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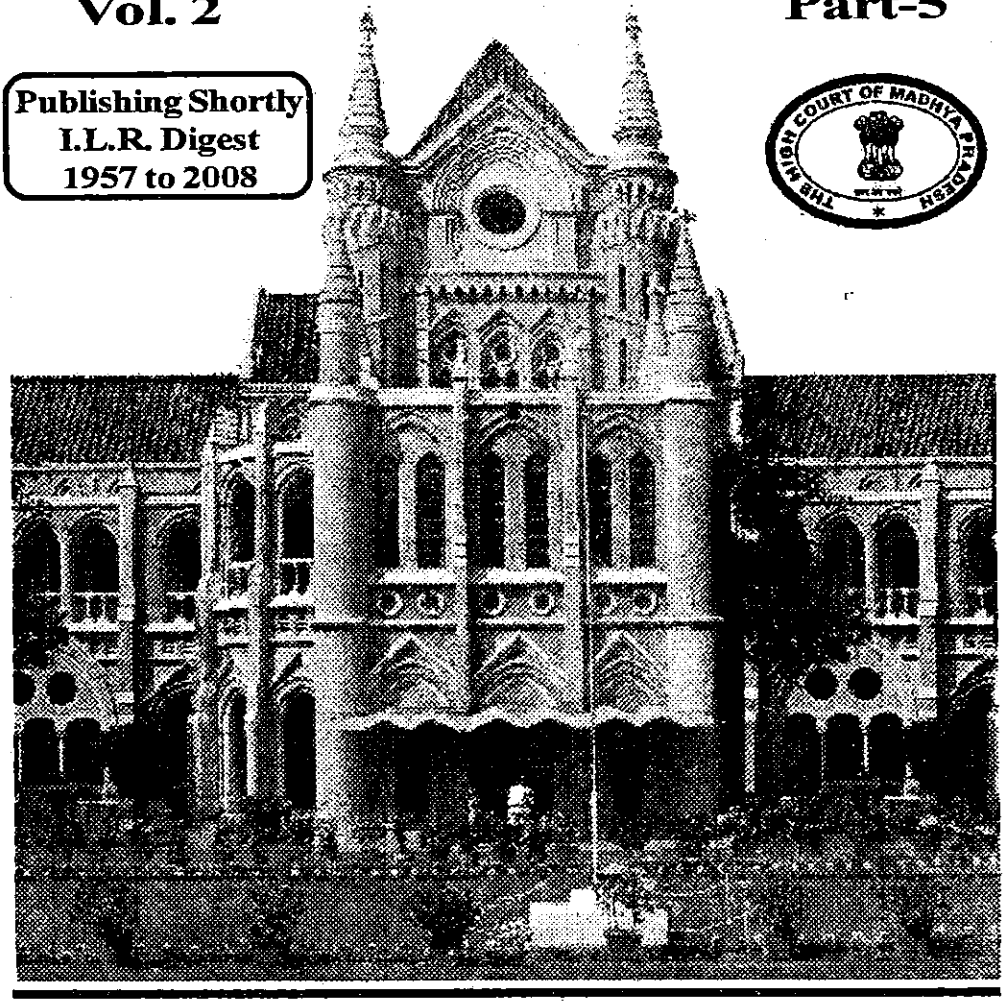

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शब्द और वाक्यांश :

'कारबार' – शब्द 'कारबार' का व्यापक अर्थ है और उसका बोध निजी से सार्वजनिक क्षेत्र में भिन्न होता है – लाभ विहीन क्रियाकलाप भी शब्द 'कारबार' में सम्मिलित हो सकते हैं। (कार्मेल कॉन्वेन्ट सेकेण्ड्री स्कूल, ग्वालियर वि. म.प्र. राज्य) ...1100

'निरोध' – अर्थात् व्यक्ति अथवा वस्तु को, या तो संयोगवश अथवा उद्देश्यपूर्वक दूर रखना या रोकना – व्यक्ति को उसकी दैहिक स्वतंत्रता से वंचित करना निरोध है। (इरफान वि. म.प्र. राज्य)...1170

मुक्तिधन (फिरौती) – एक व्यक्ति द्वारा दूसरे व्यक्ति को किया गया आज्ञापक निवेदन जिससे दूसरे व्यक्ति से कुछ करने या त्यागने या किसी कार्य से प्रविरत रहने की अपेक्षा की जाती है। (इरफान वि. म.प्र. राज्य) ...1170

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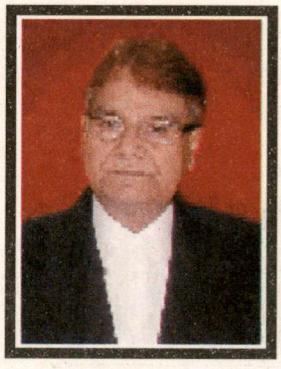
APPOINTMENT TO THE MADHYA PRADESH HIGH COURT

We congratulate Shri Brij Kishore Dube on his appointment as Judge of the High Court of Madhya Pradesh. Shri Brij Kishore Dube took oath of the High Office on 03rd of May , 2010.



Justice Brij Kishore Dube

Born on January 20,1952 in a middle class family at Village Nakau District Mainpuri (Uttar Pradesh). Passed Higher Secondary (12th) Examination in the year 1970 from Uttar Pradesh Board of Secondary Education, Allahabad, B.Sc. in the year 1972 from Govt. College, Bhind, LL.B. in the year 1975 from M.L.B. Arts & Commerce College, Gwalior with 1st Division and got 5th rank in the merit list of Jiwaji University, Gwalior (M.P.), Awarded Merit Scholarship during the academic session of 1975-76 for LL.M., and passed LL.M. in the year 1979 from M.L.B. Arts & Commerce College, Gwalior. In the meantime, selected for the post of Civil Judge, Class-II. Joined as Civil Judge, Class-II on 23rd August 1979. Promoted as Civil Judge, Class-I on 25-11-1985, then as A.C.J.M. on 20-10-1989 and as Additional District Judge on 12-10-1991. Worked as Additional Registrar, High Court of M.P. at Jabalpur from June 1997 to August 2003 and as District & Sessions Judge, Sagar from September 2003 to April 2005 and was nominated by the State Government in consultation with the Chief Justice as Member of the Madhya Pradesh State Legal Services Authority. Worked as Member Secretary, M.P. State Legal Services Authority, Jabalpur from 19th April 2005 to 30th June, 2008. Granted Selection Grade on 8-5-1999 and Super Time Scale on 26-2-2006.Worked in different capacities at Datia, Rewa, Satna, Mehgaon, Bemetara, Morena, Bhind, Neemuch, Jabalpur and Sagar.

Worked as District and Sessions Judge, Jabalpur since July, 2008.

Elevated as Additional Judge of the High Court of Madhya Pradesh on May 03,2010.

We wish Shri Justice Brij Kishore Dube, a successful tenure on the Bench.

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APPOINTMENT TO THE MADHYA PRADESH HIGH COURT

We congratulate Shri G.S. Solanki on his appointment as Judge of the High Court of Madhya Pradesh. Shri G.S. Solanki took oath of the High Office on 03rd of May, 2010.

Justice G.S. Solanki

Born on September 06, 1953 at Anjad District Badwani. Passed Higher Secondary School Examination from Govt. Higher Secondary School, Anjad, B.Sc. degree in 1974 from Gujarati Science College, Indore, M.A. (Economics) and LL.B. degrees in 1978 from Indore Christian College.

Practiced as an Advocate for one year. Joined Judicial Service as Civil Judge class-II on 14-9-1979. Worked as Civil Judge at Harda, Sohagpur, Bhanpura, Dewas and Indore. Also worked as Chief Judicial Magistrate, Indore. Was Promoted as Additional District Judge in the year 1991. Worked as Additional Registrar, Bhopal Gas Victims, Bhopal from June 1996 to May 1999 and Special Judge (Prevention of Atrocities on SC/ST Act) at Sagar from 07-06-1999 to 07-02-2002 and also worked as officiating District Judge, Sagar. Was posted as Additional Welfare Commissioner Gas Victims Bhopal for a short term and then appointed as Additional Secretary and Secretary, Law & Legislative Affairs Department, Govt. of M.P. Bhopal and worked there from March 2002 to May 2005.

Worked as District & Sessions Judge, Raisen and also headed one Member Enquiry Commission, appointed under Commissions of Enquiry Act, 1952 for enquiring into the matter of death of R.K. Jain, Deputy Commissioner, Commercial Taxes Department for his custodial death during police custody of Special Police Establishment (Lok Ayukta Bhopal). Was District Judge (Inspection & Vigilance) Jabalpur-Zone from 15-5-2007 till elevation.

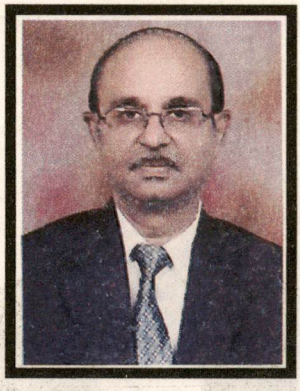
Elevated as Additional Judge of the High Court of Madhya Pradesh on May 03, 2010.

We wish Shri Justice G.S. Solanki, a successful tenure on the Bench.

****

APPOINTMENT TO THE MADHYA PRADESH HIGH COURT

We congratulate Shri Naresh Kumar Gupta on his appointment as Judge of the High Court of Madhya Pradesh. Shri Naresh Kumar Gupta took oath of the High Office on 03rd of May , 2010.



Justice Naresh Kumar Gupta

Born on July 1, 1955. Father Shri M.L. Gupta was a Judicial Officer who retired as a District Judge in the year 1976. Passed LL.B. (Hons.) degree course from Indore University in the year 1977 and secured 2nd position in the University. After receiving registration from State Bar Council ofM.P., started practice in civil side with late Shri B.K. Samadani , Advocate at Indore. Selected in P.S.C. examination and joined as Civil Judge Class-II on 10-8-1979. Got all his promotions in due course and in the year 1991 was promoted as Additional District and Sessions Judge. Being ADJ worked as Additional Registrar Adm. & Vig. at main seat of M.P. High Court at Jabalpur, Special Judge (SC/ST Prev. ofAttro.) Ujjain, Addl. Secretary (Law) at Bhopal and President, Consumer Forum at Hoshangabad. Being Addl. Registrar also held additional charge of Additional Director JOTRI at Jabalpur whereas as Addl. Secretary in Law Department also held additional charge of Director, Public Prosecution. In November 2003 joined as District and Sessions Judge, Datia. In such capacity, has also worked at Mandsaur. In the same capacity worked as District Judge (Vig.) Gwalior and Registrar, Gwalior Bench for few months. Was again appointed District Judge, Gwalior. From July 2007, worked as Principal Secretary (Law Department) and Legal Remembrancer to the Govt. of M.P. Also shared experiences with junior officers regarding judgment writing by writing a book namely "Niyamanukul Nirnaya" on the subject.

Elevated as Additional Judge of the High Court of Madhya Pradesh on May 03, 2010.

We wish Shri Justice Naresh Kumar Gupta, a successful tenure on the Bench.

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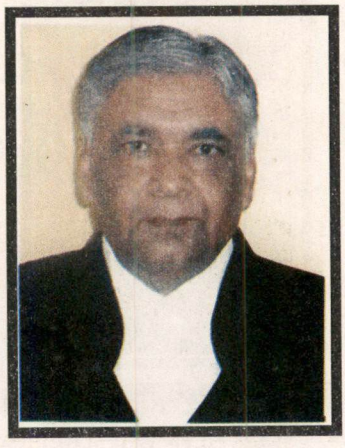
APPOINTMENT TO THE MADHYA PRADESH HIGH COURT

We congratulate Shri Anil Kumar Sharma on his appointment as Judge of the High Court of Madhya Pradesh. Shri Anil Kumar Sharma took oath of the High Office on 03rd of May , 2010.



Justice Anil Kumar Sharma

Born on October 1,1952 at Gwalior(M.P.). Passed B.Sc., M.A.,LL.B. Enrolled as Advocate in 1974. Practiced as Advocate at Mandsaur, Khandwa and Indore. Joined as Civil Judge Class-11 on 3-9-1979 for training at Indore. Posted as Civil Judge, Dharampuri, Kannod, Ashoknagar, Ambah, Tarana, Bilaspur, Katni and as C.J.M. at Jabalpur. Posted as Additional District Judge, Jabalpur, Khargon and Khandwa. Posted as Special Judge (Prevention of Atrocity), Rajgarh. Posted as President, Consumer Forum, Guna. Posted as Family Court Judge, Sagar and Bhopal. Posted as District Judge, Seoni and Ujjain. Worked as Principal Registrar (Judicial), High Court of M.P. Jabalpur since 18-6-2007.

Elevated as Additional Judge of the High Court of Madhya Pradesh on May 03, 2010.

We wish Shri Justice Anil Kumar Sharma, a successful tenure on the Bench.

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OVATION TO NEW JUDGES

Shri R. D. Jain, Advocate General of M. P. while felicitating the new Judges, said :–

I welcome Hon'ble Justice Brij Kishore Dube, , Justice Gulab Singh Solanki, Justice Naresh Kumar Gupta and Justice Anil Kumar Sharma on their elevation as Additional Judges of this Court.

The Hon'ble Judges have a vast and long experience of judicial working. Their experience as Judge will be a great asset to this High Court and a guiding light to the new comers in the profession as also beneficial to the institution. In our democratic system judiciary has a vital role to play and a powerful judiciary will give succour to the person sitting on the last fence of the society. The law is enacted to take care of the poorer section of society and appointment of Hon'ble Judges will prove to be beneficial to the litigant public. Judges possessing experience at various levels in the judicial set-up will adorn the seats and experienced Judges are sure to bring the desired result for ameliorating the fate of poor persons for whose service and upliftment, the democratic set-up has been devised. According to Justice A. Ahmedi, Ex. Chief Justice of India, the legislature determines the legislative policy and its meaningful interpretation will bring good to people. Such a result cannot be achieved without a Judge having experience and expertise in the field of administration of justice.

Shri Brij Kishore Dube was born on 20th January, 1952. He joined judicial service as Civil Judge Class-II, on 23.08.1979, promoted as Civil Judge Class-I, in November, 1985, as Chief Judicial Magistrate on 22nd October, 1989 and as officiating District Judge on 12.10.1991. He was granted selection grade on 08.05.1999 and super-time scale on 26.02.2006. He has worked in different capacities at Datia, Rewa, Satna, Mehgaon, Bemetara, Morena, Bhind, Neemuch, Jabalpur and Sagar. He also worked as Additional Registrar in the High Court of Madhya Pradesh at Jabalpur and as Member Secretary of Madhya Pradesh Legal Services Authority. Before elevation he was posted as District and Sessions Judge, Jabalpur.

Justice Gulab Singh Solanki was born on 6th September, 1953. He joined Judicial Service as Civil Judge, Class-II, on 14.09.1979, promoted as Civil Judge, Class-I on 25th November, 1985, as C.J.M. on 28th September, 1989 and as officiating District Judge on 14.10.1991. He was granted selection grade on 08.05.1999 and super-time scale on 26.02.2006. He has worked at different places i.e. Mandsaur, Harda, Sohagpur, Bhanpura, Dewas, Alirajpur, Indore, Gwalior, Dabra, Bhopal, Sagar, Raisen and Jabalpur. He has worked as Additional Welfare Commissioner, Bhopal Gas Victims, Bhopal w.e.f. 08.02.2002. He also worked as Additional Secretary, Law & Legislative Affairs Department and, before elevation he was posted as District Judge (Vigilance) Jabalpur.

Shri Naresh Kumar Gupta was born on 1st July, 1955. His father Shri M.L. Gupta was a judicial Officer who retired as a District Judge in the year 1976. He completed his LL.B.(Hons.) degree course from Indore University, in

the year of 1977 and secured 2nd position in the University. After receiving registration from State Bar Council of M.P., he started practice in civil side with late Shri B. K. Samadani, Advocate at Indore. Selected in P.S.C. examination and joined as Civil Judge Class-2 on 10.08.1979. He got all his promotions in due course and in the year 1991 he was promoted as Addl. District and Session Judge. Being ADJ he worked as Addl. Registrar Admn. & Vigilance at the main seat of M.P. High Court at Jabalpur, Special Judge (SC/ST Prevention, of Atrocities) Ujjain, Addl. Secretary (Law) at Bhopal and President Consumer Forum at Hoshangabad. As Principal Secretary in Law Department he also held additional charge of Director Public Prosecution. In Nov. 2003 he joined as District and Sessions Judge Datia. In that capacity he has also worked at Mandsaur. He has worked as District Judge (Vigilance) Gwalior and Registrar Gwalior Bench for few months. Again, he was Principal Secretary (Law Department and Legal Remembrancer) to the Govt. of M.P. He has also shared his experiences with his junior officers regarding judgment writing by writing a book namely "Niyamanukul Nirnaya" on the subject.

My Lord Mr. Justice Naresh Kumar Gupta has worked, as Principal Secretary in the Department of Law & Legislative Affairs Bhopal and in that capacity has experience and background about formulation of legislative policy which will help in solving legal riddles. His Lordship has played a distinct role as law framer and has played a role of emancipation of legal procedure from unnecessary technicalities. Usually it is said that the Judges do not make law and they only interpret but now we will have Justice Gupta having experience of making law which will help us in interpreting the same in the most benevolent manner. Under the guidance of My Lord our judicial system will grow in the direction, which was dreamt by the Constitution framers.

Shri Anil Kumar Sharma was born on 1st October, 1952. He joined Judicial Service as Civil Judge, Class-II on 03.09.1979, promoted as Civil Judge, Class-I on 30th September, 1986, as C.J.M. on 5th October, 1989 and as officiating District Judge on 17.02.1992. He was granted selection grade on 08.05.1999 and super-time scale on 26.02.2006. He has worked at different places i.e. Indore, Dharmpuri, Kannod, Ashoknagar, Ambah, Tarana, Bilaspur, Katni, Jabalpur, Khargone, Khandwa, Rajgarh, Guna, Sagar, Bhopal, Seoni and Ujjain. He has worked as President, District Consumer Forum, Guna w.e.f. 07.08.2000. He also worked as Presiding Judge, Family Court, Sagar and Bhopal. Before elevation he was posted as Principal Registrar (Judicial) in the High Court ofMadhya Pradesh at Jabalpur.

The vast experience of the Hon'ble Judges of more than three decades in the field of dispensation of justice will surely result in reducing pendency and heavy workload of the Court. As seasoned Judges, they will successfully bring improvement in the dispensation of justice towards betterment in the field of administration of justice. Their jurisprudential approach will surely result in brining a new era without engulfing in unnecessary legal rigmarole which has crept into

our system. My Lords will infuse a spirit consistent with the democratic system and the legal requirement.

My Lords know that " litigation is often taken as a battle to be won." In the new set-up, the values which we are developing, has to be compromise oriented. This doctrine has to be tested on the envil of present environment so that a sufferer at the grass root level may not feel frustrated from our legal system. Though legal hair splitting may some time become necessary but the justice-oriented approach may be developed so that the truth may not be subdued in sterile arguments. Justice Krishna Ayyar has at time and again drawn attention of the jurists towards the seriousness of the problem which might prove to be chaotic and even result in the loss of faith of a common man in the very legal system of the nature.

I may remind My Lords that the demand of time is to evolve an Indian approach towards the dispensation of justice so as to develop a correctional philosophy.

The spirit of law as evolved by the Apex Court vividly laid down in the case of Mohd. Giasuddin Vs. State of A.P. is quoted below:

> "There is a great discretion vested in the Judge, especially when pluralistic factors enter his calculations. Even so, the Judge must exercise this discretionary power, drawing his inspiration from the humanitarian spirit of the law, and living down the traditional precedents which have winked at the personality of the crime-doer and been swept away by the features of the crime. What is dated has to be discarded. What is current has to be incorporated. Therefore, innovation, in all conscience, is in the field of Judicial discretion."

Thus a juristic approach has now become absolutely essential for up-keeping the spirit of law and flourishing the democratic set-up.

I am sure that My Lords will endeavour to advance the policy of law while exercising wide discretion available to the Courts.

I, on behalf of State Govt., Law Officers of the State and My own behalf congratulate your Lordships and wish a successful tenure as Judges of this Hon'ble Court.

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Shri Anil Khare, President, M. P. High Court Bar Association, Jabalpur, while felicitating the new Judges, said :–

I feel it to be my proud privilege when I stand here on behalf of the Madhya Pradesh High Court Bar Association to welcome My Lord Hon'ble Justice shri Brij Kishore Dube. My Lord Hon'ble Justice Shri Gulab Singh Solanki, My Lord Hon'ble Justice Shri Naresh Kumar Gupta and Hon'ble Justice Shri Anil Kumar Sharma on their appointment as Additional Judges of the High Court of Madhya Pradesh. These are moments of Jubilation for My Lords when they take up the suspicious office as the Judges of this prestigious High Court.

The expectations of the Bar become very high when we look to the rich experiences possessed by My Lords. My Lord Hon'ble Justice Brij Kishore Dube joined as a Civil Class-II on 23.08.1979. He was promoted as Civil Judge Class-I in November, 1985 from the post of Civil Judge Class-II. My-Lord was promoted as officiating District Judge on 12.10.1991. He worked in different capacities, to name the few. Additional Registrar in the High Court of M.P. at Jabalpur and as Member Secretary, M.P. Legal Service Authority. My Lord Before his elevation to this Court was posted as District and Sessions Judge, Jabalpur.

My Lord Hon'ble Justice Shri Gulab Singh Solanki joined the judicial services as Civil Judge Class-II on 14.09.1979. After being promoted as Civil Judge Class-I and having worked as Chief Judicial Magistrate, My Lord was posted as officiating District Judge on 14. 10. 1991. My Lord has also discharged his functions as Additional Welfare Commissioner, Bhopal Gas Victims. My Lord has also worked as Additional Secretary and Secretary, Law and Legislative Affairs Department. My Lord was lastly posted as District Judge (Vigilance), Jabalpur.

My Lord Hon'ble Justice Shri Naresh Kumar Gupta initially started his practice at Indore after having been enrolled with the Bar council of M.P. He was selected to the judicial service, pursuant to which he joined as Civil Judge-II on 10.08.1979. My Lord Hon'ble Justice Shri Naresh Kumar Gupta was promoted as Additional District and Sessions Judge in 1991. My Lord has worked on important assignments, to name the few. Additional Registrar (Administration and Vigilance), Jabalpur, Special Judge, Ujjain, Additional Secretary (Law). My Lord also held the additional charge of Director, Public Prosecution and also worked as Principal Secretary in the Law Department.

My Lord Hon'ble Justice Shri Anil Kumar Sharma joined as Civil Judge Class-II on 03.09.1979. After being promoted as Civil Judge Class-I and having worked as Chief Judicial Magistrate, My Lord was promoted as officiating District Judge on 17.02.1992. My Lord was entrusted with various assignments at different places, to name the few, he worked as the President of District Consumer Forum, Guna and as Presiding Judge of Family Court as Sagar and Bhopal. My Lord his elevation to this Court was posted as Principal Registrar (Judicial) of this Court.

The credencials of My Lords which I read out makes us confident they will leave no stone unturned in preserving the rule of law and protecting the sacred constitution given by "We the People". The appointment of four new judges is also a step forward in cradicating the pendency of cases.

Independent judiciary is the basic feature of our constitution which has to be protected by My Lords for ensuring that faith and confidence of the public in the judicial system remain intact.

The concept of judicial independence was described in C. Ravichandran Iyer Versus Justice A.M. Bhattacharjee and others, reported in (1993) 5 SCC 457, in the following words:-

"To keep the stream of justice clean and pure the, Judge must be endowed with sterling character, impeccable integrity and upright behavior Erosion there of would undermine the efficacy of the rule of law and the working of the Constitution itself. The Judges of higher echelons, therefore should not be mere men of clay with all the frailties and foibles, human failings and weak character which may be found in those in other walks of life. They should be men of fighting faith with tough fiber not susceptible to any pressure, economic, political or of any sort. The actual as well as the apparent independence of judiciary would be transparent only when the office-holders endow those qualities which would operate as impregnable fortress against surreptitious attempts to undermine the independence of the judiciary. In short, the behavior of the Judge is the bastion for the people to reap the fruits of the democracy, liberty and justice and the antithesis rocks the bottom of the rule of the law.

It is not only the bench which is responsible for protecting the sanctity of the judicial system but the Bar is also duty bound to protect the same.

I, on this occasion on behalf of M.P. High Court Bar Association assures My Lords of its full cooperation in fulfilling your duties. The M.P. High Court Bar Association earnestly hopes and desires that the tenure of My Lords as Judges of this Court would be a historical one. I once again welcome My Lords and wish a very successful tenure with all the goodness of almighty to be showered upon you all.

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Shri T. S. Ruprah, President, High Court Advocates' Bar Association, Jabalpur, while felicitating the new Judges, said :–

I deem it to be my proud privilege to offer felicitations to your Lordships on your appointment as Judges of this High Court. We welcome Hon'ble Shri Justice **Brij Kishore Dube** Hon' ble Shri Justice **Gulab Singh Solanki.** Hon'ble Shri Justice **Naresh Kumar Gupta** and Hon'ble Shri Justice **Anil Kumar Sharma.**

My Lords, today you join the select and distinguished group of jurists and administrators, who have left their indelible mark on its institutional culture. Your professional profiles are also truly remarkable and enviable and make you eminently suitable for this high honour. Your appointment is a recognition of your juristic talent and qualities of head and heart. Your all round experience is bound to help in successful and satisfying discharge of your duties and obligations. Since the success of the judiciary and judicial administration in the State is closely linked with your success in this office, we wish and pray for your success.

My Lords, this Bar is known for its high traditions. It is full of illustrious seniors and energetic bright young members who are extremely respectful and courteous. We the members of the Bar, have great expectations from your Lordships. My Lords will bring to your task a wealth of experience, the vast knowledge of law, an almost inexhaustible fund of patience, tolerance and compassion and above all what lawyers always appreciate in a Judge, unfailing courtesy, affection and regard to the Bar.

Human life is fraught with responsibilities. When a person is raised from one position to another, his responsibilities become greater and such responsibilities can only be discharged efficiently and properly with the co-operation of all. Today with firm conviction we assure your Lordships of our fullest co-operation in discharging your functions.

I, on behalf of all the members of the Madhya Pradesh High Court Advocates Bar Association and on my own behalf welcome Your Lordships to this glorious institution and wish your Lordships a very brilliant and successful tenure.

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Shri Rameshwar Neekhra, Chairman, M. P. State Bar Council, while felicitating the new Judges, said :–

प्रदेश के विधि जगत के लिये आज के ये क्षण अत्यन्त महत्व और गौरव के है, जब हमारे इस प्रदेश के सर्वोच्च न्याय मंदिर में 4 नये माननीय न्यायाधिपतिगण अपना पदभार ग्रहण कर रहे हैं ।

प्रदेश के विधि जगत एवं मध्य प्रदेश राज्य अधिवक्ता परिषद् के लिये यह गौरव का विषय है जब हमारे लोकप्रिय न्यायाधिपति माननीय जस्टिस श्री अरुण मिश्रा प्रशासनिक न्यायाधिपति के रुप में नियुक्त होकर आज के न्यायालयीन कार्यक्रम को गरिमा प्रदान कर रहें हैं । मैं सर्वप्रथम उनका हार्दिक अभिनंदन करते हुए उन्हें मध्य प्रदेश राज्य अधिवक्ता परिषद की ओर से शुभकामनाएं देता हूँ।

माननीय श्री जस्टिस बी. के. दुबे माननीय श्री जस्टिस जी. एस. सोलंकी जी, माननीय श्री जस्टिस नरेश कुमार गुप्ता जी एवं माननीय श्री जस्टिस अनिल कुमार शर्मा जी जो न्यायिक सेवाओं में अपने दीर्घ अनुभवों के बाद इस गरिमामय पद को आलोकित कर रहें हैं। निश्चित ही मध्य प्रदेश उच्च न्यायालय में इन नये न्यायाधिपतियों द्वारा पदभार ग्रहण किये जाने से न्यायदान की प्रक्रिया में और अधिक गतिशीलता आएगी, लंबित प्रकरणों के निराकरण में सुविधा होगी और आम लोगों की न्याय के प्रति आस्था और विश्वास में वृद्धि होगी।

मैं इस अवसर पर आप सभी न्यायाधिपतिगणों का मध्य प्रदेश राज्य अधिवक्ता परिषद तथा प्रदेश के अधिवक्ताओं की ओर से एवं स्वयं अपनी ओर से हार्दिक अभिनंदन करता हूँ एवं आप सभी के सफल कार्यकाल की मंगल कामना करता हूँ।

<u>माननीय न्यायाधिपति श्री जस्टिस बी. के. दुबे :-</u>

आपने शासकीय महाविद्यालय भिन्ड से स्नातक और बाद में एम. एल. बी. आर्ट एवं कॉमर्स कॉलेज से एल.एल.बी. तथा एल.एल.एम. की उपाधि उत्तीर्ण करने के पश्चात् वर्ष 1979 को प्रदेश की न्यायिक सेवाओं में आपका चयन हुआ और तब से निरंतर प्रदेश के न्यायिक प्रशासन में व्यवहार न्यायाधीश वर्ग-2, व्यवहार न्यायाधीश वर्ग-1, अतिरिक्त जिला एवं सत्र न्यायाधीश और इसके अतिरिक्त एडीशनल रजिस्ट्रार हाईकोर्ट ऑफ म. प्र. के रुप में तथा डिस्ट्रिक्ट एण्ड सेशन जज के रुप में आपने अपनी निरंतर सेवाएं दी है और प्रदेश के विभिन्न स्थानों यथा-दतिया, सतना, रीवा, मुरैना, भिन्ड, मेहगांव, सागर एवं जबलपुर में आपने अपने अनुभव और ज्ञान की आभा फैलाई है। इसके अतिरिक्त आप 19 अप्रैल 2005 से 30 जून 2008 तक लीगल सर्विस ऑथारिटी जबलपुर के सदस्य सचिव और उसके बाद जुलाई 2008 से वर्तमान समय तक जिला एवं सत्र न्यायाधीश जबलपुर के रुप में सेवाएं प्रदत्त कर रहे थे। इस उच्च न्यायालय के न्यायाधिपति के रुप में आपकी नियुक्ति पर मैं आपका हार्दिक स्वागत करते हुए सफल कार्यकाल की मंगलकामना करता हूँ।

माननीय न्यायाधिपति श्री जस्टिस जी. एस. सोलंकी जी :-

आपका जन्म वर्ष 1953 को बड़वानी जिले की तहसील अंजड़ में हुआ तथा इंदौर से आपने स्नातक एवं विधि उपाधि प्राप्त करने के पश्चात् वर्ष 1978 से विधि व्यवसाय प्रारंभ किया।

वर्ष 1979 को प्रदेश की न्यायिक सेवाओं में आपका चयन हुआ तब से निरंतर आप न्यायिक सेवाओं के विभिन्न पदों पर पदोन्नत होते हुए न्यायदान में अपना योगदान दे रहे थे। वर्ष 1991 में आपको अतिरिक्त जिला एवं सत्र न्यायाधीश के रूप में पदोन्नत किया गया। वर्ष 1996 से 1999 के मध्य आपने एडीशनल रजिस्ट्रार भोपाल गैस विक्टीम भोपाल के पद पर कार्य किया। जून 1999 से लेकर फरवरी 2002 तक आपने सागर में विशेष न्यायाधीश के पद पर अपनी सेवाएं दीं एवं वहां पर कार्यवाहक जिला न्यायाधीश के रुप में भी अपनी सेवाएं दीं। इसके अतिरिक्त कुछ समय के लिये आप अतिरिक्त कल्याण आयुक्त गैस विक्टीम भोपाल के पद पर भी रहे एवं मध्य प्रदेश के विधि विभाग में आपने अतिरिक्त सचिव के रुप में भी आपने अपनी सेवाएं दीं। आप जिला रायसेन के जिला एवं सत्र न्यायाधीश के पद पर भी रहे एवं भोपाल कामर्शियल टैक्स विभाग के डिप्टी कमिश्नर श्री आर. के. जैन की मृत्यु पर गठित एक सदस्यी जांच समिति के भी आप सदस्य रहे हैं।

वर्तमान के गौरवशाली पदभार ग्रहण करने के पूर्व आप उच्च न्यायालय में डिस्ट्रिक्ट जज (इंस्पेक्शन और विजिलेंस) के पद पर उल्लेखनीय सेवाएं दे रहे थे। इस उच्च न्यायालय के न्यायाधिपति के रुप में आपकी नियुक्ति पर मैं राज्य अधिवक्ता परिषद की ओर से आपका स्वागत करते हुए आपके सफल कार्यकाल की मंगलकामना करता हूँ।

माननीय न्यायाधिपति श्री जस्टिस नरेश कुमार जी गुप्ता :-

आपका जन्म वर्ष 1955 में श्री एम. एल. गुप्ता जो कि स्वयं प्रदेश के लोकप्रिय न्यायिक अधिकारी थे, के यहां हुआ और आपने अपनी विधि स्नातक उपाधि वर्ष 1977 में मेरिट में द्वितीय स्थान के साथ प्राप्त की एवं इंदौर में ही विधि व्यवसाय प्रारंभ किया।

वर्ष 1979 को आपका चयन प्रदेश की न्यायिक सेवाओं में सिविल जज वर्ग-2 के पद पर हुआ एवं अपनी सेवा यात्रा की अवधि में आपने विभिन्न पदो पर पदोन्नति प्राप्त की। वर्ष 1991 में आपको अतिरिक्त जिला एवं सत्र न्यायाधीश के रुप में पदोन्नत किया गया। आपने इस उच्च न्यायालय में अतिरिक्त रजिस्ट्रार एडमिनिस्ट्रेशन एवं विजिलेंस के पद पर इस उच्च न्यायालय में अपनी सेवाएं दीं तथा बाद में विशेष न्यायाधीश उज्जैन, अतिरिक्त सचिव विधि विभाग भोपाल, अध्यक्ष उपभोक्ता फोरम होशंगाबाद के रुप में भी अपनी सेवाएं दी हैं। अतिरिक्त रजिस्ट्रार हाईकोर्ट के पद पर रहते हुए आपने अतिरिक्त निर्देशक ज्यूडिशियल आफिसर ट्रेनिंग जबलपुर को भी अपनी सेवाएं दी। अतिरिक्त सचिव विधि विभाग के पद पर रहते हुए आपने डायरेक्टर पब्लिक प्रॉसिक्यूशन के पद पर भी अपनी सेवाएं दी तथा जिला एवं सत्र न्यायाधीश के रुप में आपने दतिया में और बाद में मंदसौर जिले में भी अपनी सेवाएं दी। आपने उच्च न्यायालय की ग्वालियर बेन्च में जिला जज विजिलेंस के रुप में भी दायित्वों का सफलतापूर्वक निर्वाह किया और ग्वालियर में जिला एवं सत्र न्यायाधीश के पद पर आपने उल्लेखनीय रुप में अपनी सेवाएं दीं। वर्तमान में भी आप इस महत्वपूर्ण पद पर नियुक्त होने के पूर्व मध्य प्रदेश शासन के विधि विभाग के प्रमुख सचिव के रुप में अपनी सेवाएं दे रहे थे। आपने अपनी लेखनी से न केवल सफलतापूर्वक न्यायदान किया है वरन् अपने कनिष्ठों के मार्गदर्शन के लिये **"नियमानुकूल निर्णय"** जैसे विषय पर पुस्तक लिखकर उन्हें मार्गदर्शन भी दिया है।

उच्च न्यायालय के न्यायाधिपति के पद पर आपकी नियुक्ति के इन क्षणों में, मैं मध्य प्रदेश राज्य अधिवक्ता परिषद की ओर से एवं स्वयं अपनी ओर से आपका हार्दिक स्वागत करते हुए आपके सफल कार्यकाल की मंगलकामना करता हूँ।

माननीय न्यायाधिपति श्री जस्टिस अनिल कुमार जी शर्मा :-

आपका जन्म वर्ष 1952 में ग्वालियर में हुआ तथा विधि स्नातक की उपाधि के पश्चात् वर्ष 1974 में आपने विधि व्यवसाय प्रारंभ किया तथा मंदसौर, खंडवा इंदौर विधि व्यवसाय के कार्यस्थल रहे। वर्ष 1979 को न्यायिक सेवाओं में सिविल जज क्लास-2 के पद पर आपका चयन हुआ और तब से आपने अपनी न्यायिक सेवाओं की यात्रा में विभिन्न पदों पर पदोन्नति प्राप्त करते हुए सिविल जज के रुप में धरमपुरी, कन्नौद, अशोकनगर, अम्बाह, तराना, बिलासपुर, कटनी, जबलपुर, अतिरिक्त जिला एवं सत्र न्यायाधीश के रुप में जबलपुर, खरगौन, खंडवा में, विशेष न्यायाधीश के रुप में राजगढ़ में, अध्यक्ष उपभोक्ता फोरम गुना एवं परिवार न्यायालय के न्यायाधीश के रुप में सागर एवं भोपाल में अपनी सेवाएं दी। आपने जिला न्यायाधीश के रुप में सिवनी एवं उज्जैन में भी अपने सफल दायित्वों का निर्वाह किया। आप वर्तमान के पद पर नियुक्त होने के पूर्व आप वर्ष 2007 से प्रिंसिपल रजिस्ट्रार (ज्यूडिशियल) के रुप में इस उच्च न्यायालय में अपनी सेवाएं दे रहे थे।

मैं उच्च न्यायालय में न्यायाधिपति के रुप में आपकी नियुक्ति पर आपका हार्दिक स्वागत करता हूँ एवं आपके सफल कार्यकाल की मंगलकामना करता हूँ।

निश्चित ही आज पदभार ग्रहण कर रहे हमारे चारों नवनियुक्त न्यायाधिपति उच्च स्तरीय मेधा एवं अनुभव के धनी तो हैं ही साथ ही उन्होंने प्रदेश के विभिन्न जिला एवं तहसील केन्द्रों पर न्यायदान के अपेक्षित दायित्वों का सफलतापूर्वक निर्वाह किया है। वे आम आदमी की पीड़ा और इस प्रदेश की गौरवशाली न्याय व्यवस्था से, उनकी अपेक्षाओं से भलीभांती परिचित हैं। न्याय शीघ्र, सस्ता और सुलभ कैसे हो इसे साकार करने में हमारे नवनियुक्त न्यायाधिपति सार्थक योगदान देने भी समर्थ्य हैं। उनकी नियुक्ति से न्यायदान की प्रक्रिया को बल और प्रगति तो मिलेगी ही, साथ प्रदेश के न्यायिक प्रशासन में भी वे अपना योगदान देगें, इस हेतु मैं आशांवित हूँ।

आज के इस विशिष्ट अवसर पर मुझे यह उल्लेख करना भी आवश्यक प्रतीत होता है कि जिस राष्ट्र के न्यायतंत्र की निष्पक्षता, कार्यप्रणाली और स्वतंत्रता का सारे विश्व में सम्मान किया जाता है, वहां जिला और केन्द्र स्तरों पर न्याय देने वाले न्यायिक अधिकारी को अनेक प्रकार की बाधाओं और दबावों से गुजरना पड़ता है। हमारे माननीय मुख्य न्यायाधिपति जी, प्रशासनिक न्यायाधिपति जी मौलिक चिंतन और बुनियादी सोच के श्रेष्ट ज्ञाताओं में हैं।

प्रदेश की न्यायिक व्यवस्था को वे अपने मार्गदर्शन में उस स्तर तक ले जाने में सक्षम हैं जहां पंक्ति के अंतिम छोर पर न्याय की बाट जोहता आदमी भी राहत और संतुष्टि की शीतल छाया को महसूस कर सके, क्योंकि सामाजिक उतार-चढ़ाव की जटिलता भरी परिस्थितियों में आम आदमी के लिये न्याय ही विश्वास एवं श्रद्धा की अंतिम सीढ़ी है। वे इस बात से भी भलीभांति परिचित हैं कि न्यायदान न्यायिक अधिकारियों के कठिन परिश्रम से ही पूर्णता को प्राप्त होता है न कि किसी मीडिया ट्रायल से। मीडिया ट्रायल न्यायदान की प्रक्रिया को प्रभावित न कर सके इस हेतु भी वे समाधान के मार्ग प्रशस्त कर सकते हैं।

मैं पुनः सभी नवनियुक्त न्यायाधिपतियों का हार्दिक अभिनंदन करते हुए एवं उनके मंगल कार्यकाल की कामना करते हुए अपनी शुभकामनाएं भी देता हूँ।

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Shri Radhelal Gupta, Asstt. Solicitor General of India, while felicitating the new Judges, said :–

Before this august gathering, today I have the honour of introducing four great legal personalities My Lord Shri Justice Brij Kishore Dube, My Lord Shri Justice Gulab Singh Solanki, My Lord Shri Justice Naresh Kumar Gupta. My Lord Shri Justice Anil Kumar Sharma. It is a great pleasure for all of us to welcome Hon'ble Judges to this great temple of justice. We offer our heartiest welcome and congratulations to Hon'ble newly appointed judges.

I am thankful to Hon'ble Shri Justice A KPatnaik, the then Chief Justice of High Court of MP and Hon'ble Judges of collegium for recommending such an worthy appointment of Hon'ble Judges.

Prior to giving my brief introduction of Hon'ble Judges I would like to say:

"The best things said come last. People will talk for hours saying nothing much and then linger at the door with words that come with a rush from the heart."

This galaxy of judicial stall wards have entered in this province of Justice Delivery in the year 1979 through Public Service Commission which was the first experiment of selection of quality candidates by initiating written examination for this ticklish task in the state of MP. These four legal luminaries were successful in the first such selection process and they never looked behind and continued to proceed successfully to the present stage of elevation to the highest peak of state judiciary.

Today, in the history of this Hon'ble High Court once again a new chapter is about to begin, when four highly experienced judges are adorning the oath of Hon'ble Judge of High Court of MP.

I have strong reasons to believe that on account of their great experience and wisdom not only there will be speedy disposal of the cases, but besides this Judicial Administration will also improve as all Hon'ble new Judges have great knowledge about the various kinds of problems prevailing at various district and tehsil headquarters of the state.

With this, I would like to introduce these legal personalities.

My Lord Hon'ble Shri Justice Brij Kishore Dube,

Born on 20th Jan 1952. Passed LLB as well as LLM, and in Aug 1979, selected as Civil Judge and started this pious journey in judiciary and from that day till yesterday your lordship graced various important offices from Civil Judge Class I, Chief Judicial Magistrate, Additional District Judge, Additional Registrar of High Court of MP and then District and Session Judge, Jabalpur. Your lordship has successfully served these offices on account of great experience, deep study and well versed with the problems of judiciary. I wish your lordship will be successful during his tenure as Hon'ble Judge of High Court.

My Lord Hon'ble Shri Justice Gulab Singh Solanki,

Born on 6th Sept 1953 and after completing law your lordship was selected

Civil Judge Class II in the year 1979 and during the course of journey in judiciary your lordship has graced various offices, such as Civil Judge Class I, Chief Judicial Magisterate, Additional District Judge and thereafter Additional District and Session Judge. Your Lordship has also rendered valuable services as Additional Welfare Commissioner, Bhopal Gas Victim, as Additional Secretary Law and Legislative Affairs Department and then as Secretary, Law and Legislative Affairs Department, Bhopal. Your Lordship has rendered valuable services as District Judge (vig.) before taking the oath of this High Office of Hon'ble Judge of this great Court. I heartily welcome your appointment and express my best wishes for the successful tenure of your Lordship as High Court Judge.

My Lord Hon'ble Shri Justice N.K.Gupta,

Born on lst July 1955 in the family of Shri M L Gupta, who was a judicial officer. After completing law your lordship was enrolled as an advocate. Your Lordship was selected as Civil Judge Class-II Aug 1979 and started journey in the judiciary. Your Lordship has the credit of serving as Additional Registrar, Vig. as Special Judge, Ujjain, as Additional Secretary of Law and Legislative Affairs Department of Govt of MP, President Consumer Forum, at Hoshangabad, being Additional Registrar your Lordship had the credit of holding the additional charge of Additional Director, JOTRI as well as Additional Secretary in Law Department. Your Lordship has held the additional charge of Director Public Prosecution also. On Nov 2003 your Lordship has joined the Office of District and Session Judge at Datia and thereafter in the same capacity has worked at Mandsaur. Your Lordship were also District Judge Vig. at Gwalior. Thereafter as Registrar, Gwalior Bench. Your Lordship were working as Principle Secretary of law department of Govt of MP before gracing this high office of High Court of M. P. I heartly congratulate your Lordships appointment as Hon'ble Judge of the High Court of M. P. and express my best wishes for a successful tenure.

My Lord Hon'ble Shri Justice Anil Kumar Sharma,

Born on 1st Oct 1952. After completing law your lordship was selected as Civil Judge Class II on 1979 and started pious journey in state judiciary. Your Lordship was promoted as Civil Judge Class I in 1986, as Chief Judicial Magistrate, as Officiating Additional District Judge on 17th Feb 1992. Your Lordship is the credit of working at different places of MP. Your lordship has successfully served at Indore, Dharampuri, Kannod, Ashoknagar, Ambah, Tarana, Bilaspur, Katni, Jabalpur. Khargone, Khandwa. Rajgarh, Guna, Sagar, Bhopal, Seoni and Ujjain by holding important offices in judiciary. Your lordship has also graced the office of Principle Registrar (Judicial) in the High Court of MP.

Today I remember the few words of Hon'ble Shri Justice Raina who once said.–

" Administration of justice is very solemn duty and it demands whole hearted devotion. Being religious minded, I believe that God alone is the true foundations of justice and the Judges are called upon to discharge the judicial functioning as

his agents. We are accountable to god for all that we do in discharging our functioning and therefore, it is necessary for us to do our best according to light and wisdom given to us by him. I have always felt that if we fail in doing justice to others, we shall not be entitled to claim justice for ourselves from god."

I heartily congratulate your lordship's appointment as Hon'ble Judge of the High Court of MP and I express my best wishes for your Lordships successful tenure.

I, on behalf of Govt of India, all the Law Officers of Central Govt and on my own behalf, welcome and congratulate My Lord Shri Justice Brij Kishore Dubey, My Lord Shri Gulab Singh Solanki, My Lord Shri Naresh Kumar Gupta, My Lord Shri Anil Kumar Sharma, I wish all of them bright future, which will bring glory and will enhance dignity of the Judicial System of the State.

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Shri S. C. Datt, President, Senior Advocates Council, while felicitating the new Judges, said :–

My Lords,

We have assembled to day to felicitate and wish good to Hon'ble Justice Shri B.K.Dube, Hon'ble Justice Shri Gulab Singh Solanki, Hon'ble Justice Shri Naresh Kumar Gupta and Hon'ble Justice Shri Anil Kumar Sharma on their elevation as Judges of the High Court of Madhya Pradesh.

For every person who comes from Judicial service, it is a cherished desire to be the Judge of the High Court.

Your desire is fulfilled let this be not the last desire. You should achieve during your tenure as a Judge, reputation to be a honest, hard working and capable Judge so that no litigant goes from your court unsatisfied. Your lordships have to broaden your horizon.

A lawyer or litigant does not require any thing from you as a Judge what they require is a Judgment which touched on the test stone is a Real Judgment.

What is the duty of a Judge? It is the duty of a Judge to Judge according to what things are alleged and what things are proved.

Felix Frankfurter that great Judge from USA once said -

"What becomes decisive to a Justice's functioning on the Court...is his general attitude toward law, the habits of mind that he has formed or is capable of unforming, his capacity for detachment, his temperament or training for putting his passion behind his judgment instead of in front of it. The attitudes and qualities which I am groping to characterize are ingredients of what compendiously might be called dominating humility. I on my own behalf on behalf of the Senior Advocate's council wish you all luck to become a good Judge and have a shining future and to take this High Court to apex heights.

Wishing you the best.

Reply to Ovation by Hon'ble Shri Justice Brij Kishore Dube :–

I am extremely grateful for the kind words spoken for me on this occasion. It is really very embarrassing to hear so much of praise in your own presence, particularly when I am aware of the realities and my shortcomings. I assure all of you to do my best to overcome my shortcomings while discharging my duties and fulfill the expectations expressed by you on this occasion.

First of all, I thank the Almighty God. I am here only because of His bountiful blessings.

I have to express my heart felt gratitude to My Lord Hon'ble Shri Justice A.K. Patnaik, the then Chief Justice of this Court, presently Judge, Supreme Court of India and, the Members of the Collegium Hon'ble Shri Justice R.S. Garg, presently Chief Justice of Guwahati High Court and Hon'ble Justice Shri Dipak Misra, presently Chief Justice of Patna High Court who found me suitable for elevation to the Bench.

I express my gratitude of the kindness bestowed upon me by the Hon'ble Judges of the Collegium of the Supreme Court.

It is a matter of pride for me that oath has been administered to me by a Judge and eminent jurist, the Chief Justice Shri Syed Rafat Alam.

It is needless to say that whatever little I am today is because of blessings of my Naniji Late Smt. Renuka Mishra, my father Late Shri Ramdulare Lal Dubey and my mother Late Smt. Mithani Devi. I express my best regards to them.

I am grateful to all my Teachers and Gurujis who have inspired me to shape my carrier.

Ladies & Gentlemen, I am specially thankful to all my District Judges and Registrar Generals Late Shri B.N. Saxena, Late Shri K.K. Joshi, Justice S.K. Chawla, Justice K.S. Shrivastava, Late Shri I.C. Dubey, Shri K.K, Gupta, Justice P.C. Agrawal, Late Shri N.D. Shukla, Shri Chandrika Prasad, Shri P.K. Dubey, Late Shri C.S. Gupta, Shri N.L. Shrivastava, Justice S.L. Jain and Shri A.K. Selot with whom I had the privilege to work and who have always been of great help to me from time to time.

I can never forget the guidance and blessings of my seniors and colleagues who have always been rendering assistance and proper guidance to me.

I am thankful to my wife Smt. Mamta Dubey for her cooperation and her prayers and good wishes for me that I could achieve this position. I am extremely grateful to my son Manas and daughter Kanchan, for their great moral support.

I am extremely thankful to my brothers, sisters, brother-in-laws, relatives and friends who have come here to shower their blessings and good wishes on me.

Today I also remember my late father-in-law, Shri Rajkant Pachori who had always been encouraging me.

I am also thankful to all the Members of Bar, with whom I came in contact wherever I remain posted.

I am also thankful to my Court Staff, Registry Officials and my Personal Staff for extending their full cooperation in discharge of my duties.

I am also thankful to Registrar General Shri T.K. Kaushal for his kind cooperation.

I am extremely thankful to all those personalities and persons known or unknown to me who have blessed me and helped me.

I conclude by thanks to you all once again.

JAI HIND.

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Reply to Ovation by Hon'ble Shri Justice Gulab Singh Solanki, :–

First of all, I offer my salutation at the lotus feet of the almighty Lord Radha Soami Dayal, for showering his divine grace, by conferring this august responsibility on me.

I am overwhelmed by the good wishes and sentiments you have expressed for me. I am sure they will stand me in good stead and you will never deny me the help and co-operation, I need or require.

I must express my heartfelt gratitude to my Lord Justice A.K. Patnaik (Judge, Supreme Court of India) former Chief Justice of this court and other members of the collegium, Hon'ble Shri Justice R.S. Garg (Chief Justice, High Court of Asam) former Judge of this court and Hon'ble Shri Justice Dipak Misra (Chief Justice of Patna High Court) former Judge of this court for considering me worthy enough for appointment to this august chair. I am also grateful to my Lord the Chief Justice Shri Syed Rafat Alam and all Hon'ble Judges of this court for their blessings and good wishes.

I take this opportunity to pay my sincere regards to all the respected District Judges under whose able guidance I could develop my legal acumen particularly, Shri A.D. Deoras, Senior Advocate of this Court. Late Shri Justice R.P. Awasthi, Late Shrimati Justice Sarojmi Saxena, Shri Justice Maitheli Saran, Shri Justice W.A. Shah and Shri Justice P.C. Agrawal.

I greatly miss the presence of my beloved parents who would have been indeed happy on this event. I am sure I have their blessings from their heavenly abode.

I am extremely grateful to my elder and younger brothers, father-in-law, mother-in-law, son-in-law Dr. Anurag and Relative, friends and colleagues, posted in Registry and District Judiciary, who have graced this occasion to bless me in person.

Last but not the least I am thankful to my wife Mrs. Rajeshwari Solanki and my children Dr. Arpita, Dr. Arnrita and Ajay who have been very supportive in all walks of my life.

I thank you all, once again, for your tremendous goodwill and affection towards me. I will try my best to live up to your expectations.

Thank you.

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Reply to Ovation by Hon'ble Shri Justice N. K. Gupta, :–

I am grateful for the kind words spoken about me. I am aware that I do not well deserve the words of praise spoken about me, but I shall Endeavour to come up to them and justify the sentiments expressed about me today.

At the outset, I am obliged to Hon. the then Chief Justice Shri A.K. Patnaik, now Hon'ble Judge of the Apex Court, and Hon'ble members of the Collegium, for having considered and recommending my name for elevation to the bench of this August Court.

Born and brought up in a judicial family, my revered father, being a Judicial Officer in Madhya Bharat and later in Madhya Pradesh, who retired as a District Judge in the year 1976, I had developed a natural liking and nurtured a longing to join the legal fraternity. Having studied at various places, I graduated in law in the year 1977 from Indore University and secured second position in order of merit. Thereafter, I joined the Bar at Indore and practiced under the able guidance of late Shri B.K. Samdani Advocate, a reputed Civil Lawyer at Indore.

With the blessings and encouragement of my revered father late Shri M.L. Gupta and my revered mother late Smt. Leelawati Gupta, my elder brother Dr. Ramesh Gupta as well as my brother-in-law Shri S. R. Saraf, Advocate and my sisters and other family members, I joined judicial service, after my selection as Civil Judge-Class II, in the year 1979.

I would also like to mention that right from the beginning of my career as judicial officer at the grass root level, I have throughout got unstinted support and co-operation of my wife Mrs. Manisha Gupta and my sons Yash and Harshvardhan, without which possibly I might not have been able to work with dedication and to realize the dream of every judicial officer, of being elevated to the bench of this August Court.

I had the privilege of working in the vigilance Cell, as well as in the Administrative Section of the Registry of the main seat of High Court at Jabalpur. In this period I had an opportunity to work as Addl. Director JOTRI under the able guidance of the then Director Shri P.V.Namjoshi. I was appointed as Additional Secretary, Law and Legislative Affairs Department Govt. of M.P. and worked in that capacity during the years 2001 to 2003.

Simultaneously, I held additional charge of Director of Prosecution for one year. I also worked as President District Consumer Forum, Hoshangabad. I had the opportunity to work as District and Sessions Judge, Datia, Mandsaur and Gwalior. I had also worked as District Judge Vigilance at Gwalior, where after I was posted as Registrar of High Court Bench, Gwalior. In view of paucity of

material on the art and craft of judgment writing and considering felt needofyounger generation of the District judiciary, I had co-authored along with my wife Smt. Manisha Gupta. a book titled " Niyamanukul Nirnaya".

Before being elevated, I was Principal Secretary in the Law and Legislative Affairs Department, and legal remembrancer to M.P. Government. Hopefully, my experience in the Registry of the High Court in various capacities, as well as Principal Secretary Law Department of the Govt. of M.P. shall help me to discharge my duties towards dispensation of justice, to the satisfaction of my own conscience as also of the members of the Bar and the litigant public.

I would be failing in my duties if I do not express my sentiments and gratitude to some amongst many of my seniors in the profession as well as in personal life. I had the privilege of receiving training under able guidance of Shri R.K.Sharma (Sr.), District Judge as well as to Shri N.K.Jain ,the then C.J.M., who has since retired as Hon. Judge of this Hon. Court. Similarly, the then Civil Judge Class 2 Chanchala Didi Sharma with whom I had the privilege to take practical training and tips of the profession, have gone a long way in shaping my career. After my regular posting I had the able guidance of my first District Judge late Mr. B.N. Saksena, the revered father of Hon. Shri Justice Rakesh Saksena. He had taken great pains in laying my foundation as a judge. I had also the privilege of associating with Hon. Shri Justice V.K.Agrawal the then Registrar General while working as Addl. Registrar and also later on. The affectionate treatment and guidance given by him had helped me in learning the intricacies of administration in the Registry as well as Law and Procedure in general.

I also on this day remember my father in law late Mr. M.S.Gupta, Advocate practicing in the Supreme Court whose addresses in Hon. the Apex Court in various matter's as also discussions he held with me on various legal issues helped me a lot, in gaining insight in the domain of Law.

I am fully conscious that the members of the legal Fraternity are the best Judges of Judges. My endeavour would be to come up to their expectation. With all humility at my command on this occasion, I remind myself of the sanguine words of Hon'ble Justice Balkrishna Eradi, a great judge, I quote

"the essence of all judicial pronouncements is not only imparting of justice, but showing that it was consciously imparted. The judgment must show on the face of it that the matter has been handled justly, honestly and fairly. You can not and must not do anything arbitrarily. Nobody in the world has the power to act arbitrarily, much less the judiciary."

I fully realize that the task ahead is tough and shall require full dedication, sincerity and hard work. I hope that I shall continue to get enlightened assistance, cooperation and support from the bar, which would help me in the discharge of my duties, in keeping with my oath.

I close with the words reflecting the philosophy and thoughts of another learned judge, Hon. Justice R. S. Sarkaria:

"Know thy weakness and beware do not yield to any Of them even once. One fall may devour you, your Honour, your right to happiness. There is nothing Like courage, born of conviction of righteousness."

Thank you all, once again.

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Reply to Ovation by Hon'ble Shri Justice A. K. Sharma, :–

I am deeply touched by the sentiments expressed by the learned speakers I can assure you that I will discharge my responsibilities with full courage, confidence and devotion.

I express my deepest gratitude to my mother and father who brought me up with great expectations. Their expectations are fulfilled today.

I am grateful to my son, daughter-in law and late wife who gave me strength in all odds. I am also grateful to my Son-in-law brother, sister, in-laws, colleague and friends for giving me support throughout my career.

I am very much grateful and express my gratitude to Hon'ble Justice A.K.Patnaik the then Chief Justice of M.P., Hon'ble Judges of the collegiums who gave me the opportunity and honor to serve this august post.

I am also thankful to my Senior Advocates Shri B.L.Ghatiya of Mandsaur and Shri Anand Mohan Mathur of Indore who brought me up in the legal profession.

I am also thankful to the Court Staff worked for me in all the 19 places wherein I have been posted. Their hard work and devotion is also behind this success.

I am very much thankful to the Hon'ble Chief Justice and all the Senior Lordships for their kind guidance during my tenure as Principal Registrar (Judicial).

Finally, I am really thankful to all my well wishers assembled here for me.

Thank You.

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JUSTICE K.S. CHAUHAN

Born on May, 06, 1948 at Village Parichha District Morena (M.P.). Got school education at Village Parichha and Datahara District Morena. Passed Higher Secondary 'A' Course Certificate Examination in the year 1965 from Board of Secondary Education M.P. Bhopal in 1st Division with distinction in all the subjects and stood at the 10th place in merit list of M.P. Was awarded Silver Medal in the Year 1965 by the Board for obtaining the highest marks in Agricultural Group in M.P., passed B.Sc. (Ag.) Examination in 1969 from the Agriculture College Gwalior. Was awarded the Scholarship during the academic session 1965-66 to 1969-70. Was granted Certificate of Honour by J.N.K.V.V. Jabalpur in the year 1969 for obtaining 3.88 over all Credit Average (OCGA) out of four. Passed LL.B. Examination in the year 1972 from M.L.B. Arts & Commerce College Gwalior with 1st Division and 1st rank in the college, also passed LL.M. Part-I Exam 1973 from the same college. At the same time was selected for the post of Sales Tax Inspector by M.P.P.S.C., and joined this post and served for some time. Subsequently got selected for the post of Civil Judge Class-II. After resigning from the previous post, joined as Civil Judge Class-II on 21-6-1975. Served as Civil Judge Class-II at Bhind , Raigarh, Teonthar, Lahar.Gwalior and as Civil Judge Class-I Gwalior, Biaora and as C.J.M. at Narsinghpur and Guna. Confirmed as Civil Judge w.e.f. 21-12-1977. Promoted/posted as officiating District Judge in H.J.S. w.e.f. 27-6-1989. Served as Additional District & Sessions Judge Gwalior, Bhind and Shivpuri. Was also Special Judge for the Trial of offences relating to Prevention of Corruption Act 1988 and for the offences relating to the M.P Dacoity & Vyapharan Prabhavit Kshetra 1981 as well. Was confirmed as District Judge in H.J.S. w.e.f. 01-05-1992. Served as Additional Welfare Commissioner Bhopal Gas Tragedy, Bhopal, as Special Judge for the trial of cases under SC/ST (Prevention of Atrocities) Act 1989 and also for the cases under N.D.P.S. Act 1986 at Guna. Served as District and Sessions Judge, Seoni and Jabalpur. Granted Selection Grade Scale w.e.f. 27-5-1996 and Super Time Scale w.e.f. 01-11-2002. Worked as Registrar (Judicial) M.P. High Court, Jabalpur. Worked as District Judge (Vigilance) Jabalpur zone, Jabalpur. Participated in a Judicial Colloquium on Gender & Law from 30-11-2001 to 02-12-2001 held at H.C.M. Ripa, Jaipur and also participated in the Seminar on Administrative and Constitutional Law from 9-11-2006 to 13-11-2006 held at the National Judicial Academy Bhopal.

Appointed as Additional Judge of Madhya Pradesh High Court on 02-03-2007 and demitted office on 06/5/2010.

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

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farewell

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

We have assembled here to bid an affectionate farewell to Justice Kedar Singh Chauhan, who is demitting office today.

Hon'ble Mr. Justice Kedar Singh Chauhan was born on 06.05.1948. He joined Madhya Pradesh Judicial Service as Civil Judge, Class-II, on 21.06.1975. He was promoted as Civil Judge, Class-I on 13.12.1983. He was appointed as Chief Judicial Magistrate on 10.10.1987 and promoted as Additional District Judge on 27.06.1989. Justice Chauhan was granted selection grade on 27.05.1996 and super time scale on 01.11.2002. During his tenure, he was posted at Bhind, Raigarh, Teonthar, Lahar, Gwalior, Biaora, Narsinghpur, Guna, Shivpuri, Bhopal, Seoni and Jabalpur. He was posted as District & Sessions Judge, Jabalpur and Registrar (Judicial) in the High Court of Madhya Pradesh at Jabalpur.

During his posting as Registrar (Judicial), he managed the Judicial Branch of this Court efficiently and processed large number of departmental appeals of the employees. He also functioned as District Judge (Vigilance), Jabalpur. As District Judge (Vigilance), he inspected number of Courts falling within the jurisdiction of District Judge (Vigilance), Jabalpur Zone.

Recognizing his merit, he was appointed as Additional Judge of the High Court of Madhya Pradesh on March 2nd, 2007 and confirmed as a Judge of this Court on January 15th, 2010.

During his tenure as a Judge of the Madhya Pradesh High Court, Justice Chauhan has disposed of a large number of cases which includes first appeals, miscellaneous appeals, writ appeals, writ petitions etc. Justice Chauhan has also disposed of 312 criminal appeals, 348 criminal revisions and 418 miscellaneous criminal cases. Justice Kedar Singh Chauhan has dealt with Civil and Criminal matters with equal proficiency. His large number of judgments recorded in law journals and judicial files demonstrate his deep knowledge of law and approach in tackling complex problems.

Justice Chauhan has successfully completed the tenure as a Judge of this Court and achieved the target of dispensation of justice to the real and needy people, which by itself is a great satisfaction to a Judge. Justice Chauhan had respect for everyone, be it Judges or lawyers.

Though my association with Justice Chauhan is rather short, yet I can say with confidence that he is one of our finest Judges, silent, modest and dedicated to the cause of justice. He is admired and respected in the Judicial Fraternity. Mr.

Justice Chauhan shall always be remembered as a Judge whose actions were always just, rational and reasonable.

I am sure that his vast knowledge and experience will continue to be useful to the society even after his retirement.

On behalf of brothers & sister Judges and on my behalf, I wish Hon'ble Shri Justice Kedar Singh Chauhan and Mrs. Chauhan all happiness, good health and a long life.

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

We have assembled here to bid farewell to Hon'ble Justice K. S. Chauhan who is demitting the office as a Judge of this Court on 06.05.2010.

After completing the graduation he passed LL B. Examination in the year 1972 from the M.L.B. Arts & Commerce College, Gwalior with 1st Division and 1st rank in the college. He was selected for the post of Sales Tax Inspector by M.P. P.S.C. He joined this post and served for some time. Subsequently he was selected on the post of Civil Judge Class-II. He joined as Civil Judge Class II on 21.6.1975 and worked in, Bhind, Raigarh, Teonthar, Lahar and Gwalior. As Civil Judge Class-I he worked in Gwalior and Biaora. Promoted as Officiating District Judge in H.J.S. w.e.f. 27.6.1989. Served as Additional District and Sessions Judge, Gwalior, Bhind and Shivpuri. He was also Special Judge for the Trial of offences relating to Prevention of Corruption Act, 1988 and also for the offences relating to the M.P. Dacoity & Vyapaharan Prabhavit Kshetra 1981. Served as Additional Welfare Commissioner, Bhopal Gas Tragedy, Bhopal. Also served as Special Judge for the trial of cases under SC/ST (Prevention of Atrocities) Act, 1989 and also for the cases under N.D.P.S. Act, 1986 at Guna. Served as District & Sessions Judge, Seoni and Jabalpur. Granted Selection Grade Scale w.e.f. 27.5.1996 and Super Time Scale w.e.f. 1.11.2002.

My Lord Justice Chauhan had been with us for quite a long time in different capacities as judicial officer and most of his time was spent in or around Gwalior. We have memories and impressions which My Lord has left onus and which would be everlasting. At the time of assumption of office My Lord expressed gratitude to 'God' and stated that "by the grace of Almighty God I achieved this august office". It is this faith in God, which guided him in his entire career as a judicial officer and as Judge of the High Court. He is a great believer in religious faith and his entire life is full of religious attainments. My Lord Justice Chouhan devoted his entire career as a judicial officer and as a Judge of the High Court for welfare of mankind. My Lord always strived hard to dispense with justice in such a manner that the needy and common man may not be frustrated and citizens of this country may live with honour.

During his tenure as High Court Judge, he was very popular amongst the new comers who always preferred to appear before him. In criminal matters he has rendered certain landmark judgments, which will guide the legal fraternity in

the years to come. His soft-spoken nature endeared him to new comers and they will cherish his memory forever.

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

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

On this moment of parting with Hon'ble Justice Shri K.S.Chauhan, a feeling creeps into our hearts that someone close to us is going away. It is a moment where we are saying good bye to Hon'ble Justice Shri K.S.Chauhan on completion of his judicial innings. The professional profile of Hon'ble Shri Justice K.S.Chauhan has been made known to all present over here and I need not repeat the same.

My Lord Hon'ble Shri Justice K.S.Chauhan has been with us since 2nd of March, 2007 and during this short period, he made a mark as a judge who stood for the rule of law and for imparting justice to all.

My Lord Hon'ble Shri Justice K.S.Chauhan was always courteous towards the members of the Bar and gave a patient hearing to the lawyers.

Though according to the service book, My Lord is demitting the office as a judge today, but we hope that this would not be an end to the journey in the legal and social sphere. My Lord would continue to serve the down trodden with his vast knowledge and ability which he acquired during his tenure as a judge. My Lord Hon'ble Justice Shri K.S.Chauhan would always rule the hearts of each one of us. We earnestly hope that though the voyage of My Lord as a judge has reached one harbour but we hope that many more harbours are yet to be seen by a man who is able and lively.

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

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Shri T. S. Ruprah, President, High Court Advocates' Bar Association, Jabalpur, bids farewell :–

Hon'ble Shri Justice K.S.Chauhan Ji. This is a parting moment as far as your office as a Judge is concerned. You are demitting the Judge's Office today. Till a few moments ago, you have been delivering judgments in our case and causes. This is the day when the Bar comes to judgment on the Judge.

Your Lordship started your professional journey in the year 1975 by joining the M.P. Judicial Service as Civil Judge. During this tenure Your Lordship delivered justice with same brilliance and distinction which Your Lordship had depicted in your academic career. Because of Your Lordship's legal acumen and experience

as the District and Sessions Judge of Jabalpur, Your Lordship soon. earned a name as one of the impartial and bold Judges in the Higher Judicial Services.

On the 2nd day of March 2007, we all witnessed one of the finest Judges being elevated to this Hon'ble Court from the State's Higher Judicial Service. Someone who has indeed served with distinction the judicial service of the State. As My lord has been blessed with a firm conviction and polite disposition, the members of the Bar will always remember my lord with fond memories for the warmth and responsiveness displayed by My Lord. It is Your Lordship's great quality of remaining undisturbed and calm and not losing your temperament ever for a moment. Your Lordship would be missed by each and every one of us, as your Lordship has always been extremely courteous to everyone and gave equal treatment to Senior and Junior members of the bar.

I, on behalf of all the members of the M.P.High Court Advocate's Bar Association and on my own behalf wish your Lordship an active long and healthy life. We also wish Mrs.Chouhan and other family members healthy long life. We are sure your long experience as a distinguished Judge would be utilized by the State.

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Shri Rameshwar Neekhra, Chairman, M. P. State Bar Council, bids farewell :–

मध्य प्रदेश उच्च न्यायालय के लोकप्रिय न्यायाधिपति माननीय श्री जस्टिस के. एस. चौहान की सेवा निवृत्ति पर आयोजित इस बिदाई कार्यक्रम के माध्यम से आज हम सभी उन्हें बिदाई दे रहे हैं। वे "सादा जीवन उच्च विचार" की जीवन शैली में विश्वास रखने वाले ऐसे न्यायमूर्ति के रुप में हम सभी के बीच लोकप्रिय हैं, जिनमें अद्वितीय कुशाग्रता और गहरा अनुभव हम सभी को देखने को मिला है।

21 जून 1975 से न्यायिक सेवाओं में पदार्पण कर माननीय श्री जस्टिस के. एस. चौहान ने अपनी न्यायिक सेवाओं की यात्रा प्रारंभ की, और भिन्ड, रायगढ़, त्योंथर, लाहर, ग्वालियर, ब्यावरा, नरसिंहपुर, गुना, शिवपुरी, भोपाल, सिवनी, जबलपुर सहित प्रदेश के अनेक स्थानों पर न्यायिक सेवा के महत्वपूर्ण पदों पर अपेक्षित दायित्वों का निर्वाह करते हुये अपने ज्ञान और अनुभव की रोशनी बिखेरी। वे जिला एवं सत्र न्यायालय जबलपुर एवं रजिस्ट्रार ज्यूडिशियल के पद को भी गरिमा प्रदान कर चुके हैं।

जीवन में निरंतर सफलताओं के क्रम में उन्हें मार्च 2007 में इस न्यायमंदिर में न्यायाधिपति के रुप में नियुक्त किया गया, और अपने इस कार्यकाल में भी उन्होंने अपनी विलक्षण कानूनी समझ और अनुभव से अनेक पेचीदगी भरे प्रकरणों में सभी पक्षों को संतोष प्रदान करने वाले न्याय निर्णय दिये। मैं उनके द्वारा न्याय जगत में दिये गये योगदान पर उनका हार्दिक अभिनंदन करता हूँ।

अपनी न्यायिक सेवाओं की अवधि में आपका उन कड़वी सच्चाईयों से भी साक्षात्कार हुआ होगा, जब समाज में शोषण, अत्याचार, भेदभाव भी किसी न किसी रुप में आपको फलता फूलता और समाज में प्रतिष्ठित होता नजर आया होगा, तथा ऐसी स्थिति में पद की संवैधानिक मर्यादाओं के दायरे में पूरे खुलेपन से आपको विचारों का अभिव्यक्त करना दुविधाजनक लगा होगा सेवानिवृत्ति मेरे दृष्टिकोण में एक ऐसा अर्द्धविराम है, जहां से परिवर्तित होने वाली जीवन धारा व्यक्ति को और अधिक स्वतंत्र रुप में समाज में रचनात्मक योगदान के लिये अवसर प्रदान करती है। किंतु आनेवाला कल अनेक संदर्भों में समाज की अपेक्षाओं के अनुरुप आपसे मार्गदर्शन हेतु उम्मीद करता है।

मैं अपेक्षा करता हूँ, कि माननीय श्री जस्टिस के. एस. चौहान जी न्यायिक सेवाओं की एक गौरव शाली

पारी खेलने के पश्चात् समाज में हमारे मार्गदर्शक बनकर उन अछूते आयामों को भी जीवन्त करेंगे, जो पर्याप्त मार्गदर्शन की कमी की वजह से अब तक वांछित रुप में गतिशील नही हो सके हैं।

उनकी सेवानिवृत्ति के अवसर पर मैं उनके उत्तम स्वास्थ्य, एवं चिर परिचित प्रसन्नता भरी मुद्रा के बने रहने की मंगलकामना के साथ उनका हार्दिक अभिनंदन करता हूँ।

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

With heavy heart we all have gathered here to bid fear well to my Lord Shri Justice K S Chauhan., who is demitting the Office today on 5th May 2010.

My Lord has joined judicial services in the State of MP in the year 1975. Thereafter your Lordship has the honour of gracing various prime positions in the State Judiciary. My Lord has also graced the Office of District and Session Judge, Jabalpur and Registrar (Judicial). Due to great knowledge, experience and wisdom my Lord was appointed as Judge of the High Court of MP in the year 2007.

My Lords smiling face makes the atmosphere of the Court very congenial and friendly to the members of the Bar. We will be missing my Lord on every occasion for style of bold laughing as my Lord is very jolly and humorous who leaves no opportunity of making the Court atmosphere lighter. My Lord Shri Chauhan is capable to solve any serious problem in very light and easy mood. My Lord is very prompt in reaching to the correct conclusion and solution of any problem.

On the occasion of biding fare well I would like to remind my Lord his own ovation speech delivered on his elevation; And

" still My Lord has promise to keep,
and, miles to go before sleep."

Though retirement is closure of one chapter, but every closure of chapter opens a new chapter. My Lord Shri Chauhan is such courageous personality that he will make his new chapter of life equally lively, pleasant and happy because my Lord knows well, that pleasure multiplies on its dissemination and sharing with others.

The contribution of your Lordship in upbringing the judiciary of state shall be remembered for the years to come. On the other hand the judgments pronounced by your Lordship are land marks in the history of this High Court of MP. Needless to say that apart from his deep knowledge, my Lord his very religious minded. During his tenure my Lord was very kind to all, specially to junior advocates.

My Lord, I on behalf of the Govt of India and all the law officers of the Central Govt. and on my own behalf and wish your lordship Shri Chauhan & Mrs. Chauhan all the best for the days to come and wish you very happy and healthy life.

At the end I would like to express my feeling :

Some people come into our lives
and quickly go.

Some stay for a while,
leave footprints on our hearts,
and we are never, ever the same.

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Shri S. C. Datt, President, Senior Advocates Council, bids farewell :–

On behalf of Senior Advocates' Council and on my own behalf I bid a happy farewell and good wishes to Hon'ble Justice Shri K. S. Chauhan who is demitting office of the Judgeship of M.P.High Court today.

Time flies and it appears that My Lord has joined office of Judgeship only a few days back but more than three years have elapsed.

My Lord, appearance in your Court never created any tension and it was a comfortable feeling one had. calm and serene atmosphere.

We wish you, and Mrs. Chauhan happy and successful long life after today and wish that your experience would be utilized by the state by giving you another good assignments.

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Farewell Speech delivered by Hon'ble Shri Justice K. S. Chauhan.

After hearing very high about me, I am thrilled and thinking whether I deserve for the same or not.

Retirement or superannuation is not an unusual event in the life of a Judge. A dav is fixed for demitting this office. This date was known to me on the same day when I took an oath of this Office. I am extremely happy that after successfully discharging my duties as a Judicial Officer for more than 3 decades and as a Judge of this Court for more than 3 years, I am demitting this office today.

What is memorable is the conduct and character of the Judge. Lord Denning once said "No man is perfect, but a good Judge so conduct himself as to deserve the confidence to all those, who come before him."

I may remind what Sir, Winstin Churchil said "The service rendered by Judges demands high quality of learning, training and character". These qualities are not to be measured in ponds shilling and pence, but according to the quality of work done.

I was committed to the philosophy that tears of every person should be wiped out by imparting the substantial justice to them by Courts and Judges. I may remind of what James Barris said "those who brings sunshine to the lives of others cannot remain away from it."

I was deeply guided by the concept of the rule of law and principle of natural justice. I tried my level best to struck balance between individual liberty and interest of society in the criminal cases. I was of the firm view that guilty be not escaped and innocent be not punished. I always thought that justice be done let heavens fall.

It is said that Bar is the best Judge to judge the conduct and character of the

Judge. Now, it is up to you to assess, evaluate and determine as to how far I have been successful or not. But it is fact that I have truly and faithfully discharged my duties and left no stone unturned in imparting the substantial justice to the litigant public.

I was discharging my duties in the able guidance of my Lord Hon'ble Chief Justice Shri Syed Rafat Alam, who is very kind hearted, generous and co-operative. I am grateful to His Lordship for valuable guidance given to me from time to time. I am also grateful to my brother and sister Judges for their cooperation extended to me during my tenure as a Judge of High Court.

I worked with the members of Jabalpur Bar for more than 3 years and I found that members of Bar are intelligent, laborious and cooperative. The Senior Advocates and Senior Members of Bar used to work as guide and assist in arriving at the correct decision of a case. The younger members are taking keen interest in their work. I can say with certainty that their future is very bright. I extend my good wishes to all the Members of the Bar.

I extend my hearty thanks to the Registry Officers who extended full cooperation to me. They are very cordial, obedient and faithful. I also extend my thanks to my Court staff and personal staff who have worked with me and helped in effectively discharging my duties.

I am fully confident that I have not spoken any word to anybody so as to hurt their feelings, however advertently or inadvertently if any words so spoken kindly forgive me at this time. It is fact that departure is very painful to me but it is inevitable.

I quote one Hindi poem at this juncture:

फूल झड़ने के लिये ही खिल रहे हैं
दीप बुझने के लिये ही जल रहे हैं।
जानता हूँ मैं यहाँ आकर हमेशा,
हम बिछड़ने के लिये ही मिल रहे हैं।

With great devotion I served this institution for such a long time. I express my feelings in the honour of this institution in the following poetic form.

माँ नर्मदा के पावन जल का
जब तक पुन्य प्रभाव रहे,
तब तक इस प्यारी संस्था का
यशोगान रहे, सम्मान रहे।

At the last I express my good wishes to all of you with the help of following Sanskrit shlok.

"सर्वे भवन्तु सुखिनः
सर्वे शन्तु निरामयाः।
सर्वे भद्राणि पश्यन्तु
मा कश्चित्दुःखभाग्भवेत्॥

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I.L.R. [2010] M. P., 1021

SUPREME COURT OF INDIA

Before Mr. Justice Tarun Chatterjee & Mr. (Dr.) Justice B.S. Chauhan

14 December, 2009*

SURESH KUMAR BANSAL ... Appellant

Vs.

KRISHNA BANSAL & anr. ... Respondents

A. Civil Procedure Code (5 of 1908), Section 2(11) & Order 22 Rule 5 - *Substitution of heirs/L.Rs. - Eviction suit - Landlord/plaintiff died - His widow filed application for substitution as heir and L.R. of the plaintiff - Brother of plaintiff also sought substitution as heir and L.R. on the basis of a Will executed by the plaintiff - Trial Court allowed the application filed by the wife but rejected the application filed by the brother of plaintiff on the ground that execution of Will was suspicious - Order was upheld by the High Court - Held - The proper course to follow is to bring all the heirs and L.Rs. of the plaintiff on record including the L.Rs. who are claiming on the basis of the Will of the plaintiff so that all the L.Rs. namely, brother of the plaintiff and the natural heirs and L.Rs. of the plaintiff can represent the estate of the deceased for the ultimate benefit of the real L.Rs.* (Para 9)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 2(11) व आदेश 22 नियम 5 – वारिसों/विधिक प्रतिनिधियों का प्रतिस्थापन – बेदखली का वाद – भूस्वामी/वादी की मृत्यु – उसकी विधवा ने वादी के वारिस और विधिक प्रतिनिधि के रूप में प्रतिस्थापन के लिए आवेदन पेश किया – वादी के भाई ने भी वादी द्वारा निष्पादित वसीयत के आधार पर वारिस और विधिक प्रतिनिधि के रूप में प्रतिस्थापन की माँग की – विचारण न्यायालय ने पत्नी द्वारा पेश आवेदन मंजूर किया किन्तु वादी के भाई द्वारा पेश आवेदन इस आधार पर नामंजूर कर दिया कि वसीयत का निष्पादन संदेहास्पद है – उच्च न्यायालय द्वारा आदेश की पुष्टि की गयी – अभिनिर्धारित – समुचित प्रक्रिया, जिसका पालन किया जाना चाहिए, उन सभी विधिक प्रतिनिधियों सहित जो वादी की वसीयत के आधार पर दावा कर रहे हैं, वादी के सभी वारिसों और विधिक प्रतिनिधियों को अभिलेख पर लाना है ताकि सभी विधिक प्रतिनिधि अर्थात् वादी का भाई और वादी के नैसर्गिक वारिस एवं विधिक प्रतिनिधि, वास्तविक विधिक प्रतिनिधियों के अंतिम लाभ के लिए मृतक की सम्पदा का प्रतिनिधित्व कर सकें।

B. Civil Procedure Code (5 of 1908), Section 2(11) - *In an eviction proceeding when a legatee under a Will intends to represent the interest of the estate of the deceased testator - He will be a L.R. within the meaning of S. 2(11) of the Code - It is not necessary to decide whether the Will, on the basis of which substitution is sought for, is a suspicious one or that the parties must send the case back to the Probate Court for a decision.* (Para 10)

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 2(11) – बेदखली की कार्यवाही में जब वसीयत के अन्तर्गत वसीयतदार मृत वसीयतकर्ता की सम्पदा के हित का प्रतिनिधित्व करने

*C.A. No.8271/2009

का आशय रखता है – वह संहिता की धारा 2(1) के अर्थान्तर्गत विधिक प्रतिनिधि होगा – यह विनिश्चित करना आवश्यक नहीं है कि क्या वसीयत, जिसके आधार पर प्रतिस्थापन चाहा गया है, संदेहास्पद है या कि पक्षकारों को मामला विनिश्चय के लिए प्रोबेट न्यायालय को वापस भेजना चाहिए।

Case referred :

(2008) 8 SCC 521.

J U D G M E N T

The Judgment of the Court was delivered by TARUN CHATTERJEE, J. :–Leave granted.

2. This appeal by special leave arises from the judgment and order dated 18th of January, 2006 of the High Court of Madhya Pradesh at Gwalior in Writ Petition No.261 of 2006 dismissing the writ petition and affirming the order dated 17th of November, 2005 passed by the 8th Civil Judge, Class I, Gwalior in Civil Suit No. 40-A/2004.

3. One Shri Mohanlal Bansal (since deceased) as a plaintiff had instituted a suit for eviction and recovery of arrears of rent against one Shri Bhogiram (since deceased) in respect of a shop room situated at Kampoo, Lashkar, Gwalior, M.P. (in short the `suit premises'). During the pendency of the suit, the plaintiff had expired on 20th of June, 1989 and thereafter his widow, the respondent No.1 herein, filed an application for substitution as an heir and legal representative of the deceased in the pending suit. The appellant herein, the brother of the deceased plaintiff also filed an application for substitution/impleadment as heir and legal representative of the deceased plaintiff claiming the suit premises on the allegation that the deceased plaintiff had executed a Will in his favour on 11th of June, 1989. The learned Civil Judge by an order dated 22nd of February, 1991 had allowed the application for substitution/impleadment filed by the widow of the deceased plaintiff, namely, the respondent No.1 and rejected the application for substitution/ impleadment filed by the appellant on the ground that the Will of the deceased plaintiff did not seem to have been executed by him and, therefore, the appellant was not entitled to be substituted/impleaded in the suit for eviction as he was not the legal representative of the deceased plaintiff.

4. Feeling aggrieved by the aforesaid order of the learned Civil Judge, a revisional application was filed in the Court of the IVth Additional Judge to the Court of District Judge, Gwalior (in short, "the Additional Judge") and the Additional Judge, by his order dated 11th of November, 1991, set aside the order of the learned Civil Judge to the extent it held that the appellant was not the legal representative of the deceased plaintiff and thereafter remanded the case back to the Civil Judge for fresh decision of the application for substitution/impleadment filed at the instance of the appellant. Again, the Civil Judge by his order dated 17th of November, 2005 decided the application for substitution/impleadment filed by the appellant and rejected the same observing that the execution of the Will by the

testator i.e. the original plaintiff on the basis of which substitution/impleadment was sought for, seemed suspicious. This time, the appellant herein, feeling aggrieved by the order of the learned Civil Judge, filed a writ application in the High Court of Madhya Pradesh at Gwalior which came to be registered as W.P.No.261 of 2006. By the impugned judgment of the High Court, the writ petition filed by the appellant for his substitution/impleadment in the suit for eviction was also rejected affirming the order of the learned Civil Judge rejecting the application for substitution/impleadment of the appellant holding *inter alia* that there was no ground to interfere with the order of the Civil Judge in the exercise of its power under Article 227 of the Constitution. The High Court held that the summary enquiry was conducted only to find out whether the appellant was entitled to participate in the proceeding as a legal representative of the deceased plaintiff and in the said limited enquiry, finding was arrived at by the learned Civil Judge that the execution of the Will seemed to be suspicious and such finding of the learned Civil Judge would only be treated as the decision on the question whether the appellant should be impleaded as a party in the eviction suit.

5. It is this order of the High Court that was challenged by the appellant in this Court by way of a special leave petition which on grant of leave was heard in the presence of the learned counsel for the parties.

6. During the pendency of this appeal in this Court, more precisely on 27th of October, 2007, the original tenant, the respondent No.2 herein, had expired and his heirs and legal representatives were brought on record.

7. Before us, the only question that has to be gone into is whether the appellant, on the death of the original plaintiff, namely, Mohanlal, was entitled to be impleaded/substituted in the suit for eviction along with the natural heirs and legal representatives of the deceased, namely, respondent No.1 and others. Ms.Indu Malhotra, learned senior counsel appearing on behalf of the appellant submitted that since a separate probate proceeding has already been instituted by the appellant for grant of probate in the competent Court of Law which is now pending, the only course open to the court was to substitute or implead the appellant in the eviction proceeding along with natural heirs and legal representatives of the deceased plaintiff, that is to say, the entire proceeding should be carried on not only by the natural heirs and legal representatives of the deceased plaintiff but also by the appellant subject to grant of probate by a competent court of law. In support of this contention, Ms.Malhotra, learned senior counsel appearing on behalf of the appellant had drawn our attention to a decision of this Court in the case of *Jalai Suguna vs. Satya Sai Central Trust* [2008 (8) SCC 521]. Ms.Malhotra also submitted that in a proceeding under Order XXII Rule 5 of the Code, it was not open to the court to consider genuineness of the Will alleged to have been executed by the testator and come to a finding that the Will was suspicious and, therefore, the appellant could not be substituted/impleaded as a legal representative of the deceased plaintiff.

8. This submission of the learned senior counsel for the appellant was hotly contested by the learned counsel for the respondent. According to the learned counsel for the respondent, the question of impleading/substituting the appellant on the basis of the Will alleged to have been executed by the original plaintiff in respect of the suit premises could not arise at all, as according to him, in the impugned order, it was found by the High Court as well as by the Civil Judge that the Will seemed to be suspicious.

9. Having heard the learned counsel for the parties and after going through the impugned order as well as the application for substitution of the appellant on the basis of the Will alleged to have been executed by the deceased plaintiff, we are of the view that the impugned order of the High Court is liable to be interfered with and the application for impleadment filed at the instance of the appellant on the basis of the Will alleged to have been executed by the deceased plaintiff must be allowed and the appellant must be impleaded in the suit along with the natural heirs and legal representatives of the deceased plaintiff, subject to grant of probate by a competent court of law. It is true that in the impugned order, the High Court has made it clear that the finding regarding genuineness of the Will was made only for the purpose of deciding the application for impleadment filed at the instance of the appellant. But, in our view, if at this stage, the appellant is not permitted to be impleaded and in the event an order of eviction is passed ultimately against the tenant/respondent, the tenants will be evicted by the natural heirs and legal representatives of the deceased plaintiff who thereby shall take possession of the suit premises, but if ultimately the probate of the alleged Will of the deceased plaintiff is granted by the competent court of law, the suit property would devolve on the appellant but not on the natural heirs and legal representative of the deceased. Therefore, in the event of grant of probate in favour of the appellant, he has to take legal proceeding against the natural heirs and legal representatives of the deceased plaintiff for recovery of possession of the suit premises from them which would involve not only huge expenses but also considerable time would be spent to get the suit premises recovered from the natural heirs and legal representatives of the deceased plaintiff. On the other hand, if the appellant is allowed to carry on the eviction petition along with the natural heirs and legal representatives of the deceased plaintiff, in that case decree can be passed for eviction of the tenant when the appellant shall not be entitled to get possession from the tenants in respect of the suit premises until the probate in question is granted and produced before the Court. Therefore, ultimately if the court grants a decree for eviction of the tenant/respondent from the suit premises, such decree shall be passed subject to production of probate by the appellant. That apart, since the question of genuineness of the will cannot be conclusively gone into by the court in a proceeding for substitution in a pending eviction suit and in view of the fact that an application was made at the instance of the appellant for

impleadment as a legal representative of the deceased on the basis of the Will which is yet to be probated, in our view, best course open to the court is to allow impleadment of the appellant in the eviction proceeding, thereby permitting him to proceed with the eviction suit along with natural heirs and legal representatives of the deceased plaintiff, but in case the decree is to be passed for eviction of the tenant from the suit premises such eviction decree shall be subject to the grant of probate of the Will alleged to have been executed by the deceased plaintiff. At the same time, it is clear that in case the Will of the deceased plaintiff is found not to be genuine and probate is not granted, the court shall proceed to grant the eviction decree in favour of the respondent no.1 and not in favour of the appellant. It is well settled that in the event, the Will is found to be genuine and probate is granted, only the appellant would be entitled to get an order of eviction of the tenants/respondents from the suit premises excluding the claim of the natural heirs and legal representatives of the deceased plaintiff. The Code of Civil Procedure enjoins various provisions only for the purpose of avoiding multiplicity of proceedings and for adjudicating of related disputes in the same proceedings, the parties cannot be driven to different Courts or to institute different proceedings touching on different facets of the same major issue. Such a course of action will result in conflicting judgments and instead of resolving the disputes, they would end up in creation of confusion and conflict. It is now well settled that determination of the question as to who is the legal representatives of the deceased plaintiff or defendant under Order XXII Rule 5 of the Code of Civil Procedure is only for the purposes of bringing legal representatives on record for the conducting of those legal proceedings only and does not operate as res judicata and the inter se dispute between the rival legal representatives has to be independently tried and decided in probate proceedings. If this is allowed to be carried on for a decision of an eviction suit or other allied suits, the suits would be delayed, by which only the tenants will be benefited. In order to shorten the litigation and to consider the rival claims of the parties, in our view, the proper course to follow is to bring all the heirs and legal representatives of the deceased plaintiff on record including the legal representatives who are claiming on the basis of the Will of the deceased plaintiff so that all the legal representatives namely, the appellant and the natural heirs and legal representatives of the deceased plaintiff can represent the estate of the deceased for the ultimate benefit of the real legal representatives. If this process is followed, this would also avoid delay in disposal of the suit. In view of our discussions made hereinabove, we are, therefore, of the view that the High Court as well as the trial Court were not at all justified in rejecting the application for impleadment filed at the instance of the appellant based on the alleged Will of the deceased plaintiff at this stage of the proceedings.

10. Before parting with this judgment, it is necessary to consider the decision of this Court in the case of *Jalai Suguna (deceased) through L.Rs. v. Satya Sai*

Central Trust and Others, [(2008) 8 SCC 521] cited by the learned senior counsel for the appellant. In *Jalai Suguna* (supra), this Court held that the intestate heir (husband) and the testamentary legatees (nieces and nephews), seeking impleadment as the heirs of the deceased respondent in an appeal have to be brought on record before the Court can proceed further in the appeal. Furthermore, in that decision it was also held that a legatee under a Will, who intends to represent the estate of the deceased testator, being an intermeddler with the estate of the deceased testator, will be a legal representative. In view of the aforesaid discussions and in view of the decision reported in *Jalai Suguna* (supra), we are also of the view that in an eviction proceeding, when a legatee under a Will intends to represent the interest of the estate of the deceased testator, he will be a legal representative within the meaning of Section 2(11) of Code of Civil Procedure, for which it is not necessary in an eviction suit to decide whether the Will on the basis of which substitution is sought for, is a suspicious one or that the parties must send the case back to the probate Court for a decision whether the Will was genuine or not.

11. For the reasons aforesaid, we are of the view that the High Court as well as the trial Court had acted illegally and with material irregularity in the exercise of their jurisdiction in not impleading not only the natural heirs and legal representatives of the deceased plaintiff but also the appellant who is claiming his impleadment on the basis of an alleged Will of the deceased plaintiff.

12. Accordingly, the impugned order of the High Court is set aside and the application for impleadment filed by the appellant is allowed. For this reason, the eviction proceeding shall be carried on not only by the natural heir of the deceased plaintiff, but also the appellant who claims to be a legal representative of the deceased plaintiff on the basis of a Will alleged to have been executed by the deceased plaintiff.

13. But we make it clear that in the event, the probate of the will of the deceased plaintiff is not granted on the ground of genuineness of the Will, it is needless to say that the natural heirs and legal representatives of the deceased plaintiff would only be entitled to get possession on the basis of inheritance of the suit property on the death of the original plaintiff.

14. However, we also make it clear that the appellant would be entitled to obtain order of eviction of the tenants/respondents if the ground taken in the plaint stand proved, but such decree for eviction shall be passed subject to grant of probate of the Will of the deceased plaintiff in favour of the appellant.

15. The appeal is allowed to the extent indicated above. There will be no order as to costs.

Appeal allowed.

I.L.R. [2010] M. P., 1027
SUPREME COURT OF INDIA
Before Mr. Justice Tarun Chatterjee & Mr. Justice H.L. Dattu
17 April, 2009*

ANJALI KAPOOR (SMT.) ... Appellant
Vs.
RAJIV BAIJAL ... Respondent

Guardians and Wards Act (8 of 1890), Sections 7, 13 & 17 - ***Custody of minor female child - Ordinarily, the natural guardians of the child have the right to the custody of the child, but that right is not absolute - Courts are expected to give paramount consideration to the welfare of the minor child - Held - Child has remained with the grandmother for a long time and is growing up well in an atmosphere which is condusive to her growth - Therefore, it is desirable to allow the grandmother to retain the custody of the child - Grandmother is permitted to have the custody of child till she attains the age of majority.*** (Para 21)

संरक्षक और प्रतिपाल्य अधिनियम (1890 का 8), धाराएँ 7, 13 व 17 – अवयस्क बालिका की अभिरक्षा – सामान्यतः बालिका के नैसर्गिक संरक्षक को बालिका की अभिरक्षा का अधिकार होता है, किन्तु यह अधिकार आत्यंतिक नही है – न्यायालयों से यह आशा की जाती है कि अवयस्क बालिका के कल्याण पर सर्वोपरि ध्यान दें – अभिनिर्धारित – बालिका लम्बे समय से नानी के साथ रह रही है और ऐसे वातारण में, जो उसके विकास के लिए सहायक है, अच्छा विकास कर रही है – इसलिए, यह वांछनीय है कि नानी को बालिका को अभिरक्षा में रखे रहने की अनुमति दी जाए – नानी को अनुमति दी गई कि बालिका को तब तक अभिरक्षा में रखे जब तक कि वह वयस्कता की आयु प्राप्त न कर लेवे।

Cases referred :-

(2009) 9 SCC 745, (1973) 1 SCC 840, AIR 1987 SC 3, AIR 1935 Madras 195, (1893) 1 Ch. 143, 1981 New Ze Recent Law 257.

J U D G M E N T

The Judgment of the Court was delivered by **H.L. Dattu, J.** :–Leave granted.

1. This appeal is directed against the judgment and order passed by the High Court of Judicature at Indore in Miscellaneous Appeal No. 750 of 2004 dated 03.08.2007. By the impugned judgment, the High Court has directed that the custody of the child be handed over to the respondent/father.

2. The facts of case in brief are: - the respondent/Rajiv Baijal, had got married to the appellant's daughter/Meghana on 16.01.1998 and lived together in Pune (Maharashtra). Smt. Meghana went to Indore to the appellant's residence for delivery of the child. She was admitted in Noble Hospital, Indore and gave birth to

*C.A. No.2628/2009

a female child on 20.05.2001, but she did not survive to see the new born baby. As the child was born premature, she was kept in incubator in the hospital for nearly 45 days. After discharge from the hospital, the infant was brought to the residence of the appellant, and she was named Anagh. Add to the agony, just in a span of two months, appellant lost her husband also on 29.07.2001.

3. The Respondent herein filed an application under Guardian and Wards Act before the Family Court, inter-alia asserting that being the father of the child Anagh, he is her natural guardian and therefore, entitled to the custody of the child. In support of the claim made, the respondent had asserted before the Family Court that Anagh was not properly looked after by the appellant and it was perilous for the child to continue in the custody of the appellant. The respondent had also contended that after the child was brought to the residence of the appellant he was repeatedly requesting the appellant and her family members to hand over the custody of the child to him, since the appellant is unable to take care of the welfare of the minor child.

4. In the reply filed, the appellant had contended, that, the respondent had not come to see his daughter even once when the child was in the intensive care unit in the hospital. She had further contended that the respondent is living separately from his parents and he has to be away from his home town most of the time in a month in view of the nature of the job he is involved in. It was also contended that the financial position of the respondent is not good and he had taken loans from several persons, and in order to repay the same, on many occasions, he had asked for financial help from the appellant and her family members. In a nutshell, her claim before the Family Court was that it is not conducive for the welfare of the child to be in the company of the respondent.

5. The Family Court, Indore in its order dated 18.3.2004, has observed that, it cannot be concluded that the respondent although has borrowed money from several persons, will not be in a position to bring up her daughter and bear her educational expense. The Court has also taken note of the fact that the child/ Anagh is taken care of by appellant's brother-in-law, who has two grown-up children, and therefore, it cannot be said that the respondent will not be in a position to take care of the welfare of the child. Therefore, giving priority to the welfare of minor child, it is advisable to give custody of minor child - Anagh to the respondent, where she will be looked after well by respondent and his family members. Aggrieved by the said order, the appellant had carried the matter to the High Court, by filing Misc. Appeal No.750 of 2004.

6. The High Court in its judgment has held, that there are no compelling reasons on the basis whereof the custody of the child should be denied to her father/ respondent. Respondent has been making efforts right from the infancy of the child for guardianship of the child which was strongly resisted by his mother-in-

law. The Court has also taken note of the fact that, the appellant has lost her husband and has, therefore, suffered a great financial set back. Therefore, for better upbringing and welfare of the child, her custody should be entrusted to her father. Aggrieved by the said judgment, appellant is before us.

7. Notice was ordered to be issued to the respondent on 28.09.2007 to appear before the court on 16.10.2007. Since the same was returned unserved, a fresh notice came to be ordered. Dasti, in addition was also permitted for effecting service of the special leave petition on the sole respondent. In view of the affidavit of dasti notice filed by learned counsel for petitioner, he was permitted to take out notice of the special leave petition by publishing the same in two newspapers which has wide circulation in Pune (Maharashtra). Even this was carried out by the petitioner by publishing the notice of special leave petition in "Sandhyand" and "Free Press" which has wide circulation in Pune (Maharashtra). In spite of such publication, the respondent has not appeared before this court either in person or through his learned counsel. Therefore, while deciding this appeal, we did not have the assistance of either the respondent nor his learned counsel.

8. The learned counsel for the appellant would contend, that, the appellant is financially sound as she has a flourishing garment business and is residing in a joint family. Presently Anagh is being looked after by the appellant's family, and she is studying in a well known public school and is leading a happy life. The counsel would further contend, that, the respondent has meager income of Rs. 5,500 p.m. and will not be able to take good care of Anagh. It is further submitted that the respondent's mother is not well and also his father is suffering from High Blood Pressure and Asthama and they will also not be in a position to help the respondent to take care of the daily needs of the minor child. The counsel would further contend that respondent and any of his family members or relative, after passing of the impugned order till date never contacted the appellant to enquire about the welfare of Anagh. It is further submitted that the respondent has lost interest not only in the case but also in his daughter, since he has contracted second marriage sometime during the year 2007.

9. The question for our consideration is, whether in the present scenario would it be proper to direct the appellant to hand over the custody of the minor child/ Anagh to the respondent.

10. Under the Guardian and Wards Act, 1890, the father is the guardian of the minor child until he is found unfit to be the guardian of the minor female child. In deciding such questions, the welfare of the minor child is the paramount consideration and such a question cannot be decided merely based upon the rights of the parties under the law (See *Sumedha Nagpal v. State of Delhi,* (2000) 9 SCC 745).

11. In the case of *Rosy Jacob v. Jacob A. Chakramakkal,* (1973) 1 SCC 840,

this Court has observed that, the principle on which the Court should decide the fitness of the guardian mainly depends on two factors: (i) the father's fitness or otherwise to be the guardian, and (ii) the interests of the minors. This Court considering the welfare of the child also stated that, the children are not mere chattels: nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children have, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society."

12. In *Mrs. Elizabeth Dinshaw Vs. Arvand M. Dinshaw and Anr.* (AIR 1987 SC 3), this Court has observed that whenever a question arises before Court pertaining to the custody of the minor child, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the child.

13. At this stage, it may be useful to refer to the decision of Madras High Court, to which reference is made by the High Court in the case of *Muthuswami Moopanar* (AIR 1935 Madras 195), wherein the Court has observed, that, if a minor has for many years from a tender age lived with grand parents or near relatives and has been well cared for and during that time the minor's father has shown a lack of interest in the minor, these are circumstances of very great importance, having bearing upon the question of the interest and welfare of the minor and on the banafide of the petition by the father for their custody.

14. In our view, the observations made by the Madras High Court cannot be taken exception by us. In fact those observations are tailored made to the facts pleaded by the appellant in this case. We respectfully agree with the view expressed by the learned Judges in the aforesaid decision.

15. In *McGrath* (infants), Re (1893) 1 Ch 143: 62 LJ Ch 208 (CA), it was observed that, "... The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, or by physical comfort only. The word welfare must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

16. In American Jurisprudence, 2nd Edn., Vol. 39, it is stated that an application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of the court, and custody may be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody. In determining whether it will be for the best interest of a child to award its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment."

17. In *Walker v. Walker & Harrison,* 1981 New Ze Recent Law 257, The New Zealand Court (cited by British Law Commission, Working Paper No. 96) stated that "welfare is an all-encompassing word. It includes material welfare; both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents."

18. Bearing these factors in mind, we proceed to consider as to who is fit and proper to be the guardian of the minor child Anagh in the facts and circumstances of this case. In the present case, the appellant is taking care of Anagh, since her birth when she had to go through intensive care in the hospital till today. The photographs produced by her along with the petition, which is not disputed by the other side would clearly demonstrate, the amount of care, affection and the love that the grandmother has for the child having lost only daughter in a tragic circumstances. She wants to see her daughter's image in her grand child. She has bestowed her attention throughout for the welfare of reminiscent of her only daughter, that is the minor child which is being dragged from one end to another on the so called perception of judicial precedents and the language employed by the legislatures on the right of natural guardian for the custody of minor child.

19. Anagh is staying with the appellant's family and is also studying in one of the reputed school in Indore. It must be stated that the appellant has taken proper care and attention in upbringing of the child, which is one of the important factor to be considered for the welfare of the child. Anagh is with the appellant right from her childhood which has resulted into a strong emotional bonding between the two and the appellant being a woman herself can very well understand the needs of the child. It also appears that appellant, even after her husband's demise, is financially sound as she runs her own independent business.

20. On the other hand, considering the evidence of the respondent, it seems to us that since he has borrowed money from several persons and since he has a meager income he may not be in a position to give comfortable living for the child . In spite of notices issued to him, he has not appeared before the Court personally or through his counsel which shows his lack of concern in the matter. It is also brought to our notice that he has got married for the second time and has a child too, and the minor child might have to be in the care of step mother, specially the father being a businessman, he has to be out of the house frequently on account of his business.

21. Ordinarily, under the Guardian and Wards Act, the natural guardians of the

child have the right to the custody of the child, but that right is not absolute and the Courts are expected to give paramount consideration to the welfare of the minor child. The child has remained with the appellant/grandmother for a long time and is growing up well in an atmosphere which is conducive to its growth. It may not be proper at this stage for diverting the environment to which the child is used to. Therefore, it is desirable to allow the appellant to retain the custody of the child.

22. In view of the above discussion, we allow this appeal and set aside the impugned order. We permit the appellant to have the custody of the child till she attains the age of majority. No order as to costs.

Appeal allowed.

I.L.R. [2010] M. P., 1032
FULL BENCH
Before Mr. Justice Arun Mishra, Mr. Justice K.K. Lahoti & Mr. Justice Rajendra Menon
20 April, 2010*

ASHOK TIWARI ... Petitioner
Vs.
M.P. TEXT BOOK CORPORATION & anr. ... Respondents

A. **Service Law** - ***Daily Rated Employee - Transfer*** - *A daily rated employee is not appointed to a post - His services are not governed by any service rules, cannot be transferred from one place to another - As he does not hold a transferable service.* [1994(2) MPWN SN 38 overruled] (Paras 9 to 26)

क. सेवा विधि – दैनिक वेतन कर्मचारी – स्थानांतरण – दैनिक वेतन कर्मचारी की किसी पद पर नियुक्ति नहीं की जाती – उसकी सेवाएँ किसी सेवा नियमों द्वारा शासित नहीं होती, उसे एक स्थान से दूसरे स्थान पर स्थानांतरित नहीं किया जा सकता – इसलिए कि वह अंतरणीय सेवा धारक नहीं है। [1994 (2) MPWN SN 38 नामंजूर किया गया].

B. **Service Law** - ***Daily Rated Employee*** - *A daily rated employee can be transferred in exceptional cases - Where appointment is made to a project or a scheme and the project or a scheme is itself transferred or shifted the daily rated employee moves alongwith the project or the scheme to the new place.* (Para 26)

ख. सेवा विधि – दैनिक वेतन कर्मचारी – आपवादिक मामलों में दैनिक वेतन कर्मचारी को स्थानांतरित किया जा सकता है – नियुक्ति, जब किसी परियोजना अथवा स्कीम पर की जाती है और वह परियोजना अथवा स्कीम ही स्थानांतरित की जाती है या हटायी जाती है, दैनिक वेतन कर्मचारी उस परियोजना अथवा स्कीम के साथ नये स्थान पर चले जाते हैं।

C. **Service Law** - ***Daily Rated Employee*** - *A daily rated employee is appointed in a Establishment, Department or the Office - The entire*

*W.P. No.1967/2003 (Jabalpur)

Establishment, Department or the Office is shifted, the 'daily rated employee' moves with Establishment, Department or the Office - Otherwise, a daily rated employee cannot be transferred from one place to another. (Para 26)

ग. सेवा विधि – दैनिक वेतन कर्मचारी – स्थापना, विभाग अथवा कार्यालय में नियुक्त दैनिक वेतन कर्मचारी – संपूर्ण स्थापना, विभाग अथवा कार्यालय स्थानांतरित किया गया, 'दैनिक वेतन कर्मचारी' स्थापना, विभाग अथवा कार्यालय के साथ जायेगा – अन्यथा, दैनिक वेतन कर्मचारी को एक स्थान से दूसरे स्थान स्थानांतरित नहीं किया जा सकता।

Cases referred:

2000(2) MPLJ 249, AIR 1967 SC 884, (1977) 3 SCC 94, (1995) 2 SCC 532, (2001) 8 SCC 574, 2002(2) MPLJ 593, 2002(4) MPLJ 33, (2003) 6 SCC 123, (2004) 7 SCC 405, (2006) 2 SCC 702, (2006) 2 SCC 711, (2006) 2 SCC 716, AIR 2006 SC 1165, (2009) 5 SCC 65, 1974(2) SLR 110, (1996) 11 SCC 77.

Shobha Menon with *Rahul Choubey,* for the petitioner.

Ashish Pathak, for the respondents.

ORDER

The Order of the Court was delivered by RAJENDRA MENON, J. :–While hearing the present writ petition pertaining to transfer of a 'daily rated employee', the Writ Court found that the principles laid down by a Division Bench of this Court, in the case of *Udai Singh Yadav Vs. Depot Manager,* MPSRTC, 1994(2) MPWN pg. 50 SN 38, warrants reconsideration due to reasons indicated in the order-dated 23.7.2003 and, therefore, the following reference is made to this Bench. The questions requiring consideration as indicated by the learned Single Judge are:

> "(i) Whether a 'daily rated employee', who is not governed by any service rules, can be transferred from one place to another?
>
> OR
>
> (ii) Whether his services are transferable?
>
> OR
>
> (iii) In case of transfer, what emoluments will be available to him and whether on this ground, he is entitled to any protection under the Rules?"

2. Facts, in brief, necessary for answering the aforesaid question indicates that the petitioner herein was employed in the M.P. Text Book Corporation, Bhopal as a 'daily rated employee'. He was assigned duties in the Library as an Incharge and while so working it was found that he has acted in a manner unbecoming of an employee, in as much as he was found to be taking out photocopies of certain important documents, in an unauthorized manner. In view of the above, vide

Annexure P/12 dated 4.4.2003, he was transferred from the Head Office of the Corporation i.e.. from Bhopal to Panna Depot.

3. The writ petition in question is filed assailing the aforesaid order of transfer. During the course of hearing of the Writ Petition, on 23.7.2003 before the Writ Court, petitioner assailed the transfer mainly on the ground that he is a 'daily rated employee', inspite of certain orders passed in an earlier writ petition filed by him being W.P.No.800/2000, he has not been regularized and he continues to be a 'daily rated employee'. Accordingly, contending that he is not holding any post and the terms and conditions of his appointment do not permit for his transfer from one place to another, challenge was made to the order of transfer. Placing reliance on certain judgments indicating the status of a 'daily rated employee', it was argued before the learned Single Judge (Writ Court) that a 'daily rated employee', does not hold any post, therefore, cannot be transferred from one place to another. The contention advanced by the petitioner was refuted on behalf of the respondents before the learned Single Judge, by pointing out that petitioner had been working at one place i.e... at Bhopal, since the last 13 years, he is being transferred because of certain administrative exigency and placing reliance on the Division Bench judgment of this Court, in the case of *Udai Singh Yadav* (supra), it was argued that transfer of the petitioner is proper and permissible.

4. After considering the rival contentions, learned Single Judge found that a 'daily rated employee' does not hold any post, the legal rights available to him were limited and keeping in view certain principles laid down by a Bench of this Court, in the case of *Tilak Singh Tomar Vs. State of MP and others,* 2000(2) MPLJ 249, the learned Single Judge found that transfer of a government servant is permissible only when he is appointed to a cadre of transferable post and whose case transfer is an ordinary incident of service, which does not result in any alteration of the condition of service to the disadvantage of the employee. It was found by the learned Single Judge that in the present case, petitioner was a 'daily rated employee', he is not regularized and no service rules are applicable to the petitioner, he is getting a meagre emolument as fixed by the Collector and there is no rule showing that in the establishment of the respondent a 'daily rated employee' is holding a post, which is transferable. Prima facie finding that an employee, who does not hold a post and to whom no rules are applicable, cannot be transferred and observing that the principle laid down in this regard, in the case of *Udai Singh Yadav* (supra), warrants reconsideration, the reference in question as indicated hereinabove was made by the learned Single Judge (Writ Court).

5. During the course of hearing of this writ petition, Smt. Shobha Menon, learned Senior Advocate for the petitioner, emphasized that the admitted position in the present case are that the petitioner is a 'daily rated employee', he has not been regularized, there is no rule or regulation applicable in the respondent's

establishment, which permits transfer of a 'daily rated employee'. Referring to the import and meaning of the words 'civil post', 'government servant' and the principle laid down by the Supreme Court in the case of *The State of Assam and others Vs. Kanak Chandra Dutta,* AIR 1967 SC 884, learned Senior Advocate argued that transfer of an employee is permissible only if he is holder of a post, like a 'civil servant' or a 'government servant', and to whom the statutory rules and regulations governing the service are applicable.

6. Placing reliance on the following judgments: *The Superintendent of Post Offices and others Vs. P.K. Rajamma,* 1977(3) SCC 94; *Chief General Manager, (Telecom) N.E. Telecom Circle and Another Vs. Rajendra Ch. Bhattacharjee and others,* (1995) 2 SCC 532; *Tilak Singh Tomar (supra); National Hydroelectric Power Corporation Limited Vs. Shri Bhagwan and another,* (2001) 8 SCC 574; *Om Prakash Pali Vs. State of MP and others,* 2002(2) MPLJ 593; *R.K. Khare Vs. M.P. State Mining Corporation Limited, Bhopal and another,* 2002(4) MPLJ 33; *State of Haryana and another Vs. Tilak Raj and others,* 2003(6) SCC 123; *State of UP and another Vs. Siya Ram and another,* 2004(7) SCC 405; *M.P. Housing Board Vs. Manoj Shrivastava* 2006 (2) SCC 702; *State of MP and others Vs. Arjunlal Rajak,* 2006 (2) SCC 711; *M.P. State Agro Industries Development Corporation Limited and Another Vs. S.C. Pandey,* (2006) 2 SCC 716; *Union Public Service Commission Vs. Girish Jayanti Lal Vaghela and others,* AIR 2006 SC 1165; and, *State of Bihar Vs. Upendra Narayan Singh and others,* (2009) 5 SCC 65, learned Senior Advocate argued that the reference made be answered by holding that a 'daily rated employee' cannot be transferred. Taking us through the judgments as referred to hereinabove, the status held by a 'daily rated employee' and the concept of transfer, learned Senior Advocate argued that transfer of a 'daily rated employee' like the petitioner is not permissible.

7. Refuting the aforesaid contention and placing reliance on the judgment rendered by the Division Bench, in the case of *Udai Singh Yadav* (supra), Shri Ashish Pathak, learned counsel for the respondent Corporation, submitted that transfer is an incident of service and it is the prerogative of a employer to transfer an employee from one place to another, as per the administrative exigency. Contending that there is no prohibition in transferring an employee even a 'daily rated employee', from one place to another, Shri Ashish Pathak prays for answering the reference by holding that transfer of a 'daily rated employee' is permissible.

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

9. Transfer in relation to a service normally means a change of place of employment within an organization. This is the meaning of the word 'transfer' as defined in the **New Oxford English Dictionary, 1993 Edition.** It is a normal

incident of public service and, generally, does not require the consent of an employee. In most of the service rules, governing the terms and conditions of employment, particularly in government service so also in statutory organizations, an express provision relating to transfer is contemplated. For instance, in the Fundamental Rules governing service of Central Government employees, transfer in Supplementary Rule 2(18) to the Fundamental Rules is defined in the following manner:

> "Transfer means the movement of a Government servant from one headquarter station in which he is employed to another such station, either-
>
> (a) to take up the duties of a new post, or
>
> (b) in consequence of change of his headquarter."

In the Supplementary Rule to M.P. Fundamental Rules also, transfer is defined in Supplementary Rule 2(17), in identical manner and reads as under:

> "(17). 'Transfer' means the movement of a Government servant from one headquarter station in which is employed to another such station either (a) to take up the duties of a new post, or (b) in consequence of a change of his headquarters."

Identical definition of 'transfer' as provided in the Supplementary Rules to the Fundamental Rules and as indicated hereinabove, is contained in Rule 8(19) of the Mysore Civil Services Rules, 1958 and in the case of *U.M. Anigol Vs. State of Mysore*, 1974 (2) SLR 110, JAGANNATHA SHETTY, J - as he then was, considering the meaning of the word 'transfer' appearing in Rule 8(12) of the Mysore Civil Service Rules, observed that from the aforesaid definition it would be clear that a 'government servant' can be said to have been transferred only when he is posted to a post outside his normal headquarters. It is observed by the learned Judge that if a 'government servant' is moved and posted in different posts within the same headquarters, it may not amount to transfer. It is held that transfer contemplates change in the headquarter and joining duties in a new post, in the changed headquarter. Definition of transfer may differ, but it contemplates movement of an employee from one post to another and from one place to another within the organization. Primarily, therefore, transfer is from one post to another and therefore, holding of a post by the incumbent, who is transferred is one of the primary conditions to be fulfilled while transferring an employee. The aforesaid would be clear if the meaning of the word 'transfer' as defined in the Supplementary Rules applicable to the Central Government and State Government employees, as indicated hereinabove, is taken note of.

10. In the case of *Udai Singh Yadav* (supra), a Division Bench of this Court has held that transfer is an incident of service and an employee can claim no right

to remain posted at a particular place. The Division Bench has held that it is for the employer to see where the services of an employee are required most. It was after holding so that transfer of a daily rated conductor working in the M.P. State Road Transport Corporation was upheld by the learned Division Bench, in the case of *Udai Singh Yadav* (supra).

11. However, while so holding the learned Division Bench in the said judgment has not adverted to consider the question of transfer in relation to and with reference to the requirement of holding a post and certain other conditions to be fulfilled for appointment to a service in a particular establishment or an organization. In that view of the matter, it would be appropriate to evaluate the principle governing appointment to a service or post, the concept of such an appointment and the concept of appointment of a person on daily wage basis and the rights etc, available to such an employee and the terms and conditions governing his service.

12. As far as services in the government so also in relation to services under statutory corporation and organization created by the State are concerned, the Rules and Regulations applicable to government employees are made applicable or rules and regulation similar in nature are formulated. In the present case also, in the respondents corporation, it is stated by the learned Senior Advocate for the petitioner that the rules of the government are made applicable. In that view of the matter, it would be appropriate at this stage to consider the law governing the concept of appointment to service in the government or to a post in statutory establishments and organizations and various other aspects relating to such employment.

13. In the case of *Kanak Chandra Dutta* (supra), the Supreme Court was required to consider the meaning and scope of the words 'civil post' as appearing in Article 311 of the Constitution and the fact as to whether a 'Mauzadar' appointed under the Assam Land and Revenue Regulation, was holder of a 'civil post' or not. After taking note of various provisions, particularly the provisions of Article 310 and 311 of the Constitution, it has been held by the Supreme Court that there is no formal definition of 'post' and 'civil post'. It is held that a post is a service or employment. A person holding a post under a State is a person serving or employed under the State. It is observed by the Supreme Court that a person who holds a 'civil post' under the State holds office during the pleasure of the Governor of the State and a post under the State is an office or a position in which duty in connection with affairs of the State are attached. It is held by the Supreme Court that a post may be created before appointment or simultaneously with it. It therefore flows from the aforesaid principle that if there is no post in existence, there can be no appointment. It is further held by the Supreme Court that a post is an employment, but every employment is not a post. A casual labourer, it has been held by the Supreme Court in the aforesaid case, does not hold a post. It would, therefore, be

clear from the aforesaid judgment that appointment to a post normally means existence of a sanctioned and approved post in the organization or the department as the case may be and appointment of a person against such a post. If the person is appointed in a casual manner or otherwise and not to any post created for such appointment, he is not a 'civil post' holder nor is he an appointee to such a post. The said principle is clear on a scanning of the aforesaid judgment of the Supreme Court.

14. Again, in the case of *Superintendent of Post Offices and others* (supra), the meaning and concept of the words 'civil post' is considered by the Supreme Court in relation to Extra Departmental Postal Agents working in the Postal and Telegraph Department and it is held by the Supreme Court in the aforesaid case that a post exists apart from the holder of the post. After following the principle laid down in the case of *Kanak Chandra Dutta* (supra) and after taking note of the rights and duties of an Extra Departmental Agent's post, it is held that an Extra Departmental Agent is a 'civil post' holder under the Union of India. However, while doing so the principle laid down in the case of *Kanak Chandra Dutta* (supra) was approved and it is held that a 'civil post' holder is appointed on a created and sanctioned post and a casual labourer is not a holder of a post. In this case, it was found that a Extra Departmental Agent was appointed to a separate post, statutorily created.

15. In the case of *Chief General Manager, (Telecom) N.E. Telecom Circle and Another* (supra), the question of transfer of an employee from one place to another is taken note of and the scope of judicial review in the matter of transfer is evaluated. Even though it is held that transfer is an administrative function and is made in public interest, but in the aforesaid judgment the principle laid down is that if a person holds a transferable post, his transfer is a normal incident of service. It is, therefore, clear from the aforesaid judgments that transfer of a government servant is from one place to another and holding of a transferable post is one of the pre-conditions, which is required to be fulfilled before a government servant can be transferred. That being so, it would be appropriate now to examine as to what is the status of a 'daily rated employee' and what are the rights available to him and what are the statutory provisions, if any, which govern his terms and conditions of employment with regard to transfer, as is borne out from the records in the present case.

16. In the case of *Tilak Singh Tomar* (supra), reference to which has been made by the learned Single Judge, in the order of reference the question before the Court was with regard to the status of a 'daily rated employee' and his rights to seek absorption in service of a Municipal Council. While considering the rights available to a 'daily rated employee' in the matter of seeking absorption in the regular service, the learned Judge in the aforesaid case has found that a 'daily rated employee' has no right to hold a post. The foundation of his engagement is

expressed by the expression 'daily wager', which is indicative of the fact that his engagement is subject to availability of work. It is held by the learned Judge in the aforesaid case that a 'daily rated employee' is appointed for a day, and his engagement on the next day depends upon availability of work. A daily wager is not obliged to report for duty on every day nor is his engagement every day guaranteed. It has been held that mere continuous working for a long period will not permit him to seek absorption by over-reaching the law and without following the normal rules of selection and recruitment. The aforesaid case clearly lays down the principle that a 'daily rated employee' does not hold any post and his engagement is on day-to-day basis.

17. The status of a 'daily rated employee' is again taken note of by the Supreme Court in the case of *Tilak Raj and others* (supra), while considering the rights of a 'daily rated employee' to seek parity with regular employee in the matter of payment of salary and an earlier judgment of the Supreme Court, in the case of *State of Haryana Vs. Jasmer Singh,* (1996) 11 SCC 77, is considered and it is found that a 'daily rated employee' is not appointed as per the recruitment rules. The rigors of selection or recruitment are not undergone by him and the normal service rules are not applicable to him as is made applicable to a member of the regular service. It is also observed that such an employee is not liable to be transferred as a member of the regular service. The following observations made in this case may be taken note of:

> "8. At this juncture, it would be proper to take note of what was stated in *Jasmer Singh's case'*. In paragraph 10, it was noted as under:.
>
> '10. The respondents, therefore, in the present appeals who are employed on daily wages cannot be treated as on par with person in regular service of the State of Haryana holding similar posts. Daily-rate workers are not required to possess the qualifications prescribed for regular workers, nor do they have to fulfil the requirement relating to age at the time of recruitment. They are not selected in the manner in which regular employees are selected. In other words the requirements for selection are not as rigorous. There are also other provisions relating to regular service such as the liability of a member of the service to be transferred, and his subject to the disciplinary jurisdiction of the authorities as prescribed, which the daily-rated workmen are not subjected to. They cannot, therefore, be equated with regular workmen for the purposes for their wages. Nor can they claim the minimum of the regular pay scale of

the regularly employed." (Emphasis supplied)

18. Again, in the case of *M.P. State Agro Industries Development Corporation Limited* (supra), the status of a 'daily rated employee' is considered and after taking note of a judgment of the Supreme Court in the case of *Manoj Shrivastava* (supra), in paragraph 17 the matter is so dealt with:

> "17. The question raised in this appeal is now covered by a decision of this Court in *M.P. Housing Board Vs. Manoj Shrivastava,* (2006) 2 SCC 702, wherein this Court clearly opined that: (1) when the conditions of service are governed by two statutes; one relating to selection and appointment and the other relating to the terms and conditions of service, an endeavour should be made to give effect to both the statutes; (2) a daily-wager does not hold a post as he is not appointed in terms of the provisions of the Act and the Rules framed thereunder and in that view of the matter he does not derive any legal right; (3) only because an employee had been working for more than 240 days that by itself would not confer any legal right upon him to be regularized in service; (4) if an appointment has been made contrary to the provisions of the statute the same would be void and the effect thereof would be that no legal right was derived by the employee by reason thereof."

From the aforesaid, it would be clear that a 'daily rated employee' does not hold a post as he is not appointed in terms of the provisions of the Act and rules framed thereunder. It is, therefore, clear from a perusal of the principles laid down in the aforesaid cases that a 'daily rated employee' does not hold a post and his appointment is not made on a sanctioned or post created as per the rules after following the due procedure contemplated for appointment to the post.

19. The next question of importance, which requires consideration for answering the question referred to would be with regard to the fact as to whether a 'daily rated employee' holds a transferable service and whether transfer is an incident of service in the case of such a category of employee. A Division Bench of this Court in the case of *R.K. Khare* (supra), has laid down the principle that an employee holding a transferable post is liable to be transferred from one place to another.

20. The Supreme Court in the case of *National Hydroelectric Power Corporation Limited* (supra) has laid down the principle that a government servant or an employee of a public sector undertaking has no legal right to be posted at one particular place, in case he is holding service on a transferable post. It is, therefore, clear from this judgment that transfer of an employee is an incident and a condition of service provided he is holding a transferable post, as transfer is from one post to another.

21. Finally, the principle laid down by the Supreme Court in the case of *Union*

Public Service Commission Vs. Girish Jayanti Bai Vaghela (supra) may be taken note of. The case pertains to the rights available to a person appointed on contract basis and the question is as to whether such a person can be called a government servant. After considering the meaning of the word 'government servant' as appearing in Rule 2(4) of the Central Civil Services (Classification, Control and Appeal) Rules so also judgments of the Supreme Court in various other cases, it has been held that a person appointed on a contract basis for a specific period and when the appointment is without following the normal rules of recruitment either on contract basis or on daily wage basis, such a person cannot have any right to the post until and unless they are duly selected or appointed to the post as per the recruitment rules. Finally, in paragraph 17, the Supreme Court has crystallized the principle in the following manner as under:

> "17. It is neither pleaded nor there is any material to show that the appointment of respondent No.1 had been made after issuing public advertisement or the body authorized under the relevant rules governing the conditions of service of Drug Inspectors in the Union Territory of Daman and Diu had selected him. His contractual appointment for six months was de hors the rules. The appointment was not made in a manner which could even remotely be said to be compliant of Article 16 of the Constitution. The appointment being purely contractual, the stage of acquiring the status of a Government servant had not arrived. While working as a contractual employee respondent No.1 was not governed by the relevant service rules applicable to Drug Inspector. He did not enjoy the privilege of availing casual or earned leave. He was not entitled to avail the benefit of general provident fund nor was entitled to any pension which are normal incidents of a Government service. Similarly he could neither be placed under suspension entitling him to a suspension allowance nor he could be transferred. Some of the minor penalties which can be inflicted on a Government servant while they continue to be in Government service could not be imposed upon him nor he was entitled to any protection under Article 311 of the Constitution. In view of these features it is not possible to hold that respondent No.1 was a Government servant."
>
> *(Emphasis supplied)*

22. From the aforesaid principle it would be clear that a person, who is appointed on contract basis or on daily wage basis and who is not appointed to a service or a post, as per the recruitment rules, is not subjected to normal rules governing suspension, transfer etc. The concept of appointment to a service or post and the rights available to an employee appointed on daily wage basis to claim absorption or regularization has been considered by the Supreme Court in the case of *Upendra Narayan Singh* (supra) and it has been held that such persons who are engaged on contract basis or on daily wage basis without following the normal rules regarding

recruitment do not hold service in the Government or post till their appointment is regulated by the normal recruitment rules.

23. The principle that emerges on the basis of the aforesaid judgments would clearly indicate that transfer is of a government servant or an employee, who is appointed to a post and transfer even though an incident and condition of service, is from one post to another i.e.. from one place to another without altering the basic terms and conditions of service to the disadvantage of the employee concerned. That being so, one of the preconditions necessary for transfer of an employee is that he should be holder of a post, his appointment should be substantive in nature to a regular post in the establishment after following the due process contemplated for appointment to the post and even though transfer is an incident of service; but transfer is permissible only if the conditions of service and the contract of service contemplates a provision for transfer from one place to another. It is also clear from the aforesaid judgments and the principle, that a 'daily rated employee' is not appointed to any post and before he is appointed, the pre-conditions contemplated for appointment to the post are not followed. His appointment is on day-to-day basis as per the need of work and normally the conditions of service regarding transfer, suspension, disciplinary action cannot be applied to such an employee.

24. In the case of *Girish Jayanti Lal Vaghela* (supra), as already indicated in paragraph 17 hereinabove, it would be clear that a contractual employee, who has not acquired the status of a Government servant and to whom the relevant service rules are not made applicable, it is held that he cannot be transferred. If that be the principle governing the status of a 'daily rated employee' and his position in service and when it is clear that transfer in normal parlance means transfer of a person holding a post from one place to another, a 'daily rated employee' who is not appointed to a post and who does not hold any regular post in the establishment cannot be transferred. Transfer is an incident of service only if the person concerned or the employee holds a transferable post and not otherwise. In the present case, there is nothing available on record to indicate that the terms and conditions on which the petitioner was appointed on daily wage contemplates a provision for his transfer from one place to another. Accordingly, we are of the considered view that as a 'daily rated employee' is not appointed to any post and as his services are not governed by any service rules contemplating a provision for transfer, he, therefore, cannot be transferred.

25. The Division Bench of this Court in the case of *Udai Singh Yadav* (supra) has not considered the question of transfer of a 'daily rated employee' after evaluating the status of a 'daily rated employee' and the concept of transfer in relation to the post held by such an employee. As the principle laid down in the said case is without appreciating and considering the entire gamut governing the concept of appointment to public service and transfer, we are of the considered

view that the law laid down in the said case holding that a 'daily rated employee' can be transferred, as transfer is an incident of service, does not lay down the correct law. The correct law is that transfer is an incident of service only in case of an employee, who is either a government servant, a 'civil post' holder or a person, who is appointed substantively to a post, which is transferable and if a person is not appointed to a post, which is transferable, then in his case transfer will not be an incident of service.

26. Accordingly, holding that the law laid down in the case of *Udai Singh Yadav* (supra) is not correct, the said judgment is over-ruled and the reference is answered in the following manner namely;

(i) A 'daily rated employee', who is not appointed to a post and whose services are not governed by any service rules, cannot be transferred from one place to another, as he does not hold a transferable service.

(ii) A 'daily rated employee' cannot be transferred from one place to another in normal circumstances. However, in exceptional cases where appointment on daily basis is made to a Project or a Scheme, and if the Project or the Scheme is itself transferred or shifted, the 'daily rated employee' moves alongwith the Project or the Scheme to the new place.

In cases where the Project, Scheme or Establishment or Department of Office itself is shifted from one place to another and as a consequence thereof, a 'daily rated employee', appointed specifically to work in such Project, Scheme or Establishment or Department or Office, is also required to be shifted. In such cases they may be shifted alongwith the Establishment or Department or Office, in which they are appointed.

(iii) Similarly, if a 'daily rated employee' is appointed in a particular Establishment, Department or Office and if the entire Establishment, Department or the Office is shifted, the 'daily rated employee' moves with the Establishment, Department or the Office. Otherwise, a 'daily rated employee' cannot be transferred from one place to another. It may be clarified that in such cases, the 'daily rated employee' is not transferred, but he moves with the office in which is working and, therefore, this class of cases will not come within the purview of transfer of a 'daily rated employee'.

27. As questions (i) & (ii) are answered by holding that a 'daily rated employee' cannot be normally transferred, the question of emoluments payable to him and protection under the Rules becomes redundant and need not be considered now in this reference.

The Reference is accordingly answered. Matter be placed before Appropriate Bench for proceeding in accordance with law.

Order accordingly.

I.L.R. [2010] M. P., 1044
WRIT APPEAL
Before Mr. Justice R.S. Garg & Mr. Justice S.K. Seth
1 September, 2009*

INDORE DEVELOPMENT AUTHORITY ... Appellant
Vs.
RAJESH LALWANI & ors. ... Respondents

A. Nagar Tatha Gram Nivesh Adhiniyam, M.P. (23 of 1973), Section 50 - *Preparation of Town Development Scheme - Grant of no objection - A Scheme was prepared which was not accorded approval by the State Government - A land was purchased by respondent which was under the Scheme - He sought no objection from the appellant which was rejected - Appellant alleged that on refusal to grant NOC, the Scheme stood revived - Held - After the State Government refused to accord its ex post facto sanction to proposed Scheme No.133, the IDA having taking into account every facet of the case, took a conscious decision to drop the Scheme No.133 - Stand taken by the appellant on the erroneous assumption that Scheme stood revived automatically to refuse NOC to respondent is an outcome of total non-application of mind on the part IDA and its officers - Such a stand, is unsustainable in law in view of the Full Bench decision in Indore Development Authority vs. M/s Shri Ram Builders and others [ILR (2009) MP 2136] wherein it has been held that S. 50(4) of the Adhiniyam is prospective in nature.* (Para 14)

क. नगर तथा ग्राम निवेश अधिनियम, म.प्र. (1973 का 23), धारा 50 – नगर विकास स्कीम तैयार किया जाना – अनापत्ति का अनुदान – एक स्कीम तैयार की गयी जिसका राज्य सरकार द्वारा अनुमोदन नही किया गया – प्रत्यर्थी द्वारा एक भूमि क्रय की गई जो स्कीम के अन्तर्गत थी – उसने अपीलार्थी से अनापत्ति की माँग की जो नामंजूर कर दी गई – अपीलार्थी ने कथित किया कि अनापत्ति प्रमाण पत्र देने से इंकारी पर स्कीम पुनर्जीवित हो जायेगी – अभिनिर्धारित – राज्य सरकार के प्रस्तावित स्कीम नं. 133 का कार्योत्तर अनुमोदन करने से इंकार कर देने के बाद, इन्दौर विकास प्राधिकरण ने मामले के प्रत्येक पहलू का ध्यान रखकर स्कीम नं. 133 को बंद करने का सचेतन निर्णय लिया – अपीलार्थी द्वारा इस गलत धारणा पर अपनाया गया रुख कि प्रत्यर्थी को अनापत्ति प्रमाण पत्र देने से इंकार करने से स्कीम स्वतः पुनर्जीवित हो जायेगी, इन्दौर विकास

*W.A. No.824/2008 (Indore)

प्राधिकरण और उसके अधिकारियों के पूर्णतः मस्तिष्क का प्रयोग न करने का परिणाम है – ऐसा रुख इन्दौर विकास प्राधिकरण बनाम् मेसर्स श्रीराम बिल्डर्स व अन्य [ILR (2009) MP 2136] में पूर्ण न्यायपीठ के विनिश्चय को दृष्टिगत रखते हुए कायम रखे जाने योग्य नही है, जिसमें यह अभिनिर्धारित किया गया है कि अधिनियम की धारा 50(4) की प्रकृति भविष्यलक्षी है।

B. **Interpretation of Statutes** - *Expropriatory Legislation - Held* - *It is well settled proposition of law that when an Act is an expropriatory legislation, provisions of such an Act should be strictly construed as it deprives a person of his valuable right to property as envisaged under Article 300-A of the Constitution.* (Para 13)

ख. कानूनों का निर्वचन – स्वत्वहीन विधान – अभिनिर्धारित – यह विधि की सुस्थापित प्रतिपादना है कि जब कोई अधिनियम स्वत्वहीन विधान हो, तब ऐसे अधिनियम के उपबंधों का कठोरता से अर्थ लगाया जाना चाहिए क्योंकि यह किसी व्यक्ति को संविधान के अनुच्छेद 300–ए के अन्तर्गत दिये उसके सम्पत्ति के मूल्यवान अधिकार से वंचित करता है।

C. **Intra Court Appeal** - *Jurisdiction of Division Bench - Held - The Division Bench, sitting as a Court of Correction, corrects its own orders in exercise of the same jurisdiction as was vested in the Single Bench - Such is not an appeal against an order of a subordinate court - In such appellate jurisdiction the High Court exercises the powers of a Court of Error.* (Para 9)

ग. अन्तर्न्यायालयीन अपील – खण्ड न्यायपीठ की अधिकारिता – अभिनिर्धारित – खण्ड न्यायपीठ सुधार के न्यायालय के रूप में कार्यवाही करते हुए उसी अधिकारिता के प्रयोग में जैसी कि एकल न्यायपीठ में निहित थी अपने स्वयं के आदेशों में सुधार कर सकती है – यह अधीनस्थ न्यायालय के आदेश के विरुद्ध अपील नही है – ऐसी अपीलीय अधिकारिता में उच्च न्यायालय त्रुटि के न्यायालय की शक्तियों का प्रयोग करता है।

Cases referred :

(1996) 3 SCC 52, (2007) 8 SCC 705, ILR (2009) MP 2136.

ORDER

The Order of the Court was delivered by **S.K. Seth, J.** :–This intra Court appeal is against the Order dated 7th August, 2008 passed by the learned Single Judge in W.P. No. 2050 of 2008. By the impugned order, writ petition filed by Rajesh Lalwani (respondent No.1 herein) was allowed against the Indore Development Authority and it was directed to issue 'No Objection Certificate' **not only** to Rajesh Lalwani but to any one who applies for grant of such 'NOC'.

2. During the course of argument, learned counsel for IDA reiterated contentions urged before the learned Single Judge. In addition two more questions have been raised for our consideration in this appeal, viz. whether Scheme No. 133 framed by the appellant under the provisions of **M.P. Nagar Tatha Gram Nivesh Adhiniyam, 1973** (hereinafter referred to as the "**ACT**" for short) stood

revived notwithstanding the fact that earlier IDA had given up the said Scheme as being unworkable and economically unviable in view of the refusal of the State Government to accord approval to the Draft Scheme? And whether learned Single Judge was justified in issuing a blanket order for issuance of NOC to one and all?

3. Facts which are relevant and necessary for disposal of the appeal are as under.

4. Indore Development Authority (IDA for short) on 14.5.1993 passed resolution No. 71 to frame Scheme No. 133 in respect of 285.509 hectares of agriculture land of village Piplyakumar, Tehsil and District Indore. A declaration to this effect was published in the gazette on 18.6.1993. On 12.5.1995, draft scheme was published inviting objections/ suggestions from general public and persons likely to be affected by the proposed scheme. It appears that ex post facto sanction of the State Government was sought somewhere in the month of August 2002 but vide communication dated 1.11.2002,(Annexure P-3 to the writ petition) State Government refused to grant sanction to Scheme No. 133 and same stand was reiterated, as is clear from communication dated 1.1.2003(Annexure P-4). Matter was put up before the Board of Directors of the IDA in the meeting held on 6.3.2003 and after detailed examination of prevailing circumstances; the IDA decided to abandon the Scheme in question as being unworkable and economically unviable. Ultimately after detailed physical survey, it was found that out of 285.509 hectares of land, approximately only 67 hectare of undeveloped land was available for proposed Scheme No. 133 and as such IAD sought permission of the State Government to **drop the Scheme No. 133** before any further step could be taken under Section 50(4) of the Act. State Government was more or less agreeable to the proposal contained in Annexure P-8 as is clear from Annexure-9 dated 11.9.2003. From the material available on record, it seems that no steps under Section 50 of the Act were taken by the IDA in respect of 67 hectares of land.

5. Now we come to Rajesh Lalwani and what compelled him to file the writ petition. In the year 2005, by a registered sale deed (Annexure P-2) he purchased 0.040 hectare agriculture land situated in village Piplyakumar. He applied for No Objection Certificate from the IDA. As per resolution No. 195 dated 14.8.2007 (Annexure P-1) read with communication dated 5.10.2007 (Annexure P-14), NOC for the land in question was refused on the premise that Scheme No. 133 was in force. Rajesh Lawani challenged the said refusal by filing the writ petition, giving rise to this writ appeal.

6. The main plank of attack was that out of 285.509 hectare of land proposed for the Development Scheme No. 133, only 67 hectares of unencumbered land were available and as such proposed Scheme No. 133 could not be implemented. It was contented that from the date of publication of intention and draft Scheme, NOC was issued by the IDA to various Co-op. housing societies and individuals

in respect of plans approved by the Director Town and Country Planning and as such large chunk of land was not available for implementation of proposed Scheme No. 133. This factor was duly taken note of by the IDA before holding that the said Scheme was unworkable and economically unviable. It was also urged that State Government never accorded its permission to the said proposed Scheme, hence revival was not automatic.

7. IDA, that is, appellant was the only respondent in the writ petition which contested the matter. IDA filed reply and documents to show that earlier decision was wrong, illegal and resiled from the earlier stand and contended that the scheme stood revived automatically; therefore refusal of NOC was justified. State Government and Director Town and Country Planning (respondent No. 1 and 3 in writ petition), watched the fight in the arena as silent spectators.

8. Before deciding the writ petition, learned Single Judge was assured by the IDA on oath that no steps were taken by the IDA under Section 50(4) as would be evident from the Order-Sheet dated 7.8.2008 passed in WP which is available at page 21 of the Paper Book, then proceeded to hear the arguments. After hearing rival contentions, learned Single Judge, allowed the writ petition on the ground that in view of proviso to sub-section (4) of Section 50 of the Act, the Scheme stood lapsed because of the failure on the part of IDA to implement the Scheme within requisite time as contemplated in proviso to Section 50(4) of the Act.

9. At the outset, we must state that an intra-court appeal whereunder the Division Bench, sitting as a Court of Correction, corrects its own orders in exercise of the same jurisdiction as was vested in the Single Bench. Such is not an appeal against an order of a subordinate court. In such appellate jurisdiction the High Court exercises the powers of a Court of Error. See *Baddula Lakshmaiah v. Sri Anjaneya Swami Temple,* (1996) 3 SCC 52.

10. Before we proceed to deal with the questions involved in this appeal, we may point out that the Act in question is an expropriatory piece of legislation as has been held in *Chairman, Indore Vikas Pradhikaran v. Pure Industrial Coke & Chemicals Ltd,* (2007) 8 SCC 705. In said decision, it has been held that

> "48. The courts cannot also be oblivious of the fact that the owners who are subject to the embargos placed under the statute are deprived of their valuable rightful use of the property for a long time. Although ordinarily when a public authority is asked to perform statutory duties within the time stipulated it is directory in nature but when it involves valuable rights of the citizens and provides for the consequences therefor it would be construed to be mandatory in character."

11. Section 50 of the Act, which are material for our purpose, read as under:

> "50. Preparation of town development schemes.–

(1) The Town and Country Development Authority may, at any time, declare its intention to prepare a town development scheme.

(2) Not later than thirty days from the date of such declaration of intention to make a scheme, the Town and Country Development Authority shall publish the declaration in the gazette and in such other manner as may be prescribed.

(3) Not later than two years from the date of publication of the declaration under sub-section (2) the Town and Country Development Authority shall prepare a town development scheme in draft form and publish it in such form and manner as may be prescribed together with a notice inviting objections and suggestions from any person with respect to the said draft development scheme before such date as may be specified therein, such date being not earlier than thirty days from the date of publication of such notice.

(4) The Town and Country Development Authority shall consider all the objections and suggestions as may be received within the period specified in the notice under sub-section (3) and shall, after giving a reasonable opportunity to such persons affected thereby as are desirous of being heard, or after considering the report of the committee constituted under sub-section (5) approve the draft scheme as published or make such modifications therein as it may deem fit."

12. A proviso has been added thereafter to sub-section (4) by the Act of 2004 in terms whereof a draft scheme must be approved within a period of one year from the publication thereof. Thus it is clear from bare perusal of Section 50 that in making a town development scheme, however, the process undertaken is a three-stage one inasmuch as an intention therefor is declared, which entails serious consequences and, as noticed hereinbefore, by reason thereof, a total embargo is imposed both on land use as also the development. For the said purpose, a time-limit within which a draft town planning scheme has to be finalised is provided but the same can be subject to modification by the State which ordinarily should be with a view to deal with the same in line with the final development plan.

13. Section 51 provides for revision of the draft scheme. Section 53 imposes restrictions on land use and land development in the following terms:

"*53. Restrictions on land use and land development.*–As from the date of publication of the declaration to prepare a town development scheme, no person shall, within the area included in the scheme, institute or change the use of any land or building or carry out any development, save in accordance with the development authorised by the Director in accordance with the provisions of this Act prior to the publication of such declaration."

Thus, it is clear that no sooner publication of declaration to prepare a town planning scheme is made, Section 53 of the Act comes into play, and places a total embargo both on land use as also the development. It is well settled proposition of law that when an Act is an expropriatory legislation, provisions of such an Act should be strictly construed as it deprives a person of his valuable right to property as envisaged under Article 300-A of the Constitution of India. There cannot, therefore, be any doubt that in a case of this nature due application of mind on the part of IDA is imperative.

14. From the facts noticed above, we have no hesitation to hold that the provisions of the Act being expropriatory, they require strict construction. After the State Government refused to accord its ex-post-facto sanction to proposed Scheme No. 133, the IDA having taking into account every facet of the case, took a conscious decision to drop the Scheme No. 133. The stand taken by the appellant on the erroneous assumption that Scheme stood revived automatically to refuse NOC to Rajesh Lalwani is an outcome of total non-application of mind on the part IDA and its officers. Such a stand is unsustainable in law in view of the foregoing discussion. We, therefore, do not agree with the reasoning of the learned Single Judge when he allowed the writ petition on ground of retrospective application of proviso to Section 50(4) especially in view of the Full Bench decision in W.A. No. 1455 of 2007 in the matter of Indore *Development Authority viz. M/s. Shri Ram Builders and others* decided 24.4.2009 at the Main Seat. In view of the said decision it is no longer open for us to hold that Proviso to Section 50(4) of the Act is retrospective in nature. Be that as it may, the Full Bench has held that it is prospective in nature, therefore, we agree with the conclusion of the learned Single Judge in view of the above discussion but not with his reasoning. We are of view the learned Single Judge should not have issued a blanket order for grant of 'NOC'. Grant of 'NOC' depends upon many factors and each case has to be examined in the light of surrounding facts and circumstances.

15. In view of the foregoing discussion we dismiss the appeal with costs throughout with the slight modification as pointed hereinabove with regard to issuance of 'NOC'. Counsel's fee Rs. 2500/-, if certified.

Appeal dismissed.

NEELESH SHUKLA Vs. STATE OF M.P.

I.L.R. [2010] M. P., 1050
WRIT PETITION
Before Mr. Justice Dipak Misra & Mr. Justice R.K. Gupta
5 October, 2009*

NEELESH SHUKLA & ors. ... Petitioners
Vs.
STATE OF M.P. & ors. ... Respondents

A. Service Law - Patwari Selection and Examination Conduction Rules, M.P. 2008, Rule 1.8 - *Appointment of Patwari - A condition in the advertisement for appointment as Patwari that passing of Higher Secondary or High School is necessary - In addition 'O' level certification from DOEACC/IETE or one year Diploma in Computer Application (DCA) from an institute registered/recognized/affiliated with the university recognized by the UGC or higher education in computer - Said condition challenged as irrelevant and not in nexus to the object sought to be achieved - Held - Patwari are required to maintain Data and thus the prescription of requirement for having DCA cannot be treated to be arbitrary or irrational to invite wrath of Article 14 of the Constitution - The rule is intra vires.* (Para 18)

क. सेवा विधि – पटवारी चयन और परीक्षा संचालन नियम, म.प्र. 2008, नियम 1.8 – पटवारी की नियुक्ति – पटवारी के रूप में नियुक्ति के लिए विज्ञापन में शर्त कि उच्चतर माध्यमिक या हाईस्कूल उत्तीर्ण होना आवश्यक है – इसके अतिरिक्त डीओईएसीसी/आईईटीई से 'ओ' स्तर प्रमाण पत्र या यूजीसी द्वारा मान्यताप्राप्त विश्वविद्यालय से रजिस्ट्रीकृत/मान्यताप्राप्त/सम्बद्ध किसी संस्था से एक वर्षीय डिप्लोमा इन कम्प्यूटर एप्लीकेशन (डीसीए) या कम्प्यूटर में उच्चतर शिक्षा – उक्त शर्त को असंगत और उसं उद्देश्य के सम्बन्ध में न होने के कारण चुनौती दी गई जिसे प्राप्त करना चाहा गया है – अभिनिर्धारित – पटवारियों से आंकड़े अनुरक्षित रखना अपेक्षित है और इस प्रकार डीसीए रखने की आवश्यकता के निर्धारण को संविधान के अनुच्छेद 14 को लागू करने के लिए मनमानां या विवेकहीन नहीं माना जा सकता – नियम शक्त्याधीन है।

B. Service Law - Patwari Selection and Examination Conduction Rules, M.P. 2008, Rule 1.8 - *Appointment of Patwari - A condition in the advertisement for appointment as Patwari that passing of Higher Secondary or High School is necessary - In addition 'O' level certification from DOEACC/IETE or one year Diploma in Computer Application (DCA) from an institute registered/recognized/affiliated with the university recognized by the UGC or higher education in computer - A further clarification issued that only those certificates which are issued under the seal and signature of the university shall be valid and the certificate issued by the institutes shall not be valid - Held - The institutions are established by the University but the diplomas are eventually conferred by the University itself - What is required*

*W.P. No.8419/2009 (Jabalpur)

by the letter-circular is to produce diplomas or certificates with the seal of the University and with the signature of the competent authority of the University - There is no change in the terms incorporated in the advertisement - It does not remotely transgress the stipulation in the Rule - The letter-circular postulates is only the method how the certificate is to be produced as per law - It is in accord with the Rule and the advertisement. (Para 32)

ख. सेवा विधि – पटवारी चयन और परीक्षा संचालन नियम, म.प्र. 2008, नियम 1.8 – पटवारी की नियुक्ति – पटवारी के रूप में नियुक्ति के लिए विज्ञापन में शर्त कि उच्चतर माध्यमिक या हाईस्कूल उत्तीर्ण होना आवश्यक है – इसके अतिरिक्त डीओईएसीसी/आईईटीई से 'ओ' स्तर प्रमाण पत्र या यूजीसी द्वारा मान्यताप्राप्त विश्वविद्यालय से रजिस्ट्रीकृत/मान्यताप्राप्त/सम्बद्ध किसी संस्था से एक वर्षीय डिप्लोमा इन कम्प्यूटर एप्लीकेशन (डीसीए) या कम्प्यूटर में उच्चतर शिक्षा – एक अतिरिक्त स्पष्टीकरण जारी किया गया कि केवल वे प्रमाण पत्र, जो विश्वविद्यालय की मुद्रा और हस्ताक्षर के अधीन जारी किये गये हैं, विधिमान्य होंगे और संस्थाओं द्वारा जारी प्रमाण पत्र विधिमान्य नहीं होगा – अभिनिर्धारित – संस्थान विश्वविद्यालय द्वारा स्थापित किये गये हैं किन्तु डिप्लोमा अंतिमतः स्वयं विश्वविद्यालय द्वारा प्रदत्त किये जाते हैं – पत्र–परिपत्र द्वारा विश्वविद्यालय की मुद्रा से और विश्वविद्यालय के सक्षम प्राधिकारी के हस्ताक्षर से डिप्लोमा या प्रमाण पत्र पेश करने की अपेक्षा की गयी है – विज्ञापन में समाविष्ट निबंधनों में कोई परिवर्तन नहीं – यह नियम में अनुबंध का दूरस्थ उत्क्रमण नहीं करता – पत्र–परिपत्र केवल रीति स्वीकृत करता है कि विधि अनुसार कैसे प्रमाण पत्र पेश किया जाना है – यह नियम और विज्ञापन के अनुरूप है।

Cases referred :

AIR 1993 SC 2285, AIR 1968 SC 349, AIR 1974 SC 1, AIR 1977 SC 1237, (2006) 8 SCC 42, (2008) 9 SCC 242, AIR 1970 SC 1832, AIR 1990 SC 1233, AIR 1999 SC 2093, (2007) 10 SCC 627, (1990) 3 SCC 157, (2009) 4 SCC 555, (2005) 4 SCC 154, AIR 1988 SC 2255, AIR 1989 SC 2262, AIR 2003 MP 171.

V.K. Shukla & Deependra Mishra, for the petitioners.
Deepak Awasthy, G.A., for the respondent Nos.1 to 3/State.
Avinash Zargar, for the respondent No.6.

ORDER

The Order of the Court was delivered by **DIPAK MISRA, J.** :– Regard being had to the commonality of controversy involved in this batch of writ petitions, it was heard analogously and is disposed of by a singular order. For the sake of convenience the facts in W.P.No.8419/2009 are uncurtained herein.

2. The M.P. Professional Examination Board (VYAPAM) issued an advertisement on 5-6-2008 inviting applications for appointment of "patwaris' in respect of 2194 posts. The advertisement postulated the requisite qualifications meant for 'Patwaris' Examination. It provided number of posts to be filled up district-wise and relaxation to be extended as regards the age as per the General Administration Department and the selection process, domicile certificate,

registration in the Employment Exchange and various other aspects. With regard to the educational qualifications (clause 1.8 of Chapter I of the Advertisement laid a postulate to the effect that the candidate must have passed Higher Secondary or High School (10+2) Examination and must also possess 'O' level certification from DOEACC/IETE or 1 year Diploma in Computer Application (DCA) from an institute affiliated/registered/recognized by a University which should have been recognised by University Grants Commission (UGC), or higher education in Computer.

3. It is contended that the petitioners have the requisite qualifications inasmuch as they have passed Higher Secondary School Examination and hold DCA from an institute affiliated to a University. The petitioners No.1 to 5 hold DCA certificate and the petitioners No.5 and 6 hold PGDCA certificate issued by the Rajeev Gandhi Computer Saksharta Mission and Sarva Computer Saksharta Mission, respondents No.5 and 6 respectively. The certificates evidencing the qualifications of the petitioners have been brought on record cumulatively as Annexure-P/2. It is urged that the petitioners have higher education in computer and hence, they are fully eligible to be appointed as 'patwaris'. Documents have been brought on record to show that the respondents No.5 and 6 are affiliated to the University, namely, Maharshi Mahesh Yogi Vedic Vishwavidyalaya [for short 'the University'] which is recognized by the UGC. It is put forth that earlier, candidates possessing DCA from the said institutes were held to be eligible and appointed to the post of 'Patwari'.

4. It is pleaded that the Industries Directorate issued instructions to all District Employment Officers to enroll the candidate in employment exchange in NOC category those who had passed DCA or PGDCA from the Institute run by AISECT and Sanatan Charitable Trust. Copies of the instructions issued by the said Directorate, dated 4-4-2007 and 7-9-2006 have been brought on record as Annexure-P/ 4 and Annexure-P/5. The petitioners are registered and enrolled in employment exchange as is noticeable .fromAnnexure-P/6.

5. It is averred that the petitioners being eligible filed their forms with all the documents with the VYAPAM; that the examining body issued admit cards and the examination was held on 7-9-2008 and the result was declared in the month of June, 2009; that District-wise merit list was prepared; and that the petitioners successfully cleared the examination.

6. As set forth vide communication dated 20-6-2009 the petitioners along with other candidates were called upon to furnish original documents in support of their candidatures before the District Collector and pursuant to the said communication the petitioners submitted all the documents including the documents pertaining to their educational qualification in support of their candidatures. It is set forth that the office of the Commissioner, Land Records and Settlement,

the 2nd respondent herein, vide letter dated 19-12-2008 had already clarified that the certificates issued by the respondents No.5 and 6 affiliated to Maharshi Mahesh Yogi Vedic University are to be accepted as valid certificates. A copy of the letter dated 19-12-2008 has been brought on record as Annexure-P/10.

7. It is noticeable from the pleadings that the office of the respondent No.3 vide letter dated 15-01-08, Annexure P-12, had addressed to all District Collectors that (a) Higher Secondary and (b) '0' level certification from DOEACC/IETE or one year diploma course in computer from an institute run by registered/ recognized/affiliated to UGC recognized University or higher education in computer have been made requisite educational qualification. Thereafter, the said respondent issued further instructions on 27-7-2009 as contained in Annexure-P/14 to all the district collectors.

8. It is contended that the said instructions are patently arbitrary, illegal and has been issued in contravention of the terms of the advertisement which were prescribed in the advertisement on the head of educational qualifications. By the said executive instruction an additional qualification has been prescribed to be possessed by the successful candidates, which were not there at the time of holding of the examination and, therefore, the whole action smacks of arbitrariness. The petitioners hold valid and legal DCA certificates which are beyond reproach but the respondent No.2 has issued the instructions which tantamount to incorporation of an additional qualification. It is urged that though it is done in the garb and guise of clarification yet the petitioners who were initially eligible are sought to be disqualified by adding additional qualification which is contrary to well-settled principle that the prescribed eligibility criteria cannot be changed at a subsequent stage. It is asserted. that if the communication is allowed to stand the same would render almost 90% of the successful candidates ineligible. It is setforth that the certificates obtained by the petitioners are from the institutes run by the Maharshi Vedic Vishwavidyalaya and DOACC respectively and on the basis of the certificates of the said institutes successful candidates have been recruited but the respondent No.2 on the basis of erroneous interpretation of Rule 1.8 of the M.P. Patwari Selection and Examination Conduction Rules, 2008 [for short '2008 Rules' have issued the present instructions. It is urged that the interpretation placed by the respondent No.2 is absolutely erroneous and has been deliberately done to oust the likes of the petitioners and affect their selection. It is also the stand of the petitioners that they fulfil the eligibility criteria having passed one year diploma of DCA but the said clause is being misinterpreted and the petitioners are being disqualified on account of subsequent orders. Adding of additional qualification after the advertisement is impermissible in law and that makes the whole action arbitrary and unsustainable. There is no justification or warrant not to accept the certificates issued by the institutes which are duly recognised by the UGC and the University.

9. Be it placed on record, the petitioners have also challenged the constitutional validity of the Rule 1.8 of the Rules and called in question the legal propriety as well as validity of the letter-circular on the ground that it runs counter to the Rule as it adds an additional qualification which has been prescribed in the advertisement. Thus, the challenge is two fold. It is urged that Rule 1.8 of the 2008 Rules is illegal, arbitrary and unreasonable as it prescribes siich qualification of higher standard of computer for the post of 'Patwari' though the said qualification has no nexus with the duties performed by the 'patwaris'. It is put forth that even for the post of Data Entry Operator or I.T. Operators such higher qualification of Diploma has not been made essential. It is urged that when minimum qualification for the post of 'patwari' has been prescribed is to be Higher Secondary or High School (10+2 Pattern), the prescription of qualification of diploma in computer application is irrational inasmuch as the said qualification is totally unwarranted if nature of duties of Patwaris'are taken into consideration. In this factual matrix it has been prayed to declare the Rule 1.8 of 2008 Rules as unconstitutional being violative of Article 14 of the Constitution of India and further and for issue of a writ of certiorari for quashment of the order dated 27-7-2009 contained in Annexure-P/14. An additional prayer has been made to issue a writ of mandamus commanding the respondents No. 1 to 4 to scrutinise the documents furnished by the petitioners on the basis of earlier instructions dated 20-7-2009 and to issue order of appointment.

10. When the matter was listed on 14-9-2009 this Court felt that impleadment of the University, namely, Maharshi Vedic Vishwavidyalaya is imperative and accordingly, permission was granted to implead the said University through the Registrar which was carried out. After filing requisites the University was served and has been represented by the counsel. When the matter was listed on 23-9-2009 Mr. Deepak Awasthi, learned Govt. Advocate for the State submitted that the State does not intend to file any return as documents are on record which would speak for themselves and what is necessary is to interpret the said documents and as the whole thing hinges on interpretation no counter is necessary to meet any kind of allegation. As regards the constitutional validity of the Rule is concerned it is submitted by him that computer knowledge is necessitous in the modern administrative setup and further the petitioners having undertaken the examination have woken up to assail the validity of the Rule which manifestly is an afterthought. It is also propounded by him that it is the prerogative of the employer to provide the eligibility criteria for a particular post.

11. Mr. Avinash Zargar, learned counsel for the respondent No.6 stated with certitude that the University need not to file the return as. it is only required to refer to the enactment, namely, Maharshi Mahesh Yogi Vedic Vishwavidyalaya Adhiniyam, 1995 by which the University was created. The learned counsel for the State as well as the University submitted without any kind of hesitation that

the fulcrum of the matter rests on appreciation of the advertisement and other documents brought on record and the construction placed thereupon and, therefore, the matter should be heard as the State is suffering because of an order of stay operating as a consequence of which it is unable to fill up the posts.

12. In view of the aforesaid we thought it apt to proceed to decide the matter as we were convinced in course of hearing that as an actual fact, a counter affidavit was not the warrant to put the controversy to rest. We were further inclined to think so as the challenge to the constitutional validity really melted into insignificance and, in fact, the learned counsel appearing for the petitioners in their wisdom restricted their submissions to the interpretation of the provision. However, we shall for the sake of completeness, advert to the constitutional validity and thereafter proceed to dwell upon the issue which has been urged with a lot of vigour and vehemence by the learned counsel for the petitioners.

13. Rule 1.8 which is in Hindi, on being translated into English reads as follows:-

> *"1.8 Educational qualifications -*
>
> *Passing of Higher Secondary or High School (10+2) is necessary. In addition, '0' Level Certification from DOEACC/ IETE or one year Diploma in Computer Application (DGA) from an institute run by a registered/recognized/affiliated with the University recognized by the UGC or higher education in computer."*

14. The submission of Mr. V.K. Shukla, learned counsel for the petitioners who has led the argument is that when there is a prescription for passing of 10+2 Examination the prescription for passing of one year diploma in computer application is not only irrelevant but also ushers in an anomalous situation. On a query being made whether a person who has passed High School Certificate Examination can undertake the one year course or not, learned counsel appearing in all cases fairly stated that they can undertake course in DCA. Thus, it is perceivable that it is not an anomalous requirement. As far as requirement is concerned, it is urged by Mr. Deepak Awasthi, learned Govt. Advocate for the State that the said qualification has been prescribed as 'patwaris' are required to keep datas and it is felt necessary to curb any kind of manipulation and further to facilitate keeping of entries in a scientific manner. It is also canvassed by him that keeping in view advancement in computer science provision has been made and the petitioners having appeared in the Patwari Examination cannot take a somersault to challenge the 2008 Rules. It is proponed by the learned Govt. Advocate that requirement for a particular job is within the domain of the State Government.

15. In this context, we may notice a few authorities in the field. In *V.K.Sood vs. Secretary, Civil Aviation and others.* AIR 1993 SC 2285 the Apex Court after

referring to the decisions rendered in *State of Mysore vs. P. Narsingh Rao,* AIR 1968 SC 349, *State of Jammu & Kashmir vs. Triloki Nath Khosa,* AIR 1974 SC 1 and *State of Orissa vs. N.N.Swamy,* AIR 1977 SC 1237 expressed thus:

> *"6. .....in the exercise of the rule making power, the President or authorised person is entitled to prescribe method of recruitment, qualifications both educational as well as technical for appointment or conditions of service to an office or post under the State. The rules thus having been made in exercise of the power under proviso to Art. 309 of the Constitution, being statutory cannot be impeached on the ground that the authorities have prescribed tailor made qualifications to suit the stated individuals whose names have been mentioned in the appeal."*

16. In *Sanjay Kumar Manjul vs. Chairman, UPSC and others,* (2006)8 SCC 42 it has been held as follows:

> *"25. The statutory authority is entitled to frame the statutory rules laying down the terms and conditions of service as also the qualifications. essential for holding a particular post. It is only the authority concerned which can take ultimate decision therefor.*
>
> *26. The jurisdiction of the superior courts, it is a trite law, would be to interpret the rule and not to supplant or supplement the same.*
>
> *27. It is well settled that the superior courts while exercising their jurisdiction under Article 226 or 32 of the Constitution of India ordinarily do not direct an employer to prescribe a qualification for holding a particular post."*

17. In this regard we may refer with profit to the decision rendered in *Union of India us. Pushpa Rani and others,* (2008) 9 SCC 242 wherein it has been held as follows:

> *"35. A careful reading of the policy contained in Letter dated 9-10-2003 shows that with a view to strengthen and rationalise the staffing pattern, the Ministry of Railways had undertaken review of certain cadres. The basis of the review was functional, operational and administrative requirement of the Railways. This exercise was intended to improve the efficiency of administration by providing incentives to the existing employees in the form, of better promotional avenues and at the same time requiring the promotees to discharge*

more onerous duties. The policy envisaged that additional posts becoming available in the higher grades as a sequel to restructuring of some of the cadres should be filled by promotion by considering such of the employees who satisfy the conditions of eligibility including the minimum period of service and who are adjudged. suitable by the process of selection. This cannot be equated with upgradation of posts which are required to be filled by placing the existing incumbents in the higher grade without subjecting them to the rigour of selection.

36. In view of the above discussion, we hold that the Railway Board did not commit any illegality by directing that the existing instructions with regard to the policy of reservation of posts for Schedule Castes and Scheduled Tribes will apply at the stage of effecting promotion against the additional posts and the Tribunal committed serious illegality by striking down para 14 of Letter dated 9-10-2003.

37. Before parting with this aspect of the case, we consider it necessary to reiterate the settled legal position that matters relating to creation and abolition of posts, formation and structuring/restructuring of cadres, prescribing the source/ mode of recruitment and qualifications, criteria of selection, evaluation of service records of the employees fall within the exclusive domain of the employer. What steps should be taken for improving efficiency of the administration is also the preserve of the employer. The power of judicial review can be exercised in such matters only if it is shown provision or is patently arbitrary or is vitiated due to mala fides. The court cannot sit in appeal over the judgment of the employer and ordain that a particular post be filled by direct recruitment or promotion or by transfer. The court has no role in determining the methodology of recruitment or laying comparative evaluation of the merit of the candidates. The court cannot. suggest the manner in which the employer should structure or restructure the cadres for the purpose of improving efficiency of administration."

(Emphasis supplied)

18. in view of the aforesaid enunciation of law we are of the considered opinion that the prescription of requirement for having DCA cannot be treated to be arbitrary or irrational to invite the wrath of Article 14 of the Constitution of India. Therefore, we hold the Rule to be intra vires.

19. The next aspect which requires to be dwelled upon is whether there has been a change of condition in the advertisement by issuing the letter-circular. The instructions for holding the Patwari Examination has been brought on record as Annexure-P/16. The question arises whether the instructions run counter to the Rules 2008 or the Advertisement. The relevant portion being translated into English read as under:

> *"3. The DCA certificates submitted by the candidates were sent by some Collectors to this Office which were forwarded, to the University concerned for verification and requisite information as regards their veracity was sought. It was apprised by the Universities that even if an institution is recognised/affiliated/registered affiliated with the University then too it has no right to issue any kind of certificate. The DCA certificates if issued by an institute under its seal and signature are invalid. The certificate issued only by the University under its seal and signature are valid. Similarly, the DOEACC Society has informed that the for computers the '0' Level Certificates issued by the DOEACC Society Delhi are valid. The certificates issued by an institution affiliated with DOEACC are invalid.*
>
> *"4. Hence, it is instructed that only those DCA certificates of the selected candidates for the post of 'Patwari' shall be valid which have been issued by the University under its seal and signature. The DCA certificates containing seal and signature of the institutes which are registered/recognized / affiliated by the University, being illegal shall be held invalid. Similarly, if any institute which is affiliated with DOEACC then the 'O' Level Certificate issued only by the DOEACC Society, Delhi under its seal and signature shall be held valid but not the certificates issued by the affiliated institute."*

20. The submission of the learned counsel for the petitioners is that the Rule prescribes for obtaining of 'O' Level Certificate from DOEACC/IETE or one year diploma in computer application (DCA) from an institute fun by registered/ recognised/affiliated to a UGC recognized University or higher education in computer and that means a registered and recognized institute can issue a Diploma in Computer Application and that having been produced the same should suffice, whereas vide letter-circular dated 27-7-09 it is mandated the certificate given by the institute is not to be accepted and it has to be given by the institute with seal and signature of the competent authority of the University. Similar prescription is also there from DOEACC Society, New Delhi. Thus, what

is provided in the letter-circular is that the seal and signature of the competent authority of the University. As has been submitted by Mr. Shukla, learned counsel appearing for the petitioners, the same runs counter to the Rules if the Rule is held valid. It is contended by him that an additional qualification is required as per the said letter-circular which is not in existence in the Rule. The learned counsel submitted that even if a qualification is prescribed in the form of an advertisement the same cannot be materially changed by later executive instructions.

21. In this context we may fruitfully refer to the decision in *Dr. Chetkar Jha vs. Dr. Vishwanath Prasad Verma and others*, AIR 1970 SC 1832 wherein the Apex Court has held as under:

> *"12. .....Admittedly, the Vice-Chancellor had obtained such approval for filling up the vacancy by direct. recruitment and also for the advertisement in terms of the Statute laying down the qualifications for the post. Once, therefore, such an approval had been obtained, no further approval would be necessary for the various consequential steps which would have to be taken to bring about the appointment and fill in the vacancy. Furthermore, the revision in the advertisement became necessary because the advertisement given by the Commission was not in conformity with the University Statute and the requisition made by the Vice-Chancellor for which he had already obtained the Chancellor's approval. In other words, he had the advertisement revised so as to bring it in accord with his requisition which was sanctioned by the Chancellor. That could only be done by removing the limitation under which contrary to the Statute only candidates with M.A. Degrees in Political Science could apply. The Chancellor, therefore, was in error in holding that the revises advertisement required his approval and that in the absence of such approval it was invalid or that the Commission's recommendation and the appointment by the Syndicate based thereon were bad in law on that account".*

22. In *N.T. Bevin Katti, etc., vs. Karnataka Public Service Commission and others*, AIR 1990 SC 1233 it has heen held as follows:

> *"13. .....Where proceedings are initiated for selection by issuing advertisement, the selection should normally be regulated by the then existing rules and Government orders and any amendment of the rules or the government order pending the selection should not affect the validity of the*

selection made by the selecting authority or the Public Service Commission unless the amended rules or the amended Government orders issued in exercise of its statutory power either by express provision or by necessary intendment indicate that amended Rules Shall be applicable to the pending selections. See P. Mahendra vs. State of Karnataka, (1989) 4 JT 459: AIR 1990 SC 405."

23. In *Gopal Krushna Rath vs. M.A.A. Baig (dead) by L.Rs. And others,* AIR 1999 SC 2093 the Apex Court has ruled thus:

"6. When the selection process has actually commenced and the last date for inviting applications is over, any subsequent change in the requirement regarding qualification by the University Grants Commission will not affect the process of selection which has already commenced. Otherwise it would involve issuing a fresh advertisement with the new qualifications. In the case of P. Mahendran vs. State of Karnataka, (1990)1 SCC 411 at 416: (AIR 1990 SC 405 at pp.408 and 409) this Court has observed:

'It is well settled rule or construction that every statute or statutory rule is prospective unless it is expressly or by necessary implication made to have retrospective effect'.

The Court further observed that:

"Since the amending rules were not retrospective, it could not adversely affect the right of those candidates who were qualified for selection and appointment on the date they applied for the post, moreover, as the process of selection had already commenced when the amending Rules came into force, the amended Rules could not affect the existing rights of those candidates who were being considered for selection as they possessed the requisite qualifications prescribed by the Rules before its amendment.'

7. In the present case, therefore, the appellant possessed the necessary qualifications as advertised on the last date of receiving applications. These qualifications were in accordance with the Rules/guidelines then in force. There is also no doubt that the appellant obtained higher marks than the original respondent No. 1 at the selection. There is no challenge to the process of selection, nor is there any allegation of mala fides in the process of selection."

24. In *Sonia vs. Oriental Insurance Co. Ltd. and others,* (2007) 10 SCC 627 the Apex Court referred to the decision rendered in *N.T. Devin Katti vs. Karnataka Public Service Commission,* (1990) 3 SCC 157 and expressed the view thus:

> *"10. In N.T. Devin Katti vs. Karnataka Public Service Commission, this Court has held that where selection process has been initiated by issuing an advertisement inviting applications, selection should normally be regulated by the rule or order then prevalent and also when advertisement expressly states that the appointment shall be made in accordance with the existing rule or order, subsequent amendment in the existing rule order will not affect the pending selection process unless contrary intention is expressly or impliedly indicated."*

25. In *Mohd. Sohrab Khan vs. Aligarh Muslim University and others,* (2009) 4 SCC 555 their Lorships relying on the decision rendered in *A.P. Public Service Commission vs. B. Swapna,* (2005) 4 SCC 154 and expressed the as under:

> *"28. In A.P. Public Service Commission vs. B. Swapna, at para 14 it was held by this Court that norms of selection cannot be altered after commencement of selection process and the rules regarding qualification for appointment, if amended, during continuation of the process of selection do not affect the same.*
>
> *29. Further at para 15 of B. Swapna case it was held that the power to relax the eligibility condition, if any, to the selection must be clearly spelt out and cannot be otherwise exercised. The said observations are extracted herein below: (SCC pp. 159-60, paras 14-15)*
>
> *'14. The High Court has committed an error in holding that the amended rule was operative. As has been fairly conceded by learned counsel for Respondent 1 applicant it was the unamended rule which was applicable. Once a process of selection starts, the prescribed selection criteria cannot be changed. The logic behind the same is based on fair play. A person who did not apply because a certain criterion e.g. minimum percentage of marks can make a legitimate grievance, in case the same is lowered, that he could have applied because he possessed the said percentage. Rules regarding qualification for appointment if amended during*

continuance of the process of selection do not affect the same. That is because every statute or statutory rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the rules showing the intention to affect existing rights the rule must beheld to be prospective. If the rule is expressed in a language which is fairly capable of either interpretation it ought to be considered as prospective only. (See P. Mahendran vs. State of Karnataka and Gopal Krushna Rath vs. MAA Baig.)

15. Another aspect which this Court has highlighted is scope for relaxation of norms. Although the Court must look with respect upon the performance of duties by experts in the respective fields, it cannot abdicate its functions of ushering in a society based on the rule of law. Once it is most satisfactorily established that the Selection Committee did not have the power to relax essential qualification, the entire process of selection so far as the selected candidate is concerned gets vitiated. In P.K. Ramachandra Iyer vs. Union of India this Court held that once it is established that there is no power to relax essential qualification, the entire process of selection of the candidate was in contravention of the established norms prescribed by advertisement. The power to relax must be clearly spelt out and cannot otherwise be exercised."

26. The present controversy is to be tested on the anvil of the aforesaid pronouncement of law. The question that emanates for consideration is whether the letter-circular in effect runs counter to the Rule and whether it travels beyond the stipulations in the advertisement. Before we delve into factual scenario in this contextual set up and the submissions proponed by the learned counsel for the parties, we think it apposite to notice a few decisions in the field. In *Union of India and ors. Vs. Sh. Somasundaram Viswanath and Ors.* AIR 1988 SC 2255, it has been held as follows:

"6..... If there is a conflict between the executive instructions and the rules made under the proviso to Art. 309 of the Constitution of India, the rules made under proviso to Art. 309 of the Constitution of India prevail, and. if there is a conflict between the rules made under the proviso to Art. 309 of the Constitution of India and the law made by the appropriate Legislature the law made by the appropriate Legislature prevails....."

27. In *Senior Supdt. of Post Office and Ors Vs. Izhar Hussain,* AIR 1989 SC 2262, a two-Judge bench of the Apex Court has stated thus:

> *".....A statutory rule cannot be modified or amended by executive instructions. A valid rule having some lacuna or gap can be supplemented by the executive instructions, but a statutory rule which is constitutionally invalid cannot be validated with the support of executive instructions. The instructions can only supplement and not supplant the rule. "*

28. In *Ram Dayal Prajapati Vs. State of M.P. and ors.* AIR 2003 MP 171, it has been held as under:

> *"14. In the case of Additional District Magistrate (Rev.) Delhi Admn. Vs. ShriRam AIR 2000 SC 2143 it has been stated that it is a well recognized principle of statute that conferment of rule making power by an Act does not enable the rule making authority to make rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.*
>
> *15. in the case of Agricultural Market Committee Vs. Shalimar Chemical Works Ltd. AIR 1997 SC 2502 it was laid down that if a delegated legislation creates a legal fiction which is beyond the scope of principal Act the same has to be regarded as ultra vires."*

29. The submission of Mr. Shukla, learned counsel for the petitioners is that the Rule 1.8 basically stipulated a certificate of one year diploma from an institute and the advertisement also stipulated accordingly. Clause 1.8 of Chapter I of the advertisement has been pressed into service. The same being translated into English reads as follows:

> *"1.8 Educational qualifications -*
>
> *Passing of Higher Secondary or High School (10+2) is necessary. In addition, '0' Level Certification from DOEACC/ IETE or one year Diploma in Computer Application (DCA) from an institute run by a registered/recognized/affiliated with the University recognized by the UGC or higher education in computer."*

30. From the aforesaid it is perceptible that what has been really stipulated is that a candidate must have one year Diploma in Computer Application (DCA) from an institute affiliated/registered/recognised by a University which is recognised by the University Grants Commission. The letter-circular provides that the

certificate issued by a University containing seal. and signature would be valid. The certificate issued by the institute on its own seal and signature of its authority is not to be accepted. The submission of Mr. Deepak Awasthi and Mr. Avinash Zargar is that the Rule and the advertisement are absolutely clear that the diploma course should be from an institute run by a recognized/registered/affiliated by a University which is recognized by the University Grants Commission. It is their stand that it is the University which issues a degree or diploma. In this context we may refer with profit to Section 6 of the Madhya Pradesh Vishwavidyalaya Adhiniyam, 1973 which deals with the powers of the University. Sub-Section (9) empowers the University to institute degrees, diplomas, certificates and other academic distinctions. Sub-Section (10) empowers the University to confer degrees and other academic distinctions on the basis of examinations, evaluation or any other method of testing. Sub-Section (12) confers power on the University to withdraw degrees, diplomas, certificates and other academic distinctions for good and sufficient reasons. Thus, from the said provision it is clear crystal that it is the University which confers diplomas, degrees, certificates and other academic distinctions.

31. Be it noted, many of the candidates had produced certificates from the institutes run under the Maharshi Mahesh Yogi Vedic Vishwavidyalaya Adhiniyam, 1995 which is an Act to establish and incorporate a University in the State of Madhya Pradesh and to provide for education and prosecution of research in Vedic learnings and practice and to provide for matters connected therewith or incidental thereto. The University as has been defined under the Act means the Maharshi Mahesh Yogi Vedic University established under this Act. Section 4 of the Act deals with powers of the University. Sub-section 4 (1) (a) of Section 4 read as under:

> *" 4 (i) (a) grant, subject to such conditions a the University may determine, diplomas or certificates and confer degrees or other academic distinctions on the basis of examination, evaluation or any other method of testing on, persons and withdraw any such diplomas, certificates, degrees or other academic distinctions for good and sufficient cause;"*

Section 2(1) defines -'institution'. It reads as under:

> *"Institution" means an academic institution, not being a college, maintained by the University."*

Section 2(o) defines 'recognised institution' which is as under:

> *"Recognised institution" means an institution of higher learning recognised by the University."*

32. Thus, it is evincible that Section 4 of the Act deals with powers of the University. Sub-section (vi) empowers the University to establish and maintain colleges, institutions and Halls. The institutions are established by the University but the diplomas are eventually conferred by the University itself. What is required by the letter-circular is to produce diplomas or certificates with the seal of the University and with the signature of the competent authority of the University. Hence, there is no change in the terms incorporated in the advertisement. It does not remotely transgress the stipulation in the Rule. What the letter-circular postulates is only the method how the certificate is to be produced as per law. It is in accord with the Rule and the advertisement. Therefore, we are unable to accept the spacious submissions raised by the learned counsel for the petitioners that the same transgresses the Rule or the advertisement.

33. Consequently, we perceive no merit in the writ petitions and accordingly, they are dismissed without any order as to costs.

Petition dismissed.

I.L.R. [2010] M. P., 1065
WRIT PETITION
Before Mr. Justice P.K. Jaiswal
15 January, 2010*

SHIV CHARAN BHURTIYA ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Sections 69 & 86(2) - *Prescribed authority on the basis of report of enquiry found petitioner guilty of financial irregularities and directed Gram Panchayat for initiation of proceeding for removal of petitioner - On refusal by the Gram Panchayat, the prescribed authority passed order of removal of petitioner from the post of Panchayat Karmi and denotified him from post of Secretary - Held - Gram Panchayat is bound to comply with direction issued by State Government or prescribed authority u/s 86(2) otherwise the said authority shall have all necessary powers to get complied with direction - Decision of prescribed authority is not against the provision - Petition dismissed.* (Paras 8 to 11)

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धाराएँ 69 व 86(2) – विहित प्राधिकारी ने जाँच रिपोर्ट के आधार पर याची को वित्तीय अनियमितताओं का दोषी पाया और याची को हटाने की कार्यवाही आरम्भ करने के लिए ग्राम पंचायत को निदेश दिया – ग्राम पंचायत द्वारा इनकार करने पर विहित प्राधिकारी ने याची को पंचायत कर्मी के पद से हटाने

*W.P. No.596/2009 (Jabalpur)

का आदेश पारित किया और उसकी सचिव के पद से अधिसूचना रद्द की – अभिनिर्धारित – ग्राम पंचायत राज्य शासन या विहित प्राधिकारी द्वारा धारा 86(2) के अन्तर्गत जारी निदेशों का अनुपालन करने के लिए बाध्य है, अन्यथा उक्त प्राधिकारी को निदेश का अनुपालन कराने की सभी आवश्यक शक्तियाँ होंगी – विहित प्राधिकारी का विनिश्चय उपबंध के विरुद्ध नहीं है – याचिका खारिज।

Cases referred :

2007(4) MPHT 431, 2008(4) MPHT 132, 2009(1) MPLJ 545.

Alok Kumar, for the petitioner.

Samdarshi Tiwari, G.A., for the respondent Nos.1, 2 & 3.

ORDER

P.K. JAISWAL, J. :–Heard.

By this writ petition under Article 226 of the Constitution of India, the petitioner is challenging the order dated 29/12/2008 by which respondent No.3-Collector, Shahdol, in exercise of powers conferred under Section 86(2) of M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (in short 'the Act') terminated the petitioner from the post of Panchayat Karmi, Gram Panchayat, Bocharo, Janpad Panchayat, Beohari and in exercise of powers conferred under Section 69 of the Act de-notified him from the post of Panchayat Secretary.

2. By the impugned order, respondent No.3 has found gross irregularities which were committed by the petitioner while he was discharging the functions of Panchayat Secretary. Up-sarpanch, Panchas and other villagers of Gram Panchayat, Bocharo have made a complaint (Annexure-R/4-1) against the petitioner who was then working as Panchayat Karmi of Gram Panchayat, Bocharo in which various allegations were made with respect of his working. On this complaint, Shri S.K. Shukla, Dy. Director, Panchayat and Social Justice was appointed as Enquiry Officer. The said enquiry officer conducted the enquiry and submitted his enquiry report (Annexure-R/4-2) to respondent No.3-Collector, Shahdol in which the petitioner was found to be indulging in various financial and other irregularities. Thereafter respondent No.3 has issued a show cause notice to the petitioner for his explanation on the irregularities committed by him vide Annexure-R/4-3. On 14/2/2007 the petitioner submitted his reply to the said show cause notice and admitted most of the irregularities and submitted that the said irregularities were committed because of negligence and prayed for forgiveness vide Annexure-R/4-4 dated 19/2/2007 in which para-11 the petitioner states as under :

> "11. यह कि रोकडवही दिनांक 17.5.2005 के पश्चात मेरे लापरवाही भूल वश संधारित नहीं की गई है दिनांक 22.6.2005 से 14.11.2006 तक विभिन्न बैठकों से आहरित राशि 419669.00 रूपये आय व्यय कैश बुक में दर्ज नहीं किए गये नहीं प्रमाणक उपलब्ध है । चूंकि प्रार्थी 419669.00 विभिन्न कार्य एवं विभिन्न योजनाओ से संबंधित है जिससे हैण्ड पम्प निर्माण दी है रामप्रताप के घर के पास

2. बाबूलाल के घर के पास । जिसके प्रमाणक ग्रामपंचायत सरपंच के पास बताया गया है । रोड निर्माण वार्ड कं0 11 रोड निर्माण लोनि निटोला मध्यान्य भोजन चेक भुगतान एवं इन्द्रा आवास योजना हित ग्राही के चेंक भुगतान पेश इस सभी भुगतान में प्रमाणित बाउचर सरपंच के पास होने के कारण रोकड वहीं संधारण लम्बित है । चूँकि उक्त राशि का आहरण वितरण ग्राम पंचायत एवं ग्राम सभा के माध्यम से ही राशि का उपयोग किया गया है जो जनता के हित में व्यय है जिसका मौके पर कार्य प्रमाणित किया जा सकता है । अभिलेख प्राप्त आते ही श्रीमान के निर्दश पर रोकड बही संधारण एवं वर्ष 2005.06 का आडित आवेक्षण करा लिया जावेगा । प्रार्थी के उपर बिन्दु कं 1 से 10 तक का आरोपित है इस संबंध में उक्त जबाव श्रीमान के समक्ष प्रस्तुत करते हुए लिपकीय त्रुटियों को ना देखते हुए सहानुभूति पूर्वक विचार कर क्षमा करे तथा भविष्य में ऐसी गलतियों की पुनरावृत्ति न की जावेगी ।"

3. The reply was not found satisfactory by respondent No.3 and, therefore, in exercise of powers conferred under Section 69(1) of the Act, the petitioner was denotified from the post of Secretary vide order dated 21/2/2007 (Annexure-R/4-5). The said order was challenged by the petitioner by filing an appeal No.142/2006-07 before respondent No.2-Commissioner, Rewa. Respondent No.2 vide order dated 3/3/2007 (Annexure-P/4) dismissed the said appeal at motion stage. Feeling aggrieved, the petitioner approached to respondent No.1-State Minister in Revision No.F-5-15/22/P-2/07. Respondent No.1 vide order dated 21/3/2007 stayed the order of the Collector and Commissioner. Against the aforesaid order dated 21/3/2007 (Annexure-P/5) passed by respondent No.1, respondent No.5 had filed Writ Petition No.1147/2007. On 5/4/2007 this Court quashed the order dated 21/2/2007 (Annexure-P/4), order dated 3/3/2007 (Annexure-P/4) and order dated 21/3/2007 (Annexure-P/5) with the consent of learned counsel for the parties, the matter was remitted to respondent No.3-Collector, Shahdol for passing a reasoned order, after affording opportunity of hearing to the parties. Para- 3 and 4 of the order dated 5/4/2007 passed in W.P. No.4471/2007 read as under :

> "After arguing for some time, learned counsel for the parties realising the position that the orders of the Collector and Commissioner are non-speaking orders and the order of the second respondent/ State Minister is without jurisdiction, prayed that this petition be disposed of by the quashing the order dated 21/3/2007 (Annexure-P-6) passed by the Commissioner, Rewa, the order dated 21/2/2007 (Annexure P-4) passed by the Collector, Shahdol and the Collector, Shahdol be directed to pass a reasoned order after affording opportunity of hearing to the petitioner in regard to the show cause notice (Annexure P-3).
>
> Having gone through the order dated 21/2/2007 (Annexure P-4) and the order dated 3/3/2007 (Annexure P-6), I am of the

view that the Collector and the Commissioner has not passed reasoned order in the matter. The order of the second respondent also being without jurisdiction is not sustainable. Thus, as agreed by the learned counsel for the parties, the orders dated 21/2/2007 (Annexure P-4) the order dated 3.3.2007 (Annexure P-6) and th order dated 21.3.2007 passed by the second respondent are hereby quashed. The matter is remitted to the Collector, Shahdol to take appropriate decision and pass a reasoned order after affording opportunity of hearing to the third respondent."

4. Respondent No.3-Collector, Shahdol in compliance of the order dated 5/4/2007 issued show cause notice to the petitioner on 24/4/2007, 21/5/2007, 11/6/2007, 9/7/2007 and 16/7/2007 respectively in respect of the charges of financial irregularities levelled against him. The petitioner in spite of the aforesaid notices failed to appear before respondent No.3 nor he submitted any explanation to the said show cause notices nor he produced any document to controvert the allegations made against him. Respondent No.3 after appreciating the record, enquiry report of the Dy. Director, Panchayat and Social Justice (Annexure-R/4-2) and the reply of the petitioner to the said show cause notice dated 14/2/2007 came to the conclusion that all the charges levelled against the petitioner has been found proved to the extent that an amount of Rs.4,19,669/- has been withdrawn without there being any entry in the cash book and he has been found to be guilty of financial irregularities of Rs.4,56,869/-. The petitioner has been found to be guilty in discharging the duties as the allegations made against him and held that he does not deserve to be continued on the post of Secretary and his continuance in the office is undesirable in the interest of public. The following charges has been found proved against the petitioner which reads as under :

"1. कुडियालाना टटियाझर में बोरी बंधान कार्य मुताबिक मस्टर रोल कमांक 1 एवं 4 में दिनांक 15.11.04 से 28.11.04 तक कार्य कराया किंतु कार्य प्रारंभ होने के पूर्व ही ग्राम पंचायत के प्रस्ताव कंमाक 04 दिनांक 22.9.04 में उक्त कार्य का मूल्यांकन होना बताया जाकर रू0 37200.00 आहरण दिनांक 13.10.2004 को किया गया तथा रोकडबही के व्या कांक 19 दिनांक 14.10.2004 को राशि का व्यय होना दर्शाया गया । इस प्रकार रू0 372000.00 का दुरूपयोग किया जाना प्रमाणित पाया जाता है ।

2. श्री भूर्तिया के द्वारा निराश्रित हितग्राही श्यामलाल एवं दददी कोल की मत्यु की सूचना कमश; 8 माह एवं 2 वर्ष पश्चात जनपद पंचायत को दी गई । इस अवधि में मत हितग्राहियों की राशि आहरण की जाकर शासकीय राशि का दुरूपयोग किया जाना पाया गया ।

3. श्री भूर्तिया के द्वारा राष्टीय परिवार सहायता के हितग्राही बूटी बाई एवं राजवती से 500 500 रूपये की रिश्वत लेना प्रथम दृष्टया प्रमाणित पाया गया ।

4. श्री भूर्तिया के द्वारा शासन के नियमों के विपरीत रिश्वत लेकर फर्जी राशनकार्ड बनाये गये ।

5. श्री भूर्तिया द्वारा ग्राम पंचायत की रोकडबही दिनांक 03.04.97 में पूर्व सरपंच के हस्ताक्षर कोरे पन्ने में कराये गये ।

6. श्री भूर्तिया के द्वारा ग्राम पंचायत के रोकडबही दिनांक 01.04.04 से 31.03.05 तक प्रत्येक पृष्ठ पर वर्तमान व पूर्व सरंपच दोनो के हस्ताक्षर कराये गये रोकडबही में आय व्यय का गोसवारा नहीं दर्शाया गया नलकूंप खनन का कार्य जनहित के विरूद्ध स्वाहित में कराया गया है ।

7. श्री भूर्तिया के नियुक्ति के समय भूर्तिया का सगा भाई रामचरण भूर्तिया उपसरपंच पद पर निर्वाचित था जो पंचायत राज्य अधिनियम के विरूद्ध नियुक्ति की गई थी ।

10. श्री भूर्तिया के द्वारा पंचायत की रोकडबही दिनांक 17.05.05 के पश्चात संधारित नहीं की गई जबकि दिनांक 22.06.05 से 14.11.06 तक विभिन्न बैकों पंचायत खातों से कुल रू0 419669.00 ;चार लाख उन्नीस हजार छ; सौ उनहत्तर; रू0 आहरित कर राशि का दुरूपयोग प्रभक्षण किया गया ।

5. Thereafter Collector on 2/11/2007 in exercise of powers conferred under Section 86(1) of the Act has issued directions to respondent No.4-Gram Panchayat, Bocharo to initiate proceedings for removal of the petitioner from the post of Panchayat Secretary as the power to remove the Panchayat Karmi is with the Gram Panchayat. Thereafter again a reminder was sent and respondent No.3 issued a show cause notice dated 19/2/2008 (Annexure-R/4-8) to the then Sarpanch, Gram Panchayat, Bocharo. Respondents 4 and 5 vide their reply dated 7/3/2008 intimated the Collector that they had passed a resolution not to remove the petitioner on 18/11/2007 and if learned authority found that petitioner has committed serious irregularities and in public interest his continuation in the office is undesirable, then appropriate action can be taken for his removal under Section 86(2) of the Act.

6. The State Government vide its circular dated 27/1/2006 given powers in the certain cases to the Collector to remove the Panchayat Karmi (Secretary). The State Govt. has made it clear that in case the Collector received complaint with regard to the working of Panchayat Karmi (Secretary), then in exercise of powers under Section 86(1) of the Act he can direct the concerned Gram Panchayat to remove the Panchayat Karmi within the stipulated period and if it fails then same can be done by the Collector in exercise of powers conferred under Section 86(2) of the Act. Thus, the Collector has full power to remove a Panchayat Karmi in case proof of misconduct. Para-2 of the circular dated 27/1/2006 reads as under:

"2. यदि सरपंच द्वारा धारा 86;1; तहत जारी आदेश के अनुकम में निर्धारित समयावधि में पंचायतकर्मी को नहीं हटाया जाता है तब अधिनियम की धारा 86;2द्ध

के तहत कलेक्टर स्वयं ग्राम पंचायत के सरपंच की शक्तियों का प्रयोग करते हुए पंचायतकर्मी को हटाने की कार्यवाही करेंगें ।"

7. Respondent No.3 in exercise of powers conferred under Section 86(2) of the Act passed an order for removal of the petitioner from the post of Panchayat Karmi and de-notified him from the post of Secretary vide impugned order 29/12/2008. From the above facts, the contention of learned counsel for the petitioner that the impugned order dated 29/12/2008 has been passed in violation of principles of natural justice is incorrect and contrary to the facts on record. After decision from this Court on 5/4/2007, the petitioner was summoned to be remained present before respondent No.3 on 24/4/2007, 21/5/2007, 11/6/2007, 9/7/2007 and 16/7/2007 respectively. Number of charges levelled against the petitioner as reproduced herein above in the preceding paragraphs have been found proved. The petitioner has been found to be guilty of the financial irregularities of Rs.4,56,869/-. The act of the petitioner has been found to be involved in gaining unwarranted gain or advantage for him which is detrimental to the purpose for which the enactment has been made and the scheme has been prepared.

8. The enquiry was conducted by respondent No.3 in pursuance to the order passed by this Court on 5/4/2007 in W.P. No.4471/2007. Under the provisions of M.P. Panchayat Services (Discipline and Appeal) Rules, 1999 (in short 'Rules of 1999') the order of major penalty cannot be passed unless an enquiry is held. In the present case the enquiiry was held by the Dy. Director on 5/1/2007 and thereafter with the consent of the parties, the matter was again remitted to respondent No.3 to hold an enquiry and decide it in accordance with law. Respondent No.3 after giving opportunity of hearing to the petitioner inquired the matter and recommended the Gram Panchayat to pass a resolution for removal of the petitioner. The then Sarpanch of Gram Panchayat contrary to the enquiry report passed a resolution not to remove him in spite of the fact that number of irregularities are found to be true and, therefore, respondent No.3 in exercise of powers conferred under Section 86(1) of the Act has issued a notice to the Gram Panchayat on 19/2/2008 which was duly replied by Gram Panchayat on 7/3/2008. By the circular dated 27/1/2006 the Collector has full power to remove a Panchayat Karmi. Thus, at this stage, when the petitioner himself gave his consent for remitting the matter to the Collector and taking an appropriate decision by passing a reasoned order, cannot dispute or challenge the order on the ground that action of respondent No.3 is illegal and contrary to the provisions of the Act. Under Section 86(2) of the Act, the Collector is the prescribed authority and shall have all the necessary powers to take appropriate action against a Panchayat Karmi. Here in the present case, action was taken by respondent No.3 in pursuance to the order passed by this Court on 5/4/2007 as well as the powers conferred to him by the State Government on 27/1/2006.

9. Section 86 confers the power on the State Government or the prescribed authority to issue order directing the Panchayat for execution of works in certain cases. However, to carry out the purpose of M.P. Rural Employment Guarantee Scheme the Government of M.P.has issued the instructions dated 27/1/2006 through the Principal Secretary of the Department concerned directing for the appointment of the Panchayat Karmi under the scheme on failure, the prescribed authority are directed to exercise the powers of Gram Panchayat as prescribed under Section 86(2) of the Act. In support of the validity attached provisions of Section 86 of the Panchayat Act is also relevant, which is being reproduced as under :

> "86. (i) Power of State Government to issue order directing Panchayat for execution of works in certain cases. (1) The State Government or the prescribed authority may, by an order in writing, direct any Panchayat to perform any duty imposed upon it, by or under this Act, or by or under any other law for the time being in force or any work as is not being performed or executed, as the case may be, by it and the performance or execution thereof by such Panchayat is, in the opinion of the State Government or prescribed authority, necessary in public interest.
>
> (2) The Panchayat shall be bound to comply with the direction issued under sub-section (1) and if it fails to do so (the State Government or the prescribed authority shall have all necessary powers to get the directions complied with at the expense, if any, of the Panchayat) and in exercising such powers it shall be entitled to the same protection and the same extent under this Act as the Panchayat or its officers or servant whose powers are exercised."

10. Bare reading of the said provisions, it is apparent that the State Government or the prescribed authority by an order in writing may direct the Panchayat to perform any duty imposed upon it by or under this Act or under any other law for the time being in force and it may further direct to perform or execute any work which has not been done by the Panchayat. If in the opinion of the State government or of the prescribed authority it is necessary in public interest. Under sub-section (2), on issuing the instructions by the Government or by the prescribed authority, the Panchayat is bound to comply with the directions. Otherwise, the said authority shall have all necessary power to get the directions complied with at the expense, if any, of the Panchayat, for which the Government or the prescribed authority shall be entitled to the same protection and to the extent as Panchayat or its officers have.

11. As per provisions of Section 69(1) of the Act, the State Government or the prescribed authority i.e. the Collector will have the power to appoint the Secretary for a Gram Panchayat or group of two or more Gram Panchayats. Therefore, if the powers vest in the Collector to appoint a Secretary then certainly under the

provisions of General Clauses Act he can also remove a person from the post. Admittedly in this case a show cause notice was issued by respondent No.3 who is prescribed authority under the Act. The said prescribed authority after giving show cause notice to the petitioner passed an order de-notifying the petitioner from the post of Secretary, the said action cannot be held to be illegal. This fact also find place in the impugned order dated 29/12/2008.

12. The petitioner will not get any help from the decisions of this Court cited by learned counsel for the petitioner in the case of *Neelash Dubey V. State of M.P.and others*, 2007 (4) MPHT 431, *Gram Panchayat, Bamrol Vs. Jagdish Singh Rawat and others*, 2008(4) MPHT 132 and *Kamlesh Dubey Vs. State of M.P.and others*, 2009(1) MPLHJ 545, because here in the present case enquiry was held by the Dy. Director as required under the provisions of rules of 1999. In the said enquiry the petitioner was found guilty in financial irregularities of Rs.4,56,869/-. Thereafter, after giving opportunity of hearing by respondent No.3 who is prescribed authority under sub-section (2) of Section 86 of the Act, has taken a decision for removal of the petitioner and, therefore, the same cannot be said to be contrary to the provisions of the Act.

13. For the above mentioned reasons, the petition filed by the petitioner has no merit and is, accordingly, dismissed with cost. Counsel fee Rs.3,000/-, if certified.

Petition dismissed.

I.L.R. [2010] M. P., 1072
WRIT PETITION

Before Mr. Justice S.K. Gangele and Mr. Justice Piyush Mathur
18 January, 2010*

GOPAL DAS RENWAL ... Petitioner
Vs.
SMT. DEEPIKA JAIN ... Respondent

A. Civil Procedure Code (5 of 1908), Order 14 Rule 1(3) - *Summoning of witnesses - When plaintiff made serious efforts of bringing his witnesses to the Court, and witness expresses his unwillingness - Plaintiff left with no choice except to prefer an application for seeking assistance of Court machinery to enforce and secure the attendance of her own witness.* (Para 11)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 14 नियम 1(3) – साक्षियों को समन करना – जब वादी ने अपने साक्षियों को न्यायालय में लाने के लिए गंभीरता से प्रयास किये और साक्षी अनिच्छा प्रकट करता है – वादी के पास कोई विकल्प नही बचता सिवाय इसके कि वह अपने स्वयं के साक्षी की उपस्थिति बाध्य करने और सुनिश्चित करने के लिए न्यायालयीन सहायता चाहने हेतु आवेदन प्रस्तुत करें।

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*W.P. No.2337/2009 (Gwalior)

B. Civil Procedure Code (5 of 1908), Order 14 Rule 1(3) - ***Summoning of witnesses - Reasons - When a party prays for summoning of a witness to the Court, then he has to assign sufficient and adequate reasons for seeking assistance.- Inability of plaintiff to keep her witness present for cross-examination is justified reason for summoning witness.*** (Para 13)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 14 नियम 1(3) – साक्षियों को समन करना – कारण – जब पक्षकार साक्षी को समन कराने की न्यायालय से प्रार्थना करता है तब सहायता पाने के लिए उसे पर्याप्त और यथोचित कारण दर्शाने होते है – वादी की उसके साक्षी को प्रतिपरीक्षण हेतु उपस्थित रखने में असमर्थता, साक्षी को समन करने का न्यायोचित कारण है।

Ravindra Malav, for the petitioner.
Kamal Rochlani, for the respondent.

ORDER

The Order of the Court was delivered by PIYUSH MATHUR, J. :–Defendant Gopal Das Renwal has preferred this Writ Petition under Article 227 of the Constitution of India against the order dated 1.5.2009 passed by the 8th Civil Judge Class-II, Gwalior, in Civil Suit No.2-A/06, Smt. Dipika Jain v. Gopal Das Renwal, wherein the Trial Court has permitted the Plaintiff to summon the attesting witness of the Will by issuance of summons.

2. The plaintiff has preferred a Civil Suit against the Defendant seeking eviction of the premises as also for recovery of the arrears of rent by claiming herself to be the Landlady/Owner of the suit property on the strength of a Registered Will Dated 4.2.2001, which was executed in her favour by the original landlord Late Shri Kesharimal Jain.

3. Defendant Gopal Das Renwal while denying the averments of the plaint has questioned the genuineness of the Will executed in favour of the Plaintiff by further denying the relationship of the Landlord and Tenant between the parties.

4. The Court after framing of the issues had allowed the parties to lead their evidence and when the Plaintiff had examined her witnesses and intended to examine the attesting witness of the Will, namely, Mr. Vinod Kumar Agrawal, his presence could not be procured and the Plaintiff prayed for the closure of her evidence. At this point of time, the Defendant filed an application under Order XIX Rule 2 of the Code of Civil Procedure by making a prayer to the Trial Court for directing the Plaintiff to produce his witness Mr. Vinod Kumar Agrawal for cross-examination on his affidavit/examination-in-chief, but the Trial Court had rejected this application filed on behalf of the Defendant.

5. Defendant Gopal Das Renwal preferred Writ Petition No.593/09 against the order of rejection of the application preferred under Order XIX Rule 2 of CPC, wherein the Division Bench of this Court, while disposing of the Writ Petition on Dated 25.2.2009, observed as follows :

> "So far as his examination-in-chief is concerned, if the defendant wants to reply on the said evidence, the defendant-petitioner can always rely on the same and the Court cannot say that the said examination-in-chief shall not be read at the time of deciding the case. Therefore, the Court has committed jurisdictional error in holding that the affidavit of Vinod Kumar Agrawal shall not be read at the time of decision of the case. As there is no cross-examination by the defendant in the present case, the defendant is ready and willing to cross-examine Vinod Kumar Agrawal. In such circumstances, he can definitely rely on the affidavit on behalf of Vinod Kumar Agrawal filed by the plaintiff and the Court can also draw an adverse inference against the plaintiff for not producing the said witness for cross-examination."

6. The Plaintiff preferred a Review Petition being R.P.No.89/09 by demonstrating that the observation about drawing an adverse inference against the plaintiff is running counter to Mandate of Law and whiling considering the legal provisions and the prayer of the Plaintiff, this Court observed as follows while disposing of the Review Petition :

> "After perusing the impugned order, we do not find that there is no mistake apparent on the face of the record. However, in the interest of justice we deem it fit to grant one more opportunity to tender Vinod Kumar Agarwal for cross examination by the defendant. Hence, we direct that if Vinod Kumar Agarwal is kept present by the plaintiff for cross examination on the next date of hearing, he shall be cross examine by the defendant."

7. Since this Court while disposing of the Review Petition had granted an opportunity to the Plaintiff for presenting his witness Vinod Kumar Agrawal, an application was filed by the Plaintiff under Order XVI Rule 1 (3) of CPC explaining circumstances of not bringing the witness before the Court and for praying of summoning the witness through the Court.

8. The Defendant submitted reply to the application and demonstrated that summoning of the witness through Court would offend the two orders passed by the High Court in Writ Petition No.593/09 and R.P.No.89/09.

9. The Trial Court while dealing with the application preferred under Order XVI Rule 1 (3) of CPC has considered the entire facts and observations of this Court given in the aforesaid two matters and found that the Plaintiff is unable to bring the witness on her own and found the reasons to be legal and logical of issuing Process/Summons to the witness, sought to be examined by the Plaintiff. The Defendant has approached this Court again by challenging the legality and correctness of the order Dated 1.5.2009 passed by the Trial Court.

10. The contention of the Counsel for the Petitioner/Defendant is that when an application preferred under Order XIX Rule 2 of CPC was rejected by the Court and observations were made by the High Court about 'tender' of the witness for his examination/cross-examination, therefore, the Trial Court was not justified in overreaching the orders of the Superior Court (High Court) and the provisions contained in Order XVI or Order XIX of CPC could have not been invoked for the purpose of summoning the witness as the Plaintiff had failed to take advantage of the orders of the High Court.

11. The Counsel for the Respondent/Plaintiff submits that while disposing of the Review Petition, this Court has granted an opportunity for tendering the witness for his cross-examination and when the Plaintiff made serious efforts of bringing the witness to the Court, the witness expressed his unwillingness, which left the Plaintiff with no choice except to prefer an application under Order XIV Rule 1 (3) of CPC for seeking assistance of the Court machinery to enforce and secure the attendance of her own witness Vinod Kumar Agrawal. The Counsel for the Plaintiff/Respondent relied upon the provisions contained in Order XVI of CPC to demonstrates that when the Plaintiff fails to secure the presence of the witness, then he can secure the presence of the witness in terms of Sub-rule (3) of Rule 1 of Order XVI of CPC and the Learned Trial Court has not committed any error of Law, fact or jurisdiction in allowing the application.

12. Since the provisions of Order XVI and Order XIX of CPC are relevant for the disposal of the controversy involved in the matter, therefore, the same are being quoted hereinbelow:

"ORDER XVI-SUMMONING AND ATTENDANCE OF WITNESSES.

1. List of witnesses and summons to witnesses.

(1) On or before such date as the Court may appoint, and not later than fifteen days after the date on which the issues are settled, the parties shall present in Courts a list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summonses to such persons for their attendance in Court.

(2) A party desirous of obtaining any summons for the attendance of any person shall file in Court an application stating therein the purpose for which the witness is proposed to be summoned.

(3) The Court may, for reasons to be recorded, permit a party to call, whether by summoning through Court or otherwise, any witness, other than those whose names

appears in the list referred to in sub-rule (1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list.

(4) Subject to the provisions of sub-rule (2), summonses referred to in this rule may be obtained by the parties on an application to the Court in this behalf within five days of presenting the list of witnesses under sub-rule (1)."

"ORDER XIX-AFFIDAVITS.

1. **Power to order any point to be proved by affidavit.-** Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable:

Provided that where it appears to the Court that either party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

2. **Power to order attendance of deponent for cross-examination.**(1) Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs.

3. **Matters to which affidavits shall be confined.**(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted;

Provided that the grounds thereof are stated.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall unless the Court otherwise directs be paid by the party filing the same."

13. A perusal of Order XVI Rule 1 (3) of CPC demonstrates that when a party prays for summoning of a witness to the Court, then he has to assign sufficient and adequate reasons for seeking assistance of the Court for summoning the witness and since the application preferred on behalf of the Plaintiff under Order XVI Rule 1 (3) of CPC assigns adequate reasons, which are based upon the inability of the Plaintiff to keep the witness present for his cross-examination, therefore, the Plaintiff was justified in seeking assistance of the Court for issuance of the summons. The order passed in the Revision Petition by this Court simply provides for one opportunity to the Plaintiff for examining the witness Vinod Kumar Agrawal, wherein it has certainly been observed that the Plaintiff would make sincere endeavour of keeping the witness present on the next date of hearing; but in view of the provisions contained in Order XVI and Order XIX of CPC, it cannot be said that this Court has curtailed or restricted the Plaintiff's right of moving an application under Order XVI Rule (1) (3) of CPC seeking assistance of the Trial Court for issuance of the summons.

14. Therefore, we do not find any error in the order passed by the Court below in issuing Process/Summons to the witness Vinod Kumar Agrawal for deposing before the Court. Consequently, the Writ Petition is dismissed.

Petition dismissed.

I.L.R. [2010] M. P., 1077
WRIT PETITION
Before Mr. Justice R.S. Garg & Mr. Justice Prakash Shrivastava
22 January, 2010*

MANSINGH (DECEASED) THROUGH L.RS.
SMT. SUMRANBAI & ors. ... Petitioners
Vs.
RAMESHWAR ... Respondent

A. Stamp Act (2 of 1899), Schedule 1-A, Article 23 - *Stamp duty payable - Agreement to sell immovable property with a recital in the document that possession has been delivered to the purchaser - Seller has raised a plea that possession is not delivered to purchaser - Held - Seller's plea will not affect the character of document - Document would be deemed to be a conveyance and stamp duty thereon shall be leviable accordingly [2008 (2) MPLJ 416 overruled].* (Paras 7 & 8)

क. स्टाम्प अधिनियम (1899 का 2), अनुसूची 1–ए, अनुच्छेद 23 – देय स्टाम्प शुल्क – स्थावर सम्पत्ति के विक्रय का करार दस्तावेज में इस परिवर्णन के साथ कि क्रेता को कब्जा दे दिया गया है – विक्रेता ने अभिवचन किया कि क्रेता को कब्जा नहीं दिया है –

*W.P. No.6464/2008 (Indore)

अभिनिर्धारित – विक्रेता का अभिवचन दस्तावेज के स्वरूप को प्रभावित नहीं करेगा – दस्तावेज हस्तान्तरण (conveyance) माना जाएगा और उस पर उसी अनुसार स्टाम्प शुल्क उद्ग्रहीत किया जाएगा। [2008 (2) MPLJ 416 उलटा गया]

B. Stamp Act (2 of 1899), Sections 33, 35 & 38 - *Agreement not properly stamped - Plaintiff was directed to file application to the court below for referring the document to the Stamp Collector for deciding the question relating to duty and penalty.* (Para 10)

ख. स्टाम्प अधिनियम (1899 का 2), धाराएँ 33, 35 व 38 – करार समुचित रूप से स्टाम्पित नहीं – वादी को निदेश दिया गया कि शुल्क और शास्ति से सम्बन्धित प्रश्न का विनिश्चय करने के लिए दस्तावेज स्टाम्प कलेक्टर के पास भेजने के लिए अधीनस्थ न्यायालय के समक्ष आवेदन फाइल करे।

Case referred :

2008(2) MPLJ 416.

M.I. Khan, for the petitioner.
B.I. Mehta, for the respondent No.1.
Rashmi Pandit, for the respondent No.2/State.

J U D G M E N T

The Judgment of the Court was delivered by **R.S. Garg, J.** :–The petitioner/plaintiff being aggrieved by order dated 27.8.2008 passed in Civil Suit No. 48-A/2007 by the learned XI Additional District Judge, Indore holding the document dated 26.6.2000 (hereinafter referred to 'the Agreement') to be falling under Article 23 of Schedule-IA of the Indian Stamp Act, requiring the plaintiff to pay the duty and penalty has come to this Court.

2. The short facts necessary for disposal of the present petition are that the plaintiff filed a suit for specific performance of the agreement dated 26.6.2000 with a submission that. the property in dispute was agreed to be sold for a sum of Rs. 2,75,000/-, out of the said amount Rs. 1,60,000/- was received by the defendant no.1 and possession of the property was delivered to the plaintiff and the fact was mentioned in the said agreement. He prayed for the specific performance of the cootract, however, it is to be noted that he did not claim any relief for possession.

3. The defendant no.1 appeared in the suit and submitted that the suit was barred by limitation and that possession was never delivered to the plaintiff. When the suit agreement was sought to be produced in the evidence, the defendant raised an objection submitting *inter alia* that as the delivery of possession is recited in the suit agreement, the plaintiff should prove before the Court that the document was properly stamped and in case the document: was not properly stamped then the duty which is in the short fall and the penalty ten times be recovered. It was contended before the Court below that the document was admitted by the other

side, and therefore, the same was admissible in evidence.However, the learned Court below came to the conclusion that the document ought to have been on stamp worth Rs. 20.625/- and as it was written on stamps worth Rs. 50/- only, the short fall was Rs. 20,575/-. Calculating the penalty on the short fall, the trial Court observed that the plaintiff would be required to pay a sum of Rs. 2,05,750/- as penalty. The plaintiff is now before us.

4. Placing reliance upon a judgment of the learned Single Judge of this Court in the matter of *Laxminarayan and others Vs. Omprakash and others* reported in 2008(2) MPLJ 416, learned counsel for the petitioner/plaintiff submitted that assuming the document recites that possession was delivered but the fact is denied by the defendant and if it is asserted by the defendant that possession was not delivered then such recital in the document would lose its importance and the document would become admissible in evidence.

5. Learned counsel for the respondent on the other hand submitted that the said judgment would not apply to the facts of the present case.

6. Smt. Rashmi Pandit, learned Deputy Government Advocate for the State, however submitted that admissibility of the document would depend upon the recitals made in the document and not on basis of the pleadings made by one party and denied by the other.

7. Article 23 of Schedule-IA of the Indian Stamp Act refers to conveyance but with an added explanation it says that whenever there is an agreement to sell immovable property and there is a recital in the document that possession has been delivered to the proposed purchaser then the document would be deemed to be a conveyance and the stamp duty at the rate of 7.5% will have to be paid.

8. A document would be admissible on basis of the recitals made in the document and not on basis of the pleadings raised by the parties. In the matter of *Laxminarayan* (supra), the learned Single Judge with due respect to his authority we don't think that he did look into the legal position but it appears that he was simply swayed away by the argument that as the defendant was denying the delivery of possession, the endorsement/recital in the document lost all its effect and efficacy.

9. It would be trite to say that if in a document certain recitals are made then the Court would decide the. admissibility of the document on the strength of such recitals and not otherwise. In a given case, if there is an absolute unregistered sale deed and the parties say that the same is not required to be registered then we don't think that the Court would be entitled to admit the document because simply the parties say so. The jurisdiction of the Court flows from Sections 33, 35 and 38 of the Indian Stamp Act and the Court has to decide the question of admissibility. With all humanity at our command we over-rule the judgment in the matter of *Laxminarayan* (Supra).

10. Taking into consideration our judgment in the matter of *Umesh Kumar Vs. Rajaram and another* decided on 19.1.2009 in Writ Petition No. 3014/2008 we are of the opinion that the plaintiff would be entitled to make an application to the Court below for referring the document to the Stamp Collector under Section 38(2) of the Indian Stamp Act for deciding the question relating to the duty and penalty.

11. In so far as the merits of the case are concerned, we are unable to hold that the Court below was unjustified in looking into the recitals made in the document.

Order accordingly.

I.L.R. [2010] M. P., 1080
WRIT PETITION
Before Mr. Justice S.K. Gangele & Mrs. Justice Indrani Datta
9 February, 2010*

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

A. **National Security Act (65 of 1980), Section 3(2)** - *It is mandatory for the SP to mention correct facts in recommending the case for detention - Particularly whether the person has been acquitted in certain criminal cases or not - Non-mentioning the aforesaid facts is fatal in detention of the person.* (Para 12)

क. राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(2) – पुलिस अधीक्षक के लिए यह आज्ञापक है कि निरोध के लिए मामले की सिफारिश करने में सही तथ्यों को उल्लिखित करे – विशिष्टतः यह कि क्या व्यक्ति को कतिपय दाण्डिक मामलों में दोषमुक्त किया गया है अथवा नहीं – उपर्युक्त तथ्यों को उल्लिखित न करना व्यक्ति के निरोध में घातक है।

B. **National Security Act (65 of 1980), Section 3(2)** - *There was no subjective satisfaction of the District Magistrate in ordering the detention of the petitioner, which is necessary as per S. 3(2) of the Act - Order is against the law and provision of S. 3(2) of the Act - Order quashed.* (Para 12)

ख. राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(2) – याची का निरोध आदेशित करने में जिला मजिस्ट्रेट का व्यक्तिपरक समाधान नहीं हुआ था, जो कि अधिनियम की धारा 3(2) के अनुसार आवश्यक है – आदेश विधि तथा अधिनियम की धारा 3(2) के उपबंध के विरुद्ध – आदेश अभिखंडित।

Cases referred :

(2008) 3 SCC 613, 2010(I) MPHT 331(DB), AIR 1992 SC 687, (1989) 2 SCC 370, 2000(2) MPLJ 618.

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*W.P. No.5184/2009 (Gwalior)

TEHSILDAR SINGH Vs. STATE OF M.P.

Rajkumar Singh Kushwaha, for the petitioner.
Vivek Khedkar, G.A., for the respondents/State.

ORDER

The Order of the Court was delivered by **S.K. GANGELE, J.** :– Heard.

Petitioner has filed this writ petition challenging the order of detention, Annexure P-1 dated 22nd April 2009.

2. The Superintendent of Police submitted a memorandum dated 2-4-2009 to the District Magistrate, Morena for detention of the petitioner under the provisions of National Security Act, 1980(hereinafter called as the 'Act of 1980'). It has been mentioned by the Superintendent of Police in the memorandum that the petitioner was a notorious criminal and he had been involved in number of criminal offences. Due to the criminal activities of the petitioner, the persons were not willing to come forward to record their evidence in criminal cases and due to the activities of the petitioner, the peace of the area was in danger. The Superintendent of Police has mentioned details of nine criminal cases registered against the petitioner under different Sections of the Indian Penal Code which are as under :-

Sr. No	Crime No.	Offence Under Sections	Police Station.
1	158/94	147, 148, 149, 323, 336, 294, 451, 506-B, 307 IPC	Porsa,District Morena, (MP)
2	24/95	25, 27 Arms Act	Porsa,District Morena, (MP)
3	99/96	382, 452, 147, 148, 149, 307 IPC	Porsa,District Morena, (MP)
4.	10/03	324, 323, 34 ;IPC	Porsa,District Morena, (MP)
5.	265/05	457, 380 IPC	Porsa,District Morena, (MP)
6.	270/05	294, 341, 323, 506-B, 34 IPC	Porsa,District Morena, (MP)
7.	323/05	365, 34 IPC 11, 13 MPDVPK Act and 114 IPC	Porsa,District Morena, (MP)
8.	13/06	365 IPC, 11, 13 MPDVPK Act 212, 216 IPC and 368 IPC	Porsa,District Morena, (MP)
9.	279/08	392, 34 IPC 11, 13 MPDVPK Act	Porsa,District Morena, (MP)

3. The District Magistrate as per the memorandum of the Superintendent of Police has recorded the statements of the residents of localities and also perused the record and passed an order of detention under Section 3 of the Act of 1980 of the petitioner. The learned Magistrate mentioned nine grounds for detaining the petitioner under the provisions of the Act of 1980. The grounds are based on the basis of registration of criminal cases against the petitioner. The matter was referred to the Advisory Board and the Board also recommended the detention of the petitioner under the Act of 1980, and consequently, the State Government vide order dated 18th May, 2009 affirmed the detention order of the petitioner, passed by the District Magistrate.

4. Learned counsel for the petitioner has submitted that the order of detention of the petitioner is illegal because the Superintendent of Police did not submit the facts that the petitioner was acquitted in number of criminal cases in his memorandum to the District Magistrate, hence, true and proper information had not been supplied by the Superintendent of Police to the District Magistrate and the District Magistrate has formed a wrong satisfaction about the detention of the petitioner under the provisions of Act of 1980. In support of his contentions, learned counsel relied on a judgment of this Court in the case of *Geeta Sahu vs. District Magistrate, Shahdol and others,* reported in 2002 (2) MPLJ 618.

5. Contrary to this learned counsel for the respondents/State has submitted that after considering the material on record and the recommendation of the Superintendent of Police and registration of criminal cases against the petitioner, the District Magistrate has formed a positive opinion that the detention of the petitioner under the provisions of the Act of 1980 is necessary. The opinion has been formed after perusal of the record, hence, there is no merit in the petition. In support of his contentions learned counsel relied on the following judgments of the Hon'ble Supreme Court :

(1) (2008) 3 SCC 613 *(State of Maharashtra and others v. Bhaurao Punjabrao Gawande);*

(2) 2010 (I) MPHT 331 (DB) *(Jugaroo alias Virendra vs. State of M.P. And others);* and

(3) AIR 1992 SC 687 *(Smt. Victoria Fernandes v. Lalmal Sawma and others).*

6. The District Magistrate passed the order of detention of the petitioner under Section 3(2) of the Act of 1980, which is as under :

3. Power to make orders detaining certain persons.

(1) xxxxxxxxx

(2) The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing

him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.

Explanation.-For the purposes of this Sub-section, "acting in any manner prejudicial to the maintenance of supplies and services essential to the community" does not include "acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community" as defined in the Explanation to sub-section (1) of Section 3 of the Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980, and accordingly no order of detention shall be made under this Act on any ground on which an order of detention may be made under that Act."

7. Learned Magistrate mentioned nine grounds for his satisfaction in regard to detention of the petitioner under the Act of 1980. As per the Magistrate, nine offences have been registered against the petitioner from 1994 to 2007-2008. The Magistrate has only mentioned the registration of offences against the petitioner and filing chargesheet in the appropriate court for trial in regard to said offences against the petitioner. Same facts have been mentioned by the Magistrate in his statement of ground of detention. It has clearly been mentioned that a charge-sheet with regard to grounds No.1, 2, 3 & 4 was filed before the criminal court under relevant sections of I.P.C.

8. With regard to ground No.5, it has been mentioned that the petitioner was convicted by the J.M.F.C. and with regard to grounds No.6, 7, 8 & 9, it has been mentioned that the charge-sheet was filed before the relevant criminal court and the matter is pending under investigation. Same facts have been mentioned by the Superintendent of Police in his memorandum dated 2-4-2009 submitted to the District Magistrate requesting the Magistrate to pass an order of detention under Section 3(2) of the Act of 1980 against the petitioner. The Superintendent of Police has clearly mentioned under the heading of criminal background of the petitioner that in four cases registered vide Crime No.158/94 under Sections 147, 148, 323, 336, 294, 451, 506-B & 307 of IPC and criminal case registered against the petitioner vide Crime No.24/95 at Police Station Porsa under Section 25 & 27 of Arms Act and an offence vide Crime No.99/96, under Sections 382, 452, 147, 148, 149, 307 IPC, that the charge-sheets had been filed against the petitioner. The Superintendent of Police further mentioned the fact that total nine cases were registered against the petitioner and in one case which was registered vide

Crime No.265/05, the petitioner was convicted and in four cases charge-sheet was filed and in four cases i.e. grounds No.6, 7, 8 & 9, the cases were pending against the petitioner before the court. However, the petitioner has specifically mentioned in his petition and filed copies of the judgments that in the case mentioned at Serial No.3 registered against the petitioner vide Crime No.99/96 under Sections 382, 452, 147, 148, 149, 307 of IPC and the offences registered against the petitioner mentioned at Serial No.7, vide Crime Nos.323/2005, under Sections 365, 34 IPC 11, 13 MPDVPK Act & 114 of IPC and at Serial No.8, under Sections and 13/ 2006, 365 of IPC & 11, 13 MPDVPK Act 212 & 216 of IPC and 368 IPC, the petitioner has been acquitted.

9. As per the petitioner he has been acquitted in eight criminal cases and he had no knowledge about the acquittal or conviction in two criminal cases mentioned at Serial No.1 & 2 and he has been convicted in criminal case mentioned at Serial No.5. The Superintendent of Police did not mention the fact that the petitioner had been acquitted by the criminal court in the criminal cases mentioned at Serial No.3, 7 & 8. It has only been mentioned by the Superintendent of Police that the charge-sheets had been filed before the Court. The same fact has been mentioned by the District Magistrate in his order of detention.

10. The Hon'ble Supreme Court in the case of *Dharamdas Shamlal Agarwal Vs. Police Commissioner and Another,* reported in (1989) 2 SCC 370, has held as under with regard to non-placing the correct and material facts before the detaining authority:

> "9. Though as per Section 6 of the Act the grounds of detention are severable and the order of detention shall not be deemed to be invalid or inoperative if one ground or some of the grounds are invalid, the question that arises for consideration is whether the detaining authority was really aware of the acquittal of the detenu in those two cases mentioned under Serial Nos. 2 and 3 on the date of passing the impugned order. It is surprising that the detaining authority who has specifically mentioned in the grounds of detention that the petitioner's cases 2 and 3 were pending trial on the date of passing the order of detention has come forward with a sworn statement in reply, filed nearly three months after signing the grounds of detention. that he knew that the accused had been acquitted in both the cases. The averments made in paragraphs 12 and 13 in the affidavit in reply are not clear at what point of time the detaining authority came to know of the acquittal of the detenu in both the cases. At any rate, it is not his specific case that the fact of acquittal was placed before him for consideration at the time of passing the impugned order. But what the authority

repeatedly states is that "each activity of the petitioner is a separate ground of detention and adds further that "the fact that the petitioner was acquitted in Criminal Cases Nos. 411/82 and 412/82 is of no consequence ....." We are unable to comprehend the explanation given by the detaining authority. It has been admitted by Mr. Poti that the sponsoring authority initiated the proceedings and placed all the materials before the detaining authority on 14-9-1988 by which date the petitioner had already been acquitted in the above said two cases. Thus it is clear that either the sponsoring authority was not aware of the acquittals of those two cases or even having been aware of the acquittals had not placed that material before the detaining authority. So at the time of signing the order of detention, the authority should have been ignorant of the acquittals. Evidently to get over the plea of the detenu in the writ petition in this regard for the first time in the counter, the detaining authority is giving a varying statement as if he knew about the acquittal of the detenu in both the cases. As ruled by this Court in *Shiv Ratan Makim v. Union of India,* 1985 Supp (3) SCR 843 at page 848: (AIR 1986 SC 610 at p. 613) "even if a criminal prosecution fails and an order of detention is then made, it would not invalidate the order of detention" because as pointed out by this Court in *Mohd. Subrati v. State of West Bengal,* (1973) 3 SCC 250 : (AIR 1973 SC 207) "the purpose of preventive detention being different from conviction and punishment and subjective satisfaction being necessary in the former while proof beyond reasonable doubt being necessary in the latter" the order of detention would not be bad merely because the criminal prosecution has failed. In the present case, we would make stress, not on the question of acquittal but on the question of non-placing of the material and vital fact of acquittal which if had been placed, would have influenced the minds of the detaining authority one way or the other. Similar questions arose in *Sk. Nizamuddin v. State of West Bengal,* AIR 1974 SC 2353 in which the detention order was passed under the provisions of Maintenance of Internal Security Act. In that case the ground of detention was founded on a solitary incident of theft of aluminium wire alleged to have been committed by the detenu therein. In respect of that incident a criminal case was filed which was ultimately dropped. It appeared on record that the history sheet of the dotenu which was before the detaining authority did not make any reference to the criminal case launched against the petitioner, much less to the fact that the prosecution had been dropped or the

date when the petitioner was discharged from the case. In connection with this aspect this Court observed as follows :

> "We should have thought that the fact that a criminal case is pending against the person who is sought to be proceeded against by way of preventive detention is a very material circumstance which ought to be placed before the District Magistrate. That circumstance might quite possibly have an impact on his decision whether or not to make an order of detention. It is not altogether unlikely that the District Magistrate may in a given case take the view that since a criminal case is pending against the person sought to be detained, no order of detention should be made for the present, but the criminal case should be allowed to run its full course and only if it fails to result in conviction, then preventive detention should be resorted to. It would be most unfair to the person sought to be detained not to disclose the pendency of a criminal case against him to the District Magistrate."

10. It is true that the detention order in that case was set aside on other grounds but the observation extracted above is quite significant. The above observation was subsequently approved by this Court in *Suresh Mahato v. The District Magistrate, Burdwan,* AIR 1975 SC 728, and in *Asha Devi v. K. Shivraj, Addl. Chief Secretary to the Govt. of Gujarat,* (1979) 2 SCR 215 : (AIR 1979 SC 447). In the latter case (i.e. *Asha Devi*), it has been pointed out :

> ".....if material or vital facts which would influence the minds of the detaining authority one way or the other on the question whether or not to make the detention order, are not placed before or are not considered by the detaining authority it would vitiate its subjective satisfaction rendering the detention order illegal."

11. In *Sita Ram Somani v. State of Rajasthan,* (1986) 2 SCC 86 : (AIR 1986 SC 1072) certain documents which were claimed to have been placed before the Screening Committee in the first instance were not placed before the detaining authority and consequently there was no occasion for the detaining authority to apply its mind to the relevant material. In the circumstance of that case, a principal point was raised before this Court that there was no application of mind by the detaining authority to those vital

materials which were withheld. This Court, while answering that contention observed thus :

> "No one can dispute the right of the detaining authority to make an order of detention if on a consideration of the relevant material, the detaining authority came to the conclusion that it was necessary to detain the appellant. But the question was whether the detaining authority applied its mind to relevant considerations. If it did not, the appellant would be entitled to be released."

12. From the above decisions it emerges that the requisite subjective satisfaction the formation of which is a condition precedent to passing of a detention order will get vitiated if material or vital facts which would have bearing on the issue and weighed the satisfaction of the detaining authority one way or the other and influenced his mind are either withheld or suppressed by the sponsoring authority or ignored and not considered by the detaining authority before issuing the detention order. It is clear to our mind that in the case on hand, at the time when the detaining authority passed the detention order this vital fact, namely, the acquittals of the detenu in case Nos. mentioned at Serial Nos. 2 and 3 have not been brought to his notice and on the other hand they were withheld and the detaining authority was given to understand that the trial of those cases were pending. The explanation given by the learned counsel for the respondents, as we have already pointed out, cannot be accepted for a moment. The result is that the non-placing of the material fact -namely the acquittal of detenu in the above-said two cases resulting in non-application of minds of the detaining authority to the said fact has vitiated the requisite subjective satisfaction, rendering the impugned detention order invalid."

11. The Hon'ble Division Bench of this Court in the case of *Geeta Sahu Vs. District Magistrate, Shahdol and others,* reported in 2000 (2) MPLJ 618, has held as under with regard to non-mentioning the factum of acquittal or detention in criminal case by the Superintendent of Police in his memorandum sent to the District Magistrate :

> 9. In the matter of *Dharamdas Shamlal Agarwal vs. Police Commissioner and another,* 1989 (2) SCC 370, it is held that the requisite subjective satisfaction, the formation of which is a condition precedent to passing of a detention order, will get vitiated if material or vital facts which would have bearing on the issue and weighed the satisfaction of the detaining authority one way or

the other and influenced his mind are either withheld or suppressed by the sponsoring authority or ignored and not considered by the detaining authority before issuing the detention order. In the present case, it is not in dispute before us that the fact regarding acquittal of the petitioner in as many as 13 cases was not brought to the notice of the detaining authority. The stress is not on the question of acquittal but on the question of non-placement of the material and vital fact of acquittal which if had been placed, would have influenced the mind of the detaining authority one way or the other. The fact of acquittal quite possibly have an impact on the decision of the detaining authority whether or not to make an order of detention. It is not altogether unlikely that the District Magistrate may in a given case take the view that since the person sought to be detained was acquitted in 13 out of 14 cases and only one criminal case is pending against him, no order of detention should be made for the present and the criminal case should be allowed to run its full course. In the matter of *Abdul Razak Nannekhan Pathan vs. The Police Commissioner, Ahmedabad,* Judgments Today 1989 (3) SC 231, the Supreme Court observed that the cases which were not proximate to the date of the order of detention and were stale could not be taken into consideration and where the person sought to be detained was acquitted of the criminal charges such cases also could not be taken into consideration.

12. From the aforesaid decision of the Hon'ble Supreme Court and this Court, it is clear that it is mandatory for the Superintendent of Police to mention correct facts in recommending the case of a detenu for detention and particularly whether the person has been acquitted in certain criminal cases or not. Non-mentioning the aforesaid facts is fatal in detention of the person. In the present case also the Superintendent of Police has not mentioned the fact that the petitioner was acquitted in three criminal cases registered against him, in such circumstances, in our opinion, there was no subjective satisfaction of the District Magistrate in ordering the detention of the petitioner, which is necessary as per Section 3(2) of the Act of 1980. Hence, the detention of the petitioner under the provisions of the Act of 1980 is against law and against the provisions of Section 3(2) of the Act of 1980.

13. Consequently, the petition of the petitioner is allowed. The impugned orders Annexure-P/1, dated 22-4-2009 and Annexure-P/3, dated 18th May, 2009 are hereby quashed. The petitioner be released forthwith, if his detention is not required in any other offence.

Petition allowed.

I.L.R. [2010] M. P., 1089
WRIT PETITION
Before Mr. Justice S.C. Sharma
11 February, 2010*

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

A. Civil Services (Medical Attendance) Rules, M.P. 1958, Rule 2(d)(ii) - *Wholly dependent - Husband of the petitioner was receiving meagre pension - The husband of the petitioner has to be treated wholly dependent for the purpose reimbursement of medical bills - Therefore, petitioner is entitled for reimbursement in respect of treatment availed by her husband.* (Para 10 & 11)

क. सिविल सेवा (चिकित्सीय परिचर्या) नियम, म.प्र. 1958, नियम 2(डी)(ii) – पूर्णतः आश्रित – याची का पति अपर्याप्त पेंशन प्राप्त कर रहा था – याची के पति को चिकित्सा देयकों की प्रतिपूर्ति के प्रयोजन के लिए पूर्णतः आश्रित माना जाना चाहिए – इसलिए, याची उसके पति द्वारा कराये गये उपचार के सम्बन्ध में प्रतिपूर्ति की हकदार है।

B. Civil Services (Medical Attendance) Rules, M.P. 1958, Rule 4 - *Husband of the petitioner was treated at All India Institute of Medical Sciences, New Delhi without prior permission - Held - State Government cannot deny reimbursement of medical bills on the ground that prior permission has not been obtained - Writ petition allowed - Respondents directed to reimburse the amount with interest @ 8% p.a.* (Paras 10 to 12)

ख. सिविल सेवा (चिकित्सीय परिचर्या) नियम, म.प्र. 1958, नियम 4 – याची के पति का उपचार पूर्व अनुमति के बिना अखिल भारतीय आयुर्विज्ञान संस्थान, नई दिल्ली में कराया गया – अभिनिर्धारित – राज्य सरकार इस आधार पर चिकित्सा देयकों की प्रतिपूर्ति से इंकार नहीं कर सकती कि पूर्व अनुमति अभिप्राप्त नहीं की गयी – रिट याचिका मंजूर – प्रत्यर्थियों को निदेश दिया गया कि राशि की प्रतिपूर्ति 8 % वार्षिक ब्याज सहित करें।

Cases referred :

2009(III) MPJR SN 8, AIR 1998 SC 659.

M.P.S. Raghuvanshi with *Gaurav Samadhiya*, for the petitioner.
Praveen Newaskar, G.A., for the respondent/State.

J U D G M E N T

S.C. Sharma, J. :–The petitioner a retired Upper Division Teacher of the School Education Department of the State of Madhya Pradesh, has filed this present writ petition being aggrieved by an order dated 18.8.2006 by which the Director, Medical Education has rejected the claim of the petitioner, claiming reimbursement of medical bills in respect of treatment of her husband. The petitioner is also

*W.P. No.6228/2006 (Gwalior)

aggrieved by an order dated 26.9.2006 passed by the Assistant Director, Public Instruction by which the District Education Officer, Guna has been directed not to reimburse the medical bills of the petitioner.

2. The petitioner before this Court has stated in the writ petition that at the relevant point of time she was working as a Upper Division Teacher in the School Education Department of State of Madhya Pradesh and her husband was a pensioner and retired on attaining the age of superannuation from the post of Reader (Clerk) from District Court, Guna. The husband of the petitioner was a pensioner and as he was having some heart problem, was referred to All India Institute of Medical Sciences, New Delhi by the doctors at Guna in the year 2006 and as there was a medical emergency to shift the husband of the petitioner to Delhi, he immediately shifted to Delhi and was admitted in the All India Institute of Medical Sciences, New Delhi. The husband of the petitioner underwent heart surgery on 16.3.2006 and as the petitioner was holding the post of Upper Division Teacher serving the State Government, submitted a claim to the authority concerned to the tune of Rs.67940/-00 towards the treatment availed by her husband. The petitioner has further stated that her claim was rejected by the Director, Medical Education on the ground that there is no statutory provisions enabling a retired government servant to avail the treatment from out of State of Madhya Pradesh.

3. The learned counsel for the petitioner has argued before this Court that the husband of the petitioner though has retired from the post of Reader from District Court and is a pensioner, has to be treated a member of a family of the petitioner and is certainly wholly dependent upon the petitioner and, therefore, the petitioner was justified in submitting the claim to the tune of Rs. 67940/-00. The learned counsel for the petitioner has relied upon a judgment delivered by this Court in the case of *Vishwanath Prasad Khare (Dr.) vs. State of Madhya Pradesh & others* 2009 (III) M.P.J.R, SN-8, wherein this Court has directed the authority therein to reimburse the medical bills in case of a pensioner also amounting to Rs.107254=00.

4. The learned counsel for the petitioner has also relied upon a judgment delivered by the Apex Court in the case of *State of Madhya Pradesh & others vs. M.P. Ojha and another* A.I.R 1998 S.C. 659, wherein the Apex Court has also treated a pensioner to be wholly dependent in the peculiar facts and circumstances of the case.

5 A reply has been filed on behalf of respondent / State and they have stated that the impugned order has rightly been passed, rejecting the claim of the petitioner as there is no statutory provisions enabling a pensioner to avail the treatment from out of the State. The respondents have also stated that the petitioner has never applied for grant of permission at any point of time and there is no statutory

provisions for reimbursement of medical bills in respect of the pensioner, and therefore, the claim of the petitioner cannot be accepted. The respondents have reiterated in the return that no permission was granted at any point of time for treatment in case of the petitioner's husband. The respondents have prayed for dismissal of the writ petition. The respondents have also enclosed Annexure R/1 wherein post facto sanction was accorded for reimbursement of claim in similar nature.

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

7. The petitioner before this Court, at the relevant point of time was serving as Upper Division Teacher in the School Education Department of the State of Madhya Pradesh and during the pendency of this present writ petition has attained the age of superannuation. The husband of the petitioner prior to his retirement was working as Upper Division Clerk (Reader) and retired on attaining the age of superannuation on 31.5.2005. The petitioner was residing with her husband at Guna. In the year 2006 the husband of the petitioner was suffering from some heart ailment and was referred by the doctor at Guna to the All India Institute of Medical Sciences, New Delhi. The husband of the petitioner was operated upon on 16.3.2006 at the All India Institute of Medical Sciences, New Delhi and the petitioner, who at the relevant point of time was serving in the School Education Department on the post of Upper Division Teacher submitted an application for reimbursement of medical bills amounting to Rs.67940/=00 and the same has been turned down by the Director of Medical Education vide order dated 18.8.2006 on the ground that there is no statutory provisions with regard to treatment of a pensioner from out of State of Madhya Pradesh and the same was communicated to the petitioner vide letter dated 26.9.2006. In the present case, the petitioner has already stated earlier that she was serving on the post of Upper Division Teacher and her husband was receiving a meager pension at the relevant point of time.

8. The Apex Court in the case of *State of Madhya Pradesh & others vs. M.P. Ojha and another* A.I.R 1998 S.C. 659 (supra) in paragraphs 6,7,8,9,10,11,12,13 and 14 has held as under:

> 5. As the 2nd respondent failed in his attempt to get reimbursement under the Medical Rules, he approached the Tribunal seeking relief. He impleaded the State Government, Director of Medical Education (Health) and Joint Director-cum-Superintendent, M.Y. Hospital as respondents. His father was also made a party as a co-petitioner. The Tribunal after considering the facts of the case and relevant Medical Rules allowed the application and directed the respondents to reimburse the expenditure incurred by the 2nd respondent on treatment of his father, the 1st respondent at Bombay. Aggrieved by the said judgment, the State has filed this appeal.

6. It was submitted by Mr. Choudhary, learned advocate for the appellants, that father, a retired Government servant, who lived with his son, a Government servant, could not be treated as "wholly dependent" within the meaning of "family" under Rule 2(d) of the Medical Rules and thus the 2nd respondent was not entitled to any reimbursement for the treatment of his father. Mr. Choudhary said that to understand the expression "wholly dependent" reference should be made to Fundamental Rule (FR) 9. Mr. Gambhir, learned counsel for the respondents, however, submitted that reference to FR 9 was irrelevant and in any case this FR 9 was not applicable in the present case. He said that son was entitled to reimbursement as per Medical Rules. Alternatively, he submitted that permission in the present case was granted by the competent authority within the Medical Rules and reimbursement of the expenses incurred by the son for treatment of his father could not be denied to him.

7. Admittedly, Medical Rules do not apply to retired Government servant and Rules have been framed regarding medical attendance of Government pensioners and further that there are instructions issued from time to time entitling them to get treatment, free of charge, available in the Government hospitals of the State. However, Government pensioners are not entitled for reimbursement of expenses incurred for their treatment outside the State.

8. At this stage, it would be appropriate to set out the relevant Rules.

9. M.P. Civil Services (Medical Attendance) Rules, 1958.

"1(3) These rules shall not apply to -

(a) Retired Government servants;

(b) to (c).

2(d) "Family" means -

(i) The wife or husband of a Government servant;

(ii) The parents, legitimate children including children adopted legally and step children of such Government servant residing with and wholly dependent on that Government servant.

11. (1) Rules 3 to 10 shall, in so far as they relate to medical attendance and treatment at hospital apply to the members of the family of a Government servant in the same manner and to the same extent as they apply to Government servant:

Provided that where another child is born to a Government servant where there are three or more children living, the additional child so born shall not be entitled to the concession admissible under these rules.

(2) A Government servant shall also be entitled for reimbursement of the charges incurred by him for the treatment of his wife during the confinement (including pre-natal and post-natal treatment and treatment for abortion):

Provided that no reimbursement shall be made if three or more children are living on the date of such confinement."

10. We may note that Rules 3 to 10 provide for free medical treatment to Government servant and also for reimbursement of the expenses incurred by him towards that.

11. We may now refer to the definition as to what "family" means under Fundamental Rules as contended by Mr. Choudhary and in that connection according to him FR9 contains the following definition of "family"

"Family means (a) a Government servant's wife or husband, as the case may be, residing with the Government servant and legitimate children and step children residing with and wholly dependent upon the Government servant.

Except for purpose of S. XVI-A of the Supplementary Rules in Appendix V, it includes, in addition, parents, sisters and minor brothers, if residing with and wholly dependent upon the Government servant.

(b) For the purpose of S. XI, it includes in addition unmarried and widowed sisters and minor brother if residing with and wholly dependent upon the Govt. servant.

Note. Govt. servant's wife or husband, as the case may be, legitimate children, step children, father, mother, step mother, unmarried and widowed sisters, minor brothers who reside and pension equivalent to death-cum-retirement gratuity does not exceed Rs. 250/- p.m. may be deemed to be wholly dependent upon the Government servant.

This amendment takes effect from the date of issue. Cases already decided will not be re-opened.

Notes (1) Not more than one wife is included in the term 'family' for the purpose of these rules.

(2) An adopted child shall be considered to be a legitimate child if, under the personal law of the Government servant, adoption is legally recognised as conferring on it the status of a natural child."

12. According to Mr. Choudhary, therefore, to understand as to what the expression "wholly dependent" means in Medical Rules we should draw strength from the similar expression "wholly dependent" appearing in FR quoted above. The whole argument of Mr. Choudhary appears to us to be fallacious. Fundamental Rules have been framed under the Government of India Act. There is no FR 9 as such. FR 9 (32) defines as to what is "Travelling allowances". According to this definition "travelling allowances" means :

"9(32). Travelling allowance' means an allowance granted to a Government servant to cover the expenses which he incurs in travelling in the interest of public service. It includes allowances granted for the maintenance of conveyances, horses and tents."

13. Under this FR 9 (32) Supplementary Rules have been framed and the definition of "family" on which Mr. Choudhary relied is in fact Supplementary Rule 8 (SR 8) framed under FR 9(32). Now, for one thing this definition of "family" is to be confined to the case where a Government servant on transfer seeks to draw allowances for himself and members of his family wholly dependent upon him. Secondly, this definition of "family" in SR 8 and the expression "wholly dependent" appearing therein cannot be brought in to interpret similar expression in Medical Rules.

14. The expression "wholly dependent" is not a term of art. It has to be given its due meaning with reference to the Rules in which it appears. We need not make any attempt to define the expression "wholly dependent" to be applicable to all cases in all circumstances. We also need not look into other provisions of law where such expression is defined. That would likely to lead to results which the relevant Rules would not have contemplated. The expression "wholly dependent" has to be understood in the context in which it is used keeping in view the object of the particular Rules where it is contained. We cannot curtail the meaning of "wholly dependent" by reading into this the definition as given in SR 8 which has been reproduced above. Further, the expression "wholly dependent" as appearing in the definition of 'family' as given in Medical Rules cannot be confined to mere

financial dependence. Ordinarily dependence means financial dependence but for a member of family it would mean other support, may be physical, as well. To be "wholly dependent" would therefore include both financial and physical dependence. If support required is physical and a member of the family is otherwise financially sound he may not necessarily be wholly dependent. Here the father was 70 years of age and was sick and it could not be said that he was not wholly dependent on his son. Son has to look after him in his old age. Even otherwise by getting a pension of Rs. 414/-per month which by any standard is a paltry amount it could not be said that the father was not "wholly dependent" on his son. That the father had a separate capacity of being a retired Government servant is immaterial if his case falls within the Medical Rules being a member of the family of his son and wholly dependent on him. A flexible approach has to be adopted in interpreting and applying the Rules in a case like the present one. There is no dispute that the son took his father to Bombay for treatment for his serious ailment after getting due permission from the competent

9. Keeping m view the judgment of the Apex Court, it is evident that the Apex Court in spite of the fact that the respondent therein was a pensioner, has treated him as wholly dependent irrespective of the fact he himself was receiving pension. The Apex Court has held the son with whom the pensioner was residing to be entitled for reimbursement of medical expenses incurred on the treatment of his father.

10. In the present case the petitioner a lady serving on the post of Upper Division Teacher is claiming reimbursement in respect of treatment availed by her husband at the All India Institute of Medical Sciences, New Delhi, who was pensioner and, therefore, keeping in view the judgment delivered by the Apex Court, it can be safely gathered especially in light of the fact that the husband of the petitioner was receiving meager pension that he was wholly dependent upon his wife. This Court while deciding almost similarly matter in the case of *Vishwanath Prasad Khare (Dr.) vs. State of Madhya Pradesh & others* (supra) has approved medical claims of the pensioner who has availed medical treatment even without permission of the State Government. This Court while deciding the aforesaid case, has held as under:

The petitioner was immediate need of open heart surgery and he has rushed immediately to Bhopal Memorial Hospital & Research Centre, Bhopal. A Division Bench of Punjab and Haryana High Court in the case of *Shakuntala Vs. State of Haryana* reported

in 2004(1)SLR 563 has allowed the claim of Medical Reimbursement wherein the medical treatment was not availed from the approved hospital. It has been observed that saving the life of a sufferer should be the paramount consideration. Similarly the Apex Court in the case of *Suman Rakheja Vs. State of Haryana and another* 2006 SCC (L & S) 890 has held that in case of emergency where a government servant has been rushed to a hospital though it is a private hospital, the employee/widow is entitled to get refund of 100 percent medical expenses at the AIIMs rate. In the present case the rate fixed by State Government for open heart surgery is Rs. 2.5 lacs and the bills submitted by the petitioner is less than half of the rates prescribed by the State Government for such surgery. Moreover, the certificate issued by the Bhopal Memorial Hospital & Research Centre, Bhopal has not been disputed by the State Government. Resultantly, the present writ petition is allowed, respondents are directed to reimburse the amount of Rs. 1,07, 254/-of medical expenses within a period of three months positively from the date of receipt of certified copy of this order.

11. Keeping in view the totality facts and circumstances of the case and also the judgment delivered by the Apex Court, this Court is of the considered opinion that the husband of the petitioner has to be treated wholly dependent for purpose reimbursement of medical bills amounting to Rs. 67940/=00 and, therefore, the respondents are directed to reimburse the medical bills of the petitioner within a period of 60 days from the date of receipt of certified copy of this Court. In the present case, the petitioner is also a pensioner and as the respondents have delayed the payment of medical bills, they are directed to pay interest also at the rate of 80/ per annum from the date of filing of this petition.

12. With the aforesaid, the writ petition stands allowed and disposed of.

No order as to costs.

Petition allowed.

I.L.R. [2010] M. P., 1097
WRIT PETITION
Before Mr. Justice Arun Mishra & Mr. Justice S.C. Sinho
18 February, 2010*

PRAKASH SHARMA ... Petitioner
Vs.
RANI DURGAWATI VISHWAVIDYALAYA, JABALPUR & ors. ... Respondents

Bar Council of India Rules, Part IV, Chapter II, Rule 7 - Admission in LL.B. Course - *University has prescribed admission guidelines as requirement of 40% marks in case of entrance test is conducted and 45% marks in case entrance test is not conducted - Such Guidelines are in contravention of rule 7 - Rules are framed under the Advocates Act, which have the statutory force - Petitioner got admission in LL.B. course as per guideline prescribed by University - University realizing the mistake cancelled admission of petitioner within 15 days - Order is not illegal - Petition dismissed.* (Paras 6 & 7)

भारतीय अधिवक्ता परिषद् नियम, भाग IV, अध्याय II, नियम 7 – एलएल.बी. पाठ्यक्रम में प्रवेश – विश्वविद्यालय ने प्रवेश के लिए परीक्षा आयोजित किये जाने की दशा में 40 प्रतिशत अंकों और प्रवेश परीक्षा आयोजित न किये जाने की दशा में 45 प्रतिशत अंकों की आवश्यकता की गाइडलाईन विहित की – ऐसी गाइडलाईन नियम 7 का उल्लघंन करती है – नियम अधिवक्ता अधिनियम के अन्तर्गत विरचित हैं, जोकि वैधानिक शक्ति रखते हैं – याची ने विश्वविद्यालय द्वारा विहित गाइडलाईन के अनुसार एलएल.बी. पाठ्यक्रम में प्रवेश लिया – विश्वविद्यालय ने गलती समझकर 15 दिन के भीतर याची का प्रवेश उचित रूप से रद्द किया – आदेश अवैधानिक नहीं – याचिका खारिज।

V.K. Shukla, for the petitioner.
Suyash Tripathi, for the respondent No.1.
Deepak Awasthy, G.A., for the respondent Nos.2 & 3.

O R D E R

The Order of the Court was delivered by ARUN MISHRA, J. :–The writ petition has been filed by the petitioner aggrieved by cancellation of his admission in LL.B. First Year on the ground that he was not having requisite percentage of 45% in the qualifying examination.

2. It is averred in the petition that the petitioner possessed 41.89% marks in graduation. He appeared in the entrance test for admission in 3 years LL.B. course in which 40% marks in graduation were required. As he fulfilled the criteria he was permitted to participate in the entrance examination and admission was given to him, but, suddenly his admission was cancelled on the ground that he was

*W.P. No.387/2010 (Jabalpur)

having 41.89% marks in graduation, not 45% as required. Petitioner filed a representation which was not considered. Hence, petition has been preferred.

3. In the return filed by the respondents No.2 and 3 it is contended that Bar Council of India has framed the Rules of Legal Education and as per Part-IV Chapter II Rule 7 minimum marks to be obtained in the qualifying examination is 45% in the case of general category candidates for admission in 3 years LL.B. course. The guidelines dated 22.5.2009 framed by the College were not in tune with the rules of legal education framed by the Bar Council of India having statutory force. When said fact came to the notice, error was rectified vide letter dt.25.7.2009, it was clarified that for 5 years course and also for 3 years LL.B. course, the minimum qualifying marks are fixed as 45% for general category candidates as prescribed by the Bar Council of India. Petitioner was admitted on 23.7.2009 and order of cancellation was passed on 7.8.2009 within two weeks of admission. No case is made out so as to interfere in the writ petition.

4. Shri V.K. Shukla, learned counsel appearing on behalf of the petitioner has submitted that admission was rightly given in view of admission bulletin for LL.B. First Semester published by the Rani Durgawati Vishwa Vidyalaya, Jabalpur in which it was mentioned in para 4 and 12 that admission in the First Year has to be on the basis of entrance examination in qualifying examination and graduation or post-graduation incumbent must possess 40% marks. Guidelines (P/3) issued by Higher Education Department in para 5.3 has also been relied upon by the petitioner which provides that for admission in the First Year Course of LL.B. in case entrance test is conducted 40% marks are required and in graduation/post-graduation and 45% in case entrance examination is not conducted.

5. Counsel appearing on behalf of the respondents have relied upon the Bar Council of India Rules framed under the Advocates Act contained in Part-IV. Chapter II Rule 7 of BCI Rules. The BCI has prescribed the standard vide Resolution No.110/2008 which came in force w.e.f. 14.9.2008. The resolution provides that minimum percentage in the qualifying examination should not be below 45% of the total marks in case of general category candidate and 40% of total marks in case of SC/ST candidates. It is contended that it was not open to the State Govt. or to University to violate the binding directive of BCI, thus, the guidelines which were framed by University and State Govt. were corrected to bring them in tune with the rule 7 contained in Part IV Chapter II of BCI Rules.

6. No doubt about it that in the admission guidelines issued by the University and the State Govt. it was provided that minimum percentage for general category candidate is 40% in case admission is by holding entrance examination and in case it is not conducted qualifying percentage in the graduation/post graduation had been fixed at 45%. However, said guidelines are in contravention of BCI Rules Rule 7 contained in Chapter II Part IV of the BCI Rules framed under the

Advocates Act which have the statutory force. BCI has power to prescribe the standard for the purpose of standards of legal education and recognition of degrees in law for the purpose of enrolment as advocate and inspection of Universities for recognizing its degree in law under sections 7(1)(h) and (I), 24(1)(c)(iii) and (iiia), 49(1)(af),(ag), and (d) of the Advocates Act, 1961. the rules have statutory force Rule 7 contained in Chapter II of Part IV of Bar Council of India Rules is as follows :

> **"7. Minimum marks in qualifying examination for admission.**
>
> Bar council of India may from time to time, stipulates the minimum percentage of marks not below 45% of the total marks in case of general category applicants and 40% of the total marks in case of SC and ST applicants, to be obtained for the qualifying examination, such as +2 Examination in case of Integrated Five Years' course or Degree course in any discipline for Three years' LL.B. course, for the purpose of applying for and getting admitted into a Law Degree Program of any recognized University in either of the streams.
>
> Provided that such a minimum qualifying marks shall not automatically entitle a person to get admission into an institution but only shall entitle the person concerned to fulfill other institutional criteria notified by the institution concerned or by the government concerned from time to time to apply for admission."

It is apparent from Rule 7 of the aforesaid rules that Bar Council of India has prescribed minimum percentage of marks not below 45% in case of general category and 40% in case of SC/ST candidates to be obtained in the qualifying examination, such as +2 examination in case of integrated five years course or in Degree course in any discipline for admission in three years' LL.B. course. It is pre-requisite for admission into the law degree programme of any recognized University in either scheme. Proviso also makes it clear that the person who possess minimum qualifying marks has also to fulfill other institutional criteria notified by the institution concerned or by the government concerned from time to time to apply for admission. By making provision of entrance test institutional criteria has been prescribed, but, in no case it was open to the University to violate the directive of the BCI contained in Rule 7 Chapter II Part IV of the Bar Council of India Rules. Rule is mandatory and it could not have been by-passed by making the provision of entrance test. The prescribing of 40% marks in the qualifying examination for 3 years course amounted to dilution of the mandatory direction of the BCI. Bar Council of India has prescribed aforesaid standard in exercise of various provisions of Advocate Act referred to above. Realizing the mistake the respondents have rightly cancelled the admission and it was rightly realized by the State Government and the College that such a dilution of the standard

prescribed by the BCI is not permissible. Admission was cancelled within 15 days. It cannot be said that the action taken was illegal in any manner. It was in accordance with mandatory directive of BCI. The guidelines (P/2, P/3) which were framed were not in tune of mandatory directive of the BCI. The State and University had realized their mistake and rightly taken the curative steps.

7. We do not find any merit in the submission of counsel that the petitioner be awarded compensation as he was wrongly admitted in the course. His admission was cancelled within 15 days. However, as conceded by counsel appearing for respondent the admission fee and tuition fee which may have been deposited shall be refunded to the petitioner.

8. Resultantly, we find no merit in this petition, same is dismissed. Parties to bear their own costs as incurred.

Petition dismissed.

I.L.R. [2010] M. P., 1100
WRIT PETITION
Before Mr. Justice S.K. Gangele
23 February, 2010*

CARMEL CONVENT SECONDARY SCHOOL, GWALIOR ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. **Shram Kalyan Nidhi Adhiniyam, M.P. 1982 (36 of 1983), Section 9 [Notification dated 04.05.1995]** - *An institution has employed teaching and non-teaching staff for imparting education to the children - It is charging tuition fees from the children and paying a salary to its staff - Staff members are dependent over the salary for their livelihood - Thus, institution is carrying a business - Hence, as per the notification, institution is governed under the provisions of the Act and liable to pay contribution.* (Paras 12 & 13)

क. श्रम कल्याण निधि अधिनियम, म.प्र. 1982 (1983 का 36), धारा 9 [अधिसूचना तारीख 04.05.1995] – संस्था ने बच्चों को शिक्षा प्रदान करने के लिए अध्यापन तथा अध्यापनेतर कर्मचारीवृंद (स्टाफ) नियोजित किया – यह बच्चों से शिक्षण शुल्क प्रभारित कर रही है और अपने कर्मचारीवृंद को वेतन भुगतान कर रही है – कर्मचारीवृंद अपनी जीविका के लिए वेतन पर निर्भर हैं – इस प्रकार, संस्था कारबार कर रही है – इसलिए अधिसूचना के अनुसार, संस्था अधिनियम के उपबंधों के अधीन शासित होती है और अंशदान संदाय करने के लिए दायी है।

B. **Words & Phrases** - *'Business'* - *The word 'business' has wide meaning and its perceptions differ from private to public sector - Even non-profitable activities could be included in the word 'business'.* (Para 12)

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*W.P. No.1693/2008 (Gwalior)

CARMEL CONVENT SECONDARY SCHOOL, GWALIOR Vs. STATE OF M.P.

ख. शब्द और वाक्यांश – 'कारबार' – शब्द 'कारबार' का व्यापक अर्थ है और उसका बोध निजी से सार्वजनिक क्षेत्र में भिन्न होता है – लाभ विहीन क्रियाकलाप भी शब्द 'कारबार' में सम्मिलित हो सकते हैं।

Cases referred :

AIR 2002 SC 1582, AIR 1975 SC 1639, (1990) 3 SCC 682, (1995) (Suppl.) 2 SCC 348, (1980) 2 SCC 322, AIR 1973 P & H 76, AIR 1955 SC 176, AIR 1958 SC 861, AIR 1993 SC 935.

K.N. Gupta with *S. Gajendragadkar,* for the petitioner.
Praveen Newaskar, Dy.G.A., for the respondent No.1.
Madhukar Rao, K.L. Tiwari, for the respondent Nos. 2 & 3.

ORDER

S.K. GANGELE, J. :–Petitioner has filed this petition challenging recovery of dues from the petitioner under the provisions of Madhya Pradesh Shram Kalyan Nidhi Adhiniyam 1982.

2. The petitioner has been running a school named as 'Carmel Convent Senior Secondary School, Phalka Bazar, Lashkar, Gwalior. It is a minority educational institution and it has been imparting education to children up to 12th standard. The petitioner – institution is not getting any grant-in-aid from the State Government. The State Government enacted an Act named as Madhya Pradesh Shram Kalyan Nidhi Adhiniyam 1982 (Act No. 36 of 1983), hereinafter referred to as the Act of 1982. Under Chapter II of the aforesaid Act a fund has been constituted as 'Labour Welfare Fund' and Section 9 of the Act of 1982 prescribes contribution payable under the afore said Act of 1982. Under the provisions of the aforesaid Act the Assistant Commissioner, M.P. Labour Welfare Mandal, Gwalior, vide letter dated 05.12.2005 sought details of the staff working in the institution of the petitioner and further intimated that an amount of Rs.30,000/- was due to the petitioner – institution as contribution under the provisions of the Act of 1982. The petitioner in its reply dated 02.01.2006 submitted that the institution is not liable to pay the contribution and further requested to drop the proceedings. Thereafter, vide another show cause noticie dated 06.03.2006 the Assistant Welfare Commissioner sought explanation from the petitioner that why amount of Rs.30,000/- as demanded was not paid. The petitioner in its reply dated 16th March 2006 further denied the fact that it is liable to pay an amount of Rs.30,000/- under the provisions of Act of 1982 as contribution. The petitioner stated in the reply that the institution has been running an educational institution and it is imparting education and the teachers are not governed by the definition of 'employee' under the provisions of Payment of Gratuity Act, 1972, as per the judgment of Hon'ble the Supreme Court, hence the provisions of Act of 1982 is not applicable to the petitioner - institution. Finally, vide impugned order dated 13.03.2008, Annexure P-I the petitioner has been directed by the Labour Welfre Commissioner to pay an amount of Rs.11,640/-.

3. As per the return filed by respondents No. 2 and 3, the petitioner - institution is engaged in trade and business. It is imparting education to the students and it has been charging a fixed fee from the students. Thereafter, it has been paying salaries to its staff. Apart from teachers, there are other employees working in the institution - petitioner, such as, Peon, Chowkidar, Security Guards, Sweepers and other Class IV employees. At the time of inspection it was found that the petitioner employed near about 30 security guards on contract basis and there were total 97 employees who had been working in the institution other than teachers. The Inspection report has also been filed. The respondents further stated that the petitioner has not permitted the officers of the department to conduct inspection of the institution neither petitioner submitted service records of the employees for its perusal. It has further been pleaded that the Act of 1982 has been enacted by the State Government in order to provide certain benefits to the workers and it has been made applicable to all the establishments which carry on any business or trade or any work in connection to ancillary thereto. Hence, the petitioner - Institution has been covered under the provisions of the Act of 1982 and it is liable to pay contribution in accordance with Section 9 of the Act of 1982. Subsequently, the rate of contribution has been changed by the Government, hence a final demand of Rs.11,640/- has been made against the petitioner as contribution.

4. The learned Senior Counsel appearing on behalf of petitioner - institution has contended that the petitioner has not been engaged itself in any profession or trade, hence it is not governed by the provisions of the Act of 1982. Consequently, it is not liable to pay the contribution in accordance with Section 9 of the Act of 1982. Learned Senior Counsel further contended that the petitioner - institution has been imparting education and its a minority institution, hence the object of the petitioner - institution is not to carry out any activity for the purpose of earning money. In support of his contentions learned counsel relied on the following judgments :-

(1) *Commissioner of Sales Tax v. Sai Publication Fund,* AIR 2002 SC 1582;

(2) *The Central Inland Water Transport Corporation Ltd., v. Their Workmen,* AIR 1975 SC 1639

(3) *Punjab Land Development and Reclamation Corporation Ltd. Chandigarh v. Presiding Officer, Labour Court, Chandigarh and others,* (1990) 3 SCC 682.

(4) *P. Kasilingam and others v. P.S. G. College of technology and others,* (1995) (Suppl) 2 SCC 348; and

(5) *State of Gujrat v. Maheshkumar Dhirajlal Thakkar,* (1980) 2 SCC 322.

5. Contrary to this, learned Counsel appearing on behalf of respondents No. 2 and 3 has contended that the petitioner has been running educational institutions. It has been charging fees from students. Apart from tuition fees the institution has also been charging fees on other heads. It has been paying regular salary to its employees, which include teaching staff as well as other non-teaching staff. Hence, the petitioner is in the 'business' and it is governed by the provisions of the Act of 1982. Consequently, the present writ petition is liable to be dismissed.

6. From the facts of the case, it is clear that the petitioner - institution has been providing education to various children and for the aforesaid purpose it has been charging fees from the students as tuition fees as well as fees on other heads. The respondents collected information with regard to petitioner - institution and they found that the petitioner - institution employed Peon, Chowkidar, Security Guards, Sweepers and other Class IV employees and also employed teachers for imparting education. The State Government in exercise of powers conferred to it by Sub-section (3) of Section 1 of the Act of 1982 appointed 1st day of June 1995 as the date on which all the provisions of the said act shall come in to force in respect of such establishments in the State of Madhya Pradesh, which carry on any business or trade or any work in connection with or ancillary thereto, and which employ or have employed on any working day during the preceding twelve months more than 9 persons. The notification dated 04.05.95 is as under :-

> "F-14-3/94/16-B, In exercise of the powers coanferred by sub-section (3) of section 1 of the Madhya Pradesh Shram Kalyan Nidhi Adhiniyam, 1982 (No.36 of 1983) read with clause (11) of sub-section (5) of Section 2 thereof, and in continuation of Labour Deptt's previous notification No. 14-01-84-XVI-B Dt. 11.11.87 the State Government hereby appoints 1st day of June 1995 as the date on which all the provisions of the said act shall come in to force in respect of such establishments in the State of Madhya Pradesh, which carry on any business or trade or any work in connection with or ancillary thereto, and which employ or have employed on any working day during the preceding twelve months more than 9 persons."

7. It is not in dispute that the petitioner has employed more than nine persons. Now it has to be decided that whether the petitioner carry on any business or trade or any work in connection with or ancillary thereto.

8. In the case of *Model Town Welfare Council Ludhiana v. Bhupinder Pal Singh,* AIR 1973 Punjab and Haryana 76, has quoted the Corpus Juris Secundum, Valume 12, at page 762 the word 'business' which is as under :-

> "11. In Corpus Juris Secundum, Valume 12, at page 762 the word 'business' in its broad sense is defined as follows :-

"In its broad, its broader, or in its broadest, since, in its more general or common use, in its primary meaning, or when used colloquially, the word 'business' carries with it a very borad meaning : and it has been said that it denotes not only all gainful occupations, but all occupations or duties in which men engaged .....; has common and general application to all sorts of enterprises which engage people's attention and energies; and includes nearly all the affairs in which either an individual or a corporation can be actors; and is a word in common use to describe every occupation in which men engaged, ..., the word is commonly employed in connection with an occupation for livelihood or profit but it is not limited to such pursuits, for it has been said that the definition of 'business' by the lexicographers is sufficiently broad and comprehensive to embrace every employment or occupation ....."

The very fact, that the word 'trade' has been used separately from 'business'. It was urged, clearly shows that the word 'business' is used in a much wider sense than the word 'trade'. For the respondent the contention, however, was that the word 'business' as used in the Rent Restriction act cannot be taken to mean the activities normally within the sphere of the working of a welfare society and must mean an undertaking of a commercial type involving some pursuit with an eye to profit."

9. The Hon'ble Supreme Court in *Messrs. Narain Swadeshi Weaving Mills v. The Commr. Of Excess Profits Tax*, AIR 1955 SC 176, has held as under with regard to 'Busines' as defined in section 2 (5) of the Excess Profits Tax Act, after quoting a judgment of Privy Council :-

"(14) 'Business' as defined in section 2 (5) of the Excess Profits Tax Act includes amongst others, any trade, commerce or manufacture or any adventure in the nature of trade, commerce or manufacture. The first part of this definition of 'a business' in the Excess Profits Tax Act is the same as the definition of a business in section 2 (4) of the Indian Income-tax Act. Whether a particular activity amounts in any trade, commerce or manufacture or any adventure in the nature of trade, commerce or manufacture; is always a difficult question to answer.

On the one hand it has been pointed out by the Judicial Committee in the - '*Commissioner of Income-tax, Bengal v. Shaw Wallace & Co.*', AIR 1932 OC 138 (A), that the words used in that definition are no doubt wide but unerlying each of them is the fundamental idea of the continuous exercise of an

activity. The word 'business' connotes some real, substantial and systematic or organised course of activity or conduct with a set purpose. On the other hand, a single and isolated transaction has been held to be conceivably capable of falling within the definition of business as being an adventure in the nature of trade provided the transaction bears clear indicia of trade. The question, therefore, whether a particular source of income is business or not must be decided according to our ordinary notions as to what a business is."

10. Hon'ble the Supreme Court further in the case of *Mazagaon Dock Ltd. v. Commissioner of Income-Tax and Excess Profits Tax,* AIR 1958 SC 861, has held, as under, with regard to 'business' :-

"(14) We are unable to agree with this contention. The word "business" is, as has often been said, one of wide import and in fiscal statutes, it must be construed in a broad rather than a restricted sense. Discussing the connotation of the word "trade", scott, L. J., observed in Smith Barry v. Cordy, 1946-28 Tax Cas. 250 at p. 259 (A) :

"The history of judicial decisions has been similar, showing a strong tendency not to restrict the scope of Schedule D; a tendency which was, we think, in sympathy with the general social and economic out-look of the country. There is hardly any activity for gaining a livelihood and not covered by the other Schedules, which does not seem to us to be swept into the fiscal net by the Schedule D."

"The word 'business' connotes', it was observed by this Court in *Narain Swadeshi Weaving Mills v. Commissioner of Excess Profits Tax* 1955-1 SCR 952 at p. 96: [(S) AIR 1955 SC 176 at p. 181) (B); "some real, substantial and systematic or organised course of activity or conduct with a set purpose." Now, it may be conceded that when a person purchases his requirements from a particular dealer, he cannot without more be said to carry on business with him. But, here there is much more. The non-resident ;Companies send their ships for repair to the appellant, not as they might to any other repairer but under a special agreement that repairs should be done at cost. And further unlike customers who purchase goods for their own consumption or use, the non-resident Companies get their shops repaired for use in what is admittedly their business. These are clearly trading activities, organised and continuous in their character and it will be difficult to escape the conclusion that they constitute business. We are not even concerned in this

appeal with the larger question whether the activities of the non-resident Companies in connection with the repair of the shops amount to carrying on of business. What we have to decide is whether having regard to the course of dealings between the non-resident Companies and the appellant it can be said of the former that they carry on business with the latter within the meaning of S. 42 (2). Now, it should be observed that S. 42 speaks not of the non-residents carrying on business in the abstract but of their carrying on business with the resident, and in the context, it must include all activities between them having relationship to their business. That is the view taken by the learned Judges in the Court below, and we are in agreement with it."

11. Hon'ble the Supreme Court further in *Mahesh Chandra v. Regional Manager, U.P. Financial Corporation and others,* AIR 1993 SC 935, has held, as under, with regard to 'business' :-

"Corporation deal with public money for public benefit. The approach has to be public oriented, helpful to the loanee, without loss to the corporation. S. 24 of the Act itself required the Board "to discharge its function on business principles, due regard being had to the interest of industry, commerce and general public". 'Business' is a word of wide import. It has no definite meaning. Its perceptions differ from private to public sector or from institutional financing to commercial banking. The Financial Corporations under the Act were visualised not as a profit earning concerns but an extended arm of a welfare State to harness business potential of the country to benefit the common man."

12. From the aforesaid principle of law laid down by Hon'ble the Supreme Court, it is clear that the word 'business' has no definite meaning. It is a word of wide meaning and its perceptions differ from private to public sector. Even non-profitable activities could be included in the word 'business'. In the present case, the petitioner - institution has employed teaching staff and other non-teaching staff, namely, Peon, Chowkidar, Security Guards, Sweepers and other Class IV employees and it has been imparting education to the children. It is charging monthly tuition fees from the children and it has also been paying salary to its staff members. The petitioner has not produced any Profit and Loss account to establish that it is a non-profitable institution. It is paying regular salary to its staff members and staff members are dependent over the salary for their livelihood. In such circumstances, in my opinion, the petitioner - institution has been carrying a 'business'. Hence, it is governed under the provisions of the Act of 1982 as per the notification dated 04.05.1995, copy of which has been filed as Annexure R-1.

13. Consequently, the petitioner - institution is liable to pay contribution as per the provisions of the Act of 1982. Hence, I do not find any merit in this writ petition. It is hereby dismissed. Looking to the facts of the case, no order as to cost.

Petition dismissed.

I.L.R. [2010] M. P., 1107
WRIT PETITION
Before Mr. Justice S.C. Sharma
3 March, 2010*

RAKESH CHANDRA KEIN ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Service Law - ***Appointment on contractual basis - Opportunity of hearing*** - *Assistant Engineer served for more than 10 years on contractual basis under Rajiv Gandhi Shiksha Mission - Without granting any opportunity of hearing a stigmatic order was passed for discontinuance of service on the ground that he has committed large irregularities - Held - Termination is not a termination simpliciter - It is punitive in nature without providing opportunity of hearing - Order set-aside.* (Paras 6 to 10)

सेवा विधि – संविदा आधार पर नियुक्ति – सुनवाई का अवसर – सहायक यंत्री ने राजीव गांधी शिक्षा मिशन के अन्तर्गत संविदा आधार पर 10 वर्ष से अधिक सेवा की – सुनवाई का कोई अवसर दिये बिना सेवा समाप्ति का लांछनकारी आदेश इस आधार पर पारित किया गया कि उसने बड़ी अनियमितताएँ की हैं – अभिनिर्धारित – सेवा समाप्ति केवल सेवा समाप्ति नहीं है – सुनवाई का अवसर दिये बिना इसकी प्रकृति दण्डात्मक है – आदेश अपास्त।

Cases referred :

2002(2) MPLJ 391, 2001(3) MPLJ 616, 2008(4) MPLJ 670, (2006) 4 SCC 1.

R.K. Vashishtha, for the petitioner.
Nidhi Patankar, G.A., for the respondents/State.

ORDER

S.C. Sharma, J. :–The petitioner before this Court has filed this petition challenging the order dated 12.06.2009 (Annexure P/1) passed by District Project Director, District Education Centre, Bhind, by which his services have been put to an end.

2. The contention of the petitioner is that he was appointed as Assistant Engineer in Rajeev Gandhi Shiksha Misson vide order dated 05.03.1999 on contractual basis for a period of one year. The petitioner has further stated that the tenure was extended from time to time and on 12.06.2009 without granting

*W.P. No.2777/2009(S) (Gwalior)

any opportunity of hearing to the petitioner a stigmatic order was passed for discontinuing the services of the petitioner. He prayed for quashing of the aforesaid order.

3. Learned counsel for the petitioner has relied upon judgments delivered by this Court in the case of *Umesh Kumar Trivedi Vs. State Committee, Rajiv Gandhi Prathmik Shiksha Mission and others,* 2002 (2) M.P.L.J. 391, *Rahul Tripathi Vs. Rajeev Gandhi Shiksha Misson, Bhopal,* 2001(3) M.P.L.J., 616 and *Jitendra Vs. State of M.P. and others,* 2008(4)M.P.L.J., 670. His contention is that even though the petitioner was serving on contractual basis, the respondents could not have been terminated the petitioner from service without granting any opportunity of hearing especially in view of the fact that the impugned order is stigmatic in nature.

4. Reply has been filed on behalf of the respondents and the stand of the State is that the petitioner was appointed purely on contractual basis on a fixed salary of Rs.5,500/- per month. The tenure of the petitioner was extended from time time. The respondents have also stated that as per the terms and conditions of the appointment order, the impugned order has been passed for discontinuing the services of the petitioner by giving him a month's notice. The respondents have also stated that the petitioner has committed gross irregularities and as the petitioner was a contractual employee, no notice nor any fact finding enquiry is necessary in the present case. Respondents have relied upon the judgment delivered by the Apex Court in the case of *Secretary, State of Karnataka Vs. Uma Devi,* 2006(4) SCC 1.

5. Heard the learned counsel for the parties at length and with the consent of the parties, the matter has been finally heard and disposed of at motion stage.

6. In the present case, the petitioner before this Court was appointed as Assistant Engineer in the services of the State Govt. under the Rajeev Gandhi Shiksha Mission by an order dated 05.03.1999. The initial appointment reflects that the appointment was for a period of one year. However, the same was extended from time to time. The order of termination dated 12.06.1999 reflects that the petitioner has committed large number of irregularities while serving as Assistant Engineer (contractual basis) and based upon the irregularities committed by the petitioner it was resolved by the District Project Director to discontinue the services of the petitioner. In the case of *Rahul Tripathi Vs. Rajeev Gandhi Shiksha Mission, Bhopal,* this Court in paragraph 10 has held as under:-

> "10. The present factual matrix is to be tested on the aforesaid enunciation of law. To find out whether the order of termination is a termination simpliciter or punitive in nature it is apposite to refer to the order contained in Annexure P-18. The relevant portion of the same reads as under:-

"श्री राहुल त्रिपाठी आत्मज श्री बी.के. त्रिपाठी को विकासखंड, बलदेवगढ़ में विकास खंड स्त्रोत केंद्र समन्यवयक के रूप में राजीव गांधी प्राथमिक शिक्षा मिशन के अंतर्गत एक वर्ष की संविदा नियुक्ति आदेश क्रमांक डी.पी.ई.पी./नियु./95/22/6 दिनांक 21–08–1995 द्वारा दी गई थी, जिसकी अवधि निम्नानुसार दिनांक 20–08–1996 को हो गई थी। इस अवधि की समाप्ति के उपरांत कार्यालयीन आदेश क्रमांक 839, दिनांक 6–9–1996 द्वारा श्री त्रिपाठी को संविदा नियुक्ति की शर्तों पर ही पुनः आगामी आदेश तक पदस्थ किया गया था किन्तु श्री त्रिपाठी के विरूद्ध गंभीर वित्तीय अनियमितताओं एवं वरिष्ठ कार्यालयों के आदेशों की अवहेलना की शिकायतें प्राप्त हुई। शिकायतों के संबंध में इस कार्यालय के पत्र क्रमांक 710 दिनांक 25–11–1997, क्रमांक 858/1 दिनांक 23–12–1997, क्रमांक 983/1 दिनांक 21–1–1998, क्रमांक 1120 दिनांक 18–11–1998 क्रमांक 1156 दिनांक 2–12–1998 द्वारा स्पष्टीकरण चाहा गया किन्तु श्री त्रिपाठी द्वारा स्पष्टीकरण एवं उसके उल्लेखित आरोपों का कोई समाधान–कारक उत्तर प्रस्तुत नही किया गया। विकास खंड शिक्षा अधिकारी, बलदेवगढ़ द्वारा भी विकास खंड स्त्रोत केन्द्र, बलदेवगढ़ में श्री त्रिपाठी द्वारा वित्तीय अनियमितता किए जाने एवं अपने कर्तव्यों का निर्वहन गंभीरता से न करने संबंधी प्रतिवेदन प्रस्तुत किया है, जिससे बलदेवगढ़ विकास खंड में मिशन कार्य अत्यंत प्रभावित हुआ है।

अतः उपरोक्त कारणों को दृष्टिगत रखते हुए श्री त्रिपाठी को तत्काल प्रभाव से विकास खंड स्त्रोत केंद्र समन्यवयक, बलदेवगढ़ पद से पृथक किया जाता है। इन्हें नोटिस न दिए जाने के कारण नियमानुसार एक माह का वेतन देय होगा।

(कलेक्टर एवं जिला मिशन संचालक द्वारा आदेशित)"

On a bare glance at the aforesaid order it becomes graphically clear that the petitioner's appointment was extended from time to time but during his continuance serious allegations with regard to financial irregularities, were received. The order also reflects that the petitioner was asked to show cause in number of correspondences but the petitioner could not explain the charges levelled against him. It has also been mentioned in the order as the petitioner has committed financial irregularities and has not performed his duties with sincerity the work of the Mission has been affected and accordingly he has been removed. At this juncture, it is worthwhile to refer to the counter affidavit wherein it has been also mentioned that against the petitioner there were serious financial irregularities and he was asked to show cause but his reply was not found satisfactory. The return filed by the respondent No.3 also reflects the same. On a scrutiny of the entire factual scenario, there remains no scintilla of doubt that the

order of termination passed against the petitioner is stigmatic and cannot be regarded as a termination simpliciter. The allegations incorporated in the order clearly establish that stigma has been cast and it will affect the future prospects of the petitioner. Accordingly, the case and it will affect the furture prospects of the petitioner. Accordingly, the order contained in Annexure P-18 deserves to be quashed and accordingly, I so do. Needless to emphasis the petitioner shall reap all the consequential benefits."

7. This Court in the case of *Umesh Kumar Trivedi Vs. State Committee, Rajiv Gandhi Prathmik Shiksha Mission and others* in paragraphs 9 and 10 has held as under:-

"9. In the return, there are serious allegations levelled against the petitioner of making appointment in an illegal manner and not distributing the books. As a matter of fact, petitioner ought to have been required to show cause and a by-party enquiry should have been conducted into the allegations if the services of the petitioner were to be dispensed with on that basis. The misconduct alleged in the return was the "foundation" and not merely a "motive". Thus, it was necessary to have conducted an enquiry. In *Jarnail Singh and others Vs. State of Punjab and others,* AIR 1986 SC 1626, the Supreme Court held that in such circumstances, it is imperative to conduct an enquiry even where the services are ad hoc in its nature. No enquiry was conducted and outrightly the petitioner was given march order, that too after rendering the services for about a period of five years. His services shall be deemed to be extended for want of specific order of extension and if termination was to be made, clause 4 containing the condition relating to termination should have been complied with. The impugned order Annexure P/2, thus, cannot withstand the judicial scrutiny. The same is liable to be quashed and is hereby quahsed. The petitioner is directed to be reinstated along with back wages.

10. Writ petition is allowed. Annexure P/2 is quashed. Reinstatement of the petitioner is directed along with back wages. Principle of "no work no pay" is not applicable as the petitioner's removal has been found to be illegal and contrary to rules and without following the principles of natural justice."

8. A similar view has been expressed in the case of *Jitendra Vs. State of M.P. and others,* wherein, this Court in paragraphs 7 to 10 has held as under:-

"7. After going through the impugned order; averments made in

the petition; reply and rejoinder; it is clear that the respondents had issued a show-cause notice to the petitioner alleging the irregularities committed by him in purchasing various articles. Thereafter a three member Committee enquired and found illegalities and irregularities in the purchases. The decision of the Committee was on the basis of enquiry conducted behind the back of the petitioner. On the foundation of such report, the State Level Appointment Committee held the petitioner's services to be unsatisfactory and took decision to terminate him from service.

8. True, it is that in the impugned order no allegation about unsatisfactory record or misconduct has been mentioned. However, a reference has been made in the said order of termination about the decision dated 14.6.2005 taken by the said State level Appointment Committee in an enquiry conducted behind the back of the petitioner. Having regard to this and the stand taken by the respondents to reply as referred to above it is graphically clear that foundation or the impugned order of termination is punitive in nature. On scrutiny of the entire factual scenario leading to the termination of the petitioner's services, there remains no doubt that order of termination passed against the petitioner is stigmatic in nature and cannot be regarded as termination simpliciter. The foundation of impugned order is decision of the State Level Appointment Committee, which is based upon the enquiry report of the three Member Committee, which had conducted the enquiry behind the back of the petitioner.

9. In the case of *Shamshersingh Vs. State of Punjab,* AIR 1974 SC 423, it has been held by the Supreme Court that form of the order is not conclusive and innocuously worded order can be passed on a foundation of grave charge. In the case of *State of U.P. Vs. Ramchandra Trivedi,* AIR 1976 SC 2547, it was held by the Supreme Court, that the motive in passing an order of termination is not a relevant factor. What is determinative is the foundation on which it is based. It is foundation which makes the order punitive in nature. In the case of *Dipti Prakash Banerjee Vs. Satyendra Nath Bose, National Centre for Basic Sciences, Calcutta and others,* AIR 1999 SC 983, it has been held by the Supreme Court that the material which amounts stigma need not be mentioned in the order of termination of the probationer but might be contained in any document referred in the termination order or in its annexures. Obviously such a document could be

asked for or called for by any future employer of the probationer. In such case, the order of termination would stand vitiated on the ground that no regular inquiry was conducted. In the case of *Radheshyam Gupta Vs. U.P. Industries Agro,* (1999) 2 SCC 21, the Supreme Court has held that where the termination is preceded by an enquiry and evidence is received and findings as to misconduct or a definitive nature are arrived at behind back of the officer and where on the basis of such a report, the termination order is issued, such an order will be violative of the principles of natural justice in as much as the purpose of the enquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence for a future regular departmental enquiry. In such cases, the termination is to be treated as based or founded upon misconduct and will be punitive. In somewhat identical situation, learned Single Judge of this Court in the case of *Rahul Tripathi Vs. Rajeev Gandhi Shiksha Kendra,* 2001(3) MPLJ 616, has quashed the termination order and held that petitioner shall reap all the consequential benefits.

10. Having regard to the aforesaid legal position there remains no iota of doubt that the impugned termination order dated 18-6-2005 (Annexure P-9) though, innocuously worded but is founded upon the enquiry conducted behind the back of the petitioner about the alleged misconduct. In the circumstances, the same deserves to be and is hereby quashed. As a result, the petitioner shall be entitled for reinstatement will all consequential benefits".

9. In the present case, to find out whether the order of termination is a termination simpliciter or punitive in nature it is apposite to refer to the order contained in Annexure P-1. The aforesaid order reads as under:-

"कार्यालय (कलेक्टर) जिला शिक्षा केन्द्र भिण्ड
कमांक/एस.एस.ए./स्था./2009/772 भिण्ड, दिनांक 12.6.2009

..आदेश...

जिला शिक्षा केन्द्र भिण्ड में संविदा पर कार्यरत सहायक यंत्री श्री पी.सी. केन के द्वारा भिण्ड जिले में सर्वशिक्षा अभियान अन्तर्गत स्वीकृत निर्माण कार्यों की धीमी प्रगति, वर्ष 2007–08 में स्वीकृत निर्माण कार्यों की धीमी प्रगति, एवं अपने पदीय दायित्वों के निर्वहन में लापरवाही, शासकीय कार्यों के प्रति उदासीनता तथा निम्नलिखित अनियमितताओं:–

1. सत्र 2007–08 में वार्षिक कार्य योजना में स्वीकृत शाला भवनों में नियमानुसार प्रशासकीय स्वीकृति इत्यादि के वगैर सीधे खाते खुलवाकर राशि जारी की गई, जिससे वित्तीय अनियमितता होना सिद्ध होता है।

2. स्वीकृत शाला भवनों में माध्यमिक विद्यालय मड़रौली अनुदान प्राप्त होने के बावजूद शासकीय शाला दर्शाकर शाला भवन निर्माण हेतु 6.78 लाख रूपये की राशि जारी की जाकर शासन को 6.78 लाख रूपये की क्षति पहुंचाई गई है, जो स्थाई वित्तीय अनियमितता की श्रेणी में आती है।

3. शासकीय माध्यमिक विद्यालय विरधनपुरा के भवन निर्माण बावत् राशि जारी की जाने वाली नश्ती को 1 वर्ष विलम्ब से प्रस्तुत किए जाने के कारण निर्माण कार्य में विलम्ब किया गया है।

4. सत्र 2008–09 में संविदा पर कार्यरत सहायक यंत्री श्री पी.सी. केन को सौंपे गये दायित्वों (निर्माण कार्य) की प्रगति अति न्यून होने के कारण जिले की ग्रेडिंग निम्न स्तर पर होने से जिले की छवि धूमिल हुई है।

5. दिनांक 11.06.2009 को आयुक्त महोदय चम्बल संभाग मुरैना के द्वारा निर्माण कार्यों की नश्तियों के अवलोकन के उपरान्त संविदा पर कार्यरत सहायक यंत्री श्री पी.सी. केन को दोषी पाया गया।

के कारण आपकी वर्ष 2009–10 में संविदा अवधि न बढ़ाने का निर्णय लिया गया है तथा संविदा शर्तों के अनुरूप आपकी संविदा एकमाह की पूर्व सूचना के साथ दिनांक 11.07.2009 से समाप्त कर दी गई है। आप नियत दिनांक से पूर्व अपना समस्त कार्यभार जिला परियोजना समन्वयक द्वारा निर्देशित व्यक्ति को सौंपकर 11.07.2009 को कार्यमुक्त होना सुनिश्चित करें।

(कलेक्टर महोदय द्वारा आदेशित)

सही/–
जिला परियोजना संचालक,
जिला शिक्षा केन्द्र भिण्ड"

10. Keeping in view the aforesaid judgments delivered by this Court in an identical cases, as the order is certainly punitive and stigmatic in nature, the writ petition deserves to be allowed. The impugned order dated 12.06.2009 is hereby quashed. The respondents are directed to reinstate the petitioner forthwith and the petitioner shall entitle for all consequential benefits.

No order as to costs.

Petition allowed.

SUBHASH SONA Vs. STATE OF M.P.

I.L.R. [2010] M. P., 1114
WRIT PETITION
Before Mr. Justice R.S. Garg & Mr. Justice R.K. Gupta
3 March, 2010*

SUBHASH SONA & anr. ... Petitioners
Vs.
STATE OF M.P. & ors. ... Respondents

Constitution, Articles 14 & 16, Transport (Gazetted) Service Recruitment Rules, M.P. 1972, Rule 7, Column 5 of Schedule II - *Promotion to the post of Regional Transport Officer - Appointment to the post of Regional Transport Officer shall be made by taking persons on transfer or deputation - Out of 8 posts, 5 posts have been reserved to be filled on deputation and remaining posts are to be filled from in-service candidates - Held - Firstly, State Government by reserving 5 posts has created class within the class - Secondly, there are no equal opportunities in the employment and there is a differentiation with respect to the officers in services and Officer brought on deputation - No justification is given to prescribe such higher percentage for deputationists - Provision is contrary to Articles 14 & 16(1) -Provisions unconstitutional - Petition allowed.* (Paras 18 to 24)

संविधान, अनुच्छेद 14 व 16, परिवहन (राजपत्रित) सेवा भर्ती नियम, म.प्र. 1972, नियम 7, अनुसूची II का कालम 5 – क्षेत्रीय परिवहन अधिकारी के पद पर पदोन्नति – क्षेत्रीय परिवहन अधिकारी के पद की पूर्ति किसी व्यक्ति के स्थानांतरण या प्रतिनियुक्ति द्वारा की जायेगी – क्षेत्रीय परिवहन अधिकारी के 8 पदों में से 5 पद प्रतिनियुक्ति से पूर्ति के लिए आरक्षित और शेष पद सेवारत अभ्यर्थियों से पूर्ति के लिए – अभिनिर्धारित – प्रथमतः राज्य सरकार ने 5 पद आरक्षित कर वर्ग के भीतर वर्ग सृष्ट किया – द्वितीयतः नियोजन में समान अवसर नहीं है और सेवारत अधिकारियों और प्रतिनियुक्ति पर लाये गये अधिकारियों के बीच भेदभाव – ऐसा उच्चतर प्रतिशत प्रतिनियुक्तों (deputationist) के लिए विहित करने का कोई औचित्य नहीं दर्शाया गया –उपबंध अनुच्छेद 14 व 16(1) के प्रतिकूल – उपबंध असंवैधानिक – याचिका मंजूर।

Cases referred :

(2002) 4 SCC 34, 2006 (2) MPLJ 164, (1997) 4 SCC 348, AIR 1979 SC 429.

Manoj Sharma, for the petitioners.
Rahul Jain, Dy.G.A. with *Vivek Agrawal, G.A.,* for the respondents.

J U D G M E N T

The Judgment of the Court was delivered by **R.K. Gupta, J. :**–As the question of fact and law involved in this batch of three writ petitions is common, they are being disposed of by this singular judgment.

2. In these writ petitions, the petitioners, Assistant Regional Transport Officers

*W.P. No.3428/2003 (Jabalpur)

in the Transport Department of the State of Madhya Pradesh, have prayed for issue of a Writ of Mandamus declaring Rule 7 and corresponding Column 5 under Schedule-II of the M.P. Transport (Gazetted) Service Recruitment Rules, 1972 as ultra vires the Constitution of India and the Motor Vehicles Act, 1988 and consequentially to convene a Departmental Promotion Committee for their promotions to the posts of ATC/RTO/Additional RTOs. The petitioners have further prayed for a direction restraining the respondents from filling up the posts of the Regional Transport Officers by deputation/transfer from the members of the State Civil Services and any other cadre except that of Assistant Regional Transport Officers.

3. For the sake of convenience, the facts of the case are referred to from W.P. No.3428/2003. The petitioners initially entered into the services of the Transport Department as Transport Sub-Inspectors. Their services are governed by the M.P. Transport (Gazetted) Service Recruitment Rules, 1972. The channel of promotion from the post of Transport Sub-Inspectors is to the posts of Transport Inspector and then to the post of Assistant Regional Transport Officer. By virtue of the service rendered in the department the petitioners got their promotion as Assistant Regional Transport Officers. Prior to publication of the Gazette Notification dated 20.9.1999, Annexure P-3, the post of Assistant Regional Transport Officer was not a Gazetted Post. As per the channel of promotion, the petitioners are now to be promoted as Assistant Transport Commissioner (ATC), Regional Transport Officer (RTO) and Additional Regional Transport Officer, all these posts are treated as equivalent and carry a pay scale of Rs.6,500-10,500.

4. M.P. Transport (Gazetted) Service Recruitment Rules, 1972 (hereinafter referred to in short as "the 1972 Rules") were framed in exercise of the powers conferred under the proviso to Article 309 of the Constitution of India and they came into effect on publication in the Madhya Pradesh Gazette on 18th November, 1972.

5. Rule 4 provides for classification and scale of pay etc. and the number of posts included in the service as per the provision contained in the Schedule-I appended thereto. Rule 5 relates to the method of recruitment wherein Sub-Rule (a) provides two methods of recruitment to the service, namely, (1) by promotion of departmental personnel and (2) by transfer/deputation of persons, who are holding such posts in substantive capacity in such service as may be specified in this behalf. It is specified in Sub-Rule (b) that the number of persons recruited under clause 1 and 2 of Sub-Rule (a) shall not at any time exceed the percentage shown in columns 3 and 5 of Schedule-II. Appointment by Transfer/ Deputation has been further specified in Rule 7. As per Sub-Rule (1) of Rule 7, appointment to the post of Regional Transport Officers mentioned in Column 5 of Schedule-II shall be made by taking persons on transfer from the M.P. State Civil Service

Class-II and appointment to the post of Assistant Transport Commissioner (Tax) shall be made by taking a person on transfer either from M.P. State Civil Service Class-II or M.P. State Accounts Service Class-II or on deputation from Accountant General, Madhya Pradesh. Rule 6 provides that the appointment to the service of the Transport Department after commencement of the 1972 Rules shall be made by the Government only after selection by one of the methods of recruitment specified in Rule 5.

6. Initially there were only seven posts of Regional Transport Officers, only two senior officers of the department were working on the said posts, while the remaining five were filled by deputation. Subsequently, by way of amendment published in the Gazette Notification on 26th August, 1975, 1972 Rules were amended and one post was added by amending the Rules and the posts of RTOs were increased to "8" and accordingly the promotees quota was also enhanced to "3" in place of "2", however, five posts to be filled by deputation/transfer remained the same. A Departmental Promotion Committee met on 29.11.1989 wherein the case of some of the petitioners was considered and they were found fit to be promoted as Regional Transport Officer but no promotion was effected. According to the petitioners, though certain attempts were made to fill up the said posts at the behest of Deputy Collectors but because of the confrontation from the representative Union of the officers and the employees of the Department i.e. the M.P. Transport (Govt.) Department Officers and Employees Union, for a considerable period the posts of Regional Transport Officers were not filled by the persons from Revenue Department, but vide order dated 19.3.2001, as contained in Annexure P-2, the private respondents were posted as Regional Transport Officers in terms of Rule 7(1) much to the detriment of the petitioners and alike persons who are serving as the Assistant Regional Transport Officers. However, before that, an attempt was made by certain colleagues of the petitioners by filing original application No.908/2001 before State Administrative Tribunal with a prayer to restrain the respondents from filling up vacancies by transfer of Deputy Collectors on deputation. The Tribunal vide order dated 27.3.2001, Annexure P-6, directed to maintain status-quo with regard to posting of Additional RTOs. The action of the respondents in placing the services of the private respondents as the Regional Transport Officers vide order dated 19.3.2001 was challenged by certain colleagues of the petitioners as well as the M.P. Transport Department Officers and Employees Union before the M.P. State Administrative Tribunal in Original Application No.1333/2001. After abolition of the tribunal, the said application has been transferred to this Court for its adjudication and was registered as W.P. No.17238/2003, which has also been taken up for analogous hearing.

7. Understandably, as the department itself was taking shape at the beginning it might have made a provision of five posts to be filled from the M.P. Civil Services Class-II services as provided under Column 5 of Schedule-II of the Rules but the

grievance of the petitioners is that by efflux of time when the departmental candidates with technical qualifications are available then persistence with the provision of filling of the post of Regional Transport Officers on deputation/transfer by the officers of the Class-II services of the M.P. Civil Services is the very antitheses of what the 1972 Rules and the provisions of the Motor Vehicle Act, 1988 stand for. It is urged on behalf of the petitioners that the provision of posting of employees of other department on deputation on the post of Regional Transport Officer is violative of Articles 14 and 16 of the Constitution of India inasmuch as it deprives the petitioners and similarly situated officers of the department a right to further promotion as Regional Transport Officer/Additional Regional Transport Officers.

8. Per-contra, the respondents-State in their return have contended that it is within the powers of the State to provide for mode of appointment which could either be through direct appointment, promotion or by deputation. Refuting the contention of the petitioners it is submitted on behalf of the State that there is no such provision in the 1972 Rules that only a person with specialization or skill can only be appointed as Regional Transport Officer. According to them, even the petitioners also do not possess any extra-ordinary technical qualification and as such there is no violation of any fundamental right of the petitioners by filling the posts on transfer/deputation. We have also been apprised that presently in the cadre of Assistant Commissioner/Regional Transport Officer and Additional Regional Transport Officers the strength is of 30 posts out of which total 25 posts are meant for departmental officers and five posts of R.T.O. are reserved to be filled on deputation.

9. It would be apt to mention here that this Court at the stage of motion hearing on 1.9.2008 has passed the following order:

> *"Shri Rahul Jain, learned counsel for the State submits that due to some inadvertence or misunderstanding certain statements were made in the earlier affidavits in relation to the departmental candidates but the State after realising its mistake is seeking withdrawal of insinuating pleadings. According to him, the departmental candidates are as efficient and competent as any other. It is submitted by him that the Government is proposing to amend Schedule-I, II and IV appended to the Rules and the draft amendment has already been sent to the Law Department. It is also submitted by the learned counsel for the State that the Department may consider the question of deleting filling of post by deputation.*
>
> *In our opinion, if the State is of the opinion that the departmental candidates are efficient and competent as others*

then ordinarily there would be no need to fill the post by deputation.

From the reply filed by the State it does not appear that why the State Government wants to have a small gully open to it to invade into the rights of the departmental candidates. Even otherwise it is to be seen that the original rules provide that out of seven posts, two would be filled by promotion while the other five would be filled by deputation by the Government of its sweet will.

We are also unable to understand that why such ratio should be allowed to continue which goes to the extent 2:5 or 28:72.

Let the Government justify its stand as to why it is continuing filling of the post of deputation. The Government should also inform this Court that within what time the State Government would pass necessary orders amending the Rules. Put up in week commencing 22.9.2008."

10. After some additional documents were filed on behalf of the State, the case was listed on 24.10.2008 on which date the following order was passed:

"Shri Jain submits that on 6.10.2008 the respondents have filed some additional documents.

The said documents are not available in the records. Office is hereby directed to place the documents along with the records. The office is hereby informed that the delay on part of the office in placing the documents on record is not in good taste because the Court has to adjourn the cases unnecessarily.

Shri Jain, learned counsel for the State submitted that a Notification has been issued by the State Government on 23rd August, 2008 from which it would clearly appear that out of 30 posts, only five posts have been reserved and the said five posts, if are filled by deputation, then as many as 25 posts would be available to be filled by the departmental candidates.

Shri Tiwari, learned counsel for the petitioners, on the other hand, submitted that as they have not been supplied with copy of the reply and the documents, they are unable to make their comments.

Shri Rahul Jain, learned counsel for the State submits that the Secretary of the department may be asked to remain in attendance to clarify the position that whether the five posts can be filled by deputation or only five posts of Regional

Transport Officer out of nine are to be filled deputation.

At the request of Shri Jain, it is hereby directed that the concerned Secretary of the department shall remain in attendance on 21.11.2008 to clarify the said position."

11. The case was listed on 3.3.2009 but nothing was clarified as to why five posts of Regional Transport Officer have been reserved to be filled on deputation and this Court passed the following order:

"Though the State Government has filed an additional return but till date they have not informed us that if thirty posts are equal in cadre then why reservation is made only in the post of Regional Transport Officer. Repeatedly, we have been asking the State, its officers and the Transport Commissioner that if all the posts of Regional Transport Officers, Assistant Transport Officers/Transport Officers are equal in cadre then why reservation of five posts in total number of thirty posts is not being made.

The respondents are purposely playing game with the Court by avoiding the answers. If on the next date of hearing, appropriate reply is not filed then this Court is likely to issue a direction that all the deputationists be repatriated and all the nine posts of Regional Transport Officers be filled by the competent officers of the department.

A complaint is being made by the learned counsel for the petitioners that this Court simply directed that further posts in the cadre of Regional Transport Officers be not filled by deputation but taking undue advantage of the facts and misinterpreting the orders, the respondents have stopped the meeting of the D.P.C. and are not promoting the competent officers to occupy the office of R.T.O.

Let learned counsel for the respondents seek instructions in the matter and inform us that assuming five posts are reserved for deputation then why the other four posts are not being filled after conduction of D.P.C. and in case the posts are to be filled through the D.P.C. then within what time the D.P.C. would be convened."

12. On behalf of the petitioners it is argued that excessive reservation made in favour of the deputationists not only affects the promotional avenues of in-service candidates but the excessive reservation also discourages in-service candidates. On this basis it is submitted that the policy as such is violative of Article 14 of the

Constitution of India being arbitrary. It is also contended that in-service candidates are being ignored and preference is being given to the deputationists by prescribing higher percentage of reservation for the deputationists. This submission is supported on the basis of the fact that out of total eight posts of Regional Transport Officer, five posts have been given for transfer/deputation and no justification is given by the respondents to prescribe such a higher percentage for the deputationists to the higher posts.

13. On behalf of the respondents it is contended that the persons on deputation wherever they are posted as RTOs more revenue is being earned by them and therefore, on the basis of the revenue earned by the persons on deputation, the State is justified in prescribing the higher percentage to fill the vacancy of RTO from deputationists. It is also submitted that while making the recruitment rules the State has the discretion to prescribe the percentage of the posts to fill by in-service candidates and by deputationists and the Rule as such cannot be held to be arbitrary.

14. The rival submissions made by the parties are considered. In this reference, with profit we may take into account the decision rendered by the Apex Court in *Ashutosh Gupta v. State of Rajasthan and others,* (2002) 4 SCC 34 wherein it is held that mere differentiation or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. When a law is challenged as violative of Article 14, it is necessary in the first place to ascertain the policy underlying the statute and the object intended to be achieved by it. The Court has to apply a dual test in examining the validity as such whether the classification is rational and based upon an intelligible differentia which distinguished persons or things grouped together from those left out of the group and whether the basis of differentiation has any rational nexus of relation with its avowed policy and objects. The relevant para-6 of the said decision is reproduced as under:-

> *"The concept of equality before law does not involve the idea of absolute equality amongst all, which may be a physical impossibility. All that Article 14 guarantees is the similarity of treatment and not identical treatment. The protection of equal laws does not mean that all laws must be uniform. Equality before the law means that among equals the law should be equal and should be equally administered and that the likes should be treated alike. Equality before the law does not mean that things which are different shall be treated as though they were the same. It is true that Article 14 enjoins that the people similarly situated should be treated similarly but what amount of dissimilarity would make the people disentitled to be treated equally, is rather a vexed question. A legislature, which has*

to deal with diverse problems arising out of an infinite variety of human relations must of necessity, have the power of making special laws, to attain particular objects; and for that purpose it must have large powers of selection or classification of persons and things upon which such laws are to operate. Mere differentiation or inequality of treatment does not "per se" amount to discrimination within the inhibition of the equal protection clause. The State has always the power to make classification on a basis of rational distinctions relevant to the particular subject to be dealt with. In order to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others who are left out of the group, and (ii) that that differentia must have a rational relation to the object sought to be achieved by the Act. What is necessary is that there must be a nexus between the basis of classification and the object of the Act. When a law is challenged as violative of Article 14, it is necessary in the first place to ascertain the policy underlying the statute and the object intended to be achieved by it. Having ascertained the policy and the object of the Act, the court has to apply a dual test in examining the validity, the test being, whether the classification is rational and based upon an intelligible differentia which distinguished persons or things that are grouped together from others that are left out of the group, and whether the basis of differentiation has any rational nexus or relation with its avowed policy and objects. In order that a law may be struck down under this article, the inequality must arise under the same piece of legislation or under the same set of laws which have to be treated together as one enactment. Inequality resulting from two different enactments made by two different authorities in relation to the same subject will not be liable to attack under Article 14. It is well settled that Article 14 does not require that the legislative classification should be scientifically or logically perfect. If we examine the impugned provisions of the Emergency Recruitment Rules from the aforesaid standpoint the conclusion is irresistible that the aforesaid set of Rules have been framed for a specific recruitment to the administrative service. The provision of Rule 25 dealing with seniority has been specifically designed to

meet all situations under which people from different walks of life could be recruited to Rajasthan Administrative Service under the Emergency Recruitment Rules. The law-making authority must be presumed to have examined pros and cons in making the aforesaid provision for seniority in the cadre which is in pari materia with similar provisions for recruitment to the Indian Administrative Service and, therefore, it is difficult for us to hold that the aforesaid provision is discriminatory in nature."

15. It may also be seen that a person has only right to be considered for promotion but he has no right to be promoted. Any rule which reduces the chances of promotion cannot be held to be bad. In this reference, we may profitably refer to a decision rendered by a Division Bench of this Court in *S.S. Shrivastava vs. State of Madhya Pradesh and others*, 2006 (2) M.P.L.J. 164 and the reliance is placed on paras 13, 14, 15 and 16 of the said decision, which are reproduced as under:-

"13. Mr. Sanjay Yadav, learned Government Advocate for the State and Mr. Rajendra Tiwari, learned Senior Counsel for the respondent No.2, on the other hand, submitted that the State Government has powers under the Proviso to Article 309 of the Constitution to amend the Rules relating to conditions of service of State Government servants and such powers are subject to only constitutional limitations and merely because the chances of the petitioner for being promoted to the post of Engineer-in-Chief of the Public Health Engineering Department are taken away by the impugned amendment of the Rules of 1980 under the said Proviso to Article 309 of the Constitution of India, the impugned rule cannot be held to be illegal.

14. We find full force in the aforesaid submission of Mr. Yadav and Mr. Tiwari, learned counsel for the respondents, that the power of the Governor under the Proviso to Art. 309 of the Constitution to frame rules is subject to only the Constitutional provisions. As the opening words of Article 309 of the Constitution indicate, the recruitment and conditions of service of persons appointed to public service and posts in connection with the affairs of the Union or any State can be regulated by Acts of the appropriate legislature 'subject to provisions of the Constitution'. The Proviso to Art. 309 of the Constitution states that until such provision is made for regulating the recruitment and conditions of service of person appointed to

public service and post in connection with the affairs of the Union or of a State by an Act of the appropriate Legislature, the President or the Governor, as the case may be, may direct making of rules regulating such recruitment and conditions of service of persons appointed to service and post under the Union of the State. Hence, the power to make a rule regulating the recruitment and conditions of service of persons appointed to service and post in connection with affairs of the Union or any State is subject to the provisions of the Constitution. Unless a rule or an amendment to such rule made under Proviso to Article 309 of the Constitution is shown to be violative of the provisions of the Constitution, the Court cannot strike down such a rule or amendment to the Rules as ultra-vires. Hence, the contention of the petitioner that the impugned amendment to the rules made by the notification dated 1st May, 1998 is ultra-vires inasmuch as it takes away the chances of the petitioner for promotion as Engineering-in-Chief in the Public Health Engineering Department is misconceived.

15. In the case of R.S. Deodhar (supra) cited by the petitioner, a contention was raised that the Proviso to section 115(7) of the States Reorganisation Act, 1959 provided that the service conditions of Tehsildars of the Ex-Hyderabad State would not be varied without the prior concurrence of the Central Government. The Supreme Court found that the Rules of July, 1959 did not really vary the service conditions of the petitioner in that case to his disadvantage and only reduced the chances of his promotion and held that the Rules of 1959 impugned in the said case were not in violation of the Proviso to section 115 of the said Act. In the instant case, as we have seen, the power of the Governor to make Rules regulating recruitment and conditions of service of persons appointed in connection with affairs of any State are wide enough to amend or vary any rules and such power is only subject to the provisions of the Constitution. The decision of the Supreme Court in the case of R.S. Deodhar (supra) , therefore, is of no assistance to the petitioner.

16. In the case of State of Maharashtra vs. Chandrakant (supra) cited by the petitioner, a similar question arose as in the case of R.S. Deodhar (supra) and the Supreme Court held that mere chances are not conditions of service and the fact that there was reduction in the chances of promotion did not

tantamount to a chance in the conditions of service, therefore, the Proviso to section 115(7) of the States Re-organization Act, 1956 was not attracted. As we have discussed above, the Governor has powers under the Proviso to Article 309 of the Constitution, not only to make rules regulating the recruitment and conditions of service of any person appointed in connection with the affairs of the State but also to amend of such rule and such power is only subject to provisions of the Constitution. Hence, the decision of the Supreme Court in the case of State of Maharashtra vs. Chandrakant (supra) is of no help to the petitioner."

16. As per Schedule-II appended to the 1972 Rules after its amendment, out of eight posts of the Regional Transport Officers, only three posts of RTOs are there to be filled by promotion from in-service candidates whereas five posts have been reserved for the officers to be brought on deputation/transfer as the Government may decide. Thus, out of total eight posts, the total percentage of posts of Regional Transport Officers which are prescribed to be filled on deputation is 60% as compared to 40% posts which are reserved for in-service candidates to be filled by way of promotion. In this reference, we may refer to the decision rendered by the Apex Court in *P.K. Sandhu (Mrs) v. Shiv Raj V. Patil,* (1997) 4 SCC 348. In the said case, the validity of the Rules relating to the reservation for 25% from the deputationists was challenged as 25% posts were reserved for the persons to be brought on deputation and 75% were reserved for the promotion. Their Lordships upheld the said percentage of 25 for the posts to be filled on deputation on the ground that if the persons are brought on deputation then 25% of quota will be an opportunity to accelerate competence and efficiency apart from improving excellence. On that basis it was held that providing of quota is fair and in the best interest of the service and it cannot be characterised as arbitrary. Para-7 of the said decision is quoted as below:

"Shri Aruneshwar Gupta, learned counsel for the petitioner, contends that this Court has indicated in the order that to improve efficiency of administration and also to enthuse discipline and inculcate, among in service officers, the spirit of competence, efficiency and excellence, opportunity for promotion would be made available. This method of reserving 75% recruitment by way of promotion and giving option to call for transfer on deputation from other sources is ultra vires. We find no force in the contention. It is seen that the rule indicates that in service candidates would be eligible to be considered for promotion to the extent of 75% of the posts in

accordance with the eligibility conditions prescribed in column 3 thereof. In that event, if the officers were not found eligible to be promoted, instead of keeping the post vacant and work suffering, options have been kept given to the Speaker to take the service of other officers on deputation. Therefore, the officers on deputation would remain on deputation without any incursion into the 75% quota reserved for the promoted officers. As and when the promoted officers are found to be fit for promotion, considered and promoted, the deputation officers necessarily would give place to the officers promoted within the 75% quota. 75% quota for in-service officers encourages the officers and inculcates spirit of competence, character and integrity. Otherwise, the in-service officer would lose his chances of promotions to higher echelons of service. Equally, induction of officers of competence and ability on deputation of 25% quota will be an opportunity to accelerate competence and efficiency apart from improving excellence. Therefore, the respective quota is fair and in the best interest of the service. It cannot be characterised as arbitrary."

17. An analysis of the decision rendered in *P.K. Sandhu* (supra) would further reveal that the Apex Court upholding the 25% of quota for the deputationists has taken into account that in-service candidates towards the quota of 75% would also get encouraged as it would inculcate the spirit of competence, character and integrity, otherwise the in-service officers would lose chances of promotions to higher echelons of service.

18. In the present case, it is not that the State Government has not reserved more percentage of posts for deputationists in comparison to the in-service candidates. As we have already discussed in the foregoing paragraph, out of 8 posts of the Regional Transport Officer, 60% posts have been reserved to be filled on deputation and only 40% posts are to be filled from in-service candidates. There is nothing that towards the quota of deputationists i.e. 05, in-service candidates gradually may get promotion and in the meanwhile they will replace the deputationists. The only justification is given that the persons coming on deputation are earning more revenue in their respective places than what is earned by the in-service candidates.

19. In the present case, if the object sought to be achieved is taken into account as per the decision rendered by the Apex Court in *Ashutosh Gupta* (supra) then what is to be further taken note of the situation is that whether ideologically it is proper for the State Government to bring the persons on deputation particularly when the eligible candidates are already available in the department for their

promotion. It is not the case of the State Government that number of eligible and efficient officers are not available in the department for getting them promotion to the post of Regional Transport Officer. The question of getting more revenue would also depend upon the situation when in-service candidates are also trusted by giving posting to the places where the persons on deputation are posted. The object sought to be achieved by prescribing the promotional avenue in the department is related to the aspect of giving preference to the in-service candidates over the persons to be brought on deputation. Whatever be the reason, a right balance has to be stuck and reasonableness has to prevail while framing the recruitment rules and allocating the posts both for in-service candidates and the persons to be brought on deputation so that not only the in-service candidates have fair chance of promotion but the object of improving excellence of work by inducting officers of competence from other departments is also achieved. We are not addressing ourselves on a question that the State Government has no right to bring the officers on deputation to fill the post by making a provision in the relevant recruitment rules. We accept the right of the State to bring the officers on deputation but there has to be justification with the State Government to prescribe the higher percentage of quota to fill the vacancy of Regional Transport Officer by the officers brought on deputation. In service jurisprudence there appears no rationality in the excessive percentage of posts prescribed to be filled on deputation/transfer by ignoring the rightful claim of in-service candidates those who serve the department for number of years and belong to the cadre. Therefore, the provision as such is arbitrary and thus violative of Articles 14 of the Constitution of India.

20. Apart from the aforesaid, the controversy can also be viewed from another angle. Learned counsel for the petitioners has produced a chart on 22.2.2010 showing the cadre strength as mentioned by the respondents in there reply and the amendment to the reply. The same is reproduced as under:-

Total Number of Posts of Assistant Commissioner/ Regional Transport Officer/ Additional Regional Transport Officer	Total Number of Posts meant for Departmental Officials	Number of posts reserved for deputationists
30	25	5

21. On basis of the aforesaid, it is clear that out of 30 posts, 25 are meant for promotees and only five are reserved for the persons to be brought on deputation, the ratio is thus, 80:20. There has been a reasonable classification with respect to the posts in the cadre as in all other posts in the cadre in-service candidates are to be given promotion. Article 14 of the Constitution of India permits reasonable classification but prohibits a classification within the classification. The posts of Assistant Regional Transport Officer have already been defined to be included in

the cadre and out of total eight posts of the Regional Transport Officer, five have been reserved for the persons to be brought on deputation at the discretion of the State Government from the Class-II services of the M.P. State Civil Service.

22. The justification with respect to earning of more revenue by the persons brought on deputation will not be a classification in itself for creating a class within the class. No other justification has been given by the State Government for reserving five posts out of total eight posts to be filled from the officers by deputation/transfer. Thus, apparently the State Government by reserving five posts has created a class within the class and for this reason, even otherwise also, we cannot approve the action of the State Government while framing the recruitment rules. In this context, the reliance is placed on the Apex Court decision in *The Manager, Govt. Branch Press and another v. D.B. Belliappa,* AIR 1979 SC 429 wherein it is held that expression as used in Article 16(1) not only applies to appointment but includes termination of or removal from service or matters relating to employment which includes promotion. Thus, in the present case there has to be equality of opportunity in the matters of public employment.

23. In view of the above, if the amendment made to the Rules is considered and particularly when in the light of the only reason supplied by the State Government to justify the provision we are of the considered view that such a provision is contrary to the Article 14 and 16(1) of the Constitution of India firstly on the ground that it creates a class within the class and secondly there are no equal opportunities in the employment and there is a differentiation with respect to the officers in service and officers brought on deputation.

24. In view of the foregoing discussion, in order to strike a right balance in equality of opportunity i.e. the chances of promotion on the post of Regional Transport Officer from in-service candidates and to fill the said posts from the deputationists, we are inclined to declare and accordingly declare Rule 7 and corresponding column 5 under Schedule-II of the Madhya Pradesh Transport (Gazetted) Service Recruitment Rules, 1972 as unconstitutional and set aside the same. However, it will be open to the State Government to prescribe a reasonable percentage of posts of Regional Transport Officer to be filled by deputation/ transfer. In the result, the writ petition succeeds and is allowed accordingly. No order as to costs.

Petition allowed.

I.L.R. [2010] M. P., 1128

WRIT PETITION

Before Mr. S.R. Alam, Chief Justice and Mr. Justice Alok Aradhe

11 March, 2010*

JAGDISH PRASAD PASTARIYA ... Petitioner

Vs.

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

A. **National Security Act (65 of 1980) - Public Order & Law and Order - Distinction** - *There is thin distinction between 'public order and law and order' and sometime they may overlap each other -The criminal act or the crime howsoever heinous may be, cannot be brought within the ambit of public order, unless it is shown that the impact of the act was such that it disturbed the locality and life of the community.* (Para 7)

क. राष्ट्रीय सुरक्षा अधिनियम (1980 का 65) – लोक व्यवस्था एवं विधि और व्यवस्था – विभेद – 'लोक व्यवस्था' तथा 'विधि और व्यवस्था' के बीच में कम विभेद है और कभी–कभी वे एक दूसरे को अतिव्याप्त करते है – आपराधिक कृत्य या अपराध कितना भी जघन्य हो, उसे तब तक लोक व्यवस्था की परिधि के अंतर्गत नहीं लाया जा सकता जब तक कि यह दर्शाया न जाए कि कृत्य का आघात ऐसा था कि जिससे समुदाय के जीवन तथा परिक्षेत्र में विघ्न हुआ।

B. **National Security Act (65 of 1980), Section 3(2) - Detention** - *Detention order passed mainly on the ground that petitioner's son fired a gun shot and looted money - Held - It is not the gravity or seriousness of the act or incident but its degree and extent of the reach upon the society or its potentiality would determine as to whether it affected public order or only law and order - In absence of such material on record or in the grounds of detention, detention order is not justified.* (Para 10)

ख. राष्ट्रीय सुरक्षा अधिनियम (1980 का 65) – धारा 3(2) – निरोध – निरोध आदेश मुख्यतः इस आधार पर पारित किया गया कि याची के पुत्र ने बंदूक से गोली चलायी और पैसे लूटे – अभिनिर्धारित – कृत्य अथवा घटना की भीषणता अथवा गंभीरता से नहीं बल्कि उसकी समाज पर होने वाली पहुँच की मात्रा एवं विस्तार अथवा उसकी क्षमता से यह निर्धारित किया जाएगा कि क्या उससे लोक व्यवस्था प्रभावित हुई या केवल विधि और व्यवस्था – अभिलेख पर अथवा निरोध के आधारों में इस प्रकार की सामग्री के अभाव में निरोध आदेश न्यायोचित नहीं है।

Cases relied on:

AIR 1966 SC 740, AIR 1970 SC 1228, (2008) 9 SCC 89.

Narendra Nikhare, for the petitioner.

Prashant Singh, A.A.G. for the respondents.

ORDER

In the instant writ petition, petitioner has challenged the validity of the order

*W.P. No.6675/2009 (Jabalpur)

of the District Magistrate, District Raisen(MP) dated 5.5.2009 detaining his son Ram Kumar Pastaria under sub-section (2) of Section 3 of the National Security Act, 1980 {hereinafter referred as to 'Act') with a view to preventing him from acting in any manner prejudicial to the maintenance of public order. The petitioner has also challenged the order of the State Government dated 29th June, 2009 approving the order of detention dated 5.5.2009 and directing to detain him for a period of 12 months from the date of his detention.

2. Respondents have appeared and filed their counter affidavit which is on record. It appears from the grounds of detention that the son of the petitioner was involved in number of crimes and because of his criminal backgrounds an atmosphere of terror was prevailing due to which nobody was ready to depose against him and, therefore, the District Magistrate acting on the report on the report sent by the Superintendent of Police, and having been satisfied with the material on record passed the impugned order of detention. As per the grounds of detention, the detenue alleged to have been involved in the following cases:

No.	Sections	Crime No.
1.	151,107,116 Cr.P.C.	76/07
2.	294,327,506 IPC	359/07
3.	341,327,294,506 IPC	311/08
4.	110 Cr. P. C.	42/08
5.	326/34,307 IPC	367/08
6.	394,307,307 IPC	144/09

3 The last incident which appears to be the main reason for taking recourse of preventive detention is alleged to have been taken place on 2nd-3rd April, 2009. It has been alleged that the son of the petitioner fired on Hari Singh as a result of which he sustained gunshot injury and also forcibly looted Rs.1,49,530/-. It has also been alleged that on account of the said incident, it was necessary to detain petitioner's brother under the Act to maintain public order as well as law and order.

4. Learned counsel for the petitioner vehemently contended that the alleged act of petitioner's son does not come within the purview of public order and at the most it might have disturbed law and order and thus the detention under the Act cannot sustain. It is argued that from the allegations in the grounds of detention, it is apparent that the alleged act was directed against an individual and not towards general public and; therefore, it does not come within the four-corner of public order as it is an offence against an individual. The argument proceeds that there was no material before the detaining authority to indicate that on account of the alleged act of petitioner's son public order was disturbed and thus the impugned detention being illegal deserves to be quashed. In support of his contention,

learned counsel for the petitioner placed reliance on the decision of Apex Court in *Ajay Dixit vs. State of U.P. and others,* AIR 1985 SC 18 and submitted that since the activity of the petitioner's son cannot be held to be prejudicial to the public order, his detention is not justified.

5. Though various other points raised in the writ petition but during the course of arguments learned counsel for the petitioner confined his submissions only to the point that the alleged act since does not come within the purview of public order and thus the order of detention is bad.

6. On the other hand, learned Additional Advocate General while opposing the petition submitted that the petitioner's son committed robbery at a public place and also used fire arms and thus the alleged act is bound to disturb the public order. It is further argued that because of the criminal activities of the petitioner's son fear and panic is prevailing in the locality and therefore to restore the normalcy, his detention is justified. In view of our earlier order dated 9.3.2010, he produced the record for the perusal of the Court. However, despite our repeated query, he could not point out any material on record to show whereupon conclusion could be drawn that the alleged act was directed towards general public and due to which even tempo of the society was disturbed, hence public order was affected. Even in the grounds of detention, it has nowhere been alleged that due to incident of 2.4.2009, a sense of fear and panic was prevailing in the locality and people were not able to discharge their normal routine work due to panic and terror created on account of the alleged incident and therefore public tranquillity was disturbed.

7. It is true that whenever a serious crime takes place, it has its impact in the locality but it cannot be held that it has disturbed the public order unless it is found on the basis of the material available that the said incident had serious impact on the people of the locality due to which they were not able to lead their normal life. There is thin distinction between 'public order' and 'law and order' and sometime they may overlap each other. The criminal act or the crime howsoever heinous may be cannot be brought within the ambit of public order, unless it is shown that the impact of the act was such that it disturbed the locality and life of the community. A Constitution Bench of the Apex Court in *Ram Manohar Lohia(Dr.) vs. The State of Bihar and another* reported in AIR 1966 S.C. 740 while defining the "public order" and "law and order" in para 51 of the judgment observed that the contravention of law always affects order, but before it can be said to affect "public order", it must affect the community or the public at large.

8. In *Arun Ghosh vs State of West Bengal,* AIR 1970 SC 1228, the Apex Court relying on its previous judgment has held as under:

> *"Public order was said to embrace more of the community than law and order. Pubic order is the even tempo of the life of the*

community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order."

9. The apex Court in *K.K. Saravana Babu Vs. State of Tamil Nadu and another* (2008) 9 SCC 89, having considered its previous judgment in respect of distinction between "land and order" and "public order" observed in para 31 as under :-

"We have tried to deal with the important cases dealing with the question of "law and order" and "public order" right from Romesh Thappar to the latest case of R. Kalavathi. This Court has been consistent in its approach while deciding the distinction between "law and order" and "public order". According to the crystallised legal position, cases affecting the public order are those which have great potentiality to disturb peace and tranquillity of a particular locality or in the words of Hidayatullah, J. disturb the even tempo of the life ofthe community of that specified locality."

10. In the case in hand, there is no material on record nor it has been alleged in the grounds of detention that people of the locality were so terrorised that they confined themselves inside the house as a result of which the normal life of the locality was disturbed hence public order was disturbed. In view of the exposition of law made by the Apex Court as pointed out earlier, it is not the gravity or seriousness of the act or incident but its degree and extent of the reach upon the society or its potentiality would determine as to whether it affected public order or only law and order. In absence of such material on record or in the grounds of detention, it is difficult for us to hold that the alleged act of the petitioner's son comes within the four-corner of public order and therefore his detention is justified.

11. In view of the aforesaid discussions made above, in our view, the impugned order of detention cannot sustain. In the result, the writ petition succeeds and is hereby allowed. Consequently, the impugned order dated 5.5.2009 detaining the petitioner's son under sub-section (2) of Section 3 of the Act is hereby quashed. The respondents are directed to set the petitioner's son Ram Kumar Pastaria at liberty forthwith unless required to be detained in any case. However, there shall be no order as to cost.

Petition allowed.

I.L.R. [2010] M. P., 1132
ELECTION PETITION
Before Mr. Justice Abhay M. Naik
26 March, 2010*

RAJENDRA BHARTI ... Petitioner
Vs.
NAROTTAM MISHRA ... Respondent

A. Representation of the People Act (43 of 1951), Section 81(3) - *Preliminary objection of respondent that copy served on the respondent is not attested as true copy and the same being in violation of S. 81(3) of the Act, the election petition is liable to be dismissed u/s 86(1) of the Act - Held - In the absence of complete & total non-compliance of S. 81(3) of the Act, Election Petition cannot be legally dismissed in limine.* (Paras 6 to 8)

क. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 81(3) – प्रत्यर्थी की प्रारम्भिक आपत्ति कि प्रत्यर्थी पर तामील की गई प्रतिलिपि सत्य प्रतिलिपि के रूप में अभिप्रमाणित नहीं है और यह अधिनियम की धारा 81(3) के उल्लंघनकारी होने से निर्वाचन याचिका अधिनियम की धारा 86(1) के अन्तर्गत खारिज किये जाने योग्य है – अभिनिर्धारित – अधिनियम की धारा 81(3) के पूर्ण और समग्र अननुपालन के अभाव में निर्वाचन याचिका को आरम्भ में ही विधितः खारिज नहीं किया जा सकता।

B. Representation of the People Act (43 of 1951), Section 81(3) - *In case of substantial compliance of S. 81(3) of the Act, dismissal of Election Petition at the threshold is not justified.* (Para 14)

ख. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 81(3) – अधिनियम की धारा 81(3) के सारवान अनुपालन की दशा में निर्वाचन याचिका की प्रारम्भ में खारिजी न्यायसंगत नहीं है।

C. Representation of the People Act (43 of 1951), Section 81(3) - *There should not be variation in the true copy which may mislead or caused prejudice to the respondent.* (Para 9)

ग. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 81(3) – सत्य प्रतिलिपि में फेरफार नहीं होना चाहिए जो प्रत्यर्थी को भुलावा दे सकता हो या पूर्वाग्रह कारित कर सकता हो।

D. Representation of the People Act (43 of 1951), Section 81(3) - *Illegibility or incompleteness in the matter of verification is not substantial defect, more so, on account of having been cured by supplying a fresh copy causing no prejudice.* (Para 10)

घ. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 81(3) – सत्यापन के मामले में अस्पष्टता या अपूर्णता सारवान त्रुटि नहीं है, इसके अलावा नयी प्रतिलिपि प्रदाय कर त्रुटि का उपचार कर दिये जाने के कारण कोई पूर्वाग्रह कारित नहीं होता है।

*Election Petition No.26/2009 (Gwalior)

E. **Representation of the People Act (43 of 1951), Section 81(3)** – *Preliminary objections not going to the root of the case and the respondent having not been mislead or prejudiced in any manner - More so, in view of substantial compliance, preliminary objections are not liable to be accepted - Petition dismissed.* (Para 14)

ङ. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 81(3) – प्रारम्भिक आपत्तियाँ मामले की जड़ तक नहीं जाती हैं और प्रत्यर्थी को किसी भी ढंग से भ्रमित या पूर्वाग्रहग्रस्त नहीं किया गया है – इसके अलावा सारवान अनुपालन को देखते हुए प्रारम्भिक आपत्तियाँ स्वीकार किये जाने योग्य नहीं हैं – याचिका खारिज।

Cases referred:

AIR 2001 SC 600, AIR 2000 Bom 362, AIR 1997 Delhi 116, AIR 1964 SC 1027, AIR 1964 SC 1545, (2005) 2 SCC 188, 2001(4) MPLJ 1, AIR 1999 SC 1359, AIR 2001 Gauhati 52, AIR 2002 P & H 215, AIR 1980 SC 303, AIR 1984 SC 956, (2009) 10 SCC 541, (2000) 1 SCC 481, (2008) 11 SCC 740, AIR 1971 SC 342, (2009) 8 SCC 736, AIR 1999 Karnataka 241, AIR 1994 P & H 32.

Ankur Mody & Vijay Sundaram, for the petitioner.
Anand Bhardwaj & G.M. Soni, for the respondent.

ORDER

ABHAY M. NAIK, J. :–Challenge has been made to the election of respondent to Vidhan Sabha Constituency No.22 Datia on alleged ground of corrupt practices by submitting the election petition under Sections 81, 100 & 100 (1) of the Representation of People Act, 1951 (in short 'the Act'), wherein preliminary objections are raised by moving I.A.No. 1327/10, praying thereby for dismissal of election petition. This order disposes of the said interlocutory application.

2. Shri Anand Bharadwaj and Shri Ankur Mody, learned counsel for the parties made their respective submissions, which have been considered in the light of the material on record and the law governing the situation.

3. Dismissal of the election petition has been sought mainly on the following grounds :-

(i) Copy of election petition is not attested as true copy;

(ii) True copy of the postal receipt pasted on the reverse of Annexure P/38 was not supplied to the respondent while serving him with the true copy of the election petition alongwith annexures;

(iii) There is variance between the election petition and the true copy served on the respondent inasmuch as;

(a) true copy of the postal receipt pasted on the reverse

of Annexure P/38 was not supplied, (b) Verification on the true copy of Annexure P/72 is not legible, (c) there is incomplete verification on the true copy of Annexures P/73, P/74 and P/76.

(iv) Date and place of verification is not mentioned on annexures, which amounts to violation of Section 83 (1) (c) and 83 (2) of the Act read with Order 6 Rule 15 (3) of CPC.

(v) Affidavit being defective for want of verification is violative of Rule 94-A of the Conduct of Elections Rules 1961 and Form 25.

(vi) Verification of Election Petition as well as paragraph B of affidavit in support of election petition is vague and not specific.

4. Before entering into the merits of the contentions, I feel it apposite to reproduce Sections 81, 83 and 86 (1) of the Representation of People Act for convenience :-

81. Presentation of petitions.-(l) An election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of section 100 and section 101 to the High Court by any candidate at such election or any elector within forty-five days from, but not earlier than the date of election of the returned candidate or if there are more than one returned candidate at the election and dates of their election are different, the later of those two dates.

Explanation.- In this sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

(2) ****

(3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.

83. Contents of petition.- (1) An election petition-

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges including as full as statement as possible of the names of the parties alleged to have committed such corrupt

practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings.

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

86. Trial of election petitions. - (1) The High Court shall dismiss as election petition which does not comply with the provisions of Section 81 or section 82 or section 117.

Explanation.- An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of section 98.

Perusal of sub section (1) of Section 86 of the Act makes it clear that the legislative mandate is for dismissal of election petition in case of non-compliance of Section 81 or section 82 or section 117. Non inclusion of Section 83 is quite significant as observed by the Apex Court from time and again in various decisions.

In the case of *Vijay Laxmi Sadho v. Jagdish* (AIR 2001 SC 600), it has been observed :

> "An election petition is liable to be dismissed in limine under Section 86 (1) of the Act only if the election petition does not comply with either the provisions of 'Section 81 or Section 82 or Section 107 of the Act. The recruitment of filing an affidavit along with an election petition, in the prescribed form, in support of allegations of corrupt practice is contained in Section 83 (1) of the Act or of its proviso. What other consequences, if any, may follow from an allegedly 'defective' affidavit, is to be judged at the trial of an election petition but Section 86 (1) of the Act in terms cannot be attracted to such as case."

5. It has been contended by Shri Anand Bharadwaj, learned counsel that true copy served on the respondent is not attested as true copy and the same being in violation of sub section (3) of Section 81 of the Act, the election petition is liable to be dismissed under Section 86 (1) of the Act. Reliance has been placed on AIR 2000 Bombay 362 *(Narendra Bhikahi Darade v. Kalyanrao Jaywantrao Patil)* & AIR 1997 Delhi 116 *(Mukhtiar Singh v. Chief Election Officer).*

6. In the case of *Narendra* (supra), copy furnished to the respondent was attested as true copy by advocate and not by the petitioner, whereas in the case of *Mukhtiar Singh* (supra), substantial variance was found in the annexures and the copies served upon the respondent. In the case in hand, it has been admitted by the learned counsel for the respondent that each page of the copy of election petition does bear the original signature of the petitioner. It is submitted that copy of the election petition has not been attested as true copy and mere signature of the petitioner on each page of the copy does not amount to attestation thereof as true copy.

7. Sub section 3 of Section 81 of the Act requires that every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition. This sub section is in two parts. First part requires that there must be as many copies of the election petition alongwith the election petition itself, as there are respondents mentioned in the petition. This has been held as mandatory requirement by the Apex court in the case of *Ch.Subbarao v. Member, Election Tribunal* (AIR 1964 SC 1027).

8. In the case of *Ch.Subbarao v. Member, Election Tribunal* (AIR 1964 SC 1027), copies accompanying the election petition were carbon copies of the type script. The copies bore two signatures in original of the Election Petitioner. The petitioner did not however insert the words "true copy" before or above his signatures. Considering it, it was held that if the signature of the petitioner whose name is set out in the body of the petition is appended at the end, surely it authenticates the contents of the document. Accordingly, it was held that there was substantial compliance of Section 81 (3) of the Act. It was observed by the apex court that *Murarka's case,* C.A.Nos-30 and 31 of 1963 D/- 7-5-1963 (SC) is authority for the position that the absence of a writing in the copy indicating the signature in the original would not detract the copy from being a true copy.

9. Further submission about absence of copy of postal receipt on the reverse of Annexure P/38 is not liable to be accepted. Long back the apex court in the case of *Murarka Radhy Shyam Ram Kumar v. Roop Singh Rathod and others* (AIR 1964 SC 1545) has observed that the test whether the copy is a true one is whether any variation from the original is calculated to mislead an ordinary person. Moreover, the respondent has been served with fresh copy of the election petition with annexures, which does contain a photo copy of the postal receipt pasted on the reverse of Annexure P/38. Applying the test prescribed by the apex court as aforesaid, it is found that the respondent was not mislead in any manner and thus, there is substantial compliance of Section 81 (3) of the Act. I may here successfully refer the following passage contained in paras 35 and 36 of the decision of the apex court in the case of *Chandrakant Uttam Chodankar v. Dayanand Rayu Mandrakar and others* (2005) 2 SCC 188.

"35.....The question that was raised by the learned counsel for Respondent 1 before us was whether subsequent supply of such true copies on Respondent 1 could be treated to be a sufficient compliance with Section 81 (3) of the Act. Apart from the conclusions made hereinbefore, we are also of the view that in view of the decision of this Court in *Anil R.Deshmukh v. Onkar N.Wagh* this question needs to be decided in favour of the appellant and against Respondent 1. In para 17 of the aforesaid decision this Court observed as follows : (SCC p.212)

'We have already referred to the fact that even before arguments were heard on the preliminary objection by the High Court in this case, *the true copies of the affidavits had been served on the first respondent and his counsel. In the facts and circumstances of this case, we have no doubt that there was sufficient compliance with the provisions of Section 81 (3) read with Section 83 (1) (c) of the Act even if it could be said that the copies served in the first instance on the first respondent were not in conformity with the provisions of the Act."*
(emphasis supplied)

36. Such being the position, we hold that the High Court was not justified in rejecting the election petitions for non-compliance with Section 81 (3) of the Act.

I may here successfully refer to the Single Bench decision of this court in the case of *Dinanath Sharma v. Tarun Prasad Chatterjee* 2001 (4) MPLJ 1, wherein it is observed :-

"As noticed above, in the instant case, copy of the petition and annexures thereof, furnished to the respondent were undisputably the true copies of the election petition as well as of the annexures thereof. In fact, they were prepared by the same mechanical process in which the original election petition and the annexures enclosed therewith were prepared, inasmuch as the copy of the petition furnished to the respondent were prepared simultaneously by preparing photocopies. The above factual aspect is not disputed, and it is not contended on behalf of the respondent that the copy of the petition and the annexures thereof are not the true copies of election petition or the annexures. Each of the copies bar the signature in original of the petitioner. Therefore, there appears to be substantial compliance of Section 81 (3) of the Act."

10. Illegibility or incompleteness in the matter of verification on the copy

of Annexures P/72, P/73, P/74 and P/76 is not a substantial defect because the defect in verification itself is of curable in nature. Supreme Court of India in the case of *T.M.Jacob v. C.Poulose and others* (AIR 1999 SC 1359), has clearly observed :

> "The law as settled by the two Constitution Bench decisions of this Court referred to above is by itself sufficient to repel the argument of Mr. Salve. That apart, to our mind, the Legislative intent appears to be quite clear, since it divides violations into two classes - those violations which would entail dismissal of the election petition under Section 86 (1) of the Act like non-compliance with Section 81 (3) and those violations which attract Section 83 (1) of the Act i.e. non-compliance with the provisions of Section 83. It is only the violation of Section 81 of the Act which can attract the application of the doctrine of substantial compliance as expounded in *Murarka Radhey Shyam* (AIR 1964 SC 1545) and *Ch.Subbarao's cases* (AIR 1964 SC 1027). The defect of the type provided in Section 83 of the Act, on the other hand, can be dealt with under the doctrine of curability, on the principles contained in the Code of Civil Procedure."

11. In view of the aforesaid discussion, reliance by Shri Anand Bharadwaj, learned counsel for the respondent on *T.Phungzathang v. Sri Hangkhanlian (MLA) and others* (AIR 2001 Gauhati 52) & *Vijay Somani Vs. Capt. Ajay Singh* (AIR 2002 Punjab & Haryana 215) is of no avail.

AIR 1980 SC 303 *(Sharif-ud-Din v. Abdul Gani Lone)* is distinguishable on facts inasmuch as the attestation is found to have been made by the advocate, which could not be treated as the equivalent of attestation by the petitioner under his own signature. It has been clearly observed :-

> "The object of requiring the copy of an election petition to be attested by the petitioner under his own signature to be a true copy of the petition appears to be that the petitioner should take full responsibility for its contents and that the respondent or respondents should have in their possession a copy of the petition duly attested under the signature of the petitioner to be the true copy of the petition at the earliest possible opportunity to prevent any unauthorised alteration or tampering of the contents of the original petition after it is filed into court."

In the case of *Rajendra Singh v. Smt Usha Rani and others* (AIR 1984 SC 956), it was found that the respondent was served with an incorrect copy of election petition. Case in hand is again distinguishable because there would be distinction between incorrectness and incompleteness of the copy. Copy of postal receipt pasted on the reverse of Annexure P/38 was missing in the copy served

upon the respondent in first round. Thus, provision under the law was substantially complied with, more so when the deficiency was made good after serving a fresh copy. Additionally, the respondent could not be shown to have been mislead nor prejudiced in any manner.

Decision of the Supreme Court in the case of *Ramsukh v. Dinesh Aggarwal* (2009) 10 SCC 541, deals with the question of maintainability on account of lack of material facts and full particulars. This being not the case of the respondent, decision of the apex court can not be harnessed into operation.

12. With regard to objection about absence of date and place in the verification, it is observed that the defect in verification itself has been held to be curable by the Supreme Court of India in the case of *R.P.Moidutty v. P.T. Kunju Mohammad and another* (2000) 1 SCC 481.

13. Lastly, it is contended that the affidavit to the election petition is defective for want of verification.

On perusal, it is found that the affidavit accompanying the election petition is substantially in Form 25 as required under Rule 94-A of the Conduct of Elections Rules, 1961. Para A thereof relates to the specific paragraphs, which are within the knowledge of the petitioner himself, whereas para B relates to specific paragraphs, which are sworn on the basis of the knowledge received from the persons named therein. On perusal of election petition, it is further found that the information provided by particular individual named in para B is also mentioned in specific in the particular paragraph of the election petition. Thus it can not be said that there is vagueness in the affidavit or there is no specific mention in the affidavit.

14. At this stage, I would also further like to mention the contention of Shri Ankur Mody as correct one that there being no complete and total non-compliance of Section 81 (3) of the Act, the election petition can not be legally dismissed in limine. It has also been observed long back by the apex court in the case of *Ch.Subbarao v. Member, Election Tribunal* (AIR 1964 SC 1027) :

> "We are not impressed by this argument. When S.81 (3) requires an election petition to be accompanied by the requisite number of copies, it becomes a requirement for the presentation of the election petition to the Commission, and therefore a condition precedent for the proper presentation of an election petition. If that is a requirement of S.81, no distinction can be drawn between the requirements of sub-sections (1) and (2) and of sub-sec.(3). We might add that if there is a total and complete non-compliance with the provisions of S.81 (3), the election petition might not be "an election petition presented in accordance with the provisions of this Part" within S.80 of the Act."

In the case of *Chandrakant Uttam Chodankar v. Dayanand Rayu Mandrakar and others* (2005) 2 SCC 188, the Supreme Court has rejected the similar preliminary objection for dismissal of the election petition at the threshold.

Recently, the apex court in the case of *Umesh Challiyill v. Rajendran* (2008) 11 SCC 740 has held that the test for dismissal of election petition at the outset is whether the defects would go to the root of the matter or only are cosmetic in nature. It has been observed :

> "The courts have to view whether the objections go to the root of the matter or they are only cosmetic in nature. It is true that the election petition should not be summarily dismissed on such small breaches of procedure. Section 83 itself says that the election petition should contain material facts. Section 86 says that the High Court shall dismiss the election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117. But not of defect of the nature as pointed out by the respondent would entail dismissal of the election petition. These were the defects, even if the Court has construed them to be of serious nature, at least notice should have been issued to the party to rectify the same instead of resorting to dismissal of the election petition at the outset."

In the case of *Jagat Kishore Prasad Narain Singh v.,Rajendra Kumar Poddar and others* (AIR 1971 SC 342), respondent was found to have been mislead and prejudiced in his defence on account of discrepancies, whereas no such case is pleaded or made out by the respondent in the present case. Therefore, respondent does not get any assistance from this.

Respondent in this case has failed to establish that the defects pointed out by him go to the root of the case. On the contrary, they appeared to be cosmetic in nature. Accordingly, such defects in the opinion of this court will not lead to dismissal of the election petition at the outset.

15. Although, it is submitted in the reply that a strict adherence to the provisions of the Act is to be made as observed by the Supreme Court of India in the case of *G.V.Sreerama Reddy and another v. Returning Officer and others* (2009) 8 SCC 736, the same does not render any assistance to the respondent because the same is distinguishable on facts inasmuch as non compliance of mandatory provisions was found to have been made in that case.

Reliance of the counsel for the respondent on AIR 1999 Karnataka 241 *(G,Mallikarjunappa and another v. Shamanur Shivashankarappa and others)* & AIR 1994 Punjab and Haryana 32 *(Boota Singh v. Sher Singh and others)* is also of no avail being distinguishable on facts.

16. In the result, it is held that there is no total non compliance of Section 81 (3)

of the Act or any mandatory provisions of law. Objections raised by the respondent vide I.A.No.1327/10 do not go to the roots of the case and the respondent having not been mislead or prejudiced in any manner in the facts and circumstances of the case, more so in view of substantial compliance, preliminary objections are not liable to be accepted. Resultantly, I.A.No.1327/10 is hereby dismissed with no order as to costs.

Petition dismissed.

I.L.R. [2010] M. P., 1141
COMPANY PETITION
Before Mr. Justice Shantanu Kemkar
6 January, 2010*

SUNGRACE FINVEST PVT. LTD. ... Petitioner
Vs.
MAIKAAL FIBRES LTD. & anr. ... Respondents

Companies Act (1 of 1956), Section 433(e) - *Winding up of Company - Respondent Company indebted to petitioner - Respondent Company failed to prove defence - Held - Petitioner has proved that respondent Company is unable to pay its debts - Petitioner can not be denied the order of winding up of respondent Company by directing it to avail alternate remedy - Petition allowed.* (Paras 13 & 15)

कम्पनी अधिनियम (1956 का 1), धारा 433(ई) – कम्पनी का परिसमापन – प्रत्यर्थी कम्पनी याची की ऋणी – प्रत्यर्थी कम्पनी प्रतिरक्षा साबित करने में असफल रही – अभिनिर्धारित – याची ने साबित किया कि प्रत्यर्थी कम्पनी अपने ऋण का भुगतान करने में असमर्थ है – याची को वैकल्पिक उपचार का उपयोग करने का निदेश देकर प्रत्यर्थी कम्पनी के परिसमापन के आदेश से इंकार नहीं किया जा सकता – याचिका मंजूर।

Cases referred :

AIR 1971 SC 2600, (2006) 129 Comp Cases 160 (MP), (1965) 35 Comp Cases 456, (1998) 91 Comp Cases 146, (2003) 114 Comp Cases 288, (1983) 53 Comp Cases 184.

ORDER

SHANTANU KEMKAR, J. :–This order shall also govern disposal of Company Petition No.12/2005 and Company Petition No.15/2005.

2. This petition has been filed under Section 433 (e) of the Companies Act, 1956 (for short the Act) seeking winding up of the respondent Company.

3. In Company petition no.8/2005 averments have been made that the respondent Company is indebted to the petitioner Company for a sum of Rs.83,07,021/- which includes principal amount as on 31.03.2004 to the tune of

*Company Petition No.8/2005 (Indore)

Rs.68,80,085/- amount of tax deducted at source Rs.2,58,736/-, interest @ 20% from 01.04.2004 to 31.01.2005 to the tune of Rs.11,68,200/-. In Company Petition No.12/2005 it has been averred that Rs.33,08,836/- is due to the petitioner Company from the respondent Company out of which towards principal amount due is Rs.27,48,125/- towards interest from 01.04.2005 to 15.02.2005 to the tune of Rs.66,349/- is due and towards further interest from 16.02.2005 till 30.07.2005 to the tune of Rs.1,94,362/- is due. In Company Petition No.15/2005 the due amount to be recovered from the respondent Company by the petitioner Company is averred to be to the extent Rs.5,57,71,017/- with interest @ 15% per annum.

4. The Company Petition No.8/2005 being the first amongst all the three Company petitions, the order is being passed in Company Petition No.8/2005 which will govern the other Company petitions.

5. It has been averred by the petitioner that the respondent Company has become commercially insolvent and is unable to pay its debts. A legal notice of demand was served upon the respondent Company but even after the expiry of statutory period the debts have not been paid. According to the petitioner the financial position of the respondent company is such that the company is unable to meet its current liabilities and pay its debts. The liabilities of the company far exceeds its assets. It has been averred that the company has lost its commercial substratum in view of Annual Reports of the respondent company for the period 2000 to 2004.

6. The respondent company has filed reply to the petition and denied the averments made in the petition. It has been stated that the prayer for seeking winding up is to exert pressure upon the company to enforce payment of debts. In the additional reply filed by the respondent company, it has been stated that prior to the filing of the winding up petition talks and negotiations were going on between the petitioner and the respondent company regarding the actual quantum of the liability of respondent company, the mode of repayment and also about ways of sorting out the differences between the parties. It has also been stated that the respondent company has all the intentions to repay the undisputed amount of debts to its unsecured creditors in a phased manner.

7. Intervention application has been filed by Maikaal Fibres Shramik Sangathan, Bheelgaon in which it has been stated that the members of the intervenor Sangathan are employees of the company. They and the members of their family are dependent upon the company and if the company is wound they will starve as there are no prospect of employment in the neighbouring areas.

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

9. It has been argued on behalf of the petitioner that the respondent company has not paid its dues inspite of demand being raised. Pointing out to the statement made by the respondent company in the additional reply that undisputed amount

shall be paid to the petitioner company in a phased manner it has been argued that inspite of the said stand being taken in the additional reply till date no amount has been paid by the respondent company to the petitioner. In the circumstances, according to the learned counsel for the petitioner, the act of the respondent company clearly establishes that the respondent company is unable to pay its debts and as such the respondent company be ordered to be wound up invoking provision of Section 433 (e) of the Act. Reliance has been placed on the judgment of the Supreme Court in the case of *M/s Madhusudan Gordhandas and Co. Vs. Madhu Woollen Industries Pvt. Ltd.* [AIR 1971 SC 2600].

10. Shri P.B.S.Nair, learned counsel appearing for the respondent company did not dispute the liability of respondent company to pay debts of the petitioner. He however argued that the petitioner is having alternative remedy of approaching the Civil Court for realisation of its dues. According to him, the petition for winding up of the respondent Company is not a remedy which can be resorted to as of right. In support, he placed reliance on judgment of this Court in the case of *Jagdamba Polymeres Ltd. Vs. Neo Sack Ltd.* (2006) 129 Comp Cases 160 (MP) and judgments of the Supreme Court in the cases of *Amalgamated Commercial Traders (P.) Ltd Vs. A.C.K.Krishnaswami and another* (1965) 35 Comp. Cases 456, *Kiran Sandhu and others Vs. Saraya Sugar Mills Ltd and others* 1998 (91) Comp. Cases 146, *S.Palaniappan and others Vs. Tirupur Cotton Spinning and Weaving Mills Ltd.*, 2003 (114) Comp. Cases 288 and *National Textiles Workers Union Vs. P.R.Ramakrishnan and others* 1983 (53) Comp. Cases 184.

11. In order to appreciate the controversy in its correct perspective it would be appropriate to firstly deal with the judgments on which reliance has been placed by the learned counsel for the parties.-

12. In the case of *M/s Madhusudan Gordhandas and Co. Vs. Madhu Woollen Industries Pvt. Ltd.* (supra) the Supreme Court has observed that :-

> "Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt.
>
> Where, however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely.
>
> The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law, and thirdly, the company adduces prima facie proof of the facts on which the defence depends".

In the case of *Jagdamba Polymeres Ltd. Vs. Neo Sack Ltd.* (supra) it has been held by this Court that :-

> "A petition for winding up is not a remedy which can be resorted to as of right. In other words, it is always regarded as a discretionary remedy. The company court is not bound to entertain the petition for winding up once filed, nor is it bound to allow winding up even if a case to that effect on facts is made out; it being a settled principle of law relating to winding up that winding up is in the nature of death of a company and puts an end to all its activity for all time to come in future, the court is under legal obligation to see that no running company be pushed into a winding up for one or two defaults. In other words, the effort must be to save the company from being wound up, if the case to that effect is made out on the facts. It is for this purpose and keeping in view this objective, the legislature has enacted sub-section (2) of section 443 which empowers the company court to exercise powers while hearing a petition for winding up. Sub-Section (2) does empower the company court to refuse to make an order of winding up, if it is of an opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy."

In *Amalgamated Commercial Traders (P) Ltd. Vs. A.C.K. Krishnaswami & another* the Supreme Court had held that it is well settled that a winding petition is not a legitimate means of seeking to enforce payment of a debt which is bonafide disputed by the Company. A petition presented ostensibly for a winding up order really to exercise pressure will be dismissed and under circumstances may be stigmatize abuse of the process of the Court. If a debt is bonafide disputed there cannot be neglected to pay within the meaning of Section 434 (1) (a) of the Companies Act, 1956. If there is no neglect the deeming provision does not come into play and the ground of winding up namely that the company is unable to pay its debt is not substantiated. In the case of *Kiran Sandhu and others Vs. Saraya Sugar Mills Ltd and others* (supra) it has been observed by the Allahabad High Court that a petition filed under Section 433 (f) of the Act has to be considered along with Section 443 (2). In *S. Palaniappan and others Vs. Tirupur Cotton Spinning and Weaving Mills Ltd.* (supra) the Supreme Court has held that a winding up petition is a remedy of last resort. In *V.V. Projects and Investments P. Ltd. Vs. 21st Century Constructions P. Ltd.* The Andhra Pradesh High Court has declined to order winding up of the respondent company on the ground that the petitioner had the alternative remedy of approaching the Company Law Board either under Section 397 & 398 or Section 235 for causing investigation by the Central Government.

13. On a close scrutiny of the law laid down in the aforesaid cases and after going through the pleadings raised by the parties I find in the present case the respondent company did not dispute its liability towards the petitioner to pay the debts. The defence of the Company in the additional reply is that it has all the intentions to repay the undisputed amount of debt to its unsecured creditors but in a phased manner. During the course of the arguments the learned counsel for the respondent fairly accepted the liability of the respondent Company to pay the debts of the petitioner but opposed the relief claimed in the petition on the ground of availability of the alternative remedy to the petitioner for recovery of debts by approaching the civil court. The respondent company has failed to demonstrate as to in what way the amount claimed by the petitioner is disputed. It is also worthwhile to mention that even after lapse of long time no payment of the undisputed amount has been made by the respondent company. In the circumstances I do not find any defence much less a substantial one has been taken by the respondent so that it can be said that it is likely to succeed in point of law. No prima facie proof in regard to the defence or dispute has been brought on record by the respondent company so as to say that the debt is bonafide disputed and the defence is a substantial one. In the circumstances when the petitioner has proved to the satisfaction of this Court that the respondent company is unable to pay its debts, the petitioner cannot be denied the order of winding up of the respondent company by directing it to avail alternative remedy. It is also worthwhile to mention that in other connected company petitions also the respondent company has not raised any defence except to make the payment in the phased manner and about availability of alternative remedy. Thus having regard to the financial position of the respondent company as is clear from the Annual reports and the amount of debts, I am of the view that the respondent Company is unable to pay its debts.

14. As regards the contention of the intervener in my considered view for the reasons stated by them in the intervention application the petitioner's prayer for winding up of the Company cannot be rejected, more particularly when the interest of intervenors can be taken care of at the appropriate stage.

15. In this view of the matter in terms of the provision contained in Section 433 (e) and 434 of the Act and the law laid down by the Supreme Court in the case of *M/s Madhusudan Gordhandas and Co. Vs. Madhu Woollen Industries Pvt. Ltd.* (supra) which squarely apply to the present case which is essentially under Section 433 (e) of the Companies Act, in my view it is not a fit case to refuse to make an order of winding up in exercise of powers under Section 443(2) of the Act which is applicable where the petition is presented on the ground that it is just and equitable that the company should be wound up. On the other hand I am of the view that it is a fit case to order winding up of the respondent Company. Accordingly, I order winding up of respondent company in accordance with the provisions of the Act read with Companies (Court) Rules, 1959 (for short the Rules).

16. Accordingly and with a view to enable this Court to pass a final winding up order as contemplated under Rule 282 of the Rules official liquidator of this Court who becomes a liquidator of the company by virtue of Section 449 of the Act is appointed as liquidator of the company. The Registrar of this Court to take steps as provided under Rule 109 of the Rules so that necessary orders as required under Rule 112 and onwards can be passed by this Court on the next date of hearing.

17. List on 3.2.2010.

Order accordingly.

I.L.R. [2010] M. P., 1146
APPELLATE CIVIL
Before Mr. Justice Abhay M. Naik
8 February, 2010*

PARWAT (DEAD) THROUGH L.RS.
SMT. KESAR BAI & ors. ... Appellants
Vs.
PYARELAL & ors. ... Respondents

A. Specific Relief Act (47 of 1963), Section 19 - *Burden of proof on bona fide purchaser - Vendor is not in physical possession of agricultural land -Subsequent purchaser is bound to make enquiry from the occupant - He did not made any enquiry about possession - He has not issued any public notice expressing his intention to purchase the land - He did not appear in the witness box to assert that he obtained the possession of land - Subsequent purchaser failed to prove his good faith and bona fide.* (Paras 19 to 21)

क. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 19 – सद्भाविक क्रेता पर सबूत का भार – विक्रेता कृषि भूमि के भौतिक कब्जे में नहीं – पश्चात्वर्ती क्रेता अधिभोगी से जाँच–पड़ताल करने के लिए आबद्ध है – उसने कब्जे के बारे में कोई जाँच–पड़ताल नहीं की – उसने भूमि क्रय करने का अपना आशय अभिव्यक्त करते हुए कोई आम सूचना जारी नहीं की – वह यह प्राख्यान करने के लिए कठघरे में उपस्थित नहीं हुआ कि उसने भूमि का कब्जा प्राप्त कर लिया – पश्चात्वर्ती क्रेता अपनी सदिच्छा और सद्भावना साबित करने में असफल हो गया।

B. Evidence Act (1 of 1872), Section 114(g) - *Adverse inference when may be drawn - Suit for specific performance of agreement to sale - Courts below in concurrent manner have found proved that plaintiff was put into possession of the suit land as per recital in sale deed - Existence of dispute with the plaintiff on account of possession of the suit land is already established - Subsequent purchaser who stated as per W.S. to have obtained possession pursuant to the registered sale deed has not appeared in the witness box to establish his possession despite being defendant - Thus, adverse*

*S.A. No.169/2000 (Gwalior)

inference is liable to be drawn against him about possession as well as about absence of knowledge of earlier agreement. (Para 22)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 114(जी) – प्रतिकूल अनुमान कब निकाला जा सकेगा – विक्रय अनुबन्ध के विनिर्दिष्ट पालन के लिए वाद – अधीनस्थ न्यायालयों ने समवर्ती रूप से यह साबित होना पाया कि वादी विक्रय विलेख में परिवर्णन के अनुसार वादग्रस्त भूमि के कब्जे में आया – वादग्रस्त भूमि के कब्जे के कारण वादी से विवाद का अस्तित्व पहिले से साबित – पश्चात्वर्ती क्रेता, जिसने लिखित कथन के अनुसार रजिस्ट्रीकृत विक्रय विलेख के अनुसरण में कब्जा प्राप्त करने का कथन किया, प्रतिवादी होने के बावजूद अपना कब्जा साबित करने के लिए कठघरे में उपस्थित नहीं हुआ – इस प्रकार कब्जे के बारे में साथ ही साथ पूर्ववर्ती अनुबन्ध की जानकारी के अभाव के बारे में उसके विरुद्ध प्रतिकूल अनुमान निकाला जाने योग्य है।

C. Specific Relief Act (47 of 1963), Section 19 - *Burden of proving good faith and lack of notice is on subsequent purchaser - It is not obligatory on the plaintiff to prove absence of good faith.* (Para 15)

ग. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 19 – सदिच्छा और सूचना का अभाव साबित करने का भार पश्चात्वर्ती क्रेता पर है – वादी पर यह बाध्यकारी नहीं है कि सदिच्छा के अभाव को साबित करे।

D. Civil Procedure Code (5 of 1908), Order 41 Rule 33 - *Power of Court of Appeal - Subsequent purchaser (def. No.1) has not prayed for refund the amount of consideration - Even though, in exercise of power under Order 41 Rule 33, High Court directs vendor (def. No.2) to refund the amount of consideration to the subsequent purchaser within 3 months - In case of failure, subsequent purchaser shall be entitled to recover the amount from vendor with interest @ 6% p.a.* (Para 26)

घ. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 33 – अपील न्यायालय की शक्ति – पश्चात्वर्ती क्रेता (प्रतिवादी क्र. 1) ने प्रतिफल की रकम वापसी के लिए प्रार्थना नहीं की है – फिर भी उच्च न्यायालय ने आदेश 41 नियम 33 के अन्तर्गत शक्ति के प्रयोग में विक्रेता (प्रतिवादी क्र. 2) को निर्देश दिया कि पश्चात्वर्ती क्रेता को 3 माह के भीतर प्रतिफल की रकम वापस करे – असफल रहने की दशा में पश्चात्वर्ती क्रेता विक्रेता से 6 % प्रतिवर्ष की दर से ब्याज सहित रकम वसूल करने का हकदार होगा।

Cases referred:

AIR 1998 SC 2028, AIR 1972 SC 1520, 1992 JLJ 635, AIR 1979 SC 1241, AIR (33) 1946 PC 97, (2000) 6 SCC 402, (1998) 5 SCC 537, AIR 1999 SC 1441.

Deepak Khot, for the appellants.

J.P. Mishra with *R. Bhore,* for the respondent No.1.

None, for the other respondents.

J U D G M E N T

ABHAY M. NAIK, J. :–This is plaintiffs appeal against judgment and decree

passed by the Courts below, denying thereby decree for specific performance of contract.

2. Short facts involved herein are that the plaintiff/appellants instituted a suit for specific performance of agreement to purchase agricultural land comprised in survey No.145 in area 17 bigha 9 biswa, situated at Village Kanjwaha.Tahsil Khaniyadhana, District Shivpuri with allegations that the suit land belonged to Dhansingha (defendant No.2), who was Bhumiswami and occupant of it. He agreed to sell it to the plaintiff for a consideration of Rs.8500/-. He received entire consideration on 07-06-1984 and delivered possession of the suit land on the same day. He further executed an agreement of sale on the same day. The suit land was inherited by defendant No.2 from Gajua, whose name was recorded as Bhumiswami. After the death of Gajua, the suit land was inherited by defendant No.2 but his name was not entered in the record of rights in place of Gajua, therefore, it was agreed that registered sale deed would be executed by defendant No.2 after getting his name mutated in the record of rights in place of Gajua. Later on, defendant No.2 despite Mutation in his favour did not execute registered sale deed in favour of plaintiff and, instead, executed a registered sale deed in favour of defendant No.1 (Pyarelal) on 11-12-1987 despite having already contracted with the plaintiff, hence, the alleged sale deed dated 11-12-1987 is incompetent, void and ineffective vis-a-vis plaintiffs interest in the suit land. The alleged sale deed dated 11-12-1987 is fictitious and without consideration. Plaintiff has been ready and willing to get the registered sale deed executed in his favour in accordance with the above mentioned agreement. Plaintiff issued the notice, requiring defendants No.1 and 2 to execute the registered sale deed on 20-04-1988. They did not turn up on the said date to execute the registered sale deed in favour of plaintiff. It is further pleaded that the plaintiff onwards 07-06-1984 constructed a well in the suit land by spending Rs.2,000/- and has been cultivating it since then. With the aforesaid allegations he sought a decree for specific performance in his favour and prayed that defendants No.1 and 2 may be directed to execute a registered sale deed in respect of the suit land in his favour. He also prayed for perpetual injunction that they be restrained from interfering into plaintiffs possession.

3. Defendants No.1 and 2 submitted a joint written statement refuting thereby the claim of plaintiff. They inter alia, stated that defendant No.2 is not in receipt of Rs.8500/- as consideration from the plaintiff and has not executed the alleged sale agreement dated 07-06-1984. Possession of the suit land was also not handed over to the plaintiff. Thus, the alleged agreement in favour of plaintiff was totally denied. Instead, it was stated that defendant No.2 has sold the suit land to defendant No.1 after receipt of consideration of Rs.15,000/- vide registered sale deed dated 11-12-1987 and has also delivered possession to defendant No.1. Alleged construction of well by the plaintiff on the suit land was also denied. Possession

of the plaintiff on the suit land was equally denied. It was further objected that the suit of plaintiff for want of prayer for restoration of possession is bad in law. The alleged agreement dated 07-06-1984 was opposed as a forged and concocted document. Thus, dismissal of the suit of plaintiff was prayed for.

4. Learned trial Judge after recording the evidence held that defendant No.2 had executed a sale agreement in favour of plaintiff on 07-06-1984 after receipt of consideration of Rs.8500/-. However, delivery of possession at the time of execution of sale agreement was not believed. Learned trial Judge accordingly granted a decree for refund of Rs.8500/- in favour of plaintiff vide judgment and decree dated 09-08-1991.

5. Aggrieved by the aforesaid, plaintiff preferred Civil Appeal No.1-A/1992. Defendant/respondents No.1 and 2 submitted cross-objections under Order 41 Rule 27 of CPC against granting a decree in favour of plaintiff for refund of Rs.8500/-.

6. Learned lower appellate Judge dismissed Civil Appeal as well as cross-objections vide impugned judgment and decree dated 23-12-1999, hence the present appeal, which has been heard on the following substantial questions of law alongwith application under Order 41 Rule 27 CPC (I.A.N0.322/09):

1- Whether the Courts below were justified in refusing a decree for specific performance of the agreement Ex.P/1 in the facts and circumstances of the case ?

2- Whether a decree for refund of consideration only can be awarded without awarding any damages and compensation ?

7. Shri Deepak Khot, learned counsel for the appellants and Shri J.P. Mishra, Advocate with Shri R. Bohre, Advocate for respondent No.1 made their respective submissions on merits as well as on the application under Order 41 Rule 27 CPC.

8. Shri Deepak Khot, learned counsel contended that the documents accompanying the application under Order 41 Rule 27 CPC are certified copies issued by the Court of Naib Tahsildar, Khaniyadhana, District Shivpuri and are liable to be taken into consideration while appreciating the plaintiffs case with regard to delivery of possession at the time of alleged sale agreement dated 07-06-1984. According to the respondent's counsel documents are not necessary for deciding the controversy involved in the suit and the application for additional evidence is, therefore, liable to be dismissed.

9. Suit for specific performance was instituted on 13-05-1998 with specific allegation that the sale agreement was executed by defendant No.2 in favour of plaintiff on 07-06-1984. Simultaneously, possession of the suit land was handed over by defendant No.2 to the plaintiff. Proposed documents reveal that the plaintiff submitted an application in the month of July, 2002 to record his possession.

The application was dismissed on 24-07-02 by the Court of Naib Tahsildar on account of pendency of civil litigation. Report of revenue inspector dated 09-05-02 is without issuing notice to the defendants/respondents. Likewise Panchnama was also prepared in the absence of respondents No.1 and 2. This being so, the proposed documents cannot be taken into consideration as additional evidence. Likewise, statement of Chimma and Devlal are also not liable to be considered because they were not subjected to cross- examination by respondents No.1 and 2. Accordingly, application under Order 41 Rule 27 CPC (I.A.No.322/09) is hereby dismissed.

10. On merits, it has been contended by Shri Deepak Khot, learned counsel for the appellants that execution of agreement dated 07-06-1984 is duly proved and has been so found by the Courts below. This being so, the suit for specific performance ought to have been decreed in plaintiffs favour and defendant/ respondents No.1 and 2 ought to have been directed to execute the registered sale deed in his favour. It is further contended that defendant No.1 despite being subsequent purchaser has not taken the plea of bona fide purchaser without notice of earlier agreement. This apart, the attending facts and circumstances clearly reveal that he was aware of the sale agreement in favour of plaintiff and. is bound by it. Moreover, defendant No.1 did not choose to appear in the witness box and an adverse inference ought to have been drawn against him about knowledge of prior agreement. This being so, impugned judgment and decree denying thereby decree for specific performance is not sustainable in law. The suit ought to have been decreed in plaintiffs favour in toto.

11. On behalf of respondents No.1 and 2, it has been- contended that the Courts below have concurrently found that the defendant No.1 is bona fide purchaser without notice of prior agreement. These findings do not warrant interference for want of infirmity.

12. Considered the submissions and perused the record.

13. Proven facts of the case are that the defendant No.2 has executed an agreement of sale in respect of the suit land in favour of plaintiff on 07-06-1984 vide Ex-P/1 for consideration of Rs.8500/-. It is clearly recited in Ex-P/1 that the entire consideration of Rs.8500/- was received by defendant No.2 and possession of the suit land was delivered to plaintiff on the same day. Ex-P/1 contained stipulation that the suit land was entered in the revenue papers in the name of deceased Gajua and defendant No.2 would execute the registered sale deed in favour of plaintiff after getting his name mutated in place of Gajua. It is equally found proved that defendant No.2 has executed the registered sale deed dated 11-12-1987 (Ex-D/1) in favour of defendant No.1 in respect of the suit land which is subsequent in point of time in comparison to Ex-P/1. Thus, plaintiffs case would be governed by Section 19(b) of the Specific Relief Act, 1963 which reads as under:

19. Relief against parties and persons claiming under them by subsequent title. - Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against-

(a) either party thereto:

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract.

14. In view of the aforesaid, it was obligatory on part of the respondent No.2 to establish that he was transferee for value who had no notice of the earlier contract and has paid his money in good faith. If the evidence on record establishes that the subsequent purchaser was bona fide purchaser for value without notice of earlier agreement with the plaintiff, latter would not be entitled for the relief of specific performance against subsequent purchaser. Reference to the settled proposition of law may be found in so many cases, one successful reference may be made to the decision of Hon'ble Supreme Court in the case of *Jagan Nath V. Jagdish Rai and others* (AIR 1998 SC 2028). Similarly, it is equally true that if the evidence shows that the subsequent purchaser had notice of prior agreement, he would be bound by the prior agreement. Reference for this purpose may be made to the decision of Supreme Court in the case of *Dr. Govinddas and another V. Smt. Shantibai and others* (AIR 1972 SC 1520).

15. Learned counsel for the respondent No.1 submitted that the plaintiff has nowhere averred in the plaint that defendant No.1 purchased the suit property subsequent to the sale agreement in his favour with notice of such earlier agreement. Learned counsel relying upon a single Bench decision of this Court in the case of *Harikishan and another V. Jaswant Singh and others* (1992 JLJ 635). submitted that it ought to have been averred with specific pleadings and in absence of such pleadings evidence about knowledge of earlier agreement to the subsequent purchaser cannot be looked into. This Court is not impressed with this submission because of specific language of Section 19 of Specific Relief Act, 1963.

16. Grant of decree for specific performance has already been held as a rule with its denial an exception by the Apex Court in the case of *Prakash Chandra V. Angadlal and others* (AIR 1979 SC 1241). Clause (b) (supra) of Section 19 is worded in a manner that a subsequent transferee has to establish that he is bona fide purchaser for value without notice of the earlier agreement. This makes it clear that in order to avoid a decree for specific performance, subsequent purchaser is bound to establish the aforesaid facts. Long back Privy Council in the case of *Shankarlal Narayandas Mundade V. The New Mofussil Co. Ltd. and others.* AIR (33) 1946 Privy Council 97 has already observed:

'Their Lordships have found it unnecessary to examine the evidence which was called on behalf of the plaintiff to show that these defendants in fact had notice of the earlier contract, since a decision of this Board is clear authority for the proposition that the burden of proving good faith and lack of notice lay upon the defendants."

17. Both the Courts have concurrently found that- defendant No.2 has executed an agreement of sale on 07-06-1984 in favour of plaintiff after having received the entire consideration to the tune of Rs.8500/-. Subsequently, he executed a registered sale deed in respect of the suit land in favour of defendant No.1 on 11-12-1987 for a consideration of Rs. 15,000/- which is found to be mala fide on the part of defendant No.2 by the trial Court while deciding issue No.1 0. This finding is not found disturbed by the learned lower appellate Judge.

18. Case of the plaintiff is that while executing the sale agreement (Ex-P/1) on 07-06-1984, possession of the suit land was delivered to the plaintiff who has been continuing in its cultivating possession since then. Contrary to this, defendant No.2 stated in written statement as well as in his statement on oath that possession over the suit land was delivered to defendant No.1 on 11-12-1987 while executing the registered sale deed. Defendant No.1 has not appeared in the witness box to assert his possession. Plaintiff and his three witnesses have appeared in the witnesses box to prove plaintiffs possession. Defendant No.2 has stated in paragraph 4 of his statement that Pyarelal (defendant No.l) had obtained the money from Chandrabhan Singh and had paid to him. Chandrabhan Singh while appearing as DW-2 has stated that police report was lodged against him by the plaintiff somewhere in the year 1985-86. Thus, it seems more probable that plaintiff was in possession of the suit land pursuant to the sale agreement dated 07-06-1984 and effort was made to snatch away possession from him. Since there was a dispute about possession, it was obligatory on the part of defendant No.1 to make enquiry about nature of dispute with regard to possession and the claim with respect thereto.

19. In order to establish bona fide subsequent purchase for value without notice of earlier agreement, a subsequent purchaser shall have to establish that he made the requisite enquiry. If the vendor is not in physical possession of the property, the intending purchaser is bound to make enquiry from the occupant. In the present case, there was a dispute about possession with the plaintiff, as admitted by Chandrabhan Singh (DW-2). If defendant No.1 had made an enquiry from occupant i.e. Parwat, present plaintiff, he would have come to know about earlier agreement dated 07-06-1984. It is worthwhile to reproduce the relevant observations from the decision of the Apex Court in the case of *R.K. Mohammed Ubaidullah and others Vs. Hajee C. Abdul Wahab (D) by Lrs.*, (2000) 6 SCC 402 (equivalent to AIR 2001 SC1658):-

14. Section 19 of the Specific Relief Act, 1963, to the extent it's relevance, reads:

> "19. Relief against parties and persons claiming under them by subsequent title. - Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against-
>
> (a) either party thereto;
>
> (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;
>
> (c)-(e)

As may be seen from Section 19 (a) and (b) extracted above specific performance of a contract can be enforced against (a) either party thereto and (b) any person claiming under him by a title arising subsequent to the contract, except a transferee for value who has paid his money in good faith and without notice of the earlier contract. Section 19(b) protects the bona fide purchaser in good faith for value without notice of the original contract. This protection is in the nature of exception to the general rule. Hence the onus of proof of good faith is on the purchaser who takes the plea that he is an innocent purchaser. Good faith is a question of fact to be considered and decided on the facts of each case. Section 52 of the Penal Code emphasizes due care and attention in relation to the good faith. In the General Clauses Act emphasis is laid on honesty.

15. Notice is defined in Section 3 of the Transfer of Property Act. It may be actual where the party has actual knowledge of the fact or constructive. "A person is said to have notice" of a fact when he actually knows that fact, or when, but for willful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it. Explanation II of said Section 3 reads:

> "Explanation II:- Any person acquiring , any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof."

Finally the Apex Court has summed up in paragraph 19 as under:

> "In view of what is stated above, it is clear that the defendants 2 to 5 were not bona fide purchasers for value without prior notice

of the original contract and that they were required to make inquiry as to the nature of possession or title or further interest, if any, of the plaintiff over the suit property at the time when they entered into sale transaction notwithstanding they were already aware that the plaintiff was in possession of the property as the tenant. What is material is the inquiry at the time when subsequent sale transaction was entered into."

20. In the case of *Jagan Nath Vs. Jagdish Rai and others,* (1998) 5 SCC 537. the Apex Court while dealing with the matter of subsequent purchaser has observed :

"It is well settled that the initial burden to show that the subsequent purchaser of suit property covered by earlier suit agreement was a bona fide purchaser for value without notice of the suit agreement squarely rests on the shoulders of such subsequent transferee. In the case of *Bhup Narain Singh V. Gokul Chand Mahton* the Privy Council relying upon earlier Section 27 of the Specific Relief Act of 1877 which is in pari materia with section 19(1)(b) of the present Act, made the following pertinent observations at p.70 of the Report in this connection:

Section 27 lays down a general rule that the original contract may be specially enforced again a subsequent transferee, but allows an exception to that general rule, not to the transferor, but to the transferee, and therefore it is for the transferee to establish the circumstances which will allow him to retain the benefit of a transfer which prima facie, he had no right to get:"

However, it has to be kept in view that once evidence is led by both the sides the question of initial onus of proof pales into insignificance and the court will have to decide the question in controversy in the light of the evidence on record."

21. It is not at all impossible but little improbable to prove by direct evidence that a subsequent purchaser had notice of earlier agreement. This is to be gathered from the attending facts and circumstances. Subsequent purchaser is also required to have acted with bona fide. Absence of bona fide may also be gathered from absence of enquiry as well as absence of publication of public notice for intended/ proposed purchase. Admittedly, defendant No.1 has not issued any public notice expressing his intention to purchase the suit land from defendant No.2. Had he issued such public notice, plaintiff would have definitely objected to it in writing. He has not appeared in witness box to prove that he has made any enquiry with respect to the suit land on spot or otherwise.

22. Now coming to the case in hand, it may be seen that agreement of sale

dated 07-06-1984 is found proved by both the Courts below in concurrent manner. Accordingly, defendant No.2 has executed an agreement to sell in respect of suit land in favour of plaintiff after receiving entire consideration of Rs.8500/-. It has already been found by the trial Court that defendant No.2 executed a registered sale deed on 11-12-1987 with mala fide intention of unduly gaining more money. Defendant No.1 being subsequent purchaser was bound to prove that he acted in good faith by purchasing the suit land from defendant No.1 for value without notice of earlier agreement. Admittedly, he has not chosen to appear in the witness box to prove bona fide on his part. Similarly, he has not appeared in the witness box to assert his possession pursuant to the registered sale deed dated 11-12-1987. According to law laid down by the Apex Court at times and again it was obligatory on his part to establish bona fide on his part which could have been proved by establishing that he had made requisite enquiry. Existence of dispute on account of possession on the suit land is already established as admitted by DW-2. This dispute occurred with Parwat, the plaintiff who was put into possession of the suit land as per Ex-P/1. Delivery of possession has already been recited in Ex-P/1 which has been found proved by the Courts below in concurrent manner. Defendant No.1 who is stated as per written statement to have obtained possession pursuant to the registered sale deed dated 11-12-1987 has not appeared in the witness box to establish his possession despite being defendant. Thus, adverse inference is liable to be drawn against him about possession as well as about absence of knowledge of earlier agreement in view of law laid down by the Apex Court in the case of *Vidhyadhar V. Mankikrao and another* (AIR 1999 SC 1441) wherein it is observed:

> "Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct."

23. Learned Courts below have not focused on the aforesaid law laid down by the Apex Court in the matter of burden to be discharged by subsequent purchaser. In the present case, defendant No.1 being subsequent purchaser was bound to prove that the purchase made by him falls in the exception envisaged under clause (b) of Section 19 of Specific Relief Act, 1963. He has not even dared to appear in the witness box. This being so, he is not found to be bona fide purchaser without notice of the prior agreement and is not found to have paid money in good faith. Learned Courts below ought to have granted decree for specific performance against the defendant No.2 as well as defendant No.1. Accordingly substantial question of law no.1 is answered in favour of appellant.

24. In view of answer to substantial question of law No.1, substantial question of law No.2 need not be answered.

25. In the result, the appeal is hereby allowed. Suit for specific performance instituted by the plaintiff is hereby decreed in his favour against defendant No.1 as well as defendant No.2. Both these defendants are directed to execute registered sale deed in favour of plaintiff within a period of three months at the cost and expenses of plaintiff. Decree be modified accordingly. Impugned judgment and decree are hereby set aside.

26. In exercise of power under Order 41 Rule 33 CPC, this Court further directs defendant No.2 to refund the amount of consideration of Rs.15,000/- to the defendant No.1 within the aforesaid period. In case of failure, defendant No.1 shall be entitled to recover this amount from defendant No.2 with interest @ 6% p.a. after expiry of three months.

Defendants No.1 and 2 shall bear the costs of litigation of the plaintiff throughout up to the stage of this appeal.

Appeal allowed.

I.L.R. [2010] M. P., 1156
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
24 February, 2010*

GAYATRI (SMT.) & ors. ... Appellants
Vs.
ASHISH KUMAR ... Respondent

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) - *Alternate accommodation available - Duty of plaintiff - During pendency of suit, plaintiff got vacant possession of two shops of the same house situated near to the shop in dispute - Plaintiff is obliged to discharge his duty to explain by way of pleadings in the suit about non-suitability of the available alternate accommodation either it was available with him on the date of filing the suit or the same was got vacated during pendency of the suit - Plaintiff has failed to put forth such account in the pleadings - Plaintiff could not get the decree for eviction on the ground of bona fide requirement.* (Paras 10 & 11)

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ) – वैकल्पिक स्थान उपलब्ध – वादी का कर्तव्य – वाद के लम्बित रहने के दौरान, वादी ने उसी मकान में वादग्रस्त दुकान के निकट स्थित दो दुकानों का रिक्त कब्जा प्राप्त कर लिया – वादी उपलब्ध वैकल्पिक स्थान, चाहे वह वाद दाखिल करने की तारीख को उसके पास उपलब्ध हो या वाद के लम्बित रहने के दौरान उसे रिक्त कराया गया हो, की अनुपयुक्तता के बारे में, वाद में अभिवचन द्वारा स्पष्ट करने के अपने कर्तव्य का पालन करने के लिए बाध्य है – वादी अभिवचनों में ऐसा स्पष्टीकरण देने में असफल हो गया – वादी वास्तविक आवश्यकता के आधार पर बेदखली की डिक्री नहीं पा सकता।

*S.A. No.1190/2004 (Jabalpur)

Cases referred :

(1981) 3 SCC 103, 2008(2) MPLJ 155, (1996) 5 SCC 344, (2000) 1 SCC 679, (2001) 6 SCC 473, AIR 1987 SC 2131, (2005) 8 SCC 252, 2000(3) MPLJ 343.

Adarshmuni Trivedi with *Ritesh Sharma,* for the appellant.

Avinash Jargar, for the respondent.

J U D G M E N T

U.C. MAHESHWARI, J. :–The appellants- defendants have preferred this appeal under Section 100 of the Code of Civil Procedure being aggrieved by the judgment and decree dated 9.10.04 passed by Ist Additional District Judge, Betul in Civil Regular Appeal No: 32-A/03 whereby setting aside the judgment and decree dated 23.10.03 passed by Civil Judge, Class-II, Betul in Civil Original Suit No. 5-A/02 dismissing the eviction suit of the respondent, the same was decreed against the appellant on the ground under Section 12 (1) (f) of the M.P. Accommodation Act 1961, in short the Act.

2. The facts giving rise to this appeal in short are that the respondents herein filed a suit against one Ramesh Soni, the principal defendant and the predecessor of the appellants, for eviction, arrears of rent and mesne profit with respect of a shop situated in Betul, contending that defendant being his tenant is in occupation of the same for non residential purposes @ Rs.500/- per month. The same was filed on the ground of bonafide genuine requirement of the respondent to open the cloth shop for which he did not possess any other suitable accommodation of his own in such town. As per further pleadings the available adjoining shop to the disputed shop is in occupation of his father who is using the same as godown. The same is also not suitable for the alleged need because a tube well is installed in the centre of such shop. The disputed shop being situated on the corner and facing both sides road is more convenient and suitable for the alleged business of the respondent. The suit was also filed on the ground of arrears of rent. In pendency of the suit principal defendant Ramesh Soni died and thereafter his widow , the appellant no. 1 Smt. Gayatri, being domestic woman and other appellants being minor are not doing any business in such premises and the same was given by them to one Sanjay Soni, the brother of Ramesh Soni, on sub tenancy. In such premises an additional ground of Section 12 (1) (b) of the Act was also taken by the respondent by way of amendment in the suit.

3. In written statements of the appellants, by admitting the tenancy it is stated that initially it was @ Rs. 400/- per month. Subsequently it was enhanced @ Rs.500/- per month but after death of principal defendant by amendment it is stated that keeping in view such changed circumstances of the appellants' family the rent was reduced by the respondent @ Rs.300/- per month. The respondent-plaintiff is doing the business of cloth and General Stores with his father since

last ten years in his another shop situated near Sunita Lodge, Betulganj. The alleged need of the tenanted premises to the respondent is neither bonafide nor genuine. After inducting the principal defendant in disputed shop, the other three adjoining shops were given to different tenants by the respondents. The respondent wants to evict the appellants from such shop with some ulterior motive. So far his alleged need is concerned, it is said that the respondent can start his new business in the available alternate accommodation situated adjoining to the shop. In pendency of the suit some other shops also got vacated by the respondent. The same are lying vacant. Accordingly respondent is in possession of sufficient alternate suitable accommodation of his own for the alleged need, in which he can start his alleged business. The other stated grounds of eviction are also denied in written statements and prayer for dismissal of the suit is made.

4. In view of pleadings of the parties after framing as many as five issues the trial was held. On appreciation of the evidence, in the first inning of litigation, vide judgment and decree dated 10th October 1998 the suit of the respondent was partly decreed for the sum of arrears of rent while on other grounds the same was dismissed. The same was challenged by the respondent in appeal, on consideration of such appeal by allowing the amendment application of the appellants after setting aside such judgment and decree of the trial court the case was remitted back to the trial court to decide afresh after extending opportunity of consequential amendment to other party and framing the additional issues on the amended pleadings. After remitting back the matter, in compliance of the direction of the appellate court after extending the opportunity of consequential amendment and framing the additional issues, the additional evidence of the parties was recorded and on fresh appreciation the suit was dismissed by the trial court. Such dismissal was challenged by the respondent before the appellate court. On consideration by allowing such appeal in part the suit of the respondent was decreed against the appellants for eviction on the ground enumerated under Section 12 (1) (f) of the Act holding the respondent is in bonafide genuine need of the alleged accommodation for his own business, for which he did not possess any other suitable alternate accommodation of his own in Betul. Being dis-satisfied with the same, the appellants – defendants have come forward to this court with this appeal.

5. On earlier occasion vide order dated 19.7.06 this appeal was admitted on the following substantial question of law:-

> "1. Whether the need of the plaintiff can still be said to be bonafide since after having obtained vacant possession of two shops adjoining to the suit shop, he has not started the business?"

6. Shri Adarshmuni Trivedi, learned Sr. Adv assisted by Shri Ritesh Sharma, learned counsel for the appellants by referring the pleadings and the evidence adduced by the parties, said that the appellants had successfully proved that the

respondent had sufficient alternate accommodation of hiw own with him for his alleged need, besides this, in pendency of the suit respondent also got vacated some shops adjoining to the disputed shop, situated in the same building from other tenants namely: (a) Tuteza Cloth Stores, (b) R.K. Traders and P.P. Sale, taking into consideration the same, the trial court rightly dismissed the suit but the appellate court contrary to such evidence and without taking into consideration that the entire account of available alternate accommodation of the shops adjoining to the disputed shop has not been put fourth by the respondent in his pleading only on the basis of inadmissible evidence in the lack of the pleadings explaining the unsuitability of such available alternate accommodation has decreed the suit on the ground under Section 12 (1) (f) of the Act. Such approach of the appellate court is not sustainable under the law. In support of his contention he placed his reliance on a decision of the Apex Court in the matter of *Hasmat Rai and other Vs. Raghunath Prasad* reported in (1981) 3 SCC 103 and also of this court in the matter of *Banarasi Devi Jain Vs. M.P. Transport Company and another* reported in 2008 (2) M.P.L.J Page 155 and prayed for setting aside the judgment of the appellate court by restoring the judgment of the trial court dismissing the suit of the respondent.

7. Shri Avinash Jargar, learned counsel for the respondent while responding the aforesaid arguments justified the impugned judgment of the appellate court and said the same is based on proper appreciation of evidence and is in conformity with law. It does not require any interference at this stage. In continuation he argued that as per settled legal proposition the appellant is the only sole judge to decide the suitability of the place for opening his alleged business. The court is not having any authority to discard such wish of the respondent by holding the other alternate accommodation of his own is suitable for such need. As such the court can not insist the landlord like the respondent to open his business at some other adjoining place contrary to his wish. By referring the evidence adduced by the parties, he said that the disputed shop is the only suitable shop for opening the business of the respondent. The other available alternate shops are not suitable for the same. He also said that it is not necessary for the respondent to put fourth the entire account of available alternate vacant accommodation with him in the pleadings, specially when such facts have come on record in the depositions of the witnesses. In such premises, he said that the appellate court has not committed any error in passing the impugned decree of eviction on appreciation of the evidence and prayed for dismissal of this appeal. He also placed his reliance on some reported cases of the Apex Court as well as of this court.

8. Having heard the parties, after perusing the record in the available circumstances the court has to answer the aforesaid framed substantial question of law. It is undisputed fact between the parties as stated by them in their depositions that in pendency of the suit the respondent has got vacant possession

of two shops, of the same house situated near to the shop in dispute, from the different tenants namely Tuteja Cloth Stores and P.P. Sale. Ashish Kumar Jain, (PW-1), the plaintiff himself categorically stated in para 32 of his deposition that it is true that he has obtained the possession of the shops from Tuteja Cloth Stores, R.K. Traders and P.P. Sale and in such shops there is no tubewell in any of them. He also said in para 27 of his deposition that the shop got vacated from Tuteja Cloth Stores is under use as godown. It is apparent from the averments of the plaint that even after taking the possession of such shops from the other tenants during pendency of the suit the account of such available alternate accommodation how the same are not suitable has not been put fourth in the pleading by way of amendment. It is settled proposition of law that the landlord like the respondent is obliged under the law to put fourth the entire account with respect of available vacant alternate accommodation of his own with him stating how the same are not suitable for him. In absence of any pleadings in that regard in view of availability of such alternate accommodation with the landlord like the respondent, his alleged need for the disputed accommodation could not be held to be bonafide or genuine for passing the decree of eviction against the appellants under Section 12 (1) (f) of the Act. Long back on arising the occasion such question was answered by the Apex Court in the matter of *Hasmat Rai and other Vs. Raghunath Prasad* (1981) 3 SCC 103 in which it was held as under:-

> "10. Section 12 starts with a non obstante clause thereby curtailing the right of the landlord to seek eviction of the tenant which he might have under any other law and the right of eviction is made subject to the overriding provision of Section 12. It is thus an enabling section. In order to avail of the benefit conferred by Section 12 to seek eviction of the tenant the landlord must satisfy the essential ingredients of the section. The landlord in this case seeks eviction of the tenant under S. 12 (1)(f). He must, therefore, establish (i) that he requires bona fide possession of a building let for non-residential purpose for continuing or starting his business; and (ii) that he has no other reasonably suitable non-residential accommodation of his own in his occupation in the city or town concerned. The burden to establish both the requirements of S. 12(l)(f) is squarely on the landlord. And before an allegation of fact to obtain the relief required is permitted to be proved, the law of pleadings require that such facts have to be alleged and must be put in issue. Ordinarily, therefore, when a landlord seeks eviction under S. 12 (1)(f) the Court after satisfying itself that there are proper pleadings must frame two issue namely (i) whether the plaintiff landlord proves that he bona fide requires possession of a building let to the tenant for non-residential purpose for continuing

or starting his business, and (ii) whether he proves that he has no other reasonably suitable non-residential accommodation of his own in the city or town concerned. Without elaborating we must notice a well established proposition that any amount of proof offered without pleading is generally of no relevance."

"14..... The M. P. Act enables a landlord to seek eviction of a tenant and obtain possession under various circumstances set out in Section 12. If a landlord bona fide requires possession of a premises let for residential purpose for his own use he can sue and obtain possession. He is equally entitled to obtain possession of the premises let for non-residential purposes if he wants to continue or start his business. If he commences the proceedings for eviction on the ground of personal requirement he must be able to allege and show the requirement on the date of initiation of action in the Court which would be his cause of action. But that is not sufficient. This requirement must continue throughout the progress of the litigation and must exist on the date of the decree and when we say decree we mean the decree of the final Court. Any other view would defeat the beneficial provisions of a welfare legislation like the Rent Restriction Act. .....If the tenant is in a position to show that the need or requirement no more exists because of subsequent events, it would be open to him to point out such events and the Court including the appellate Court has to examine, evaluate and adjudicate the same. Otherwise the landlord would derive an unfair advantage. An illustration would clarify what we want to convey. A landlord was in a position to show that he needed possession of demised premises on the date of the suit as well as on the date of the decree of the trial Court. When the matter was pending in appeal at the instance of the tenant, the landlord built a house or bungalow which would fully satisfy his requirement. If this subsequent event is taken into consideration, the landlord would have to be non-suited. Can the Court shut its eyes and evict the tenant? Such is neither the spirit nor intendment of Rent Restriction Act which was enacted to fetter the unfettered right of re-entry. Therefore when an action is brought by the landlord under Rent Restriction Act for eviction on the ground of personal requirement, his need must not only be shown to exist at the date of the suit, but must exist on the date of the appellate decree, or the date when a higher court deals with the matter. During the progress and passage of proceeding from Court

to Court if subsequent events occur which if noticed would non suit the plaintiff, the Court has to examine and evaluate the some and mould the decree accordingly."

9. Subsequently on arising the occasion the aforesaid principle laid down by the Apex Court is followed by this court also in the matter of *Banarasi Devi Jain Vs. M.P. Transport Company and another* reported in 2008 (2) M.P.L.J Page 155 in which it was held as under:-

"12. Coming to the question of section 12 (1) (f) of the Act regarding bonafide, genuine requirement of disputed premises to the appellant for business and godown of her son is concerned, it is apparent from the plaint that on the date of filing the suit or subsequent to it, at any point of time, the available alternate accommodation, was neither pleaded nor any application in this regard was moved by the appellant. Although in the written statement of the respondents, the plea regarding availability of alternate accommodation is taken by the respondent and on vacating the premises by the tenant of adjoining premises under execution of the decree from the tenant New Delhi-MP Transport Company, the written statement was amended and such alternate accommodation is also pleaded. Inspite of such pleadings, the appellant did not take any steps to put forth the explanation and the accounts regarding unsustainability of such available accommodation by amending the suit. Although in support of the pleadings of alternate accommodation, the witnesses of the respondents did not state anything in their deposition but the witnesses of the appellant were cross – examined on this count. Jai Kumar Jain (PW-1) son of the appellant admitted in para -6 of his deposition that her mother has got possession of the adjoining premises from the other tenant. In view of the settled preposition of the law that the plaintiff like appellant is bound to built -up her case with all probabilities to get the decree she could not be benefited on the weakness of the respondent/defendant, the aforesaid admission is sufficient to draw an inference that the appellant has got adjoining alternate accommodation during pendency of the suit and as per available evidence in the lack of any evidence regarding unsuitability of such accommodation for the alleged need, the suit could not be decreed at this stage on this ground by setting aside the findings of the trial Court in this regard. My aforesaid view is fully fortified by the dictum of the Apex Court announced in the matter of *Hasmat Rai and another Vs. Ragunath Prasad,* 1981 MPLJ (SC) 610=AIR 1981 SC 1711.

10. In view of the aforesaid dictum on examining the case at hand then the same are applicable in available circumstances. In such premises, the impugned judgment and decree of the appellate court could not be sustained.

11. Although the respondent's counsel argued that the appellants have failed to prove by their evidence that any of the abovesaid alternate accommodation is suitable and sufficient for the alleged need of the respondent, but I have found sufficient evidence in the deposition of Pawan, (DW-3) with respect of the available alternate accommodation with the respondent of his own for his alleged need. Even otherwise under the law the landlord like the respondent is obliged to discharge his duty to explain by way of the pleadings in the suit about non- suitability of the available alternate accommodation either it was available with him on the date of filing the suit or the same was got vacated during pendency of the suit. In view of the aforesaid discussion the respondent has failed to put fourth such account in the pleadings. In such circumstances merely on some weakness of the appellants-defendants, the respondent could not get the decree for eviction against the appellants on the ground of bonafide genuine requirement.

12. So far the case laws cited on behalf of the respondent's counsel are concerned, the same are taken up for consideration one by one:-

(a) In the matter of *Meenal Eknath Kshirsagar (Mrs.) Vs. Traders & agencies and antoher* reported in (1996) 5 SCC 344 is concerned, this court has no dispute with the principle laid down in this case, that it is for the landlord to decide how and in what manner he should live and he is the best judge of his residential requirement. If the landlord desires to beneficially enjoy his own property when the other property occupied by him as a tenant or on any other basis is either insecure or inconvenient it is not for the courts to dictate to him to continue such premises. But in the case at hand the respondent-plaintiff has not pleaded how the available alternate accommodation, got vacated by him during pendency of the suit, is insecure or inconvenient for him, hence in the lack of such pleadings in the plaint the cited case is not helping to the appellant. It is settled proposition of law that in the lack of the proper pleadings the evidence in that regard if adduced could not be looked into.

13. The matter of *Ragavendra Kumar Vs. Firm Prem Machinery & Co.* reported in (2000) 1 SCC 679 was decided taking into consideration the amended pleadings of the plaint in para 6-A stating the explanation of the available alternative accommodation. In such case the landlord – plaintiffs were not having vacant possession of the alternate accommodation of his own and the suit premises was found to be suitable for his business which is not the situation here, hence the same is not helping to the respondent.

14. In the case of *N.R. Narayan Swamy Vs. B. Francis Jagan* reported in (2001) 6 SCC 473, the question of maintainability of subsequent suit for bonafide

genuine requirement after dismissing the earlier suit was decided. In the case at hand no such question is involved, hence, the same is not helping to the respondent.

15. In the matter of *Dr. Saroj Kumar Das Vs. Shri Arjun Prasad Jogani* reported in AIR 1987 SC 2131, the concerning landlord was having the alternate accommodation with him in some other locality of Calcuttta, which was very far off from the place of working of the landlord and of his wife and taking into consideration such circumstance the suit was decreed, which is not the situation here. In the case at hand the alternate accommodation which has not been pleaded by the respondent-plaintiff is situated near to the disputed shop in the same building of the respondent and not in the different locality, therefore, the cited case is distinguishable on the factual matrix of the case at hand, hence the same is not helping to the respondent.

16. So far the case law in the matter of *Sait Nagjee Purushotham & Co. Ltd. Vs. Vimalabai Prabhulal and others* reported in (2005) 8 SCC 252 is concerned, the same was decided taking into consideration that the plaintiff company was having the business in some other city and at the place where the accommodation was situated, such plaintiff- company wanted to expand its business and in such premises it was held that it is always prerogative of the landlord to decide for what purpose he requires the premises in question. In this case for his bonafide use of extending his business, the same can not be a ground that the landlord is already having a business in other city, therefore, such need is not genuine need as such tenant can not dictate the terms and condition to the landlord and advise what he should do and what he should not. Such situation is not existing in the present case. In the present case the respondent is having the shops as alternate accommodation near the shop under disputed for the alleged need. He has not come with the case that in some other town he is having the business and except disputed shop he does not have any other shop of his own for his alleged need in Betul. In such premises, this case law is not helping to the repsondent.

17. In the case of this court in the matter of *Kailash Chandra Shankarlal Trivedi Vs. Punjab National Bank Ltd. and others* reported in 2000 (3) M.P.L.J. 343 the suit was decreed taking into consideration the requirement for opening offices of the members of the landlord family as the concerned plaintiff- family was in need to open the various offices for different members of the family which is not the situation in the case at hand. On the contrary inspite having three shops got vacant during pendency of the litigation the present respondent has neither opened nor started his business in any of the those shops, which are situated near or adjoining to the disputed shop. Therefore, such case law is also not helping to the respondent.

18. In view of the aforesaid discussion, the framed substantial question of law is answered accordingly in favour of the appellants holding that on obtaining the

vacant possession of the two shops adjoining to the disputed shop the respondent's alleged need is not subsisting. The same has come to and end. In pursuance of it the impugned judgment and decree of the appellate court directing eviction of the appellants from the disputed premises under Section 12 (1) (f) of the Act deserves to be set aside.

19. Therefore, by allowing this appeal, the impugned judgment and decree of the appellate court is set aside and the judgment and decree of the trial court dismissing the suit of the respondent is hereby restored. The respondent by bearing his own cost throughout shall also afford the cost of the appellants throughout of this litigation. The cost of this appeal is quantified at Rs.5000/-. Decree be drawn up accordingly.

20. The appeal is allowed, as indicated above.

Appeal allowed.

I.L.R. [2010] M. P., 1165
APPELLATE CIVIL
Before Mr. Justice Prakash Shrivastava
25 March, 2010*

F.F. (I) L.C. 16/3, T.T.M.I.D.C. AREA, NAVI MUMBAI ... Appellant
Vs.
M/S SUPREME ENGINEERS, ALWAR (RAJASTHAN) ... Respondent

A. Civil Procedure Code (5 of 1908), Order 39 Rules 1 & 2 - ***Interlocutory mandatory injunction*** *- Court has to grant such relief on the basis of sound judicial discretion to be exercised in the fact situation in a particular case - Though exercise of such a discretion is limited to rare and exceptional cases - But, there is no absolute bar in granting such a relief in deserving cases - Such order can be granted on an application after notice to the defendants and after hearing the parties.* (Para 10)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – अंतवर्ती आज्ञापक व्यादेश – न्यायालय को ऐसा अनुतोष किसी विशिष्ट मामले की तथ्य परिस्थिति में प्रयोग किये जाने वाले ठोस न्यायिक विवेक के आधार पर प्रदान करना चाहिए – यद्यपि ऐसे विवेक का प्रयोग विरल और आपवादिक मामलों तक सीमित है – परन्तु उपयुक्त मामलों में ऐसा अनुतोष प्रदान करने पर आत्यंतिक रोक नहीं है – किसी आवेदन पर प्रतिवादियों को सूचना देने और पक्षकारों को सुनने के बाद ऐसा आदेश प्रदान किया जा सकता है।

B. Civil Procedure Code (5 of 1908), Order 39 Rules 1 & 2 - ***Interlocutory mandatory injunction*** *- Court is required to see that the plaintiff has a strong case for trial i.e. it should be of a higher standard than the*

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*M.A. No.1240/2010 (Jabalpur)

prima facie case and it is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money and the balance of convenience should be in favour of plaintiff. (Para 10)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – अंतवर्ती आज्ञापक व्यादेश – न्यायालय को यह देखना आवश्यक है कि वादी का विचारण के लिए सशक्त मामला है अर्थात् वह प्रथम दृष्ट्या मामले की तुलना में उच्चतर कोटि का होना चाहिए और अपूर्तनीय या गम्भीर क्षति, जिसकी साधारणतः धन के रूप में क्षतिपूर्ति नहीं की जा सकती, के निवारण के लिए यह आवश्यक हो और सुविधा का संतुलन वादी के पक्ष में होना चाहिए।

C. Civil Procedure Code (5 of 1908), Order 39 Rules 1 & 2, Contract Act, 1872, Sections 148, 160 & 170 - *Plaintiff filed the suit seeking the relief of settling the accounts in terms of contract and the relief of direction to the defendant to handover the machinery and equipments to plaintiff - Defendant took the plea that in terms of S. 160 or 170 of the Act, he has right to retain the machines and equipments - Held - Contract agreement between the parties indicates that the conditions of bailment as contained in S. 148 of the Act are not satisfied - Therefore, the plea cannot be accepted.* (Para 15)

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2, संविदा अधिनियम, 1872, धाराएँ 148, 160 व 170 – वादी ने संविदा के निबंधनों के अनुसार लेखाओं का परिनिर्धारण करने और प्रतिवादी को यह निदेश देने कि वादी को मशीनरी और उपकरण सुपुर्द करे, का अनुतोष चाहते हुए वाद पेश किया – प्रतिवादी ने दलील दी कि अधिनियम की धारा 160 या 170 के निबंधनों के अनुसार उसे मशीनों और उपकरणों को रोक रखने का अधिकार है – अभिनिर्धारित – पक्षकारों के मध्य संविदा करार उपदर्शित करता है कि अधिनियम की धारा 148 में अन्तर्विष्ट उपनिधान की शर्तें पूरी नही हुई हैं – इसलिए दलील स्वीकार नहीं की जा सकती है।

D. Civil Procedure Code (5 of 1908), Order 39 Rules 1 & 2 - ***Interlocutory mandatory injunction*** - *Plaintiff's machinery and equipments lying at the site unused are getting spoiled and loosing their value - The final disposal of suit may take some time - Considering the controversy involved between the parties, it may not be possible to compensate the plaintiff if the machines and equipments are destroyed and damaged - Plaintiff has a very strong prima facie case in his favour - Interlocutory mandatory injunction rightly granted.* (Paras 16 & 17)

घ. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – अंतवर्ती आज्ञापक व्यादेश – कार्यस्थल पर अनुपयोगी पड़े हुए वादी के मशीनरी और उपकरण खराब हो रहे हैं और उनका मूल्य कम हो रहा है – वाद के अन्तिम निपटारे में कुछ समय लग सकता है – पक्षकारों के मध्य अन्तर्ग्रस्त विवाद को ध्यान में रखते हुए, मशीन और उपकरण यदि नष्ट और क्षतिग्रस्त हो जाएँ तो वादी को उसकी क्षतिपूर्ति करना संभव नहीं हो सकता है – वादी के पक्ष में अत्यंत सशक्त प्रथम दृष्ट्या मामला है – अंतवर्ती आज्ञापक व्यादेश उचित रूप से प्रदान किया गया।

Cases referred :

(1990) 2 SCC 117, AIR 1988 Delhi 140, AIR 1989 Bom 247, AIR 1985 Calcutta 248, AIR 2003 SC 115.

Sankalp Kochar, for the appellant.
Pranay Verma, for the respondent.

O R D E R

PRAKASH SHRIVASTAVA, J. :–Heard on the question of admission.

THIS appeal under order 43 Rule 1(r) of the CPC has been filed against the order dated 9th March 2010, passed by the Trial Court, granting interlocutory mandatory injunction in favour of the respondent.

2. The brief facts are that the respondent (plaintiff) had filed the Civil Suit No. 49-A/2009 pleading that the appellant was awarded contract from Bharat Oman Refinery Limited (for short 'BORL') for carrying out the contract work. The appellant had entered into an agreement with the respondent on 13th April 08. In terms of this agreement certain facilities were to be provided by the respondent and some of the facilities were to be provided by the appellant for completing the work awarded by 'BORL to the appellant. It is alleged that the appellant committed certain irregularities and did not make the payment to the respondent within time and alloted part of the work of the respondent to a third party, therefore, the respondent filed the present suit seeking the relief of settling the accounts in terms of the contract, and restraining the appellant from awarding the contract to a third party and other similar reliefs including the relief of direction to the appellant to hand over the machinery and equipments to the respondent.

3. The suit was opposed by the appellant by submitting the written statement and denying the allegations made in the plaint and taking the plea that the respondent did not execute the work in terms of the agreement, therefore, after giving notice, the contract was terminated on 13.3.08.

4. The respondent had also filed an application under Order 39 Rule 1 CPC, in the suit pleading that the machinery and equipments of the respondent are lying at the site, which are being used by the appellant causing enormous loss to the respondent. It was alleged that without issuing the gate pass by the appellant the respondent cannot remove the machinery and equipments, consequently the relief of interlocutory mandatory injunction was sought for issuing direction to the appellant to issue gate pass to the respondent.

5. The appellant filed reply to the application under Order 39 Rule 1 CPC, taking the stand that the machinery and equipments of the respondent are not being used by the appellant on the site and further that since the appellant has suffered loss due to the negligence of the respondent, therefore, the machineries have been kept as security which will be returned after the final settlement of accounts.

6. The Trial Court by order dated 9th March 2010, allowed the application under Order 39 Rule 1 and 2, filed by the respondent and directed the appellant to take steps for granting permission to the respondent for taking the machinery and equipments. The Trial Court found prima facie case in favour of the respondent and that under the contract the appellant has no right to retain the machinery and equipments and considering the prima facie case, balance of convenience and irreparable injury the Trial Court passed order of interlocutory mandatory injunction in favour of the resoondent.

7. Learned counsel for the appellant, submitted that the temporary injunction in mandatory form can be granted only in rarest of the rare case and this is not one of such case. He further, submitted that it is a case of bailment covered under Section 148 of the Contract Act (for short 'the Act'), therefore under Section 160 and 170 of the Contract Act the appellant has right to retain the goods. He submitted that the suit filed by the respondent is not properly valued and proper Court fee has not been paid, therefore the temporary injunction could not be granted to him and that the Trial Court has committed an error in granting final relief at the interim stage.

8. Learned counsel appearing for the respondent submitted that, since the appellant has no right to retain the machinery and equipments, therefore it is one of those cases were temporary injunction in mandatory form has rightly been granted by the Trial Court. He further submitted that it is not a case of bailment, since the possession was not handed over to the appellant and that in view of the averments contained in the plaint and nature of the suit, proper Court fee has been paid and no error has been committed by the Trial Court in passing the order of temporary injunction in mandatory form.

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

10. It is the settled position in law that while granting interlocutory mandatory injunction the Court is required to see that the plaintiff has a strong case for trial i.e. it should be of a higher standard than the prima facie case which is normally required for temporary injunction and it is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money and the balance of convenience should be in favour of the one who is seeking such a relief. The Interlocutory mandatory injunction is essentially the equitable relief which is to be decided by the Court on the basis of sound judicial discretion to be exercised in the fact situation in a particular case. Though exercise of such a discretion is limited to rare and exceptional cases but there is no absolute bar to the Court in granting such a relief in deserving cases. Whether or not a case comes in the category of rare and exceptional one, is to be decided according to the facts and circumstances of the case. Such an order of temporary injunction can be granted on an interlocutory application after notice to the defendants and after hearing the parties.

11. The aforesaid position in law is supported by the judgments in the matter of *Dorabji Warden v/s Sorab Warden* 1990 (2 SCC) 117, *Mrs. Vijay Shrivastava v/s Rahul* AIR 1988 Delhi 140, *Baban Narayan Landge v/s Madhu Bhikaji Tonchar and others* AIR 1989 Bombay 247 and *Indian Cable Company Limited v/s Smt. Sumitra Chakroborty* AIR 1985 Calcutta 248.

12. The facts of the present case needs to be examined in the light of the aforesaid position in law.

13. In the present case the agreement dated 13.3.08 was executed between the parties. In pursuance to the agreement the respondent had deployed the machinery and equipments at the site and it was also the responsibility of the respondent to deploy sufficient number of skilled workmen and supervisors to commence the job. No clause of the agreement indicates that the possession of machine and equipments was handed over by the respondent to the appellant.

14. Learned counsel appearing for the appellant could not point out from the contract agreement that in terms of the agreement the appellant had any right to retain the machinery and equipments deployed by the respondent at the site. He also could not point out that after terminating the contract machinery and equipment could be retained in terms of the agreement. Thus, it is prima facie found that the appellant has no right to retain the machines and tools of the respondent yet the appellant is keeping them in his possession without any authority by not issuing the gate pass to the respondent for taking out the machinery and equipments. The ownership of the respondent on the machines and tools is not in dispute.

15. Under Section 148 of the Contract Act, the bailment has been defined as delivery of goods by one person to another for some purpose, upon a contract that they will, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. In the present case a perusal of the contract agreement between the parties indicates that the conditions of bailment as contained in section 148 of the Act are not satisfied. Therefore, the argument of the learned counsel for the appellant that in terms of Section 160 or 170 of the Act he has right to retain the machines and equipment of the respondent cannot be accepted.

16. The Trial Court has noted that the machinery and equipments lying at the site unused are getting spoiled and loosing their value. The final disposal of the suit may take some time. Considering the nature of machines and equipments and the controversy involved between the parties, it may not be possible to compensate the respondent if the machines and equipments are destroyed or damaged if kept laying at the site.

17. Thus, the aforesaid circumstances indicates that the respondent has a very strong prima facie case in his favour.

18. So far as the issue of Court fee is concerned the Trial Court has rightly noted that the original suit of the respondent is not in respect of the property but the settlement of account, in terms of the agreement. Therefore, the suit is not required to be valued on the basis of the valuation of the property.

19. So far as the issue of granting final relief at the interim stage is concerned the respondent had claimed several reliefs in the plaint and one of the relief claimed is in respect of return of the machines and equipments retained at the site. While issuing the interlocutory mandatory injunction of such a nature final relief at the interim stage can be granted, looking to the strong prima facie case in favour of the party concerned and considering the possibility of his success in the suit in respect of the relief which is granted at the interim stage.

20. The judgments in the matter of *Public Services Tribunal Bar Association v/s State of U.P.* AIR 2003 SC 115, relied upon by the appellant is distinguishable on facts since it relates to grant of stay by Tribunal in service matters.

21. Thus, in view of the aforesaid the Trial Court has not committed an error in granting interlocutory mandatory injunction, since it is one such exceptional case where considering the equitable circumstances the respondent is entitled for relief of such a interlocutory mandatory injunction.

22. In view of the aforesaid, the appeal is dismissed. No order as to costs.

Appeal dismissed.

I.L.R. [2010] M. P., 1170
APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saksena and Mrs. Justice Sushma Shrivastava
1 February, 2010*

IRFAN & anr. ... Appellants
Vs.
STATE OF M.P. ... Respondent

A. Evidence Act (1 of 1872), Section 3 - Child witness - *Boy of Seven years kidnapped for ransom - Since, the child witness himself was the victim of the offence and the natural manner and confidence with which, he narrated the incident in the court - He cannot be disbelieved merely on the ground that he was a child witness.* (Para 8)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – बालक साक्षी – सात वर्ष के बालक का मुक्तिधन (फिरौती) के लिए व्यपहरण – चूँकि बालक साक्षी स्वयं घटना का शिकार था और जिस प्राकृतिक ढंग से और आत्मविश्वास के साथ उसने न्यायालय में घटना का वर्णन किया – उस पर अविश्वास नहीं किया जा सकता मात्र इस आधार पर कि वह बालक साक्षी था।

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*Cr.A. No.285/2002 (Jabalpur)

B. **Evidence Act (1 of 1872), Section 9 - Test Identification Parade** - *Boy of Seven years kidnapped for ransom - He had remained with accused persons for 7 days and had correctly identified all the four accused persons - It was not necessary to have held the test identification proceeding for him.* (Para 8)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 9 – शिनाख्त परेड – सात वर्ष के बालक का फिरौती के लिए व्यपहरण – वह सात दिनों तक आरोपीगण के साथ रहा और उसने सभी चारों आरोपीगण की सही पहचान की है – उसके लिए शिनाख्त कार्यवाही करना आवश्यक नहीं।

C. **Penal Code (45 of 1860), Section 364-A** - *Seven years boy was kidnapped and a demand for ransom was made - Defence plea that it was not proved that accused persons made demand of ransom for release of kidnappee and that there was no apprehension that the kidnappee might be put to death or hurt -Held - To attract the provisions of Section 364-A - It is required to prove that accused kidnapped a person and kept him under detention for a ransom.* (Para 17)

ग. दण्ड संहिता (1860 का 45), धारा 364–ए – सात वर्ष के बालक का व्यपहरण किया गया और फिरौती की मांग की गयी – बचाव अभिकथन कि यह साबित नहीं किया गया कि अभियुक्तों ने अपहत की मुक्ति के लिए फिरौती की मांग की और यह कि अपहत की मृत्यु कारित करने या उपहति कारित करने की कोई आशंका नहीं थी – अभिनिर्धारित – धारा 364–ए के उपबंधों को आकृष्ट करने के लिए यह साबित करना अपेक्षित है कि अभियुक्त ने व्यक्ति का व्यपहरण किया और फिरौती के लिये उसे निरोध में रखा।

D. **Penal Code (45 of 1860), Section 364-A** - *Seven years boy was kidnapped - He was not kept confined in any closed room or house but he was kept in the village, which was 200 km. away from his residence - Seven years boy could not have gone to his house himself - He was kept there by extending assurance to him that his parents would come there to fetch him - In these circumstances, such detention after his kidnapping is clearly punishable u/s. 364-A.* (Paras 21 and 22)

घ. दण्ड संहिता (1860 का 45), धारा 364–ए – सात वर्ष के बालक का व्यपहरण किया गया – उसे किसी बंद कमरे में अथवा घर में परिरूद्ध नहीं किया गया बल्कि उसे गांव में रखा गया जो उसके निवास स्थान से 200 कि.मी. दूर था – सात वर्ष का बालक स्वयं अकेले घर नहीं जा सकता था – उसे वहां लगातार यह आश्वासन देकर रखा गया कि उसके माता–पिता उसे लेने आएगें – इन परिस्थितियों में उसके व्यपहरण के पश्चात् ऐसा निरोध धारा 364–ए के अतंर्गत स्पष्ट रूप से दण्डनीय है।

E. **Penal Code (45 of 1860), Section 364-A** - *Three accused persons kidnapped a seven years old boy and one of the accused persons communicated the demand of ransom to the grandfather of the boy - Prosecution has not proved which particular accused made or communicated the demand of ransom - Held*

- It is not always necessary to be proved that which particular accused made or communicated the demand of ransom. (Para 19)

ङ. दण्ड संहिता (1860 का 45), धारा 364–ए – तीन अभियुक्तों ने सात वर्ष के बालक का व्यपहरण किया और अभियुक्तों में से एक ने बालक के दादा को फिरौती की मांग का संदेश भेजा – अभियोजन यह साबित नहीं कर पाया कि किस विशिष्ट अभियुक्त ने फिरौती की मांग की या मांग संसूचित की – अभिनिर्धारित – सदैव यह साबित करना आवश्यक नहीं है कि किस विशिष्ट अभियुक्त ने फिरौती की मांग की या मांग संसूचित की।

F. Penal Code (45 of 1860), Section 368 r/w 364-A - *From the evidence of kidnappee and other circumstances proved by prosecution evidence, it has been amply established that accused had wrongfully concealed and kept kidnappee in his house knowingly that he had been kidnapped - Therefore, accused is guilty for the charge u/s 368 r/w. 364-A.* (Para 24)

च. दण्ड संहिता (1860 का 45), धारा 368 सहपठित धारा 364–ए – अपहृत की साक्ष्य तथा अभियोजन द्वारा साबित की गयी अन्य परिस्थितियों से यह पर्याप्त रूप से स्थापित होता है कि अभियुक्त ने अपहृत को सदोष छिपाकर रखा तथा यह जानते हुये कि उसका व्यपहरण किया गया है, उसे अपने घर में रखा – इसलिए अभियुक्त धारा 368 सहपठित धारा 364–ए के अंतर्गत अपराध का दोषी।

G. Words and Phrases - Ransom - *An imperative request preferred by one person to another requiring the latter to do or yield something or to abstain from some act.* (Para 18)

छ. शब्द और वाक्यांश – मुक्तिधन (फिरौती) – एक व्यक्ति द्वारा दूसरे व्यक्ति को किया गया आज्ञापक निवेदन जिससे दूसरे व्यक्ति से कुछ करने या त्यागने या किसी कार्य से प्रविरत रहने की अपेक्षा की जाती है।

H. Words and Phrases - 'Detention' - *Means the act of keeping back or withholding either accidentally or by design, a person or thing - Detention is depriving of a person of his personal liberty.* (Para 22)

ज. शब्द और वाक्यांश –'निरोध' – अर्थात् व्यक्ति अथवा वस्तु को, या तो संयोगवश अथवा उद्देश्यपूर्वक दूर रखना या रोकना – व्यक्ति को उसकी दैहिक स्वतंत्रता से वंचित करना निरोध है।

S.C. Datt with *Siddharth Datt,* for the appellants.

J.K. Jain, Deputy Advocate General for the respondent.

JUDGMENT

The Judgment of the Court was delivered by RAKESH SAKSENA, J. :–All the appeals arise out of the common judgment passed by the Court below, as such they are being disposed of by this common judgment.

2. Appellants have filed these appeals against the judgment dated 18.01.2002

passed by Tenth Additional Sessions Judge, Jabalpur in Sessions Trial No.463/1999 convicting all the appellants except appellant Mohammad Ali under section 364-A of the Indian Penal Code and sentencing each of them to imprisonment for life with fine of Rs.500/-. Appellant Mohammad Ali has been convicted under section 368 read with section 364-A of the Indian Penal Code and sentenced to imprisonment for life with fine of Rs.500/-.

3. In nutshell, the prosecution case is that Shashank Gupta, a child of about 7 years of age, was a student of Class I of Bela Singh School, Premnagar Madanmahal, Jabalpur. On 23.3.1999 at about 7 o'clock, in the morning, he had gone to appear in the examination. His father Santosh Gupta (PW2) had left him at the school. Since Santosh Gupta was busy in repairing the roof of his house he sent his brother-in-law Bhupendra Gupta (PW7) to fetch Shashank. After the time of the school was over, at about 10:30 a.m., when Bhupendra Gupta reached the school, he did not find Shashank there. He inquired from teacher and peon, but Shashank was not traceable. He rushed to his house and informed Santosh Gupta and Manju Gupta and again went to school with them, but they did not find Shashank at the school. Grandfather of Shashank namely Kamta Prasad (PW5) lodged a report Ex.P/5 with the police about the missing of Shashank. On the same day in the evening at about 5 p.m. Kamta Prasad received a phone call from some unknown person inquiring whether Shashank had come back. On 24.3.1999 and 25.3.1999, again Kamta Prasad received phone calls from some unknown person, who told if they wanted their child back they should give Rs.5 lacs. When Kamta Prasad replied that they were not in a position to arrange for such a huge amount, he replied if they wanted their child back they will have to manage. On 25.3.1999, police registered the case under section 364-A of the Indian Penal Code as per F.I.R. Ex.P/11 against the unknown persons and started investigation. Omprakash Patel (PW14), Station Officer of Police Station Barghat, District Seoni, on receiving the radio message from police control room, Jabalpur checked all the STD/PCOs. On getting information from an informer that a boy was seen in suspicious circumstances near the house of accused Mohammad Ali, he reached there. As soon as he reached, 2-3 persons tried to run away from there who were nabbed by the police. They were accused Irfan, Mukesh and Javed. On the information furnished by the aforesaid accused persons, kidnapped child Shashank was recovered from the house of Mohammad Ali. Shashank disclosed to police that accused Mukesh had asked him to go on Heropuch moped with other two accused persons who instead of carrying him to his house, took away to some other place. Accused persons had told to him that his mother and father were admitted in the hospital, therefore, they had come to pick him up. They used to tell him that his parents would come and take him to his house. When he was playing with some boys, Mukesh and other accused persons asked him to go inside the house but thereafter police reached there. In the course of investigation, police

recorded the statements of Bal Govind Sahu (PW3) and Hemant (PW4), who were running the STD booth at Barghat from where the accused persons had made phone calls to the house of Shashank. Accused persons were also identified by these witnesses before the test identification parade conducted by the Executive Magistrate K.L.Soni (PW11). After investigation, charge sheet was filed and case was committed for trial.

4. Accused persons abjured their guilt, and pleaded false implication. According to accused Javed, there had been a quarrel between him and Santosh, father of Shashank, because he suspected that he used to move around his house in connection with his sister. According to accused Mukesh, he was falsely implicated by Santosh because he had illicit relation with his sister Mamta. The defence of accused Irfan was that he was falsely implicated because he used to go in the locality of the house of Santosh Gupta with Javed. They had a quarrel also with Santosh Gupta. According to Mohammad Ali, he was arrested by the police because he used to go to give food to accused Irfan.

5. Learned Additional Sessions Judge after trial and upon appreciation of the evidence adduced in the case found the accused/appellants guilty of kidnapping Shashank Gupta for ransom and convicted and sentenced them as mentioned above.

6. Learned counsel for the appellants submitted that the trial Court gravely erred in placing implicit reliance on the testimony of child witness Shashank and the evidence of identification by Hemant (PW4). He further submitted that the prosecution had failed to prove that any demand of ransom was made by the appellants. On the other hand, learned counsel for the State, while justifying the finding of conviction recorded by the trial Court, submitted that the evidence of prosecution witnesses had amply established that Shashank was kidnapped for ransom, therefore, trial Court rightly held the appellants guilty and no interference was called for in the impugned judgment.

7. We have heard the learned counsel of both the sides and perused the impugned judgment and the evidence on record carefully.

8. The first question before us is whether Shashank (PW1) was kidnapped by appellants Mukesh, Irfan and Javed. Key witness in this regard is child Shashank Gupta (PW1). He deposed that on the day of incident in the morning he had gone to his school with his father to appear in the examination. When his paper was finished, he came at the gate of his school waiting for his father. When all other children had gone, Mukesh uncle, who was known to him, came there with accused Irfan and Javed. Irfan and Javed had come on a Heropuch moped. Javed told him that his mother and father were admitted in the hospital and he would take him there. Mukesh also asked him to go with Javed on his moped, Irfan and Javed carried him to village Dharna and kept him in the house of accused Mohammad Khan. They left him there with the family members of Mohammad Khan. Javed

and Irfan used to go some where in the morning and come back in the night. On his insisting that he wanted to go back home, they assured him that they will take him back to his house. Javed, Irfan and Mohammad Khan one day took him to the temple of Banjaru Mata saying that his parents would come there to fetch him. At the temple accused Mukesh was also present. However, till night his parents did not come. Next day when he was present at the house of Mohammad Khan, police came with accused Javed, Mohammad Khan, Irfan and Mukesh and took him to police station Seoni. Next day he was brought to police station Garha of District Jabalpur from where his parents took him back to his house. From the evidence of this witness, it is evident that he was a young boy of about 7 years and was student of Class 1, he was recovered from the house of Mohammad Ali and recovery memorandum Ex.P/1 was prepared. He had signed on Ex.P/1. Before the Court, he correctly identified all the four accused persons. He was subjected to a very lengthy and tedious cross-examination but he stood Firm. He explained that accused Mukesh used to come to his house, therefore, he called him uncle whereas other accused persons called each other by their respective names therefore, he came to know their names. He categorically stated that his mother and father did not suggest him what he had to say before the Court. He admitted that none of the accused maltreated him. He was kept by the accused persons for seven days but accused persons never intimidated him. He did not even feel that he was taken forcibly. He firmly denied that his father had asked him to go with the accused persons. The argument advanced by learned counsel for the appellants that since Shashank was a young boy of about 7 years he could have been easily tutored, therefore, his evidence in the absence of test identification was not reliable, is not acceptable. Learned Sessions Judge who recorded the statement of Shashank observed "that since the child witness Shashank Gupta himself was the victim of the offence and the natural manner and confidence with which he narrated the incident in the Court, he cannot be disbelieved merely on the ground that he was a child witness. The objection regarding his trustworthiness made by the defence was baseless. He had remained with the accused persons for about 6-7 days and had correctly identified all the four accused persons viz. Irfan, Javed, Mohammad Ali and Mukesh, therefore, it was not necessary to have held the test identification proceeding for him."

9. Trial Court had occasion of watching the demeanour of this witness. The impression gathered by the trial Judge that he was not a tutored witness was based upon the manner in which the witness was replying the questions. Though an attempt was made to the witness to suggest that he was tutored by his parents but all these suggestions were negatived by him.

10. We have carefully scrutinized the evidence of this witness and found that he cannot be described as a tutored witness. He has corroborated the prosecution story on all material particulars. We agree with the findings reached by the learned

Sessions Judge regarding trustworthiness of Shashank Gupta (PW1). In our opinion, evidence of Shashank alone is sufficient to establish that he was kidnapped by the appellants.

11. Santosh Gupta (PW2) and Manju Gupta (PW6), who are -respectively the father and mother of Shashank, have deposed that on the date of occurrence i.e. 23.3.1999, the age of Shashank was 7 years. In the morning at about 7 o'clock Santosh Gupta had taken him to R.S.Bela Singh School, Madan Mahal. After the school hours since Santosh Gupta could not go to school being busy in repairing the roof of his house, he sent his brother-in-law Bhupendra Gupta (PW7) to fetch him. This fact is established from the evidence of Bhupendra Gupta (PW7), Santosh Gupta (PW2), Kamta Prasad (PW5) and Manju Gupta (PW6). According to Bhupendra Gupta (PW7), when he reached the school at about 10:30 a.m. the school time was already over but he did not find Shashank in the school. He, therefore, inquired from teacher and peon and looked for him in the classroom and all other places in the school but all in vain. He went back and informed Santosh Gupta and Manju Gupta. They also went to school and searched but Shashank could not be traced out. Shashank's grandfather Kamta Prasad (PW5) went to police station Garha and lodged the report which was recorded by Assistant Sub Inspector Dinesh Kumar Mishra (PW8) as a missing person report Ex.P/5. From the evidence of these witnesses, it is evident that Shashank Gupta, who was a minor boy of about 7 years of age, was missing from his school since 23.3.1999.

12. Learned counsel for the appellants argued that appellant Mukesh Kumar was falsely implicated because he had illicit relation with the sister of Santosh Gupta (PW2) and appellants Irfan and Javed were roped in because they used to go to the locality in which house of Santosh Gupta was situated and Santosh Gupta suspected that they had an evil eye on his sister. These suggestions were put to Santosh Gupta (PW2) who firmly.denied.

13. Station Officer of police station Barghat, Omprakash Patel (PW14) deposed that at the relevant time he came to know from the newspaper that a boy from Jabalpur was kidnapped and he also received information from Jabalpur Police Control Room that kidnappers were demanding ransom from the family members of child by calling them on their telephone number 423841. On this basis, he checked all the STD/PCOs situated in village Barghat. On 29.3.1999, he found that 3-4 times telephone calls were made on the said number by one of the PCO booth. He put a vigil on that booth and in the meanwhile he received a message from an informer that an unknown boy was seen near the house of accused Mohammad Ali in suspicious circumstances. He with his staff immediately reached at the house of Mohammad Ali situated in village Dharna. When he reached near the house of Mohammad Ali, 2-3 persons tried to run away who were nabbed. They were accused Irfan, Mukesh and Javed. They disclosed about the kidnapping of

Shashank and keeping him in the house of Mohammad Ali. Their informations were recorded in memoranda Ex.P/6,P/7 and P/8. At their instance, Shashank was recovered from the house of Mohammad Ali. Recovery memo Ex.P/1 was drawn at the spot in the presence of witnesses Shankarlal (PW9) and Bhajanlal (PW10). Though Shankarlal and Bhajanlal deposed that Shashank was recovered from village Dharna but they denied that he was recovered on the information given by accused persons from the house of Mohammad Ali. They were declared hostile. Even then, in our opinion, the evidence of ASI Omprakash Patel cannot be doubted that he arrested the accused persons from village Dharna and recovered Shashank Gupta from the house of Mohammad Ali. His evidence stands corroborated from the evidence of Shashank Gupta (PWI).

14. The next argument advanced by the learned counsel for the appellants is that the evidence of Kamta Prasad (PW5) and Hemant (PW4) is not trustworthy. The trial Court committed error in placing implicit reliance on their evidence and holding that the demand of ransom was made by the accused persons. Kamta Prasad -(PW5), who is grandfather of child Shashank Gupta, deposed that around 5 p.m. on the day on which Shashank was missing, he received a telephone call from some unknown person inquiring whether Shashank was found, subsequently on 25.3.1999, around 1 p.m. again some one told him on phone that if they wanted Shashank back they will have to give Rs.5 lacs. When he told that he did not have such a huge amount he asked as to how much he could give and told him to call again. Though police had kept the land line phone number of Santosh Gupta under observation, but the prosecution produced the observation report Ex.P/15 only of 25.3.1999 and 26.3.1999. In this report, no call was found to have been received at the phone number of Santosh Gupta from any town other than Jabalpur.

15. B.L.Khanpasole (DW2), who proved the aforesaid observation report, deposed that all the phone calls received at the phone of Santosh Gupta were made from local phone numbers of Jabalpur, however, trial Court found that in Ex.P/15 there was no mention about the calls received on 25.3.1999 before 3 p.m. This observation report was found to be of no help by the trial Court because it was an incomplete report, but this, in our opinion, does not render the evidence of Kamta Prasad (PW5) unreliable that he had received phone call demanding Rs.5 lacs as ransom for releasing Shashank Gupta. Normally it is difficult to prove the demand of ransom by direct evidence yet it can still be established by the circumstantial evidence that such demand was made.

16. Hemant (PW4), who was running STD/PCO, at bus stand Seoni deposed that on 27.3.1999, two boys had come to phone at about 6 a.m. and had told him that they wanted to have some personal talks on phone, he then had gone out of the STD/PCO. Those boys had called at STD No.0761 phone No-423841. According to him, he remembered this number because for the first time such an

incident had occurred before him. After about 4-5 days, he was asked to identify the accused persons in Tahsil Court. He and other two PCO operators namely Sahu and a girl had also participated in the identification parade. He had identified Irfan and Javed as the persons who had made the said phone call from his PCO. This witness was subjected to a rigorous cross-examination but he answered all the questions firmly and did not deviate from his version. He fairly stated that he maintained a register about the record of calls and he had shown that register to police but police had returned that register to him. He had also given a bill for receiving Rs-13.50 to the accused persons for making the call. Learned counsel for the appellants submitted that in the absence of the record of PCO, oral evidence of this witness was not reliable. We are unable to accept his submission. Even if Investigating Officer committed mistake in not seizing the register of PCO, merely on that ground the evidence of Hemant (PW4) which otherwise appears reliable cannot be disbelieved. It is also to be noted that the investigation of the case was conducted by police Garha, District Jabalpur whereas PCO was situated within the jurisdiction of police station Barghat District Seoni. In cross-examination, Hemant, though admitted that he was called to Jabalpur by police Garha and some boys were shown to him at police station but he categorically stated that accused Irfan and Javed were not among those persons. It is also important to note that test identification parade had been held in the Court of Tahsildar, Seoni, therefore, it cannot be held that accused Javed and Irfan were shown to this witness at police station. Finding of the trial Court that identification of these accused persons by Hemant (PW4) before the Court was reliable, appears to us just and proper. It is true that no documentary evidence in respect of phone call made by the accused persons on 27.3.1999 had been produced but the evidence of Hemant finds corroboration from the evidence of Kamta Prasad (PW5) that on 27.3.1999 he had received phone call for demand of Rs. 5 lacs for the release of Shashank. According to Kamta Prasad, the caller had told that the child was kept 200 kms away from Jabalpur and if the amount of ransom was not paid, child would be killed. The evidence of Bal Govind Sahu (PW3) was rightly disbelieved by the trial Court because he admitted he had seen accused Irfan and Javed in police station Seoni before he went to identify the accused persons in Tahsil Court.

17. We are unable to accept the contention of the learned counsel for the appellants that it was not proved that accused persons made demand of ransom for release of Shashank and that there was no apprehension that the kidnappee might be put to death or hurt, therefore, the charge under section 364-A I.P.C. was not proved. To attract the provisions of section 364-A, it is required to be proved that accused kidnapped a person and kept him under detention for a ransom.

18. To pay a ransom as per Black's Law Dictionary means "to pay price or demand for ransom". The word "demand" means "to claim as ones due"; "to require"; " to ask relief; "to summon"; "to call in Court"; "An imperative request

preferred by one person to another requiring the latter to do or yield something or to abstain from some act;" "An asking with authority, claiming." The definition as pointed out above would show that the demand has to be communicated. It is an imperative request or a claim made.

19. From the evidence of Kamta Prasad (PW5), it has been clearly established that after Shashank was kidnapped a demand for ransom of Rs.5 lacs was communicated to him for his release and a threat was also communicated to him that in case ransom was not paid child would be killed. In our opinion, it is not always necessary to be proved that which particular accused made or communicated the demand.

20. Section 364-A deals with "Kidnapping for ransom etc". This Section reads as follows:

> "Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or (any foreign State or inter governmental organization or any other person) to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine."

This section refers to both "Kidnapping" and "Abduction". Section 359 defines Kidnapping. As per the said provision there are two types of kidnapping i.e. (1) kidnapping from India; and (2) kidnapping from lawful guardianship.

> S.361 refers to "Kidnapping from lawful guardianship'.-Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

21. From the evidence adduced in the case, it is established that appellants Javed and Irfan took minor child Shashank on Heropuch moped out of the keeping of his lawful guardian. It has also been proved that accused Mukesh, who was known to Shashank, enticed him to go with Javed and Irfan on the moped on the pretext that his parents were in the hospital. It has also been proved that Shaskank was kept by accused Mohammad Ali in his house for about 7 days. Though he was not kept confined in any closed room or house but he was kept in village Dhanra which was about 200 kms away from Jabalpur. He was a child of about 7 years of age who could not have gone to his house himself. He was kept

there by extending assurance to him that his parents would come there to fetch him.

22. Common meaning of "detain" as given in Chambers 21st Century Dictionary is to stop, hold back, keep waiting or delay someone or something. Similarly "detention" means the act of detaining or the state of being detained. According to Collins Cobuild English Dictionary, to detain some one means to delay them or to keep some one in a place under the control of some one. In Black's Law Dictionary, "detention" means the act of keeping back or withholding, either accidentally or by design, a person or thing. Thus, it is clear that the fact of "detention' is depriving of a person of his personal liberty. In these circumstances, keeping Shashank at the house of Mohammad Ali would amount to "detention" after his kidnapping which is clearly punishable under section 364-A of the Indian Penal Code.

23. Mohammad Ali has also been convicted under section 368 read with section 364-A of the Indian Penal Code. S.368 read as follows:

> "368. Wrongfully concealing or keeping in confinement, kidnapped or abducted person.- Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person, shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement."

24. From the evidence of Shashank and other circumstances proved by the prosecution evidence, it has been amply established that accused/appellant Mohammad Ali had wrongfully concealed and kept Shashank in his house knowingly that he had been kidnapped, therefore, trial Court was justified in holding him guilty for the charge under section 368 read with section 364-A of the Indian Penal Code.

25. For the reasons stated above, we hold that the Court below has rightly appreciated the evidence on record and came to conclusion that the appellants were guilty of the offences charged. Accordingly, the finding of conviction recorded by the Court below and the sentence awarded to appellants is affirmed and the appeals are dismissed.

26. A copy of this judgment be kept in the record of Criminal Appeal No.452/2002 and Criminal Appeal No. 459/2002.

Appeal dismissed.

PILLU @ PRAHLAD Vs. STATE OF M.P.

I.L.R. [2010] M. P., 1181
APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saksena & Mrs. Justice Sushma Shrivastava
11 February, 2010*

PILLU @ PRAHLAD & anr. ... Appellants
Vs.
STATE OF M.P. ... Respondent

A. **Evidence Act (1 of 1872), Section 3** - *Appreciation of evidence - Delay in recording statement u/s 161 Cr.P.C. - Statement of eye-witness recorded after 22 days of the incident - No inimical relations with the accused persons or any animosity against them - Plausible explanation given by the witness that on account of illness of his father he had gone to out of city and came back after 20-22 days, then he gave statement to the police - His evidence cannot be discarded and doubted on the ground of his delayed examination by the I.O.* (Para 17)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्ष्य का अधिमूल्यन – द.प्र.सं. की धारा 161 के अन्तर्गत कथन अभिलिखित करने में विलम्ब – प्रत्यक्षदर्शी साक्षी का कथन घटना के 22 दिन बाद अभिलिखित किया गया – अभियुक्त व्यक्तियों के साथ कोई वैरपूर्ण सम्बन्ध या उनके विरुद्ध कोई विद्वेष नहीं – साक्षी द्वारा युक्तिसंगत स्पष्टीकरण दिया गया कि उसके पिता की बीमारी के कारण वह शहर के बाहर गया हुआ था और 20–22 दिन बाद वापस आया, तब उसने पुलिस को कथन दिया – अनुसंधान अधिकारी द्वारा विलम्बित परीक्षा के आधार पर उसकी साक्ष्य संदेहास्पद और अमान्य नहीं की जा सकती।

B. **Evidence Act (1 of 1872), Section 3, Criminal Procedure Code, 1973, Section 154** - *Appreciation of evidence - Effect of non-mentioning the name of eye-witness in FIR - There was crowd on the place of occurrence - Therefore, it cannot be reasonably expected from the first informer that the name of every onlooker should be mentioned in the FIR - Testimony of eye-witness cannot be disbelieved on the ground that he was not named in the FIR.* (Para 18)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड प्रक्रिया संहिता, 1973, धारा 154 – साक्ष्य का अधिमूल्यन – एफ.आई.आर. में प्रत्यक्षदर्शी साक्षी का नाम उल्लिखित न करने का प्रभाव – घटनास्थल पर भीड़ थी – इसलिए, प्रथम सूचनादाता से युक्तियुक्त रूप से यह आशा नहीं की जा सकती कि प्रत्येक दर्शक का नाम एफ.आई.आर. में उल्लिखित होना चाहिए – प्रत्यक्षदर्शी साक्षी की परिसाक्ष्य पर इस आधार पर अविश्वास नहीं किया जा सकता कि वह एफ.आई.आर. में नामित नहीं था।

C. **Evidence Act (1 of 1872), Section 3** - *Hostile witness - First informer turned hostile to prosecution and resiled from the contents of the FIR but he admitted his signature on the FIR and the factum of lodging the report at the police station - Evidence of eye-witness clearly reflects the*

*Cr.A. No.766/2001 (Jabalpur)

presence of both the accused persons on the place of occurrence - As also their complicity in the commission of the crime - First informer was declared hostile by the prosecution - The evidence of such witness cannot be treated as effaced or washed off from the record altogether - But, the same can be accepted to the extent the version of such witness is found to be dependable on a careful scrutiny thereof. (Para 21)

ग. साक्ष्य अधिनियम (1872 का 1), धारा 3 – पक्षद्रोही साक्षी – प्रथम सूचनादाता अभियोजन के लिए पक्षद्रोही हो गया और एफ.आई.आर. की अन्तर्वस्तु को इंकार किया, किन्तु उसने एफ.आई.आर. पर अपने हस्ताक्षर और पुलिस थाने में रिपोर्ट दर्ज कराने के तथ्य को स्वीकार किया – प्रत्यक्षदर्शी साक्षी की साक्ष्य घटनास्थल पर दोनों अभियुक्तों की उपस्थिति का और अपराध करने में उनकी सहपराधिता का स्पष्ट रूप से आभास कराती है – अभियोजन द्वारा प्रथम सूचनादाता को पक्षद्रोही घोषित किया गया – ऐसे साक्षी की साक्ष्य का अभिलेख से पूर्णतया मिटना या विलुप्त होना नहीं माना जा सकता – किन्तु इसे उस सीमा तक स्वीकार किया जा सकता है जिस तक ऐसे साक्षी का बयान उसकी सावधानी से की गई जाँच पर आश्रित होना पाया जाए।

Cases referred :

(2005) 3 SCC 114, AIR 1991 SC 1853, (2007) 1 SCC 699.

Ramesh Tamrakar, for the appellants.

S.K. Rai, G.A., for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by **Smt. Sushma Shrivastava, J. :**–Appellants have preferred this appeal challenging their conviction and order of sentence passed by Additional Sessions Judge, Narsinghpur in S.T. No.26/2000, decided on 16.4.2001.

2. Appellants have been convicted under Section 302/34 of IPC for committing murder of Sanju @ Sanjay and sentenced to life imprisonment with fine of Rs.3,000/- each, in default rigorous imprisonment for six months, by the impugned judgment.

3. As per prosecution case, on 29.9.99 about 10 'O'clock at night at Gotegaon when complainant Shankar was standing on the betel shop of deceased Sanjay Jain (hereinafter referred to as 'deceased'), appellants Pillu @ Prahlad and Guddu @ Rajesh came there and asked the deceased not to give evidence in court in fan case. When deceased declined to do so, appellants began hurling abuses. On oppugnation, appellant Guddu @ Rajesh pulled deceased Sanju out of his betel shop by holding his collar, threw him on the ground and exhorted to kill him. Then appellant Pillu @ Prahlad began assaulting him by means of scissors. Both the appellants were telling that they will not leave him alive. It is alleged that co-accused Govind was also exhorting them to kill the deceased. Complainant Shankar tried to intervene, but appellant Guddu @ Rajesh gave him a blow by tubelight causing injuries in his right hand. Deceased was rushed to the hospital in injured state, but he succumbed to his injuries.

4. The FIR of the incident was lodged by complainant Shankar at Police Station Gotegaon, on the basis of which an offence was registered against the appellants alongwith co-accused Govind and was investigated. Injured Shankar was also sent for medical examination. The intimation of death of Sanju @ Sanjay was sent to the Police by the hospital authorities, whereupon merg intimation was recorded and merg inquest was made. The dead body of deceased Sanju was sent for postmortem examination. Blood stained earth and plain earth was seized from the spot. Blood stained clothes of the deceased were also seized. After due investigation, appellants and co-accused Govind were prosecuted under Section 307, 324, 302, 294/34 of IPC and were put to trial.

5. Appellants and co-accused Govind denied the charges framed against them under Section 302/34 and 323 of IPC and pleaded false implication due to enmity.

6. Learned Additional Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, acquitted co-accused Govind of the charges under Section 302/34, 323 of IPC, also acquitted the appellants of the charge under Section 323 of IPC, but found them guilty under Section 302/34 of IPC, convicted and sentenced them as aforesaid by the impugned judgment, which has been challenged in this appeal.

7. We have heard the learned counsel for the parties.

8 It was no longer disputed that deceased Sanju @ Sanjay met a homicidal death. It is also reflected from the medical evidence that Sanju @ Sanjay died of bodily injuries. Dr. Vinod Kumar Garg (P.W-7), who conducted the postmortem examination on the dead body of deceased, alongwith Dr. R.K. Pyasi (P.W-8), found following antemortem injuries on his body:-

(1) Incised wound through and through present over upper part of pinna of right ear 1cm x 0.2cm.

(2) Incised wound 1.2cm x 0.5cm x bone deep on left frontal region of skull.

(3) Stab wound on left side of chest over fifth costal cartilage and 4th I.C. space obliquely 1.2cm x 0.5cm x depth as probe passing the chest wall easily one inch.

(4)- Swelling over the bridge of nose with clotted blood in both nostril.

(5) Incised wound over left phalanx joint cutting the vessels of left ring finger.

(6) Incised wound on little finger middle phalanx.

9. On internal postmortem examination of the deceased, a stab injury 1cm x 0.1cm over right ventricle anterior aspect, pericardial space containing blood at

the right border, stab wound 0.6 x 0.1cm x whole of anterior wall musculature were also found.

10. In the opinion of Dr. Vinod Kumar Garg (P.W-7), the cause of death of deceased was shock as a result of external and internal massive hemorrhage due to injury to the vital organ heart and death was homicidal in nature.

11. There are no reasons to discard or disagree with the aforesaid medical evidence, which remained virtually unrebutted. It was thus clearly evident that death of deceased Sanju @ Sanjay was homicidal in nature.

12. Learned counsel for the appellants, however, submitted that the trial court gravely erred in placing implicit reliance on the testimony of the so called eyewitness, namely, Rameshwar Prasad (P.W-11) and failed to appreciate that he was a planted witness and did not actually witness the occurrence, erroneously convicted the appellants without their being any cogent evidence against them. In the alternative, it was submitted that the appellants had no intention to kill the deceased and their case would not travel beyond the ambit of Section 304 of IPC.

13. Learned counsel for the State, on the other hand, justified and supported the conviction of the appellants.

14. We have gone through the entire evidence on record.

15. The main evidence is that of Rameshwar Prasad (P.W-11), who is an eyewitness to the incident. Rameshwar Prasad (P.W-11) categorically deposed in his evidence that on 29.9.99 about 9'O'clock at night there was a big rush in front of Ashok Talkies, Gotegaon and he had seen that Sanjay (deceased) was lying down and appellant Guddu was overpowering him, while appellant Prahlad @ Pillu was assaulting him by scissors, sanjay was fluttering, and after sometime he had died. He then went to the place of Sanjay and informed his father.

16. Learned counsel for the appellant submitted that the aforesaid witness was not named in the FIR; his police statement under Section 161 of Cr.P.C. was also recorded after twenty two days, he was thus a manufactured witness, who did not actually witness the incident.

17. Rameshwar Prasad (P.W-11), however, has given a reasonable explanation in his evidence that after the incident he had gone to Damoh on account of illness of his father and came back after 20-22 days, then he gave statement to the police, the said explanation is found to be reliable and acceptable. The Apex Court in the case of *State of U.P. Vs. Satish* reported in (2005) 3 Supreme Court Cases 114 has reiterated that if plausible and acceptable explanation is given for the delayed examination of a witness, it cannot be viewed with suspicion. In the instant case, the witness himself, namely, Rameshwar Prasad (P.W-11) had given a satisfactory explanation that he had gone to Damoh to see his ailing father and when he came back after 20 to 22 days, he gave his statement to the Police.

Rameshwar Prasad (P.W-11) appears to be a sort of independent witness; he has denied the suggestion of any inimical relations with the appellants or any animosity against them. In view of plausible explanation given by Rameshwar Prasad (P.W-11), his evidence, in our opinion, cannot be discarded and doubted on the ground of his delayed examination by the Investigating Officer.

18. It also transpires from the evidence on record that there was crowd on the place of occurrence; it, therefore, cannot be reasonably expected from the first informer that the name of every onlooker should be mentioned in the FIR. The testimony of Rameshwar Prasad(P.W-11), therefore, cannot be disbelieved on the ground that he was not named in the FIR.

19. The trial Court has given cogent reasons for believing and accepting the testimony of Rameshwar Prasad (P.W.-11), although it disbelieved the evidence of Manju @ Manoj Jain (P.W-12). We also do not find any justifiable grounds to discard the evidence of Rameshwar Prasad (P.W-11). Despite elaborate cross-examination, nothing has been elicited in his evidence so as to doubt his presence on the place of occurrence or to discredit his statement that he witnessed the incident. There are also no cogent reasons for his making false statement against the appellants or for their false implication. In fact, upon close scrutiny of the evidence of Rameshwar Prasad (P.W.-11), his statement that he had seen appellant Pillu @ Prahlad assaulting the deceased by means of scissors and the other appellant overpowering him, is found to be credible and acceptable.

20. Moreover, the evidence of complainant Shankerlal (P.W.-1), who lodged the FIR (Ex. P-1) also indicates that appellants are the perpetrators of the crime. Although, complainant Shankerlal (P.W.-1) turned hostile to prosecution and resiled from the contents of the FIR (Ex. P-1), but he admitted his signatures on the FIR (Ex. P-1) and the factum of lodging the report at the police station. Complainant Shankerlal (P.W.-1) also deposed that about 10 O'Clock at night, he had gone to the betel shop of the deceased for having a betel and at that time, an altercation was going on between the deceased and the appellants over some issue of fan and there was also scuffle between the appellants and the deceased, who subsequently died in the hospital. On being cross-examined by the Public Prosecutor, though Shankerlal (P.W.-1) denied the suggestion that appellants Pillu and Guddu were asking the deceased not to give evidence in the court in the fan case and did not fully support the version of the incident of assault by the appellants, yet his evidence clearly indicates the presence of both the appellants on the place of occurrence, as also an altercation between the appellants and the deceased over the issue of fan followed by a scuffle between them.

21. On considering the entire evidence of Shankerlal (P.W.-1), it appears that he has tried to shield the appellants, nevertheless his evidence clearly reflects the presence of both the appellants on the place of occurrence, as also their complicity

in the commission of crime. Although, P.W.-1 Shankerlal was declared hostile by the prosecution, but it is well settled, as reiterated by the Apex Court in the case of *Khujji @ Surendra Tiwari V. State of Madhya Pradesh* reported in AIR 1991 Supreme Court page 1853, the evidence of hostile witness cannot be treated as effaced or washed off from the record altogether, but the same can be accepted to the extent the version of such witness is found to be dependable on a careful scrutiny thereof.

22. More so, there is clear, cogent and credible evidence of Rameshwar Prasad (P.W.-11) that appellant Pillu @ Prahlald assaulted the deceased by means of scissors and appellant Guddu @ Rajesh had pressed and overpowered him at the time of assault, leading to his death. There is also corroborative medical evidence on record that deceased Sanjay died of bodily injuries.

23. The medical evidence of Dr. Vinod Kumar Garg (P.W.-7) reveals that there were several antemortem incised wounds on the body of the deceased, besides a stab wound on the left side of his chest, which corroborates the ocular version that the deceased was assaulted by means of scissors. The various incised wounds found on the various parts of the body of the deceased including incised wound on his frontal region and stab wound on his chest also indicate that repeated blows were dealt on the body of the deceased and some of the blows were inflicted on his vital parts like chest and scalp. It is thus clearly borne out from the medical evidence that the repeated blows by means of sharp weapon causing several incised injuries plus stab injury over the chest going into the right ventricle of the deceased were caused by appellant Pillu @ Prahlad.

24. It is also clearly evident from the ocular evidence that appellant Guddu @ Rajesh was pressing or overpowering the deceased when he was being assaulted by appellant Pillu @ Prahlad by means of scissors and he thereby actively participated and accelerated the commission of the crime. It also transpires from the evidence on record that both the appellants, who are the real brothers, had also gone to the betel shop of the deceased at night hours with ill-intent, entered into altercation with him and then one of them i.e., appellant Pillu @ Prahlad assaulted him by means of scissors, while the other appellants facilitated him and thereby caused several incised injuries including a stab wound on his chest, resulting into his instantaneous death. The aforesaid facts per se indicate that both the appellants acted in furtherance of their common intention of causing death of the deceased.

25. In the aforesaid facts and circumstances, we are unable to accept the submission of the learned counsel for the appellants that appellants had no intention to kill the deceased and their case would be covered under Section 304 of I.P.C. The citation referred to by learned counsel for the appellants as reported in (2007) 1 Supreme Court Cases page 699 *Salim Sahab Vs. State of M.P.* has no direct bearing on the facts of the instant case.

26. In view of the forgoing discussion, and the evidence available on record against both the appellants, we are of the considered opinion, that the trial court rightly convicted the appellants under Section 302/34 of I.P.C.

27. We find no merit in the appeal. We uphold the conviction of the appellants and life sentence with fine of Rs.3,000/- each awarded to them under Section 302 of I.P.C.

Appeal fails and is dismissed.

Appeal dismissed.

I.L.R. [2010] M. P., 1187
CRIMINAL REVISION
Before Mr. Justice K.S. Chauhan
3 February, 2010*

MOHAMMAD AJEEM KHAN ... Applicant
Vs.
STATE OF M.P. & anr. ... Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Sections 451 & 457, Gauvansh Pratishedh Adhiniyam, M.P. 2004, Sections 4, 6 & 9, Agriculture Cattle Preservation Act, M.P. 1959, Sections 4 & 6, Prevention of Cruelty to Animals Act, 1960, Sections 10 & 11 - *27 cattle were transported by truck for slaughtering purposes which was seized by Police and offence u/ss. 4, 6 & 9 of Adhiniyam, 2004, Ss. 4 & 6 of Act, 1959 and Ss. 10 & 11 of Act of 1960 registered - Cattle were given in the temporary custody to a benevolent institution which is acting in the welfare of cattle - CJM declined to hand over the cattle in the interim custody of applicant - Held - Cattle were being carried in a very deplorable condition - Out of 27 cattle, 4 were found dead - This is clear indicative of the fact that they were being carried for slaughtering purposes - No document for purchasing these cattle have been filed - If the cattle are given in the custody of the applicant, the possibility of their slaughtering cannot be ruled out - Revision dismissed.* (Para 10)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 451 व 457, गौवंश प्रतिषेध अधिनियम, म.प्र. 2004, धाराएँ 4, 6 व 9, कृषि पशु संरक्षण अधिनियम, म.प्र. 1959, धाराएँ 4 व 6, पशुओं के प्रति क्रूरता का निवारण अधिनियम, 1960, धाराएँ 10 व 11 – ट्रक द्वारा 27 पशुओं को वध करने के प्रयोजन के लिए ले जाया गया, जिसका पुलिस द्वारा अभिग्रहण किया गया और अधिनियम, 2004 की धारा 4, 6 व 9, अधिनियम, 1959 की धारा 4 व 6 और अधिनियम, 1960 की धारा 10 व 11 के अन्तर्गत अपराध पंजीबद्ध किया गया – पशुओं को पशुओं के कल्याण में कार्यरत हितकारी संस्था की अस्थायी अभिरक्षा में दिया गया – मुख्य न्यायिक मजिस्ट्रेट ने पशुओं को आवेदक की अंतरिम अभिरक्षा में सुपुर्द करने से इंकार कर दिया –

*Cr.R. No.1702/2008 (Jabalpur)

अभिनिर्धारित – पशुओं को बहुत दयनीय अवस्था में ले जाया जा रहा था – 27 पशुओं में से 4 मृत पाये गये – यह इस तथ्य का स्पष्ट सूचक है कि उन्हें वध करने हेतु ले जाया जा रहा था – इन पशुओं के क्रय का कोई दस्तावेज प्रस्तुत नहीं किया गया – यदि पशुओं की अभिरक्षा आवेदक को दी जाती है तो उनका वध किये जाने की आशंका से इंकार नहीं किया जा सकता – पुनरीक्षण खारिज।

B. Criminal Procedure Code, 1973 (2 of 1974), Sections 451 & 457, Gauvansh Pratishedh Adhiniyam, M.P. 2004, Sections 4, 6 & 9, Agriculture Cattle Preservation Act, M.P. 1959, Sections 4 & 6, Prevention of Cruelty to Animals Act, 1960, Sections 10 & 11, Essential Commodities Act, 1955, Section 3/7 - *Truck was seized by police for the offence of transporting the cattle for slaughtering purposes - CJM declined to hand over the truck in the interim custody of applicant - Held - Since the offence u/s 3/7 of E.C. Act has also been registered and the confiscation proceeding of the truck was going on before the Competent Authority, hence there was no question to give the truck on Supurdginama - Revision dismissed.* (Para 13)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 451 व 457, गौवंश प्रतिषेध अधिनियम, म.प्र. 2004, धाराएँ 4, 6 व 9, कृषि पशु संरक्षण अधिनियम, म. प्र. 1959, धाराएँ 4 व 6, पशुओं के प्रति क्रूरता का निवारण अधिनियम, 1960, धाराएँ 10 व 11, आवश्यक वस्तु अधिनियम,1955, धारा 3/7 – पशुओं का वध करने हेतु परिवहन करने के अपराध के लिए पुलिस ने ट्रक अभिगृहित किया – मुख्य न्यायिक मजिस्ट्रेट ने ट्रक आवेदक की अंतरिम अभिरक्षा में देने से इन्कार किया – अभिनिर्धारित – चूंकि आवश्यक वस्तु अधिनियम की धारा 3/7 के अंतर्गत भी अपराध दर्ज किया गया तथा ट्रक की जब्ती की कार्यवाही सक्षम प्राधिकारी के समक्ष चल रही थी इसलिए ट्रक को सुपुर्दगीनामे पर देने का प्रश्न नही – पुनरीक्षण खारिज।

Cases referred :

1998 AIR SCW 2943, 2009(4) MPHT 182; Order dated 22.02.2002 of Supreme Court in Cr.A. No.283-287/2002.

A.D. Mishra, for the applicant.

P.C. Jain, P.L., for the non-applicant No.1/State.

Sanjay Jain, for the non-applicant No.2.

ORDER

K.S. Chauhan, J. :–This criminal revision under Section 397/401 of the Code of Criminal Procedure has been preferred being aggrieved by the order dated 07.08.2008 passed by Chief Judicial Magistrate, Seoni (M.P.) whereby the applications filed by the applicant under Section 451 and 457 of Cr.P.C. have been rejected.

2. The brief facts of the case are that on 21.07.2008 Ajju Khan and Arif Khan were transporting the cattle by Truck No.MP-20 G/1642 for slaughtering purposes to Nagpur which was seized by Seoni Police and offence under Sections 4, 6, 9 of M.P. Gauvansh Pratishedh Adhiniyam, 2004, section 4, 6 of M.P. Agriculture Cattle Preservation Act, 1959, section 10 and 11 of Prevention of Animal Cruelty Act,

1960, section 3/7 of Essential Commodities Act and Section 166 and 192 of Motor Vehicle Act against them. Out of 27 cattle 4 were found dead. They were given in the temporary custody of respondent No.2.

3. Applicant Mohd. Ajeem Khan @ Ajju, S/o Ajeej Khan filed the applications under Section 451 and 457 of Cr.P.C. for taking the cattle and truck on Supurdginama which were rejected by the impugned order and the application filed by respondent No.2 for taking the cattle on interim custody was allowed and the cattle were given in the interim custody to respondent No.2 on the conditions enumerated in the impugned order. Being aggrieved by the impugned order the applicant preferred the instant petition.

4. Learned counsel for the applicant submitted that the applicant is attorney holder of the truck owner Mohd. Javed. The copy of power of attorney is filed as Annexure A-5. The applicant is the owner and possession holder of the truck and cattle. These cattle were being carried for selling purposes and not for slaughtering. The court below has committed an illegality in rejecting the applications, therefore, the direction be made to provide truck and cattle in the interim custody of the applicant. In support of his contention he has referred the decision rendered in *Manager, Pinjrapole Deodar and another v. Chakram Moraji Nat and others,* 1998 AIR SCW 2943.

5. On the contrary, Shri P.C. Jain, learned P.L. appearing on behalf of the respondent/State and Shri Sanjay Jain, learned counsel for the respondent No.2 supported the impugned order passed by the court below. Learned counsel for the respondents submitted that power of attorney was executed after one month of the incident. The power of attorney is not valid because the contents are defective. The court below has rightly exercised discretion, therefore, it does not call for any interference in the revision. In support of their contention they have referred the case of *Secretary, Gopal Goshala Jhonkar v. Ramesh and others* reported in 2009(4) M.P.H.T. 182.

6. Considered the rival contentions raised by the learned counsel for the parties.

7. Section 4 of M.P. Krishik Pashu Parirakshan Adhiniyam, 1959 prohibits the slaughter of agricultural cattle and section 6 prohibits the transportation of agricultural cattle for slaughtering purpose. The Section 11 of Prevention of Cruelty to Animals Act provides punishment for treating the animals with cruelty.

8. Sections 4, 6 and 9 of the Madhya Pradesh Govansh Vadh Pratishedh Adhiniyam, 2004 reads as underlying:-

> **"Section 4. Prohibition of slaughter of cow progeny.**—No person shall slaughter or cause to be slaughtered or offer or cause to be offered, for slaughter of any cow progeny.
>
> **Section 6. Prohibition on transport of cow progeny for**

slaughter.—No person shall transport or offer for transport or cause to be transported any cow progeny from any place within the State to any place outside the State, for the purpose of its slaughter in contravention of the provision of this Act or with the knowledge that it will be or is likely to be, so slaughtered.

Section 9. Penalties.—Whoever contravenes or attempts to contravene or abets the contravention of the provisions of Sections 4, 5 and 6 shall be punished with imprisonment of either description for a term which may extend to three years, or with fine which may extend to ten thousand rupees or with both."

9. In the case of *Manager, Pinjrapole Deudar* (supra) the Apex Court has held thus:

"Under S. 35(2) of the Act, the Magistrate has discretion to handover interim custody of the animal to Pinjrapole but he is not bound to handover custody of the animal to Pinjrapole in the event of not sending it to an infirmary. In a case where the owner is claiming the custody of the animal, Pinjrapole has no preferential right. In deciding whether the interim custody of the animal be given to the owner who is facing prosecution, or to the Pinjrapole, the following factors will be relevant: (1) the nature and gravity of the offence alleged against the owner; (2) whether it is the first offence alleged or he has been found guilty of offences under the Act earlier; (3) if the owner is facing the first prosecution under the Act, the animal is not liable to be seized, so the owner will have a better claim for the custody of the animal during the prosecution; (4) the condition in which the animal was found at the time of inspection and seizure; (5) the possibility of the animal being again subjected to cruelty."

10. So far as the present case is concerned, the cattle were being carried in a very deplorable condition. Out of 27 cattle 4 were found dead. This is clear indicative of the fact that they were being carried for slaughtering purposes. No documents for purchasing these cattle have been filed. The respondent No.2 is a benevolent institution and acts in the welfare of the cattle. If the cattle are given in custody of the applicant the possibility of their slaughtering cannot be ruled out.

11. In the matter of *State of U.P. vs. Mustakeem* in Criminal Appeal No.283-287/2002 vide order dated 22.02.2002, the Hon'ble Apex Court has observed as under:-

"The State of Uttar Pradesh is in appeal against the direction of the Court directing release of the animals in favour of the owner. It is alleged that while those animals were registered for alleged

violation of the provisions of Prevention of Cruelty to Animals Act, 1960, and the specific allegation in the FIR was that the animals were transported for being slaughtered, and the animals were tied very tightly to each other. The criminal case is still pending. On an appeal for getting the custody of the animals was filed, the impugned order has been passed. We are shocked as to how such an order could be passed by the learned Judge of the High Court in view of the very allegations and in view of the charges, which the accused may face in the criminal trial. We, therefore, set aside the impugned order and direct that these animals be kept in the Goshala and the State Government undertakes to take the entire responsibility of the preservation of those animals so long as the matter is under trial."

12. Keeping in view the facts and circumstances of this case the court below has rightly declined to hand over the cattle in the interim custody of applicant. The discretion appears to be exercised in proper manner.

13. Since the offence under Section 3/7 of the Essential Commodities Act has also been registered and the confiscation proceeding of the truck was going on before the competent authority, hence there was no question to give that truck on supurdginama.

14. The court below after considering the every aspect of the matter has rightly dismissed the applications of the applicant. There is no illegality, irregularity, perversity, impropriety in the impugned order hence does not call for interference. The revision is devoid of merits and deserves to be dismissed.

15. Consequently, this revision petition fails and is dismissed accordingly. However, the court below is directed to decide the case expeditiously.

Revision dismissed.

I.L.R. [2010] M. P., 1191
CRIMINAL REVISION
Before Mr. Justice K.S. Chauhan
25 February, 2010*

MOHD. SHAHABUDDIN & anr. ... Applicants
Vs.
STATE OF M.P. & anr. ... Non-applicants

Essential Commodities Act (10 of 1955), Section 6(A), Public Distribution System Control Order, 2001 - *Truck and rice was seized by police as BPL rice which was to be supplied at the Fair Price Shops of some*

*Cr.R. No.1813/2007 (Jabalpur)

villages was not carried there and diverted the route and breached the Order, 2001 - Collector passed order of confiscation of the truck and rice - Sessions Judge upheld the order - The defence of the truck owner that he was having no knowledge about it - Held - Driver has clearly stated that he talked with the truck owner and at his instructions only he loaded the rice in the truck to be transported at some place at Chhattisgarh State - The rice was being transported at night and there were no labourer on this truck to unload the same - The Fair Price Shops remaine closed at night - This also negatives the possibility that the rice was being transported to Fair Price Shops - Defence contentions are not acceptable - Order of confiscation affirmed - Revision dismissed. (Paras 6 to 8)

आवश्यक वस्तु अधिनियम (1955 का 10), धारा 6(ए), सार्वजनिक वितरण प्रणाली नियंत्रण आदेश, 2001 – पुलिस द्वारा ट्रक और चावल अभिग्रहीत किया गया क्योंकि बीपीएल चावल, जिसकी कुछ गाँवों की उचित मूल्य की दुकानों पर आपूर्ति की जानी थी, उसे वहाँ नहीं ले जाया गया और मार्ग परिवर्तित किया गया और आदेश, 2001 को भंग किया – कलेक्टर ने ट्रक और चावल की जब्ती का आदेश पारित किया – सेशन न्यायाधीश ने आदेश की पुष्टि की – ट्रक स्वामी की प्रतिरक्षा कि उसे इसके बारे में कोई जानकारी नहीं थी – अभिनिर्धारित – चालक ने स्पष्ट रूप से कथन किया कि उसने ट्रक स्वामी से बात की थी और उसके निर्देश पर ही उसने छत्तीसगढ़ राज्य में किसी स्थान पर परिवहन के लिए चावल ट्रक में लादा था – चावल का रात के समय परिवहन किया जा रहा था और उसे उतारने के लिए इस ट्रक पर कोई श्रमिक नहीं था – उचित मूल्य की दुकानें रात के समय बन्द रहती हैं – यह भी इस संभावना को नकारता है कि चावल उचित मूल्य की दुकानों पर पहुँचाया जा रहा था – प्रतिपरीक्षा कथन स्वीकार योग्य नहीं – जब्ती आदेश की पुष्टि की गई – पुनरीक्षण खारिज।

R.P. Mishra, for the applicants.

Dildar Singh Purba, Dy.G.A., for the non-applicants.

ORDER

K.S. CHAUHAN, J. :–This petition under Section 397 r/w 401 of the Code of Criminal Procedure has been preferred being aggrieved by the judgment dated 07.09.2007 passed by III Additional District Judge (Fast Track Court), Shahdol in Special Criminal Appeal No.3/2007 confirming the order dated 16.07.2007 passed by Collector, Anuppur in Case No.38 B-121/06-07 whereby the order for confiscation of Mini Truck No.C.G. 10-A/9549 under Section 6(A) of the Essential Commodities Act has been passed.

2. The facts of the case in short are that the Station House Officer, Police Station, Jaithari, District Anuppur received an information on 19.02.2007 that 100 quintals rice of Fair Price Shops belong to Lead Jaithari loaded from Ware House of M.P. State Ware Housing Corporation, Anuppur is being transported to Bilaspur (C.G.) by Mini Truck No.C.G. 10-A/9549. He proceeded to spot to verify the fact and blockade at Forest Barrier, Venkat Nagar situated at Chhattisgarh Border.

The truck came there at about 9:30 p.m. Driver Amin Khan told him that the rice in question has been loaded by Anjani Shrivastava, Lead Manager and it was being carried to Bilaspur at the instruction of truck owner Mohd. Shahabuddin. The truck and the rice were seized. An offence under Section 3/7 of the Essential Commodities Act, 1955 was registered against Amin Khan driver, Vimlesh Khalasi, Mohd. Shahabuddin Truck Owner and Anjani Shrivastava, Lead Manager of Jaithari. An application for initiation of confiscation proceeding was filed in the court of Collector, Anuppur.

The notices were issued to the concerned persons. They filed the replies. Statement of J.P. Patel S.H.O., Police Station, Jaithari was recorded. The affidavits were filed. After affording opportunity of hearing Collector, Anuppur passed order on 16.07.2007 confiscating the truck and rice in question. Being aggrieved by that order the Special Criminal Appeal No.03/2007 was filed before the Sessions Judge, Shahdol by the applicants but the same was dismissed on 07.09.2007. Being aggrieved by the impugned order the instant revision has been preferred on the grounds mentioned in the memo of revision.

3. Shri R.P. Mishra, learned counsel for the applicants submitted that the courts below have not appreciated the evidence in proper perspective. The finding is contrary to the evidence available on record. There is no breach of the Public Distribution System (Control) Order, 2001, therefore, the confiscation of the truck is erroneous. Learned counsel further submitted that this truck was attached to one J.K. Transporter. The proprietor used to deduct the commission and pay the freight charges to truck owner. Anjani Shrivastava hired this truck from J.K. Transporter. The truck owner was having no knowledge about it. The concerned police officer was demanding Rs.500/- and they have been falsely implicated on account of not fulfilling such demand. The order of confiscation of truck is illegal hence the same be set aside and truck be delivered to the truck owner.

4. On the contrary, Shri Dildar Singh Purba, learned Dy. G.A. appearing on behalf of the respondent/State supported the orders passed by courts below mainly contending that the truck owner was colluded with Lead Manager of Jaithari and the 100 quintals rice of BPL was being transported to the State of Chhattisgarh which was prevented at the Forest Barrier, Venkat Nagar. There is breach of the Public Distribution System (Control) Order, 2001. The courts below have not committed any illegality in confiscating the truck and rice in question.

5. The main point for consideration in this revision is that whether the courts below have committed any illegality in confiscating the Mini Truck No.C.G. 10-A/ 9549 and 100 quintals rice in question.

6. Shri J.P. Patel, the then S.H.O. Jaithari has given the evidence in support of the prosecution mainly contending that at about 9:30 p.m. Mini Truck No.C.G. 10-A/9549 was seized at Forest Barrier, Venkat Nagar. Amin Khan driver of this

vehicle told him that the rice has been loaded after taking instruction from the truck owner Mohd. Shahabuddin. Anjani Shrivastava loaded rice and told him that he will inform him telephonically as to where the rice would be unloaded at Bilaspur. The rice was seized. Receipt No.881 and 882 were also seized. Accordingly the rice was to be supplied to Fair Price Shops of villages Paudi, Singhora, Sulkhari and Lahsuna and to the hostels situated at Paudi and Lahsuna. It is evident that these villages are situated 3-4 kilometers before reaching Venkat Nagar. Collector, Anuppur in his order has clearly mentioned the convenient routes by which the rice could have been transported to these villages. There was no necessity to go to Venkat Nagar which was situated at the border of Chhattisgarh. There is no plausible explanation as to why the driver carried the truck at Forest Barrier, Venkat Nagar. While he was trying to cross that barrier S.H.O. Police Station, Jaithari caught him and seized the truck and rice.

7. Rule 6 of the Public Distribution System (Control) Order, 2001 reads as follows:-

> "**6. Distribution:--** (1) The procedure for distribution of foodgrains by the Food Corporation of India to the State Governments or their nominated agencies, shall be as per paragraph 4 of the Annexe to this Order.
>
> (2) Fair price shop owners shall take delivery of stocks from authorised nominees of the State Governments to ensure that essential commodities are available at the fair price shop within first week of the month for which the allotment is made.
>
> (3) The district authority entrusted with the responsibility of implementing the Public Distribution System shall ensure that the stocks allocated to the fair price shops are physically delivered to them by the authorised nominee within the stipulated time.
>
> (4) The authority or person, who is engaged in the distribution and handling of essential commodities under the Public Distribution System, shall not willfully indulge in substitution or adulteration or diversion or theft of stocks from Central godowns to fair price shop premises or at the premises of the fair price shop.
>
> Explanation. –For the purpose of this clause:
>
> (i) 'diversion' means unauthorized movement or delivery of essential commodities released from central godowns but not reaching the intended beneficiaries under the Public Distribution System.
>
> (ii) 'substitution' means replacement of essential commodities released from central godowns with the

same articles of inferior quality for distribution to the intended beneficiaries under the Public Distribution System."

Thus the BPL rice which was to be supplied at the fair price shops of these villages was not carried there and diverted the route and breached Public Distribution System (Control) Order, 2001.

8. The defence of the truck owner that the truck in question was attached to J.K. Transport, Shahdol is not substantiated by any reliable evidence. The fact is that the rice was to be transported from Anuppur where transporters were also available then what was the necessity to contact with a transporter of Shahdol which is quite away from Anuppur. It is also a fact that Mohd. Shahabuddin truck owner resides in the State of Chhattisgarh and the driver has clearly stated that he talked with the truck owner and at his instruction only he loaded the rice in the truck to be transported at some place at Bilaspur. Though the place is not mentioned as to where it was to be unloaded but driver has clearly stated that Anjani Shrivastava who loaded the rice has told him that he will telephonically communicate the place at Chhattisgarh where the rice was to be unloaded and it has come on record that the driver was waiting for his instructions. Thus there was the collusion in between the truck owner and Anjani Shrivastava, Lead Manager, Jaithari. The B.P.L. rice of the Fair Price Shops was being carried to Chhattisgarh but at the intervention of police the same could not be carried there. It is also evident that the rice was being transported at night and there were no labourer on this truck to unload the same. The Fair Price Shops remain closed at night. This also negatives the possibility that the rice was being transported to Fair Price Shops. The contentions raised by applicants in this behalf are not acceptable. There is no reason to falsely implicate the applicants.

9. The courts below have appreciated the evidence in proper perspective and have rightly arrived at the conclusion regarding the confiscation of truck and rice. There is no illegality, irregularity, impropriety and perversity in the findings of the courts below, hence does not call for interference. The revision is meritless and deserves to be dismissed.

10. Consequently, the revision fails and is dismissed. The order passed by courts below are hereby affirmed. The ad-interim stay granted by this Court on 17.10.2007 is hereby vacated.

Revision dismissed.

I.L.R. [2010] M. P., 1196
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Piyush Muthur
24 December, 2009*

SUMITRA ... Applicant
Vs.
STATE OF MADHYA PRADESH ... Non-applicant

A. Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, M.P. (36 of 1981), Section 2(f) - ***Specified offence - The Charged offence must not only a "Specified Offence" but it should arise out of commission of Dacoity and the offence must have a nexus with the commission of Dacoity.*** (Para 9)

क. डकैती और व्यपहरण प्रभावित क्षेत्र अधिनियम, म.प्र. (1981 का 36), धारा 2(एफ) – विनिर्दिष्ट अपराध – आरोपित अपराध न केवल "विनिर्दिष्ट अपराध" होना चाहिए बल्कि वह डकैती कारित किये जाने से उत्पन्न होना चाहिए और अपराध का डकैती कारित किये जाने से सम्बन्ध होना चाहिए।

B. Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, M.P. (36 of 1981), Section 5 - ***Regulation of bail - Affected person entitled to move bail application at four stages - (i) Immediately after arrest where he can demonstrate that no reasonable suspicion of his being involved/concerned exist, (ii) Upon completion of 24 hours, during currency of investigation, where he can demonstrate that accusation is not well founded against him, (iii) After completion of investigation where he can demonstrate that no sufficient and prima facie proof is available against him, (iv) When the investigation is not completed within 120 days.*** (Para 10)

ख. डकैती और व्यपहरण प्रभावित क्षेत्र अधिनियम, म.प्र. (1981 का 36), धारा 5 – जमानत का विनियमन – प्रभावित व्यक्ति चार प्रक्रम पर जमानत आवेदन प्रस्तुत करने का हकदार – (i) गिरफ्तारी के तुरंत बाद वह यह दर्शित कर सकता है कि उसके सम्मिलित होने/सम्बंधित होने का कोई युक्तियुक्त संदेह अस्तित्व में नहीं है, (ii) 24 घंटे पूर्ण होने के उपरांत, अन्वेषण के चलते, वह यह दर्शित कर सकता है कि उसके विरूद्ध आरोप के ठोस आधार नहीं है, (iii) अन्वेषण पूर्ण होने के पश्चात् वह यह दर्शित कर सकता है कि उसके विरूद्ध कोई पर्याप्त और प्रथम दृष्टया सबूत उपलब्ध नहीं हैं, (iv) जब अन्वेषण 120 दिन के भीतर पूर्ण नहीं हो।

Cases referred :

1982 MPLJ7 (FB), 1982 Cr.L.R. (M.P.) 1

P.S. Bhadoriya, for the applicant.
R.D. Agarwal, Panel Lawyer for the non-applicant.

J U D G M E N T

PIYUSH MATHUR, J. :–Arguments heard and perused the Case Diary.

*M.Cr.C. No.8089/2009 (Gwalior)

2. This is a repeat application (Second application), under Section 439 of Cr.P.C. for grant of bail. The applicant has been arrested by Police Station Kotwali, District Morena in crime no. 643/2009, registered for the offence punishable under Sections 393 IPC and 11/13 MPDVPK Act.

3. The case of the Prosecution is that Applicant Sumitra along with one Co-accused Sapna had made an attempt to commit the Offence of Dacoity on Date 22.08.09 at a Public Place with the assistance of two Male Assistant and a serious attempt to commit the offence was made but since the residents of the Locality intervened therefore the Accused/Applicant was caught on the spot and was arrested by the Police.

4. The Counsel for the Applicant submits that from the perusal of the Chargesheet, it can not be said at this stage that the Applicant has committed the offence with an intention to commit Dacoity in terms of the offence punishable under Section 393 IPC and the elements of Section 11/13 MPDVPK Act is also missing. He submits that the Applicant is in custody since 23.08.09 and is a Lady who has no criminal antecedents.

5. The Madhya Pradesh Dacaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981, is a special legislation made by State Legislature, in relation to certain offences in the "Dacaiti and Kidnapping affected Areas" of Madhya Pradesh, with a view to curb effectively the commission of specified offences, in view of the menace of organized and unorganized gangs of the dacoit as also with a view to break the chain of vested interests, assisting or associated with such gangs: The Legislature has also made provision for the attachment and confiscation of the huge properties, alleged to have been acquired through the commission of specified offences and therefore the Legislature has given a wide definition of "Dacoity " which includes not only a person who has committed Dacoity for the first time but also the person who has already committed offence under Section 395 of IPC. Similarly, certain offences described in IPC have been picked up for classifying as "Specified Offences". The Definition of a Dacoit and the specified offences mentioned in Section 2(b) and Section 2(f) are quoted herein below for ready reference :

> 2(b) **"dacoit"** in relation to a dacoity and kidnapping affected area, means a person who commits or has committed an offence punishable under Section 395 of the Indian Penal Code (XLV of 1860) or a specified offence, or as the case may be, a person accused of commission of any such offence;
>
> 2(f) **"specified offence" means :-**
>
> (i) an offence specified in the schedule offence committed in relation to an area declared under section 3 being an offence forming part of arising out of or connected with the commission of dacoity or kidnapping;

(ii) an offence for which punishment has been provided under section 9, 11 and 12 of this Act;

(iii) an offence punishable under section 212, 216, 216-A, 311, 347, 392, 393, 394, 395, 396, 397, 398, 399, 402 and 412 of the Indian Penal Code, 1860 (XLV of 1860) committed in relation to an area declared under section 3;

and includes abatement or attempt to commit any of the offences specified in sub-clauses (i),(ii) and (iii).

6. While dealing with the merits of the present matter, where charges under Sections 11 and 13 of the Adhiniyam have been incorporated alongwith other offences, it would be pertinent to examine the scope of the provisions contained therein, therefore Section 11 and Section 13 are quoted herein below for ready reference :

11. Punishment for specified offences generally : A dacoit who commits a specified offence shall, if no specific punishment is provided for that Act in the Indian Penal Code (XLV of 1860) and that act is also not punishable under section 9, be punished with imprisonment which may extend to ten years and with fine.

13. Minimum period of imprisonment: Notwithstanding anything contained in section 11 and 12 or any other law for the time being in force, minimum punishment with which a specified offence shall be punished shall be imprisonment for three years.

7. While examining the Scheme of the Dacoity Adhiniyam, it appears that the Legislature has provided a bar in relation to grant of bail, by making provisions in Section 5 of the Adhiniyam, where not only the anticipatory bail but the regular bail has also been qualified with a non-obstante clause with an added condition of opposition of the State Counsel. For ready reference Section 5 is quoted herein below :

5. Regulation of grant of bail :---(1) Notwithstanding anything contained in the Code, no application for an anticipatory bail shall be entertained by any court in respect of a dacoit.

(2) Notwithstanding anything contained in the Code, no application for bail of a dacoit shall be allowed, if opposed:

Provided that no court or Magistrate shall authorize the detention of a person accused of a specified offence in custody during the course of investigation for a period exceeding 120 days and on the expiry of such period (in the event of the police report under sub – section (2) of Section 173 of the Code being not filed,) the accused shall be released forthwith if he is prepared to and does furnish bail.

8. When initially the need to curb menace of Dacoity was felt in the State of M.P. particularly in the areas of Gwalior, Morena, Bhind, Datia, Shivpuri, Guna, Sagar, Damoh, Tekamgarh, Chattarpur and Panna, an Ordinance was promulgated which was captioned in the description in which the present Adhiniyam is couched and this Court had an occasion to deal with the provisions of the Ordinance, when the Full Bench of this Court has found the provisions of the Ordinance to be intra virus, while considering the scope and stages of grant of bail. The judgment delivered by the Full Bench of this Court in the case of *Gulabchand Kannoolal Vs. State of M.P. and Others* reported as 1982 MPLJ 7 (FB) had dealt with the situation, wherein an associate of a gangster engaged in commission of kidnapping and abduction had facilitated raising of a demand and encashment of ransom money, within the notified Dacoity Area, where The Full Bench while considering yet another Judgment of the Division Bench of this Court in the case of *Pramod Kumar Khare Vs. The Governor of M.P. and Others* reported as 1982 Criminal Law Reporter (M.P.) 1 has found that the findings given in the case of *Pramod Kumar Khare* (supra) about section 5 (2) being ultra virus, are not correct and instead of giving any opinion further about this judgment, the Full Bench has carved out four stages of filing and entertainment of bail application by the High Court. The Full Bench has observed thus :

> In all such cases, the ban on the grant of bail to a dacoit under Section 5 (2) of the Ordinance will not apply. Putting it differently a person arrested for dacoity or a specified offence under the Ordinance can apply for bail in spite of section 5(2) at the stage immediately after his arrest on the ground that there was no reasonable suspicion of his being concerned in such offence; at the stage after twenty four hours of his arrest and during investigation on the ground that there are no grounds that the accusation or information against him is well founded and at the stage after the investigation is complete on the ground that there is no sufficient evidence or prime facie proof against him in support of the accusation. We may add that bail has also to be granted, as pointed out later in this judgment, when the investigation is not complete within 120 days from the date of arrest under the proviso to section 5 (2).

9. Therefore, it is very much clear that the charged offence must not be only a "Specified Offence" but it should arise out of commission of the Dacoity and the offence must have a nexus with the commission of the Dacoity and it would be required to ascertain, as to whether the nexus existed at the material time of the commission of the offence.

10. Similarly, while examining the Legislation, the Full Bench of this Court has found that an accused person would be entitled to move a Bail Application at four

stages; firstly immediately after his arrest where he can demonstrate that no reasonable suspicion of his being involved/concerned exist; secondly upon completion of 24 hours, during the currency of the investigation where he can demonstrate that the accusation is not well founded against him, thirdly, after completion of the entire investigation where he can demonstrate before the Court that no sufficient evidence and prima facie proof is available against him and fourthly based upon the language of the proviso appended to sub-Section 2 of Section 5, when the investigation is not completed within 120 days, when he can claim the consideration of his Application for his release.

11. Since Dacoity Adhiniyam happens to be a special Legislation, therefore the Legislature in its wisdom has calculatedly engrafted two non-obstante clause in sub Sections (1) and (2) of Section 5 of the Adhiniyam which carves out two different categories and situations about the grant of bail, then the One provided in the Code of Criminal Procedure, in relation to the grant of Anticipatory Bail, Temporary Bail and Regular Bail. Keeping in view, the Legislative Intendment, it would be necessary to examine the merits of the matter very cautiously while dealing with the Bail Application by ascertaining as to under which category, the accused person has made out a case for Bail and in what manner his case for grant of bail could be considered.

12. The effect and implementation of the provision of Dacoity Adhiniyam has been examined in several subsequent judgments delivered by several Single Judges of this Court, which also suggest for analyzing each case on its merit.

13. Therefore, while examining the merits of the present case, and the perusal of the Chargesheet, it can not be said at this stage that the Applicant has committed the offence with an intention to commit Dacoity in terms of the offence punishable under Section 393 IPC and the elements of Section 11/13 MPDVPK Act is also missing.

14. Considering the aforesaid circumstances as also the action of the accused person in attempt to commit the Offence as also on account of the fact that the Challan has been filed, I allow this Application and direct that the applicant be released on bail on her furnishing a personal bond in the sum of Rs. 30,000/-(Rs. Thirty thousand only) with one solvent surety in the like amount to the satisfaction of the trial Court on the condition that she shall remain present before the Court concerned during trial and also comply with the conditions enumerated under Section 437 (3) of Cr.P.C.

15. A copy of this order be sent to the Court concerned for compliance.

C.C. as per rules.

Order accordingly.

KAILASH AGARAWAL Vs. STATE OF M.P.

I.L.R. [2010] M. P., 1201

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.S. Dwivedi

5 January, 2010*

KAILASH AGARAWAL & ors. ... Applicants

Vs.

STATE OF M.P. & anr. ... Non-applicants

A. Prevention of Food Adulteration Act (37 of 1954) – Sections 17(2), 7 r/w 16 - *Offence by Partnership firm - Liability of Partners - NA-2 has been authorized and nominated as per provisions of Section 17(2) - Liability also accepted by NA-2 - Nomination Form has been accepted by Local (Health) Authority - Only NA-2 can be prosecuted on behalf of the registered partnership firm for the offence punishable under Act - Prosecution of applicants as partners of registered firm is erroneous and liable to be quashed.* (Para 16)

क. खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37) – धारा 17(2), 7 सहपठित 16 – भागीदारी फर्म द्वारा अपराध – भागीदारों का दायित्व – अनावेदक क्र. 2 धारा 17(2) के उपबंधों के अनुसार प्राधिकृत तथा नामित किया गया – अनावेदक क्र. 2 द्वारा दायित्व स्वीकार भी किया गया – नामांकन फार्म स्थानीय (स्वास्थ्य) प्राधिकारी द्वारा स्वीकार किया गया – अधिनियम के अन्तर्गत दण्डनीय अपराध के लिए रजिस्ट्रीकृत भागीदारी फर्म की ओर से केवल अनावेदक क्र. 2 को अभियोजित किया जा सकता है – रजिस्ट्रीकृत फर्म के भागीदारों के रूप में आवेदकों का अभियोजन गलत है और अभिखंडित किये जाने योग्य है।

B. Prevention of Food Adulteration Act (37 of 1954), Sections 17(2), 7 r/w 16(1)(a) - *Offence by Companies/Partnership firm - Sample was sold by accountant (Muneem) to food inspector and Panchnama has been prepared in his presence - Accountant of the firm cannot be held liable for the prosecution because he is not responsible for day to day manufacturing and sale - His duty is only to maintain the accounts of the firm.* (Para 18)

ख. खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37)–धारा 17(2), 7 सहपठित 16 (1)(ए) – कंपनी/भागीदारी फर्म द्वारा अपराध – लेखापाल (मुनीम) द्वारा खाद्य निरीक्षक को नमूना (Sample) बेचा गया और उसकी उपस्थिति में पंचनामा तैयार किया गया – फर्म के लेखापाल को अभियोजन हेतु दायी नहीं ठहराया जा सकता क्योंकि वह प्रतिदिन के विनिर्माण और विक्रय के लिए उत्तरदायी नहीं है – उसका कर्तव्य केवल फर्म के लेखे रखना है।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 482 - *Maintainability - If apparently the prosecution is found to be illegal then certainly complaint can be quashed u/s 482 - Petition can not be dismissed on this count that grounds can be raised before the Trial Court.* (Para 20)

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*M.Cr.C. No.8536/2009 (Gwalior)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2) – धारा 482 – पोषणीयता – यदि प्रकट रूप से अभियोजन अवैध पाया जाता है तब परिवाद निश्चित रूप से धारा 482 के अन्तर्गत अभिखंडित किया जा सकता है – इस कारण कि विचारण न्यायालय के समक्ष आधार उठाये जा सकते है याचिका खारिज नहीं की जा सकती।

Cases referred :

AIR 1983 SC 67, AIR 1992 SC 1168, 2005(1) MPLJ 282, 2009 CrLJ 3577, 2001(2) FAC 120, 2003 FAJ 125, 2008(2) MPLJ 63 = ILR (2008) MP 1313, 2008(1) FAC 116, 2008 (2) FAC 97, 1987 FAJ 420, 2000(1) JLJ 391, (1998) 7 SCC 698, 2007(1) MPLJ 90.

Sanjay Behrani, for the applicants.
T.C. Bansal, for the non-applicant No.1.
None, for the non-applicant No.2.

O R D E R

S.S. Dwivedi, J. :–The applicants have filed this petition under Section 482 of the Code of Criminal Procedure, for quashment of the criminal complaint case no. 2436/07 pending before JMFC Gwalior arising out of a complaint filed by the Food Inspector, Gwalior against the applicants for the offence punishable under Section 7 read with section 16 of the Prevention of Food Adulteration Act (hereinafter referred to as the 'PFA Act').

2. Briefly stated the facts of the case are, the applicants are the partners of the registered partnership firm doing the business of oil trade and industry situated at near Gauram Dharamkanta, A.B.Road, Gwalior. As per the direction of Food Controller, Gwalior the Flying Squad of Food and Drug Administration, Gwalior had taken the search of the premises belonging to the applicant-firm and found certain oil stored for sale. At the time of inspection it is alleged that one employee alleged to be the Accountant (Muneem) namely Kailash S/o Late Ramswaroop Agarwal was found present there in the oil industry concerned. After giving him necessary notice for taking sample of the oil stored for sale the necessary sample of 375 Gms. oil had been purchased, the requisite price of the sample had also been paid to the concerned employee Kailash Agarawal/applicant no.1 and the sample had been divided into three parts all the three parts were sealed properly; necessary Panchnama had been prepared thereafter the sealed packet of the article had been sent for its chemical analysis to the Food Laboratory, from where the report had been received wherein the sample of the concerning oil was found below standard. Thereafter, complaint had been filed against the applicants before the JMFC. Gwalior for the offence punishable under section 7 read with section 16 (1) (a) of the PFA Act. On receipt of the information about filing of the charge sheet the applicants came up before this Court by this petition under Section 482 Cr.P.C. for quashment of the criminal proceedings initiated against them.

3. Having heard the learned counsel for the applicants as well as learned Public Prosecutor for the State and perused the record.

4. It is submitted on behalf of the applicants that admittedly the applicants no.2 and 3 are the partners of the registered partnership firm/applicant no.4 Firm Ajeet Kumar Rakesh Kumar Oil Trade and industries. The applicant no.1 is simply shown to be the Accountant (Muneem), who is authorised for maintaining the accounts of firm only, he is nowhere related for manufacturing of the oil concerned in the oil industry. It is further submitted that as per the provisions of Section 17 of PFA Act when the offence is committed by a registered company or registered partnership firm with regard to the offence related to PFA Act then the person authorised by the company or the firm concerned, as the case may be, can only be prosecuted by the competent authority for the offence punishable under the PFA Act. The applicants had already declared respondent no.2 Manoj Kumar as the person who is responsible for the prosecution for the offence under PFA Act as per the provisions of Section 17 (2) of PFA Act, therefore, the implication of the present applicants in the concerned criminal proceedings is erroneous and illegal. Therefore, on this sole ground the prosecution initiated against the applicants is liable to be quashed.

5. Learned Public Prosecutor for the State submits that the applicant no.1 was found at the time when sample of the oil concerned had been taken by the Food inspector. He had received the amount/price of the sample concerned, therefore, he is liable to be prosecuted. Similarly being the partners of the registered partnership firm the applicants no.2 and 3 are also responsible for the day to day Business of the firm concerned and they have been rightly made accused in this case and no grounds are available for the quashment of the criminal proceedings against the applicants. Therefore, prayed for dismissal of the petition.

6. On consideration of rival contentions of both the counsel for the parties it is apparent that the applicants have challenged their prosecution on the solitary ground as per the provisions of sub-Section (2) of Section 17 of the PFA Act on the allegation that being the partners of the registered partnership firm they are not liable to be prosecuted for the offence punishable under PFA Act. Only the person responsible for day to day business and authorised or nominated by the company or the firm can only be prosecuted under this offence. It will be useful here to quote the provisions of Section 17 of the PFA Act to ascertain the point for dispute in between the parties, which reads here as under:-

> **"17. Offence by companies.- (1) Where an offence under this Act has been committed by a company–**
>
> **(a)(i) the person, if any, who has been nominated under sub-section (2) to be in charge of, and responsible to, the company for the conduct of the business of the company**

(hereinafter in this section referred to as the person responsible), or

(ii) where no person has been so nominated, every person who at the time of the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company; and

(b) the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of such offence.

(2) Any company may, by order in writing, authorise any of its directors or managers (such manager being employed mainly in a managerial or supervisory capacity) to exercise all such powers and take all such steps as may be necessary or expedient to prevent the commission by the company of any offence under this Act and may give notice to the Local (Health) Authority, in such form and in such manner as may be prescribed, that it has nominated such director or manager as the person responsible, alongwith the written consent of such director or manager for being so nominated.

Explanation– Where a company has different establishments or branches or different units in any establishment or branch, different persons may be nominated under this sub-section in relation to different establishments or branches or units and the person nominated inrelation to any establishment, branch or unit shall be deemed to be the person responsible in respect of such establishment, branch or unit.

(3) The person nominated under sub-section (2) shall, until-

(i) further notice cancelling such nomination is received from the company by the Local (Health) Authority; or

(ii) he ceases to be a director or, as the case may be, manager of the company; or

(iii) he makes a request in writing to the Local (Health) Authority, under intimation to the company, to cancel the nomination (which request shall be complied with by the Local (Health) Authority),

whichever is the earliest, continue to be the person responsible.

Provided that where such person ceases to be a director or, as the case may be, manager of the company, he shall intimate the fact of such cesser to the Local (Health) Authority:

Provided further that where such person makes a request under clause (iii), the Local (Health) Authority shall not cancel such nomination with effect from a date earlier than the date on which the request is made.

(4) Notwithstanding anything contained in the foregoing sub-sections, where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company (not being a person nominated under sub-section (2) such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation." For the purposes of this section–

(a) "company" means any body corporate and includes a firm or other association of individuals;

(b) "director", in relation to a firm, means a partner in the firm; and

(c) "manager" in relation to a company engaged in hotel industry, includes the person in charge of the catering department of any hotel managed or run by it.)

7. On perusal of the aforesaid provision of Section 17 of the PFA Act, which relate to the offence by companies. It is pertinent to note that the company may authorise in writing a person, who is liable for prosecution under this Act as per the provisions of sub-section (2) of Section 17. Thereafter Sub-section (3) of Section 17 deals with the procedure for the person, who has been authorised or nominated by the company as per sub-section (2) of Section 17. Similarly the explanation of Section .17 clearly indicates that the provisions made for the offence

related to the company which means any body corporate and also includes a firm or other association of individuals. Meaning thereby in the present case the applicants no.2 and 3 are the partners of registered partnership firm AjeetKumarRakesh Kumar Oil Trade and Industries, therefore, under the provisions the person to be held liable for the prosecution as shown by the applicants is respondent no.2-Manoj Kumar, who has been legally authorised and nominated by the firm as per the provisions of Section 17 (2) of the PFA Act.

8. Insofar as the authorisation or nomination of respondent no.2 is concerned, the applicants have filed a document, Annexure P/2, whereby the Managing Director of the company namely Ajeet Kumar Rakesh Kumar Oil Trade and Industries had authorised respondent no.2-Manoj Kumar as the person nominated as per the provisions of sub-section (2) of section 17 of the PFA Act. In this Annexure P/2 the respondent no.2-Manoj Kumar had accepted the aforesaid liability and this nomination form Annexure P/2 has also been accepted by the Local (Health) Authority/Deputy Director, Food and Drugs Administration Gwalior. In view of the aforesaid admitted documentary evidence Annexure P/2 the applicants have proved the fact that as per provisions of sub-section (2) of Section 17 of the PFA Act the applicants no.2,3 and 4 had legally nominated respondent no.2 Manoj Kumar as the person, who can be prosecuted on behalf of the registered partnership firm for the offence punishable under PFA Act.

9. Learned Public Prosecutor cannot dispute the fact that Annexure P/2 is the document by which the respondent no.2 had been legally nominated as per the provisions of sub-section (2) of Section 17 of PFA Act. In view of this, the prosecution of the present applicants as the partners of the registered partnership firm is apparently found to be illegal.

10. For this proposition the reliance can be placed on the decision of the Hon'ble Apex Court in *Municipal Corporation Delhi vs. Ram Kishan*, reported in AIR 1983 SC 67, dealing with the prosecution of Directors and Managers of the company held here as under:-

> **"Proceedings against an accused in the initial stages can be quashed only if on the face of the complaint or the papers accompanying the same, no offence is constituted. In other words, the test is that taking the allegations and the complaint as they are, without adding or subtracting anything, if no offence is made out then the High Court will be justified in quashing the proceedings in exercise of its powers under section 482.**
>
> **In the instant case the complaint clearly contains the allegations regarding the sample taken by the Inspector from a shop which was sent to the Public Analyst, was**

manufactured by the Company in question and that the Public Analyst found the sample to be adulterated. The complaint was filed against the Company, its Directors and the Managers. So far as the Directors are concerned, there is not even a whisper nor a shred of evidence nor anything to show, apart from the presumption drawn by the complainant, that there is any act committed by the Directors from which a reasonable inference can be drawn that they could also be vicariously liable. In these circumstances, therefore it can be said that no case against the Directors has been made out ex-facie on the allegations made in the complaint and the proceedings against them were rightly quashed by the High Court.

However, the Manager of the Company who is directly incharge of its affairs, could not fall in the same category as the Directors. It could not be reasonably argued that no case is made out against the Manager because from the very nature of his duties it is manifest that he must be in the knowledge about the affairs of the sale and manufacture of the disputed sample. From the very nature of his duties it can be safely inferred that the Manager would undoubtedly be vicariously liable for the offence; vicarious liability being an incident of an offence under the Act. Hence the order of the High Court quashing the proceedings against the Manager is liable to be set aside.

11. The same view has been re-iterated by the Hon'ble Apex Court in *R.Banerjee and others v. H.D.Dubey and others*, reported in AIR 1992.SC 1168, wherein also the Hon'ble Apex Court has held here as under-

"9. On a careful perusal of the complaints lodged by the Food Inspector under the Act it is evident that intimation regarding the nomination in favour of H.Dayani and Dr. Nirmal Sen had been communicated to the Food Inspector before the complaints came to be lodged. This is evident from the averments made in the respective complaints. The nomination was, however, not acted upon by the complainant on the ground that it was incomplete. It was, therefore, said that in the absence of a valid nomination from the concerned company the Directors of the company were liable to be proceeded against and punished on proof of the charge levelled against them in the complaint. It will thus be seen that there is no allegation in the complaint which would bring

the case within the mischief of Section 17(4) of the Act. There is no allegation in the complaint that the offence was committed with the consent/connivance/negligence of the Directors, other than the nominated person, who were impleaded as co-accused. We are, therefore, satisfied that the allegations in the complaint do not make out a case under sub-section (4) of Section 17 of the Act. That being so, the inclusion of the co-accused other than the company and the nominated person as the persons liable to be proceeded against and punished cannot be justified. As held by this Court in *Municipal Corporation of Delhi v. Ram Kishan Rohtagi,* (1983)1 SCR 884 : (AIR 1983 SWC 67) where the allegations set out in the complaint do not constitute any offence, no process can be issued against the co-accused other than the company and the nominated person and the High Court would be justified in exercising its inherent jurisdiction under Section 482 of the Code of Criminal Procedure, 1973 to quash the order passed by the Magistrate taking cognizance of the offence against such co-accused."

12. The same decision is also followed by the Single Bench of this Court in *Yogesh Chandra and another vs. State of Madhya Pradesh,* reported in 2005 (1) MPLJ 282, wherein the prosecution of the Directors of the company had been quashed on the ground that the Manager being responsible person authorised under sub-section (2) of Section 17 of the PFA Act can only be prosecuted.

13. The same view has also been taken by the High Court of Gujarat in *Loknath Bhattacharya, Managing Director & another v. State of Gujarat & another,* reported in 2009 Cri.L.J. 3577, wherein it was held hereas under:-

"21. Apart from the above, in the facts of this case, under sub-section (2) of Section 17 of the Act, the petitioner company had nominated one Mr.Ashutosh Maity, Factory Superintendent of the Company by passing resolution on 25.01.1993 and the same was duly communicated therefore, there was no justification for filing complaint against the petitioner company involving the Managing Director and other directors. Therefore, the complaint deserves to be quashed and set aside on this ground also."

14. Same view has been taken by the High Court of Delhi in *Vidyapati Kanodia vs. Local Health Authority of PFA*, reported in 2001(2) FAC 120, wherein it was held. hereas under:-

"If a person is nominated by a company for prosecution

under Sub-Section (2) of Section 17 of the PFA Act then he alone can be prosecuted by the , competent authority and not all the Directors or partners of the firm."

15. Same view has been taken by the Single Bench of this Court also in *K.B.Dadi vs. Food Inspector & others,* reported in 2003 FAJ 125; *Hindustan Food Products India vs. State of MP and another,* reported in 2008(2) MPLJ 63; *Hardeep Singh and others vs. Food Inspector, Department of PFA & others,* reported in 2008(1) FAC 116; and, *Ramesh Chandra Jain and another vs. State of Rajasthan and another,* reported in 2008(2) FAC 97.

16. In view of the aforesaid decisions of the Hon'ble Apex Court as well as of this Court it is clear that the applicants no.2 and 3 have legally nominated the respondent no.2 as the person who can be prosecuted for the offence punishable under the provisions of PFA Act. In view of this, the prosecution of the applicants no.2 and 3 as the partners of the registered partnership firm is found to be erroneous and liable to be quashed.

17. Insofar as the applicant no.1 is concerned, he is shown to be the Accountant (Muneem,) of the firm, who is responsible for maintaining the accounts only and his prosecution is also not found to be valid unless, he is found to be responsible for the manufacturing of the oil concerned. For this proposition learned counsel for the applicants placed reliance on the decision of the Himachal Pradesh High Court in *BihariLal and another vs. The State of H.P.,* reported in 1987 FAJ 420, wherein it is held here as under:-

"4. So far as petitioner Bihari Lal is concerned it is an admitted fact that he was a mere employee of the owner of the shop in question. Jaishi Ram, co-petitioner, who was present in the shop at the time when the impugned sample was taken by the Food Inspector by purchasing the sample (sabatrash) from said Bihari Lal who admittedly, acted as muneem of said Jaishi Ram in the said shop. Under these circumstances no criminal liability under the Act is attracted qua this petitioner Bihari Lal. Apparently being a muneem, he was not supposed to engage himself as a salesman in the shop and indulge in the act of selling. But, since he alone was present in the shop, it was he who sold the article in question to the Food Inspector when required to do so by the said Food Inspector. I am fortified in coming to the conclusion by a judgment of the Supreme Court in an appeal by special leave against a judgment of this Court in Criminal Appeal No.10 of 1985 (*Brij Mohan and another vs. The State of H.P.*), decided on May 30, 1986, which was registered as

1720 of 1986 in the Supreme Court and decided vide order dated July 16, 1986. The facts in that case were that one Brij Mohan was running a shop at Hamirpur in the name and style of M/s Mohan General Store, Hamirpur, dealing in general provisions of merchandise and he had employed Rattan Chand as a salesman in the said shop. The Food and Supplies Inspector, Hamirpur, checked the said shop when only Rattan Chand, the employee of Brij Mohan was present in the shop and challaned said Rattan Chand and also the proprietor of the shop Brij Mohan for offences under Section 3 read with Section 7 of the Essential Commodities Act, 1955 and the Judge Special Court after trial of the case found both of them guilty and sentenced each of them to undergo simple imprisonment for a period of three months and to pay fine of Rs.100/-. The appeal in this Court against this order was dismissed and the co-accused Rattan Chand employee in the said shop took an appeal to the Supreme Court against the order of this Court. Their Lordships of the Supreme Court then in that case held:

> **"We see no necessity to issue notice and delay disposal of the matter as the admitted position is that the appellant was an employee of the shop. He was not found engaged in the act of selling. We accept his appeal and set aside his conviction and vacate the sentences of imprisonment and fine. The appeal is allowed."**

On the analogy of this finding I hold that even this Bihari Lal being 'Muneem' in the shop was not engaged in the act of selling at the time of taking of sample and was only an employee in the shop: under section 7 read with section 16(i)(a) of the Act. His revision petition is, therefore, accepted and order of conviction passed against him is set aside and consequently the sentences of imprisonment and fine passed against him are vacated."

18. In view of the aforesaid decision, which has been relied upon, the decision of the Hon'ble Apex Court in Criminal Appeal No .10 of 1985 *(Brij Mohan vs. State of H.P.)* squarely covers the status of the applicant no.1 being the Muneem of the firm, he cannot be held liable for the prosecution because he is not responsible for day to day manufacturing and sale of the oil concerned. His duty is only to maintain the accounts of the firm.

19. Similarly, it has been objected by learned Public Prosecutor for the State

that as the charge sheet has been filed and all these grounds can be taken by the applicants before the trial Court itself, therefore the petition for quashment of the proceedings will not lie under the provisions of Section 482 Cr.P.C.

20. This Court is not much impressed by the aforesaid submission of learned Public Prosecutor for the State. If a wrong complaint has been filed against the applicants then certainty the complaint can be quashed under the provisions of Section 482 Cr.P.C. by this Court if apparently the prosecution is found to be illegal. For this reliance can be placed on a decision of this Court in *Pappu and another vs. State of M.P.*, reported in 2000 (1) JLJ 391, wherein the decision of the Hon'ble Apex Court in *Ashok Chaturvedi and others vs. Shital H. Chanchani and another*, reported in 1998 SCC (Criminal 1704 is also relied upon and held that **"if on the averments made in the complaint no case is made out against the applicant then the proceedings can be quashed under the provisions of Section 482 Cr.P.C.**

21. Same view has also been taken again in *Puranmal s/o Badrilal Gupta and another vs. State of MP and others*, reported in 2007 (1) MPLJ 90, also.

22. Thus, on the basis of the aforesaid case law on the point and on perusal of the facts of the present case it is apparent that the applicants no.2 and 3 have legally nominated respondent no-2-Manoj Kumar as a person responsible under PFA Act he has been authorised under the provisions of sub-Section (2) of Section 17 of PFA Act then the prosecution can be initiated only against the respondent no,2 as nominated person of applicant, no. 4-firm and not against all the partners of the firm concerned. Therefore, criminal prosecution of the applicants no.1 to 3 is found to be erroneous and liable to be quashed.

23. Resultantly, the petition filed on behalf of the applicants succeeds and is hereby allowed. The criminal proceedings of Criminal Case No. 2436/07, pending, before the JMFC Gwalior for the offence punishable under Section 7 read with section 16 of PFA Act, initiated against the applicants no.1, 2 and 3 by respondent no.1 is hereby quashed.. The respondent no.1 can proceed with the concerning case only against the applicant no.4 the registered firm through respondent no.2-Manoj Kumar, who is legally nominated as the person as per provisions of sub-section (2) of Section 17 of PFA for the alleged act.

Petition allowed.

I.L.R. [2010] M. P., 1212

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice N.K. Mody

8 January, 2010*

MANDIRA BEDI (SMT.) ... Applicant

Vs.

PAWAN & anr. ... Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 188 - *Offence committed outside India - Sanction from Central Govt. - Applicant was wearing saree which was having design of images of flags of various countries participating in World Cup Cricket, 2007 - Image of National Flag of India was on the bottom and was touching to the legs of Applicant - Held - Offence was committed outside India i.e., West Indies - No enquiry or trial could be initiated in India except with previous sanction of Central Govt.* (Paras 6, 7)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 188 – भारत के बाहर कारित अपराध – केन्द्रीय सरकार से मंजूरी – आवेदक ने साड़ी पहनी थी, जिस पर विश्वकप क्रिकेट, 2007 में सम्मिलित विभिन्न देशों के ध्वजों की आकृतियों का डिजाइन बना था – भारत के राष्ट्रध्वज की आकृति निचले हिस्से पर थी और आवेदक के पैरों को छू रही थी – अभिनिर्धारित – अपराध भारत के बाहर अर्थात वेस्ट इंडीज में कारित किया गया – कोई जॉच या विचारण केन्द्रीय सरकार की पूर्व मंजूरी के बिना भारत में आरंभ नहीं की जा सकती।

B. Criminal Procedure Code, 1973 (2 of 1974) (Amendment inserted w.e.f. 23.06.2006), Section 202(1) - *Accused resident of place beyond jurisdiction of Court - It is obligatory upon Magistrate that before summoning the accused residing beyond his jurisdiction, he shall enquire into the case himself, or direct investigation to be made by a police officer or by such person as he thinks fit - Applicant resident of Mumbai - Cognizance was taken and process was issued without inquiry and also without directing any investigation - Issuance of process not in accordance with law - Order quashed.* (Para 9)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2) (23.06.2006 से प्रभावशील संशोधन प्रविष्ट किया गया), धारा 202(1) – अभियुक्त न्यायालय की अधिकारिता के बाहर के क्षेत्र का निवासी – यह मजिस्ट्रेट के लिए बाध्यकारी था कि अभियुक्त जो उसकी अधिकारिता से बाहर निवास करता है, को समन करने से पहले वह स्वयं मामले की जॉच करता या पुलिस अधिकारी द्वारा या किसी ऐसे व्यक्ति द्वारा जैसा वह उचित समझे अनुसंधान के लिए निर्देशित करता – आवेदक मुम्बई की निवासी है – बिना जॉच के और अन्वेषण का कोई निर्देश दिये बिना संज्ञान लेकर आदेशिका जारी की गयी – आदेशिका जारी करना विधि अनुसार नहीं – आदेश अभिखंडित।

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*M.Cr.C No.2121/2008 (Indore)

Cases referred :

(1993) 3 SCC 609, ILR [2008] MP 591.

Ramesh Saboo, for the applicant.
Ashish Choubey, for the non-applicant No.1.
C.R. Karnik, Dy.G.A., for the non-applicant No.2.

ORDER

N.K. Mody, J. :– This is a petition under Section 482 of Cr.P.C. for quashment of complaint bearing No.261/2007 dated 30/04/2007 and also the orders dated 18/06/2007 and 05/12/2007 pending in the Court of JMFC, Bhikangaon whereby in a private complaint filed by respondent No. 1 cognizance of the offence has been taken under Section 2 of the Prevention of Insults to National Honour Act, 1971 (No.69 of 1971) which shall be referred-hereinafter as "Act" and bailable warrant was issued against the petitioner.

2. Short facts of the case are that the respondent No. 1 filed a private complaint on 12/04/2007 alleging that petitioner/Smt. Mandira Bedi was Producer and Director of programme Fourth Empire, SET MAX TV Channel, Mumbai. It was alleged that during telecast of Cricket Match of World Cup Cricket, 2007 being played on 28/04/2007 at West Indies petitioner was wearing a Saree which was having design of images of flags of various participating countries including the Indian National Flag. It was alleged that on that Saree there was a image of National Flag of India which was on the bottom and was touching to the legs of the petitioner. It was alleged that the petitioner has dishonoured the National Flag publically and thus has committed an offence which is punishable under the Act. After recording of statement of respondent No. 1 under Section 200 and 202 of Cr.P.C. learned JMFC, Bhikangaon vide order dated 18/06/2007 took the cognizance of the offence and issued bailable warrant against the petitioner against which the present petition has been filed.

3. Mr. Ramesh Saboo, learned counsel for the petitioner argued at length and submits that as per the complaint the cause of action has accrued to the respondent No. 1 during the telecast of Cricket Match of World Cup Cricket, 2007 being played on 28/04/2007 at Barbadose, West Indies while the petitioner was performing the role of commentator of programme Fourth Empire on SET MAX TV Channel. It is submitted that the offence as alleged was committed by the petitioner outside India i.e. at West Indies, therefore, the petitioner- could not have been prosecuted without obtaining the sanction from the Central Government. It is submitted that by taking cognizance of the offence for which the learned JMFC, Bhikangaon was having no jurisdiction unless and until sanction is obtained from the Central Government, the whole action is illegal and deserves to be quashed. Learned counsel further submits that the petitioner is resident of Mumbai while the complaint has been filed at Bhikangaon. It is submitted that as per amended

provision of sub-section (1) of Section 202 of Cr.P.C., 1973 in case where the accused is residing at a place beyond the jurisdiction of the Magistrate before whom complaint is filed, then such Magistrate shall postpone the issue of process against the accused and either inquire into the case himself or direct investigation by police officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding with the alleged offence and to take cognizance. It is submitted that by not following the procedure learned JMFC, Bhikangaon committed error in taking the cognizance of the offence. It is submitted that the petition filed by the. petitioner be allowed and the impugned order and also the complaint filed by the respondent No. 1 be quashed.

4. Mr. Ashish Choubey, learned counsel for the respondent No. 1 submits that at the relevant time the petitioner was wearing the saree having design of images of flags of various participating countries including the National Flag of India in such a manner which was appearing close to legs of the petitioner. It is submitted that for the purpose of cheap publicity the petitioner has wore the saree having the image of Indian National Flag and knowingly insulted the National Flag of India. It is submitted that after going through the complaint and after recording the evidence adduced by the respondent No. 1 learned JMFC, Bhikangaon has rightly taken cognizance of the offence against the petitioner, ft is submitted that the petition filed by the petitioner be dismissed.

5. Learned counsel for the respondent No.2/State supports the contention raised by counsel for the respondent No. 1 and submits that cognizance of the offence has rightly been taken by learned JMFC, Bhikangaon which requires no interference.

6. Section 188 of Cr.P.C., 1973 deals with the offence committed outside India which reads as under :-

> **188. Offence committed outside India.**- When an offence is committed outside India -
>
> (a) by a citizen of India, whether on the high seas or elsewhere; or
>
> (b) by a person, not being such citizen, on any ship or aircraft registered in India,
>
> he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found:
>
> Provided that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government.

7. In the matter of *Ajay Aggarwal Vs. Union of India* (1993) 3 SCC 609 the

Hon'ble Apex Court had a occasion lo consider the impact of proviso of Section 188 of Cr.P.C. wherein the accused who was carrying on business in Dubai charged under Section 120-B, 420, 468 and 471 of IPC for conspiring with others residing in India to cheat a bank in India and in furtherance committing offences of cheating and forgery partly in India and partly in Dubai, Hon'bie Apex Court has observed that even if part of the acts in pursuance of the conspiracy done in India, cognizance of the offences can be taken in India without prior sanction of Central Government. It was further observed that previous sanction of Central Government is not a condition precedent to take cognizance of the offence and sanction can be obtained before commencement of trial. In the matter of In *Reference Vs. Prakash Kumar Thakur* I.L.R. (2008) M.P. 591 wherein Sania Mirza, a rising star on Tennis firmament was prosecuted on the allegation that she by placing her feet on the table in the manner that thereby she insulted the National Flag fixed on the table, as displayed from her photographs published in the news papers wherein cognizance was taken by CJM, Bhopal, this Court observed that no inquiry or trial of such offence could be initiated in India except with the previous sanction of Central Government as the alleged offence was committed at Australia and the offence in itself was completed out side India and no act of the accused amounting to offence was committed in India.

8. Sub-Section (1) of Section 202 of Cr.P.C. as it was existing prior to the amendment Act. 2005 reads as under :-

> 202. Postponement of issue of process.- (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding.

9. The words "and shall in a case where the accused is residing at a place beyond the area in which he is exercising his jurisdiction" has been inserted vide amendment Act No.25 of 2005. By the aforesaid amendment it is made obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused. This has been done to see that innocent persons are not harassed by unscrupulous persons. Undisputedly, petitioner is resident of Mumbai while the complaint was filed at Bhikangaon, thus, the petitioner was residing beyond the jurisdiction of the concerned Magistrate, therefore, it was mandatory on the part of the leamed JMFC, Bhikangaon to postpone the issue of process against the accused and

either inquire into the case himself or direct investigation by police officer or by such other person as he thinks fit. In the present case, from perusal of record, it appears that without inquiry and also without directing any investigation cognizance was taken by the learned JMFC, Bhikangaon and process was issued which is not in accordance with law. Apart from this, since the offence was committed outside India and no part of the offence has been committed within India, therefore, as per proviso of Section 188 of Cr.P.C. the cognizance of the offence could not have been taken by the learned JMFC, Bhikangaon without obtaining the previous sanction from the Central Government.

10. In view of this, the petition filed by the petitioner is allowed and complaint, bearing No.261/2007 dated 30/04/2007 and also the orders dated 18/06/2007 and 05/12/2007 pending in the Court of JMFC, Bhikangaon whereby in a private complaint filed by the respondent No. 1 cognizance of the offence has been taken under Section 2 of the Act and bailable warrant was issued against the petitioner stands quashed with a liberty to respondent No.1 to file a fresh complaint after obtaining the sanction from Central Government as per the proviso of Section 188 of Cr.P.C.

11. With the aforesaid observations, petition stands disposed of. C.C. as per rules.

Petition disposed of.

I.L.R. [2010] M. P., 1216
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice R.C. Mishra
18 March, 2010*

PRASHANT SHRIVASTAVA ...Applicant
Vs.
SMT. SUSHMA SHRIVASTAVA & anr. ... Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 125 - *Whether an ex parte decree for restitution of conjugal rights passed in favour of husband was sufficient to disentitle the wife from claiming maintenance u/s 125 from her husband - No.* (Paras 7 & 8)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – क्या पति के पक्ष में पारित दाम्पत्य अधिकारों के प्रत्यास्थापन की एकपक्षीय डिक्री पत्नी को अपने पति से धारा 125 के अन्तर्गत भरण–पोषण का दावा करने के हक से वंचित करने के लिए पर्याप्त है – नहीं।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 125, Penal Code, 1860, Section 498-A - *Effect of acquital on maintenance proceedings*

*M.Cr.C. No.7130/2009 (Jabalpur)

- Prosecution for the offence u/s 498-A affords a reasonable ground to the wife to live separately - Moreover, the acquital for the offence u/s 498-A would not be sufficient to wash out the statement of the wife on oath that she had been treated with cruelty at her matrimonial home. (Para 11)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125, दण्ड संहिता, 1860, धारा 498–ए – भरण–पोषण कार्यवाहियों पर दोषमुक्ति का प्रभाव – धारा 498–ए के अन्तर्गत अपराध का अभियोजन पत्नी को पृथक रहने का युक्तियुक्त आधार प्रदान करता है – इसके अतिरिक्त धारा 498–ए के अन्तर्गत अपराध की दोषमुक्ति पत्नी के इस सशपथ कथन को अमान्य करने के लिए पर्याप्त नहीं होगी कि उसके दाम्पत्य निवास में उसके साथ क्रूरतापूर्ण व्यवहार किया गया था।

C. Criminal Procedure Code, 1973 (2 of 1974), Sections 482 & 397(3) - *Scope of interference u/s 482 with a revisional order is limited - High Court may correct any mistake committed by the revisional Court only where it finds that there is grave miscarriage of justice or abuse of process of the Court or the required statutory procedure has not been complied with or there is failure of justice - The concurrent finding as to liability of the husband to pay the maintenance allowance - It is not necessary for High Court to re-examine the whole evidence threadbare under the inherent powers - Petition dismissed.* (Para 12)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 482 व 397(3) – पुनरीक्षण आदेश में धारा 482 के अन्तर्गत हस्तक्षेप का क्षेत्र सीमित है – उच्च न्यायालय पुनरीक्षण न्यायालय द्वारा की गई किसी भूल को केवल वहाँ सुधार सकेगा जहाँ यह पाया जाता है कि घोर अन्याय हुआ है अथवा न्यायालयीन कार्यवाही का दुरुपयोग हुआ है अथवा अपेक्षित कानूनी प्रक्रिया का पालन नहीं हुआ है अथवा न्याय न हो पाया हो – भरण–पोषण भत्ता देने के पति के दायित्व सम्बन्धी समवर्ती निष्कर्ष – उच्च न्यायालय के लिए यह आवश्यक नहीं है कि अन्तर्निहित शक्तियों के अन्तर्गत सम्पूर्ण साक्ष्य का बारीकी से पुनःपरीक्षण करे – याचिका खारिज।

D. Precedent - *Balakram's case [2007(1) MPWN 10] has urged that the decree for restitution of conjugal rights passed in favour of husband, even though ex parte, was sufficient to disentitle the wife from claiming maintenance - The earlier decision of the High Court rendered in Babulal's case [1987 CrLJ 525] does not find reference in Balakram's case - In such a situation, as explained by the Full Bench in Jabalpur Bus Operators Association [2003(1) MPLJ 513] the earlier decision by bench of equal strength, still holds the field as the binding precedent.* (Para 8)

घ. पूर्व निर्णय – बालकराम के मामले [2007(1) MPWN 10] में कहा गया है कि पति के पक्ष में पारित दाम्पत्य अधिकारों के प्रत्यास्थापन की डिक्री, यदि एकपक्षीय हो तो भी पत्नी को भरण–पोषण का दावा करने के हक से वंचित करने के लिए पर्याप्त है – उच्च न्यायालय द्वारा बाबूलाल के मामले [1987 CrLJ 525] में दिये गये पूर्वतर निर्णय का बालकराम के मामले में संदर्भ

नहीं है – ऐसी स्थिति में जैसा कि पूर्ण न्यायपीठ द्वारा जबलपुर बस ऑपरेटर एसोसियेशन [2003(1) MPLJ 513] में स्पष्ट किया गया, समान संख्या की न्यायपीठ द्वारा दिया गया पूर्वतर निर्णय अब भी बाध्यकारी पूर्व निर्णय के रूप में प्रमुत्व रखता है।

Cases referred :

AIR 2003 SC 3174, 2002 CrLJ 2599, 2004(4) MPLJ 532, 2007(I) MPWN 10, 1987 CrLJ 525, 2003(1) MPLJ 513 (2006) 5 SCC 752, 1962 MPLJ (SN) 258, 1966 MPLJ (SN) 82, 1964 MPLJ (SN) 131, (1997) DMC 1, 2006 (1) MPLJ 495, (1999) 6 SCC 326.

Shobhitaditya, for the applicant.

T.C. Lakhera, for the non-applicants.

ORDER

R.C. Mishra, J. :–This is a petition, under Section 482 of the Code of Criminal Procedure (hereinafter referred to as 'the Code'). The petitioner is aggrieved by the order-dated 22.04.2009 passed by Additional Sessions Judge, Lakhnadon in Criminal Revision No.39/2009 affirming the maintenance order passed by Shri Thakur Das, JMFC, Lakhnadon, on 23.12.2008 in MJC No.185/05. As an obvious consequence, the petitioner is liable to pay a total amount of Rs.2500/- per month (Rs.1500/- for respondent no.1 and Rs.1000/- for respondent no.2) as maintenance allowance under Section 125 of the Code.

2. Background facts may be summed up as under –

Marriage of respondent no.1 was solemnized with the petitioner on 09.03.1999. In the wedlock, they were blessed with a daughter viz. respondent no.2, who, at the time of filing of application for grant of maintenance, was aged about 4 years. However, the marital relationship could not remain smooth and cordial. Ultimately, on 17.03.2004, the respondent no.1 along with other respondent returned to her parental home at Chhapara. Since then, she has been residing there only. On 09.06.2004, upon a written complaint made the respondent no.1, a case under Section 498A of the IPC and Section 3 read with S.4 of the Dowry Prohibition Act, 1961 was registered against the petitioner and his mother. The petitioner also filed a petition, under Section 9 of the Hindu Marriage Act, 1955, before the Family Court, Jabalpur for restitution of conjugal rights, contending that the respondent no.1 was refusing to discharge her matrimonial obligations without any reasonable excuse. In the corresponding case, registered as Civil Suit No.282-A/2005, an ex-parte decree was passed on 14.09.2006. Later on, upon an application moved by the respondent no.1 under Rule 13 of Order 9 CPC, the decree was set aside vide order-dated 13.03.2008 passed in MJC No.2/2007.

3. Assailing legality and propriety of the maintenance order, learned counsel for the petitioner has strenuously contended that while upholding it, learned ASJ completely overlooked the following material aspects of the matter -

(i) In the wake of conduct of the respondent no.1 to live separately without any sufficient cause, the petitioner was constrained to file a petition for restitution of conjugal rights and was also able to obtain an ex-parte decree for the purpose.

(ii) His acquittal in the criminal case re-affirmed his plea that he had neither treated the respondent no.1 with cruelty nor harassed her due to non-satisfaction of any demand for dowry.

4. To fortify the contentions, reliance has been placed on the under-mentioned precedents –

(i) *Deb Narayan Halder v. Smt. Anushree Halder* AIR 2003 SC 3174.

(ii) *Smt. Renu v. Hiralal* 2002 CrLJ 2599

(iii) *Sunitabai v. Lalu* 2004 (4) MPLJ 532

(iv) *Balakram v. Smt. Durgabai* 2007 (I) MPWN 10

In reply, learned counsel for the respondents has submitted the order of maintenance is well-merited in the light of the evidence on record.

5. At the outset, it may be observed that custody of the respondent no.2 is immaterial for determining the liability of her father, the petitioner here, to maintain her.

6. Coming to the question as to accountability of the petitioner as against the respondent no.1-wife, the decision in *Deb Narayan Halder's case* (supra) is also of no avail to him in the factual scenario as highlighted above, as in that case, the couple had enjoyed normal marital relationship for a considerable period of 12 years.

7. In *Renu's case* (above), the revisional order setting aside an interim maintenance order was affirmed inter alia on the ground that an ex-parte decree for restitution of conjugal rights has already been passed against wife and there was no allegation that it was obtained by fraud. However, as pointed out already, in the present case, the decree had already been annulled. The order passed in *Renu's case* also contained reference to the decision of this Court in *Babulal v. Sunita* 1987 CRI.L.J. 525 wherein it was held that decree for restitution of conjugal rights in favour of the husband would not operate as bar to the maintainability of wife's claim for grant of maintenance under Section 125 of the Code.

8. However, learned counsel for the petitioner, while inviting attention to the decision in Balakram's case (ibid), has urged that the decree, even though ex-

parte, was sufficient to disentitle the respondent no.1 from claiming maintenance but the fact remains that the earlier decision of this Court rendered in *Babulal's case* does not find reference in *Balakram's case*. In such a situation, as explained by the Full Bench of this Court in *Jabalpur Bus Operators Association v. State of MP* 2003 (1) MPLJ 513, the earlier decision by a Bench of equal strength, still holds the field as the binding precedent.

9. Still, while making reference to the decision of the Apex Court in *Mayuram Subramanian Srinivasan v. CBI* (2006) 5 SCC 752, learned counsel for the petitioner has contended that the ratio in *Babulal's case* (supra) should be ignored as having being contrary to the view expressed by co-ordinate Benches of this Court in *Sunderlal Puniwala v. Nirmalabai* 1962 MPLJ (SN) 258 and *Hiraman Singh v. Smt. Urmilabai* 1966 MPLJ (SN) 82. However, the contention is apparently misconceived as not only these precedents but also a similar ratio laid down in *State of M.P. v. Yeshpal* 1964 MPLJ (SN) 131 was referred to by the learned Judge.

10. *Sunitabai's case* (above) is also distinguishable on facts, as she not only had left the matrimonial home suppressing the factum of her earlier marriage and consequent divorce but had also divorced the second husband by executing a deed in presence of the panch witnesses.

11. This apart, it is well settled that the prosecution for the offence under Section 498A of the IPC affords a reasonable ground to the wife to live separately (See. *Lajja Bai v. Ram Singh* (1997) DMC 1. Moreover, as explained in *Dalibai v. Rajendra Singh* (2006) 1 MPLJ 495, the acquittal in the criminal case relating to the offences punishable under Section 498A of IPC and Section 3 read with S.4 of Dowry Prohibition Act would not be sufficient to wash out the statement of the respondent no.1 on oath that she had been treated with cruelty at her matrimonial home.

12. Further, the scope of interference, under Section 482 of the Code, with a revisional order is limited in view of the rider placed by sub-Section (3) of Section 397 of the Code. Accordingly, this Court may correct any mistake committed by the revisional Court only where, on examination of the record, it finds that there is grave miscarriage of justice or abuse of the process of the Court or the required statutory procedure has not been complied with or there is failure of justice. (See. *Rajathi v. C. Ganesan* (1999) 6 SCC 326). Accordingly, in view of the concurrent finding as to liability of the husband to pay the maintenance allowance, it is not necessary for this Court to re-examine the whole evidence threadbare under the inherent powers. The corresponding quantum of maintenance can also not be termed as excessive in the light of social background and standard of living of the parties.

13. For these reasons, none of the contentions raised against legality and propriety

of the maintenance order deserves acceptance. As such, no interference with the impugned order is called for.

14. In the result, the petition stands dismissed.

Petition dismissed.

I.L.R. [2010] M. P., 1221
MISCELLANEOUS CRIMINAL CASE
Before Mrs. Justice Indrani Datta
20 March, 2010*

PAYAL CHOUHAN @ VARSHA (SMT.) ... Applicant
Vs.
STATE OF M.P. & Ors. ... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 407 - Power of High Court to Transfer cases and appeals - *Transfer of case sought on the ground that NA-3 was serving as District Prosecution Officer and NA-2 is practicing lawyer - Therefore, they may use influence to affect fair trial of the case - Held - Mere apprehension that the police authority are under influence of NAs cannot be ground to hold that fair and impartial inquiry or trial cannot be held in the particular court - No ground is made out for transfer of the case - Petition dismissed.* (Paras 9 & 10)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 407 – उच्च न्यायालय की मामलों और अपीलों को स्थानांतरित करने की शक्ति – मामले का स्थानांतरण इस आधार पर चाहा गया है कि अनावेदक–3 जिला अभियोजन अधिकारी के रूप में सेवारत था और अनावेदक–2 वकालत करता है – इसलिए, मामले के सही विचारण को प्रभावित करने के लिए वे अपने प्रभाव का उपयोग कर सकते हैं – अभिनिर्धारित – मात्र आशंका कि पुलिस अधिकारी अनावेदकों के प्रभाव में है, यह मानने का आधार नहीं बनता कि विशिष्ट न्यायालय में सही और निष्पक्ष जॉच या विचारण नहीं किया जा सकता – मामला स्थानांतरित करने का कोई आधार नहीं बनता – याचिका खारिज।

Upendra Srivas, for the applicant.
Mohd. Irshad, for the non-applicants.
D.S. Tomar, for the non-applicant Nos. 2 to 10.

O R D E R

INDRANI DATTA, J. :–Heard on admission.

Admit.

With the consent of parties, the matter is heard finally at motion stage.

1. Petitioner has filed this petition under Section 407 of Cr.P.C for transfer of the Criminal Case No.1934 of 2007 pending against the respondents no.2 to 10 from the Court of JMFC, Basoda, Distt. Vidisha to JMFC, Biora, District Rajgarh.

*M.Cr.C. No.3065/2009 (Gwalior)

2. The facts in nut-shell giving rise to the filing of this petition are that the petitioner is wife of respondent no.2 Amit Chouhan. Their marriage was solemnized on 6.5.2006. Respondents no.3 and 4 are Mother in law and Father in Law of petitioner and respondent no.5 is Brother in law of petitioner. Other respondents are relatives of respondent no.2 Amit Chouhan husband of petitioner. After marriage, respondents no.2 to 10 demanded two lacs in cash and one Maruti Car from petitioner and her father. As petitioner's parents were unable to fulfill demand, hence, respondents started harassing petitioner and ultimately, on 16.3.2007, respondents no.2 to 4 forcibly left her to Biora District Rajgarh in her parental house and thereafter, refused to bring her back in matrimonial house. Since then, she is residing with her father at Biora, district Rajgarh.

3. A report was lodged by petitioner in the Police Station Biora on 28.8.2007 which was registered as Crime No.0/2007 and thereafter the case was transferred to Police Station, Ganj Basoda and same is registered at Crime No.731 of 2007 on 7.9.2009 by PS Ganj Basoda. Challan has been filed against respondents no.2 to 10 in the Court of JMFC, Ganj Basoda district Vidisha and now the case is pending in the court of JMFC Ganj Basoda Distt. Vidisha.

4. It is contended on behalf of the petitioner that initially, the case was registered as Crime No.0 of 2007 at PS Biora and thereafter, it is transferred to Ganj Basoda, whereas, the chargesheet should have been filed in the Court of Biora, distt. Rajgarh. It is further contended that respondent no.3 was serving as District Prosecution Officer in Ganj Basoda Court, hence, police authorities are under his influence and respondent no.2 is also a lawyer practicing at Ganj Basoda and he may also use his influence to affect fair trial of the case. Hence, it is prayed that this case pending in the Court of JMFC, Ganj Basoda Distt. Vidisha be transferred to the JMFC, Biora, District Rajgarh.

5. Learned Panel Lawyer and counsel for the respondents no.2 to 10 opposed the application and submitted that the demand of dowry was made at Ganj Basoda, District Vidisha, hence the Court at Ganj Basoda has jurisdiction to deal with the matter. Therefore, no ground is made out for transferring the case from the Court of JMFC, Ganj Basoda, Distt. Vidisha to the court of JMFC, Biora, Distt. Rajgarh.

6. Heard rival contentions of the parties and perused the documents brought on record.

7. Before going into the merits of the case, it would be relevant to go through the provisions of Section 177 and 178 of Cr.P.C as it deal with the ordinary place of inquiry and trial which read thus :

> "Section 177: ORDINARY PLACE OF INQUIRY AND TRIAL :
>
> Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed."

"Section 178: PLACE OF INQUIRY OR TRIAL :

(a). When it is uncertain in which of several local areas an offence was committed, or

(b). where an offence is committed partly in one local area and partly in another, or

©. where an offence is continuing one, and continues to be committed in more local areas than one, or

(d). where it consists of several acts done in different local areas, it may be inquired.

Into or tried by a Court having jurisdiction over any of such local areas".

8. A bare reading of section 177 and 178 of Cr.P.C, it is clear that as the alleged demand of dowry is made at Ganj Basoda, hence, Ganj Basoda Court has jurisdiction to try the case, hence, first contention of learned counsel for petitioner that charge sheet should have been filed in the Court of JMFC, Biora is not acceptable.

9. Second contention raised by learned counsel for the petitioner is that respondent No.3 was serving as Distt. Prosecution Officer Ganj Basoda, District Vidisha, hence, police authorities are under his influence and respondent no.2 is also practicing at Ganj Basoda and he may also use his influence to affect fair trial of the case. hence, the case is to be transferred from the Court of JMFC, Ganj Basoda district Vidisha to the Court of JMFC, Biora, District Rajgarh, this contention also cannot be accepted. For this purpose, a fair reading of section 407(1) Cr.P.C would be required which reads as under:

"407. Power of high court to transfer cases and appeals : (1) Whenever it is made to appear to the High Court :–

(a). that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b). that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice"

10. In the present case, it seems that it is only apprehension of the petitioner that police authorities are under influence of respondent no.3 but this ground seems to be baseless as charge sheet has already been filed, therefore, there is no question of causing any influence by respondents no. 3 on the police officers. Therefore, it cannot be said that the fair and impartial trial cannot be held in Ganj Basoda Court. Further submission that the respondent no.2 is practicing as lawyer at Ganj Basoda District Vidisha and he may also use his influence to affect fair trial of the

case, has no basis as his place of residence as mentioned in the main petition is at Bhopal. So this contention also seems to be unreasonable.

11. Considering the facts of the case, no ground is made out for transfer of the Cr.Case No.1934 of 2007 pending against the respondents no.2 to 10 from the Court of JMFC, Ganj Basoda, District Vidisha to JMFC, Biora, District Rajgarh. Consequently, this petition being bereft of any substance, is hereby dismissed.

Petition dismissed.

I.L.R. [2010] M. P., 1224
MISCELLANEOUS CRIMINAL CASE
Before Mrs. Justice Indrani Datta
31 March, 2010*

SULEMAN KHAN & ors. ... Applicants
Vs.
STATE OF M.P. ... Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 408 - *Power of Sessions Judge to transfer cases and appeal - Session Trial is on the verge of conclusion and was fixed for final arguments before Sessions Judge - At that stage case was transferred to the court of third ASJ - Held - Nothing is apparent from the record that the case was transferred because, it was expedient for the ends of justice - Order set a side - Case is sent back to the court of Sessions Judge.* (Para 11)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 408 – मामले तथा अपील अंतरण करने की सेशन न्यायाधीश की शक्ति – सेशन विचारण निर्णायक अवस्था में था और सेशन न्यायाधीश के समक्ष अन्तिम बहस के लिए नियत था – इस प्रक्रम पर मामला तृतीय अपर सेशन न्यायाधीश के न्यायालय को अंतरित किया गया – अभिनिर्धारित – अभिलेख से ऐसा कुछ भी प्रकट नहीं होता है कि मामला इसलिए अंतरित किया गया क्योंकि यह करना न्याय के उद्देश्यों की पूर्ति के लिए समीचीन था – आदेश अपास्त – मामला सेशन न्यायाधीश के न्यायालय को वापस भेजा गया।

B. Criminal Procedure Code, 1973 (2 of 1974), Sections 408 & 409 -*Power exercisable u/s. 408 is a judicial power whereas the power exercisable u/s 409 is an administrative power - For exercising a power u/s. 408 there is no such embargo on the Sessions Judge to see as to whether the trial of the case or the hearing of an appeal, as the case may be, has commenced or not.* (Para 9)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 408 व 409 – धारा 408 के अंतर्गत प्रयोज्य शक्ति न्यायिक शक्ति है जबकि धारा 409 के अंतर्गत प्रयोज्य शक्ति प्रशासनिक शक्ति है – धारा 408 के अंतर्गत शक्ति का प्रयोग करते समय सेशन न्यायाधीश पर ऐसी कोई रोक नहीं है कि वे यह देखे कि क्या मामले का विचारण अथवा अपील की सुनवाई, जैसे भी स्थिति हो, प्रारंभ हुयी है अथवा नहीं।

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*M.Cr.C. No.1523/2010 (Gwalior)

Cases referred:

2006 CrLJ 4152, 2006 CrLJ 2956.

Arun Pateria, for the applicants.
Nutan Saxena, P.P., for the non-applicant.
F.A. Shah, for the complainant.

ORDER

INDRANI DATTA, J. :–Heard on admission.

Admit.

1. With the consent of the parties, the matter is heard finally at motion stage.

2. Invoking extraordinary jurisdiction of this court, this petition has been preferred under section 482 of Cr.P.C for setting side the order dated 8.2.2010 passed by Third ASJ, Shivpuri allowing prosecution's application filed under Section 311 Cr.P.C for recalling witness Ajeet Singh and also for setting aside the order dated 27.1.2010 passed by Sessions Judge, Shivpuri concerning transfer of Sessions trial No.215 of 2006 from his court to the court of Third ASJ, Shivpuri.

3. The facts of the case in nut-shell giving rise to this petition are that the petitioners are facing Session Trial No.215 of 2006 in the Court of Sessions Judge Shivpuri for offence under section 307, 323, 147, 148 and 149 IPC and a cross case is also pending against complainant party in that Court. Evidence of prosecution witnesses was recorded in the Court of Sessions Judge, Shivpuri. Petitioners-accused were examined under section 313 CrPC in that court and after examination of defence witnesses, the case was fixed for arguments on 27.1.2010. On that day, learned Sessions Judge, transferred the case without any reason to the Court of Third ASJ, Shivpuri. Third ASJ, Shivpuri allowed the application filed by prosecution under section 311 Cr.P.C for recalling witness Ajeet Singh, hence, this revision for setting-aside impugned orders.

4. It is contended on behalf of the petitioners that so far as order dated 8.2.2010 passed by Third ASJ, Shivpuri allowing prosecution's application for recalling witness Ajeet Singh is concerned, that witness has already been recalled and cross-examined, therefore, he does not want to press his prayer for setting aside the order dated 8.2.2010 passed by Third ASJ, Shivpuri. He is only confining his argument concerning order of transfer of the case passed by learned Sessions Judge, Shivpuri from his Court to the Court of Third ASJ, Shivpuri.

5. Learned counsel for the petitioners submitted that the order passed by learned Sessions Judge is perverse and illegal as, when total trial of the case was conducted in Sessions Court and matter was fixed for arguments, it was not proper and reasonable to transfer the case without any ground under section 408 and 409 Cr.P.C.

6. Learned counsel for the complainant on the other hand has opposed the

petition and submitted that the order of transfer of a case is purely an administrative order, so it is legal. It is further admitted by him that he has no objection if the case is heard by Sessions Judge.

7. Heard rival contention of learned counsel for the parties and perused the documents on record.

8. In the present case, before going into the merits of the case, perusal of Section 408 Cr. P.C would be relevant, which read as follows :

> "408. Power of Sessions Judge to transfer cases and appeal-(1) Whenever it is made to appear to a Sessions Judge that an order under this subsection is expedient for the ends of justice, he may order that any particular case be transferred from one Criminal Court to another Criminal Court in his sessions division.
>
> (2). the Sessions Judge may act either on the report of the lower Court, or on the application of a party interested or on his own initiative
>
> (3). the provisions of sub-sections (3), (4), (5), (6), (7) and (9) of section 407 shall apply in relation to an application to the Sessions Judge for an order under sub-section (1) as they apply in relation to an application to the High Court for an order under sub-section (1) of section 407 except that sub-section (7) of that section shall so apply as if for the words "one thousand rupees" occurring therein, the words "two hundred and fifty rupees" were substituted".

9. In case of *Avinash Singh Vs. State of Chhattisgarh* 2006 CRI.L.J 4152 it is held that powers under Sections 408 and 409 of the Code are independent. Section 408 deals with the power of Sessions judge to transfer the cases and appeals, whenever it is made to appear that an order under sub-section (1) is expedient for the ends of justice. It has further been provided that the Sessions Judge may act either on the report of the lower Court or on the application of a party interested or on his own initiative. Section 409 provides for withdrawal of cases and appeals by the Sessions Judge which he has made over to any Additional Sessions Judge or the CJM subordinate to him. Sub-section (2) of section 409 indicates that the Sessions Judge would exercise this power at any time before the trial of the case or hearing of the appeal has commenced before the Additional Sessions Judge. Sub-section (3) provides that after calling of the case back, the Sessions Judge may either try the case in his own cout or hear the appal himself or make it over in accordance with the provisions of this Code to another court for trial or hearing, as the case may be. A perusal of both these sections would show that the power exercisable under section 408 is a judicial power whereas the power exercisable under section 409 is an administrative power and for exercising

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

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

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

Order accordingly.
