juncture, I am hastened to add that cross-examination on the plaintiff Hallu (PW-1) was conducted on 02-03-1989 when in paragraph 2 of statement on oath he stated that the suit land was obtained by him for cultivation from defendants No. 1 to 4. They had visited the suit land and had delivered its possession to him.

PARMAL SINGH Vs. HALLU

Document was prepared by Kanchhedi Baniya, which was executed by defendants No. 1 to 4 and was attested by Suraj Singh and Parwat Singh as witnesses. Document was kept by him at his residence. Cross-examination on this witness could not be concluded on that day for shortage of time, therefore, case was adjourned. However, cross-examination was resumed on 01-09-1989. In the meantime, plaintiff (PW-1) got ample time for preparing himself for further cross-examination. It has brought a change in the statement of PW-1, who on 01-09-1989 resiled from his earlier version. In paragraph 3 of his cross-examination, he denied to have given any statement about documentation. He has gone to the extent that earlier version recorded by learned trial Judge about execution of the document was not made by him. Learned lower appellate Judge while reversing the judgment has failed to take into consideration aforesaid demeanour of the witness which seems to be an outcome of adjournment for six months and getting opportunity to improve the statement as an after thought. Therefore, finding on this point of learned ADJ is patently perverse and is hereby set aside.

14. Plaintiff after entering into possession under a permission from defendants was obliged to prove that when did his possession become adverse. There is no such averment in the plaint and further there is no proof on record. This being so, the plaintiffs cannot be said to have acquired title by virtue of adverse possession on the date of the suit. Accordingly, substantial question of law is answered in favour of the appellants.

15. As regards I.A. No.3377/01 (under Order XXLI Rule 27 of CPC), it is suffice to observe that the Civil Suit was instituted on 06.07.85 whereas the proposed documents are of the year 1990 and onwards. Thus, these documents were and are not necessary for deciding the controversy involved in the suit. I.A. is hereby rejected.

16. Since the plaintiffs have been in Possession of the suit land, their possession is liable to be protected. This being so, decree for permanent injunction in their favour is not being disturbed and the decree to that extent deserves to be maintained.

17. Eventually, this Court declines to interfere in the decree for perpetual injunction granted to the plaintiffs. In the result, appeal is hereby partly allowed. Suit of the plaintiffs for declaration of title is hereby dismissed. However, looking to the long possession of the plaintiffs, restraint order against the defendants is hereby confirmed. Decree be modified accordingly.

No order as to costs.

Appeal partly allowed.

RAM MANOHAR PATEL Vs. RAM PRASAD PATEL

I.L.R. [2010] M. P., 1461

APPELLATE CIVIL*Before Mr. Justice U.C. Maheshwari*

4 March, 2010*

RAM MANOHAR PATEL

... Appellant

Vs.

RAM PRASAD PATEL & ors.

... Respondents

A. Civil Procedure Code (5 of 1908), Section 100 - Concurrent finding of fact - If erroneous could be interfered - Held - Concurrent findings of fact based on evidence even the same are erroneous could not be interfered u/s 100 CPC at the stage of second appeal unless the same are involved any substantial question of law. (Para 7)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 - तथ्य का समवर्ती निष्कर्ष - यदि त्रुटिपूर्ण हो हस्तक्षेप किया जा सकता है - अभिनिर्धारित - साक्ष्य पर आधारित तथ्य के समवर्ती निष्कर्ष त्रुटिपूर्ण होने पर भी सि.प्र.सं. की धारा 100 के अन्तर्गत द्वितीय अपील के प्रक्रम पर हस्तक्षेप नहीं किया जा सकता जब तक कि उसमें विधि का कोई सारवान प्रश्न अन्तर्लित न हो।

B. Civil Procedure Code (5 of 1908), Section 100 - Concurrent finding of fact in respect of adverse possession - Held - Question of adverse possession being finding of fact could not be interfered in a second appeal. (Para 8)

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 - प्रतिकूल कब्जे के सम्बन्ध में तथ्य का समवर्ती निष्कर्ष - अभिनिर्धारित - प्रतिकूल कब्जे का प्रश्न तथ्य का निष्कर्ष होने से द्वितीय अपील में हस्तक्षेप नहीं किया जा सकता।

C. Civil Procedure Code (5 of 1908), Section 100 - Concurrent finding of fact in respect of possession - Held - The concurrent finding with respect of possession of the property based on appreciation of evidence being finding of fact could not be interfered in a second appeal. (Para 9)

ग. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 - कब्जे के सम्बन्ध में तथ्य का समवर्ती निष्कर्ष - अभिनिर्धारित - साक्ष्य के अधिमूल्यन पर आधारित सम्पत्ति के कब्जे के सम्बन्ध में समवर्ती निष्कर्ष तथ्य का निष्कर्ष होने से द्वितीय अपील में हस्तक्षेप नहीं किया जा सकता।

Cases referred :

AIR 1999 SC 2213, 1986 MPWN (I) 87, 1997 RN 195, AIR 1981 SC 1183.

Anurag Tiwari, for the appellant.

Surendra Verma, for the respondent.

ORDER

U. C. MAHESHWARI J.:-This appeal is directed by the appellant/ defendant No.2 under Section 100 of CPC being aggrieved by the judgment dated 31.7.2007

RAM MANOHAR PATEL Vs RAM PRASAD PATEL

passed by 9th Additional District Judge, Jabalpur in Civil Regular Appeal No.11-A/07, affirming the judgment and decree dated 24.2.2006 passed by Civil Judge Class-II Patan in Civil Original Suit No.36-A/04 decreeing the suit of respondent No.1 filed for perpetual injunction with respect of disputed house described in the plaint.

2. The facts necessary to consider the question of admission in short are that respondent No.1/ plaintiff herein filed the suit for perpetual injunction against the appellant and respondent No.2, 3 with respect of a house property situated at village Riyana described in the plaint and also marked in red colour in the annexed map with the plaint. According to it he and respondent No.2 being sons of Ghanshyam Prasad Patel are the real brothers while the appellant and respondent No.3 are the sons of respondent No.2. In the life time of Ghanshyam Patel in his presence on 19.7.1973 the family property was partitioned between him, respondent No.2 and said Ghanshyam Patel, in which the aforesaid disputed house was given to respondent No.1 in his share and since then he is coming in possession of the same. The share of the house given to the respondent No.2 and Ghanshyam Patel are shown in the green and blue colour in the aforesaid annexed map. In such premises, the appellant and respondent No.2, 3 did not have any right in the disputed house. Said Ghanshyam Patel died on 29.5.2004. Since then the appellant and respondent No.2, 3 are trying to interfere in his possession of aforesaid house, for which a report is also lodged with the police Patan. With these pleadings the aforesaid suit is filed.

3. In the written statement of the appellant by denying the averments of the plaint, it is stated that the description of the house received by the respondent No.1 in the alleged partition is not specifically pleaded in the plaint. On what basis the measurement of the property is shown in the map, the same is not described with particulars. The annexed map is also disputed. Since 1973, the respondent No.1 is residing at Gotegaon in his in-laws family where he also constructed his own house. In such premises he could not be deemed to be the resident of village Riyana. In additional pleadings it is stated that the possession of the alleged house was never taken by the respondent No.1. Just after two months from the alleged partition of 1973, the respondent No.1 was constructing his house at Gotegaon for which he being in need of the money has sold his share of the house with possession to father Ghanshyam Prasad Patel in consideration of Rs.7,000/-, since then the respondent No.1 was never remained in possession of the same. As such after the partition since 1973 onward for 20 years Ghanshyam Prasad Patel was remained in possession of the house and thereby he perfected his title on it by adverse possession and after his death the same is coming in possession of the appellant and respondent No.2. During the aforesaid period no proceedings for taking over the possession was initiated by the respondent No.1. The suit is filed on insufficient court fee on improper valuation. The same is also filed barred by limitation. With these pleadings the prayer for dismissal of the suit

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is made.

4. In view of the pleadings of the parties after framing the issues the evidence was recorded. On appreciation by holding the respondent No.1 is in possession of the house since 1973 from the time of the family partition and never sold the same at any point of time to his father Ghanshyam Prasad Patel and also by holding the appellant and respondent No.2 and 3 had never perfected their title on such property by adverse possession and the suit is filed with in limitation on proper valuation and court fees, decreed the same by the trial Court. On filing the appeal by the appellant/ defendant No.2, on re-appreciation of evidence by affirming the judgment and decree of the trial court the same was dismissed. Thereafter, the appellant has come forward with this appeal.

5. Shri Anurag Tiwari, learned counsel of the appellant by referring the pleadings, evidence and the exhibited documents on record said that boundaries of the disputed property was not specifically mentioned in the plaint and without ascertaining the same the suit has been decreed by both the courts below. In such premises both the courts below have committed grave error in holding the possession of disputed house with the respondent No.1. He further said that the partition deed settled between the respondent No.1, 2 and their father Ghanshyam Prasad Patel has not been properly considered in accordance with the averments of it. The alleged sale transaction between respondent No.1 and Ghanshyam Prasad Patel was wrongly disbelieved by both the Courts below contrary to the available evidence only in the lack of any registered document without taking note that the consideration of such property was paid by Ghanshyam Prasad to respondent No.1. The perfected title of late Ghanshyam Prasad Patel and after him of the appellant and respondent No.2 by adverse possession over such house against respondent No.1 has been discarded under wrong premises contrary to the evidence. The disputed property was having worth of one lac to one lack fifty thousand and in such premises such suit should have been filed on such valuation with ad-valorem court fees before the competent Court and not in the Court of Civil Judge Class-II. He also argued that at the stage of first appeal he filed an application under Order 26 Rule 9 of CPC to ascertain the boundaries of such property by calling the commissioner report and one another application under Order 41 Rule 27 of CPC for permission to produce the map of disputed property but the same have been dismissed under the wrong premises by the appellate Court. In continuation he said that without ascertaining the boundaries of the disputed premises the question involved in this case could not be decided. He also said that the map which was filed along with the application under Order 41 Rule 27 of CPC was very relevant but only on the ground that it was neither prepared nor issued by any authority by dismissing such application, the same was not taken on record. In such premises, he prayed for admission of this appeal on the proposed substantial question of law mentioned in the appeal memo.

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6. Having heard keeping in view the arguments advanced by the counsel, I have carefully gone through the entire record.

7. It is apparent on record from Ex.p 1 that alleged partition took place between Ghanshyam Prasad Patel and his two sons, respondent No.1 and 2. in such partition, the disputed house was given to the respondent No.1. It appears from the impugned judgments that on appreciation of evidence in the lack of any admissible document the alleged sale transaction of the house between respondent No.1 and Ghanshyam Prasad Patel was not found to be proved and in such premises it was held that even after shifting the respondent No.1 from such village to Goteagaon the disputed premises was remained in possession of the respondent No.1. Pursuant to it, it was also held that as the property was not sold to Ghanshyam Prasad Patel then there was no question to devolve the suit property in favour or in possession of the appellant and respondent No.2. On appreciation of the evidence both the courts below had concurrently found that the appellant and respondent No.2 had not perfected their right of title over the house in dispute by adverse possession as the property was given to respondent No.1 in the family partition and therefore the question of perfection of right by adverse possession could not be inferred in the matter. Aforesaid both the findings based on appreciation of evidence being findings of fact could not be interfered at this stage under Section 100 of CPC, because they do not give rise to any questions of law rather than the substantial questions of law. It is settled proposition of law that concurrent findings based on evidence even the same are erroneous could not be interfered under Section 100 of CPC at the stage of second appeal unless the same are involved any substantial question of law as laid down by the Apex Court in the matter of "*Kondiba Dagadu Kadam v. Savitribai Sopan Gujar*" reported in AIR 1999 S. C. 2213.

8. Apart the above in view of the law laid down by this Court in the matter of *Seeganram Vs. Magnia* reported in 1986 MPWN (Vol.1) 87 and *Ram Singh Vs. Kashiram* reported in 1997 RN 195, the question of adverse possession being finding of fact could not be interfered at this stage under Section 100 of CPC. In such premises this appeal does not give rise to any substantial question of law.

9. The concurrent findings with respect of possession of the property based on appreciation of evidence being finding of fact could not be interfered at this stage as laid down by the Apex Court in the matter of *Kishanlal Biharilal Maheshwari and others v. Ramrao Hanumant Rao Patil and anothers* reported in AIR 1981 S. C 1183.

10. So far the question of valuation and court fees is concerned, the impugned suit was filed by respondent No.1 stating his possession over the disputed property for issuing perpetual injunction restraining the appellant and respondent No.2, 3 from inferring in his possession of the same. In such premises the suit could be

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filed on the fixed valuation with the Court fees accordingly. In such premises I have not found any circumstance in the case at hand giving rise to any question of law rather than substantial question of law.

11. So far rejection of the applications of the appellant by the appellate Court filed under Order 41 Rule 27 of CPC and under Order 26 Rule 9 are concerned, the appellant has not filed any authentic or certified copy of the map issued by any authority with the application but he has filed the map prepared by some independent agency or the person which could have been filed before the trial Court also, thus taking into consideration that no sufficient cause is shown by the appellant about non-filing such document in the trial Court during pendency of the suit such application was dismissed. In such findings I have not found any perversity or the circumstance giving rise to substantial question of law.

12. In view of the partition deed of the year 1973 the fact of partition or family arrangement was apparently on record and as per concurrent findings of both the courts below the respondent No.1 is found in possession of the disputed premises, therefore, in such circumstance the appellate Court has not committed any error in dismissing the appellant's application filed under Order 26 Rule 9 of CPC. In such premises the reasons given by the appellate court for such dismissal does not give rise to any substantial question of law in the present appeal.

13. In view of aforesaid discussion, I have not found any perversity in the impugned judgments giving rise to any questions of law rather than substantial questions of law requiring any consideration under Section 100 of CPC at this stage. Resultantly, the appeal is hereby dismissed at the stage of motion hearing.

Appeal dismissed.

I.L.R. [2010] M. P., 1465

APPELLATE CIVIL

Before Mr. Justice K.K. Lahoti

1 April, 2010*

ISHAQUE MOHAMMAD & ors.

... Appellants

Vs.

SMT. SAINI BEGUM

... Respondent

Civil Procedure Code (5 of 1908), Section 97 - Appeal from final decree where no appeal from preliminary decree - Meaning - Held - Provisions of S. 97 attained finality to a preliminary decree in respect of the matters decided by it - A party aggrieved by a preliminary decree does not appeal from it then he is precluded from disputing its correctness in an appeal from the final decree.

(Para 10)

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सिविल प्रक्रिया संहिता (1908 का 5), धारा 97 – अंतिम डिक्री से अपील जहाँ प्रारम्भिक डिक्री से कोई अपील नहीं की गयी है – अर्थ – अभिनिर्धारित – धारा 97 के उपबंध- किसी प्रारम्भिक डिक्री को उसके द्वारा विनिश्चित किये गये विषयों के सम्बन्ध में अंतिम बना देते हैं – प्रारम्भिक डिक्री से व्यथित कोई पक्ष उसके विरुद्ध अपील नहीं करता है तब वह अंतिम डिक्री से अपील में उसकी शुद्धता को विवादित करने प्रवारित हो जाता है।

Cases referred :

AIR 1997 Kar 370, AIR 2003 SC 267, AIR 1995 SC 2493, AIR 1992 MP 13.

Adil Usmani, for the appellants.

Manoj Mishra, for the respondent.

ORDER

K.K. LAHOTI, J. :- This appeal is directed against a final decree dated 7.12.2005 passed by 5th Additional District Judge, Sagar district Sagar in Civil Suit No.33A/2003. The defendants have also challenged preliminary judgment and preliminary decree dated 24.2.2004 passed by the same Court.

2. Learned counsel for the appellants submitted that the Court below erred in granting 5/8th share to the respondent/plaintiff while as per Mohammedan Law she was not entitled for the same share. The appellants also challenged the will bequeathed by Pyar Mohd. in favour of Saini Begam on the ground that the will was executed more than the share of Pyar Mohd and the plaintiff was not entitled for such share even on the basis of will dated 3.2.1979.

3. Learned counsel appearing for the respondent raised a preliminary objection that the appellants cannot challenge the correctness of preliminary decree against, which no appeal was preferred within the limitation and in this appeal, appellants have not filed any application seeking condonation of delay in filing appeal against preliminary judgment and decree. It is not in dispute that no application seeking condonation of delay has been filed in this appeal though the appellants have challenged the preliminary decree passed in the matter dated 24.2.2004.

4. Learned counsel for the respondent also submitted that under Section 97 of the C.P.C., the findings recorded by the court below while passing a preliminary decree cannot be assailed at the time of hearing of an appeal against a final decree. In support of his contention, he has placed reliance to a Single Bench judgment of the Karnataka High Court in *Smt. Parvathamma vs. A.Muniyappa and others* [1997 Karnataka 370] and submitted that this appeal may be dismissed.

5. From the perusal of the record, facts are that the respondent Smt. Saini Begam filed a suit against the appellant on 14.11.1991 claiming her share in the property. She also set up a will in her favour by her brother Pyar Mohd. The suit was contested by the appellant. The 5th Additional District Judge, Sagar by judgment dated 24.2.2004 found that the disputed property is a joint property of the plaintiff and defendants. The property was of Sheikh Muneer, father of the

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plaintiff. The plaintiff got 1/4th share by way of succession, 3/8th share from her brother Pyar Mohd. by way of will. The will dated 3.2.1979 bequeathed by Pyar Mohd in her favour was found valid and on the basis of this the trial Court granted a preliminary decree in favour of the respondent. In nut shell, preliminary decree passed by the trial Court was as under :-

i) The plaintiff is the owner of disputed house situated at Chandrashekhar ward, Sagar old No.174, area 4500 sq.ft. to the extent of 5/8th share, the share shall exclude the area shown by green line in the map.

ii) That the plaintiff shall be entitled for a partition of her 5/8th share by excluding the property which was shown in green colour in the map.

iii) Perpetual injunction was issued against the defendants that the defendants shall not disposes the plaintiff from the property in her possession till she gets her share after partition. The defendants shall bear their expenses and shall also bear the expenses of plaintiff.

6. No appeal was preferred against the preliminary decree.

7. Thereafter the plaintiff/respondent filed an application for final decree on 26.7.2004. In the proceedings, a notice was issued to the defendants/appellants. All the appellants appeared before the trial Court. By order dated 27.2.2005, Court appointed Shri V.K. Kher, Advocate as Commissioner and a writ of commission was issued to him. On 2.7.2005, Shri V.K. Kher, the Commissioner submitted his report. The degree holder plaintiff filed his objection on the Commissioner report on 6.8.2005. The defendants have not filed any reply to the objection filed by the plaintiff. On 20th September, 2005, the trial Court directed both the parties to submit their proposal and alternate in respect of partition. On 20.10.2005, the defendants submitted their proposal for the partition. The Court heard the parties on 10.11.2005 and passed an order on the objection on 25.11.2005. In the order dated 25.11.2005 the Court had also gave various options to the parties in respect of division of the disputed property but it appears that none any option in response to order dated 25.11.2005, therefore a final decree was passed on 7.12.2005 which is under challenge in this appeal.

8. To appreciate the contention of the parties, firstly legal position in respect of objections of the respondent may be looked into. Section 97 of the Civil Procedure Code, 1908 reads as under :-

97. Appeal from final decree where no appeal from preliminary decree.—Where any party aggrieved by a preliminary decree passed after the commencement of this Code

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does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

9. The aforesaid provision specifically provides that where any party has not filed any appeal against the preliminary decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

10. The Apex Court considered the scope of Section 97 in *Venkatrao Anantdeo Joshi and others vs. Sau. Malatibai and others* [AIR 2003 SC 267], wherein the Apex Court held that in a suit for partition where preliminary decree is passed, at the time of passing of final decree it is not open to the respondent to raise objection that he was a tenant of the suit premises. Section 97 of CPC specifically provides that where any party aggrieved by the preliminary decree does not appeal from the said decree, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. The Apex Court referred an earlier judgment in *Moolchand and others vs. Dy. Director, Consolidation and others* [1995 SC 2493] in this regard. The Division Bench of this Court in *Devisahai and others vs. Sardar Govindrao Mahadik and others* [AIR 1992 MP 13] held that a preliminary decree passed in a partition suit is not a tentative decree but should be regarded as conclusive in respect of the matters dealt with in the preliminary decree. Although when the legislature provided for a preliminary decree, a final decree is to be passed and the final decree has been made executable but that would not mean that a preliminary decree is a tentative decree or an interlocutory order. The provisions of Section 97 CPC attained finality to a preliminary decree in respect of the matters decided by it. A party aggrieved by a preliminary decree does not appeal from it then he is precluded from disputing its correctness in an appeal from the final decree.

11. The judgment relied on by the respondent in *Smt. Parvathamma* (supra) also laid down the same law held that after commencement of the Civil Procedure Code if no appeal is filed against a preliminary decree such party shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

12. In view of the specific provision as contained in Section 97 of the Code and the law laid down by the Apex Court and this Court, there is no iota of doubt that the appellant is precluded from raising correctness of the preliminary decree in this appeal. Though appellants in this appeal has also challenged the preliminary decree but has not filed any application seeking condonation of delay in filing appeal. Apart from this, alongwith the memo of appeal, a certified copy of the preliminary decree is also not filed. Against the preliminary decree dated 24.2.2004, this appeal was barred by limitation on 19.1.2006 when this F.A.No.112/06 was filed. In absence of application or certified copy of the Decree this appeal can not

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be found as an appeal against preliminary decree, so no interference can be made in the preliminary decree.

13. Apart from this in the final decree proceedings, appellants were noticed by the trial Court. They appeared and participated in the final decree proceedings. Now after passing of the final decree, they are estopped from raising correctness of the preliminary decree.

14. In view of the aforesaid, the contention of the appellant that in the preliminary decree shares were not properly determined by the trial Court or by will respondent was not entitled to claim share of Pyar Mohammad, cannot be examined and in this regard objections raised by the learned counsel for the Respondent is sustained.

15. So far as the second contention of the appellant that by way of will, the brother of the appellant namely Pyar Mohd could not have bequeathed the 1/3rd share in favour of plaintiff Smt. Saini Begum, this question was considered by the trial Court in the judgment and preliminary decree dated 24.2.2004 and decided issue No.2 and 3 against the appellants. No appeal was preferred by the appellants against the aforesaid findings or against the judgment and decree dated 24.2.2004. As the aforesaid findings have attained finality and while considering this appeal against the final judgment and decree, the findings recorded by the judgment dated 24.2.2004 cannot be re-examined.

16. No other point is raised in respect of final decree.

17. In view of the aforesaid, this appeal is found without merit and is dismissed with cost. Counsel's fee Rs.1,000/-.

Appeal dismissed.

I.L.R. [2010] M. P., 1469

APPELLATE CRIMINAL

Before Mr. Justice S.S. Dwivedi

12 January, 2010*

BHARAT

Vs.

STATE OF M.P.

... Appellant

... Respondent

Penal Code (45 of 1860), Section 376 - Evidence of prosecutrix - Under what circumstances the solitary statement of prosecutrix without corroboration can be believed - Law discussed. (Para 10)

दण्ड संहिता (1860 का 45), धारा 376 - अभियोक्त्री की साक्ष्य - किन परिस्थितियों के अन्तर्गत अभियोक्त्री के एकमात्र कथन पर बिना सम्पुष्टि के विश्वास किया जा सकता है - विधि की विवेचना की गयी।

BHARAT V. STATE OF M.P.**Case referred :**

(2007) 12 SCC 122.

Mahesh Goyal, for the appellant.*M. Bhardwaj, P.P.*, for the respondent/State.**J U D G M E N T**

S.S. DWIVEDI, J. :-The appellant has preferred this appeal under Section 374(2) of Cr.P.C. aggrieved by the judgment of conviction and sentence dated 28th March, 2006 passed by Sessions Judge, Sheopur in Special Sessions Trial No.75/05 whereby held the appellant/ accused guilty for the offence punishable under Section 376 (1) of IPC and sentenced him to seven years' R.I. with a fine of Rs.2000/- in default of payment of fine further ordered to suffer imprisonment for six months.

2. Briefly stated facts of the case are on 28.8.2005, the complainant/prosecutrix went to her field for cutting the grass and, thereafter, when she was returning to her home, at that time, the appellant/accused came there caught hold the complainant/ prosecutrix and took her to nearby field and, thereafter, committed rape on her. The incident was narrated by the complainant/ prosecutrix to her mother Kasturibai and Ramdeen. Thereafter, the F.I.R. had been lodged at the Police Station, Vijaypur, on which basis, police had registered a case under Section 376 of IPC. Sent the complainant/prosecutrix for medical examination to the Govt. hospital, where, the lady Assistant Surgeon, Seema Lakhda (P.W7) examined the complainant/prosecutrix and prepared the slide of vaginal discharge and after sealing it, handed over to the Constable concerned for the chemical examination and proved the examination report Ex.P-4. After due investigation charge-sheet has been filed.

3. The appellant/accused abjured the guilt and his defence is of false implication. The learned trial Court after due appreciation of the entire evidence on record held the appellant/accused guilty for the offence punishable under Section 376 of IPC and sentenced him as stated herein-above. Aggrieved by which, the appellant has preferred this appeal.

4. Having heard the learned counsel for the appellant as well as the Public prosecutor appearing for the State and perused the record.

5. It is submitted on behalf of the appellant that there is no corroboration available by the medical evidence with regard to the injuries sustained to the complainant/prosecutrix in this incident of forcible rape. The FIR is also delayed by 24 hours for which also no reasonable explanation is on record. The complainant/prosecutrix is a major married lady and if no corroboration is available then the learned trial Court has wrongly believed the solitary statement of the prosecutrix and wrongly held the appellant/accused guilty for the aforesaid offence,

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therefore, prayed for setting aside of the impugned judgment of conviction and sentence passed by the trial Court.

6. Per contra, learned Public Prosecutor for the State supported the impugned judgment and prayed for dismissal of the appeal.

7. To bring home the charge as levelled against the appellant, the prosecution had examined the complainant/prosecutrix (P.W1), who clearly stated that when she was returning to home, on the way, the appellant/accused came there, caught hold her and took her to nearby field and, thereafter, committed rape on her. When she started crying, at that time, her mother Kasturibai and one Ramdeen came there and on seeing them, the appellant/accused ran away from the spot. She also narrated the incident to her father. When they were going to lodge the report, at that time, the appellant/accused was standing in front of his house with a gun and threatened her if she reported the matter to the Police Station, he will kill them by the gun. She could not go to the Police for lodging of the report. After two days, she lodged the report at Police Station Vijaypur which is Ex.P-1. In detailed cross examination, she denied the fact that due to some previous enmity, this false report has been lodged by her against the appellant/accused. She also denied that at the instigation of the appellant's father Jagdish one Ramdulhari had lodged a report against her father. No such report was produced in defence by the appellant/accused. Therefore, the allegation for false implication of the accused by the complainant/prosecutrix is not proved in her detailed cross examination.

8. The statement of complainant/prosecutrix has got further support by the statement of Kasturibai (P.W2), who was also coming to her home from the field and saw the appellant/accused lying on her daughter and her daughter was crying. Thereafter, her daughter, the prosecutrix narrated the incident to her and appellant/accused committed rape on her. In the detailed cross examination of the witness Kasturibai (PW2) also denied the suggestion that due to some previous enmity of false report had been lodged by the complainant against the appellant. Similarly, the third witness Ramdeen also saw the appellant/accused lying on the complainant and on seeing him, the appellant/accused ran away from the spot. Nothing substantial came in the statement of these witnesses Kasturibai (P.W2) and Ramdeen (PW3) on which basis their statement against the appellant can be disbelieved.

9. Murari (P.W5) is the father of the complainant/prosecutrix before whom the complainant narrated the incident and, he also proved the reason for delay in lodging of the FIR that when they were going to lodge the report, at that time, the appellant/accused Bharat armed with a gun, threatened them if they lodged the report then he will kill them by the gun.

10. It is true that on medical examination of the complainant by Dr. Seema Lakhda (P.W7), she had not found any injuries on the body of the complainant/

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prosecutrix. Therefore, it is vehemently argued by the counsel for the appellant that if no medical support is available then certainly the solitary statement of the prosecutrix cannot be believed. I am not much impressed by the aforesaid statement of the learned counsel for the appellant. In case of rape, if the statement of the prosecutrix is found to be trustworthy then, no medical corroboration is also required. For this proposition, the reliance can be placed on the decision of the Apex Court reported in *B.C. Deva Vs. State of Karnataka* ((2007) 12 S.C.C. 122; (2008) 2 SCC Criminal 53), wherein, the Hon'ble Apex Court has led that "absence of marks of injury on the person of the prosecutrix does not mean to any inference that accused has not committed forcible sexual intercourse on the prosecutrix".

11. In view of the aforesaid decision of the Apex Court, the opinion of this Court, the statement of prosecutrix found to be trustworthy and it is proved that it is the appellant/accused who has committed forcibly intercourse on the complainant/prosecutrix and, thereafter, committed an offence punishable under Section 376 of IPC.

12. It is submitted on behalf of the appellant with regard to the delay in lodging of the FIR for which as discussed herein-above, the reasonable explanation has been given by the complainant/prosecutrix as well as by his father Murari (PW5) that when they were going to lodge the report, appellant/accused armed with a gun and threatened them to be killed. In such circumstances, the reasonable explanation is on record, therefore, the delay in lodging of the FIR is also not found to be fatal for the prosecution.

13. Thus, on over all reappraisal of the entire evidence on record, my considered opinion, the prosecution has proved the fact that the appellant/accused has committed rape on the complainant/prosecutrix and thus the trial Court has rightly held guilty for the offence punishable under Section 376 of IPC.

14. With regard to the sentence is concerned, the appellant/accused is a major person and it is presumed that he know the consequences of such a criminal act and in such circumstances, no material circumstances is on record on which basis the minimum sentence provided for the offence under Section 376 of IPC can be reduced any further.

15. Resultantly, the appeal preferred by the appellant being devoid of any merit, is dismissed and the impugned judgment of conviction and sentence passed by the trial Court is confirmed.

Appeal dismissed.

BALKISHAN (DELETED) Vs. STATE OF M.P.

I.L.R. [2010] M. P., 1473

APPELLATE CRIMINAL*Before Mr. Justice A.K. Shrivastava & Mrs. Justice Indrani Datta*

19 January, 2010*

BALKISHAN (DELETED) & ors.

... Appellants

Vs.

STATE OF M.P.

... Respondent

A. Evidence Act (1 of 1872), Section 3 - Interested witness - Testimony of witnesses if found trustworthy, reliable and cogent cannot be discarded only on the basis that they are alleged to be interested witness.

(Paras 12 & 13)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 - हितबद्ध साक्षी - साक्षियों का परिसाक्ष्य यदि भरोसे लायक, विश्वसनीय और अकाट्य पाया जाए तो केवल इस आधार पर अमान्य नहीं किया जा सकता कि वे हितबद्ध साक्षी होना अभिकथित हैं।

B. Evidence Act (1 of 1872), Section 3 - Chance witness - Testimony of witness cannot be discredited merely because he is a chance witness. (Para 15)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 3 - संयोगी साक्षी - साक्षी के परिसाक्ष्य पर केवल इसलिए अविश्वास नहीं किया जा सकता कि वह संयोगी साक्षी है।

C. Evidence Act (1 of 1872), Section 3 - Independent witness - Even if independent witnesses were not examined by I.O., it would not be a sole ground to discard the testimony of eye-witnesses. (Para 18)

ग. साक्ष्य अधिनियम (1872 का 1), धारा 3 - स्वतंत्र साक्षी - यद्यपि अनुसंधान अधिकारी द्वारा स्वतंत्र साक्षियों की परीक्षा नहीं करायी गयी तथापि यह प्रत्यक्षदर्शी साक्षियों के परिसाक्ष्य को अमान्य करने के लिए एकमात्र आधार नहीं होगा।

D. Penal Code (45 of 1860), Section 302 - Murder - Conflict between oral evidence and medical evidence - Law discussed. (Para 21)

घ. दण्ड संहिता (1860 का 45), धारा 302 - हत्या - मौखिक और चिकित्सीय साक्ष्य के मध्य विरोध - विधि की विवेचना की गयी।

E. Criminal Procedure Code, 1973 (2 of 1974), Section 157 - Copy of FIR to Magistrate - Merely because I.O. could not specify that when copy of FIR is dispatched to concerning Magistrate, no ground to reject entire prosecution story. (Para 23)

ङ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 157 - मजिस्ट्रेट को एफ. आई.आर. की प्रतिलिपि - केवल इसलिए कि अनुसंधान अधिकारी यह विनिर्दिष्ट नहीं कर सका कि सम्बन्धित मजिस्ट्रेट को एफ.आई.आर. की प्रतिलिपि कब प्रेषित की गयी, सम्पूर्ण अभियोजन कथा को नामंजूर करने के लिए कोई आधार नहीं।

BALKISHAN (DELETED) Vs. STATE OF M.P.**Cases referred :**

2007 AIR SCW 1835, (2006) 3 SCC (Cri) 503, ILR [2007] MP 1698, 2004 SCC (Cri) 1463, 2004 SCC (Cri) 963, (2008) 1 SCC (Cri) 27, (2006) 1 SCC 99, AIR 1983 SC 753, (2003) 6 SCC 380, (2008) 5 SCC 368, 1998 SCC (Cri) 278.

Shailendra Singh & Vinay Sharma, for the appellants.

Mukund Bhardwaj, P.P., for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by **INDRANI DATTA, J.** :—This appeal has been preferred by the appellants assailing the judgment of conviction and sentence dated 20.11.1997 passed by learned IV Additional Sessions Judge, Gwalior in S.T. No.186/1985; whereby, appellants Sultan Singh and Babulal have been convicted under Section 302 of IPC and appellant Gabbar Singh has been convicted under Section 302/34 of IPC and sentenced to suffer life imprisonment and to pay fine of Rs.2000/- each with default stipulations.

2. Indisputably, the accused / appellant Balkishan has died during pendency of appeal. Vide order dated 12.4.06 his name has been deleted from the array of appellants hence the appeal so far as appellant Balkishan is concerned, stands abated.

3. Facts in a nutshell giving rise to the appeal are that on 17.09.1985 at about 5 p.m. in the evening complainant Sukha was returning from his field after grazing his cattle. Deceased Tejsingh was also going towards his village with his cattle. Balkishan (deceased accused) and appellant Sultan Singh were sitting on the mound of field of Jagdish Pujari and they were armed with Kharerua and Luhangi. Appellants Gabbar Singh and Babulal were also present there and Babulal was armed with lathi. As soon as deceased Tejsingh reached there, appellant Gabbar Singh caught hold of him and thereafter Balkishan (deceased accused) and other appellant Sultan Singh and Babulal inflicted blows on the head of deceased by means of Kharerua, Luhangi and lathi. Complainant Sukha tried to rescue deceased Tejsingh, then all the appellants tried to assault him also, so he ran away from the spot. Incidence has been witnessed by Lakharam (PW-4), who was also present on spot. Complainant Sukha (PW-3) informed the inhabitants of village namely Hukumsingh and Ramsingh and other persons, who reached on spot and found that deceased Tejsingh had already expired. Thereafter, Sukha lodged a report in the Police Station Madhavganj at 3.00 a.m. On the basis of report Ex.P/6, the matter was investigated. Spot map was prepared vide Ex.P/1. Dead body of deceased was sent for postmortem vide Ex.P/13. Postmortem was conducted vide Ex.P/14. Weapons used in the incidence were sized vide Ex.P/9 to P/12 and after investigation, charge-sheet was filed in the court of JMFC Gwalior, from where the case was committed to the court of Sessions.

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4. The appellants were charged, prosecuted and tried for committing offence under Section 302/34 of IPC. Appellants abjured their guilt and pleaded false implication. After conclusion of trial, learned IV ASJ Gwalior convicted and sentenced the appellants as stated above. Hence this appeal.
5. Many fold submissions have been made by the learned counsel for the appellants.
6. Learned counsel for State on the other hand supported the judgment and prayed for dismissal of appeal.
7. Heard the learned counsel for the parties at length and perused the record.
8. To prove its case, the prosecution has examined as many as 9 witnesses out of which PW-3 Sukha and PW-4 Lakharam are eye-witnesses. In defence appellants examined three witnesses.
9. The contention of learned counsel for the appellants is that as per the prosecution case alleged eye-witnesses are Sukkha (PW-3) and Lakharam (PW-4) out of which Sukkha nephew and Lakharam is near relative of deceased Tejsingh and therefore their statements are not reliable as they are chance and interested witnesses.
10. So far as first contention of learned counsel for appellants is concerned, this contention is not acceptable. In the present case, main evidence is ocular evidence of PW-3 Sukha and PW-4 Lakharam. PW-3 Sukha has narrated that on the date of incidence at about 5 p.m. when he was returning to his home after grazing his cattle, Tejsingh was going ahead towards village and near Jagdish Pujari Charu Ki Dinger, all the appellants were sitting. Appellant Sultan Singh was armed with Luhangi and Babulal was armed with Lathi and Balkishan was armed with Kharerua, as soon as deceased Tejsingh reached there, appellant Gabbar Singh caught hold of him and thereafter Balkishan (deceased accused) inflicted blow by Kharerua on the head of deceased. Appellant Sultan Singh inflicted Luhangi blow and appellant Babulal inflicted lathi blow on the head of deceased Tejsingh, and when he tried to rescue deceased Tejsingh, appellants tried to catch him and then he ran away from the spot and narrated the incidence to Hotam Singh, Ramsingh. He reached again on spot with them and found that Tejsingh has died. He intimated about the incidence to the son of deceased Tejsingh, who was not in the village at that time and had gone to Lashkar then he lodged report at 3.00 a.m. at Police Station as per Ex.P/6 and thereafter police prepared spot map as per Ex.P/7. In paragraph 11 this witness has admitted that deceased was his real uncle.
11. Statement of this eyewitness PW-3 Sukha has been corroborated by the statement of PW-4 Lakharam who was also present at the place of occurrence and has specifically stated that Gabbar Singh caught hold deceased Tejsingh and

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all other appellants inflicted injuries by means of their weapons on the head of deceased by their respective weapons. He further deposed that at that time Sukha was also present there and though Sukha tried to rescue deceased Tejsingh but when appellants / accused tried to catch him, he ran away from the spot.

12. On appreciation of evidence of these eye-witnesses, we find that their testimony is wholly reliable. Undisputedly PW-3 Sukha is related witness however on the basis of it, his testimony cannot be jettisoned but his testimony has to be scrutinized with care and caution. The Hon'ble Apex Court in the case of *Namdeo v. State of Maharashtra*, 2007 AIR SCW 1835 has held that a witness who is a relative of the deceased or victim of a crime cannot be characterised as "interested". The term "interested" postulates that the witness has some direct or indirect "interest" in having the accused somehow or other convicted due to animus or for some other oblique motive. It is further held that evidence of relative witness, however, must be scrutinized carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the "sole" testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one.

13. So far as relationship of the eyewitness with the deceased is concerned, the relationship does not affect credibility of a witness as observed by the Apex Court in the case of *S. Sudershan Reddy and Ors. v. State of A.P.* (2006) 3 SCC (Cri.) 503. In this case it is held that relationship is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible. Similar view is expressed in case of *State of A.P. v. S. Rayappa and Others* (2006) 2 SCC (Cri.) 353 that merely because witness were related to deceased, they cannot be said to be interested witnesses and on that ground alone, their testimony cannot be rejected. In view of the reluctance of the general public to be a witness, a close relative is the only natural witness, and the only requirement is that testimony of such a witness should be examined cautiously by court.

14. That apart, it is admitted fact that PW-4 Lakharam is not in close relation with deceased, hence there is no reason to disbelieve his testimony. Evidence of eye-witnesses PW-3 Sukha and PW-4 Lakharam are corroborated with each other so also with the version of FIR. Therefore, there is no reason to disbelieve the ocular testimony of these two eyewitnesses.

15. So far as contention of learned counsel for the appellants that PW-3 Sukha and PW-4 Lakharam are chance witnesses hence their statements are not reliable

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is concerned, this argument does not find worth in the facts and circumstances of the case. In the case of *Lilli @ Surendra Pandey and another Vs. State* ILR (2007) M.P. 1698 it is held that testimony of witnesses cannot be discredited merely because he is a chance witness.

16. Next contention of learned counsel for appellants is that the prosecution has failed to examine the independent witness, who were present on the spot at the time of occurrence as admitted by PW-8 Investigating Officer Chhotelal Sharma in cross-examination paragraph 12 wherein he has stated that Hotam Singh and Bhura were present on spot at the time of occurrence. It is further contended by learned counsel for appellants that Bhura and Hotam Singh have been examined as DW-2 and DW-3 and their statements falsify the prosecution story. Relying upon the statement of DW-1 Raghuwar, DW-2 Bhura and DW-3 Hotam Singh it is argued that DW-1 Raghuwar narrated that he saw deceased on the spot at about 8 p.m. then he went to deceased house and then called PW-3 Sukha and PW-4 Lakharam and therefore they are not eye-witnesses. We are not convinced by the arguments advanced by learned counsel for appellants.

17. DW-2 Bhura and DW-3 Hotam Singh have not stated that they have seen incidence. As per their statements, they have seen deceased in injured condition thereafter they intimated Raghuwar. DW-3 Hotam Singh has specifically admitted in paragraph 5 that he has not seen who has caused injury to Tejsingh. Therefore, testimony of Bhura and Hotam Singh is of no use. So far as DW-1 Raghuwar is concerned, he is not a witness of incidence. He has deposed that Gambhira and Sunharilal approached him and reported him that one dead body is lying near temple then he accompanied with Kachhu watchman reached on spot where he saw dead body of Tejsingh lying on the ground and then he went to Sukha and Lakharam and called them. So far as version of this witness is concerned, he is not a witness of incidence. His testimony that he called Sukha and Lakharam is not sufficient to discard the testimony of eyewitnesses Sukha and Lakharam when their testimony is found to be concise, precise and fully satisfactorily and reliable. Moreover statement of defence witnesses is not reliable as per postmortem report and statement of Dr.A.K. Saxena PW-9, deceased died after six hours of taking food and as per statement of these witnesses. Tejsingh died at about 8 p.m.

18. So far as contention of the learned counsel for appellants that Investigating Officer has not examined other independent eyewitnesses is concerned, even if it is presumed that alleged eyewitnesses have not been examined by I.O., it would not be a sole ground to discard the testimony of eye-witnesses PW-3 Sukha and PW-4 Lakharam specifically when there is no contradiction or inconsistency in their statements.

19. Next contention of learned counsel for appellants is that statement of eye-witnesses is belied by medical evidence. As per statement of Sukha in paragraph

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13 Gabbar Singh caught hold of deceased from front side and Balkishan and appellant Sultan Singh and Babulal inflicted injury on his head from back side. It is further contended by the learned counsel for the appellants that in postmortem, no injury has been detected on back portion of head of deceased. Therefore, statement of this witness is not medically corroborated. It is further submitted that as per prosecution's own case appellants were three in number and they inflicted blow by means of their respective weapons and only two ante-mortem injuries were detected on the head of deceased and that too on the frontal side of the head. Therefore, it is not possible that three appellants are inflicting blows on the head and only two injuries are sustained by deceased. In support of the contention learned counsel for the appellants has placed reliance in the case of *State of U.P. v. Ram Bahadur Singh and Others* 2004 SCC (Cri.) 1463 and on a citation *Devatha Venkataswamy v. Public Prosecutor*, High Court of A.P. 2004 SCC (Cri.) 963. in that case there was a conflict between medical and oral evidence and appellant stated to have pierced the forehead of the deceased with a spear (sharp-edged weapon) once and as per medical evidence the said injury was caused by the use of a blunt weapon and that too by repeated blows. Hence there was direct conflict between oral and medical evidence and it was held that High Court erred in concluding that the medical evidence supported the oral evidence. Further reliance has been placed on *State of U.P. v. Mushtaz Alam*. (2008) 1 SCC (Cri.) 27. In that case presence of alleged eyewitnesses at the spot has also been found to be not established and the testimony of the witnesses were inconsistent with medical evidence. It was held that it apparently shows that they had not seen the actual occurrence. On these grounds, appeal was dismissed and judgment of acquittal of High Court was upheld. Another reliance has been placed on *State of U.P. v. Shiv Kumar and others* (2006) 1 SCC 99. In this case presence of other alleged eyewitness at the scene of occurrence was doubtful, hence it has been held that High Court has rightly given the accused benefit of doubt.

So far as citation relied upon by learned counsel for the appellants are concerned, on a meticulous reading it transpires that they are distinguishable on facts and circumstances and would not bolster or apply in the case at hand.

20. As far as the contention of learned counsel for appellants that when three appellants are inflicting blows on the head of deceased and only two injuries have been detected in postmortem report and therefore prosecution story is belied by medical evidence is concerned, we do not agree with the submission made by learned counsel for appellants.

As per evidence of Dr. A.K. Saxena (PW-9) and postmortem report (Ex.P/ 14) following injuries were detected in the head of deceased;-

- (1) lacerated wound on frontal region of skull size 2"x1/4"

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(2) Depressed fracture in pterion region involving frontal parietal, temporal and maxillary bone; and

(3) Lacerated wound size 1"x1/4" on fronto parietal region just above lat end of right eye-brow

Dr. Saxena has stated in cross-examination in paragraph 8 that injuries No. 1 and 3 cannot be inflicted from the back side of deceased and injury No.2 was impact of injury No.3.

21. On going through the record it is crystal clear that the appellants have inflicted blows on the head of the deceased Tejsingh and PW-4 Lakharam has specifically stated that all the appellants inflicted blows on the head of deceased. Though PW-3 Sukha has not stated specifically about the position of victim and from which side assault was made but it does not make the testimony of PW-3 Sukha unreliable. It is alleged that three accused persons were inflicting blows on the head of deceased. In such an incidence it would naturally difficult for a witness to precision from where blows were given to deceased whether from his front side or back side. So if he has not noticed the details even then his testimony that one appellant caught hold deceased and other appellants caused injuries to him by their respective weapons is not liable to be rejected. In the case of *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*, AIR 1983 SC 753 it is held that by and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen. It has been further held that ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

22. So far as only two injuries have been found on the dead body of the deceased is concerned, even if it is presumed that one blow of one of the accused was missed, even then liability of all is fastened under Section 34 IPC as act is done in furtherance of common intention of all accused. Therefore, everyone is equally responsible for committing the murder of the deceased.

Moreover, in the case of *Thaman Kumar v. State of Union Territory of Chandigarh*, (2003) 6 SCC 380 the Hon'ble Apex Court has held that the conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they deposed to have

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been caused by the eyewitnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third categories no such inference can straight away be drawn. The manner and method of assault, the position of victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony. Case in hands would fall under third category. So no such inference can be drawn that PW-3 Sukha and PW-4 Lakharam have not witnessed the incidence.

23. Last contention of learned counsel for appellants is that provisions of Section 157 CrPC have not been followed as PW-8 T.I. Chhotelal has admitted in para 15 of his cross-examination that receiving information immediately he went on the place of occurrence and after directing Head Moharrir to send copy of FIR to concerned Magistrate and today he is unable to tell that when copy of FIR was sent to concerned Magistrate. In the case of *Animireddy Venkata Ramana and Others v. Public Prosecutor, High Court of Andhra Pradesh* (2008) 5 SCC 368 it is held that FIR need not precede the information regarding commission of cognizable offence received by officer in charge of a police station and requiring him to reach the place of occurrence as early as possible. Moreover, in the case of *Shiv Ram and Another v. State of U.P.* 1998 SCC (Cri.) 278 it is held that mere delay in dispatching the copy of FIR to Magistrate is no ground to reject entire prosecution case.

24. Considering the above legal position if Investigating Officer is not able to tell that when the copy of FIR was sent to concerned Magistrate then no adverse inference can be drawn in present circumstances of the case.

25. In the light of the above discussions considering the evidence produced, there is sufficient reason to hold the testimony of eyewitnesses reliable and in consonance with version of FIR. There is no reason found that appellants have been falsely implicated by the eyewitnesses and the ocular version is corroborated by medical evidence also. It is proved that fatal injuries have been caused on the head of the deceased by appellants. Thus, it is proved that the appellants-accused have committed murder of deceased Tejsingh in furtherance of their common intention and the Trial Court did not commit any error in convicting the appellants for the offences as aforesaid. Appeal accordingly is dismissed. Findings of the learned trial court with respect to conviction and sentence of the appellants is confirmed.

26. Appellants are on bail. Their bail bonds shall stand cancelled after they surrender before the learned Trial Court on or before 25th February, 2010 failing

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which the learned Trial Court shall issue perpetual warrant against them. The learned Trial Court shall, in that situation, also issue notices to the sureties of the appellants and may proceed against them in accordance with law. It is, however, made clear that in case, appellants surrender before the learned Trial Court on or before 25th February, 2010 their bail bonds shall stand cancelled and the learned Trial Court is directed to send them to jail to serve out the remaining part of jail sentence.

Registry is directed to send the record of the learned Trial Court posthaste so as to reach on or before 25th February, 2010. After appellants are arrested, the learned Trial Court shall also intimate the Registry of this Court.

Order accordingly.

I.L.R. [2010] M. P., 1481

CIVIL REVISION

Before Mr. Justice U.C. Maheshwari

18 March, 2010*

RAMKISHORE

... Applicant

Vs.

GYANCHANDRA JAIN

... Non-applicant

A. Accommodation Control Act, M.P. (41 of 1961), Section 23A & 23J - Landlord - What amounts to - Premises were given on rent by the predecessor in title and not the present landlord who is a retired government servant - Plea raised that such person is not covered under the definition of landlord u/s 23J of the Act - Held - Every retired government servant is a landlord within the meaning of S. 23J of the Act - The provision can not be read to add qualifiers to it. (Paras 16 & 17)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धाराएँ 23ए व 23जे - भूस्वामी - क्या शामिल है - परिसर हक-पूर्वाधिकारी द्वारा किराये पर दी गयी न कि वर्तमान भूस्वामी द्वारा जो एक सेवानिवृत्त शासकीय सेवक है - यह तर्क दिया गया कि ऐसा व्यक्ति अधिनियम की धारा 23जे के अन्तर्गत भूस्वामी की परिभाषा में नहीं आता है - अभिनिर्धारित - प्रत्येक सेवानिवृत्त शासकीय सेवक अधिनियम की धारा 23जे के अर्थान्तर्गत भूस्वामी है - उपबंध उससे विशेषक जोड़ने लिए नहीं पढ़ा जा सकता।

B. Pleadings - No alternative accommodation suitable for the need of plaintiff available pleaded in the plaint - Held - Landlord is obliged under the law to put forth the account of available alternate accommodation of his own and regarding unsuitability of the same for the alleged need in the pleadings - In absence of such pleading in view of availability of such alternate accommodation with the landlord the alleged need of the landlord

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regarding disputed premises could not be held to be bona fide or genuine for passing the decree of eviction against the tenant. (Para 21)

ख. अभिवचन – वादी की आवश्यकता के लिए उपलब्ध किसी उपयुक्त वैकल्पिक स्थान का अभिवचन वादपत्र में नहीं किया गया – भूस्वामी अभिवचनों में उसके स्वयं के उपलब्ध वैकल्पिक स्थान का और कथित आवश्यकता के लिए उस स्थान की अनुपयुक्तता के सम्बन्ध में विवरण देने के लिए विधि के अन्तर्गत बाध्य है – ऐसे अभिवचनों के अभाव में वादी के पास ऐसे वैकल्पिक स्थान की उपलब्धता को देखते हुए विवादग्रस्त परिसर के सम्बन्ध में भूस्वामी की कथित आवश्यकता को किरायेदार के विरुद्ध डिक्री पारित करने के लिए सद्भावी या वास्तविक होना अभिनिर्धारित नहीं किया जा सकता।

Cases referred :

2002(2) J.L.J. 105, (1990) 1 SCC 324, (1988) 1 SCC 656, (1984) 1 SCC 288, 2008(4) MPHT 136(SC), (2000) 8 SCC 191, (1981) 3 SCC 103, 2008(2) MPLJ 155, AIR 1987 SC 406.

Ravish Agrawal with Pranay Verma, for the applicant.

R.K. Samaiya with Shailendra Samaiya, for the non-applicant.

O R D E R

U.C. MAHESHWARI J.:—This revision is directed by the applicant/ tenant under Section 23-E of Madhya Pradesh Accommodation Control Act, 1961 (in short “the Act”) being aggrieved by the order dated 23.1.2006 passed in Case No. RCA 3/A-90(1)/2003-2004 by the Rent Controlling Authority, Tikamgarh allowing the application of the respondent filed under Section 23-A (b) of the Act for eviction of the applicant from the shop described in such application situated in House No.12 of Ward No.10, at Tikamgarh.

2. The facts giving rise to this revision in short are that the respondent herein filed aforesaid application before the Rent Controlling Authority, Tikamgarh under Section 23-A (b) of the Act contending that the applicant herein being his tenant is in occupation of one shop described in the application situated at Tikamgarh @ Rs.500/- pm for non-residential purpose. As per further averments the respondent being retired government servant from the post of teacher is in bona-fide genuine need of such shop to start his business with his sons namely Arvind and Sanjay, for which they do not possess any other suitable accommodation of their own in the township of Tikamgarh. The disputed shop is more suitable and convenient for them. With respect of the alleged business the respondent had sufficient fund and means. In spite giving the notice dated 4.6.2003 to the applicant for vacating the shop, the same has not been complied with by vacating the premises. With these pleadings the aforesaid application for eviction was filed. In pendency of the case by amendment it is pleaded that his son Sanjay has vacated the tenanted shop in which he was running his business and other son Arvind has got assignment of a contract teacher in the State government for three years but still the alleged

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need is subsisting as the Arvind after three years on completing his aforesaid assignment on vacating the premises shall start the business.

3. In reply of the applicant, it is stated that disputed shop was taken long before on tenancy @ Rs.6/- pm, the same has been gradually increased up to Rs.400/- pm and not Rs.500/- pm. The respondent running his business in his own shop while his one son is doing the clothes business and another son is running the travelling business by operating the Tata Sumo vehicle. The available alternate vacant shops lying with the respondent have not been disclosed by way of pleadings in the application. Subsequently by amendment it is also pleaded that on account of heavy competition in the market said Sanjay after closing his cloth's shop of Tikamgarh started such business in the rural areas by roaming in different villages through vehicle while the further need of the other son who has got the job of contract teacher could not be deemed to be bona-fide need of the respondent. It is also stated that in pendency of the petition some vacant shop lying with the respondent is also let out by him to some person on tenancy. In spite it the respondent is still in possession of some vacant shops of his own, with these pleadings, the alleged need of the respondent regarding disputed shop is denied and prayer for dismissal of the application is made.

4. In view of the pleadings after framing the issues, the evidence was recorded, on appreciation of the same by holding the tenancy @ Rs.400/- pm by allowing the respondent's application the rent Controlling Authority passed the impugned eviction order against the applicant. On which the applicant has come to this Court.

5. Shri Ravish Agrawal, Senior Advocate assisted by Shri Pranay Verma learned counsel of the applicant by referring the pleadings, evidence, available documents and the impugned order said the respondent is not covered under the definition of the specified landlord defined under Section 23-J (i) of the Act, hence his application under Section 23-A(b) could not be entertained by the Rent Controlling Authority. In continuation he said that according to the language of Section 23-J(i) of the Act only such retired government servant could be deemed to be specified landlord who actually while remaining in such service inducted the tenant in the premises. Under such definition a retired government servant who acquired the premises in succession in which the tenant was inducted by the predecessor in title is not covered. It was also said that it is apparent on record that the present applicant was not inducted by the respondent while remaining in government service, therefore he could not be deemed to be a specified landlord. In support of such contention he placed reliance on some reported decisions and said that the applicant being not covered under the category of specified landlord his application under Section 23-A(b) of the Act was entertained by the Rent Controlling Authority contrary to law and passed the impugned order contrary to the jurisdiction vested in it. Therefore, the same is not sustainable.

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6. So far other merits of the case is concerned, he argued that the respondent inspite having possession of some vacant shops of his own adjoining to the disputed shop has not put forth the account of the same along with the explanation why the same are not suitable for his alleged need, while as per settled proposition of law in the lack of the pleading about such accommodation and it's unsuitability, the evidence if adduced by the party in that respect could not be read or taken into consideration as admissible evidence. In such premises the findings of impugned order holding the respondent is in bona-fide need of accommodation is not sustainable under the law. In continuation he said that the availability of sufficient alternate shops in possession of the respondent of his own in such town has been proved by the applicant by admissible evidence based on pleading and by placing his reliance on some reported decisions prayed for setting aside the impugned order of eviction with dismissal of the respondent's application by allowing this revision.

7. On the other hand responding the aforesaid arguments respondent's counsel Shri R. K Samaiya by referring the pleadings, recorded evidence and documents justified the impugned order of eviction saying that the same is based on sound appreciation of evidence and also is in conformity with law. So far the definition of specified landlord under Section 23-J(i) of the Act is concerned, he said that being retired government servant the respondent falls under such category of specified landlord and contrary to the language of such provision no different meaning or interpretation by categorizing the different category of the retired government servant could be given. In support of this contention he has referred the Full Bench decision of this Court in the matter of *Kunju Lal Yadu Vs. Parashram Sharma* reported in 2000(2) J.L.J 105 and said there is no force in the arguments advanced by the applicant's counsel in this regard. By supporting the findings of the impugned order on the question of bona-fide genuine requirement he said that as per requirement of Section 23-A (b) of the Act all necessary facts are pleaded in paragraph 5 of his application and there was no need to plead or put forth the account of any available vacant shops lying with him and was also not necessary for him to plead how the same are not suitable and convenient for the alleged need. The same being matter of evidence has been proved by adducing the same. The Rent Controlling Authority on appreciation of evidence after holding such alternate accommodation is not suitable for the alleged need passed the impugned order. Therefore, mere in the absence of the pleadings with respect of such alternate available accommodation the impugned order could not be set aside specially when the case is contested by the parties with full understanding about availability of such other accommodation with the respondent. According to his submission, the case law cited on behalf of the applicant in this regard is not applicable in the present circumstance. In support of this contention he also placed his reliance on some reported decisions. It was also argued that under the

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revisional jurisdiction of this Court the re-appreciation of evidence in the manner as argued by the applicant's counsel is not permissible and prayed for dismissal of this petition.

8. Having heard the learned counsel, I have carefully examined the record of Rent Controlling Authority and also perused the impugned order.

9. The relationship of the applicant and respondent as tenant and landlord is not under dispute only the question that respondent is not falling under the category of specified landlord under Section 23-J (i) of the Act is raised on behalf of the applicant.

10. On behalf of the applicant tenability of the petition is challenged on the ground that respondent is not falling under the category of specified landlord defined under Section 23-J (i) of the Act. In order to consider such question as ready reference I would like to reproduce the concerning part of such Section 23-J(i) of the Act. The same is as under:

23-J. Definition of landlord for the purpose of Chapter III-A:

(i) a retired servant of any Government including a retired member of Defence Services ; or

(ii)

(iii)

(iv)

(v)

11. It is apparent from the record that accommodation in dispute was acquired by the respondent in inheritance. As per available evidence long before the applicant was inducted in the disputed shop on behalf of the respondent by his maternal uncle and in such premises the respondent was the landlord of the premises who is initially covered by the definition of the landlord defined under Section 2(b) of the Act. It is also apparent on record that the applicant was remained as tenant in the premises when the respondent was in government service as teacher and only after his retirement from service he filed the impugned petition for eviction under Section 23-A(b) of the Act.

12. By referring the case law of the Apex Court in the matter of *Bhagwat Dutt Rishi Vs. Ram Kumar* reported in (1990) 1 SCC 324, it was argued by Shri Ravish Agrawal that according to law laid down in this case only that public servant could be deemed to be the specified landlord under Section 23-J(i) of the Act who actually leased out the disputed premises while he was a member of such service. According to him the applicant was not inducted in the premises by the respondent himself while remaining in the government service; as such he was inducted long back by the maternal uncle of the respondent when the respondent even did not

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join the service. Therefore, the respondent being not falling under the category of such specified landlord his petition was not entertainable by the RCA.

13. I have carefully read the aforesaid cited case along with the earlier cases of the Apex Court referred in it. The case of *Bhagwat Datt* (Supra) and the referred case in it in the matter of *D. N. Malhotra Vs. Kartar Singh* (1988) 1 SCC 656 was decided on the background of Section 2(hh) and 13-A of the East Punjab Urban Rent Restriction Act (In short the Punjab Act) while the another referred case in the matter of *Mrs. Winifred Ross Vs. Mrs. Ivy Fonseca* (1984) 1 SCC 288 decided on the background of Section 13-A-1 of Bombay Rents Hotel & Lodging House Rates Control Act 1947 (In short the Bombay Act.). In aforesaid both the enactment above mentioned para materia specific provision with respect of retired government officers to get eviction order against the tenant are enacted and the same were in existence. Taking into consideration the same aforesaid principle with respect of the definition of specified landlord was decided in the *Bhagwat Datt's Case* (Supra). The language of the above mentioned Sections of the Punjab Act and of the Bombay Act are para materia and taking into consideration the same in view of the proved fact that concerned premises was not leased out to the applicant by the landlord while remaining in the government service. It was held that such landlord is not falling under the category of specified landlord defined under the above mentioned provisions.

14. Long before Section 20-AA, the para materia of the aforesaid provision of Section 13-A of the Punjab Act and Section 13-A (1) of the Bombay Act was in existence under the M. P. Accommodation Control Act 1961. The same has been omitted by M. P. Accommodation Control Amended Act No.27 of 1983 w.e.f. 16.8.1983. Now after omitting Section 20AA of the Act from the statue the field of Section 23-J(i) of the Act is not governed by the law laid down by the Apex Court in the case of *Bhagwat Datt* (Supra) or the case laws referred in it. In such premises the cited case is not helping to the respondent in the case at hand.

15. The case law in the matter of *Smt. Sulochna Vs. Rajendra Singh* reported in 2008 (4) MPHT 136 (SC) cited by the applicant's counsel was decided taking into consideration the facts that some widow landlord (landlady) falling under the category of specified landlord under Section 23-J of the Act filed the eviction suit against the tenant in the Civil Court on the grounds available under Section 12-1 (a), (c) and (f) of the Act which was decreed by the trial Court only on the ground of bona-fide genuine requirement under Section 12-1 (f) of the Act, on challenging the validity of such decree on the ground of jurisdiction of the Civil Court in view of the provision of Section 23-J of the Act, in second appeal such decree was set aside by the High Court holding that she being landlord defined under Section 23-J of the Act could not have filed the suit in the Civil Court. But in appeal by the Apex Court it was held that such widow landlady is entitled to file the suit in the Civil Court as question of title of property as well as other grounds

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of eviction are also involved in the matter, and the decree was restored. In view of such distinguishable set of facts the cited case is neither applicable to the present case nor helping to the applicant.

16. Long before the aforesaid question regarding specified category of landlord defined under Section 23-J (i) is answered by the Full Bench of this Court in the matter of *Kunju Lal Yadu Vs. Parashram Sharma* reported in 2000(2) J.L.J. 105 in which it was held as under :

“13. In view of the aforesaid, it becomes bounden duty not to read the words into Act as the same is not absolutely necessary to do so. This view of ours gets support from the decision rendered in the case of the *Director General, Telecommunication v. T. N. Peethambaram*, AIR 1987 162 : (1987 Lab IC 31). Thus, in view of the categoricial, clear, unequivocal and unambiguous language used under Section 23-J of the Act, we are inclined to hold that the terms 'a retired Government servant' is only capable of one interpretation and every retired Government servant is a landlord within the meaning of the aforesaid provision. We do not intend to read it down to add qualifiers. In our considered opinion such reading down is not necessary.

17. The aforesaid Full Bench decisions was given after taking into consideration the ratio of various Supreme Court decisions including the case of “Winifred Röss” (Supra) on which the case of “*Bhagwat Datt Rishi*” (Supra) was decided. In the aforesaid Full Bench decision the note of repealed Section 20-AA of M. P. Accommodation Control Act the para materia provisions of existing Section 13-1 of aforesaid Punjab Act and Section 13-A-1 of Bombay Act was also taken and taking into consideration that such section has been repealed the aforesaid answer was given. Therefore, at present the law settled by the Full Bench of this Court is governing the field in this regard. Therefore, it is held that respondent is covered under the category of specified landlord defined under Section 23-J(i) of the Act and he has rightly filed the eviction petition before Rent Controlling Authority under Section 23-A (b) of the Act. Thus the argument of the applicant's counsel in this regard is failed.

18. Coming to examine the question regarding sustainability of the findings of the impugned order with respect of the bona-fide genuine requirement of the disputed shop to the respondent is concerned. In paragraph 6 of the respondent's application filed under Section 23-A (b) of the Act it is stated that after vacating the disputed premises by the applicant and the adjoining premises by tenant Gyasilal the respondent and his both sons want to start their business for which they did not possess any other suitable accommodation of their own in the town of Tikamgarh. They had sufficient fund and means for such business. Accordingly

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they are in bona-fide genuine need of the alleged shop. It is noted that except these pleading, in order to show bona-fide genuine requirement the averments of the available vacant accommodation of their own in such town are not pleaded. On the other hand in the written statement of the applicant by denying the aforesaid alleged need of the respondent, it is stated that the respondent is running his own business in some other shop. Besides this some other vacant shops of his own are also lying with him. In such premises the alleged need of the respondent is neither bona-fide nor genuine. In pendency of the case by amendment in paragraph 7, it is stated that a son of the respondent namely Sanjay was running his shop situated near Chhotidevi in Mukhya Bazar but because lot of competition in the business he voluntarily has closed the aforesaid shop. The same was not got vacated by his landlord but the same was voluntarily vacated by Sanjay. So far other son is concerned, it is stated that he got employment as contract teacher in the state government. Therefore, such need is not in existence. It is also stated that in pendency of the case respondent also let out a vacant shop to some person on tenancy, inspite it the respondent is still having two vacant shops with him for the alleged need.

19. At trial Gyanchand Jain (A.W.1) the respondent landlord categorically accepted in his cross examination that he has six shops in which four are situated in side of gallery and out of them three shops are occupied by the tenant while one vacant shop is lying with him. The supporting witness his son Sanjay Jain (A.W.2) more and less deposed the same in different words. On the other hand the applicant Ramkishor Soni (N.A.W.4) in paragraph five of his affidavit filed under Order 18 Rule 4 of CPC and also in last paragraph of his cross examination categorically stated that some vacant shops are still lying with the respondent. His supporting witnesses Kamal Soni (N.A.W.1), Dinesh Soni (N.A.W.2) whom one shop was given on tenancy by the respondent in pendency of the case and Manoj Soni (N.A.W.3) also deposed that respondent had some vacant shop of his own in the same building. Besides this in the map annexed with the application under Section 23-A(b) of the Act some shops are shown to be vacant as the name of occupants of such shops are not mentioned either in such map or in the aforesaid application.

20. It is apparent from the aforesaid admission of the respondent that he is in possession of some vacant alternate non-residential accommodation of his own in the same building but the same has not been stated in the pleadings of the application. In order to show the bona-fide for the alleged need the landlord is duty bound to plead the available vacant accommodation with him and also the circumstance how the same are not suitable to him for the alleged need. It is settled proposition of law that no evidence can be led on a plea not raised in the pleadings and no amount of evidence can cure defect in the pleadings as laid down by the Apex Court in the matter of *Ravinder Singh Vs. Janmeja Singh* reported in (2000)8 SCC 191.

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21. The law is well settled on this question that the landlord is obliged under the law to put forth the account of available alternate accommodation of his own and regarding unsuitability of the same for the alleged need in his pleadings. In the absence of such pleading in view of availability of such alternate accommodation with the landlord the alleged need of the landlord regarding disputed premises could not be held to be bona-fide or genuine for passing the decree of eviction against the tenant. Long back taking into consideration the provision of Section 12(1)(f) of the Act, which is para materia of Section 23-A (b) of the Act, the Apex Court in the matter of *Hasmat Rai and other Vs. Raghunath Prasad* reported in 1981 (3) SCC 103, has answered the aforesaid question in following verdict :

“10. Section 12 starts with a non obstante clause thereby curtailing the right of the landlord to seek eviction of the tenant which he might have under any other law and the right of eviction is made subject to the overriding provision of Section 12. It is thus an enabling section. In order to avail of the benefit conferred by Section 12 to seek eviction of the tenant the landlord must satisfy the essential ingredients of the section. The landlord in this case seeks eviction of the tenant under S. 12 (1)(f). He must, therefore, establish (i) that he requires bona fide possession of a building let for non-residential purpose for continuing or starting his business; and (ii) that he has no other reasonably suitable non-residential accommodation of his own in his occupation in the city or town concerned. The burden to establish both the requirements of S. 12(1)(f) is squarely on the landlord. And before an allegation of fact to obtain the relief required is permitted to be proved, the law of pleadings require that such facts have to be alleged and must be put in issue. Ordinarily, therefore, when a landlord seeks eviction under S. 12 (1)(f) the Court after satisfying itself that there are proper pleadings must frame two issue namely (i) whether the plaintiff landlord proves that he bona fide requires possession of a building let to the tenant for non-residential purpose for continuing or starting his business, and (ii) whether he proves that he has no other reasonably suitable non-residential accommodation of his own in the city or town concerned. Without elaborating we must notice a well established proposition that any amount of proof offered without pleading is generally of no relevance.”

22. On arising the occasion the aforesaid principle is also followed by this Court in the matter of *Banarsi Devi Jain Vs. M.P. Transport Company and another* reported in 2008 (2) MPLJ 155 in which it was held as under:

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"12. Coming to the question of section 12 (1) (f) of the Act regarding bonafide, genuine requirement of disputed premises to the appellant for business and godown of her son is concerned, it is apparent from the plaint that on the date of filing the suit or subsequent to it, at any point of time, the available alternate accommodation, was neither pleaded nor any application in this regard was moved by the appellant. Although in the written statement of the respondents, the plea regarding availability of alternate accommodation is taken by the respondent and on vacating the premises by the tenant of adjoining premises under execution of the decree from the tenant New Delhi-MP Transport Company, the written statement was amended and such alternate accommodation is also pleaded. In spite of such pleadings, the appellant did not take any steps to put forth the explanation and the accounts regarding unsustainability of such available accommodation by amending the suit. Although in support of the pleadings of alternate accommodation, the witnesses of the respondents did not state anything in their deposition but the witnesses of the appellant were cross - examined on this count. Jai Kumar Jain (PW-1) son of the appellant admitted in para -6 of his deposition that her mother has got possession of the adjoining premises from the other tenant. In view of the settled proposition of the law that the plaintiff like appellant is bound to built-up her case with all probabilities to get the decree she could not be benefited on the weakness of the respondent/defendant, the aforesaid admission is sufficient to draw an inference that the appellant has got adjoining alternate accommodation during pendency of the suit and as per available evidence in the lack of any evidence regarding unsuitability of such accommodation for the alleged need, the suit could not be decreed at this stage on this ground by setting aside the findings of the trial Court in this regard. My aforesaid view is fully fortified by the dictum of the Apex Court announced in the matter of *Hasmat Rai and another Vs. Ragunath Prasad*, 1981 MPLJ (SC) 610=AIR 1981 SC 1711.

23. The principle laid down in the aforesaid case law in the available facts and circumstances of the instant case as discussed above, is directly applicable and in such premises the impugned order of eviction in view of availability of alternate vacant accommodation with the respondent, could not be sustained.

24. In the case of *Duggii Veera Venkata Gopala Satyanarayana Vs. Sakala Veera Raghavaiah* reported in AIR 1987 SC 406 cited by the respondent's counsel the eviction order was challenged at the first time in revision on the ground of

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absence of the averments of facts constituting all conditions of the eviction in the plaint. Such case was contested by the tenant without taking any objection in that regard and with all understanding of the fact even in the absence of any pleading in that regard. In such a situation by holding that at the stage of revision on first time no such objection of other side could be entertained and the order of eviction was not set aside by the Apex Court. While in the present case at the initial stage in the written statement the averments regarding available alternate vacant shops with the respondent was raised before the Rent Controlling Authority inspite that the respondent has not rebutted such averments with explanation of unsuitability of such accommodation for the alleged need by way of amendment in the petition. Accordingly, in the present matter such question is not being raised at the first time in revision by the applicant, hence the cited case being distinguishable on fact and stage of taking objection is not helping to the respondent. Besides this in view of the decision of the Apex Court presided over by Hon'ble three Judges in the case of *Hasmat Rai* (Supra) in order to prove the bona-fide need the pleading with respect of available alternate vacant accommodation is necessary and in the lack of it the eviction order could not be passed against the tenant.

25. So far the argument of the respondent's counsel that all necessary ingredients as per requirement of Section 23 A-1(b) of the Act are pleaded in paragraph 6 of the application and except that the pleadings with respect of availability of other accommodation and regarding their unsuitability was not required. The same could have been and has been proved by adducing the evidence, therefore the impugned order of eviction could not be set aside is concerned it is suffice to say that in view of the principle of *Hasmat Rai's case* (Supra) such argument is not sustainable, hence the same is failed.

26. So far the case law in the matter of *Sujata Sarkar Vs. Anil Kumar Duttani* reported in 2009 (2) MPLJ 156 cited by the respondent's counsel is concerned. The concerning landlords were in need of the entire building for the medical profession and in such case concerned tenant has neither set up the case in the written statement to the effect that the landlords/ plaintiffs has some suitable alternative accommodation in the city Jabalpur nor have the witnesses been examined to that effect. Therefore considering such peculiar circumstance by allowing such appeal the eviction decree of trial Court was restored while in the present case not only the averments regarding availability of alternate accommodation with respondent is pleaded by the applicant in the written statement but the same has been proved by adducing the evidence. So in such distinguishable circumstances the cited case is not helping to the respondent.

27. Apart the case of "*Sujata*" (Supra) the case of Apex Court in the matter of *Ramnarayan Arora Vs. Asharani and others* reported in 1999(1) SCC141 referred in the "*Sujata's*" case (Supra) was also cited. Such case was decided

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taking in to consideration the requirement of residential accommodation by holding that if the pleadings are lacking or vague and if both parties have understood what was the case pleaded and put forth with reference to requirement of law and placed such material before the Court, neither party is prejudiced, the order of the High Court was affirmed while in the instant case neither the requisite pleadings in the light of "*Hasmat Rai's*" case (Supra) was pleaded nor the material to show that how the available vacant shops in possession of the respondent are unsuitable to him for the alleged need is placed on record. In the lack of such pleadings and/or such material on record the applicant could not get the sufficient opportunity to rebut such circumstance either by cross-examining the respondent and his witnesses or by producing the sufficient evidence in that regard. In such premises if the impugned order of eviction is affirmed in this revision then certainly the right of applicant to defend the case on the question of availability of alternate accommodation with the respondent would be prejudiced. Hence, the above mentioned cited case is not helping to the respondent. Although with all respect this Court did not have any dispute regarding principle laid down in the aforesaid cited case but in the available set of facts of the present case the same is not helping to the respondent.

28. So far interference in the impugned order by invoking the revisional jurisdiction of this Court under Section 23-E of the Act is concerned, in view of the aforesaid long discussion the impugned order in the lack of proper appreciation of evidence adduced by the parties as discussed in former paragraph of this judgment and also contrary to existing legal position as held by the Apex Court in the matter of *Hasmat Rai's* case (Supra) till the extent of directing the eviction of the applicant from the disputed premises is apparently perverse, hence by invoking the revisional jurisdiction of this Court, the same could be set aside at this stage.

29. Therefore, by allowing this revision, the impugned order till the extend of directing the eviction of the applicant from the disputed premises is set aside and till this extent the application of the respondent filed under Section 23-A(b) of the Act is hereby dismissed. In the facts and circumstances, there shall be no order as to the costs.

30. Revision is allowed as indicated above.

Revision allowed.

BHAVUKSHARMA Vs. SMT. ANJU SHARMA**I.L.R. [2010] M. P., 1493****MISCELLANEOUS CRIMINAL CASE****Before Mr. Justice Piyush Mathur****29 January, 2010*****BHAVUK SHARMA & ors.**

... Applicants

Vs.**SMT. ANJU SHARMA & anr.**

... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Sections 320 & 482, Penal Code, 1860, Section 498-A - Compromise - Applicants facing trial for offence punishable u/s 498-A of IPC - Parties have already compromised the matrimonial and other disputes - Held - No useful purpose would be served if criminal proceedings continue in this background against applicants u/s 498-A of IPC and S. 4 of Dowry Prohibition Act - Proceedings quashed - Application allowed. (Para 11)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 320 व 482, दण्ड संहिता, 1860, धारा 498-ए - समझौता - आवेदकों पर भा.द.सं. की धारा 498-ए के अन्तर्गत दण्डनीय अपराध का विचारण - पक्षकारों ने पूर्व में ही विवाह विषयक और अन्य विवादों में समझौता कर लिया - अभिनिर्धारित - कोई उपयोगी प्रयोजन पूरा नहीं होगा यदि इस पृष्ठभूमि में आवेदकों के विरुद्ध भा.द.सं. की धारा 498-ए और दहेज प्रतिषेध अधिनियम की धारा 4 के अन्तर्गत दण्डिक कार्यवाहियाँ जारी रखी जाती हैं - कार्यवाहियाँ अभिखण्डित - आवेदन मंजूर।

Cases referred :

(2003) 4 SCC 675, (2005) 3 SCC 299, (2005) 3 SCC 302, (2008) 9 SCC 677, 2005(2) MPLJ 502, 2009 (77) All India Cases 610 (M.P.).

: *Neeraj Kalbhore*, for the applicants.

Manjula Goswami, for the non-applicant No.1.

Mukund Bharadwaj, P.P., for the non-applicant No.2/State.

ORDER

PIYUSH MATHUR, J. :- This petition under Section 482 of Cr.P.C has been filed in relation to an Order passed on Date 23.12.2009 by the Judicial Magistrate First Class, Gwalior in Criminal Case No. 6902/2007 pending before the Court, which arose from Crime No. 15/2007 registered by the Police Station (Mahila Thana), Padav under Section 498-A IPC read with Section 4 of the Dowry Prohibition Act.

2. The Petitioners Bhavuk Sharma, Smt. Mohini Sharma and Shri Mahesh Chandra Sharma are facing a Criminal Trial before the Competent Court in relation to registration of the offence against them, who had entered into a compromise with the complainant Smt. Anju Sharma (who was married with the petitioner Bhavuk Sharma on Date 07.07.2003) that their matrimonial dispute and other

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disputes have been mutually compromised. An application was moved under Section 320 of Cr.P.C. before the JMFC in the criminal case No. 6902/2007, whereby the petitioners have prayed to the Court, that the offence registered under Section 498-A IPC read with Section 4 of Dowry Prohibition Act may be compounded, however, the Learned Court below, while finding the offence under Section 498-A to be non-compoundable had dismissed the application vide Order Dated 23.12.2009.

3. The petitioners have placed on record a copy of the Judgment Dated 06.01.2010 passed in Case No. 38/2008/Hindu Marriage Act, by the IVth Additional District Judge, Gwalior, where on the basis of the compromise, entered into between the husband and wife, a decree of divorce has been granted in terms of Section 13-B of Hindu Marriage Act, wherein the fact of complete compromise of Civil and Criminal Liability was disclosed before the Family Court.

4. Petitioners have also submitted an independent application herein containing the terms of compromise, in terms of Section 302(2) of Cr.P.C by subscribing their affidavits to substantiate the fact of mutual compromise, which demonstrates that the civil and criminal dispute subsisting initially between the husband and the wife have been compromised and no dispute exists between them. The judgment of family Court, whereby the decree of divorce had been granted to the husband and the wife also disclose the fact of payment of Rs. 8.50 Lacs to the wife as also to the daughter, whereafter no dispute subsists between the parties.

5. Shri Neeraj Kalgore, learned counsel for the petitioner, Smt. Manjula Goswami, learned counsel for the respondent No.1 and Shri Mukund Bhardwaj, appearing on behalf of State/respondent No.2 have made their submissions about the scope of the powers of the High Court in ordering for compounding of the offence as also for quashment of the proceedings before the Criminal Court, in view of the compromise arrived at between the Litigant Parties. I have carefully examined the documents placed on record and the submissions advanced on behalf of the parties.

6. The Hon'ble Supreme Court while examining the scope of the inherent powers available under Section 482 of Cr.P.C, in relation to the compounding of the matrimonial dispute has observed in the case of *B.S.Joshi Vs. State of Haryana* reported in 2003(4) SCC 675 that the matrimonial matters could be compromised with a view to encourage genuine settlements of the disputes. The relevant paragraphs 11 and 14 are quoted herein below;

"11. In *Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angrè* it was held that while exercising inherent power of quashing under Section 482, it is for the High Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest

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of justice to permit a prosecution to continue. Where, in the opinion of the court, chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may, while taking into consideration the special facts of a case, also quash the proceedings.

12. The special features in such matrimonial matters are evident. It becomes the duty of the court to encourage genuine settlements of matrimonial disputes.

13. The observations made by this Court, though in a slightly different context, in *G.V. Rao v. L.H.V. Prasad* are very apt for determining the approach required to be kept in view in a matrimonial dispute by the courts. It was said that there has been an outburst of matrimonial disputes in recent times. Marriage is a sacred ceremony, the main purpose of which is to enable the young couple to settle down in life and live peacefully. But little matrimonial skirmishes suddenly erupt which often assume serious proportions resulting in commission of heinous crimes in which elders of the family are also involved with the result that those who could have counselled and brought about rapprochement are rendered helpless on their being arrayed as accused in the criminal case. There are many other reasons which need not be mentioned here for not encouraging matrimonial litigation so that the parties may ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law where it takes years and years to conclude and in that process the parties lose their "young" days in chasing their "cases" in different courts.

14. There is no doubt that the object of introducing Chapter XX-A containing Section 498-A in the Indian Penal Code was to prevent torture to a woman by her husband or by relatives of her husband. Section 498-A was added with a view to punishing a husband and his relatives who harass or torture the wife to coerce her or her relatives to satisfy unlawful demands of dowry. The hypertechnical view would be counterproductive and would act against interests of women and against the object for which this provision was added. There is every likelihood that non-exercise of inherent power to quash the proceedings to meet the ends of justice would prevent women from settling earlier. That is not the object of Chapter XX-A of the Indian Penal Code.

15. In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings

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or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code.

7. The Hon'ble Supreme Court in the case of *Ruchi Agarwal v. Amit Kumar Agrawal*, (2005) 3 SCC 299 has further considered the scope of the powers available to the Court under Section 482 of Cr.P.C as also power available to the Supreme Court under Article 14 of the Constitution of India in relation to the quashment of the proceedings regarding matrimonial dispute of the Litigating Parties, where the Supreme Court has found that for doing complete justice, the criminal proceedings could be quashed in the event of compromise being arrived at between the parties. The relevant Paragraphs 5 to 9 are quoted hereinbelow for ready reference ;

"5. In the compromise petition, referred to hereinabove, both the parties had agreed to withdraw all the civil and criminal cases filed by each against the other. It is pursuant to this compromise, the above divorce as sought for by the appellant was granted by the husband and pursuant to the said compromise deed the appellant also withdrew Criminal Case No. 63 of 2002 on the file of the Family Court, Nainital which was a complaint filed under Section 125 of the Criminal Procedure Code for maintenance. It is on the basis of the submission made on behalf of the appellant and on the basis of the terms of the compromise, the said case came to be dismissed. However, so far as the complaint under Sections 498-A, 323 and 506 IPC and under Sections 3 and 4 of the Dowry Prohibition Act is concerned, which is the subject-matter of this appeal, the appellant did not take any steps to withdraw the same. It is in those circumstances, a quashing petition was filed before the High Court which came to be partially allowed on the ground of the territorial jurisdiction, against the said order the appellant has preferred this appeal.

6. From the above-narrated facts, it is clear that in the compromise petition filed before the Family Court, the appellant admitted that she has received stridhan and maintenance in lump sum and that she will not be entitled to maintenance of any kind in future. She also undertook to withdraw all proceedings, civil and criminal, filed and initiated by her against the respondents within one month of the compromise deed, which included the complaint under Sections 498-A, 323 and 506 IPC and under Sections 3 and 4 of the Dowry Prohibition Act from which complaint this appeal arises. In the said compromise, the respondent husband agreed to withdraw his petition filed under Section 9 of the Hindu Marriage

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Act pending before the Senior Judge, Civil Division, Rampur and also agreed to give a consent divorce as sought for by the appellant.

7. It is based on the said compromise the appellant obtained a divorce as desired by her under Section 13-B of the Hindu Marriage Act and in partial compliance with the terms of the compromise she withdrew the criminal case filed under Section 125 of the Criminal Procedure Code but for reasons better known to her she did not withdraw that complaint from which this appeal arises. That apart after the order of the High Court quashing the said complaint on the ground of territorial jurisdiction, she has chosen to file this appeal. It is in this background, we will have to appreciate the merits of this appeal.

8. Learned counsel appearing for the appellant, however, contended that though the appellant had signed the compromise deed with the abovementioned terms in it, the same was obtained by the respondent husband and his family under threat and coercion and in fact she did not receive lump. sum maintenance and her stridhan properties. We find it extremely difficult to accept this argument in the background of the fact that pursuant to the compromise deed the respondent husband has given her a consent divorce which she wanted, thus had performed his part of the obligation under the compromise deed. Even the appellant partially performed her part of the obligations by withdrawing her criminal complaint filed under Section 125. It is true that she had made a complaint in writing to the Family Court where Section 125 CrPC proceedings were pending that the compromise deed was filed under coercion but she withdrew the same and gave a statement before the said court affirming the terms of the compromise which statement was recorded by the Family Court and the proceedings were dropped and a divorce was obtained. Therefore, we are of the opinion that the appellant having received the relief she wanted without contest on the basis of the terms of the compromise, we cannot now accept the argument of the learned counsel for the appellant. In our opinion, the conduct of the appellant indicates that the criminal complaint from which this appeal arises was filed by the wife only to harass the respondents.

9. In view of the abovesaid subsequent events and the conduct of the appellant, it would be an abuse of the process of the court if the criminal proceedings from which this appeal arises is allowed to continue. Therefore, we are of the considered opinion to do

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complete justice, we should while dismissing this appeal also quash the proceedings arising from criminal case Cr. No. 224 of 2003 registered in Police Station Bilaspur (District Rampur) filed under Sections 498-A, 323 and 506 IPC and under Sections 3 and 4 of the Dowry Prohibition Act against the respondents herein. It is ordered accordingly. The appeal is disposed of."

8. In yet another judgment reported as 2005 (3) SCC 302, The Supreme Court while considering the Scope of the power of quashment of FIR in a criminal dispute has found that the continuance of the proceedings before Criminal court, in the event of the Agreement of the parties would be an abuse of the process of the Court. The relevant Paragraphs 12 to 16 are quoted hereinbelow;

"12. In view of the fact that the settlement was arrived at the intervention of a judicial officer of the rank of the Additional Sessions Judge, we are of the opinion, the contention of the first respondent herein to the effect that she was not aware of the contents thereof and the said agreement as also the affidavits which were got signed by her by misrepresentation of facts must be rejected. In the facts and circumstances of this case, we have no doubt in our mind that the denial of execution of the said deed of settlement is an afterthought on the part of Respondent 1 herein.

13. Ex facie the settlement between the parties appears to be genuine. If the contention of the first respondent herein is to be accepted, she would not have accepted the sum of Rs 2,25,000 and in any event, she could have filed an appropriate application in that behalf before the court of S.N. Gupta, Additional Sessions Judge, Delhi. What was least expected of her was that she would return the said sum of Rs 2,25,000 to the appellants herein.

14. Section 406 is a compoundable offence with the permission of the Court. It is true that Section 498-A IPC is not compoundable.

15. This Court in *Ruchi Agarwal v. Amit Kumar Agrawal* in almost a similar situation has quashed a criminal proceeding against the husband, stating: (SCC pp. 301-02, paras 8-9)

"8. 'Therefore, we are of the opinion that the appellant having received the relief she wanted without contest on the basis of the terms of the compromise, we cannot now accept the argument of the learned counsel for the appellant. In our opinion, the conduct of the appellant indicates that the criminal complaint from which this appeal arises was filed by the wife only to harass the respondents.

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9. In view of the abovesaid subsequent events and the conduct of the appellant, it would be an abuse of the process of the court if the criminal proceedings from which this appeal arises is allowed to continue."

16. In view of the conduct of the first respondent in entering into the aforementioned settlement, the continuance of the criminal proceeding pending against the appellants, in our opinion, in this case also, would be an abuse of the process of the court. Respondent 1, however, would be entitled to withdraw the sum of Rs 50,000 which has been deposited in the court. We, therefore, in exercise of our jurisdiction under Article 142 of the Constitution direct that the impugned judgment be set aside. The first information report lodged against the appellants is quashed. The appeal is allowed. However, this order should not be treated as a precedent."

9. It would not be out of place to observe that the initial judgment of the Supreme Court passed in the case of *B.S. Joshi* (supra) was pressed into service in a different context before the Supreme Court in the case reported as 2008 (9) Supreme Court cases, 677 *Nikhil Merchant Vs. Central Bureau of Counsel and another*, where the scope of detrimentation of criminal liability in Commercial Transactions was analyzed, in relation to the fact of compromise of a dispute in criminal matters, while taking assistance of the case of *B.N. Joshi* (Supra), for impressing upon the Court, to allow the compounding of the offence, on the strength of the compromise and the Supreme Court has analysed this aspect in Paragraphs 30 and 31 of its judgment by finding that the criminal proceedings could be quashed in the event of compromise. The relevant Paragraphs are quoted herein below 30 and 31 ;

"30. In the instant case, the disputes between the Company and the Bank have been set at rest on the basis of the compromise arrived at by them whereunder the dues of the Bank have been cleared and the Bank does not appear to have any further claim against the Company. What, however, remains is the fact that certain documents were alleged to have been created by the appellant herein in order to avail of credit facilities beyond the limit to which the Company was entitled. The dispute involved herein has overtones of a civil dispute with certain criminal facets. The question which is required to be answered in this case is whether the power which independently lies with this Court to quash the criminal proceedings pursuant to the compromise arrived at, should at all be exercised?

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31. On an overall view of the facts as indicated hereinabove and keeping in mind the decision of this Court in *B.S. Joshi case* and the compromise arrived at between the Company and the Bank as also Clause 11 of the consent terms filed in the suit filed by the Bank, we are satisfied that this is a fit case where technicality should not be allowed to stand in the way in the quashing of the criminal proceedings, since, in our view, the continuance of the same after the compromise arrived at between the parties would be a futile exercise.

32. We, therefore, set aside the order passed by the High Court dismissing the petitioner's Revision Application No. 49 of 2003 in Special Case No. 80 of 1998 and quash the proceedings against the appellant. The appeal is accordingly allowed."

10. It would be further needful to mention that based upon the Judgment of the Supreme Court in case of *B.S. Joshi* (Supra), the Two Single Judges of M.P. High Court have also permitted compounding of the offence, as also the quashment of the criminal proceedings, in the event of compromise between the Husband and Wife. The First Judgment reported as 2005 (2) MPLJ 502 *Hemraj vs. State of M.P.* was a case where the offence under Sections 323 and 498 of IPC was found to be committed by the Husband, for which he was convicted and the Criminal Revision was pending before the High Court, where the matter was compromised and this Court, while exercising the inherent powers under Section 482 Cr.P.C. had quashed the proceedings in Revision Petition. Similar was the case, where another Single Judge of this Court in the case of *Ankush Golecha v. State of M.P.*, 2009 77 All India Cases 610 (M.P.) had quashed the proceedings of compromise executed between the husband and the wife.

11. In the present case also not only the Husband and Wife, but the father and mother of the petitioner Bhavuk Sharma (Husband) have entered into a compromise and respondent Smt. Anju Sharma (Wife) had subscribed to the terms of the compromise in her affidavit, therefore, this Court feels satisfied that no useful purpose would be served if the criminal proceedings continue in this background against the present petitioners under Section 498-A of IPC and Section 4 of the Dowry Prohibition Act, before the Criminal Court in the event of settlement of matrimonial dispute.

12. The identity of the Husband and Wife, as also the other petitioners have been properly certified by their respective Counsels appearing before this Court and terms of the affidavit have also been verified by the Husband and Wife, while remaining present before this Court and stating about the contents of the affidavit.

13. Therefore, in view of the judgment of the Supreme Court as also in view of the compromise entered into between both the parties, this Court has no hesitation

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in compounding the offence registered against the present petitioners at Police Station, Mahila Thana, Padav in Crime No. 15/07 under Section 498-A and Section 4 of the Dowry Prohibition Act as also the Criminal Case No. 6907/07, pending before the Judicial Magistrate First Class, Gwalior while exercising power under Section 482 of Cr.P.C for quashing the criminal proceedings pending against the petitioners.

14. Therefore, this petition is allowed and the proceedings pending against the Petitioners before the Criminal Court in Case No.6907/2007 are quashed.

Petition allowed.

I.L.R. [2010] M. P., 1501
MISCELLANEOUS CRIMINAL CASE
Before Mrs. Justice Indrani Datta
 5 February, 2010*

DASHRATH SINGH

... Applicant

Vs.

BANTI & anr.

... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Sections 439 & 439(2)
- Cancellation of bail - Grounds - Cancellation of bail granted to N.A. I sought on the ground that bail of co-accused already rejected - Held - Rejection of bail in a non-bailable case at initial stage and cancellation of bail already granted, have to be considered and dealt with on different basis - Very cogent and overwhelming circumstances are necessary for cancellation of bail.
 (Paras 17 to 19)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 439 व 439(2) - जमानत का रद्दकरण - आधार - अनावेदक क्रमांक 1 को दी गई जमानत का रद्दकरण इस आधार पर चाहा गया कि सह-अभियुक्त की जमानत पहले से नामंजूर की जा चुकी है - अभिनिर्धारित - गैर-जमानतीय मामले में प्रारम्भिक प्रक्रम पर जमानत की नामंजूरी और पूर्व में प्रदत्त जमानत के रद्दकरण पर विभिन्न आधारों पर विचार और व्यवहार किया जाना चाहिए - जमानत के रद्दकरण के लिए अत्यंत तर्कपूर्ण और दुर्दमनीय परिस्थितियाँ आवश्यक हैं।

Cases referred :

2007(3) CCSC 1566 (SC), 2007(3) CCSC 1604 (SC), 1995 SCC (Cri) 237, (1992) 4 SCC 272.

A.S. Bhadoriya, for the applicant/complainant.

Arun Barua, for the non-applicant No.1.

B.B.Sharma, P.L., for the non-applicant No.2/State.

DASHRATH SINGH Vs. BANTI**ORDER**

INDRANI DATTA, J. :- Heard the matter finally with the consent of parties.

2. Perused the case diary and documents on record.
3. Complainant / applicant has filed this application under Section 439(2) of CrPC for cancellation of bail granted to respondent No.1 Banti alias Jitendra Gurjar in M.Cr.C. No.4228/09 vide order dated 1.7.09.
4. Respondent Banti alias Jitendra Gurjar was arrested by Police Station University in connection with Crime No.448/08 for offence punishable under Section 302, 120-B, 307, 294, 147, 148, 149 IPC and Section 27 and 30 Arms Act.
5. As per prosecution case, respondent No.1 Banti alias Jitendra Gurjar and co-accused caused fire arm injuries to deceased Ramkhiladi and killed him.
6. It is contended on behalf of the complainant / applicant that bail granted to respondent Banti is to be cancelled on the following grounds:
 - (1) bail was obtained by suppressing material facts;
 - (2) respondent Banti is threatening complainant and his family members; and
 - (3) application for grant of bail of co-accused Betu alias Virendra Sharma has been rejected on 21.7.09 in M.Cr.C. No.4617/09.
7. Per contra, learned counsel for respondent No.1 while vehemently opposing the application has argued that no material fact has been suppressed and the respondent No.1 was enlarged on bail after considering the facts and circumstances of the case. It is further submitted that there is no material to show that respondent No.1 is threatening complainant and his family members. It is further submitted that bail of Betu was rejected considering the facts and circumstances of the case and allegation made against him. On that ground bail of present respondent cannot be cancelled.
8. Learned counsel for complainant/applicant drew this Court's attention to a citation in *Deepak Singchi v. State of Rajasthan and another*, 2007 (3) CCSC 1566 (SC) in which accused was charged of having committed serious offence and bail was granted by High Court and bail was set aside and matter was remitted to High Court for fresh consideration of bail application. The aforesaid canon is distinguishable and does not apply in the case at hand.
9. Furthermore, learned counsel has relied upon a citation in *Sudha Verma v. State of U.P. And another* 2007(3) CCSC 1604 (SC) in which Apex Court has highlighted the factors which are to be considered while granting bail, which are as follows:-
 - (1) the nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence;

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(2) Reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(3) Prima facie satisfaction of the Court in support of the charge.

10. In that case bail was granted to respondent on the ground that co-accused has already released on bail by Sessions Judge and at the most offence was one under Section 304 IPC and not under Section 302 IPC. It was held that High Court has not indicated as to what is the relevance of bail to co-accused granted to co-accused ignoring that the respondent was the alleged assailant who fired the gun and killed the deceased. Considering these grounds matter was remitted to High Court to consider the application afresh.

11. So far as this citation is concerned, facts of the present case are totally distinguishable. So applicant / complainant does not derive any benefit on the basis of these citations.

12. On the other hand, contention of learned counsel for respondent is that material facts are not suppressed at the time of obtaining bail is concerned, as per FIR and statement of witnesses recorded under Section 161 CrPC specific allegations is made against co-accused Lakhān that he had fired on the head of deceased Ramkhiladi, who died in the incidence. There is omnibus allegation of all the witnesses that respondent and other co-accused also fired gunshots at deceased. So it cannot be said that any material fact has been suppressed while obtaining the bail. Contention of learned counsel for respondent with this respect cannot be ignored.

13. Next contention raised by learned counsel for complainant that present respondent is threatening complainant / applicant and his family members is concerned, learned counsel for complainant drew this Courts attention to two complaints made by complainant; one to S.P. Gwalior on 5.5.09 and second complaint to President, C.J. Collector, Governor on 12.6.09 in which it is mentioned that complainant's brother was killed at the instance of MLA Rakesh Shukla and he is eyewitness of the case and necessary police protection may be provided to him and his family members as he has been threatened by accused persons. Further, it is submitted on filing a writ petition bearing W.P. No.2392/09 learned Writ Court directed that till further order, necessary police protection be provided to petitioner (complainant/applicant herein) and his family members as and when required, therefore this is a cogent ground for cancellation of respondent's bail.

14. On the contrary, Learned counsel for respondent No.1 pointed out that alleged threats are not given by respondent which is evident from complaints dated 5.5.09 and 12.6.09 because at that juncture he was in jail and he was enlarged on bail only on 1.7.09. Therefore, there arises no question of threatening the complainant or his family members. It is further contended by him that bail of co-accused Betu alias Virendra Sharma has been rejected after considering the

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allegation that Betu alias Virendra and other co-accused who are already released on bail as well as absconding accused are threatening the complainant and his family members.

15. It is further submitted by counsel for respondent No.1 that as many as 22 criminal cases are registered against the complainant. He is a proclaimed accused and reward has been levied on him. Out of the aforesaid 22 cases, two criminal cases bearing Crime No.276/09 and 289/09 have been recently registered against complainant under Sections 307/34, 120(B) IPC and Section 25/27 Arms Act and Section 11/13 MPDVPK Act and Section 302, 307, 324, 147, 148, 149 IPC respectively, and therefore there is no likelihood of his appearing in court to lead evidence in present case, which will definitely prolong the proceedings and there would be no possibility of early trial. Thus, no ground for cancellation of bail is made out.

16. Learned counsel for respondent placed reliance in *Dolat Ram and Others v. State of Haryana* 1995 SCC (Cri.) 237 in which factors to be taken into consideration while dealing with cancellation of bail have been enshrined, which are as under :-

"Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail already granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial."

17. Furthermore learned counsel for respondent also drew this court's attention to a Full Bench decision in *Aslam Babalal Desai v. State of Maharashtra*, (1992) 4 SCC 272 wherein the Apex Court has held as follows:-

"Bail granted under Section 437(1) or (2) or Section 439(1) can be cancelled under Section 437(5) and 439(2) where (i) the accused misuses his liberty by indulging in similar criminal activity, (ii)

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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.