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Criminal Procedure Code, 1973 (2 of 1974), Section 174 - See - *Penal Code 1860, Sections 306 & 498-A,* [Shriram v. State of M.P.] ...665

Criminal Procedure Code, 1973 (2 of 1974), Section 197 - *Acts not done in discharge of official duty - Umbrella of S. 197 Cr.P.C. is not available.* [O.P. Yadav v. State of M.P.] ...745

Criminal Procedure Code, 1973 (2 of 1974), Section 204 - *There cannot be any straitjacket formula for issuance of warrants but as a general rule, unless an accused is charged with the commission of an offence of a*

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 91 – आरोप की विरचना के प्रक्रम पर दस्तावेजों का बुलाया जाना – इसे विधि की आत्यंतिक प्रतिपादना होना नही कहा जा सकता कि किसी भी परिस्थिति में न्यायालय प्रतिरक्षा द्वारा आरोप विरचना के समय पेश सामग्री पर विचार नही कर सकता। (मुन्ना लाल वि. म.प्र. राज्य) ...703

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 91 – आरोप की विरचना के प्रक्रम पर दस्तावेजों का बुलाया जाना – विरल और आपवादिक मामले हो सकते हैं जहाँ विचारण न्यायालय को कथित प्रतिरक्षा सामग्री यह प्रदर्शित करने कि अभियोजन कथा पूर्णतः अर्थहीन या असंगत है, दर्शायी जा सकती है और आरोप विरचना के समय न्यायालय द्वारा प्रतिरक्षा सामग्री पर विचार किया जा सकता है – विचारण न्यायालय को निदेश दिया गया कि धारा 91 के अन्तर्गत आवेदन ग्रहण करे और आरोप की विरचना के समय उन दस्तावेजों पर विचार की जाँच करे जिन्हें समनित करना याची द्वारा चाहा गया है। (मुन्ना लाल वि. म.प्र. राज्य) ...703

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 133 व 145 – न्यूसेंस – धारा 145 के अन्तर्गत कार्यवाहियों में, अभिलेख पर उपलब्ध सामग्री लोक न्यूसेंस के अस्तित्व को प्रकट करती है – एसडीएम धारा 133 के अन्तर्गत कार्यवाही करने से विवर्जित नही है – आवेदन खारिज। (शिवराज सिंह वि. म.प्र.राज्य) ...742

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – अन्वेषण का निदेश देने की शक्ति – मजिस्ट्रेट परिवाद में कथित अभिकथनों का अन्वेषण करने का आदेश पारित करने के लिए सशक्त है यद्यपि यह सेशन न्यायालय द्वारा विचारणीय हो। (अरूण कुमार जैन वि. दिनेश त्रिपाठी) ...707

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – अन्वेषण का निदेश देने की शक्ति – अन्वेषण करने का आदेश पारित करते समय, मजिस्ट्रेट को अभिकथनों के बारे में अपने मस्तिष्क का प्रयोग करना चाहिए – यदि द.प्र.सं. की धारा 156(3) के अन्तर्गत निदेश के प्रक्रम पर भी मस्तिष्क का प्रयोग किये बिना आदेश पारित किया जाता है तो यह अपास्त किया जा सकेगा। (अरूण कुमार जैन वि. दिनेश त्रिपाठी) ...707

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – कब अनुसंधान करने का निदेश नही दिया जा सकता – कोई क्षति कारित करने के किसी विनिर्दिष्ट अभिकथन या वरिष्ठ अधिकारियों के विरुद्ध कोई भूमिका समनुदिष्ट करने के अभाव में मात्र स्पष्ट कथनों पर संबंधित एस.एच.ओ. से उनके विरुद्ध कथित घटना का अन्वेषण कराने का निदेश जारी करना निदेशित नही किया जा सकता। (अरूण कुमार जैन वि. दिनेश त्रिपाठी) ...707

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 174 – देखें –दण्ड संहिता, 1860, धाराएँ 306 व 498–ए. (श्रीराम वि. म.प्र. राज्य) ...665

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 197 – कार्य पदीय कर्तव्यों के निर्वहन में नही किये गये – द.प्र.सं. की धारा 197 की सुरक्षा उपलब्ध नही है। (ओ.पी. यादव वि. म.प्र. राज्य) ...745

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 204 – वारण्ट जारी करने के लिए कोई स्ट्रेटजेकेट फॉर्मूला नही हो सकता है किन्तु सामान्य नियम यह हो सकता है कि जब तक कोई अभियुक्त किसी जघन्य अपराध के किये जाने के आरोप से आरोपित नही किया गया हो और यह

heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided. [O.P. Yadav v. State of M.P.] ...745

Criminal Procedure Code, 1973 (2 of 1974), Section 222 - ***When offence proved included in offence charged*** - *When it is not clear or doubtful as to what offence is committed or made out, then the Court possess the power to convict a person in relation to a minor offence established from the evidence brought on record.* [Mazboot Singh v. State of M.P.] ...674

Criminal Procedure Code, 1973 (2 of 1974), Section 319 - *Evidence - On the basis of examination-in-chief of witnesses, a person can be summoned u/s 319.* [Rakesh Ranpuria v. State of M.P.] ...749

Criminal Procedure Code, 1973 (2 of 1974), Section 319 - ***Power to proceed against other persons appearing to be guilty of offence*** - *Court is empowered to proceed against any person not shown or mentioned as accused if it appears from evidence that such person has committed an offence - This power is conferred on Court to do real justice.* [Rakesh Ranpuria v. State of M.P.] ...749

Criminal Procedure Code, 1973 (2 of 1974), Section 407 - ***Transfer of case*** - *Applicants being prosecuted u/ss. 122, 124-A, 153-A of IPC, u/ss. 3 & 13 of Unlawful Activities (Prevention) Act, 1967 and u/ss. 25 & 27 of Arms Act, 1959 at Dhar - Counsel for applicants from Ujjain who appeared before Court was beaten and threatened by some of members of Bar Association and Political Party - News also published in newspapers under heading "Dhar Mein Simi Sarganaon Ke Vakil Ko Phir Peeta" - CD also shows that Advocate was illtreated and beaten - Held - For administrative convenience and also in the interest of fair and impartial justice the matter is transferred from Dhar to Indore - Application allowed.* [Ansar v. State of MP] ...753

Criminal Procedure Code, 1973 (2 of 1974), Sections 438 & 439 - ***Regular bail - Custody*** - *Even though, an application for grant of regular bail on behalf of accused enjoying liberty of release on anticipatory bail may be presented through a Counsel, yet, it can be heard and decided only when accused is in custody.* [Sonu @ Shahazad v. State of M.P.] ...758

Criminal Procedure Code, 1973 (2 of 1974), Sections 438 & 439 - ***Regular bail - Custody - Interim bail*** - *Court hearing regular bail application has inherent powers to grant interim bail pending its final disposal - If application for grant of interim bail is made on the ground of non-availability of case diary, the Court should hear and decide interim bail application on the same day.* [Sonu @ Shahazad v. State of M.P.] ...758

Criminal Procedure Code, 1973 (2 of 1974), Sections 438 & 439 - ***Regular bail - Custody*** - *In view of precondition of custody no adjournment should be asked by Public Prosecutor on the ground of non-availability of*

भय हो कि वह साक्ष्य को प्रभावित या नष्ट कर सकता है या विधि की प्रक्रिया से बच निकल सकता है तब तक गैर जमानतीय वारण्ट जारी किये जाने से बचना चाहिए। (ओ.पी यादव वि. म.प्र. राज्य) ...745

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 222 – जब साबित अपराध आरोपित अपराध में सम्मिलित हो – जब यह स्पष्ट न हो या शंकास्पद हो कि कौन सा अपराध किया गया है, तब न्यायालय को, अभिलेख पर लायी गयी साक्ष्य से साबित किसी छोटे अपराध के सम्बन्ध में किसी व्यक्ति को दोषसिद्ध करने की शक्ति है। (मजबूत सिंह वि. म.प्र. राज्य) ...674

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 – साक्ष्य – साक्षियों की मुख्य परीक्षा के आधार पर धारा 319 के अन्तर्गत किसी व्यक्ति को समन किया जा सकता है। (राकेश रनपुरिया वि. म.प्र. राज्य) ...749

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 – अपराध का दोषी प्रतीत होने वाले अन्य व्यक्ति के विरुद्ध कार्यवाही करने की शक्ति – न्यायालय किसी व्यक्ति के विरुद्ध कार्यवाही करने के लिए सशक्त है जो अभियुक्त के रूप में दर्शित या उल्लिखित नही किया गया है यदि साक्ष्य से यह प्रतीत होता हो कि ऐसे व्यक्ति ने अपराध किया है – न्यायालय को यह शक्ति वास्तविक न्याय करने के लिए प्रदत्त की गई है। (राकेश रनपुरिया वि. म.प्र. राज्य) ...749

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 407 – मामले का अंतरण – आवेदकों को भा.द.सं. की धारा 122, 124–ए, 153–ए, विधिविरुद्ध क्रियाकलाप (निवारण) अधिनियम, 1967 की धारा 3 व 13 तथा आयुध अधिनियम, 1959 की धारा 25 व 27 के अन्तर्गत धार में अभियोजित किया गया – आवेदकों के अधिवक्ता उज्जैन के थे जो न्यायालय के समक्ष उपसंजात हुए और उन्हें बार एसोसियेशन और राजनैतिक दल के कुछ सदस्यों द्वारा पीटा गया और धमकी दी गई – समाचार पत्रों में "धार मे सिमी सरगनाओं के वकील को फिर पीटा" शीर्षक से समाचार भी प्रकाशित किया गया – सी.डी. भी यह दर्शाती है कि अधिवक्ता के साथ दुर्व्यवहार किया गया और पीटा गया – अभिनिर्धारित – प्रशासनिक सुविधा के लिए और ऋजु और निष्पक्ष न्याय के हित में मामला धार से इन्दौर अंतरित किया गया – अपील मंजूर। (अंसार वि. म.प्र. राज्य) ...753

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 438 व 439 – नियमित जमानत – अभिरक्षा – यद्यपि अग्रिम जमानत पर छोड़ने की स्वतंत्रता का उपभोग कर रहे अभियुक्त की ओर से नियमित जमानत प्रदान करने के लिए आवेदन किसी अधिवक्ता के माध्यम से प्रस्तुत किया जा सकता है, तथापि इसे केवल तब सुना और विनिश्चित किया जा सकता है जब अभियुक्त अभिरक्षा में हो। (सोनू उर्फ शहजाद वि. म.प्र. राज्य) ...758

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 438 व 439 – नियमित जमानत – अभिरक्षा – अंतरिम जमानत – नियमित जमानत के आवेदन की सुनवाई कर रहा न्यायालय उसका अंतिम निपटारा लम्बित रहते अंतरिम जमानत प्रदान करने की अन्तर्निहित शक्तियाँ रखता है – यदि केस डायरी की अनुपलब्धता के आधार पर अंतरिम जमानत प्रदान करने के लिए आवेदन किया जाता है तो न्यायालय को अंतरिम जमानत का आवेदन उसी दिन सुना और विनिश्चित किया जाना चाहिए। (सोनू उर्फ शहजाद वि. म.प्र. राज्य) ...758

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 438 व 439 – नियमित जमानत – अभिरक्षा – अभिरक्षा की पूर्ववर्ती शर्त को देखते हुए लोक अभियोजक द्वारा केस डायरी की अनुपलब्धता के

case diary - Accused may also disclose the date of his proposed surrender to custody at least 3 days in advance. [Sonu @ Shahazad v. State of M.P.]...758

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - *Complaint - Quashed without petition - Four police officers filed petition seeking quashment of the private complaint and the direction to investigate against them - Addl.S.P. has not filed such petition - Held - There is no ground to investigate against the police officers including the Addl.S.P. - Invoking the inherent powers with a view to prevent the abuse of process of Court or to otherwise secure the ends of justice the complaint filed against the Addl.S.P. also quashed.* [Arun Kumar Jain v. Dinesh Tripathi] ...707

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - *Quashment of F.I.R. registered against the Advocate - Whether a criminal case can be registered against an Advocate who had filed a civil suit on the instructions of his client - Held - FIR lodged by complainant against her husband and one Girija Devi that both of them made a conspiracy and filed a civil suit u/s 9 of Hindu Marriage Act, 1955 and obtained forged decree from Court - No allegation and iota of evidence that Advocate was also involved in conspiracy - Registration of case against Advocate illegal and erroneous - Petition allowed.* [Mahesh Singh Tomar v. State of M.P.] ...*9

Criminal Trial - *Principle of vicarious liability having no application in a prosecution which is to be lodged against superior officers.* [Arun Kumar Jain v. Dinesh Tripathi] ...707

Easements Act (5 of 1882), Section 52 - *License - Ingredients - License is personal to grantor and licensee (grantee) - It is not annexed to the property in respect of which it is enjoyed and it is neither transferable nor heritable - It creates no duties and obligations upon the person making the grant - It also does not create an interest in the property.* [R.V. Infrastructure Engineers Pvt. Ltd. v. State of MP] ...608

Electricity Supply Code, M.P. 2004, Section 4.17 - *Application for new electric connection by house purchaser - Arrears of electricity due or other dues with regard to the same premises against erstwhile owner - Held - House purchaser could not get any benefit if the arrears of electric connection be not paid - Petition dismissed.* [Mahila Kamla Dubey v. M.P. Vidyut Mandal, Gwalior] ...598

Essential Commodities Act (10 of 1955), Sections 7(1)(a)(ii) & 10-A, Criminal Procedue Code, 1973, First Schedule, Appendix "A" r/w S. 2(a) - *Classification of offences against other laws - Under the E.C. (Special Provisions) Act (18 of 1981), the offences were made non-bailable by amending S. 10-A of E.C. Act - Now, the Act, 1981 is not in force and the amendment stands deleted automatically - Therefore, the provisions of Cr.P.C. are applicable - As per First Schedule, Appendix "A" r/w S. 2(a) of Cr.P.C.,*

आधार पर कोई स्थगन नही माँगा जाना चाहिए – अभियुक्त भी अभिरक्षा में अपने प्रस्तावित आत्मसमर्पण की तारीख कम से कम 3 दिन पहले ही से प्रकट कर सकता है (सोनू उर्फ शहजाद वि. म.प्र. राज्य) ...758

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – परिवाद – याचिका के बिना अभिखंडित – चार पुलिस अधिकारियों ने प्रायवेट परिवाद और उनके विरुद्ध अन्वेषण करने के निदेश का अभिखंडन चाहते हुए याचिका पेश की – अतिरिक्त पुलिस अधीक्षक ने ऐसी याचिका पेश नही की – अभिनिर्धारित – अतिरिक्त पुलिस अधीक्षक को सम्मिलित करते हुए पुलिस अधिकारियों के विरुद्ध अन्वेषण करने का कोई आधार नही है – न्यायालय की कार्यवाही का दुरुपयोग निवारित करने या अन्यथा न्याय का उद्देश्य प्राप्त करने की दृष्टि से अन्तर्निहित शक्तियों का अवलंब लेकर अतिरिक्त पुलिस अधीक्षक के विरुद्ध पेश परिवाद भी अभिखंडित किया गया। (अरूण कुमार जैन वि. दिनेश त्रिपाठी) ...707

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अधिवक्ता के विरुद्ध रजिस्टर एफ.आई.आर. का अभिखंडन – क्या किसी अधिवक्ता के विरुद्ध कोई दाण्डिक मामला रजिस्टर किया जा सकता है जिसने अपने मुवक्किल के अनुदेशों पर सिविल वाद पेश किया था – अभिनिर्धारित – परिवादी द्वारा अपने पति और गिरजा देवी के विरुद्ध एफ.आई.आर. दर्ज करायी कि उन दोनों ने षड्यंत्र कर हिन्दू विवाह अधिनियम, 1955 की धारा 9 के अन्तर्गत सिविल वाद पेश किया और न्यायालय से कूटरचित डिक्री अभिप्राप्त की – कोई अभिकथन और साक्ष्य नही कि अधिवक्ता भी षड्यंत्र में अन्तर्ग्रस्त था – अधिवक्ता के विरुद्ध मामला रजिस्टर करना अवैध और त्रुटिपूर्ण – याचिका मंजूर। (महेश सिंह तोमर वि. म.प्र. राज्य) ---*9

दाण्डिक विचारण – प्रतिनिधिक दायित्व का सिद्धांत ऐसे अभियोजन में कोई उपयोगिता नही रखता जो वरिष्ठ अधिकारियों के विरुद्ध दर्ज किया जाना है। (अरूण कुमार जैन वि. दिनेश त्रिपाठी) ...707

सुखाचार अधिनियम (1882 का 5), धारा 52 – अनुज्ञप्ति – अवयव – अनुज्ञप्ति अनुदाता और अनुज्ञप्तिधारी (प्राप्तिकर्ता) के लिए वैयक्तिक है – यह उस सम्पत्ति से संलग्न नही है जिसके सम्बन्ध में इसका उपभोग किया जाता है और यह न तो अंतरणीय है और न दाययोग्य – यह अनुदान करने वाले व्यक्ति पर कोई कर्तव्य या बाध्यताएँ सृष्ट नही करती – यह सम्पत्ति में कोई हित भी सृष्ट नही करती। (आर.व्ही. इन्फ्रास्ट्रक्चर इंजीनियर्स प्रा.लि. वि. म.प्र. राज्य) ...608

विद्युत आपूर्ति संहिता, म.प्र. 2004, धारा 4.17 – गृह क्रेता द्वारा नये विद्युत कनेक्शन के लिए आवेदन – उसी परिसर के सम्बन्ध में भूतपूर्व स्वामी के विरुद्ध विद्युत देय या अन्य देय के बकाया – अभिनिर्धारित – गृह क्रेता कोई लाभ प्राप्त नही कर सकता यदि विद्युत कनेक्शन के बकाया का भुगतान न किया जाए – याचिका खारिज। (महिला कमला दुबे वि. म.प्र. विद्युत मंडल, ग्वालियर) ...598

आवश्यक वस्तु अधिनियम (1955 का 10), धाराएँ 7(1)(ए)(ii) व 10–ए, दण्ड प्रक्रिया संहिता, 1973, प्रथम अनुसूची परिशिष्ट "ए" सहपठित धारा 2(ए) – अन्य विधियों के विरुद्ध अपराधों का वर्गीकरण – आवश्यक वस्तु (विशेष उपबंध) अधिनियम (1981 का 18) के अन्तर्गत आवश्यक वस्तु अधिनियम की धारा 10–ए को संशोधित कर अपराधों को गैर जमानतीय बनाया गया था – अब अधिनियम, 1981 प्रवर्तन में नही है और संशोधन स्वतः विलोपित हो गया है – इसलिए, द.प्र.सं. के उपबंध लागू होंगे – द.प्र.सं. की प्रथम अनुसूची, परिशिष्ट "ए" सहपठित धारा 2(ए) के उपबंधानुसार जो अपराध आवश्यक वस्तु अधिनियम की धारा 7(1)(ए)(ii) के

offences fall u/s 7(1)(a)(ii) of E.C. Act are cognizable and non-bailable. [Hariom v. State of M.P.] ...764

Evidence Act (1 of 1872), Section 3 - *Child witness - Reliability - Child witness has understood the true meaning of oath and necessity of speaking truth and has given rational answers to all the questions put to her - Not exhibited any intellectual incapacity to understand the nature of questions - No iota of doubt exist about tutoring by prosecution - Evidence reliable.* [Mazboot Singh v. State of M.P.] ...674

Evidence Act (1 of 1872), Section 3 - *Child witness - When there exists a reliable and trustworthy testimony of daughter of prosecutrix, it becomes difficult for Court to brush aside the testimony of the child witness.* [Mazboot Singh v. State of M.P.] ...674

Evidence Act (1 of 1872), Section 3 - *Circumstantial evidence - Law discussed.* [State of M.P. v. Shankarlal] ...717

Evidence Act (1 of 1872), Section 3 - See - *Penal Code, 1860, Sections 302, 366, 364 & 376* [State of M.P. v. Shankarlal] ...717

Evidence Act (1 of 1872), Section 27 - *How much of information received from accused may be proved - Law discussed.* [State of M.P. v. Shankarlal] ...717

Evidence Act (1 of 1872), Section 27 - *How much of information received from accused may be proved - Place where dead body was lying was already in the knowledge of the investigating agency - Recovery of empty liquor bottle from open and accessible place to everybody - Both circumstances are not incriminating circumstances.* [State of M.P. v. Shankarlal] ...717

Evidence Act (1 of 1872), Section 27 - *How much of information received from accused may be proved - Recovery of blue underwear - Seized underwear was not got identified by parents or other relatives of deceased by holding T.I.P. - Underwear not produced in Court and not got identified in Court - Recovery of blue underwear of no consequence - Appeal allowed.* [State of M.P. v. Shankarlal] ...717

Evidence Act (1 of 1872), Section 32 - See - *Penal Code, 1860, Sections 304-B & 498-A,* [Srikant v. State of M.P.] ...683

Evidence Act (1 of 1872), Section 113-A - See - *Penal Code, 1860, Sections 306 & 498-A,* [Shriram v. State of M.P.] ...683

Excise Act, M.P. (2 of 1915), Section 34(1)(a)(2) - *Conspicuous possession - Applicant registered owner of Tractor & Trolley - Liquor seized from Trolley and at the time of seizure no one was present with Tractor concerned - Prosecution failed to prove that from conspicuous possession of the applicant, the contraband article was seized - Applicant cannot be held guilty - Revision allowed.* [Sobran Singh v. State of M.P.] ...*10

अन्तर्गत आते हैं, संज्ञेय और गैर जमानतीय हैं। (हरिओम वि. म.प्र.राज्य) ...764

साक्ष्य अधिनियम (1872 का 1), धारा 3 – बालक साक्षी – विश्वसनीयता – बालक साक्षी ने शपथ और सत्य बोलने की आवश्यकता का सही अर्थ समझ लिया और उससे पूछे गये सभी प्रश्नों का युक्तिसंगत उत्तर दिया – प्रश्नों की प्रकृति समझने में कोई बौद्धिक असमर्थता प्रदर्शित नही की – अभियोजन द्वारा यंत्रणा देने के बारे में जरा भी संदेह विद्यमान नही – साक्ष्य विश्वसनीय। (मजबूत सिंह वि. म.प्र. राज्य) ...674

साक्ष्य अधिनियम (1872 का 1), धारा 3 – बालक साक्षी – जब अभियोक्त्री की पुत्री के विश्वसनीय और भरोसे लायक परिसाक्ष्य का अस्तित्व हो, न्यायालय के लिए यह कठिन हो जाता है कि बालक साक्षी के परिसाक्ष्य की उपेक्षा की जाए। (मजबूत सिंह वि. म.प्र. राज्य) ...674

साक्ष्य अधिनियम (1872 का 1), धारा 3 – परिस्थितिजन्य साक्ष्य – विधि की विवेचना की गई। (म.प्र. राज्य वि. शंकरलाल) ...717

साक्ष्य अधिनियम (1872 का 1), धारा 3 – देखें – दण्ड संहिता, 1860, धाराएँ 302, 366, 364 व 376, (म.प्र. राज्य वि. शंकरलाल) ...717

साक्ष्य अधिनियम (1872 का 1), धारा 27 – अभियुक्त से प्राप्त जानकारी में कितनी साबित की जा सकेगी – विधि की विवेचना की गई। (म.प्र. राज्य वि. शंकरलाल) ...717

साक्ष्य अधिनियम (1872 का 1), धारा 27 – अभियुक्त से प्राप्त जानकारी में कितनी साबित की जा सकेगी – स्थान, जहाँ शव पड़ा हुआ था, पहिले से अनुसंधान एजेंसी के ज्ञान में था – शराब की खाली बोतल की बरामदगी खुले और प्रत्येक व्यक्ति के लिए सुगम स्थान से – दोनों परिस्थितियाँ अपराध में फँसाने वाली नही हैं। (म.प्र. राज्य वि. शंकरलाल) ...717

साक्ष्य अधिनियम (1872 का 1), धारा 27 – अभियुक्त से प्राप्त जानकारी में कितनी साबित की जा सकेगी – नीले अंडरवियर की बरामदगी – बरामद अंडरवियर की शिनाख्त मृतक के माता–पिता या अन्य रिश्तेदारों की शिनाख्त परेड कराकर नही करायी गयी – अंडरवियर न्यायालय में पेश नही किया गया और न्यायालय में शिनाख्त नही करायी गयी – नीले अंडरवियर की बरामदगी का कोई परिणाम नही – अपील मंजूर। (म.प्र. राज्य वि. शंकरलाल)...717

साक्ष्य अधिनियम (1872 का 1), धारा 32 – देखें – दण्ड संहिता, 1860, धाराएँ 304–बी व 498–ए, (श्रीकांत वि. म.प्र. राज्य) ...683

साक्ष्य अधिनियम (1872 का 1), धारा 113–ए –, देखें – दण्ड संहिता, 1860, धाराएँ 306 व 498–ए, (श्रीराम वि. म.प्र. राज्य) ...683

उत्पाद–शुल्क अधिनियम, म.प्र. (1915 का 2), धारा 34(1)(ए)(2) – सहजदृश्य कब्जा – आवेदक ट्रेक्टर व ट्रॉली का रजिस्ट्रीकृत स्वामी – ट्रॉली से शराब अभिग्रहीत की गयी और अभिग्रहण के समय संबंधित ट्रेक्टर के साथ कोई मौजूद नही था – अभियोजन यह साबित करने में असफल हो गया कि आवेदक के सहजदृश्य कब्जे से प्रतिबंधित पदार्थ अभिग्रहीत किया गया – आवेदक को दोषी नही ठहराया जा सकता – पुनरीक्षण मंजूर। (सोबरन सिंह वि. म.प्र. राज्य) ...*10

Flag Code of India, 2002 - ***Flag Code is not a statute and cannot regulate fundamental right to fly National Flag.*** [Aamir Khan v. State of M.P.] ...736

Flag Code of India, 2002 - ***Flag Code is not a statute and cannot regulate fundamental right to fly National Flag.*** [J.P. Dutta v. Ravi Antarolia] ...729

Flag Code of India, 2002, Sections 2(B)(5), 3, 5, 6 & 11 - **See** - ***Prevention of Insults to National Honour Act, 1971, Sections 2 & 3*** [Aamir Khan v. State of M.P] ...736

General Sales Tax Act, M.P. 1958 (2 of 1959), Section 44 - ***Reference*** - *Whether an Aadhatiya is liable to pay entry tax - Held - An Aadhatiya is nothing but a commission agent and he causes entry of the goods in the local area and he is liable to be taxed.* [Sales Tax Commissioner v. M/s. Pannalal Narendra Kumar, Jabalpur] ...725

Interpretation of documents - ***Recital*** - *Recitals in a document can never be conclusive - Substance of the term agreed upon and not the nomenclature given to the deed by the parities is material.* [R.V. Infrastructure Engineers Pvt. Ltd. v. State of MP] ...608

Nuisance - ***Remedies under civil and criminal law*** - *Law discussed.* [Shivraj Singh v. State of M.P.] ...742

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 86(1) - ***Gram Panchayat appointed Panchayat Karmi*** - *SDO set-aside the order of appointment in appeal - Collector directed appointment by fresh advertisement u/s 86(1) - Held - Collector (Prescribed Authority) can not issue such direction unless there is willful default or negligence on the part of Gram Panchayat in performing its duties of filling the post - Order of learned Single Judge setting-aside order of Collector upheld - Writ Appeal dismissed.* [Brajesh Sharma v. Nagendra Singh Sisodiya] ...550

Penal Code (45 of 1860), Section 109 - **See** - ***Prevention of Insults to National Honour Act, 1971, Sections 2 & 3,*** [Aamir Khan v. State of M.P.]...736

Penal Code (45 of 1860), Sections 302, 366, 364 & 376, Evidence Act, 1872, Section 3 - ***Rape and Murder*** - ***Circumstantial evidence*** - ***Last seen together*** - *Salesman of liquor shop (P.W. 15) states that appellant along with girl had come to liquor shop and had purchased liquor - He had identified the dead body of the girl and appellant from a photograph published in newspaper - Newspapers not filed - Dock identification after 12 months of incident of no use in absence of T.I.P. - Witness not reliable.* [State of M.P. v. Shankarlal] ...717

Penal Code (45 of 1860), Sections 304-B & 498-A - ***Dowry death*** - *Deceased died along with her 2 year old girl by burning within 7 years of*

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साधारण विक्रय–कर अधिनियम, म.प्र. 1958 (1959 का 2), धारा 44 – निर्देश – क्या आढ़तिया प्रवेश कर अदा करने के लिए दायी है – अभिनिर्धारित – आढ़तिया कोई और नही बल्कि एक कमीशन अभिकर्ता है और वह स्थानीय क्षेत्र में माल का प्रवेश कराता है और वह कर के लिए दायी है। (सेल्स टेक्स, कमिश्नर वि. मे. पन्नालाल नरेन्द्र कुमार, जबलपुर) ...725

दस्तावेजों का निर्वचन – परिवर्णन – दस्तावेज में परिवर्णन निश्चायक कभी नही हो सकता – अनुबंधित शर्त का सार न कि पक्षकारों द्वारा विलेख में दी गई नामावली तात्विक है। (आर. व्ही. इन्फ्रास्ट्रक्चर इंजीनियर्स प्रा.लि. वि. म.प्र. राज्य) ...608

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पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 86(1) – ग्राम पंचायत ने पंचायत कर्मी की नियुक्ति की – एस.डी.ओ. ने अपील में नियुक्ति आदेश अपास्त किया – कलेक्टर ने धारा 86(1) के अन्तर्गत नये विज्ञापन द्वारा नियुक्ति का निदेश दिया – अभिनिर्धारित – कलेक्टर (विहित प्राधिकारी) ऐसे निदेश जारी नही कर सकता जब तक कि ग्राम पंचायत की ओर से पद भरने के कर्तव्यों के पालन में जानबूझकर व्यतिक्रम या उपेक्षा न की गई हो – कलेक्टर के आदेश को अपास्त करने वाले विद्वान एकल न्यायाधीश के निर्णय की पुष्टि की गयी – रिट अपील खारिज। (ब्रजेश शर्मा वि. नागेन्द्र सिंह सिसोदिया) ...550

दण्ड संहिता (1860 का 45), धारा 109 – देखें – राष्ट्र गौरव अपमान निवारण अधिनियम, 1971, धाराएँ 2 व 3, (आमिर खान वि. म.प्र. राज्य) ...736

दण्ड संहिता (1860 का 45), धाराएँ 302, 366, 364 व 376, साक्ष्य अधिनियम, 1872, धारा 3 – बलात्संग और हत्या – परिस्थितिजन्य साक्ष्य – अंतिम बार साथ–साथ देखें गये – शराब दुकान के विक्रेता (अ.सा. 15) ने कथन किया कि अपीलार्थी लड़की के साथ शराब की दुकान पर आया था और शराब क्रय की थी – उसने समाचार पत्र में प्रकाशित फोटोग्राफ से लड़की के शव और अपीलार्थी की शिनाख्त की – समाचार पत्र पेश नही किये गये – शिनाख्त परेड के अभाव में घटना के 12 माह बाद कठघरे में शिनाख्त किसी उपयोग की नही – साक्षी विश्वसनीय नही। (म.प्र. राज्य वि. शंकरलाल) ...717

दण्ड संहिता (1860 का 45), धाराएँ 304–बी व 498–ए – दहेज मृत्यु – मृतक की उसकी 2 वर्ष की लड़की सहित विवाह के 7 वर्ष के भीतर असामान्य परिस्थितियों में जलने से

marriage in abnormal circumstances - Appellant also did not inform the incident to the police or to his in-laws - Circumstances suggest that deceased was being harassed by persistent and consistent demand of dowry - Guilt of appellant proved beyond reasonable doubt. [Srikant v. State of M.P.] ...683

Penal Code (45 of 1860), Sections 304-B & 498-A, Evidence Act, 1872, Section 32 - *Dying declaration - Reliability - Principal of school recorded dying declaration of deceased - No certificate of doctor that deceased was fit to give statement - Statement not recorded in question answer form - Statement not read over to deceased - Statement of Principal of school is self contradictory on material facts - Principal of school appears to be interested witness - Evidence unreliable.* [Srikant v. State of M.P.] ...683

Penal Code (45 of 1860), Sections 306 & 498-A, Criminal Procedure Code, 1973, Section 174 - *Absence of allegations of demand of vehicle, cruelty or harassment to deceased in merg intimation echo the possibility of it being an afterthought.* [Shriram v. State of M.P.] ...665

Penal Code (45 of 1860), Sections 306 & 498-A - *Cruelty - Merely addressing Þdkyh dywVhß or Þrsjs cki us dqN ugh fn;kß can hardly be said to be such willful conduct so as to drive a woman to commit suicide or to cause grave injury to her life or limb.* [Shriram v. State of M.P.] ...665

Penal Code (45 of 1860), Sections 306 & 498-A, Evidence Act, 1872, Section 113-A - *Presumption - Although deceased committed suicide within 3 days after coming to her nuptial home but there is no evidence that appellants in any way aided, instigated or abetted commission of suicide or subjected her to cruelty or harassment for any unlawful demand - Presumption u/s 113-A cannot be attracted.* [Shriram v. State of M.P.] ...665

Penal Code (45 of 1860), Sections 306 & 498-A - *Unlawful demand - Vehicle given at the time of marriage developed defects within one month - Appellant No.1 brought back the vehicle and gave it to father-in-law for getting it repaired at a place from where it was purchased - Held - If vehicle had developed some problem within one month, there was noting wrong if it was brought back for getting it repaired at a place from where it was purchased - This could not be termed as unlawful demand.* [Shriram v. State of M.P.]...665

Penal Code (45 of 1860), Section 354 - *Attempt to outrage the modesty - Prosecution to establish causation of assault or use of criminal force against a woman with intend to outrage her modesty.* [Mazboot Singh v. State of M.P.]...674

Penal Code (45 of 1860), Sections 354 & 376 - *Rape or attempt to outrage modesty - Medical evidence - When medical evidence is conspicuously silent about occurrence of injuries either on the person or on private part of prosecutrix, irresistible conclusion of there being no forcible intercourse could easily be drawn.* [Mazboot Singh v. State of M.P.] ...674

मृत्यु हो गयी – अपीलार्थी ने भी घटना के बारे में पुलिस या अपने ससुराल पक्ष को जानकारी नही दी – परिस्थितियां सुझाव देती हैं कि मृतक को दहेज की सतत् और निरंतर माँग के लिए तंग किया जा रहा था – अपीलार्थी का दोष युक्तियुक्त शंका से परे साबित। (श्रीकांत वि. म.प्र. राज्य)...683

दण्ड संहिता (1860 का 45), धाराएँ 304–बी व 498–ए, साक्ष्य अधिनियम, 1872, धारा 32 – मृत्युकालिक कथन – विश्वसनीयता – स्कूल के प्राचार्य ने मृतक का मृत्युकालिक कथन अभिलिखित किया – चिकित्सक का कोई प्रमाण पत्र नही कि मृतक कथन देने लायक थी – कथन प्रश्न उत्तर के रूप में नही लिखा गया – कथन मृतक को पढ़कर नही सुनाया गया – स्कूल के प्राचार्य का कथन तात्विक तथ्यों पर विरोधाभासी – स्कूल का प्राचार्य हितबद्ध साक्षी प्रतीत होता है – साक्ष्य अविश्वसनीय। (श्रीकांत वि. म.प्र. राज्य) ...683

दण्ड संहिता (1860 का 45), धाराएँ 306 व 498–ए, दण्ड प्रक्रिया संहिता, 1973, धारा 174 – मर्ग सूचना में वाहन की माँग, क्रूरता या मृतक को तंग करने के अभिकथनों का अभाव उसके पश्चात्वर्ती विचार होने की संभाव्यता की प्रतिध्वनि करता है। (श्रीराम वि. म.प्र. राज्य)...665

दण्ड संहिता (1860 का 45), धाराएँ 306 व 498–ए – क्रूरता – केवल सम्बोधन कि "काली कलूटी" या "तेरे बाप ने कुछ नही दिया" मुश्किल से ऐसा स्वेच्छापूर्ण आचरण कहा जा सकता है जिससे किसी महिला को आत्महत्या करने के लिए या उसके जीवन या शरीर को गंभीर क्षति कारित करने के लिए प्रेरित किया जाए। (श्रीराम वि. म.प्र. राज्य) ...665

दण्ड संहिता (1860 का 45), धाराएँ 306 व 498–ए, साक्ष्य अधिनियम, 1872, धारा 113–ए – उपधारणा – यद्यपि मृतक ने अपने ससुराल आने के 3 दिन बाद आत्महत्या कर ली किन्तु कोई साक्ष्य नही कि अपीलार्थियों ने किसी ढंग से आत्महत्या करने में सहायता दी, उकसाया या दुष्प्रेरित किया या किसी विधिविरुद्ध माँग के लिए उसके साथ क्रूरता की या तंग किया – धारा 113–ए के अन्तर्गत उपधारणा आकृष्ट नही हो सकती। (श्रीराम वि. म.प्र. राज्य) ...665

दण्ड संहिता (1860 का 45), धाराएँ 306 व 498–ए – विधिविरुद्ध माँग – विवाह के समय दिये गये वाहन में एक माह के भीतर खराबी आ गयी – अपीलार्थी क्र. 1 वाहन वापस ले आया और उसे उस स्थान से, जहाँ से उसे क्रय किया था, मरम्मत करवाने के लिए श्वसुर को दिया – अभिनिर्धारित – यदि वाहन में एक माह के भीतर कुछ समस्या आ गयी थी तो कुछ गलत नही था यदि उसे उस स्थान से, जहाँ से उसे क्रय किया था, मरम्मत करवाने के लिए वापस लाया गया – इसे विधिविरुद्ध माँग नही कहा जा सकता। (श्रीराम वि. म.प्र. राज्य) ...665

दण्ड संहिता (1860 का 45), धारा 354 – लज्जाभंग करने का प्रयत्न – अभियोजन को हमले का कारण या किसी स्त्री के विरुद्ध उसकी लज्जाभंग करने के आशय से आपराधिक बल का प्रयोग साबित करना होगा। (मजबूत सिंह वि. म.प्र. राज्य) ...674

दण्ड संहिता (1860 का 45), धाराएँ 354 व 376 – बलात्संग या लज्जाभंग करने का प्रयत्न – चिकित्सीय साक्ष्य – जब चिकित्सीय साक्ष्य या तो अभियोक्त्री के शरीर पर या गुप्तांग पर क्षतियों की उपस्थिति के बारे में सुस्पष्ट रूप से मौन हो, बलपूर्वक मैथुन न होने का अप्रतिरोध्य निष्कर्ष आसानी से निकाला जा सकता। (मजबूत सिंह वि. म.प्र. राज्य) ...674

Prevention of Food Adulteration Act (37 of 1954), Sections 10(4) & 10(4-A) - ***Powers of the Food Inspector*** - *Held - As per Ss. 10(4) & 10(4-A) of the Act, if any article seized is found adulterated and Local Authorities have satisfied that it is unfit for human consumption, the Authorities could destroy the adulterated food article.* [Hind Dairy and Food Products, Maharajpura, Gwalior v. State of MP] ...583

Prevention of Food Adulteration Act (37 of 1954), Section 24, Prevention of Food Adulteration Rules, M.P. 1962, Rule 4 - ***Powers & duties of State Authority*** - *Held - State Authority i.e. Food (Health) Authority and Controller, Food & Drugs Administration, Bhopal has power to suspend the production & manufacture of articles of food if on inspection after a report of Public Analyst, it has been found that the aforesaid article of food is adulterated or misbranded.* [Hind Dairy and Food Products, Maharajpura, Gwalior v. State of MP] ...583

Prevention of Food Adulteration Rules, M.P. 1962, Rule 4 - **See** - ***Prevention of Food Adulteration Act, 1954, Section 24,*** [Hind Dairy and Food Products, Maharajpura, Gwalior v. State of MP] ...583

Prevention of Insults to National Honour Act (69 of 1971), Section 2 - ***Penalty*** - *Film 'LOC Kargil' exhibited the coffins of the soldiers covered by National Flag - It was alleged that National Flags were wrongly used for covering the coffins - Held - It is no where stated that how the flag has to be used - Offence under the Act can only be constituted if any person within public view burns, mutilates, defaces, disfigures, destroys, tramples upon or otherwise brings into contempt.* [J.P. Dutta v. Ravi Antarolia] ...729

Prevention of Insults to National Honour Act (69 of 1971), Sections 2 & 3, Flag Code of India, 2002, Sections 2(B)(5), 3, 5, 6 & 11, Penal Code, 1860, Section 109 - ***National Flag was hosting even after sunset*** - *Film Actor Aamir Khan was chief guest of function in which complainant was also present - Nothing in complaint or in evidence has been stated against Aamir Khan except that he was present in the said function - Prima facie no evidence to prove that he has caused insult to National Flag - Application allowed.* [Aamir Khan v. State of M.P.] ...736

Public Premises (Eviction of Unauthorised Occupants) Act (40 of 1971), Section 7 - ***Payable*** - ***Meaning*** - *Held - The word "payable" in S. 7 of the Act in the context in which it occur s means legally recoverable.* [Lakhanlal Rawat v. Union of India] ...699

Public Premises (Eviction of Unauthorised Occupants) Act (40 of 1971), Section 7 - ***Power to require payment of rent or damages in respect of public premises*** - ***Time barred claim*** - ***Permissibility*** - *Section 7 of the Act only provides of special procedure for realization of rent in arrears and does not constitute a source or foundation of a right to claim debt otherwise*

खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 10(4) व 10(4–ए) – खाद्य निरीक्षक की शक्तियाँ – अभिनिर्धारित – अधिनियम की धारा 10(4) व 10(4–ए) के अनुसार यदि कोई अभिगृहीत पदार्थ अपमिश्रित पाया जाता है और स्थानीय प्राधिकारियों का यह समाधान हो गया हो कि यह मानवीय उपभोग के लिए अनुपयुक्त है तो प्राधिकारी अपमिश्रित खाद्य पदार्थ को विनष्ट कर सकता है। (हिन्द डेयरी एण्ड फुड प्रोडक्टस, महाराजपुरा, ग्वालियर वि. म.प्र. राज्य) ...583

खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 24, खाद्य अपमिश्रण निवारण नियम, 1962, नियम 4 – राज्य प्राधिकारी की शक्तियाँ और कर्तव्य – अभिनिर्धारित – राज्य प्राधिकारी अर्थात् खाद्य (स्वास्थ्य) प्राधिकारी और नियंत्रक, खाद्य एवं औषधि प्रशासन, भोपाल को खाद्य पदार्थों के उत्पादन और विनिर्माण को निलंबित करने की शक्ति है यदि लोक विश्लेषक की रिपोर्ट के बाद निरीक्षण पर यह पाया गया हो कि उपर्युक्त खाद्य पदार्थ अपमिश्रित या मिथ्या छाप वाला है। (हिन्द डेयरी एण्ड फुड प्रोडक्टस, महाराजपुरा, ग्वालियर वि. म.प्र. राज्य) ...583

खाद्य अपमिश्रण निवारण नियम, 1962, नियम 4 – देखें – खाद्य अपमिश्रण निवारण अधिनियम, 1954, धारा 24, (हिन्द डेयरी एण्ड फुड प्रोडक्टस, महाराजपुरा, ग्वालियर वि. म.प्र. राज्य) ...583

राष्ट्र गौरव अपमान निवारण अधिनियम (1971 का 69), धारा 2 – शास्ति – फिल्म 'एलओसी कारगिल' में राष्ट्रध्वज से ढके हुए सैनिकों के ताबूतों को प्रदर्शित किया गया – यह कथित किया गया कि ताबूतों को ढकने के लिए राष्ट्रध्वजों का गलत ढंग से उपयोग किया गया – अभिनिर्धारित – यह कहीं भी कथित नहीं किया गया कि ध्वज का प्रयोग कैसे किया जाना है – अधिनियम के अन्तर्गत अपराध केवल तब गठित हो सकता है यदि कोई व्यक्ति लोक दृष्टिगोचरता में जलाता है, काट–छाँट करता है, विरूपित करता है, विद्रूपित करता है, नष्ट करता है, कुचलता है या अन्यथा अवमान करता है। (जे.पी. दत्ता वि. रवि अंतरोलिया) ...729

राष्ट्र गौरव अपमान निवारण अधिनियम (1971 का 69), धाराएँ 2 व 3, भारतीय ध्वज संहिता, 2002, धाराएँ 2(बी)(5), 3, 5, 6 व 11, दण्ड संहिता, 1860, धारा 109 – सूर्यास्त के बाद भी राष्ट्रध्वज फहराया जा रहा था – फिल्म अभिनेता आमिर खान समारोह के मुख्य अतिथि थे जिसमें परिवादी भी मौजूद था – परिवाद या साक्ष्य में आमिर खान के विरुद्ध कुछ भी कथित नही किया गया सिवाय इसके कि वह उक्त समारोह में मौजूद थे – यह साबित करने के लिए प्रथम दृष्ट्या कोई साक्ष्य नही कि उन्होंने राष्ट्रध्वज का अपमान कारित किया है – आवेदन मंजूर। (आमिर खान वि. म.प्र. राज्य) ...736

सरकारी स्थान (अप्राधि.त अधिभोगियों की बेदखली) अधिनियम (1971 का 40), धारा 7 – देय – अर्थ – अभिनिर्धारित – अधिनियम की धारा 7 में शब्द "देय" जिस संदर्भ में पाया जाता है, का अर्थ वैध रूप से वसूली योग्य है। (लखनलाल रावत वि. यूनियन ऑफ इंडिया) ...699

सरकारी स्थान (अप्राधि.त अधिभोगियों की बेदखली) अधिनियम (1971 का 40), धारा 7 – सरकारी स्थान के सम्बन्ध में किराया या नुकसानी के भुगतान की अपेक्षा करने की शक्ति – समय वर्जित दावा – अनुज्ञेयता – अधिनियम की धारा 7 बकाया किराये की वसूली के लिए केवल विशेष प्रक्रिया का उपबंध करती है और अन्यथा समय वर्जित ऋण का दावा

time barred -When a duty is cast on an authority to determine the arrears of rent, the determination must be in accordance with law. [Lakhanlal Rawat v. Union of India] ...699

Registration Act (16 of 1908), Section 17 - See - *Transfer of Property Act, 1882, Section 107,* [Balvant Rai Agrawal v. Bharat Petroleum Corporation]...646

Registration Act (16 of 1908), Sections 17 & 49 - *Unregistered & unexecuted sale deed - When document has not been executed by all the sellers - Document could not be presented for registration - Ss. 17 & 49 not applicable.* [Narbada Prasad v. Manik Darbar] ...595

Service Law - *Civil Services (Pension) Rules, M.P. 1976, Rule 47 - Family Pension - Denied on the ground that deceased government servant didn't complete 25 years qualifying service - Held - If a government servant, who is not governed by the Workmen's Compensation Act, 1923, dies while in service after having rendered not less than 7 years continuous service, the family pension is payable - Petition allowed.* [Kamla (Smt.) v. State of M.P.] ...593

Specific Relief Act (47 of 1963), Section 6 - *After dispossession, defendant constructed two Pucca rooms on the suit property - Suit u/s 6 of the Act - Decree for restoration of possession with the direction to the defendant for removal of construction - Held - Court has no power to direct for removal of construction in a suit u/s 6 of the Act - Such direction set-aside - Decree modified accordingly.* [Ramniwas Sharma v. Smt. Jasoda Bai] ...691

Specific Relief Act (47 of 1963), Section 6, Civil Procedure Code, 1908, Section 115 - *Remedy against a decision u/s 6 of the Act - Unsuccessful party can file a suit based on title - Remedy of filing a revision is available but that is only by way of an exception - Held - In the present case, direction for removal of construction issued which is obviously an exceptional circumstance - Therefore, revision is maintainable.* [Ramniwas Sharma v. Smt. Jasoda Bai]...691

Stamp Act (2 of 1899) [As amended by Stamp (M.P. Amendment) Act, (12 of 2002) w.e.f. 13.08.2002], Schedule 1-A, Article 33 - *Constitutional validity - Stamp duty on lease - Document in question is not the one which is covered under List I, Entry 91 of 7th Schedule of Constitution - Entry 44 of IIIrd List of 7th Schedule of Constitution provides for stamp duties other than duties or fees collected by means of judicial stamps - State is competent to prescribe the rates as mentioned in Article 33 of Schedule 1-A of Stamp Act, as amended in Madhya Pradesh - Said Article is not repugnant to S. 105 of T.P. Act or S. 2(16) of Stamp Act.* [R.V. Infrastructure Engineers Pvt. Ltd. v. State of MP] ...608

Stamp Act (2 of 1899) [As amended by Stamp (M.P. Amendment) Act, (12 of 2002) w.e.f. 13.08.2002], Schedule 1-A, Article 33(c) - *The duty*

करने के किसी अधिकार का स्रोत या आधार गठित नही करती – जब किसी प्राधिकारी पर किराये का बकाया अवधारित करने का कर्तव्य डाला जाता है, तब अवधारण विधि अनुसार होना चाहिए। (लखनलाल रावत वि. यूनियन ऑफ इंडिया) ...699

रजिस्ट्रीकरण अधिनियम, (1908 का 16), धारा 17 – देखें – सम्पत्ति अन्तरण अधिनियम, 1882, धारा 107, (बलवंत राय अग्रवाल वि. भारत पेट्रोलियम कारपोरेशन) ...646

रजिस्ट्रीकरण अधिनियम (1908 का 16), धाराएँ 17 व 49 – अरजिस्ट्रीकृत व अनिष्पादित विक्रय विलेख – जब दस्तावेज सभी विक्रेताओं द्वारा निष्पादित न किया गया हो – दस्तावेज रजिस्ट्रीकरण के लिए प्रस्तुत नही किया जा सकता – धाराएँ 17 व 49 लागू होने योग्य नही। (नर्बदा प्रसाद वि. मानिक दरबार) ...595

सेवा विधि – सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 47 – परिवार पेंशन – इस आधार पर इंकार की गयी कि मृतक शासकीय सेवक ने 25 वर्ष की अर्हता सेवा पूर्ण नही की थी – अभिनिर्धारित – यदि किसी शासकीय सेवक की, जो कर्मकार प्रतिकर अधिनियम, 1923 से शासित नही होता है, निरंतर सेवाएँ, जो 7 वर्ष से कम नही हैं, देने के बाद सेवा में रहते हुए मृत्यु हो जाती है, परिवार पेंशन देय है – याचिका मंजूर। (कमला (श्रीमति) वि. म.प्र. राज्य) ...593

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 6 – बेदखली के बाद प्रतिवादी ने वादग्रस्त सम्पत्ति पर दो पक्के कमरों का निर्माण किया – अधिनियम की धारा 6 के अन्तर्गत वाद – कब्जे के प्रत्यावर्तन की डिक्री प्रतिवादी को निर्माण हटाने के निदेश के साथ – अभिनिर्धारित – न्यायालय को अधिनियम की धारा 6 के अन्तर्गत किसी वाद में निर्माण हटाने का निदेश देने की कोई शक्ति नही है – ऐसा निदेश अपास्त – डिक्री तदनुसार उपांतरित। (रामनिवास शर्मा वि. श्रीमति जशोदा बाई) ...691

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 6, सिविल प्रक्रिया संहिता, 1908, धारा 115 – अधिनियम की धारा 6 के अन्तर्गत विनिश्चय के विरुद्ध अनुतोष – असफल पक्षकार स्वत्व पर आधारित वाद पेश कर सकता है – पुनरीक्षण पेश करने का अनुतोष उपलब्ध है किन्तु वह एक अपवाद के रूप में है – अभिनिर्धारित – वर्तमान मामले में निर्माण हटाने का निदेश जारी किया गया जो एक आपवादिक परिस्थिति है – इसलिए पुनरीक्षण पोषणीय है। (रामनिवास शर्मा वि. श्रीमति जशोदा बाई) ...691

स्टाम्प अधिनियम (1899 का 2) [स्टाम्प (म.प्र. संशोधन) अधिनियम (2002 का 12) द्वारा तारीख 13.08.2002 से यथासंशोधित], अनुसूची 1–ए, अनुच्छेद 33 – संवैधानिक विधिमान्यता – पट्टे पर स्टाम्प शुल्क – प्रश्नगत दस्तावेज वह नही है जो संविधान की 7वीं अनुसूची की सूची I, प्रविष्टि 91 के अन्तर्गत आता है – संविधान की 7वीं अनुसूची की सूची III की प्रविष्टि 44 न्यायिक स्टाम्प के द्वारा संग्रहीत शुल्क या फीस से भिन्न स्टाम्प शुल्क का उपबंध करती है – राज्य, मध्य प्रदेश में यथासंशोधित भारतीय स्टाम्प अधिनियम की अनुसूची 1–ए के अनुच्छेद 33 में उल्लिखित दरें विहित करने के लिए सक्षम है – उपर्युक्त अनुच्छेद सम्पत्ति अंतरण अधिनियम की धारा 105 या स्टाम्प अधिनियम की धारा 2(16) के विरुद्ध नही है। (आर.व्ही. इन्फ्रास्ट्रक्चर इंजीनियर्स प्रा.लि. वि. म.प्र. राज्य) ...608

स्टाम्प अधिनियम (1899 का 2) [स्टाम्प (म.प्र. संशोधन) अधिनियम (2002 का 12) द्वारा तारीख 13.08.2002 से यथासंशोधित], अनुसूची 1–ए, अनुच्छेद 33(सी) –

as per rate prevailing on the date of agreement is payable not on the date when Cabinet took the decision and letter of acceptance of offer was issued. [R.V. Infrastructure Engineers Pvt. Ltd. v. State of MP] ...608

Stamp Act (2 of 1899), Section 2(10), Schedule 1-A, Item 5 & 22 - *Unexecuted & unregistered sale deed - Not signed by all sellers - Document is neither agreement nor conveyance - Item 5 & 22 of Schedule 1-A not applicable.* [Narbada Prasad v. Manik Darbar] ...595

Stamp Act (2 of 1899), Section 2(16) - See - ***Transfer of Property Act, 1882, Section 105,*** [R.V. Infrastructure Engineers Pvt. Ltd. v. State of MP] ...608

Transfer of Property Act (4 of 1882), Section 54 - ***Sale - Sale how made*** - *Held - Sale of property less than Rs.100 can be made without there being a registered instrument and the sale can be proved by delivery of possession.* [Joge Ram Das Kahar v. Chhotelal Sharma] ...639

Transfer of Property Act (4 of 1882), Section 105 - ***Lease - Change of purpose*** - *Land allotted on lease for establishment of industry - Petitioner applied for change of purpose of lease for installing of Petrol Pump, establishment of restaurant, Aushadhalaya and departmental store - Held - No condition/covenant in lease deed that lessee would be entitled to ask for change of purpose and lessor would be obliged to change the purpose - Permission rightly rejected - Petition dismissed.* [Himgouri Pulses Industrial Area, Harda (M/s.) v. State of M.P.] ...630

Transfer of Property Act (4 of 1882), Section 105 - ***Lease - Ingredients*** - *(i) There is a transfer of a right to enjoy property, (ii) it is made for a certain time, express or implied or in perpetuity, and (iii) there has to be consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value.* [R.V. Infrastructure Engineers Pvt. Ltd. v. State of MP] ...608

Transfer of Property Act (4 of 1882), Section 105, Stamp Act, 1899, Section 2(16) - *Lease - Right to collect tolls for fifteen years in lieu of the amount spent by the Concessionaire in the construction of roads, bridges etc. under the Build, Operate and Transfer (B.O.T.) scheme - Right to enjoy property clearly makes the transaction that of lease - Mere apprehension that there may not be successful completion will not come in the way of chargeability of the document - Since construction of road, handing over of possession, as well as recovery of toll is provided hence the document falls within the definition of lease.* [R.V. Infrastructure Engineers Pvt. Ltd. v. State of MP] ...608

Transfer of Property Act (4 of 1882), Section 106 - ***Requirement of notice*** - *When the period of lease is fixed by a contract and it comes to an end then the tenant is not entitled to a notice u/s 106 of the Act - After expiry*

अनुबन्ध की तारीख को विद्यमान दर के अनुसार शुल्क देय है न कि उस तारीख पर शुल्क देय है जब मंत्रिमण्डल ने निर्णय लिया हो और प्रस्ताव के प्रतिग्रहण का पत्र जारी किया हो। (आर.व्ही. इन्फ्रास्ट्रक्चर इंजीनियर्स प्रा.लि. वि. म.प्र. राज्य) ...608

स्टाम्प अधिनियम (1899 का 2), धारा 2(10), अनुसूची 1–ए, मद 5 व 22 – अनिष्पादित व अरजिस्ट्री.त विक्रय विलेख – सभी विक्रेताओं द्वारा हस्ताक्षरित नही – दस्तावेज न तो करार है और न हस्तान्तरण पत्र – अनुसूची 1–ए के मद 5 व 22 लागू होने योग्य नही। (नर्बदा प्रसाद वि. मानिक दरबार) ...595

स्टाम्प अधिनियम (1899 का 2), धारा 2(16) – देखें – सम्पत्ति अन्तरण अधिनियम, 1882, धारा 105, (आर.व्ही. इन्फ्रास्ट्रक्चर इंजीनियर्स प्रा.लि. वि. म.प्र. राज्य) ...608

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 54 – विक्रय – विक्रय कैसे किया जाता है – अभिनिर्धारित – 100 रुपये से कम की सम्पत्ति का विक्रय रजिस्ट्रीकृत विलेख के बिना किया जा सकता है और कब्जे के परिदान द्वारा विक्रय साबित किया जा सकता है। (जोगे रामदास कहार वि. छोटेलाल शर्मा) ...639

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 105 – पट्टा – प्रयोजन का परिवर्तन – भूमि उद्योग स्थापित करने के लिए पट्टे पर आवंटित की गई थी – याची ने पेट्रोल पम्प, रेस्टोरेण्ट, औषधालय और डिपार्टमेंटल स्टोर की स्थापना के लिए पट्टे का प्रयोजन परिवर्तित करने के लिए आवेदन दिया – अभिनिर्धारित – पट्टा विलेख में कोई शर्त/प्रसंविदा नही कि पट्टेदार प्रयोजन परिवर्तित करने की माँग करने का हकदार होगा और पट्टादाता प्रयोजन परिवर्तित करने के लिए बाध्य होगा – अनुमति उचित रूप से नामंजूर की गयी – याचिका खारिज। (हिमगौरी पल्सेस इन्डस्ट्रियल एरिया, हरदा (मे.) वि. म.प्र. राज्य) ...630

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 105 – पट्टा – अवयव – (i) सम्पत्ति का उपभोग करने के अधिकार का अंतरण हो, (ii) यह एक अभिव्यक्त या विवक्षित समय के लिए या शाश्वत काल के लिए किया गया हो, और (iii) किसी कीमत के, जो दी गई हो या जिसे देने का वचन दिया गया हो, अथवा धन या फसलों के अंश या सेवा या किसी अन्य मूल्यवान वस्तु के प्रतिफल के रूप में होना चाहिए। (आर.व्ही. इन्फ्रास्ट्रक्चर इंजीनियर्स प्रा.लि. वि. म.प्र. राज्य) ...608

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 105, स्टाम्प अधिनियम, 1899, धारा 2(16) – पट्टा – निर्माण, प्रवर्तन और अंतरण (बी.ओ.टी.) स्कीम के अधीन रियायत पाने वाले द्वारा सड़क, पुल आदि के निर्माण में खर्च की गई रकम के बदले में पन्द्रह वर्ष तक पथकर संग्रह का अधिकार – सम्पत्ति का उपभोग करने का अधिकार स्पष्ट रूप से संव्यवहार को पट्टे का संव्यवहार बनाता है – केवल यह आशंका कि सफलतापूर्ण समापन नही हो सकेगा दस्तावेज की प्रभार्यता के मार्ग में बाधक नही होगी – चूंकि सड़क का निर्माण, कब्जे की सुपुर्दगी साथ ही पथकर की वसूली का उपबंध है इसलिए दस्तावेज पट्टे की परिभाषा में आयेगा। (आर.व्ही. इन्फ्रास्ट्रक्चर इंजीनियर्स प्रा.लि. वि. म.प्र. राज्य) ...608

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 106 – सूचना पत्र की आवश्यकता – जब पट्टे की कालावधि संविदा द्वारा नियत की गयी हो और वह समाप्त हो जाती है तब किरायेदार अधिनियम की धारा 106 के अन्तर्गत सूचना पत्र का हकदार नही है – पट्टे के अवसान की कालावधि की

of the period of termination of lease the possession of the lessee was that of a tenant-at-sufferance as being one who came in by right and held over without right - Such a person can be evicted without notice. [Balvant Rai Agrawal v. Bharat Petroleum Corporation] 646

Transfer of Property Act (4 of 1882), Section 107, Registration Act, 1908, Section 17 - *Lease for 10 years - Lease cannot be renewed automatically - Renewal for a period of 10 years will become admissible only when the renewal is made by a registered lease deed as laid down u/s 17 of the Registration Act r/w S. 107 of T.P. Act.* [Balvant Rai Agrawal v. Bharat Petroleum Corporation] ...646

Transfer of Property Act (4 of 1882), Section 111(a) - *Determination of lease - Original period of lease extended for 10 years, thereafter, lease not renewed in terms of agreement - Suit for ejectment - Alternate plea of continuation of lease in plaint by lessor - Held - Contract of lease came to an end and lease was determined by efflux of time limited thereby - An admission made as alternate plea regarding renewal of lease cannot overrule statutory provision and lease period can not be said to be renewed - Lessor has right to eject lessee - Appeal allowed.* [Balvant Rai Agrawal v. Bharat Petroleum Corporation] ...646

WORDS & PHRASES :

Aadhat - *Meaning - A commission received by a dealer or a commission agent in the business of grains - The word 'Aadhat' does not mean anything less than or more than a commission.* [Sales Tax Commissioner v. M/s. Pannalal Narendar Kumar, Jabalpur] ...725

Aadhatiya - *Meaning - A person, who receives goods either on his own behalf or on behalf of the principal, sells the same in the market on basis of certain commission - An Aadhatiya may sell or even purchase the goods under the instructions of the principal.* [Sales Tax Commissioner v. M/s. Pannalal Narendar Kumar, Jabalpur] ...725

Kachha Aadhatiya - *Meaning - Kachha Aadhatiya is a person who is to abide by all the instructions issued by the principal and he is not entitled to take any decision on his own behalf.* [Sales Tax Commissioner v. M/s. Pannalal Narendar Kumar, Jabalpur] ...725

Pakka Aadhatiya - *Meaning - A 'Pakka Aadhatiya' is person, who receives the goods, keep with him and under the instructions of the principal is to dispose of the same but he could dispose of the goods on his own terms - Pakka Aadhatiya in fact agrees with the principal that he would pay a particular amount for the consignment.* [Sales Tax Commissioner v. M/s. Pannalal Narendar Kumar, Jabalpur] ...725

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समाप्ति के बाद पट्टेदार का कब्जा मूक सम्मति से किरायेदार के समान होता है जो अधिकार द्वारा आया और बिना अधिकार के रुका हुआ है – ऐसा व्यक्ति बिना सूचना के बेदखल किया जा सकता है। (बलवंतराय अग्रवाल वि. भारत पेट्रोलियम, कारपोरेशन) ...646

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 107, रजिस्ट्रीकरण अधिनियम, 1908, धारा 17 – पट्टा 10 वर्ष के लिए – पट्टा स्वतः नवीकृत नही हो सकता – 10 वर्ष की कालावधि के लिए नवीनीकरण केवल तब ग्राह्य होगा जब नवीनीकरण धारा 17 रजिस्ट्रीकरण अधिनियम सहपठित धारा 107 सम्पत्ति अंतरण अधिनियम के अन्तर्गत रजिस्ट्रीकृत पट्टा विलेख द्वारा किया गया हो। (बलवंतराय अग्रवाल वि. भारत पेट्रोलियम, कारपोरेशन) ...646

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 111(ए) – पट्टे का पर्यवसान – पट्टे की मूल कालावधि 10 वर्ष के लिए बढ़ायी गयी, उसके बाद करार के निबंधनो के अनुसार पट्टे का नवीनीकरण नही किया गया – बेदखली के लिए वाद – पट्टाकर्ता द्वारा वादपत्र में पट्टा जारी रहने का वैकल्पिक अभिवचन – अभिनिर्धारित – पट्टे की संविदा समाप्त हो गयी और उसके द्वारा सीमित समय के बीत जाने पर पट्टे का पर्यवसान हो गया – पट्टे के नवीनीकरण के सम्बन्ध में किये गये वैकल्पिक अभिवचन के रूप में की गयी स्वीकृति कानूनी उपबंध को रद्द नही कर सकती और पट्टे की कालावधि नवीकृत हुई नही कही जा सकती – पट्टाकर्ता को पट्टेदार को बेदखल करने का अधिकार है – अपील मंजूर। (बलवंतराय अग्रवाल वि. भारत पेट्रोलियम, कारपोरेशन) ...646

<u>शब्द और वाक्यांश</u> :

आढ़त – अर्थ – कमीशन जो किसी व्यापारी या कमीशन अभिकर्ता द्वारा अनाज के कारोबार में प्राप्त किया जाता है – शब्द 'आढ़त' का अर्थ कमीशन से कम या अधिक कुछ नही है। (सेल्स टेक्स कमिश्नर वि. मे. पन्नालाल नरेन्द्र कुमार, जबलपुर) ...725

आढ़तिया – अर्थ – कोई व्यक्ति, या तो स्वयं की ओर से या मालिक की ओर से माल प्राप्त करता है, कतिपय कमीशन पर उसे बाजार में बेचता है – आढ़तिया मालिक के अनुदेशों के अन्तर्गत माल विक्रय या क्रय कर सकता है। (सेल्स टेक्स कमिश्नर वि. मे. पन्नालाल नरेन्द्र कुमार, जबलपुर) ...725

कच्चा आढ़तिया – अर्थ – कच्चा आढ़तिया वह व्यक्ति है जो मालिक द्वारा जारी किये गये सभी अनुदेशों से पाबंद है और वह स्वयं अपनी ओर से कोई निर्णय लेने का हकदार नही है। (सेल्स टेक्स कमिश्नर वि. मे. पन्नालाल नरेन्द्र कुमार, जबलपुर) ...725

पक्का आढ़तिया – अर्थ – पक्का आढ़तिया वह व्यक्ति है जो माल प्राप्त करता है, उसे अपने पास रखता है और मालिक के अनुदेशों के अन्तर्गत उसका व्ययन करता है किन्तु वह स्वयं अपने निबंधनों पर माल का व्ययन कर सकता है – पक्का आढ़तिया वास्तव में मालिक से सहमत होता है कि वह प्रेषित माल के लिए विशिष्ट धनराशि अदा करेगा। (सेल्स टेक्स कमिश्नर वि. मे. पन्नालाल नरेन्द्र कुमार, जबलपुर) ...725

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NOTES OF CASES SECTION

Short Note

(9)

S.S. Dwivedi, J

MAHESH SINGH TOMAR
Vs.
STATE OF M.P.

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - *Quashment of F.I.R. registered against the Advocate - Whether a criminal case can be registered against an Advocate who had filed a civil suit on the instructions of his client - Held - FIR lodged by complainant against her husband and one Girija Devi that both of them made a conspiracy and filed a civil suit u/s 9 of Hindu Marriage Act, 1955 and obtained forged decree from Court - No allegation and iota of evidence that Advocate was also involved in conspiracy - Registration of case against Advocate illegal and erroneous - Petition allowed.*

"7. Considering the averments made in the written complaint lodged by Mamtabai, the main allegation is against Girija Devi and her husband Vishnu Gupta that both of them had made a conspiracy and filed a civil suit under Section 9 of the Hindu Marriage Act and obtained a forged decree from the Court. There is no specific allegation against the applicant that he being an Advocate was also involved in this conspiracy.

8. As an Advocate the applicant has filed the aforesaid civil suit on the basis of the instructions given to him by Girija Devi. It is also pertinent to note that in the order sheet of the concerning case the applicant never appeared before the Court concerned on behalf of Girija Devi and, in such circumstances also, there is no iota of evidece available, on which basis of the involvement of the present applicant in this forgery can be found proved. Otherwise also it will be very difficult if in each and every case which is filed by the Advocate on the instruction of his client is also subsequently made an accused for the alleged forgey. In these circumstances, the registration of the FIR against the applicant is found to be illegal and erroneous."

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अधिवक्ता के विरुद्ध रजिस्टर एफ.आई.आर. का अभिखंडन – क्या किसी अधिवक्ता के विरुद्ध कोई दाण्डिक मामला रजिस्टर किया जा सकता है जिसने अपने मुवक्किल के अनुदेशों पर सिविल वाद पेश किया था – अभिनिर्धारित – परिवादी द्वारा अपने पति और गिरजा देवी के विरुद्ध एफ.आई.आर. दर्ज करायी कि उन दोनों ने षड्यंत्र कर हिन्दू विवाह अधिनियम, 1955 की धारा 9 के अन्तर्गत सिविल वाद पेश किया और न्यायालय से कूटरचित डिक्री अभिप्राप्त की – कोई अभिकथन और साक्ष्य नही कि अधिवक्ता भी षड्यंत्र में अन्तर्ग्रस्त था – अधिवक्ता के विरुद्ध मामला रजिस्टर करना अवैध और त्रुटिपूर्ण – याचिका मंजूर।

R.K. Sharma, for the applicant.

M. Bhardwaj, P.P., for the non-applicant/State.

***M.Cr.C. No.3850/2009 (Gwalior), D/-1 December, 2009.**

NOTES OF CASES SECTION

Short Note

(10)

S.S. Dwivedi, J

SOBRAN SINGH
Vs.
STATE OF M.P.

Excise Act, M.P. (2 of 1915), Section 34(1)(a)(2) - *Conspicuous possession - Applicant registered owner of Tractor & Trolley - Liquor seized from Trolley and at the time of seizure no one was present with Tractor concerned - Prosecution failed to prove that from conspicuous possession of the applicant, the contraband article was seized - Applicant cannot be held guilty - Revision allowed.*

"7. To bring home the charge as levelled against the applicant, the seizing officer Narendra Kumar Tripathi (PW5) clearly stated that in the trolly the concerned liquor had been seized as per seizure memo Ex. P/1 and at the time of seizure no one was present with the tractor concerned. Thus, the presence of the applicant at the time of seizure is also not proved by the statement of seizing officer Narendra Kumar Tripathi (PW5). On perusal of his statement it is also not clear that he also saw the applicant/accused driving the tractor concerned and after that the applicant/accused ran away from the spot when he saw the police officer while stopping the tractor concerned.

8. The other independent panch witnesses examined by the prosecution are Sanjay Singh (PW1) and Kamal Singh (PW4), who had also not supported that the liquor had been seized from the tractor trollery concerned. They only signed the seizure memo in the police station. Both these independent panch witnesses had been declared hostile by the prosecution but in the cross-examination also the prosecution has failed to substantiate that they are deliberately giving false statement in favour of the applicant/accused specially in the situation when the applicant is having a specific defence that the police had wrongly brought the tractor from his house and thereafter this false case has been registered against him for the illegal possession of the liquor."

उत्पाद–शुल्क अधिनियम, म.प्र. (1915 का 2), धारा 34(1)(ए)(2) – सहजदृश्य कब्जा – आवेदक ट्रेक्टर व ट्रॉली का रजिस्ट्रीकृत स्वामी – ट्रॉली से शराब अभिग्रहीत की गयी और अभिग्रहण के समय संबंधित ट्रेक्टर के साथ कोई मौजूद नही था – अभियोजन यह साबित करने में असफल हो गया कि आवेदक के सहजदृश्य कब्जे से प्रतिबंधित पदार्थ अभिग्रहीत किया गया – आवेदक को दोषी नहीं ठहराया जा सकता – पुनरीक्षण मंजूर।

Brijesh Sharma, for the applicant.

Nutan Saxena, P.P., for the non-applicant/State.

***Cr.R. No.123/2004 (Gwalior), D/- 30 November, 2009.**

UNION OF INDIA Vs. DIPAK MALI

I.L.R. [2010] M. P., 547

SUPREME COURT OF INDIA

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

15 December, 2009*

UNION OF INDIA & ors. ... Petitioners

Vs.

DIPAK MALI ... Respondent

Central Civil Services (Classification, Control and Appeal) Rules, 1965, Rule 10(6) & 10(7) [Inserted by amendment w.e.f. 02.06.2004] - ***Suspension - Review of suspension order - As per sub-rule (6), order of suspension would not survive after period of 90 days unless it is extended after review - Respondent suspended on 10.08.2002 - Case of respondent reviewed on 20.10.2004 - Held - As per amended rules, as review committee was not constituted and review had not been conducted within 90 days - Subsequent review could not revive the order which had already become invalid - Appeal dismissed.*** (Para 11)

केन्द्रीय सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, 1965 नियम 10(6) व 10(7) [02.06.2004 से संशोधन द्वारा अंतःस्थापित] – निलंबन – निलंबन आदेश का पुनर्विलोकन – उपनियम (6) के अनुसार, निलंबन का आदेश 90 दिन की कालावधि के बाद विद्यमान नही रहेगा जब तक वह पुनर्विलोकन के बाद बढ़ा न दिया गया हो – प्रत्यर्थी को तारीख 10.08.2002 को निलंबित किया गया – प्रत्यर्थी के मामले का पुनर्विलोकन 20.10.2004 को किया गया – अभिनिर्धारित – संशोधित नियमों के अनुसार, चूंकि पुनर्विलोकन समिति गठित नही हुई थी और पुनर्विलोकन 90 दिनों के भीतर नही किया गया था – पश्चात्वर्ती पुनर्विलोकन ऐसे आदेश को पुनर्जीवित नही कर सकता था जो अविधिमान्य हो चुका था – अपील खारिज।

J U D G M E N T

The Judgment of the Court was delivered by ALTAMAS KABIR, J. :–This Special Leave Petition has been filed by the Union of India and its officers in the Ministry of Defence against the judgment and order dated 1st September, 2005, passed by the Madhya Pradesh High Court at Jabalpur in Writ Petition (S) No.2569 of 2005, dismissing the same. The respondent, who was working as a Civilian Motor Driver-II in the establishment of the Senior Quality Assurance Officer, Senior Quality Assurance Establishment (Armaments) in the Gun Carriage Factory at Jabalpur, was suspended pending inquiry on 10th August, 2002. Under Rule 10 of the Central Civil Services (CCA) Rules, 1965 amended by Notification dated 23rd December, 2003, Sub-Rules (6) and (7) were inserted. As the same are relevant to the facts of this case, the same are extracted hereinbelow :

"(6) An order of suspension made or deemed to have been

*S.L.P.(C) No.6661/2006

made under this rules shall be reviewed by the authority competent to modify or revoke the suspension, before expiry of ninety days from the date of order of suspension, on the recommendation of the Review Committee constituted for the purposes and pass orders either extending or revoking the suspension. Subsequent reviews shall be made before expiry of the extended period of suspension. Extension of suspension shall not be for a period exceeding one hundred and eighty dates at a time.

(7) Notwithstanding anything contained in sub-rules 5, an order of suspension made or deemed to have been made under sub- rules (1) or (2) of this rule shall not be valid after a period ninety days unless it is extended after review, for a further period before the expiry of ninety days."

2. The aforesaid amendment came into effect from 2nd June, 2004, but as a Review Committee was not constituted, the respondent's suspension was not reviewed as required by the amended Rules. The respondent, therefore, claimed that the suspension order must be deemed to have lapsed and accordingly, he approached the Central Administrative Tribunal by filing O.A. No.540/2004 for a declaration that the suspension order dated 10th August, 2002, became invalid on the expiry of 90 days from the date on which Sub-Rules (6) and (7) of Rule 10 came into force, since the same had not been extended by the Review Committee.

3. There is no dispute that the suspension of the respondent was not extended. The Tribunal, accordingly, allowed the application filed by the respondent and by its order dated 29th March, 2005, quashed the suspension order dated 10th August, 2002. The said order of the Tribunal was questioned before the High Court on the ground that while Sub-Rules (6) and (7) of Rule 10 came into force only on 2nd June, 2004, the application had been made prematurely in July, 2004 even before the expiry of three months. It was contended that since the matter was subjudice on account of the pendency of the Original Application filed by the respondent before the expiry of 90 days from 2nd June, 2004, the petitioners were unable to review the respondent's case.

4. Dealing with the said contention the High Court held that since there was no interim stay in O.A.No.540/2004 filed by the respondent, there was nothing to prevent the petitioners from reviewing the suspension within 90 days from 2nd June, 2004. On such ground the High Court dismissed the writ petition.

5. It is against the said order of the High Court that the present Special Leave Petition has been filed.

6. On behalf of the Union of India, it was not denied that the amended provisions of Rule 10 came into effect from 2nd June, 2004, and that the case of the Respondent was reviewed on 20th October, 2004, beyond the period envisaged

under Sub-rule (6) thereof. It was, however, contended that the delay in conducting the review was not on account of any laches on the part of the petitioners, but having regard to the fact that the Respondent filed OA No.540 of 2004, before the Central Administrative Tribunal in July, 2004, and the same was disposed of by the Tribunal on 18th August, 2004, during which period the petitioner was unable to take any action under Rule 10 in view of the provisions of Section 19(4) of the Administrative Tribunals Act, 1985, which provides that where an application has been admitted by a Tribunal under Sub-section (3), every proceeding under the relevant service rules as to redressal of grievances in relation to the subject matter of such application pending immediately before such admission, shall abate, and save as otherwise provided by the Tribunal, no appeal or revision in relation to such matter shall thereafter be entertained under such rules.

7. It was submitted that since the proceedings were pending before the Tribunal, the Petitioner had no option but to stay its hands in regard to the proceedings against the respondent. It was also submitted that on 20th October, 2004, when the Reviewing Committee took up the Petitioners' case, it extended the period of suspension, which was again extended thereafter by order dated 8th April, 2005. Learned counsel for the petitioner submitted that having regard to the above, the order passed by the High Court upholding the order of the Central Administrative Tribunal was liable to be set aside along with the order passed by the learned Tribunal.

8. On behalf of the Respondents, it was urged that Section 19(4) of the Administrative Tribunals Act, 1985, did not contemplate stay but abatement of proceedings before other authorities once an application was admitted by the Central Administrative Tribunal. By virtue of Sub-section (4) of Section 19, on admission of such application proceedings pending before other Courts and Forums would abate unless otherwise directed by the Tribunal.

9. Learned counsel contended that in the absence of any stay, nothing prevented the petitioners from reviewing the petitioner's case and the explanation forthcoming for not taking steps under Sub-section (6) of Section 7 must inure to the benefit of the respondent.

10. Having carefully considered the submissions made on behalf of the parties and having also considered the relevant dates relating to suspension of the Respondent and when the Petitioner's case came up for review on 20th October, 2004, we are inclined to agree with the views expressed by the Central Administrative Tribunal, as confirmed by the High Court, that having regard to the amended provisions of Sub-rules (6) and (7) of Rule 10, the review for modification or revocation of the order of suspension was required to be done before the expiry of 90 days from the dateof order of suspension and as categorically provided under Sub-rule (7), the order of suspension made or deemed would not be valid after a period of 90 days unless it was extended after review for a further period of 90 days.

11. The case sought to be made out on behalf of the petitioner, Union of India as to the cause of delay in reviewing the Respondent's case, is not very convincing. Section 19(4) of the Administrative Tribunals Act, 1985, speaks of abatement of proceedings once an original application under the said Act was admitted. In this case, what is important is that by operation of Sub-rule (6) of Rule 10 of the 1965 Rules, the order of suspension would not survive after the period of 90 days unless it was extended after review. Since admittedly the review had not been conducted within 90 days from the date of suspension, it became invalid after 90 days, since neither was there any review nor extension within the said period of 90 days. Subsequent review and extension, in our view, could not revive the order which had already become invalid after the expiry of 90 days from the date of suspension.

12. For the said reasons, we are not inclined to interfere with the impugned order of the High Court and the Special Leave Petition is, accordingly, dismissed.

13. There will, however, be no order as to costs.

Petition dismissed.

I.L.R. [2010] M. P., 550
WRIT APPEAL
Before Mr. Justice S.K. Gangele & Mr. Justice Piyush Mathur
18 January, 2010*

BRAJESH SHARMA ... Appellant
Vs.
NAGENDRA SINGH SISODIYA & ors. ... Respondents

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 86(1) - *Gram Panchayat appointed Panchayat Karmi - SDO set-aside the order of appointment in appeal - Collector directed appointment by fresh advertisement u/s 86(1) - Held - Collector (Prescribed Authority) can not issue such direction unless there is willful default or negligence on the part of Gram Panchayat in performing its duties of filling the post - Order of learned Single Judge setting-aside order of Collector upheld - Writ Appeal dismissed.* (Para 9)

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 86(1) – ग्राम पंचायत ने पंचायत कर्मी की नियुक्ति की – एस.डी.ओ. ने अपील में नियुक्ति आदेश अपास्त किया – कलेक्टर ने धारा 86(1) के अन्तर्गत नये विज्ञापन द्वारा नियुक्ति का निदेश दिया – अभिनिर्धारित – कलेक्टर (विहित प्राधिकारी) ऐसे निदेश जारी नही कर सकता जब तक कि ग्राम पंचायत की ओर से पद भरने के कर्तव्यों के पालन में जानबूझकर व्यतिक्रम या उपेक्षा न की गई हो – कलेक्टर के आदेश को अपास्त करने वाले विद्वान एकल न्यायाधीश के निर्णय की पुष्टि की गयी – रिट अपील खारिज।

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*W.A. No.579/2009 (Gwalior)

Cases referred :

2008(III) MPWN 86 = ILR (2008) MP 2817.

S.B. Gupta & S.K. Gupta, for the appellant.

M.P.S. Raghuvanshi, for the respondent No.1.

ORDER

The Order of the Court was delivered by PIYUSH MATHUR, J. :–This Intra-Court appeal has been preferred by Brajesh Sharma against the Order of the Writ Court passed in Writ Petition No.2071/08 (S) on Date 2.12.2009, whereby his appointment as Panchayat Karmi has been found to be contrary to the provisions of Sections 70 and 86 (2) of the Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (hereinafter for short referred to as the "Panchayat Act"), in a Writ Petition preferred by Nagendra Singh Sisodiya, who had raised a grievance that instead of passing a fresh Resolution on the basis of the misconduct of the Candidates, pursuant to an Advertisement Dated 27.07.2007, the Collector (Deputy Director, District Shivpuri) has unauthorizedly directed the Gram Panchayat to take steps to convene fresh exercise for the appointment of Panchayat Karmi.

2. The Record demonstrates that an Advertisement was issued on date 27.07.2007 by Gram Panchayat Bhainsravan, Tahsil Pohri, District Shivpuri for inviting applications for the Post of Panchayat Karmi, pursuant to which as many as 10 Candidates had submitted their applications and while considering their respective merits, a Resolution was passed by the Gram Panchayat on Date 10.8.2007, whereby one Devendra Kumar was appointed as Panchayat Karmi, instead of being less meritorious to Writ Petitioner Nagendra Singh Sisodiya.

3. The appointment of Devendra Kumar, who was appointed by majority of members, was challenged before the Sub-Divisional Officer, who allowed the Appeal by his Order Dated 15.11.2007 and the Resolution passed by the Gram Panchayat on Date 10.08.2007 was set aside and consequently the Gram Panchayat was directed to pass a fresh Resolution while considering the merits of the Candidates.

4. Since the Gram Panchayat was required to pass a fresh Resolution after the passing of the Order of the Sub-Divisional Officer, the Petitioner herein submits that the Deputy Director was not competent in the eyes of Law to have straightway directed the Gram Panchayat to issue a fresh Advertisement for filling up the Post of Panchayat Karmi, in view of Sections 70 and 86 (2) of the Panchayat Act, inasmuch as the Gram Panchayat has not expressed its inability of fulfilling the Post and there exists no document to demonstrate that inspite of issuance of directions by the Competent Authority, the Gram Panchayat failed to comply with the same.

5. The Petitioner had attacked mainly on the action of the Collector (Deputy

Director, District Shivpuri), whereby a direction was given to the Gram Panchayat for publishing a fresh Advertisement It seems that an Advertisement was issued on Date 14.01.2008 by the Chief Executive Officer, Janpad Panchayat, Pohri, by inviting applications for the Post of Panchayat Karmi for the Gram Panchayat and the Appointment Order was issued in favour of Brajesh Sharma on Date 26.03.2008.

6. It is also argued on behalf of the Private Respondent that he has been selected by an Independent Advertisement and being the most meritorious candidate, he has rightly been appointed on the Post of Panchayat Karmi. Although, he has not adverted to the legitimacy of the directions of the Deputy Director and also remained silent about the scope and sweep of the provisions of the Panchayat Act in relation to the legality of the steps taken by the Panchayat in initiating a Fresh Process of Appointment. The Counsel for the State has also justified the action of the State Government.

7. After hearing the parties, the Writ Court vide its Order Dated 02.12.2009 has found the entire exercise of publication of Fresh Advertisement to be contrary to the provisions of the Panchayat Act and has quashed the Order of Appointment issued in favour of Appellant Brajesh Sharma (Respondent no.5 in Writ Petition). Aggrieved by the aforesaid Judgment, Brajesh Sharma has preferred this Writ Petition before this Court.

8. We have heard Shri S.B. Gupta, Learned Counsel for the Appellant and Shri MPS Raghuwanshi, Learned Counsel for the Respondent No.1 and have perused the record of the case.

9. From the perusal of the record, it is evident that the Sub-Divisional Officer vide Order Dated 15.11.2007 has allowed the Appeal and the Resolution passed by the Gram Panchayat on Date 10.08.2007 was set aside, where-after there was no necessity for holding a fresh exercise of filling the Post, but the Panchayat was required to pass a fresh Resolution, on the basis of the merit of the Candidates. A close scrutiny of the entire record/documents demonstrates that the Gram Panchayat was neither negligent in performing its duties of filling the Post nor it failed to fill up the Post of the Panchayat Karmi and as such, there was no occasion for the Collector/Deputy Director to have issued instructions or directions for the fulfillment of the vacancy in terms of the provisions as contained in Section 86 of the Panchayat Act. Therefore, the interference of the Collector/Deputy Director appears to be contrary to the provisions of Sections 70 and 86 of the Panchayat Act.

10. The contention of the Learned Counsel for the Appellant about the availability of the powers of the Collector of issuing directions for filling the Post, cannot be questioned, but the same has to be evaluated in the fact situation of each case because unless there is a willful default or negligence on the part of the Gram

Panchayat, the Competent Authority (Collector) cannot issue such direction in terms of Section 86 of the Panchayat Act. The Learned Counsel for the Appellant has placed reliance on a Division Bench Judgment of this Court, which is reported as 2008 (III) MPWN 86 *Leelawati and another v. State of M.P. & others*, wherein the Division Bench has categorically found that the Collector being the Prescribed Authority had issued a direction to the Gram Panchayat to perform its duty of appointing a Panchayat Karmi and the Panchayat had failed to comply such direction. But here is a case where, on the basis of the available record, it could not be gathered that at any point of time, the Competent Authority (Collector) had ever directed the Panchayat to perform its duty of filling the Post of Panchayat Karmi and the Panchayat did fail to comply with the same. Section 86 of the Panchayat Act has an independent sweep of its own, but the same is circumscribed as the same is based upon certain events to occur first, which include inability or disability of a Panchayat in complying with the direction of the Competent Authority, but in absence of issuance of directions to the Panchayat, the Competent Authority cannot straightway exercise that power.

11. The Writ Court has very carefully examined the factual and legal aspect of the matter and has found that the Deputy Director (Collector, Shivpuri) was not competent to order for the issuance of a Fresh Advertisement, in absence of fulfillment of the requisite provisions of Section 86 of the Panchayat Act and as such the Writ Court has rightly set aside the direction of the Collector and Advertisement Dated 14.01.2008 as also the consequently issued appointment Order Dated 26.03.2008, in favour of Appellant Brajesh Sharma.

12. Therefore, we find no reason to interfere in the direction of the Writ Court as given to the Gram Panchayat for considering all the applications received pursuant to the Advertisement Dated 27.07.1997, on their respective merits.

13. Therefore, this Court finds no illegality in the impugned Order of the Writ Court and consequently the Writ Appeal is dismissed. However, there shall be no order as to costs.

Appeal dismissed.

I.L.R. [2010] M. P., 553
WRIT PETITION
Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Ajit Singh
11 November, 2009*

NARMADA BACHAO ANDOLAN ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. **Constitution, Article 21** - *Rehabilitation* - *Respondents Nos.1 & 2 will provide rehabilitation and re-settlement benefits of rehabilitation policy*

*W.P. No.6056/2009 (Jabalpur)

of Government of M.P. for Narmada Valley Project to displaced persons and families of Indira Sagar and Omkareshwar Canal Projects and will constitute Grievance Redressal Authority to decide complaints. (Para 37)

क. संविधान, अनुच्छेद 21 – पुनर्वास – प्रत्यर्थी क्र. 1 व 2 इंदिरा सागर और ओंकारेश्वर नहर परियोजनाओं के विस्थापित व्यक्तियों और परिवारों को नर्मदा घाटी परियोजना के लिए म.प्र. शासन की पुनर्वास नीति के पुनर्वास और पुनःस्थापन लाभ प्रदान करेंगे और शिकायतों के विनिश्चय के लिए शिकायत निवारण प्राधिकरण का गठन करेंगे।

B. **Constitution, Article 21** - *Rehabilitation - No further acquisition of land, excavation or construction of canal network for Command Area of Indira Sagar and Omkareshwar Projects will be undertaken until Command Area Development Plans are cleared by committee of experts constituted for Sardar Sarovar, Indira Sagar and Omkareshwar Projects.* (Para 37)

ख. संविधान, अनुच्छेद 21 – पुनर्वास – इंदिरा सागर और ओंकारेश्वर परियोजनाओं के प्रभावित क्षेत्र के लिए भूमि का आगे कोई और अर्जन, उत्खनन या नहर तंत्र का निर्माण प्रारम्भ नही किया जायेगा जब तक कि सरदार सरोवर, इंदिरा सागर और ओंकारेश्वर परियोजनाओं के लिए गठित विशेषज्ञों की समिति द्वारा प्रभाव क्षेत्र विकास योजनाएँ स्पष्ट नही की जाती।

Cases referred :

(2000) 10 SCC 664, (2004) 9 SCC 362, AIR 2009 MP 26, 1992 (Supp) 1 SCC 548, AIR 2004 SC 3582, (2004) 8 SCC 14, (2008) 4 SCC 695, (1996) 11 SCC 501, (1996) 6 SCC 445, (2000) 2 SCC 48, (1997) 2 SCC 627.

Medha Patkar, for the petitioner.

Ravish Agrawal with *Naman Nagrath, Addl.A.G. & Arpan J. Pawar,* for the respondent Nos.1, 2, 5 & 6.

Radhelal Gupta, A.S.G., for the respondent No.3.

Dharmendra Sharma, for the respondent No.4.

K.K. Trivedi, for the intervenor-contractors.

Ansuman Singh, for the intervenors-farmers.

J U D G M E N T

The Judgment of the Court was delivered by

A.K. Patnaik, C.J. :–The petitioner No. 1 is a senior social activist of Narmada Bachao Andolan and was a member of the World Commission on Dams. The petitioners No.2 to 7 are persons affected by the canals of Omkareshwar and Indira Sagar Projects in Districts Dhar and Badwani. The petitioners have filed this writ petition under Article 226 of the Constitution as a public interest litigation claiming appropriate reliefs in respect of the work now being carried on by respondents No. 1 and 2 in connection with the canals of the Indira Sagar and Omkareshwar Projects on the Narmada river.

2. The background facts are that the Narmada Valley Development Project consists of several large and medium dam projects. Indira Sagar and Omkareshwar

Dam Projects are two such projects located in the State of Madhya Pradesh. For the Indira Sagar Project, which was earlier known as Narmada Sagar Project, the Government of India, Ministry of Environment and Forests, granted environmental clearance by Office Memorandum dated 24th June, 1987 and for the Omkareshwar multipurpose Project, the Government of India, Ministry of Environment and Forests, granted environmental clearance by Office Memorandum dated 13th October, 1993. After the construction of the Indira Sagar and Ornkareshwar dams, the construction of the main and branch canals of the Indira Sagar Project started in 1991 and the construction of main and branch canals of the Omkareshwar Project started in 2006. The petitioners have filed this writ petition praying that no work on the canals be carried out without the execution of Resettlement and Rehabilitation Plans and without completion of Command Area Development Plans and without approval of these plans by the Union Ministry of Environment and Forests. The petitioners have also prayed that agricultural land in the Narmada region which is already irrigated be protected and displacement of persons be minimised by construction of the canal network. The petitioners have further prayed that the land acquisition process be quashed and no canal excavation work be carried out without prior consultation with the Gram Sabha in accordance with the provisions of the Panchayat (Extension to Schedule Areas) Act, 1996 (for short "the PESA Act").

3. On 23.6.2009, the Court after hearing Ms. Medha Patkar for the petitioners issued notices to the respondents and thereafter on 1.7.2009 after hearing, the parties took the view that if the Court does not pass any order of status quo and the Court finally declares the acquisition proceedings void and directs restoration of the land to the land owners and if the State continues to spend more money on excavation of land and on construction of the canals, the State will suffer greater loss. The Court was of the further view that the better course in the public interest would be to hear the writ petition as early as possible and decide the matter and in the meantime the respondents should maintain status-quo on the excavation work for the canal and in respect of land acquisition proceedings and accordingly passed an order of statusquo on 1.7.2009.

4. On 1.7.2009, the Court allowed the application for intervention I.A. No.6658/2009 filed by Nilesh Patidar, Amichand Patidar, Chand Khan Mansoori, Shivraj Singh, Inder Singh Sisodia and Joginder Singh. Again on 8.10.2009, the Court allowed the application for intervention I.A. No. 9582/2009 filed by M/s Goodwill Advance Construction Company Ltd. which has been entrusted with part of the work of excavation of canals. Replies have been filed by respondents No. 1, 2 and 3. Counsel for the parties and the interveners were heard at length on 08.10.2009, 09.10.2009, 14.10.2009, 20.10.2009, 21.10.2009, 22.10.2009, 23.10.2009, 27.10.2009 and 28.10.2009.

Issue relating to environment

5. Ms. Medha Patkar appearing for the petitioners submitted that the Office Memorandum dated 24th June, 1987 of the Government of India, Ministry of Environment and Forests granting environmental clearance to the Indira Sagar Project clearly contemplated that Command Area Development Plan will be prepared and made available to the department and further stipulated that the Narmada Control Authority will ensure that environmental safeguard measures are planned and implemented pari passu with the progress of the work on the project. She submitted that similarly the Office Memorandum dated 13th October, 1993 of the Government of India, Ministry of Environment and Forests stipulated that Command Area Development Plan will be prepared and submitted in March, 1994. She submitted that the Office Memorandum dated 24th June, 1987 and the Office Memorandum dated 13th October, 1993of the Government of India, Ministry, of Environment and Forests therefore granted environmental clearance subject to the condition that Command Area Development Plans are prepared in advance and submitted to the department. She submitted that the letter dated 1st July, 2009 of the Secretary, Government of India, Ministry of Environment and Forests to the Chief Secretary, Government of Madhya Pradesh annexed to the rejoinder of the petitioners would show that the Command Area Development Plan of the Omkareshwar Multipurpose project has not been submitted to the Ministry of Environment and Forest, Government of India. She referred to the para 8 of the affidavit filed on behalf of the Ministry of Environment and Forest, Government of India (respondent No.3), which also states that till date the Ministry has not received the Command Area Development Plan of Omkareshwar Multipurpose project. She submitted relying on para 3.13 of the writ petition that the lands in villages which have been acquired for Indira Sagar canals and Ornkareshwar canals are being irrigated by Narmada water through pumps and pipelines or through strong and deep wells owned by individual farmers and only a small portions of such land are not irrigated. She further submitted relying on para 3.13.2 of the writ petition that many villages in Badwani and Dhar districts which have already lost land and houses because of the Sardar Sarovar Project, are now going to be affected by the Indira Sagar Project canals and Omkareshwar project canals. She also submitted that some of the project affected families have received special rehabilitation package and have purchased alternative land but such land has again been acquired for the canals. She vehemently argued that if Command Area Development Plans for Indira Sagar and Omkareshwar project were prepared in time and submitted, all these problems would have been avoided. She argued that in the absence of Command Area Development Plans of the two projects, no canal excavation work should be carried out and the entire land acquisition process should be stalled.

6. Mr. Vijay Paranjpye appeared as a Technical Expert on behalf of the petitioners and submitted that Command Area Development Plan is necessary to ensure

that the irrigation benefits of a dam project are maximised and must be prepared alongwith the detailed project report of the dam project. He further submitted that the Indira Sagar Project canals and the Omkareshwar Project canals are to irrigate regions in Madhya Pradesh which have black cotton soil and black cotton soil absorbs and retains water and the Command Area Development Plan must therefore ensure a proper drainage system as otherwise there will be water logging and other adverse environmental consequences. He submitted that if Command Area Development Plan is prepared before the canals are built, the alignment of the canals will be proper. Mr. Paranjpey filed documents in support of his submissions and cited para 85 of the judgment of Kripal, J. in *Narmada Bachao Andolan vs. Union of India and others,* (2000) 10 SCC 664, in which there is a reference to a note sent by the Secretary, Ministry of Environment and Forest to the Prime Minister stating *inter alia* that environmental management plan should be implemented pari passu with engineering and other works in the Narmada Sagar and Sardar Sarovar projects for harmonising the environmental conservation needs with the development effort. He also referred to a statement in para 85 of the Judgement of Kripal, J. in Narmada Bachao Andolan showing the costs and benefits of the Narmada Sagar and the Sardar Sarovar Dam. He submitted that benefits of a dam project can be optimised if the Command Area Development Plan is submitted alongwith the detailed project report of the dam.

7. Mr. Ravish Agrawal, learned senior counsel appearing for the respondents No. 1, 2, 5 and 6, relying on the Additional Return filed on behalf of the respondents No .1, 2, 5 and 6, submitted that it would have been a paper formality, if detailed Command Area Development Plans of Indira Sagar Project and Ornkareshwar Project were submitted in the years 1987 and 1993 at the time of environmental clearance because the ground realities substantially change if construction of the Canals is undertaken long after the preparation of the Command Area Plans. He submitted that the statutory notifications under sub-section (2) of Section 3 of the Environment (Protection) Act, 1986 requiring environment clearance to different development projects became effective only in the year 1994 as has been held in para 126 of the judgment in *Narmada Bachao Andolan vs. Union of India and others* (supra) and hence the environmental clearances issued by the Government of India, Ministry of Environment and Forests in the years 1987 and 1993 in the case of Indira Sagar and Ornkareshwar Projects were not statutory but essentially administrative in nature. He further submitted that under the Government of India (Allocation of Business) Rules made under Clause (3) of Article 77 of the Constitution, Command Area Development is allocated to the Ministry of Water Resources and not to the Ministry of Environment and Forests and that the Central Water Commission, an expert body of the Ministry of Water Resources, is the authority which approves major and medium irrigation works, water management, etc. He submitted that on a query made by the Principal Secretary

& Member (R), Narmada Valley Development Authority, Government of Madhya Pradesh by D.O. letter dated 16.10.2009, the Central Water Commission has opined in the communication dated 23.10.2009 annexed to the Additional Return as Annexure R-2/B that Cammand Area Development Plan does not have any bearing on the design, layout/construction of main and branch canals. He submitted that in any case a comprehensive Command Area Development Plan for Indira Sagar Project was submitted to the Ministry of Environment and Forests alongwith the letter dated 21.08.1992 by Narmada Valley Development Authority, Government of MadhyaPradesh, a copy of which is annexed to the Additional Return as Annexure R-2/C and a command area study of Indira Sagar Project and Omkareshwar Project was conducted by the Indian Institute of Science, Bangalore in April, 1985 and was submitted to the Ministry of Environment and Forests alongwith the letter dated 21.08.1992 of the Narmada Valley Development Authority, Government of Madhya Pradesh. He further submitted that recently by letters dated 16.10.2009 (Annexure R-2/D and E), Command Area Development Plans of Indira Sagar Project and Omkareshwar Project have been submitted to the Government of India. He submitted that infact by a recent notification dated 17.9.2009, a copy of which has been annexed to the Additional Return as Annexure R-2/F, the Government of India, Ministry of Environment and Forests has set up an independent Committee of Experts to monitor and review canals and command area development of Omkareshwar Project and this Committee is already monitoring and reviewing canals and command area development of Indira Sagar Project. He cited the observations in the majority judgment of Kripal, J in *Narmada Bachao Andolan vs. Union of India and others* (supra) in para 126 that change in environment does not per se violate any right under Article 21 of the Constitution of India. He also relied on the majority judgment of *Rajendra Babu, J in N.D. Jayal and another vs. Union of India and others,* (2004) (9) SCC 362 in which the contention of the petitioners therein that the work of Tehri Dam should be stopped till the conditions attached to the environmental clearance dated 19.7.1990 including submission of Command Area Development Plan was rejected with the finding that the petitioners have not established that the project work was being carrying out without complying with the conditions of clearances, although they had produced materials to show that there were lapses at certain stages which had been taken care of by the monitoring agencies.

Findings with reasons :

8. The Office Memorandum dated 24th June, 1987 of the Government of India, Ministry of Environment and Forests by which environment clearance was given to the Narmada Sagar Project now renamed as Indira Sagar Project stipulated in paras 4 and 5:

"4. The NCA has been expanded and its terms of reference have been amplified to ensure that environmental safeguard measures are planned and implemented to depth and in its pace of implementation pari passu with the progress of work on the project.

5. After taking into account all relevant facts the Narmada Sagar Project, Madhya Pradesh and the Sardar Sarovar Project, Gujarat are hereby accorded environmental clearance subject to the following conditions:

i The Narmada Control Authority (NCA) will ensure that environmental safeguard measures are planned and implemented pari passu with progress of work on projects.

ii The detailed surveys/studies assured will be carried out as per the schedule proposed and details made available to the Department for assessment.

iii The Catchment Area Treatment Programme and the Rehabilitation Plans be so drawn as to be completed ahead of reservoir filling.

iv The Department should be kept informed of progress on various works periodically."

Paragraphs 4 and sub-para (i) of para 5 of the Office Memorandum dated 24th June, 1987 of the Government of India, Ministry of Environment and Forests quoted above would show that the Narmada Control Authority (NCA) was to ensure that the environmental safeguard measures are planned and implemented pari passu with the progress of work on the project. This means that alongwith the engineering and other works the environmental management plan was to be made and implemented as contemplated in the note of the Secretary, Ministry of Environment and Forest to the Prime Minister quoted in para 8 of the judgment of Kripal, J in *Narmada Bachao Andolan vs. Union of India and others* (supra).

9. The Office Memorandum dated 13th October, 1993 of the Government of India, Ministry of Environment and Forests by which environmental clearance was given to the Omkareshwar Multipurpose project states:

"The proposal was considered from environmental angle and approved subject to implementation of the following mitigative measures pari-passu with the project construction:

x x x x x
x x x x x
x x x x x
x x x x x

x x x x x
x x x x x
x x x x x

(viii) A detailed Command Area Development Plan should be prepared and submitted in March, 1994 so that benefit stream can be ensured as proposed.

x x x x x
x x x x x
x x x x x
x x x x x

(xiii) The Ministry should be kept informed every 6 months of the follow up action taken on the recommendations and the project should be initiated only after ensuring that all arrangements to execute the environmental mitigative measures have been made as a part and parcel of the project."

The Office Memorandum dated 13th October, 1993 of the Government of India, Ministry of Environment and Forests relating to Omkareshwar Multipurpose Project is thus clear that environmental mitigative measures were to be taken pari passu with the project construction and a detailed Command Area Development Plan was to be prepared and submitted in March, 1994 and the Ministry of Environment and Forests was to be kept informed every 6 months of the follow up action taken on the recommendations and that the project was to be initiated only after ensuring that all arrangements to execute the environmental mitigative measures have been made as part and parcel of the project. Thus in the case of Omkareshwar Multipurpose Project also environmental mitigative measures were to be planned alongwith the project to be undertaken and all arrangements to execute the environmental mitigative measures were to be made as part and parcel of the project.

10. Relevant paragraphs of the reply dated 23rd October, 2009 of the Central Water Commission on which Mr. Agrawal relied are extracted hereinbelow:

> "The Command Area Development (CAD) now forms an integral part of the project to ensure that the irrigation potential created is fully utilized. The CAD would encompass all aspects of water management for efficient and equitable distribution of water in the commands of irrigation projects for optimal utilization in a participatory manner. As per the Guidelines for "Preparation of Detailed Project Report of Irrigation and Multipurpose Projects, 1980", the Detailed Project Report (DPR) of a project is prepared to include separate chapters of (1) Irrigation planning, (ii) CAD and (iii) Estimates.

> Whereas all engineering works from source of supply up to outlet are covered in main DPR, all engineering work in Command area comprising of land levelling and shaping construction of water courses lined or unlined, field channels, field drains and field roads are to be covered in Command Area development report. Detailed Project Report and Command Area Development Report shall be submitted together.
>
> The guidelines further stipulate that provisions in the estimate for Earthwork covering main/branch canal(s) shall be based on detailed surveys of main/branch canal(s). Therefore it implies that at the stage of approval of a DPR itself, the alignment of main canal and branch canals have been finalised as provision in the estimates are based on detailed surveys. Therefore it is felt that the Command Area Development Plan, as reported to have not been finalised for the present should not have any bearing on the design, layout/construction of Main and Branch canals."

According to the opinion of the Central Water Commission, therefore, Command Area Development Plan now forms an integral part of the project to ensure that the irrigation potential created is fully utilised and covers all aspects of water management for efficient and equitable distribution of water in the commands of irrigation projects for optimal utilisation in a participatory manner and therefore the Command Area Development Report is to be submitted alongwith the detailed project report, but where the Command Area Development Plan is not finalised, it would not have any bearing on design, layout/construction of main and branch canals. This opinion of the Central Water Commission does not mention whether environmental safeguards or mitigative measures are to be planned before construction of the main canals and branch canals. In other words, the opinion of the Central Water Commission in the reply dated 23rd October, 2009 is only on the engineering aspects and not on the environmental aspects of command area development.

11. In *N.D. Jayal and another vs. Union of India and others* (supra) relied upon by Mr. Agrawal, Rajendra Babu, J delivering the majority judgment has observed in para 45 at page 390 of (2004) 9 SCC:

> "Command area development primarily aims to avert the problems of waterlogging and emergence of salinity. This is very important in maintaining the environmental balance."

In *Narmada Bachao Andolan vs. Union of India and others* (supra) cited by Mr. Agrawal, Kripal, J speaking for the majority has held in para 126 at page 728 of (2000) 10 SCC:

> "Change in the environment does not per se violate any right under Article 21 of the Constitution of India especially when

ameliorative steps are taken not only to preserve but to improve the ecology and environment and in case of displacement, prior relief and rehabilitation measures take place pari passu with the construction of the dam."

The aforesaid observations in two Supreme Court judgements are emphatic that to prevent water logging and salinity and to maintain the ecology and environment, ameliorative steps have to be planned and implemented *pari passu* with the construction of the project.

12. We are thus of the considered opinion that the Command Area Development Plans of Indira Sagar and Omkareshwar projects were required to be prepared and submitted to the authority entrusted with the responsibility of monitoring planning and implementation of environmental safeguards and this was to be done before the commencement of the work of the canals so that such authority could ensure that the environmental safeguards and mitigative measures had been properly planned and could be implemented pari passu with the construction of the canal project. Hence before acquiring land for construction of the canal network of the Command Area and before excavating such land for construction of the canal network, the Command Area Development Plans ought to have been scrutinised by the authority entrusted with the responsibility of ensuring that environmental safeguards or environmental mitigative measures were properly planned and could be implemented along with the engineering works of the canal project. We are also of the considered opinion that if land is acquired and excavated and canals are constructed before preparation and submission of the Command Area Development Plans to such monitoring authority, environmental safeguards or mitigative measures cannot be implemented pari passu with the construction of the canal project. Rather if the main canals and branch canals are constructed without keeping in mind the environmental requirements, there may be immense problem of water logging and salinity disturbing the environmental plans and the authority entrusted to ensure that environmental safeguards and mitigative measures are implemented may not be able to reverse the acquisition of land and work done on the excavation and the construction of main canals and branch canals because of the legal consequences of acquisition of land and the heavy expenditure incurred by the State on acquisition of land, excavation work and construction work of the canals.

13. We however find that by latter dated 21.08.1992 of the Narmada Development Authority, a comprehensive Command Area Plan was sent to Smt. Nalini Bhatt, Scientist (S.E.), Government of India, Ministry of Environment and Forests. Along with the letter, a report prepared by the Indian Institute of Science, Bangalore in April, 1985 on the basis of study of the composite command of Narmada Sagar and Omkareshwar Reservoirs work had also been sent to Smt. Nalini Bhatt, Scientist (S.E.), Government of India, Ministry of Environment and

Forests. We also find that by letters dated 16.10.2009 (Annexure R-2/D and Annexure R-2/E), the Chief Conservator of Forest sent copies of the Command Area Development Plan of the Indira Sagar Project and the left bank canal of the Omkareshwar Project. In the two letters, the Chief Conservator of Forest of Madhya Pradesh has also mentioned that endeavor will be made to ensure that Command Area Development Plan is implemented alongwith development of irrigation facilities. We also find that a notification dated 17.9.2009 of the Government of India, Ministry of Environment and Forests has been issued saying that the Committee of Experts which was constituted for the Sardar Sarovar and Indira Sagar Projects on 2.9.2008 will also monitor and review the canals and Command Area Development of Omkareshwar Project and this Committee includes Dr. Pavan Kumar, Director (Environment) of the Narmada Control Authority. Until this Committee of Experts scrutinises the Command Area Development Plans submitted to the Ministry of Environment and Forests and communicates its decision to the Respondent No. 1, there should be no further acquisition of land for the canal network and there should be no further excavation of land and construction of canal network. In a recent decision *Karnataka Industrial Areas Development Board vs. C. Kenchappa and others,* AIR 2006 SC 2038 in para 97 at page 2049 of the AIR the Supreme Court has taken the view that principles of "Sustainable Development" should be followed and before acquisition of land for development, the consequence and adverse impact of development must be properly comprehend.

Issue relating to consultation with Gram Sabha.

14. Ms. Medha Patkar appearing for the petitioner submitted that Part IX titled "The Panchayats" was inserted in the Constitution by the Constitution (Seventy Third Amendment) Act, 1992 with effect from 24.4.1993. She submitted that Article 243M of the Constitution stipulated that nothing in Part IX shall apply to the Scheduled Areas referred to in clause (1) of Article 243 of the Constitution but Clause (4) of Article 243M provided in sub-clause (b) that notwithstanding anything in the Constitution, Parliament may, by law, extend the provisions of Part IX to the Scheduled Areas subject to such exceptions and modifications as may be specified in such law. She submitted that in exercise of this power under sub-clause (b) of clause (4) of Article 243M of the Constitution, Parliament has made the PESA Act. She submitted that Section 4 of the PESA Act expressly provides that notwithstanding anything under Part IX of the Constitution, Legislature of a State shall not make any law under Part IX which is inconsistent with any of the features indicated in clauses (a) to (o) of Section 4 of the PESA Act. She submitted that in clause (i) of Section 4 of the PESA Act it is provided that the Gram Sabha or the Panchayats at the appropriate level shall be consulted before making acquisition of land in the Scheduled Areas for development projects and before re-settling or rehabilitating persons affected by such projects in the

Scheduled Areas. She argued that acquisition of land for the Indira Sagar and Omkareshwar canal projects therefore could only be made after consultation with the Gram Sabha. She argued that only after the Command Area Development Plan containing the proposal for constructing the canal network in the concerned village is placed before the Gram Sabha and the views of the Gram Sabha are taken, the process for acquisition of land in Scheduled Areas for the Indira Sagar and Omkareshwar canal projects could not be initiated.

15. Ms. Patkar submitted that after this writ petition was filed and after the Court passed orders on 1.7.2009 directing maintenance of status-quo with regard to acquisition of land and excavation work for the canal, the respondent No. 1 has hastily and arbitrarily passed orders on 30.7.2009 that the concerned Janpad Panchayat of the areas through which the canal network was proposed to be constructed is required to be consulted. She submitted that the order dated 30.7.2009 passed by the respondent No. 1 for consultation with Janpad Panchayat instead of Gram Sabhas of the concerned villages is not in accord with the object of Section 4(i) of the PESA Act. She submitted that the object of Section 4(i) of the PESA Act is to be found in Article 40 of the Constitution which provides that the State shall take steps to organise village panchayats and endow them with such powers as may be necessary to enable them to function as units of self-government. She submitted that to achieve this object in Article 40 of the Constitution, Part IX was inserted in the Constitution by the Seventy Third Constitution Amendment. She submitted that in Part IX, 'Gram Sabha' has been defined in Article 243(b) to mean a body consisting of persons relating to a village comprised within the area of Panchayat at the village level. She argued with all force that if the object of self-government is to be achieved, before making acquisition of land for a development project and before re-settling or rehabilitating persons affected as provided in Section 4(i) of the PESA Act, the Government must have prior and informed consultation with the Gram Sabha of the concerned village in which the development work is to be undertaken. She submitted that the application of respondents No.1, 2, 5 and 6 numbered as. IA. No.9118/2009 would show that in a malafide and arbitrary manner the respondent No.1 has consulted the Janpad Panchayats instead of the Gram Sabhas. She submitted that the order of State Government dated 30.7.2009 providing for consultation with Janpad Panchayats instead of Gram Sabhas is therefore vitiated by malafide, arbitrariness and is violative of Article 14 of the Constitution. She vehemently submitted that since consultation with Gram Sabha is mandatory and since there has been no consultation with regard to re-settling and rehabilitation of the villagers in the Scheduled Areas likely to be affected, the Court should quash the land acquisition proceedings and direct the respondents to consult the Gram Sabha after informing the villagers about the details of proposed canal network which may affect the villagers.

16. Mr. Agrawal, learned senior counsel appearing for the respondents 1, 2, 5 and 6, on the other hand, submitted that Article 40 of the Constitution is only a Directive Principle of State Policy and Article 37 of the Constitution clearly states that the Directive Principles shall not be enforceable by any Court. He submitted that the State Legislature has power under Articles 245 and 246 of the Constitution read with Entry 5 of List-11 of the Schedule VII of the Constitution to make law on local Government for the purpose of local self-government or village administration. He submitted that the provisions in Part IX of the Constitution are clear. Parliament has no power to legislate on Panchayats and Gram Sabhas. He referred to the provisions of Article 243A and 243C, 243D, 243G, 243H and 243K which confer power on the state legislature to make law on different aspects of Panchayats and Gram Sabhas. He submitted that the State Legislature has made the Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 but has not made any provision therein for consultation with Gram Sabha or any Panchayat before acquisition of law in Scheduled Areas for development projects as provided in Section 4(i) of the PESA Act and therefore Section 4(i) of the PESA Act has no legal effect and cannot be enforced-by the Court. He cited Principles of Statutory Interpretation by Justice G.P. Singh 11th Edition - 2008 in which it is stated at page 557 that it is not permissible to Parliament to do indirectly what it is prohibited to do directly. He vehemently argued that since Parliament has no power to legislate on any matter relating to self-government or village administration including Gram Sabha and Panchayats, Parliament could not make the PESA Act even indirectly relating to Panchayats and Gram Sabhas.

17. Mr. Agrawal submitted that as a matter of fact acquisitions of land for the Indira Sagar Project and Omkareshwar Dam Project have not been made under any law made by State Legislature but under the Land Acquisition Act, 1894, a Central Act, and a Division Bench of this Court has already held in *Naresh Singh and others vs. Union of India and others*, AIR 2009 MP 26 that the embargo in Section 4(i) is not on Parliament but on Legislature of a State and therefore Section 4 (i) of the PESA Act does not apply to acquisition of land made under the Land Acquisition Act, 1894. Mr. Agrawal submitted that without prejudice to the aforesaid stand of the State Government, the State Government has consulted the concerned Gram Sabhas in the Scheduled Areas and as many as 324 Gram Sabhas have approved, 28 have not.approved and 10 Janpad Panchayats have approved the acquisitions of land for the canals. He cited the decision of the Supreme Court in *State of Jammu & Kashmir vs. A.R. Zakir and others*, 1992 (Suppl) I SCC 548 for the proposition that "consultation" does not mean "concurrence and that a writ or direction cannot be issued by the High Court to the legislature to make a law.

Findings with reasons:

18. Mr. Agrawal is right in his submission that the Legislature of a State has

power to make laws for the whole or any part of the State in respect of any of the matters in List II in the VIIth Scheduled of the Constitution under Articles 245 and 246 of the Constitution, but as would be clear from the opening words of Article 245 of the Constitution such power of the Legislature of the State to make any law in respect of any matter in List II in the VIIth Schedule of the Constitution is "subject to the provisions of this Constitution". Thus, even if the Legislature of the State of Madhya Pradesh has exclusive power to make a law on Local Government and Local Authorities for the purpose of local self-government or village administration covered under Entry 5 of List II in the VII Schedule of the Constitution, such power of the State Legislature of Madhya Pradesh is subject to the provisions of the Constitution including the provisions in Part IX of the Constitution. The provisions in Part IX of the Constitution deal with various aspects of the panchayats such as Gram Sabha (243A), Constitution of Panchayats (243B), Composition of Panchayats (243C), Reservation of seats in Panchayats (243D), Duration of Panchayats etc. (243E), Disqualification for membership of Panchayat (243F), Powers, authority and responsibility of Panchayat (243G), Powers to impose taxes by, and Funds of, the Panchayats (243H), Audit and accounts of Panchayats (243J) and Elections to Panchayats (243K), but Article 243M states that nothing in Part IX shall apply to the Scheduled Areas referred to in clause (1) of Article 244. Article 243M((4)(b) however states:

> "(4)Notwithstanding anything in this Constitution:
>
> (a) .....
>
> (b) Parliament may, by law, extend the provisions of this Part to the Scheduled Areas and the tribal areas referred to in clause (1) subject to such exceptions and modifications as may be specified in such law, and no such law shall be deemed to be an amendment of this Constitution for the purposes of article 368."

Article 243M(4) thus begins with a non-obstante clause and states that notwithstanding anything in the Constitution Parliament may, by law, extend the provisions of Part IX to the Scheduled Areas subject to such exceptions and modifications as may be specified in such law. The result is that to Scheduled Areas referred to in clause (1) of Article 244 of the Constitution, none of the provisions in Part IX of the Constitution apply and only Parliament has the power to make a law extending the provisions of Part IX to the Scheduled Areas subject to such exceptions and modifications as may be specified in such law made by the Parliament. It is in exercise of this power under Article 243M(4)(b) that Parliament has enacted the PESA Act in the year 1996. Sections 3 and 4(i) of the PESA Act which are relevant for this case are quoted hereinbelow-

> "3. The provisions of Part IX of the Constitution relating to Panchayats are hereby extended to the Scheduled Areas subject

to such exceptions and modifications as are provided in Section 4.

4. Notwithstanding anything contained under Part IX of the Constitution, the Legislature of a State shall not make any law under that Part which is inconsistent with any of the following features, namely:-

(i) the Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before re-settling or rehabilitating persons affected by such projects in the Scheduled Areas; the actual planning and implementation of the projects in the Scheduled Areas shall be coordinated at the State level."

Thus, by provisions of Section 4(i) of the PESA Act, the Legislature of a State was prohibited from making any law under Part IX of the Constitution inconsistent with the feature that the Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before resettling or rehabilitating persons affected by such projects in the Scheduled Areas.

19. We find that after the PESA Act, the Legislature of the State of Madhya Pradesh has by MP Act 43 of 1997 inserted Chapter XIV-A titled "Special provisions for panchayats in the Scheduled Areas" in Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (for short 'the Adhiniyam, 1993') and thereafter also amended some of the provisions of Chapter XIV-A by the MP Act 5 of 1999 and the MP Act 23 of 2001. On a detailed examination of the provisions of Sections 129-A to 129-F in Chapter XIV-A of the Adhiniyam, 1993 as amended, we do not find therein any provision requiring consultation with the Gram Sabha or the Panchayats at the appropriate level before acquisition of land for a development project or before rehabilitation and re-settlement of persons affected by a development project in Scheduled Areas, and the vires of the Special provisions for Panchayats in the Scheduled Areas in Chapter XIV-A of the Adhiniyam, 1993 have also not been challenged in this writ petition. The State Legislature, in our considered opinion, ought to have made a provision in the Adhiniyam, 1993 in accordance with Section 4(i) of the PESA Act providing for consultation with the Gram Sabha or Panchayats at the appropriate level before acquisition of land in the village for development projects or before resettlement and rehabilitation of persons affected by such projects but in the absence of any special provision in the Adhiniyam, 1993 requiring consultation with the Gram Sabha or Panchayats at the appropriate level before making acquisition of land in the Scheduled Areas for development projects, the Court cannot issue a direction or mandamus to the respondent No. I to consult the Gram Sabha before acquisition of land or before rehabilitation and re-settlement of persons affected by a

development project in Scheduled Areas nor can the Court hold that the acquisitions of lands in Scheduled Areas without consultation with the Gram Sabha in accordance with Section 4(i) of the PESA Act are null and void. Moreover, as has been held by this Court in *Naresh Singh and others vs. Union of India and others* (supra), the embargo in Section 4(i) of the PESA Act is not on Parliament but on the Legislature of a State and therefore Section 4(i) of the PESA Act does not apply to land acquisition under a Central Act namely the Land Acquisition Act, 1894 unless a provision in the law is made by the State Legislature that land in Scheduled Areas will not be acquired under the Land Acquisition Act, 1894 without consultation with the Gram Sabha or the Panchayats at the appropriate level as provided in Section 4(i) of the PESA Act.

Issue relating to rehabilitation and re-settlement:

20. Ms. Patkar submitted that the Office Memorandum dated 24.6.1987 of the Government of India, Ministry of Environment and Forests granting environmental clearance for the Indira Sagar Project shows that details were also sought from the project authorities on rehabilitation master plans. She submitted that the O.M. dated 13th October, 1993 of the Ministry of Environment and Forests for the Omkareshwar Multipurpose project stipulated in clause (vii) that. the rehabilitation programme should be extended to landless labourers and the people affected due to canal by identifying and allocating suitable land as permissible and a time bound programme was to be submitted by December, 1993. She submitted that the definition of 'displaced person in paragraph 1.1 (a) to whom rehabilitation was to be provided covered not only a person affected by construction of dam but also a person affected by construction of a canal of the project. She submitted that strangely enough the respondent No.1 has taken a stand in its reply that persons affected by construction of canal are not entitled to the benefits of rehabilitation and re-settlement and this is because of an order passed by respondent No.2 in July, 2003 so as to exclude a person otherwise affected by the project from the definition of "displaced person". She submitted that persons or families displaced on account of submergence or on account of acquisition of land for canal equally are deprived of their livelihood because of the project and therefore a rehabilitation and resettlement policy which gives benefits to persons affected by submergence of a dam but at the same time denies such benefits to persons affected by construction of canals is based on a classification which has no rational nexus with the object of the policy and is discriminatory and is violative of Article 14 of the Constitution. She also submitted that once the respondent No.1 had promised and assured all project affected persons of the Narmada Valley Project rehabilitation benefits, it cannot now retract from such promise and assurance in the year 2003 by an order passed by the Respondent No.2.

21. Mr. Agrawal submitted that the definition of "displaced persons" on rehabilitation policy will not include the canal affected persons. He further

submitted that in *Narmada Bachao Andolan vs. Union of India and others* (supra), Kripal, J in his majority judgment in para 169 at page '742 of the SCC has agreed with the view that canal affected families need not be treated on a par with oustees in the submergence area as there is a basic difference in the impact of the project in the upstream submergence area and in the beneficiary zone of the command area where the canal affected person continue to live. He submitted that if the canal affected persons have been left out from the benefits of rehabilitation by the order of respondent No:2 in 2003, the policy cannot be held to be discriminatory and violative of Article 14 of the Constitution.

Findings with reasons:

22. The majority judgment of Kripal, J in *Narmada Bachao Andolan vs. Union of India and others* (supra) held in para 169:

> "Dealing with the contention of the petitioners that there will be 23,500 canal-affected families and they should be treated on a par with the oustees in the submergence area, the respondents have broadly submitted that there is a basic difference in the impacts of the projects in the upstream submergence area and its impacts in the beneficiary zone of the command area. While people, who were oustees from the submergence zone, required resettlement and rehabilitation, on the other hand, most of the people falling under the command area were in fact beneficiaries of the projects and their remaining land would now get relocated with the construction of the canal leading to greater agricultural output. We agree with this view and that is why, in the award of the Tribunal, the State of Gujarat was not required to give to the canal-affected people the same relief which was required to be given to the oustees of the submergence area."

Para 169 of the majority judgment of Kripal, J quoted above in **Narmada Bachao Andolan** would show that in the award of the Narmada Water Disputes Tribunal, State of Gujarat was not required to give to the canal-affected people the same relief which was required to be given to the oustees of the submergence area and the Supreme Court agreed with the broad submission made by the respondents in the case that there is a basic difference in the impacts of the projects in the upstream submergence area and its impacts in the beneficiary zone of the command area inasmuch as people in the submergence area require re-settlement and rehabilitation but people falling under command area were in fact beneficiaries of the projects and their remaining land would get relocated with construction of canal leading to greater agricultural output.

23. The majority judgment of Kripal, J in Narmada Bachao Andolan however held in para 166 that each State has its own package and that the liberalisation of

the packages by the three States need not be to the same extent and the States could not be faulted if the package which is offered, is more liberal than the one envisaged in the Tribunal's award. As Kripal, J., has held:

> " The resettlement and rehabilitation packages in the three States were different due to different geographical, local and economic conditions and availability of land in the States. The liberal packages available to the Sardar Sarovar Project oustees in Gujarat are not even available to the project-affected people of other projects in Gujarat. It is incorrect to say that the difference in R&R packages, the packages of Gujarat being the most liberal, amounts to restricting the choice of the oustees. Each State has its own package and the oustees have an option to select the one which was most attractive to them. A project-affected family may, for instance, choose to leave its home State of Madhya Pradesh in order to avail the benefits of the more generous package of the State of Gujarat while other PAFs similarly situated may opt to remain at home and take advantage of the less liberal package of the State of Madhya Pradesh. There is no requirement that the liberalisation of the packages by the three States should be to the same extent and at the same time. the States cannot be faulted if the package which is offered. though not identical to each other. is more liberal than the one envisages in the Tribunal's award."

Hence the rehabilitation and re-settlement package of be State of Gujarat which did not treat canal affected families at par with the oustees in the submergence area or the award of the Narmada Water Disputes Tribunal cannot be the basis for refusing rehabilitation and re-settlement of the canal affected families in the State of Madhya Pradesh. We have to examine the terms of clearances of the Indira Sagar and Omkareshwar Projects given by the Government of India, Ministry of Environment and Forests and the policy of rehabilitation and resettlement as formulated by the State of Madhya Pradesh to decide whether the canal affected persons and families of the Indira Sagar and Omkareshwar projects are to be treated at par with persons and families affected by submergence on account of the two dams.

24. The Office Memorandum dated 24.6.1987 of the Government of India, Ministry of Environment and Forests granting environmental clearance to the Indira Sagar Project stated in para 2 :

> " On the basis of examination of details on these projects by the Environmental Appraisal Committee for River Valley Projects and discussions with the Central and State authorities the following details were sought from the Project authorities:

i. Rehabilitation Master Plan.
ii. Phased Catchment Area Treatment Scheme.
iii. Compensatory Afforestation Plan.
iv. Command Area Development.
v. Survey of Flora and Fauna.
vi. Carrying capacity of surrounding area.
vii. Selomicity; and
viii. Heath Aspects."

Thus, it will appear from para 2 of the O.M. dated 24th June, 1987 quoted above that prior to the environmental clearance details with regard to Rehabilitation Master Plan had been sought from the project authorities in the course of discussion with the Central and State authorities. It is not known whether such Rehabilitation Master Plan included rehabilitation of the canal affected persons of the Indira Sagar Project, but it appears from the Rehabilitation Policy of the State of Madhya Pradesh for Narmada Valley Projects that all persons affected by submergence or otherwise on account of the Narmada River Projects were entitled to the benefits of Rehabilitation Policy.

25. In para 1.1 (a) and 1.1(b) of the Rehabilitation Policy, 1989, a "displaced person" and a "displaced family" have been defined. Paras 1.1 (a) and 1.1(b) of the Rehabilitation Policy, 1989, are extracted hereinbelow:

1.1(a) Displaced Person :

Any person who has been ordinarily residing or carrying on any trade or vocation for his livelihood for his livelihood for at least one year before the date of publication of notification under Section 4 of the Land Acquisition Act or has been cultivating land for atleast three years before the date of such notification in an area which is likely to come under submergence whether temporary or permanent because of the project or is otherwise required for the project.

1.1(b) Displaced Family:

(i) A family composed of displaced persons as defined above shall mean and include husband, wife and minor children and other persons dependent on the head of the family, eg. Widowed mother, widowed sister, unmarried sister, unmarried daughter or old father.

(ii) Every son who has become major on or before the date of notification under Section 4 of the Land Acquisition Act, will be treated as a separate family."

A reading of the underlined portion of the definition of displaced person in clause 1.1(a) of the Rehabilitation Policy 1989 quoted above would show that not only

persons in an area which is likely to come under submergence, whether temporary or permanent, because of the project but also persons in any area which is otherwise required for the project came within the definition of displaced person. The expression "area otherwise required for the project" will obviously cover area sought to be acquired for the canals and the canal network. It is further clear from clause 1.1(b) of the Rehabilitation Policy 1989 quoted above that a "displaced family" is composed of displaced persons as defined in clause 1.1 (a) of the Rehabilitation Policy 1989. Thus, the Rehabilitation Policy of the Government of Madhya Pradesh as it was in 1989 applied to not only persons displaced by submergence of areas by Narmada Valley Projects but also to persons displaced by canal projects of the Narmada Valley Projects.

26. Moreover, on a reading of the different provisions of the Rehabilitation Policy 1989 of the Government of Madhya Pradesh for the oustees of Narmada Projects, it appears that the entitlement of displaced persons or displaced family are linked with the extent of land that such displaced persons/families lose on account of the project. This is illustrated by clause 3 of the Rehabilitation Policy relating to allotment of agricultural land which is extracted hereinbelow in extenso:

> "3.0 Allotment of Agricultural Land:
>
> 3.1 Displaced families would be rehabilitated in accordance with their preferences on land at the new sites, taking as far as possible, the social groups as a unit.
>
> 3.2(a) Every displaced family from whom more than 25 percent of its land holding is acquired in revenue villages or forest villages shall be entitled to and be allotted land to the extent of land acquired from it, subject to provision in 3.2(b) below.
>
> (b) A minimum area of 2 ha. of land would be allotted to all the families whose lands would be acquired irrespective of whether government land is offered or private land is purchased for allotment. Where more than 2 ha. of land is acquired from a family, it will be allotted equal land, subject to a ceiling of 8 ha.
>
> (c) The government will assist displaced families in providing irrigation by well/tube-well or any other method on the land allotted, provided such land is not already irrigated. In case the allotted land cannot be irrigated (which fact would be certified by the Agriculture Department), the displaced family will be allotted a minimum of 4 hectares of land instead of 2 hectares provided at 3.2 (b) above. In other cases, where

irrigation is not possible, the development of dry land would be subsidized by the State Government to the extent of 75% of the cost involved, unless higher subsidies are provided to farmers in any other scheme of the Government.

3.3 Entitlements of Encroachers for allotment of land:

Encroachers, whether on revenue land or forest land will also be entitled for the allotment of land. Where the area of the land acquired from an encroacher is up to I ha. he will be entitled to I ha. area of land. In those cases where acquisition of land from an encroacher is more than I ha., he will be entitled to 2 ha. of land irrespective of the fact that the land acquisition from such an encroacher may be even greater than 2 ha."

A reading of clause 3.2(a) would show that only if 25% of land of displaced family is acquired, the displaced family will be entitled to allotment of agricultural land. Where a displaced family loses less than 25% of its land by acquisition on account of the project, it will not be entitled to allotment of agricultural land. Clause 3.2(b) further states that a minimum area of 2 ha. of land will be acquired but where more than 2 ha. of land is acquired from a family, it will be allotted 2 ha. of land subject to a ceiling of 8 ha. Thus, depending upon the extent of land lost by a displaced family, agricultural land was to be allotted to a displaced family. Clause 3.3 of the rehabilitation policy quoted above would further show that encroachers, whether on revenue land or forest land, will also be entitled for agricultural land to the extent indicated therein.

27. The Rehabilitation Policy of 1989 stated the broad principles for rehabilitation of displaced families in para I and one of the clauses of para I stated:

" The displaced families would be rehabilitated, maintaining the existing structure of social groups as far as possible in the command area or near the periphery of the affected areas in accordance with their preferences."

It will be clear from the clause of para I of the Rehabilitation Policy quoted above that the displaced families were to be rehabilitated as far as possible in the command area or in the periphery of the affected areas in accordance with their preference. Hence, displaced families of the submerged areas were to be rehabilitated in the command area if they so preferred and were to benefit from the canals in the same way as families who are affected by the canals but who continue in their remaining land in the command area.

28. The Rehabilitation Policy 1989 also provides in Clause 9 rehabilitation benefits for landless displaced family and reads thus:

"9.0 Landless Displaced Families :

9.1 Special efforts will be made for the effective rehabilitation of landless displaced families. Adequate arrangements will be made by the Narmada Valley Development Authority for the upgradation of existing skills or important of new skills so as to promote full occupational rehabilitation. In this regard, new opportunities emerging as a result of the project will be fully used for the benefit of the displaced families. Suitable provisions will be incorporated in the tender document of Local Competitive Bidding (LCB) and other forms to ensure the employment of displaced persons. The Narmada Valley Development Authority will ensure appropriate arrangement for discharge of these responsibilities within a stipulated timeframe. In the interim time, special financial assistance will be given to supplement the income of the landless agricultural labourers and the landless scheduled castes and scheduled tribe oustees families for 3 years in descending order, which shall be in addition to the grant-in-aid mentioned in para 6.1. This period of three years will be calculated from the payment year of the grant-in-aid under para 6.1. Thus, a landless oustee family will get a special income support amount of Rs.2,250/-, Rs.5,500/- and Rs.2,750/- in the second, third and fourth year of displacement, respectively. In addition, a further sum of Rs.12,500/- shall be kept in reserve for every landless oustee family and shall be made available for executing an independent viable scheme for earning livelihood or for purchase of productive assets. The above support amounts will be 75%, 50% and 25% respectively of the poverty line and the amount to be kept in reserve is also linked with the poverty line. If the scale of poverty lineland was ne is revised, the amount of special support amount and the reserve shall also be proportionately increased accordingly. For other landless families special financial assistance of Rs.19,500/- will be given for the purchase of productive assets."

Hence, landless displaced families have also been given rehabilitation and re-settlement benefits under the policy of Rehabilitation for Narmada Valley Project of the Government of MadhyaPradesh.

29. Thus, under the Rehabilitation Policy, 1989, rehabilitation and resettlement benefits to be given to displaced persons, displaced families and landless displaced families are linked with the extent to which the displaced family or displaced person was affected by a Narmada Valley Project and the displaced families if they so preferred, were to be rehabilitated in the Command Area and were to

be beneficiaries of the canals in the same way as those displaced by the canals who were to continue to live in the Command Area. This kind of policy which has taken care of differences of impacts of the project on the person or the family whether on account of submergence or on account of the canal net work must apply equally to all displaced persons and displaced families of the Narmada Valley Project, irrespective whether the persons or families have been displaced because of submergence on account of the construction of the dam or because of land acquisition for construction of the canal net work. For these reasons, the definition of 'displaced person in the Rehabilitation Policy as made in 1989 included a person affected by the Project otherwise than by submergence and the Rehabilitation Policy was to apply to all persons displaced by the Project, i.e. by submergence or otherwise.

30. We further find that the O.M. dated 13.10.1993 of the Government of India, Ministry of Environment and Forests granting environmental clearance to the Omkareshwar Multipurpose Project stipulated in para (vii) :

> " The Rehabilitation Programme should be extended to landless labourers and the people affected due to canal by identifying and allocating suitable land as permissible. A time bound programme should be submitted by December, 1993."

The language in the stipulation in para (vii) of the OM dated 13.10.1993 would show that the rehabilitation programme was to be extended to landless labourers and the people affected due to canal by identifying and allocating suitable land as permissible and was not to be confined to only people affected by submergence because of construction the dam.

31. After having declared the policy of rehabilitation and resettlement making no distinction between people affected by the submergence and people affected by the canals, the respondent No.2 appears to have taken a decision in 2003 to exclude persons in areas otherwise affected by a project of the Narmada River from the benefits of the Rehabilitation Policy and confining the definition of "displaced persons" to only persons in areas affected by submergence, temporary or permanent on account of the project. In 2003 respondent No.2 has classified displaced persons in two groups, one affected by submergence, permanent or temporary, and the other not affected by submergence and has extended the benefits of rehabilitation and re-settlement only to the group, which is affected by submergence. Though there is an intelligible differentia in making this classification, in our considered opinion, such differentia has no rational nexus with the object sought to be achieved by the rehabilitation policy. The object of the rehabilitation policy is to ensure that persons displaced by Narmada Valley Projects are better off and their right to livelihood guaranteed under Article 21 of the Constitution is not violated. As we have seen, the Rehabilitation Policy of the Government of

Madhya Pradesh itself contains provisions which grants rehabilitation benefits to displaced persons and displaced families depending on the extent of impact suffered by the person or family displaced by the project and the displaced families are to be rehabilitated in the Command Area or in the periphery of the Command Area as per their preference. In our considered opinion, the stand taken by the respondents No. 1 and 2 in the return that the impacts on people affected by submergence and the people affected by the canal network are different justifying different treatment to submeregence affected persons and canal affected persons has no rational basis. The rationale of the policy of the State of Gujarat in not treating canal affected persons on par with the submergence affected persons discussed in para 129 of the majority judgment of Kripal, J. in Narmada Bachao Andolan is not available to the State of Madhya Pradesh on account of the peculiar features of its policy of rehabilitation as discussed above. The order of the respondent No. 1 made in the year 2003 excluding persons in areas otherwise affected by the project, in our view, does not satisfy the test of intelligible differentia having rational nexus with the object sought to be achieved by the Rehabilitation Policy and is therefore discriminatory and violative of Article 14 of the Constitution of India and the order of Respondent No. 1 made in the year 2003 in so far as it excludes canal affected persons from the definition of "displaced family" is therefore ultra vires the Constitution.

32. We are conscious that if rehabilitation and re-settlement benefits are to be provided to all the canal affected persons in accordance with the rehabilitation policy for oustees of Narmada Project of the Government of Madhya Pradesh, respondents No. 1 and 2 will have to incur heavy costs for the canal projects of Indira Sagar and Omkareshwar. But according to us, as rehabilitation and re-settlement are part of the constitutional obligation of the State Government under Article 21 of the Constitution to the displaced persons, particularly those belonging to the tribes, the respondent No. 1 has to find the resources for rehabilitation and re-settlement of the canal affected persons and cannot circumvent this constitutional obligation by issuing an order that the Rehabilitation Policy will not apply to the canal affected persons. This constitutional obligation under Article 21 of the Constitution towards persons displaced by the canal project will also ensure that the displacement of persons by the project is minimised and areas which are already irrigated and which do not need better means of irrigation are not unnecessarily covered in the Command Area Development Plan and there is no unwarranted burden on the public exchequer due to higher costs of the project. Moreover, in recent times, there has been growing resistence of the local inhabitants to acquisitions of land by Governments for development projects because they have lost confidence in public authorities and are not quite sure whether they will be true to their public commitments and assurances to rehabilitate and resettle them once the development project comes through and is commissioned.

Considering all these aspects, we are inclined to direct the respondents No. I and 2 to provide rehabilitation and re-settlement benefits of the Rehabilitation Policy of the Government of Madhya Pradesh to the canal affected persons of the Indira Sagar and Omkareshwar Projects.

Issue relating to land acquisition and compensation:

33. Ms. Patkar submitted that the land acquisition for the canal work has been done by invoking the urgency clause under Section 17 of the Land Acquisition Act, 1894 and even the inquiry under Section 5-A of the Land Acquisition Act, 1894 has been dispensed with. She submitted that the invocation of the urgency clause under Section 17 and the dispensing with the inquiry under Section 5-A have violated the right of the oustees whose land has been acquired is as much as they cannot raise any objection to the land acquisition and are denied a hearing in accordance with Section 5-A of the Land Acquisition Act, 1894. She submitted that the Indira Sagar and the Omkareshwar dam projects were conceived several decades back and the environmental clearances were given for the two projects in 1987 and 1993 respectively and there were no emergency circumstances warranting invocation of the urgency clause in Section 17 of the Land Acquisition Act, 1894 and requiring dispensing with the inquiry under Section 5-A of the Land Acquisition Act, 1894. She submitted that in *Union of India and others vs. Krishan Lal Arneja and others,* AIR 2004 SC 3582, the Supreme Court has taken a view that Section 17 of the Land Acquisition Act, 1894 confers extra-ordinary powers on the authorities to dispense with the normal procedure laid down under Section 5-A of the Act in exceptional case of urgency and such powers cannot be lightly resorted to except in case of real urgency enabling the Government to take possession of the land proposed to be acquired for public purpose. In the aforesaid decision, she submitted, the Supreme Court has further held that a public purpose however laudable it may be by itself is not sufficient for the authorities to take the aid of Section 17 to use the extra-ordinary power as use of such power deprives the land owner of his right to file objections to the proposed acquisition of his property and it also dispenses with the inquiry under Section 5-A of the Act. She also relied upon *Union of India and others vs. Mukesh Hans,* (2004) 8 SCC 14, in which the Supreme Court has also held that existence of urgency or unforeseen emergency though is a condition precedent for invoking Section 17(4) of the Land Acquisition Act, 1894, that by itself is not sufficient to direct dispensing with the inquiry under Section 5-A of the Act and it requires an opinion to be formed by the Government concerned that alongwith the existence of such urgency or unforeseen emergency there is also a need for dispensing with Section 5-A inquiry. Ms. Patkar vehemently submitted that the proceedings for acquisition of land for the Indira Sagar and Omkareshshwar Canal Projects in which urgency clause in Section 17 of the Land Acquisition Act, 1894 and in which the inquiry under Section 5-A of the Act has been dispensed with be set

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aside by the Court. She further submitted that the compensation for acquisition of land paid to the oustees is thoroughly inadequate and this Court should direct the respondents to pay reasonable compensation in accordance with the Rehabilitation Policy of the State Government for Narmada Valley Project.

34. Mr. Ravish Agrawal, on the other hand, relying on para 9 of the Additional Return filed on 28.10.2009 on behalf of the respondents, submitted that till 28.10.2009 the records of cases of acquisition of land for the canals of Indira Sagar and Omkareshwar projects show that in 355 cases awards have been passed and compensation has been disbursed to the land owners and Section 17 of the Land Acquisition Act, 1894 has been invoked in 302 cases. He further submitted relying on relying on the Additional Return filed on 28.10.2009 that 336 land acquisition cases are in process out of which in 100 cases the urgency clause in Section 17 has been invoked. Relying on para 10 of the Additional Return filed on 28.10.2009, he further submitted that the petitioners No. 2 and 3 have not suffered any acquisition of land and in the case of petitioner No.4 his land has been acquired and award has been passed and the petitioners No.5, 6 and 7 have also accepted the award amount for the land required from- them. Mr. Agrawal submitted that most of the awards in land acquisition cases were passed during 2003 to 2006 and the writ petitioner which has been filed in 2009 should be dismissed for delay and latches on the part of the petitioner to approach this Court against the land acquisition proceedings. He cited *Swaika Properties (P) Ltd. and another vs. State of Rajasthan and others,* (2008) 4 SCC 695, in which the Supreme Court considering its earlier decisions in *Municipal Corporation of Greater Bombay vs. Industrial Development Investment Co. Pvt. Ltd. and others,* (1996) 11 SCC 501, *State of Rajasthan vs. D.R. Laxmi,* (1996) 6 SCC 445, *Municipal Council, Ahmednagar vs. Shah Hyder Beig,* (2000) 2 SCC 48 and *C. Padma vs. Dy. Secretary to Government of Tamil Nadu,* (1997) 2 SCC 627, has taken a view that where a writ petition is filed after possession has been taken over and after the award has become final, it deserves to be dismissed on the ground of delay and latches. Mr. Agrawal further submitted that the reasonableness of compensation paid for land acquisition under an award is a matter for the Civil Court to decide under Section 18 of the Land Acquisition Act, 1894 and the High Court should not decide this question in this writ petition.

35. Considering the consistent view of the Supreme Court in the cases cited by Mr. Agrawal that the Court should not entertain a writ petition challenging acquisition of land after possession of the land has been taken over and awards have become final, we are not inclined to examine the issue with regard to the validity of the land acquisition proceedings in this public interest litigation in which the facts of the individual cases of acquisition as to when possession was taken and awards became final are not on record. In case the oustee whose land is acquired for canal projects approaches this Court in a separate and independent

writ petition, the challenge may be considered on its own merits. For the same reasons, we are also not inclined to go into the question whether reasonable compensation has been determined in the awards as these are matters to be decided by the Civil Court under Section 18 of the Land Acquisition Act, 1894.

Authority to ensure implementation of environmental and rehabilitation measures:

36. Before we part with this case, we would like to decide the authority which will ensure implementation of environmental safeguards and rehabilitation-re-settlement measures as directed in this order. In exercise of powers conferred by Section 6-A of the Inter-State Water Disputes Act, 1956, the Central Government has framed a scheme by notification dated 10th September, 1980 inter alia constituting the Narmada Control Authority. Sub-clause (1) of clause 9 of the Scheme as amended by the notification dated 3rd June, 1987 and sub-clause (2) of clause 9 of the Scheme read as follows:

> "9(1) The role of the authority will mainly comprise of overall coordination and direction of the implementation of the projects including the engineering works, the environmental protection measures and the rehabilitation programmes and to ensure faithful compliance of the terms and conditions stipulated by the Central Government at the time of clearance of the projects.
>
> (2) The authority shall be charged with the power and shall be under a duty to do any or all things necessary, sufficient and expedient for the implementation of the orders with respect to-
>
> (i) the storages, apportionment, regulation and control of the Narmada waters;
>
> (ii) sharing of power benefits from Sardar Sarovar project;
>
> (iii) regulated releases by Madhya Pradesh;
>
> (iv) acquisition by the concerned State for Sardar Sarovar project of lands and properties likely to be submerged under Sardar Sarovar;
>
> (v) compensation and rehabilitation and settlement of outstees; and
>
> (vi) sharing of costs."

It is thus clear from a reading of sub-clause (1) of clause 9 of the Scheme as amended by the notification dated 3rd June, 1987 that the Narmada Control Authority (NCA) has been statutorily vested with the role of overall coordination and direction of the implementation of the environmental protection measures and the rehabilitation programmes and also to ensure faithful compliance of the terms and conditions stipulated by the Central Government at the time of the clearance

of the projects. It is also clear from sub-clause (2) of clause 9 of the Scheme quoted above that the Narmada Control Authority (NSA) is charged with the power and is under a duty to do any or all things necessary, sufficient and expedient for the implementation of the orders with regard to acquisition of land by the concerned State for the project and compensation, rehabilitation and settlement of oustees. The Narmada Control Authority has been impleaded as respondent No.4 in this writ petition. We are of the considered opinion that the respondent No.4 through its agencies or otherwise, should monitor the environmental protection measures, the acquisition of land, compensation and the rehabilitation and settlement of the oustees in accordance with the observations and directions in this order.

37. In the result, we direct that :

(i) no further acquisition of land, excavation or construction of the canal network for the Command Area of the Indira Sagar and Omkareshwar projects will be undertaken, until the Command Area Development Plans submitted to the Government of India, Ministry of Environment and Forests, are scrutinised by the Committee of Experts constituted for the Sardar Sarovar, Indira Sagar and Omkareshwar Projects by the Notifications dated 2.9.2008 and 17.9.2009 and until this Committee of Experts communicates its clearance in respect of the particular work to the respondents No. 1and 2;

(ii) the respondents No. 1 and 2 will provide rehabilitation and re-settlement benefits of the Rehabilitation Policy of the Government of Madhya Pradesh for Narmada Valley Project to the displaced persons and displaced families of the Indira Sagar and Omkareshwar Canal Projects and will constitute a Grievance Redressal Authority which will decide the complaints of such displaced persons and displaced families regarding rehabilitation and resettlement;

(iii) the respondent No.4 will ensure that the two directions in (i) and (ii) above are implemented by the respondents No.1 and 2 and that the environmental safeguards and rehabilitation measures are planned and implemented pari-passu with the works of the Indira Sagar and Omkareshwar Canal Projects;

(iv) the respondent No.4 will submit a report once every

three months to this Court on whether the respondents No.1 and 2 are implementing the directions in this order.

The writ petition is disposed of with the aforesaid directions. The interim order of status quo is vacated. The parties will bear their own costs.

Petition disposed of.

I.L.R. [2010] M. P., 581
WRIT PETITION
Before Mr. Justice Shantanu Kemkar
25 November, 2009*

AHMAD HUSSAIN ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 10(iv), Civil Services (Pension) Rules, M.P. 1976, Rule 9 - *Withholding of pension to the extent of 1% with cumulative effect - Petitioner retired before the order of penalty could be passed - Penalty of withholding of 1% of pension with cumulative effect imposed - Held - Such penalty is not a minor penalty - If petitioner had already retired, respondents could have taken recourse of Rule 9 of Rules, 1976 - Order of penalty quashed.* (Para 5)

सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 10(iv), सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 9 – संचयी प्रभाव से 1 प्रतिशत की सीमा तक पेंशन का रोकना – शास्ति का आदेश पारित किया जा सके इससे पूर्व याची सेवानिवृत्त हो गया – संचयी प्रभाव से 1 प्रतिशत पेंशन रोकने की शास्ति अधिरोपित – अभिनिर्धारित – ऐसी शास्ति लघु शास्ति नही है – यदि याची सेवानिवृत्त हो चुका था तो प्रत्यर्थी नियम, 1976 के नियम 9 का आश्रय ले सकते थे – शास्ति का आदेश अभिखंडित।

Ranjana Gawade, for the petitioner.
Rashmi Pandit, Dy.G.A., for the respondents.

ORDER

SHANTANU KEMKAR, J. :–Petitioner was working on the post of Chief Warder in the Jail Department of the Government of M.P. On the basis of incident dated 03.03.2008 a charge-sheet was issued to him on 24.03.2008 levelling as many as 3 charges. A departmental enquiry was conducted for the charges levelled against him in which he was found guilty by the Enquiry Officer. Before the order of penalty could be passed by the disciplinary authority, the petitioner was retired on 31.05.2008. Thereafter, the disciplinary authority vide order dated 01.07.2008 (Annexure P-1) inflicted upon the petitioner penalty under Rule 10 (iv) of the M.P. Civil Services (Classification Control and Appeal) Rules, 1966 (for short the

*W.P. No.1057/2009(S) (Indore)

MPCCA Rules) of reduction of his pension permanently to the extent of 1% with cumulative effect. Aggrieved, the petitioner submitted an appeal before the Appellate Authority. The Appellate Authority vide order dated 22.10.2008 (Annexure P-2) dismissed the said appeal. Aggrieved the petitioner has filed this petition.

2. According to the petitioner imposition of penalty of reduction in pension by 1% with cumulative effect invoking Rule 10 (iv) of the MPCCA Rules is illegal and without jurisdiction. According to him, there is no provision of reduction of pension under Clause (iv) of Rule 10 of the MPCCA Rules and such a penalty could not have been imposed upon the petitioner.

3. The respondents have submitted reply and have justified the action by contending that since the petitioner was held guilty in a departmental enquiry conducted against him, the impugned order of penalty has been passed which is permissible under Rule 10 (iv) of the MPCCA Rules.

4. Heard learned counsel for the parties.

5. Admittedly, before the order of penalty could be passed the petitioner was already retired w.e.f 31.05.2008 on attaining the age of superannuation. Rule 10 of the MPCCA Rules provides for minor penalties. Clause (iv) of Rule 10 provides for penalty of "withholding of increments of pay or stagnation allowance." In the circumstances, the respondents by invoking Rule 10 (iv) could not have passed the order of penalty of withholding of petitioner's pension to the extent of 1% with cumulative effect. The said order of penalty does not fall within the minor penalty provided in Rule 10 (iv) of the MPCCA Rules. If the petitioner was already retired the respondent could have taken recourse of Rule 9 of the M.P.Civil Services (Pension) Rules, 1976 but in no circumstances the order of penalty of withholding of pension by invoking Rule 10 (iv) could have been passed.

6. In the circumstances, the impugned order dated 01.07.2008 (Annexure P-1) and the appellate order dated 22.10.2008 (Annexure P-2) are liable to be and are hereby quashed. Consequently, the respondents are directed to restore the petitioner's pension as per his entitlement and refund him the pension recovered so far from him within a period of 4 months from the date of receipt of copy of this order failing which the petitioner shall be entitled for refund of it with interest @ 9% per annum.

Order accordingly.

I.L.R. [2010] M. P., 583
WRIT PETITION
Before Mr. Justice S.K. Gangele
1 December, 2009*

HIND DAIRY & FOOD PROADUCTS,
MAHARAJPURA, GWALIOR ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. Prevention of Food Adulteration Act (37 of 1954), Section 24, Prevention of Food Adulteration Rules, M.P. 1962, Rule 4 - *Powers & duties of State Authority* - *Held - State Authority i.e. Food (Health) Authority and Controller, Food & Drugs Administration, Bhopal has power to suspend the production & manufacture of articles of food if on inspection after a report of Public Analyst, it has been found that the aforesaid article of food is adulterated or misbranded.* (Para 14)

क. खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 24, खाद्य अपमिश्रण निवारण नियम, 1962, नियम 4 – राज्य प्राधिकारी की शक्तियाँ और कर्तव्य – अभिनिर्धारित – राज्य प्राधिकारी अर्थात् खाद्य (स्वास्थ्य) प्राधिकारी और नियंत्रक, खाद्य एवं औषधि प्रशासन, भोपाल को खाद्य पदार्थों के उत्पादन और विनिर्माण को निलंबित करने की शक्ति है यदि लोक विश्लेषक की रिपोर्ट के बाद निरीक्षण पर यह पाया गया हो कि उपर्युक्त खाद्य पदार्थ अपमिश्रित या मिथ्या छाप वाला है।

B. Prevention of Food Adulteration Act (37 of 1954), Sections 10(4) & 10(4-A) - *Powers of the Food Inspector* - *Held - As per Ss. 10(4) & 10(4-A) of the Act, if any article seized is found adulterated and Local Authorities have satisfied that it is unfit for human consumption, the Authorities could destroy the adulterated food article.* (Paras 16 & 17)

ख. खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 10(4) व 10(4–ए) – खाद्य निरीक्षक की शक्तियाँ – अभिनिर्धारित – अधिनियम की धारा 10(4) व 10(4–ए) के अनुसार यदि कोई अभिगृहीत पदार्थ अपमिश्रित पाया जाता है और स्थानीय प्राधिकारियों को यह समाधान हो गया हो कि यह मानवीय उपभोग के लिए अनुपयुक्त है तो प्राधिकारी अपमिश्रित खाद्य पदार्थ को विनष्ट कर सकता है।

Cases referred :
AIR 1999 SC 738, (2004) 7 SCC 68, 2008 CrLJ 1830, 2006(1) EFR 73, 2008 CrLJ 3576, (1989) 1 SCC 420.

K.B. Chaturvedi with *Yogesh Chaturvedi*, for the petitioner.
Ami Prabal, Dy.A.G., for the respondents.

*W.P. No.5638/2008 (Gwalior)

March-10 (First)

HIND DAIRY & FOOD PRO., MAHARAJPURA, GWALIOR Vs. STATE OF M. P.

ORDER

S.K. GANGELE, J. :–Petitioner has filed this petition challenging the order, Annexure P-1, dated 01.12.2008 passed by Food (Health) Authority, and. Controller, Food and Drugs Administration, Bhopal and also for a direction with regard to payment of compensation of Rupees Eight lacs. The petitioner also challenged the proceedings initiated against him in respect of order passed by Collector under Section 144 of the Criminal Procedure Code.

2. The petitioner has been in the business of manufacturing and sale of Ghee in the name of Gwala Shri Agmark Ghee and Shri Anmol Pure Deshi Ghee. He obtained permission from the General Manager, District Trade and Industries, Gwalior on 18.08.08 to this effect. He also obtained a certificate of Authorisation for the purpose of manufacture of Agmark Ghee by the Competent Authority, Assistant Agricultural Marketing Advisor, Directorate of Marketing & Inspection, Regional Office, Bhopal on 17.07.08 and a Certificate of Quality Control issued by Chairman / Director, Care Certification Pvt. Ltd., New Delhi, issued on 15.11.08.

3 As per the petitioner, on 07.10.08 at around 9.30 P.M. A team consisting of Swati Meena, Assistant Collector, Mr. Raghav, Naib Tehsildar and police personnels came to the factory of the petitioner and put a seal and lock on the factory. Thereafter, on 08.10.08 another team consisting of Assistant Collector and Naib Tehsildar along with Dharmendra Soni and Rajesh Rai, Food Inspectors, came at the factory premises and Food Inspectors had taken samples of Gwala Shri Agmark Ghee and Shri Anmol Pure Deshi Ghee. The team also seized 250 cartoons containing 4500 liters Ghee, however, seizure receipt was not supplied to the petitioner. On 15.11.08 some quantity of Ghee about 190 cartoons and 1000 Kg loose Ghee was destroyed by the team. As per the petitioner, the samples taken by the Food Inspectors were sent to the Public Analyst, however, the reports have not been supplied to the petitioner. The petitioner submitted representation before the Authorities along with other persons, but, no action has been taken.

4 The respondents in the return submitted that the Collector, Gwalior had received information from the informant and other persons that at the time of festival, Dhanteras and Deepawali the petitioner and other manufacturers of Ghee had been indulging in processing of adulterated Ghee and looking to the gravity of the situation and the danger to the health of the citizens the District Magistrate, Gwalior vide order dated 15.10.2008 directed the District Administration to take appropriate measures to prevent persons from making adulterated and synthetic Ghee, Khowa and other milk products. The Collector also directed the Authorities to take samples of products and take necessary action, if it be found that the products were adulterated or they were synthetic. Thereafter, Authorised Food Inspectors along with Police force, Naib Tehsildar,

Assistant Collector and officers of District Administration visited the factory of the petitioner and it was found that the petitioner was in process of making of adulterated synthetic Ghee, and process was being used by the petitioner for the purpose of extraction of Ghee from milk or milk products. Consequently, the factory premises of the petitioner was immediately sealed and the adulterated articles had been taken into possession looking to serious health hazards to the citizens. Food Inspectors had also taken samples in accordance with the provisions of the Prevention of Food Adulteration Act, 1954 and after receiving the reports from Public Analyst the products of the petitioner were found adulterated and misbranded. The respondents have taken similar action against other manufacturers and looking to the gravity of the situation the Appropriate Authority, Food (Health) Authority, and, Controller, Food and Drugs Administration, Bhopal vide order, Annexure P-1 dated 01.12.08 suspended the sale and manufacturing of the aforesaid Ghee. By way of additional return, the respondents further stated that the petitioner, in spite of sealing of the premises, was in the process of manufacturing Ghee, hence the premises was again inspected on 03.10.2009 and again samples were collected by the Food Inspectors. The aforesaid samples were sent to Public Analyst, State Food Laboratory, Bhopal for analysis and in the report it was found that the Ghee was adulterated. Looking to the gravity of the situation a proceeding under the provisions of National Security Act was also initiated against the petitioner and a detention order against Mr. Gyanesh Sharma, the Proprietor of the petitioner - Firm was passed under the provisions of National Security Act on 13.10.2009. The aforesaid order has also been confirmed by the State Government and Advisory Board. However, the proprietor of the petitioner -Firm has been absconding. It is further stated that the Government of India, Ministry of Agriculture, vide order dated 09.09.2009 also canceled the licence of the petitioner of Agmark Packing and directed the petitioner to deposit the aforesaid licence along with other persons.

5. Learned Senior Counsel appearing on behalf of the petitioner has submitted that the State Authorities have no power and authority to ban the business of the petitioner. The State authorities have no power to seal the factory premises of the petitioner and destroy the seized property. It has further been contended by the learned Senior Counsel that as per the report of the Public Analyst in one case the product of the petitioner has been found misbranded and in another case it has been found adulterated. He further submitted that the petitioner also sent the seized articles through Court for analysis to the Laboratory of Central Government and in this report the product has been found only misbranded. Hence, the impugned order is illegal without jurisdiction and power and further proceedings conducted by the State Authorities including destruction of product of the petitioner is also arbitrary and illegal. In support of his contentions learned Counsel relied on the following judgments :-

March-10 (First)

(1) *Calcutta Municipal Corporation v. Pawan Kumar Saraf and another,* SIR 1999 SC 738;

(2) *Godawat Pan Masala Products I.P. Ltd. And another v. Union of India and others,* (2004) 7 SCC 68,

(3) *K.P. Sugandh Limited & Etc. v. State of Chhattisgarh and others,* 2008 Cri. L.J. 1830

(4) *S. Narendra Kumar & Co. v. State of Sikkim and another,* 2006 (1) EFR 73;

(5) *Jiwan Kumar v. State of Punjab,* 2008 Cri. L. J. 3576.

6. Contrary to this, the learned Deputy Advocate General contended that looking to the gravity of the situation and the facts that the petitioner was manufacturing a synthetic Ghee without using any product of milk or milk, hence the district administration has taken a temporary measure and for time being the production of the product of the petitioner has been stopped because on inspection, it was found that the petitioner was manufacturing synthetic Ghee by using vegetable oils and other chemicals which is injuries to the health of the citizens. Learned Deputy Advocate General further submitted that only for temporary period the product of the petitioner has been suspended and for that purpose the State Authorities have power to pass the orders. It has further been contended by the learned Deputy Advocate General that the Authority has not baned the Ghee as contended by the petitioner, however, the authority has taken only an action to stop manufacture of synthetic Ghee, which was being manufactured by the petitioner. Learned Counsel also submitted that looking to the nature of the gravity the State Government has canceled the licence of the petitioner and the Central Government has also canceled the licence of Agmark of the petitioner and the order of detention of the Proprietor, Mr. Gyanesh Sharma under the National Security Act has been passed. In such circumstances, petition of the petitioner is not maintainable.

7. With regard to power of the State Government to take action against the petitioner, it is an admitted fact that the petitioner is in the business of manufacturing of Ghee and as per the respondents the factory of the petitioner was inspected by the State Authorities including Food Inspectors who were authorised to do so under the provisions of the Prevention of Food Adulteration Act, 1954 and it was found that the petitioner was manufacturing adulterated, synthetic Ghee. The petitioner was manufacturing the synthetic / adulterated Ghee by mixing some ingredients of different vegetable oils and chemicals. This fact is clear from para 9 of the additional return filed by the State and report of Public Analyst , State Laboratory, Bhopal. In the report the value of R.M. Of Ghee was found 14.45 while minimum required R.M. Value of Ghee is 26. It means that sample contained vegetable oils. Because, there was eminent danger to the health and hygiene of

the citizens, hence the Authorities sealed the factory and also seized the product. Even looking to the eminent danger to health of the citizens a proceeding under the provisions of the National Security Act has been taken against the proprietor of the petitioner - Firm, Mr. Gyanesh Sharma and order of detention under the National Security Act has been passed, which is also affirmed by the State Government and State Advisory Board. The State Government and also the Central Government canceled the licences of the petitioner - Firm.

8. Hon'ble the Supreme Court in *Godawat Pan Masala Products I.P. Ltd. And another v. Union of India and others,* (2004) 7 SCC 68, has considered the provisions of the Prevention of Food Adulteration Act, 1954, as under, :-

> "14. In order to appreciate the contentions of the learned counsel, it will be necessary to briefly notice the relevant provisions of the Act. As the preamble of the Act indicates, "it is an Act to make provision for the prevention of adulteration of food". Section 2 (i-a) defines what is "adulterated food". Broadly speaking, the definition covers situations where a food article is substandard, or contains injurious ingredients or has become injurious to health by reason of packing or keeping under unsanitary conditions or having become contaminated or is otherwise not fit for consumption. The definition also extends to cases of articles which fall below the prescribed standards of purity or quality. The Act also deals with misbranding of food articles, which is not of concern to us for the present. For the purpose of administration of the Act, any urban or rural area may be declared by the Central Government or the State Government by a notification to be ;a local area" for the purpose of the Act. In relation to such local area, an officer is appointed by the Central Government or the State Government by notification in the Official Gazette to be in charge of the Health Administration in such area with such designation as specified therein and such officer is defined to be ;a "Local (Health) Authority" by Section 2 (Viii-a). Section 2 (vi) defines "Food (Health) Authority" as the Director of Medical and Health services or the Chief Officer in charge of Health Administration in a State, by whatever designation he is known, and includes any officer empowered by the Central Government or the State Government, by notification in the Official Gazette, to exercise the powers and perform the duties of the Food (Health) Authority under the Act with respect to such local area as may be specified in the notification. Section 7, upon which most of the arguments turn, needs to be noticed. Section 7 reads as under :-
>
> "7. Prohibition of manufacture, sale, etc. of certain

articles of food .-No person shall himself or by any person on his behalf manufacture for sale, or store, sell or distribute -

(i) any adulterated food;

(ii) any misbranded food;

(iii) any article of food for the sale of which a licence is prescribed, except in accordance with the conditions of the licence;

(iv) any article of food the sale of which is for the time being prohibited by the food (Health) Authority in the interest of public health;

(v) any article of food in contravention of any other provision of this Act or of any rule make thereunder; or

(vi) any adulterant.

Explanation .- For the purposes of this section, a; person shall be deemed to store any adulterated food or misbranded food or any article of food referred to in clause (iii) or clause (iv) or clause (v) if he stores such food for the manufacture therefrom of any article of food for sale."

Section 22-A empowers the Central Government to give such directions as it may deem necessary to a State Government regarding the implementation of the Act. Section 23 empowers the Central Government to make rules to carry out the provisions of the Act. In particular, and without prejudice to the generality of the rule-making power, the power of the Central Government includes the one in clause (f). Section 24 of the Act is the section which grants rule-making power to the State Government. The State Government may, after consultation with the Committee, and subject to the condition of previous publication, thereunder make rules for the purpose of giving effect to the provisions of the Act in matters not falling within the purview of Section 23. Sub-section (2) of Section 24 grants power to the State Government to make rules with regard to the powers and duties of the different authorities under the Act. Prescription of forms of liicences for the manufacture for sale, storage, sale and distribution of articles of food, the conditions subject to which such licences may be issued and the fees payable therefor, analysis of any article of food or matter and provision for further delegation of power by the State

Government to the Food (Health) Authority or the subordinate authorities are the matters covered within this delegated power.

9. The State Government in exercise of powers conferred by Section 24 of the Act of 1954 after consultation with the Central Government has framed rules, named as the "Madhya Pradesh Prevention of Food Adulteration Rules, 1962", hereinafter referred to as the 'Rules of 1962". Rule 3 and 4 of the aforesaid Rules of 1962, which is as under, prescribes the power and duties of the Health Authority :-"

Rule 3. Food (Health) Authority and its powers and duties .- (1) the Director of Health Services, Madhya Pradesh (being the Chief Officer in charge of health administration in the State of Madhya Pradesh) shall be the Food (Health) Authority (hereinafter referred to as the "authority").

(2) The authority shall be responsible for the general superintendence of the administration and enforcement of the Act.

(3) The authority shall for giving effect to the provisions of the Act, have control over the Public Health Laboratories maintained by the State Government and local authorities and the public analysts and Food Inspectors appointed under the Act.

(4) The authority may give to a local authority all such directions as it may consider necessary in regard to any matter connected with the enforcement of the Act and the rules made thereunder and the local authority shall comply with such directions.

(5) The authority, whenever called upon to do so, shall advise the State Government or the local authority, as the case may be, in matters relating to the administration and enforcement of the Act."

Rule 4. Powers and duties of local authority .- (1) Subject to the provisions of Rule 3, the local authority shall be responsible for the proper day-to-day administration and enforcement of the Act within its jurisdiction.

(2) The local authority shall appoint a health officer, or health officers for the purpose of the Act, having jurisdiction over the whole or part of its area as it may specify.

(3) The local authority may appoint persons in such number as it thinks fit, having qualifications prescribed under the central Rules, to be Food Inspectors for the purposes of the Act, they shall exercise powers within such local area as it may assign to them with the approval of the authority.

(4) The local authority shall appoint such officers, as it thinks fit

to be licensing authorities within jurisdiction for the purposes of Clause (b) of sub-section (2) of Sec. 24 of the Act."

10. Rule 4 of the Rules of 1962 prescribes powers and duties of local authorities and Rule 5 prescribes procedure of issuance of licence. From the aforesaid provisions of the Rules 1, 2 and 4, it is clear that no person can sale any adulterated food, misbranded food and any article of food which for time being prohibited by the Food Authority in the interest of public. In the present case, the State Authority has not banned manufacture of Ghee, it has only prohibited production of Ghee of the petitioner - Firm which was found misbranded and adulterated by the Public Analyst in his report. Actually, the petitioner was in the process of manufacturing adulteratged synthetic Ghee which is highly injuries to health. The State Government and State Authorities have been given power to issue licences for the purpose of manufacture of food items, in the present case - Ghee, and admittedly, the petitioner was manufacturing the aforesaid Ghee under the licence of the Authority prescribed under the Rules. Section 10 of the Act of 1954 gives power to the Food Inspectors to take samples of any article of food and for that purpose the Food Inspector has also been given power to enter any place where the article is being manufactured. The Local Health Authority under section 10 (4-A) has also power to destroy the seized article if it is perishable in nature and if it is satisfied that the food article is unfit for human consumption.

11. From the facts of the case, it is clear that the State Authority i.e. Food (Health) Authority, and. Controller, Food and Drugs Administration, Bhopal has not banned any food article from production. However, in the present case, it has suspended production of Ghee from factory of the petitioner, which was found to be adulterated/ misbranted one and in the report of the Public Analyst with regard to Shri Anmol Pure Deshi Ghee it was found adulterated and misbranded and in the case of Gwala Shri Agmark Ghee it was found misbranded. It is also a fact that in spite of seizure the petitioner's factory again it had been manufacturing adulterated Ghee. Hence, the premises of the petitioner's factory was again inspected and again samples were taken on 03.10.2009 and they were sent to the Laboratory and both the samples were found adulterated. Copy of the report of Public Analyst has been filed along with the additional return as Annexure P-2.

12. Hon'ble the Supreme Court in the *Godawat Pan Masala Products I.P. Ltd. And another v. Union of India and others* (supra) has held as under with regard to interpretation of the provisions of Act of 1954 as under :-

"29. It is an accepted canon of construction of statutes that a statute must be read as a whole and one provision of the Act should be construed with reference to other provisions of the same Act so as to make a consistent, harmonious enactment of the whole statute. The court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed,

but to the scheme of the entire statute. The attempt must be to eliminate conflict and to harmonise the different parts of the statute for it cannot be assumed that Parliament had given by one hand what it took away by the other. (See in this connection *CIT v. Hindustan Bulk Carriers*, (2003) 3 SCC 57 at paras 18.20, and *CIT v. National Taj Traders*, (1980) I SCC 370.) This Court in *O.P. Singla v. Union of India* (1984) 4 SCC 450 (vide SCC p. 461, para 17) said :

> "However, it is well recognised that, when a rule or a section is a part of an integral scheme, it should not be considered or construed in isolation. One must have regard to the scheme of the fasciculus of the relevant rules or sections in order to determine the true meaning of any one or more of them. An isolated consideration of a provision leads to the risk of some other interrelated provision becoming otiose or devoid of meaning."

13. The Hon'ble Supreme Court further in *Dineshchandra Jamnadas Ganghi v. State of Gujrat* (1989) I SCC 420, has held as under, with regard to object and purpose of the Prevention of Food Adulteration Act, 1954 :-

> "16. The object and the purpose of the Act are to eliminate the danger to human life from the sale of unwholesome articles of food.' The legislation is on the topic 'Adulteration of Food Stuffs and Other Goods' (Entry 18 List III Seventh Schedule). It is enacted to curb the widespread evil of 'food adulteration and is a legislative measure for social defence. It is intended to suppress a social and economic mischief - an evil which attempts to poison, for monetary gains, the very sources of sustenance of life and the well-being of the community. The evil of adulteration of food and its effects on the health of the community are assuming alarming proportions. The offence of adulteration is a socio-economic offence. In *Municipal Corpn. Of Delhi v. Kacheroo Mal* (1976) I SCC 412, Sarkaria.J. said :
>
> > 'The Act has been enacted to curb and remedy the widespread evil of food adulteration, and to ensure the sale of wholesome food to the people. It is well settled that wherever possible, without unreasonable stretching or straining, the language of such a statute should be construed in a manner which would suppress the mischief, advance the remedy, promote its object, prevent its subtle evasion and foil its artful circumvention.

14. From the aforesaid principle of law laid down by Hon'ble the Supreme Court and the provisions of the Act of 1954 and the Rules of 1962 framed by the State Government, in my opinion, the State Authority i.e. Food (Health) Authority, and, Controller, Food and Drugs Administration, Bhopal, has power to suspend the production and manufacture of articles of food if on inspection after a report of Public Analyst, it has been found that the aforesaid article of food is adulterated or misbranded. In the present case, after inspection by the District Authorities, it was found that the petitioner was making synthetic / adulterated Ghee, which is contrary to natural Ghee or no pure Ghee and also it was found as per report of the Public Analyst that the food articles (Ghee) seized from the petitioner's factory was adulterated, consequently the Authorities of the State Government and Central Government have canceled the licence of the petitioner including Agmark authorisation and also issued order of detention of the proprietor of the petitioner - firm under the National Security Act. In such circumstances, the action of the authorities could not be said to be without any power or authority.

15. The learned Senior Counsel strongly placed reliance on *Godawat Pan Masala Products I.P. Ltd. And another v. Union of India and others,* (supra). However, in this case Hon'ble the Supreme Court considered power of State Authority to impose complete ban on manufacture or sale of Pan Masala which is not the present case.

16. The next point raised by the learned Senior Counsel appearing for the petitioner that the Authorities of the District Administration have no power to seize and destroy the Ghee of the petitioner. As mentioned earlier in this order, as per Section 10 (4) and (4-A) of the Act of 1954, if any article seized is found adulterated and local Authorities have satisfied that it is unfit for human consumption, the Authorities could destroy the adulterated food article. The section is as under :-

> "10. Powers of Food Inspectors .-
>
> (4) If any article intended for food appears to any Food Inspector to be adulterated or misbranded, he may seize and carry away or keep in the safe custody of the vendor such article in order that it may be dealt with as hereinafter provided, and he shall, in either case, take a sample of such article and submit the same for analysis to a public analyst:
>
> Provided that where the Food Inspector keeps such article in the safe custody of the vendor he may require the vendor to execute a bond for a sum of money equal to the value of such article with one or more securities as the Food Inspector deems fit and the vendor shall execute the bond accordingly.
>
> (4A) Where any article of food seized under sub-section (4) is of a perishable nature and the local (Health) Authority is satisfied

that such article of food is so deteriorated that it is unfit for human consumption, the said Authority may, after giving noticie in writing to the vendor, cause the same to be destroyed."

17. In the present case, as per the return, seized Ghee was adulterated, hence, in my opinion, the State Authorities had power to seize and destroy the Ghee, if it is found adulterated and unfit for consumption looking to the danger to public health.

18. After going through the various contentions of the counsel, and terms and conditions of the licence and the facts of the case, this Court has gathered an impression that at large scale process of manufacturing of adulterated Ghee was being carried out by the petitioner and other persons. In such circumstances, the State Authorities have taken an extra-ordinary measure looking danger to the public health. The adulterated food is a slow poison and process of manufacture of adulterated food is a serious offence against the humanity and it has to be dealt with effectively. It affects the subsistence of health of well being of the community and it has reached now a days at alarming situation. It is a crime against humanity. It has come to the notice of the Court that the State Government has not appointed the required number of Food Inspectors to check adulteration for long time. Even in some areas only one Food Inspector has been posted for two or three districts. This situation is quite alarming and it is necessary for the State Government to take effective measures in this regard.

19. Consequently, I do not find any merit in this petition. It is hereby dismissed. No order as to cost.

Petition dismissed.

I.L.R. [2010] M. P., 593
WRIT PETITION
Before Mr. Justice Shantanu Kemkar
1 December, 2009*

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

Service Law - Civil Services (Pension) Rules, M.P. 1976, Rule 47 - *Family Pension - Denied on the ground that deceased government servant didn't complete 25 years qualifying service - Held - If a government servant, who is not governed by the Workmen's Compensation Act, 1923, dies while in service after having rendered not less than 7 years continuous service, the family pension is payable - Petition allowed.* (Para 5)

सेवा विधि – सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 47 – परिवार

*W.P. No.1323/2007(S) (Indore)

पेंशन – इस आधार पर इंकार की गयी कि मृतक शासकीय सेवक ने 25 वर्ष की अर्हता सेवा पूर्ण नही की थी – अभिनिर्धारित – यदि किसी शासकीय सेवक की, जो कर्मकार प्रतिकर अधिनियम, 1923 से शासित नही होता है, निरंतर सेवाएँ, जो 7 वर्ष से कम नही हैं, देने के बाद सेवा में रहते हुए मृत्यु हो जाती है, परिवार पेंशन देय है – याचिका मंजूर।

Cases referred :

2005(1) MPLJ 164.

V.K. Patwari, for the petitioner.

S.S. Garg, G.A., for the respondents.

ORDER

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

Petitioner's son Dinesh was initially appointed on the post of Assistant Teacher in the School Education Department of the Govt. of M.P. vide order dated 03.07.1986 (Annexure P-1). He joined his duties on 14.07.1986 and died in harness on 05.08.2005.

2. According to the petitioner, her son Dinesh was unmarried. He had nominated her being his mother and dependent for receiving all types of his death claims. It is the case of the petitioner that her claim for family pension has been rejected by the respondents vide Annexure P-5 on the ground that she is not entitled for the same. Aggrieved she submitted her representation dated 16.01.2007 (Annexure P-6) and has filed this petition.

3. Petitioner claims that her son Dinesh had worked with the respondents for more than 19 years in the circumstances she is entitled for family pension in view of Rule 47 of the M.P.Civil Services (Pension) Rules, 1976 (for short Pension Rules). Reliance has been placed on the order passed by this Court in the case of *Munni Bai Vs. Municipal Corporation, Jabalpur* 2005 (1) M.P.L.J. 164.

4. The respondents have filed reply and have stated that in the nomination form (Annexure P-3) a declaration was made by the deceased to the effect that the family pension shall be payable in the event of his death after completion of 25 years of qualifying service. According to the respondents as the petitioner's son did not complete 25 years of services prior to his death the petitioner has been rightly denied family pension.

5. Having considered the contentions raised by learned counsel for the parties, in my considered view the denial of the family pension to the petitioner on the basis of document Annexure P-3 is wholly illegal. The respondents could not point out as to under which Rule the said declaration was incorporated in Annexure P-3 fixing qualifying period of 25 years for extending the benefit of family pension. On the other hand, on the basis of Rule 47 of the Pension Rules as also the order passed by this Court in the case of *Munni Bai Vs. Municipal Corporation, Jabalpur* (supra) it is clear that if a Government servant who is not governed by

the Workman's Compensation Act, 1923 dies while in service after having rendered not less than seven years continuous service the family pension is payable.

6. In the circumstances, the rejection of the petitioner's claim on the ground that her son did not complete 25 years of service is wholly misconceived and is contrary to the Pension Rules.

7. Accordingly the petition deserves to be and is hereby allowed. The respondents are directed to release the family pension to the petitioner with interest @ 6% per annum from the date of entitlement till payment.

Appeal allowed.

I.L.R. [2010] M. P., 595
WRIT PETITION
Before Mr. Justice R.S. Garg & Mr. Justice R.S. Jha
11 January, 2010*

NARBADA PRASAD ... Petitioner
Vs.
MANIK DARBAR & ors. ... Respondents

A. Stamp Act (2 of 1899), Section 2(10), Schedule 1-A, Item 5 & 22 - *Unexecuted & unregistered sale deed - Not signed by all sellers - Document is neither agreement nor conveyance - Item 5 & 22 of Schedule 1-A not applicable.* (Paras 7 & 8)

क. स्टाम्प अधिनियम (1899 का 2), धारा 2(10), अनुसूची 1–ए, मद 5 व 22 – अनिष्पादित व अरजिस्ट्रीकृत विक्रय विलेख – सभी विक्रेताओं द्वारा हस्ताक्षरित नही – दस्तावेज न तो करार है और न हस्तान्तरण पत्र – अनुसूची 1–ए के मद 5 व 22 लागू होने योग्य नही।

B. Registration Act (16 of 1908), Sections 17 & 49 - *Unregistered & unexecuted sale deed - When document has not been executed by all the sellers - Document could not be presented for registration - Ss. 17 & 49 not applicable.* (Para 9)

ख. रजिस्ट्रीकरण अधिनियम (1908 का 16), धाराएँ 17 व 49 – अरजिस्ट्रीकृत व अनिष्पादित विक्रय विलेख – जब दस्तावेज सभी विक्रेताओं द्वारा निष्पादित न किया गया हो – दस्तावेज रजिस्ट्रीकरण के लिए प्रस्तुत नही किया जा सकता – धाराएँ 17 व 49 लागू होने योग्य नही।

Avinash Zargar, for the petitioner.
Priyankush Jain, for the respondents No.1.

J U D G M E N T

The Judgment of the Court was delivered by **R.S. Garg, J.** :–Short facts necessary for disposal of the present petition are

*W.P. No.11435/2009 (Jabalpur)

that respondent no.1 Manik Darbar filed a suit for specific performance basically on the ground that the property in dispute was agreed to be sold for a sum of Rs.4,90,500/-, entire amount was paid to the defendants viz. Narbada Prasad, Pramod Kumar Singh and Vinod Kumar Singh, a document was written on stamp papers worth Rs.115/- but, however the other two sellers refused to sign the said document and left the office of the Registrar of Conveyance, therefore, the suit was for a direction to the defendants to appear before the Registrar and execute the sale deed so also for other reliefs. During the trial the defendant filed an application that the document was worth for Rs.5 lacs, stamp duty worth Rs.60,000/- was to be paid, penalty would be ten times that is Rs.6 lacs, therefore, the said amount of duty and penalty be asked to be deposited and only thereafter, the question of admissibility of the document be decided. The plaintiff appeared and submitted that the document in question was not an agreement but in fact it was an unexecuted sale deed not falling under item no.5 of Schedule 1-A appended to Indian Stamps Act, therefore, the defendant's objections be rejected.

2. The learned Court below after hearing the parties came to the conclusion that the document would not come under the mischief of item no.5 of Schedule 1-A nor would come under item no.22 of Schedule 1-A of the Indian Stamp Act. Being aggrieved by the said order the defendant has filed this writ petition.

3. Learned counsel for the petitioner submitted that as the document is in relation to sale of an immovable property and it recites that possession of the property has already been delivered to the plaintiff, the plaintiff is bound to pay stamp duty payable on an agreement as provided under Art.5 of the Schedule 1-A. In the alternative it is submitted that if it is taken to be a conveyance as provided under Item 22 then too the plaintiff is required to pay stamp duty on the market value as provided under Item 22.

4. Learned counsel for the respondent no.1 on the other hand submitted that item no.5 of the Schedule 1-A apply to an agreement or memorandum of an agreement and as in the present case the document in question is not an agreement or memorandum of an agreement, item No.5 would not apply. It is also submitted that present would not be a conveyance because the document is neither a completed sale nor title in the property has been transferred in favour of the plaintiff. He submitted that the petition deserves to be dismissed.

5. We have heard the parties at length, we have gone through the provisions of law and we have also gone through the contents of the documents.

6. Schedule 1-A as applicable in Madhya Pradesh clearly provides that proper stamp duty shall be as given in column no.2 on a particular document well described in column no.1 of Schedule 1-A.

7. Item no.5 of Schedule 1-A undisputedly relates to agreement or memorandum of an agreement. Clause (e) provides that if the agreement or

memorandum of an agreement relates to sale of immovable property when possession of the property is delivered or is agreed to be delivered without executing the conveyance, the stamp duty would be the same as payable on a conveyance on the market value of the property. Undisputedly the document in question is neither an agreement nor memorandum of an agreement. Undisputedly it is an un-registered/un-executed sale deed. If that be so. Item No.5 of Schedule 1-A shall not apply. In so far as applicability of item no.22 is concerned, we will have to first refer to Clause 10 of Section 2 of Indian Stamp Act which provides the definition of 'conveyance'. According to said clause 10 a '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 1 or by Schedule 1-A as the case may be. The inclusive definition would simply mean that the document would be a conveyance when it is executed as sale and the intention of the party is to transfer the right, title and interest in the property.

8. In the present matter when the other defendants did not append their signatures on the disputed document, the document remained incomplete and would not fall within the definition of conveyance. Even otherwise the document cannot be called a conveyance. Under such circumstances item no.22 of Schedule 1-A also shall not apply.

9. The document is simply an unexecuted and un-registered sale deed. The question of un-registered documents' admissibility, in the present case would also not come in the way of the plaintiff because the document can be treated to be unregistered if in all other respects the document was complete and it was not registered. In the present case when the document has not been executed by all the sellers the document could not be presented for registration and under the circumstances Section 17 read with Section 49 of the Indian Registration Act shall also not apply.

10. In our considered opinion the learned Court below was absolutely justified in rejecting the objections raised by the defendants.

11. The petition is dismissed.

Petition dismissed.

I.L.R. [2010] M. P., 598
WRIT PETITION
Before Mr. Justice S.K. Gangele
13 January, 2010*

MAHILA KAMLA DUBEY ... Petitioner
Vs.
M.P. VIDYUT MANDAL, GWALIOR & ors. ... Respondents

Electricity Supply Code, M.P. 2004, Section 4.17 - *Application for new electric connection by house purchaser - Arrears of electricity due or other dues with regard to the same premises against erstwhile owner - Held - House purchaser could not get any benefit if the arrears of electric connection be not paid - Petition dismissed.* (Paras 8, 9 & 12)

विद्युत आपूर्ति संहिता, म.प्र. 2004, धारा 4.17 – गृह क्रेता द्वारा नये विद्युत कनेक्शन के लिए आवेदन – उसी परिसर के सम्बन्ध में भूतपूर्व स्वामी के विरुद्ध विद्युत देय या अन्य देय के बकाया – अभिनिर्धारित – गृह क्रेता कोई लाभ प्राप्त नही कर सकता यदि विद्युत कनेक्शन के बकाया का भुगतान न किया जाए – याचिका खारिज।

Cases referred :

(2004) 3 SCC 587, (1995) 2 SCC 648, 2006(4) MPLJ 132, 2009(2) MPLJ 61, Order dated 01.07.2008 passed in W.A. No.323/2006, (1995) 2 SCC 648.

N.K. Saxena, for the petitioner.
Ravi Jain, for the respondent Nos.1 & 2.

ORDER

S.K. GANGELE, J. :–Petitioner has filed this petition for a direction that the respondents No. 1 and 2 be directed to provide electricity supply connection to the petitioner.

2. Petitioner purchased a residential house from respondents No. 3 and 4 vide registered sale-deed dated 03.12.2008. Thereafter, petitioner applied for a new electricity supply connection. Before that a electricity connection was provided to the house of respondents No. 3 and 4 vide connection No. 302-43-4-361544 and after computerization the service number was 302-43-4-3615443 The respondents No. 1 and 2 refused to grant a new electricity supply connection to the petitioner on the ground that at the time of purchase of the house by the petitioner an amount of Rs.68,203.00 was over due on respondents No. 3 and 4 against the old electricity connection No. 302-43-4-361644 and until and unless the aforesaid amount be cleared by the petitioner or respondents No. 3 and 4, the new electricity connection could not be provided to the petitioner.

3. The petitioner has not disputed the aforesaid factual position that an amount of Rs.68,203.00 was due against respondents No. 3 and 4 towards old electricity

*W.P. No.2763/2009 (Gwalior)

connection of the aforesaid house before purchase of the house by the petitioner. However, the petitioner contended that she had no information about the aforesaid due amount and she could not be denied the facility of new electricity connection on this ground by respondents No. 1 and 2.

4. Learned counsel for petitioner has submitted that the petitioner has a right to get a fresh electricity connection because she has purchased the house and earlier electricity connection was in the name of respondents No. 3 and 4 and for their liability the petitioner could not be denied the facility of new electricity connection. In support of his contentions learned counsel relied on the judgments of Hon'ble the Supreme Court, reported in the cases of *Ahmedabad Electricity Co. Ltd. v. Gujarat Inns Pvt. Ltd. And others,* (2004) 3 SCC 587; *Isha Marbles v. Bihar State Electricity Board and another,* (1995) 2 SCC 648 and the judgment of learned Single Judge of this Court in the case of *Durgesh Agarwal v. M.P. State Electricity Board and others,* 2006 (4) MPLJ 132.

5. Contrary to this, learned counsel for respondents No. 1 and 2 has contended that in view of Section 4.17 of the Madhya Pradesh Electricity Supply Code, 2004, hereinafter referred to as the 'Code of 2004', the respondents have no obligation to provide electricity supply connection to the petitioner until and unless the dues which were over due in regard to the said premises be not cleared. In support of his contention the learned counsel relied on the judgments of Hon'ble the Supreme Court in the case of *Paschimanchal Viidyut Vitran Nigam Ltd. And others v. DVS Steels and Alloys Pvt. Ltd. And others,* 2009 (2) MPLJ 61 and an unreported order of this Court in the case of *The Madhya Pradesh State Electricity Board and another v. Durgesh Agarwal,* passed on 01.07.2008 in Writ Appeal No. 323 of 2006.

6. The controversy involved in this writ petition is that whether the petitioner is entitled to receive a new electricity supply connection for the house which was purchased by her from respondents No. 3 and 4 without clearing the over due amount of electricity connection which was over due on the previous owners of the house.

7. It is an admitted fact that the petitioner purchased the house from respondents No. 3 and 4 vide registered sale -deed dated 03.12.2008. At the time of registration of the sale-deed an electricity supply connection, Service Connection No. 302-43-4-361544 and after computerization the service number was 302-43-4-3615443, was provided to the residential house and an amount of Rs.68203.00 was due against the aforesaid electricity connection.

8. The Madhya Pradesh Electricity Regulatory Commission has made a Code, named as 'Madhya Pradesh Electricity Supply Code, 2004' in exercise of powers conferred by Section 43 (1) read with section 181 (t), Section 44; read with Section 181 (1), section 47 (1) read with section181 (v), section 47 (4) read with section

181 (w), section 47 (2, 3 and 5), Section 48 (b), Section 50 read with section 181 (2x) and section 56 of the Electricity Act, 2003 (no. 36 of 2003), section 9 (j) of Madhya Pradesh Vidyut Adhiniyam, 2000 (No. 4 of 2001) and all other powers enabling it in that behalf and the draft of the same having been previously published in the official gazette as required under section 181 (3), to govern supply and retail sale of electricity by the licensees and procedures thereof, the powers, functions and obligations of the licensees and the rights and obligations of consumers, and matters connected therewith and incidental thereto. Section 4.17 thereof prescribes that if any arrears of electricity dues or other dues for the premises where the new connection is applied the requisition for supply may not be entertained by the licensee until the dues are paid in full. The relevant provision is as under :-

> "4.17 If the consumer, in respect of an earlier agreement executed in his name or in the name of a firm or company with which he was associated either as a partner, director or managing director, has any arrears of electricity dues or other dues for the premises where the new connection is applied for and such dues are payable to the licensee, the requisition for supply may not be entertained by the licensee until the dues are paid in full. In case of a person occupying a new property, it will be the obligation of that person to check the bills for the previous months or, in case of disconnected supply, the amount due as per the licensee's records immediately before his occupation and ensure that all outstanding electricity dues as specified in the bills are duly paid up and discharged. The licensee shall be obliged to issue a certificate of the amount outstanding from the connection that was installed or is installed in such premises on request made by such person. The licensee may refuse to supply electricity to the premises through the already existing connection or refuse to give a new connection to the premises till such outstanding dues to the licensee are cleared."

9. From the aforesaid statutory provision, it is clear that the petitioner has to clear the arrears of electricity dues of the premises where the new connection has been applied. The analogous provision to the aforesaid provision has been considered by the Hon'ble Supreme Court in *Paschimanchal Vidyut Vitran Nigam Ltd. And others v. DVS Steels and Alloys Pvt. Ltd. And others,* 2009 (2) MPLJ 61 where the Hon'ble Supreme Court has held as under :-

> "9. The supply of electricity by a distributor to a consumer is 'sale of goods'. The distributor as the supplier, and the owner/ occupier of a premises with whom it enters into a contract for supply of electricity are the parties to the contract. A transferee

of the premises or a subsequent occupant of a premises with whom the supplier has no privity of contract cannot obviously be asked to pay the dues of his predecessor in title or possession, as the amount payable towards supply of electricity does not constitute a 'charge' on the premises. A purchaser of a premises, cannot be foisted with the electricity dues of any previous occupant, merely because he happens to be the current owner of the premises. The supplier can therefore neither file a suit nor initiate revenue recovery proceedings against a purchaser of a premises for the outstanding electricity dues of the vendor of the premises, in the absence of any contract to the contrary.

10. But the above legal position is not of any practical help to a purchaser of a premises. When the purchaser of a premises approaches the distributor seeking a fresh electricity connection to its premises for supply of electricity, the distributor can stipulate the terms subject to which it would supply electricity. It can stipulate as one of the conditions for supply, that the arrears due in regard to the supply of electricity made to the premises when it was in the occupation of the previous owner/occupant, should be cleared before the electricity supply is restored to the premises or a fresh connection is provided to the premises. If any statutory rules govern the conditions relating to sanction of a connection or supply of electricity, the distributor can insist upon fulfilment of the requirements of such rules and regulations. If the rules are silent, it can stipulate such terms and conditions as it deems fit and proper, to regulate its transactions and dealings. So long as such rules and regulations or the terms and conditions are not arbitrary and unreasonable, Courts will not interfere with them.

11. A stipulation by the distributor that the dues in regard to the electricity supplied to the premises should be cleared before electricity supply is restored or a new connection is given to a premises, cannot be termed as unreasonable or arbitrary. In the absence of such a stipulation, an unscrupulous consumer may commit defaults with impunity, and when the electricity supply is disconnected for non-payment, may sell away the property and move on to another property, thereby making it difficult, if not impossible for the distributor to recover the dues. Having regard to the very large number of consumers of electricity and the frequent moving or translocating of industrial, commercial and residential establishments, provisions similar to clause 4.3 (g) and (h) of Electricity Supply Code are necessary to safeguard the

interests of the distributor. We do not find anything unreasonable in a provision enabling the distributor/supplier, to disconnect electricity supply if dues are not paid, or where the electricity supply has already been disconnected for non-payment, insist upon clearance of arrears before a fresh electricity connection is given to the premises. It is obviously the duty of the purchasers/occupants of premises to satisfy themselves that there are no electricity dues before purchasing/occupying a premises. They can also incorporate in the deed of sale or lease, appropriate clauses making the vendor/lessor responsible for clearing the electricity dues upto the date of sale/lease and for indemnity in the event they are made liable. Be that as it may."

10. The question raised by the petitioner in the present petition has already been answered by Hon'ble the Supreme Court. Howeverr, the learned counsel relied on the judgment of the Hon'ble Supreme Court reported in *Isha Marbles v. Bihar State Electricity Board and another,* (1995) 2 SCC 648, where the Hon'ble Supreme Court has held that the new electricity connection cannot be refused to a consumer on the ground that the earlier dues with regard to same premises were not cleared by the erstwhile owner of the premises. However, the Hon'ble Supreme Court has based that judgment on the peculiar facts of the case because at that time there was no law framed by the Electricity Board to the effect that a new connection could not be granted to a consumer if the earlier dues of the premises were not cleared after the consumer purchased the house from the previous owner. The relevant observation of the Hon'ble Supreme Court are as under :-

"Electricity is public property. Law, in its majesty, benignly protects public property and behoves everyone to respect public property. Hence, the courts must be zealous in this regard. But, the law, as it stands, is inadequate to enforce the liability of the previous contracting party against the auction-purchaser who is a third party and is in no way connected with the previous owner / occupier. It may not be correct to state that if it is held as above then it would permit dishonest consumers transferring their units from one hand to another, from time to time, infinitum without the payment of the dues to the extent of lakhs and lakhs of rupees and each one of them can easily say that he is not liable for the liability of the predecessor in interest. No doubt,m dishonest consumers cannot be allowed to play truant with the public property but inadequacy of the law can hardly be a substitute for overzealousness."

11. Hence, the judgment cited by the learned counsel for the petitioner is not applicable in the present case. Learned counsel further relied on the judgment of the learned Single Judge of this Court in the case of *Durgesh Agarwal v. M.P. State Electricity Board and others,* 2006 (4) MPLJ 132. The aforesaid judgment was delivered by the learned Single Judge in regard to facts of the case where the provisions of the Madhya Pradesh Electricity Supply Code, 2004 were not applicable. This has also been observed by the learned Single Judge in para 6 of the order, which is as under :-

> "6. As far as applicability of the M.P. Electricity Supply Code, 2004, is concerned the said Code came into force with effect from 10.6.2004 and in all the three petitions the premises were purchased by the petitioner well before the said date and the connections were also sought for and refused before the said date. As the said Code does not have any retrospective effect, the said Code does not apply in any of the cases."

12. Hence, this judgment is also not applicable in the present case and the petitioner cannot get any benefit on the basis of the findings recorded in the aforesaid judgment.

13. Looking to the aforesaid facts of the case, I do not find any merit in this petition. It is hereby dismissed. No order as to cost.

Petition dismissed.

I.L.R. [2010] M. P., 603
WRIT PETITION
Before Mr. Justice K.K. Lahoti & Mr. Justice S.C. Sinho
27 January, 2010*

KAMLA BAI (SMT.) ... Petitioner
Vs.
SMT. PREETI RAIZADA ... Respondent

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f), Civil Procedure Code, 1908, Order 6 Rule 17 - *Amendment after commencement of trial - Permissibility - Suit for eviction at the stage of defendant evidence - Plaintiff executed lease deed of adjacent shop - Immediately thereafter defendant sought amendment in written statement - Held - Subsequent event has occurred after commencement of trial and application for amendment filed with due diligence - Trial Court erred in exercising its jurisdiction in rejecting application - Petition allowed.* (Paras 9 to 14)

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ), सिविल प्रक्रिया संहिता, 1908, आदेश 6 नियम 17 – विचारण प्रारम्भ होने के बाद संशोधन

*W.P. No.13469/2008 (Jabalpur)

– अनुज्ञेयता – बेदखली का वाद प्रतिवादी साक्ष्य के प्रक्रम पर – वादी ने निकटवर्ती दुकान का पट्टा विलेख निष्पादित किया – उसके तुरन्त बाद प्रतिवादी ने लिखित कथन में संशोधन चाहा – अभिनिर्धारित – विचारण प्रारम्भ होने के बाद पश्चात्वर्ती घटनाक्रम घटित हुआ और सम्यक् तत्परता से संशोधन के लिए आवेदन पेश किया गया – विचारण न्यायालय ने आवेदन खारिज करने में अपनी अधिकारिता का प्रयोग करने में त्रुटि की – याचिका मंजूर।

Cases referred :

(2006) 12 SCC 1 = 2007 AIR SCW 513, (2009) 2 SCC 409 = 2009(I) MPWN 69 (SC), (2007) 5 SCC 660.

Rajesh Maindiretta, for the petitioner.

R.K. Jain & Jagdish Sakalle, for the respondent.

O R D E R

This petition is directed against an order dated 1.10.2008, in Civil Suit No. 8-A/2006, by which petitioner's application under Order 6 rule 17 C.P.C. was dismissed. The application was rejected by the trial Court on the ground that the plaintiff/respondent had closed her evidence and the petitioner/defendant had also examined her 3 witnesses. As the trial had commenced, petitioner/defendant cannot be allowed to amend the pleadings and the application was rejected.

2. Learned counsel appearing for petitioner assailed the order on the ground that during pendency of the suit on 28.8.2008, the plaintiff alongwith other co-owners let out the adjacent shop to M/s Reliance Fresh Limited by a registered lease-deed dated 8.5.2008, which was registered on 27.8.2008. The application seeking amendment was immediately filed on 15.9.2008. The petitioner herein moved an application with due diligence. The proposed amendment was based on subsequent event occurred after commencement of the trial, but the trial Court erred in rejecting the application filed by the petitioner.

3. Learned counsel appearing for plaintiff/respondent supported the order and submitted that in fact the plaintiff/respondent is not owner of the property which is subject matter of lease dated 8.5.2008. In this regard, a copy of the registered partition-deed dated 13.9.1991 is referred. It is stated that the premises let out to M/s Reliance Fresh Limited has not fallen into share of plaintiff Smt.Preeti Raizada. The aforesaid partition-deed has already come on record and the petitioner herein has cross-examined the plaintiff at length in this regard. The trial Court after considering the fact that plaintiff has denied that she had leased out her premises by the aforesaid lease in favour of M/s Reliance Fresh Limited, has rightly rejected the application. Respondent has also placed reliance to the Apex Court's judgments in *Ajendraprasadji N.Pande Vs. Swami Keshavprakeshdasji N.* (2006) 12 SCC 1=2007 AIR SCW 513 and *Vidya Bai Vs. Padamalatha* (2009) 2 SCC 409=2009(1) MPWN 69 (SC) and submitted that in view of the settled law by the Apex Court that no amendment can be allowed after commencement of the trial, the trial Court has rightly rejected the application.

4. To appreciate the rival contentions of the parties, we perused the record, documents, lease-deed dated 8.5.2008 registered on 27.8.2008 and application Annexure P/3 filed by the petitioner under Order 6 rule 17 CPC. From the perusal of the aforesaid, we find that the petitioner herein moved the application on 15.9.2008 before the trial Court seeking amendment in the written statement by inserting two paragraphs as 4-A and 4-B. By para 4-A, petitioner herein proposed an amendment that the plaintiff has leased out a shop having 3 portions to M/s Reliance Fresh Limited. M/s Reliance Fresh Limited has put two big shutters in the premises. Aforesaid lease was given just few days before filing of the application. Plaintiff is also receiving rent by cheque from Reliance Fresh Limited and is depositing it in her bank account of Central Bank of India, Imami Gate Branch, Bhopal. As shop has been let out by the plaintiff to M/s Reliance Fresh Limited during pendency of the suit, it shows that plaintiff is not having bonafide necessity of the disputed shop.

5. Another amendment which has been prayed by the petitioner herein is in respect of registration of the firm in the name of mother-in-law of the plaintiff namely Raj Dulari and it is stated that this firm is being managed by the plaintiff. Plaintiff's two sons are engaged in the profession of advocacy and they are not doing any business, so plaintiff is not having bonafide necessity of the suit accommodation.

6. This application was opposed by the plaintiff by filing a reply denying the allegations made by the petitioner herein in the application. The trial Court relying on the aforesaid judgments of the Supreme Court dismissed the application.

7. To appreciate the contention made by the petitioner, provision as contained in Order 6 rule 17 CPC may be looked into, which reads thus:-

> **Rule 17. Amendment of pleadings**- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."
>
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.
>
> (emphasis supplied)

8. The provisions as contained under Order 8 rule 9 CPC may be looked into which reads thus:-

> **Rule 9. Subsequent pleadings**- No pleading subsequent to the

written statement of a defendant other than by way of defence to set-off or counter-claim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit; but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time of not more than thirty days for presenting the same.

9. Order 6 rule 17 CPC specifically provides that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. It is brought to our notice that plaintiff closed her evidence on 2.5.2007. Thereafter, petitioner/defendant commenced her evidence. It is stated at the Bar that till date, petitioner herein has examined 3 witnesses and the case is fixed for cross-examination of the remaining witnesses. On 15.9.2008, an application under Order 6 rule 17 CPC was filed in which allegation were made in respect of the leasing of a portion of the house in which the suit accommodation is situated to M/s Reliance Fresh Limited. Copy of deed is on record which reflects that though lease was made effective from 8.5.2008 but was registered on 27.8.2008 and within a period of 18 days, an application was filed before the trial Court seeking amendment in the written statement. From the perusal of the lease-deed Annexure P/5, it is apparent that one among the executants of the deed is Smt.Priti Raizada, respondent herein. The lease further provides in para 1 that the lessors are the sole owners and absolutely seized and possessed of or otherwise well and sufficiently entitled to a immovable property. Meaning thereby that all the executants/lessors of the lease were owners of the property. Prima-facie lease was executed by the owners including plaintiff in favour of M/s Reliance Fresh Limited. Though the respondent submitted that because of insistence on the part of M/s Reliance Fresh Limited, respondent stood as an executant of the deed and in fact she was not having any right or title in the leased premises, but this aspect cannot be examined at this stage while considering the application for amendment. As subsequent events has occurred after commencement of the trial and the petitioner herein immediately moved an application seeking amendment in the written statement supported by document i.e. lease-deed, it cannot be said that the application was moved with no due diligence. If the application was filed within a period of 18 days of the registration of the document, petitioner herein was right in exercising her right under Order 6 rule 17 CPC. The provision does not come in the way of the petitioner to amend the pleadings. Apart from this, the trial Court is having jurisdiction to permit the defendant for amendment of pleadings based on subsequent event, if filed in due diligence. The aforesaid pleadings can be filed with the leave of the Court upon such term as the Court thinks fit. As stated hereinabove, the application was filed immediately within a period of 18 days of the leasing out the premises to M/s

Reliance Fresh Limited, the trial Court erred in rejecting the application filed by the petitioner seeking amendment in the written statement.

10. The Apex Court in *Ajendraprasadji N.Pande* (supra) while considering the scope of order 6 rule 17 proviso, held that the application can be rejected where the matter was not raised earlier and due diligence was not there. But as stated hereinabove, the application was filed with due diligence immediately after execution of the deed. In *Vidya Bai* (supra) the Apex Court though held that after commencement of the trial, such amendment cannot be allowed. But in this case, the application was filed with due diligence and such application can be allowed. Aforesaid judgments are not applicable in the facts of the present case.

11. The Apex Court in *Ram Kumar Barnwal Vs. Ram Lakhan* (2007) 5 SCC 660 considering the question of taking note of subsequent events held that the Court has power to take note of subsequent events and mould the relief accordingly, subject to the following conditions being satisfied; (i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted; (ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and (iii) that such subsequent event is brought to the notice of the Court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise. The Apex Court further held that if the subsequent event is based on facts, the party relying on the subsequent event, which consists of facts not beyond the pale of controversy either as to their existence or in their impact, is expected to have resort to amendment of pleadings under Order 6 Rule 17 CPC. Such subsequent event, the court may permit being introduced into the pleadings by way of amendment as it would be necessary to do so for the purpose of determining the real questions in controversy between the parties.

12. In view of the aforesaid settled position of law in the aforesaid pronouncement, there is no iota of doubt that the aforesaid subsequent event ought to have been taken on record by the trial Court by permitting the petitioner herein to amend the pleadings.

13. Now another proposed amendment as prayed in para 4-B of the application may be looked into. This amendment is in respect of registration of the firm in the name of mother-in-law of the plaintiff namely Raj Dulari and in this regard certain averments have been prayed to be brought on record, but no reason has been assigned by the petitioner why this amendment could not be inserted before commencement of the trial. In absence of any explanation in this regard, the trial Court was justified in rejecting this part of the application in which no error is found.

14. In view of the aforesaid discussion, we find that the trial Court erred in exercising its jurisdiction under Order 6 Rule 17 CPC in rejecting the entire

application. The order is not sustainable under the law and is set aside in part. In the result, we allow this application in part and direct as under:-

(i) The petitioner's application under Section 6 rule 17 CPC in so far as it relates to amendment of the written statement by inserting new para 4-A is hereby allowed. Rest application is hereby rejected.

(ii) After allowing the amendment, the trial Court shall extend an opportunity to the plaintiff to amend the plaint, if required, then permit both the parties to lead evidence in respect of the proposed amendment. While considering the case on merits, the trial Court shall also consider the contention of the plaintiff that the said shop had not fallen into her share and because of insistence of the M/s Reliance Fresh Limited, she stood as an executant of the document Annexure P/5.

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

Petition partly allowed.

I.L.R. [2010] M. P., 608

WRIT PETITION

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

11 February, 2010*

R.V. INFRASTRUCTURE ENGINEERS PVT. LTD. ... Petitioner

Vs.

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

A. Transfer of Property Act (4 of 1882), Section 105 - *Lease - Ingredients - (i) There is a transfer of a right to enjoy property, (ii) it is made for a certain time, express or implied or in perpetuity, and (iii) there has to be consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value.* (Para 10)

क. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 105 – पट्टा – अवयव – (i) सम्पत्ति का उपभोग करने के अधिकार का अंतरण हो, (ii) यह एक अभिव्यक्त या विवक्षित समय के लिए या शाश्वत काल के लिए किया गया हो, और (iii) किसी कीमत के, जो दी गई हो या जिसे देने का वचन दिया गया हो, अथवा धन या फसलों के अंश या सेवा या किसी अन्य मूल्यवान वस्तु के प्रतिफल के रूप में होना चाहिए।

B. Easements Act (5 of 1882), Section 52 - *License - Ingredients - License is personal to grantor and licensee (grantee) - It is not annexed to the property in respect of which it is enjoyed and it is neither transferable nor heritable - It creates no duties and obligations upon the person making the grant - It also does not create an interest in the property.* (Para 11)

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*W.P. No.3041/2004 (Jabalpur)

ख. सुखाचार अधिनियम (1882 का 5), धारा 52 – अनुज्ञप्ति – अवयव – अनुज्ञप्ति अनुदाता और अनुज्ञप्तिधारी (प्राप्तिकर्ता) के लिए वैयक्तिक है – यह उस सम्पत्ति से संलग्न नही है जिसके सम्बन्ध में इसका उपभोग किया जाता है और यह न तो अंतरणीय है और न दायय्योग्य – यह अनुदान करने वाले व्यक्ति पर कोई कर्तव्य या बाध्यताएँ सृष्ट नही करती – यह सम्पत्ति में कोई हित भी सृष्ट नही करती।

C. Transfer of Property Act (4 of 1882), Section 105, Stamp Act, 1899, Section 2(16) - *Lease - Right to collect tolls for fifteen years in lieu of the amount spent by the Concessionaire in the construction of roads, bridges etc. under the Build, Operate and Transfer (B.O.T.) scheme - Right to enjoy property clearly makes the transaction that of lease - Mere apprehension that there may not be successful completion will not come in the way of chargeability of the document - Since construction of road, handing over of possession, as well as recovery of toll is provided hence the document falls within the definition of lease.* (Paras 16 & 19)

ग. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 105, स्टाम्प अधिनियम, 1899, धारा 2(16) – पट्टा – निर्माण, प्रवर्तन और अंतरण (बी.ओ.टी.) स्कीम के अधीन रियायत पाने वाले द्वारा सड़क, पुल आदि के निर्माण में खर्च की गई रकम के बदले में पन्द्रह वर्ष तक पथकर संग्रह का अधिकार – सम्पत्ति का उपभोग करने का अधिकार स्पष्ट रूप से संव्यवहार को पट्टे का संव्यवहार बनाता है – केवल यह आशंका कि सफलतापूर्ण समापन नही हो सकेगा दस्तावेज की प्रभार्यता के मार्ग में बाधक नही होगी – चूंकि सड़क का निर्माण, कब्जे की सुपुर्दगी साथ ही पथकर की वसूली का उपबंध है इसलिए दस्तावेज पट्टे की परिभाषा में आयेगा।

D. Stamp Act (2 of 1899) [As amended by Stamp (M.P. Amendment) Act, (12 of 2002) w.e.f. 13.08.2002], Schedule 1-A, Article 33 - *Constitutional validity - Stamp duty on lease - Document in question is not the one which is covered under List I, Entry 91 of 7th Schedule of Constitution - Entry 44 of IIIrd List of 7th Schedule of Constitution provides for stamp duties other than duties or fees collected by means of judicial stamps - State is competent to prescribe the rates as mentioned in Article 33 of Schedule 1-A of Stamp Act, as amended in Madhya Pradesh - Said Article is not repugnant to S. 105 of T.P. Act or S. 2(16) of Stamp Act.* (Para 26)

घ. स्टाम्प अधिनियम (1899 का 2) [स्टाम्प (म.प्र. संशोधन) अधिनियम (2002 का 12) द्वारा तारीख 13.08.2002 से यथासंशोधित], अनुसूची 1–ए, अनुच्छेद 33 – संवैधानिक विधिमान्यता – पट्टे पर स्टाम्प शुल्क – प्रश्नगत दस्तावेज वह नही है जो संविधान की 7वीं अनुसूची की सूची ए प्रविष्टि 91 के अन्तर्गत आता है – संविधान की 7वीं अनुसूची की सूची ए की प्रविष्टि 44 न्यायिक स्टाम्प के द्वारा संग्रहीत शुल्क या फीस से भिन्न स्टाम्प शुल्क का उपबंध करती है – राज्य, मध्य प्रदेश में यथासंशोधित भारतीय स्टाम्प अधिनियम की अनुसूची 1–ए के अनुच्छेद 33 में उल्लिखित दरें विहित करने के लिए सक्षम है – उपर्युक्त अनुच्छेद सम्पत्ति अंतरण अधिनियम की धारा 105 या स्टाम्प अधिनियम की धारा 2(16) के विरुद्ध नही है।

E. Stamp Act (2 of 1899) [As amended by Stamp (M.P. Amendment) Act, (12 of 2002) w.e.f. 13.08.2002], Schedule 1-A, Article 33(c) - *The duty as per rate prevailing on the date of agreement is payable not on the date when Cabinet took the decision and letter of acceptance of offer was issued.* (Para 28)

ङ. स्टाम्प अधिनियम (1899 का 2) [स्टाम्प (म.प्र. संशोधन) अधिनियम (2002 का 12) द्वारा तारीख 13.08.2002 से यथासंशोधित], अनुसूची 1–ए, अनुच्छेद 33(सी) – अनुबन्ध की तारीख को विद्यमान दर के अनुसार शुल्क देय है न कि उस तारीख पर शुल्क देय है जब मंत्रिमण्डल ने निर्णय लिया हो और प्रस्ताव के प्रतिग्रहण का पत्र जारी किया हो।

F. Interpretation of documents - ***Recital - Recitals in a document can never be conclusive - Substance of the term agreed upon and not the nomenclature given to the deed by the parities is material.*** (Para 11)

च. दस्तावेजों का निर्वचन – परिवर्णन – दस्तावेज में परिवर्णन निश्चायक कभी नही हो सकता – अनुबंधित शर्त का सार न कि पक्षकारों द्वारा विलेख में दी गई नामावली तात्विक है।

Cases referred :

AIR 1922 Nag 162, AIR 1931 Mad 216, AIR 1940 Mad 102, AIR 1956 Orissa 156, AIR 1966 Bom 113, 1933 ALJ 749, AIR 1974 SC 396, AIR 1959 SC 1262, (1991) 2 SCC 180, (1979) 3 SCC 106, (1995) 1 SCC 560, AIR 1987 All 348, AIR 2001 AP 442, 1990 MPLJ 579, 2007(4) MPLJ 102, 2004(3) MPLJ 571, AIR 1954 SC 496, (1999) 6 SCC 15, (1994) 2 SCC 497, (1999) 5 SCC 708, AIR 1958 SC 560, AIR 1961 SC 1534, AIR 1964 SC 1037, AIR 1962 SC 594, AIR 1979 SC 898.

Kishore Shrivastava with *Kunal Thakre,* for the petitioner.

R.D. Jain, A.G. with *P.K. Kaurav, Dy.A.G.,* for the respondent Nos. 1 & 2.

Ashok Agarwal, for the respondent No.3/M.P. Rajya Setu Nirman Nigam Ltd.

O R D E R

The Order of the Court was delivered by ARUN MISHRA, J. :–In these writ petitions, question involved is whether a transaction where the right to collect tolls is given in lieu of the amount spent by the Concessionaire in the construction of roads, bridges etc. under the Build, Operate & Transfer (BOT) scheme amounts to a "lease" as contemplated under Section 105 of the Transfer of Property Act,1882 (hereinafter referred to as "T.P.Act") and Section 2(16) of the Indian Stamp Act,1899.

2. The constitutional validity of the amendment made in proviso to third clause of Article 33 of the Schedule 1-A as amended by Indian Stamp (M.P.) Act,2002 has also been challenged. Further prayer has been made to declare Section 48 and 48-B as amended by M.P.Act 24 of 1990 as ultra vires.

3. Facts are being referred from WP No.3041/2004 *(RV Infrastructure Engineers Pvt. Ltd. Vs. State of M.P. and others)*. The petitioner is a Company engaged in construction of roads, etc. Respondent No.3/M.P. Rajya Setu Nirman Nigam Ltd. (hereinafter referred to as "MPRSNN") is a company incorporated and registered under the Companies Act. State Government has authorized MPRSNN for reconstruction, strengthening, widening and rehabilitation on Badnawar-Badnagar-Ujjain-Dewas Road project of approximately length of about 106 kms. on Build, Operate and Transfer basis vide Order dated 1.2.2001. NIT was issued by MPRSNN inviting the bids, letter of acceptance was issued on 25.4.03 requiring execution of Concession Agreement within 30 days. Concession agreement dated 31.7.03 was executed. A show cause notice was served upon the petitioner by Revenue Officer, Collector (Stamps), Ujjain which required to produce original copy of the agreement. Petitioner had submitted that notice is vague. In order to point out the correct position, petitioner at his own submitted reply-cum-representation (P.4).Collector thereafter passed the impugned order against the petitioner on 31.3.2004 purporting to exercise power under Section 48-B of Indian Stamp Act directing recovery of deficit stamp duty of Rs.98,60,000 and fine of Rs.5,00,000, total Rs.1,03,60,000. Petitioner has submitted that the transaction is not "lease". The Concession Agreement has two parts (a) it offers for use and development of the highway site to the Concessionaire to repair, construction and maintenance of roads under a Bond BOT Scheme; and (b) it entitles concessionaire after completion of the project and during the agreed toll period to levy, collect and appropriate the fees (toll) for the user of project highway by the travelling public pursuant to and in accordance with the fee notified. Petitioner has submitted that right to collect toll as per the Concession Agreement arises only after completion of project. The right is dependent on various contingencies and fulfillment of conditions enumerated in the Agreement. Benefit of the toll will accrue only when the project is successfully completed. The property (road) is yet to be created. The agreement may be terminated even before completion of the project. The transaction does not amount to "lease" within Section 2(16)(c) of the Indian Stamp Act. It is a "licence" not a "lease". Government is providing subsidies to promote and complete the project. No machinery of adjudication has been provided under Section 48-B of the Indian Stamp Act as amended in M.P. Under Section 48 the Collector has power to recover the duty and penalty by coercive method. Section 48-B suffers with the same flaw. Both the provisions 48 and 48-B are unconstitutional. Petitioner has also submitted that Article 33 of Schedule 1-A as amended by Indian Stamp (MP) Act,2002 is ultra vires due to lack of legislative competence. Schedule 1-A levies stamp duty on instrument properly and legally characterized as lease. From the amended provision, it is clear that though instrument is not a "lease", it is sought to be made liable to bear stamp duty. Thus, the provision is violative of Article 14 of the Constitution of India. The charging Section cannot impose the stamp duty.

The stamp duty cannot be levied on the basis of mere estimate of expenditure in the project. When the tenders were floated, there was no whisper of liability of payment of Stamp Duty on the agreement. Provision contained in clause 6.8 of the Concession Agreement has not been taken into consideration,hence the writ applications have been preferred.

4. The respondents 1 and 2 have filed their return in WP No.3041/2004 *(RV Infrastructure Engineers Pvt. Ltd. Vs. State of M.P. and others)* which has been adopted in all the petitions. In nutshell the case of respondents 1 and 2 is that as document is an "instrument" as defined under Section 2(16) of the Indian Stamp Act. Section 3 provides that the instrument shall be chargeable with duty of the amount indicated in the Schedule. Article 33 of Schedule 1-A has been amended in State of MP vide Act No. 12 of 2002. The provision clearly specifies that duty chargeable is 2% on the amount likely to be spent on the agreement under the lease by the lessee. Any agreement by which right to collect tolls is given in lieu of amount spent by the lessee in construction of roads, bridges, etc. under BOT scheme, it chargeable to stamp duty at the rate of 2%. Though the agreement was titled as Concession Agreement, but infact same was an Agreement to Lease. The right was transferred to petitioner to collect tolls for fifteen years in lieu of amount worth Rs.49.30 crores which would be spent in construction, strengthening and rehabilitation of Badnawar-Badnagar-Ujjain-Dewas Road. The order passed by the Collector (Stamp) is proper, it has been passed after giving due opportunity of hearing. The agreement in question is chargeable to stamp duty under proviso to Artilce 33-C of Schedule 1-A of the Indian Stamp Act. The process of recovery of land revenue has been given in Chapter XI of MP Land Revenue Code, 1959. Thus, there is a machinery for adjudication as well as for recovery. Provision of Section 48 and 48-B cannot be said to be arbitrary. The amendment is within the competence of State legislature.

5. In the return filed by MPRSNN/respondent no.3 it is submitted that respondent is bound by law to deduct the tax which is being done lawfully. BOT Scheme agreement attracts levy of stamp duty at 2% under Article 33(c) of Schedule 1-A, principle of estoppel is not attracted.

6. Shri Kishore Shrivastava, Shri Ajay Mishra, Sr. Advocates, Shri Imtiyaz Hussain, Shri Satish Agrawal, Shri H.K.Upadhyay and Shri Akshat Agarwal, Advocate for the petitioners have submitted that possession was not given, no rent was payable, thus, the transaction does not amount to lease under Section 105 of the T.P.Act or Section 2(16) of the Indian Stamp Act. It amounts to "license" as defined in Section 52 of the Indian Easements Act,1882. They have submitted that there is simply an offer to lease the land in future. There is no demise of the land *in presenti* as toll has to be recovered from a future date on successful completion of the construction of the road, exclusive possession has also not been taken. It cannot be deemed to be a lease. There is no demise *in*

presenti. It has also been submitted that it is the Union's subject to prescribe the rates of stamp duty as provided in Entry 91 of Ist List. In List IInd i.e. State List, Entry 63 provides the authority with respect to rates of stamp duty in respect of documents other than specified in List I. Entry 44 of IIIrd List i.e. concurrent list has also been referred which provides stamp duty other than duties or fees collected by means of judicial stamps, but not including the rates of stamp duty. Learned counsel have submitted that by virtue of Article 254 of the Constitution the amendment which has been inserted in Article 33(c) of Stamp Act by MP Amendment is void. It was also submitted by learned counsel appearing for petitioners that on 1.7.2002 the Cabinet had taken a decision not to impose any stamp duty on such transactions , later on amendment has been brought by the legislature, the agreements have been executed subsequently. The date for chargeability should be the date of issuance of NIT or the date of acceptance of the bid.

7. Shri R.D.Jain, learned Advocate General appearing with Shri P.K. Kaurav, learned Deputy Advocate General for respondents 1 and 2/State has submitted that the transaction amounts to lease under Section 105 of the T.P.Act. Right to collect toll has been given for fifteen years under the agreement. Section 3(26) of the General Clauses Act is applicable for the purpose of understanding the meaning of "immovable property". He has also referred to Section 3 of the T.P.Act. Learned Advocate General has also submitted that right to realize the benefit arising out of the land has been given under the agreement. The road is "immovable property", right to enjoy the property has been given for fifteen years. He has also referred to various clauses of the agreement. Consideration has been paid in advance then right has been given to recover by collection of toll. Construction of roads, operation and financing has to be done by the concessionaire. The agreement cannot be said to be a licence within the purview of Section 52 of the Easement Act. Successors are permitted to be substituted which is not the case in the "license". Learned counsel has also submitted that in case license is granted and construction is made, license become irrevocable under Section 60 of the Easement Act. In the instant case, agreement itself provides for construction of road, it cannot be said to be a "license". Possession has been given and there is an obligation upon the petitioners to give back the possession also. The transaction cannot be said to be a "license" as the licensee cannot enjoy through servant or agents.. "License" is personal in nature. It cannot be said that another agreement was to be executed in future for recovery of the toll, that right has been given under the agreement in question itself. Thus, the transaction amounts to lease. It is open to the State to realize the stamp duty at an earlier date also with respect to the transaction which is concluded. No remission has been made by the State Government under Section 9. In case of reduction of stamp duty from a future date, the chargeability of the document in question is not affected.

Petitioners have to pay as per the rates prevailing at the time of execution of the agreement.

8. Shri Ashok Agarwal and Shri Samdarshi Tiwari, learned counsel appearing for MPRSNN have supported the submissions made by learned Advocate General that MPRSNN has right to deduct the tax payable.

9. The main question for consideration is that whether the agreement in question as per the terms contained in it can be said to be a "lease" or "license".

10. Before coming to the terms of the agreement, we refer to the legal provisions defining "lease" and "license". The lease has been defined in Section 105 of the T.P.Act thus :-

> **"105. Lease defined:-** A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."

It is apparent that in a lease (i) there is a transfer of a right to enjoy such property; (ii) it is made for a certain time, express or implied or in perpetuity and (iii) there has to be consideration of a price paid or promised, or of money, a share of crops, service of any other things of value.

The Indian Stamp Act, Section 2(16) defines "lease". Section 2(16) is quoted below :-

> **"2(16):-** "Lease" means a lease of immovable property and includes also-
>
> (a) a patta;
>
> (b) a kabuliyat or other undertaking in writing; not being a counterpart of a lease, to cultivate, occupy or pay or deliver rent for, immovable property;
>
> (c) any instrument by which tolls of any description are let;
>
> (d) any writing on an application for a lease intended to signify that the application is granted."

The definition is inclusive, it specifically includes, a patta, kabuliyat or other undertaking in writing, not being a counter part of a lease for the purposes enumerated in Section 2(16)(b). Section 2(16)(c) provides that any instrument by which tolls of any description are let is a lease. Section 2(16)(d) provides any writing on an application for a lease intended to signify that the application is granted.

Section 52 of the Indian Easements Act, 1882 defines "license" thus :-

> **"52. "License" defined :-** Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license."

Essence is that but for the right granted under the license act would be unlawful otherwise and such right does not amount to easement or an interest in the property. In case an interest in property is created, it cannot be said to be a license.

The "immovable property" has been defined in Section 3(26) of the General Clauses Act. The definition reads thus :-

> **"3(26) :-** "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth."

The benefit arising out of land is included in the immovable property. Collection of toll is one such benefit.

11. The Registration Act, 1908 under Section 2(7) defines "lease" thus :-

> **"2(7):-** "lease" includes a counterpart, kabuliyat, and undertaking to cultivate or occupy, and an agreement to lease."

We come to question what constitute license, as a rule, a licence is personal both to the grantor as well as licensee (grantee). A licence is not annexed to the property in respect of which it is enjoyed and is so evanescent that it is neither transferable nor heritable as laid down in *Karselal vs. Badriprasad* AIR 1922 Ng.162, *Chinnon vs. Ranjithammal* AIR 1931 Mad.216 and *Alagiri vs. Muthuswami* AIR 1940 Mad.102. Another essential of the licence is that it creates no duties and obligations upon the person making the grant and is, therefore, revocable except in certain circumstances expressly provided for in the Act itself is laid down in *Mohd. Khan vs. Ramnarayan Misra* AIR 1956 Orissa 156 and in *Miss Aninha D'Costa vs. Mrs. Parvathibai M.Thakur* AIR 1966 Bom.113. It is also settled that a licence does not create an interest in the land as laid down in *Alagiri Chetty vs. Muthaswami Chetty* (supra).

The words "an interest in the property" are presumably intended to cover cases where there might be a right in the property granted as a lease. It is also settled proposition that recitals in a document can never be conclusive. The substance of the term agreed upon and not the nomenclature given to the deed by the parties is material. All the terms and conditions have to be looked into. In *Burmah Shell Oil Storage and Distributing Co.of India Ltd.* 1933 ALJ 749 the use and the occupation of the land were transferred to the landlord company, they

were to erect on the part of the land a building or other structure of the substantial and permanent character and when the transaction was to be terminated the railway administration had the right to re-enter upon, retake and absolutely retain the possession of the said land, use and occupation were certainly transferred to the Oil Company. Right of inspection was available with the Railways. It was held in the circumstances that it would not be mere license within the scope of Section 52 of the Easement Act as a license does not confer exclusive possession and enjoyment. The intention of the parties to an instrument must be gathered from the terms of the agreement examined in the light of the surrounding circumstances. A recital that agreement does not create a tenancy is not decisive. Crucial test is not the nomenclature of the document but whether instrument is intended to create or not to create an interest in the property. Transfer of right to enjoy the property is the test for determination whether disputed right is leasehold or merely a license. The Apex Court in *Qudarat Ullah vs. Municipal Board, Bareilly* AIR 1974 SC 396 has put it pithily, if an interest in immoveable property, entitling the transferors to enjoyment, is created, it is a lease. If permission to use land without right to exclusive possession is alone granted, a licence is the legal result as held in *Associated Hotel's of India vs. R.N.Kapoor* AIR 1959 SC 1262.

12. In *Puran Singh Sahni vs. Sundari Bhagwandas Kripalani (Smt.)and others* (1991) 2 SCC 180 relied upon by Shri Kishore Shrivastava, Sr.Advocate distinction between lease and license has been considered. It has been laid down that for the lease as defined in Section 105 of T.P.Act, the essential elements are (i) the parties (ii) the subject matter, or immovable property (iii) the demise, or partial transfer (iv) the term or period and (v)the consideration, or rent. When the agreement vests in the lessee a right of possession for a certain time it operates as a conveyance or transfer and is a lease. The section defines the lease as a partial transfer,that is, transfer of right of enjoyment for a certain time. The test of exclusive possession is not decisive. By mere use of the word lease or licence the correct categorization of an instrument under law cannot be affected. While interpreting the agreement Court has also to see what transpired before and after the agreement. *Ex praecedentibus et consequentibus optima bit interpretation* i.e. the best interpretation is made from the context. If in fact it was intended to create an interest in the property, it would be a lease, if it did not, it would be a license. Interest for this purpose means a right to have the advantage accruing from the premises or a right in the nature of property in the premises but less than title.

13. The definition of "immovable property" given in Section 3(26) of General Clauses Act gathers importance while considering the lease as defined in Section 105 of T.P.Act. The Apex Court in *Sri Tarkeshwar Sio Thakur Jiu vs. Dar Dass Dey & Co.and others* (1979) 3 SCC 106 has observed that the definition given of the "immovable property" in Section 3(26) of General Clauses Act and

not Section 3 of the T.P. Act will apply for interpretation of the expression "right to enjoy immovable property" used in Section 105 of the T.P.Act. Immovable property, thus, includes interest in or benefits arising out of immovable property. Grant of khas possession of the land for a certain period and for a fixed price payable on yearly basis or for raising and taking minerals from inside the land is a lease not a licence.

14. When we consider the agreement in question, it is apparent that concessionaire/petitioner is entitled to make reconstruction, strengthening, widening and rehabilitation of a section of Road project of considerable length and its operation and maintenance to be executed through a Concession on build, operate and transfer (BOT) basis. Clause 2 of the Concession Agreement entered into on 31st July,2003 provides that Concessionaire or Company include its successor and permitted substitutes whereas license is personal in nature. In Clause 2(a) the aforesaid works of reconstruction, strengthening, widening and rehabilitation Road project and its operation and maintenance to be executed through a Concession on build, operate and transfer (BOT) basis has been provided. Clause 2(e) provides for design, engineering, financing, procurement, construction, operation and maintenance of the Project Highway. The tender document Volume V(A) in clause 1.1.41 provides for "Escrow Account", and the "Toll Escrow Account" has to remain under lien with the lenders,as the case may be, in accordance with the provisions of the agreement. However, notification for the purpose of recovery of toll charges is dealt with in clause 1.1.45 of the definition as is issued under Indian Tolls Act,1932. Levy and collection of the fees has to be as per rates prescribed under the notification issued under the aforesaid Act from time to time. Clause 2 of the tender document provides for scope of project which includes performance and execution by the Concessionaire of all detailed design, engineering, financing, procurement, construction, completion, operation, maintenance and transfer of the Project Highway under the agreement. It shall include reconstruction, strengthening and widening of the existing lane in accordance with the specifications and stands for the same and also operation and maintenance as per Specifications and Standards mentioned under the agreement. As provided in clause 6.5 of the tender document, the fees collected by the Concessionaire or MPRSNN or MPRSNN's nominee pursuant to the agreement shall be deposited in the Toll Escrow Account and appropriated in accordance with the provisions of Clause 25.

15. The obligations of the Concessionaire are defined in clause 9.1 of the tender document. Steps have been taken to clear the site and to save and indemnify and defend GOI, MPRSNN and GoMP from and against all proceedings, claims, demands, costs, expenses, losses and damages arising out of or relating to the securing of rights to use such real estate by the Concessionaire or any person claiming through or under the Concessionaire.Concessionaire be responsible for

safety, soundness and durability of the Project Highway is provided in clause 9.1(xxiii). The clause 9.1(xxv) provides that after receiving "vacant possession" of the Site or part thereof, ensure that such Site remains free from all encroachments and take all steps necessary to remove encroachments, if any. Thus, vacant possession was handed over to the Concessionaire. Obligations of the MPRSNN are dealt with in clause 10.1 of the tender document. It has required to hand over the physical possession of the Project Site and enable access to the Site, free from Encumbrances, in accordance with this agreement.

The agreement is for fifteen years. "Toll date" has been defined in clause 1.1.103. The "toll date" means the Commercial Operations Date of the Project Highway from which date the Concessionaire is entitled to collect the toll/fee.

16. The agreement for collection of toll is for fifteen years is not disputed. It has to commence from the date of completion of the contract and that right has been given in the document itself, no separate agreement on a future date is required to be executed. On completion of construction of road, the document in question itself authorizes the Concessionaire to collect the toll for a period of fifteen years. The transaction is that of lease. In *Juthika Mulick (Smt.) and another vs. Dr.Mahendra Yashwant Bal And Ors.* (1995) 1 SCC 560 the Apex Court has laid down that one of the essential attributes of a lease is that transfer must be made for a certain time expressed or implied or in perpetuity. What is the meaning of "fixed period" has also been discussed by the Apex Court in the aforesaid decision. *Maxim "certum est quod certum reddi potest"* i.e. sufficiently certain which can be made certain is applicable in such cases.

There is a price paid in every case beside there is subsidy also. When we consider another perspective which shows the document to be a lease the price paid or promised, as per the agreement, the Concessionaire has promised to construct the road which is the consideration of the agreement. It is provided in clause 14.4.5 of the tender that the Concessionaire shall provide at his own cost,all the site laboratory and testing equipments, facilities means of transport, conveyance, materials, reference Books standards and any tools, tackles, labour and manpower for carrying of all tests required for the project at site by MPRSNN or their Independent Consultants. Clause 15.1 of the agreement deals with the completion. When the Project shall be deemed to be complete and open to traffic only when the Completion Certificate or the Provisional Certificate is issued in accordance with the provisions of Clause 16. Clause 15.2 of the agreement provides Toll date of the Project shall be the date on which MPRSNN has issued the Completion Certificate or Provisional Certificate, as the case may be, under the agreement and the Concessionaire shall not levy and collect any Fee until it has received such Completion Certificate or the Provisional Certificate. It is clear that it is consideration to recover toll that investment is made by the Concessionaire in the road, he has to built it, he has to operate it and thereafter transfer it back after

recovering the toll and the consideration or price promised is the money which he has invested in the project as per agreement. Thus, investment of the money is made by the Concessionaire. He has corresponding right to enjoy the property, no doubt on successful completion of the construction of road. Right to enjoy the property clearly makes the transaction that of lease.The mere apprehension that there may not be successful completion will not come in the way of chargeability of the document as document provides for recovery of tolls for fifteen years and there is consideration also for that.

17. From the aforesaid, it is clear that there is clearly a transfer of right to enjoy the property under the Agreement for a period of fifteen years and collection of tolls is specifically provided to be a "lease" under Section 2(16) of the Indian Stamp Act. There is right to enjoy the property conferred on Concessionaire, consequently, document cannot be said to be a "license" at all but it is that of "lease".

18. When we consider the definition of lease given under Section 2(16) of the Indian Stamp Act, the definition is inclusive. The collection of tolls is clearly provided to be a lease, thus, the agreement fulfills the requirement of Section 2(16) also and it has to be treated as lease not as a license. The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases. The words or phrases comprehend not only natural import but also the things which the interpretation clause declares that they shall include. Clause 1.1.45 provides that tolls has to be collected as prescribed under the Indian Tolls (MP) Amendment Act,1932. Under Section 2 of Indian Tolls (MP) Amendment Act,1932 toll collection is also a lease. Section 2 of Indian Tolls (MP) Amendment Act,1932 is quoted below :-

> **"2. Power of State Government to lease levy of tolls-** It shall be lawful for the State Government to lease the levy of tolls at the rates prescribed under section 2 of the Indian Tolls Act,1851, as subsequently amended, upon any public road or bridge by public auction or private contract from year to year or for such longer period not exceeding fifteen years on such terms and conditions as the State Govt. may deem fit-
>
> Provided that the lessee shall give security for the due fulfillment of such conditions, and that sums payable under the terms and conditions of the lease shall be recoverable as if they were arrears of land revenue."

In *Mohammad Ali vs. Board of Revenue, U.P.,Allahabad and others* AIR 1987 Allahabad 348 and *Uppalapati Durga Prasad vs.Executive Engineer (R & B) N.H.Division, Srikakulam and others* AIR 2001 AP 442 it is held that when agreement has been entered into for collection of toll, it is a lease not a license.

19. In *Ishwarlal Vyas vs. District Judge,Indore & Anr.* 1990 MPLJ 579 and in *R.P.Shrivastava vs. Smt. Sheela Devi and others* 2007(4) MPLJ 102 it is held that license is a personal right whereas lease creates interest in the property. The license is not transferable and even a servant cannot use the property as per Section 56 of the Easement Act. It is provided in clause 1.1.106 that tolling contract means the contract, if any, entered into by the Concessionaire with the Tolling Contractor for operation of the Toll Plazas including collection of fees for and on behalf of the Concessionaire. Clause 1.1.107 defines "Tolling Contractor" means the person, if any, with whom the Concessionaire has entered into a Tolling Contract for operation of Toll Plazas and collection of Fees for and on behalf of the Concessionaire. Clause 1.1.106 and 1.1.107 are quoted below :-

> **"1.1.106 :** "Tolling Contract" means the contract, if any, entered into by the Concessionaire with the Tolling Contractor for operation of the Toll Plazas including collection of Fees for and on behalf of the Concessionaire."
>
> **1.1.107:** "Tolling Contractor" means the person, if any, with whom the Concessionaire has entered into a Tolling Contract for operation of Toll Plazas and collection of Fees for and on behalf of the Concessionaire."

Aforesaid clauses indicates that right to enjoy the property has been conferred on Concessionaire through tolling Contractors, etc. and even the right of supervision is with the Concessionaire and whether agreement is being carried upon or not can be looked into by the respondents. Conferral of such right indicates transaction is that of lease.

In the instant case, it is not the case of license but it is a lease, as clearly an interest in the property has been created. There is right of enjoyment of the immovable property given to Concessionaire in the manner in which the public road is capable of being possessed since it is used by the public at large, the total control of entry on the road after payment of toll will be with the Concessionaire, it can safely be concluded that he is given the lease not the license. In license normally the right to use is given and possession continues with the owner which is absent in the instant case. Possession has to be given to Concessionaire, the possession will be retransferred back as provided in clause 9.1(xxv), clause 10.1(i)and (ii) and clause 33.1(a) and (b) which are quoted below :-

> **"9.1(xxv)** :- after receiving vacant possession of the Site or part thereof, ensure that such Site remains free from all encroachments and take all steps necessary to remove encroachments, if any.
>
> **10.1** :- MPRSNN agrees to observe, comply and perform in addition to and not in derogation of its obligations elsewhere set out in this Agreement, the following :-

(i) Hand over the physical possession of the Project Site and enable access to the Site, free from Encumbrances, in accordance with this Agreement;

(ii) Permit peaceful use of the Site by the Concessionaire under and in accordance with the provisions of this Agreement without any let or hindrance from MPRSNN or persons claiming through or under it.

33.1 Upon termination of this Agreement, the Concessionaire shall comply with the following:-

(a) notify to MPRSNN forthwith the location and particulars of all Project Assets.

(b) deliver forthwith actual or constructive possession of the Project Highway free and clear of all Encumbrances and execute such deeds, writings and documents as may be required by the MPRSNN for fully and effectively divesting the Concessionaire of all the rights, title and interest of the Concessionaire in the Project Highway and conveying the Project Highway free of any charge or cost to MPRSNN."

Since construction of road, handing over of possession, as well as recovery of toll is provided hence the document falls within the definition of lease.

20. It was submitted by Shri R.D.Jain, learned AG appearing for the respondents 1 and 2 that in case construction of permanent nature is permitted then license becomes irrevocable under Section 60 of the Easement Act. He has relied upon a decision in *Ganpat Rao vs. Ashok Rao and others* 2004 (3) MPLJ 571. In our opinion, in the instant case, it is not the license which has been given,section 60 is not attracted, however,under Section 60 of the Easement Act,in case permanent nature of construction is raised, the license becomes irrevocable. In the instant case, right to build road is given under the agreement coupled with right to enjoy the property by regulating entry for fifteen years after recovering toll is given, hence, it cannot be said to be license.

21. Shri Kishore Shrivastava, Sr.Advocate has relied upon clause 1.1.44 that fee means the charge levied on and payable for a vehicle using the Project Highway in accordance with the Fee Notification and the agreement. Learned counsel has also relied upon clause 1.1.103 of the tender document which provides that toll date commences from future date not *in presenti*. In his submission, it is uncertain whether Concessionaire would be entitled to collect the toll as such as per definition of "toll date" given in clause 1.1.103 ,hence, the Concessionaire cannot be asked to make payment of stamp duty on the fee. He has relied upon clause 1.1.103 ,clause 2 and 6.5 which reads thus :-

"1.1.103 :- "Toll date" means the Commercial Operations Date (COD) of the Project Highway from which date the Concessionaire is entitled to collect the toll/fee under the toll/fee notification and shall be the date notified so by MPRSNN upon completion of full/ substantial completion/ of works of the Project Highway in accordance with this Agreement."

"2. Scope of Project :-The project shall be executed on the Site, described in this document. The scope of the Project shall include performance and execution by the Concessionaire of all detailed design, engineering, financing,procurement,constructi-on, completion, operation, maintenance and transfer of the Project Highway of this Agreement. It shall include reconstruction, strengthening and widening of the existing lane in accordance with the Specifications and Standards for the same and also operation and maintenance as per the Specifications and Standards mentioned under this Agreement as well as details mentioned in the Scope of Project as per Schedule I annexed to this Agreement. It shall also include the performance and fulfillment of other obligations by the Concessionaire under this Agreement."

"6.5 :- The Fees collected by the Concessionaire or MPRSNN or MPRSNN's nominee pursuant hereto shall be deposited in the Toll Escrow Account and appropriate in accordance with the provisions of Clause 25."

Learned counsel has also relied upon clause 25.4 of the Agreement which provides for disbursement from toll escrow account which provides that toll collected by the Concessionaire has to be applied in the manner given provided under clause 25.4.1(i) to 25.4.1(x), and as per clause 25.4.1(i), all taxes due and payable statutory payments and insurance payable by the Concessionaire, thereafter liability is to wipe off, O & M expenses including fees collections expenses,etc. is provided in clause 25.4.1(ii). It is provided in clause 25.4.1 (iii) that the whole or part of the expense on repair work including fees collection incurred by MPRSNN, then liability comes under clause 25.4.1(iv) to meet all concession fees,costs and reimbursements, etc. and after exhausting payment as provided the remainder of toll has to be utilized by the Concessionaire.

We are not impressed by the aforesaid submission of learned counsel based upon the clauses referred to by the counsel. Considering clause 1.1.44 and 1.1.45, meaning of "fee" and "fee notification", it is clear that in essence it is the toll which has to be realized as fixed under the Tolls Act, 1932. On facts, it is submitted by respondents' counsel that toll has been increased by now. Whatever that may be, question of exigibility of the stamp duty is based upon the approximate amount which is invested and same was minimum likely to be recovered as toll during the

period of contract by the Concessionaire which appears to be just and appropriate. Merely by the fact that "toll date" is found on a future date as provided in clause 1.1.103 of the tender document, the scenario is not changed as in the agreement itself in presenti without any requirement of execution of any other document, the right has been given to realize the toll for a period of fifteen years and right of enjoyment of the property has been conferred. It is open to ask for stamp duty even before execution of formal document, in the instant case, document has been executed. When we consider scope of project, as mentioned in clause 2 quoted above, it becomes clear that reconstruction, strengthening, widening, and maintenance, financing, engineering and transfer of the Project Highway is involved, thus, scope of project makes it clear that it is a lease. Toll has to be deposited in "toll escrow account" as provided in clause 6.5 of the tender document and as provided in clause 25.4.1(i) to (x), the toll has to be utilized for the purposes enumerated in the aforesaid clause first and then remainder has to be retained by the Concessionaire. The liabilities have to be cleared by the petitioner as per the agreement, thus, the remainder of the toll has to reach to him does not change the nature of the document. It cannot be said that he would not recover the toll and the part of same has to be utilized in the mode prescribed to meet expenditure part as agreed. Profit part has to be retained by the Concessionaire.

22. In WP No. 10366/07 *(M/s Jora-Nayagaon Toll Road Company Pvt.Ltd. vs. The State of M.P. and others)* Shri Kishore Shrivastava, learned senior counsel has in addition referred to clause 3.1 of the Concession Agreement by which MPRDC has granted to the Concessionaire the Concession quoted therein including the exclusive right, license and authority during the subsistence of this agreement to construct, operate and maintain the Project Highway. He has also relied upon clause 3.2.1 by which Concessionaire has been given access and license to the site to the extent conferred by the provisions of this agreement. He has also referred to clause 3.2.7 under which Concessionaire cannot assign, transfer or sublet or create any lien or encumbrance on this agreement or the concession hereby granted or on the whole or any part of the project nor transfer, lease or part possession therewith save and except as expressly permitted by this agreement or the substitution agreement. Learned senior counsel has also relied upon clause 8.2 by which MPRDC has granted to the Concessionaire for the Concession Period the right and licence to enter upon all real estate comprised in the Site and to survey design, engineer, procure, construct, operate and maintain the Project Highway including the Project Facilities in accordance with the provisions of this Agreement. He has also referred to clause 8.3 which provides that it is expressly agreed that the licence granted hereunder shall terminate automatically and forthwith, without the need for any action to be taken by the MPRDC to terminate the licence, upon the termination of this agreement for any reasons whatsoever. Learned counsel has also relied upon clause 8.4 by which the Concessionaire

appointed the MPRDC as lawful attorney, to surrender of licence granted. Under clause 8.6 again there is reference of word "license" and the right to use the Site shall granted for the purpose of carrying out the functions placed upon the Concessionaire under the Agreement and not for any other purposes. Clause 8.8 has also been relied upon by the counsel which creates an embargo upon the Concessionaire for subletting whole or any part of the Site. Reference has also been made to clause 9.1 with respect to procurement of site contained in Chapter IX which provides signing of the memorandum by the authorized representatives of the Parties shall be deemed to constitute a valid licence and right of way to the Concessionaire for free and unrestricted use and development of the vacant and unencumbered site during the concession period. Clause 9.2 provides for grant of vacant access and right of way. Reliance has also been placed on clause 13.6 contained in Chapter XIII which provides that if the toll date does not occur within 12 months from the Scheduled Project Completion Date for any reason other than occurrence of Force Majeure or or for reasons attributable to MPRDC or any Governmental Agency, MPRDC shall be entitled to terminate this Agreement in accordance with the provisions of Clause 29.3.4.

Learned counsel has emphasized that word "license" has been used on several places in the aforesaid clauses. In our opinion, the use of the word "license" is not determinative of the nature of the agreement. License which has been granted for various purposes, the word has different connotation at different places. Considering the other terms and conditions being similar in the instant case with the other clauses which we have referred to in various other writ petitions, merely use of the word "license" at different places would not change the nature of the agreement. Even if word "lease" is mentioned or word "license" is mentioned is not determinative of the nature of document. What is contemplated and conferred under the agreement is right to construct and enjoy the property which is the crux of the matter. Thus, we find no force in the additional submission raised by Shri Shrivastava in WP No.10366/2007.

23. Shri Kishore Shrivastava, learned senior counsel has relied upon clause 6.8 of the tender document, same reads thus :-

> "6.8 :- In case of any levy or increase therein of any Stamp Duty or cess on fees/toll collected by the concessionaire during the Concession Period becomes payable, the same shall be borne by MPRSNN."

It is clearly provided that in case of any levy or increase of the stamp duty or cess on fees/toll collected by the concessionaire during the Concession Period becomes payable, the same shall be borne by MPRSNN. In case any new levy or increase in the stamp duty during the concession period, then MPRSNN is liable not otherwise. The "Concession Period" has been defined in clause 1.1.20 to

mean the period beginning from the Commencement Date or any valid extension granted thereof by MPRSNN or the Termination Date whichever is earlier. The physical possession is to be delivered by MPRSNN after the date of execution of this agreement, thus, clause 6.8 is not applicable,as on the date of execution of the agreement. The liability under the law is that of the lessee to bear the expenses of Stamp Duty as provided in Section 29(c) of the Indian Stamp Act. Submission based of clause 6.8,thus, fails.

24. Shri Kishore Shrivastava, Sr.Counsel has submitted that *in presenti* there is no document which can be said to be lease,he has also relied upon a decision of Apex Court in *Tolaram Relumal and another vs. The State of Bombay* AIR 1954 SC 496 in which distinction of lease and agreement to lease has been considered. It has been held that an instrument is usually construed as a lease if it contains words of present demise and where certain things have to be done by the lessor before the lease is granted, such as the completion of repair or improvement of the premises. It was held on facts of the case that agreement between the parties did not constitute a lease, it amounted to an agreement. In the instant case, no document has to be executed in future, thus, reliance on aforesaid decision is of no use. Shri Shrivastava has also referred to decision of Apex Court in *V.B.Dharmyat (deceased) through LRs vs. Shree Jagadguru Tontadrya and others* (1999) 6 SCC 15 wherein the Apex Court has laid down that agreement to lease under Section 2(7) of the Registration Act must be a document which effects an actual demise and operates as a lease. An agreement between two parties which entitles one of them merely to claim the execution of a lease from the other without creating a present and immediate demise in his favour is not an agreement to lease within the meaning of Section 2(7) of the Act. In the instant case, there is actual demise and the Agreement (P.1) operates as a lease. Learned senior counsel has also placed reliance on a decision in *State of Maharashtra and others vs. Atur India Pvt. Ltd.* (1994) 2 SCC 497 wherein the Apex Court, in the context of Bombay Stamp Act,1956, has laid down that lease does not include agreement to lease executable at a future date without immediately bringing into effect a lessor-lessee relationship and actual demise. In case offer is accepted without effecting actual demise, it was an "agreement to lease" not "an agreement of lease". The stipulation debarring transfer or assignment of lease rights was not enforced, it was held that transaction is not covered by the definition of lease under Section 2(n). In the instant case, in our opinion, considering the nature of agreement there is a lease in presenti to enjoy the property. Right and interest in the property has been created. Learned senior counsel has also relied upon a decision of Apex Court in *ICICI vs.State of Maharashtra and others* (1999) 5 SCC 708 in which the Bombay Stamp Act again came for consideration and the deed putting the prospective lessee in possession of land as licensee for a specific period of three years only for the purpose of construction of buildings and

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postulating that after the completion of construction a lease deed of that land would be executed and that the said deed should not itself be construed as demising any interest in the land, deed was held not to be a lease. In the instant case, it is not the license which has been executed, but lease has been executed *in presenti* authorizing the construction and investment in the road, obtain the finance, etc., possession has also been handed over, thus, decision has no application. Learned senior counsel has also referred to decision in *State of Madras vs. M/s Gannon Dunkerley & Co.(Madras) Ltd.* AIR 1958 SC 560 in which it was laid down that on a future sale tax cannot be levied. When it has not resulted in the passing of the property in the goods to the purchaser, thus, entry 48 cannot be construed in its popular sense but must be interpreted in its legal sense. The decision is of no help in the instant case as there is demise *in presenti*. It is not a case of deeming fiction being created.

25. Coming to submission whether Entry 33 of Schedule 1-A as amended in the Indian Stamp (MP Amendment) Act, 2002 is ultra vires or repugnant to provision of the main Stamp Act . Entry is quoted below :-

33. Lease, including an under lease, or sub-lease and any agreement to let or sub-let or any renewal of lease :-

(a)	----------	----------
(b)	----------	----------
(c)	Where the lease is granted for a fine or premium or for money advanced or to be advanced in addition to rent fixed	The same duty as conveyance (No.22) for a market value equal to the amount or value of such fine or premium or advance as setforth in the lease, in addition to the duty which would have been payable on such lease, if no fine or premium or advance has been paid or delivered: Provided that where the lease purports to be for a term exceeding thirty years or in perpetuity or does not purport to be for a definite period, the duty on such lease shall be chargeable as a conveyance (No.22) on the market value of the property leased : Provided also that

	(a)---------- (b)---------- (c) an agreement to lease where the right to collect tolls is given in lieu of the amount spent by the lessee in construction of roads, bridge etc.under the Build, Operate and Transfer (B.O.T.) scheme, shall be chargeable at the rate of two percent on the amount likely to be spent under the agreement by the lessee.

The aforesaid entry as inserted by the Indian Stamp (Madhya Pradesh Amendment) Act, 2002 as per petitioners is ultra vires. We are unable to accept the submission as firstly we have held that transaction is a lease as contemplated under Section 105 of TP Act read with Section 2(16)(c) of the Indian Stamp Act, question of applying the aforesaid entry so as to constitute transaction as a lease does not arise. Purpose of aforesaid entry in Schedule 1-A is to provide the stamp duty which is chargeable on a particular transaction, under the aforesaid entry as amended in State of M.P, the stamp duty is specifically provided for the kind of transaction which is a lease under Section 2(16)(c) of Stamp Act read with Section 105 of the TP Act. Entry 33 by itself cannot be said to be a provision defining lease, it only provides for charging rates, with precision. The transaction in question has been mentioned by which it cannot be taken that the Entry 33 of Schedule 1-A define the lease, but it provides rate of stamp duty for the kind of lease.

26. So as to render aforesaid Article 33 of Stamp Act as amended in MP as ultra vires of Constitution, Shri Kishore Shrivastava, learned senior counsel has referred to Ist list, Entry 91 of 7th Schedule of Constitution which provides that Union Government can prescribe the rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letter of credit, policies of insurance, transfer of shares, debentures, proxies and receipts. In List IInd of 7th Schedule, the State is empowered to prescribe rates of stamp duty in respect of instruments other than those specified in List I. In our opinion,the document in question is not the one which is covered under Entry 91, thus, the State was competent to prescribe the rates of stamp duty as the document is other than those specified in provisions of List I of Entry 91 with regard to rates of stamp duty. Entry 44 of IIIrd List of 7th Schedule which is concurrent list provides for stamp duties other than duties or fees collected by means of judicial stamps, but

not including rates of stamp duty. Considering the aforesaid entries of List I and II of 7th Schedule, the State is competent to prescribe the rates as mentioned in Entry 33 of Schedule 1-A of Indian Stamp Act as amended in Madhya Pradesh. The said entry cannot be said to be repugnant to Section 105 of TP Act or Section 2(16) of Stamp Act.

27. Learned senior counsel has also submitted that the instrument should be liable to the stamp duty infact only then it can be imposed not otherwise. Under the law stamp duty cannot be imposed on a transaction which is not a lease. He has also relied upon decision of Apex Court in *M/s J.K.Jute Mills Co.Ltd. vs. State of Uttar Pradesh and another* AIR 1961 SC 1534 wherein Entry 54 in List 2 of 7th Schedule of the Constitution came for consideration which confers on the State authority to enact a law with respect to tax on sale of goods. Considering what is the extent of that authority ?, there must be infact a sale as recognized by law, it is only then that a tax could be imposed. But, if the transaction sought to be taxed is not a sale, a law which seeks to tax it, treating it as a sale will be ultra vires . There is no dispute with the aforesaid proposition. In the instant case,the transaction has been found to be a lease ,thus, there is no question of Schedule 1-A Entry 33 as amended in MP being ultra vires as the transaction is covered within the ambit of lease as defined in Section 105 of TP Act read with Section 2(16)(c) of Indian Stamp Act.

Shri Kishore Shrivastava, learned senior counsel has also relied upon decision of Apex Court in *Bhopal Sugar Industries Ltd., M.P. and another vs. D.P.Dube, Sales Tax Officer, Bhopal Region, Bhopal and another* AIR 1964 SC 1037 wherein the Apex Court considered the meaning of "retail sale". It has been laid down that consumption by retail dealer himself for his own use falls within definition of "retail sale". By extending the meaning, the transaction cannot be taxed.Clause including the transaction by extending the meaning was held to be ultra vires. We have held that Entry 33(c) of Schedule I of Stamp Act is not extending the meaning of lease, but only prescribes the rate on a particular kind of lease as mentioned therein.

Learned senior counsel has also relied upon decision of Apex Court in *M/s R.M.D.C.(Mysore)Private Ltd. vs. State of Mysore* AIR 1962 SC 594 in which the Apex Court considered inconsistency between the Central Act, Prize Competitions Act (1955) and the Mysore Lotteries and Prize Competitions Control and Tax Act and held that Mysore Act deals with taxes in respect of prize competitions for which a licence had been obtained under S.8 might be said to have become void and not the rest. Reliance has also been placed on decision in *M.Karunanidhi vs. Union of India* AIR 1979 SC 898 wherein the Apex Court has laid down that where there is direct collision between the provisions made by State and that made by Parliament with respect to one of the matters enumerated in the concurrent list, then subject to the provisions of clause (2) of Article 254,

the State law should be void to the extent of repugnancy. This only means that where the law passed by the State comes into collision with a law passed by Parliament contemplated by the concurrent list then the State Act shall prevail to the extent of the repugnancy and the provisions of Central Act would become void provided the State Act has been passed in accordance with Cl.(2) of Art.254. So far as the matters in 2nd list, that is, State list are concerned, the State legislature alone is competent. We do not find that the aforesaid decision is of any help to petitioners as Article 33(c) of Schedule 1-A of Stamp Act,is charging provision ,in any case, in our view, it does not enlarge the scope of definition of lease as provided in Section 2(16)(s) of Stamp Act or definition of lease as provided in Section 105 of TP Act, thus, Article 33(c) of Schedule 1-A as inserted by MP Amendment Act cannot be said to be creating any repugnancy with the aforesaid provisions and State is empowered to legislate such a provision.

28. Learned senior counsel has also submitted that at the time when Cabinet took the decision and letter of acceptance of offer was issued, the stamp duty was not in existence. In our view,as agreements have been entered into after Article 33(c) of Schedule 1-A as amended in the Indian Stamp (MP Amendment) Act,2002 came into force in Madhya Pradesh. Thus, the duty as per the rate prevailing on the date of agreement is payable.

We find equally futile the submission raised by learned senior counsel that now the stamp duty has been reduced, hence it is a case of discrimination. In our opinion,it cannot be said to be a case of discrimination. It is open to the State to prescribe the stamp duty payable time to time on such transactions, the plea of discrimination cannot be raised with respect to legislative provision in force at different point of time.

29. Resultantly, the transactions in question are that of lease under Section 105 of TP Act read with Section 2(16)© of Stamp Act. The proviso (c) of Article 33-C of Schedule I-A of Stamp Act as amended in Madhya Pradesh vide the Indian Stamp (MP Amendment) Act 2002 is not ultra vires. We find no merits in the writ petitions, same deserve dismissal and are hereby dismissed. No costs.

Petition dismissed.

I.L.R. [2010] M. P., 630
WRIT PETITION
Before Mr. Justice R.S. Garg & Mr. Justice R.K. Gupta
22 February, 2010*

HIMGOURI PULSES INDUSTRIAL AREA, HARDA (M/S) ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Transfer of Property Act (4 of 1882), Section 105 - *Lease - Change of purpose - Land allotted on lease for establishment of industry - Petitioner applied for change of purpose of lease for installing of Petrol Pump, establishment of restaurant, Aushadhalaya and departmental store - Held - No condition/covenant in lease deed that lessee would be entitled to ask for change of purpose and lessor would be obliged to change the purpose - Permission rightly rejected - Petition dismissed.* (Para 24)

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 105 – पट्टा – प्रयोजन का परिवर्तन – भूमि उद्योग स्थापित करने के लिए पट्टे पर आवंटित की गई थी – याची ने पेट्रोल पम्प, रेस्टोरेण्ट, औषधालय और डिपार्टमेंटल स्टोर की स्थापना के लिए पट्टे का प्रयोजन परिवर्तित करने के लिए आवेदन दिया – अभिनिर्धारित – पट्टा विलेख में कोई शर्त/प्रसंविदा नही कि पट्टेदार प्रयोजन परिवर्तित करने की माँग करने का हकदार होगा और पट्टादाता प्रयोजन परिवर्तित करने के लिए बाध्य होगा – अनुमति उचित रूप से नामंजूर की गयी – याचिका खारिज।

Manoj Sharma & Siddharth Patel, for the petitioner.
Vivek Agrawal, G.A., for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by **R.S. Garg, J.** :–Shri Siddharth Patel Advocate for the petitioner firstly appeared in the Court and said that Mr.Manoj Sharma Advocate who has to argue the matter is on legs before another Judge, therefore, the matter be passed over.

2. It is to be noticed and is to be recorded by us that we had been telling the Counsel appearing in our Court that if for some reason or the other the arguing counsel is not available in the Court then his junior colleague may open the arguments and in case we are not satisfied with the arguments of the junior counsel, we will call the senior counsel. Despite such a statement in the open Court, unfortunately number of the counsel are neither giving their briefs to their junior colleagues nor are ready to rely upon the words of the Judges.

3. In the present case also, we compelled Mr.Siddharth Patel Advocate to start the argument and after coming of Mr.Manoj Sharma Advocate, we started hearing him. During course of the arguments, we had pointed a question to Mr.Manoj Sharma Advocate that from the order Annexure P/1, it would clearly

*W.P. No.10049/2007 (Jabalpur)

appear that the petitioner was not carrying on the industrial purpose for which the land was alloted to him and was asking for change of the user then under what authority of law such change is permissible.

4. Mr.Manoj Sharma Advocate referred to Rule 16 of Madhya Pradesh Udhyog {Shade, Plot Avam Bhumi Avantan} Niyam, 1974 {Annexure-P/5} and submitted that in every industrial area so marked, 20% of the land can be reserved or may be awarded for ancillary purposes which shall be like electrical sub-center, petrol pump, post office, office of the industrial union, restaurant, hospital, residential houses, banks, STD booths, weigh bridge, railway siding, truck parking, community hall, auditorium and for such other purposes so declared by the State Government from time to time but however with the condition that such establishment shall be feeding need of adjoining industries. It further says that the lease rent shall be recovered at commercial rate.

5. We asked Mr.Manoj Sharma Advocate to read Rule 16 with a slow pace so that we could discuss the effect & impact of Rule 16 but Mr.Manoj Sharma for the reasons best known to him read first two lines slowly and thereafter started reading Rule 16 after leaving number of the material statements. We again requested Mr.Manoj Sharma Advocate not to read in such a fashion because the question of interpretation is involved in the matter. We asked Mr.Manoj Sharma Advocate that he should read with us. After we started reading Rule 16, Mr.Manoj Sharma said that he be allowed to argue the matter as he likes and he be allowed to develop the arguments on which we said that an argument which is contrary to record shall not be permissible and a counsel is not entitled to argue the matter as he likes but he is required & obliged to hear & understand the questions posed by the Court and explain everything to the Court. Mr.Manoj Sharma Advocate thereafter said that if he is not allowed to argue the matter as he wants, he is not ready & willing to argue the matter. We requested Mr.Manoj Sharma Advocate in the open Court that he should try to understand the question posed by the Court but Mr.Manoj Sharma Advocate said that if he is not allowed it is useless to argue in the Court which is not ready to hear the argument. Mr.Manoj Sharma Advocate thereafter in a contemptuous manner closed the file and said that he would not argue the matter. In the open Court, we again requested Mr.Manoj Sharma Advocate that if he was of the opinion that the matter is to be argued in the manner he likes, we are ready & willing to hear him but Mr.Manoj Sharma Advocate said that he would not open the argument; the Court may do whatever the Court wants.

6. Ordinarily, we could have taken a serious exception against the conduct of Mr.Manoj Sharma Advocate but taking into consideration that he has to go a long way and the arrogance shown in the Court is not going to pay to him, we told him that he should not be so arrogant in the Court. On that, Mr.Manoj Sharma Advocate said that he was not being arrogant in the Court but he was trying to place his point before the Court. Despite all that, we again requested Mr.Manoj Sharma Advocate to argue the matter but he refused to proceed further.

7. It is also to be noted that these proceedings are being recorded in presence of Mr.Manoj Sharma Advocate, his colleague Mr.Siddharth Patel Advocate, Mr.Vivek Agrawal Government Advocate, Mr.Rahul Jain Deputy Advocate General, Mr.Hitendra Singh Advocate, Mr.G.S.Ahluwalia Advocate and number of others. Even at this stage, Mr.Manoj Sharma Advocate has no remorse for whatever he has done and, therefore, we proceed to decide the matter.

8. The petitioner by this petition seeks to challenge the order dated 16.12.2005 {Annexure P/2} whereunder the petitioner's lease dated 23.6.2001 has been cancelled and the order dated 30.6.2006 {Annexure P/1} communicated to the petitioner on 11.8.2006 has been dismissed. The petitioner is also challenging the order dated 20.6.2007 passed by the State Government in its revisional jurisdiction whereunder the orders {Annexures P/1 & P/2} have been confirmed.

9. Short facts necessary for disposal of the present writ petition are that the petitioner applied for allotment of an industrial plot for establishment of an industry producing/manufacturing Pulses {Dal}. The lease deed {Annexure P/4} was executed between the parties. The said lease deed provided that upon the request of the lessee, the lessor had agreed to grant to the lessee subject to the terms & conditions a lease of piece of 34000 square feet for manufacture of Pulses {Dal} and the purposes ancillary thereto. It was agreed between the parties thus:-

> "1. In consideration of the premium and ground rent {for land} or rent {for premises} herein reserved and the covenants on the part of the lessee herein contained, the lessor shall demise to the lessee and the lessee shall accept a lease of the said land/building to hold the same for the purpose of manufacturing Pulses.....for a period of 99 years commencing on the date on which the possession of said land/premises is handed over to the lessee.
>
> 7. The lessee hereby agrees that he shall utilize the complete land leased out to him hereunder, for implementation of the project or for its expansion within a period of three years in case of SSI and five years in case of Medium & Large Scale Industry for the above said purposes.
>
> 10. The lessee shall use the said premises, land & building, structures and works, erected or constructed thereon only for the purpose of the said business of manufacturing Pulses.....and other allied products as mentioned in project report/provisional registration for construction of offices, administrative building, godowns and shall not use the same or any other part thereof or permit it or any other part thereof to be used for any other purpose without the previous permission in writing of the lessor.
>
> 18. The lessee shall continuously run, during the period of lease

the factory for which the land/premises is alloted. Closure of the factory for a continuous period exceeding six months without proper reasons to the satisfaction of the allotting authority shall be considered as a breach of this condition."

10. Though there were number of other terms but we are referring to the above referred Clauses which are in nature of the mandatory terms. When the show cause notice was issued to the petitioner that contrary to the terms of the lease, he was not producing/manufacturing the Pulses {Dal}, therefore, why the lease granted in his favour be not cancelled, the petitioner applied to the Industry Department that he be allowed to change the purpose of the lease for opening or installing of petrol pump, establishment of a restaurant, Krishi {Agriculture} Aushadhalaya {Hospital} and departmental store. It was submitted by the petitioner that he was ready & willing to continue with the purpose for which the lease was granted to him but because of infection of the crop of Gram, number of the agriculturists were not growing the Gram crop and under the circumstances not only the petitioner but number of other Mills were closed. The petitioner submitted that he was ready & willing to continue as a lessee but for different purposes.

It is to be seen from the reply that the petitioner nowhere was saying that the land in question was reserved for ancillary purposes but on the other hand it would clearly appear from the averments contained in the lease deed and the petition that the land was alloted to the petitioner for industrial purposes. The District Industry Department, State Industry Department and the State Government rejected the prayer of the petitioner for conversion of the purpose from industrial to commercial and also cancelled the lease. The petitioner in the petition has said that a fair understanding of Rule 16 would make it clear that 20% of land out of the total allotable area in a particular industrial area can be alloted for ancillary purposes.

11. When Mr. Manoj Sharma Advocate was arguing the matter, he referred to Clause 16 and submitted that in the present matter, the land in question though was alloted for industrial purpose but the petitioner was entitled to make an application for conversion of the use. When Mr.Manoj Sharma Advocate was arguing the matter, he had submitted that the petitioner's land which is around 34000 square feet would not be more than 20% of the total allotable area, therefore, the petitioner was justified in making the application for conversion.

12. Shri Vivek Agrawal, learned Government Advocate for the State, on the other hand, submitted that a fair reading of Rule 16 and the above referred Clause of the lease deed would make clear that the lease is to be alloted for a particular purpose and as in the present case it was for industrial purpose, the allotee was not entitled to make an application for conversion. His submission is that in a

given industrial area, the land is required to be reserved for industrial purpose, ancillary purpose and other purposes. His further submission is that if the land is earmarked for the industrial purpose then the land cannot be alloted for any other purpose. In the alternative, it is submitted by him that if the petitioner was unable to run his industry then he was obliged to surrender the possession and make another application to the Industry Department for allotment of the land for any other ancillary purpose.

13. We have heard Mr.Manoj Sharma, Advocate for the petitioner to the extent he argued and Shri Vivek Agrawal, learned Government Advocate for the State to full.

14. It will have to be noted again that despite repeated requests by the Court, Mr.Manoj Sharma Advocate for the petitioner refused to open the arguments. Be that as it may. It is for Mr.Manoj Sharma Advocate to argue for his client or not to argue for his client. In a case like present where counsel after arguing the matter half refuses to argue further, the Court shall not be at the mercy of the Counsel nor the Court would be required to adjourn the matter. If such attitude on part of the Counsel requires the Court to adjourn the matter then it would give a handle in the hands of the Counsel to throw the file, tie the tags & refuse to argue and the Court would be obliged to adjourn the matter so that the Counsel or the party may find some convenient Bench.

15. In the present matter, undisputedly and it would also appear from the lease deed {Annexure P/4} that the land was alloted to the petitioner for construction and establishing thereon a factory for manufacture of Pulses {Dal} and the purposes ancillary thereto. Undisputedly, the land was alloted for manufacture of Pulses {Dal} and for the purposes ancillary thereto. A purpose which is ancillary to the main purpose cannot be wider than the original purpose. If the original purpose was for establishment of an industry, for manufacture of Pulses {Dal} then all ancillary purposes should have been related to the manufacture of Pulses {Dal}. The petitioner in some part of the industry could open a refreshment center, some hospital but however establishment of a petrol pump and settlement of a departmental store would not be an ancillary purpose for the industry manufacturing Pulses {Dal}.

16. It is also to be seen from Condition No. 1 of Annexure P/4 that in consideration of the premium of ground rent, the lease was executed in favour of the petitioner for the purpose of manufacturing Pulses {Dal} for a period of 99 years.

17. It would also appear that in Condition No. 7, the petitioner had agreed that he shall utilize the complete land leased out to him for implementation of the project or for its expansion within a period of three years in case of SSI and five years in case of Medium & Large Scale Industry.

18. Condition No. 10 would also show that the lessee is obliged to use the said premises, land & building, structures and works, erected or constructed thereon only for the purpose of the said business of manufacturing Pulses and other allied products as mentioned in the project report. However, Condition No. 10 does not permit the petitioner to change the purpose for which the land was leased out to him.

19. From Condition No. 18, it would appear that the lessee is required to continuously run the factory for which the lands/premises were alloted to him. Undisputedly, the petitioner failed in running the Industry/Factory. Condition No. 18 further says that closure of the factory for a continuous period exceeding six months without proper reason to the satisfaction of the allotting authority shall be considered as a breach of Condition No.18. For application of Condition No.18, the lessee is obliged to satisfy the judicial conscience of the allotting authority that for a genuine reason he was unable to run the Industry for a period beyond six months.

20. In the present matter, the only reason assigned by the petitioner was that because of the infection in the standing crops, number of cultivators stopped growing Gram crop and, therefore, the petitioner was unable to get the raw material and produce the Pulses {Dal}.

21. We are at a loss to understand that if the Gram crop was not available, why the petitioner could not use other raw material for manufacture of Pulses {Dal}. The lease deed nowhere said that the petitioner is obliged to manufacture or produce Gram Pulses {Dal}; it simply says that the petitioner would produce the Pulses.

22. Except a bald statement in reply to the show cause, the petitioner did not file any document especially a report from Patwari, Revenue Inspector, Tahsildar, Sub Divisional Officer or Collector that in the particular area because of the bad weather or because of the insects' infection, the crops were damaged and the particular agriculturists have stopped growing a particular crop. Simply because the petitioner says that some agriculturists have stopped growing a particular crop, such statement would not be accepted to be a gospel truth. When a petitioner comes to a Court or goes to an authority seeking exemption for one or the other reason then he is required & obliged to satisfy the Court & Authority that the reason projected by him is not an eyewash but a genuine reason. In the present case, the reason so projected in reply to the show cause is neither genuine nor a bonafide one. The reason is also not supported by any material.

23 From a perusal of order dated 30.6.2006 {Annexure P/1} communicated to the petitioner on 11.8.2006, it would clearly appear that the Appellate Authority has considered every argument. The Appellate Authority has taken into consideration that the land in dispute is marked as industrial land. The land has

been received by the Industry Department from the Revenue Department for industrial purpose and, therefore, the land could not be used for any other purpose.

24. A person who enters into the property for a particular purpose cannot be allowed to change the purpose. Similarly, in the lease deed executed between the parties, there are no Conditions/Covenants that the lessee would be entitled to ask for change of the purpose and lessor would be obliged to change the purpose on the say of such lessee. In our opinion, the authorities were absolutely justified in holding that the petitioner has failed to make out a case for non-cancellation or for change of the purpose.

25. After giving our thoughtful consideration to the totality of the facts, we are of the considered opinion that the petitioner has failed in making out a case for any interference. Ordinarily, we would have imposed cost in a matter like present but we feel that the petitioner should not be saddled with the cost because he appears to have taken wrong stand before the subordinate Tribunals on the basis of the wrong legal advise.

The petition is dismissed.

Petition dismissed.

I.L.R. [2010] M. P., 636
CONTEMPT PETITION
Before Mr. Justice Dipak Misra & Mr. Justice R.C. Mishra
4 December, 2009*

VIVEK VALENKAR ... Petitioner
Vs.
ARVIND JOSHI & ors. ... Respondents

Constitution, Article 215, Contempt of Courts Act, 1971, Section 12 - *Powers of the Court - Held - The jurisdiction in contempt is not to be invoked unless there is real prejudice which can be regarded as a substantial interference with the due course of justice and that the purpose of the Court's action is a practical purpose and it is reasonably clear on the authorities that the Court will not exercise its jurisdiction upon a mere question of propriety - Even if it is assumed that the respective actions attributed to the respondents suffer from any inadvertence or impropriety, it would not be possible to hold anyone of them guilty of contempt of the Court.* (Para 8)

संविधान, अनुच्छेद 215, न्यायालय अवमान अधिनियम, 1971, धारा 12 – न्यायालय की शक्तियाँ – अभिनिर्धारित – अवमानना में अधिकारिता का अवलंब नही लिया जाना चाहिए जब तक कि वास्तविक पूर्वाग्रह न हो, जो न्याय के सम्यक अनुक्रम के साथ सारवान हस्तक्षेप के रूप में सम्बन्धित हो सकता हो और यह कि न्यायालय की कार्यवाही का प्रयोजन व्यवहारिक

*C.P. No.1564/2007 (Jabalpur)

प्रयोजन है और यह प्राधिकारियों पर युक्तियुक्त रूप से स्पष्ट है कि न्यायालय मात्र औचित्य के प्रश्न पर अपनी अधिकारिता का प्रयोग नही करेगा – यद्यपि यह माना जा सकता है कि प्रत्यर्थियों के कारण हुए सम्बन्धित कृत्य किसी अनवधानता या अनौचित्य से ग्रसित है, तथापि यह संभव नही होगा कि उनमें से किसी को न्यायालय अवमान का दोषी ठहराया जाए।

Cases referred :

AIR 1931 Cal 257.

Kishore Shrivastava with *S.R. Tamrakar,* for the Petitioner.
S.D. Tiwari, for the respondent Nos.1 & 2.
Ajay Ojha, for the respondent No.3.

ORDER

The Order of the Court was delivered by **R. C. MISHRA, J.** :–This is the successive petition, under Article 215 of the Constitution of India read with Section 12 of the Contempt of Courts Act, 1971, committing the respondents for contempt of Court due to non-compliance with the relevant directions contained in a common order-dated 02/02/2006 (hereinafter referred to as the 'main order') passed by a Division Bench of this Court comprising one of us (Dipak Misra, J) to decide various interlinked Writ Petitions including the one filed by the State of Madhya Pradesh and numbered as W.P. No.7176/02. The previous one, registered as Contempt Petition No.2078/2006, was dismissed vide order-dated 15/5/2007 in the light of the finding that whatever was required to be done at the instance of respondent nos.1 and 2 had already been done.

2. The relevant directions contained in sub-para(v) and (vi) of paragraph 8 of the main order may be reproduced as under -

> (v) As the direction given by the Tribunal to draw a different kind of merit list has been quashed by us, the select list prepared by the PSC on 10.7.1984 would prevail and seniority list of these candidates shall be drawn accordingly treating them as valid appointees"
>
> (vi) Any candidate selected by the PSC by virtue of the select list prepared on 10.7.84 cannot be deprived of the benefit because there was a further order regularizing his services as the matter was subject to final order passed in the controversy in question.

3. Admittedly, the SLP preferred by Dashrath Singh against the main order and the order-dated 04.08.2006 passed in MCC No.883/2006 (supra) has been dismissed by the Supreme Court vide order-dated 27.11.2006 passed in SLP (Civil) No.8869/2006.

4. The grievance of the petitioner, in substance, is that even though he has been declared as one of the valid appointees selected by the Public Service Commission yet, in the seniority list published by the respondent no.3 on the website,

he has been shown as an ad hoc appointee despite the fact that he is a regular appointee, whose name was reflected at Serial No.331 in the select list prepared by the Commission on 10/07/1984. According to him, the respondent nos.3 and 4 have not been able to finalize the seniority list of the employees allocated to the State of Chhattisgarh.

5. In reply, the respondent no.3 has submitted that in pursuance of the main order, a seniority list of Assistant Engineers (Civil) working as on 31.10.2000 in the Chhattisgarh Water Resources Department has been published on 23.01.2008. He has further pointed out that at Serial No.286 in the list, the petitioner has been shown as an ad hoc employee in accordance with the corresponding entry of seniority list of Assistant Engineers (Civil) as on 31.10.2000 issued by State of M.P. on 08/05/2007.

6. The respondent nos.1 and 2, while asserting that the main order has not been violated in any manner whatsoever, have adopted the reply filed on their behalf in connected Contempt Petition No. 1278/2007 moved by Pramod Kumar Barun.

7. Not being satisfied with the explanations furnished by the respondents, the petitioner has submitted a rejoinder wherein he has emphasized that by virtue of the direction contained in sub-para (vi) [above], he is entitled to get his services regularized and also to the consequential benefits.

8. As observed by Rankin C. J., in *Anantalal Singh v. Alfred Henry Watson.* AIR 1931 Cal 257, the jurisdiction in contempt is not to be invoked unless there is real prejudice which can be regarded as a substantial interference with the due course of justice and that the purpose of the Court's action is a practical purpose and it is reasonably clear on the authorities that the Court will not exercise its jurisdiction upon a mere question of propriety. Accordingly, even if it is assumed that the respective actions attributed to the respondents suffer from any inadvertence or impropriety, it would not be possible to hold anyone of them guilty of contempt of the Court.

9. In this view of the matter, the petition stands dismissed with the observation that the petitioner shall be at liberty to challenge the legality and propriety of the action of respondent nos.1 and 2 of treating him as an ad hoc appointee by filing a Writ Petition before this Court. There shall be no order as to costs.

Petition dismissed.

I.L.R. [2010] M. P., 639
APPELLATE CIVIL
Before Mr. Justice Rajendra Menon
14 December, 2009*

JOGE RAM DAS KAHAR ... Appellant
Vs.
CHHOTELAL SHARMA & ors. ... Respondents

Transfer of Property Act (4 of 1882), Section 54 - *Sale - Sale how made - Held - Sale of property less than Rs.100 can be made without there being a registered instrument and the sale can be proved by delivery of possession.* (Para 16)

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 54 – विक्रय – विक्रय कैसे किया जाता है – अभिनिर्धारित – 100 रुपये से कम की सम्पत्ति का विक्रय रजिस्ट्रीकृत विलेख के बिना किया जा सकता है और कब्जे के परिदान द्वारा विक्रय साबित किया जा सकता है।

Cases referred :

AIR 1997 MP 238, AIR 1921 PC 8, AIR 2004 All 345, 1994 JLJ 657, 1997 RN 151.

M.L. Jaiswal with *Manoj Kushwaha,* for the appellant.
J.L. Mishra, for the respondents.

JUDGMENT

RAJENDRA MENON, J. :–This is defendants' second appeal under Section 100 of the Code of Civil Procedure, assailing the judgment and decree granted by the first appellate court, reversing the judgment and decree passed by the trial court dismissing the suit filed by respondent no.1 Chhotelal Sharma. The appeal was admitted for consideration of the following substantial question of law:

> " Whether the lower appellate court failed to see that sale deed for sale of the property worth less than Rs.100/- was not required to be registered and sale can be proved by delivery of possession, if the consideration is paid ?"

2. Plaintiff respondent no.1 Chhotelal had filed civil suit for declaration of title and injunction in the year 1975 in the court of Civil Judge Class-II, Rewa, which was re-numbered in the year 1980 as Civil Suit No.58-A/80. Holding plaintiff Chhotelal Sharma to have failed to prove his claim, suit was dismissed on 13-01-1993. Aggrieved thereof first appeal was filed before the First Additional District Judge, Rewa, which was registered as Civil Appeal No.19-A/1983 and the suit having been decreed by the first appellate court, this appeal under Section 100 of the Code of Civil Procedure is filed by the appellants herein, who are legal heirs of original defendant no.5 Ramdas Kahar.

*S.A. No.353/1995 (Jabalpur)

3. Facts in nutshell, relevant for consideration of this appeal, are that the disputed property pertaining to the present suit consists of a Plot, house measuring 100 ft. x 50 ft. known as Plot No.113/05 situated in Khutehi, it was jointly held by defendant nos. 1 to 4 i.e. Ramchandra, Mangal, Bhagwandeen and Ramavtar. By sale deed Ex.P-1 dated 30-01-1967, it is the case of the plaintiff that Ramchandra and Mangal sold the property to him on payment of a consideration of Rs.1250, the sale deed is registered and filed as Ex.-1.

4. As there was certain error in the sale deed, a correction deed was recorded vide Ex.P-2 on 07-12-1970, which is also a registered document. It is the case of Chhotelal Sharma that after acquiring title to the property i.e. 5000 sq.ft. = 0.12 decimal Chhotelal the plaintiff filed an application for mutation before the competent authority. On this being done, defendant no.5 Ramdas Kahar raised an objection and claimed his right to the entire property on the ground that vide un-registered sale deed dated 25-08-1956 Ex.D-1, he had purchased 0.42 decimal of land on payment of consideration of Rs.84/- from defendants Bhagwandeen, Ramavtar and one Ramfal. On the objection raised, it is stated that vide order dated 14-06-1973 filed by both the parties as Ex.P-3 and Ex.D-4 respectively, the competent authority rejected the application for mutation in the revenue record filed by Chhote Lal Sharma finding boundary and marking of the property purchased by him to be incorrect.

5. After rejection of the application for entry in the revenue record, Chhotelal Sharma the filed the suit in question for declaration of title and possession on the basis of sale deed Ex.P-1 dated 30-01-1967.

6. The defendant nos. 1 to 4 namely Ramchandra, Mangal, Bhagwandeen and Ramavtar, the original owners of the property accepted each and every averments made in the plaint but it was only defendant no.5 Ramdas, who refuted the contention and claimed that originally he was owner of 0.24 decimal of land in Khasra No.113/05 and the remaining 0.42 decimal was purchased by him from Bhagwandeen, Ramavtar and Ramfal vide unregistered sale deed Ex. D-1 dated 25-08-1956 on payment of consideration of Rs.84/-.

7. Before the trial court various issues were framed, documents were filed and witnesses examined. As far as plaintiff Chhotelal Sharma is concerned, he filed 3 documents namely Ex.P-1, registered sale deed dated 30-01-1967; Ex.P-2 corrected deed dated 07-12-1970; and Ex. P-3 the order dated 14-06-1973 passed by the competent authority rejecting the prayer of Chhotelal Sharma, plaintiff for mutation of his name in the revenue record. As far as defendant no.5 is concerned, he filed 4 documents i.e. Ex.D-1 the unregistered sale deed dated 25-08-1956; Ex.D-2 was the khasra entry for the year 1961-1962; Ex.D-3 was Khasra entry for the year 1968-69; Ex.D-5, the khasra entry for the year 1969-1970 and Ex.D-4 the same order dated 14-06-1973 filed by the plaintiff as Ex.

P-3. The parties examined 7 witnesses in all. 3 witnesses were examined by the plaintiff they were PW-1 Chhotelal Sharma, plaintiff himself, PW-2 Ramchandra i.e. defendant no.1 and PW-3 Ramlal. Defendant Ramdas has examined ad DW-1 and other 3 witnesses namely Ram Bhan Singh DW-2, Teerath Prasad DW-3 and Raghunath Prasad as DW-4. On the basis of evidence and material that have come on record, the learned trial court found that the plaintiff has filed to prove his case and, therefore, dismissed the suit by judgment and decree dated 13-01-1993. However, on first appeal being filed the suit having been decreed vide judgment and decree dated 14-02-1995. Legal heirs of defendant no.5 Ramdas Kahar has filed this appeal assailing the judgment and decree passed by the first appellate court.

8. As indicated hereinabove only one substantial question of law is framed for consideration. Shri M.L.Jaiswal, learned Senior Counsel alongwith Shri Manoj Kushwaha for the appellants emphasized that as Ramdas Kahar had purchased the property in question i.e. 0.42 decimal area by un registered document Ex.D-1 dated 25-08-1956 and as possession of Ramdas on the entire property i.e. 0.66 decimal is established from khasra entries Ex. D-2, Ex.D-3 and Ex.D-5, learned first appellate court committed error in holding that on the basis of unregistered documents purchase of property by the defendant no.5 is not established, it was emphasized by them that in the light of the law laid down by this court in case of *Smt. Chanda Bai and another Vs. Anwarkhan and others,* AIR 1997 MP 238, when the value of the property purchased is less than Rs.100/- registration of the sale deed is not required and as possession is proved from the khasra entries in decreeing the suit the court below is said have committed grave error. Taking me through the finding recorded by the trial court and the first appellate court and the requirement of Section 54 of the Transfer of Property Act, 1882, learned counsel for the appellant emphasized that the first appellate court committed error in dismissing the suit merely on the ground that that sale deed Ex.D-1 is not registered, accordingly contending that the suit has been decreed on improper consideration contrary to the principles of law, learned counsel prays for interference into the matter.

9. Shri J.L. Mishra, learned counsel for plaintiff Chhotelal Sharma/ defendant no.1 herein refuted the aforesaid contentions and argued that total area of land bearing Khasra No. 113/5 is 0.66 decimal. The document Ex. P-3 and D-4 are the order passed by the competent authority on 14.06.1973 dismissing the application of plaintiff Chhotelal Sharma indicates that out of the total area 0.66 decimal, Bhagwandeen and Mangal hold 1/3rd share each . Ravavtar and Ramchandra hold in all 1/6 share and therefore, out of total area i.e. 0.66 decimal defendant nos. 1 to 4 together hold 0.42 decimal. Ramdas defendant no.5 is shown to be holding only 0.24 decimal in the order Ex.P-3/D-4. Out of the total area 0.42 decimal held by defendant nos. 1 to 4, if defendant nos. 1 and 2 i.e.

Ramchandra and Mangal have sold 5000 sq ft. = 0.12 decimal to Chhotelal Sharma, then it is impossible for defendant nos. 3 and 4 to sell the entire area of 0.42 decimal by a unregistered sale deed when as per of the first appellate court the total area held by the defendant nos. 1 and 2 as per their shares come to 0.18 decimal. Contending that defendant no. 5 Ramdas has failed to establish the claim based on an unregistered sale deed Ex.D-1 dated 25-08-1956, he is only entitled to the property held by him 0.24 decimal as is apparent from the order Ex.P-3/ Ex.D-4 Shri J.L.Mishra, prays for dismissal of this appeal on the ground that the delivery of possession to the extent of 0.66 decimal is not proved by defendant no.5 Ramdas.

10. I have heard the learned counsel for the parties and perused the record. Before adverting to consider the rival contentions on merit, it would be appropriate to take note of the provisions of Section 54 of the Transfer of Property Act, 1882. Section 54 defines 'sale' and prescribes how a sale is made. Section 54 reads as under :

> **" 54. "Sale"** defined- " Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.
>
> **Sale how made.-** Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.
>
> In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.
>
> Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property."

Even though transfer of immovable property of the value below Rs.100/- by the unregistered sale deed is recognized by section 54, the same warrants delivery of possession by the seller to the buyer. The provisions of section 54 has been subject matter of interpretation before the Privy council in the case of *Mathura Prasad and others Vs. Narayan Choudhary and others*, AIR 1921 Privy Council 8, and in the aforesaid judgment it has been held by the Privy Council that according to Section 54 of the Transfer of Property Act, for sale of land value of which is less than Rs.100/- there has to be acted delivery of the property by the seller to the buyer. This principle is further affirmed by the Allahabad High Court in the case of *Ram Chandra and others Vs. Hari Kirtan and another*, AIR 2004 Allahabad 345, wherein it is laid down that under section 54 of the Transfer of Property Act, two things are required to

constitute a sale, namely, a contract to transfer the ownership of the land sold in exchange for a price and the transfer of ownership followed by delivery of the property. The existence of an unregistered document is not a bar under section 91 of the Evidence Act, provided sale is followed by actual delivery. It is therefore, clear that the requirement of law is that in case of sale by unregistered document actual delivery of property is a requirement of law and in case actual delivery of property is not established the sale is also not proved.

11. If facts of the case in hands are analyzed in the backdrop of the aforesaid principles, it would be seen that Ramdas was already in possession of 0.24 decimal of land in Khasra No.113/5 it was his case that vide unregistered sale deed Ex.D-1 dated 25-08-1956, he had purchased the remaining 0.42 decimal of land from defendants Bhagwandeen Ramavtar and Ramfal on payment of a consideration of Rs.84/-. The unregistered document Ex.D-1 indicates that Ramdas had purchased the property from Bhagwandeen , Ramavtar and Ramfal. There is no dispute with regard to fact that the entire 0.42 decimal of lands belong to 4 defendants namely Ramchandra. Mangal, Bhagwandeen and Ramavtar and it is further admitted that Ramchandra and Mangal have not effected any sale. The order dated 14-06-1973 Ex.P-3/ Ex.D-4 passed by the competent authority, while rejecting the application of plaintiff Chhotelal Sharma indicates that out of this area 0.42 decimal of lands, Ramchandra and Mangal had 0.18 decimal of land to their credit i.e. they had 1/3 share each in the property and out of this 0.18 decimal they have sold 0.12 decimal by registered sale deed to Chhotelal on 30-01-1967. The other defendants Bhagwandeen had 1/6th share , Ramdas had 1/6th share and Ramavtar had 1/9th share . Accordingly, it would be clear that the property was held jointly by 5 persons namely Ramchabndra, Mangal, Bhagwandeen, Ramavtar and Ramfal and it is only 3 persons Bhagwandeen , Ramavtar and Ramdas who have executed the unregistered document Ex. D-1. That being so the first appellate court after considering the requirement of section 54 of the Transfer of Property Act had held that Bhagwandeen , Ramavtar and Ramfal could no sell the property to the extent of share held by Ramchandra and Mangal and therefore it was incumbent for defendant no.5 Ramdas to show actual handing over of possession by the 5 owners. This is not proved by leading cogent evidence and therefore, disbelieving execution of the unregistered document Ex.D-1 and finding plaintiff to have purchased 5000 sq. ft. of land by registered sale deed Ex.P-1 dated 30-01-1967, the suit is decreed.

12. If the law requires establishment of sale by virtue of an unregistered sale deed to be followed by delivering of possession, it was incumbent upon the appellants to show before that all the 5 owners i.e. Ramchandra, Mangal, Bhagwandeen, Ramavtar and Ramfal had delivered the actual possession after un registered document Ex.D-1 was registered ,plaintiff has tried to prove this

actual possession by placing reliance on the khasra entries Ex. D-2, Ex.D-3 and Ex.D-5. Apart from the khasra entries, no other evidence is adduced by the plaintiff to show actual possession being handed over after unregistered sale deed was executed on 25-08-1956. By placing reliance on the judgment of this court in the case of *Smt. Chanda Bai* (supra) learned counsel for the appellant wanted this court to record a conclusion that as the possession of defendant no.5 Ramdas on the entire property i.e. 0.66 decimal is established from the khasra and therefore the entries requirement of section 54 is fulfilled. However, the question is as to whether this contention can be accepted .

13. Khasra entries Ex. D-2, Ex.D-3 and Ex.D-5 are the entries for the year 1961-1962, 1968-69 and 1969-70. After these documents were prepared prior to 1970 the matter went to the competent authority and on the application filed by the plaintiff Chhotelal, which ultimately resulted in passing of the order dated 14-06-1973 Ex.P-3/D-4. When the competent authority evaluated the case on 14-06-1973 the finding recorded is that Ramdas is only in possession of area measuring 0.24 decimal. The remaining area, i.e. 0.42 decimal is held by Ramchandra, Mangal, Bhagwandeen, Ramavtar and Ramfal in the ratio as indicated in the order. If that be so then the veracity of the khasra entries Ex. D-2, D-3 and D-5 becomes doubtful. As there are contradiction in the facts mentioned in khasra entries and the order dated 14-06-1973 passed by the revenue authorities. That apart Ex.D-2, Ex.D-3 and Ex.D-5 are khasra entries they are maintained in accordance to the provisions of the M.P. Land Revenue Code and the question is as to whether presumption can be drawn with regard to correctness of the entries in the revenue record, and further question is as to how entry made in the revenue record are to be established/proved. A Bench of this court in the case of *Sitaram V. Ramcharan and others*, 1994 JLJ 657 has held that the entries made in the revenue record are only presumptive in nature their correctness can be presumed under law, only if it is established from the record that the revenue records have been prepared according to procedure laid down in the M.P. Land Revenue Code for the said purpose. It has been held in the aforesaid judgment that the inference with regard to correctness of revenue record can be raised under section 79 of the Evidence Act when the document is proved to have been prepared in the manner as prescribed by law. In the present case the revenue records and Khasra entries are required to be prepared in accordance to the prescribed procedure contained in the M.P. Land Revenue Code. Defendant no.5 Ramdas has not led any evidence to prove that the revenue record i.e. khasra entries Ex.D-2, Ex.D-3 and Ex.D-5 are prepared as per procedure prescribed under law. The documents are only marked as exhibits on the basis of the statement of defendant witness no.1 i.e. Ramdas himself and no revenue officer or authority is examined to show that the records Ex.D-2, Ex. D-3 and Ex.D-5 are prepared in accordance to the prescribed procedure.

14. In that view of the matter, in the light of the law laid down by this court in the case of *Sitaram* (supra) it cannot be assumed that the revenue entry made with regard to possession i.e. Ex.D-2, Ex.D-3 and Ex.D-5 are enough to draw a presumption that possession of the defendant Ramdas is established.

15. In the case of *State of M.P. Vs. Khilan Singh,* 1997, Revenue Nirnay 94 and again in the case of *Daulatram Vs. Gopi and others,* 1997 Revenue Nirnay 151, this principle is reiterated and it is held that entries made in revenue records cannot give presumption even of illegal possession . It has been held in the case of *Daulatram* (supra) that certain entries made in the record for certain period cannot lead to a presumption of possession by the person concerned for a long period of time. In the present case as already indicated hereinabove preparation of the revenue record Ex.,D-2, Ex.D-3 and Ex.D-5 in accordance to the prescribed procedure is not proved and in comparison to these documents another document relied upon by both the parties Ex.P-3/D-4 gives a totally different picture. In that view of the matter it is a case where actual possession of the appellants is not proved and therefore, the appellate court, it can be held has not committed any error in holding that the defendant no.5 claimed based by unregistered document Ex.,D-1 is not established. Even after it is assumed that the registration of the sale deed Ex.,D-1 is not required, but taking over of actual possession after execution of the unregistered sale deed was required to be proved by the defendants Ramdas and Ramdas having failed to prove that he had taken actual possession from Ramchandra, Mangal, Bhagwandeen, Ramavtar and Ramfal after execution of the unregistered document on 25-08-1956, the appellate court has not committed any error in decreeing the suit. Once purchase of the property disputed i.e. 0.12 decimal 100 x 50 ft. – 5000 sq.ft, by the plaintiff is established on the basis of registered sale deed Ex. P-1 dated 30-1-1967.

16. The evidence adduced by the defendant and the 4 witnesses examined by him have only testified with regard to a house available in the area belonging to Ramdas. None of the witnesses have stated that after the unregistered document Ex.D-1 was executed on 25-08-1956 the actual possession immediately thereof or after some time was granted by Ramchandra, Mangal, Bhagwandeen, Ramavtar and Ramfal. The appellant having failed to establish this fact which is a requirement of law i.e section 54 of the Transfer of Property Act, I am of the considered view that the learned court below has not committed any error in decreeing the suit. Accordingly the only question framed is answered by holding that the lower appellate court has not committed any error in decreeing the suit as delivery of possession is not proved and therefore, even if the sale deed of a property less then Rs.100/- can be effected by unregistered document. In the absence of actual delivery of possession being not proved, which is requirement of law as indicated hereinabove in decreeing the suit, the first appellate court has not committed any error.

17. Accordingly, finding no merit in the appeal filed the same is dismissed. The judgment and decree passed by the first appellate court is affirmed. The appeal is dismissed with costs on parties.

Appeal dismissed.

I.L.R. [2010] M. P., 646
APPELLATE CIVIL
Before Mr. Justice P.K. Jaiswal
7 January, 2010*

BALWANT RAI AGRAWAL ... Appellant
Vs.
BHARAT PETROLEUM CORPORATION ... Respondent

A. Transfer of Property Act (4 of 1882), Section 106 - *Requirement of notice - When the period of lease is fixed by a contract and it comes to an end then the tenant is not entitled to a notice u/s 106 of the Act - After expiry of the period of termination of lease the possession of the lessee was that of a tenant-at-sufferance as being one who came in by right and held over without right - Such a person can be evicted without notice.* (Para 15)

क. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 106 – सूचना पत्र की आवश्यकता – जब पट्टे की कालावधि संविदा द्वारा नियत की गयी हो और वह समाप्त हो जाती है तब किरायेदार अधिनियम की धारा 106 के अन्तर्गत सूचना पत्र का हकदार नही है – पट्टे के अवसान की कालावधि की समाप्ति के बाद पट्टेदार का कब्जा मूक सम्मति से किरायेदार के समान होता है जो अधिकार द्वारा आया और बिना अधिकार के रुका हुआ है – ऐसा व्यक्ति बिना सूचना के बेदखल किया जा सकता है।

B. Transfer of Property Act (4 of 1882), Section 107, Registration Act, 1908, Section 17 - *Lease for 10 years - Lease cannot be renewed automatically - Renewal for a period of 10 years will become admissible only when the renewal is made by a registered lease deed as laid down u/s 17 of the Registration Act r/w S. 107 of T.P. Act.* (Para 18)

ख. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 107, रजिस्ट्रीकरण अधिनियम, 1908, धारा 17 – पट्टा 10 वर्ष के लिए – पट्टा स्वतः नवीकृत नही हो सकता – 10 वर्ष की कालावधि के लिए नवीनीकरण केवल तब ग्राह्य होगा जब नवीनीकरण धारा 17 रजिस्ट्रीकरण अधिनियम सहपठित धारा 107 सम्पत्ति अंतरण अधिनियम के अन्तर्गत रजिस्ट्रीकृत पट्टा विलेख द्वारा किया गया हो।

C. Transfer of Property Act (4 of 1882), Section 111(a) - *Determination of lease - Original period of lease extended for 10 years, thereafter, lease not renewed in terms of agreement - Suit for ejectment - Alternate plea of continuation of lease in plaint by lessor - Held - Contract*

*S.A. No.2215/2005 (Jabalpur)

of lease came to an end and lease was determined by efflux of time limited thereby - An admission made as alternate plea regarding renewal of lease cannot overrule statutory provision and lease period can not be said to be renewed - Lessor has right to eject lessee - Appeal allowed. (Paras 15, 16, 18 & 19)

ग. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 111(ए) – पट्टे का पर्यवसान – पट्टे की मूल कालावधि 10 वर्ष के लिए बढ़ायी गयी, उसके बाद करार के निबंधनो के अनुसार पट्टे का नवीनीकरण नही किया गया – बेदखली के लिए वाद – पट्टाकर्ता द्वारा वादपत्र में पट्टा जारी रहने का वैकल्पिक अभिवचन – अभिनिर्धारित – पट्टे की संविदा समाप्त हो गयी और उसके द्वारा सीमित समय के बीत जाने पर पट्टे का पर्यवसान हो गया – पट्टे के नवीनीकरण के सम्बन्ध में किये गये वैकल्पिक अभिवचन के रूप में की गयी स्वीकृति कानूनी उपबंध को रद्द नहीं कर सकती और पट्टे की कालावधि नवीकृत हुई नही कही जा सकती – पट्टाकर्ता को पट्टेदार को बेदखल करने का अधिकार है – अपील मंजूर।

Cases referred :

AIR 1964 SC 461.

Atul Anand Awasthy, for the appellant.

V.R. Rao with *Kapil Jain,* for the respondent.

JUDGMENT

P.K. JAISWAL, J. :–This second appeal has been filed by the plaintiff against the judgment and decree dated 22.6.2005 passed by the II Additional District Judge, Sagar, reversing the judgment and decree of the Trial Court and dismissing the suit for ejectment filed by the appellant.

2. On 1.10.1981 appellant had filed the civil suit for ejectment of the respondent from the suit plot marked as 'A', 'B', 'C' and 'D' in the plaint map on the allegation that the respondent was his tenant. The agreed rent was Rs.1800/- per annum and the tenancy started from 15th August of each year and ended on the 14th August of the next year. It was stated that the suit plot having an area of 22,500 sq ft is situated at Makronia (Buzurg), Tehsil on Sagar-Kanpur road and on this plot there exists a petrol pump belonging to the appellant. It was also stated that the petrol pump was let out initially to "Burmah Shell Oil Storage and Distributing Company of India Limited" on 15.8.1961 vide lease deed dated 14.8.1961 (Annexure Ex.P/1). The letting out was for the period of 10 years, and thereafter, the lease continued as it was renewed every 10 years. The respondent took over after nationalization in the year 1976 and stepped into the shoes of "Burmah Shell Oil Storage and Distributing Company of India Limited" as a lessee on same terms. It was claimed that the tenancy was terminated by notice dated 22.12.1980 w.e.f. 14.8.1981 and, therefore, after termination of the tenancy, the appellant was entitled to take possession. Further pleadings regarding termination of tenancy was that there was no renewal of tenancy since 14.8.1981 and, therefore, the tenancy expired by efflux of time. It was also claimed that after termination of

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the tenancy, the appellant was entitled to claim mesne profit of Rs.450/- at the time of filing of the suit and it was claimed that Rs.450/- per month be paid to the appellant during the pendency of the suit. It was alleged that the appellant required the suit plot bona fide for starting his business and he also wanted to construct for the purpose of his business certain building. It was also stated that the suit land was out of Municipal Corporation limit of Sagar. By saying this it appears that the appellant implied that the M.P. Accommodation Control Act, 1961 did not apply. In the plaint, it has been shown that the suit land was in the name of plaintiff in the village Makronia (Buzurg).

3. That in the lease deed (Ex.P/1), the lessee agreed with the lessor in clause (2)(b) as follows :-

> "2. THE LESSEE HEREBY COVENANTS WITH THE LESSOR AS FOLLOWS :-
>
> (a) xxxx xxxxx xxxxx
>
> (b) At the expiration of the said term or extended term or sooner determination thereof as the case may be to surrender and deliver up to the Lessor the demised premises after levelling the ground if and so far as may be required by the Lessor to do."
>
> and further, it was expressly agreed in clause 4(b) of the lease deed as under:
>
> "4. IT IS HEREBY EXPRESSLY AGREED AS FOLLOWS :-
>
> (a) xxxxxx xxxxxx xxxxxx
>
> (b) If the Lessee shall be desirous of taking a renewal lease of the demised premises upon the expiration of the term hereby granted, then the Lessor shall on receipt of a notice in writing to that effect, at least two months prior to the expiration of the lease, grant to the Lessee a fresh lease of the demised premises for a further period/s not extending TEN (10) years each at the same rent and upon the same terms and conditions in all respects as are reserved and contained herein. Provided however that should the Lessee exercise the aforesaid option of renewal for a period lesser than full renewal period then in that case the Lessee shall be entitled to a further option equal to the balance of the renewal period and the Lessee shall be entitled to continue to occupy and use the demised premises for such further period as it may desire notwithstanding whether a fresh lease has been executed and registered or not by the Lessor."

4. As per terms and conditions of lease deed dated 14.8.1961 (Ex.P/1) after expiry of the original period the lease was extended for further period of 10 years

up to 14.8.1981 and thereafter, the lease was not renewed and prior to it respondent's lease was determined vide notice dated 22.12.1980 (Ex.P/4) and the respondent was asked to vacate the leased out plot as per map (Ex.P/2) but the defendent company in stead of vacating the leased out plot brought a suit on 4.7.1984 for permanent injunction against the appellant restraining him from taking possession of suit plot on the ground that the lease deed automatically stood renewed because of it being a permanent tenant and having raised Pucca structure thereon. The suit of the respondent was dismissed on 29.8.2003 (Civil Suit No.88-A/2000).

5. The appellant to counter the allegations made by the respondent in his suit for permanent injunction, filed two applications for amendment in para 6 of the plaint which relates to alternative plea about continuation of "cause of action". Amendment dated 8.4.1992 and amendment dated 5.4.2002 are relevant which read as under :-

Amendment dated 8.4.1992

यदि विकल्प में यह भी मान लिया जावे कि प्रतिवादी भारत प्रेट्रोलियम कार्पोरेशन की जवाबदावा की कंडिका (1)अ एवं इसी भारत प्रेट्रोलियम कार्पोरेशन की दी0मु0नं0 6 अ/84 के वादपत्र की कंडिका 5 व 9 अ की स्वीकारोक्ति के मुताबिक किरायेदारी दिनांक 14 अगस्त 1991 तक के लिए नवीनीकृत हो चुकी थी तब प्रतिवादी भारत प्रेट्रोलियम कार्पोरेशन ने रजिस्टर्ड लीज डीड दिनांक 5/5/1970 की शर्त कमांक 4 (बी) के मुताबिक अपनी ओर से कोई कार्यवाही नहीं की बल्कि इस प्रकरण के वादी श्री बलवंत राय अग्रवाल ने अपने पूर्व के डायरी प्रकरण कमांक 52–अ/81 के समस्त अधिकारों को सुरक्षित रखते हुए रजिस्टर्ड नोटिस दिनांक 2/8/1991 का (1) प्रतिवादी भारत पेट्रोलियम कार्पोरेशन के चेयरमेन एवं मैनेजिंग डायरेक्टर 4–6 ब्लार्डस्टेट कुरीम–मोम रोड बंबई – 38, (2) सीनियर डिवीजन मैनेजर, भारत प्रेट्रोलियम कार्पोरेशन लिमिटेड आफिस काम्प्लेक्स ब्लाक ए गौतम नगर, भोपाल, (3) डिवीजन मैनेजर, प्रेट्रोलियम कार्पोरेशन लिमिटेड, आफिस काम्प्लेक्स, ब्लाक ए गौतम नगर, भोपाल (4) श्री सत्यपाल सिंह ठाकुर, डीलर आक भारत प्रेट्रोलियम कार्पोरेशन लिमिटेड मकरोनिया, सागर को भेजा जिसमें अन्य बातों के अलावा वादी ने पिछले अधिकारों को सुरक्षित रखते हुए यह सूचित किया कि प्रतिवादी भारत प्रेट्रोलियम कार्पोरेशन का कोई अधिकार वादग्रस्त भूमि में दिनांक 14/8/1991 से आगे अपना आधिपत्य रखने का नहीं है तथा प्रतिवादी इसे 14/8/1991 की मध्यरात्रि तक खाली करके रिक्त कब्जा वादी को सौंपें एवं दिनांक 14/8/1991 के बाद भी यदि प्रतिवादी खाली नहीं करता है तो वह अनाधिकृत कब्जा व उपयोग की नुकसानी रूपये 2/– प्रतिवर्ग फुट के प्रतिमाह के हिसाब से मय दांडिक ब्याज के देनदार होगा । यह नोटिस उपरोक्त प्रतिवादी एवं उसके उपर वर्णित अधिकारियों एवं डीलर पर तामील हुआ व नोटिस के बावजूद वादग्रस्त जगह खाली न करने से एवं कथित

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नुकसानी अदा न करने से भी वाद हेतु दिनांक 14/8/1991 की मध्यरात्रि को व उसके बाद प्रतिमाह की पहली तारीख को नुकसानी अदा न करने से उत्पन्न हुआ तथा इस न्यायालय को वाद निर्णय अधिकार है, तथा वादी वैकल्पिक आधार पर भी वादग्रस्त भूमि प्रतिवादी से खाली कराने का अधिकारी है ।

Amendment dated 5.8.2002 :

यदि प्रतिवादी की लीज अवधि विवादित जगह के संबंध में वर्ष 1991 तक मान भी ली जावे तो भी वर्ष 1991 के बाद प्रतिवादी ने लीज अवधि बढाए जाने बाबत कोई आवेदन नहीं दिया है और न ही फ्रेश लीज डीड संपादित कराई है इस कारण संपादित लीज डीड वर्ष 1991 के बाद स्वयमेव समाप्त हो जाती है तथा प्रतिवादी को विवादित जगह पर किरायेदार की हैसियत से कन्टीन्यू रहने का कोई अधिकार नहीं है ।

6. The written statement filed by the respondent denied almost all the allegations in the plaint. The respondent contested the suit on the defence that the lease was of permanent character and the said lease of tenancy stood renewed up to 14.8.1991 because of notice dated 30th March, 1981 for renewal of lease, so institution of suit as such in absence of cause of action being "premature" deserves to be dismissed.

7. The learned Trial Court after appreciating the oral and documentary evidence recorded findings that the respondent is lessee of plaintiff in disputed plot @ Rs.1800/- per year and the respondent has not delivered the vacant possession of the disputed plot to the appellant, despite the determination of lease vide notice dated 22.12.1980 (Ex.P/4). The Trial Court also held that the cause of action arose on 15.8.1981 and the suit filed by the plaintiff is maintainable and not premature and could be filed legally prior to 15.8.1991. With the above finding the Trial Court decreed the suit and granted a decree that the plaintiff is entitled to get back the vacant possession of leased out demised premises from the respondent and also directed the respondent to handover the vacant possession of the appellant peacefully and also granted damages @ 1800/- per year till the date of possession.

8. The appellant challenged the said judgment and decree of the Trial Court by filing first appeal before the lower appellate Court. The lower appellate court on the basis of amendments made by the appellant came to the conclusion that period of lease stood automatically renewed up to 14.8.1991 and the suit instituted on 1.10.1981 was premature, the lower appellate court reversed the finding recorded by the Trial Court and dismissed the suit as premature.

9. The following substantial question of law was formulated at the time of admission of this second appeal by order dated 25.9.2006 :-

> "Whether the lower appellate court was justified in law in reversing the judgment and decree of the trial court on the ground that there was no cause of action to file the suit on 14.8.1981, despite the fact that the lease was determined vide notice Ex.P.4 ?"

10. In the written statement it was pleaded by the respondent that the suit premise was let out to the "Burmah Shell Oil Storage and Distributing Company of India Limited" vide lease deed dated 14.8.1961 for a period of 10 years and later on in terms of clause 4(b) of lease deed, the lease was extended for a further period of 10 years on 14.8.1971 and during this extended period the assessts of "Burmah Shell Oil Storage and Distributing Company of India Limited" were taken by the Union of India under the special law "The Burmah Shell (Acquisition of Undertakings in India) Act, 1976 (in short "Act of 1976") and in consequence thereof the right, title and interest of Burmah Shell, in relation to its undertaking in India, stood transferred to, and shall vested, in Central Government. As per Section 5(2) of the Act of 1976 on the expiry of the term of any lease or tenancy, such lease or tenancy shall, if so desired by the Central Government, be renewed on the same terms and conditions on which the lease or tenancy was held by Burmah Shall immediately before the appointed day i.e. 24th January, 1976. It is not in dispute that the respondent-defendant did not avail and exercised the option for renewal and thereafter lease was determined/terminated by the appellant vide notice dated 22.12.1980 on expiry of its second term on 15.8.1981. Y.Shrinath (DW-1) in his statement very categorically stated that the respondent company after expiry of the lease period never requested for renewal of lease for a further period of 10 years w.e.f. 15.8.1981. No document has been filed by the respondent to prove that by registered notice dated 30.3.1981 they prayed for renewal of the lease agreement nor such document is on record and, therefore, both the Courts below very categorically stated that lease was valid up to 14.8.1981. It is also not in dispute that vide notice dated 22.12.1980 (Ex.P/4) the appellant prior to expiry of lease period determined the lease and respondent was asked to vacate the lease plot and deliver the vacant possession to the appellant.

11. Learned counsel for the appellant drew my attention to the averments made in the plaint particularly the amended portion of the plaint and submits that the said amendment was made just to counter the allegations made in a suit for permanent injunction filed by the respondent and the said plea was taken only as an alternative plea and the same cannot be treated as admission made by the appellant that the period of lease was valid up to 14.8.1991. It is also submitted that once the tenancy/lease comes to an end on expiry of the fixed period under the lease deed or by efflux of time in and thereupon status of tenant/lessee becomes of a tenant-at-sufferance and then it was not necessary to again determine the tenancy of lease by giving fresh notice and there was no need of issuing any notice to the respondent, if term of tenancy/lease has expired and notice is required only when lease/tenancy is in existence. He submits that the lower appellate court misconstrued the provisions of law and committed a legal error in reversing the finding recorded by the Trial Court and dismissing the suit of the appellant.

12. On the other hand, learned counsel for the respondent drew my attention to

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amendment dated 8.4.1992 and 5.8.2002 and submitted that the appellant himself in his plaint very categorically admitted that the period of lease was renewed up to 14.8.1991. The lower appellate court has not committed any legal error in dismissing the suit. His submission was that the admission made by the appellant is a best piece of evidence on which the opposite party can rely upon and the said admission is not required to be proved. With the above submission, learned senior counsel for the respondent supported the judgment and decree of the lower appellate court and prayed for dismissal of the appeal.

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

14. The parties could not by their pleadings alter the intrinsic character of the lease or bring about a change of the rights and obligations flowing therefrom. The lease was a lease for a definite term and, therefore, expired by efflux of time by reason of Section 111(a) of the Transfer of Property Act. It is not disputed by the parties that thereafter the said period was never extended and prior to the expiry of lease period, the lease of the respondent was determined by notice dated 22.12.1980. On termination of the lease the possession of the lessee was that of a tenant-at-sufferance as being one who came in by right and held over without right. The Apex Court in a case reported as *Pooran Chand v. Motilal,* AIR 1964 SC 461 observed as under :-

> "It is, therefore, manifest that the lease was for a period of one year and that it is not a monthly tenancy. As the term fixed under the deed had expired, the appellant was not entitled to any statutory notice under Section 106 of the Transfer of Property Act, 1882.

15. In the present case, the tenancy come to an end vide Ex.P/1. Thereafter there was no lease deed in his favour. It is well settled that when the period of lease is fixed by a contract and it comes to an end then the tenant is not entitled to a notice under Section 106 of the Act after expiry of the period of termination of the lease, the possession of the lessee was that of a tenant-at-sufferance as being one who came in by right and held over without right. Such a person can be evicted without notice.

16. Lease of urban immovable property represents a contract between the lessor and the lessee. If the contract is to be put to an end it has to be terminated by a notice to quit as envisaged under Section 106 of the T.P. Act. But it is equally clear as provided by Section 111 of the T.P.Act that the lease of immovable property determines by various modes therein prescribed. Now, if the lease of immovable property determined in any one of the modes prescribed under Section 111, the contract of lease comes to an end, and the landlord can exercise his right of re-entry. In the present case the contract comes to an end and lease was determined under Section 111 of the T.P.Act. The Courts below has apparently being misled

by the amendment made by the appellant in para-6 of the plaint that because the lease was renewed up to the period 14/8/1991, there was no cause of action to file the suit on 14/8/1981. In fact the lease deed dated 14/8/1961 (Ex.P/1) as well as its renewal from 1971 to 1981 were compulsorily registrable under Section 107 of T.P.Act, whereas lease deed in question being unregistered. The presumption about the duration of the lease under Section 106 of the T.P. Act and as such defendant lease was legally valid under Section111 (a), (b) and (h) of the T.P. Act vide notice Ex.P/4.

17. It may be seen that the lease in question is an unregistered lease deed and the question of recording of finding that fresh tenancy came into existing after 14/8/1981 and the period was renewed for a further term of ten years till 14/8/1991 is not sustainable. The status of respondent was that of a tenant-at-sufferance.

18. On determination of a lease it is the duties of the lessee to deliver the possession of the demised premises to the lessor. If the lessee continues in possession even after the determination of the lease, the landlord obviously has a right to eject him forthwith. It is also to be seen that a notice for determination of lease was served to the respondent by registered post and thereafter the suit was filed on 1.10.1981, after expiry of the original period of the lease, the lower appellate court on the basis of alternative plea made by the appellant cannot be said that period of lease was automatically renewed till 14.8.1991 when admittedly no renewal was made nor any lease deed was executed between the parties. On the basis of said admission, it cannot be said that no cause of action arose on 1.10.1981 and the suit filed by the appellant was premature. Thus, by way of abundant caution and as alternative plea an admission made by way of amendment cannot overrule the statutory provision of Section 111 of T.P. Act nor on the basis of admission as an alternative plea it can be said that the lease period was renewed till 14.8.1991. The renewal for a period of 10 years will become admissible only when the renewal is made for the aforesaid period of 10 years by a registered lease deed as laid down under Section 17 of the Registration Act read with Section 107 of the T.P. Act. The lower appellate Court committed an error in reversing the judgment and decree of the Trial Court on the ground that there was no cause of action to file the suit on 14.8.1981.

19. Admission in itself does not create any interest or title in the property. Leasehold right is an interest in the property and unless the lease was duly executed and registered lease hold rights cannot be created. As already stated hereinbefore that in absence of renewal there was no extension of the period of the lease and the lease was duly determined by notice the position of the respondent was that of a tenant-at-sufferance. Such a person is not a tenant at all. He has no estate or interest in the property. He has only a protection of statute.

20. For the above mentioned reasons the substantial question of law is decided

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in favour of appellant by holding that the lower appellate court committed an error in reversing the well considered judgment of the Trial Court on the ground that there was no cause of action to file a suit on 14.8.1981 despite the fact that the lease was determined vide notice dated 22.2.1980 and thereafter the original period of the lease had also expired on 14.8.1981.

21. In the result, the impugned judgment and decree passed by the lower appellate court is liable to be set aside and is hereby set aside and the judgment and decree of the Trial Court is restored. The appeal filed by the appellant is allowed with cost. Counsel fee Rs.3000/-.

Appeal allowed.

I.L.R. [2010] M. P., 654
APPELLATE CIVIL
Before Mr. Justice Abhay M. Naik
15 January, 2010*

HARVEER SINGH ... Appellant
Vs.
SHRI KISHAN SINGH TOMAR & ors. ... Respondents

A. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(b) & (f) - *Right of sub-tenant to oppose eviction - Sub-tenant has no right to oppose the claim for eviction on the ground of bona fide need - He has merely a right to oppose eviction on the ground of sub-tenancy u/s 12(1)(b) of the Act.* (Para 21)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(बी) व (एफ) – बेदखली का विरोध करने का उपभाड़ेदार का अधिकार – उपभाड़ेदार को वास्तविक आवश्यकता के आधार पर बेदखली के दावे का विरोध करने का कोई अधिकार नही है – उसे केवल अधिनियम की धारा 12(1)(बी) के अन्तर्गत उपभाड़ेदारी के आधार पर बेदखली का विरोध करने का अधिकार है।

B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) *Plaintiff filed a suit for bona fide need of his son -- Prior to the institution of suit, suit shop was allotted to the son in partition - After death of plaintiff, son is brought on record in place of plaintiff - Bona fide need is found proved and decree of eviction on ground u/s 12(1)(f) passed - Held - Decree cannot be interfered with at the instance of sub-tenant that the original plaintiff was not competent to represent the estate at the time of institution of suit.* (Para 23)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ) – वादी ने अपने पुत्र की वास्तविक आवश्यकता के लिए वाद पेश किया – वाद संस्थित किये जाने के पूर्व वादग्रस्त दुकान विभाजन में पुत्र को आवंटित की गयी – वादी की मृत्यु के बाद पुत्र को वादी के

*S.A. No.108/2000 (Gwalior)

स्थान पर अभिलेख पर लाया गया – वास्तविक आवश्यकता साबित पायी गयी और धारा 12(1)(एफ) के अन्तर्गत आधार पर बेदखली की डिक्री पारित की गयी – अभिनिर्धारित – उपभाड़ेदार के इस अनुरोध पर कि वाद के संस्थापन के समय मूल वादी सम्पदा का प्रतिनिधित्व करने के लिए सक्षम नही था, डिक्री में हस्तक्षेप नही किया जा सकता।

C. Accommodation Control Act, M.P. (41 of 1961) - Section 12 (1) -*Mesne profits - Higher rate than contractual rate - Tenant found to have parted with the possession of the suit shop in favour of sub-tenant - Sub-tenant is running the business in it for last number of years - Mesne profits on higher rate than contractual rate may be awarded.* (Para 26)

ग. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41) – धारा 12 (1) – अंतःकालीन लाभ – संविदात्मक दर से अधिक दर – भाड़ेदार द्वारा उपभाड़ेदार के पक्ष में वादग्रस्त दुकान का कब्जा सौंपना पाया गया – उपभाड़ेदार उसमें पिछले कई वर्षों से कारोबार कर रहा है – संविदात्मक दर से अधिक दर पर अंतःकालीन लाभ अधिनिर्णीत किया जा सकता है।

Cases referred :

(1999) 6 SCC 6321, AIR 1981 SC 1113, 1971 JLJ 102, 1964 JLJ 436, AIR 1946 PC 59, AIR 1995 SC 1653, AIR 1986 SC 1952, 2007(2) MPLJ 104, AIR 1975 SC 1409, AIR 1977 SC 2262, AIR 1977 SC 2270, 1988(I) MPWN 26, 2001(1) MPLJ 547.

P.K. Patni, for the appellant.

K.N. Gupta with *Anmol Khedkar*, for the respondent No.1.

S.B. Mishra with *J.P. Mishra*, for the L.Rs. of deceased respondent No.2.

JUDGMENT

Abhay M. Naik, J. :–This judgment disposes of Second Appeal Nos. 108/00, 62/00 and 206/00, as they arise from a common suit.

2. Subalal, the original plaintiff, instituted a suit for eviction and recovery of arrears of rent on 04.11.1985 against Harveer Singh and Shri Kishan Singh Tomar with allegations that the defendant no.1 (Harveer Singh) had obtained the suit shop from the plaintiff on rent @ Rs.400/- per month vide rent note dated 20.02.1980. He sublet it to defendant no.2 (Shri Kishan Singh Tomar) and parted with possession of the suit shop in favour of defendant no.2, who is running a shop of motor parts in it. Suit shop is required bonafide for the plaintiff's son, namely, Bahadurlal to start a business of grains.

3. Defendant No.1 submitted his written statement and denied the claim of the plaintiff. He denied to have executed the alleged rent note and equally denied to have obtained the suit shop on rent from the plaintiff. He also denied to have parted with possession of the suit shop in favour of defendant no.2. Alleged genuine requirement for the plaintiff's son was also denied.

4. Defendant No.2 submitted a separate written statement. He asserted his

possession as tenant of the plaintiff on account of having obtained the suit shop on rent @ Rs. 25/- per month under oral tenancy. He stated that defendant No.1 was never a tenant in the suit shop and defendant No.2 was not and is not sub-tenant of defendant no.1. Alleged genuine need for the plaintiff's son was also denied.

5. During pendency of the suit, written statement was amended by defendant No.2 and it was pleaded, in specific, as a special plea that the plaintiff was not owner and occupant of the suit shop on the date of the institution of the suit, therefore, he has no right to seek eviction. In the light of the aforesaid amended version, plaintiff amended the plaint and pleaded that the mutual partition between his sons was accepted by the Municipality, Morena on 01.07.87 and accordingly the suit shop was allotted to the share of Bahadurlal, plaintiff's son, whose need was pleaded in the plaint.

6. After the complete trial, learned trial judge vide judgment and decree dated 31.03.98 granted a decree for eviction with a finding that the defendant no.1 had obtained the suit shop from the plaintiff on rent @ Rs.400/- per month vide rent note dated 20.02.1980. Suit shop is required "bonafide" for the business of grain-merchant of Bahadurlal, the plaintiff's son. Defendant No.2 has not occupied the suit shop as a tenant of the plaintiff and is rather a sub-tenant. Accordingly, a decree under Sections 12(1)(b) & (f) of the M.P. Accommodation Control Act, 1961 (for brevity "the Act") was granted in favour of the plaintiff with the arrears of rent and "mesne profits" @ Rs.2000/- per month w.e.f. 01.04.1983.

7. Aggrieved by the aforesaid, defendants No.1 and 2 preferred separate civil appeals bearing numbers 55A/98 and 42A/98, respectively. Learned lower appellate judge found that the defendant No.1 has sublet the suit shop to defendant no.2 and that the suit shop is bonafide required for the business of grain-merchant of Bahadurlal, plaintiff's son. Accordingly, on these two grounds, judgment and decree of the learned trial judge was confirmed. However, the judgment and decree with regard to "mesne profits" @ Rs.2000/- per month has been set aside and instead the same @ Rs.400/- per month is granted.

8. Aggrieved by the aforesaid, defendant Nos 1 and 2 preferred Second Appeal Nos. 108/00 and 62/00, respectively, containing challenge to eviction on ground under Sections 12(1)(b) and (f) of the Act. Simultaneously, plaintiffs/appellants preferred Second Appeal No.206/00 for grant of future "mesne profits" @ 2000/- per month.

9. Appeals are admitted and heard on the following substantial questions of law:

(i) Second Appeal No.108/2000:-

"1.Whether in a suit of eviction a decree can be passed to handover the possession to someone else other than the plaintiff?

2.Whether the decree of eviction can be passed on the ground of subtenancy only on the ground that the rent-note is proved?"

(ii) Second Appeal No.62/2000:-

"1. Whether the suit filed by the plaintiff/respondent after the disputed shop falling to the share of another member of family was maintainable?

2. Whether the maintainability of the suit can be decided on the basis of receipts of rent when the rent was so received in ignorance of family partition and the transaction of payment of rent was governed by Section 50 of the Act?

3. Whether the receipt of rent in ignorance of the fact of partition was vitiated by mistake as to the right to receive rent and the transaction was void under Section 21 of the Indian Contract Act and in any case it was voidable under Section 22 of Indian Contract Act which could give no right under Section 2(b) Accommodation Control Act?

4. Whether acceptance of rent by the plaintiff from appellant Shri Krishna Singh attracted the principle of waiver and the right of the plaintiff to file the suit for eviction on the ground of subtenancy is waived and no decree could be passed on this ground?"

(iii) Second Appeal No.206/2000:-

" Whether on the basis of *Naval Kishore Mangilal's case* finding arrived at by first appellate court regarding mesne profit is without any basis and against evidence led by parties ?"

10. Shri P.K. Patni, learned counsel for the appellant, in S.A. No.108/00, submitted that merely on account of the execution of the rent-note having been proved against defendant No.1, decree for eviction cannot be legally granted on the ground of subtenancy.

On consideration of the aforesaid contention in the light of the material on record, it is observed that the case of the plaintiff, in specific, is that the suit shop was let out to defendant no.1 vide rent note dated 20.02.1980. Suit shop was obtained by defendant No.1 on rent @ Rs.400/- per month from the plaintiff. It is further pleaded in the plaint that after obtaining the suit shop on rent, defendant No.1 handed it over to defendant No.2 who happened to be the uncle of defendant No.1. Since then, defendant No.2 has been in the actual possession of the suit shop and is running a business of motor parts in it. Defendant No.1 denied to have executed rent-note in favour of the plaintiff and has also equally denied relationship

of tenancy with the plaintiff. According to his own written statement, he is not in possession and it is the defendant No.2 who is in exclusive possession of the suit shop. Original rent-note dated 20.02.1980 is on record as Ex.P-1 which is duly proved to have been executed by defendant No.1. Thus, obviously, the case for eviction on ground under 12(1)(b) is made out since the suit shop is occupied by the defendant No.2 alone without proof of privity of contract with the plaintiff. This finding has been recorded by the courts below after correct appreciation of the evidence on record, therefore, this court does not find any infirmity in the grant of decree under Section 12(1)(b) of the Act in favour of the plaintiff. Substantial question of law No.2 is accordingly answered against the appellant.

11. As regards substantial question of law No.1, it is contended by Shri Patni, learned counsel, that the suit shop was already allotted to Bahadurlal, plaintiff's son, prior to the institution of the suit, therefore, the suit instituted by Subalal is not maintainable. Reliance for this purpose is placed on the decision of the Apex Court in the case of *T.K. Lathika Vs. Seth Karsandas Jamnada* [(1999) 6 SCC 632]. In the case of *T.K. Lathika* (Supra), a petition for eviction under Section 11(3) of Kerala Buildings (Lease and Rent Control) Act, 1965, was submitted regardless of the third proviso to Section 11(3) which prescribed that a landlord whose right to recover possession arose under an instrument of transfer "inter vivos" would be entitled to apply for such possession only after the expiry of one year from the date of instrument.

12. In the case in hand, it is observed, firstly, that the defendant No.1/appellant has not taken any such plea in his written statement. Secondly, eviction against appellant is also ordered under Section 12(1)(b) of the Act which enables the landlord to seek eviction of the tenant who has unlawfully sublet, assigned or otherwise parted with the possession of the whole or any part of the accommodation for consideration or otherwise. Plaintiff has already duly proved the rent-note in his favour which was executed by defendant No.1 who is not in possession of the suit shop. Defendant No.2 who is running his business in the suit shop has no contractual relationship of landlord and tenant with the plaintiff. Thus, case of the plaintiff that defendant No.1 has parted with possession in favour of defendant No.2 is clearly made out and no interference is called for in the decree for eviction on this ground.

13. It is further contended by Shri Patni that the learned lower appellate judge has illegally directed the defendant to handover possession of the suit shop to Bahadurlal since the latter is third party and no possession could be directed to be handed over except to the plaintiff.

This submission is also not impressive because during pendency of the appeal before this Court, original plaintiff Subalal has died and Bahadurlal being the son of the deceased/original plaintiff has already been brought on record as plaintiff/

respondent. The law cited by Shri Patni, learned counsel, as AIR 1981 SC 1113 *(M.M. Quasim Vs. Manohar Lal Sharma & Others)*, 1971 JLJ 102 *(Shankar Sahai Vs. Kanmal & Others)* & 1964 JLJ 436 *(Pyarelalsa Vs. Garanchandsa)* has no application in the case of decree for eviction on ground under Section 12(1)(b), more so, when Bahadurlal has already been brought on record in place of deceased Subalal. Accordingly, substantial question of law No.1 is also answered against the appellant.

In the result, Second Appeal No.108/2000 is found meritless and the same is hereby dismissed.

14. Shri K.N. Gupta, learned Senior Counsel, appearing for appellant in Second Appeal 62/2000 contended that the plaintiff in paragraph 6 of the plaint has admitted by virtue of amendment that the partition took place which was accepted by Municipality Morena vide order dated 01.07.1987. In paragraph 36 of the statement on oath plaintiff has further admitted that the partition between him and his sons took place in the year 1979 and an application for mutation in accordance with the partition was submitted in the year 1982. Relying upon Article 340 of the principle of Hindu Law (Mulla 18th Edition), it is contended that after partition in the year 1979, Subalal ceased to be owner of the suit shop and was not competent to represent the estate. Thus, the suit for ejectment at the instance of Subalal is incompetent.

15. *Per contra*, Shri S.B. Mishra, learned senior counsel, appearing for the plaintiff, it is contended, firstly, that it was merely a family settlement which was referred to by the plaintiff in paragraph 36. Secondly, no such specific plea is taken in the written statement by the appellant. Thirdly, Bahadurlal to whom the suit shop is allotted in partition is already impleaded in place of deceased Subalal, therefore, objection raised by the appellant's learned senior counsel is not liable to be accepted.

Considered the submissions and perused the record.

16. On close scrutiny of the plaintiff's statement, it may be seen that the plaintiff categorically admitted in paragraph 36 that there occurred partition between him and his sons in the year 1979. He did not speak about the alleged family settlement. Plaintiff has further admitted that pursuant to the said partition, application for mutation was submitted in the Municipality, Morena in the year 1982 and the mutation was accordingly made in the year 1987. Thus, by no stretch of imagination, it can be termed as a family settlement.

17. Again in paragraph 37, the plaintiff has stated that mutation was effected in the year 1987 after partition in the year 1979. Though he has stated that during this period he continued to be the owner, same cannot be accepted in law because the effect of partition is to cause severance of status and the separating members thenceforth hold their respective share as their separate property and the share of each member will pass on his death to his heirs (Mulla Art.340)

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18. Shri K.N. Gupta, learned Senior Advocate, placed reliance for this purpose on AIR 1946 Privy Council 59 *(Jagdish Narain Vs. Nawab Said Ahmed Khan)* wherein it is observed that:

> **.....the plaintiffs were suing in ejectment, and they could only succeed on the strength of their own title. There was no obligation upon the defendants to plead possible defects in the plaintiff's title which might manifest themselves when the title was disclosed. It was sufficient that in the written statements the defendants denied the plaintiffs' title, and under this plea they could avail themselves of any defect which such title disclosed.**

19. On perusal, it is found that the defendant/appellant has not denied the ownership of the plaintiff. On the contrary, he has clearly stated in paragraph 16 of his written statement that the defendant No.2 alone is occupying the suit shop as tenant of the plaintiff @ Rs.25/- per month. This has not been found proved. Thus, the present appellant having no privity of tenancy with the plaintiff, it is not open to him to challenge the plaintiff's suit for eviction on ground of bonafide requirement. He having been impleaded merely as a sub-tenant was and is entitled to oppose the suit only on ground of sub-tenancy.

20. As regards substitution of Bahadurlal, son of the plaintiff in place of deceased/plaintiff alongwith other legal heirs, it is submitted by Shri K.N. Gupta, learned Senior Advocate that the requirement was pleaded for the son of the plaintiff. Bahadurlal was impleaded accordingly as legal representative of the deceased and not in his personal capacity. Therefore, ownership of Bahadurlal in respect of the suit shop cannot be invoked. Reliance for this purpose is placed on the decision of Hon. Supreme Court of India in the case of *Vidyawati Vs. Man Mohan & Others* (AIR 1995 SC 1653) wherein it is observed that it is true that when the petitioner was impleaded as a party-defendant, all rights under Order 22, Rule 4(2) and defences available to the deceased defendant become available to her. In addition, if the petitioner had any independent right, title or interest in the property then she had to get herself impleaded in the suit as a party defendant in which event she could set up her own independent right, title and interest, to resist the claim made by the plaintiff or challenge the decree that may be passed in the suit.

In AIR 1986 SC 1952 *(Bal Kishan Vs. Omprakash)*, it is observed that sub-rule 2 of Rule 4 of Order 22 of CPC authorised the legal representative of a deceased defendant to file an additional written statement or statement of objections raising all plea which the deceased-defendant had or could have raised except those which were personal to the deceased-defendant or respondent.

Law laid down by the Apex Court in the aforesaid two decisions has also

been followed by this Court in the case of *Munna Lal S/o Kedarnath Bhandari & Others Vs. Chironjilal S/o Lalluram and others*, 2007(2) MPLJ 104.

21. It has already been observed above that the defendant No.1/appellant did not raise any objection in his written statement about the ownership of the plaintiff. Defendant No.2 is merely a sub-tenant and has no right to oppose the claim for eviction on the ground of bonafide need. He has merely a right to oppose eviction on the ground of sub-tenancy under Section 12(1)(b) of the M.P. Accommodation Control Act, which reads as under:-

> **Section-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:
>
> (a) that the tenant has, whether before or after the commencement of this Act, unlawfully sub-let, assigned or otherwise parted with the possession of the whole or any part of the accommodation for consideration or otherwise;

22. A bare perusal of the aforesaid makes it clear that the provision does not contemplate ownership of the landlord. Plaintiff has pleaded, in specific, which has been found proved that the defendant No.1 was inducted in the suit shop by the plaintiff vide rent-note (Ex.P/1). According to the pleadings of defendants No. 1 and 2, defendant No.1 is not in possession of the suit shop but it is the defendant No.2 who is occupying it to the exclusion of the former. Thus, ground under Section 12(1)(b) is clearly made out. Plaintiff, right from the beginning, has been raising the need of Bahadurlal under Section 12(1)(f) of the Act. Bahadurlal is not a stranger but is the son of the plaintiff, who has acquired title by virtue of partition and has already been impleaded in the suit. This proven subsequent event cannot be ignored in view of the law laid down by the Apex Court in the case of *Pasupuleti Venkateswarlu Vs. The Motor & General Traders* (AIR 1975 SC 1409). In paragraph 4, the Apex Court has observed :-

> "**.....It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of**

procedure, where no specific provision or fairplay is violated, with a view to promote substantial justice–subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myriad. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognisance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed."

23. Law is to be always applied in progressive manner and subsequent events must be taken into consideration to promote justice. Eviction has been claimed on various grounds including bonafide need of Bahadurlal, who is proved either exclusive owner or co-owner. Since the ownership is not contemplated for eviction on the ground under Section 12(1)(b) of the Act, it would not be appropriate to dismiss the suit for eviction despite the proof about bonafide need of Bahadurlal on the ground that his father was not competent to represent the estate, at the time of institution of suit. Bahadurlal has already been impleaded in the present litigation as plaintiff and his bonafide need has already been found established by the courts below in concurrent manner. Defendants have been unable to demonstrate any infirmity in such finding. Thus, it would not be appropriate and justiciable to expect Bahadurlal to institute a fresh suit despite his proven need by dismissing the suit on the ground of earlier partition. Bahadurlal has already been impleaded in the present suit and his alleged need has already been found genuine by the courts below. This being so, this court declines to interfere in the impugned judgment on the substantial question of Law No.1, at the instance of sub-tenant. Defendant No.2 is merely a subtenant and has no right to contest the suit for eviction on the ground under Section 12(1)(f) of the Act, therefore, denial of ownership by him of the plaintiff is meaningless and the same cannot be availed by defendant no.1. Hence, substantial question of law No.1 is answered accordingly.

24. As regards substantial question of law Nos. 2, 3 and 4, it may be seen that there is no averment in the written statement either of defendant no.1 or of defendant no.2 that the rent was paid in ignorance of the family partition. On the contrary, specific plea of defendant no.1/appellant is that he was never tenant in the suit shop. Contrary to this, it has been found by the courts below that the

defendant/appellant was inducted into suit shop vide rent note marked as Ex.P-1. Further case of the plaintiff is that the possession of the suit shop was handed over by the defendant No.1 to defendant No.2 as a sub-tenant within the meaning of Section 12(1)(b) of the Act and decree for eviction on this ground has been sought. Defendant No.2 has clearly admitted that he is in possession of the suit shop. Thus, in the totality of the facts and circumstances on record, it has been rightly found that the defendant No.1/appellant has parted with possession in favour of defendant No.2 and has incurred liability of eviction on ground under Section 12(1)(b) of the Act. There is no proof on record that defendant No.2 had paid rent as a tenant to the plaintiff. Privity of contract between the plaintiff and defendant No.2 is not found established by both the courts below in concurrent manner which is obviously finding of fact. Thus, this court does not find any infirmity in the decree on the ground under Section 12(1)(b) of the Act and accordingly substantial questions of law No.2, 3 and 4 are decided against the appellant.

In the result, Second Appeal No.62/2000 stands dismissed for want of substance.

25. Shri S.B. Mishra, learned Senior Advocate appearing for the appellant in Second Appeal No.206/2000 submitted that "mesne profits" @ Rs. 2000/- per month were rightly awarded and the same has been illegally denied by the learned lower appellate judge. This submission is opposed by Shri P.K. Patni, learned counsel for respondent No.2 placing reliance on AIR 1977 SC 2262 *(Smt. Chander Kali Bail and others. Vs. Jagdish Singh Thakur and another)*. The decision in the case of *Smt. Chander Kali Bail* (Supra) is dated 06.10.1977 whereas the same Bench of the Apex Court by later decision dated 12.10.77 in the case of *Shyam Charan Vs. Sheoji Bhai and another* (1977 SC 2270) awarded "mesne profits" at the rate higher than contractual. In another case of the Apex Court in the case of *Nandita Bose (Smt.) Vs. Ratanlal Nahta,* 1988(1) MPWN 26 it has been held that the "mesne profits" can be awarded more than that of rent rate. This Court in the case of *Prema Agarwal and others Vs. Om Prakash Gautam and another,* 2001(1) MPLJ 547, has awarded "mesne profit" at higher rate after summing up the law in paragraphs 5 and 6 as under:

> "5. It has been further submitted for the appellants that although the learned appellate court had relied upon a decision of the Apex Court in case of *Chandra Kali Vs. Jagdish Singh Thakur* reported in AIR 1977 SC 2262. However over-looked the case of *Shyam Charan Vs. Sheoji Bhai* AIR 1977 SC 2271 wherein contractual rent was Rs.1,600/- per month while the "mesne profits" was awarded by the trial court at the rate of Rs.4,000/- per month. This amount of "mesne profits" was not disturbed even up to the appeal before Hon'ble the Supreme Court.

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6. In case of *Nandita Bose (Smt.) Vs. Ratanlal Nahta,* 1988(1) MPWN 26, it has been held that mesne profits from the tenant can be claimed more than that of rent-rate. Hon'ble Supreme Court in the case of *D.C. Oswal Vs. V.K. Subbiah and others* reported in AIR 1992 SC 184 has observed that judicial notice can be taken of the fact that rental has escalated everywhere and in appropriate cases the rent can also be raised. The Calcutta High Court in case of *Jagat Narayan Singh Vs. Rabinder Mohan Bhandari and others* reported in AIR 1992 Calcutta 216 after expiry of lease period held tenant liable to pay "mense profits" for occupation of premises at prevalent rate and not at contractual rate. In a Division Bench decision of Delhi High Court in case of *Vinod Khanna and others Vs. Bakshi Sachdev (deceased Through L.R's and others)*, reported in AIR 1996 Delhi 32, even when no evidence was led by landlord in respect of increase of rent, held, justified in fixing compensation "mesne profits" by taking judicial notice of the fact of increase in rent."

26. It is further observed that in the case in hand, defendant no.1 (i.e. tenant) has incurred liability to be evicted by parting with possession of the suit shop in favour of the defendant no.2 (sub-tenant) who is running the business of motor-parts in it for last number of years. When the tenant himself has invited action against him by making available to the landlord a ground for eviction, there would be no impropriety in awarding proper and reasonable "mesne" profits even at the rate higher to contractual one.

27. Consequently, substantial question of law in Second Appeal No.206/2000 is answered in favour of the appellant and it is held that the appellant is entitled to receive "mesne profit" @ Rs.1,000/- per month in the facts and circumstances of the case. Accordingly, Second Appeal No. 206/2000 stands partly allowed. The judgment and decree of the lower appellate court to this extent is set aside. Decree be modified accordingly. Appellant to receive cost of Rs. 5,000/- from appellants of Second Appeal No.108/00 and 62/00, if already certified.

Order accordingly.

I.L.R. [2010] M. P., 665
APPELLATE CRIMINAL
Before Mrs. Justice Sushma Shrivastava
5 November, 2009*

SHRIRAM & ors. ... Appellants
Vs.
STATE OF M.P. ... Respondent

A. Penal Code (45 of 1860), Sections 306 & 498-A - ***Unlawful demand*** - *Vehicle given at the time of marriage developed defects within one month - Appellant No.1 brought back the vehicle and gave it to father-in-law for getting it repaired at a place from where it was purchased - Held - If vehicle had developed some problem within one month, there was noting wrong if it was brought back for getting it repaired at a place from where it was purchased - This could not be termed as unlawful demand.* (Para 19)

क. दण्ड संहिता (1860 का 45), धाराएँ 306 व 498–ए – विधिविरुद्ध माँग – विवाह के समय दिये गये वाहन में एक माह के भीतर खराबी आ गयी – अपीलार्थी क्र. 1 वाहन वापस ले आया और उसे उस स्थान से, जहाँ से उसे क्रय किया था, मरम्मत करवाने के लिए श्वसुर को दिया – अभिनिर्धारित – यदि वाहन में एक माह के भीतर कुछ समस्या आ गयी थी तो कुछ गलत नही था यदि उसे उस स्थान से, जहाँ से उसे क्रय किया था, मरम्मत करवाने के लिए वापस लाया गया – इसे विधिविरुद्ध माँग नही कहा जा सकता।

B. Penal Code (45 of 1860), Sections 306 & 498-A, Criminal Procedure Code, 1973, Section 174 - *Absence of allegations of demand of vehicle, cruelty or harassment to deceased in merg intimation echo the possibility of it being an afterthought.* (Para 25)

ख. दण्ड संहिता (1860 का 45), धाराएँ 306 व 498–ए, दण्ड प्रक्रिया संहिता, 1973, धारा 174 – मर्ग सूचना में वाहन की माँग, क्रूरता या मृतक को तंग करने के अभिकथनों का अभाव उसके पश्चात्वर्ती विचार होने की संभाव्यता की प्रतिध्वनि करता है।

C. Penal Code (45 of 1860), Sections 306 & 498-A - ***Cruelty*** - *Merely addressing "काली कलूटी" or "तेरे बाप ने कुछ नही दिया" can hardly be said to be such willful conduct so as to drive a woman to commit suicide or to cause grave injury to her life or limb.* (Para 27)

ग. दण्ड संहिता (1860 का 45), धाराएँ 306 व 498–ए – क्रूरता – केवल सम्बोधन कि *"काली कलूटी" या "तेरे बाप ने कुछ नही दिया"* मुश्किल से ऐसा स्वेच्छापूर्ण आचरण कहा जा सकता है जिससे किसी महिला को आत्महत्या करने के लिए या उसके जीवन या शरीर को गंभीर क्षति कारित करने के लिए प्रेरित किया जाए।

D. Penal Code (45 of 1860), Sections 306 & 498-A, Evidence Act, 1872, Section 113-A - ***Presumption*** - *Although deceased committed suicide*

*Cr.A. No.3187/1999 (Jabalpur)

within 3 days after coming to her nuptial home but there is no evidence that appellants in any way aided, instigated or abetted commission of suicide or subjected her to cruelty or harassment for any unlawful demand - Presumption u/s 113-A cannot be attracted. (Para 28)

घ. दण्ड संहिता (1860 का 45), धाराएँ 306 व 498–ए, साक्ष्य अधिनियम, 1872, धारा 113–ए – उपधारणा – यद्यपि मृतक ने अपने ससुराल आने के 3 दिन बाद आत्महत्या कर ली किन्तु कोई साक्ष्य नही कि अपीलार्थियों ने किसी ढंग से आत्महत्या करने में सहायता दी, उकसाया या दुष्प्रेरित किया या किसी विधिविरुद्ध माँग के लिए उसके साथ क्रूरता की या तंग किया – धारा 113–ए के अन्तर्गत उपधारणा आकृष्ट नही हो सकती।

Cases referred :

(2001) 6 SCC 407, 2001 CrLJ 4724, (2002) 5 SCC 177, 1998(II) MPWN 25, AIR 2004 SC 2790, AIR 1994 SC 1418.

J.S. Singh, for the appellants.

Sheetal Dubey, G.A., for the respondent/State.

JUDGMENT

SUSHMA SHRIVASTAVA, J. :–Appellants have preferred this appeal challenging their conviction and order of sentence passed by Sessions Judge, Seoni in S.T. No.127/98, decided on 22.11.99.

2. Appellants have been convicted under Section 498-A/34, 306/34 of IPC and each of them sentenced to rigorous imprisonment for three years and five years for the respective offences by the impugned judgment. Both the sentences were directed to run concurrently.

3. According to prosecution, deceased Sarita Bai (hereinafter referred to as 'deceased') was married to appellant no.1 Shriram Kurmi of village Singhori on 23.4.98. Appellants no.2 & 3 are the father and mother of appellant no.1. Appellants had demanded a vehicle in the marriage of the deceased from her father. Chintaman, the father of the deceased, however, gave an M-80 moped, fan, TV and other articles as per his capacity in the marriage of his daughter. The M-80 Moped developed mechanical defect after sometime, so it was sent back to the parents of the deceased for getting it repaired. Thereafter, appellants began harassing the deceased for the vehicle and they subjected her to ill-treatment and cruelty. Appellant no.3, the mother-in-law of the deceased also taunted her about her dark complexion and for bringing small vehicle in dowry. On 12.7.98 when appellant no.2 Vishnu Prasad, the father-in-law of the deceased came to her father's place to take her to her matrimonial home, she was not willing to go back and complained to her parents that appellants tortured and ill-treated her for vehicle and on account of her dark complexion, but they somehow sent her with appellant no.2 Vishnu. On 14.7.98 deceased Sarita Bai died at her in-laws' place under suspicious circumstances, while she was hale and hearty when she came back

from her parents' house on 12.7.98. The intimation of her death was given to the Police by Rajkumar, the brother of the deceased, whereupon merg intimation was recorded at Police Station Bandol, District Seoni and merg inquest report was prepared. The dead body of deceased was sent for postmortem examination. Her viscera was preserved and sent for chemical examination. As per report of chemical examiner, Endosulfan was found present in her viscera. After completion of merg inquiry, offence was registered against the appellants and was investigated. After due investigation, appellants were prosecuted under Section 304-B, 498-A of IPC and were put to trial.

4. Appellants were charged under Section 498-A/34, 304-B/34 of IPC and alternatively under Section 306/34 of IPC.

5. Appellants abjured the guilt and pleaded false implication.

6. According to the appellants, upon the death of Sarita Bai, her father and brother came to village Singhori and asked back the articles given in marriage and an amount of rupees twenty thousand as expenses incurred in the marriage; appellants were ready to return back the articles, but they insisted for a receipt and declined to give rupees twenty thousand. Therefore, both father and son threatened the appellants to send them to jail and falsely implicated them.

7. Learned Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, acquitted all the appellants of the charge under Section 304-B/34 of IPC, but found them guilty for committing offence under Section 498-A/34, 306/34 of IPC, convicted and sentenced them as aforesaid by the impugned judgment, which has been challenged in this appeal.

8. Arguments of both the sides were heard. Record of the lower court perused.

9. It was not disputed that deceased Sarita Bai was married to appellant no.1 Shriram on 23.4.98. It was also no longer disputed that deceased Sarita Bai died in her matrimonial home within three months of her marriage. It is also borne out from the testimony of Rajkumar (P.W-3) coupled with the evidence of Sub Inspector K.K. Narvare (P.W-4) that the intimation of the death of deceased Sarita Bai was given to Police Station Bandol by her brother Rajkumar (P.W-3), whereupon merg intimation (Ex.P-3) was recorded and merg inquest report (Ex.P-2) was prepared on 14.7.98.

10. Dr. Azad Kumar Saravagi (P.W-5), who conducted the postmortem on the dead body of deceased Sarita Bai on 15.7.98, found that her nails were cyanosed, throat and trachea were full of white froth, her lower esophagus and stomach were highly congested and eroded, fluid smelling like insecticide was also present and the cause of her death was internal asphyxia. To confirm the death by poisoning, her viscera was preserved, which was sent for chemical examination. Dr. Azad Kumar Saravagi (P.W-5) also opined that there was possibility of suicidal death

rather than homicidal death. It is also evident from the report of the chemical examiner that Endosulfan was found present in her viscera.

11. It is thus clear from the aforesaid evidence, which remained virtually unrebutted that deceased Sarita died within seven years of her marriage due to poisoning at the house of the appellants. There was no such case, nor any material on record to indicate that it was a case of accidental or homicidal death, therefore, it could be safely inferred that deceased committed suicide by consuming insecticide at the house of the appellants within seven years of her marriage.

12. The next crucial question to be seen is whether the appellants subjected the deceased to cruelty and abetted the commission of suicide by her?

13. There is no direct evidence as such against the appellants either of the cruelty meted out to the deceased or abetment of commission of suicide by her. The conviction of the appellants is based mainly on the testimony of Chintaman (P.W-2) and Rajkumar (P.W-3) and on the strength of presumption drawn under Section 113-A of Evidence Act. P.W-2 Chintaman is the father of the deceased and Rajkumar (P.W-3) is her brother to whom deceased allegedly made oral complaints. According to these witnesses, deceased used to complain to them of the ill-treatment and harassment in connection with unlawful demand meted out to her by the appellants.

14. Learned counsel for the appellants submitted that the trial court gravely erred in placing implicit reliance on the testimony of related witnesses and it failed to appreciate that their evidence was inter se contradictory and there was complete omission of certain part of their deposition in their police statements, which demolished the entire case of prosecution regarding cruelty or harassment to the deceased in connection with unlawful demand by the appellants.

15. Learned counsel for the appellants also submitted that the trial court failed to consider that there was no demand of dowry as such and nor was there any evidence of harassment of the deceased in connection with the demand of dowry or any other unlawful demand. Learned counsel for the appellants further submitted that the conclusions drawn by the learned trial judge were based on conjectures and surmises without there being any cogent and positive evidence of cruelty or harassment to the deceased in connection with unlawful demand of property. Learned counsel for the appellants strenuously urged that the conclusions drawn in para 12 of the impugned judgment were based on no evidence and the trial judge proceeded on assumption without putting any such facts to the appellants during their examination under Section 313 of Cr.P.C. and no presumption under Section 113-A of the Evidence Act could be drawn against the appellants in the facts and circumstances of the case. Reliance was placed on the decisions rendered in the case of *Arvind Singh Vs. State of Bihar* reported in (2001)6 Supreme Court Cases page 407, *Ramesh Kumar Vs. State of Chhattisgarh* reported in

2001 Cri. L. J. page 4724, *Girdhar Shankar Tawade Vs. State of Maharashtra* reported in (2002)5 Supreme Court Cases page 177 and *Ajab Singh Vs. State of M.P.* reported in MPWN 1998 Vol-II Short note 25.

16. Learned counsel for the State, on the other hand, justified and supported the conviction of the appellants.

17. In view of the submissions made by learned counsel for the parties, the entire evidence on record is closely examined. As per statement of Chintaman (P.W-2), the father of the deceased, he had given an M-80 moped in the marriage of his daughter as demanded by Jagannath, the maternal uncle of appellant no.1, but after marriage the same was spoiled by appellant no.1 and returned to him for getting it repaired. According to Chintaman (P.W-2), when Sarita Bai came to his place she had told him that her mother-in-law Shyama Bai used to tell her that she was not fit for their family and she should come back only when she brings back the vehicle. Chintaman (P.W-2) also deposed that when appellant no.1 Shriram came to take back his daughter he told that his mother, appellant no.3, had asked that he should bring back Sarita only when she brings back the vehicle. Then Chintaman (P.W-2) sent the appellant no.1 to Seoni to bring back the vehicle lying for repairs, but the company did not deliver the vehicle at that time. Appellant no.1 Shriram then went back to his place straightway and did not return to take back Sarita. It was also stated by Chintaman (P.W-2) that when Sarita came last before her death, she was asked by the appellants either to bring the vehicle or five thousand rupees. According to Chintaman (P.W-2), his daughter had told him that her mother-in-law Shyama Bai ill-treated her and appellants did not permit her to take tea in the morning and she was made to work in the field, fill water, throw cow-dung and other manual work like grinding etc.

18. However, when Chintaman (P.W-2) was cross-examined, he admitted that when the deceased came to his place in the beginning for two-three times, she did not make any complaints against the appellants. He was also contradicted with his police statement (Ex.D-1) with regard to omission of the statement that deceased was asked to bring five thousand rupees or the vehicle. He was also contradicted with his police statement (Ex.D-1) with regard to the omission of his statement that the deceased told him that her mother-in-law Shyama Bai used to tell her that deceased was not fit for their family and she should come back only if she brings back the vehicle with her and not otherwise. In view of these omissions, it is aptly clear that Chintaman (P.W-2) tried to make improvements in his statement regarding allegations with regard to demand of rupees five thousand in lieu of the vehicle and other allegations pressurising his daughter to come with the vehicle and not otherwise.

19. Moreover, Chintaman (P.W-2) also admitted in his cross-examination that the vehicle given by him had developed some problem within a month and therefore,

appellant Shriram brought back the vehicle and asked him to get it repaired at the place from where it was purchased. Learned counsel for the appellants was right in his submission that if the vehicle had developed some problem or mechanical defects within a month, there was nothing wrong if it was brought back for getting it repaired at the place from where it was purchased, and it could not be termed as unlawful demand. Needless to repeat, that the allegations of demand for rupees five thousand in lieu of the vehicle is found to be an improvement and embellishment in the testimony of Chintaman (P.W-2) and is not acceptable.

20. As regards the allegation of oral complaints made by the deceased to her father Chintaman (P.W-2) regarding physical work and labour and not giving her tea etc., the same is also found to be an improvement in view of the admission made by Chintaman (P.W-2) in para 16 of his deposition that he narrated it for the first time in the court and not earlier to the Police. Moreover, even otherwise, physical work or labour as allegedly complained by the deceased to her father, which is common in the village culture, even if taken by the appellants from the deceased, can hardly amount to act of cruelty.

21. As regards the evidence of Rajkumar (P.W-3), the brother of the deceased, it also suffers from the same infirmities. According to Rajkumar (P.W-3), whenever Sarita Bai used to come to her parental house she used to tell that the appellants harassed her for a big vehicle like Rajdoot, ill-treated her and abused her. As per the evidence of this witness, Sarita Bai also used to tell that appellants addressed her 'काली–कलूटी' and said that "तेरे बाप ने कुछ नहीं दिया".

22. First of all, the father of the deceased, namely, Chintaman (P.W-2) never stated in his evidence that deceased made any such complaints to him that appellants demanded a bigger vehicle like Rajdoot and harassed her to bring a bigger vehicle. Secondly, Rajkumar (P.W-3) himself admitted in his cross-examination in para 7 of his deposition that he disclosed it for the first time before the court and not to the police that deceased told him that appellants used to ask for a bigger vehicle or addressed her as 'काली–कलूटी' etc. In view of his clear and categorical admission in para 7 of his deposition that he never stated to the police in his evidence regarding harassment of the deceased for demand of Rajdoot vehicle etc., same is found to be an afterthought and embellishment and can hardly be accepted as true.

23. Moreover, Rajkumar (P.W-3) himself admitted in his cross-examination that a demand for return of the articles given in the marriage was made from their side after the death of his sister and appellants asked for a receipt in writing, to which they did not agree. In view of these facts, the possibility of making invented and manufactured statements by both father, Chintaman (P.W-2) and son Rajkumar (P.W-3) against the appellants regarding harassment of the deceased for vehicle or allegations of cruelty to the deceased, cannot be ruled out.

24. Be that as it may, whatever the allegations are made by Chintaman (P.W-2)

and Rajkumar (P.W-3) against the appellants regarding ill-treatment or harassment of the deceased for vehicle, in the form of complaints made to them by the deceased, being deposed for the first time before the court and not earlier to the Police, cannot be accepted as correct and true beyond periphery of doubt.

25. Apposite to point out that no allegations regarding demand of vehicle, cruelty or harassment to the deceased were made by Rajkumar (P.W-3) in the merg intimation (Ex.P-3), which was recorded at his instance soon after the death of his sister Sarita Bai. Although the minute details are not necessarily required to be mentioned in the merg intimation, but when other details including the suspicion over the death of his sister were mentioned by Rajkumar (P.W-3) in merg intimation (Ex.P-3) while informing the death of his sister to the police, the allegations of harassment for vehicle or cruelty against the appellants too could have been mentioned by him. Absence of such allegations in merg intimation (Ex.P-3) also echo the possibility of it being an after thought.

26. More so, it also transpires from the evidence of Chintaman (P.W-2), that after her marriage deceased came to her parental house for three-four times from her in-laws' place and someone or the other used to come to take her back for her matrimonial home and last time appellant no.2 Vishnu Prasad had taken her back, but no demand for any money or Rajdoot motorcycle was ever made to the father or brother of the deceased in person except that the vehicle lying for repairs in the company was asked for, which too could not be said to be unjustified when the vehicle was given for repairs in the company.

27. There is no such evidence on record that deceased ever complained to her parents or brother about any physical torture or beating to her at the hands of the appellants. No injury was also found by Dr. Azad Kumar Saravagi (P.W-5) on her postmortem examination. There was also no cogent evidence on record of either mental cruelty meted out to the deceased. Merely addressing her as 'काली–कलूटी' or telling her "तेरे बाप ने कुछ नहीं दिया" as alleged, can hardly be said to be such willful conduct so as to drive a woman to commit suicide or to cause grave injury to her life or limb.

28. There is also no such evidence on record that appellants in any way aided, instigated or entered into conspiracy or in any way abetted the commission of suicide by the deceased. Though it has come in the evidence that deceased committed suicide within three days after going to her nuptial home, but there is nothing on record to indicate that any of the appellants aided, instigated or abetted the commission of suicide by her, or subjected her to cruelty or harassment for any unlawful demand within those three days so as to attract the presumption under Section 113-A of the Evidence Act.

29. The mere fact that the deceased consumed poison within three days after arriving her matrimonial home, by itself, cannot lead to a presumption that deceased

was subjected to mental or physical cruelty so as to drive her to commit suicide. No doubt, the death of deceased Sarita Bai occurred in the dwelling house of the appellants, which ought to have been explained by them, but then the initial burden is on the prosecution to prove the guilt of the appellants beyond all reasonable doubts. The Apex Court in the case of *Arvind Singh Vs. State of Bihar* (supra) has also observed as under:

> "While it is true that the husband being the companion in the bedroom ought to be able to explain as to the circumstances but there exists an obligation on the part of the prosecution to prove the guilt of the accused beyond all reasonable doubt. Criminal jurisprudential system of the country has been to that effect and there is neither any departure nor any escape therefrom."

30. The trial court in the instant case proceeded on assumption that when the deceased consumed insecticide, which affected her internal organs leading to vomiting etc., appellants did not take her to the hospital for treatment which amounts to cruelty on their part, but such facts were not on record, nor any such questions were put to the appellants during their examination under Section 313 of Cr.P.C. so as to give them an opportunity for giving an explanation in this behalf, no presumption under Section 113-A of Evidence Act could be drawn against the appellants on this basis in the facts and circumstances of the case.

31. The legal position regarding presumption under Section 113-A of the Evidence Act was examined by their lordships in the case of *Hans Raj Vs. State of Haryana* reported in AIR 2004 Supreme Court page 2790 and it was held as under:

> "Unlike Section 113-B of the Indian Evidence Act, a statutory presumption does not arise by operation of law merely on proof of the circumstances enumerated in Section 113-A of the Indian Evidence Act. Under Section 113-A of the Indian Evidence Act the presumption has first to establish that the woman concerned committed suicide within a period of seven years from the date of her marriage and that her husband (in this case) had subjected her to cruelty. Even if these facts are established the court is not bound to presume that the suicide had been abetted by her husband. Section 113-A gives a discretion to the Court to raise such a presumption, having regard to all the other circumstances of the case, which means that where the allegation is of cruelty it must consider the nature of cruelty to which the woman was subjected, having regard to the meaning of word 'cruelty' in Section 498-A of IPC. The mere fact that a woman committed suicide within seven years of her marriage and that she had been subjected to cruelty by her husband, does not automatically give rise to the

presumption that the suicide had been abetted by her husband. The Court is required to look into all the other circumstances. One of the circumstances which has to be considered by the Court is whether the alleged cruelty was of such nature as was likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health of the woman."

32. The Apex Court in it's three judges Bench decision rendered in the case of *Ramesh Kumar Vs. State of Chhattisgarh* reported in 2001 Cri. L. J. page 4724 also held that presumption under Section 113-A of Evidence Act is not mandatory and is only permissive and the "other circumstances of the case" used in Section 113-A suggests the need to reach a cause and effect relationship between the cruelty and the suicide for the purpose of raising a presumption.

33. In the instant case, however, there was no cogent or positive evidence on record that appellants subjected the deceased to any such mental or physical cruelty so as to drive her to commit suicide. There was also no cogent, consistent or reliable evidence on record that appellants harassed the deceased in connection with or in order to coerce her to meet any unlawful demand of property. Whatever the allegations of cruelty or harassment attempted to be brought forth on record by way of alleged oral complaints made by the deceased to Chintaman (P.W-2) and Rajkumar (P.W-3), which are not found to be reliable and acceptable, were also not of such nature so as to drive a woman to commit suicide or to attract the presumption under Section 113-A of the evidence Act. It would be profitable to refer to the following observation made by their lordships in the case of *State of West Bangal Vs. Orilal Jaiswal and another* reported in AIR 1994 Supreme Court page 1418:

"We may add here that the court should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it transpires to the Court that a victim committing suicide was hyper-sensitive to ordinary petulance discord and differences in domestic life quite common to the society to which the victim belonged and such petulance discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty."

34. Thus, as discussed above, when there was no positive, cogent and reliable evidence against the appellants that they subjected the deceased to cruelty or

harassment in connection with any unlawful demand of property or in any way abetted the commission of suicide, neither any presumption under Section 113-A of Evidence Act could be drawn against the appellants, nor could they be convicted under Section 498-A or 306 of IPC. The conviction of the appellants under Section 498-A and 306 of IPC, therefore, cannot be sustained and deserves to be set aside.

35. Appeal is, therefore, allowed. The conviction of the appellants under Section 498-A and 306 of IPC and sentence passed on them are hereby set aside. Appellants are acquitted of the aforesaid charges.

36. Appellants are on bail. Their bail bonds shall stand discharged.

Appeal allowed.

I.L.R. [2010] M. P., 674
APPELLATE CRIMINAL
Before Mr. Justice Piyush Mathur
3 December, 2009*

MAZBOOT SINGH ... Appellant
Vs.
STATE OF M.P. ... Respondent

A. Evidence Act (1 of 1872), Section 3 - *Child witness - When there exists a reliable and trustworthy testimony of daughter of prosecutrix, it becomes difficult for Court to brush aside the testimony of the child witness.* (Para 14)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – बालक साक्षी – जब अभियोक्त्री की पुत्री के विश्वसनीय और भरोसे लायक परिसाक्ष्य का अस्तित्व हो, न्यायालय के लिए यह कठिन हो जाता है कि बालक साक्षी के परिसाक्ष्य की उपेक्षा की जाए।

B. Evidence Act (1 of 1872), Section 3 - *Child witness - Reliability - Child witness has understood the true meaning of oath and necessity of speaking truth and has given rational answers to all the questions put to her - Not exhibited any intellectual incapacity to understand the nature of questions - No iota of doubt exist about tutoring by prosecution - Evidence reliable.* (Para 14)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 3 – बालक साक्षी – विश्वसनीयता – बालक साक्षी ने शपथ और सत्य बोलने की आवश्यकता का सही अर्थ समझ लिया और उससे पूछे गये सभी प्रश्नों का युक्तिसंगत उत्तर दिया – प्रश्नों की प्रकृति समझने में कोई बौद्धिक असमर्थता प्रदर्शित नही की – अभियोजन द्वारा यंत्रणा देने के बारे में जरा भी संदेह विद्यमान नही – साक्ष्य विश्वसनीय।

C. Penal Code (45 of 1860), Sections 354 & 376 - *Rape or attempt*

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*Cr.A. No.42/2006 (Gwalior)

to outrage modesty - Medical evidence - When medical evidence is conspicuously silent about occurrence of injuries either on the person or on private part of prosecutrix, irresistible conclusion of there being no forcible intercourse could easily be drawn.. (Para 16)

ग. दण्ड संहिता (1860 का 45), धाराएँ 354 व 376 – बलात्संग या लज्जाभंग करने का प्रयत्न – चिकित्सीय साक्ष्य – जब चिकित्सीय साक्ष्य या तो अभियोक्त्री के शरीर पर या गुप्तांग पर क्षतियों की उपस्थिति के बारे में सुस्पष्ट रूप से मौन हो, बलपूर्वक मैथुन न होने का अप्रतिरोध्य निष्कर्ष आसानी से निकाला जा सकता।

D. Penal Code (45 of 1860), Section 354 - *Attempt to outrage the modesty - Prosecution to establish causation of assault or use of criminal force against a woman with intend to outrage her modesty.* (Para 17)

घ. दण्ड संहिता (1860 का 45), धारा 354 – लज्जाभंग करने का प्रयत्न – अभियोजन को हमले का कारण या किसी स्त्री के विरुद्ध उसकी लज्जाभंग करने के आशय से आपराधिक बल का प्रयोग साबित करना होगा।

E. Criminal Procedure Code, 1973 (2 of 1974), Section 222 - *When offence proved included in offence charged - When it is not clear or doubtful as to what offence is committed or made out, then the Court possess the power to convict a person in relation to a minor offence established from the evidence brought on record.* (Para 18)

ङ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 222 – जब साबित अपराध आरोपित अपराध में सम्मिलित हो – जब यह स्पष्ट न हो या शंकास्पद हो कि कौन सा अपराध किया गया है, तब न्यायालय को, अभिलेख पर लायी गयी साक्ष्य से साबित किसी छोटे अपराध के सम्बन्ध में किसी व्यक्ति को दोषसिद्ध करने की शक्ति है।

Cases referred :

AIR 1979 SC 135, (2007) 2 SCC 170, (2009) 6 SCC 712, (2008) 15 SCC 133, (2005) 8 SCC 122.

N.D. Singhal & Gagan Sharma, for the appellant.

R.P. Johri, Panel Lawyer, for the respondent/State.

J U D G M E N T

Piyush Mathur, J. :–This is an Appeal against the judgment of conviction passed by Additional Sessions Judge Chachauda, District Gwalior in Session Trial No. 323/2003 vide judgment Dated 05/01/2006 whereby the Appellant Mazboot Singh has been convicted under Section 376 of the Indian Penal Code and ordered to undergo sentence of Rigorous Imprisonment for a period of Seven years with a fine of Rs. Five Hundred.

2. The Prosecution has demonstrated before the Trial Court that on Date 15.09.03 at Village Tulsikheda, the Prosecutrix Halki Bai had gone to her fields along with her daughter Savita Bai and when at about 11:00 in the Morning Hours

she was removing the grass from her fields, (where crop of Maize was grown) the Accused Mazboot Singh caught hold of her from behind and threw her on the earth, with an intention to forcibly commit intercourse and when her daughter Savita (aged 9 years) made hue and cry, then the Accused ran away from the spot. The Prosecution further demonstrated that the Prosecutrix Halki Bai narrated the entire story to her husband Kailash in the Evening Hours but since it was raining during the entire day, the FIR could only be lodged on the next day i.e. on Date 16.09.03 at 11:00 hours. The Stations House Officer Kumbhraj recorded the FIR, at the instance of the Prosecutrix Halki Bai and registered an offence under Section 376 of IPC against the Accused/Appellant Mazboot Singh and sent the Lady for her Medical Examination where PW-6 Dr. S.J. Baig examined her.

3. Shri N.D. Singhal, Counsel for the Appellant, submits that there is an un-explained and inordinate delay in lodging of the FIR, in as much as, the incident has occured at 11:00 hours on Date 15.09.03, whereas the FIR was lodged at 11:00 hours on the next day i.e. on Date 16.09.03 and there exist contradiction in the reason of delay in lodging the FIR in as much as the FIR, offers an explanation of delay on the strength of falling of rain, whereas the Prosecutrix , her husband and other witnesses denied this story at the time of the recording of their Statements before the Court and had developed a story of Bribe being demanded by the Police Officers, for the purposes of lodging the FIR. Shri Singhal submits that the explanation offered for the delay in Lodging the FIR after 24 hours is not only fatal to Prosecution and un-believable at first blush because the natural rain do not continue for 24 hours, which could deter a person not to approach the Police Station, which was situated at a short distance of Two Kms. only and no witness has corroborated each other in the Statements about the demand of Bribe. He has made a reference to the Statements of PW-1/Kailash, PW-2 Halki Bai to demonstrate that even the husband and wife do not support each other about the story of lodging of delayed FIR.

4. Shri Singhal has cited a Judgment of the Supreme Court reported as AIR 1979 Supreme Court, 135 *Ganesh Bhavan Patel Vs. State of Maharashtra* to demonstrate that the delay in recording the FIR and the Statements of witnesses, even while taking into consideration the surrounding circumstances, would lead to an irresistible conclusion that the delay and its explanation offered about lodging of FIR has to be examined with great caution and circumspection and the complete benefit of delay should be given in favour of the Accused.

5. Shri Singhal further submits, on the strength of the Medical evidence, to demonstrate that when the Lady was examined by Dr. S.J. Baig neither the injury marks were found upon her body nor signs of forcible intercourse were seen by the Lady Doctor. He further submits that when the Prosecutrix has described herself to be completely stained with mud, it was expected from the Medical Expert to have made reference about the status of the clothes and the existence

of the mud upon the Prosecutrix, because that would have further corroborated or contradicted the story of the Prosecution. He further submits that even though the necessary slide of the semen and vaginal fluid were obtained by the Doctor, no specific proof of existence of semen on the clothes of the Prosecutrix was proved in evidence.

6. Shri Singhal has referred to the Spot Map (Exhibit P-5) to demonstrate that the Fields of the Complainant and the Accused were adjoining each other and crop of Maize was grown in the Fields, therefore it was difficult for any women not to sustain any injury in view of the nature of the crop and the location, suggested in the Spot Map. He referred to the Statements of prosecutrix to demonstrate that even if the place of the Commission of the offence is taken to be on the boundary (Medh) of the field it would have exposed the Lady and the Accused to the vicinity of the adjoining Agriculturist and since none of the adjoining Agriculturist were examined by I.O., the entire story put forth by the Persecution gets suspicious, as the neighboring Agriculturist were the best available witnesses, in view of the fact that the incident occurred in the broad day light.

7. Shri Singhal has read over extensively the Statements of Savitabai (PW-3) aged 9 years to demonstrate that though the Trial Court has found her to be a child of sound understanding, however her evidence is consisting of sufficient contradictions, on the basis of which, it can not be completely relied upon, however he has conveniently picked up those statements of Savitabai (PW-3) to demonstrate that it is only the child witness Savitabai who made an alarm, upon looking the Accused at the scene of offence, however she nowhere states about the event of shouting of her mother and while highlighting this conduct of the child witness Shri Singhal demonstrates that in the peculiar facts and circumstances of this Case, it becomes completely unreliable to sustain a conviction on the basis of contradictory Statements of the Prosecutrix and her own daughter about the commission of the offence.

8. The Counsel for the Appellant has articulated his argument on the strength of the timings reflecting in the FIR and the Statements of Halkibai (PW-2) and Savitabai (PW-3) where not only the prosecutrix had described the timings of the offence around at 11:00 in the morning hours, (which she further clarifies and confirms in her testimony before the Court) whereas PW-3/Savitabai States that the incident took place when the Sun was about to set. Shri Singhal submits a reverse argument here that when the Trial Court has found the child witness to be trustworthy, therefore her entire testimony has to be treated to be trustworthy even for the purposes of comparing the two sets of evidence, in relation to the timings offered by the Prosecution witnesses, to understand as to whether any incident took place or not or further to demonstrate the exact timings of the incident. He heavily stressed upon the contradiction crept in the Statements of the the two witnesses PW-2 and PW-3 which highlights the unnatural conduct of the two witnesses about the timings of the incident.

9. Shri Singhal has read over the Statements of PW-1 Kailash, PW-2 Halkibai and PW-3 Savitabai to explain the conduct of the Prosecutrix while bringing the entire chain of events to develop the story of consent of the Prosecutrix, where in Paragraph (1), PW-2 Halkibai nowhere states about the fact of her shouting throughout the incident, which shows that she made no hue and cry about the incident. Shri Singhal further submits that PW-3 Savitabai has no where averred that her mother has shouted at all, whereas she has stated that while watching the Accused person lying on her mother she shouted herself and thereafter the Accused ran away from the Spot. Therefore the learned Counsel for the Appellant contends that the conduct of the Prosecutrix becomes very relevant for understanding the nature of the offence as also for presuming her consent in the commission of the offence. He also made a reference to the Age and Personality of the Prosecutrix and the Accused (who are 30 years and 46 years of age respectively) to demonstrate the physical disparity, due to the age and the resistance, which the Prosecutrix could have offered in the given circumstances and his submission gets fortified from a perusal of the Medical Report that had the physical force been applied by the Accused person, for securing intercourse with the lady, the possibility of occurrence of injury marks on the person of the Proseuctrix could have not been ruled out and since the Medical Report is quite clear about the non existence of the injuries upon the Proseucturix, the story put forth by the Prosecution about offering resistance gets belied.

10. Shri R.P. Johri, Learned Panel Lawyer appearing on behalf of the State has argued that apart from the Statements of the Proseucutrix and her husband the Statements of the child witness PW-3 Savitabai is very relevant because she has actually seen the incident and her status of being eye witness can not be ignored merely on account of certain minor lapses or contradictions in her testimony. He very strongly argued that all the elements requiring for the constitution of the offence of the rape are fulfilled and a perusal of the testimony of proseucutrix alone would established that the Accused/Appellant has forcibly made intercourse with the Prosecutrix and as such the Sessions Court has not committed any illegality in convicting the Appellant under Section 376 of the Indian Penal Code.

11. Shri N.D. Singhal appearing for the Accused has read over the Statements of PW-3 Savitabai and PW-1 Halkibai to demonstrate that the witnesses have narrated incident that the Accused was found to be lying on the person of the Proseuctrix, rather he was described to have fallen upon her (loom gaya) but none of the Prosecution witnesses have ever said about the actual act of forcible intercourse or even about minor penetration, therefore it could not be said that the offence as described and punishable under Section 376 of IPC was made out at all.

12. The argument advanced about the Delay in lodgement of the F.I.R. prima facie appears to be convincing that even when the incident occurred at 11:00

Morning Hours, the Prosecutrix choose to remain silent up till Evening, when her Husband Kailash P.W.(1) came back to Home, from the Fields and even thereafter the F.I.R. could be lodged on the Next Day, by offering an unrealistic averment about continuous falling of Rain Water, but a careful reading of the contents of the F.I.R. reveals that the Delay in the lodgement of the F.I.R. was accurately revealed at the time of the recording of the F.I.R and as such it could not be treated to be so fatal that the entire story about the commission of the offence could become untrustworthy or unreliable. The Supreme Court has examined several such illustrations, in the case of *Ramdas Vs. State of Maharashtra* (2007) 2 SCC 170, which could be treated to be plausible causes of Delay in the lodgement of the F.I.R. wherein the Court has ruled that the Courts should consider totality of the evidence, for weighing as to whether the delay in lodging the Fisrt Information Report adversely affects the case of the Prosecution and since there exist adequate explanation about the Delay in the present case, I do not find that there was such a delay in the lodgement of the F.I.R. which could be treated to be fatal or could enure to the advantage of the accused, in the peculiar facts and circumstances of the present case.

13. A close analysis and scrutiny of the Statement of PW-2 Halki Bai demonstrate that the Prosecutrix has made a very categorical narration of the entire scene, right from the stage of recording of the FIR till the recording of her statement before the Court and has made no material contradictions as regards the holding of her person from behind by the Accused persons and forcibly falling her on the earth and making an attempt to commit the offence of rape, and she has also specifically averred about the actual penetration in her statement but the manner in which she has narrated the incident about the actual penetration, appears to be quite unnatural, because she has described the presence of her daughter Savitabai in such a close proximity of the place of incident that it becomes impossible to ascertain as to whether there was an act of forcible intercourse by the Accused person at all, as the Prosecturix herself clarifies that the moment accused fell upon her, her daughter made an alarm by shouting. This goes to show that the daughter did not shout when the Accused caught the Lady or forcibly threw her on the floor of the field but she shouted at that point when she saw him lying upon her Mother.

14. Had there been no eye witness of the incident and had there been no comparable eye witness account on record, it would have been an 'Open and Shut' case for the Prosecution to have secured a conviction of the accused, only and exclusively on the strength of the testimony of the Prosecutrix herself, (who has made a categorical statement about actual penetration), but when there exist a reliable and trustworthy testimony of none other than the Daughter of the Prosecutrix, (who has proved herself to be a girl of sound understanding, in the entire narration of events), it becomes difficult for the Court to brush aside the

testimony of the Child Witness, who gives a graphic description of each and every minute detail of the incident, which further leaves the Court with no choice except to accept the testimony of an innocent witness, who seems to bear or carry no malice or bias in her heart or mind. The Supreme Court has observed in its recent Judgement in *Himmat Sukhadeo Wahurwagh Vs, State of Maharashtra* (2009) 6 SCC 712 that when the witness of tender age is able to discern between right and wrong and understand the implication of what he/she says then Section 118 of the Evidence Act would not preclude a Child from being a Witness and the only test required to be applied would be to examine as to whether the Witness understand the sanctity of Oath and the import of the Questions that were put to him/her. Therefore while analyzing the testimony of the Child Witness in comparison to the testimony of an Adult Woman/Prosecutrix, I find that the Child Witness had understood the true meaning of Oath and necessity of speaking Truth and has given rationale answers to all the questions put to her and has not exhibited any intellectual incapacity to understand the nature and/or import of the questions put to her and no iota of doubt exist about tutoring by the prosecution and even when the Supreme Court has insisted for the corroboration of the testimony of the Child Witness, (as a Child being susceptible to tutoring), the fact remains that a cautious scrutiny of the entire Evidence, done with clarity and circumspection reveals that the evidence suggesting for the attempt to outrage the modesty of the Prosecutrix certainly gets corroborated with the testimony of the Child Witness, therefore this Court accepts the truthfulness of the graphic description given by the Child Witness about the entire incident and record a finding that the Prosecution has failed to establish beyond reasonable doubt that the accused has committed an Offence of Rape, in terms of Section 376 of the Indian Penal Code however the Prosecution has proved that the appellant has committed an Offence punishable under Section 354 of the Indian Penal Code and consequently while granting him the 'Benefit of Doubt', this Court acquits the Convict Appellant Mazboot Singh from the Charge of Section 376 but convict him under Section 354 of the Indian Penal Code and sentence him to undergo Rigorous Imprisonment for Two Years with Fine of Rs. 500/-.

15. The Supreme Court has recently examined in the case of a Gang Rape, the scope of the application of the provisions of Sections 113-A, 113-B and 114-A of the Evidence Act, for ascertaining the correctness of the statements of the Prosecutrix and has ruled in the case *Raju Vs. State of M. P.* reported as (2008) 15 SCC 133 that the allegations about Rape must be examined as that of an injured witness, whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth and at best her statement can be adjudged on the principal that ordinarily no injured witness would tell a lie or implicate a person falsely, but when the allegations about the commission of Rape are not proved then the benefit of doubt should be

extended to the accused person, since Truth and Falsehood are so inextricably intertwined, that it becomes impossible to discern, where one ends and the other begins. Therefore the caution given by the Supreme Court in its previous Judgement of *State of M. P. Vs. Dayal Sahu* (2005) 8 SCC 122 also gets attracted, where the Supreme Court (while finding acquittal of accused, on the ground of non-examination of the Doctor to be bad) has observed that the Doubt should be a reasonable doubt and the Court should not reverse the findings of guilt on the basis of irrelevant circumstances or mere technicalities. However there exist relevant circumstances and cogent evidence suggesting for the non-commission of Offence of Rape, therefore in view of contradictory evidence of actual penetration /intercourse, this Court arrives at a conclusion that this would be an appropriate case where the accused should be granted the benefit of doubt.

16. When the testimony of PW-3 Savitabai is independently examined, it reflects that she shouted exactly at that point of time when the Accused forcibly caught hold of the Prosectrix and threw her on the floor of field therefore PW-3 Savitabai has not said anything about the act of penetration at all and when specific questions about her presence on spot were put to her during the Cross-examination she confirmed that she shouted immediately when the Accused threw her mother on the floor of the field. This specific evidence of PW-3 Savita Bai demonstrates that she has narrated the correct story about simply making an attempt by the Accused person for molesting the Prosecutrix and not an act of actual intercourse. The Medical Report is conspicuously silent about the occurrence of injuries either on the person or on the private parts of the Prosecutrix, and as such an irresistible conclusion of there being no forcible intercourse could be easily drawn. Therefore, while granting benefit of doubt to accused, I do not find that an offence of committing rape is made out, which could be punishable under Section 376 of the IPC, however a perusal of the entire testimony of the Prosecution Witnesses definitely demonstrate that a calculated attempt to outrage modesty of the Prosexutrix was made on behalf of the Accused person, with the use of criminal force as defined in Section 354 of IPC. For ready reference Section 354 IPC is quoted herein below:

> **" 354 Assault or criminal force to woman with intent to outrage her modesty-**Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

17. The element requiring for proving a charge of Section 354 is to establish causation of assault or use of criminal force against a woman with intend to outrage her modesty and since in the present matter the Proseucutrix and her daughter Savitabai (PW-3) have proved in their Statements that the Accused /

Appellant Mazboot Singh has used criminal force against the Proseuctrix, by catching hold of her from behind and throwing her on the floor of the field, with an intention to outrage her modesty, an offence under Section 354 of the Indian Penal Code is certainly made out and proved.

18. The Code of Criminal Procedure has envisioned this exigency and had made specific provision in Section 222, when it is not clear or doubtful as to what offence is committed or made out, (without imposition of the substantive charge), then the Court possess the power to convict a persons in relation to a minor charge, established from the evidence brought on record, and since Section 354 happens to be a minor charge or an alternative charge of the substantiative offence punishable under Section 376 of IPC the accused Mazboot Singh is convicted for committing an offence under Section 354 of IPC. The judgment of the Supreme Court and this Court throw sufficient light on the subject that when the Court finds that accused has not committed an offence in the nature of Section 376 IPC, he could be conveniently convicted for a lesser offence under Section 354 IPC therefore, I hereby convict the Appellant under Section 354 of IPC and acquit him from the charge of Section 376 IPC by granting him benefit of doubt. Consequently the Judgment of conviction passed against accused Mazboot Singh under Section 376 IPC is set aside, instead he is convicted under Section 354 IPC for a sentence of Rigorous Imprisonment of Two years, with fine of Rs. 500/-.

19. The Record demonstrates that the Accused/Appellant was in custody in between Dates 1.10.03 to 14.10.03. It has also been brought to my notice that after the delivery of the Judgment of the Sessions Court on Date 05.01.06, the Applications for suspension of sentence were made on behalf of the Accused/ Appellant in the present Appeal but the same were rejected by two Orders Dated 22.02.06 and Dated 03.07.06 which shows that right from the date of delivery of the Judgment by the Sessions Court, the Accused/Appellant remained in Judicial Custody (Jail) and has served the entire sentence of two years, now awarded under Section 354 IPC, therefore he would be entitled to be released immediately, if he is not detained in connection with some other offence.

Therefore, Criminal Appeal is partly allowed, in terms of the aforesaid judgment.

Appeal partly allowed.

SRIKANT Vs. STATE OF M.P.

I.L.R. [2010] M. P., 683

APPELLATE CRIMINAL

Before Mr. Justice K.S. Chauhan

15 December, 2009*

SRIKANT ... Appellant

Vs.

STATE OF M.P. ... Respondent

A. Penal Code (45 of 1860), Sections 304-B & 498-A, Evidence Act, 1872, Section 32 - *Dying declaration - Reliability - Principal of school recorded dying declaration of deceased - No certificate of doctor that deceased was fit to give statement - Statement not recorded in question answer form - Statement not read over to deceased - Statement of Principal of school is self contradictory on material facts - Principal of school appears to be interested witness - Evidence unreliable.* (Para 10)

क. दण्ड संहिता (1860 का 45), धाराएँ 304–बी व 498–ए, साक्ष्य अधिनियम, 1872, धारा 32 – मृत्युकालिक कथन – विश्वसनीयता – स्कूल के प्राचार्य ने मृतक का मृत्युकालिक कथन अभिलिखित किया – चिकित्सक का कोई प्रमाण पत्र नही कि मृतक कथन देने लायक थी – कथन प्रश्न उत्तर के रूप में नही लिखा गया – कथन मृतक को पढ़कर नही सुनाया गया – स्कूल के प्राचार्य का कथन तात्विक तथ्यों पर विरोधाभासी – स्कूल का प्राचार्य हितबद्ध साक्षी प्रतीत होता है – साक्ष्य अविश्वसनीय।

B. Penal Code (45 of 1860), Sections 304-B & 498-A - *Dowry death - Deceased died along with her 2 year old girl by burning within 7 years of marriage in abnormal circumstances - Appellant also did not inform the incident to the police or to his in-laws - Circumstances suggest that deceased was being harassed by persistent and consistent demand of dowry - Guilt of appellant proved beyond reasonable doubt.* (Para 29)

ख. दण्ड संहिता (1860 का 45), धाराएँ 304–बी व 498–ए – दहेज मृत्यु – मृतक की उसकी 2 वर्ष की लड़की सहित विवाह के 7 वर्ष के भीतर असामान्य परिस्थितियों में जलने से मृत्यु हो गयी – अपीलार्थी ने भी घटना के बारे में पुलिस या अपने ससुराल पक्ष को जानकारी नही दी – परिस्थितियां सुझाव देती हैं कि मृतक को दहेज की सतत् और निरंतर माँग के लिए तंग किया जा रहा था – अपीलार्थी का दोष युक्तियुक्त शंका से परे साबित।

Cases referred :

2007(3) MPLJ 554, (2008) 12 SCC 51.

Yogesh Dhande, for the appellant.

Dildar Singh Purba, Dy.G.A., for the respondent/State.

G.P. Patel, for the complainant.

*Cr.A. No.7/1991 (Jabalpur)

SRIKANT Vs. STATE OF M.P.

JUDGMENT

K.S. CHAUHAN, J. :–Appellant No.2 Ram Charan has died during the pendency of this appeal, hence appeal against him has been abated.

2. This criminal appeal has been preferred under Section 374(2) of the Code of Criminal Procedure being aggrieved by the judgment, finding and sentence dated 20.12.1990 passed by Additional Sessions Judge, Dindori (M.P.) in S.T. No.10/1990, whereby the appellant has been convicted under Section 498-A and 304-B of I.P.C. and sentenced to R.I. for 3 years and R.I. for 10 years. Both the sentences were directed to run concurrently.

3. The prosecution case in short is that Mamta Bai was married with this appellant Srikant in the year 1986 in the Collective Marriage Conference held at Jabalpur. At that time no any dowry was settled but afterwards the appellant started demanding dowry of Rs.15,000/- and used to harass her and subjected to cruelty on account of not fulfilling the demand. Badri Prasad Gupta (PW-17) the brother of Mamta who was Sub Engineer in Irrigation Department at Baikunthpur managed the appellant to open a hotel at Baikunthpur which was run by him for 2½ months but the business of hotel could not run properly hence it was closed. Thereafter appellant had gone to Bhopal for business purposes. From there also he returned to Baikunthpur and intended to start the business of stationery at Vikrampur, therefore, Badri Prasad Gupta gave Rs.2500/- to him. Thereafter also he persisted his demand and got the letters written by his wife Mamta (deceased) and brother Ramakant but the parents and the brothers of deceased could not manage the same. Therefore he continued the harassment of his wife Mamta Bai. On 25.07.1989 Mamta poured kerosene over her and her daughter Ruby aged 2 years and ablazed the fire on account of which they sustained burn injuries. Guljarilal (PW-7) informed at outpost Vikrampur on the same day. This report was written in Rojnamcha Sanha (Ex.P-33C) by Ravishankar (PW-37). Sardar Makhan Singh, Principal of Government Higher Secondary School, Vikrampur recorded her dying declaration (Ex.P-26). Mamta and her daughter Ruby were sent to P.H.C. Dindori where they were admitted. Dr. S.K. Khare (PW-11) intimated the concerned police for recording her dying declaration, therefore, at the request of concerned police C.L. Yadav (PW-8), Naib Tahsildar and Executive Magistrate recorded her dying declaration (Ex.P-6). On 26.07.1989 at 3:05 a.m. Mamta died, her daughter Ruby also died. Marg intimation No.0/89 was registered at Police Station Dindori from where it was sent to Police Station Shahpur where the marg intimation No.15/89 under Section 174 of Cr.P.C. was registered. After preparing panchnama of dead body of Mamta the postmortem examination was conducted by Dr. S.K. Khare (PW-11) and Dr. R.M. Mishra (PW-29). According to their opinion the cause of death was shock as a result of extensive burns. However, viscera and articles were preserved for further chemical and his to

pathological examination. The inquiry was made. The spot map was prepared. The container of the kerosene and match box etc were seized from the spot. Other articles were also seized. On the basis of inquiry of marg intimation, F.I.R. of Crime No.81/89 under Section 306 of I.P.C. was registered at Police Station Shahpur. The statement of the witnesses were recorded during the course of investigation. The seized articles were sent to F.S.L. Sagar for chemical examination. After completing the investigation, the charge sheet was filed in the Court of J.M.F.C. Dindori who committed the case to the Sessions Court for trial.

4. Accused was charged under Section 498-A, 304-B or in alternative under Section 306 of I.P.C. He denied the guilt and claimed to be tried mainly contending that he is innocent. The prosecution examined as many as 37 witnesses whereas the appellant did not examine any witness. After appreciating the evidence trial Court found him guilty under Section 498-A and 304-B of I.P.C. and sentenced thereto as stated hereinabove in para no.2 of this judgment. Being aggrieved by the judgment, finding and sentence the instant appeal has been preferred on the grounds mentioned in the memo of appeal.

5. Shri Yogesh Dhande, learned counsel for the appellant submitted that the court below has not appreciated the evidence in proper perspective. Since the marriage was performed in a Collective Marriage Conference, therefore, there was no question of settlement of dowry. The appellant has never demanded the money in dowry. His economic condition was poor therefore he demanded the money for starting the business. The death was accidental and the court below has committed an illegality in not relying upon the dying declarations given by Mamta. There is no evidence that she was subjected to cruelty soon before her death, therefore, the prosecution has failed to prove the guilt beyond reasonable against the appellant and the Court below has committed illegality in convicting and sentencing the appellant. The finding of guilt is erroneous which deserves to be set aside and the appellant is entitled for acquittal.

6. On the other hand, Shri Dildar Singh Purba, learned Dy. G.A. appearing on behalf of respondent/State and Shri G.P.Patel, learned counsel for the complainant supported the impugned judgment, finding and sentence mainly contending that death of Mamta was not accidental. The dying declarations were given under the pressures of the appellant and his family members. There is ample evidence that she was subjected to cruelty. She has written the letters from time to time in this regard. The finding of guilt is proper hence does not call for any interference.

7. The main point for consideration in this appeal is that whether the court below has committed any illegality in convicting and sentencing the appellant under Section 498-A and 304-B of I.P.C.

8. There is no dispute that marriage of Mamta was performed with this appellant in the year 1986 in Collective Marriage Conference held at Jabalpur and she died

on 26.07.1989 by burn injuries in her in-laws house. The dispute is whether her death was suicidal or accidental.

9. It is borne out from the record that one Guljarilal (PW-6) informed police Vikrampur on 25.07.1989 about this incident. The report was written in Rojnamcha Sanha (Ex.P-33C) by Ravishankar (PW-37) the then A.S.I. at outpost Vikrampur. He immediately rushed to the spot and found that Mamta and her daughter were seriously burnt. Sardar Makhan Singh (PW-35) who was the Principal of Government Higher Secondary School, Vikrampur recorded her dying declaration (Ex.P-29) wherein she stated that when she was cooking meals the 'Dibbi' (small container) of kerosene fell down on account of which she caught fire and burnt. However, this witness in the cross examination has admitted that he did not see any oven or container of kerosene there. The kerosene was not spread there. There was no smell of kerosene from the body of Mamta. However, he has been contradicted from his earlier police statement (Ex.P-30). He has further stated that Mamta was seriously burnt. He has taken her thumb impression on dying declaration (Ex.P-29). But this dying declaration was not read over to Mamta. On another dying declaration (Ex.P-6) Dr. S.K. Khare has given certificate that her both hands were burnt hence she could not sign or affix thumb impression on it. In the aforesaid situation the evidence of Sardar Makhan Singh (PW-35) is not reliable that she affixed thumb impression on Ex.P-29. He is contradicted from his own statement on this point.

10. It is apparent that Ravishankar (PW-37) did not send any requisition in writing to this witness for recording her statement. It appears that on the oral request of the concerned Inspector he has done so. This statement has not been recorded in question and answer form. It has not been read over to her. There is no certificate of the Doctor that she was fit to give such statement. Autopsy Surgeons who conducted the postmortem examination of the deceased have clearly stated that the smell of kerosene was coming out from the dead body of deceased. Thus the statement of this witness is contrary to the statement of the Autopsy Surgeons. Though he has stated in his police statement Ex.P-30 that the smell of kerosene was coming out from her body but in the Court he has denied such fact. Thus he is giving the self contradictory statement on the material fact. Therefore, he appears to be an interested witness and no reliance can be placed on his evidence.

11. Mamta and her daughter Ruby were sent to P.H.C., Dindori and her dying declaration (Ex.P-6) was recorded by C.L. Yadav (PW-8), the then Naib Tahsildar and Executive Magistrate, Dindori. The certificate that she was fit to give statement was obtained from Dr. S.K. Khare (PW-11). C.L. Yadav (PW-8) has given statement that he recorded the dying declaration of deceased Mamta and she gave such statement. She remained conscious during the course of recording the statement. This witness has stated that at the time of recording the statement no other person except doctor was present there. Other persons were sent outside.

12. On perusal of his statement it reflects that he has given the evidence before the Court in a very short slipped manner. He has not given the evidence in detail as to what the deceased stated in her dying declaration. The court also failed in his duty to record the statement of this witness properly. It is evident that such dying declaration was not recorded in the question and answer form, therefore, the dying declaration was not recorded properly. It is evident that the members of her in-laws family were there when she was admitted in P.H.C. Dindori therefore the possibility of their influencing the deceased for giving such statement cannot be ruled out. Thus dying declaration was not given voluntarily. Moreover, as stated earlier, the theory of falling down kerosene and consequently catching the fire has been negatived in view of the evidence of Autopsy Surgeons Dr.S.K. Khare (PW-11) and Dr. R.M. Mishra (PW-29) who have clearly deposed that the smell of kerosene was coming out from the body of the deceased which can only be possible by pouring the kerosene over body and setting the fire. Dr. R.M. Mishra (PW-29) has clearly opined that it was not the case of accidental fire. This is not proved that Mamta gave dying declaration voluntarily.

13. Learned counsel for the appellant placed reliance on the decision in the case of *Hariram @ Harishankar vs. State of M.P.*, 2007 (3) M.P.L.J. 554 wherein it has been held that dying declaration can be acted without corroboration if it is found to be otherwise true and reliable. Corroboration is necessary when the same is infirm.

14. So far as the present case is concerned the dying declaration was not true and voluntary and it was given under the influence of the family members of the appellant, therefore, the cited case is of no help to the appellant.

15. Mamta died on 26.07.1989 at 3:05 a.m. The panchnama of dead body was prepared. Postmortem examination was conducted by Dr. S.K. Khare (PW-11) and Dr. R.M. Mishra (PW-29). According to their opinion the cause of death was shock as a result of extensive burns. The postmortem examination report is Ex. P-14A which contains the signature of both the Autopsy Surgeons.

16. Thus Mamta died on account of extensive burns. Keeping in view the evidence of the Autopsy Surgeons, her death can not be regarded as accidental hence the contention of the learned counsel for the appellant that her death was accidental is not acceptable. Since Mamta died due to burns within 7 years of her marriage, therefore, the fact that she died in abnormal circumstances within the span of 7 years of her marriage in her in-laws house has been established.

17. The prosecution has led the evidence that Mamta was harassed by the appellant for dowry and she was subjected to cruelty on account of which she committed suicide. Such evidence deserves to be considered.

18. Ramdayal Gupta (PW-22) is the father of deceased Mamta and Ravishankar Gupta (PW-7), Badri Prasad Gupta (PW-17) and Purushottam Lal Baishya

March-10 (First)

(PW-3) are her brothers. They have given evidence that appellant demanded Rs.15,000/-. The letters were also received. They have denied the suggestive question that the appellant demanded such money for doing the business.

19. Ramdayal Gupta (PW-22) has deposed that Rs.7,000/- were given at the time of marriage but the appellant demanded Rs.15,000/- at the time of 'Bidai'. His daughter used to tell him that the appellant used to demand money. She told this thing 3-4 times and lastly before 5-6 months of this incident. Since he was not having money therefore the same could not be given. His daughter wrote the letter Article-B to him which was seized by the police. In the cross examination he has stated that he did not lodge the report regarding the demand of dowry because he wanted relation to be maintained.

20. Ravishankar Gupta (PW-7) has also given evidence that appellant demanded Rs.15,000/- but he did not provide the same. He also received letter Article-D written by the brother of this appellant.

21. Badri Prasad Gupta (PW-17) has also stated that the appellant demanded Rs.15000/-. He used to harass his sister, therefore, he took his sister to Baikunthpur where he was serving. The appellant also reached there. He managed to open a hotel to appellant but it could not run for a long time and hence closed after 2½ months. Thereafter the appellant went to Bhopal to do some other business. On Holi festival he returned from Bhopal. Thereafter he intended to start the business of stationery at Vikrampur for which he provided Rs.2,500/- but after a week one letter written by his sister was received wherein it was mentioned that she was in trouble. This letter is Article-C. This witness has also denied the suggestive question that the appellant demanded the money for starting the business. He has clearly stated that appellant warned him that if the demand is not fulfilled then he will not come to take back his wife to her in-laws house. This fact was also mentioned in the letter Article-D.

22. Purushottam Lal Baishya (PW-23) has stated that after marriage he had gone to Vikrampur where the appellant demanded Rs.15,000/- but he refused. Thereafter he demanded Rs.3000/- or Rs.4000/- but he expressed his inability to provide any amount. He also received the letter of the appellant wherein the demand of money was made but that letter is not traceable. He has also stated that his sister used to tell him that appellant harasses her on account of not giving the dowry.

23. Thus all these witnesses have given evidence against the appellant that he used to demand the money and harass Mamta for not fulfilling such demand. None of them has admitted the defence that appellant used to demand such money for starting the business.

24. On appreciation of their evidence it is manifestly clear that though the dowry was not settled at the time of marriage but thereafter he started demanding cash

of Rs.15,000/-. Demand was not disputed by the appellant. However, his defence is that he demanded the money for starting the business but none of the witnesses has admitted his defence and he has not produced any evidence to prove this fact. The evidence of Badri Prasad Gupta that appellant warned that in case of not providing Rs.15,000/- he will not come to take his wife back to in-laws house clearly indicates that this demand was in the form of dowry and not by way of request for starting the business. The letters Articles A, B, C & D were said to have been written either by Mamta or by Ramakant younger brother of this appellant at the instance of appellant or his father.

25. Ramakant Gupta (PW-13) who is the brother of this appellant has deposed that Rs.15,000/- were settled at the time of marriage. Out of it Rs.7000 to 8000/- were given at the time of marriage. The assurance was given to provide the rest amount later on therefore, he wrote a letter to provide such money for business at the instance of his father.

26. The evidence of Rama Kant Gupta also establishes the fact that the demand of money was made. As observed earlier this demand was not made for starting business but in the form of demand.

27. The letters written by Mamta and by Ramakant brother of this appellant have been proved by the evidence of H.S. Tomar (PW-36) Hand Writing Expert. These letters were seized vide seizure memo Ex.P-17 and were available before the court below who had an opportunity to peruse and consider the same and took the view that dowry demand was made. These letters were sent in a packet to this Court but unfortunately these letters have been mutilated by the termites and the attempts were made to reconstruct the record but in vain. Now the position is that no part of these letters is legible. But there is sufficient evidence in this regard that the appellant demanded dowry and subjected Mamta to cruelty for not fulfilling such demand. She was so harassed that she determined to end her life along with her daughter Ruby aged 2 years by burning. Thus two lives have gone for the sake of dowry.

28. In the case of *State of Rajasthan vs. Jaggu Ram,* (2008) 12 SCC 51 the Apex Court has held thus:

> "10. At the outset we consider it proper to mention that with a view to curb the growing menace of dowry deaths, Parliament amended the Penal Code and the Evidence Act and inserted Sections 304-B and 113-B respectively in the two statutes. This was done keeping in view the recommendations made by the Law Commission of India in its 21st Report. Section 304-B(1) IPC lays down that where the death of a woman is caused by burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before

her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death. Explanation appearing below sub-section (1) of Section 304-B declares that for the purpose of this sub-section, "dowry" shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961. Sub-section (2) of Section 304-B prescribes the minimum punishment for dowry death as seven years which can be extended up to imprisonment for life.

11. The ingredients necessary for the application of Section 304-B IPC are:

1. that the death of a woman has been caused by burns or bodily injury or occurs otherwise than under normal circumstances;

2. that such death has been caused or has occurred within seven years of her marriage; and

3. that soon before her death the woman was subjected to cruelty or harassment by her husband or any relative of her husband in connection with any demand for dowry.

12. Section 113-B of the Evidence Act lays down that if soon before her death a woman is subjected to cruelty or harassment for, or in connection with any demand for dowry by the person who is accused of causing her death then the court shall presume that such person has caused the dowry death. The presumption under Section 113-B is a presumption of law and once the prosecution establishes the essential ingredients mentioned therein it becomes the duty of the court to raise a resumption that the accused caused the dowry death.

13. A conjoint reading of Section 304-B IPC and Section 113-B, Evidence Act shows that in order to prove the charge of dowry death, prosecution has to establish that the victim died within 7 years of marriage and she was subjected to cruelty or harassment soon before her death and such cruelty or harassment was for dowry. The expression "soon before her death" has not been defined in either of the statutes. Therefore, in each case the court has to analyse the fats and circumstances leading to the death of the victim and decide whether there is any proximate connection between the demand of dowry, the act of cruelty or harassment and the death- *State of A.P. v. Raj Gopal Asawa*, *Arun Garg v.*

State Punjab, Kaliyaperumal v. State of T.N. Kamesh Panjiyar v. State of Bihar and Ram Badan Sharma v. State of Bihar."

29. In the light of the aforesaid pronouncement and in the facts and circumstances of this case it is established that Mamta died within 7 years of her marriage in the abnormal circumstances by burn injuries in her in-laws house. She was subjected to cruelty. Being harassed she ended her life along with her two years daughter Ruby. The conduct of the appellant is highly suspicious because he even did not inform the incident to the police or to the parents of deceased. The circumstances suggest that being harassed by persistent and consistent demand of dowry which she was not in a position to fulfill she determined to end her life. The prosecution has proved the guilt beyond reasonable doubt against the appellant. The court below has dealt with every aspect in great detail and has rightly arrived at the conclusion regarding the guilt of appellant. There is no infirmity, illegality, impropriety or perversity in such finding hence the same is hereby affirmed. Looking to the gravity of offence and keeping in view that Mamta and her daughter Ruby have died the sentence awarded by the trial Court is not excessive and hence it does not call for any interference. The appeal is meritless and deserves to be dismissed.

30. Consequently, the appeal fails and is dismissed accordingly. The conviction and sentence passed by the court below are hereby affirmed. The appellant is on bail. His bail bonds are cancelled. He be directed to surrender before C.J.M. Dindori on 18.01.2010 for serving out the remaining part of the sentence.

Appeal dismissed.

I.L.R. [2010] M. P., 691
CIVIL REVISION
Before Mr. Justice Abhay M. Naik
24 November, 2009*

RAMNIWAS SHARMA ... Applicant
Vs.
SMT. JASODA BAI & ors. ... Non-applicant

A. **Specific Relief Act (47 of 1963), Section 6** - *After dispossession, defendant constructed two Pucca rooms on the suit property - Suit u/s 6 of the Act - Decree for restoration of possession with the direction to the defendant for removal of construction - Held - Court has no power to direct for removal of construction in a suit u/s 6 of the Act - Such direction set-aside - Decree modified accordingly.* (Paras 16 to 18)

क. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 6 – बेदखली के बाद प्रतिवादी ने वादग्रस्त सम्पत्ति पर दो पक्के कमरों का निर्माण किया – अधिनियम की धारा 6 के

*C.R. No.3/2009 (Gwalior)

अन्तर्गत वाद – कब्जे के प्रत्यावर्तन की डिक्री प्रतिवादी को निर्माण हटाने के निदेश के साथ – अभिनिर्धारित – न्यायालय को अधिनियम की धारा 6 के अन्तर्गत किसी वाद में निर्माण हटाने का निदेश देने की कोई शक्ति नही है – ऐसा निदेश अपास्त – डिक्री तदनुसार उपांतरित।

B. Specific Relief Act (47 of 1963), Section 6, Civil Procedure Code, 1908, Section 115 - *Remedy against a decision u/s 6 of the Act - Unsuccessful party can file a suit based on title - Remedy of filing a revision is available but that is only by way of an exception - Held - In the present case, direction for removal of construction issued which is obviously an exceptional circumstance - Therefore, revision is maintainable.* (Para 17)

ख. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 6, सिविल प्रक्रिया संहिता, 1908, धारा 115 – अधिनियम की धारा 6 के अन्तर्गत विनिश्चय के विरुद्ध अनुतोष – असफल पक्षकार स्वत्व पर आधारित वाद पेश कर सकता है – पुनरीक्षण पेश करने का अनुतोष उपलब्ध है किन्तु वह एक अपवाद के रूप में है – अभिनिर्धारित – वर्तमान मामले में निर्माण हटाने का निदेश जारी किया गया जो एक आपवादिक परिस्थिति है – इसलिए पुनरीक्षण पोषणीय है।

Cases referred :

AIR 1984 SC 1894, AIR 1971 SC 2324, (1999) 8 SCC 274, AIR 1915 Cal 687, AIR 1940 Cal 464, 1977 MPWN SN 519, (2004) 4 SCC 664.

H.D. Gupta with *D.D. Bansal*, for the applicant.

Ashok Khedkar, for the non-applicants.

ORDER

ABHAY M. NAIK, J.:–This revision is directed against judgment and decree dated 4th December, 08 passed by the court of Additional Judge to the court of First Additional District Judge, Gwalior in Civil Suit No.29-A/08, filed under Section 6 of the Specific Relief Act.1963.

2. Plaintiffs instituted a suit mainly with the allegation that the suit house situated at Narayani Bai Ki Ganji, Shinde Ki Chhawni, Bijali Ghar, Lashkar Gwalior bearing Municipal Number 1174 Ward No.32(old number 1046 Ward No.32 and earlier number 943 Ward No.23) was owned and possessed by the plaintiffs which was entered into the municipal record in the name of Sunderpal, husband of the plaintiff No.1 and father of plaintiff Nos. 2 to 6. Plaintiffs used to reside in the suit house. However due to the absence of facility of water and electricity and further due to its dilapidated condition, plaintiffs kept there old domestic material inside and put a lock over it and shifted to their another house in the same area. They used to keep supervision over it up to August, 06. However, the entire family in the month of September,06 fell sick by "Chikanguniya" and they failed to visit the house for a month. During this period, defendant demolished the plaintiffs' construction and constructed two Pucca rooms after removing the belongings of the plaintiffs which were kept inside the suit house. The suit house was surrounded by various properties belonging to the community of the defendant, therefore, the

plaintiffs could not come to know about their forcible dispossession and construction made by the defendant.

3. Plaintiff No.1 is a poor widow and employed as a peon in A.G.Office. On 1/10/06, she lodged a report with the police station Jayendraganj, Gwalior. When no cognizance was taken on her report, she made a written complaint to Municipal Corporation, Gwalior on 5/10/06. Again no heed was paid. However, the defendant completed the construction and occupied the suit house forcibly, hence the suit was instituted on 18/10/06 with a prayer for restoration of possession.

4. It is not out of place to mention here that by virtue of amendment vide order dated 21/1/08. a relief was added that the construction made by the defendant may be demolished and removed.

5. Defendant/revisionist submitted his written statement denying thereby the claim of the plaintiffs. It was, inter alia, stated that the suit property is in continuous possession of the defendant since 1976. It is stated that there was a pucca Patore belonging to the defendant which was being used by the defendant to keep fodder of buffaloes. He was running a dairy, which was closed and consequently, the said Patore was of no use and was therefore demolished and removed. Thereafter the construction of two room was made over it. Boundaries were already constructed. It was further stated that no construction was made during the period of two years and only plastering and whitewashing were made.

6. It was denied that the plaintiff and her family members were suffering from Chikanguniya. It was denied that the belongings of the plaintiffs were inside the patore. On the contrary, it was stated that waste and unusable domestic material was kept inside . Accordingly, it was stated that the suit under Section 6 of the Specific Relief Act is liable to dismissal. Additionally, it was stated that the court dealing with the suit under Section 6 of the Specific Relief Act has no power to direct to remove the construction from the suit premises.

7. After recording the evidence, learned trial judge decreed the suit in favour of the plaintiffs. Learned trial judge held that the plaintiffs are entitled to restoration of possession and the defendant has been directed to remove his construction within a period of two months and deliver possession thereafter. He was also further directed to refrain from making any construction and interference after delivery of possession to the plaintiffs. Aggrieved by the same, present civil revision is submitted.

8. Shri H.D.Gupta, learned Sr. Advocate and Shri Ashok Khedkar, learned counsel appearing for the revisionist and non-applicants, respectively, made their submissions at length which have been considered in the light of the material on record.

9. It has been contended by Shri Gupta, learned Sr. counsel for the revisionist that prior possession of the plaintiffs within a period of six months preceding the

institution of the suit is not established. On the contrary, the defendant has successfully proved that he was in possession of it. It is further submitted that the learned trial judge has considered the question of title to the suit house whereas the question of title is beyond the purview of section 6 of the Specific Relief Act.

10. On perusal, the submission of learned Sr. Advocate is not found impressive. Issue No.1 is in respect of plaintiffs' possession up to August, 06 whereas Issue No.2 is about forcible possession by the defendant in September, 06. This issue further involves the question of construction of two pucca rooms after forcible occupation by the defendant. There is no issue framed by the learned trial judge with regard to title of the suit property which clearly goes to show that the learned trial judge while dealing with the suit under Section 6 of the Specific Relief Act was fully aware of his limitation. In paragraph 13 of the impugned judgment learned trial judge reminded himself of the fact that while dealing with the matter under Section 6 of the Specific Relief Act, it has to be determined that whether the plaintiff was in possession of the suit property and has been dispossessed illegally and forcibly and that after such dispossession a suit under Section 6 of the Specific Relief Act for restoration of possession has been brought within a period of six months from the date of their dispossession. From these specific contents of paragraph 13, it is clear that the learned trial court was fully aware of its limitation under Section 6 of the Specific Relief Act. From paragraph 14 onwards to paragraph 39, learned trial judge has discussed the entire evidence and has finally concluded in paragraph 40 after appreciating the evidence on record that it has been proved by the documentary and oral evidence that the plaintiffs were in possession of the suit property till August. 06. It has further been held that in September, 06 defendant forcibly occupied the suit house and has further constructed two rooms over it. Appreciation made by the learned trial judge and the result arrived therefrom is not impeachable merely on the ground that a different view was possible. It is not permissible in law as observed by the Hon'ble Supreme court of India in the case of *M/s Bhojraj Kunwarji Oil Mill and Ginning Factory and another Vs. Yograjsinha Shankersinha Parihar and others* (AIR 1984 SC 1894). It was held that no interference is warranted in exercise of revisional jurisdiction merely on the ground that a different view was possible.

11. Admittedly, the trial court had a requisite jurisdiction to decide the suit under Section 6 of the Specific Relief Act. It had two sets of evidence: one adduced by plaintiff and another adduced by defendant. It has believed the evidence produced by the plaintiffs on the question of possession for the reasons stated in the judgment while appreciating the evidence. It is not a case of no evidence. In such a situation, it is not desirable to interfere in the findings recorded by the trial judge since there is no jurisdictional error. I may successfully refer to the decision of the Supreme Court of India in the case of *M/s D.L.F. Housing and Construction Co.(P) Ltd. Vs. Sarup Singh and others* (AIR 1971 SC 2324) wherein it is observed :-

"The position thus seems to be firmly established that while exercising the jurisdiction under S.115, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the Jurisdiction of the Court to try the dispute itself. Clauses (a) and (b) of this section on their plain reading quite clearly do not cover the present case. It was not contended, as indeed it was not possible to content, that the learned additional District Judge had either exercised a jurisdiction not vested in him by law or had failed to exercise a jurisdiction so vested in him, in recording the order that the proceedings under reference be stayed till the decision of the appeal by the High Court in the proceedings for specific performance of the agreement in question. Clause (c) also does not seem to apply to the case in hand. The words "illegally" and "with material irregularity" as used in this clause do not cover either errors of fact or of law: they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may, in our view, relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision, and not to errors either of fact or of law, after the prescribed formalities have been complied with. The High court does not seem to have adverted to the limitation imposed on its power under S.115 of the Code. Merely because the High court would have felt inclined, had it dealt with the matter initially, to come to a different conclusion on the question of continuing stay of the reference proceedings pending decision of the appeal, could hardly justify interference on revision under S.115 of the Code when there was no illegality or material irregularity committed by the learned Additional district Judge in his manner of dealing with this question. It seems to us that in this matter the High court treated the revision virtually as if it was an appeal."

12. Shri H.D.Gupta, learned Sr. Advocate placing reliance on the decision of the Apex court in the case of *Mahabir Prasad Jain Vs. Ganga Singh* (1999) 8 SCC 274, submitted that erroneous presumption drawn by the trial court and non-consideration of evidence on record cannot be ignored while exercising revisional power under section 115 of the Code of Civil Procedure. His submission cannot be doubted at all. However, it could not be pointed out that the finding about the prior possession of the plaintiffs and their dispossession by the defendant is based on erroneous presumption or non-consideration of any particular material piece of evidence. Learned trial judge has discussed the evidence at length from paragraph 9 to paragraph 39. Though, the defendant has asserted his possession since the year 1976, it may be seen that adjacent to the disputed

land in southern direction, the defendant/revisionist had purchased the immovable property vide Ex.P/13. In the map annexed to it, disputed property is shown to be that of Sunderlal. Although, the defendant/revisionist stated that the husband of plaintiff No.1 was Sunderpal and not Sunderlal, but it has been found by the trial court as discussed in paragraph 18 of the impugned judgment that Sunderpal was also known as Sunderlal. Suit-property shown in the map of Ex.P/13 is not shown to be in possession of the defendant. There is further detailed discussion of evidence in paragraph 30 of the impugned judgment. Thus, it cannot be said that the findings are recorded by the trial judge by drawing erroneous presumption and/or by ignoring any material piece of evidence on record.

13. It is further submitted that relief for removal of construction could not have been granted in a suit under section 6 of the Specific Relief Act. Reliance for this purpose is placed on the Apex Court decisions in the cases of *Mahabir Prasad Jain Vs. Ganga Singh* (1999) 8 SCC 274 *Rahmatulla Vs. Maftzuilla and others* (AIR 1915 Cal. 687) and *Sona Mia and another Vs. Prakash Chandra Bhattachariya and others* (AIR 1940 Calcutta 464). In the case of *Mahabir Prasad Jain,* (supra) there was no prayer for removal of the construction in the plaint. Relief granted by the trial court for removal of construction was confirmed by the High court. In this background the Apex Court has observed as under:-

> "As already pointed out, the decree passed by the trial court as affirmed by the High court travels beyond the prayer in the plaint and also the scope of Section 6 of the Specific Relief Act. Apart from granting a decree for possession as prayed for by the respondent, the trial court has granted an additional relief which was not prayed for by him in that the trial court has directed the appellant to remove the construction put up by him including the dismantling of the glass. Such a relief cannot be granted under the provisions of Section 6 of the Specific Relief Act, particularly when there is no prayer therefor in the plaint."

14. Judgment of Calcutta in the case of *Rahmatulla* (supra) relied upon by learned Sr. Advocate for the revisionist is very short which may be reproduced as under:-

> "The suit is, therefore, decreed with costs against defendants 1 to 8 and it is ordered that the plaintiffs do recover possession of the land by removing the house built on it by the defendants if necessary.
>
> We granted a Rule calling upon the opposite party to show cause why the order complained of should not be set aside on the ground that it was beyond the Jurisdiction of the Court. That portion of the order which allows the plaintiff to remove the house built on the land by the defendant is beyond the jurisdiction of the court under the Section; for under that section the Court cannot do

more than make an order with respect to possession of the land. The rule is therefore made absolute, the first part of the order remains unaffected and that part of the order which directs to remove the house, etc., is set aside. The petitioner is entitled to his costs, the hearing fee being assessed at one gold mohur."

15. In another decision of Calcutta High court in the case of *Sona Mia and another* (supra) it has been held as under:-

"All that the Court can do under S. 9, Specific Relief Act, is to restore the plaintiffs to physical possession. It cannot direct the defendants to remove any structures which they have erected on the land or permit the plaintiffs to pull down the structures. In a suit under S.9 of the Act the question of the title of the respective parties is not adjudicated upon and, therefore, it would be wrong to pass any order regarding the structures on the land. The order of the learned Munsif ejecting the defendants from the land is maintained, but the order regarding the structures erected on the land by the defendants is set aside."

16. From the aforesaid decisions, it is clear that in a suit filed under Section 6 of the Specific Relief Act, the hands of the courts are not tied if. the defendant dispossesses the plaintiff and the plaintiff establishes that he was in possession within six months preceding the institution of the suit and dispossessed by the defendant in an illegal and forcible manner. Possession of suit property may be restored to him. Limitation of six months in such a suit is provided under Section 6 itself of the Specific Relief Act. Even if the defendant after dispossessing the plaintiff in an illegal and forcible manner makes a construction in hasty manner that will not dislodge the plaintiff from invoking section 6 of the Specific Relief Act and jurisdiction of the court under Section 6 (supra) cannot be ousted by the wrong of the defendant in the form of illegal and forcible construction. In case of contrary interpretation, it would provide a tool in the hands of the defendant to forcibly occupy anybody's property and make a speedy construction. It, perhaps, may not be the object of legislative intent. Even the Apex court in the case of *Mahabir Prasad Jain* (supra) has not held that in case if the construction is made on the subject matter of the suit under Section 6 of the Specific Relief Act, the suit will have to be dismissed for want of jurisdiction. In the cases of Calcutta High court cited above, the judgments pertaining to restoration of possession have been maintained, setting aside the direction for removal.

17. Shri Khedkar, learned counsel for the non-applicants placing reliance on 1977 MPWN SN 519 *(Somnath and others Vs. Badri and others)* contended that remedy against impugned judgment and decree is to file a regular suit for establishing title to the suit property. It is provided in sub-section (4) of section 6 of the Specific Relief Act and therefore, no revision lies under Section 115 of the

Code of Civil Procedure. In the case of *Somnath* (supra) itself, it is mentioned that there being no exceptional circumstance to justify interference, the revision was not maintainable in view of availability of remedy of civil suit. In the present case, direction for removal of construction is issued to the revisionist, which obviously is exceptional circumstance, therefore, I do not feel it proper to dismiss the revision on that count. I may derive benefit from the decision of the Supreme court in the case of *Sanjay Kumar Pandey and others Vs. Gulbahar Sheikh and others* (2004) 4 SCC 664 wherein it has been held :-

> "A suit under Section 6 of the Act is often called a summary suit inasmuch as the enquiry in the suit under Section 6 is confined to finding out the possession and dispossession within a period of six months from the date of the institution of the suit ignoring the question of title. Sub-section (3) of Section 6 provides that no appeal shall lie from any order or decree passed in any suit instituted under this section. No review of any such order or decree is permitted. The remedy of a person unsuccessful in a suit under Section 6 of the Act is to file a regular suit establishing his title to the suit property and in the event of his succeeding he will be entitled to recover possession of the property notwithstanding the adverse decision under Section 6 of the Act. Thus, as against a decision under Section 6 of the Act, the remedy of unsuccessful party is to file a suit based on title. The remedy of filing a revision is available but that is only by way of an exception: for the High court would not interfere with a decree or order under Section 6 of the Act except on a case for interference being made out within the well-settled parameters of the exercise of revisional jurisdiction under Section 115 of the Code."

18. Apart from the aforesaid, it may be seen that the suit was instituted on 18/10/06 whereas the amendment regarding relief was made on 22/1/08, which was obviously after about one year from the date of dispossession. No issue was raised on the question of relief pertaining to direction to the defendant for removal of construction. Thus, in the set of facts and circumstances of the case, direction for removal is found illegal and same is liable to be set aside. Accordingly, impugned judgment and decree with regard to direction to the defendant for removal of construction within two months is hereby set aside. Rest of the judgment is maintained. Decree be modified accordingly. However, this order will come into force after one month in order to enable the defendant to either remove the construction or to institute a suit as envisaged in sub-section (4) of Section 6 of the Specific Relief Act.

No order as to costs

Order accordingly.

I.L.R. [2010] M. P., 699
CIVIL REVISION
Before Mr. Justice Alok Aradhe
18 January, 2010*

LAKHANLAL RAWAT ... Applicant
Vs.
UNION OF INDIA ... Non-applicant

A. **Public Premises (Eviction of Unauthorised Occupants) Act (40 of 1971), Section 7** - *Power to require payment of rent or damages in respect of public premises - Time barred claim - Permissibility - Section 7 of the Act only provides of special procedure for realization of rent in arrears and does not constitute a source or foundation of a right to claim debt otherwise time barred -When a duty is cast on an authority to determine the arrears of rent, the determination must be in accordance with law.* (Para 13)

क. सरकारी स्थान (अप्राधिकृत अधिभोगियों की बेदखली) अधिनियम (1971 का 40), धारा 7 – सरकारी स्थान के सम्बन्ध में किराया या नुकसानी के भुगतान की अपेक्षा करने की शक्ति – समय वर्जित दावा – अनुज्ञेयता – अधिनियम की धारा 7 बकाया किराये की वसूली के लिए केवल विशेष प्रक्रिया का उपबंध करती है और अन्यथा समय वर्जित ऋण का दावा करने के किसी अधिकार का स्रोत या आधार गठित नही करती – जब किसी प्राधिकारी पर किराये का बकाया अवधारित करने का कर्तव्य डाला जाता है, तब अवधारण विधि अनुसार होना चाहिए।

B. **Public Premises (Eviction of Unauthorised Occupants) Act (40 of 1971), Section 7** - *Payable - Meaning - Held - The word "payable" in S. 7 of the Act in the context in which it occur s means legally recoverable.* (Para 13)

ख. सरकारी स्थान (अप्राधिकृत अधिभोगियों की बेदखली) अधिनियम (1971 का 40), धारा 7 – देय – अर्थ – अभिनिर्धारित – अधिनियम की धारा 7 में शब्द "देय" जिस संदर्भ में पाया जाता है, का अर्थ वैध रूप से वसूली योग्य है।

Cases referred :

AIR 1976 SC 1637, AIR 1993 PC 63, AIR 1980 MP 106, AIR 1999 SC 1305.

Pranay Verma, for the applicant.
Amrit Ruprah, for the non-applicant.

ORDER

ALOK ARADHE, J. :–In this revision filed under Section 115 of the Code of Civil Procedure, applicant has called in question the legality and validity of the order dated 27.9.2004 passed in Civil Appeal No.26-A/2004 by which Additional District Judge, Khurai, District Sagar has upheld the order dated 26.2.2004 passed by the Estate Officer in proceedings under Section 7 of the Public Premises

*C.R. No.494/2006 (Jabalpur)

March-10 (First)

(Eviction of Unauthorised Occupants) Act, 1971, hereinafter referred to as the "Act" for sake of brevity.

2. Applicant is retired Station Master, who superannuated on 31.3.1985. While the applicant was posted at Bina, he was allotted a Railway Quarter. As per the version of the applicant, on his transfer to another Railway Station namely Baad, he vacated the quarter on 28.4.1982. After a period of 19 years from the date of applicant's superannuation, Senior Divisional Personnel Officer, Jhansi issued a direction on 30.8.2001 to the Manager, State Bank of India, Bina to recover an amount of Rs.2,24,879/- from the dearness allowance of the applicant, as damages on account of illegal occupation of the quarter from 1.4.1985 to 29.6.1997 by the applicant. Aforesaid order formed subject matter of challenge in Original Application No.656/01 before the Central Administrative Tribunal. Central Administrative Tribunal by order dated 5.3.2003 issued a direction to appropriate authority to refer the dispute to Estate Officer and to proceed with the matter in accordance with Section 7 of the Act.

3. Accordingly, proceedings were initiated against the applicant under Section 7 of the Act and a show-cause notice dated 22nd May, 2003 was issued to the applicant by which he was asked to deposit a sum of Rs.2,24,879/- as damages for illegal occupation of the quarter. The applicant filed reply to the aforesaid show-cause notice in which it was pointed out that he had vacated the premises on 28.4.1992, on his transfer and proceedings initiated against him were barred by time.

4. During the course of proceedings before the Estate Officer, the non-applicant produced four witnesses and adduced documentary evidence. The proceedings were fixed for 13.8.2003 and 29.8.2003 or cross-examination of the witnesses produced by the non-applicant. The applicant did not cross-examine the witnesses of the non-applicant and sought time. Accordingly, right of the applicant to cross-examine the witnesses produced on behalf of the non-applicant was closed on 15.9.2003. Thereafter, on 6.10.2003, the applicant moved an application for permission to cross-examine the witnesses of the non-applicant. However, the same was rejected by the Estate Officer vide order dated 21.10.2003.

5. The Estate Officer vide order dated 26.2.2004 held that from perusal of the order passed by the Divisional Railway Manager (Personnel) dated 24.3.2003, it is apparent that proceedings were initiated within time. Application was filed on 9.5.2003, therefore, the same cannot be treated as barred by limitation. On the basis of material adduced by the non-applicant, the Estate Officer recorded a finding that applicant was in unauthorized occupation of the premises for a period from 26.3.1982 to 26.3.1997. The documents filed by the applicant were discarded by the Estate Officer on the ground that the applicant had neither proved the genuineness of the documents nor its content. The Estate Officer did not take into

consideration the documents filed by the applicant also on the ground that the applicant had filed the photocopies of the same. Accordingly, the Estate Officer directed the applicant to make payment of an amount of Rs.2,24,879/- within a period of one month from the date of order failing which, it was directed that the amount shall carry interest w.e.f. 1.4.2004 at the rate of 8%. It was further directed that in case the applicant does not deposit the amount, the non-applicant would be at liberty to recover the same under Rule 16(6) of the Railway Service (Pension) Rules. 1993.

6. Being aggrieved by the aforesaid order, the applicant preferred an appeal under Section 9 of the Act before the appellate officer i.e. in the Court of Additional District Judge, Khurai. The learned Additional District Judge vide impugned order dated 27.9.2004 partly allowed the appeal preferred by the applicant. The learned Additional District Judge discussed the material available on record in paragaraphs 12 and 13 and recorded a finding in paragraph 14 of the order to the effect that applicant has been in illegal occupation of the premises for a period from 1.4.1985 to 29.6.1997. Though learned Additional District Judge noted the contention of the applicant that proceedings are barred by limitation yet, no finding was recorded on the issue of limitation. However, learned appellate Court held that from the computation sheet, it appears that damages have been computed for different periods at different rates. The non-applicant herein has not produced any material to show the basis of calculation of damages. Accordingly, it was directed that damages be calculated at the rate fixed by the Collector and interest be levied at the rate of 6% instead of 8%.

7. Against the aforesaid portion of the order by which the appellate officer modified the quantum of damages and rate of interest, the non-applicant has filed a revision before this Court, which is registered as Civil Revision No.158/08. In the aforesaid revision, challenge has been made to the order on the ground that non-applicant is bound by the orders issued by the Railway Board and, therefore, the appellate officer committed an error in interfering with the quantum of damages and the rate of interest.

8. From the facts as stated supra, it is apparent that proceedings under Section 7 of the Act in respect of unauthorized occupation of the quarter by the applicant for a period from 26.3.1982 to 26.3.1997 were initiated on 22.5.2003 when show-cause notice under Section 7 of the Act was issued to the applicant i.e. after a period of 6 years approximately.

9. Mr. Pranay Verma, learned counsel for the applicant has made many a submission. It has been contended by him that proceedings initiated on 22.5.2003 under Section 7 of the Act in respect of the rent due for a period from 1.4.1985 to 29.6.1997 were barred by limitation. In support of the aforesaid submission, learned counsel for the applicant has placed reliance on a decision of the Supreme Court

March-10 (First)

in the case of *New Delhi Municipal Committee Vs. Kaluram & Anr.* AIR 1976 SC I.637:1976(3) SCC 407.

10. Ms. Amrit Ruprah, learned counsel appearing on behalf of the non-applicant inter-alia has contended that Estate Officer in paragraph 3 of the order dated 26.2.2004 has recorded a finding that the proceedings have been initiated within limitation. Learned counsel for the non-applicant has placed reliance on a decision in the case of *L.S. Nair Vs. Hindustan Steel Ltd.. Bhilai & Ors.*, AIR 1980 MP 106, in support of her contention that provisions of Limitation Act does not apply to proceedings before the Estate Officer under Section 7 of the Act.

11. Thus, the issue which arises for consideration before me in the instant revision is whether damages for illegal occupation of the quarter for a period from 1.4.1985 to 29.6.1997 are legally recoverable in proceedings initiated on 22.5.2003 under Section 7 of the Act.

12. While construing the expression "any money due" under Section 186 of the Indian Companies Act, 1913 the Privy Council in *Hans Raj Gupta Vs. Official Liquidators of the Dehradun-Mussoorie Electric Tramway Company Ltd.*, AIR 1993 Privy Council, 63 has held that Section 186 of the Indian Companies Act creates a special procedure for obtaining payment of moneys and is not a section which purports to create a foundation upon which to base a claim for payment. It creates no new rights.

13. In *New Delhi Municipal Committee* (supra), the Supreme Court while considering the scope and ambit of expression "payable", appearing in Section 7 of the Act held that Section 7 of the Act only provides of special procedure for realization of rent in arrears and does not constitute a source or foundation of a right to claim debt otherwise time barred. It was further held that when a duty is cast on an authority to determine the arrears of rent, the determination must be in accordance with law. It was held that the word "payable" in Section 7 of the Act in the context in which it occurs means legally recoverable.

14. The aforesaid decision of the Supreme Court in the matter of *New Delhi Municipal Committee* referred to supra was quoted with approval in *State of Kerala & Ors. Vs. V.R. Kalliyanlyutty & Anr.*, AIR 1999 SC 1305.

15. Thus, the issue involved in the instant revision is squarely covered by the decision of the Supreme Court in *New Delhi Municipal Committee's case* supra. Therefore, it is held that damages for the period from 1.4.1985 to 29.6.1997 on account of illegal occupation of quarter were irrecoverable in proceedings initiated on 22.5.2003. Since, this Court has dealt with the question of limitation only, therefore, it is not necessary to refer to the other contentions raised by the learned counsel for the parties.

16. For the reasons aforementioned, the revision filed by the applicant succeeds and is hereby allowed. Consequently, the order dated 27.9.2004 passed by

Additional District Judge, Khurai in Civil Appeal No.26-A/04 and order dated 26.2.2004 passed by the Estate Officer, West Central Railway Division, Bhopal, are hereby set aside. In the facts and circumstances of the case, there shall be no order as to costs.

Revision allowed.

I.L.R. [2010] M. P., 703

CRIMINAL REVISION

Before Mr. Justice S. Samvatsar & Mr. Justice Piyush Mathur

17 December, 2009*

MUNNALAL ... Applicant

Vs.

STATE OF M.P. ... Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 91 - ***Summoning of documents at the stage of framing of charge - It cannot be said to be absolute proposition of law that under no circumstance the Court can look into the material produced by defence at the time of framing of charge.*** (Para 8)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 91 – आरोप की विरचना के प्रक्रम पर दस्तावेजों का बुलाया जाना – इसे विधि की आत्यंतिक प्रतिपादना होना नही कहा जा सकता कि किसी भी परिस्थिति में न्यायालय प्रतिरक्षा द्वारा आरोप विरचना के समय पेश सामग्री पर विचार नही कर सकता।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 91 - ***Summoning of documents at the stage of framing of charge - There can be rare and exceptional cases where alleged defence material could be shown to the trial Court for demonstrating that prosecution version is totally absurd or preposterous and defence material could be looked into by the Court at the time of framing of charge - Trial Court was directed to entertain application u/s 91 and also to examine documents sought to be summoned by petitioner at the time of framing of charge.*** (Paras 8 & 10)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 91 – आरोप की विरचना के प्रक्रम पर दस्तावेजों का बुलाया जाना – विरल और आपवादिक मामले हो सकते हैं जहाँ विचारण न्यायालय को कथित प्रतिरक्षा सामग्री यह प्रदर्शित करने कि अभियोजन कथा पूर्णतः अर्थहीन या असंगत है, दर्शायी जा सकती है और आरोप विरचना के समय न्यायालय द्वारा प्रतिरक्षा सामग्री पर विचार किया जा सकता है – विचारण न्यायालय को निदेश दिया गया कि धारा 91 के अन्तर्गत आवेदन ग्रहण करे और आरोप की विरचना के समय उन दस्तावेजों पर विचार की जाँच करे जिन्हें समनित करना याची द्वारा चाहा गया है।

Cases referred :

(2005) 1 SCC 568, (2008) 14 SCC 1.

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*Cr.R. No.261/2007 (Gwalior)

March-10 (First)

Anil Mishra, for the applicant.
Mukund Bhardwaj, P.P., for the non-applicant/State.

ORDER

PIYUSH MATHUR, J. :-This is a Revision Petition preferred against the order Dated 6.12.2006 passed by the Special Judge, Morena, in Sessions Trial No.03/05, whereby the Charges under Sections 420 and 406 of the Indian Penal Code read with Sections 13 (1) (c) (d) and 13 (2) of the Prevention of Corruption Act, 1988, have been framed against the petitioner and an application preferred under Section 91 of the Criminal Procedure Code for calling the additional documents/records has been rejected without examining the necessity of summoning of the record for framing of the Charge.

2. The Economical Offences Bureau Office of the State of Madhya Pradesh has submitted a Chargesheet against as many as 13 persons in relation to misappropriation of funds of Prathmik Bunkar Sahakari Samiti Noorabad and Prathmik Bunkar Sahakari Samiti, Dattehara, Morena, where petitioner Munnalal was described to be the President of one of the Society during years 1990-93, when on account of misappropriation of funds and non-utilization of the fund, certain offences were found to be committed by the Petitioner.

3. Learned Counsel for the Petitioner submits that an application under Section 91 of the Criminal Procedure Code was filed on behalf of the accused persons, namely, Yadunath Singh Tomar, Deen Dayal and Munnalal and a specific prayer was made on behalf of Petitioner Munnalal that since the Society is not functioning at the prescribed place and there exists an official order authorizing its shifting from the prescribed place to the changed place and the entire amount entrusted to the Society was properly utilized and a Utilization Certificate was issued and the balance of the amount was deposited, whereafter no offence could have possibly been made out and since the summoning of these documents would be necessary for the just decision of the case, a prayer for calling the record was made before the Court below, but the same was rejected on the ground that as per the general direction given by the High Court, the cases pertaining to the Prevention of Corruption Act were required to be disposed of by the end of the year. The application was cursorily rejected and the Charges were framed against the petitioner contrary to the documentary evidence.

4. Learned Counsel for the State has submitted that the Trial Court has correctly applied the principle enunciated by the Hon'ble Supreme Court in the case of *State of Orrisa v. Devendra Nath Padhi* reported as (2005) 1 SCC 568, wherein the Court has propounded that the provisions of Section 91 of the Criminal Procedure Code should not be permitted to be mis-utilized for the purposes of introduction of defence by the accused persons at the stage of framing of Charges. Learned Public Prosecutor has also stated that deposit of the balance amount by

the petitioner-Society would not be sufficient to exonerate the petitioner-accused. He has justified the passing of the impugned order as also the imposition of the Charge.

5. Learned Counsel for the Petitioner submits that since the petitioner happens to be an Office Bearer/Elected Representative of the Co-Operative Society, therefore, the provisions of Prevention of Corruption Act would not be applicable to such of the category of persons, which are not prescribed/notified in the Category of 'Public Servant' and as such the Court was not justified in imposing the charge under the provisions of Prevention of Corruption Act. His further submission revolves around the fact of non-summoning of the documents and non-consideration of the application, preferred under Section 91 of the Criminal Procedure Code, to demonstrate that had the Trial Court been vigilant about the nature of the document, sought to be summoned by the accused persons, it would have realized that in view of the production of Utilization Certificate and the Certificate of shifting of the headquarter of the Society, the Court would have not framed the Charges at all.

6. Learned Counsel for the petitioner has also drawn our attention to an order passed in Criminal Revision No.44/07, wherein a Single Judge of this Court, while dealing with a Revision Petition of co-accused Yadunath Singh Tomar, has found that without passing the orders on the application preferred under Section 91 of the Criminal Procedure Code, the order of imposition of Charge was not justified and since the case of the present petitioner is not different than the case of Yadunath Singh Tomar, on the principle of parity, it may be remanded back to the Court below, for entertaining the application preferred under Section 91 of the Criminal Procedure Code as also by calling the documents and then hearing parties on the question of imposition of Charge.

7. We have considered the facts of the case, perused the record and heard the Learned Counsels and found that certain applications were filed on behalf of the accused persons before the Trial Court in terms of Section 91 of the Criminal Procedure Code and specific document and the necessity of summoning the document were pressed into service before the Trial Court, but without examining the necessity of calling the document, the Trial Court has rejected the application on the ground that the cases pertaining to the Prevention of Corruption Act have to be disposed by the end of the year but this could not be treated to be a legitimate ground for rejecting the application.

8. While supporting the order of rejection of the application preferred under Section 91 of the Criminal Procedure Code, the Trial Court has made a reference to a Judgment of the Supreme Court *State of Orrisa v. Devendra Nath Padhi* reported as (2005) 1 SCC 568, wherein the Supreme Court has certainly observed that the provisions of Section 91 of the Criminal Procedure Code should not be

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misutilized for the purposes of alleging an accused person to introduce his defence at the stage of framing of the Charge, but in a subsequent judgment reported as (2008) Vol.14 SCC 1 *Rukmini Narvekar v. Vijay Satardekar,* the Supreme Court has clarified that there can be rare and exceptional cases where alleged defence material could be shown to the Trial Court, for demonstrating that the prosecution version is totally absurd or preposterous and in some of such circumstances the defence material could be looked into by the Court, at the time of framing of the Charge or taking Cognizance. The Supreme Court has further said that it cannot be said to be an absolute proposition of law that under no circumstance the Court can look into the material produced by the defence at the time of framing of the Charge. The Supreme Court has specifically carved out an exception that in rare of the rarest circumstance, such an exercise could be performed, but the scope for entertaining the application under Section.91 of the Criminal Procedure Code and consideration of the material produced by the defence has certainly been visualized.

9. We have been also persuaded by the fact of passing of an order by the Single Judge of this Court, whereby the Trial Court has been directed to consider the application and the documents before framing the Charge and we find parity not only in the circumstances but in the nature of the documents sought to be summoned by similarly situated accused persons of the same Trial.

10. Therefore, in view of the aforesaid discussions, the charges framed under Sections 420 and 406 of the Indian Penal Code read with Sections 13 (1) (c) (d) and 13 (2) of the Prevention of Corruption Act, 1988, against the accused-Petitioner Munnalal Verma are hereby quashed, however, the Trial Court is directed to entertain the application of Petitioner preferred under Section 91 of the Criminal Procedure Code as also to examine the documents, sought to be summoned by the accused-Petitioner and to hear the matter on the question of framing of the Charge while taking into account the entire evidence and if the Trial Court find that there exists sufficient material for framing the Charge, the Trial Court would be free to frame the charges against the accused persons, even in the light of the documents sought to be produced on behalf of the accused-Petitioner.

11. With the aforesaid observations/directions, this Criminal Revision is finally disposed of.

Revision disposed of.

I.L.R. [2010] M. P., 707
CRIMINAL REVISION
Before Mr. Justice J.K. Maheshwari
21 January, 2010*

ARUN KUMAR JAIN ... Applicant
Vs.
DINESH TRIPATHI & ors. ... Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) - *Power to direct investigation - Magistrate is empowered to pass an order to investigate the allegations alleged in complaint even if it is triable by Court of Sessions.* (Para 12)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – अन्वेषण का निदेश देने की शक्ति – मजिस्ट्रेट परिवाद में कथित अभिकथनों का अन्वेषण करने का आदेश पारित करने के लिए सशक्त है यद्यपि यह सेशन न्यायालय द्वारा विचारणीय हो।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) - *Power to direct investigation - While passing an order to investigate, the Magistrate ought to have applied his mind to the allegations - If order is passed without application of mind, even at the stage of direction u/s 156(3) Cr.P.C., it may be liable to be set-aside.* (Para 12)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – अन्वेषण का निदेश देने की शक्ति – अन्वेषण करने का आदेश पारित करते समय, मजिस्ट्रेट को अभिकथनों के बारे में अपने मस्तिष्क का प्रयोग करना चाहिए – यदि द.प्र.सं. की धारा 156(3) के अन्तर्गत निदेश के प्रक्रम पर भी मस्तिष्क का प्रयोग किये बिना आदेश पारित किया जाता है तो यह अपास्त किया जा सकेगा।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) - *When direction to investigate cannot be given - In absence of any specific allegation of causing any injury or assigning any role against superior officers, merely on the bald statement issuance of direction to investigate the said incident by the concerning SHO against them cannot be directed.* (Para 16)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – कब अनुसंधान करने का निदेश नही दिया जा सकता – कोई क्षति कारित करने के किसी विनिर्दिष्ट अभिकथन या वरिष्ठ अधिकारियों के विरुद्ध कोई भूमिका समनुदिष्ट करने के अभाव में मात्र स्पष्ट कथनों पर संबंधित एस.एच.ओ. से उनके विरुद्ध कथित घटना का अन्वेषण कराने का निदेश जारी करना निदेशित नही किया जा सकता।

D. Criminal Procedure Code, 1973 (2 of 1974), Section 482 - *Complaint - Quashed without petition - Four police officers filed petition seeking quashment of the private complaint and the direction to investigate*

*Cr.R. No.546/2007 (Indore)

against them - Addl.S.P. has not filed such petition - Held - There is no ground to investigate against the police officers including the Addl.S.P. - Invoking the inherent powers with a view to prevent the abuse of process of Court or to otherwise secure the ends of justice the complaint filed against the Addl.S.P. also quashed. (Para 16)

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – परिवाद – याचिका के बिना अभिखंडित – चार पुलिस अधिकारियों ने प्रायवेट परिवाद और उनके विरुद्ध अन्वेषण करने के निदेश का अभिखंडन चाहते हुए याचिका पेश की – अतिरिक्त पुलिस अधीक्षक ने ऐसी याचिका पेश नही की – अभिनिर्धारित – अतिरिक्त पुलिस अधीक्षक को सम्मिलित करते हुए पुलिस अधिकारियों के विरुद्ध अन्वेषण करने का कोई आधार नही है – न्यायालय की कार्यवाही का दुरुपयोग निवारित करने या अन्यथा न्याय का उद्देश्य प्राप्त करने की दृष्टि से अन्तर्निहित शक्तियों का अवलंब लेकर अतिरिक्त पुलिस अधीक्षक के विरुद्ध पेश परिवाद भी अभिखंडित किया गया।

E. Criminal Trial - *Principle of vicarious liability having no application in a prosecution which is to be lodged against superior officers.* (Para 16)

ङ. दाण्डिक विचारण – प्रतिनिधिक दायित्व का सिद्धांत ऐसे अभियोजन में कोई उपयोगिता नही रखता जो वरिष्ठ अधिकारियों के विरुद्ध दर्ज किया जाना है।

Cases referred :

AIR 1976 SC 1672, AIR 2006 SC 705, Cr.R. No.131/2004 Satyanand Mishra Vs. P.C. Jain decided on 08.03.2006, AIR 2001 SC 571, 2001 CrLJ 3363, AIR 1997 SC 3104, 1992 CrLJ 527, (2008) 5 SCC 668.

Dr. Manohar Dalal, for the applicant.
A. Upadhyay, for the non-applicant No.1.
C.L. Yadav with *O.P. Solanki,* for the non-applicant Nos. 2, 4, 5, 6 & 9.
Z.A. Khan with *R.R. Trivedi,* for the non-applicant No.3 & 8.
C.R. Karnik, Dy.G.A., for the non-applicant/State.

O R D E R

J.K. Maheshwari, J. :–This order shall govern the disposal of Cr. R. No. 546/2007 Arun Kumar Jain Vs. Dinesh Tripathi and nine others and M.Cr.C. No.1580/2008 Madhu Kumar Babu and four others Vs. State and others. A copy of this order be placed in the record of both the cases.

2. The Criminal Revision No.546/2007 has been filed by the complainant Arun Kumar Jain assailing the tenability and viability of the order dated 11.4.2007 passed by the 1st Additional Sessions Judge, Indore in Criminal Rvisions No.352/2006, 386/2006 and 389/2006, whereby the order passed by the trial Court dated 3.5.2006, directing the Police to take appropriate steps as per Section 156 (3) of Cr.P.C. on a private complaint against the accused persons in accordance with law with an intimation to the Court on the next date was set aside, and the matter was remitted back to the trial Court to pass appropriate orders after due application of mind. Being aggrieved by such direction applicant Arun Kumar Jain has assailed the order impugned in the revision.

3. M.Cr.C. No. 1580/2008 has been filed by the accused persons namely Madhu Kumar Babu, Virendra Singh. B. J. Salunke and Brajesh Mishra under Section 482 of Cr.P.C. to quash the private complaint filed against them by Arun Kumar Jain. In the petition it is contended that as per the allegations of the private complaint, on the face of it no offence is made out against them and it has been filed to take vengeance with mala fide intention, however, the complaint filed against them may be quashed. It is also contended that the revisional Court while passing the order impugned after referring various judgments of the apex Court came to hold that while passing the order, exercising the powers under Section 156 (3) of Cr.P.C., the Magistrate ought to have applied his mind on the allegations as alleged in the complaint. If on the face of allegations no offence disclosing cognizable offence is made out then trial Court ought not to apply his mind again, in passing the order in furtherance to the order of revisional Court. Thus, the complaint filed against them may be quashed.

4. The facts of the case in brief are that the complainant Arun Kumar Jain has filed a private complaint stating that from the year 1996-2000, he was posted as Dy. Superintendent of Police in the Special Police Establishment, Lokayukt at Indore and also as in-charge Superintendent of Police. One Mr. Subhash Sojatiya Accused No. 7 was the ex-minister of Information and Public Relation Department. The matter of his elder brother Ashok Sojatiya, who was the Engineering-in-Chief in Water Resources Department, had investigated by him and a charge sheet under Sections 13 (1) (d) and 13 (2) of the Prevention of Corruption Act 1988 read with Sections 420, 120-B of the IPC was filed. Similarly he had also investigated the matter of his younger brother Mr. Kamlesh Sojatiya and the charge sheet under Section Sections 13 (1) (d) and 13 (2) of the Prevention of Corruption Act 1988 read with Sections 420, 120-B of the IPC was filed against him also. Thus Mr. Subhash Sojatiya has become biased against him and having malign intention. It is averred that Mr. Subhash Sojatiya was very much close to the then Chief Minister Mr. Digvijay Singh, however, due to his intervention he has faced a lot of mental and physical torture. By their intervention he was invariably placed under suspension, and also gave an assurance in the assembly for arrest in a false case registered against him. It is further said that the accused No. 1, 7, 8 and 9 having conspiracy, by meeting of mind with a view to take revenge and an assault over him. It is said that one Dinesh Tripathi accused No. 1 reached in between 7:15am to 8:00 am at his house in the morning along a pet dog. While reaching in front of his house it is said by him that you have not yet come to rescue to his fault, I have been sent by Mr. Subhash Sojatiya "Mantri" to convey this message to you. Thereafter, Dinesh Tripathi has sent his pet dog to attend the natural call in front of his house and on refusal by him an assault by means of Lathi over the head has made causing injury. The FIR submitted by applicant has not been registered. It is further averred that the conspiracy was done by Accused

No. 9 Dilip Bhandari, the then SDOP, Sonkatch, the present SDOP, Depalpur with the connivance of Respondent No. 7 Subhash Sojatiya and accused No. 8 Karan Singh Panwar. The Accused No. 2, Madhukumar Babu, No. 3 Rakesh Gupta, No. 4 Virendra Singh No. 5 B. J. Salunke and No. 6 Brajesh Mishra have not taken any action on his complaint, while on the FIR of Dinesh Tripathi an offence under Sections 341, 323, 295 and 506 of IPC was registered against the complainant at Crime No.545/2003 in Police Station Palasia, Indore. Therefore, he has filed private complaint against all these persons stating that they have not taken any step to register the FIR, while cognizable offence is made out, against accused No. 1, 7, 8 and 9; it indicates their association or having criminal conspiracy, with the accused persons, however, prayer is made to take cognizance to the offence under Sections 307, 201, 212, 120-B, 166, 167, 289, 323, 341, 468, 471 read with Section 34 of IPC against all the accused persons and to punish them suitably.

5. In the present case on filing of the complaint before trial Court along with some documents an application under Section 156 (3) of Cr.P.C. was filed, where upon an order dated 3.5.06 has been passed, directing the SHO concerned of police station to take appropriate step on the attached private complaint against the accused persons in accordance with law with an intimation to the Court on the next date. Against the said order three revisions were filed by Mr. Madhu Kumar Babu, Virendra Singh, Brajesh Mishra, B. J. Salunke and Rakesh Gupta.

6. It was contended in the revisions that the allegation as alleged relates to non discharging their official duty by the applicants, however, without seeking permission under Section 197 of Cr.P.C. order directing investigation under Section 156 (3) of Cr.P.C. cannot be passed by the Magistrate. It is also contended that on the basis of the allegations as alleged in the private complaint offence cognizable under Sections 307, 468 and 471 of IPC has alleged, however, the Magistrate is not having jurisdiction to direct for investigation under Section 156 (3) of Cr.P.C. The ground of non-application of mind has also been urged along with some other grounds. The revisional Court allowed those revisions holding that the order impugned passed by the trial court is without due application of mind, however, such order is liable to be set aside and the matter was remitted back to the trial Court to pass appropriate order by application of mind after going through the contents of the complaint, while other arguments were rejected. Now by filing the petition under Section 482 of Cr.P.C. the quashment is sought for by Mr. Madhu Kumar Babu, Virendra Singh, Brajesh Mishra and B. J. Salunke that the direction as issued by the revisional Court cannot be made applicable against them because on the face of the allegations as alleged in the private complaint no cognizable offence is made out, and they have been made accused to take vengeance due to not registering the FIR on the complaint of Arun Kumar Jain.

7. Shri Manohar Dalal, counsel appearing for the applicant has placed reliance on a judgment of the apex court in the case of *Devarapalli Lakshminarayana*

Reddy and others Vs. Narayana Reddy and others – AIR 1976 SC 1672 and urged that the Magistrate who receives a complaint disclosing offence exclusively triable by Sessions Court, is not ousted by jurisdiction to send it to the police for investigation under Section 156 (3) of Cr.P.C. The order of investigation is different from the powers to take cognizance conferred on him by Section 200 (1) of Cr.P.C. In such circumstances it is contended by him that even if an offence triable by Court of Sessions under Sections 307, 468, 471 of IPC has alleged, the issuance of direction by the Magistrate to investigate the complaint by police is not beyond its competence. The issue of jurisdiction of taking cognizance by the Magistrate at that stage is not required to be adjudicated. He has further been placed reliance on a judgment of the apex Court in the case of *Mohd. Yousuf Vs. Smt. Afaq Jahan and another* – AIR 2006 SC 705 reiterating the same arguments. Reliance has also been placed on a Single Bench judgment of this Court passed in Criminal Revision No. 131/2004 *Satyanand Mishra Vs. Prakash Chand Jain* decided on 8.3.2006 and it is contended that in similar case the order passed by the trial court has been upheld by this Court directing investigation against the officers of top class of hierarchy, therefore, in the present case also the order passed by the Magistrate deserves to be upheld.

8. Per contra, counsel appearing on behalf of the accused persons, Shri C. L. Yadav, Sr. Advocate, Shri Z. A. Khan, Sr. Advocate, and Shri Manoj Soni, J. K. Joshi, Advocates contends that by an order of the revisional Court the order passed by the Magistrate has been set aside, because it was without due application of mind, however, such findings are liable to be upheld, in view of the judgment of the apex Court in the case of *Suresh Chand Jain Vs. State of Madhya Pradesh and another* – AIR 2001 SC 571. It is submitted by them that any Judicial Magistrate while taking cognizance, to a offence, may direct for investigation under Section 156 (3) of Cr.P.C., enabling the police to start the investigation. It is open to the Magistrate to direct the police to register the FIR, nothing is illegal in doing so, because it involves only the process of entering the substance of the information relating to the commission of the cognizable offence. On the same analogy reliance has further been placed on Full Bench judgment of Allahabad High Court in the case of *Ram Babu Gupta and another Vs. State of U.P. and others* – 2001 Cri.L.J. 3363 and the judgment of the apex Court in the case of *Madhu Bala Vs. Suresh Kumar and others* – AIR 1997 SC 3104. It is embarked upon by them that issuance of direction to investigate through police is not an empty formality, the Magistrate passing an order ought to have apply his mind to the allegations as alleged in complaint, and only on finding some substance the direction for investigation may be ordered. The judgment relied upon by *Shri Dalal, Advocate of Devarapalli Lakshminarayana Reddy* (supra) and Mohd. *Yusuf* (supra) is of no help to him because the revisional Court has set aside the order impugned of the trial Court only on the ground that it has been passed

without due application of mind, turning down other arguments, however, the said judgments are of no help to him.

9. It is also contended that looking to the allegations as alleged in the private complaint no cognizable offence is prima facie made out against accused persons Madhu Kumar Babu, Rakesh Gupta, Virendra Singh, B. J. Salunke and Brajesh Mishra, i.e. the officers posted in different capacity from Sub Inspector to the Superintendent of Police at the relevant time at Indore. Therefore, issuance of the direction against those accused persons under Section 156 (3) Cr.P.C. to investigate the private complaint is unwarranted and without due application of mind.

10. By filing the petition under Section 482 of Cr.P.C. it is contended that in exercise of power under Section 482 of Cr.P.C. this Court with a view to prevent abuse of process of any Court or to otherwise secure the ends of justice, may quash the private complaint filed against them. It is said that as per the judgment of the apex Court in the case of *State of Haryana and others Vs. Ch. Bhajan Lal and others* – 1992 Cri.L.J. 527 seven principles have been laid down, which are as under :-

> "(1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
>
> (2) Where the allegations in the First information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156 (1) of the Code except under an order of a Magistrate within the purview of S. 155 (2) of the Code.
>
> (3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
>
> (4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155 (2) of the Code.
>
> (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
>
> (6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision on

the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/ or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spit him due to private and personal grudge."

11. In the present case on the allegations made in the complaint on its face value in entirety it do not prima facie constitutes any offence to be made out against the accused persons namely Madhu Kumar Babu, Rakesh Gupta, Virendra Singh, B.J. Salunke, Dilip Bhandari and Brajesh Mishra. More so, lodging of the private complaint by complainant manifestly with a mala fide intention, because on a complaint made by the Dinesh Tripathi an offence was registered against him, who is a police officer and no action has been taken on his complaint, however, for this reason also the private complaint is liable to be quashed against the officers posted at the relevant time. It is also contended that looking to the contents of the private complaint no allegation of commission of any offence under Section 307 of IPC has alleged against the accused persons Madhu Kumar Babu, Rakesh Gupta, Virendra Singh, B. J. Salunke and Brajesh Mishra; more so the allegation of conspiracy prior to commission of the said offence is also not in the private complaint. No document or pleading has been made to show any connection of these officers with the then Minister Mr. Subhash Sojatiya, however, there is no evidence how they have conspired with Dinesh Tripathi and Mr. Sojatiya with a view to assault over the complaint, therefore, prima facie no offence is made out on the basis of the said complaint. It is also contended that the principles of vicarious liability having no application in criminal cases. Until and unless specific act or overt act of a particular officer has been pleaded in complaint showing ingredient of commission of the alleged offence; which is missing in the private complaint the Magistrate is not required to direct investigation against them. In such circumstances powers under Section 482 of Cr.P.C. even at the stage of issuance of the direction to the police under Section 156 (3) of Cr.P.C., may be exercised. Reliance has been placed on a judgment of apex Court in the case of *Maksud Saiyed Vs. State of Gujarat and others* – (2008) 5 SCC 668.

12. After having heard learned counsel appearing on behalf of the parties, in the opinion of this Court, and as per the judgment of apex Court in the case of *Suresh Chand Jain* (supra), it is the trite law, the Magistrate is empowered to pass an order under Section 156 (3) of Cr.P.C. to investigate the allegations as alleged in the private complaint even if it is triable by the Court of Sessions. It is also settled that while passing such an order the Magistrate ought to have applied his mind to the allegations as alleged in the complaint. It is also settled that if an order passed by the Magistrate is without due application of mind even at the stage of direction Section 156 (3) of Cr.P.C., it may be liable to be set aside.

13. In the present case it is apparent that on filing a private complaint by the complainant Arun Kumar Jain along with an application under Section 156 (3) of Cr.P.C. a request was made to allow the said application and to issue direction for investigation on complaint. The trial court had directed to SHO of concerned police station to take action in accordance with law on the attached private complaint and intimate to the Court on the next date. In view of the contents of the private complaint it is apparent that the assault as alleged was made by the accused No. 1 Dinesh Tripathi upon complainant in between 7:15am to 8:00am while he was along with his pet dog. The allegations of bias and malign intention has been alleged against accused No. 7 Mr. Subhash Sojatiya due to filing of Challan by the complainant against his brothers. Conspiracy has been done by accused No. 8 Karan Singh Panwar and No. 9 Dilip Bhandari. It is only alleged that accused Madhu Kumar Babu, Rakesh Gupta, Virendra Singh, B. J. Salunke and Brajesh Mishra, were the officers posted in the police station as Sub Inspector, Town Inspector, City Superintendent of Police, and the Superintendent of Police, Indore have not taken any action on the complaint of complainant against Dinesh Tripathi and to harbour them made some change in the Rojnamcha entries. There is no allegation of having any connection of these officers with Mr. Subhash Sojatiya, and Dinesh Tripathi prior to the said incidence. The allegation of having any conspiracy prior to the said incident is also not pleaded in complaint, therefore, in such circumstances prior to passing an order under Section 156 (3) of Cr.P.C., against the said officers, the Magistrate is required to apply his mind on the allegations of private complaint. Therefore, the order passed by the revisional Court to set aside the order of trial Court appears to be just and proper.

14. In Judgment of *Satyanand Mishra* (Supra) of learned Single Bench of this Court, relied upon by Mr. Dalal, learned counsel, said to be of identical facts of this case is unfounded. In the said case, the allegations of the offences punishable U/s 13(1), 13(2) of the Prevention of Corruption Act, read with Section 120 B of the IPC of hatching conspiracy were alleged against the accused person wherein the order of investigation U/s 156(3) was passed. In the said case, complaint was filed on 27/11/2003. The trial court passed an order "the time would require for going through the complaint and the documents filed therewith" therefore, it was kept for consideration on 04/12/2003. On the said date, time was sought for to examine the complainant in court, however, it was fixed on 09/01/2004. On the said date, the court observing that U/s 19 of the Prevention of Corruption Act, without prior sanction cognizance cannot be taken, however, directed the police to investigate into the matter. Thus, it is apparent in the said case after giving two dates and after going through the contents of the complaint and applying his mind, directed the police to investigate because previous sanction as required U/s Prevention of Corruption Act was not there. Thus, this court was of the opinion that the order passed by learned judge directing investigation by police is after

due application of mind. In the present case, the facts are entirely different because on the date of filing of the complaint, the Trial Court mechanically directed to the concerned SHO to take action and to report compliance on the next date. Moreso, the Trial Court has not applied his mind whether any specific allegation of commission of cognizable offence against the officers posted at the relevant time is available or not. In the said circumstances, the judgment of *Satyanand Mishra* (supra) having no application and the complainant cannot derive any benefit from the said judgment.

15. On going through the contents of the private complaint it is apparent that the allegations of assault over the complainant is against accused No. 1 Dinesh Tripathi, who allegedly a man of Mr. Subhash Sojatiya. At the time of commission of the offence, it is stated by him to the complainant that till now you have not yet come to rescue to his fault and he has been sent, by accused No. 7 to convey this massage. Thus after reaching to the house of the complainant on some altercation because his pet dog went for call of nature in front of the house of complainant, assault by means of Lathi was made by Dinesh Tripathi causing injury over the head. The allegation of conspiracy is against accused No. 8 Karan Singh Panwar and accused No. 9 Dilip Bhandari. Bare reading of the private complaint it does not reveal that any meeting of mind of the accused Dinesh Tripath, Mr. Subhash Sojatiya, Dilip Bhandari and Karan Singh Panwar, with the officers posted at the relevant time namely Mr. Madhu Kumar Babu, Rakesh Gupta, Virendra Singh, B.J. Salunke, and Brajesh Mishra to establish the common intention, prior to the alleged incident is on record. Because of prior meeting of mind is not their and no specific allegations of conspiracy has come against those officers, however, looking to the allegations as alleged on the face of the private complaint it cannot be inferred that any indulgence of the officers is there, in commission of the alleged offence under Section 307 of IPC by Dinesh Tripathi. Now only allegation which remains in the private complaint that is of harbouring of Mr. Dinesh Tripathi, because on a complaint submitted by the complainant the officers posted from the rank of Sub Inspector till Superintendent of Police has not discharged their official duty, becoming a public servant and no case has been registered against him. From the allegations of the complaint specific act of any of the officer has not been pleased making him responsible for the said act. The allegations with respect to Rojnamcha entry as alleged in the complaint is also not specific to show the act of the particular officer. Thus, on the basis of the allegations as alleged in the complaint no cognizable offence prima facie constitutes against Madhu Kumar Babu, Rakesh Gupta, Virendra Singh, B.J. Salunke and Brajesh Mishra. It is also seen from the record that the complainant is a police officer and an offence against him has been registered on the information of one Dinesh Tripathi. Therefore, he may have feeling of non-registration of the case on his information, which may create an element of bias against these officers posted at the relevant time at

Indore, and it may be safely presumed that with a view to take vengeance he might have proceeded against them, without specifying act, overt act and assigning their role in commission of the said offence.

16. In view of the discussion as made herein above in the opinion of this Court the principles as laid down in the case of *Bhajan Lal* (supra) at Sl. No. 1 and 2 and Sl. No.7, having it application and it is one of rare of the rarest cases to exercise the power under Section 482 of Cr.P.C. and to quash the private complaint filed by the complainant Arun Kumar Jain against Madhu Kumar Babu, Rakesh Gupta, Virendra Singh, B.J. Salunke and Brajesh Mishra. It is further to be noted that the principle of vicarious liability having no application in a prosecution which is to be lodged against superior officers. My view fortifies from the judgment of the apex court in the case of *Maksud Saiyed* (supra). Thus, in absence of any specific allegation of causing any injury or assigning any role against them merely, on the bald statement issuance of direction to investigate the said incident by the concerning SHO against Madhu Kumar Babu, Rakesh Gupta, Virendra Singh, B.J. Salunke and Brajesh Mishra cannot be directed. It is to be explained here that one Rakesh Gupta posted as Additional Superintendent of Police, Indore, at the relevant time has not filed any petition under Section 482 of Cr.P.C., seeking quashment of the private complaint, but on the basis of the allegations of the private complaint nothing has been found against him and in view of the discussion made herein above the direction to investigate on a private complaint against the officers posted at the relevant time have not been issued, however there is no reason to discriminate him with others. Thus in the opinion of this Court invoking the inherent powers of the High Court under Section 482 of Cr.P.C with a view to prevent the abuse of process of Court or to otherwise secure the ends of justice the complaint filed against the aforesaid five officers is hereby quashed.

17. In view of the forgoing discussion the Criminal Revision No. 546/2007 is devoid of any merit, therefore, the same stands dismissed and the order passed by the revisional Court is upheld to the extent of passing an order afresh only against accused No. 1 Dinesh Tripathi, accused No.7 Subhash Sojatiya, accused No.8 Karan Singh and accused No. 9 Dilip Bhandari. At the same time M.Cr.C. No.1580/2008 stands allowed. The private complaint filed by the complainant Arun Kumar Jain against Madhu Kumar Babu, Rakesh Gupta, Virendra Singh, B.J. Salunke and Brajesh Mishra is hereby quashed. It is directed that in furtherance to the order passed by the revisional Court, the trial Court may pass appropriate order on a private complaint against the four accused persons as indicated herein above.

Revision dismissed.

STATE OF M.P. Vs. SHANKARLAL

I.L.R. [2010] M. P., 717

CRIMINAL DEATH REFERENCE

Before Mr. Justice S.L. Kochar & Mr. Justice S.K. Seth

5 November, 2009*

STATE OF M.P. ... Appellant

Vs.

SHANKARLAL ... Respondent

A. Evidence Act (1 of 1872), Section 3 - *Circumstantial evidence - Law discussed.* (Para 8)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – परिस्थितिजन्य साक्ष्य – विधि की विवेचना की गई।

B. Penal Code (45 of 1860), Sections 302, 366, 364 & 376, Evidence Act, 1872, Section 3 - *Rape and Murder - Circumstantial evidence - Last seen together - Salesman of liquor shop (P.W. 15) states that appellant along with girl had come to liquor shop and had purchased liquor - He had identified the dead body of the girl and appellant from a photograph published in newspaper - Newspapers not filed - Dock identification after 12 months of incident of no use in absence of T.I.P. - Witness not reliable.* (Para 9)

ख. दण्ड संहिता (1860 का 45), धाराएँ 302, 366, 364 व 376, साक्ष्य अधिनियम, 1872, धारा 3 – बलात्संग और हत्या – परिस्थितिजन्य साक्ष्य – अंतिम बार साथ–साथ देखे गये – शराब दुकान के विक्रेता (अ.सा. 15) ने कथन किया कि अपीलार्थी लड़की के साथ शराब की दुकान पर आया था और शराब क्रय की थी – उसने समाचार पत्र में प्रकाशित फोटोग्राफ से लड़की के शव और अपीलार्थी की शिनाख्त की – समाचार पत्र पेश नही किये गये – शिनाख्त परेड के अभाव में घटना के 12 माह बाद कठघरे में शिनाख्त किसी उपयोग की नही – साक्षी विश्वसनीय नही।

C. Evidence Act (1 of 1872), Section 27 - *How much of information received from accused may be proved - Law discussed.* (Paras 10 & 11)

ग. साक्ष्य अधिनियम (1872 का 1), धारा 27 – अभियुक्त से प्राप्त जानकारी में कितनी साबित की जा सकेगी – विधि की विवेचना की गई।

D. Evidence Act (1 of 1872), Section 27 - *How much of information received from accused may be proved - Place where dead body was lying was already in the knowledge of the investigating agency - Recovery of empty liquor bottle from open and accessible place to everybody - Both circumstances are not incriminating circumstances.* (Paras 12 & 13)

घ. साक्ष्य अधिनियम (1872 का 1), धारा 27 – अभियुक्त से प्राप्त जानकारी में कितनी साबित की जा सकेगी – स्थान, जहाँ शव पड़ा हुआ था, पहिले से अनुसंधान एजेंसी के ज्ञान में था – शराब की खाली बोतल की बरामदगी खुले और प्रत्येक व्यक्ति के लिए सुगम स्थान से – दोनों परिस्थितियाँ अपराध में फँसाने वाली नही हैं।

*Criminal Death Ref. No.1/2009 (Indore)

STATE OF M.P. Vs. SHANKARLAL

E. Evidence Act (1 of 1872), Section 27 - *How much of information received from accused may be proved - Recovery of blue underwear - Seized underwear was not got identified by parents or other relatives of deceased by holding T.I.P. - Underwear not produced in Court and not got identified in Court - Recovery of blue underwear of no consequence - Appeal allowed.* **(Para 14)**

ड. साक्ष्य अधिनियम (1872 का 1), धारा 27 – अभियुक्त से प्राप्त जानकारी में कितनी साबित की जा सकेगी – नीले अंडरवियर की बरामदगी – बरामद अंडरवियर की शिनाख्त मृतक के माता–पिता या अन्य रिश्तेदारों की शिनाख्त परेड कराकर नही करायी गयी – अंडरवियर न्यायालय में पेश नही किया गया और न्यायालय में शिनाख्त नही करायी गयी – नीले अंडरवियर की बरामदगी का कोई परिणाम नही – अपील मंजूर।

Cases referred :

(2006) 10 SCC 172, (2007) 2 SCC (Cri) 162, AIR 1947 PC 67, AIR 1967 SC 1113, (2007) 1 SCC (Cri) 582, (2008) 1 SCC (Cri) 72, AIR 1970 SC 1934, (2004) SCC (Cri) 2028.

G. Desai, Dy.A.G., for the State.

M.A. Bohara, for the accused.

J U D G M E N T

The Judgment of the Court was delivered by **S.L. Kochar, J.** :–THIS Judgment shall also govern the disposal of Criminal Appeal No. 734/2009 filed by the appellant/accused through Legal Aid against the impugned judgment and order of conviction and sentence.

2. The learned III Addl. Sessions Judge, Indore/trial Court submitted the Criminal Death Reference No.1/2009 for confirmation of death sentence passed by the impugned judgment and order in Sessions Trial No.280/2008 decided on 30/6/2009 whereby the learned Judge has convicted the appellant U/Ss.366, 364,376 and 302 of the IPC, sentenced to undergo RI for 10 years with fine of Rs.500/- in three counts U/Ss.366, 364,376 of the IPC and sentenced to death U/S.302 of the IPC, with defaulting clause of payment of fine, appellant shall undergo RI for six months under each count. However, the substantive jail sentences have been directed to run concurrently. Appellant/accused has also filed Criminal Appeal No.734/2009 aggrieved with the judgment and order of conviction and sentence as mentioned herein above.

3. Short resume of the prosecution case as put forth before the trial Court is that on 20/1/2008 in the night at 9.00 p.m Police Control Room, Indore received information that heirless dead body of a girl aged 6-7 years was lying behind the House No.585 and 588 of Usha Nagar. On the basis of this information, police of police station, Annapurna Nagar, Indore registered Murg No.2/2008 U/S.174 of the Cr.P.C and Station House Officer (for short "SHO") S.P.Dubey (PW.19) immediately reached on the spot and in presence of witnesses prepared inquest

report (Ex.P.2). A team of Forensic Science was called and photographs of the body were taken. A handkerchief was found tied around the neck and mouth was crammed by polythene. In the opinion of witnesses of the inquest, deceased was ravished and thereafter killed by throttling. Dead body was sent for postmortem examination which was conducted by Dr.Bharat Prakash (PW.2). Postmortem report is Ex.P.3. Dead body was not claimed by anybody, therefore, intimation was sent in this regard to all the police stations of the town. When dead body was lying in hospital, Manohar S/o Tulsiram (PW.13), father of deceased, resident of Vijay Nagar reached in the police station for lodging report of missing of his daughter. Police took Manohar and his brother to hospital where they identified the body of the girl named Nisha @ Kaali. Police prepared identification memo (Ex.P.8). After inquest enquiry, FIR (Ex.P.16) was registered by SHO S.P. Dubey (PW.19). During the course of investigation, police came to know that appellant once removed the underwear of the girl with an intention to commit rape. On this basis, appellant was taken into custody and interrogated. Appellant disclosed before the police about place of incident and got recovered the empty liquor bottle. From the bag of the appellant, one blue colour underwear was seized. Police prepared confirmation memorandum at the instance of the appellant regarding place of incident. Appellant was sent for medical examination and examined by Dr.A.K.Tiwari (PW.3) who also issued MLC report of appellant (Ex.P.6). The seized articles including clothes and slide of vaginal swab of deceased were sent to FSL and its report is Ex.P.24. Investigating Officer recorded the statements of the witnesses who were acquainted with the facts of the case and also got recorded statements of Takiasingh (PW.12) and Rambahadur (PW.14) by Magistrate as per provision U/S.164 of the Cr.P.C. On completion of investigation, charge sheet was filed against the appellant U/Ss.364, 366, 376 and 302 of the IPC.

4. The appellant refuted the charges and his defence was denial, however, he had not examined any witness in defence. Learned trial Court finding the appellant guilty, convicted and sentenced the appellant as noted herein above.

5. We have heard the learned counsel for parties at length and also perused the entire record minutely.

6. Homicidal death of the deceased has not been challenged before the trial Court as well as before this Court, otherwise also in view of the evidence of Dr.Bharat Prakash (PW.2) and postmortem report (Ex.P.3), it is fully established that deceased met homicidal death by asphyxia due to throttling. It is also undisputed that appellant was 60 years of age at the time of his arrest and medical examination by Dr.A.K. Tiwari (PW.3) who proved MLC report (Ex.P.6).

7. It emerged from the impugned judgment that conviction of the appellant is mainly based on circumstantial evidence and circumstances relied upon by the

learned trial Court are past conduct of the appellant regarding removal of underwear of deceased, suspicion raised on the appellant by Ramsingh (PW.10), Manoharsingh (PW.13) and Smt. Bharatibai (PW.20), uncle, father and mother of the deceased, medical evidence regarding homicidal death and commission of rape with the deceased, seizure of underwear of deceased from the possession of the appellant, recovery of empty liquor bottle at the instance of the appellant, pointing out place of incident to police in presence of witnesses Rambabu (PW.11) and Takiasingh (PW.12) and evidence of last seen of the deceased in the company of the appellant before her death by Deepak (PW.15).

8. The core question for decision by us is whether above mentioned circumstances have been proved by the prosecution to bring home the guilt of the appellant beyond all reasonable doubt or not ? The law of circumstantial evidence has been very well enunciated by Supreme Court in cases of *Ram Reddy Rajesh Khanna Reddy Vs. State of Andhra Pradesh* [2006 (10) SCC 172] and *State of Goa Vs. Sanjay Thakran* [2007 (2) SCC (Cri) 162, para 13], it is extracted herein:-

> "13. The prosecution case is based on the circumstantial evidence and it is a well-settled position of law that when the case rests upon circumstantial evidence, such evidence must satisfy the following tests:-
>
> (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
>
> (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence;
>
> (See *State of U.P. v. Satish* [(2005) 3 SCC 114], *Padala Veera Reddy v. State of A.P.* [1989 Supp (2) SCC 706], *Sharad Birdhichand Sarda v. State of Maharashtra* [(1984) 4 SCC 116], *Gambhir v. State of Maharashtra,* SCC p.355, para 9 [(1982) 2 SCC 351] and *Hanumant Govind Nargundkar v. State of M.P.* [AIR 1952 SC 343].

9. In the light of aforesaid legal position of circumstantial evidence, now we proceed to examine the main evidence of last seen of the appellant in the company of the deceased by Deepak (PW.15). He has deposed that he was serving as salesman in liquor shop situated in Mishra Nagar, Annapurna Road, Indore. On 19/1/2008 at 7.45 pm one old man with a girl aged about 8-9 years having a bag (thaila) in his hand purchased a quarter and paid coin of rupees forty. He was short of money, therefore, took some money from that girl, at that moment one person told that "beggar is also drinking liquor" at which he replied that it is a question of interest. After purchasing one quarter liquor, both had gone. Further say of this witness is that on 24/1/2008 he had seen photo of a person in paper who had committed rape (kukarm) with a girl and killed her. On the basis of photograph, he identified the man who came to the shop with girl having bag. It is also stated by him that he had also seen the photo of girl who came with Baaba (old man) in newspaper on 20/1/2008. It was also mentioned in the paper that girl was first ravished, thereafter killed by throttling and her dead body was found in Usha Nagar. After seeing photo of girl as well as photo of Baaba he himself went to the police station for giving statement. He identified the appellant in the Court who was seen with the girl in the evening of 19/1/2008. The statement of this witness is not dependable for the following reasons.

(I) Papers dated 20/1/2008 and 24/1/2008 have not been produced and exhibited in Court to ascertain the version of this witness whether in fact photographs were published and he had seen the same. (we are construing word paper as daily newspaper though in the statement of this witness, nowhere it is mentioned that he had seen the photograph in daily newspaper but in cross examination he has mentioned names of some papers). The best evidence was the photographs published in both the papers which attracted the attention of this witness and the very basis of his going to the police station are not filed and got proved by the prosecution. The only reasonable inference as per provision U/S.114-g of the Evidence Act can be drawn that the papers did not contain such photographs and if produced would have falsified the witness to that extent.

(II) No TI parade of the appellant was held by the Investigating Agency to ascertain and to fix the identity of the appellant by this witness (PW.15). There is no evidence brought on record by the prosecution that this witness produced both the papers in the police station, therefore, the police should have collected both the papers to verify his version and should have also held T.I parade to fix the identify of the accused if papers were not collected. In view of all these facts , dock identification of the appellant in Court for the first time after 12 months of the incident cannot be relied upon without corroboration to his testimony by way of evidence of T.I parade memo or newspapers.

(III) He had seen only photograph of the girl in paper dated 20/1/2008 then why immediately he had not gone to the police station to give his statement

that he had seen this girl describing her features and personality. No reasonable and plausible explanation has been given by this witness on this aspect.

10. The next important circumstance relied upon by the learned trial Court is the disclosure statement (Ex.P.19) made by the appellant before SHO S.P. Dubey (PW.19) and in presence of witnesses Rambabu (PW.11) and Takiasingh (PW.12) about discovery of fact as per provision U/S.27 of the Evidence Act. Scope and ambit of Sec.27 of the Evidence Act were enunciated by Privy Council in *Pullukuri Kotayya Vs. King Emperor* [AIR 1947 PC 67] in the following words, which have become locus classicus and the relevant observation is extracted thus:-

> **It is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."**

11. The above mentioned legal position was again discussed in detail in case of *Prabhoo Vs. State of U.P* [AIR 1963 SC 1113] which is extracted hereunder:-

> **"11. Although the interpretation and scope of Section 27 has been the subject of several authoritative pronouncements, its application to concrete cases [in the background events proved therein] is not always free from difficulty. It will therefore be worthwhile at the outset, to have a short and swift glance at Section [27] and be reminded of its requirements. The section says:**
>
> **'27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession**

or not, as relates distinctly to the fact thereby discovered, may be proved.

12. The expression 'provided that' together with the phrase 'whether it amounts to a confession or not' show that the section is in the nature of an exception to the proceeding provisions particularly Section 25 and 26. It is not necessary in this case to consider it this section qualifies, to any extent, Section 24, also. It will be seen that the first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information recovered from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only 'so much of the information' as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word 'distinctly' means 'directly', 'indubitably', 'strictly', 'unmistakably'. The word has been advisedly used to limit and define the scope of the provable information. The phrase 'distinctly relates to the fact thereby discovered' is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered." (See *Mohd. Inayatullah v. State of Maharashtra,* SCC pp.831-32, paras 11-12.). (emphasis in original)

Also See *Amitsingh Vs. State of Maharashtra* [2007(1) SCC (Cri)582] and *Anil @ Raju Vs. Administration of Daman & Diu* [(2008) 1 SCC (Cri) 72].

12. In the light of aforesaid legal position about discovery of fact at the instance of the appellant, it is clear that confessional part of his memorandum statement (Ex.P.19) cannot be looked into being hit by Secs.25 and 26 of the Evidence Act which are reproduced for convenience:-

Confession to police officer not to be proved.

25. No confession made to a police officer, shall be proved as against a person accused of any offence.

Confession by accused while in custody of police not to be proved against him.

26. No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

13. In the instant case, learned trial Court has relied upon the statement of the appellant (Ex.P.19) and verification panchnama (Ex.P.20 and P.21) about place where dead body was thrown as well as seizure memo of empty liquor bottle (Ex.P.22) though investigating agency was already knowing place where dead body was found prior to disclosure statement (Ex.P.19) made by the appellant long back on 20/1/2008. The memorandum statement was recorded on 23/1/2008. Since place was already known to the Investigating Officer Shri Dubey (PW.19), it cannot be regarded as fact discovered at the instance of the appellant and same cannot be used as an incriminating circumstantial evidence against him. See *Jaffer Husain Dastagir Vs. The State of Maharashtra* [AIR 1970 SC 1934]. The seizure of empty liquor bottle from open and accessible place to everybody is also not an incriminating circumstance.

14. Simple seizure of blue underwear from the bag of the appellant vide Ex.P.18 is not sufficient to establish that it was the underwear of the deceased. After seizure, this underwear was not got identified by parents or any other relative witness by holding T.I. Parade during the course of investigation. The seized underwear was not shown and identified by Ramsingh (PW.10), Manoharsingh (PW.13), Smt. Bhartibai (PW.20); uncle, father and mother of the deceased. The blue colour underwear said to have been seized from the bag of the appellant by SHO Shri Dubey (PW.19) was also not got identified by him in Court which could be the substantive piece of evidence. The seized underwear and empty liquor bottle was neither produced in the Court nor got identified by Shri Dubey and both the panch witnesses Rambabu (PW.11) and Takiasingh (PW.12). Both the articles were not given Article number in the Court, therefore, there is no substantive piece of evidence to establish the identity of both the articles with seizure memo and the oral statements of all the three witnesses. The Supreme Court has discussed this issue about non production of seized property in Court during the course of trial in case of *Jitendra Vs. State of MP* [2004 SCC (Cri) 2028].The learned trial Court has not at all considered and discussed the provision U/S.27 of the Evidence Act and even relied upon inadmissible part of document (Ex.P.19, P.20 and P.21).

15. On exclusion of evidence of Deepak (PW.15) about last seen of the appellant in the company of the girl and discovery of fact relating to the crime at the instance of the appellant as discussed herein above, there remains no other clinching evidence to form the chain of circumstances pointing out unerringly, excluding all reasonable hypothesis of innocence in favour of the appellant, towards the guilt of the appellant, therefore, in our considered view the appellant is entitled to be acquitted.

16. The statement of mother, father and uncle of the deceased is only regarding suspicion on the appellant and it is trite that suspicion howsoever strong, shall not take place of proof and conviction cannot be based on the basis of suspicion.

17. In the result, for the foregoing discussion, Death Reference is negated and Criminal Appeal filed by the appellant is allowed. Appellant is in jail. Learned trial Court is directed to release him forthwith if not wanted in any other criminal case.

18. Original Judgment is kept in Criminal Death Reference No.1/2009 and a copy whereof be placed in the record of connected Criminal Appeal No. 734/2009. Office is directed to "send a copy of this judgment along with the record to the trial Court for information and immediate compliance.

Order accordingly.

I.L.R. [2010] M. P., 725
SALES TAX REFERENCE
Before Mr. Justice R.S. Garg & Mr. Justice P.K. Jaiswal
4 November, 2009*

SALES TAX COMMISSIONER ... Petitioner
Vs.
M/S PANNALAL NARENDRA KUMAR, JABALPUR ... Respondent

A. General Sales Tax Act, M.P. 1958 (2 of 1959), Section 44 - *Reference - Whether an Aadhatiya is liable to pay entry tax - Held - An Aadhatiya is nothing but a commission agent and he causes entry of the goods in the local area and he is liable to be taxed.* (Para 11)

क. साधारण विक्रय-कर अधिनियम, म.प्र. 1958 (1959 का 2), धारा 44 – निर्देश – क्या आढ़तिया प्रवेश कर अदा करने के लिए दायी है – अभिनिर्धारित – आढ़तिया कोई और नही बल्कि एक कमीशन अभिकर्ता है और वह स्थानीय क्षेत्र में माल का प्रवेश कराता है और वह कर के लिए दायी है।

B. Words & Phrases - ***Aadhatiya*** *- Meaning - A person, who receives goods either on his own behalf or on behalf of the principal, sells the same in the market on basis of certain commission - An Aadhatiya may sell or even purchase the goods under the instructions of the principal.* (Para 6)

ख. शब्द और वाक्यांश – आढ़तिया – अर्थ – कोई व्यक्ति, या तो स्वयं की ओर

*Sales Tax Reference No.28/2000 (Jabalpur)

से या मालिक की ओर से माल प्राप्त करता है, कतिपय कमीशन पर उसे बाजार में बेचता है – आढ़तिया मालिक के अनुदेशों के अन्तर्गत माल विक्रय या क्रय कर सकता है।

C. **Words & Phrases** - ***Kachha Aadhatiya*** - *Meaning - Kachha Aadhatiya is a person who is to abide by all the instructions issued by the principal and he is not entitled to take any decision on his own behalf.* (Para 7)

ग. शब्द और वाक्यांश – कच्चा आढ़तिया – अर्थ – कच्चा आढ़तिया वह व्यक्ति है जो मालिक द्वारा जारी किये गये सभी अनुदेशों से पाबंद है और वह स्वयं अपनी ओर से कोई निर्णय लेने का हकदार नही है।

D. **Words & Phrases** - ***Pakka Aadhatiya*** - *Meaning - A 'Pakka Aadhatiya' is person, who receives the goods, keep with him and under the instructions of the principal is to dispose of the same but he could dispose of the goods on his own terms - Pakka Aadhatiya in fact agrees with the principal that he would pay a particular amount for the consignment.* (Para 7)

घ. शब्द और वाक्यांश – पक्का आढ़तिया – अर्थ – पक्का आढ़तिया वह व्यक्ति है जो माल प्राप्त करता है, उसे अपने पास रखता है और मालिक के अनुदेशों के अन्तर्गत उसका व्ययन करता है किन्तु वह स्वयं अपने निबंधनों पर माल का व्ययन कर सकता है – पक्का आढ़तिया वास्तव में मालिक से सहमत होता है कि वह प्रेषित माल के लिए विशिष्ट धनराशि अदा करेगा।

E. **Words & Phrases** - ***Aadhat*** - *Meaning - A commission received by a dealer or a commission agent in the business of grains - The word 'Aadhat' does not mean anything less than or more than a commission.* (Para 8)

ङ. शब्द और वाक्यांश – आढ़त – अर्थ – कमीशन जो किसी व्यापारी या कमीशन अभिकर्ता द्वारा अनाज के कारोबार में प्राप्त किया जाता है – शब्द 'आढ़त' का अर्थ कमीशन से कम या अधिक कुछ नही है।

Rahul Jain, Dy.A.G., for the petitioner/Revenue.
H.S. Shrivastava with *Sandesh Jain*, for the respondent/assessee.

ORDER

The Order of the Court was delivered by **R.S. GARG, J.** :–The respondent an assessee had challenged the order passed by Additional Assistant Commissioner, Sales Tax Jabalpur passed on 31.10.1985 in Case No.78/82-83 Pravesh Kar (Entry Tax) wherein the petitioner was held liable to pay tax. The appeal No.18/JBP/4/E/85-Pravesh Kar for the period 28.10.1981 to 15.11.1982 was dismissed therefore, the respondent/assessee filed further Appeal No.144-PBR/87 before the Board of Revenue. The Board of Revenue was pleased to allow the appeal vide order dated 8.8.1989. Thereafter, the revenue made an application under section 44 of the M.P. General Sales Tax Act for making a reference to the High Court. After hearing the parties the learned Member, Board of Revenue was pleased to refer the matter to the High Court for answering the following question:

"Whether under the fact and the circumstances of the case the Board of Revenue was justified in holding that the *Aadhatiya* was not liable to pay entry tax in respect of the goods entered by him into the local area as agent of the Principal"

2. In the present matter undisputedly certain goods were sent by a third party which were received by the assessee as *Aadhatiya* of said person. The goods were sent by the outside dealer and the same were received for being sold in the market area by the assessee. The question which cropped up before the revenue authorities was whether the assessee who was working as an *Aadhatiya* was liable to pay tax. Though the Assessing Officer and the First Appellate Authority came to the conclusion that the assessee who sold the goods in his *aadhat* was liable to tax but the Board of Revenue held that the assessee was simply an *Aadhatiya,* therefore, he was not liable to pay the tax. The Board was also of the opinion that assessee did not cause entry of the goods in the local area but, in fact the goods were entered into the local area by the Principal by sending the goods. The Board of Revenue ultimately held that the assessee was not liable to pay any tax.

3. Shri Rahul Jain, learned Deputy Advocate General for the petitioner submitted that the Entry-Tax Act if is read with Madhya Pradesh General Sales Tax Act then Section 2(d) of M.P. General Sales Tax Act would come into operation and would define a dealer. According to him a commission agent called by whatever name *'Kachha Aadhatiya', 'Pakka Aadhatiya',* agent, commission agent etc. would be taken to be a dealer for purposes of Section 2 (d) and as on his say the goods are allowed to enter in local area, it could not be argued by the assessee that he is not liable to pay tax.

4. Shri Shrivastava, learned Senior Counsel for the respondent, submitted that a fair understanding in the dealing between the Principal and the Aadhatiya would show that the Principal had sent the goods for being sold in the market or in the Aadhat of Aadhatiya and as the property in the goods continues to be with the Principal and as the Principal causes the entry of the goods in the local area, the commission agent-cum-aadhatiya cannot be held liable to pay the tax.

5. The Entry Tax Act says that, all the expressions other than expression 'goods' and 'sale', which are used, but are not defined in the Entry Tax Act and are rather defined in the Sales Tax Act shall have the same meaning assigned to them in the M.P. General Sales Tax Act. Section 2 (d) of the M.P. General Sales Tax Act defines a "dealer" as under:

"Section 2(d):

"Dealer means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise,

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whether for cash, or for deferred payment, or for commission, remuneration or other valuable consideration and includes -

(i). a local authority, a company, an undivided Hindu family or any society (including a co-operative society), club, firm or association which carries on such business:

(ii). a society (including a co-operative society), club, firm or association which buys goods from, or sells, supplies or distributes goods to members;

(iii) a commission agent, a broker, a del credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on business of buying, selling, supplying or distributing goods on behalf of any principal".

A perusal of the definition would make it clear that a dealer would include any person who carries on the business of buying, selling, supplying or distribution of goods directly or otherwise, a local authority, a company an undivided Hindu family etc, a commission agent, a broker, del credere agent an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of buying, selling, supplying or distributing goods on behalf of any principal.

6. The word Aadhatiya has not been defined either in the M.P. General Sales Tax Act or under the Entry Tax Act or under the Sale of Goods Act or under the Contract Act. The word *Aadhatiya* is used as a colloquial word to mean a person who receives goods either on his own behalf or .on behalf of the principal, sells the same in the market on basis of certain commission. An Aadhatiya may sell or even purchase the goods under the instructions of the Principal.

7. The old trading system had two types of the Aadhatiyas viz. *'Kachha Aadhatiya'* and *'Pakka Aadhatiya'*. *'Kachha Aadhatiya'* was. a person who was to abide by all the instructions issued by the Principal and he was not entitled to take any decision on his own behalf. If the Principal said that the goods have to be sold at a particular rate then he was obliged not to charge a penny more than what the Master/Principal directed. Such *'Kachha Aadhatiya* in fact was a clearing agent and was not holding property in the goods. A *'Pakka Aadhatiya* in the old trading system was to receive the goods, keep with him and under the instructions of the Principal was to dispose of the same but he could dispose of the goods on his own terms. *'Pakka Aadhatiya'* in fact agrees with the Principal that he would pay a particular amount for the consignment. Once there is an agreement between the *'Pakka Aadhatiya'* and the Principal that a particular amount has to be paid by the *'Pakka Aadhatiya'* to the Principal then the sale is complete and the property in the goods passes in favour of the *'Pakka Aadhatiya'*.

8. In the present matter it is not known to us that the assessee was a *'Kachha Aadhatiya'* or a *'Pakka Aadhatiya.* The word 'Aadhat is a Hindi word which

means a commission received by a dealer or a commission agent in the business of grains. The word *'Aadhat"* does not mean anything less than or more than a commission.

9. *'Kachha Aadhatiya'* so also the *'Pakka Aadhatiya'* are entitled to commission, they have to act under the directions of the Principal but *'Kachha Aadhatiya'* cannot do anything beyond what the master has said. Unless an *'Aadhatiya'* (agent or the commission agent) agrees to receive the goods in the market area, the Principal would not be entitled to send the goods to anybody. In every case where an agent, commission agent, *Aadhatiya* called by any name agrees that the goods be sent to him then he receives the goods in his personal capacity and he causes entry of the goods into the local area. To say that an *Aadhatiya* is something different from a commission agent or has a different identity would be a jugglery of the words simply to prove that such a person is not liable to tax.

10. In the present matter it is also to be seen in the light of Section 3 that when a person in his capacity as a dealer in the course of his business purchases goods from a person or a dealer other than a registered dealer who has effected entry of such goods into a local area prior to such purchase, the entry tax shall be paid by the dealer who has purchased such goods.

11. Be that as it may, we have no hesitation in holding that an *Aadhatiya* is nothing but a commission agent and he causes entry of the goods in the local area and he is liable to be taxed. The question referred to us is answered in favour of the Revenue and we hold that the Board of Revenue was not justified in holding that the agent/*Aadhatiya* was not liable to pay entry tax in respect of the goods entered by him in the local area as agent of the Principal. Let the department proceed in accordance with law.

Order accordingly.

I.L.R. [2010] M. P., 729
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice N.K. Mody
29 April, 2009*

J.P. DUTTA ... Applicant
Vs.
RAVI ANTAROLIA ... Non-applicant

A. Prevention of Insults to National Honour Act (69 of 1971), Section 2. - *Penalty* - *Film 'LOC Kargil' exhibited the coffins of the soldiers covered by National Flag - It was alleged that National Flags were wrongly used for covering the coffins - Held - It is no where stated that how the flag*

*M.Cr.C. No.1973/2006 (Indore)

March-10 (First)

has to be used - Offence under the Act can only be constituted if any person within public view burns, mutilates, defaces, disfigures, destroys, tramples upon or otherwise brings into contempt. (Paras 7 & 14)

क. राष्ट्र गौरव अपमान निवारण अधिनियम (1971 का 69), धारा 2 – शास्ति – फिल्म 'एलओसी कारगिल' में राष्ट्रध्वज से ढके हुए सैनिकों के ताबूतों को प्रदर्शित किया गया – यह कथित किया गया कि ताबूतों को ढकने के लिए राष्ट्रध्वजों का गलत ढंग से उपयोग किया गया – अभिनिर्धारित – यह कहीं भी कथित नहीं किया गया कि ध्वज का प्रयोग कैसे किया जाना है – अधिनियम के अन्तर्गत अपराध केवल तब गठित हो सकता है यदि कोई व्यक्ति लोक दृष्टिगोचरता में जलाता है, काट–छाँट करता है, विरूपित करता है, विद्रूपित करता है, नष्ट करता है, कुचलता है या अन्यथा अवमान करता है।

B. Flag Code of India, 2002 - *Flag Code is not a statute and cannot regulate fundamental right to fly National Flag.* (Para 8)

ख. भारतीय ध्वज संहिता, 2002 – ध्वज संहिता कोई कानून नहीं है और राष्ट्रध्वज फहराने के मूलभूत अधिकार को विनियमित नहीं कर सकती।

Cases referred :

(2004) 2 SCC 510, (2003) 8 SCC 717, 2003(2) JLJ 296.

Z.A. Khan with *Vivek Sharan & Akash Sharma,* for the applicant.

M.I. Khan, for the non-applicant.

ORDER

N.K. Mody, J. :–This is a petition U/s 482 Cr.P.C. for quashment of proceedings of Criminal Case No. 110/04.

2. Short facts of the case are that the repsondent filed a private complaint against the petitioner U/s 2 of Prevention of Insult to National Honour Act, 1971 (which shall be referred hereinafter as an Act) alleging that the petitioner is producer of a film titled as LOC Kargil. It was alleged in the complaint that in the said film the petitioner has exhibited the coffins of the soldiers covered by the National Flag, It was alleged that National Flags were wrongly used for covering the coffins. It was alleged that the act of the petitioner amounts to commit an offence which is punishable U/s 2 of the act. It was alleged in the complaint that after taking cognizance of the offence and also after notice, petitioner be convicted. After filing of the complaint and also after recording of statement U/s 200 and 202 Cr.P.C. learned Trial Court took cognizance of the offence vide order dated 04/02/04 and issued bailable warrant of, the petitioner, against which the present petition has been filed.

3. Mr. ZA. Khan, learned senior counsel appearing on behalf of petitioner submits that the impugned order passed by the learned Trial Court is illegal and deserves to be quashed. It is submitted that at the time of shooting of the film one Colonel of army always remained present at the site/location and the entire shooting

of the film was picturised under the supervision and guidance of the Colonel of the Army of this Country. It is submitted that the Ministry of defence has issued a certificate to the effect that keeping in view the modifications / deletions suggested by the Army Headquarters and based on the preview of the amended provision held in New Delhi on 05/12/2003 film "Kargil War, 1999" (LOC) has been considered fit for clearance from the Army's image point of view as well as security. It is submitted that the certificate was also issued by the Central Board of Film Certification wherein it was certified that after examination of the film by the members of the Examining Committee on the recommendations of the committee the board hereby certifies that the film is fit for unrestricted public exhibition. Learned counsel further submits that in the Flag there is no scene which may have been considered detrimental or insulting to the National Flag as neither the Army nor the Central Board of Film Certification has pointed out for such act. It is submitted that none of the ingredients have been proved nor any evidence has been produced for constitution of an offence under the act. It is submitted that the petition filed by the petitioner be allowed and the impugned order passed by the learned Court below and the complaint filed by the respondent be quashed.

4. Mr. MI. Khan, learned counsel for respondent submits that the petition itself is not maintainable. It is submitted that for the same relief earlier also a petition was filed by the petitioner which was numbered as Cr.R. No.595/04 and the same was dismissed. It is submitted that in view of this the petition filed by the petitioner deserves to be dismissed. Learned counsel further submits that after taking into consideration the allegations made in the complaint and the evidence adduced by the respondent, the learned Trial court has taken the cognizance of the offence, which requires no interference.

5. The Prevention of Insults to National Honour Act, 1971 (Act No.69/1971) has come in force w.e.f 23/12/1971. In the statement of objects and reasons it is mentioned that Cases involving deliberate disrespect to National Flag, the National Anthem and the Constitution have come to the notice in the recent past. Some of these incidents were discussed in both the Houses of Parliament and members expressed great anxiety about the disrespect shown to the national symbols. Government were urged to prevent the recurrence of such incidents. Disrespect to the National Flag and the Constitution or the National Anthem is not punishable under the existing law. Public acts of insults to these symbols of sovereignty and the integrity of the nation must be prevented. Hence the Bill. The scope of the law is restricted to overt acts of insult to and attack on, the national symbols by burning, trampling, defiling or mutilating in public. It is not intended to prohibit honest and bona fide criticism of the symbols, and express provisions to this effect have been made in the Bill.

6. Section-2 of the Act reads as under:-

Whoever in any public place or in any other place within public view burns, mutilates, defaces, disfigures, destroys, tramples upon or otherwise brings into contempt (whether by words, either spoken or written, or by acts) the Indian National Flag or Constitution of India or any part thereof, shall he punished with imprisonment for a term which may extend to three years, or with fine, or with both.

7. From perusal of the aforesaid sections it is evident that it is no where stated that how the flag has to be used. The offence under the Act can only be constituted if any person within the public view burns, mutilates, defaces, disfigures, destroys, tramples upon or otherwise brings into contempt commits an offence under the Act.

8. Government of India, Ministry of Home Affairs, New Delhi has published Flag Code of India, 2002, which has come in force w.e.f. 26/01/2002. Part-I of the Code lays down as under:-

1.1. The National Flag shall be a tri-colour panel made up for three rectangular panels or sub-panels of equal widths. The colour of the top panel shall be India saffron (Kesari) and that of the. bottom panel shall be India green. The middle panel shall be white, bearing at its center the design of Ashoka Chakra in navy blue colour with 24 equally spaced spokes. The Ashoka Chakra shall preferably be screen printed or otherwise printed or stenciled or suitably embroidered and shall be completely visible on both sides of the Flag in the centre of the white panel.

1.2 The National Flag of India shall be made of hand spun and hand woven wool/cotton/silk Khadi bunting.

1.3 The National Flag shall be rectangular in shape. The ratio of the .length ofthe height (width) of the Flag shall be 3:2.

1.4 The standard sizes of the National Flag shall be as follows:-

Flag Size No.	*Dimensions in mm*
1	6300 x 4200
2	3600 x 2400
3	2700 x 1800
4	1800x1200
5	1350 x 900

6	*900 x 600*
7	*450x300*
8	*225x150*
9	*150x100*

1.5 An appropriate size should be chosen for display. The flags of 450 x 300 mm size are intended for aircrafts on VVIP flights, 225 x 150 mm size for motor cars and 150 x 100 mm size for table flags.

9. Section-V of the Code deals with Misuse of the Flag, which reads as under:-

3.22 The Flag shall not be used as a drapery in any form whatsoever except in State/Military/Central Paramilitary Forces funerals hereinafter provided.

3.23 The Flag shall not he draped over the hood, top, sides or back of a vehicle train or boat.

3.24 The Flag shall not be used or stored in such a manner as may damage or soil it.

3.25 When the Flag is in a damaged or soiled condition, it shall not be cast aside or disrespectfully disposed of but shall be destroyed as a whole in private, preferably by burning or by any other method consistent with the dignity of the Flag.

3.26 The Flag shall not be used as a covering for a building.

3.27 The Flag shall not be used as a portion of a costume or uniform of any description. It shall not be embroidered or printed upon cushions, handkerchiefs, napkins or boxes.

3.28 Lettering of any kind shall not be put upon the Flag.

3.29 The Flag shall not be used in any form of advertisement nor shall an advertising sign be fastened to the pole from which the Flag is flown.

3.30 The Flag shall not be used as a receptacle for receiving, delivering, holding or carrying anything:

Provided that there shall be no objection to keeping flower petals inside the Flag before it is unfurled, as part of celebrations on special occasions and on National Days like the Republic Day and the Independence Day.

10. Chapter-XI of the deals with Half-Masting. Clause 3.58 deals with the occasions when the Flag can be used in funerals, which reads as under:-

"On occasions of State/Military/Central Para-Military. Forces funerals, the Flag shall be draped over the bier or coffin with the saffron towards the head of the bier or coffin. The Flag shall not be lowered into the grave or burnt in the pyre."

11. Whether the Flag Code of India is law or not has been considered by the Hon'ble Apex Court in the matter of *Union of India Vs, Naveen Jindal,* Reported in (2004) 2 SCC 510 wherein Hon'ble Apex Court held as under:-

In the context of the present case a question arose whether Flag Code is "law"? Flag Code concededly contains the executive instructions of the Central Government. It is stated that for the Ministry of Home Affairs, winch is competent to issue them, the instructions contained in the Flag Code and all matters relating thereto are one of the items of business allocated to the said Ministry by the President under the Government of India (Allocation of Business) Rules, 1961 framed in terms of Article 77 of the Constitution of India. A bare perusal of Article 13(3)(a) would clearly go to show that executive instructions would not fall within the aforementioned category. Such executive instructions may have the force of law for some other purposes; as for example, those instructions which are issued as a supplement to the legislative power in terms of clause(1) of Article 77 of the Constitution of India. The necessity as regards determination of the said question has arisen as Parliament has not chosen to enact a statute which would confer at least a statutory right upon a citizen of India to fly the National Flag. An executive instruction issued by the appellant herein can any time be replaced by another set of executive instructions and thus deprive Indian citizens from flying National Flag. Furthermore, such a question will also arise in the event if it be held that right to fly the National Flag is a fundamental or a natural right within the meaning of Article 19 of the Constitution of India; as for the purpose of regulating the exercise of right of freedom guaranteed under Articles 19(1) (a) to (e) and (g) a law must be made. Flag Code is not a statute; thereby the fundamental right under Article 19(1) (a) is followed to the extent it provides for preservation of dignity and respect for the National Flag. The right to fly the National Flag is not an absolute right. The freedom of expression for the purpose of giving a feeling of nationalism and for that purpose all that is required to be done is that the duty to respect

the Flag must be strictly obeyed. The pride of a person involved in flying the Flag is the pride to be an Indian and that, thus, in all respects respect to it must be shown. The State may not tolerate even the slightest disrespect.

12. In the matter of *Karan Johar Vs. Union of India.* Reported in (2003) 8 SCC 717 wherein this Court directed in public interest litigation that the film *Kabhi Kushi Kabhi Gham* shall not be shown in any theatre unless the scene which depicts the national anthem is deleted and it was further directed to withdraw the film from all cinema halls and the theatre-owners are restrained from showing the film in its present form and to withdraw the certificate unless deletion is effected, Hon'ble Apex Court also observed that the national anthem exhibited in the course of exhibition of newsreel or documentary or in a film, the audience is rtot expected to stand as the same interrupts the exhibition of the film and would create disorder and confusion, rather than add to the dignity of the national anthem. The order passed by this Court was suspended by the Hon'ble Apex Court Vide judgment dated 19/04/04 reported in (2004) 5 SCC 127 in the same matter the Hon'ble Apex Court has observed that in view of the instructions issued by the Government of India that the national anthem is exhibited in course of the exhibition of a newsreel or documentary, the audience is not expected to stand, as the same would cause disorder and confusion rather than add to the dignity of the National Anthem. The appeal is allowed.

13. In the matter of *Ganesh Lal Bathri Vs. State of M.P.,* Reported in 2003(2) JLJ 296 wherein this Court in a case where there was a bona fide mistake in tying the national Flag in reverse position held that no case for trial is made out and the accused is entitled to be discharged.

14. From perusal of the photographs of coffins which has been produced by the petitioner from the magazine 'India Today' it appears that the coffins were wrapped by the flag. The saffron side of the flag was used horizontally, while as per Clause 3.58 of the Code it ought to have been vertically towards head side of the coffin. Since the Hon'ble Supreme Court has held in so many words that the flag code is not a statute and the certificate was issued by the Central Board of Film Certification to the petitioner under the Provisions of Cinematography Act, 1952 and complainant does not disclose any of the ingredients of Section 2 of Prevention of Insult to National Honour Act, 1971, this Court is of the view that the learned Trial Court committed error in taking cognizance against the petitioner. It will not be out of place to mentioned that neither in the complaint nor in the evidence adduced by the respondent none of the ingredients of Section 2 of the Act has been pleaded or proved, so that it can be said that, respondent has committed an offence. It is true that the demonstration of the Flag in the said film is not in accordance with clause 3.58 of Chapter XI of the Flag Code of, India, 2002. However since the Flag Code of India is not having force of law and there

is nothing on record to show the displaying of the flag was to insult the Flag intentionally, therefore, this Court is of the view that the learned Trial Court committed error in taking cognizance of the offence against the petitioner under the Act.

15. It is true that earlier also a petition was filed by the petitioner which was numbered as Cr.R. No.595/04 an was decided on 24/03/06 which was disposed of with an observation that learned counsel for the applicant has submitted a letter written by the applicant to Dy. S.P., APTC, Indore (MP)/complainant/ non-applicant wherein petitioner has expressed his sincere and heartfelt apology. The same is on record. It was also observed by this Court that in view of the aforesaid amicable settlement between applicant and non-applicant, applicant wants to withdraw the revision, therefore, the same is dismissed as withdrawn. This order shall not come in the way of the petitioner because it appears that there were some understanding between the parties and after submission of apology it was expected from the respondent to withdraw the petition. Since the prosecution was not withdrawn and the petition was dismissed as withdrawn, therefore, the present petition can not be dismissed on the ground that the earlier petition was dismissed by this Court. On the contrary it is a fit case in which this Court shall exercise powers conferred U/s 482, Cr.P.C. to save the petitioner from abuse of process who has produced a national film.

16. in view of this petition filed by the petitioner is allowed and the impugned order passed by the learned Trial Court whereby the cognizance was taken and the complaint bearing No. 110/04 pending in the Court of JMFC, Indore stands quashed.

With the aforesaid observations, petition stands disposed of.

Petition disposed of.

I.L.R. [2010] M. P., 736
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice N.K. Mody
3 August, 2009*

AAMIR KHAN ... Applicant
Vs.
STATE OF M.P. & anr. ... Non-applicants

A. Flag Code of India, 2002 - *Flag Code is not a statute and cannot regulate fundamental right to fly National Flag.* (Para 10)

क. भारतीय ध्वज संहिता, 2002 – ध्वज संहिता कोई कानून नही है और राष्ट्रध्वज फहराने के मूलभूत अधिकार को विनियमित नही कर सकती।

*M.Cr.C. No.6424/2007 (Indore)

AAMIR KHAN Vs. STATE OF M.P.

B. Prevention of Insults to National Honour Act (69 of 1971), Sections 2 & 3; Flag Code of India, 2002, Sections 2(B)(5), 3, 5, 6 & 11, Penal Code, 1860, Section 109 - *National Flag was hosting even after sunset - Film Actor Aamir Khan was chief guest of function in which complainant was also present - Nothing in complaint or in evidence has been stated against Aamir Khan except that he was present in the said function - Prima facie no evidence to prove that he has caused insult to National Flag - Application allowed.* (Para 12)

ख. राष्ट्र गौरव अपमान निवारण अधिनियम (1971 का 69), धाराएँ 2 व 3, भारतीय ध्वज संहिता, 2002, धाराएँ 2(बी)(5), 3, 5, 6 व 11, दण्ड संहिता, 1860, धारा 109 – सूर्यास्त के बाद भी राष्ट्रध्वज फहराया जा रहा था – फिल्म अभिनेता आमिर खान समारोह के मुख्य अतिथि थे जिसमें परिवादी भी मौजूद था – परिवाद या साक्ष्य में आमिर खान के विरुद्ध कुछ भी कथित नही किया गया सिवाय इसके कि वह उक्त समारोह में मौजूद थे – यह साबित करने के लिए प्रथम दृष्ट्या कोई साक्ष्य नही कि उन्होंने राष्ट्रध्वज का अपमान कारित किया है – आवेदन मंजूर।

Cases referred :

AIR 2004 SC 1559, 1992 Supp (1) SCC 335, 2009(4) Scale 685, 2005(5) Scale 1.

S.C. Bagadiya with *D.K. Chhabra,* for the applicant.

C.R. Karnik, Dy.G.A., for the non-applicant No.1.

Rajendra Tiwari, for the non-applicant No.2.

ORDER

N.K. Mody, J. :–This is a petition under Section 482 of the Cr.P.C. for quashment of the order dated 27/09/07 and Criminal Complaint No-33932/07 whereby the cognizance was taken by the learned JMFC, Indore under Section 2 & 3 of the Prevention of Insults to National-Honour Act, 1971 Clause (2),(3),(4),(5),(7),(8),(11),(12) of Section 2(B)(5),(10) and Clause 3.5, 3.7, 3.90 and 9.13 of Section 3 and Clause 3.24, 3.25, 3.27 of Section 5, Clause 3.31 of Section 6 and clause 3.57 of Section 11 Flag Code of India 2002 and Section 109 of the IPC.

2. Short facts of the case are that the respondent No.2 Shailendra Sharma filed a private complaint on 22/09/07 before the learned Court below alleging that on 16/08/07 a programme was arranged by accused Rakesh Rajpal and Ashok Rajpal at their premises M/s Rajpal Abhikaran Private Limited, dealers of Toyota vehicles and in that programme petitioner was invited as guest, who was suppose to give keys of Innova Cars to the persons who have purchased the same. In the complaint it was alleged that in the business campus of M/s Rajpal Abhikaran Pvt. Ltd. wherein the said programme was arranged, some National Flags were hoisted. It was alleged that even after the sunset, the National Flags continued to fly in the premises. It was alleged that in the said function higher authorities of the police department were also present. It was further alleged that there was a huge

gathering in the function and when the fact was brought to the notice to the accused Rakesh Rajpal and Ashok Rajpal, than the National Flags were pull down in a disrespectful and insulting manner. It was alleged in the complaint that to allow to fly the flag after the sunset and to pull down the same in disrespectful manner amounts to an offence. In the complaint it is further alleged that news in that regard was flashed in the news papers dated 17/08/07. It was alleged that the petitioner who is a film hero and was the brand ambassador of Toyota, who was present as chief guest has also committed the alleged offence. It was prayed that after taking cognizance of the offence the petitioner and other accused persons be noticed and after recording of evidence they be convicted.

3. In support of the complaint respondent No.2 Shailendra Sharma examined himself under Section 200 and 202 Cr.P.C. as AW/1 and also examined Arvind Sharma as AW/2. Upon the complaint vide order dated 27/09/07 the learned Trial Court took the cognizance of the offence and issued bailable warrant, hence this petition.

4. Learned senior counsel for the petitioner argued at length and submits that the complaint filed by the respondent No.2 against the petitioner deserves to be quashed as no offence is made out against the petitioner.

5. Section 2 of the Prevention to National Honour Act, 1971 reads as under:-

> ***Insult to Indian National Flag and Constitution of India:***
>
> *Whoever in any Public place or in any other place within public view burns, mutilates, defaces, defiles, disfigures, destroys, tramples, upon or [otherwise shows disrespect to or brings] into contempt (whether by words, either spoken or written, or by acts) the Indian National Flag or Constitution of India or any part thereof, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.*

6. Relevant provisions of Flag Code of India, 2002 for which the cognizance has been taken reads as under:-

> *2.2 A member of public, a private organization or an educational institution may hoist/display the National Flag on all days and occasions, ceremonial or otherwise. Consistent with the dignity and honour of the National Flag-*
>
> *(ii) a damaged or dishevelled Flag should not be displayed;*
>
> *(iii) the 'Flag should not be flown from a single masthead simultaneously with any other flag or flags;*
>
> *(iv) the Flag should not be flown on any vehicle except in accordance with the provisions contained in Section IX of Part III of this Code;*

(v) when the Flag is displayed on a speaker's platform, it should be flown on the speaker's right as he faces the audience or flat against the wall, above and behind the speaker;

(vi) when the Flag is displayed flat and horizontal on a wall, the saffron band should be upper most and when displayed vertically, the saffron band shall be on the right with reference to the Flag (i.e., left to the person facing the Flag);

(vii) to the extent possible, the Flag should conform to the specifications prescribed in Part I of this Code;

(viii) no other flag or bunting should be placed higher than or above or side by side with the National Flag; nor should any object including flowers or garlands or emblem be placed on or above the Flag-mast from which the Flag is flown:

(ix) the Flag should not be used as a festoon, rosette or bunting or in any other manner for decoration;

(x) the Flag made of paper may be waved by public on occasions of important national, cultural and sports events. However, such paper Flags should not be discarded or thrown on the ground after the event. As far as passible it should be disposed of in private consistent with the dignity of the Flag;

(xi) where the Flag is displayed in open, it should, as far as possible, he flown from sunrise to sunset, irrespective of weather conditions:

(xii) the Flag should not be displayed or fastened in any manner as may damage it;

(xiii) when the Flag is in a damaged or soiled condition, it shall be destroyed as a whole in private, preferably by burning or by any other method consistent with the dignity of the Flag:

7. Section 109 of Indian Penal Code reads as under:

"Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment and no express provision is made by that code for the punishment of such abetment be punished with the punishment provided for the offence.

8. In support of the complaint the respondent No.2 has filed the cuttings of the News Paper Prabhat Kiran dated 17/08/07 whereir news was published under the head line "रात में तिरंगा" "आमिर का इंदौर आना झगडे में". In the News Paper

Choutha Sansar dated 17/08/07 news was published under the head line "आमिर को दिखाए काले झंडे". In the news paper News Today dated 17/08/0'-news was flashed under the head line "इंदौर में तिरंगे का अपमान" .

9. Apart from this respondent No.2 has also submitted the photographs, video cassettes and has examined himself as AW/1 and Arvind Sharma as AW/2. In the statement which was given by the petitioner before the Court under Section 200 and 202 Cr.P.C. respondent No.2 has stated that even in the night hours the National Flags were flurrying. Complainant has further stated that complainant opposed the action to the organizers. He has further stated that upon his agitation Ashok Rajpal and Rakesh Rajpal along with the petitioner directed to remove the flags. AW/2 Arvind Sharma has stated that in the said function petitioner was also present. Except this evidence there is absolutely no evidence against the petitioner. Respondent No.2 has also filed the video cassettes of the programme in which also there is no role of the petitioner.

10. So far as Flag Code is concerned, in the matter of *Union of India Vs. Naveen Jindal,* AIR 2004 SC 1559 Hon'bic Supreme Court has held that the Flag Code is not a statute and cannot regulate fundamental right to fly National Flag. In the matter of *State of Hariyana Vs. Bhajan Lal,* 1992 Supp. (1) SCC 335 Hon'ble apex Court has given the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice and held that it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formula and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

1. Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
2. Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.
3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
4. Where the allegations in the FIR do not constitute a

cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6. Where there is an express legal bar engrafted in any of the of provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

11. In the matter of *Chunduru Siva Ram Krishna Vs. Peddi Ravindra Babu,* 2009(4) Scale 685 Hon'ble Apex court held that the principle that could be culled out is that when at an initial stage a prosecution is asked to be quashed, the test to be applied by the Court is as to whether the uncontroverted allegations as made in the complaint filed prima facic establish the offence. It is also for the court to take into consideration any special feature that may appear in a particular case while considering whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the Court cannot be utilised for any oblique purpose. In the matter of *Sundar Babu Vs. State of Tamil Nadu,* 2009(5) Scale I Hon'ble Apex Court held that though the scope for interference while exercising jurisdiction under Section 482 Cr.P.C. is limited, but it can be made in cases to prevent abuse of the process of Code.

12. As per the complainant himself who is respondent herein the petitioner was the chief-guest of the function while other accused persons were organizer. Either in the complaint or in the evidence oral or documentary adduced by the respondent No.2, nothing has been stated against the petitioner except the fact that the petitioner was present in the said function. Since prima facie there is no evidence to prove that petitioner has caused insult to the National Flag, the learned Court below committed error in passing the impugned order whereby cognizance of the

alleged offence was taken against the petitioner. In view of this petition filed by the petitioner is allowed and the impugned order whereby the cognizance has been taken against the petitioner stands quashed to that extent.

With the aforesaid observations, petition stands disposed of.

C.C. as per rules.

Petition disposed of.

I.L.R. [2010] M. P., 742
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice R.C. Mishra
9 September, 2009*

SHIVRAJ SINGH & anr. ... Applicants
Vs.
STATE OF M.P. & ors. ... Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Sections 133 & 145 - *Nuisance - In proceedings u/s 145, material available on record discloses existence of public nuisance - SDM is not precluded from taking action u/s 133 - Application dismissed.* (Paras 10 to 13)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 133 व 145 – न्यूसेंस – धारा 145 के अन्तर्गत कार्यवाहियों में, अभिलेख पर उपलब्ध सामग्री लोक न्यूसेंस के अस्तित्व को प्रकट करती है – एसडीएम धारा 133 के अन्तर्गत कार्यवाही करने से विवर्जित नही है – आवेदन खारिज।

B. Nuisance - ***Remedies under civil and criminal law - Law discussed.*** (Para 12)

ख. न्यूसेंस – सिविल एवं दाण्डिक विधि के अन्तर्गत उपचार – विधि की विवेचना की गई।

Cases referred :

1982 JLJ 659, 1983 MPWN 334, AIR 1980 SC 1622, 2001 STPL (LE-Crim) 1049 GAU = 2001 CrLJ 4472, (2005) 9 SCC 36.

D.D. Bansal, for the applicants.
Mukund Bhardwaj, G.A., for the non-applicant No.1/State.

O R D E R

R.C. Mishra, J. :–Heard on admission.

2. This is a petition under Section 482 of Code of Criminal Procedure (for short 'the Code'). The petitioners are aggrieved by the order-dated 28.08.2009 passed, by First Additional Sessions Judge, Ashok Nagar in Criminal Revision No.86/2009 affirming the order dated 06,08.2009 passed by Sub Divisional

*M.Cr.C. No.5887/2009 (Jabalpur)

Magistrate, Ashok Nagar in Case No. 12/9/145 containing direction to remove encroachment made by them. In that case, the proceedings, under Section 145 of the Code, were initiated upon information submitted by SHO of P.S Ashok Nagar in the form of Istagasa bearing no.7/09, arraigning the petitioners as party no.1 and the respondent nos.2 and 3 as party no.2. It contained averments to the effect that a dispute between the parties concerning the land, whereon the petitioners had raised construction, was likely to cause a breach of peace.

3. Accordingly, a preliminary order, under Section 145(1) of the Code, was passed by the SDM requiring the parties to put in written statements of their respective claims as to the subject matter of the dispute. However, none of them came forward to file any such statement.

4. Taking note of the fact that the matter related to encroachment on a public way resulting in obstruction thereto, learned SDM directed (a) the SHO to ensure that construction work at the spot did not continue anyfurther and (b) the Tahsildar to submit report after making a local investigation.

5. In response, the Tahsildar submitted a report indicated that both the petitioners, whose houses were facing each other, had completely covered 15 ft. wide public way by erecting RCC roof thereon and had also closed the door, situated in the north of the house of respondent no.2, opening towards the road. The SDM, while acting upon the report, directed removal of encroachment forthwith.

6. In revision, learned ASJ declined to interfere by observing that the order for removal of encroachment was well merited in view of the fact that the petitioners had not been able. to even deny existence of public path on the land covered by them.

7. Learned counsel for the petitioners has strenuously contended that revisional Court completely overlooked the scope and ambit of-the powers conferred on the SDM under section 145 of the Code. He is of the view that the SDM had no jurisdiction to pass the order for removal of encroachment in the form of projection on the land in dispute to which even the provisions of Section 223(1) of the M.P. Municipalities Act, 1961 (for brevity 'the Act') were not applicable. To buttress the. contention, reliance has been placed on the following decisions -

(i) *Municipal Council, Kukshi v. Ramdas Haribhai Mukati* 1982 JLJ 659.

(ii) *Municipal Council, Khargone v. Anuradhabai* 1983 MPWN 334.

8. In *Ramdas's case* (supra), it was held that the expression "in any public street" as occurring in section 223(1) of the Act has to be construed in such a manner as to exclude a case of over hanging encroachment whereas in

Anuradhabai's case (above), it was observed that gallery on upper storey could not be treated as obstruction or encroachment upon public street.

9 However, the case on hand reflects a distinguishable factual scenario. As reported by Tahsildar, the petitioners had covered the public way in its entirety by constructing RCC roof thereon.

10. There is yet another aspect of the matter. Nothing in Section 145 of the Code precludes the SDM from taking action under Section 133 of the Code where existence of public nuisance is disclosed from the material brought on record. Further, as explained by the Apex Court in *Municipal Council Ratlam V. Vardhichand* AIR 1980 SC 1622, although the power under S. 133 of the Code is discretionary yet, the judicial discretion has a mandatory import. Relevant observations made by Justice V. R. Krishna Iyer, in his inimitable style, may usefully be quoted as under -

> "S. 133 Cr, P. C, is categoric, although reads discretionary judicial discretion when facts for its exercise are present, has a mandatory import. Therefore, when the Magistrate has, before him, information and evidence, which disclose the existence of a public nuisance and, on the materials placed, he considers that such unlawful obstruction or nuisance should be removed from any public place which may be lawfully used by the public, he shall act. Thus, his judicial power shall, passing through the procedural barrel, fire upon the obstruction or nuisance, triggered by the jurisdictional facts"

11. Faced with such a situation, learned counsel for the petitioners, while making reference to the decision of the Gauhati High Court in *Sushil Ranjan Nath v. Satyabrata Dey* 2001 STPL (LE-Crim) 1049 GAU, has submitted that even for exercise of power of removal of any unlawful obstruction, the SDM was required to make two enquiries - firstly, to determine whether or not there exists any public right in respect of the way etc. and secondly; whether or not there has been obstruction caused on the said way etc. regarding the use of it by the public and these enquiries could not be made simultaneously without complying with the requirements of Sections 137 and 133 of the Code. However, as pointed out already, none of the petitioners had filed any written statement whereas existence of unauthorized obstruction on a public road was duly established from the report of the Tahsildar. The argument that the overhanging projections were not causing any practical inconvenience to the public at large is apparently misconceived. The encroachment in question certainly amounted to a public nuisance.

12. The remedy to nuisance are of two kinds - civil and criminal. Further, the

remedies under the civil law are of two kinds. One is under Section 91 of the Code of Civil Procedure. Under it a suit lies and the plaintiffs need not prove that they have sustained any special damage. The second remedy is a suit by a private individual for a special damage suffered by him. There are three remedies under the criminal law. The first relates to the prosecution under Chapter XIV of IPC. The second provides for summary proceedings under Sections 133 to 144 of the Code, and the third relates to remedies under special or local laws (See. *Kachrulal Bhagirath Agrawal vs. State of Maharashtra* (2005) 9 SCC 36).

13 To sum up, even assuming that the order for removal of the encroachments was not strictly justifiable under Section 145, it had the legal sanction, as contemplated in Section 133 of the Code, whereunder the SDM was duty bound to pass such an order, irrespective of the fact that existence of public nuisance was brought on record of the proceedings under Section 145 of the Code. Further, the impugned order of removal was passed only after giving a reasonable opportunity of being heard to the petitioners.

14. In this view of the matter, it is not a case of misuse of judicial mechanism or procedure. Consequently, no interference under the inherent powers is called for.

15. The petition, therefore, stands dismissed in limine. However, nothing contained herein shall affect the right of the petitioners to seek any other remedy in accordance with law.

C.C. as per rules.

Petition dismissed.

I.L.R. [2010] M. P., 745
MISCELLANEOUS CRIMINAL CASE
Before Mrs. Justice Indrani Datta
30 October, 2009*

O.P. YADAV & ors. ... Applicants
Vs.
STATE OF M.P. & anr. ... Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 197 - *Acts not done in discharge of official duty - Umbrella of S. 197 Cr.P.C. is not available.* (Para 7)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 197 – कार्य पदीय कर्तव्यों के निर्वहन में नही किये गये है – द.प्र.सं. की धारा 197 की सुरक्षा उपलब्ध नही है।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 204 - *There cannot be any straitjacket formula for issuance of warrants. but as a general rule, unless an accused is charged with the commission of an offence of a*

*M.Cr.C. No.5409/2009 (Gwalior)

heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided. (Para 11)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 204 – वारण्ट जारी करने के लिए कोई स्ट्रेटजेकेट फॉर्मूला नही हो सकता है किन्तु सामान्य नियम यह हो सकता है कि जब तक कोई अभियुक्त किसी जघन्य अपराध के किये जाने के आरोप से आरोपित नही किया गया हो और यह भय हो कि वह साक्ष्य को प्रभावित या नष्ट कर सकता है या विधि-की प्रक्रिया से बच निकल सकता है तब तक गैर जमानतीय वारण्ट जारी किये जाने से बचना चाहिए।

Cases referred :

AIR 2009 SC 1404, 2009 AIR SCW 1415, ILR (2009) MP 255, (2007) 12 SCC 1.

Puran Kulshrestha, for the applicants.

Mukund Bhardwaj, for the non-applicant No.1/State.

S.N. Dubey, for the non-applicant No.2.

O R D E R

INDRANI DATTA, J. :–With the consent of parties, matter is finally heard.

2. Invoking the extraordinary jurisdiction of this Court conferred under Section 482 of CrPC, the petitioners have filed this petition under Section 482 CrPC for quashing the proceedings of complaint case No .5/09 pending in the Court of Special Judge (Dacoity) Gwalior by which on complaint of respondent No.2 cognizance has been taken against present petitioners under Section 394 IPC and Section 13 of MPDVPK Act and arrest warrants have been directed to be issued against .the petitioners.

3. Facts in a nutshell giving rise to the petition are that a complaint has been lodged by respondent No.2 in the Court of Special Judge (Dacoity) alleging that on 8.6.05 complainant after purchasing five bottles of Rum and other articles of household use was coming towards his village on motorcycle with one Jitendra, at that time present petitioners restrained him and asked him to give three bottles of Rum and half share of household articles. When complainant refused to fulfill their demand, they assaulted him and thereafter robbed Rum bottles and household articles and also took him to Police Station Maharajpura and got registered a false case against him for an offence punishable under section 34 of Excise Act. On the anvil of complaint .filed by respondent No.2, the learned Special Judge (Dacoity) Gwalior after considering the preliminary evidence adduced by complainant so also the statement of complainant, has taken cognizance and issued arrest warrant against the present petitioners.

4. Many folds submission has been advanced by the counsel for petitioners that the petitioners have been falsely implicated in the case. It is further submitted that *prima facie* case under Section 394 IPC and 13 of MPDVPK Act is not

made out against the petitioners. It is further asserted that bar of Section 197 (1) CrPC is available in the instant case and the petitioners cannot be prosecuted for the aforesaid offence without there being obtaining previous sanction of superior authority. It is vehemently argued on behalf of petitioners that taking of cognizance and issuance of arrest warrants against present petitioners directly instead issuing summons or bailable warrant, is the abuse of process of court, which requires interference by this Court while exercising inherent power enshrined under Section 482 of CrPC.

5. Combating the claim of the petitioners, learned counsel for respondent No.2 vehemently.argued that under Section 197 CrPC sanction to prosecute is only required when act. is done in discharge of official duty but it does not include the case of abuse of power. It is further submitted that committing a criminal offence which was not part of duties of respondent No.2 could not be said to be an act performed in course of discharge of official duties. Hence protection of Section 197 CrPC is not available to the respondent No.2. Bolstering his arguments, learned counsel drew this Court's attention to a citation in the case of *Choudhury Parveen Sultana v. State of West Bengal & Anr* AIR 2009 SC 1404 in which while mentioning the case of *Bhagwan Prasad Srivastava v. N.P. Mishra* AIR 1970 SC 1661, it is held by the Hon'ble Apex Court that

> "All acts done by a public servant in the purported discharge of his official duties cannot as a matter of course be brought under the protective umbrella of Section 197. On the other hand, there can be cases of misuse and/or abuse of powers vested in a public servant which can never be said to be a part of the official duties required to be performed by him. The underlying object of 197 is to enable the authorities to scrutinize the allegations made against a public servant to shield him/her against frivolous, vexatious or false prosecution initiated with the main object of causing embarrassment and harassment to the said official. However, if the authority vested in a public servant is misused for doing things which are not otherwise permitted under the law, such acts cannot claim the protection of S. 197 and have to be considered dehors the duties which is public servant is required to discharge or perform. Hence, in respect of prosecution for such excesses or misuse of authority, no protection can be demanded by the public servant concerned."

6. Similar is the stand taken in case of *Prakash Singh Bindal v. State of Punjab* 2009 AIR SCW 1415 where same question was considered and similar observation was made. In case of *Ramesh Chandra v. State of M P* ILR (2009) MP 255 allegation against applicant/accused was that he availed money of LTC

without travelling, then it is held by bench of this court that no sanction for prosecution under Section 197 CrPC is necessary as act of applicant was not in discharge of his official duties. Thus, Bar of Section 197 CrPC is not available in the case at hands. It is further submitted that learned Special Court (Dacoity) Gwalior has taken cognizance after recording and considering the statement of complainant so also on the basis of documents available on record. Therefore, prima facie case is made out against the present petitioners. It is further asserted that there is no reason to falsely implicate the petitioners and therefore there is no ground available for quashing the proceedings of criminal case pending in the court of Special Judge (Dacoity) Gwalior.

7. A combined reading of the provisions of Section 197 CrPC with the facts and circumstances of the case, depicts that Bar of Section 197 CrPC is not available in the present case as alleged acts have not been done by respondent No.2 in discharging official duty, therefore, umbrella of Section 197 CrPC is not available to the petitioners and no protection can be sought for under the provisions of Section 197 CrPC.

8. A perusal of documents available on record reveals that *prima facie* there is no material in this context that complainant had filed the complaint with malafide intention in order to falsely implicate the petitioners. Taking of cognizance by the learned Special Judge (Dacoity) at that stage considering the allegations made in complaint and documents and statements of complainant recorded under Section 200 CrPC, cannot be said to be perverse or without any legal basis nor it can be said that proceedings are instituted maliciously. In my considered opinion the learned Special Judge (Dacoity) has not erred in taking cognizance against present petitioners after considering prima fade case and the same is infallible at that stage and does not warrant any interference in the instant petition.

9. So far as learned Special Judge (Dacoity) after taking cognizance has directly issued arrest warrants against petitioners is concerned, in the case of *Inder Mohan Goswami and another v. State of Uttaranchal and others* (2007) 12 SCC 1 it is held by Hon'ble Supreme Court that in complaint cases at the first instance the court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the court, in the second instance should issue bailable warrant. In the third instance, when the court is fully satisfied that the accused in avoiding the court's proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non-bailable warrants.

10. Reverting to the facts of the case at hands, it is suffice to say that there is no reason for quashing the proceedings pending in the court of Special Judge

(Dacoity) nor does it suffice to interfere in the aforesaid proceedings at this stage while exercising the power conferred under Section 482 of CrPC. Accordingly, the petition is dismissed.

11. Adverting to the alternative prayer made by learned counsel for the petitioners that learned trial court has directly issued the arrest warrant against the petitioners without issuing either summons or bailable warrant in the case. The aforesaid prayer appears to be reasonable. The power being discretionary one must be exercised judiciously with extreme care and caution and the court should properly balance both personal liberty and societal interest before issuing warrants. There cannot be any straitjacket formula for issuance of warrants but as a general rule, unless an accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided. It is also worth appreciating that this Court had occasion on 19.8.2009 while staying the execution of warrants of arrest issued against petitioners. On consideration of the totality of the facts and circumstances of this case, the impugned order so far as it relates to issuance of arrest warrants against petitioners is recalled and the impugned order is modified with a direction to the learned Special Judge (Dacoity) that without being influenced by this order, the learned Special Judge (Dacoity) shall first issue summons or bailable warrant against the petitioners and if they appear and move application for regular bail, then proceed to decide the application in accordance with law.

12. With the aforesaid direction and modification, the petition is disposed of.

Certified copy as per rules.

Petition disposed of.

I.L.R. [2010] M. P., 749
MISCELLANEOUS CRIMINAL CASE
Before Mrs. Justice Indrani Datta
20 November, 2009*

RAKESH RANPURIA & anr. ... Applicants
Vs.
STATE OF M.P. & anr. ... Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 319 - *Power to proceed against other persons appearing to be guilty of offence - Court is empowered to proceed against any person not shown or mentioned as accused if it appears from evidence that such person has committed an offence - This power is conferred on Court to do real justice.* (Paras 8 to 10)

*M.Cr.C. No.2874/2009 (Gwalior)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 – अपराध का दोषी प्रतीत होने वाले अन्य व्यक्ति के विरुद्ध कार्यवाही करने की शक्ति – न्यायालय किसी व्यक्ति के विरुद्ध कार्यवाही करने के लिए सशक्त है जो अभियुक्त के रूप में दर्शित या उल्लिखित नही किया गया है यदि साक्ष्य से यह प्रतीत होता हो कि ऐसे व्यक्ति ने अपराध किया है – न्यायालय को यह शक्ति वास्तविक न्याय करने के लिए प्रदत्त की गई है।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 319 - *Evidence - On the basis of examination-in-chief of witnesses, a person can be summoned u/s 319.* (Para 11)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 – साक्ष्य – साक्षियों की मुख्य परीक्षा के आधार पर धारा 319 के अन्तर्गत किसी व्यक्ति को समन किया जा सकता है।

Cases referred :

2009(1) CAR (SC) 105, AIR 2007 SC 2786, 2009 CrLJ 1553, 2009 CrLJ 929.

S.M.A. Naqvi, for the applicant.

J.M. Sahani, P.L., for the Non-applicant No.1/State.

ORDER

INDRANI DATTA, J. :–With the consent of parties, matter is finally heard.

Invoking the extraordinary jurisdiction of this Court -conferred under Section 482 of CrPC, the petitioners have filed this petition under Section: 482 CrPC against order dated 6.4.09 passed: by Second ASJ Gwalior in Criminal Revision N0.327/08 dismissing the revision filed by petitioners.

2. Facts in a nutshell: giving rise to petition are that on the report of respondent No.2 at P.S. Mahila Thana Padav in Crime No.65/06 under Section 498-A/34 IPC has been registered against co-accused Charan Singh and others and the case is pending in the Court of JMFC Gwalior. During, the pendency of trial one application under section 319 CrPC has been filed by the complainant/respondent No.2 and the trial court has taken cognizance against the present petitioners and issued bailable warrant against them. Against that order revision was preferred which was dismissed by Second ASJ Gwalior. Hence this petition for setting aside the order of court below.

3. It is contended on behalf of the petitioners that petitioner No.1 was posted at Ashoknagar in Treasury Office from 21.8.06 to 6.10.06 and petitioner No.2 was also present in Treasury Office Gwalior on 17.9.06 and 18.9.06. They are government servants and during investigation Police has found that present petitioners are in no way involved in the crime, therefore, charge-sheet was not filed against them. Complainant has wrongly filed application under Section 319 CrPC and they are falsely implicated in the case. It is further contended that trial court has not scrutinized the evidence produced in the case and complainant has

maliciously implicated them. Therefore, proceedings initiated against them are to be vitiated as the order is perverse and contrary to law.

4. Learned counsel for petitioners placed reliance in the case of *Lal Suraj @ Suraj Singh & Anr. v. State of Jharkhand* 2009(1) CAR (SC) 105 in which it is held that even if a person had not been charge-sheeted he may come within the purview of description of such person as contained in Section 319 of the Code and it is further held that the principle of strong suspicion may be a criterion at the stage of framing of charge as all the material brought during investigation were required to be taken into consideration but for the purpose of summoning a person under Section 319 who did not figure as accused a different legal principle is required to be applied. A court while framing a charge would have before it all material on record which was required to be proved by the prosecution. In a case where however court exercises its jurisdiction under Section 319 of Code power has to be exercised on the basis of fresh evidence brought before the Court. Hence there lies a fine but clear distinction.

5. On the basis of above citation Learned counsel urged that there is no evidence of commission of offence by petitioners and no overt act has been attributed against them showing their involvement in alleged offence, therefore, merely because complainant has mentioned their names court should not have taken cognizance against them.

6. Learned Counsel for State opposed the petition and submitted that in FIR complainant has specifically mentioned that present petitioners have also harassed her with respect to demand of dowry and in FIR which was registered on the basis of application Ex.P/1 names of petitioners are specifically mentioned. It is further submitted that complainant's statement has been recorded in the trial court and in her statement in paragraph 1 and 2, she has specifically narrated that present petitioners also harassed her with respect to demand of dowry, therefore, trial court under discretionary power properly issued bailable warrants against petitioners holding that *prima facie* case under Section 498-A IPC and Section 4 of Dowry Prohibition Act is made out against the petitioners. That order is legal and proper and requires no interference.

7. Heard rival contention of both the counsel and perused the documents on record.

Section 319 of CrPC reads as under :-

> **319. Power to proceed against other persons appearing to be guilty of offence;-** (1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court

may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court he may be arrested or summoned, as the circumstances of the case may require, for the purpose of aforesaid.

(3) Any person attending the Court although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence he appears to have committed.

(4) Where the Court proceeds against any person under sub section (1) then.

(a) the proceedings inrespect of such person shall be commenced afresh, and witnesses re-heard

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

A bare reading of Section 319 CrPC makes it clear that the provisions of this Section empowers the Court to proceed against any person not shown or mentioned as accused if it appears from evidence that such person has committed an offence for which he could be tried together with the main accused against whom an enquiry or trial is being held. This power is conferred on the court to do real justice.

8. Perusal of record shows that the names of the petitioners have been specifically mentioned in the FIR and FIR corroborates the statement of complainant. Therefore, it is not an afterthought. Complainant has specifically stated that petitioners also harassed her with respect to demand of dowry. Statement of complainant on oath has got significant value at this stage.

9. In the case of *Rajendra Singh v. State of U.P. & Anr.* AIR 2007 SC 2786 it is held by Apex Court that exercise of power under Section 319 of Code is left to the Court trying the offence based on evidence that comes before it. The Court must be satisfied of the condition precedent for the exercise of power under S.319. There is no reason to assume that a Court trained in law would not exercise the power within the confines of the provision and decide whether it may proceed against such person or not. There is no rationale in fettering that power and discretion, either by calling it extraordinary or by stating that it will be exercised only in exceptional circumstances. It is intended to be used when the occasion envisaged by the section arises. It must appear to the Court from the evidence that someone not arrayed as an accused, appears to have committed an offence. The Court need not be satisfied that he has committed an offence. It need only

appear to it that he has committed an offence. In other words, from the evidence it need only appear to it that someone else has committed an offence, to exercise jurisdiction under S.319 CrPC.

10. Similarly in the case of *Ram Pal Singh & Ors.v. State of U.P.& Anr.* 2009 CrL.J. 1553 it is observed by the Apex Court that ingredients of Section 319 are unambiguous and. indicate that where in the course of inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence, for which such person could be tried together with the accused, the Court may proceed against such person, for the offence he has committed.

11. In the case of *Mahendra Yadav and Anr. v. State of U.P. & Anr.* 2009 Cri. L.J. 929 it is held that under Section 319 CrPC word "evidence" includes statement recorded before the trial Court in examination-in-chief of witness, therefore, on the basis of examination-in-chief of witness if *prima facie* commission of offence is disclosed, additional accused can be summoned on its basis.

12. Thus, view taken by this Court finds support by the ratio of above judgments. Judgment which has been relied on by learned petitioners counsel in my view does not help his cause.

13. Resultantly, considering the above legal position at this stage, it cannot be said that impugned order is illegal and improper which warrants any interference by this Court. So no ground is made out for setting aside the impugned orders passed in Criminal Case No. 14999/06 and Criminal Revision N0.327/08 while exercising the power conferred under Section 482 of CrPC. Accordingly, the petition is dismissed.

Petition dismissed.

I.L.R. [2010] M. P., 753
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice N.K. Mody
18 December, 2009*

ANSAR & ors. ... Applicants
Vs.
STATE OF M.P. & ors. ... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 407 - *Transfer of case - Applicants being prosecuted u/ss. 122, 124-A, 153-A of IPC, u/ss. 3 & 13 of Unlawful Activities (Prevention) Act, 1967 and u/ss. 25 & 27 of Arms Act, 1959 at Dhar - Counsel for applicants from Ujjain who appeared before Court was beaten and threatened by some of members of Bar Association and Political Party - News also published in newspapers under*

*M.Cr.C. No.3795/2008 (Indore)

heading "Dhar Mein Simi Sarganaon Ke Vakil Ko Phir Peeta" - CD also shows that Advocate was illtreated and beaten - Held - For administrative convenience and also in the interest of fair and impartial justice the matter is transferred from Dhar to Indore - Application allowed. (Para 12)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 407 – मामले का अंतरण – आवेदकों को भा.द.सं. की धारा 122, 124–ए, 153–ए, विधिविरुद्ध क्रियाकलाप (निवारण) अधिनियम, 1967 की धारा 3 व 13 तथा आयुध अधिनियम, 1959 की धारा 25 व 27 के अन्तर्गत धार में अभियोजित किया गया – आवेदकों के अधिवक्ता उज्जैन के थे जो न्यायालय के समक्ष उपसंजात हुए और उन्हें बार एसोसियेशन और राजनैतिक दल के कुछ सदस्यों द्वारा पीटा गया और धमकी दी गई – समाचार पत्रों में "धार मे सिमी सरगनाओं के वकील को फिर पीटा" शीर्षक से समाचार भी प्रकाशित किया गया – सी.डी. भी यह दर्शाती है कि अधिवक्ता के साथ दुर्व्यवहार किया गया और पीटा गया – अभिनिर्धारित – प्रशासनिक सुविधा के लिए और ऋजु और निष्पक्ष न्याय के हित में मामला धार से इन्दौर अंतरित किया गया – अपील मंजूर।

Cases referred :

2006 AIR SCW 3224, 1998(1) MPLJ 297.

Anwar Khan, for the applicants.

C.R. Karnik, Dy.G.A., for the non-applicant Nos.1 & 2.

O R D E R

N.K. Mody, J. :–This order shall also govern the disposal of M.Cr.C. No. 3475/08, as in both the petitions point involved is one and the same. In the petition it is prayed that the criminal case No.1 534/08 registered at Crime No. 120/08 at PS Pithampur pending before CJM, Dhar be transferred to some other district. While in M.Cr.C. 3475/08 the same prayer is made for transfer of Criminal Case. In M.Cr.C. No.3795/08 there are 10 accused, while in M.Cr.C. No.3475/08 there are three accused. Apart from this in M.Cr.C. No.3475/08 counsel for the petitioners is also the petitioner.

2. In M.Cr.C. No.3795/08 it is alleged that the petitioners are being prosecuted for an offence punishable U/s 122, 124(A), 153(A) IPC, U/s 3 & 13 of illegal Activities Act and U/s 25 & 27 of Arms Act and the criminal case is pending at Dhar. It is alleged in the petition that petitioners were represented through Shri Noor Mohammed, advocate from Ujjain, who appeared before the learned CJM on 11/04/08 wherein he was illtreated, beaten and threatened by some of the members of respondent No.2 and 3 who gathered in the Court compound. It is alleged that petitioners have also filed an application challenging the territorial jurisdiction of learned CJM which has yet to be decide. It was alleged that petitioners will not get fair justice at Dhar because Bar Association of Dhar has resolved that no members of Bar Association, Dhar shall appear on behalf of the petitioners. It was prayed that in the interest of justice it is necessary that criminal case pending before CJM. Dhar be transferred.

3. Prior to this one more petition was filed which is numbered as M.Cr.C. 3475/08 wherein it was alleged that petitioners of M.Cr.C. No.3475/08 engaged petitioner No.4 as counsel. It was alleged that petitioner No. 4 went to the Court by Taxi on 11/04/08 and moved two applications. In the application it was alleged that police protection be provided to the petitioner No.4. In the petition it is alleged that petitioner No. 4 who is an advocate was standing in the compound of the court on 11/04/08, at that time the Journalist of Electronic Media came there started to talk about the case with the petitioner No.4. It was alleged that petitioner No. 4 took a press conference one day before i.e. 07/04/08 and in that press conference narrated the complete facts about the case. It is submitted that the journalist who were present in the Court compound asked the note of the press conference which was taken by the petitioner No.4 on 07/04/08. It was alleged that when the petitioner No.4 was standing near to the door of the Court at that time petitioner No 4 was threatened by 15-20 lawyers of Bar Association, Dhar, who told the petitioner No. 4 not to appear on behalf of the accused persons of the case. It was alleged that petitioner No.4 was threatened for dire consequences. It is alleged that 15-20 persons of Hinduism Organization appeared out side the Court and warned that no advocate shall appear on behalf of the accused person in the Court. It was alleged that petitioner No. 4 was beaten by kicks and fists. It was alleged that the members of Bar Association created an atmosphere in which it was practically not possible, to the petitioner No.4 to defend the petitioners. It is alleged that at about 5:00 PM the accused persons were brought before the Court under police custody. It was alleged that members of Hindu Organization crated nuisance and under the police protection petitioner No.4 was brought out of the Court. It was alleged that while returning to Indore under Police protection, the vehicle in which the petitioner No.4 was travelling was stopped at PS. Betma and Police Officers asked the petitioner No. 4 to remove black coat, which the petitioner No.4 was wearing. It was alleged that petitioner No.4 told that the law and order situation is not under control and if the petitioner No.4 remains in black coat, than he will be in trouble. It is submitted that an application was taken by the police officers forecibly wherein petitioner No.4 was asked to write down that petitioner No.4 does not want to take any action for the incident which took place at Dhar. It was alleged that on 25/04/08 petitioner No. 4 made a complaint to all the Higher Authorities at Bhopal, Indore, Ujjain and Dhar about the incident.It was alleged that since the case was adjourned for 09/05/08, therefore, the petitioner No.4 requested to all the authorities to provide police protection, but no protection was provided to the petitioner No.4. It was alleged that Dhar is a place which is highly sensational and communal rights takes place every now and then. It was alleged that the persons who has illtreated the petitioner No.4 are non-else but the members of organizations which is in power in the State. With all these allegations it was prayed that the criminal case pending at Dhar be transferred.

4. In support of the petition the petitioners has enclosed the cutting of News Paper Dainik Bhaskar wherein a news was published under the heading 'धार में सिमी सरगनाओं के वकील को फिर पीटा'. In the News Paper Choutha Sansar dated 12/04/08 wherein the news was published under the heading 'वकील और हिन्दूवादी संगठनों में झडप'. In the News Paper Dainik Bhaskar dated 12/04/08 the news was published under the heading 'सिमी सरगनाओं के वकील को कोर्ट परिसर में पीटा'. In the News Paper Dainik Agnipath dated 12/04/08 the news was published under the heading ' उज्जैन के वकील की धार में पिटाई'. The news was also published in the news paper Free press dated 12/04/08 which was published under the heading 'SIMI activists sent to judicial custody'. It was also the heading that 'Defense lawyer thrashed in Court premises'.

5. Mr. Anwar Khan, learned counsel for petitioners argued at length and submits that in the facts and circumstances of the case it is practically not possible for the petitioner No.4 to appear before the learned CJM, Dhar. It is submitted that since the petitioners are kept Indore, therefore, on administrative grounds also the case be transferred from Dhar to Indore. Learned counsel placed reliance on a decision in the matter of *Fajlor Rahman @ Mohamod Fajloo@ Raju Vs.State of Punjab*,. Reported in 2006 AIR SCW 3224 wherein Hon'ble Apex court held that in interest of justice and for convenience of parties case filed in Punjab transferred to Assam. Reliance is also placed on a decision in the matter of *Bhawna Vs. State of M.P.*, Reported in 1998 (1) MPLJ 297 wherein this Court has held that there are circumstances from which it can be inferred that party entertains reasonable apprehension that he would not get a fair and impartial trial and transfer of case is expedient for ends of justice. On the strenth of aforesaid decisions learned counsel prayed that the petition filed by the petitioners be allowed and the case be transferred.

6. C.R. Karnik, learned Deputy Government Advocate argued at length and submitted that no case is made out for transfer of criminal case pending at Dhar. It is submitted that the petitioner Safdar Nagori is involved in many criminal cases which are pending against him all over the country. In connection with these cases, the accused is required to be sent on all the places where the criminal cases are pending and prayed that the petition filed by the petitioners be dismissed.

7. From perusal of the record, it appears that there are 13 accused in number who are petitioners in both the petitions. To prove the case against the petitioners, there are 18 listed witnesses. Most of the witnesses are from Pithampur and Indore and some of the witnesses are from Khargoan and two witnesses Head Constable Hari Kumar Bakshi and Additional Suprintendent of Police Virendra Singh are from Dhar.

8. A report has been submitted by DIG Indore on 11.05.2009 wherein it was alleged that upon information received from informer a case was registered

as Case No.120/08 against the petitioners on 26.03.2008 for an offence punishable under Sections 122, 124-A, 153-A of IPC and under Section 3(X) &(XIII)of illegal Activities Act, 1967 and under Section 25 & 27 of Arms Act. It was alleged that the petitioners were arrested on 27.03.2008 & seven pistol and 32 cartridges were seized from the possession of the petitioners. In the said report, it is submitted that the accused persons were presented before the Judicial Magistrate Dhar on 11.05.2008 and Shri Noor Mohammed petitioner No.4 in M.Cr.C. No.3475/05 is an advocate for the rest of the petitioners who came from Ujjain and appeared for the petitioners. In the said report, it is alleged that a press note was distributed by Noor Mohammed, advocate in favour of SIMI in Court premises. It is submitted that because of the press-note some dispute arose. It was also alleged that on 17.07.2008 Noor Mohammed advocate appeared in the Court without any prior intimation and while going back to Ujjain at that time some unknown persons obstructed and abused him. It is submitted that upon which criminal case was registered at Crime No.587/2008 for an offence punishable under Sections 341, 323,294, 506 and 34 of IPC. Further, it is submitted that after investigation challan was filed on 14.11.2008 against Akhilesh s/o Rameshwar Choudhary, Raju S/o Govind Yadav which is pending before JMFC Dhar. It is alleged that Mr. Noor Mohammed has been advised that prior intimation should be given by him so that necessary police protection can be provided to him.

9. The press note which has been submitted by DIG Indore, alleged to have been issued by Shri Noor Mohammed is on recoed. In the press note it is alleged that the information given by Electronic and Print Media about SIMI workers wherein Muslim comnunity has been targeted. It was alleged that all this action is an ex-parte and Muslim community has not been given any opportunity to explain. In the press note it was alleged that there is prohibition on SIMI workers wich was imposed in the year 2001, according to which only those persons can be arrested who are doing work or getting help by SIMI Organization. It was alleged that only those persons are being arrested and cases are prepared by police by showing that pistol and literature has been recovered from them. In the press note it was alleged that hard core organizations are also pressurising Bar Association to show that no advocate should defend the accused persons. In the press note, it was prayed that the State Government is expected to work impartially and should not work to create dispute between the two communities.

10. In the evidence. CD has been submitted which shows that in the Court premises itself Noor Mohammed advocate was also present and was ill-treated and was also beaten. This Court has given number of opportunities to the State to inform the administrative difficulties in pursuing the case at Indore instead of Dhar. Dhar is a small place and is also at a distance of 60-70 Kms from Indore. No satisfactory answer has been given by the State except that the case shall be tried at Dhar. It would not be out of place to mention here that an objection has

been raised by the accused persons before the Court at Dhar relating to territorial Jurisdiction.

11. An undertaking has also been given on behalf of the petitioners that in case the case is transferred to Indore, then petitioners will not raise the dispute regarding the territorial jurisdiction. From perusal of order-sheet dated 05/06/09 it is evident that from that date it is only Nafser who is the accused was present and the case was adjourned for 19/06/09. On 19/06/09 again accused Nafser was present and the accused. Sehzad was produced from District Jail, Dhar. Other accused persons who were in jail at Datiya. Hosangabad, Bhopal, Rewa and Indore were not present After hearing the arguments learned trial Court committed the case to the Court of Sessions, at Dhar.

12. After taking into consideration all the facts and circumstances of the case. this Court is of the view that for administrative convienence and also in the interest of fair and impartial justice it will be in the interest of both the parties to transfer the case from District Court Dhar to District Court, Indore. It will not be out of place to mention that it will be also convenient for the prosecution to keep the accused persons present at Indore instead of Dhar. It is made clear that the petitioners shall not be allowed to raise any objection regarding territorial jurisdiction.

13. Record be sent back forthwith to transmit the same to the District and Sessions Judge, Indore. Keeping in view the gravity of the offence, learned District Judge, Indore is requested to decide the case itself instead of transferring to some other Sessions Court.

14. With the aforesaid observations. both the petition stands disposed of. A copy of the order be placed in the record of M.Cr.C No.3475/08.

C.C. as per rules.

Petition disposed of.

I.L.R. [2010] M. P., 758
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice R.C. Mishra
8 January, 2010*

SONU @ SHAHAZAD ... Applicant
Vs.
STATE OF M.P. ... Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Sections 438 & 439 - *Regular bail - Custody - Even though, an application for grant of regular bail on behalf of accused enjoying liberty of release on anticipatory*

*M.Cr.C. No.13030/2009 (Jabalpur)

bail may be presented through a Counsel, yet, it can be heard and decided only when accused is in custody. (Para 15)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 438 व 439 – नियमित जमानत – अभिरक्षा – यद्यपि अग्रिम जमानत पर छोड़ने की स्वतंत्रता का उपभोग कर रहे अभियुक्त की ओर से नियमित जमानत प्रदान करने के लिए आवेदन किसी अधिवक्ता के माध्यम से प्रस्तुत किया जा सकता है, तथापि इसे केवल तब सुना और विनिश्चित किया जा सकता है जब अभियुक्त अभिरक्षा में हो।

B. Criminal Procedure Code, 1973 (2 of 1974), Sections 438 & 439 - *Regular bail - Custody - In view of precondition of custody no adjournment should be asked by Public Prosecutor on the ground of non-availability of case diary - Accused may also disclose the date of his proposed surrender to custody at least 3 days in advance.* (Para 16)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 438 व 439 – नियमित जमानत – अभिरक्षा – अभिरक्षा की पूर्ववर्ती शर्त को देखते हुए लोक अभियोजक द्वारा केस डायरी की अनुपलब्धता के आधार पर कोई स्थगन नही माँगा जाना चाहिए – अभियुक्त भी अभिरक्षा में अपने प्रस्तावित आत्मसमर्पण की तारीख कम से कम 3 दिन पहले ही से प्रकट कर सकता है ।

C. Criminal Procedure Code, 1973 (2 of 1974), Sections 438 & 439 - *Regular bail - Custody - Interim bail - Court hearing regular bail application has inherent powers to grant interim bail pending its final disposal - If application for grant of interim bail is made on the ground of non-availability of case diary, the Court should hear and decide interim bail application on the same day.* (Para 17)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 438 व 439 – नियमित जमानत – अभिरक्षा – अंतरिम जमानत – नियमित जमानत के आवेदन की सुनवाई कर रहा न्यायालय उसका अंतिम निपटारा लम्बित रहते अंतरिम जमानत प्रदान करने की अन्तर्निहित शक्तियाँ रखता है – यदि केस डायरी की अनुपलब्धता के आधार पर अंतरिम जमानत प्रदान करने के लिए आवेदन किया जाता है तो न्यायालय को अंतरिम जमानत का आवेदन उसी दिन सुना और विनिश्चित किया जाना चाहिए।

Cases referred :

2005(3) MPHT 272, M.Cr.C. No.4984/2005 Brijesh Garg Vs. State of M.P. decided on 18.08.2005, (2004) 7 SCC 558, (2005) 1 SCC 608, 2008 AIR SCW 696, 1984 CrLJ 134, AIR 1980 SC 785, AIR 2008 SC 218, (2009) 2 SCC 281, 2009(4) Scale 77.

Surendra Singh with *Manish Mishra*, for the applicant.
R.P. Tiwari, G.A., for the non-applicant/State.

O R D E R

R.C. Mishra, J. :–Arguments heard.

SONU @ SHAHAZAD Vs. STATE OF M. P.

This is an application for extension of period of anticipatory bail granted to the applicant, vide order-dated 17/9/09 passed in MCrC No.9398/2009 in the wake of his apprehension of arrest in connection with Crime No.419/2009 registered at City Kotwali Chhatarpur inrespect of the offences punishable under Sections 148 and 307 read with 149 of the IPC.

2. The relevant extract of the order reads -

> "This order shall remain in force for a period of 60 days and in the meanwhile, if the applicant so desires, may move an application for regular bail before the competent Court, which shall be considered by the Court in accordance with law".

3. According to the applicant, his application for regular bail, though submitted on 10/11/09, could not be considered on merits for want of case diary. For this, reference has been made to contents of corresponding order-sheets indicating that after obtaining repeated adjournments on the ground that it had not been received back from the office of the Advocate General, the SHO of Kotwali was able to produce the case diary on 08/12/09 only.

4. While opposing the prayer, learned Govt. Advocate has submitted that bail application could not be considered so far in view of the fact, as indicated by learned Special Judge in the order-dated 08/12/09, that the applicant had not surrendered to custody even after expiry of the period of anticipatory bail.

5. In response, learned Senior Counsel has pointed out that as per the practice developed in the Courts of Session in the State, in the light of the decision of a co-ordinate Bench of this Court in *Rajul Rajendranath Dubey v. State of M.P.* (2006 (3) MPHT 65), the applicant did not prefer to -

> (a) surrender to custody before filing the application for grant of regular bail or
>
> (b) remain present before the Court at the time of its hearing.

6. He has also posed a significant question for consideration as to what would happen in a case where as a law-abiding citizen, an accused surrenders to custody but his application for grant of regular bail is not considered on merits for want of case diary.

7. The decision in *Rajul's case* (above) contemplates two different approaches to be adopted by the Court of Session and the High Court while dealing with an application under Section 439 of the Code of Criminal Procedure (for short 'the Code') for grant of regular bail to an accused enjoying liberty of release on anticipatory bail. The relevant observations may be reproduced as under-

> *"when an accused on anticipatory bail makes an application for regular bail, either under Section 437 or 439 of the Code,*

it is not necessary by reason of umbrella over him that either he should be present or should be in custody for consideration of his regular bail application. But, once such application is rejected and either he is not taken into custody or moves out of the custody of the Court for any reason, the application under Section 439 of the Code made to Higher Court, which may either be the Court of Sessions or the High Court, as depending in the individual case, is not then maintainable".

8. A close analysis of the decision would reveal that it contained reference to an earlier decision rendered by the same Bench in *Sunil Gupta v. State of M.P.* 2005 (3) MPHT 272 and the negative answers given by a Division Bench of this Court in *Brijesh Garg @ Poda v. State of M.P.* (MCrC No.4984/2005 decided on 18.08.2005) to the questions as to -

(i) whether the protective umbrella granted under the anticipatory bail order can be claimed by an accused whose application for regular bail is rejected by the Court of Session and in such a situation, whether his application under Section 439 of the Code would be maintainable before the High Court ?

(ii) whether the accused who has been enlarged on anticipatory bail for a limited duration and whose application for regular bail is rejected by the Court of Session but at the time of consideration of his application, either he was not present before the Court or had moved out of the custody of the Court, whether his application under Section 439 of the Code would be maintainable before the High Court ?

9. It is relevant to note that in *Sunil Gupta's case* (supra), the legal position as explained by the Apex Court in *Nirmal Jeet Kaur v. State of M.P.* (2004) 7 SCC 558 and reaffirmed in *Sunita Devi v. State of Bihar* (2005) 1 SCC 608 was also taken into consideration. However, none of these precedents had recognized maintainability of an application under Section 439 of the Code of a person who is not in custody irrespective of whether he is under the protective umbrella of Section 438 of the Code or not.

10. Further, in *State of Haryana v. Dinesh Kumar* 2008 AIR SCW 696, the Supreme Court, though in a different context, while dis-approving the contrary view taken by a full Bench of Madras High Court in *Roshan Beevi v. Joint Secretary to Govt. of Tamil Nadu* 1984 CriLJ 134 on the question as to what constitutes 'arrest' and 'custody' in relation to criminal proceedings, quoted with approval the following observations made by Justice V.R. Krishna Iyer, in his inimitable style, in the case of *Niranjan Singh v. Prabhakar Rajaram Kharote* AIR 1980 SC 785 -

" When is a person in custody, within the meaning of S. 439, Cr. P.C.? When he is, in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of S .439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubiotics are unfair evasion of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose.

Custody, in the context of S.439, is physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and order of the court. He can be in custody not merely when the police arrest him, produces him before a Magistrate and gets a remand to judicial or other custody.

He can be stated to be in judicial custody when he surrenders before the court and submits to its directions..... "

11. The word 'custody' was used with the same meaning in *Nirmal Jeet Kaur's case* (supra). The basic rule, as propounded therein and re-affirmed in *Sunita Devi's case* (above), "that an application, under Section 439 of the Code for grant of bail, would not be maintainable unless a person is in custody", has been approved by the Supreme Court in all subsequent decisions on the point including *Naresh Kumar Yadav v. Ravindra Kumar* AIR 2008 SC 218 and *Vaman Narain Ghiya v. State of Rajasthan* (2009) 2 SCC 281.

12. In *Naresh Kumar Yadav's case,* the Apex Court proceeded to add -

"In Nirmal Jeet Kaur's case and Sunita Devi's case, certain grey areas in K.L. Verma v. State, (1998) 9 SCC 348 were noticed. The same related to the observation 'or even a few

days thereafter to enable the accused persons to move the higher court, if they so desire'. It was held that the requirement of Section 439 of the Code is not wiped out by the above observations. Section 439 comes into operation only when a person is 'in custody'. In K.L. Verma's case, reference was made to Salauddin Abdulsamad Shaikh v. State of Maharashtra (1996) 1 SCC 667. In the said case there was no such indication as given in K.L. Verma's case, that a few days can be granted to the accused to move the higher court if they so desire. The statutory requirement of Section 439 of the Code cannot be said to have been rendered totally inoperative by the said observation.

13. Needless to say that subordinate Courts are bound to follow the decision of the High Court only when there is no apparently contrary view expressed by the Apex Court on the point.

14. The legal position that emerges on a broad conspectus of these decisions rendered by the Supreme Court, may be summed up in the following words -

> "an application under Section 439 of the Code for grant of bail can be considered only when the accused is in custody, meaning of which has been explained in *Niranjan Singh's case* (ibid), irrespective of whether the period of anticipatory bail has expired or not."

15. In other words, even though, an application for grant of regular bail on behalf of an accused, enjoying liberty of release on anticipatory bail, may be presented through a counsel yet, it can be heard and decided only when he is in custody.

16. The ideal situation would be that an application for regular bail must be considered and disposed of on merits as expeditiously as possible in view of the pre-condition as to custody and no adjournment should be asked for by the public prosecutor on the ground of non-availability of the case diary. Moreover, in order to enable production of the case diary on the date of hearing, the accused may also disclose, in his bail application, the date of his proposed surrender to custody at least 3 days in advance (See. *Naresh Kumar Yadav's case* (above).

17. This apart, as observed by the Apex Court in *Kamlendra Pratap Singh v. State of U.P.* 2009 (4) Scale 77, the Court hearing the regular bail application has inherent power to grant interim bail pending final disposal of the regular bail application. Accordingly, in case, the accused-applicant along with his regular bail application also applies for interim bail on the ground of non-availability of the case diary, the Court concerned should hear and decide the interim bail application on the same day.

18. Adverting to the application under consideration, it may be observed that the applicant has been able to establish a reasonable ground for extension of the period of anticipatory bail.

19. Subject to these clarifications, the application stands allowed and the period of anticipatory bail order-dated 17/09/2009 is hereby extended upto 27/01/2010.

Application allowed.

I.L.R. [2010] M. P., 764
MISCELLANEOUS CRIMINAL CASE
Before Mrs. Justice S.R. Waghmare
21 January, 2010*

HARIOM ... Applicant
Vs.
STATE OF M.P. ... Non-applicant

Essential Commodities Act (10 of 1955), Sections 7(1)(a)(ii) & 10-A, Criminal Procedue Code, 1973, First Schedule, Appendix "A" r/w S. 2(a) - ***Classification of offences against other laws - Under the E.C. (Special Provisions) Act (18 of 1981), the offences were made non-bailable by amending S. 10-A of E.C. Act - Now, the Act, 1981 is not in force and the amendment stands deleted automatically - Therefore, the provisions of Cr.P.C. are applicable - As per First Schedule, Appendix "A" r/w S. 2(a) of Cr.P.C., offences fall u/s 7(1)(a)(ii) of E.C. Act are cognizable and non-bailable.*** (Paras 5 to 7)

आवश्यक वस्तु अधिनियम (1955 का 10), धाराएँ 7(1)(ए)(ii) व 10–ए, दण्ड प्रक्रिया संहिता, 1973, प्रथम अनुसूची परिशिष्ट "ए" सहपठित धारा 2(ए) – अन्य विधियों के विरुद्ध अपराधों का वर्गीकरण – आवश्यक वस्तु (विशेष उपबंध) अधिनियम (1981 का 18) के अन्तर्गत आवश्यक वस्तु अधिनियम की धारा 10–ए को संशोधित कर अपराधों को गैर जमानतीय बनाया गया था – अब अधिनियम, 1981 प्रवर्तन में नही है और संशोधन स्वतः विलोपित हो गया है – इसलिए, द.प्र.सं. के उपबंध लागू होंगे – द.प्र.सं. की प्रथम अनुसूची, परिशिष्ट "ए" सहपठित धारा 2(ए) के उपबंधानुसार जो अपराध आवश्यक वस्तु अधिनियम की धारा 7(1)(ए)(ii) के अन्तर्गत आते हैं, संज्ञेय और गैर जमानतीय हैं।

Cases referred :

2001 CrLJ 1306, 2006(1) EFR 119, 2001(3) MPLJ 414, 2001(1) MPHT 213, Judgment dated 26.08.1999 of Bombay High Court in Cr.W.P. No.302/1999 (Purthviraj Chandrakant Shinde & ors. Vs. State of Maharashtra & ors.).

Z.A. Khan with *J.K. Jain,* for the applicant.

B.L. Yadav, G.A., for the non-applicant/State.

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*M.Cr.C. No.8826/2009 (Indore)

HARIOM Vs. STATE OF M.P.

ORDER

S.R. WAGHMARE, J. :–By this application filed under Section 438 of the Cr.P.C., the applicant Hariom s/o Radheshyamji Gupta has moved the application for grant of anticipatory bail being implicated in crime No. 357/2009 registered by police station Garoth, District Mandsaur for offence under Section 3/7 of the Essential Commodities Act, 1955 (hereinafter referred as to "the Act").

2. Counsel for the applicant has vehemently argued that the lower Court had erred in rejecting the bail application for grant of anticipatory bail to the present applicant since he was basically a businessman, a registered dealer and involved in the sale of fertilizers. Even if the prosecution allegations are considered, Counsel has stated that the present applicant being the proprietor of Annapurna Trading Company, Boliya; the offence was registered for selling the fertilizer for urea at higher rate than was permitted, according to the provisions of law. Counsel had averred that even if there was violation under Section 3 / 7 of the Act itself as alleged, this Court had considered whether the offence was bailable and the Court had held that the application for offence under Section 438 of the Cr.P.C. was maintainable since the amendment by the Act of 1988 had lost its life and efficacy by lapse of time and the police and the administration were not likely to know about the provisions and the interpretation and hence, allowed the anticipatory application in the matter of *Dinesh Kumar Dubey and another vs. State of M.P. and others* {2001 Cri L.J. 1306}. Counsel has prayed for grant of anticipatory bail. He has also relied on *Uday Bhan Singh vs. State of M.P.* {2006(1) EFR 119}.

3. Counsel for the respondent State, on the other hand, has opposed the submissions of the Counsel for the applicant and stated that the amendment was valid only for a period of 15 years after the Third Amendment and the offence is "cognizable" and there is no indication that it is non-bailable. Hence, Counsel urged that under such circumstances where no provision is made regarding the offence being bailable Schedule II of the Code of Criminal Procedure 1973 has to be seen and in case of violation of Section 7 of the Essential Commodities Act is punishable by 7 years of imprisonment then the offence would be non-bailable. And since the present applicant was selling urea at a higher rate than fixed by the State Government. Counsel has prayed for dismissal of the application.

4. At this juncture Counsel for the applicant Shri Z.A.Khan referred to a judgment of this Court in the matter of *Balwant vs. State of Madhya Pradesh* {2001 (3) M.P.L.J. 414; whereby this Court has discussed several other cases besides *Dinesh Kumar Dubey* (supra), whereby the offence under Section 7 (1)(a)(ii) of the Act had been held to be "cognizable" and "bailable" and concluded that a 'sub-silentio' order, an assumption in disregard of clear and unambiguous statutory provision is not a precedent. The Court held thus:

"(9) Where a certain point of law is not brought to the view of the Court in determining a cause, the decision is not a precedent calling for the same decision in a similar case in which the point is brought before the Court. (Law Lexicon by P.R. Aiyar edited by Justice Y.V. Chandrachud 1997 edition page 1494). In *Goodyear India Ltd. vs. State of Haryana,* AIR 1990 SC 781, it has been observed by the Supreme Court that a decision on a question which has not been argued cannot be treated as a precedent. If an ingredient of a section was neither argued nor was considered, the passing reference based on the phraseology of the section cannot be said to be the dictum.

(10) Failure to consider a statutory provision is one of the clearest cases in which the Court is not bound to follow its own decisions. *Bonalumi vs. Sectretary of State,* (1985) 1 ALL ER 797. In *Young vs. Bristol Aeroplane Co. Ltd.* (1994) 2 All ER 293, it has been observed by Lord Greene. M.R.C.P.: "Where the Court has construed a statute or a rule having the force of a statute, its decision stands on the same footing as any other decision on a question of law. But where the Court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the Court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam." It has been held by a Division Bench of this Court in *United India Insurance Company vs. Mahila Ramshree,* 1996 JLJ 69 691 that a judgment is per incuriam if the relevant law has not been considered and it has no binding effect.

(11) In view of the above discussion, it must be held that the cases falling under Section 7(1)(a)(ii) of the Act being punishable with imprisonment which may extend to seven years read with Schedule I-Part II to the Code are "non-bailable". In the present case the alleged contravention of the Control Order is punishable under Section 7(1)(a)(ii) of the Act. The applicant who was found selling kerosene in excess of the price fixed under the Control Order does not on the facts and in the circumstances of the present case

deserve anticipatory bail. The application for anticipatory bail is rejected."

Thus the Court held that the offences are non-bailable and judgments rendered in M.Cr.C. No.6111 of 1999, *Nemchand Agrawal vs. The State of M.P.* And a reported decision *Dinesh Kumar Dubey vs. State of M.P.*, 2001 (1) MPHT 213 and two other cases holding that the offence under Section 7 of the Act as bailable were per incuriam.

5. On considering the above submissions, I find that the entire controversy pertains to the amendment in Section 3, Section 6-A & Section 6-C, Section 7 and Section 10-A of the Act, which are still in the nature of proposed amendments as The Essential Commodities (Amendment) Bill 2000 has yet to take the shape of an amending Act as it has not received the assent from the Parliament of India and the legislative intent has not crystallized in to an Act. Then under such circumstances, I find that there is a Division Bench judgment of Bombay High Court *Purthviraj Chandrakant Shinde and others vs. State of Maharashtra and others* judgment rendered in Criminal Writ Petition No.302 of 1999 decided on August 26,1999 (copy of the judgment is available on the record of this file), whereby Their Lordships decided thus:

"(5) However, in the year 1981, Act 18 of 1981 was passed to amend certain provisions of the Act. Under the Act 18 of the 1981, the offences were made non-bailable by amending Section 10-A of the Essential Commodities Act 1955. Act 18 of 1981 was at the first instance, for a period of five years. Then the period was extended up to ten years. Again by effecting amendment, Ordinance No. 12 of 1992, the period was extended to 15 years. That means, the amended provisions were to remain in force for a period of 15 years from 1/9/1982, the date on which the Act 18 of 1981 came into force. There is no further amending Act or Ordinance to extent the period of Act 18 of 1981 beyond the first period of 15 years. So, so far as the contention of the learned Counsel for the petitioners, that now the Act 18 of 1981 is not in force and the amendment stands deleted automatically, is quite correct.

(6) But merely because the words "and non-bailable" which were inserted in the amending Act 18 of 1981 stand deleted. It will not be correct to say that all the offences under the Essential Commodities Act, 1955, would be bailable. When the special Act is not making any provision in this respect, then the provisions of the Code of Criminal

Procedure, 1973, are required to be made applicable and so, the position which was there during the period from 1974 to 1981 is restored and the offences would be bailable or non-bailable as per the quantum of punishment provided under the Act.

(7) It is admitted position that in all these criminal writ petitions, the offences alleged against the present petitioners do not fall under clause ('h') or clause ('i') or sub-section (2) of Section 3 of the Act and, therefore, the provisions of Section 7 (1)(a)(ii) are not applicable where the maximum sentence of imprisonment provided extends to one year only. The offences alleged fall under Section 7(1)(a)(ii) and the sentence of imprisonment provided under this clause extends to 7 years and, in such circumstances, considering the provisions under the Code of Criminal Procedure, 1973, especially the First Schedule, Appendix "A", read with Section 2(a) of the Code of Criminal Procedure 1973, the offences alleged against the petitioners are non-bailable. The contention of the petitioners, that these offences be treated as bailable cannot be accepted.

(8) In the result, Criminal Writ Petition Nos. 302/1999, 312/1999 and 314/1999 are dismissed in limine. The order of interim relief passed by this Court, on 18.8.1999, in Criminal Writ Petition No.302/1999, is vacated."

6. This position has been reiterated by our own High Court in the matter of *Balwant* (supra) in 2001 and by Single Judge of the Jharkhand High Court in *Nathuram Agrawal vs. State of Bihar* in 2001 and in the matter of *Amarnath Sahu vs. State of Chhatisgarh* High Court in the year 2001 and our own High Court in the matter of *Uday Bhan* (supra) in the year 2005.

7. Consequently, I find that the offence under Section 7 (1)(a)(ii) and Section 10-A of the Act is cognizable and non-bailable and my view is in consonance with the view of the Division Bench judgment of the Bombay High Court and I also place my reliance on the judgment in the matter of *Balwant* (supra) whereby, the Learned Single Judge has already held that judgment in *Dinesh Kumar* (supra), *Nemchand Agrawal* (supra) and similar others cases are per incuriam.

8. Coming to the facts of the present case, I find from record that the applicant has been alleged to sell without licence fertilizer urea at higher prices than prescribed under the control order. However, to the contrary the applicant is a registered dealer his registration is filed along with the application, the applicant has also filed an amended circular of the State Government of M.P., whereby the rates of

urea have been upgraded and amended; besides certain bills receipts of sale have also been filed to indicate his bona-fides but they are not very legible to hold that proper rates are being levied by the applicant. Counsel for the applicant has urged that he was willing to cooperate with the investigating agency as and when required, but arresting him would lead to loss of face and social ostracism. And hence giving the applicant the benefit of doubt the application is allowed.

9. It is directed that in the event of arrest, the applicant Hariom shall be released on bail for the period of 30 days (thirty days) upon his furnishing personal bond to the tune of Rs. 25,000/- (Rupees Twenty five thousand only) with one surety in the like amount to the satisfaction of the Arresting Officer for his further appearance as and when directed.

The applicant shall apply for regular bail within the aforesaid period of 30 days which shall be dealt by the trial Court in accordance with law.

It is also directed that the applicant shall abide by all the conditions enumerated under Section 437(3) of the Cr.P.C.

C.c.as per Rules.

Order accordingly.

March-10 (First)