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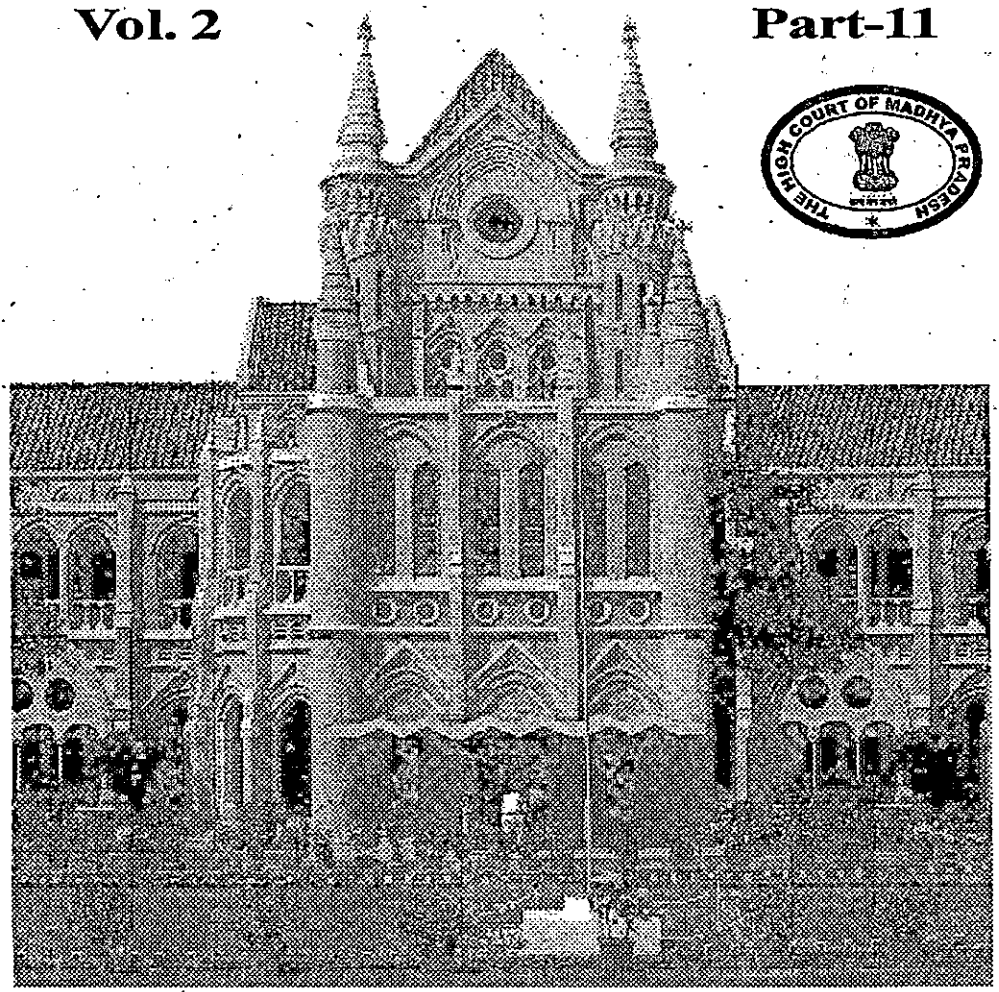
THE INDIAN LAW REPORTS

CONTAINING M. P. SERIES

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

Vol. 2 **Part-11**



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(pp. 2243 to 2441) *

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TABLE OF CASES REPORTED

(Note An asterisk (*) denotes Note number)

******

N.K. Maheshwari, for the appellants.

B.L. Pavecha with *Nitin Phadke,* for the respondents.

***S.A. No.220/2003 (Indore) D/- 16 July, 2010.**

Short Note
*(55)**

Rakesh Saksena &
Smt. Sushma Shrivastava, JJ

SURYAKANT SINGH
Vs.
STATE OF M.P.

Evidence Act (1 of 1872), Section 3, Penal Code, 1860, Sections 302 & 201 - ***Appreciation of evidence - Murder - Deceased the wife of accused/appellant was last seen in company of the accused on same day- Accused Previously maltreated the deceased- The car used by accused was got washed, its seat covers were changed and car repaired by denting & painting soon after occurrence- Medical evidence confirmed that death by gun shot injury and bullet recovered from the spot could be fired by gun recovered at the instance of accused- All the circumstances proved by prosecution had clear tendency to indicate that it was accused/ appellant who had committed the offence. Conviction & sentence passed by trial court affirmed- Appeal dismissed.***

साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड संहिता, 1860, धाराएँ 302 व 201 – साक्ष्य का अधिमूल्यन – हत्या – मृतिका आरोपी की पत्नि को उसी दिनांक को आखिरी बार अभियुक्त/अपीलार्थी के साथ देखा गया – पूर्व में अभियुक्त ने मृतका के साथ दुर्व्यवहार किया – अभियुक्त द्वारा इस्तेमाल की गयी कार को घटना के तत्काल बाद धुलवा दिया गया, इसके सीट कवर को बदलवा दिया गया, एवं कार की डेन्टिंग पेंटिंग कर मरम्मत करवा दी गयी – चिकित्सीय साक्ष्य द्वारा गोली लगने के कारण मृत्यु तथा घटना स्थल से बरामद गोली अभियुक्त द्वारा बरामद करवाई गयी बन्दूक से दागे जा सकने की पुष्टि अभियोजन द्वारा साबित की गयी परिस्थितियां अभियुक्त/अपीलार्थी द्वारा अपराध कारित किये जाने का स्पष्ट संकेत है – विचारण न्यायालय द्वारा पारित दोषसिद्धि एवं दण्डादेश की पुष्टि – अपील खारिज।

Case referred :

AIR 2002 SC 3164.

Vishal Dhagat & Mukesh Shukla, for the appellant
Chanchal Sharma, G.A. for the respondent.

***Cr.A. No.2659/2008 (Jabalpur), D/- 19 January, 2010.**

NOTES OF CASES SECTION

Short Note

(56)*

R.K. Gupta, J

ACME PAPERS LIMITED (M/S)

Vs.

M.P. FINANCIAL CORPORATION & anr.

A. Civil Procedure Code (5 of 1908), Order 21 Rules 89 & 90, Limitation Act, 1963, Section 5, Article 127 - *Commencement of period of limitation for the said purpose is the date of sale - S. 5 of Limitation Act has no application.*

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 89 व 90, परिसीमा अधिनियम, 1963, धारा 5, अनुच्छेद 127 – उक्त प्रयोजन हेतु परिसीमा की कालावधि विक्रय दिनांक से प्रारम्भ होती है – परिसीमा अधिनियम की धारा 5 प्रयुक्त नहीं है।

B. Limitation Act (36 of 1963), Section 14 - *Requirement of section is that the said proceedings were chosen and were taken up with due diligence - Mere prosecution of remedy by itself would be sufficient to ignore the period of limitation spent in prosecuting the remedy before a wrong forum.*

ख. परिसीमा अधिनियम (1963 का 36), धारा 14 – इस धारा की आवश्यकता यह है कि उक्त कार्यवाही का चुनाव एवं प्रारम्भ समुचित सावधानी से किया गया – उपचार हेतु अग्रसरण ही अपने आप में गलत न्यायालय के समक्ष उपचार को अग्रसर करने में व्यतीत परिसीमा की कालावधि छोड़ देने हेतु पर्याप्त है।

Rajesh Pancholi, for the appellant.

None, for the respondent No.1.

Ravish Agrawal with *K.S. Jha,* for the respondent No.2.

***M.A. No.2398/2003 (Jabalpur), D/- 9 July, 2010.**

Short Note

(57)*

Sanjay Yadav, J

ANITA KHARE (SMT.)

Vs.

STATE OF M.P. & ors.

Criminal Procedure Code, 1973 (2 of 1974), Section 24, Legal Remembrance Manual, Rule 18 - ***Extension of terms of Government Pleaders and Additional Government Pleaders*** - *Extension granted on the basis of recommendation by District Magistrate having approved by District & Sessions Judge - Held - S. 24 of the Code does not speak about extension or renewal of terms of person so appointed - Same procedure, as provided u/s 24(4) has to be followed for extension - No panel of names prepared by District Magistrate - No effective consultation between District Magistrate and Sessions Judge - Provisions not complied - Appointment quashed - Petition allowed.*

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 24, विधि परामर्श निर्देशिका, नियम 18 – सरकारी अधिवक्ताओं तथा अतिरिक्त सरकारी अधिवक्ताओं के कार्यकाल में विस्तार – जिला एवं सेशन न्यायाधीश द्वारा अनुमोदित किये जाने पर, जिला मजिस्ट्रेट की सिफारिश के आधार पर विस्तार प्रदान किया गया – अभिनिर्धारित – इस प्रकार से नियुक्त व्यक्ति के कार्यकाल के विस्तार या नवीकरण के संबंध में संहिता की धारा 24 मौन है – विस्तार के लिये उसी प्रक्रिया का अनुसरण करना होगा जैसा कि धारा 24(4) के अंतर्गत उपबंधित है – जिला मजिस्ट्रेट द्वारा नामों का कोई पैनल तैयार नहीं किया गया – जिला मजिस्ट्रेट और सेशन न्यायाधीश के बीच कोई प्रभावकारी परामर्श नहीं हुआ – उपबंधों का अनुपालन नहीं किया – नियुक्ति अभिखंडित – याचिका मंजूर।

Case referred :

AIR 2004 SC 3800.

S.P. Sinha with *Ashok Sinha,* for the petitioner.
Harish Agnihotri, G.A. for the respondent Nos.1 & 2.
T.K. Modh, for the respondent Nos.3 & 4.

***W.P. No.9073/2009 (Jabalpur), D/- 5 August 2010.**

Short Note
(58)*

Sanjay Yadav, J

ASHIT VERMA & ors.
Vs.
STATE OF M.P. & ors.

Excellent Player Certificate - *Cancellation - Permissibility - Excellent Player Certificate granted to the petitioner cancelled for the alleged irregularity in the selection process - Action challenged - Held - Merely on the basis of the finding of certain irregularities in the procedure whereunder the players had no role to play, extreme steps were taken by cancelling the entire selection not warranted - Order quashed.*

उत्कृष्ट खिलाड़ी प्रमाण पत्र – रद्दकरण – अनुज्ञेयता – याची को प्रदत्त उत्कृष्ट खिलाड़ी प्रमाण पत्र, चयन प्रक्रिया में कथित अनियमितता के कारण रद्द किया गया – कार्यवाही को चुनौती दी गई – अभिनिर्धारित – मात्र प्रक्रिया में कुछ अनियमितताओं के पाये जाने के आधार पर, जहां खिलाड़ी कोई भूमिका नहीं रखते थे, संपूर्ण चयन को रद्द करके आत्यंतिक कदम उठाये गये, जो समर्थनीय नहीं हैं – आदेश अभिखंडित।

Cases referred :

(1998) 4 SCC 37, (2000) 9 SCC 283, (2002) 3 SCC 146, (2003) 7 SCC 285, (relied upon).

Sujoy Paul, for the petitioner.
Harish Agnihotri, G.A. for the respondent/State.

***W.P. No.338/2000 (Jabalpur), D/- 29 June, 2010.**

NOTES OF CASES SECTION

Short Note
(59)*

Alok Aradhe, J

BANSHIDHAR GOYANKA
Vs.
ALOK KUMAR & ors.

A. Limitation Act (36 of 1963), Section 5 - *Condonation of delay - Powers of the Court - Held - The matter of condonation of delay is in the discretion of the Court.*

क. परिसीमा अधिनियम (1963 का 36), धारा 5 – विलम्ब की माफी – न्यायालय की शक्तियाँ – अधिनिर्धारित – विलम्ब की माफी न्यायालय का विवेकाधिकार है।

B. Civil Procedure Code (5 of 1908), Section 115 - *Powers of High Court - Held - If the order passed by the Trial Court is in the interest of justice, the High Court can refuse to interfere u/s 115 of CPC even if the order suffers from material irregularity or illegality, unless grave injustice or hardship would result from failure to do so..*

Trial Court vide impugned order allowed the application preferred by non-applicant under Order 9 Rule 13 of the Code of Civil Procedure. It was found that summons were served on 17.05.1999. However on 1.4.1999 plaintiff filed an application for amending the plain extensively. The said application was allowed by trial court. However, no notice of the amended plaint was issued to defendants. Trial Court further held that on 25.06.1999, the presiding Officer was on leave which was a formal date. Therefore, fresh summons ought to have been issued. Trial Court further held that non-applicant No.1 derived knowledge of the ex parte decree on 26.01.2007. Accordingly, the ex parte decree was set aside and non-applicant No.1 was directed to pay costs of Rs. 5,000/- to plaintiff.

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 115 – उच्च न्यायालय की शक्तियाँ – अभिनिर्धारित – यदि विचारण न्यायालय द्वारा पारित आदेश न्यायहित में है, तो आदेश तात्विक अनियमिता एवं अवैधता से ग्रस्त होने पर भी, उच्च न्यायालय सि.प्र.सं. की धारा 115 के अन्तर्गत हस्तक्षेप करने से इनकार कर सकता है, जब तक कि ऐसा करने में असफलता से गंभीर अन्याय अथवा कठिनाई न हो।

Cases referred :

2000(I) WN 97, AIR 1981 Orissa 202, 2008(5) MPHT 2 (SC), 2004(4) MPLJ 537, 2000(2) WN Note No.116, (2002) 5 SCC 377, 2004(4) MPHT 53, 1991 MPLJ 329, 2005(5) MPHT 23, 1977 MPWN Note (339), 1991 MPLJ 329, 1993(1) MPWN Note 339, 1991 MPLJ 329, 1993 MPWN Note (7), 1964 JLJ SN 78, 1978(I) MPWN 443, 1986 CCLJ N-39, 1994 JLJ 747, 2003(1) MPLJ 513, 2000(1) MPLJ 407, (2009) 9 SCC 94, (1998) 7 SCC 123, 2003(1) MPLJ 310 (relied upon).

S.S. Tiwari, for the applicant.
Archana Nagariya, for the non-applicants.

***C.R. No.382/2009 (Jabalpur) D/- 28 July, 2010.**

Short Note
(60)*

Arun Mishra & Mrs. Sushma Shrivastava, JJ

JABALPUR CO-OPERATIVE MILK PRODUCERS UNION LTD.
Vs.
UNION OF INDIA & ors.

Income Tax Act (43 of 1961), Section 142(2-A) - *Order of assessment and bill of special auditor challenged - The wrong and improper posting made the account complex, thus, it was considered necessary to resort to special audit - It can not be said that provision has been violated in any manner - Petition dismissed.*

आयकर अधिनियम (1961 का 43), धारा 142(2–ए) – कर निर्धारण के आदेश एवं विशेष लेखापरीक्षक के बिल को चुनौती – त्रुटिपूर्ण एवं अनुचित प्रविष्टियों के कारण खातों में जटिलता उत्पन्न हो गयी, इस प्रकार विशेष लेखापरीक्षा कराना आवश्यक समझा गया – यह नहीं कहा जा सकता कि उपबंध का किसी प्रकार से उल्लंघन किया गया है – याचिका खारिज ।

Cases referred :

(2006) 287 ITR 91 (SC), (2008) 300 ITR 403, 2005 (72) ITR 482.

Sumit Nema, for the petitioner.
Sanjay Lal, for the respondent Nos.1 to 3.
Sapan Usrethe, for the respondent No.4.

***W.P. No.2420/1997 (Jabalpur), D/- 18 March, 2010.**

Short Note
(61)*

S.K. Gangele & Abhay M. Naik, JJ

KHOOBIRAM
Vs.
SMT. URMILA CHOUHAN & ors.

Specific Relief Act (47 of 1963), Section 28 - ***Rescission of contract for sale*** *- In a case where decree holder is not directed, under decree of specific performance of execution of sale deed, to pay the balance and rather the judgment debter is directed to receive the balance amount and execute the sale deed, within a stipulated time, the non-payment of balance amount by decree holder will not attract S. 28, unless the judgment debtor gives a notice by himself or through the Court requiring decree holder to pay/deposit the balance - Petition dismissed.*

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 28 – विक्रय की संविदा का विखंडन – किसी मामले में जहाँ विक्रय विलेख के निष्पादन की विनिर्दिष्ट अनुपालन की डिक्री के अन्तर्गत डिक्रीदार शेष राशि भुगतान करने हेतु निदेशित नहीं है एवं निर्णीत–ऋणी शेष राशि प्राप्त किये जाने एवं निर्धारित समय में विक्रय विलेख निष्पादित किये जाने के लिये निदेशित है, डिक्रीदार द्वारा शेष राशि का भुगतान न किया जाना धारा 28 को आकृष्ट नहीं करेगा, जब तक कि निर्णीत ऋणी स्वयं अथवा न्यायालय के माध्यम से डिक्रीदार से शेष राशि भुगतान/जमा करने की अपेक्षा करते हुए सूचना नहीं दे देता – याचिका खारिज।

Cases referred :

(2007) 14 SCC 26, (2009) 8 SCC 766, AIR 1999 SC 918, AIR 1962 Raj 54, AIR 1988 J&K 1.

K.N. Gupta with *M.B. Mangal,* for the petitioner.

R.S. Pawaiya, for the respondent No.1.

***W.P.No. 3952/2008(Gwalior) D/- 19 May, 2010.**

Short Note
(62)*

Arun Mishra & S.C.Sinho, JJ

M.M. TRADERS
Vs.
STATE OF M.P. & ors.

Central Sales Tax Act (74 of 1956), Section 3 - *Inter-State sale - What amounts to - Held - The sale would be inter-state sale in case there is stipulation express or implied in the agreement of sale or the movement of goods is incidental and must be the necessary consequence of sale or purchase - It must be a case of cause and effect; cause being sale & purchase and effect being movement of the goods from one State to another - The sale and movement of goods must be a part of same transaction.*

केन्द्रीय विक्रय कर अधिनियम (1956 का 74), धारा 3 – अन्तर्राज्यिक विक्रय – की कोटि में क्या आता है – अभिनिर्धारित – विक्रय अन्तर्राज्यिक विक्रय होगा यदि विक्रय के करार में अभिव्यक्त या विवक्षित शर्त हो या माल का संचलन आनुषंगिक हो और विक्रय या क्रय का आवश्यक परिणाम हो – इसे कार्य कारण का मामला होना चाहिए, कारण विक्रय और क्रय हो और कार्य एक राज्य से दूसरे में माल का संचलन हो – विक्रय और माल का संचलन एक ही संव्यवहार का भाग होना चाहिए।

Cases referred :

AIR 1961 SC 65, AIR 1963 SC 980, AIR 1966 SC 563, AIR 1966 SC 1216, (1970) 3 SCC 697, AIR 1955 SC 661, AIR 1964 SC 1752, 25 STC 527, (1975) 1 SCC 733, (1976) 2 SCC 44, (1979) 2 SCC 24, (1992) 3 SCC 750, (2007) 9 SCC 97, 2007(7) VST 214 (SC).

Rajendra Shrivastava, Sheel Nagu, Sumit Nema with *Mukesh Agrawal, Ashish Rawat, Sanjay Mishra,* for the petitioners.

P.K. Kaurav, Dy.A.G., for the respondent/State.

***W.P. No.8996/2010 (Jabalpur), D/- 15 July, 2010.**

NOTES OF CASES SECTION

Short Note

(63)*

Sanjay Yadav, J

MAHMOOD HASAN & ors.

Vs.

SOUTH EASTERN COALFIELDS LTD. & ors.

Constitution, Article 226 & 227 - *Writ of Mandamus* - *Petitioners working as teachers in school managed by Western Coalfields Limited Educational Society (WCLES) sought Mandamus to SECL for granting various allowances at par with State Govt. teachers and/or benefits given to coalfields employee under National Coal Wage Agreement (NCWA), on the grounds that the effective control of the Society (WCLES) vests with WCL and 100% grant is given to society by SECL and some other teachers are also being given the benefit - Held - (1) There being no deep pervasive control of the WCL/SECL in the management of the Society which is an independent entity, which is the necessary coroliary to claim for grant of wages and other allowances as per NCWA, (2) The petitioners have failed to establish that they are the employees of the erstwhile Associated Cement Company, to get the succour u/s 14 of Nationalization Act, (3) The petitioners are shown to be temporary teachers and no material is brought on record to show that any regular procedure known to law was adhere at while engaging the petitioners as teachers - The petitioners, therefore, cannot as a matter of right claim parity with regular teachers in respect of pay and allowances.* (Paras 17, 19 & 20)

संविधान, अनुच्छेद 226 व 227 – परमादेश रिट – वेस्टर्न कोलफील्डस् लिमिटेड शिक्षा सोसाइटी (डब्ल्यू.सी.एल.ई.एस.) द्वारा संचालित विद्यालय में अध्यापकों के रूप में कार्यरत याचियों ने राज्य सरकार के अध्यापकों के समतुल्य विभिन्न भत्ते और/या नेशनल कोल वेज ऐग्रीमेंट (एन.सी. डब्ल्यू.ए.) के अधीन कोलफील्डस् कर्मचारी को दिये गये लाभों को प्रदान करने लिये एस.ई.सी.एल. को परमादेश इस आधार पर चाहा कि सोसाइटी (डब्ल्यू.सी.एल.ई.एस.) का प्रभावी नियंत्रण डब्ल्यू.सी.एल के साथ निहित है और सोसाइटी को एस.ई.सी.एल. द्वारा 100 प्रतिशत अनुदान दिया जाता है और कुछ अन्य अध्यापकों को भी लाभ दिया जा रहा है – **अभिनिर्धारित** – (1) सोसाइटी जिसका अपना स्वतंत्र अस्तित्व है, के प्रबंधन में डब्ल्यू.सी.एल./एस.ई.सी.एल. का कोई गहरा व्यापक नियंत्रण नहीं है जो कि एन.सी.डब्ल्यू.ए. के समतुल्य वेतन तथा अन्य भत्ते प्रदान करने का दावा करने लिये आवश्यक अनुमान है, (2) याची राष्ट्रीयकरण अधिनियम की धारा 14 के अंतर्गत सहायता प्राप्त करने के लिये यह स्थापित करने में असफल रहे कि वे भूतपूर्व एसोसियेटेड सीमेंट कम्पनी के कर्मचारी हैं, (3) याचियों को अस्थायी अध्यापक दर्शाया गया है और अभिलेख पर यह दर्शाने वाली कोई सामग्री नहीं लायी गयी है कि याचियों को अध्यापकों के रूप में नियोजित करते समय विधिज्ञात किसी नियमित प्रक्रिया का दृढ़ता से पालन किया गया – इसलिए, याची वेतन एवं भत्तों के संबंध मे नियमित अध्यापकों के साथ समता का दावा अधिकार के रूप में नहीं कर सकते।

Cases referred :

(1989) 1 SCC 121, (2002) 6 SCC 72, (2007) 8 SCC 279, (2008) 11 SCC 60, (1997) 3 SCC 571, (1998) 3 SCC 362, (2000) 2 SCC 42, AIR 2004 SC 3644.

NOTES OF CASES SECTION

U.K. Sharma with *A. Verma,* for the petitioners.
P.S. Nair with *S. Dixit,* for the respondents.

***W.P. No.518/1996 (Jabalpur), D/- 21 April 2010.**

Short Note
*(64)**

Piyush Mathur, J .

MANISH GUPTA
Vs.
STATE OF M.P. & ors.

A. Service Law - *Guest Faculty for giving lectures required to swear in affidavit that he/she is not involved in teaching in other institution - Purpose - Held - A close scrutiny and comparative analysis of Clause (8) and Condition No.10(4) clearly reveal that the purpose of seeking such an affidavit from a candidate, is to secure an undertaking that the Guest Faculty shall devote his/her optimum time, effort and energy in preparing and delivering good lectures to the students and shall not treat the assignment to be a multiple engagement with multiple educational institutions, with a solitary objective of earning more and more honorarium.*

क. सेवा विधि – अतिथि विद्वानों द्वारा व्याख्यान देने के लिये शपथपत्र पर शपथ लेना आवश्यक है कि वह अन्य संस्था में अध्यापन कार्य में शामिल नही है – प्रयोजन – अभिनिर्धारित – खंड (8) व शर्त क्र. 10(4) की सूक्ष्म जाँच तथा तुलनात्मक विश्लेषण से यह स्पष्ट रूप से प्रकट होता है कि अभ्यर्थी से ऐसा शपथ पत्र चाहने का प्रयोजन यह वचन सुनिश्चित करना है कि अतिथि विद्वान अच्छे व्याख्यान तैयार करने तथा विद्यार्थियों को देने में अपना सर्वोत्तम समय, प्रयास एवं उर्जा समर्पित करेगा/करेगी और कर्तव्य भार को ज्यादा से ज्यादा मानदेय प्राप्त करने के एकमात्र उद्देश्य के साथ विविध शैक्षणिक संस्थाओं के साथ बहुविध नियोजन के रूप मे नहीं लेगा।

B. Service Law - ***Reasonable restriction on multiple employment*** - *Clause 10(4) of the invitation letter stipulated that the Guest Faculty member should not be involved in teaching in any other college - Held - There appears to be a clear objective behind asking a Guest Faculty about his other engagements with other college and even if the same is taken or felt as a "restriction" for obtaining analogous employment, the same seems to consist of a pious nexus with the objective, sought to be achieved by the Higher Education Department and/or the college - It passes the test of reasonableness and could not be classified as "unreasonable" in any manner.*

ख. सेवा विधि – बहुविध नियोजन पर युक्तियुक्त निर्बन्धन – आमंत्रण पत्र के खंड 10(4) में निर्दिष्ट है कि अतिथि विद्वान सदस्य को अन्य किसी महाविद्यालय में अध्यापन कार्य में सम्मिलित नहीं होना चाहिए – अभिनिर्धारित – अतिथि विद्वानों से उसके अन्य महाविद्यालय के साथ अन्य काम–काज के संबंध में पूछने के पीछे स्पष्ट उद्देश्य प्रतीत होता है और यद्यपि उसे सदृश नियोजन प्राप्त करने के लिए "निर्बन्धन" माना या समझा जाए तथापि वह उस उद्देश्य के साथ पुनीत संबंध मे अनुरूप होना प्रतीत होता है जिसे उच्च शिक्षा विभाग और/अथवा महाविद्यालय द्वारा प्राप्त

करना चाहा गया है – वह युक्तियुक्तता की परीक्षा मे सफल होता है और किसी प्रकार से उसका "अयुक्तियुक्त" के रूप मे वर्गीकरण नहीं किया जा सकता।

S.C. Sharma, for the petitioner.

Nidhi Patankar, Dy.G.A., for the respondents.

***W.P. No.5230/2009 (Gwalior), D/- 2 August, 2010.**

Short Note

(65)*

I.S. Shrivastava, J

MULCHAND

Vs.

UNION OF INDIA

A. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8/18(b) & 8/21(c) - ***Proof*** - *Independent witnesses not supporting prosecution case - Compliance of S. 52 not proved - House from where the contraband was seized, not proved to be in ownership and possession of accused - Seized property/contraband not produced before Court and only samples were produced - Held - Accused not liable to be convicted.*

क. स्वापक औषधि और मन:प्रभावी पदार्थ अधिनियम (1985 का 61), धाराएँ 8/18(बी) व 8/21(सी) – सबूत – स्वत्रंत साक्षियों ने अभियोजन का समर्थन नहीं किया – धारा 52 का अनुपालन साबित नहीं हुआ – घर, जहाँ से निषिद्ध पदार्थ अभिग्रहीत किया गया अभियुक्त के स्वामित्व और कब्जे का होना साबित नहीं हुआ – अभिग्रहीत सम्पत्ति/निषिद्ध पदार्थ न्यायालय के समक्ष पेश नहीं किया गया और केवल नमूने पेश किये गये – अभिनिर्धारित – अभियुक्त दोषसिद्ध किये जाने के लिए दायी नहीं।

B. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8/29(18b) & 8/29(21-c) - *Rs.1,57,000/- recovered from accused / appellant in persuance of statement of co-accused that he had given advance of Rs.1,60,000/- to accused* - ***Held*** - *The statement of co-accused is doubtful and not reliable, recovery of money from house of accused is not proved, and it has also not been proved that the accused had received that money from co-accused - Conviction and sentence can not be sustained.*

During investigation, accused Sunderlal informed that for the preparation of morphine, opium is required and he purchased the same from his relative accused Mulchand on 06.02.1997, he had advanced Rs. 1,60,000/- to Mulchand for the purchase of 30 Kg opium. On the basis of the statement of Sunderlal, on 13.02.1997, preventative party raided the house of Mulchand and seized Rs. 1,57,000/-. He disclosed the fact that he received this money from Sunderlal for opium and he had spent Rs. 3,000/- Mulchand was also arrested.

Held - Rs.1,57,000/- was seized from the possession of accused on 13.02.1997 at 1 pm vide seizure memo. Thereafter, vide arrest memo,

he was arrested at 5 pm on 13.02.1997. There is no explanation, as to why accused was not arrested at 1 pm when Rs.1,57,000/- was seized from him. Why there is a gap of four hours in his arrest. Papers show that on 13.02.1997 a complaint was sent to SP by U.P.C. and after complaint an anticipatory bail application was filed in Sessions Court which was registered as Misc. case no. 87/1997. This creates doubt about genuineness of the proceedings taken up by the Investigating Officer, hence the appellant is entitled for benefit of doubt.

It is pertinent to note that on 07.02.1997 Sunderlal did not disclose the fact that he advanced money of Rs.1,60,000/- to accused for the purchase of 30 Kg opium. That was only on 12.02.1997 on the second statement, this fact was disclosed and the seizure was made on 13.02.1997. All these circumstances creates suspicion about the recovery of Rs.1,57,000/- and creates doubts about the prosecution story.

ख. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराएँ 8/29(18–बी) वं 8/29(21–सी) – सह–अभियुक्त के कथन, कि उसने 1,60,000/– रुपये का अग्रिम अभियुक्त को दिया था, के अनुसरण में अभियुक्त/अपीलार्थी से 1,57,000/– रुपये बरामद किये गये – अभिनिर्धारित – सह–अभियुक्त का कथन शंकास्पद है और विश्वसनीय नहीं है, अभियुक्त के घर से रुपये की बरामदगी साबित नहीं हुई है, और यह भी साबित नहीं हुआ है कि अभियुक्त ने वह रुपया सह–अभियुक्त से प्राप्त किया था – दोषसिद्धि और दण्डादेश कायम नहीं रखे जा सकते।

Cases referred :

ACR-II (2006) 362, 2001(1) ERF 160, (2004) 10 SCC 562, 2008(iv) AD-Cri (SC) 337, 2009(2) JLJ 148, AIR 1996 SC 3033, 2001(2) EFR 6, 2009 CrLJ 2407.

D.D. Vyas with *Ashish Sharma,* for the appellants.

Manoj Soni, for the respondent/CBN.

***Cr.A. No.67/2004 (Indore), D/- 29 June, 2010.**

Short Note

*(66)**

Rakesh Saksena & S.C. Sinho, JJ

PURUSHOTTAM PATEL & ors.

Vs.

STATE OF M.P.

Penal Code (45 of 1860), Sections 302, 304-I/149 & 148 - *Murder or culpable homicide - Neither any single injury found on the body was sufficient in the ordinary course of nature to cause death nor the injuries found on the body, cumulatively, were sufficient in the ordinary course of nature to cause death nor any injury was inflicted on any vital part of the body of deceased - In these circumstances, it could not be held that the injuries by the appellants were caused with the intention of causing death or causing*

such bodily injury as was likely to cause death of deceased - However, since the appellants wielded weapons like sword, axe, Farsa etc., it can safely be held that they had knowledge that it was likely to cause death of deceased - Conviction of appellants u/s 304-I, altered to one u/s 304 Part II.

दण्ड संहिता (1860 का 45), धाराएँ 302, 304–I/149 व 148 – हत्या या आपराधिक मानव वध – न तो कोई एक क्षति शरीर पर पायी गई जो प्रकृति के सामान्य अनुक्रम में मृत्यु कारित करने के लिये पर्याप्त हो और न ही शरीर पर पायी गई क्षतियाँ संचयी तौर पर प्रकृति के सामान्य अनुक्रम में मृत्यु कारित करने के लिये पर्याप्त थीं और न ही मृतक के शरीर के किसी मर्मस्थल पर कोई क्षति पहुँचाई गयी – इन परिस्थितियों में यह नहीं माना जा सकता कि अपीलार्थियों द्वारा क्षतियाँ, मृत्यु कारित करने अथवा ऐसी शारीरिक क्षति जिससे मृतक की मृत्यु कारित होना संभाव्य था, कारित करने के आशय से कारित की गयीं थीं – तथापि, चूंकि अपीलार्थी तलवार, कुल्हाड़ी, फर्सा आदि जैसे आयुधों से सुसज्जित थे, यह सुरक्षित रूप से माना जा सकता है कि उन्हें ज्ञान था कि मृतक की मृत्यु कारित होना संभाव्य था – धारा 304–I के अंतर्गत अपीलार्थियों की दोषसिद्धि को धारा 304 भाग–II के अंतर्गत परिवर्तित किया गया।

Cases referred :

AIR 1976 SC 2499, AIR 1978 SC 1525, AIR 1993 SC 350, AIR 2005 SC 1000.

S.C. Datt with *Siddharth Datt*, for the appellant.

Prakash Gupta, Panel Lawyer, for the respondent/State.

***Cr.A. No.2015/2006 (Jabalpur), D/- 31 March, 2010.**

Short Note
(67)*

R.K. Gupta, J

R.R. SONVER & anr.
Vs.
MUKHTYAR SINGH & ors.

Law of Torts - *Malicious Prosecution - The person at whose instance the machinery is put to action and if law is put to action, then the person as such, who is responsible to put the machinery in action, shall be liable for the malicious prosecution.*

Appellants, who were Inspector and Sales Tax Officer submitted a complaint to deputy commissioner alleging that when Inspector went to shop of plaintiff/respondent and directed him to show the books of accounts and challans, he abused and uttered unfair words. The complaint was forwarded to Police and after enquiry and investigation a challan by Police u/s 186 & 353 of I.P.C. was filed against plaintiff. The Criminal Court, holding that the case is not proved beyond reasonable doubt, acquitted the plaintiff.

The respondent/plaintiff filed a suit claiming damages for malicious prosecution and also for preparation of documents to make

out a case for prosecution against appellant/defendant. The trial court found that there was no occasion for the appellant to inspect the shop or documents as the Tax was already paid and decreed the suit for Rs.70000/-. The appellant challenged the decree on ground that launching of the prosecution was not by the appellants No.1 and 2, but it was at the instance of police authorities and so it cannot be said plaintiff has been maliciously prosecuted.

Held,

From a perusal of the aforesaid pronunciation and the factual matrix of the present case it is clear that merely because a public servant has authority or is empowered to do certain things in discharge of his public duty as defined under the Act, but that duty should not be exercised capriciously or with malafide intention.

It is abundantly on record that the appellants while discharging their duties acted capriciously and the exercise of power resulted in harassment and agony to the plaintiff, therefore, the responsibility has to be fixed on the erring official.

It is to be seen who is the real prosecutor in the present case and who had put the machinery into action. There is no dispute in the present case that a complaint was made by the appellant No.1 which was forwarded by appellant No.2 to the police authorities for appropriate action. On the basis of the same it is clear that the appellant No.1 was the prosecutor and the appellant No.2 by preparing the dispatch register also gave assistance to appellant No.1 to justify the correctness of the complaint by concocting the documents as has been enumerated in detail in the foregoing paragraphs of this judgment. Thus, the submission so made on behalf of the appellants cannot be accepted that the appellants were not the prosecutor.

- Appeal dismissed.

अपकृत्य विधि – विद्वेषपूर्ण अभियोजन – वह व्यक्ति जिसके अनुरोध पर तंत्र को क्रियाशील किया गया और यदि विधि को क्रियाशील किया गया तब वह व्यक्ति जो कि तंत्र को क्रियाशील करने के लिये जिम्मेदार है, विद्वेषपूर्ण अभियोजन के लिये दायी होगा।

Cases referred :

AIR 1994 SC 787, (1996) 1 SCC 573, 1999 AIR SCW 3578, (1976) 2 SCC 521 (at 579), AIR (34) 1947 PC 108, 2007 AIR SCW 4118, AIR 1986 Guj 35.

Umakant Sharma with *Anil Verma,* for the appellants.

A.K. Jain, for the respondent No.1.

None, for the respondents Nos.2 & 4.

***F.A. No.262/2001 (Jabalpur), D/- 29 April 2010.**

NOTES OF CASES SECTION

Short Note

(68)*

P.K. Jaiswal, J

RAJENDRA SINGH
Vs.
STATE OF M.P.

Criminal Procedure Code, 1973 (2 of 1974), Sections 173(2), 173(4), 173(8) & 401(2) - *CJM accepted/allowed the closure report after taking statement of complainant - Later on, the police filed application for further investigation, which was, though rejected by CJM but allowed by revisional Court - Order of revisional Court challenged by applicant/accused on ground that no notice was given to him - Held - At the stage when the police want to investigate the matter further in terms of S. 173(8) of the Code, question of issuance of notice to the applicant would not arise - At the stage of investigation the principle of audi alteram partem do not apply - Revision dismissed.*

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 173(2), 173(4), 173(8) व 401(2) – मुख्य न्यायिक मजिस्ट्रेट ने परिवादी का कथन अभिलिखित करने के पश्चात् समापन प्रतिवेदन स्वीकार किया – बाद में, पुलिस ने अतिरिक्त अन्वेषण करने के लिए आवेदन पेश किया, जिसे यद्यपि मुख्य न्यायिक मजिस्ट्रेट द्वारा नामंजूर किया गया लेकिन पुनरीक्षण न्यायालय द्वारा स्वीकृत किया गया – आवेदक/अभियुक्त द्वारा पुनरीक्षण न्यायालय के आदेश को इस आधार पर चुनौती दी गयी कि उसे कोई सूचना नहीं दी गयी – अभिनिर्धारित – इस प्रक्रम पर जब कि पुलिस संहिता की धारा 173(8) के निबंधनों के अनुसार मामले में अतिरिक्त अन्वेषण करना चाहती है, आवेदक को सूचना दिये जाने का प्रश्न ही नहीं उठता – अन्वेषण के प्रक्रम पर दूसरे पक्ष को भी सुनो का सिद्धांत लागू नहीं होता – पुनरीक्षण खारिज ।

Cases referred :

(2004) 13 SCC 472, (1999) 5 SCC 740, (1998) 5 SCC 223.

Jaisingh with *Viveksingh*, for the applicant.

Girish Desai, Dy.A.G., for the non-applicant/State.

***Cr.R. No.735/2010 (Indore), D/- 1 July, 2010.**

Short Note

(69)*

S.K. Gangele & S.S. Dwivedi, JJ

SHANTI BAI
Vs.
STATE OF M.P.

Penal Code (45 of 1860), Sections 302, 304-I - ***Murder or culpable homicide*** - *Incident took place all of a sudden, without premeditation - Due to anger and annoyance, appellant/accused caused burn injuries to deceased by pouring kerosene on his body and by lighting a matchstick, set him on fire - The appellant can be held guilty for the offence punishable u/s 304 Part-I and not u/s 302 of IPC - Appeal allowed.*

दण्ड संहिता (1860 का 45), धाराएँ 302, 304–I – हत्या या आपराधिक मानव वध – घटना पूर्वचिन्तन के बिना अकस्मात घटित हुई – क्रोध और क्षोभ के कारण अपीलार्थी/अभियुक्त ने मृतक के शरीर पर केरोसीन उड़ेलकर और माचिस की तीली जलाकर उसको आग लगाकर उसे जलने की क्षतियाँ कारित कीं – अपीलार्थी को भा.द.सं. की धारा 304 भाग–I के अन्तर्गत दण्डनीय अपराध के लिए दोषी ठहराया जा सकता है न कि धारा 302 के अन्तर्गत – अपील मंजूर।

Cases referred :

(2000) 10 SCC 324.

Deeksha Mishra, for the appellant.

T.C. Bansal, Public Prosecutor, for the respondent/State.

***Cr.A. No.376/2002 (Gwalior), D/- 13 May, 2010.**

Short Note

*(70)**

Rajendra Menon, J

SIGMA CONSTRUCTION (M/S)

Vs.

BHARAT HEAVY ELECTRICALS LTD. & ors.

Arbitration and Conciliation Act (26 of 1996), Section 11(6) - *Even if the Court is to exercise the jurisdiction and is to appoint Arbitrator, the Arbitrator named in the agreement, is to be given preference and under normal circumstance he has to be appointed as Arbitrator - The arbitrator appointed by respondent during Court proceeding, approved by the Court and permitted to proceed and decide the dispute.*

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) – यदि न्यायालय को अधिकारिता का प्रयोग करना हो और मध्यस्थ की नियुक्ति करना हो, तो भी अनुबंध में नामित मध्यस्थ को अधिमान्यता दी जानी होगी एवं सामान्य परिस्थिति में उसे ही मध्यस्थ नियुक्त किया जाना होगा – न्यायालय की कार्यवाही के दौरान प्रत्यर्थी द्वारा नियुक्त किये गये मध्यस्थ को न्यायालय द्वारा अनुमोदित किया गया और आगे कार्यवाही करने व विवाद का निराकरण करने की अनुज्ञा दी गई।

Cases referred :

(2008) 8 SCC 151, (2006) 2 SCC 638, (2007) 5 SCC 684, (2010) 6 SCC 394, (1995) 5 SCC 329, (2009) 8 SCC 520, (2010) 1 SCC 562, (2010) 1 SCC 673, (2007) 7 SCC 684, (2008) 11 SCALE 500.

M.S. Bhatti, for the petitioner.

Ashok Lalwani, for the respondents.

***A.C. No.15/2009 (Jabalpur), D/- 23 September 2010.**

NOTES OF CASES SECTION

Short Note

(71)*

Rakesh Saksena & G.S.Solanki, JJ — STATE OF MAHARASHTRA
Vs.
NANDLAL DEWANI & ors.

Criminal Procedure Code, 1973 (2 of 1974), Sections 24, 378(1) & 378(3) - *State of Maharashtra filed an appeal against acquittal passed by Sessions Judge, and application seeking permission/leave to file the appeal was also filed by Special Public Prosecutor of State of Maharashtra - Maintainability of appeal was challenged by non-applicants on the ground that there was no valid appointment of Public Prosecutor - **Held** - It is only the State of M.P., who can appoint and direct Public Prosecutor or a Special Public Prosecutor to file the appeal u/s 378(1) of the Code against the impugned judgment of acquittal passed by the Sessions Judge, Chhindwara - The appeal/application for grant of leave to appeal filed by the State of Maharashtra is therefore not maintainable.*

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 24, 378(1) व 378(3) – महाराष्ट्र राज्य ने सेशन न्यायाधीश द्वारा पारित दोषमुक्ति के विरूद्ध अपील फाइल की और महाराष्ट्र राज्य के विशेष लोक अभियोजक द्वारा अपील फाइल करने की अनुमति हेतु आवेदन पत्र भी प्रस्तुत किया गया – अनावेदकों द्वारा अपील की पोषणीयता को इस आधार पर चुनौती दी गयी कि लोक अभियोजक की कोई विधिमान्य नियुक्ति नहीं थी – **अभिनिर्धारित** – केवल म.प्र. राज्य ही सेशन न्यायाधीश छिन्दवाड़ा द्वारा पारित दोषमुक्ति के आक्षेपित निर्णय के विरुद्ध संहिता की धारा 378(1) के अन्तर्गत अपील फाइल करने हेतु लोक अभियोजक या विशेष लोक अभियोजक को नियुक्त और निदेशित कर सकता है – अतः महाराष्ट्र राज्य द्वारा फाइल की गयी अपील/अपील की अनुमति प्रदान करने का आवेदन पोषणीय नहीं है।

Cases referred :

1999(2) MPLJ 703, (2005) 8 SCC 771, AIR 2008 SC 2997.

R.N. Singh with *Y.B. Mandpe, Bharti H. Dangre & Rahul Diwakar,* for the applicant.

Surendra Singh with *Ashok Lalwani,* for the non-applicants.

***M.Cr.C. No.7434/2009 (Jabalpur), D/- 4 August, 2010.**

Short Note

(72)*

Shantanu Kemkar, J — TUKARAM & ors.
Vs.
STATE OF M.P. & ors.

Land Acquisition Act (1 of 1894), Sections 4, 6 & 17 - *Declaration u/s 6(1) was published on the same date when the notification u/s 4(1) was published - The same is in clear violation of S. 17(4) of the Act and as such cannot be sustained - Notification quashed.*

भूमि अर्जन अधिनियम (1894 का 1), धाराएँ 4, 6 व 17 – धारा 6(1) के अंतर्गत घोषणा उसी दिन प्रकाशित हुई जब कि धारा 4(1) के अन्तर्गत अधिसूचना का प्रकाशन हुआ – यह अधिनियम की धारा 17(4) का स्पष्ट उल्लंघन है और इसे स्थिर नहीं रखा जा सकता – अधिसूचना अभिखंडित की गई।

Cases referred :

AIR 1989 SC 682, 1994(II) MPWN 190 (relied upon).

A.S. Garg with *Pankaj Sohani,* for the petitioners.
Vivek Patwa, Dy.G.A., for the respondents.

***W.P. No.163/2010 (Indore), D/- 4 March, 2010.**

Short Note
(73)*

S.C. Sharma, J

VIRENDRA KUMAR MANDLOI
Vs.
STATE OF M.P. & ors.

Service Law - ***Withdrawal of resignation - Petitioner has not submitted any application for withdrawal of his resignation prior to the date reflected in the notice period - The question of accepting the application for withdrawal of his resignation does not arise.***

"Petitioner submitted an application seeking voluntary retirement from services w.e.f. 23.12.2008. He also deposited a month's salary while submitting the application. He submitted an application for withdrawal of his earlier application submitted by him for grant of voluntary retirement on 15.04.2009 and also submitted a joining report on 16.04.2009. The respondent did not accept his application and on 18.12.2009, when the W.P. No.4282/2009(S) was pending the respondent accepted the resignation w.e.f. 23.12.2008.

Keeping in view the aforesaid (AIR 1999 SC 1829), it is evident that the application for voluntary retirement comes into operation after a notice period is over and therefore, this court is of the considered opinion that respondents were justified in passing the impugned order in the peculiar facts and circumstances of the case."

सेवा विधि – त्यागपत्र का प्रत्याहरण – याची ने नोटिस अवधि में दर्शित/वर्णित दिनांक के पूर्व त्यागपत्र की वापसी/प्रत्याहरण का आवेदन प्रस्तुत नहीं किया – त्यागपत्र की वापिसी का आवेदन स्वीकार किये जाने का प्रश्न ही उत्पन्न नहीं होता है।

Cases referred :

1979 MPLJ 77, 1999(1) JLJ 169.

A.K. Sethi with *Rahul Sethi,* for the petitioner
Vivek Phadke, G.A., for the respondents.

***W.P. No.1324/2010(S) (Indore), D/- 23 July, 2010.**

I.L.R. [2010] M. P., 2243

SUPREME COURT OF INDIA

Before Mr. Justice V.S. Sirpurkar & Mr. Justice Surinder Singh Nijjar

1 February, 2010*

STATE OF M.P. ... Appellant

Vs.

BALRAM MIHANI & ors. ... Respondents

Criminal Procedure Code, 1973 (2 of 1974), Chapter VII-A (Sections 105-A to 105-L) - *The whole chapter is specific chapter relating to the specified offences therein and has nothing to do with the local offences or the properties earned out of those.* (Para 12)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), अध्याय सात–क (धाराएँ 105–क से धारा 105–ढ) – यह सम्पूर्ण अध्याय इसमें विर्निदिष्ट अपराधों के लिये विर्निदिष्ट अध्याय है एवं यह स्थानीय अपराधों या उनसे अर्जित संपत्ति के लिये प्रयोज्य नहीं है।

J U D G M E N T

The Judgment of the Court was delivered by **V.S. Sirpurkar, J.** :– By our earlier order dated 19.01.2010, we have dismissed the appeals filed by the State of Madhya Pradesh. Now, we proceed to give reasons thereof.

2. The Station House Officer, Itarsi moved applications before the Judicial Magistrate, First Class, Itarsi for initiating proceedings against the respondents herein under Chapter VII-A of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") for attachment and forfeiture of the properties of the respondents. According to the applications, the said properties were derived from or used in commission of offences and were acquired from the criminal activities. The police further urged that the respondents were involved in the criminal activities since long and had accumulated huge wealth derived directly or indirectly by or such criminal and unlawful activities. According to the police some of these properties were in the names of their relatives which were clearly traceable to the respondents herein. The prayer thus was made under Section 105-D of the Code for authorization to take all necessary steps to trace out and identify such properties and further for the forfeiture and vesting thereof. Some other applications were also filed on identical facts against some other respondents also. The Trial Court having passed an order in pursuance of these applications allowing the same, the respondents challenged the same by way of a petition under Section 482 of the Code. Finding that there were divergent opinions on the tenability of the applications amongst two learned Single Judges of the Madhya Pradesh High Court, the matter was referred to the Division Bench and the Division Bench by the impugned order quashed the proceedings holding that the provisions of Chapter VII-A were not applicable to such local offences complained of. It is

*Cr.A. No.891-893/2007

this order which is in challenge before us at the instance of the State Government in these appeals.

3. Shri Dushyant A. Dave, learned Senior Counsel appearing on behalf of the State of Madhya Pradesh very painstakingly took us through Chapter VII-A containing Sections 105-A to 105-L. It will be useful to see the import of some of the Sections.

4. Section 105A(a) defines "contracting State" and refers to any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country through a treaty or otherwise. Section 105A (c) defines proceeds of crime as under:

> "(c) "proceeds of crime" means any property derived or obtained directly or indirectly, by any person as a result of criminal activity (including crime involving currency transfers) or the value of any such property"

Section 105A (d) defines the property as under:

> "(d)"property" means property and assets of every description whether corporeal or incorporeal, movable or immovable, tangible or intangible and deeds and instruments evidencing title to, or interest in, such property or assts derived or used in the commission of an offence and includes property obtained through proceeds of crime."

Section 105-B deals with assistance in securing arrest of persons on request from contracting states or the arrest in the contracting states. Sub-Section (1) thereof starts with the words "Where a Court in India". So also Sub-Section (3) starts with the aforementioned words. Section 105C is as under:

> "105C. **Assistance in relation to orders of attachment or forfeiture of property.**
>
> (1) Where a court in India has reasonable grounds to believe that any property obtained by any person is derived or obtained, directly or indirectly, by such person from the commission of an offence, it may make an order of attachment or forfeiture of such property, as it may deem fit under the provisions of sections 105D to 105J (both inclusive).
>
> (2) Where the Court has made an order for attachment or forfeiture of any property under sub-section (1), and such property is suspected to be in a contracting State, the court may issue a letter of request to a court or an authority in the contracting State for execution of such order.
>
> (3) Where a letter of request is received by the Central

> Government from a court or an authority in a contracting State requesting attachment or forfeiture of the property in India, derived or obtained, directly or indirectly, by any person from the commission of an offence committed in that contracting State, the Central Government may forward such letter of request to the court, as it thinks fit, for execution in accordance with the provisions of sections 105D to 105J (both inclusive) or, as the case may be, any other law for the time being in force."

5. Section 105-D empowers the court to direct any police officer not below the rank of Sub-Inspector to take steps for tracing and identifying such property under Section 105C (1) or on receipt of letter of request under sub-section (3) of Section 105-C. Section 105-E empowers the officer conducting an inquiry or investigation to make an order of seizure of such property, if he has a reason to believe that such property is likely to be concealed, transferred or dealt with in any manner which will result in disposal of the property. Section 105-F relates to the power of court to appoint District Magistrate of any area or his nominee where the property situated to perform the functions of an administrator of such property. Section 105G provides for show cause notice before forfeiture. Section 105-H deals with the forfeiture of the property to Central Government while Section 105-I empowers the Court giving an option to the owner of such property to pay, in lieu of forfeiture, the fine equal to the market value of such property. Section 105-J takes care of the situation where after making an order under sub-section (1) of Section 105-E or the issue of a notice under Section 105-G, the property stands transferred by any mode whatsoever and further provides that such transfer shall be ignored and also that such transfer of property shall be deemed null and void. Section 105-L deals with the applications and powers in this Chapter.

6. The stress of the learned counsel is particularly on Section 105-D and the learned counsel is at pains to point out that Section 105-C and D can apply to any property in India which is derived or obtained from the commission of offence. Such offence could be even the offence which does not have international ramifications. The High Court, has taken stock of all these Sections and referred to the heading of the Chapter, the Statement of Objects and Reasons of the amending Act being Act No.40 of 1993 and the speech of the Hon'ble Minister for Home Affairs Shri S.B. Chavan (as he then was). From this the High Court has come to the conclusion that firstly the provisions of Chapter VII-A are not the ordinary law of land and further the provisions therein would be applicable only to the offences which have international ramifications. The High Court has further reached the conclusion that the said provisions override the provisions of Chapter V, VI AND VII of the Code relating to search and seizure during investigation. The High Court has posed following questions:

i) What was the law before the making of the amendment?

ii) What was the mischief and defect for which the law did not provide?

iii) What is the remedy that the amendment has provided? And

iv) What is the reason of the remedy?

7. Answering all these questions and also taking into account the general provisions of search and seizure contained in Sections 91 to 101 of the Code, as also taking into consideration Sections 451, 452 and 457 of the Code dealing with the custody and disposal of the property involved in crime, the High Court ultimately came to the conclusion that the said provisions of Chapter VII-A would not apply to the cases in question. The High Court has also taken into consideration the provisions of Section 41(1)(g) of the Code, Sections 166-A and 166-B of the Code and has relied upon three other cases, namely, *Union of India & Anr. v. W.N. Chadha [1993 Supp.* (3) SCC 260], *Jayalalitha v. State* [(2002) Crl.L.J. 3026] and *Bhinka v. Charan Singh* [AIR 1959 SC 90]. It has ultimately held that Chapter VII-A has been incorporated with an intention to curb mischief or completely eliminate the terrorists activities and international crimes. According to the High Court, the provisions of this Chapter are supplemental to the special provisions contained in Sections 166-A and 166-B and had nothing to do with the investigation into offences in general.

8. We have considered the judgment as also the contentions raised by the learned counsel. We have also perused the heading of Chapter VII-A as also the Statement of Objects and Reasons. After perusing the same we are of the firm opinion that the well written judgment of the High Court is correct and the High Court has taken a correct view.

9. In the Statement of Objects and Reasons to the Amending Act 40 of 1993 there is a clear cut reference that the Government of India had signed an agreement with the Government of United Kingdom of Great Britain and Northern Ireland for extending assistance in the investigation and prosecution of crime and the tracing, restraint and confiscation of the proceeds of crime (including crimes involving currency transfer) and terrorist funds, with a view to check the terrorist activities in India and the United Kingdom. The statement further goes on to provide the three objectives, viz.:

(a) the transfer of persons between the contracting States including persons in custody for the purpose of assisting in investigation or giving evidence in proceedings;

(b) attachment and forfeiture of properties obtained or derived from the commission of an offence that may have been or has been committed in the other country; and

(c) enforcement of attachment and forfeiture orders issued by a court in the other country.

10. We have even taken into consideration the speech of the then Home Minister Shri S.B. Chavan which leaves no doubt that this Chapter is not meant for the local offences.

11. When we see the applications as also the order passed by the Trial Court, it is clear that it is only and only in respect of the local offences like gambling and the offences under I.P.C. which are local.Even the properties are not shown to be connected with crimes mentioned in the Objects and Reasons of the amending Act. In fact, no connection is established also between crimes mentioned and the properties. Such properties are clearly not included in Section 105-C. Though the language of Section 105-C (1) is extremely general, its being placed in Chapter VII-A cannot be lost sight of. Again there is a clear cut reference in Sub-section (2) thereof to the contracting state, the definition of which is to be found in Section 105-A (a). It is, therefore, clear that the property envisaged in Section 105-C (1) cannot be an ordinary property earned out of ordinary offences committed in India. Where the language is extremely general and not clear, the contextual background has to be taken into consideration for arriving at clear interpretation. Some assistance was tried to be taken from the language of Section 105-B(2) which starts with the words "notwithstanding anything contained in this Code". However, when the sub-section is read in entirety, it is clear that it makes reference to a person who is in "contracting State". Therefore, even that reference will not bring in any provision within the scope of general law. We again cannot ignore the express language of Sections 105-B and 105-C which starts with the words "where a court in India". If this chapter was meant for the general offences and the properties earned out of those general offences in India, then such a phraseology would not have been used by the Legislature.

12. Lastly we see the provisions of Section 105-L which are clear that the Central Government may by notification in the official gazette, direct that the application of this chapter in relation to a contracting State with which there are reciprocal arrangements would be subject to some conditions, exceptions and qualifications as would be specified in the said notification. It is, therefore, clear that the whole chapter is specific chapter relating to the specified offences therein and has nothing to do with the local offences or the properties earned out of those.

13. At this juncture, it is pointed out that there are specific other Central laws wherein the properties earned out of trading of Narcotic Drugs and Psychotropic Substances or the offences relating to smuggling or financial offences relating to foreign exchange are liable to be attached, seized and forfeitured. Chapter VII-A is one such measure to introduce stringent measures for attachment and forfeiture of the properties earned by the offences, by way of reciprocal arrangement in the contracting countries. However, if we accept the State's contention that the provisions of Chapter VII-A are for all and sundry offences in India, it would be illogical.

14. If such a construction as claimed by the petitioner is given then it would mean that even for the offences which are local in nature and committed within the State, still the property connected with those offences shall be forfeitured to the Central Government. That would obviously be an absurd result.

15. Lastly, we cannot ignore the likely misuse of the provisions in Chapter VIIA if the whole Chapter is made applicable to the local offences generally. Such does not appear to be the intendment of the Legislature in introducing Chapter VII A.

16. In view of the above we approve the judgment of the Madhya Pradesh High Court and confirm the same. The appeals are dismissed.

Appeal dismissed.

I.L.R. [2010] M. P., 2248

SUPREME COURT OF INDIA

Before Mr. Justice Harjit Singh Bedi & Mr. Justice K.S. Radhakrishnan

5 May, 2010*

S.K. DASGUPTA & ors. ... Appellants

Vs.

VIJAY SINGH SENGAR & ors. ... Respondents

Constitution - ***Public Interest Litigation*** - *Is to be invoked sparingly and with rectitude and any order made in this situation must be reasonable.*

(Para 6)

संविधान – जनहित याचिका – का अवलंब कमी कमार एवं सिधाई के साथ लिया जाना चाहिए और इस परिस्थिति में दिया गया आदेश युक्तियुक्त होना चाहिए।

ORDER

These appeals arise out of a contempt petition wherein a Single Judge of the Madhya Pradesh High Court, Gwalior Bench, in his order dated 1st April, 2003 has ordered an enquiry against some officials and members of the M.P. State Electricity Board by the Central Bureau of Investigation and arrayed some senior Members of the Board and others as contemnors as well.

2. The facts are as under:

The respondent, Vijay Singh Sengar, a practising Advocate at Jabalpur, filed a writ petition in public interest pointing out that patients in Government hospitals were suffering great agony on account of un-scheduled load-shedding from 6.30 a.m. to 8.30 a.m. and 7.00 p.m. to 8.00 p.m. and that the entire State was plunged into darkness taking the State back to the 'Stone Age Days'. Alongwith the writ petition a large number of newspaper cuttings were also appended, to substantiate the pleas that had been raised. During the hearing of the petition several senior officers of the Board were summoned to Court including

*C.A. No.6794/2003

Mr.R.N. Mishra, the Chief Engineer (O & M). It was also observed in an interim order made by the Court that the Board had undertaken to take all measures to supply electricity for street lights and that in a democratic set up it was the responsibility of the State to maintain all essential services and the basic amenities of life. It was also observed that it was a matter of common knowledge that the absence of the power supply to Government hospitals caused great discomfort, pain and constituted a danger to the patients who were admitted therein. By an order dated 13th September, 2001, a direction was accordingly given in the following terms:

> "We, therefore, as an interim measure, direct respondents 1 and 2 to maintain round the clock electricity supply in the Government Hospitals throughout the State. We further direct that the street lights shall be kept on throughout the State between sunset and sunrise.

The above directions be carried out in letter and spirit forthwith, even at the cost of discontinuing with the scheduled load shedding as a whole with the only exception in the event of the Madhya Pradesh Electricity Board itself not getting the power supply, or a 'Grid Failure' beyond their control It is further being made clear that any breach of the above directions would be viewed seriously.

> List for further orders on 27/9/2001.
>
> Let a copy of this order be supplied to Shri Sanjay Seth, Additional Advocate General, today for necessary compliance."

3. It appears that a special leave petition was filed against the aforesaid order but the same was dismissed in view of the fact that the M.P. Electricity Regulatory Commission had passed certain effective orders and no orders were thus thought to be called from the Court. It appears that another public interest litigation was subsequently filed and an order was made on 17th March, 2003 while issuing notice that "there shall be no power cut during night time until further orders."

Another petition was filed before the Indore Bench, highlighting the difficulties being faced in the State due to interrupted supply of electricity by the Board and by an interim order officers of the M.P. Electricity Regulatory Commission were also directed to be present so that some method could be devised to reduce the rigour of the power cuts in force.

4. The matter was thereafter adjourned time and again to see if the directions given by the Court from time to time were effectively complied with. It was also observed during the course of the proceedings before the Indore Bench that the Court could not be a mere spectator to the miseries being felt by the public and that the arguments made on behalf of the staff, Board and State agencies that the Court could not interfere in policy matters, could be ignored as it was the bounden duty of the Court to ensure the welfare of the State citizens. The Court accordingly observed that it appeared that the officials of the Electricity Board and the Regulatory Commission were not serious in implementing the directions of the

Court and they were prima facie guilty of having committed contempt of Court. Contempt notices were accordingly issued on 26 th March, 2003. The officers of the Board appeared before the Court and pointed out that the situation was beyond their control but they were sternly warned that any further neglect of the Court's orders would be viewed seriously. The Court also felt that the Court's direction to the concerned officer that if a power cut could not be avoided they were to intimate to the Registrar of the Court (as to why the power cuts had been imposed) had been flouted and the Courts interference was thus essential on which further directions were issued on Ist April, 2003 in the following terms,

"Accordingly, the Director, C.B.I., New Delhi, shall constitute a team of officers not associated with the State of M.P. to be headed by an officer not below the rank of Joint Director to conduct an impartial enquiry with the help of the experts of the Central Electricity Authority on the following terms of reference.

(1) As to reasons leading to violation of this Court's order directing not to resort to power cuts after 8.30 in the night.

(2) As to justification being in the nature of situation beyond control, if any, for power cuts in violation of this Court's order after 8.30 in the night:

(3) As to individual liability of the contemners or any other person for deliberate violation of this Court's orders in the absence of a justification as such:

(4) As to veracity of claims of the Boad and the Govt. regarding non-availability of surplus electricity form any source for purchase at any cost:

(5) As to willful disobedience by the M.P.S.E.B., Headquarters, Jabalpur, if any, by ignoring request of the Board's establishment at Gwalior to strictly adhere to this Court's directions on power cuts in the night:

(6) As to fabrication and manipulation of records, if any, for justification of the Board/the Government's actions in resorting to power cuts; and

(7) As to any other area of enquiry, which the Director, C.B.I.thinks appropriate for proper adjudication of this Contempt Petition.

(10) We would like to indicate that, in view of prima facie deliberate violations of this Court's order the only way, we are left with to reiterate the rule of law is to punish the contemners or persons responsible for such violation by warding exemplary punishments even by involving our powers under Article 215 of the Constitution of impose punishments proportionate to damage

caused to the credibility of this Institution, irrespective of the quantum of sentence prescribed under the Contempt of Courts Act. Besides, as there has been incidents of suicide by the students, due to power cuts during crucial periods of examinations and as there is commotion in the society on that count, C.B.I., shall take up the inquiry at the earliest and shall exercise all such powers as are enshrined in the Cr.P.C. and other relevant statues.

(11) As it is submitted that (i) Shri Baleshwar Sharma, chief Managing Director,, (ii) Shri R.K.Verma, Chief Managing Director and (iii) Shri R.S.Yadav, Chief Engineer, have been inadvertently left out from the array of contemners, they are directed to be so added and be issued with notices of contempt today itself.

(12) the C.B.I. Shall also record all the power cuts henceforth and incorporate the same in its report. keeping in view the fact, that each power cut shall constitute an independent offence of the Contempt of this Court.

(13) A copy of this order be immediately sent by a special messenger and also by fax to the Director, C.B.I., New Delhi.

(14) The C.B.I. shall submit an interim report within one month and final report within two months."

5. It is against the order dated Ist April, 2003 that a special leave petition was filed and while after issuing notice. proceedings before the High Court had been stayed as well. The respondents though served have not put in appearance on which leave has also been granted. We have accordingly gone through the matter with the assistance of the learned counsel for the appellant.

6. We are of the opinion that the directions made by the High Court in the impugned judgment are clearly beyond the Courts jurisdiction in a Public Interest Litigation as they interfere with the functioning of independent State agencies in matters which are beyond their control insofar as uninterrupted supply of electricity is concerned. We cannot ignore that a shortage of power is a phenomena common to the entire country and to single out Members of the Board or the Regulatory Commission for failure to comply with the directions of the Court, which are incapable of compliance, is not called for.

The direction that the matter should be referred to Central Bureau of Investigation for enquiry is to our mind completely misplaced. There is no finding of the Court or even a suggestion of any misconduct on any attempt to forestall the uninterrupted supply of electricity to the State or Government hospitals. We, thus do not find any justification in the direction that the CBI investigates matters which are purely technical and administrative in nature. We must emphasize once again that a Public Interest Litigation is to be invoked sparingly and with rectitude and any order made in this situation must be

reasonable and must not reflect the pique of the Court more particularly as it is not the Courts business to attempt to run the Government in a manner which the Court thinks is the proper way. The officers of the Board had repeatedly come to Court to explain that the situation was beyond their control and that the short fall in the supply of electric power was not of their making or in their control. The High court ignored this basic fact and passed orders which were incapable of compliance.

7. We therefore allow these appeals and set aside the order dated 1st April 2003 and discharge the contempt proceeding.

Appeal allowed.

I.L.R. [2010] M. P., 2252

SUPREME COURT OF INDIA

Before Mr. Justice V.S. Sirpurkar & Mr. Justice Dr. Mukundakam Sharma

27 July, 2010 *

BHAGMAL & ors. ... Appellants

Vs.

KUNWAR LAL & ors. ... Respondents

Limitation Act (36 of 1963), Section 5, Article 123, Civil Procedure Code, 1908, Order 9 Rule 13 - *Suit decreed ex parte on 19.04.1985 against the appellant, who filed application for setting aside decree on 08.07.1988 alleging that he could only know about the decree when execution notice was served and without filing any application for condonation of delay - Held - The limitation must be deemed to have started from the date when the appellants/defendants came to know about the decree on 22.06.1988 - An application under Order 9 Rule 13 was filed within 30 days from that date and therefore, it is clear that it was within time - At any rate, even if it held that the limitation started from the date of decree, there was a satisfactory explanation of the delay if any.* (Para 8)

परिसीमा अधिनियम (1963 का 36), धारा 5, अनुच्छेद 123, सिविल प्रक्रिया संहिता, 1908, आदेश 9, नियम 13 – वाद, अपीलार्थी के विरूद्ध 19.04.1985 को एक पक्षीय डिक्रीत किया गया, जिसने डिक्री अपास्त करने के लिये 08.07.1988 को आवेदन, इस अभिकथन के साथ कि उसे डिक्री के संबंध मे केवल तब ज्ञात हुआ जब निष्पादन नोटिस तामील किया गया, और विलंब की माफी के लिये कोई आवेदन प्रस्तुत किये बिना, प्रस्तुत किया – अभिनिर्धारित – परिसीमा का आरम्भ उस तारीख से माना जायेगा जब अपीलार्थी/प्रतिवादियों को 22.06.1988 को डिक्री के संबंध मे पता चला – आदेश 9 नियम 13 के अंतर्गत आवेदन उस तारीख से 30 दिनों के भीतर प्रस्तुत किया गया था और इसलिए, यह स्पष्ट है कि वह समय के भीतर था – किसी भी हालत मे, यदि यह भी माना जाये कि परिसीमा डिक्री की तारीख से आरम्भ हुई थी, तब भी विलंब, यदि कोई हो, उसका संतोषजनक स्पष्टीकरण वहाँ पर मौजूद था ।

Cases referred :

(2009) 6 SCC 194.

*C.A. No.5875/2005

J U D G M E N T

The Judgment of the Court was delivered by V.S. SIRPURKAR, J. :–The order passed by the High Court allowing a Civil Revision and thereby restoring the order of the Trial Court is challenged herein. A Civil Suit bearing No. 321-A of 1984 came to be filed by the respondents against the father of the petitioner No. 1 namely Kallu. Kallu died during the pendency of the suit and his legal heirs were brought on record. The suit was for declaration of title, possession and permanent injunction against the appellants/defendants in respect of the house in dispute. The Court proceeded ex-parte and the decree came to be passed. It is only when the execution proceeding started that the appellants/defendants allegedly came to know about the decree and moved an application under Order IX Rule 13 read with Section 151of the Civil Procedure Code (hereinafter called `CPC' for short) for setting aside the ex-parte decree.

2. According to the appellants/defendants, this application was moved within 30 days from the date of their knowledge of ex-parte decree. The appellants/ defendants had pointed out that there was a compromise effected on 10.12.1983, which was an out-of-Court settlement, wherein it was agreed between the parties that the respondent No. 1/plaintiff would withdraw the suit on account of the understanding having been arrived at between the parties. The appellants/ defendants further pleaded that since it was the understanding between the parties that the respondent No. 1/plaintiff would withdraw the suit or get it dismissed, they did not attend the further proceedings, which the respondent No. 1/plaintiff continued surreptitiously and hence they did not even know about the ex-parte order and the decree passed against them.It was the stand of the appellants/ defendants that since the application had been moved within 30 days from the knowledge, a separate application for condonation of delay was not required. The application under Order IX Rule 13 was dismissed by the Trial Court, which held the said application to be barred by time. A Misc. Civil Appeal came to be filed in the Court of District Judge, Bhopal against that order. There was some delay in filing the said appeal and, therefore, the application under Section 5 of the Limitation Act for condonation of delay was also filed. The appellate Court held that the application filed by the appellants/defendants under Order IX Rule 13 deserved to be allowed and held that the Trial Court had erred in law in not allowing the application. The appeal came to be allowed and the appellate Court directed the Trial Court to decide the case on merits after hearing the parties.

3. A Civil Revision came to be filed under Section 115 CPC before the High Court. The High Court took the view that the application filed by the appellants/ defendants under Order IX Rule 13 was barred by time and the appellate Court had not recorded any finding on the question as to whether the filing of the application under Section 5 of the Limitation Act was necessary or not and, therefore, the appellate Court had exceeded its jurisdiction in allowing the application without condoning the delay. On that count, the impugned order of the

appellate Court was set aside and that of the Trial Court was restored. Ms. June Chaudhary, learned Senior Counsel appearing on behalf of the appellants invited out attention to the order of the appellate Court, by which the Order IX Rule 13 application of the appellants/defendants was allowed. The learned Senior Counsel pointed out that the appellate Court had, on merits, discussed all the issues and had come to the finding that there indeed was a compromise effected in between the parties, in which there was an understanding arrived at that the respondent No. 1/plaintiff would withdraw his suit in pursuance of the understanding between the parties. The learned Senior Counsel also pointed out that, therefore, the appellants/defendants never attended the Court after 10.12.1983. This was tried to be countered with Shri M.P. Acharya, the learned Counsel appearing on behalf of the respondents that the order sheet of the suit showed as if the appellants/ defendants were present even after 10.12.1983. Our attention was invited to the order sheets of the dates after 10.12.1983, wherein it was recorded 'parties as before'. On that basis Shri Acharya contended that the appellants/ defendants remained present in the Court and they had the knowledge of the proceedings. However, our attention was also invited to the finding by the appellate Court that those entries could not be relied upon because admittedly there were no signatures of the parties on any of those order sheets. Therefore, one thing was certain that the appellate Court was right in holding that due to the compromise effected, the appellants/defendants did not attend the suit and, therefore, were not knowing about the proceedings at all.

4. The appellate Court also has pointed out that the evidence was led before the Trial Court in support of the application under Order IX Rule 13 and in that, the appellants/defendants had examined the witnesses like Rambharose (AW-1), Shanta Bai (AW-2), Jabia (AW-3), Babulal (AW-4), Bhagmal (AW-5), Genda Lal (AW-6), Dashrat Singh (AW-7), Bhurra @ Aziz (AW-8) and Nand Kishore (AW-9). The appellate Court also recorded the finding that the compromise deed was also got proved by the appellants/defendants in those proceedings through the witnesses who asserted that the compromise deed bore their signatures. The witnesses went on to say that the compromise deed was also signed by the present respondents. The appellate Court, therefore, rightly came to the conclusion that the appellants/defendants were justified in not attending the Court and that they did not even know about the decree having been passed and, therefore, the delay in presenting the application was also justified. The appellate Court also referred to the evidence of respondent Kunwar Lal and came to the conclusion therefrom that indeed a compromise deed was executed between the parties. The appellate Court also went on to express that the inference by the Trial Court that the compromise deed was doubtful, was also not correct. The appellate Court has also dealt with the cross objections raised before it by the present respondents to the effect that the compromise deed (Exhibit A-1) was prepared fraudulently. The appellate Court has rejected that contention in the cross objections and in our opinion, rightly.

5. This well considered order of the appellate Court came to be interfered with by the High Court solely on the ground that there was no application for condonation of delay made by the appellants/defendants before the Trial Court in support of their application under Order IX Rule 13 CPC. The High Court observed that the appellate Court had not recorded any finding on the question as to whether the filing of the application under Section 5 of the Limitation Act was necessary or not and went on to decide the application on merits and, therefore, it had exceeded its jurisdiction. The High Court also commented on the fact that the ex-parte decree was decided on 19.4.1985, while the application for setting aside the ex-parte decree was filed on 8.7.1988 and that no application for condonation of delay under Section 5 of the Limitation Act was filed.

6. Relying on Article 123 of the Limitation Act, the High Court took the view that the application ought to have been filed within 30 days from the date of passing of the decree and since it was not so filed, at least a condonation of delay application should have been made under Section 5 of the Limitation Act and, therefore, in the absence of prayer for condonation of delay, the appellate Court could not have allowed the application under Order IX Rule 13.

7. In our opinion, the High Court was not justified in taking a hypertechnical view. We have seen all the orders. It is quite clear from the Trial Court's order that the Trial Court entertained the application on merits. The Trial Court undoubtedly has referred to the reply of the respondents to the effect that the application for setting aside the ex-parte decree was beyond the limitation. However, the view taken by the Trial Court was based more on the merits. In fact, it went on to record the finding that there was no compromise and the theory of compromise and delay on account of that was not acceptable. The Trial Court has more or the less based its findings regarding delay on the basis of the order sheets. That was not right as the order sheets nowhere bore the signatures of the parties. They were mechanically written mentioning "parties as before". Therefore, the Trial Court did not throw the application under Order IX Rule 13 merely on the basis of the fact that no application for condonation of delay was made.It went on to consider the delay aspect as well as the merits and even allowed the parties to lead evidence. It is to be seen here that the question of delay was completely interlinked with the merits of the matter. The appellants/ defendants had clearly pleaded that they did not earlier come to the Court on account of the fact that they did not know about the order passed by the Court proceeding ex-parte and also the ex-parte decree which was passed. It was further clearly pleaded that they came to know about the decree when they were served with the execution notice. This was nothing, but a justification made by the appellants/defendants for making the Order IX Rule 13 application at the time when it was actually made. This was also a valid explanation of the delay. The question of filing Order IX Rule 13 application was, in our opinion, rightly considered by the appellate Court on merits and the appellate Court was absolutely right in

coming to the conclusion that appellants/defendants were fully justified in filing the application under Order IX Rule 13 CPC at the time when they actually filed it and the delay in filing the application was also fully explained on account of the fact that they never knew about the decree and the orders starting the ex-parte proceedings against them. If this was so, the Court had actually considered the reasons for the delay also. Under such circumstances, the High Court should not have taken the hyper-technical view that no separate application was filed under Section 5. The application under Order IX Rule 13 CPC itself had all the ingredients of the application for condonation of delay in making that application. Procedure is after all handmaid of justice. Here was a party which bona fide believed the assurance given in the compromise panchnama that the respondent No. 1/plaintiff would get his suit withdrawn or dismissed. The said compromise panchnama was made before the elders of the village. Writing was also effected, displaying that compromise. The witnesses were also examined. Under such circumstances, the non-attendance of the appellants/defendants, which was proved in the further proceedings, was quite justifiable. The appellants/defendants, when ultimately came to know about the decree, had moved the application within 30 days. In our opinion, that was sufficient.

8. Shri Acharya, learned Counsel appearing on behalf of the respondents tried to argue on the basis of Article 123 of the Limitation Act. However, in our opinion, Article 123 cannot be, in the facts of this case persuade us to take the view that the limitation actually started from the date of knowledge, as the appellants/ defendants had no notice of the decree or the proceedings which the respondents had promised to terminate. Shri Acharya then tried to persuade us by suggesting that unless the application was filed for condonation of delay, the court had no jurisdiction to entertain the application for setting aside the decree. He has based this contention on the basis of a reported decision of this Court in *Sneh Gupta Vs. Devi Sarup & Ors.* [2009 (6) SCC 194] and more particularly, the observations made in para 70 therein. In our opinion, the facts of this case were entirely different, as it was held in that case that the appellant had knowledge of passing of the compromise decree and yet she had not filed the application for condonation of delay. That is not the situation here. Even in this case, there is a clear cut observation in para 57, as follows:-

> "However, in a case where the summons have not been served, the second part shall apply."

The Court was considering Article 123 of the Limitation Act. In our opinion, in this case, the limitation must be deemed to have started from the date when the appellants/defendants came to know about the decree on 22.6.1988. An application under Order IX Rule 13 was filed within 30 days from that date and, therefore, it is clear that it was within time. At any rate, even if it held that the limitation started from the date of decree, there was a satisfactory explanation of the delay if any.

9. We, therefore, allow this appeal, set aside the judgment of the High Court and restore that of the appellate Court. The suit will now proceed before the Trial Court in pursuance of these orders. Under the circumstances, the proceedings of the suit shall be expedited. There shall be no costs.

Appeal allowed.

I.L.R. [2010] M. P., 2257

SUPREME COURT OF INDIA

Before Mr. Justice P. Sathasivam & Mr. Justice Dr. B.S. Chauhan

27 July, 2010*

VIJAY @ CHINEE ... Appellant

Vs.

STATE OF M.P. ... Respondent

A. Evidence Act (1 of 1872), Section 3 - *Appreciation of evidence - The evidence of the witnesses must be read as a whole and the cases are to be considered in totality of the circumstances and while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution case, should not be taken into consideration as they cannot form grounds to reject the evidence as a whole.* (Para 25)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्ष्य का अधिमूल्यन – साक्षियों की साक्ष्य को सम्पूर्णता से पढ़ना चाहिए तथा मामलों की परिस्थितियों पर समग्रता से विचार करना चाहिए और किसी साक्षी की साक्ष्य का अधिमूल्यन करते समय तुच्छ विषयों पर गौण असंगतियाँ, जो अभियोजन मामले को गहराई से प्रभावित नहीं करतीं, उन्हें विचार में नहीं लेना चाहिए क्योंकि वे सम्पूर्ण साक्ष्य को अस्वीकार करने के आधार नहीं बना सकतीं।

B. Evidence Act (1 of 1872), Section 9 - ***Test Identification Parade*** *- It is used only to corroborate the evidence recorded in the Court - Therefore, it is not substantive evidence - The actual evidence is what is given by the witnesses in the Court.* (Para 19)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 9 – शिनाख्त परेड – इसका उपयोग केवल न्यायालय में अभिलिखित साक्ष्य की संपुष्टि के लिये किया जाता है – इसलिए, यह तात्विक साक्ष्य नहीं है – वास्तविक साक्ष्य वह है जो साक्षियों द्वारा न्यायालय में दी जाती है।

C. Penal Code (45 of 1860), Section 376/34 - ***Rape*** - *Accused & Co-accused were convicted for offence of rape on prosecutrix, an illiterate rustic village girl - Appeal against, by the appellant - Held - There is no dispute regarding incident and place of occurrence - Defence could not establish that it was a case of consent - FIR was lodged most promptly - Accused were arrested on next day - There is no reason for which prosecutrix would have enroped them falsly - Appeal dismissed.* (Para 45)

ग. दण्ड संहिता (1860 का 45), धारा 376/34 – बलात्संग – अभियुक्त व

*Cr.A. No.660/2008

सह–अभियुक्त को अभियोक्त्री, एक अशिक्षित देहाती गाँव की लड़की, के साथ बलात्संग के अपराध के लिये दोषसिद्ध किया गया – इसके विरूद्ध अपीलार्थी द्वारा अपील – अभिनिर्धारित – घटना एवं घटना स्थल के संबंध में कोई विवाद नहीं – बचाव पक्ष यह साबित नहीं कर सका कि यह सम्मति का मामला था – एफ.आई.आर. तत्परता से दर्ज कराई गयी – अगले दिन अभियुक्तों को गिरफ्तार कर लिया गया – कोई कारण नहीं है जिसके लिये अभियोक्त्री ने उन्हें झूठा फँसाया हो – अपील खारिज।

Cases referred :

AIR 1990 SC 658, AIR 2005 SC 1248, AIR 1996 SC 1393, AIR 2002 SC 1963, (1993) 2 SCC 622, (2010) 2SCC 9, AIR 1952 SC 54, AIR 1999 SC 3916. AIR 2003 SC 2669, (2010) 3 SCC 508, AIR 1971 SC 1050, AIR 1973 SC 2190, AIR 2007 SC 2257, AIR 1985 SC 48, AIR 2009 SC 152, AIR 1972 SC 2020, AIR 1983 SC 753, (2009) 11 SCC 588, (2009) 9 SCC 626), AIR 1972 SC 2661, AIR 2003 SC 3365, (2007) 10 SCC 30, (2008) 16 SCC 582, (2010) 1 SCC 742, (1995) 3 SCC 367.

JUDGMENT

The Judgment of the Court was delivered by **Dr. B.S. Chauhan, J.** :–This appeal has been preferred against the judgment and order dated 5.9.2006 passed by the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No. 15/1991 by which it had affirmed the judgment of the Trial Court i.e. Additional Sessions Judge, Sihore, Camp Katni dated 14.12.1990 in Sessions Case No. 85/1989, wherein the appellant had been convicted under Section 376/34 of the Indian Penal Code, 1860 (hereinafter called as 'IPC') and sentenced to undergo 10 years' RI along with fine of Rs.500/-. In the event of default in payment of fine, the appellant would further undergo RI for three months. A part of the fine imposed on the appellant and his co-accused was directed to be paid to the prosecutrix Asha @ Gopi as compensation.

2. Facts and circumstances giving rise to this appeal are that on 6.12.1988, an FIR under Section 376/34 IPC was registered against the appellant and six others at Police Station Katni, District Jabalpur, on the information of one Asha @ Gopi that she had been subjected to gang rape by the appellant and six others at about 6.00 p.m. on the said date. The police after recording the FIR, sent the prosecutrix to the hospital at Katni for medical examination. The appellant was arrested on 7.12.1988 and subjected to medical tests along with the other accused on 8.12.1988. After the completion of the investigation, the police filed a charge sheet against the appellant and six others. As they denied the charges, refuted the prosecution story and pleaded innocence, all of them were put to trial.

3. The Trial Court after concluding the proceedings vide judgment and order dated 14.12.1990 convicted all the accused persons including the appellant herein for committing gang rape and sentenced each of them to 10 years' RI and fine of Rs.500/- each.

4. Aggrieved by the said judgment and order dated 14.12.1990 passed by the

Sessions Court, the appellant and other accused preferred Appeal Nos. 15/1991, 3/1991, 1185/1990 and 1194/1990 before the High Court of Madhya Pradesh at Jabalpur. The High Court vide impugned judgment and order dated 5.9.2006 dismissed the appeal of the appellant and one other co-accused, Raju @ Ramakant. One accused, namely Anil, died during the pendency of the said appeal. The High Court acquitted the remaining four accused. Hence, this appeal by the appellant herein.

5. Shri Anip Sachthey, learned counsel appearing for the appellant has submitted that the prosecutrix was a major and it was a case of consent. He has further submitted that conviction cannot be based on the sole deposition of the prosecutrix. There is no other evidence to corroborate her version. The prosecutrix's statement suffers from material discrepancies. On the date of examination of the prosecutrix no physical injury was found on her person or on her private parts. The prosecutrix had given a most improbable and unacceptable version of events that the appellant continued to rape her for about two hours. Then one another accused raped her for about an hour. Also, in spite of the fact that the appellant and others had been arrested on the next date of the incident, the Investigating Officer did not conduct the Test Identification Parade. The prosecutrix was examined on the next day i.e. on 7.12.1988 by Dr. Rupa Lalwani, Medical Officer (PW-3), and the said Medical Officer referred her for a Radiological Test to determine her age, but the report of the said test has never been brought on record. Thus, an adverse inference is to be drawn against the prosecution. The appeal deserves to be allowed. The appellant had falsely been enroped in the crime.

6. On the other hand, Shri Siddhartha Dave along with Ms. Vibha Datta Makhija, learned counsel appearing for the State of M.P., vehemently opposed the appeal contending that the prosecutrix was a minor on the date of the incident. The non-production of the report of the Radiological test and not holding the Test Identification Parade would not discredit the investigation or the prosecution case. The non-existence of any injury on the person of the prosecutrix cannot be a ground to dis-believe her version. The prosecutrix had such a social background that she did not have any sense of time, duration etc. and, thus, she was not able to give a precise account of each activity of the incident. She had lost her father; and was an uneducated, rustic villager, who came from a very poor family. The discrepancies in the statement of the witnesses or the prosecutrix are such that the same are not sufficient to demolish the prosecution's case. In a rape case, an accused can be convicted on the sole testimony of the prosecutrix. The appeal lacks merit and is liable to dismissed.

7. We have considered the rival submissions made by learned counsel for the parties and perused the record.

8. Before we proceed to examine the impugned judgments of the courts below and facts of the case, it may be desirable to refer to the settled legal principles which have to be applied in the instant case.

LEGAL ISSUES:

Sole Evidence of Prosecutrix :

9. In *State of Maharashtra Vs.Chandraprakash Kewalchand Jain* AIR 1990 SC 658, this Court held that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Court observed as under :-

> *"A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."*

10. In *State of U.P. Vs. Pappu @Yunus & Anr.* AIR 2005 SC 1248, this Court held that even in a case where it is shown that the girl is a girl of easy virtue or a girl habituated to sexual intercourse, it may not be a ground to absolve the accused from the charge of rape. It has to be established that there was consent by her for that particular occasion. Absence of injury on the prosecutrix may not be a factor

that leads the court to absolve the accused. This Court further held that there can be conviction on the sole testimony of the prosecutrix and in case, the court is not satisfied with the version of the prosecutrix, it can seek other evidence, direct or circumstantial, by which it may get assurance of her testimony. The Court held as under :-

> *"It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would do."*

11. In *State of Punjab Vs. Gurmit Singh & Ors.* AIR 1996 SC 1393, this Court held that in cases involving sexual harassment, molestation etc. the court is duty bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice. The Court further held that the delay in filing FIR for sexual offence may not be even properly explained, but if found natural, the accused cannot be given any benefit thereof. The Court observed as under :-

> *"The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix.....The courts must, while evaluating evidence remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to*

make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case.....Seeking corroboration of her statement before replying upon the same as a rule, in such cases, amounts to adding insult to injury.....Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances.

** ** ** **

The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

12. In *State of Orissa Vs. Thakara Besra & Anr.* AIR 2002 SC 1963, this Court held that rape is not mere a physical assault, rather it often distracts the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence.

13. In *State of Himachal Pradesh Vs. Raghubir Singh* (1993) 2 SCC 622, this Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity.

14. A similar view has been reiterated by this Court in *Wahid Khan Vs. State of Madhya Pradesh* (2010) 2 SCC 9, placing reliance on earlier judgment in *Rameshwar Vs. State of Rajasthan* AIR 1952 SC 54.

15. Thus, the law that emerges on the issue is to the effect that statement of prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix.

Test Identification Parade:

16. Holding of the Test Identification Parade is not a substantive piece of evidence, yet it may be used for the purpose of corroboration; for believing that a person brought before the Court is the real person involved in the commission of the crime. However, the Test Identification Parade, even if held, cannot be considered in all the cases as trustworthy evidence on which the conviction of the accused can be sustained. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant. (*Vide State of H.P. Vs. Lekh Raj* AIR 1999 SC 3916).

17. In *Malkhan Singh Vs. State of M.P.* AIR 2003 SC 2669, this Court has observed as under:

> *"It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine."*

18. In *Mulla & Anr. Vs. State of Uttar Pradesh* (2010) 3 SCC 508, this court (one of us, Hon'ble P. Sathasivam, J.) placed reliance on *Matru@Girish Chandra Vs. The State of Uttar Pradesh* AIR 1971 SC 1050; and *Santokh Singh Vs. Izhar Hussain & Anr.* AIR 1973 SC 2190, wherein it had been held that the Tests Identification Parades do not constitute substantive evidence. They are primarily meant for the purpose of providing the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on right lines. The Test Identification Parade can only be used as corroboration of the statement in Court. The necessity for holding the Test Identification Parade can arise only when the accused persons are not previously known to the witnesses. The test is done to check the veracity of the witnesses. The court further observed as under :-

> *"The evidence of test identification is admissible under Section 9 of the Indian Evidence Act. The Identification parade belongs to the stage of investigation by the police. The question whether a witness has or has not identified the accused during*

the investigation is not one which is in itself relevant at the trial. The actual evidence regarding identification is that which is given by witnesses in Court. There is no provision in the Cr.P.C. entitling the accused to demand that an identification parade should be held at or before the inquiry of the trial. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in Court."

19. Thus, it is evident from the above, that the Test Identification is a part of the investigation and is very useful in a case where the accused are not known before hand to the witnesses. It is used only to corroborate the evidence recorded in the court. Therefore, it is not substantive evidence. The actual evidence is what is given by the witnesses in the court.

Discrepancies and inconsistencies in depositions of witnesses:

20. It is settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution case, may not prompt the Court to reject the evidence in its entirety.

21. In *State of Rajasthan Vs. Om Prakash* AIR 2007 SC 2257, while dealing with a similar issue, this Court held that "irrelevant details which do not in any way corrode the credibility of a witness cannot be levelled as omissions or contradictions."

22. In *State of U.P. Vs. M.K. Anthony* AIR 1985 SC 48, this Court laid down certain guidelines in this regard, which require to be followed by the courts in such cases. The Court observed as under :-

"While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion

about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross examination is an unequal duel between a rustic and refined lawyer."

23. In *State Vs. Saravanan & Anr.* AIR 2009 SC 152, while dealing with a similar issue, this Court observed as under :-

".....while appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case, ought not to prompt the court to reject evidence in its entirety. Further, on the general tenor of the evidence given by the witness, the trial court upon appreciation of evidence forms an opinion about the credibility thereof, in the normal circumstances the appellate court would not be justified to review it once again without justifiable reasons. It is the totality of the situation, which has to be taken note of. Difference in some minor detail, which does not otherwise affect the core of the prosecution case, even if present, that itself would not prompt the court to reject the evidence on minor variations and discrepancies."

24. It is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witness. As the mental capabilities of a human being cannot be expected to be attuned to absorb all the details, minor discrepancies are bound to occur in the statements of witnesses (vide *Sohrab & Anr. Vs. The State of M.P.* AIR 1972 SC 2020; *Bharwada Bhogini Bhai Hirji Bhai Vs. State of Gujarat* AIR 1983 SC 753; *Prithu @ Prithi Chand & Anr. Vs. State of Himachal Pradesh* (2009) 11 SCC 588; and *State of U.P. Vs. Santosh Kumar & Ors.* (2009) 9 SCC 626).

25. Thus, in view of the above, the law on the point can be summarised to be that the evidence of the witnesses must be read as a whole and the cases are to be considered in totality of the circumstances and while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of

the prosecution case, should not be taken into consideration as they cannot form grounds to reject the evidence as a whole.

Injury on the person of the Prosecutrix

26. In the case of *Gurcharan Singh Vs. State of Haryana* AIR 1972 SC 2661, this Court has held that *"the absence of injury or mark of violence on the private part on the person of the prosecutrix is of no consequence when the prosecutrix is minor and would merely suggest want of violent resistance on the part of the prosecutrix. Further absence of violence or stiff resistance in the present case may as well suggest helpless, surrender to the inevitable due to sheer timidity. In any event, her consent would not take the case out of the definition of rape"*

27. In *Devinder Singh & Ors. Vs. State of Himanchal Pradesh* AIR 2003 SC 3365, a similar issue was considered by this Court and the court took into consideration the relevant evidence wherein rape was alleged to have been committed by five persons. No injury was found on the body of the prosecutrix. There was no matting on the pubic hair with discharge and no injury was found on the genital areas. However, it was found that prosecutrix was used to sexual intercourse. This Court held that the fact that no injury was found on her body only goes to show that she did not put up resistance.

Determination of Age

28. As per Modi's Medical Jurisprudence and Toxicology, 23rd Edn., the age of a person can be determined by examining the teeth (Dental Age), Height, Weight, General appearance (minor signs) i.e. secondary sex characters, ossification of bones and producing the birth and death/school registers etc. However, for determining the controversy involved in the present case, only a few of them are relevant.

Teeth- (Dental - Age)

29. So far as permanent teeth are concerned, eruption generally takes place between 6-8 years. The following table shows the average age of eruption of the permanent teeth :-

Central incisors	-	6th to 8th year
Lateral incisors	-	7th to 9th year
Canines	-	11th to 12th year
Second Molars	-	12th to 14th year
Third Molars or Wisdom Teeth	-	17th to 25th year

In total, there are 32 teeth on full eruption of permanent teeth.

Secondary Sex Characters

30. The growth of hair appears first on the pubis and then in the axillae (armpits). In the adolescent stage, the development of the pubic hair in both sexes follows the following stages :-

a) One of the first signs of the beginning of puberty is chiefly on the base of penis or along labia, when there are few long slightly pigmented and curled or straight downy hair;

b) The hair is coarser, darker and more curled, and spread sparsely over the junction of pubis;

c) More or less like an adult, but only a smaller area is covered, no hair on the medial surface of thighs;

The development of the breasts in girls commences from 13 to 14 years of age; however, it is liable to be affected by loose habits and social environments. During adolescence, the hormone flux acts and the breasts develop through the following stages:

i) Breasts and papilla are elevated as a small mound, and there is enlargement of areolar diameter.

ii) More elevation and enlargement of breast and areola, but their contours are not separate.

iii) Areola and papilla project over the level of the breast.

iv) Adult stage - only the papilla projects and the areola merges with the general contour of the breast.

Evidence of Rustic/ illiterate villager

31. In *Dimple Gupta (minor) Vs. Rajiv Gupta,* (2007) 10 SCC 30, this Court held that a person coming from altogether different background and having no education may not be able to give a precise account of the incident. However, that cannot be a ground to reject his testimony. The court observed that in a case like rape, "it is impossible to lay down with precision the chain of events, more particularly, when illiterate villagers with no sense of time are involved."

A similar view has been re-iterated by this Court in *Virendra @ Buddhu & Anr. Vs. State of U.P.* (2008) 16 SCC 582.

32. The case requires to be considered in the light of the aforesaid settled legal propositions.

Shri Anip Sachthey, learned counsel for the appellant, submitted that the prosecutrix was a major on the date of incident and that it was a clear case of consent. The Trial Court as well as the High Court examined the issue involved herein very minutely. Dr. Rupa Lalwani (PW-3), who had examined the prosecutrix on 7.12.1988, has stated that in the examination she found that there were in all 28 teeth in both the jaws; her breast had developed a little; the armpit hairs were in its initial stage; but there were pubic hair present around her vagina. On the basis of this, she opined that at relevant time, prosecutrix was aged between 12 and 14 years. As the statement of Dr. Rupa Lalwani (PW-3) makes it clear that the prosecutrix Asha @ Gopi had very little developed breast and the growth of

her armpit hair was at its initial/first stage, the Court believed that she was below 16 years of age. Undoubtedly, Asha @ Gopi, the prosecutrix had stated in her deposition that she was sent for a Radiological Test to Jabalpur and she could not explain as to why the report of the Radiological Test could not be produced before the Trial Court. In fact, the circumstances under which the report of the Radiological Test could not be produced before the Trial Court, would have been explained only by the Investigating Officer. Unfortunately, there is nothing on record to show that the defence had put any such question to the I.O. during his examination before the Trial Court. In our opinion, the I.O. was the only competent person to throw light on the issue of the non-production of the report of the Radiological Test and in the facts and circumstances of this case, no adverse inference can be drawn against the prosecution in this issue. More so, the prosecution had no control over prosecuting agency. Same remains the position for not holding the Test Identification Parade in this case.

33. Dr. Rupa Lalwani (PW-3) had stated that hymen of the prosecutrix was found completely torn and fresh blood was oozing out of it and she further opined that the vagina of a girl becomes loose even after one intercourse and two fingers can easily enter into her vagina. She had further opined that loosening of vagina and entering two fingers into vagina of a girl cannot give presumption that the girl was habituated to sexual intercourse.

34. Under Section 114-A of the Indian Evidence Act, 1872, which was inserted by way of amendment in the year 1988, there is a clear and specific provision that where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped, and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

35. Asha @Gopi, the prosecutrix had been consistent throughout in her statement that intercourse was against her wishes and that there was no consent as she had forcibly been caught and threatened and thereafter, she had been subjected to gang rape. In view of the above, we are of the view that the Courts below reached the correct conclusion that the prosecutrix was a minor. Be that as it may, there is nothing on record to establish the consent of the prosecutrix in this case.

36. The medical examinations of the appellant and other accused were also conducted soon after their arrest on the next day and it was found that the appellant and others were fit and competent to perform sexual intercourse. There is nothing on record to contradict or disprove the statement of the prosecutrix that the appellant and others took her behind the Railway School and when she cried out, one of the accused showed her a knife and in the meanwhile, accused Vijay, the appellant pressed her mouth and raped her. Thereafter, the other accused persons raped her turn by turn and all of them ran away when the police reached there.

37. Shri Sachthey, learned counsel for the appellant, would point out the

discrepancies between the statement of the prosecutrix and the other evidence on record. In the Court, she stated that she had gone to work at a business place for sorting apples and when she went to answer the call of nature, the accused met her and took her near the school and raped her. This statement was inconsistent with her version in the FIR, wherein, it was mentioned that when she was going to get her chappals repaired, she was forcibly taken by the accused to the school and was raped. There was also a contradiction in her statement regarding the dress she was wearing at that time as at one stage, she had stated that she was wearing sari, but at another stage, she stated that she was wearing a frock and vest. Shri Sachthey further submitted that as per the prosecutrix, the appellant had sexual intercourse with her for two hours and one other accused had it for about one hour. Such a course is wholly unnatural and improbable and, therefore, the evidence given by the prosecutrix cannot be held to be reliable.

38. We have considered the contradictions, inconsistencies and discrepancies pointed out by Shri Anip Sachthey, however, they are immaterial for the reason that the Trial Court as well as the High Court have considered these aspects and came to the conclusion that none of those contradictions goes to the root of the case. Admittedly, the prosecutrix was at the place of the incident and the appellant and other accused had intercourse with her. Even if it is presumed that she was major, there is nothing on record to show that she had given her consent. There is nothing on record to show that she had some basic education or had a sense of time and place. Such improvements have to be ignored as they do not go to the root of the case. The Trial Court has recorded the following findings in this regard:

> "(1) Her father is not alive. All these facts clearly prove that she was uneducated, poor and helpless child labour and, therefore, minor contradictions only given by her are very natural. ..... All depends upon the observance and memory of an individual.
>
> (2) The level of understanding of the prosecutrix is very-very low. It appears that in fact she wants to clarify that invariably one may not believe or presume that her consent was there in the gang rape and perhaps therefore she tried to give such a statement.....This clearly demonstrates that a testimony and understanding is of a very low level and on the same basis she has been stating about her age also."

39. The High Court has considered the discrepancies in her statement as to whether she was going to get her chappal repaired or was easing herself and came to the conclusion that such contradictions had no material bearing on the prosecution's case as "the fact remains that at that time she was going through that area.".

40. There are concurrent findings of fact by both the courts below. The courts below have applied settled principles of law in the correct perspective which we have explained hereinabove.

41. We do not find any force in the submissions made by Shri Anip Sachthey, learned counsel appearing for the appellant, that the instant case was squarely covered by the judgment of this Court in *Sunil Vs. State of Haryana* (2010) 1 SCC 742, wherein in a similar case, for non-production of the report of Radiological Test, an adverse inference was drawn against the prosecution and the appellant therein had been acquitted. In the said case, this Court had relied upon the judgment in *Sukhwant Singh Vs. State of Punjab* (1995) 3 SCC 367, wherein it has been held as under:

> *".....failure to produce the expert opinion before the trial Court in such cases affects the creditworthiness of the prosecution case to a great extent.'*

42. The facts of the case are quite distinguishable. In the said case, the basic issue was merely as to whether the prosecutrix was a minor. The prosecutrix was examined by Dr. Sadhna Verma (PW-1), and found that her Secondary Sex Characters were well developed. She carried out a local examination and in her opinion, the prosecutrix was major. The report reads :

> *"Labia majora was well developed. Pubic hair was present. Carunculae myrtiformes was present. Vagina admitting two fingers. Uterus was normal and retroverted, furnaces free.*
>
> *For her age verification, she was referred to dental surgeon and radiologist opinion."*

43. The report of the Medical Officer in the said case was quite contrary. That was a case under Sections 363, 366-A and 376 IPC and in her statement under Section 164 of Code of Criminal Procedure, 1973, the prosecutrix had stated that she was in love with the appellant therein and she had always been a consenting party. This Court itself, after appreciating the statement of Dr. Sadhna Verma (PW1), came to the conclusion that the prosecutrix therein was major. Thus, it is evident that the ratio of the said judgment has no application in the instant case.

44. If we examine the whole case in the totality of the circumstances and consider that an illiterate rustic village girl having no sense/estimate/assessment of time and place, found herself apprehended by the appellant and his accomplices and forced to surrender under the threat to life, it is quite possible that she could not even raise hue and cry. She had no option except to surrender. It appears to be a case of non-resistance on the part of the prosecutrix because of fear and the conduct of the prosecutrix cannot be held to be unnatural.

45. There is no dispute regarding the place of occurrence and the incident that occurred. The defence could not establish that it was a case of consent. FIR had been lodged most promptly. Appellant and other accused were arrested on the next day. The prosecutrix as well as the appellant and other accused were medically examined on the next day. The appellant or any other accused was not known to the prosecutrix. No reason could be there for which the prosecutrix

would have enroped them falsely. Definitely, it could not be a case of consent by the prosecutrix, even if it is assumed that she was major. The discrepancies in the statement of the prosecutrix have to be ignored as explained hereinbefore.

46. There is no material on record on the basis of which, this Court may take a different view or conclusion from the courts below. We do not find any force in this appeal, which is accordingly dismissed.

Appeal dismissed.

I.L.R. [2010] M. P., 2271
SUPREME COURT OF INDIA
Before Mr. Justice Dalveer Bhandari & Mr. Justice K.S. Radhakrishnan
28 July, 2010*

SAMEER KUMAR PAL & anr. ... Appellants
Vs.
SHEIKH AKBAR & ors. ... Respondents

Civil Procedure Code (5 of 1908), Section 100, Accommodation Control Act, M.P. 1961, Sections 12(1)(c), 12(1)(f) & 12(1)(g) - *Concurrent findings of fact in a case cannot be reversed in second appeal by weaving out an entirely new case without pleadings or basis - Judgment & order of trial Court as affirmed by first appellate Court is restored - Appeal allowed.* (Paras 9 to 13)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100, स्थान नियंत्रण अधिनियम, म.प्र. 1961, धाराएँ 12(1)(सी), 12(1)(एफ) व 12(1)(जी) – किसी मामले में तथ्य के समवर्ती निष्कर्षो को बिना अभिवचन या आधार के संपूर्णतः नया मामला बनाकर द्वितीय अपील में उलटा नहीं जा सकता – विचारण न्यायालय का निर्णय तथा आदेश, जैसा कि प्रथम अपीलीय न्यायालय द्वारा पुष्ट किया गया है, पुनःस्थापित किया गया – अपील मंजूर।

Cases referred :

AIR 1960 SC 335, (1984) 3 SCC 447, (1969) 1 SCC 386, ILR 1948 Mad 440.

J U D G M E N T

The Judgment of the Court was delivered by **Dalveer Bhandari, J.** :–This appeal is directed against the judgment and order of the High Court of Madhya Pradesh at Jabalpur dated 17.8.2001 passed in Second Appeal No.596 of 1999.

2. The appellant is particularly aggrieved by the impugned judgment because the concurrent findings of fact have been set aside by the High Court in the second appeal without any basis, justification or cogent grounds.

3. Brief facts necessary to dispose of this appeal are recapitulated as under:

Appellants Sameer Kumar Pal and Subhash Chandra Pal, both sons of Laxminarayan Pal (who were the plaintiffs in the trial court), filed a suit in the

*C.A. No.2398/2002

Court of the Civil Judge, Jabalpur. In the plaint, it was clearly incorporated that the appellants were the owners in possession of Shop No.1214 (Old No.892), New Corporation Chowk, Wright Town, Jabalpur. They purchased the said shop vide sale-deed dated 31.12.1991.

4. The appellants filed a suit for eviction against the defendants (respondents herein) under section 12(1)(c) (that the tenant has created nuisance), 12(1)(f) (for bona fide requirement of landlord for non-residential purposes) and 12(1)(g) (bona fide requirements of landlord to carry out repairs) of the M.P. Accommodation Control Act, 1961. The relevant parts of section 12 of the Act are set out as under:

> "12. Restriction on eviction of tenants.--(1) Notwithstanding anything to the contrary contained in any other law or contract, no suit shall be filed in any civil court against a tenant for his eviction from any accommodation except on one or more of the following grounds, only, namely--
>
> (a) - (b) x x x
>
> (c) that the tenant or any person residing with him has created a nuisance or has done any act which is inconsistent with the purpose for which he was admitted to the tenancy of the accommodation, or which is likely to affect adversely and substantially the interest of the landlord therein:
>
> (d) - (e) x x x
>
> (f) that the accommodation let for non-residential purpose is required bona fide by the landlord for the purpose of continuing or starting his business or that of any of his major sons or unmarried daughters if he is the owner thereof or for any person for whose benefit the accommodation is held and that the landlord or such person has no other reasonably suitable non-residential accommodation of his own in his occupation in the city or town concerned;
>
> (g) that the accommodation has become unsafe, or unfit for human habitation and is required bona fide by the landlord for carrying out repairs which cannot be carried out without the accommodation being vacated."

5. In the written statement filed in the trial court, the respondents herein raised the main objection that the appellants herein are not the owners of the suit property and the trial court had no jurisdiction to adjudicate the matter as the suit property has been a Wakf property. It may be pertinent to mention that in the written statement the respondents nowhere took the plea that the suit property, namely `Madras Hotel' is a joint family property. The trial court held that the appellants were in bona fide need of carrying on the business of sweets and for running a

restaurant. No other vacant property was in possession of the appellants in Jabalpur. It was also held that the shop in question is very old, unsafe and in dilapidated condition. There is need to repair and carry out some structural changes in the shop which cannot be carried out unless the same is made available to the appellants. The trial court clearly held that the appellants are in bona fide need of the suit property. The trial court also held that the respondents have not paid rent since September, 1992 and decided the issue of default in favour of the appellants. The trial court categorically held that the suit property is not the Wakf property and decreed the suit of the appellants.

6. The respondents preferred first appeal before the court of XIth Additional District Judge, Jabalpur. The entire evidence was re-appreciated by the appellate court independently and the court clearly held that the respondents have failed to prove that the appellants are in possession of any other non-residential accommodation in the entire city of Jabalpur. The first appellate court upheld the findings of the trial court. It may be pertinent to mention that before the first appellate court also, no plea was taken that the property in question, namely the 'Madras Hotel', was a joint family property. The first appellate court dismissed the appeal.

7. Respondent nos. 1 & 2, aggrieved by the judgment of the XIth Additional District Judge, Jabalpur, preferred a second appeal before the High Court of Madhya Pradesh at Jabalpur.

8. The High Court in the impugned judgment, without any pleadings or basis, held that the property namely 'Madras Hotel' is a joint family property. The High Court erroneously observed that the property namely 'Madras Hotel' was purchased by the father of the appellants and his brothers, whereas in fact the property was purchased by the appellants vide sale deed dated 31.12.1991. The assumption of wrong fact has led to total erroneous finding and conclusion. The High Court in para 8 observed as under:

> ".....It is firmly established that the building known as 'Madras Hotel' belongs to Laxminarayan Pal and his two sons who are the plaintiffs. That is their joint family property. This building was purchased by Laxminarayan when he was carrying on business with his two brothers and the partition took place long after the acquisition of that building. In that partition that building was allotted to Laxminarayan alone....."

9. The High Court in the impugned judgment weaved out an entirely new case. Neither there was any pleading nor it was the case of the respondents either before the trial court or the first appellate court. The High Court gravely erred in arriving at the finding without any basis whatsoever. Subhash Chandra Pal, PW1 was examined by the trial court and in his testimony he categorically stated that he and his elder brother Sameer Kumar were owners of the property in question.

10. The appellants have relied on *Mst. Rukhmabai v. Lala Laxminarayan & Others* AIR 1960 SC 335 in which this court held that there is no presumption that any property whether moveable or immoveable held by a member of a joint Hindu family is joint family property. The burden lies upon the person who asserts that a particular property is joint family property to establish that fact.

11. The appellants further relied on *Kuppala Obul Reddy v. Bonala Venpata Narayan Reddy (dead) by LRs.* (1984) 3 SCC 447 in which this court held that there were no pleadings as to the properties being joint properties and no issue as to joint family had been raised and there was no proper evidence to make out any case of the properties being joint family properties, was raised and no such issue could possibly have been raised in absence of the pleadings. The court further held that in absence of any pleading and any issue and further in the absence of any proper evidence, the view expressed by the learned judge of the High Court that the properties were joint family properties is clearly unwarranted. There may be presumption that there is a Hindu Joint Family but there can be no presumption that the joint family possesses joint family properties.

12. The appellants further relied on *Mudi Gowda Gowdappa Sankh v. Ram Chandra Ravagowda Sankh* (1969) 1 SCC 386 wherein this Court held that, of course, there is no presumption that merely because the family is joint so the property is also joint. So the person alleging the property to be joint family property must prove it. In that case, this Court further held that the burden of proving that any particular property is joint family property is, therefore, in the first instance, upon the person who claims it to be coparcenary property. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property. The Court carved out an exception and observed that, "this is, however, subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate." In *Mudi Gowda Gowdappa Sankh* (supra), this court heavily relied upon the ratio of Privy Council judgment in *Randhi Appalaswami v. Randhi Suryanarayanamurti & Others* ILR 1948 Mad 440 wherein the legal position of Hindu Law has been beautifully articulated by Sir John Beaumont. The relevant portion of the judgment is reproduced as under:

> "Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to

the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property."

13. In this view of the matter, we are constrained to set aside the impugned judgment of the High Court. The High Court was not justified in reversing the concurrent findings of fact in this case. Consequently, the appeal is allowed and the impugned judgment of the High Court is set aside and that the judgment and order of the trial court, as affirmed by the first appellate court, is restored. In the facts and circumstances of the case, the parties are directed to bear their own costs.

Appeal allowed.

I.L.R. [2010] M. P., 2275
FULL BENCH
Before Mr. Justice Arun Mishra, Mr. Justice K.K. Lahoti & Mr. Justice Sanjay Yadav
8 September 2010*

RAGHVENDRA PRASAD GAUTAM ... Petitioner
Vs.
UNION BANK OF INDIA & anr. ... Respondents

Constitution, Articles 343 & 344, Official Languages Act, 1963, Section 3(4) - *Circular dated 4th August, 2006 of the respondent Bank in so far as it insists on 35% pass marks in English to qualify for promotion in the case of persons like the petitioner who are proficient in Hindi, is not ultra vires.* (Para 35)

संविधान, अनुच्छेद 343 व 344, राजभाषा अधिनियम, 1963, धारा 3(4) – प्रत्यर्थी बैंक का परिपत्र तारीख 4 अगस्त 2006, जहाँ तक कि यह याची जैसे हिन्दी में प्रवीण व्यक्तियों की पदोन्नति के मामले में, अंग्रेजी में 35 प्रतिशत उत्तीर्णांक की योग्यता पर जोर देता है, अधिकारातीत नहीं है।

Case referred :

(2002) 1 SCC 616.

Raghvendra Prasad Gautam, petitioner in person.
S.K. Rao with *V.K.Pandey & Shailendra Pandey,* for the respondents.
Rajendra Tiwari, amicus curie.

J U D G M E N T

Question of law which crops up for consideration on a reference by the Division Bench is :

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*W.P. No.14088/2006 (Jabalpur)

"Whether the circular dated 4th August, 2006 of the Respondent Bank in so far as it insists on 35% pass maths in English to qualify for promotion in the case persons like the petitioner who are proficient in Hindi, is ultra-vires sub-section (4) of Section 3 of the 1963 Act?"

2. While referring the said question of law Division Bench raise some doubts as to correctness of the judgment in *Raghvendra Prasad Gautam v. Union Bank of India :* 1999(1) M.P.L.J. 42; wherein the stipulation requiring a candidate to secure minimum marks of 35% in English to qualify written test for the purpose of promotions under the All India Service Category was upheld holding thereby that, it does not contravene sub-section (4) of Section 3 of the Official Languages Act, 1963 (hereinafter referred to as the Act of 1963).

3. Relevant facts for proper appreciation of the issue raised, are taken from the reference order dated 08/05/2008. They are that, the petitioner is working in the respondent Union Bank of India: wherein the promotions of Clerical Staff to the Officer Cadre are governed by the policy framed by the Management on the basis of settlement with All India Union Bank Employees' Association under section 2 (p) and section 18 (1) of the Industrial Disputes Act, 1947 read with rule 58 of the Industrial Disputes (Control) Rules, 1957.

4. One such policy was brought in vogue vide memorandum of settlement dated 10-10-1992, circulated vide staff circulation No. 3913 dated 23-10-1992 (hereinafter shall be referred to Promotion Policy). For the sake of record pertinent it would be to note that, amendments to the said policy dated 10-10-1992 were carried out in terms of settlements dated 02-02-2001, 07-12-2001, 11-07-2001, 19-02-2003, 04-11-2004 and 09-07-2009.

5. The Promotion Policy provides for two channel system to promotion from clerical cadre to officer cadre in Junior Management Grade Scale I, viz.,

(i) State services (seniority-cum-merit)

(ii) All India Services (merit)

6. The criteria for selection to respective channel is stipulated in Chapter II and Chapter III of Promotion Policy, respectively.

7. The controversy, since pertains to the criteria laid down for selection in the All India Services (merit) channel, we propose to confine ourselves to the relevant provision of Chapter III.

Clause 3.2 thereof stipulates :

"3.2 For the vacancies identified under All India Services, all those clerical staff who apply and are eligible would be allowed to participate in the written test. The Written Test shall consist of the following :

Subjects	Maximum Marks	Minimum Qualifying Marks
i) English	50	35%
ii) Law and Practice of Banking	50	35%
iii) Commercial Law/ Accountancy	50	35%
iv) Practical Banking	50	35%

For SC/ST candidates, the minimum qualifying marks will be 30% in each of the above subjects.

Marks obtained in English will not be treated for ranking purpose.

8. Thus under the promotion policy the marks obtained in English though is not applicable, for ranking purpose, but the stipulation of 35% minimum qualifying marks has a catalytic effect. Because, but for this clerical staff obtaining less than 35% marks in English and have higher marks in other subjects could not get berth in the provisional select list.

9. This, led to raising of the grievance, that same being in contravention to the provisions of sub-section (4) of the section 3 of the Act of 1963 cannot be allowed to be retained in the Promotion Policy: vide Writ Petition : W. P. No. 2529 of 1996. Wherein, the promotion policy was challenged also in the back drop of the Constitutional provisions enshrined under Article 343 and 344.

10. The Division Bench vide its order dated 04-08-1998, observing that, in absence of any constitutional provision, the promotion policy laying down minimum qualifying marks in English does not cause any violence to any of the constitutional provisions.

11. Furthermore, on the bedrock of the provisions under sub-section (4) of section 3 of the Act of 1963, it was observed by their lordships that the said provision does not prohibit, English to be regarded as a compulsory subject in any Departmental Examination or in any examination and accordingly negatived the proposition that the petitioner therein was put to any disadvantage, because of not able to score the minimum pass marks in English. [Please also see *Banking Service Recruitment Board, Madras .v. V. Ramalingam and others* : (1998) 8 SCC 523, wherein it was observed by their Lordships :

> "5.....There is nothing irregular about fixing different cut-off marks for each paper. The cut-off marks fixed will depend upon the examining body's view of the importance of the subject for the post in question. It may well fix higher cut-off marks for subjects which may have greater relevance than other subjects which may

have relevance but not to the same extent. Basically, it is for the examining body to fix cut-off marks."]

12. The judgment in Writ Petition No. 2529/1996 : *Raghvendra Prasad Gautam v. Union Bank of India and others* was, later on followed by the another Division Bench of this Court in W. P. No. 3771/05 between the same party decided on 30-08-2005.

13. The petitioner thereafter again appeared in written test for selection under All India Service (merit) channel, held on 23-01-1996, whereon he was declared unsuccessful because of obtaining less than 35% marks in English. Subsequent thereafter, the respondents vide its Staff Circular No. 5292 dated 04-08-2006 initiated proceedings to fill up 900 vacancies under State Services channel and 600 vacant posts under All India Services channel. For All India Services channel the selection criteria remained as per the Promotion Policy i.e. achieving minimum 35% in all subjects including English. This give rise to another round of litigation forming subject matter of Writ Petition. No. 14088/2006(s): wherefrom emanates the present reference.

14. Though by order dated 08-05-2008, the Division Bench has declined to reopen the question of promotion of petitioner pursuant to the circular dated 23-10-1992; however, circular dated 04-08-2006 has been taken to have given fresh cause, whereupon, the earlier judgment has been doubted.

15. Before dwelling upon the question of law referred for adjudication we propose to clarify that, though in the reference order dated 08-05-2008 the circular dated 04-08-2006 has been stated to be a fresh circular regarding promotion policy. However, a close look at the circular would reveal that, the same proposes to undertake promotion process from the clerical to officer cadre (Junior Management Grade/Scale-I) in pursuance to the Promotion Policy for Clerical Staff for promotion to Official Cadre circulated vide Staff Circular No. 3913 dated 23-10-1992, as amended from time. In other words it does not lay down any fresh promotion policy. We mention this to straighten the record.

16. However, since doubt is raised over an earlier Division Bench judgment, we dwell upon to answer the reference.

17. The Official Languages Act, 1963 owes its existence to the constitutional provisions contained under Article 343 and 344 of the Constitution of India.

Article 343 provides for :

> **"343. Official language of the Union.** (1) The official language of the Union shall be Hindi in Devanagari script.
>
> The form of numerals to be used for the official purposes of the Union shall be the international form of Indian numerals.
>
> (2) Notwithstanding anything in clause (1), for a period of fifteen years from the commencement of this Constitution, the English

language shall continue to be used for all the official purposes of the Union for which it was being used immediately before such commencement.

Provided that the President may, during the said period, by order authorise the use of the Hindi language in addition to the English language and of the Devanagari form of numerals in addition to the international form of Indian numerals for any of the official purposes of the Union.

(3) Notwithstanding anything, in this article, Parliament may by law provide for the use, after the said period of fifteen years, of -

(a) the English language, or

(b) the Devanagari form of numerals, for such purposes as may be specified in the law.

Article 344 stipulates:

"344. Commission and Committee of Parliament on official language.-(1) The President shall, at the expiration of five years from the commencement of this Constitution and thereafter at the expiration of ten years from such commencement, by order constitute a Commission which shall consist of a Chairman and such other members representing the different languages specified in the Eighth Schedule as the President may appoint, and he order shall define the procedure to be followed by the Commission.

(2) It shall be the duty of the Commission to make recommendations to the President as to-

(a) the progressive use of the Hindi language for the official purposes of the Union:

(b) restrictions on the use of the English language for all or any of the official purposes of the Union;

(c) the language to be used for all or any of the purposes mentioned in article 348;

(d) the form of numerals to be used for any one or more specified purposes of the Union;

(e) any other matter referred to the Commission by the President as communication between the Union and a State or between one State and another and their use.

(3) In making their recommendations under clause (2), the Commission shall have due regard to the industrial, cultural and scientific advancement of India, and the just claims and

the interests of persons belonging to the non-Hindi speaking areas in regard to the public services.

(4) There shall be constituted a Committee consisting of thirty members, of whom twenty shall be members of the House of the People and ten shall be members of the Council of States to be elected respectively by the members of the House of the People and the members of the Council of States in accordance with the system of proportional representation by means of the single transferable vote.

(5) It shall be the duty of the Committee to examine the recommendations of the Commission constituted under clause (1) and to report to the President their opinion thereon.

(6) Notwithstanding anything in article 343, the President may, after consideration of the report referred to in clause (5), issue directions in accordance with the whole or any part of that report."

18. The Official Languages Act, 1963 was enacted by the Parliament in exercise of its power under clause (3) of Article 343 of the Constitution of India to provide for the languages which may be used for the official purposes of the Union, for transaction of business in Parliament, for Central and State Acts.

19. Section 3 of the Act of 1963 made a provision for continuance of English language for official purposes of the Union and for use in Parliament.

20. Section 3 was substituted by section 2 of the Act of 1968 with effect from 08-01-1968. The amendment led to introduction of sub-section (4) in the following terms :-

"(4) Without prejudice to the provision of sub-section (1) or sub-section (2) or sub-section (3) the Central Government may, by rules made under section 8, provide for the language or languages to be used for the official purpose of the Union including the working of any Ministry, Department. Section or Office, and in making such rules, due consideration shall be given to the quick and efficient disposal of the official business and the interests of the general public and in particular, the rules so made shall ensure that persons serving in connection with the affairs of the Union and having proficiency either in Hindi or in the English language may function effectively and that they are not placed at a disadvantage on the ground that they do not have proficiency in both the languages."

21. The first impression which one gets from a plain reading of sub-section (4) of section 3 of the Act of 1963 is that, it is the working knowledge of either of the language i.e. Hindi and English which the framer aims at to achieve and when

provision is seen microscopically, it is observed that, it does not prohibit the use of either language for official purpose or in the working of any Ministry, Department, Section or Office and in maki.ng such rules.

22. This can be analysed from another angle. Sub-section (4) of Section 3 of the Act of 1963 starts with the expression "without prejudice to the provisions of sub-section (1) or sub-section (2) or sub-section (3)". Meaning thereby, that the action under sub-section (4) must be in consonance to and not inconsistent with the provisions contained under sub-section (1), sub-section (2) or sub-section (3). This is how the expression "without prejudice" has been interpreted. (For an authority please see *A. P. State Financial Corpn. v. M/s GAR Re-Rolling Mills* : AIR 1994 SC 2151.)

23. Sub-section (1), sub-section (2) & sub-section (3) of section 3 provides for :

> "(1) Notwithstanding the expiration of the period of fifteen years from the commencement of the Constitution, the English language may, as from the appointed day, continue to be used, in addition to Hindi,-
>
> (a) for all official purposes of the Union for which it was being used immediately before that day; and
>
> (b) for the transaction of business in Parliament:
>
> Provided that the English language shall be used for purposes of communication between the Union and a State which has not adopted Hindi as its official language;
>
> Provided further that where Hindi is used for purposes of communication between one State which has adopted Hindi as its official language and another State which has not adopted Hindi as its official language, such communication in Hindi shall be accompanied by a translation of the same in the English language:
>
> Provided also that nothing in this sub-section shall be construed as preventing a State which has not adopted Hindi as its official language from using Hindi for purposes of communication with the Union or with a State which has adopted Hindi as its official language, or by agreement with any other State, and in such a case, it shall not be obligatory to use the English language for purposes of communication with that State.
>
> (2) Notwithstanding anything contained in sub-section (1) where Hindi or the English language is used for purposes of communication-
>
> (i) between one Ministry or Department or office of the Central Government and another;
>
> (ii) between one Ministry or Department or office of the

Central Government and any corporation or company owned or controlled by the Central Government or any office thereof;

(iii) between any corporation or company owned or controlled by the Central Government or any office thereof and another;

a translation of such communication in the English language or, as the case may be, in Hindi shall also be provided till such date as the staff of the concerned Ministry, Department, office or corporation or company aforesaid have acquired a working knowledge of Hindi.

(3) Notwithstanding anything contained in sub-section (1) both Hindi and the English languages shall be used for–

(i) resolutions, general orders, rules, notifications, administrative or other reports or press communiques issued 'or made by the Central Government or by a Ministry. Department or office thereof or by a corporation or company owned or controlled by the Central Government or by any office of such corporation or company;

(ii) administrative and other reports and official papers laid before a House or the House of Parliament;

(iii) contracts and agreements executed, and licences, permits, notices and forms of tender issued by or on behalf of the Central Government or any Ministry, Department or office thereof or by a corporation or company owned or controlled by the Central Government or by any office of such corporation or company."

24. Thus in effect these provisions does not bar the use of English language for official, purpose. Consequently, we also do not perceive any illegality in the action of the respondent prescribing English language as one of the subject in examination for selection in the All India (merit) channel.

25. The question which lurks and still remains to be answered is whether by fixing a minimum cut off marks to be obtained in English would in any manner be treated as putting the persons at a "disadvantage on the ground that they do not have proficiency in both the languages."

26. Though repetitive, but worth it would be, for an answer to have a close look at the provision, i.e.sub-section (4) of section 3. This provision empowers the Central Government to frame rules under section 8 providing for the language or languages to be used for the official purpose of the Union including the working of any Ministry, Department, Section or Office. And while making such rules due consideration shall be given to the quick and efficient disposal of the official business and the interests of the general public. The provision further provides that the

Central Government while making rules shall ensure that persons serving in connection with the affairs of the Union and having proficiency either in Hindi or in the English language may function effectively and that they are not placed at a disadvantage on the ground that they do not have proficiency in both the languages. The provision therefore aims at the functional knowledge of either of the language.

27. Though much emphasis has been laid by the petitioner on the expression "efficiency" and "proficiency" to bring home the contention that, prescribing a minimum cut off marks in English would lead to a disadvantage if a person is not proficient in either language.

28. This aspect of the matter can be examined in the context of the fact that the language is the means of communication and the applicability of it would depend upon the efficient knowledge of a language. Proficiency whereof is not required.

29. For, an expression "efficient" means 'capable (able) to perform duties well' or 'producing a desired or satisfactory result'. The expression "efficiency" would therefore mean 'state or quality of being efficient'.

30. The 'proficient' on the other hand means 'skilled', 'expert'. And the expression "proficiency" is the 'quality of state of being proficient; advance in the acquisition of any art, science, or knowledge, progression in knowledge; improvement; adeptness as, to acquire proficiency in music", (reference : The American Heritage Dictionary of the English Language(R), Fourth Edition.)

31. Therefore, when 'sub-section' (4) of section 3 is examined in the context of above aspect, what it aims for, that, wanting of a proficiency in either of the language should not be treated as a disadvantage. And when conversely applied would mean that, the capability to understand and have a working knowledge of either of the language is that what is aimed at for by the provision under consideration.

32. Thus when it is expected of a person to have a minimum 35% in English to be eligible for being placed in select list is not expecting him of being proficient in the language, but must be efficient, so that he has a workable knowledge of English for an All India Service.

33. In *State of U. P. v. Dr. K. U. Ansari:* (2002) 1 SCC 616 it was observed by their Lordships :

> "10.....In the expression "efficiency" are included all relevant matters necessary for discharging his duties efficiently and satisfactorily. In the case of a teacher, particularly a teacher in medical college, it is absolutely necessary that he keeps abreast of all developments in the field of the medical science of his specialisation and he can achieve this better if he is engaged in research work. The manner in which he carries out the research and assessment of the results he obtains are matters of scrutiny

by experts; but it cannot be said that a teacher in medical college is not expected to do any research. In order to teach his students properly the teacher has to maintain a high degree of proficiency in the subject."

34. Having thus considered we are of the opinion that the stipulation as contained in the Promotion Policy dated 10-10-1992 for clerical staff for promotion to officer cadre, circulated vide staff circular No. 3913 dated 23.10.1992, and as amended from time to time, laying down the criteria of obtaining minimum 35 % marks in English in written examination for being qualified to be placed on the provisional select list, does not violate the mandate of sub-section (4) of section 3 of the Official Languages Act, 1963.

35. We accordingly answer the question of law referred to us as to that the circular dated 4th August, 2006 of the Respondent Bank in so far as it insists on 35% pass marks in English to qualify for promotion in the case of persons like the petitioner who are proficient in Hindi, is not ultra-vires sub-section (4) of Section 3 of the 1963 Act.

36. Before parting, we propose to place on record our appreciation for able assistance by the petitioner and respective counsels and more particularly of Shri Rajendra Tiwari, learned senior counsel, who readily and proficiently assisted as friend of the Court.

37. Let the matter now be listed before Single Bench for its decision on merit.

Order accordingly.

I.L.R. [2010] M. P., 2284

WRIT APPEAL

Before Mr. S.R. Alam, Chief Justice & Mr. Justice Alok Aradhe

24 June, 2010*

MAA JALPA ENTERPRISES (M/S) ... Appellant

Vs.

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

Mineral (Prevention of Illegal Mining, Transportation and Storage) Rules, M.P. 2006, Rules 3 & 18 - *Appellants, who were found transporting coal without transit pass, were imposed with a penalty of Rs.25,000/- - Challenged by them on the ground that the appellants are only traders and have valid licence for purchase and sale of coal, therefore, no transit pass is obtained and no transit pass is prescribed under the Rules - Held - Rule 3 manifestly casts an obligation on a person who intends to transport mineral/ minerals or its products from the place of raising or from one place to another place, to obtain a valid transit pass - Appellants were admittedly found transporting coal from one place to another place without obtaining a valid*

*W.A. No.379/2010 (Jabalpur)

transit pass, and as such they are liable for prosecution and for payment of penalty - Appeal dismissed. (Paras 6 & 10)

खनिज (अवैध खनन, परिवहन तथा भण्डारण निवारण) नियम, म.प्र. 2006, नियम 3 व 18 – अपीलार्थी, जिन्हें पारगमन पास के बिना कोयले का परिवहन करते हुए पाया गया, पर 25,000/– रूपये की शास्ति अधिरोपित की गयी – जिसे उनके द्वारा इस आधार पर चुनौती दी गयी कि अपीलार्थी केवल व्यापारी हैं और उनके पास कोयला खरीदने एवं बेचने का वैध लायसेंस है, इसलिए कोई पारगमन पास प्राप्त नहीं किया गया तथा नियमों के अन्तर्गत कोई पारगमन पास विहित नहीं है – अभिनिर्धारित – नियम 3 ऐसे व्यक्ति पर, जो खनिज/खनिजों अथवा इसके उत्पादों को निर्माण स्थान से या एक स्थान से दूसरे स्थान पर परिवहन करना चाहता है, प्रत्यक्षतः वैध पारगमन पास प्राप्त करने का दायित्व डालता है – अपीलार्थियों को स्वीकृत रूप से वैध पारगमन पास प्राप्त किये बिना एक स्थान से दूसरे स्थान पर कोयले का परिवहन करते हुए पाया गया और इस प्रकार वे अभियोजन एवं शास्ति का भुगतान करने के लिए दायी हैं – अपील खारिज।

N.K. Tiwari, for the appellant.

ORDER

Heard on the question of admission.

2. In this intra-court appeal preferred under Section 2 of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 challenge has been made to order dated 19-4-2010 passed by the learned Single Judge in W.P. No.13205/09. By the aforesaid order the learned Single Judge has upheld the validity of the order dated 7-11-2009 passed by the Mining Officer, Panna whereunder penalty of Rs.25,000/- was imposed on the appellants under Rule 18 of the M.P. Mineral (Prevention of Illegal Mining, Transportation and Storage) Rules, 2006 [hereinafter referred to as `Rules'] on the ground that the appellants were found transporting coal without obtaining a valid transit pass as required by the Rules.

3. Learned counsel for the appellants vehemently contended that the appellants are only traders and have valid licence for purchase and sale of coal. Therefore, he did not obtain any transit pass. It has further been submitted that no transit pass is prescribed under the provisions of the Rules which can be issued to a purchaser for transporting coal from one place to another place. Therefore, the order dated 7-11-2009 passed by the Mining Officer, Panna is arbitrary and illegal.

4. On the other hand the respondents in the return/counter affidavit filed in the writ petition have asserted that the petitioner No.2 was found transporting coal without having any valid transit pass as required under the Rules. Accordingly, a notice to show cause was issued to him under Rule 18(5) of the Rules and the truck on which coal worth Rs.1,82,083/- was being transported was seized. Thereafter, since the petitioners-appellants could not produce a valid transit pass as required under the Rules hence, after considering their reply to show cause a penalty of Rs.25,000/- is imposed by the order impugned in the writ petition. Rule 3 of the Rules prohibits transportation of any mineral/minerals and its products by

any career from one place to another, in the absence of a valid transit pass. To appreciate the controversy it would be appropriate to examine the provision contained in Rule 3 of the Rules. It reads as under:

> *"3. **Prohibition** (1) - No person shall transport or cause to be transported any mineral/minerals or/and its products by any carrier from the place of raising or from one place to another without having a valid transit pass issued under these rules;*
>
> *Provided that no such transit pass shall be required in case of any mineral/minerals or its products are being transported directly from the lease area by means of a mechanical device viz. Railway wagon or aerial ropeway or conveyor belt.*
>
> *(2)- No person shall store or cause to be stored for commercial purposes or trade any mineral/minerals or its products outside the mine/quarry area without holding a valid licence granted by the Licensing Authority under these rules."*

5. From a perusal of the aforesaid Rule 3 it is clear that no mineral/minerals or its products can be transported by any carrier from the place of raising or from one place to another without there being a valid transit pass issued under the Rules 2006. It manifestly casts an obligation on a person who intends to transport mineral/minerals or its products from the place of raising or from one place to another place to obtain a valid transit pass. The appellants admittedly, were found transporting coal worth Rs.1,82,083/- from Katni to Bhiwadi in the State of Rajasthan without obtaining a valid transit pass as required under the Rules 2006, therefore, they contravened the provisions of the Rules.

6. Rule 4 of the Rules 2006 which provides an exception is also of no help to the appellants, since they do not fall within the ambit of the exempted category. Rule 5 deals with transportation of mineral and its products. Sub-Rule (3) of Rule 5 which is relevant for the present purpose, reads as under:

> *"(3). (i) The holder of a Mineral Dealer Licence for transportation of mineral or its products from the stockyard shall make an application in Form-3 to the Officer In-charge the Mining Section of the concerned district Collectorate. The cost of the Transit Pass Book shall be deposited in the same manner, as prescribed in Clause (a) of sub-rule (3) of Rule 7 and the original treasury challan shall be attached with the Form-3;*
>
> *(ii) the Transit Pass for mineral dealer licence shall be prepared in duplicate in Form-4 and serial number to be machine numbered. Each transit pass shall clearly contain date, tie and quantity of mineral both in figures and words*

along with name and dated signature of the authorized person issuing the pass;

(iii) before issue of the Transit Pass Book, the Transit Passes shall be stamped with official seal on the reverse and the first and last page of the first copy of the Transit Pass Book shall be signed with date on the reverse by the Officer In-charge of the mining section of the concerned district collectorate certifying the total number of Transit Passes contained in the book;

(iv) the duplicate copy of the Transit Pass shall be issued by the Licensee to accompany every carrier for every trip carrying the mineral or its products from the stockyard. The copy shall be made by the carbon process and the original copy of the Transit Pass shall be retained in the Transit Pass Book;

(v) after the first issue of Transit Pass Book, the subsequent issues shall be made on submission of used Transit Pass Books;

(vi) on receipt of the used Transit Pass Books, the Officer In-charge of the Mining Section of the concerned district Collectorate shall get original copy of the Transit Pass checked in the office with regard to the material entries and after checking and verifying the same shall be returned to the Licensee after stamping the rubber stamp marked as "CHECKED" and signing the same by a person not below the rank of Mining Inspector or Mining Surveyor."

7. In the event of contravention of the provisions contained in Rule 3, the penalty is to be imposed on the transporters under Rule 18 for unauthorised transportation or storage of minerals and products.

8. Rule 18 of the Rules 2006 which provides about the penalty reads as under:

"18. PENALTY FOR UNAUTHORISED TRANSPORTATION OR STORAGE OF MINERALS AND ITS PRODUCTS

(1) Whenever any person is found transporting or storing any mineral or its products or on whose behalf such transportation or storage is being made otherwise than in accordance with these rules, shall be presumed to be a party to the illegal transportation or storage of mineral or its products and every such person shall be punishable with simple imprisonment for a term, which may extend to one year or with fine, which may extend to Rupees Five Thousand or with both;

(2) whenever any person is found transporting or storing any mineral or its products in contravention of the provisions of these rules, the authorised person may seize the mineral or its products together with tools, equipment and carrier used in committing such offence;

(3) the authorised person seizing illegally transported or stored mineral or its products, tools, equipments and carrier shall give a receipt of the same to the person, from whose possession such things were so seized and shall make report to the Magistrate having jurisdiction to try such offence;

(4) the property so seized under sub-rule (2) may be released by the authorised person, who seized such property on execution of a bond to the satisfaction of the authorised person by the person, from whose possession such property was seized on the condition that the same shall be produced at the time and place, when such production is asked for by the authorised person:

Provided that where a report has been made to the Magistrate under sub-rule (3), then the property so seized shall be released only under the orders of such Magistrate;

(5) The Authorised Person not below the rank of Collector, Additional Collector of Senior IAS scale, Director, Joint Director, Deputy Director and Officer Incharge (Flying Squad) may before reporting to the Magistrate, compound the offence so committed under sub-rule (1) on payment of such fine, which may extend to double the market value of mineral or its products or Rupees Five Thousand, but in any case it shall not be less than Rupees One Thousand or ten times of royalty of minerals so seized, whichever is higher:

Provided that in case of continuing contravention, the authorised Person, not below the rank of Mining Officer in addition to the fine imposed may also recover an amount of Rupees Five Hundred for each day till the contravention continues;

(6) all property seized under sub-rule (2) shall be liable to be confiscated by order of the Magistrate trying the offence, if the amount of the fine and other sum so imposed are not paid within a period of one month from the date of order:

Provided that on payment of such sum within one month of the order, all property so seized, except the mineral or its products shall be released and the mineral or its products so

seized under sub-rule (2) shall be confiscated and shall be the property of the State Government;

(7) the authorised person may, if deemed necessary, request the Police Authority in writing for the help of Police and the Police Authorities shall render such assistance, as may be necessary to enable the authorised person to exercise the powers conferred on him/her under these rules to stop illegal transportation or storage of minerals."

9. In the case in hand before compounding the offence an opportunity to show cause was extended to the appellants and only thereafter, penalty of Rs.25,000/- was imposed. In the facts and circumstances of the case and also keeping in view that the appellants were admittedly found transporting coal from one place to another place without obtaining a valid transit pass, as required under Rule 3 and as such they are liable for prosecution and for payment of penalty for unauthorisedly transporting coal. Learned counsel for the appellants could not point out any error in the impugned order imposing the penalty. He however argued that since the appellants are traders and possess a valid licence for purchase and sale of coal hence, for transporting coal they are not required to obtain a valid transit pass. We do not find any force in the submission for the reason that the provisions contained in Rule 3 of the Rules clearly and emphatically prohibits transportation of coal without obtaining a valid transit pass and contravention of the same is made punishable and liable for payment of penalty under rule 18 of the Rules.

10. We, therefore, do not find any reason to differ with the view taken by the learned Single Judge. Accordingly, the writ appeal being without merit, is dismissed. There shall be no order as to costs.

Appeal dismissed.

I.L.R. [2010] M. P., 2289
WRIT PETITION
Before Mr Justice Sanjay Yadav
11 May 2010*

SHIVA CORPORATION ... Petitioner
Vs.
STATE OF M.P. ... Respondent

Constitution, Article 226 - *Writ of Mandamus* - *The directions given in W.P. No.1820/2001 (M/s Narmada Enterprises Vs. State of M.P. & others) made applicable and incumbent upon the State of M.P. and its functionaries, mutatis mutandis in the entire State of M.P..* (Para 7)

संविधान, अनुच्छेद 226 – परमादेश याचिका – रिट याचिका क्र. 1820/2001 (मेसर्स नर्मदा इंटरप्राइजेज वि. म.प्र. राज्य व अन्य) में दिये गये निर्देशों को सम्पूर्ण म.प्र. राज्य में,

*W.P. No.5366/2010 (Jabalpur)

म.प्र. राज्य एवं इसके कार्यकारी/कर्मचारियों को यथाआवश्यक परिवर्तन सहित प्रयोज्य एवं आवश्यक बनाया गया।

M.L. Jaiswal with *Manoj Kushwah,* for the petitioner.
Harish Agnihotri, G.A., for the respondent/State.

ORDER

SANJAY YADAV, J. :–Heard.

2. Petitioner by way of present writ petition filed under Article 226 of the Constitution of India, seeks following direction:

> (i) To issue a writ of mandamus directing the respondents to comply with a direction issued by the Hon'ble High Court vide order dated 7.5.2001 in writ petition No.1820/01 through out the State and extend the operation of the order dated 7.5.2001 accordingly.
>
> (ii) To issue a writ prohibition the officers permitting the transporters or contractor from carrying the sand more than that prescribed in the Registration Book of the Vehicle and for contravention appropriate action as provided under law be taken as laid down under section 114 of Motor Vehicles Act.
>
> (iii) To issue the any other writ order of direction which the Hon'ble Court deems fit under the under prevailing facts and circumstances of the case.

3. The reliefs are sought in the background of the fact, that the petitioner in pursuance to tender notice dated 26.3.2010 issued by the State Mining Corporation for sale of land for District Hoshangabad, Sihora and Raisen entered into contract for sale of sand from the sand quarries of the State Mining Corporation. It appears during operation of the contract the petitioner has experienced violation of various norms under section 113 & 114 of the Motor Vehicles Act 1988(hereinafter to be referred as the Act of 1988) which permits prescribed laden weight for the vehicles. And observing that besides the statutory provisions there is a direction by this Court in consonance with the statutory provision, has approached, this Court for similar direction.

4. In *M/s Narmada Enterprises V. State of M.P and others:* W.P.No.1820/2001 it was observed by his Lordship vide order dated 7.5.2001:

> "By this writ petition preferred under Articles 226 and 227 of the Constitution of India the petitioner has prayed for issued of a direction to the respondents No.3 to 5 to command the respondents no.6 to is that the Panchayats within their jurisdiction do not overload the sand of rivers of their territory against the prescribed weight mentioned in the registration certificate Book and further not to issue the transit pass in respect of the vehicles

which carry the sand overloaded from the river. A further prayer has been made to take suitable action against the person who violate the provisions as have been enumerated under sections 113 & 114 of the Motor Vehicles Act 1988.

On a perusal of the Writ Petition it appears that in paragraph 5.3 there are allegations that the Janpad Panchayats and Gram Panchayats respondent no.3 to 5 are misusing the authority and power and are transporting the sand from river and selling the same by over loading the vehicle. As par as rate is concerned that cannot be looked into but as far as the load is concerned that is controllable under the provisions of the Motor Vehicle Act, 1988. As the petitioner has been awarded contract by the M.P. State Mining Corporation he has legitimate grievance against such an activity. Keeping the aforesaid factual matrix in view, when the matter was listed on 12.4.01 . Learned Panel Lawyer for the State was required to obtain instructions in the matter. The matter stood adjourned to 24.4.2000 Mr. Vivek Awasthy learned G.A for the State prayed for further 10 days time to obtain instructions. Inspite of this no instructions have yet been obtained.

In view of the totality of the circumstances it is directed that the respondents no.3,4 & 5 namely the Collector Hoshangabad, Collector Sihore and the Collector Raisen shall instruct the concerned Regional Transport Officers to see that no truck is overloaded carrying the stand as it affects the commercial interest of the petitioner the interest of the MP State Mining Corporation. It is expected that the authority would rise to the occasion and issue appropriate instruction. So that the licence as well as the Janpad Panchayat and Gram Panchayat do not act illegally to get undue advantage.

That apart the authorities concerned would see that the permissible load is as per prescribed in the R.C.Book.

Mr. P.D.Gupta, learned Deputy Advocate General for the state submits that the sand is measured by cubic meter I am not inclined to advert to this aspect. It is only hereby stated that no truck shall carry beyond the capacity as permissible in law.

With the aforesaid directions the writ petition stands disposed of.

5. In the case at hand, on 7.5.2010, learned Govt. Advocate was requested to seek instructions.

6. When the matter is taken up today it is submitted by the learned Govt. Advocate that, the direction in *M/s Naramada Enterprises* (supra) was qua the

respective districts therein and not for other districts, and therefore, not binding at other places. However, the statutory provisions as contained under sections 113 and 114 of the Act of 1988 and its applicability to the State of M.P is not disputed. Nor the fact that, the direction in *M/s Narmada Enterprises* is in consonance with the provisions of Act of 1988.

7. Therefore, in the considered opinion of this Court, it is incumbent upon the State of M.P and its functionaries to apply the direction in *M/s Narmada Enterprises* mutatis mutandis in the entire State of Madhya Pradesh.

8. With these direction the petition is disposed of finally. No costs.

Petition disposed of.

I.L.R. [2010] M. P., 2292
WRIT PETITION
Before Mr.Justice Shantanu Kemkar
12 May, 2010*

K.P. BHALSE ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Service Law - ***Deputation - Permissibility*** - *Petitioner was sent on deputation from Forest Department to Narmada Valley Development Department, which is another department of State Government, without his consent - Held - Deputation without consent of an employee not permissible - Petition allowed.* (Para 11)

सेवा विधि – प्रतिनियुक्ति – अनुज्ञेयता – याची को उसकी सहमति के बिना वन विभाग से नर्मदा घाटी विकास विभाग में प्रतिनियुक्ति पर भेजा गया, जो कि राज्य सरकार का अन्य विभाग है – अभिनिर्धारित – बिना सहमति के कर्मचारी की प्रतिनियुक्ति अनुज्ञेय नहीं – याचिका मंजूर।

Cases relied upon :

(1997) 8 SCC 378, (1999) 4 SCC 659, LPA No.610/2004 decided on 27.10.2004.

Rajendra Tiwari, for the petitioner.
S.S. Garg, G.A., for the respondent Nos.1 to 3.
Subodh Abhyankar, for the respondents No.4.

ORDER

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

2. Petitioner is working on the post of Sub Divisional Forest Officer in the Forest Department of the State Government. He was transferred from Bhopal to Barwaha vide order dated 20.08.2008. While he was posted at Barwah, the

*W.P. No.5974/2009(S) (Indore)

State Government issued an order dated 22.08.2009 (Annexure P-4) by which he has been sent on deputation from Forest Department to Narmada Valley Development Authority (for brevity "NVDA"). Through the same order, the 4th respondent has been transferred from Betul to Barwah in place of the petitioner. Aggrieved, the petitioner submitted a representation dated 23.08.2009 (Annexure P-5) and has filed this petition. On 24.08.2009, the operation of the impugned deputation order has been stayed by this court.

3. The case of the petitioner is that the impugned order of deputation sending him from Forest Department to the Narmada Valley Development Authority has been issued without obtaining his consent and as such it is liable to be quashed. He made a categorical statement that he had not given any consent for sending him on deputation.

4. The respondents no.1, 2 and 3 in their reply have stated that in the NVDA the employees are being posted from various departments of the State Government. Apart from various works the NVDA has to perform the work of wild life management and afforestation, in the circumstances, the services of the Forest Department employees are also being taken in the NVDA. It is also the case of the respondents that the State Government is empowered to sent its employees on deputation to any other Government Departments, to the service of a body, incorporated or not which is wholly or substantially owned and controlled by the Government. Reliance has been placed by the respondents on Rules 110 of the Fundamental Rules.

5. The 4th respondent has also filed reply and has justified the impugned order of deputation. It has been stated that the petitioner was not entitled to have been posted at Barwah as Sub Divisional Officer Forest, therefore, he has rightly been sent out on deputation to NVDA which is permissible and no consent is required in view of Fundamental Rule 110.

6. Heard learned counsel for the parties and perused the annexures and the affidavits filed by them.

7. In order to appreciate the rival contentions, it would be appropriate to take note of the law laid down by the Supreme Court of India and by this Court from time to time in regard to the question involved in this petition. In the case of *State of Punjab vs. Inder Singh* [1997 (8) SCC 378] the Supreme Court has observed thus :-

> **"Concept of "deputation" is well understood in service law and has a recognised meaning. "Deputation" has a different connotation in service law. The dictionary meaning of the word "deputation" is of no help. In simple words, "deputation" means service outside the cadre or outside the parent department. Deputation is deputing or transferring an employee to a post outside his cadre, that is**

to say, to another department on a temporary basis. After the expiry period of deputation, the employee has to come back to his parent department to occupy the same position unless in the meanwhile he has earned promotion in his parent department as per the recruitment rules. Whether the transfer is outside the normal field of deployment or not is decided by the authority which controls the service or post from which the employee is transferred. There can be no deputation without the consent of the person so deputed and he would, therefore, know his rights and privileges in the deputation post."

8. In the case of *Umapati Choudhary v. State of Bihar* 1999 (4) SCC 659 it has been observed by the Supreme Court that the deputation means :-

"assignment of an employee of one department / cadre / organisation to another department / cadre / organisation in public interest. Deputation involves voluntary decision of the lending authority, borrowing authority and the employee concerned."

9. In view of the law laid down by the Supreme Court in the case of *State of Punjab* (supra) and in the case of *Umapati* (supra) it is clear that there can be no deputation without the consent of employee concerned. It is also clear from the law laid down in the aforesaid cases that if the services of an employee of one department have been assigned to another department, it would amount to deputation. In the case of *RS Rathore vs. State of M.P. and another* (LPA No.610 of 2004), a Division Bench of this Court after considering the case of *Umapati Choudhary* (supra) vide order dated 27.10.2004 has held that the deputation of a Police Officer in the Office of Lokayukta, without obtaining his consent, to be illegal and was pleased to quash the said order of deputation.

10. From the document (Annexure R-1) filed by the State Government and the document (Annexure R-4) filed by the private respondent, it is clear that NVDA has been formed and created by the Narmada Valley Development Department of the State Government. The Narmada Valley Development Department is a separate department of the State Government. The said department has framed rules providing creation of post and appointment of the employees in the NVDA. Rule 4(b)(2) provides that Officers / employees of the NVDA shall be appointed on deputation from the concerned Government Departments, Electricity Board or from the Government of India. Thus, the documents Annexures R-1 and R-4 filed by the respondents make it clear that the appointments in the NVDA which is under Narmada Valley Development Department are to be made by way of deputation from the various departments of the State Government, Electricity Board or from the Government of India.

11. Thus it is very clear that the petitioner has been sent on deputation from Forest Department to Narmada Valley Development Department an another department of the State Government for working in the NVDA which has been created by Narmada Valley Development Department of the State Government. Admittedly no consent has been obtained from the petitioner before passing the impugned order of deputation. In the circumstances, there remains no doubt that the petitioner has been sent on deputation to another department without obtaining his consent. It is not a case of transfer to foreign service and therefore, the provision contained in F.R. 110 has no application to the present case which is a case of deputation without consent.

12. In the circumstances, in view of the law laid down by Supreme Court in the cases of *State of Punjab vs. Inder Singh* (supra) and *Umapati Choudhary* (supra) and by a Division Bench of this Court in the case of *RS Rathore* (supra), the impugned order (Annexure P-4) by which the petitioner has been sent on deputation without obtaining his consent, is liable to be and is hereby quashed.

13. The petition is allowed. No orders as to costs.

Petition allowed.

I.L.R. [2010] M. P., 2295
WRIT PETITION
Before Mr. Justice Sanjay Yadav
18 May, 2010*

NAVJYOTI SAKH SAHKARI SAMITI MYDT., KHANDWA ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

(Khadya Padarth) Sarwajanik Nagrik Purti Vitran Scheme, M.P. 1991, Clause 13(4) - *Penalty - Suspension of fair price shop - Natural Justice - Held - The impugned order by which fair price shop has been placed under suspension has been passed without affording an opportunity of hearing to the petitioner, the same deserves to be quashed as suspension is one form of penalty contemplated in sub-clause (1) of clause 13 of the Scheme.* (Paras 3 & 8)

(खाद्य पदार्थ) सार्वजनिक नागरिक पूर्ति वितरण योजना, म.प्र. 1991, खण्ड 13(4) – अर्थदण्ड – उचित मूल्य की दुकान का निलम्बन – नैसर्गिक न्याय – अभिनिर्धारित – आक्षेपित आदेश जिसके द्वारा उचित मूल्य की दुकान को निलंबित किया गया वह आदेश याची को सुनवाई का अवसर दिये बिना पारित किया गया है, जो कि अपास्त किये जाने योग्य है क्योंकि निलंबन योजना के खण्ड 13 के उपखण्ड (1) के अन्तर्गत अनुध्यात अर्थदण्ड का एक स्वरूप है।

Case relied upon :
2007(II) MPJR SN 15.
Amalpushp Shroti, for the petitioner.

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*W.P. No.11960/2009 (Jabalpur)

B.N. Misra, G.A., for the respondent Nos.1 to 3.

None, for the respondent No.4.

Vivek Rusia, for the respondent No.5.

ORDER

SANJAY YADAV, J. :–The petitioner herein in this petition, filed under Article 226 of the Constitution of India challenges the validity of the order dt. 7-10-09 passed by the District Supplies Officer Dist Khandwa whereby the fair price shop of the petitioner of Ward No. 28 Bherotalab, Khandwa has been placed under suspension and its operation has been attached with the respondent no.4, Deshbandhu Sakh Sakhari Samiti. The suspension order is in purported exercise of powers under Clause 13(1) of the M.P. (Khadya Padarth) Sarwajanik Nagrik Purti Vitran Scheme, 1991 (hereinafter referred to as ' the Scheme of 1991').

2- The order of suspension is in following terms:-

"दिनांक 6.10.09 को प्रभारी पुलिस चौकी पदम कुण्ड ने नवज्योति साख सह. समिति मर्या. खण्डवा के अध्यक्ष/प्रबंधक सह विक्रेता द्वारा संचालित शा.उ.मू. दुकान वार्ड क्रं0 28 भैरोतालाब खण्डवा में सार्वजनिक वितरण प्रणाली के एपीएल गेहूँ का अवैध रूप से श्री मो0 हनीफ पिता अब्दुल गफूर निवासी खण्डवा को विक्रय पश्चात वाहन क्रं0 एम.पी. 12 बी 3746 से परिवहन किये जाने की प्राप्त शिकायत के आधार पर 20 कट्टे गेहूँ (50 किलो की भरती के) जो पुलिस चौकी पदमकुण्ड की अभिरक्षा में था, जो मय वाहन के वाहन चालक श्री रमेश चौहान कनिष्ठ आपूर्ति अधिकारी खण्डवा द्वारा जप्त किया गया तथा दुकान की जांच की गई जांच समय दुकान बंद पाई जाने एवं संस्था अध्यक्ष/प्रबंधक सह विक्रेता को सूचित करने के उपरांत भी उपस्थित न होने से सहायक/कनिष्ठ आपूर्ति अधिकारी द्वारा दुकान सील्ड की गई तथा दिनांक 7.10.2009 को अध्यक्ष/ प्रबंधक सह विक्रेता की उपस्थिति में सहायक/कनिश्ठ आपूर्ति अधिकारी द्वारा दुकान की विधिवत जांच की गई जिसमें खाद्यान्न का भौतिक सत्यापन के दौरान स्टॉक में 2.88 क्विं. गेहूँ अधिक मात्रा में तथा अवैध रूप से विक्रय कर वाहन से परिवहन किये जा रहे 10 क्विं. गेहूँ को मिला कर कुल 12.88 क्विं0 गेहूँ स्टॉक से अधिक होना पाया गया है। लीड संस्था द्वारा माह अक्टूबर 09 में उक्त दुकान को 37 क्विं0 एपीएल गेहूँ का प्रदाय किया गया है जिसे दुकान के अध्यक्ष/ प्रबंधक सह विक्रेता द्वारा स्टॉक पंजी में जुर्म से बचने के लिए 37 क्विं0 होना पाया गया, निरीक्षण समय दिनांक 3.10.2009 से स्टॉक एवं मूल्य सूची बोर्ड भरा जाना नहीं पाया दिनांक 3.10.2009 को बोर्ड में शक्कर का प्रा0स्टॉक 5.58 क्विं0 प्रदर्शित होना पाया गया जबकि स्टॉक पंजी में उपरी अपलेखन कर 8.58 क्विं0 प्रदर्शित किया गया है, इसी प्रकार संस्था द्वारा माह सितम्बर 09 की प्रस्तुत मासिक रिपोर्ट में 1.10.09 को शक्कर का प्रा0स्टॉक 5.58 क्विं0 बताया गया है जिससे स्पष्ट है कि दुकान में 3.00 क्वि0 शक्कर स्टॉक से अधिक थी जिसे दुकान के अध्यक्ष/प्रबंधक सह विक्रेता द्वारा स्टॉक पंजी में अपलेखन कर उसे स्टॉक में शामिल कर जुर्म से बचने के लिए मिथ्या रिकार्ड प्रस्तुत किया गया। इस प्रकार

अध्यक्ष/प्रबंधक सह विक्रेता नवज्योतिं साख सह.समिति मार्या. खण्डवा की शा. उ.मू. दुकान वार्ड क्रं0 28 भैरोतालाब द्वारा म0प्र0 (खाद्य पदार्थ) सार्वजनिक नागरिक पूर्ति वितरण स्कीम–1991 की कण्डिका 6(5) 9(1) 10(1), 11, 12 व अनुबंध पत्र की शर्त क्रं. 8(ग), (दो) 8(ड), 8(छ), 8(ज), 8(ञ), 8(ट), 9(ड) (एक), 9(ज), 16 का स्पष्ट उल्लंघन करने तथा आवश्यक वस्तु अधिनियम 1955 की धारा 3/7 के तहत् दण्डनीय/गंभीर अपराध की श्रेणी में हाने के फलस्वरूप म0प्र0 (खाद्य पदार्थ) सार्वजनिक नागरिक पूर्ति वितरण स्कीम–1991 की कण्डिका 13(1) में प्रदत्त अधिकारों का उपयोग करते हुए मै एम.एन.एच. खान, जिला आपूर्ति अधिकारी खण्डवा नवज्योति साख सह.समिति मार्या. खण्डवा द्वारा संचालित वार्ड क्रं0 28 भैरोतालाब की शा.उ.मू.दुकान जनहित में आगामी आदेश तक के लिए तत्काल प्रभाव से निलंबित करते हुए तथा उपभोक्ताओं की सुविधा को दृष्टिगत रखते हुए निकतम भण्डार देशबंधु साख सह0समिति द्वारा संचालित शासकीय उचित मूल्य दुकान वार्ड क्रमांक 29 पडावा की दुकान से अस्थाई रूप से संलग्न करता हूँ।

यह आदेश तत्काल प्रभावशील होगा।"

The petitioner challenges the order of suspension on the ground that the same has been passed without affording an opportunity of hearing to the petitioner. In support of his contentions, learned counsel for the petitioner has placed reliance on the order of this court in *Mukta Prathmik Upbhokta Sahkari Bhandar Fair Price Shop Vs. State of M.P. & Ors.* 2007 (II) MPJR SN 15.

3. It is urged that since the suspension is one form of penalty as is contemplated under Sub-clause 1 of Clause 13 of Scheme of 1991, it is incumbent upon the respondents to have afforded an opportunity of hearing to the petitioner. It is submitted that the order of suspension since has been passed without affording an opportunity of hearing is void-ab-initio and is liable to be set aside.

4. The respondents on their turn though, laboured hard to bring home the submission that the issuance of show-cause notice before passing of order of suspension is not implicit under Sub-clause 1 of Clause 13 of Scheme of 1991. However, when confronted with the judgment of this court in the case of *Mukta Prathmik Upbhokta Sahkari Bhandar Fair Price Shop*(supra), and the clause viz. 13(1), learned Govt. Advocate except submitting that the said judgment does not take into consideration Sub-clause 4 of Clause 13, has no other ground to persuade this court to take a view different than as taken in *Mukta Prathmik Upbhokta Sahkari Bhandar Fair Price Shop*(supra).

5. Sub-clause 4 of Clause 13 of the Scheme of 1991 as relied upon by the respondent to draw distinction is in following terms:-

"(4) उचित मूल्य दुकानदार का अधिकार पत्र रद्द किए जाने अथवा उसकी प्रतिभूति पूर्ण अथवा आंशिक रूप से समपहृत किए जाने से पूर्व जिले के लिए खाद्य अधिकारी या खाद्य नियंत्रक तथा जिले के अन्य अनुविभाग के लिए

अनुविभागीय अधिकारी दुकानदार को कारण बताओ नोटिस देगा और उसको सुनने के बाद ही निर्णय देगा यह कार्यवाही यथास्थिति एक सप्ताह में पूरी की जावेगी।"

6. This provision thus, lays down a procedure when an authority letter is to be cancelled or security or part thereof is to be forfeited. Thus,Sub-clause 4 of Clause 13 operates in a different sphere and does not control the operation of Sub-clause 1 of Clause 13.

7. Evidently, Sub-clause 1 empowers prescribed authority to impose the penalty which could be by way of suspension of allotment or its cancellation. When the framers has placed the suspension as well as cancellation of allotment under the heading penalty, it can be nobody's case that a suspension of a fair price shop for exercise of powers of Sub-clause 1 of Clause 13 does not tantamount to punishment. Therefore, submissions putforth by the respondents that affording a reasonable opportunity of hearing; is not implicit when a fair price shop is suspended under sub-clasue 1 of Clause 13, is without any basis. The analysis thus leaves this court to endorse the view as taken in the case of *Mukta Prathmik Upbhokta Sahkari Bhandar Fair Price Shop* (supra) wherein his lordship was pleased to observe:-

> "It has been the consistent view of this court that even for the purpose of suspension of licence a show-cause notice has to be issued and an inquiry has to be held and then only licence could be suspended and therefore, competent authority has to issue show-cause notice and after issuing the notice to licence holders action for suspension of licence can be made."

8. In view of the above, the inevitable is that, since, the impugned order dt. 7-10-09 has been passed without affording an opportunity of hearing to the petitioner, the same deserves to be quashed. However, the respondents are at liberty to issue a show-cause notice and after considering the explanation tendered thereof pass a reasoned and cogent order. Let the same be done within a period of thirty days from the date of communication of this order.

9. Though, this court has set aside the order on the ground that the same has been passed without affording an opportunity of hearing to the petitioner, but since, the suspension of fair price shop, prima facie has been for the reasons of rampant irregularity alleged to have been committed by petitioner (as it prima facie appears from the inspection report and panchnama), the interim arrangement as ordered ie, attachment of the shop with respondent no. 4, Deshbandhu Sakh Sahkari Samiti shall continue till the order is passed by the competent authority in respect of suspension.

10. The petition is thus partly allowed to the extent above. No costs.

Petition partly allowed.

I.L.R. [2010] M. P., 2299
WRIT PETITION
Before Mr. Justice Shantanu Kemkar
21 May 2010*

RAJARAM PAL ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Constitution, Article 226, Fundamental Rules 110 - *Petitioner an employee of Forest Department - Sent on deputation to Rajya Laghu Vanopaj Sangh without consent - Held - M.P. Laghu Vanopaj Sangh is under control of Forest Department - Fundamental Rules empowers the State Government to transfer service of government servant to body incorporated or not which is wholly or substantially owned and controlled by Government without seeking his consent - No interference in impugned order called for - Petition dismissed.* (Para 7)

संविधान, अनुच्छेद 226, मूलभूत नियम 110 – याची वन विभाग का एक कर्मचारी – बिना सहमति के राज्य लघु वनोपज संघ मे प्रतिनियुक्ति पर भेजा गया – अभिनिर्धारित – म.प्र. लघु वनोपज संघ, वन विभाग के नियंत्रणाधीन है – मूलभूत नियम राज्य सरकार को सरकारी कर्मचारी की सेवा उसकी सहमति माँगे बिना पूर्णतः या सारतः सरकार के स्वामित्व और नियंत्रण वाले निगमित या अन्यथा निकाय में अंतरित करने की शक्ति देते हैं – आक्षेपित आदेश में किसी हस्तक्षेप की माँग नहीं की जा सकती – याचिका खारिज।

Cases referred:

(1997) 8 SCC 372, (1999) 4 SCC 659.

Manoj Manav, for the petitioner.
S.S. Garg, G.A., for the respondents Nos.1 to 3.
Vivek Dalal, for the respondent No.4.

O R D E R

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

2. Petitioner is working on the post of Sub Divisional Forest Officer in the Forest Department of the State Government. He has been sent on deputation from the post of SDO Forest, Sendhwa to Rajya Laghu Vanopaj Sangh as Deputy Manager vide order dated 10.09.2009 (Annexure P-1). Through the same order, the private respondent no.4 has been posted in place of the petitioner by amending his earlier transfer order. Aggrieved, the petitioner has filed this petition.

3. According to the petitioner he has been sent on deputation to accommodate the 4th respondent. He submits that he had joined at Sendhwa only on 20.08.2008 (Annexure P-2) and as such before completion of normal tenure of posting the impugned order could not have been issued. He further submits that the impugned order of deputation being passed without seeking his consent, the same is liable to be quashed.

*W.P. No.6677/2009(S) (Indore)

4. The respondents have filed reply and have stated that M.P. Laghu Vanopaj Sangh is a wing of Forest Department of the State Government and is controlled by the Forest Department of the State Government. It is stated that the petitioner's department has not been changed and he will remain under the Forest Department. In the circumstances the case of the respondents is that for posting of the petitioner in M.P. Laghu Vanopaj Sangh no consent is required as the M.P. Laghu Vanopaj Sangh is wholly under the administrative control of the Forest Department of the State Government. It has been stated that in view of Fundamental Rule 110 a Government Servant can be sent to the service of a body, incorporated or not, which is wholly or substantially owned and controlled by the Government without seeking his consent.

5. As regards petitioner's contention that he had joined at Sendhwa only on 20.08.2008 and as such he could not been shifted from Sendhwa prior to competition of normal tenure of posting at one place, it has been stated that prior to his promotion order dated 20.08.2008 the petitioner was posted at Sendhwa itself right from the year 2006 and therefore it cannot be said that he has not completed normal tenure of posting at Sendhwa. The respondents have also denied the petitioner's contention that in order to accommodate the 4th respondent he has been shifted.

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

7. True it is that there can not be a deputation without the consent of the person deputed. The consent of the lending authority, borrowing authority and the employee concerned is necessary before passing the order of deputation. The term **"deputation"** has been explained by Supreme Court by observing that deputation is deputing or transferring an employee to a post outside his cadre, that is to say, to another department on a temporary basis. After the expiry period of deputation, the employee has to come back to his parent department to occupy the same position unless in the meanwhile he has earned promotion in his parent department as per the recruitment rules. Whether the transfer is outside the normal field of deployment or not is decided by the authority which controls the service or post from which the employee is transferred. It has been further observed that the deputation means assignment of an employee of one department / cadre / organisation to another department / cadre / organisation (See *State of Punjab vs. Inder Singh* (1997) 8 SCC 372 and *Umapati Choudhary vs. State of Bihar* (1999) 4 SCC 659). In the present case, the petitioenr has been posted in the M.P. Laghu Vanopaj Sangh which is under the control of the Forest Department of the State Government. Fundamental Rule 110 empowers the State Government to transfer service of government servant to a body incorporated or not which is wholly or substantially owned and controlled by the Government without seeking his consent. The petitioner's service was and still is under the control of the Forest Department. In the circumstances for passing of the impugned order, the petitioner's consent was not at all necessary. Merely because the fourth respondent has been posted in place of the petitioner, it can not be said that he has been accommodated more particularly when the petitioner has remained posted at

Sendhwa since 2006 he can not make any grievance if the fourth respondent has been posted at his place by modifying his earlier posting order.

8. Accordingly, I find no merit in the petition. In the circumstances, no case for interference in the impugned order is made out. The petition fails and is hereby dismissed.

Petition dismissed.

I.L.R. [2010] M. P., 2301

WRIT PETITION

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

12 July, 2010*

PHOENIX POULTRY (M/S) ... Petitioner

Vs.

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

A. **Entry Tax Act, M.P. (52 of 1976), Section 3(1)(b)** - *Petitioner, running hatchery, purchased poultry ingredients from various dealers for feeding of parental mother birds and not for feeding new born one day chicks - Challenged liability of Rs.3809198/- as entry tax on plant & machinery and poultry feed ingredients - Held - Since, poultry feeds is being used for survival of parental flocks which are instrumental and for upbringing of layer birds, cockerel and culled birds, petitioner has been rightly saddled with liability to make the payment of entry tax.* (Para 11)

क. प्रवेश कर अधिनियम, म.प्र. (1976 का 52), धारा 3(1)(बी) – याची, जो अण्ड–प्रजनन–स्थान चलाती थी, ने माता पक्षियों के पोषण हेतु न कि एक दिन के नवजात मुर्गी के बच्चे के पोषण के लिए, विभिन्न व्यापारियों से कुक्कुट सामग्री क्रय की – संयंत्र व मशीनरी और कुक्कुट खाद्य घटकों पर प्रवेश कर के रूप में रूपये 3809198/– के दायित्व को चुनौती दी गयी – अभिनिर्धारित – चूंकि, कुक्कुट खाद्य पैतृक पक्षियों को जीवित रखने के लिये उपयोग में लाया जा रहा है जो साधक है और अंडे देने वाली मुर्गियों, मुर्ग पट्ठा तथा कटने वाली मुर्गियों के लालन पालन के लिये है, याची पर प्रवेश कर अदा करने का दायित्व उचित रूप से डाला गया है।

B. **Entry Tax Act, M.P. (52 of 1976), Section 3(1)(b)** - *Manufacture - The process of taking out of the chicks amounts to process of manufacture.* (Para 10)

ख. प्रवेश कर अधिनियम, म.प्र. (1976 का 52), धारा 3(1)(बी) – विनिर्माण – मुर्गी के बच्चे निकालने की प्रक्रिया, विनिर्माण प्रक्रिया की कोटि में आती है।

Cases referred :

(1999) 9 SCC 162, 101 STC 471, (1999) 32 VKN 36, 2007(2) MPLJ 184.

S.K. Rao with *Nikhil Tiwari*, for the petitioner.

P.K. Kaurav, Dy.A.G., for the respondent/State.

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*W.P. No.12502/2006 (Jabalpur)

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :–In these writ petitions, common question has arisen for consideration hence, they are being decided by this common order.

2. In W. P. No. 12502/2006 *M/s Phoenix Poultry Vs. State of Madhya Pradesh and others*, assessment order dated 31/12/2004 passed by Assistant Commissioner of Commercial Tax, Jabalpur and order dated 12/01/2006 passed in Revision Case No. 189/R/05 passed by Additional Commissioner of Commercial Tax, Jabalpur have been assailed.

3. Petitioner in W.P. No. 12502/2006 has submitted that petitioner is a proprietory concern runs hatchery business wherein by way of biological process, the chicks are produced. These chicks are known as commercial flocks. For the purpose of keeping alive the parental mother (birds), they are fed with poultry feed made of ingredients as maize, dry fish, kodha and waste soyabeen. For the aforesaid purpose, the petitioner purchases poultry ingredients from various dealers engaged to lead business in Madhya Pradesh and others outside States. The said feed is fed to the parental mother birds. Poultry ingredients are not used in any way for feeding new born one day chicks, hence, the petitioner's case does not come under the purview of consumption or use of such goods referred to in Section 3 (1)(b) of the Entry Tax Act, 1976. The Assistant Commissioner of Commercial Taxes, Jabalpur passed the assessment order holding the petitioner liable for payment of entry tax to the extent of Rs. 38,09,198/- which includes tax on plant and machinery and poultry feed ingredients. Interest has also been imposed. Aggrieved by the same, a. revision was preferred and the same has been dismissed hence, the present petitions have been preferred.

4. Petitioner has further averred that eggs laid down by the mother, birds are collected and kept for 21 days for various process. After 21 days of hatching, chicks are born. These chicks are known as commercial chicks. The one day chicks are not given any poultry feed ingredients. The petitioner submits that since the chicks are neither reared nor fed in the hatchery, therefore, the poultry feed is not at all required to be used for the purpose of feeding the said flocks. The poultry feed is given to mother birds and not to feed the chicks which are the end products thus, within Section 3 (1)(b)(III) of M.P. Entry Tax Act, 1976 entry tax could not have been levied. The parental food purchased from various dealers is not at all used in the course of business. There is no sale of parental birds. An application has been filed to raise additional ground by the petitioner on 18/03/2010. It is submitted that the order of Additional Commissioner of Commercial Tax passed in revision petition dated 12/01/2006 was served on the petitioner on 3/04/2006, after the period of three months. Thus, the order was not passed within the period of limitation. The order of Assistant Commissioner passed on 31/12/2004 was served upon him on 17/03/2005.

5. In the return filed by the respondents, it is contended that in the hatchery business the parent birds are kept in breeder forms where they lay eggs. The hatchery is a machine having two parts (i) Incubator & (ii) Hatcher. The eggs laid by the parental birds are cleaned by different means and thereafter, the same are placed in the incubator for about 19 days in controlled temperature. The chicks come out on 21st day. The biological process is limited only upto laying of eggs by parents flocks in breeder form and thereafter the mechanise process starts. The chicks come out of the eggs are credited as (i) Broiler Chicks (ii) Layer Chicks &: (iii) Cockerels. The broiler and cockerels are sold in the market for flesh whereas layer birds/commercial birds lays eggs, which are sold in the market. The eggs laid by layer chicks are not fertile eggs. The approximate frequency of laying eggs of layer birds is 60 to 70 weeks and thereafter, they require more feed and lay less eggs and therefore, they become unprofitable for the purpose of business and are sold in the market as "Culled Birds". Section 2 (b) of the Act defines entry tax, a tax on entry of goods into a local area for consumption, use of sale therein, levied and payable. Whereas local area is defined in Section 2 (d) of the Act. Section 2 (i) of the Act defines taxable purchase. Petitioner is a registered dealer under the M.P. Commercial Tax Act, 1994 and is engaged in the business of poultry and hatchery. The petitioner has submitted that in the balance sheet the assessing authority has shown the sales in relation to broiler chicks, layer chicks, cockerel, culled birds, broiler culled Birds, commercial birds, culled eggs. The said description of sale shows that the petitioner is specifically involved in the business of poultry and hatchery and is consuming the poultry feeds for survival of parental flocks and for upbringing of layer birds, cockerel and culled birds. The aforesaid birds are being sold in the market for flesh in the course of business whereby petitioner earns the profit as apparent from the audit report of the petitioner (R-l). The petitioner is bound to make the payment of tax as per the decision of the Apex Court passed in *Indian Poultry and Others Vs. Sales Tax Officer, Rajnandgaon* (1999) 9 SCC 162.

6. It is further contended that Section 27 (8) of M.P. Commercial Tax Act provides that an assessment shall be made within a period of two calender years from the end of the period for which the assessment is to be made. It is nowhere contemplated that within the stipulated period of two calender years in which order can be passed, it has to be communicated otherwise the assessment will become void or time barred. It would be relevant hereto mention that by dispatch no. 270 dated 31/12/2004, the order of assessment was dispatched for service to the petitioner through process server of Commercial Tax Department. It is further submitted that in the place like Jabalpur where the petitioner is registered in Circle-3, Jahalpur, there are 5 Assessing Officers posted including the Assistant Commissioner, who have passed 1237 assessment orders in the month of December, 2006 and January, 2007, which were served by a team of two Process Servers. It is further submitted that these two process servers also serve different

other notices issued by the Officers. These includes notices for registration cancellation, issuance of advance tax for non-filing of return and demand notices against recovery. Thus, in the facts and circumstances, it could not have been said that the order of assessment was antedated. In this matter, the assessment involved was of the year 2001-2002.

7. In W.P. No. 1029/2008 filed by the same petitioner, the entry tax has been imposed for the year 2003-2004 with effect from 1/04/2003 to 31/03/2004. Other submissions are the same except the fact that the order of assessment was passed on 19/01/2007 and it was served on 28/02/2007.

8. It is submitted in the return that in Circle-3, Jabalpur, there are 5 Assessing Officers posted including the Assistant Commissioner, who have passed 895 assessment orders in the month of January, 2007, which were served by a team of two Process Servers. These two process servers also serve different other notices issued by the Officers. From the month of December, 2007 to June, 2008, 1594 notices were issued against registration cancellation, 1811 demand notices against recovery and 103 advance tax notices were issued by the Officers. Regarding the case of *Mafatlal Industries Vs. C.T.O.*, 101 STC Page-471. it is submitted that the aforesaid case is factually different from the present case as the order was passed within the period of limitation.

9. Coming to the first question raised by the petitioner in *Indian Poultry and Others Vs. Sales Tax Officer, Rajnandgaon* (supra), considering the purport of word 'manufacture' used in M.P. General Sales Tax Act, 1958 which is pari-materia with definition of 'manufacture' in M.P. Commercial Tax Act (hereinafter referred to as 'the Act'). Both acts are pari-materia. The appellants in the said case were denied registration as a manufacturer for the purpose of M.P. General Sale Tax Act, 1958 as in the opinion of Sales Tax Officer, such rearing of chicks did not amount to manufacture. Considering the definition of 'goods' in Section 2(g) of the Act and the manufacture as defined in section 2(j) of the Act, the Apex Court has laid down that it is not possible to uphold the reasonings of the Sales Tax Officer that 'goods' would not include animate objects for the purposes of Section 2(j) of the Act but would include animate objects for other purposes of the Act. The definition of 'manufacture' under Section 2(j) of the Act includes any manner of preparing goods. The preparing of any goods for the market is, therefore, for the purposes of this artificial definition, a process of manufacture.

10. The word 'goods' has been defined in Section 2 (k) of M.P. Commercial Tax Act, 1994 thus:-

> "**Goods** means all kinds of movable property other than actionable claims, newspapers, stocks, shares, securities or Government stamps and includes all materials, articles and commodities, whether or not to be used in the construction,

fitting out, improvement or repair of movable or immovable property, and also includes all growing crops, grass, trees, plants and things attached to, or forming part of the land which are agreed to be severed before the sale or under the contract of sale;"

The word 'manufacture' is defined in Section 2 (o) of the M.P. Commercial Tax Act, 1994 thus:-

"**Manufacture** includes any process or manner of producing, collecting, extracting, preparing or making any goods, but does not include such manufacture or manufacturing process as may be notified."

It is clear from the definition of 'manufacture' that the definition is inclusive and the preparing or making any goods any process or manner of producing, collecting and extracting is called manufacture. The process of taking out of the chicks amounts to process of manufacture. The submission raised that it is a purely natural and biological process based on the decision of this Court in *Phoenix Poultry Vs. Sales Tax Officer, Jabalpur and another* (1999) 32 VKN 36 cannot be followed in view of the binding decision of Apex Court in *Indian Poultry and Others Vs. Sales Tax Officer, Rajnandgaon* (supra). In *Central Hatcheries Private Ltd. & Others Vs. State of M.P. and Others.* 2007 (2) MPLJ 184 case not be applied as that related to levy of market fees under M.P. Krishi Upaj Mandi Adhiniyam.

11. The audit report filed by the petitioner indicates that it has shown the sales in relation to broiler chicks, layer chicks, cockerel, culled birds, broiler culled birds, commercial birds, culled eggs. The said description of sale shows that the petitioner is specifically involved in the business of poultry and hatchery and is consuming the poultry feeds for survival of parental flocks which are instrumental and for upbringing of layer birds, cockerel and culled birds. The aforesaid birds are being sold in the market in the course of business. Business has been defined in Section 2 (c) of M.P. Commercial Tax Act, 1994 thus:

"**Business includes-**

(a) any trade, commerce, manufacture or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any gain or profit accrues from such trade, commerce, manufacture, adventure or concern and irrespective of the volume, frequency, continuity or regularity of such trade, commerce, manufacture, adventure or concern; and

(b) any transaction of sale or purchase of goods in connection with or incidental or ancillary to the trade, commerce,

manufacture, adventure or concern referred to in sub-clause (a), that is to say-

(i) goods of the description referred to in sub-section (3) of Section 8 of the Central Sales Tax Act, 1956 (No.74 of 1956) whether or not they are specified in the registration certificate, if any, of the dealer under the said Act and whether or not they are in their original form or in the form of second hand goods, unserviceable goods, obsolete or discarded goods, mere scrap or waste material; and

(ii) goods which are obtained as waste products or by-products in the course of manufacture or processing of other goods or mining or generation of or distribution of electrical energy or any other form of power;"

Considering the aforesaid definition and definition of manufacture and goods and also the fact that it is apparent that there is consumption of poultry feed, petitioner has been rightly saddled with the liability to make the payment of entry tax.

12. Coming to the submission raised by the petitioner with respect to the assessment orders being barred by limitation, the order in W.P. No.12502/2006 was passed on 31/12/2004, it was served on 17/03/2005 whereas the order of assessment in W.P. No. 1029/2008 was passed on 19/01/2007 and was served on 28/02/2007. It was submitted by learned counsel appearing on behalf of the petitioner that the orders have been antedated. Had really been passed within time would have been served earlier. In the return the respondents have explained that in Circle-3 Jabalpur there are 5 Assessing Officers posted including the Assistant Commissioner, who have passed 895 assessment order in the month of January 2007, which were served by a team of two process servers. From January 2007 to June 2008 1811 demand notices against recovery and 103 advance tax notices were issued by the Officers. Considering such large number of notices, assessment orders which were passed, it could not have been said that orders have been antedated in the aforesaid cases. Reasonable time is bound to be consumed by the process servers in serving large number of notices and the orders of assessment. Time consumed cannot said to be so much enormous so as to give any room to presume that orders have been antedated. Apart from that, we find that the question of order being antedated was not raised before the revisional authority by the petitioner in W.P. No.12502/2006. It has also not been raised in the original memo of writ petition filed in 2006. The application has been filed to raise the said question by way of additional ground in March, 2010. It is clearly an after thought of the petitioner to raise the aforesaid question in the petition.

13. In writ petition No.1029/2008 the assessment order was passed 19th January, 2007 and it has been served in February, 2007, the next very month. Considering the aforesaid huge task with the process servers of circle 3 Jabalpur,

it could not be said that the order was antedated. Before the revisional authority this point was not argued. No specific ground was raised with respect to limitation or the order being antedated in the memo of revision. It was submitted before the revisional authority that the order was illegal. The point of limitation was also not raised in the course of argument it would have been mentioned by the revisional authority in its order. Whatever that may be in our opinion in none of the case the order appears to be antedated. What is required u/s. 27 (8) of the Act is that the order of assessment should be passed within the period of two calender years and the orders were passed within the two calender years as apparent from the date of the order. We are not ready to accept that the orders were antedated. Thus, we do not find any merit in the submissions raised by the petitioner.

14. Writ petitions being devoid of any merit, are hereby dismissed. Parties to bear their own costs.

Petition dismissed.

I.L.R. [2010] M. P., 2307
WRIT PETITION
Before Mr. Justice Piyush Mathur
2 August, 2010*

ANIL KUMAR MARKHEDKAR ... Petitioner

Vs.

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

Constitution, Article 226 - ***Service Law - Claim for arrears of salary*** - *Petitioner worked as In-charge Principal by order of Government - Subsequently, juniors were promoted prior to his promotion* - ***Held*** - *Petitioner is entitled to get arrears of salary for period commencing from date of promotion of juniors to his promotion - Principle of 'no work no pay' not applicable - Petition allowed.* (Paras 8, 9 & 10)

संविधान, अनुच्छेद 226 – सेवा विधि – वेतन के बकाया के लिये दावा – सरकार के आदेशानुसार, याची ने भारसाधक प्राचार्य के रूप में कार्य किया – तत्पश्चात्, उसकी पदोन्नति के पूर्व कनिष्ठों को पदोन्नत किया गया – अभिनिर्धारित – याची, कनिष्ठों की पदोन्नति के दिनांक से उसकी पदोन्नति तक की अवधि के लिये वेतन के बकाया प्राप्त करने का हकदार है – 'काम नहीं तो वेतन नहीं' का सिद्धांत लागू नहीं होता – याचिका मंजूर।

Brijesh Sharma, for the petitioner.

Nidhi Patankar, Dy.G.A., for the respondents/State.

ORDER

PIYUSH MATHUR, J. :–This Writ Petition has been filed by the Petitioner claiming the following reliefs :

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*W.P. No.5662/2009(S) (Gwalior)

(1) The Respondents be directed to consider the case of the petitioner for promotion from the post of Principal, High School to Principal, Higher Secondary School and extend the benefit of promotion w.e.f. 16.11.2007 i.e. the date of order Annexure P-1 whereby juniors to the petitioner have been promoted and all other consequential benefits arising out of the same and particularly the arrears of salary be directed to be paid.

(2) The Respondents be further directed to extend the benefit of arrears of salary for the period from 02.04.2007 to 24.11.2007 i.e. of the intervening period related to promotion from the post of Lecturer to Principal, High School and applicability of the principle of "no work no pay" as incorporated in the order Annexure P-3 may kindly be quashed.

2. Shri Brijesh Sharma Learned Counsel for the Petitioner submit that initially the Petitioner was employed as Lower Division Teacher, who was subsequently promoted as Upper Division Teacher and thereafter as a Lecturer and on account of being One of the Senior Lecturer, he was posted as In-Charge Principal, High School by State Government's Order Dated 03.08.1998 and on the strength of this Order, the petitioner continued to work as In-Charge Principal till Year 2004, whereafter, he was again given the charge of Incharge Principal and was posted at different places uptil Year 2007.

3. Learned Counsel for the petitioner submit that the State Government has conducted the meeting of Departmental Promotion Committee and without considering the case of the petitioner, a Promotion Order was passed on Date 02.04.2007 (Annexure P/8) and those employees who were junior to the petitioner were promoted, ignoring the claim of the petitioner for his promotion.

4. Learned Counsel further submits that subsequently the name of the petitioner was considered and by Order Dated 24.12.2007 he was also promoted on the post of Principal, High School in the pay scale of Rs. 6500-10500, therefore out of the two reliefs claimed by the petitioner in the present Petition, the principal relief of promotion has been granted by the State Government to the petitioner, therefore the petitioner is pressing for the grant of second relief, wherein he claims for disbursement of the difference of salary for the period commencing from Date 02.04.2007 to Date 24.11.2007 (7 Months).

5. Ms. Nidhi Patankar, Learned Deputy Government Advocate while arguing the case relies upon the Promotion Order Dated 24.12.2007 (Annexure P/3) to demonstrate that the petitioner has been promoted on the post of Principal, High School and his claim for payment of arrears of salary of the promotional post has also been considered by the State Government but it has been denied on account of application of the principal of "no work no pay".

6. Learned Counsel for the State further submit that while issuing another set

of promotion orders on Date 26.06.2010 (Annexure R/1) in relation to the post of Principal, Higher Secondary School, the State Government has uniformly ordered that the newly promoted Principals shall not be entitled for the arrears of salary/ remuneration of their promotional post, even though the employees, were working on the promotional post for quite some time, as In-Charge Principals on the principle of "no work no pay".

7. I have heard Shri Brijesh Sharma, Learned Counsel for the Petitioner and Ms. Nidhi Patankar, Learned Deputy Government Advocate for Respondents/ State and perused the record.

8. From a perusal of the Orders placed on record, it is evident that the petitioner was assigned with the duty of Incharge Principal w.e.f. Date 03.08.1998, since when the petitioner continue to discharge his duties as Incharge Principal, till issuance of his own Promotion Order Dated 24.12.2007 on the post of Principal, High School, therefore, it is quite evident that the State Government had actually deputed/posted the petitioner to work as Incharge Principal right from the Year 1998, although the petitioner is merely claiming the benefit of arrears of salary from the period commencing from Date 02.04.2007 to Date 24.11.2007 by computing it from the date, his juniors were promoted on Date 02.04.2007, which appears to be logical and reasonable.

9. The Principle of "no work no pay" applies only when an employee who was assigned with the duties of Higher post or same post, fails to discharge his duties on account of some technical difficulty or when no actual work has been done at all by an Employee, but in the present case the petitioner was specifically posted/ deputed to function/work as Incharge Principal and he had actually discharged his duties as Incharge Principal for such a long duration, therefore by stretch of no imagination the principle of "no work no pay" could be made applicable to the petitioner and as such the petitioner would be entitled to get arrears of salary for the period commencing from Date 02.04.2007 to Date 24.11.2007 (7 months).

10. Consequently this Writ Petition is allowed in so far it relates to the second relief of payment of arrears of salary to the petitioner and it is held that the Petitioner is legally entitled for the difference and arrears of Salary of the Promotional Post, for the period commencing from Date 02.04.2007 uptill Date 24.11.2007 and the State Government is hereby directed to release the arrears of payment of salary for the period commencing from Date 02.04.2007 to Date 24.11.2007 to the petitioner within a period of Three Months from the date of receipt of certified copy of this Order.

11. With the aforesaid direction, this Writ Petition is allowed and is finally disposed of.

Petition allowed.

I.L.R. [2010] M. P., 2310

WRIT PETITION

Before Mr. Justice K.K. Lahoti & Mr. Justice J.K. Maheshwari

5 August, 2010*

MEHMOODA BAI (SMT.) ... Petitioner

Vs.

CENTRAL BANK OF INDIA & ors. ... Respondents

Financial Code, M.P. (Vol. I), Rules 22 & 23 - *Amount deposited before the trial Court by the tenant, not deposited in treasury and defalcated by Nazir -The petitioner/landlord when applied for withdrawal, he was declined to payment - Held - In case of defalcation or misappropriation of the amount, such amount has to be paid by the State by debiting it to the Head "S-Special Advance" and thereafter the aforesaid amount shall be recovered and deposited in the said head by the said Government officials - The person who is entitled for the refund of the amount cannot be directed to file a civil suit for the recovery of the aforesaid amount from the estate of such employee, as explained by State Government vide circulars Nos. E-3/2/89/C-IV Dt. 30.12.1995 and M.P.F.D. Memo No.1220/IV-B-6/72 dt. 2.11.1972 - Petition allowed.* (Paras 12 & 13)

वित्त संहिता, म.प्र. (खण्ड–एक) नियम 22 व 23 – भाड़ेदार द्वारा न्यायालय के समक्ष जमा की गई राशि, खजाने में जमा नहीं की गयी और नाजिर द्वारा गबन की गई – याची/भू–स्वामी ने जब निकालने के लिये आवेदन किया, उसे भुगतान से इंकार किया गया – अभिनिर्धारित – राशि के गबन अथवा दुर्विनियोजन होने के मामले में ऐसी राशि "एस–स्पेशल एडवांस" शीर्ष के नाम जमा करके राज्य द्वारा अदा करनी होगी और उसके पश्चात् उपरोक्त राशि को उक्त सरकारी कर्मचारियों द्वारा वसूला जायेगा तथा उक्त शीर्ष मे जमा किया जायेगा – जो व्यक्ति राशि के प्रतिदाय का हकदार है उसे ऐसे कर्मचारी की सम्पदा से उपरोक्त राशि की वसूली के लिये सिविल वाद प्रस्तुत करने का निर्देश नहीं दिया जा सकता, जैसा कि राज्य सरकार द्वारा परिपत्र क्र. ई–3/2/89/सी–चार, दिनांक 30.12.1995 और म.प्र. वित्त विभाग के ज्ञापन क्र. 1220/चार–बी–6/72, दिनांक 2.11.1972 द्वारा स्पष्ट किया गया है – याचिका मंजूर।

Case referred :

AIR 1994 SC 2663.

Nikhil Tiwari, for the petitioner.

Arvind Pandey, for the respondent Nos.1 to 3.

V.S. Shroti with *Vikram Johri,* for the respondent No.4.

Rahul Jain, Dy.A.G., for the respondent No.5.

O R D E R

The petitioner has sought following reliefs :-

1."That this Hon. Court may be pleased to call for the entire relevant records.

* W.P.No. 1897/2010(Jabalpur)

2. That this Hon. Court may be pleased to direct the respondent bank to pay the rent for the month of April,2009 with interest and the bank rate to the petitioner.

3. Any other relief which this Hon. Court may deem just and proper in the facts and circumstances of the case may kindly be issued in favour of petitioner with the cost of the instant petition to the petitioner."

2. The petitioner has also challenged order dated 14.9.2009 passed by the First Addl. District Judge, Bhopal in execution Case No.40A-89/04-07 by which the Addl. District Judge declined to make payment of Rs.62,652/- to the petitioner decree holder.

3. The facts of the case are that the petitioner filed a civil suit against the respondents No. 1,2 and 3 for eviction based on landlord tenant relationship. A decree was passed in Civil suit No.40A-89/04-07 against which a First Appeal No.593/07 has been filed before this Court. On 15.1.2008 in the first Appeal the learned Single Judge of this Court stayed the execution of judgment and decree passed by the trial Court on certain terms and in compliance of the order, the tenant/defendant No.1,2 and 3 deposited the amount apart from other amount of Rs.62,652/- before the trial Court on 5.5.2009. A receipt of which bearing No.67 C.C.D. No.206 was issued in favour of the respondents. When the petitioner landlord moved an application for withdrawal of the amount, a fact revealed that the amount which was deposited by the aforesaid receipt with the Nazir of the Court, the amount was not transmitted to the Treasury. The First Addl. District Judge, Bhopal on revealing this fact passed the impugned order dated 14.9.2009 by which he declined to make payment of the said amount in favour of the petitioner. This order has cause grievances to the petitioner for filing this petition.

4. Learned counsel appearing for the petitioner submitted that in the case it is not in dispute that such amount was deposited by the respondent No.1,2 and 3 in the Court, of which a due receipt was issued in favour of the tenant on 5.5.2009. As the amount was deposited in the Court, the petitioner herein was entitled to withdraw the amount as she was legally entitled to withdraw the same. There was no fault on the part of the petitioner in respect of non-deposit of the amount by the concerned Nazir in the Treasury so the petitioner cannot be declined to payment of the aforesaid amount. It is further submitted that as the amount has not been deposited by the Nazir in the Treasury, the State is liable for the payment of the aforesaid amount. He has placed reliance to a judgment of the Apex Court in *N. Nagendra Rao vs. State of Andhra Pradesh* [AIR 1994 SC 2663].

5. Learned counsel appearing for the Bank submitted that as per the order passed by this Court, respondents No.1 to 3 duly deposited the amount in the Court of which a receipt has been issued in favour of the respondents on 5.5.2009 bearing No.67 CCD 206. After deposit of the amount, the respondents were absolved from the liability of deposit of the amount. The respondents have no

concern whether the amount which was deposited with the Nazir of which due receipt was issued to the Bank, was transmitted to the Treasury or not. It is further submitted that respondents No. 1 to 3 are not liable for the payment of the aforesaid amount which was already deposited by them in the Court.

6. Learned counsel appearing for respondent No.4 submitted that the aforesaid amount was defalcated by the Nazir of the Court and in this regard a due enquiry was initiated against him. During the pendency of the proceedings an amount of Rs.1,54,000/- was recovered from the Nazir but because of death of Nazir during the pendency of the proceedings, now the proceedings have been initiated against the legal heirs of the Nazir and appropriate order shall be passed in that regard. It was further submitted that the amount of which defalcation has been made by the Nazir in the official capacity can be reimbursed to the petitioner as per the circular issued by the State Government on 30.12.1995 and 2.11.1972 and the amount may be recovered by the State from the estate of the deceased employee.

7. Learned counsel appearing for the State opposed the aforesaid contention who submitted that it was the personal responsibility of the Nazir who defalcated the amount and the petitioner can recover the amount from the estate of Nazir. In support of his contention he placed reliance to Rule 22 Appendix 1(a) and 2 of the M.P. Financial Code and submitted that as per the aforesaid Rule, it is the sole responsibility of the said employee and the State cannot be held vicariously liable for the amount.

8. To appreciate the rival contentions of the parties, the following position is not in dispute:-

1. That the respondents No. 1 to 3 deposited the amount in the Court on 5.5.2009 of which a due receipt was issued by the concerned Nazir on the same date bearing CCD Receipt No.67. Apart from this a due entry was made in the C.C.D register of the Court at Sr. No.206.
2. That the Nazir of the District Court, Bhopal had not deposited the amount in the Treasury which was his official responsibility.
3. That the petitioner who is the landlord is entitled for the aforesaid amount as the amount was deposited for payment to the petitioner herein.
4. That the respondents No.1 to 3 had deposited the amount in the Court. Aforesaid amount was the rent for the month of April,2009.

9. In such circumstances, who should be liable has been considered by the Apex Court in *N. Nagendra Rao* (supra) in which the Apex Court considering the question held in para 11 of the judgment :-

> "Thus, it is clear that this case recognises a material distinction between acts committed by the servants employed by the State where such acts are referable to the exercise of sovereign powers delegated to public servants, and acts committed by public servants, which are not referable to the delegation of any sovereign powers. If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is : was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie. The act of the public servant committed by him during the course of his employment is, in this category of cases, an act of a servant who might have been employed by a private individual for the same purpose. This distinction which is clear and precise in law, is sometimes not borne in mind in discussing questions of the State's liability arising from tortious acts committed by public servants ....."

10. The Apex Court in the same judgment in para 32 of the judgment, further held that :-

> And the citizens of the independent nation who are governed by its own people and Constitution and not by the Crown are still faced, ever after well nigh fifty years of independence, when they approach the Court of law for redress against negligence of officers of the State in private law, with the question whether the East India Company would have been liable and, if so, to what extent for tortuous acts of its servants committed in course of its employment. Necessity to enact a law in keeping with the dignity of the country and to remove the uncertainty and dispel the misgivings, therefore, cannot be doubted.

11. In the facts of the case, the Nazir of the Court was an employee of the State and was discharging the duties which were assigned to him. In the official capacity he received the amount from the respondents No. 1,2, and 3 and a due receipt was issued by him to the respondents No. 1,2 and 3. All these acts were done by him in his official capacity and none, either the petitioner or the respondents No. 1,2 and 3 were required to see whether after deposit of the amount it was deposited by the Nazir in the Treasury or not. It was not the duty of the petitioner or respondents No. 1,2 and 3 to keep a watch on the Nazir in this regard. It was

neither expected nor it could be done by the petitioner and respondents No. 1,2, and 3 to see whether this amount was deposited by the Nazir in the Treasury or not. It was an official act which ought to have been done by the Nazir and the concerned official who were responsible to look into the affairs of the Nazir ought to have seen the act of the Nazir whether he has deposited the amount in the Treasury or not. In these circumstance, for the act of the Nazir, the State is vicarious liabile to make payment of the aforesaid amount to the petitioner. However, the State after payment of the amount can recover the amount from the estate of Nazir who is stated to be dead.

12. It is submitted by the learned counsel for respondent No.4 that a due enquiry was initiated against the Nazir and an amount of Rs.1,54,000/- was recovered from him during the life time of Nazir but after his death the proceedings were initiated for recovery of the amount, from the estate of Nazir and from the persons who were liable for such defalcation. Two circulars are produced before this Court by the respondent No.4 in support of his contention that in such circumstances even when there is defalcation by an employee what recourse should be taken by the State. For ready reference, both the circulars are quoted verbatim:-

(i) राज्य शासन आदेश

विषय : गबन, चोरी इत्यादि से हुई शासकीय हानि राशि का कोषालय से पुनः आहरण ।

शासन के ध्यान में यह बात आयी है कि गबन,चोरी, लूट आदि के प्रकरणों में आहरित शासकीय धनराशि अनुपलब्ध हो जाने पर, शासकीय कर्मचारियों के वेतन आदि स्वत्वों का भुगतान बिना उनकी किसी गलती के लम्बे समय के लिये रूक जाता है, जिसके कारण उन्हें आर्थिक कठिनाईयों का सामना करना पडता है ।

2. इस प्रकार खोई हुई राशि वित्त विभाग के ज्ञापन कमांक 1202/चार/बी. 6/72, दिनांक 2.11.72 प्रतिलिपि संलग्न में प्रसारित निर्देशों के अनुसार कोषालय से पुनः आहरित कर ली जाने का प्रवधान है । आदेश कमांक एफ. ई 3/2/89/नि.5/चार, दिनांक 12.7.89 को निरस्त करते हुए निर्देश दिये जाते हैं कि इन प्रकरणों में आहरण के पहले विभागाध्यक्ष प्रशासकीय विभाग से अनुमति प्राप्त करेंगे ।

3. राज्य शासन चाहता है कि इस प्रकार के प्रकरणों में तीन सप्ताह के अन्दर कोषालय से राशि के पुनः आहरण की व्यवस्था कर उसका वितरण कर दिया जाना चाहिए।

वित्त विभाग कमांक ई.3/2/89/सी/चार, दिनांक 30.12.1995.

(2) "Copy of M.P.F.D. Memo No.1220/IV-B-6/72, dated 2.11.1972 addressed to all departments of Govt. All H.O.D. All Collectors.

Sub:- Regarding issue of instructions in respect of procedure to be followed for adjustment etc. of the redrawal of an amount lost through misappropriation or defalcation, embezzlement etc.

Under advice of the C.A.G. Of India, it has been decided that the redrawal of the amount lost through misappropriation, defalcation, embezzlement, and the like, should be debited to the head "S-Special Advances" sub-ordinate to the major head "Departmental Advances", in Section T-Deposit and Advance Part-III "Advances not bearing interest." Under specific sanction of the Government pending investigation of the loss, fixation of responsibility and finalisation of the action for recovery of the amount lost if possible. The loss will have to be reported in accordance with the provisions contained in Rules 22 and 23 of the MPFC Vol. I. Any amount subsequently recovered may be credited to the above head and the balance, if found irrecoverable, will have to be adjusted as a loss under the relevant service head after obtaining Govt. sanction."

13. It is apparent that in case of defalcation or misappropriation of the amount, such amount has to be paid by the State by debeting it to the Head "S-Special Advance" and thereafter the aforesaid amount shall be recovered and deposited in the said head by the said Government officials. In view of the aforesaid circular, the contention of Shri Jain, learned Dy. A.G. that the amount should be recovered from the estate of the deceased has no legs to stand. Apart from this under Rule 22 and 25 which are referred by Shri Jain though provides that such loss can be recovered from the employees but it is an internal procedure which can be followed by the State against the employee but the person who is entitled for the refund of the amount cannot be directed to file a civil suit for the recovery of the aforesaid amount from the estate of such employee. So State, itself, has explained the Rule 22 and 25 by issuing aforesaid circulars of which correctness has not been disputed, so the contention of the State cannot be accepted.

14. In view of the aforesaid, this petition is allowed with following directions :-

i) That the respondent No.5/State shall release Rs.62,652/- within a period of 60 days from today to the District Judge, Bhopal and on release of the amount the same shall be paid to the petitioner by the District Judge, Bhopal in accordance with law and in this regard a due entry shall be made in the records of the District Judge, Bhopal.

ii) After release of the amount the District Judge/ competent Authority shall initiate due proceedings in accordance with law, for the recovery of the said amount from the estate of the deceased employee.

iii) The District Judge shall follow due procedure of law for the recovery of the aforesaid amount. After the recovery of the amount from the estate of the deceased employee Deepak Phoopwale , the aforesaid amount shall be deposited with the State as provided under circular dated 2.11.1972 (supra).

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

Petition allowed.

I.L.R. [2010] M. P., 2316
WRIT PETITION
Before Mr. Justice Piyush Mathur
6 August, 2010*

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

A. Service Law - ***Family Pension - Delay in claim - Held - Even if there exist some delay in approaching the Court, the same would not come in the way of Widow Petitioner, who is claiming Family Pension.*** (Para 6)

क. सेवा विधि – परिवार पेंशन – दावे में विलम्ब – अभिनिर्धारित – यद्यपि न्यायालय पहुँचने में कुछ विलम्ब हुआ है, तथापि वह विधवा याची, जो परिवार पेंशन का दावा कर रही है, के मार्ग में बाधक नहीं होगा।

B. Service Law - ***Family Pension*** - *Respondents not disputing the widow to be the legally wedded wife of the deceased who was getting pension until his death - The petitioner would be fully competent and eligible to obtain the benefit of disbursement of Family Pension - Petition allowed.* (Para 7)

ख. सेवा विधि – परिवार पेंशन – प्रत्यर्थी ने विधवा को, मृतक की, जो उसकी मृत्यु होने तक पेंशन प्राप्त कर रहा था, वैध विवाहिता होना विवादित नहीं किया – याची परिवार पेंशन संवितरण का लाभ प्राप्त करने के लिए पूर्णतः सक्षम एवं पात्र होगी – याचिका मंजूर।

Cases relied upon :

(2003) 1 SCC 184, (1985) 3 SCC 345.

Pawan Dwivedi, for the petitioner.
Nidhi Patankar, Dy.G.A., for the respondents/State.

O R D E R

PIYUSH MATHUR, J. :–This Petition has been preferred against inaction on the part of the Respondents in not disbursing Family Pension to the Petitioner, who happens to be a Widow of Constable (Hawaldar) Jagat Singh, who was working in National Security Force (NSF).

2. Shri Pawan Dwivedi, Learned Counsel appearing for Petitioner submits

*W.P. No.507/2009(S) (Gwalior)

that Husband of the Petitioner had retired from Service and was getting Pension uptill Year 2004 when he died on Date 06/04/2004 but inspite of approaching the Respondents,on several occassion the Family Pension has yet not been paid to the Petitioner/Wife.

3. Ms. Nidhi Patankar, Learned Deputy Government Advocate appearing for Respondents/State submits that this Petition has been filed quite late and this Court has also got no territorial jurisdiction in the matter, in as much as, the Husband of the Petitioner was posted at Indore at the time when he retired and since at the time of examination of the Claim of the present Petitioner (Wife of the deceased employee), it was found that the record of the employee is not available with the Department, therefore, an intimation was sent to the Petitioner on Date 29/08/2008 that for want of relevant record, Family Pension could not be granted to the Petitioner. Ms. Patankar prays for dismissal of the Writ Petition on all aforesaid grounds.

4. I have heard Shri Pawan Dwivedi, Learned Counsel and Ms. Nidhi Patankar, Learned Deputy Government Advocate and perused the record of case.

5. A perusal of documents annexed with the Writ Petition and the Reply of Respondents reveal that Jagat Singh, was employed as a Constable (Hawaldar) in the Establishment of National Security Force (NSF) and he was granted Retrenchment Pension w.e.f. Date 16/01/1951 through Treasury Office, Gwalior. It is also evident from the record that the Special Armed Force (S.A.F.) being successor of National Security Force (N.S.F.) had decided to disburse Pension to late Jagat Singh through his Bank Account of State Bank of India at Morar, Gwalior uptil his death on Date 06/04/2004 and soon after the death of the Husband, the Petitioner had approached the Respondents at Gwalior for disbursement of Family Pension to her by an Application (Annexure P/4). It is also clear from the record that on account of non-availability of service record of late Jagat Singh, inability to process the application for the grant of Family Pension was expressed by Commandant, 2nd Bn., Special Armed Force, Gwalior vide its Letter Dated 29/08/2008 which was communicated at Petitioner's residential address, situated at Village Bada Gaon, Morar, Gwalior. Therefore it is crystal clear from all these facts that the Petitioner's Husband was getting Pension at Gwalior and he was receiving Pension in his Bank Account situated at Gwalior and even the Petitioner resides within the territorial jurisdiction of Gwalior Bench, to whom the Respondents have addressed a Letter Dated 29/08/2008 describing their inability to process her Claim. Therefore, it is evident that not only on account of residence of the Petitioner but also on account of accrual of cause of action to the Petitioner at Gwalior, this Petition is maintainable before this Court and as such, the objections raised on behalf of the Respondents have no merit. Similarly the objection regarding delay has also got no merit in as much as the Petitioner has approached this Court well within time from Date 29/08/2008, when the Department had expressed its inability to process her Claim for grant of Family Pension.

6. While considering the plea of delay, in approaching the Court by a Widow, for grant of Family Pension, the Supreme Court has observed in the case of *S.K. Mastan Bee v. G.M., South Central Rly.*, (2003) 1 SCC 184 in the following terms;

> "6. We notice that the appellant's husband was working as a Gangman who died while in service. It is on record that the appellant is an illiterate who at that time did not know of her legal right and had no access to any information as to her right to family pension and to enforce her such right. On the death of the husband of the appellant, it was obligatory for her husband's employer viz. the Railways, in this case to have computed the family pension payable to the appellant and offered the same to her without her having to make a claim or without driving her to a litigation. The very denial of her right to family pension as held by the learned Single Judge as well as the Division Bench is an erroneous decision on the part of the Railways and in fact amounting to a violation of the guarantee assured to the appellant under Article 21 of the Constitution. The factum of the appellant's lack of resources to approach the legal forum timely is not disputed by the Railways. The question then arises on facts and circumstances of this case, was the Appellate Bench justified in restricting the past arrears of pension to a period much subsequent to the death of the appellant's husband on which date she had legally become entitled to the grant of pension? In this case as noticed by us hereinabove, the learned Single Judge had rejected the contention of delay put forth by the Railways and taking note of the appellant's right to pension and the denial of the same by the Railways illegally considered it appropriate to grant the pension with retrospective effect from the date on which it became due to her. The Division Bench also while agreeing with the learned Single Judge observed that the delay in approaching the Railways by the appellant for the grant of family pension was not fatal, in spite of the same it restricted the payment of family pension from a date on which the appellant issued a legal notice to the Railways i.e. on 1-4-1992. We think on the facts of this case inasmuch as it was an obligation of the Railways to have computed the family pension and offered the same to the widow of its employee as soon as it became due to her and also in view of the fact that her husband was only a Gangman in the Railways who might not have left behind sufficient resources for the appellant to agitate her rights and also in view of the fact that the appellant is an illiterate, the learned Single Judge, in our opinion, was justified in granting the relief to the

appellant from the date from which it became due to her, that is the date of the death of her husband. Consequently, we are of the considered opinion that the Division Bench fell in error in restricting that period to a date subsequent to 1-4-1992.

7. In the said view of the matter, we allow this appeal, set aside the impugned order of the Division Bench to the extent that it restricts the right of the appellant to receive family pension only from 1-4-1992 and restore that right of the appellant as conferred on her by the learned Single Judge, that is from the date 21-11-1969. The Railways will take steps forthwith to compute the arrears of pension payable to the appellant w.e.f. 21-11-1969 and pay the entire arrears within three months from the date of the receipt of this order and continue to pay her future pension."

Therefore, it could be safely observed that even if there exist some delay in approaching this Court, the same would not come in the way of Widow Petitioner, who is claiming Family Pension.

7. The Claim of the Petitioner for grant and disbursement of Family Pension has not been disputed by the Respondents on either of the grounds that the Petitioner is not a legally wedded Wife of her Husband Jagat Singh or Jagat Singh was not getting Pension from Respondents. Similarly Letter of the Commandant,SAF Dated 29/08/2008 is completely silent on this count that the Petitioner is not legally wedded Wife of deceased employee Jagat Singh but on the contrary, the Letter clarifies that the Department has recognized Smt. Shanti Devi as the Wife/Widow of Late Jagat Singh and the Respondents have also not refused to disburse Family Pension to Petitioner, on the ground that a Widow of a Constable, getting Retrenchment Pension would not be entitled for Family Pension, whereafter it is not required to be examined by this Court as to whether the Petitioner is entitled for Family Pension or not and the only issue which requires examination or scrutiny by this Court is the action of the Respondents in not making disbursement/payment of Family Pension to the Petitioner. It is apparent from the entire record that deceased employee Jagat Singh was getting Pension uptil his death on Date 06/04/2004, therefore this Court reaches an irresistible conclusion that Petitioner Smt. Shanti Devi would be fully competent and eligible to obtain the benefit of disbursement of Family Pension.

8. The issue regarding right of Widows and Dependents of deceased employees had been examined by the Supreme Court and it has been observed in the case of *Poonamal v. Union of India,* (1985) 3 SCC 345 in the following terms;

"7. It is not necessary to examine the concept of pension. As already held by this Court in numerous judgments pension is a right not a bounty or gratuitous payment. The payment of pension does not depend upon the discretion of the Government but is

governed by the relevant rules and anyone entitled to the pension under the rules can claim it as a matter of right. *(Deoki Nandan Prasad v. State of Bihar State of Punjab v. Iqbal Singh and D.S. Nakara v. Union of India)* Where the Government servant rendered service, to compensate which a family pension scheme is devised, the widow and the dependent minors would equally be entitled to family pension as a matter of right. In fact we look upon pension not merely as a statutory right but as the fulfilment of a constitutional promise inasmuch as it partakes the character of public assistance in cases of unemployment, old-age, disablement or similar other cases of undeserved want. Relevant rules merely make effective the constitutional mandate. That is how pension has been looked upon in *D.S. Nakara* judgment. At the hearing of this group of matters we pointed out that since the family pension scheme has become non-contributory effective from September 22, 1977 any attempt at denying its benefit to widows and dependents of Government servants who had not taken advantage of the 1964 liberalisation scheme by making or agreeing to make necessary contribution would be denial of equality to persons similarly situated and hence violative of Article 14. If widows and dependents of deceased Government servants since after September 22, 1977 would be entitled to benefits of family pension scheme without the obligation of making contribution, those widows who were denied the benefits on the ground that the Government servants having not agreed to make the contribution, could not be differently treated because that would be introducing an invidious classification among those who would be entitled to similar treatment. When this glaring dissimilar treatment emerged in the course of hearing in the Court, Mr B. Dutta learned counsel appearing for the Union of India requested for a short adjournment to take further instructions."

9. Therefore, in view of aforesaid analysis of the matter, the Writ Petition is allowed and Respondents are directed to grant/issue Family Pension to the Petitioner within a period of 30 Days from the date of receipt of a certified copy of this Order. It is also directed that the Petitioner shall be entitled for Family Pension from the date of the Death of her Husband i.e. from Date 06.04.2004 and shall also be entitled for payment of entire arrears of Family Pension.

With the aforesaid observation, this Writ Petition is allowed and finally disposed of.

There shall be no order as to costs.

Petition allowed.

I.L.R. [2010] M. P., 2321

WRIT PETITION

Before Mr. Justice S.K. Gangele & Mr. Justice S.S. Dwivedi

10 August 2010*

SATENDRA SINGH GUJAR ... Petitioner

Vs.

BANK OF INDIA & ors. ... Respondents

Industrial Disputes Act (14 of 1947), Sections 14 & 15, Industrial Disputes (Central) Rules, 1957, Rule 10B(9) - *Reference of dispute by appropriate Government to Labour Court - Dismissal on the ground of non-appearance passing "no dispute award" - Application for setting aside also dismissed - Held - Labour Court has no power to dismiss the reference in defaults - Petition allowed.* (Paras 9 & 10)

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 14 व 15, औद्योगिक विवाद (केन्द्रीय) नियम, 1957, नियम 10बी(9) – समुचित सरकार द्वारा श्रम न्यायालय को विवाद का निर्देश – हाजिर न होने के आधार पर खारिजी "कोई विवाद नहीं अवार्ड" पारित करते हुए – अपास्त करने का आवेदन भी खारिज – अभिनिर्धारित – श्रम न्यायालय को व्यतिक्रम के लिए निर्देश खारिज करने की कोई शक्ति नहीं है – याचिका मंजूर।

Case referred:

1969 JLJ 68.

Pawan Dwivedi, for the petitioner.

None, for the respondents.

ORDER

Heard.

The petitioner has filed this petition challenging the award dated 1st May 1995, Annexure P-l passed by Central Government Industrial Tribunal Cum Labour Court, Jabalpur and also the order dated 16.09.1998, Annexure P-2, by which the Tribunal has rejected the application of the petitioner to set aside the ex parte award dated 01.05.1995.

2. The petitioner was engaged as a Watchman at M/s Gwalior Rolling Mill, Maharajpura in March 1983. His services were terminated in the month of August 1988. Thereafter, as per the petitioner, he was engaged on. 6th June 1989 by respondent No. 1, Bank. He worked in the bank up to 08.11.1989. Thereafter his services were terminated. The petitioner filed a Letter Petition before the High Court against the order of termination. The. High Court dismissed the petition with liberty to the petitioner to raise an industrial dispute. Thereafter, the petitioner submitted a complaint to the appropriate Government. After failure of conciliation proceedings, the appropriate Government referred the disputed for adjudication before the Labour Court.

*W.P. No.1797/2004 (Gwalior)

3. The Labour Court vide impugned award dated Ist May 1995 has held that the petitioner did not appear before the Court nor filed statement of claim, hence, it appears that the petitioner was not interested in pursuing his claim, therefore, the Labour Court passed 'no dispute award'. For setting aside the aforesaid award the .petitioner filed an application before the Labour Court, which has also been dismissed vide order dated 16.09.1998. The Labour Court has held that the petitioner deliberately did not appear before the Labour Court.

4. From the award dated 1st May 1995, it is clear that the Labour Court passed the award as 'no dispute award' on the ground that the petitioner did not appear before the Labour. Court nor filed statement of claim.

5. Sections 14 and 15 of the industrial Disputes Act, 1947, which are as under, prescribes that the Labour Court to decide the dispute referred for adjudication :-

> **"14. Duties of Courts.** - A Court shall inquire into the matters referred to it and report thereon to the appropriate Government ordinarily within a period of six months from the commencement of its inquiry.
>
> **15. Duties of Labour Courts, Tribunals and National Tribunals** .- Where an industrial dispute has been referred to a Labour Court, Tribunal or National Tribunal for adjudication, it shall hold its proceedings expeditiously and shall, within the period specified in the order referring such industrial dispute or the further period extended under the second proviso to sub-section (2A) of section 10, submit its award to the appropriate Government,"

6. The Central Government in exercise of powers conferred by Section 38 of the Industrial Disputes Act, 1947 has framed the Rules, namely. The Industrial Disputes (Central) Rules, 1957'. Rule 10B (9) of the aforesaid Rules, which is as under, prescribes that the Labour Court may proceed with the reference ex parte in absence of any party and decide the reference :-

> **"10B. Proceeding before the Labour Court, Tribunal or National Tribunal .-(1).....**
>
> (9) In case any party defaults or fails to appear at any stage the Labour Court, Tribunal or National Tribunal, as the case may be, may proceed with the reference ex parte and decide the reference application in the absence of the defaulting party :
>
> Provided that the Labour Court, Tribunal or National Tribunal, as the case may be, shall submit its award to the Central Government within one month from the date of arguments oral hearing or within the period mentioned in the order of reference whichever is earlier."

7. From the aforesaid Rule it is clear that it is obligatory on the part of the Labour Court to answer the reference after considering merits of the case. However, the Labour Court has no power to pass an award as 'no dispute award' on the ground that one party did not appear before the Labour Court.

8. A Division Bench of this Court in the case of *Sital vs. Central Government Industrial Tribunal-cum-Labour Court, Jabalpur,* 1969 JLJ 68, has held that the Labour Court has no power to dismiss the reference in defaults. The relevant findings of the Division Bench are as under :-

> "9. The main question for consideration is whether the Tribunal could, as it did in this case, accept an amicable settlement between the parties which "did not specify the manner in which the dispute have been settled" and make an award in terms of that settlement because "there now remains nothing for adjudication" by the tribunal so far as these five specific demands are concerned. We are clearly of opinion that the Tribunal could not act in that way without disregarding the provisions of the Act. The word "award" as defined in clause (b) of section 2 of the Act means "an interim or final determination of any industrial dispute or of any question relating thereto by any"Labour Court, Industrial Tribunal or National Industrial Tribunal and includes an arbitration award made under section 10-A". We think that the word "determination" used in the definition implies adjudication upon relevant material by the Labour Court or the Tribunal. So, it has been held that, once a reference has been made under section 10(1) of the Act, it cannot be4 rescinded or cancelled : *State of Bihar v. Ganguli* (1.958) II JLJ 834 (SC). It cannot also be dismissed for default because that would .amount to putting an end to the. proceedings, otherwise than by adjudicating upon the dispute."

9. Hence, in our opinion, the Labour Court has committed an error of law in passing 'no dispute award' against the petitioner. The Labour Court further committed an error of law in rejecting the application for restoration of the dispute filed by the petitioner.

10. Consequently, the petition of the petitioner is allowed. The impugned award dated 1st May 1995 Annexure P-1 passed by Central Government Industrial Tribunal Cum Labour Court, Jabalpur and also the order dated 16.09.1998, Annexure P-2 are hereby quashed. The matter is remanded back to the Labour Court, respondent No.3 for deciding the reference afresh in accordance with law. Looking to the facts of the case, there shall be no order as to costs.

Petition allowed.

I.L.R. [2010] M. P., 2324
WRIT PETITION
Before Mr. Justice Ajit Singh
9 September, 2010*

YOGESH KUMAR GULATI ... Petitioner
Vs.
SATYA PRAKASH DHINGRA & anr. ... Respondents

Petroleum Rules, 2002, Rule 154(2) - *Appeal against any order of the District Authority - Sub-rule does not provide for an appeal when the District Authority refuses to cancel the no-objection certificate - Petition Allowed.* (Para 5)

पेट्रोलियम नियम, 2002, नियम 154(2) – जिला प्राधिकारी के किसी आदेश के विरुद्ध अपील – उपनियम, जिला प्राधिकारी द्वारा अनापत्ति प्रमाण पत्र को रद्द करने से इनकार करने पर, अपील का उपबन्ध नहीं करता है – याचिका मंजूर।

Sanjay Agrawal, for the petitioner.
Rajesh Maindiretta with *A.K. Soni,* for the respondent No.1.
S.M. Lal,Govt. Adv. for the respondent No.2.

ORDER

AJIT SINGH, J. :–By this petition, filed under Article 226 of the Constitution, the petitioner has prayed for quashing of order dated 10.5.2010, Annexure P12, passed by the Commissioner, Jabalpur Division (respondent no.2) on the ground that appeal is not maintainable under Rule 154(2) of the Petroleum Rules, 2002 (in short, "the Rules").

2. The petitioner is a proprietorship firm having a petrol and diesel retail outlet of Hindustan Petroleum Corporation Limited at village Raipura, District Jabalpur. The retail outlet has been established on the land bearing Khasra no.167/2, area 22,400 sq.ft., of which respondent no.1 is the owner. By a lease deed, Annexure P4, the land had been given on lease by respondent no.1 to the petitioner for 15 years commencing from 1.10.1993 to 30.9.2008 for setting up and running the petrol/diesel retail outlet. Condition no.5 of the lease deed provides that the petitioner shall have option to renew the lease for a further period of six years on the same terms and conditions after the expiry of the term of lease. The petrol and diesel pump was set up by the petitioner after obtaining no-objection certificate dated 29.10.1993, Annexure P2, under the Rules from the District Magistrate, Jabalpur. On completion of the term of lease, the petitioner opted for its renewal for a further period of six years and sent a communication to respondent no.1 in this regard. But respondent no.1 declined to extend the term of lease. The petitioner has, therefore, filed a Civil Suit No.13-A/2009 (new) in the Civil Court, Jabalpur, for execution of lease deed. Respondent no.1 in retaliation made a complaint, Annexure P6, to the District Magistrate, Jabalpur, for cancelling the no-objection

*W.P. No.6846/2010 (Jabalpur)

certificate dated 29.10.1993 granted to petitioner inter-alia on the ground that it has ceased to have any right to use the land after the expiry of lease period. The District Magistrate, after hearing respondent no.1 and the petitioner by order dated 7.12.2009, Annexure P10, dismissed the complaint by holding that there was no good ground for cancelling the no-objection certificate. Aggrieved, respondent no.1 has filed an appeal under Rule 154(2) of the Rules before the Commissioner (respondent no.2). The petitioner raised a preliminary objection against the maintainability of appeal which the Commissioner has dismissed by the impugned order dated 10.5.2010, Annexure P12. It is in this background the petitioner has filed the present petition.

3. The learned counsel for petitioner has argued that Rule 154(2) of the Rules does not provide for any appeal against an order dismissing the complaint for cancellation of no-objection certificate. The learned counsel for respondent no.1, in reply, argued that the appeal is maintainable.

4. Under Chapter VII of the Rules licence is granted to a person by the Licensing Authority on his obtaining no-objection certificate under Rule 144 from the District Authority for the site proposed. The District Authority may, under Rule 149 by a reasoned order, refuse to grant no-objection certificate and likewise it may, under Rule 150, cancel the no-objection certificate granted on being satisfied that the licensee has seized to have any right to use the site for storing petroleum. Rule 154 provides for appeal against the order of the District Authority to the next superior authority. It reads as under:

> **"154. Appeals.-** (1) An appeal shall lie against any order refusing to grant, amend or renew a licence cancelling or suspending a licence to –
>
> (i)the Central Government, where the order is passed by the Chief Controller;
>
> (ii)the Chief Controller, where the order is passed by a Controller;
>
> (iii) the immediate official superior to the District Authority, where the order is passed by the District Authority;
>
> (iv) the immediate official superior to officer appointed under rule 33 in the case of vessels licensed for the carriage of petroleum in bulk.
>
> (2) An appeal against any order of the District Authority refusing to grant or cancelling a no-objection certificate shall lie to the authority which is immediately superior to the said District Authority.
>
> (3) Every appeal shall be in writing and shall be accompanied by a copy of the order appealed against and shall be presented within sixty days of the order passed."

5. Sub-rule (2) of Rule 154 quoted above permits an appeal against any order of the District Authority "refusing to grant or cancelling a no-objection certificate". The sub-rule does not provide for an appeal when the District Authority refuses to cancel a no-objection certificate. The words "refusing to grant or cancelling" cannot be read, as argued by the learned counsel for respondent no.1, as "refusing to grant or refusing to cancel". The language used in the sub-rule does not permit such a construction and it plainly means that appeal is permissible only when the District Authority (i) refuses to grant a no-objection certificate, and (ii) when District Authority cancels a no-objection certificate. As already stated, the sub-rule does not provide for an appeal when the District Authority refuses to cancel the no-objection certificate. If the construction, as advanced by the learned counsel for respondent no.1, is accepted there would be no appeal against an order cancelling a no-objection certificate which is clearly not the intention of the Rule Making Authority.

6. For these reasons, I have no hesitation in holding that appeal of respondent no.1 before the Commissioner is not maintainable and the order dated 10.5.2010, Annexure P12, is accordingly quashed.

7. The petition succeeds and is allowed but without any order as to costs.

Petition allowed.

I.L.R. [2010] M. P., 2326
APPELLATE CIVIL
Before Mrs. Justice S.R. Waghmare
20 July, 2010*

SAHNAZ BEE ... Appellant
Vs.
NIRMALA ROAD LINES & ors. ... Respondents

A. Motor Vehicles Act (59 of 1988), Sections 140, 166, 163-A & 163-B - *Application for change of claim u/s 166 to 163-A - Permissibility - Held - Since, the claim was filed u/s 166 and the claimant also claimed that on the basis of no fault liability claim may also be considered u/s 140 - Then under such circumstances, S. 163-B of the Act would come into operation - Therefore, application cannot be accepted because the claimant has already exercised her option u/s 140 - Application dismissed as not maintainable.* (Para 13)

क. मोटर यान अधिनियम (1988 का 59), धाराएँ 140, 166, 163–ए व 163–बी – दावे के धारा 166 से धारा 163–ए में परिवर्तन हेतु आवेदन – अनुज्ञेयता – अभिनिर्धारित – चूंकि दावे को धारा 166 के अन्तर्गत प्रस्तुत किया गया और दावेदार ने यह भी दावा किया कि बिना दोष दायित्व के आधार पर भी धारा 140 के अन्तर्गत दावा विचार में लिया जावे – तब इन परिस्थितियों में अधिनियम की धारा 163–बी प्रवर्तन में आ जाती है – अतः आवेदन स्वीकार नहीं किया जा सकता

*M.A. No.1675/2003 (Indore)

क्योंकि दावेदार ने धारा 140 के अन्तर्गत अपने विकल्प का पहले ही प्रयोग कर लिया है – आवेदन अपोषणीय होने से खारिज।

B. Motor Vehicles Act (59 of 1988), Section 147 - *Liability of insurer - No liability can be mulcted on the Insurance Company when the negligence on the part of the driver is not established or the fact that the passengers were gratuitous passengers in a goods vehicle.* (Para 14)

ख. मोटर यान अधिनियम (1988 का 59), धारा 147 – बीमाकर्ता का दायित्व – बीमा कम्पनी पर कोई उत्तरदायित्व नहीं डाला जा सकता जब कि चालक के भाग पर उपेक्षा अथवा यह तथ्य स्थापित न हुआ हो कि यात्री माल वाहन में आनुग्रहिक यात्री के रूप में थे।

Cases referred :

(2004) 2 SCC 1, II (2008) ACC 1 (SC).

H.S. Rajpal with *V.S. Chauhan,* for the appellant.
Sameer Athawale, for the respondent No.1.
None, for the respondent No.2
C.P. Singh, for the respondent No.3.

ORDER

S.R. Waghmare, J. :–This is a claimants appeal against dismissal of his claim by order dated 24.6.2003 passed by 13th M.A.C.T. Indore, in Claim Case No. 201/2003.

2. Brief facts of the case are that on the date of incidence i.e.12.5.1997, at 5.30 p.m. in the ghat at Manpur, a truck bearing Registration No.MH04-H-4622 being rashly and negligently driven by Mobin, applicant No.2 turned turtle. In the peculiar facts and circumstances of the case, two sons of the driver Mobin who were travelling on the truck received grievous injuries and one of them died.

3. The claimant Smt. Shanaz Bi, the wife of the driver Mobin and mother of the two sons Salim and Kalim claimed compensation for the death of salim and permanent disability of Kalim; against the owner, the driver (her husband) and the Insurance Company. She claimed that Salim was a labourer, whereas Kalim had boarded the truck as a cleaner. She also claimed that he was earning Rs. 1,000/- per month plus Rs. 40/- per day as allowance, being 20 years of age she claimed compensation of Rs. 3,00,000/-.

4. The appellant claimant also alleged that Kalim the second son received grievous injuries and was earning Rs. 1500/- per month. He was hospitalized in M.Y. Hospital Indore, for almost 15 days and had sustained a permanent disability in his left leg and right hand and had spent Rs. 15,000/- for treatment claimed a compensation of Rs. 2,30,000/- on behalf of Kalim.

5. Non-applicant No.1 and 2 despite service remained ex-parte.

6. Non-applicant No.3 the respondent Insurance Company resisted the claim by even denying that the accident had occurred and further it also took up the

defence that the sons of Shanaz were neither cleaner nor labourers as alleged and were traveling illegally on the truck and hence they were not covered under the policy and the Insurance Company was not liable to pay the compensation if any. They could at the most be termed as gratuitous passengers and hence, the Insurance Company was not liable to pay the claim.

7. The Tribunal on considering the evidence found that the accident had occurred due to mechanical failure since the breaks had failed and as a result of which the truck had turned turtle. The information given to the Police in the FIR by the non-applicant No.2 Mobin himself was that the accident was due to break failure and hence liability could not be mulcted on non-applicant No.2 as he was the driver of the truck. Similarly, the appellant was unable to establish that deceased Salim was working as a cleaner on the truck whereas, Kalim was only 17 years of age and could not be a labourer as he was not even an adult. Moreover, since both the deceased as well as insurer had no relation with the owner as employees, the liability could not be mulcted on the Insurance Company since there was a violation of conditions of policy and even gratuitous passengers could not be covered under the same. Regarding Kalim the Doctor was examined and Dr. Inamdar was not able to establish the fact as to which muscle of his hand had become weak resulting in the permanent disability. The Tribunal found that nothing was established by the claimant mother. It was unexplained as to how without permission of the owner Kalim and Salim were travelling on the alleged truck. Since they were neither the employees nor the agricultural labourers none of the respondents could be mulcted with the liability and hence, the claim was not maintainable according to the Tribunal and it dismissed the same. Being aggrieved, the appellant has filed the present appeal.

8. Primarily Counsel for the appellant has stated that there is an application under Order 6 Rule 17 of the CPC for treating the claim filed under Section 166 of the Motor Vehicles Act, 1988 as one under Section 163-A of the Motor Vehicles Act and the cause title be allowed to be amended. IA 3472/2008 thus needs to be considered primarily before going into the merits of the case.

9. Counsel for the appellant urged that the appellant mother had filed the claim for compensation on behalf of her two sons since the driver was non-applicant her husband and father of the two children. Stating that even if the claim has been wrongly filed under Section 166 of the Motor Vehicles Act, before the learned MACT in appeal, this Court had ample powers to convert the same into a claim under Section 163-A of the Motor Vehicles Act and compensation could be granted on the basis of no fault liability since the accident had occurred as a result of the mechanical failure of the breaks of the disputed vehicle and just and fair compensation could be awarded to the claimant.

10. Counsel for the respondent Insurance Company, as well as the owner, have clearly opposed the submissions of the Counsel for the appellant. Counsel

stated that once having chosen the remedy of compensation under Section 166 and Section 140 of the Motor Vehicles Act the claimants could not turn around and pray that the claim be treated under Section 163-A of the Motor Vehicles Act. Moreover, the Tribunal had already assessed the evidence and came to a conclusion that since the vehicle was being driven by the non-applicant No.2, he could not claim compensation for his own negligence as a tortfeasor. Moreover, Counsel for the Insurance Company also stated that there were violation of conditions of policy and the Insurance Company was rightly exonerated by the learned Tribunal.

11. Relying on *Oriental Insurance Co. Ltd. V. Meena Variyal and others* 2007 ACJ 1284 Counsel stated that the Apex Court had held that when a person is not a third party within the meaning of the Act the company cannot be made automatically liable merely resorting to the ratio in *Swaran Singh's case*. In the said case the deceased being an employee was not covered under the Workmen's Compensation Act, and had to be covered compulsorily under the Motor Vehicles Act and the Court had held that there is no special contract covering such a person then the Insurance Company would be made liable to pay the compensation first and then recover it from the insurer. So also the claimant had failed to establish negligence of the driver before the Insurance Company and hence, he could not be asked to indemnify the insurer nor there was any finding of negligence. The Apex Court had also held that the claim could have been filed either under Section 166 of the Act or under Section 163-A of the Act. Once the claimants had approached the Tribunal under Section 166 of the Act the claimants have necessarily to take upon themselves, the burden of establishing the negligence of the driver or owner of the vehicle concerned but if they proceeded under Section 163-A of the Act, the compensation will be awarded in terms of the schedule without calling upon the victim or his dependants to establish his negligence or default on the part of the owner or driver of the vehicle.

12. Moreover, it has also been brought to the notice of this Court that Section 163-B provides that the option to file claim can be exercised under Section 140 of the Act; then Section 163-A is automatically extinguished since the claimant cannot file claim under both the provisions. The Section reads thus:-

> **163B. Option to file claim in certain cases-** "Where a person is entitled to claim compensation under Section 140 and section 163A, he shall file the claim under either of the said sections and not under both."

13. From the perusal of the claim, I find that the claim has been filed under Section 166 of the Motor Vehicles Act and in impugned para 21 the claimant has also claimed that on the basis of no fault liability her claim may also be considered under Section 140 of the Motor Vehicles Act. Then under such circumstances, Section 163-B of the Motor Vehicles Act would come into operation and hence,

the present application IA No. 3472/2008 cannot be allowed since the claimant has already exercised her option under Section 140 of the Motor Vehicles Act. Resultantly, the application is dismissed as not maintainable.

14. Considering the impugned judgment whereby the Tribunal has rejected the claim of the claimant, I find that the order is in consonance with the provisions of law since according to the recent judgments of the Apex Court no liability can be mulcted either on the Insurance Company when the negligence on the part of the driver is not established and the fact that the passengers were gratuitous passengers in a goods vehicle. The Insurance Company is, therefore, rightly exonerated. I also place my reliance on the decisions of the Apex Court in the matter of *National Insurance Company Ltd. Vs. Baljit Kaur* (2004) (2) SCC 1 and *National Insurance Company Ltd. Vs. Prema Devi and others* II (2008) ACC 1 (SC).

15. In the the peculiar facts and circumstances of this case no permission was sought by the non-applicant No.1 Mobin the driver of the Truck from the owner of the truck non-applicant No.2 to carry his sons; then the liability cannot be mulcted on either the driver non-applicant No.1 Mobin or the owner. Since if at all the driver of the vehicle would himself be liable to pay the compensation and moreover the negligence on the part of the owner has also not been established.

16. Thus, under these circumstances, I do not find any merit in the appeal. The appeal is, therefore, dismissed as such.

Appeal dismissed.

I.L.R. [2010] M. P., 2330
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
22 July, 2010*

ANSAR AHMED ... Appellant
Vs.
HALIM @ ABDUL HAKIM ... Respondent

A. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) - *Bona fide requirement - Inexperience and want of funds are not relevant consideration for refusing eviction.* (Para 13)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ) – वास्तविक आवश्यकता – अनुभवहीनता तथा निधि का अभाव, बेदखली नामंजूर करने के लिये सुसंगत बात नहीं हैं।

B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(a) - *Arrears of rent - When payable - Held - It is to be paid within 30 days of summons of the court or on service of notice as the case may be.* (Para 12)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ए) – भाड़े

* S.A. No. 61/2010 (Indore)

का बकाया – कब देय – अभिनिर्धारित – उसे न्यायालय के समन्स के 30 दिनों के भीतर अथवा सूचना की तामीली पर, जैसी भी स्थिति हो, अदा करना होगा।

Cases referred :

1989 MPACJ 84, 2003(II) MPACJ 277, 2008(1) MPLJ 146, (2000) 4 SCC 380, 1997(1) MPLJ 241, 1982 MPWN Note 58.

Rekha Shrivastava, for the appellant.
Anand Pathak, for the Respondent.

J U D G M E N T

N.K. Mody, J. :– This judgment shall also govern the disposal of SA. No.348/2010 as in both the appeals judgment under challenge is dated 17/12/09 passed by XX Additional District Judge, Indore in Civil Appeal No.25/09 whereby the judgment dated 29/07/09 passed by VII Civil Judge, Class-II, Indore in Civil Suit No.333-A/08 whereby decree of eviction was passed against the appellant under Section 12(1)(a) of M.P. Accommodation Control Act (which shall be referred hereinafter as the "Act") and the suit filed by the respondent under Section 12(1)(f) of the Act was dismissed, was maintained, the present appeals have been filed.

2. Both the appeals were admitted for final hearing by this Court on 23/06/10 on the following substantial question of law:-

> ***SA. No.61/10-*** *"Whether in the facts and circumstances of the case learned Courts below committed error in passing the decree against the appellant under Section 12(1)(a) of M.P. Accommodation Control Act?"*
>
> ***SA. No.348/10-*** *"Whether in the facts and circumstances of the case learned Courts below committed error in not passing the decree against the appellant under Section 12(1)(f) of M.P. Accommodation Control Act?"*

3. Short facts of the case are that the respondent filed a suit for eviction on 02/04/07 alleging that the respondent is owner of suit accommodation bearing house No.32 situated at Bombay Bazar, Indore. It was alleged that respondent is owner of the suit accommodation vide registered partition deed dated 20/09/89. It was alleged that respondent is owner of a piece of property which is measuring 16'.6" X 11'.6". It was alleged that appellant is in occupation of half of the property which is suit accommodation and is 8 feet in width as tenant @ Rs.50/- per month. It was alleged that the nature of tenancy is non-residential. Further case of respondent was that the appellant is not regular in payment of rent. It was alleged that the appellant is in arrears of rent w.e.f. 01/09/89 and the same is not paid inspie of notice of demand dated 20/11/06. Further case of respondent was that the respondent requires the suit accommodation bonafidely for carrying on the business of manufacturing of bakery items i.e. toast, double-roti etc. It was alleged that property which is in occupation of respondent is equal to the suit

accommodation and is adjoining from where respondent is carrying on the business of bakery items. In the suit it was further alleged that presently respondent is bringing bakery items from the market and sales it from the adjoining shop of suit accommodation, which is in occupation of respondent. It was alleged that now the respondent wants to start the business of manufacturing of bakery items for which respondent is not having sufficient accommodation. On the basis of these allegations it was prayed that the suit filed by the respondent be allowed and decree of eviction under Section 12(1)(a) & (f) of the Act be passed.

4. The suit was contested by the appellant by filing written statement, wherein it was alleged that the respondent is in occupation of the suit accommodation as tenant. It was alleged that the appellant was inducted by the father of respondent and at that time rent was Rs.15/- per month. It was denied that the appellant is tenant @ Rs.50/- per month. On the contrary it was alleged that the tenancy of the appellant is @ Rs.15/- per month. In the written statement it was not disputed that the notice of demand was received by the appellant, which was duly replied wherein it was alleged that the tenancy of the appellant was @ Rs.15/- per month. Appellant has also paid the rent up to October, 2006. It was denied that the respondent requires the suit accommodation bonafidely. It was also denied that the respondent is having no other alternative accommodation for fulfilling his need. It was prayed that the suit be dismissed.

5. On the basis of pleadings of parties learned trial Court decreed the suit filed by the respondent under Section 12(1)(a) of the Act, however, suit filed under Section 12(1)(f) of the Act was dismissed. Against which an appeal was filed by the appellant in which cross-objections were filed by the respondent. The appeal filed by the appellant as well cross-objection filed by the respondent were also dismissed, against which present appeals have been filed.

6. Smt. Rekha Shrivastava, learned counsel for the appellant argued at length and submits that the impugned judgment passed by the learned Courts below are illegal, incorrect and deserves to be set aside. It is submitted that right from beginning case of respondent was that the tenancy of the appellant is @ Rs.15/- per month. It is submitted that in the reply of notice which was prior to filing of the suit it was made clear that the tenancy of the appellant is of Rs.15/- per month and the rent has already been paid up to October, 2006. It is submitted that in the notice issued by the respondent whereby tenancy was terminated it was no where stated that appellant is in arrears for which period. Learned counsel submits that in fact notice itself does not constitute a ground under Section 12(1)(a) of the Act. It is submitted that after filing of suit the dispute regarding rate of rent and also arrears of rent was raised by the appellant in the written statement and the same was decided by the learned trial Court vide order dated 30/08/07 whereby rate of rent was fixed @ Rs.15/- per month and 15 days time was given to the appellant to deposit the legally recoverable arrears of rent. It is submitted that in compliance of that rent was duly deposited by the appellant initially and also

subsequently. It is submitted that there was delay in depositing the rent initially in compliance of the order dated 30/08/07 whereby provisional rent was fixed and two weeks time was granted for compliance. Learned counsel submits that the arrears ought to have been deposited within two weeks w.e.f. 30/08/07 but the same was deposited on 20/09/07. Learned counsel submits that again the default was for the month of October, 2007, as the same was deposited on 17/11/07 and also for the month of May, 2008, which was deposited on 23/06/08 for which application was filed for condonation of delay which was wrongly dismissed by the learned trial Court. It is submitted that the learned Courts below committed error in passing the decree under Section 12(1)(a) of the Act against the appellant. It is submitted that since there was dispute regarding rate of rent right from beginning and ultimately order was passed in favour of appellant and immediately after passing of the order rent was deposited by the appellant, therefore, there was no justification on the part of learned Courts below in holding that the ground under Section 12(1)(a) of the Act is made out. It is submitted that in the facts and circumstances of the case where appellant has regularly deposited the rent, learned Courts below committed error in rejecting the application filed by the appellant for condonation of delay on two occasion. Learned counsel placed reliance on a decision in the matter of *Dilip Kumar Vs. Bhaiyalal,* 1989 MPACJ 84 wherein this Court has held that operation of sub-section (1) of Section 13 is arrested till the provisional rent is not fixed. Further reliance is placed on a decision in the matter of *Imdad Ali Vs. Keshav Chand,* 2003(II) MPACJ 277 wherein decree of eviction was denied under Section 12(1)(a) of the Act by giving benefit of Section 12(3) of the Act. On the strength of aforesaid decision it is submitted that appeal filed by the appellant be allowed and the appeal filed by the respondent be dismissed and the impugned judgment passed by the learned Courts below be set aside.

7. Mr. Anand Pathak, learned counsel for respondent submits that so far as SA. No.61/10 is concerned, after due appreciation of evidence, learned trial Court has passed the decree under Section 12(1)(a) of the Act, which has been confirmed by the learned Appellate Court. It is submitted that to condone the delay is the discretion of the Court which has rightly been exercised by the learned Courts below in favour of respondent, which requires no interference. Learned counsel placed reliance on a decision of this Court in the matter of *Kandhi Lal Vs. Abhilash Kumar,* 2008(1) MPLJ 146 wherein this Court has held that while demanding the arrears of rent landlord is not required to be specified in the demand notice. It was further held that issuance of demand notice and its service on the tenant is sufficient. Further reliance is placed on a decision in the matter of *Jamnalal Vs. Radheshyam,* (2000) 4 SCC 380 wherein Hon'ble Apex Court held that Section 13(1) of the Act imposes twin obligations upon tenant facing eviction proceedings under Section 12(1) of the Act: (i) he must pay or deposit within one month of service of writ of summons, arrears due for any period in the past and up to the end of the month preceding the month in which payment is made, and (ii) he must

pay or deposit future rent, month by month. It was further held that two obligations are independent of each other. Compliance with second is not dependent upon carrying out of the first.

8. So far as SA. No.348/10 is concerned, learned counsel submits that both the Courts below committed error in dismissing the suit filed by the respondent under Section 12(1)(f) of the Act. It is submitted that sufficient evidence was on record to show that the respondent requires the suit accommodation for carrying on the business of manufacturing of bakery. It is submitted that the suit filed by the respondent has been dismissed by both the Courts below on extraneous grounds such as inexperience of respondent in the manufacturing business of bakery, short of funds etc. It is submitted that all these aspect can not be taken into consideration while examining the bonafide requirement. Learned counsel placed reliance on a decision in the matter of *Matadin S/o Datadin Vs. Manoramabai Ramlal Gattani*, 1997(1) MPLJ 241 wherein this Court held that in a suit for eviction on the ground of bonafide requirement for continuing his business, landlord is not required to prove "increase in business" and he cannot be non-suited on account of no evidence on that count. Further reliance is placed on a decision in the matter of *Chandanmal Vs. Daryanamal*, 1982 MPWN, Note-58 wherein it was held that in a suit on the ground of genuine requirement proof of funds not necessary. On the strength of aforesaid position of law and the facts and circumstances of the case, learned counsel submits that the appeal filed by the respondent be allowed and the appeal filed by the appellant be dismissed and while maintaining decree under Section 12(1)(a) of the Act decree be also passed under Section 12(1)(f) of the Act.

9. From perusal of the record it is evident that to prove the case respondent has filed the documents Ex.P/1 which is registered partition deed, Ex.P/2 is notice of demand dated 20/11/06 and Ex.P/3 is reply of notice. Apart from documentary evidence, respondent has examined himself as PW/1, Abdul Salam PW/2 and Abdul Wahid PW/3. While appellant has examined himself as DW/1 and Faruk DW/2.

10. So far as decree of eviction under Section 12(1)(a) of the Act is concerned, in the suit it was alleged that the appellant is in arrears of rent w.e.f. 01/09/89 and the notice of demand is dated 20/11/06. There is nothing on record to show that when the notice was served. However, it is not disputed that the notice was duly served as the same was replied on 28/11/06 vide Ex.P/3. Suit was filed on 02/04/07.

11. It is not in dispute that no rent was tendered by the appellant at any point of time. However, in the reply notice dispute was raised by the appellant that the tenancy is @ Rs.15/- per month and the rent has been paid up to October, 2006. The suit which was filed on 02/04/07 came up for hearing before the learned trial Court on 11/04/07 and vide order dated 11/04/07 summons were issued by the learned trial Court for appearance on 17/05/07. Notices were duly served on the

appellant on 06/05/07 and appearance was also made by the appellant on 17/05/07, while written statement was filed on 04/07/07, wherein dispute was raised regarding arrears of rent and also rate of rent, which was decided by the learned trial Court vide order dated 30/08/07. Since the notice was duly served on the appellant on 06/05/07, therefore, as per Section 13(1) of the Act it was the duty of the appellant to deposit the arrears of rent as claimed within a period of one month. Appellant could have avoided to deposit the arrears of rent by raising dispute regarding rate of rent and also regarding arrears of rent within a period of one month from 06/05/07. Thus, the dispute ought to have been raised by the appellant on or before 15/06/07 as it was summer vacation up to 14/06/07, but no dispute was raised by the appellant by that point of time. The dispute was raised by the appellant for the first time before the Court on 04/07/07. Since the arrears of rent was not deposited within 30 days from the date of receipt of summons of the Court, thus default was committed by the appellant in initial deposit of rent.

12. Apart from this, appellant also committed default in payment of rent for October, 2007 and May, 2008. In the facts and circumstances of the case it is crystal clear that appellant has committed default in payment of arrears of rent within one month from the date of the receipt of summons. Appellant further committed default in payment of arrears of rent within the time granted by the learned Trial Court while passing the provisional order. In the present case, not only appellant has committed default in payment of rent on two occasions for which application for condonation of delay was filed, which was dismissed, but also appellant committed error in depositing initial arrears of rent, for which there is no application for condonation of delay till to this date. Similarly the application for condonation of delay which was filed by the appellant before the learned trial Court and also before the learned Appellate Court was dismissed was a discretionary order. In the facts and circumstances of the case, this Court is of the view that no illegality has been committed by the learned Courts below in passing the decree against the appellant under Section 12(1)(a) of the Act.

13. So far as refusal of decree under Section 12(1)(f) of the Act is concerned, undisputedly the suit accommodation is 11' X 6' and the respondent is also having similar size of adjacent shop. It is also not in dispute that respondent is carrying on his small business. The case of the respondent was that the respondent also wants to start the business of manufacturing of bakery items for which sufficient evidence was adduced by the respondent, therefore, there was no justification on the part of learned Courts below in dismissing the suit filed by the respondent on account of bonafide requirement. It is well settled that inexperience and want of funds are not relevant consideration for refusing the eviction on the ground of bonafide requirement. There is no reason to disbelieve the respondent. The only submission of the respondent is that the respondent wants to manufacture bakery items, while respondent is in the trade of bakery business, which is similar in nature.

14. In the facts and circumstances of the case, this Court is of the view that the findings recorded by the learned Courts below so far as it relates to eviction of the appellant under Section 12(1)(f) of the Act is concerned, are perverse and deserves to be set aside. In view of this, appeal filed by the appellant is dismissed and the appeal filed by the respondent stands allowed holding that respondent is also entitled for decree of eviction under Section 12(1)(f) of the Act in addition to Section 12(1)(a) of the Act.

15. Since in consequence the appellant / defendant has to vacate the suit accommodation, therefore, to save the appellant / defendant from the peril of eviction, one years' time is granted to the appellant / defendant to vacate the suit accommodation, provided appellant / defendant furnishes an undertaking within four weeks to the effect that appellant / defendant shall handover the vacant possession of the suit accommodation peacefully on or before 31/07/2011 to the respondent / plaintiff and shall also deposit the entire arrears of rent and cost, if any, within the period of four weeks and shall pay the rent regularly to the respondent / plaintiff as per law. In case of failure on the part of appellant / defendant in submitting the undertaking or in complying the other conditions, respondent / plaintiff shall be at liberty to get the suit accommodation vacated forthwith.

16. With the aforesaid observations, both the appeals stand disposed of. Copy of this judgment be placed in the record of SA. No.348/10.

No order as to costs.

Appeal disposed of.

I.L.R. [2010] M. P., 2336
APPELLATE CIVIL
Before Mrs. Justice S.R.Waghmare
5 August, 2010*

STATE OF M.P., THROUGH COLLECTOR, DHAR & anr. ... Appellants
Vs.
RATAN DAS ... Respondent

Civil Procedure Code (5 of 1908), Section 9, Land Revenue Code, M.P. 1959, Sections 57(2) & 257 - *Dispute pertains to ancestral land and the plaintiffs are in possession of the said land and in the records as Jagir Bhumi of their ancestor since 1907-08 as owners/Bhumiswami - Determination of question of Bhumiswami rights lies within the province of the Civil Court.* (Para 10)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 9, भू राजस्व संहिता, म.प्र. 1959, धारा 57(2) एवं 257 – विवाद पैतृक भूमि से संबधित और कथित भूमि वादी के कब्जे में एवं अभिलेख में स्वामी/भूमिस्वामी के रूप में 1907–08 से उनके पूर्वज की जागीर भूमि के रूप में – भूमिस्वामी अधिकार के प्रश्न का अवधारण सिविल न्यायालय के अधिकार क्षेत्र में है।

*M.A. No.297/2003 (Indore)

Case referred :

2001 RN 3431.

L.L. Sharma, for the appellant/State.

M.A. Bohra, for the respondent.

ORDER

S.R.WAGHMARE, J. :–This is the appeal filed against order of remand dated 29th July, 2002 passed by learned Ist Additional Sessions Judge, Dhar, Distt. Dhar in two Civil Appeals 29A/2000 and 28A/2000 arising out of Civil Suits No.28A/98 and 26A/98, both are dealt by common order and this order shall govern both the appeals.

2. The State has assailed the order on the ground that the learned Judge of the trial court while decreeing the suit of the plaintiff had correctly held that the proceedings ought to have been filed under Section 57 of M.P. Land Revenue Code 1959 before the Sub-Divisional Magistrate since the plaintiffs were dissatisfied by the taking over of their land by the Collector and jurisdiction of the Civil Court was barred under Section 57(2) and Section 257 of the M.P.L.R. Code. However, the learned Judge of the Appellate Court had erred in deciding the appeals in favour of the plaintiffs by remanding the suits for re-trial hence the present appeal against remand by the State Govt.

3. The brief facts of the case in a nutshell are that land bearing Survey No.62, 72, 73, 76 and 77 ad-measuring 5.574 hectares in Badanavar Distt. Dhar belonged to plaintiff Dinesh Das and Survey Nos.51, 52, 54, 56, 62 and 71 belonged to plaintiff Ratan Das and was their ancestral property and recorded jagir in the revenue records since 1907-08 and they were in peaceful possession when suddenly in 1974-75 without granting any opportunity of hearing to them the State Govt. appointed the Collector, Dhar as administrator of their land and temple and entered the same in the revenue records; being aggrieved both plaintiff's filed Civil Suits for declaration and permanent injunction.

4. The trial Court decreed the suit as already stated above and the appellate Court set aside the judgment and remanded the matter for fresh trial and hence the State Govt. has filed the present appeal under Order 43 Rule 1 against the remand.

5. The sole question that arises for consideration in this appeal is whether the appellate Court has erred in law in setting aside the order of the trial Court holding that the jurisdiction of the Civil Court was not barred under Section 57(2) of the M.P.L.R.C. in the present case and only the S.D.O. did not have power to try the matter i.e. the Civil Court could go into the question of title of the plaintiffs as they were not hit by the bar under Section 257 of the MPLRC being the original Bhumi Swamis.

6. Counsel for the appellant State has vehemently supported the judgment of the trial Court and stated that the Trial Court had rightly dismissed the suits since

Section 57 (2) of the MPLRC which clearly bars the jurisdiction of the Civil Courts where the dispute pertains to land vested in the State Govt. and any other person. The parties have to approach the S.D.O first under Sub Section (2) of Section 57, Sub-Section (3) of Section 57 provides for appeal to the Civil Court within a year if "any person" is aggrieved by the order of the S.D.O.

7. Counsel contended that the plaintiffs had directly approached the Civil Courts for a declaration of their title before going to the S.D.O. first. Counsel also referred to S.257 of the MPLR Code whereby the jurisdiction of the Civil Courts is expressly barred when the claim is against the State Govt. for conferral of Bhumi Swami rights. Counsel therefore prayed that the impugned order be set aside and the judgment of the trial Court be restored.

8. Counsel for the respondent claimants on the other hand fully supported the order of the Appellate Court and stated that the trial Court had erred in ousting its own jurisdiction; Counsel vehemently argued that the trial Court had failed to consider that the plaintiffs were in possession of the disputed land since 1907-08 and were excluded under the proviso to Sub Section (1) of Section 57 of the MPLRC which states thus:

> **"Provided that nothing in this section shall, [save as otherwise provided in this Code] be deemed to affect any rights of any person subsisting at the coming into force of this Code in any such property"**
>
> and the Code came into effect on 2nd Oct, 1959.

9. Counsel prayed that the impugned order be upheld especially in the light of the fact that the respondents were still in possession of the said land and also urged that the Civil Court be directed to hear the matter on merits after giving opportunity to both sides since the record of the case was pending with this Court for a long time.

10. On considering the above submissions and the record, I find that the appeal is bereft of merit on the singular ground that the controversy has already been set to rest by a Full Bench decision of this Court in the matter of *State of M.P. Vs. Balveer Singh* 2001 Revenue Nirnay 3431 as rightly pointed out by the Judge of the lower Court. It succinctly settles the point thus:

> **"Thus a clear line of demarcation can be sketched between the rights of any person affected in consequence of vesting ownership in the lands in the State which could be decided by the S.D.O. under Section 57(2) of the Code and the rights of an individual in nature of private rights in any agricultural holding, which could be challenged and decided even against the State Govt. directly in a Civil Court and which, therefore, lay outside the perview of the rights envisaged under the provisions of Section 57(2) and (3) of Code."**

And I have no hesitation in upholding the order impugned since the determination of question of Bhumiswami rights lies within the province of the Civil Court excepting the cases falling within the ambit of those which are specified under Section 257 of the MPLR Code. And in the present case it has not been disputed before me that the dispute pertains to ancestral land and the plaintiffs are in possession of the said land and in the records as jagir bhumi of their ancestor Motidas since 1907-08 as owners/Bhumiswamis.

11. Thus the appeal is dismissed as sans merit, the order of remand by the appellate Court is upheld. It is directed that the matter be remanded back to the Trial Court for a fresh decision on merits. The trial Court is also directed to complete the trial as expeditiously as possible preferably within a period of one year from today. The Registry is directed to send back the record immediately along with the copy of this order for compliance. No fresh notices are necessary, the parties shall remain present before the trial Court on 30th August, 2010.

12. Thus the appeal is allowed in the terms herein above indicated.

Order accordingly.

I.L.R. [2010] M. P., 2339
APPELLATE CIVIL
Before Mr. Justice R.K. Gupta
19 August, 2010*

BAIJNATH CHOUDHARY & ors. ... Appellants
Vs.
SECRETARY, M.G.M HIGHER SECONDARY SCHOOL ... Respondent

A. Workmen's Compensation Act (8 of 1923), Section 12 - *Principal employer denying to pay compensation on the ground that deceased workman was employed by a contractor and not by him - Held - S. 12 of the Act is specific which primarily fix the responsibility of the Principal employer to pay the amount of compensation - The Principal employer cannot be absolved from its liability to pay the amount of compensation.* (Para 6)

क. कर्मकार प्रतिकर अधिनियम (1923 का 8), धारा 12 – प्रिंसीपल नियोक्ता ने इस आधार पर प्रतिकर का भुगतान करने से इंकार कर दिया कि मृतक कर्मकार को ठेकेदार द्वारा नियोजित किया गया था न कि उसके द्वारा – अभिनिर्धारित – अधिनियम की धारा 12 विनिर्दिष्ट है जो प्रतिकर की राशि अदा करने का प्रथमतः प्रिंसीपल नियोक्ता का उत्तरदायित्व निश्चित करती है – प्रिंसीपल नियोक्ता प्रतिकर की राशि भुगतान करने के अपने दायित्व से मुक्त नहीं हो सकता है।

B. Workmen's Compensation Act (8 of 1923), Section 4A(3) - *No prayer for penalty made in the claim - In appeal, prayer made for award of penalty - Held - In the absence of any prayer of penalty, there was no reasonable opportunity to the employer to offer any explanation for non-*

*M.A. No.583/2003 (Jabalpur)

payment of amount of compensation within the stipulated period - Penalty rightly not awarded. (Para 11)

ख. कर्मकार प्रतिकर अधिनियम (1923 का 8), धारा 4ए(3) – दावे में शास्ति के लिए कोई प्रार्थना नहीं की गयी – अपील में, शास्ति अधिनिर्णीत करने की प्रार्थना की गयी – अभिनिर्धारित – शास्ति की किसी प्रार्थना के अभाव में नियोक्ता को नियत कालावधि के भीतर प्रतिकर की राशि के असंदाय के लिए कोई स्पष्टीकरण प्रस्तुत करने का कोई युक्तियुक्त अवसर नहीं था – शास्ति उचित रूप से अधिनिर्णीत नहीं की गयी।

C. Workmen's Compensation Act (8 of 1923), Section 4A(3) - *Interest - Commissioner allowed the interest @ 6% p.a. - Challenged in appeal and prayer made for enhancement - Held - The penalty which is prescribed by virtue of Sub-clause (a) of Sub-section (3) of Section 4A is 12% - Accordingly, the claimants are entitled to get the rate of interest @ 12% p.a. - Appeal of claimants partly allowed.* (Para 15)

ग. कर्मकार प्रतिकर अधिनियम (1923 का 8), धारा 4ए(3) – ब्याज – कमिश्नर ने 6 प्रतिशत वार्षिक की दर से ब्याज मंजूर किया – अपील में चुनौती दी गयी और वृद्धि के लिए प्रार्थना की गयी – अभिनिर्धारित – शास्ति, जो धारा 4ए की उपधारा (3) के उपखण्ड (ए) के आधार पर विहित है, 12 प्रतिशत है – तदनुसार, दावेदार 12 प्रतिशत वार्षिक की दर से ब्याज की दर पाने के हकदार हैं – दावेदारों की अपील अंशतः मंजूर की गयी।

Nitin Agrawal, for the appellants.

S.K. Rao with *Ajit Agrawal,* for the respondent.

O R D E R

R.K. Gupta, J. :–Since these two appeals preferred against the same award dated 28.11.2002, therefore, these two appeals were heard simultaneously and a common judgment is passed.

2. These are the appeals preferred under Section 30 of the Workman's Compensation Act challenging the judgment passed on 28.11.02 by the Commissioner for Workmen's Compensation (Labour Court) Jabalpur wherein the claim application has been allowed and the Commissioner has awarded a sum of Rs.2,11,790/- as the amount of compensation.

3. The claimants have preferred an appeal against the award as the interest has been awarded at a lesser rate and also on the ground that no penalty has been awarded by the Commissioner. So far as the employer is concerned, he has preferred the appeal challenging the award itself.

4. With reference to the appeal submitted by the employer, i.e. M.A. No. 320/03, the only ground during the course of argument raised by the learned counsel for the appellant/employer is that the deceased was not a person engaged by the employer but he was an employee who was engaged by the Contractor.

5. The facts leading to the case are that on the relevant date, the deceased was employed in a construction work. The appellant was constructing a building to

run a school. It was a Multi-storied building and the contractor was engaged. Keeping in view Section 12 of the Workmen's Compensation Act, 1992, if the Principal employer has engaged a contractor then it being a Principal employer, shall be entitled to recover any amount paid towards compensation under the Workmen's Compensation Act, 1923 from the Contractor but that is subject to the terms and conditions so stipulated in the agreement between the Principal employer and the Contractor. In the present case, the employer has not filed any agreement that in terms to Section 12 of the Workmen's Compensation Act, 1923, the appellant, being a Principal employer shall recover the same from the Contractor. Apart from the aforesaid, the respondents while arguing the case have raised only a limited ground to urge that being a Principal employer and the employee since was engaged by a Contractor, it was not the liability of the principal employer to pay the amount of compensation.

6. Section 12 of the Workmen's Compensation Act is specific which primarily fix the responsibility of the Principal employer to pay the amount of compensation and accordingly since the only question raised by the employer being a Principal employer that he is not liable to pay the compensation only on the ground that the deceased was an employee employed by a Contractor, cannot get any support from Section 12 of the Act and for this reason, the Principal employer cannot be absolved from its liability to pay the amount of compensation.

7. Under the circumstances, I do not find any substance in the appeal submitted by the employer and accordingly, the appeal filed by the employer being M.A. No.320/03 stands dismissed.

8. So far as the appeal submitted by the claimants being M.A. No. 583/03 is concerned, as stated herein above, the appeal is preferred on the ground that interest has been awarded at a lower rate and that too from the date of filing of the application before the Commissioner for Workmen's Compensation Act and also no penalty has been awarded.

9. It is contended on behalf of the counsel appearing for the non-applicant that in the present case, the Commissioner for Workmen's Compensation has erroneously not allowed the amount of penalty which is provided under Section 4-A sub-clause 3(b) of the Workmen's Compensation Act, 1923. In this reference, it is submitted by him that amount should have been paid when it fell due and if the amount is not paid then in the absence of any justification for non payment of the amount, the employer has to be suffered with the penalty up to the extent of 60% of the award amount and accordingly it is submitted that Commissioner for Workmen's Compensation has committed illegality in not awarding the amount of compensation.

10. The submission so raised on behalf of the claimant is considered.

11. It is to be seen that in the application which was preferred before the Commissioner for Workmen's Compensation, the amount of penalty was not prayed for. Thus, there was no opportunity for the employer to submit any explanation for non payment of the amount on the date when it fell due. The

proviso appended to Section 4-A sub-section 3 provided that an order for payment of penalty shall not be passed under clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed.

12. On the basis of the same, it is clear that when the claimants have not made any prayer in their application for award of penalty and under these circumstances, the employer has no opportunity to file any explanation for giving justification for non payment of the amount of compensation. Thus, in the present case, no prayer to that effect was made, the Commissioner for Workmen's Compensation was justified in not allowing the penalty as per Section 4-A, Sub-section 3 and proviso appended to Sub-section 3 which provides that before imposing a penalty, a reasonable opportunity has to be given to the employer which is provided in the Statute but in the absence of any prayer of penalty, there was no reasonable opportunity to the employer to offer any explanation for non payment of amount of compensation within the stipulated period.

13. In view of the aforesaid, I am of the view that the Commissioner for Workmen's Compensation has rightly not granted penalty in the present case.

14. The next question raised is with regard to award of interest at a lesser rate.

15. In the present case, the Commissioner has allowed the interest @ 6%. The date of accident is 16.9.96. The amendment in Sub-section 3 of Section 4-A was made by Act No. 30 of 95 made with effect from 15.9.95. Sub-clause (a) provides that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of 12% p.a. or at such higher rate not exceeding the maximum of the lending rates of any scheduled Bank as may be specified by the Central Government, by notification in the Official Gazette on the amount due. Thus, the penalty which is prescribed by virtue of Sub-clause (a) of Sub-section 3 of Section 4-A is 12%. The Coiiimissioner in the present case has only awarded interest @ 6%. Accordingly, in the present case, I hold that the claimants are entitled to get the rate of interest @ 12%.

16. The Commissioner for Workmen's Compensation has awarded the interest from the date the application is filed. Prior to that, there is nothing on record to show that the amount fell due before filing of the application. The Commissioner in the present case has awarded the interest from the date the application is filed. Accordingly, I do not find the said discretion exercised by the Commissioner for Workmen's Compensation is illegal in any way.

17. In view of the aforesaid, the appeal preferred by the claimants being M.A. No. 583/03 stands partly allowed.

18. Accordingly, the appeal filed by the employer being M.A. No. 320/03 stands dismissed and the appeal preferred by the claimants being M.A. No. 583/03 stands partly allowed.

M.A.583/03 partly allowed.

I.L.R. [2010] M. P., 2343
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
27 August, 2010*

GAYA PRASAD & ors. ... Appellants
Vs.
PRADUMN PRASAD & ors. ... Respondents

A. **Civil Procedure Code (5 of 1908), Section 100** - *Scope of interference - Concurrent findings of the courts below on the question of adverse possession based on appreciation of evidence being finding of fact could not be interfered.* (Para 7)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – हस्तक्षेप का विस्तार – प्रतिकूल कब्जे के प्रश्न पर पर निचले न्यायालयों के समवर्ती निष्कर्ष, साक्ष्य के मूल्यांकन पर आधारित तथ्य के निष्कर्ष होने से हस्तक्षेप नहीं किया जा सकता।

B. **Entry of name in Municipal Record** - *Effect - Record of Municipal Corporation does not confer any right or title in the property - Such record is maintained by the local authority only for fiscal purpose to pay the taxes - It is just like the revenue record.* (Para 8)

ख. नगरपालिका अभिलेख में नाम की प्रविष्टि – प्रभाव – नगरपालिक निगम का अभिलेख सम्पत्ति में कोई अधिकार या स्वत्व प्रदान नहीं करता है – स्थानीय प्राधिकारी द्वारा ऐसा अभिलेख केवल करों के भुगतान के कर संबंधी प्रयोजन के लिए रखा जाता है – यह मात्र राजस्व अभिलेख के समान है।

Cases referred :

1986(I) MPWN 87, 1997 RN 195, AIR 1971 SC 1337, AIR 1989 SC 1809, AIR 1972 SC 2299.

Vandana Shroti, for the appellants.
Anil Mishra, for the respondents.

ORDER

U. C. Maheshwari J. :–The appellants/ plaintiffs have filed this appeal under Section 100 of CPC being aggrieved by the judgment and decree dated 2.7.2003 passed by 1st additional District Judge to the Court 1st Additional District Judge, Rewa in Civil Regular Appeal No.102-A/02, whereby the judgment and decree dated 23.1.1995 passed by 3rd Civil Judge Class-II Rewa in Civil Original Suit No.57-A/93 dismissing the suit for declaration and perpetual injunction filed by Brajbhan the predecessor in title of the appellants against the respondents with respect of the property bearing survey No.71, 72 total area 0.47 acre situated at Mahajan Tola Rewa has been affirmed with some modification by granting limited perpetual injunction in favour of the appellants.

*S.A. No.941/2003 (Jabalpur)

2. The facts giving rise to this appeal in short are that above mentioned Brajbhan the predecessor in title of the appellants filed the above mentioned suit against the respondents contending that above mentioned property was initially owned by late Lalla Ram and Chintamani under the right of Bhoomiswami, from whom before 40-45 years ago he purchased the same in consideration of Rs.40/- and thereafter constructed a temporary residential house on it and since then Brajbhan the predecessor in title of the appellants and after his death the appellants are coming in possession of the same as owner of it and thereby they have perfected their right on it by adverse possession. The name of Brajbhan is also recorded in the record of local authority the Municipal Corporation, Rewa. In the year 1991 Brajbhan was collecting the documents to construct a new house on such land on which he came to know that the Patta of such land is still recorded in the name of Lallaram and Chintamani and the respondent No.1 Pradumn Prasad son of said Lallaram by taking advantage of such entry of the record of rights initiated a proceeding in the month of September 1992 before the Tehsildar for his mutation on the aforesaid land, on which late Brajbhan under the apprehension that he may be dispossessed from such property by the respondents filed the impugned suit for declaration and perpetual injunction declaring him to be the Bhoomiswami of such land and restraining the respondents from interfering in his possession of the same.

3. In the written statement of the respondents the averments of the plaint are denied. In addition it is stated that the disputed land along with the house is the property of their ownership, as they have inherited the same from their father Lallaram and uncle Chintamani and accordingly they are coming in possession of the same. The family of defendant No.3 is residing in such house since long. It is also stated that Brajbhan being servant of their family the disputed premises was given to him for looking after the property and was never sold to him. In such premises no right or title has been acquired or perfected by Brajbhan, the predecessor in title of the appellants and prayer for dismissal of the suit is made.

4. In pendency of the suit said Brajbhan had died on which his legal representatives the appellants had come on record.

5. In view of the pleadings of the parties after framing the issues and recording the evidence on appreciation of the same the trial court by holding that the appellants have failed to prove that they perfected their title over the property by adverse possession and holding their possession to be a permissive possession dismiss the suit. On which the appeal under Section 96 of CPC was preferred before the sub-ordinate appellate court, on consideration the same was allowed in part and the judgment and decree of the trial court regarding dismissal of the suit is modified and limited perpetual injunction is issued against the respondents restraining them that without following the prescribed procedure of law they shall not dispossess the appellants from the disputed premises and the property. On which the appellants have come forward to this court with this appeal.

6. Smt. Vandana Shroti, learned appearing counsel of the appellants after taking me through pleadings of the parties evidence available on the record said that on proper appreciation of the same the courts below ought to have decreed the suit of the appellant for declaration and perpetual injunction as prayed but the same has been dismissed contrary to the available evidence and under the wrong premises. In continuation, it was said that the courts below have committed error in holding that the appellants are being in permissive possession of the property and had not perfected their title by adverse possession. It was also argued that without considering the record of the local authority and the circumstance that all the requisite taxes were paid by the appellants or their predecessor, the suit has been dismissed contrary to such record.. According to her the courts below ought to have inferred the title of the appellants on the basis of the record of the local authority, the Municipal Corporation and prayed to admit this appeal on the proposed substantial questions of law mentioned the appeal memo.

7. Having heard the counsel, I have carefully examined the records of the courts below and perused the impugned judgments. It is apparent from the impugned judgment that after taking into consideration the deposition of Chandrika Prasad (D.W.2), in which he stated that such property was purchased by his father from the predecessor in title of the respondents in consideration of Rs.40/- but could not prove the same by any documentary or other admissible evidence by holding the possession of the appellants over the property to be permissive possession dismissed the suit. Apart this taking into consideration the circumstance that inspite having possession of the property since long at any point of time the appellants or their predecessor in title in the knowledge of the respondents or their predecessor had not declared themselves to be the owner of the property. So in the lack of any specific date or time on which the appellants declared themselves to be the owner of the property in the knowledge of the respondents the courts below after taking into consideration the principle laid down by the Apex Court in the matter of *Roop Singh Vs. Ramsingh* 2000(3) SCC 708 held the appellants being in permissive possession of the property had not perfected their title on it by adverse possession. Such approach of the courts below appears to be inconsonance with the evidence led by the parties and such concurrent findings of the courts below on the question of adverse possession based on appreciation of evidence being finding of fact could not be interfered under Section 100 of CPC at the stage of Second Appeal as laid down by this Court in the matter of *Seeganram Vs. Magnia* reported in 1986 MPWN (Vol.1) 87 and *Ram Singh Vs. Kashiram* reported in 1997 RN 195. The cited subsequent decision is also based on some Supreme Court decision. In such premises, this appeal is not involving any question of law rather than the substantial question of law on the ground of adverse possession requiring any consideration at this stage.

8. So far the arguments relating to the record of Municipal Corporation, Rewa in which the name of the predecessor of the appellant has been recorded is

concerned, it is suffice to say that such record did/ does not confer any right or title to the appellants in the property. Such record is maintained by the local authority only for fiscal purpose to pay the taxes, it is just like the revenue record, hence the same did/ does not give any title to the appellants as laid down by the Apex Court in the matter of *"Shambhu Prasad Singh v. Phool Kumari"* reported in AIR 1971 S.C. 1337. Even otherwise the concurrent findings of the courts below with respect of the record of local authority which was kept only for fiscal purpose to fix the liability to pay the revenue in view of the decision of the Apex Court in the matter of *"Corporation of the City of Bangalore v. M. Papaiah"* reported in AIR 1989 S.C.1809 being finding of fact could not be interfered at the stage of second appeal by invoking the provision of Section 100 of CPC. So on this question also this appeal does not have any substantial question of law.

9. Besides the above, taking into consideration the long possession of the appellant over the property the limited perpetual injunction has been granted by the appellate court in favour of the appellants restraining the respondents not to dispossess the appellants from the disputed property without following the prescribed procedure of law. Such approach also appears to be based on sound legal position as laid down by the Apex Court in the matter of *"M. Kallappa Setty v. M. V. Lakshminarayana Rao"* AIR 1972 S.C.2299.

10. In such premises, I have not found any circumstance or substance in the matter giving rise any question of law rather than the substantial question of law requiring any consideration at this stage under Section 100 of CPC. Resultantly, this appeal being devoid of any such question is hereby dismissed at the stage of motion hearing. There shall be no order as to the costs.

11. The appeal is dismissed as indicated above.

Appeal dismissed.

I.L.R. [2010] M. P., 2346
APPELLATE CRIMINAL
Before Mr. Justice I.S. Shrivastava
24 February 2010*

VIJAY SINGH ... Appellant
Vs.
SURENDRA SINGH ... Respondent

Criminal Procedure Code, 1973 (2 of 1974), Section 256 - *On single default of appearance of the complainant and his advocate, the Court dismissed the complaint and discharged the accused/respondent - Held - The action taken by the Court was more harsh and strict - The case ought to have been adjourned for the evidence of the parties, the Court should not dismiss the complaint - The appellant was represented through counsel, then the Court should have adjourned the hearing of the case for some other day*

*Cr.A. No.808/2008 (Indore)

instead of dismissing the complaint - Order set aside and complaint restored to its original number. (Paras 7 & 8)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 256 – परिवादी और उसके अधिवक्ता की उपस्थिति के एकल व्यतिक्रम पर न्यायालय ने परिवाद खारिज किया और अभियुक्त/प्रत्यर्थी को उन्मोचित किया – अभिनिर्धारित – न्यायालय द्वारा की गयी कार्यवाही अत्यधिक कठोर और सख्त थी – मामला पक्षकारों की साक्ष्य हेतु स्थगित किया जाना चाहिए था, न्यायालय को परिवाद खारिज नहीं करना चाहिए – अपीलार्थी का प्रतिनिधित्व अधिवक्ता द्वारा किया गया, तब न्यायालय को परिवाद को खारिज करने के बजाय मामले की सुनवाई किसी अन्य दिन के लिए स्थगित करनी चाहिए थी – आदेश अपास्त और परिवाद उसके मूल क्रमांक पर पुनःस्थापित।

Cases referred :

(2002) 7 SCC 726, 2003(2) MPLJ 523.

C.P.S. Rajput, for the appellant.

B.S. Gurjar, for the respondent.

ORDER

I. S. Shrivastava, J. :–A private complaint was filed under section 138 of the Negotiable Instrument Act (for short ' the Act ') by the complainant Vijay Singh against the accused / respondent Surendra Singh before the Trial Court for dishonour of cheque of Rs. 35,000/-. Case was registered at Criminal Case no. 1479/2005. In this case, statement of the complainant was recorded and the case was pending for remaining evidence of the complainant. On 26/05/2007, the complainant and his advocate could not appeared in the Court at the call of the case, while the respondent accused along his advocate was present, the Court dismissed the complaint due to absence of the complainant and acquitted the respondent / accused from the charges under section 138 of the Act.

2. It has been argued on behalf of the appellant that in this case, statement of the complainant was recorded and he was cross-examined by the respondent and the case was fixed for remaining evidence of the complainant on 26/05/2007. On single default of appearance of the complainant and his advocate, the case was not liable to be dismissed, but the Court must have adjourned it for further date. Thus, the Court has committed error in dismissing the complaint of the complainant.

3. It has been argued on behalf of the respondent that the case has rightly been dismissed as none appeared for the complainant and his evidence was not presented. Hence the appeal being baseless, be dismissed.

4. Arguments considered.

5. In *Mohd. Azeem Vs. A Venkatesh and another* reported in 2002 (7) SCC 726, it has been held that the Court adopted a very strict and unjust attitude resulting in failure of justice. In our opinion, the learned Magistrate committed an error in acquitting the accused only for absence of the complainant on one day and refusing to restore the complaint, when sufficient cause for absence was shown by the complainant.

6. In Right Services, *Ratlam Vs.Chhotu Bhaiya Road Lines, Ratlam* reported in 2003(2) M.P.L.J. 523 it has been held that while dismissing the complaint in the absence of complainant, the Court should not pass the orders of dismissal of complaints and acquit the accused persons mechanically. The Court should consider the nature of the offence and the material produced by the complainant and also the stake which complainant is having in the matter. If on solitary hearing or hearings for one or the other reasons if the complainant is not present, normally the Court should adjourn the case and should not arbitrarily exercise its discretion refusing the exemption. Normally in complaint cases filed under section 138 of the Negotiable Instruments Act when a complaint is filed, the complainant is having a stake in the matter. Therefore, in the absence of the complainant, the complaint should not be dismissed immediately. The Court should either adjourn the case or may proceed to hear the case under the proviso of section 256 of the Cr.P.C and if the complainant is represented by an Advocate or by officer conducting the prosecution or if the personal attendance of the complainant is not necessary, the Court should either grant exemption, suo-motu or on the application of the advocate, as the order of dismissal of complaint operates as a final order. Therefore, normally it should be passed after proper application of mind and exercise of judicial discretion. Impugned orders, dismissing the complaints and acquitting the respondent / accused are hereby set aside.

7. In the present case, the complaint was filed under section 138 of the Act for the dishonour of cheque of Rs. 35,000/- and the case was fixed for evidence on 26/05/2007, but on that date, on single default of appearance of the complainant and his advocate, the Court dismissed the complaint and discharged the accused/ respondent. The action taken by the Court was more harsh and strict. The case ought to have been adjourned for the evidence of the parties, the Court should not dismiss the complaint. The appellant was represented through counsel, then the Court should have adjourned the hearing of the case for some other day instead of dismissing the complaint.

8. Keeping in view the above law and the facts and circumstances of the case, the present appeal is accepted and the order dated 26/05/2007 is hereby set aside and it is ordered that the complaint filed by the appellant be restored to its original number. Both the parties shall remain present before the Trial Court on 10/03/2010.

9. Accordingly, this appeal is disposed of.

10. C c as per rules.

Appeal disposed of.

I.L.R. [2010] M. P., 2349
APPELLATE CRIMINAL
Before Mr. Justice R.C. Mishra
23 April, 2010*

PRAKASH DABAR ... Appellant
Vs.
STATE OF M.P. ... Respondent

A. **Evidence Act (1 of 1872), Section 3** - *Appreciation of evidence -Eye witnesses saw the appellant adjusting his trouser with the prosecutrix in half-naked condition, in the bushes near temple - Mobile phone of appellant was recovered by police from the spot - Defence of appellant/accused that he was falsely implicated, found improbable - Held - The trial Court did not commit any illegality in holding that the appellant was found with the prosecutrix in semi naked condition, in bushes.* (Para 13)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्ष्य का अधिमूल्यन – प्रत्यक्षदर्शी साक्षियों ने मंदिर के पास झाड़ियों मे अपीलार्थी को अभियोक्त्री के साथ अर्धनग्न अवस्था में अपनी पतलून ठीक करते हुए देखा – पुलिस द्वारा अपीलार्थी का मोबाईल फोन घटनास्थल से बरामद किया गया – अपीलार्थी/अभियुक्त का यह बचाव कि उसे झूठा फंसाया गया, असंभाव्य पाया गया – अभिनिर्धारित – विचारण न्यायालय ने यह अभिनिर्धारित करने में कोई अवैधता नहीं की कि अपीलार्थी अर्धनग्न अवस्था में अभियोक्त्री के साथ झाड़ियों में पाया गया।

B. **Evidence Act (1 of 1872), Section 118, Mental Health Act, 1994, Section 23(1)(a)(b)** - *After evaluating the extent of the disorder, evidence of a mentally retarded witness can be recorded with the help of an expert in the field or the person with whom he or she is able to communicate by words or by way of gestures.* (Para 6, 8)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 118, मानसिक स्वास्थ्य अधिनियम, 1994, धारा 23(1)(ए)(बी) – किसी मानसिक रूप से विक्षिप्त/अविकसित साक्षी की साक्ष्य उसके मानसिक विकार की सीमा को परखने के उपरान्त उस क्षेत्र के विशेषज्ञ की अथवा किसी ऐसे व्यक्ति, जिसे वह शब्दों से अथवा संकेतों द्वारा अपनी बात समझा सके, की सहायता से अभिलिखित की जा सकती है।

C. **Penal Code (45 of 1860), Section 376 or 354** - *Mere availability of seminal stains found on the trousers of the appellant, who was a married man, would not be sufficient to connect him with the offence of rape.*

Seminal stains were found not only on the slides prepared from vaginal smear of prosecutrix and her salwar but also on the trousers said to have been worn by accused/appellant at the time of alleged incident. However, there is no positive opinion as to matching of the seminal stains. (Paras 15 & 16)

*Cr.A. No.1886/2005 (Jabalpur)

ग. दण्ड संहिता (1860 का 45), धारा 376 या 354 – अपीलार्थी, जो कि विवाहित पुरूष था, की पतलून पर वीर्य के धब्बों की उपलब्धता मात्र ही उसे बलात्संग के अपराध से संयोजित करने हेतु पर्याप्त नही होगी।

Cases referred :

1969 JLJ SN 54, (2004) 4 SCC 371, (2004) 4 SCC 379, (1912) 13 CrLJ 469, 1996 CrLJ 2039, AIR 1967 SC 63.

S.K.P. Verma, for the appellant.

Chanchal Sharma, G.A., for the respondent/State.

J U D G M E N T

R.C. Mishra, J. :–This appeal has been preferred against the judgment dated 15.7.2005 passed by Additional Judge to the Court of Additional Sessions Judge, Burhanpur in S.T.No.198/2004 whereby the appellant was convicted under Section 376(2)(a)(i) of the IPC and sentenced to undergo R.I. for 10 years and to pay fine of Rs.5000/- and in default, to suffer R.I. for 2 years.

2. Prosecution case, in short, may be narrated thus -

(i) At the relevant point of time, the appellant was posted as Assistant Sub-Inspector at Lalbagh Police Station in Burhanpur.

(ii) In the night intervening 7th and 8th Sept. 2004, on the festive occasion of Krishna Janmashtmi, a religious function was organized in Adarsh Colony, Burhanpur. At about 11.30 p.m., Sunil (PW10), an inhabitant of the colony, heard cries of a woman coming from the backside of his house. He immediately rushed to the temple and informed Balbir Arora and Vijay (PW9) accordingly. All the three boys came to the spot located in front of Param Restaurant and found a motorcycle parked there. They also saw that in the nearby bushes, the prosecutrix (a mentally challenged beggar aged about 50 years), who had been staying in the temple for last few days, was sitting in a half-naked condition holding her salwar and the appellant was coming out therefrom pulling his trousers up. He angrily asked them as to why they were making a noise and the corresponding reply led to an altercation that attracted attention of the other inhabitants of the locality.

(iii) In the meanwhile, at about 11:50 p.m., Amritlal (PW7), an Ex-member of Parliament, who was returning home, situated behind the Restaurant only, in a Maruti Car, happened to pass that way. He stopped the vehicle; got down and asked for the reason for the assemblage. In response, he was informed that a police officer in uniform viz. the appellant was seen in the bushes with the prosecutrix under suspicious circumstances. Amritlal asked the appellant, who was in a drunken condition, as to what was

going on. In turn, shouting that what authority he had to enquire into the matter, the appellant started misbehaving with him. Disclosing his identity as Dabar ASI posted at P.S. Lalbagh Burhanpur, the appellant further threw a challenge to settle the score with Amritlal in case, he came to the Police Station. At this juncture, Amritlal could also witness that the prosecutrix was standing near the bushes with salwar in her hand.

(iv) Amritlal immediately proceeded towards the Police Station in his car only and the appellant also reached there on the motorcycle. However, in the process, he left wireless set allotted to him at the place of occurrence only. At the Police Station, as Amritlal disclosed his identity as Ex-Member of Parliament, the appellant started hurling filthy abuses and threats at him and his companions including Sunil and Vijay.

(v) It was upon the FIR (Ex.P-6) lodged by Amritlal that a case under Sections 294, 506B and 354 of the IPC was registered at the police station at 1.40 in the night.

(vi) The prosecutrix was immediately sent to Nehru Hospital for medical examination. It was conducted at about 3:00 in the same night, by a panel of doctors comprising Dr. Jainuddin Bohra (PW4) and Dr. Lalita Gupta (PW11). Not being able to give any definite opinion as to recent sexual intercourse, Dr. Lalita Gupta prepared two slides from vaginal smear of the prosecutrix and also preserved her pink coloured salwar for chemical examination.

(vi) The appellant was apprehended and subjected to medical examination at about 4:50 in the night. Dr. K.M. Gupta (PW6) noticed that the appellant had consumed alcohol but was not under intoxication.

(vii) During investigation, on 8.9.2004, a uniform said to have been worn by the appellant at the time of alleged incident was also seized and the wireless set allotted to him was also recovered from the spot. The uniform along with salwar of the prosecutrix and the slides prepared from her vaginal smear were forwarded to FSL, Sagar for chemical examination. Corresponding report (Ex.P-11) indicated that the seminal stains and human spermatozoa were found on the slides, salwar and the trousers. Accordingly, on 18/10/04, the case was converted into one under Section 376 of the IPC. On the same day, the appellant was again arrested and subjected to medical examination. Dr. Ashok Pagare (PW12) found him capable of performing sexual intercourse.

3. On being charged with the offences under Sections 294, 506-B and

376(2)(a)(i) and in the alternative under Section 354 of the IPC, the appellant abjured the guilt and pleaded false implication at the instance of Manoj, the brother of complainant Amritlal and Amit Mishra, brother of a Minister namely Archana Chitnis due to animosity. In the examination, under Section 313 of the Code of Criminal Procedure, he further asserted that nearly a month before the incident in question, Manoj, Amit and other supporters of Bhartiya Janta Party were intercepted by him while roaming in the odd hours of night and on being asked to explain the cause of their apparently suspicious movements, they had not only entered into a quarrel but had also threatened him with dire consequences. According to him, the case was registered under the political pressure exerted by the complainant and his associates.

4. On a critical appraisal of the entire evidence, learned trial Judge, for the reasons assigned in the impugned judgment, proceeded to acquit the appellant of all other charges. However, she further concluded that even in absence of testimony of the prosecutrix, guilt of the appellant in respect of the offence of rape was proved beyond a reasonable doubt.

5. Legality and propriety of the conviction have been questioned on the following grounds -

(i) Non-examination of the prosecutrix despite the admission made by Sunil that she was able to understand Marathi.

(ii)Non-production of the husband or any relative of the prosecutrix in evidence.

(iii) Interestedness of Sunil (PW10) and Vijay (PW9) as neighbours and political followers of the complainant Amritlal (PW7) in securing conviction of the appellant on a false charge.

(iv) Non-examination of Balbir.

(v) Probability of the defence.

In response, learned Govt. Advocate, by making reference to the incriminating pieces of evidence on record, submitted that the conviction was fully justified.

6. In the wake of the contention relating to non-examination of the prosecutrix coupled with absence of reason for not citing her as a witness in the charge sheet, the entire record of the trial Court was perused. It was found that upon the Istgasha (complaint) made by SHO, Burhanpur under Section 23(1)(a)(b) of the Mental Health Act, 1994, Shri P.S. Rawat, the then JMFC, Burhanpur had forwarded the prosecutrix to the Mental Hospital located in Banganga at Indore for medical examination and necessary treatment. The corresponding report given by the Psychiatrist posted at M.G. Medical College, Indore, revealed that till the date of examination conducted on 10.9.2004, the prosecutrix was a person of unsound mind and was also suffering from Schizophrenia- Paranoid type. The medical expert also noticed the following facts :-

(i) Auditory hallucination

(ii) Nonsensical talks

(iii) Muttering to self

7. Upon a query made by this Court as to whether the prosecutrix was discharged from Hospital, learned Govt. Advocate has informed that the prosecutrix is still undergoing medical treatment as an indoor patient in the Mental Hospital at Indore. These reports, being essential for the decision of the present case, are accordingly taken on record.

8. It is true that after evaluating the extent of the disorder, evidence of a mentally retarded witness can be recorded with the help of an expert in the field or the person with whom he or she is able to communicate by words or by way of gestures but considering the fact that the appellant has been in prison since 18/10/2004, an order for re-trial even for a limited purpose of bringing the evidence of the prosecutrix or her incapacity to communicate would not be conducive to the ends of justice.

9. As such, in the light of the rival contentions, this Court is required to re-appreciate the evidence of Sunil (PW10), Vijay (PW9) and Amritlal (PW7) as to the involvement of the appellant in the alleged sexual assault as well as the nature and extent thereof.

10. Sunil (PW10) is the key witness. As per his statement, after hearing the shrieks of the woman, it was he who had brought Balbir and Vijay to the spot by apprising them of the circumstances suggesting that there was something wrong. He was emphatic in stating that he had seen the appellant, while adjusting his trousers, coming out of the bushes where the prosecutrix was sitting in a semi-naked condition. Vijay Singh (PW9) duly corroborated the version given by Sunil. Although, their companion namely Balbir Singh was given up by the prosecution yet, his non-examination did not assume any significance as it is not the number of witnesses but quality of evidence that counts.

11. Further, Amritlal (PW7), who being a reputed inhabitant of the locality, also came forward to substantiate the testimony of Sunil (PW10) and Vijay Singh (PW9). He reiterated the allegations as recorded by R.K. Sonkar, the then SHO, in the FIR (Ex.P-6). According to him, at about quarter to 12 in the night, while returning home from his factory in his car, he happened to pass by the place where a gathering comprising Sunil, Vijay and Balbir had informed him that the appellant was spotted with the prosecutrix who was staying at the nearby temple for the last few days and on being asked to disclose identity, the appellant, while emphasizing that he was on duty in the capacity of Inspector posted in the Lalbagh police station, started scolding him. As per her statement, the prosecutrix was also seen sitting with salwar in her hand. He categorically denied the suggestion that the appellant was falsely implicated against the backdrop of the quarrel that had ensued between his brother Manoj and his associates including Amit Mishra

and the appellant nearly a month prior to the incident. Although, SHO R.K. Sonkar (PW13) clearly admitted that Manoj and Amit had made a complaint against the appellant to the effect that he was discharging his duty of night surveillance in a drunken condition yet, he did not support the defence that the appellant was roped in a false charge of rape at the instance of Manoj and Amit only. The appellant also did not explain as to why he had not recorded misdemeanour of Manoj and Amit in the Rojnamcha of Police Station or as to why he had not informed his superior officers about the threat allegedly given by Manoj and Amit Mishra. As a police officer on duty, he could also scribe his explanation in the Roznamcha as to actual cause of altercation with Amritlal. However, admittedly, no such entry was made by him in the Roznamcha. Evidence of Head Constable Bhaskar Prajapti (DW1) only proved the report (Ex.D-7C) to the effect that Amit Mishra had also come to the police station along with Sunil, Vijay, Pradeep and Chandan at about 1.40 in the night to pressurize the SHO to register a case against the appellant.

12. Still, fact of the matter is that the appellant was not able to explain his presence in the bushes where the prosecutrix was found sitting in a semi-naked condition. Moreover, contents of the seizure memo (Ex.P-7) evidencing recovery of his wireless mobile phone set from the spot by SHO R.K. Sonkar (PW13) were also not subjected to challenge. He further explained the circumstances leading to registration of the case upon the FIR (Ex.P-6) scribed by him at the behest of Amritlal in the presence of the appellant only. Testimony of S.L. Kataria (PW14), the then SHO of Kotwali Burhanpur further suggested that the investigation was handed over to him on 08.09.2004 only. As per his statement, he not only seized the uniform worn by the appellant but also arrested him on the same day. In such a situation, the defence that he was falsely implicated by Amritlal, an Ex-M.P. representing BJP, at the instance of some party workers was apparently improbable.

13. In the light of the overwhelming evidence on record, learned trial Judge did not commit any illegality in holding that the appellant was found at the place where the prosecutrix was sitting in a half-naked condition. Now, the core question is as to what was the offence committed by the appellant ?

14. At the outset, it may be observed that in accordance with the well settled position of law on the point, as explained by a single Bench of this Court in *Samedas v. State of M.P.* 1969 JLJ-SN 54, un-exhibited Istagaza, forwarding letter and the corresponding report regarding mental condition of the prosecutrix as given by the psychiatrist could be used by the appellant to support his defence.

15. A bare perusal of the impugned judgment would reveal that the finding of guilt in respect of the offence of rape was recorded inter alia on the ground that the corresponding report of the FSL indicated that the seminal stains were found not only on the slides prepared from the vaginal smear of the prosecutrix and her salwar but also on the trousers said to have been worn by the appellant at the time

of alleged incident. However, the fact of the matter is that there was no positive opinion as to matching of the seminal stains.

16. In such a situation, mere availability of seminal stains found on the trousers of the appellant, who was a married man, would not be sufficient to connect him with the offence of rape. It is relevant to note that in the forwarding letter sent to the CMO, Nehru Hospital (Ex.P-3A) as well as in the Istagasa, the prosecutrix was also described as wife of one Janardan. However, no attempt was made to examine her husband or any other relatives. It also came in the statement of Sunil (PW10) that the prosecutrix was in a habit of moving around wrapping a Tat (sack cloth) over her body. Admittedly, the appellant was neither seen in a compromising position with the prosecutrix nor in a naked condition. Initially, upon the information given by Amritlal and his companions, a case under Section 354 of the IPC was registered.

17. Further, the appellant was not subjected to medical examination with reference to the offence of rape despite the fact that absence of smegma on the glans penis would have provided a definite clue as to involvement of the appellant in the ravishment of the prosecutrix. In the light of these facts and circumstances, it was not possible to conclude that he was able to subject the prosecutrix to coition.

18. This brings me to the question as to whether the appellant could be held guilty of making an attempt to ravish the prosecutrix ?

19. As explained by Justice Patterson in *R. v. James Lloyd* 173 ER 141 -

> "in order to find the accused guilty of an assault with intent to commit a rape, court must be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person but that he intended to do so at all events, and notwithstanding any resistance on her part".
>
> [Quoted with approval by the Apex Court in *Raju Pandurang Mahale v. State of Maharashtra* (2004) 4 SCC 371 and *Aman Kumar v. State of Haryana,* (2004) 4 SCC 379]

20. As further observed by the Supreme Court in the aforesaid decisions, the point of distinction between an offence of attempt to commit rape and to commit indecent assault is that there should be some action on the part of the accused, which would show that he was just going to have sexual connection with her. Surrounding circumstances many times throw beacon light on that aspect. In this view of the matter, the appellant could not be held guilty of attempt to commit rape on the prosecutrix.

21. In *Nuna v. Emperor* (1912) 13 CRLJ 469, the accused, who took off a girl's clothes, threw her on to the ground and then sat down beside her but said nothing to her nor did he do anything more to her, was held guilty of an offence

under Section 354 IPC only. In *Jai Chand v. State* 1996 CRLJ 2039, where the accused forcibly laid the prosecutrix on the bed and broken her pyjama's strings but made no attempt to undress himself and when the prosecutrix pushed him away, he did not make efforts to grab her again, it was held that it was not an attempt to rape but only outraging of the modesty of a woman.

22. As explained by the Apex Court in *State of Punjab v. Major Singh* AIR 1967 SC 63, modesty of a mentally challenged female can also be outraged. The relevant observations made by Bachawat, J, speaking on behalf of majority may be reproduced as under -

> ... the essence of a woman's modesty is her sex. The modesty of an adult female is writ large on her body. Young or old, intelligent or imbecile, awake or sleeping, the woman possesses a modesty capable of being outraged. Whoever uses criminal force to her with intent to outrage her modesty commits an offence punishable under Section 354. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive, as, for example, when the accused with a corrupt mind stealthily touches the flesh of a sleeping woman. She may be an idiot, she may be under the spell of anaesthesia, she may be sleeping, she may be unable to appreciate the significance of the act; nevertheless, the offender is punishable under the section".

23. Accordingly, in the light of factual scenario proved from the evidence on record as re-appreciated above, the appellant ought to have been convicted under Section 354 of the IPC.

24. Considering the social impact of the crime and other relevant circumstances of the case including that the victim was mentally handicapped, interests of justice would be met if the appellant is sentenced to undergo maximum custodial sentence prescribed for the offence. However, imposition of fine sentence would not be justified in view of the fact that the appellant has already suffered a period of more than 5 years in custody.

25. Consequently, the appeal is allowed in part. The conviction of the appellant for the offence under Section 376(2)(a)(i) is converted into one under Section 354 of the IPC and he is sentenced to undergo R.I. for 2 years. As an obvious consequence, he shall be released forthwith if not required in any other case.

Appeal partly allowed.

I.L.R. [2010] M. P., 2357

APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saksena & Mrs. Justice Sushma Shrivastava

23 April, 2010*

STATE OF M.P. ... Appellant

Vs.

PARAMLAL & ors. ... Respondents

A. Penal Code (45 of 1860), Sections 147 & 302/34 - *Appeal against acquittal - Trial Court acquitted the accused persons on grounds that the evidence not reliable and FIR ante-timed - Held - The trial Court recorded the acquittal on flimsy grounds and discarded the ocular evidence without any compelling and justifying reasons - Respondents convicted u/s 302/34 IPC and sentenced to imprisonment for life - Appeal allowed.* (Paras 39 & 40)

क. दण्ड संहिता (1860 का 45), धाराएँ 147 व 302/34 – दोषमुक्ति के विरुद्ध अपील – विचारण न्यायालय ने अभियुक्त व्यक्तियों को इन आधारों पर दोषमुक्त किया कि साक्ष्य विश्वसनीय नहीं थी और प्रथम सूचना रिपोर्ट पूर्व समय की थी – अभिनिर्धारित – विचारण न्यायालय ने दोषमुक्ति तुच्छ आधारों पर अभिलिखित की तथा चक्षुदर्शी साक्ष्य को किसी बाध्यकारी या न्यायसंगत कारण बिना अमान्य कर दिया – प्रत्यर्थियों को भा.द.सं. की धारा 302/34 के अन्तर्गत दोषसिद्ध किया गया और आजीवन कारावास का दण्डादेश दिया गया – अपील मंजूर।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 154 - *Wrong mention of time in FIR or merg inquest report by slip of pen or human error can not be viewed with suspicion - FIR can not be said or suspected ante-dated or ante-timed.* (Paras 22 & 23)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – प्रथम सूचना रिपोर्ट अथवा मर्ग मृत्युसमीक्षा रिपोर्ट में कलम फिसलने या मानवीय त्रुटि से ग़लत समय का उल्लेख हो जाना संदेह की दृष्टि से नहीं देखा जा सकता – प्रथम सूचना रिपोर्ट को पूर्व दिनांक अथवा पूर्व समय का नहीं कहा जा सकता अथवा संदेह नहीं किया जा सकता।

C. Criminal Procedure Code, 1973 (2 of 1974), Sections 154 & 157 - *Non-compliance of S. 157 could not be said to be fatal to prosecution so as to throw its case, particularly when the investigation had soon started.* (Para 23)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 154 व 157 – धारा 157 का अपालन अभियोजन के लिये हानिकारक नहीं कहा जा सकता कि इसका प्रकरण व्यर्थ हो जावे विशेषतः जब अन्वेषण अविलम्ब प्रारंभ कर दिया गया हो।

Cases referred :

2006 AIR SCW 4143, AIR 2005 SC 44, AIR 1996 SC 3197, AIR 2006 SC 951, AIR 2009 SC 2013, AIR 2003 SC 539, (2006) 10 SCC 313, AIR 1971 SC 1586, AIR 1993 SC 1469, AIR 1994 SC 250, 2004(3) MPHT 406, (2004) 9 SCC 193, (2006) 9 SC 731, (2006) 12 SCC 626, AIR 2002 SC 175.

*Cr.A. No.1224/1993 (Jabalpur)

Umesh Pandey, G.A., for the appellant/State.
Siddharth Datt, for the respondents.

JUDGMENT

The Judgment of the Court was delivered by SUSHMA SHRIVASTAVA, J. :–Appellant/State has preferred this appeal against the order of acquittal of the respondents under Section 147, 302/149 of IPC passed by 4th Additional Sessions Judge, Chhatarpur in S.T. No. 10/91 vide judgment dated 29.12.92.

2. As per prosecution allegations, on 13.10.90 about 7:30 in the evening when deceased Nandkishore was returning back to his house at Tivaranpurva alongwith his buffalo and reached near Athai (public platform). respondents armed with lathi intercepted him and began assaulting him by lathi. On hearing the screams of Nandkishore, his brother Chhotelal and other family members reached there and whooped as to why they were assaulting him, respondents then said that they would kill him and fled away after assaulting him. As a result of lathi blows on the head and other parts of the body, Nandkishore fell unconscious. He was then taken to his house by his brother Chhotelal, but Nandkishore did not regain consciousness. His brother Chhotelal then took him to the Police Station Civil Lines, Chhatarpur on a bullock-cart and lodged the FIR, on the basis of which an offence was registered against the respondents and co-accused Jaggu and was investigated. Injured Nandkishore was sent for medical examination and was admitted in the hospital, where he succumbed to his injuries on 14.10.90. Merg inquest report was prepared and the dead body of deceased was sent for postmortem examination. During investigation lathis used in the commission of offence were discovered at the instance of the respondents. After due investigation, respondents were prosecuted under Sections 341, 323. 506-B, 147. 148 and 302 of IPC and were put to trial. Co-accused Jaggu being juvenile, was sent to Juvenile Court

3. Respondents were charged and tried under Sections 147, 302/149 of IPC before Sessions Court. Respondents abjured the guilt and pleaded false implication due to enmity.

4. Learned Additional Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, came to hold that the prosecution failed to establish the case against the respondents beyond periphery of doubt and therefore, acquitted all of them of the charges under Sections 147. 302/149 of IPC by the impugned judgment, which has been challenged in this appeal.

5. We have heard the learned counsel for the parties.

6. Learned counsel for the appellant/State submitted that the trial court gravely erred in disbelieving the evidence of as many as five eyewitnesses despite corroborative medical evidence and erroneously acquitted the respondents without any cogent and justifiable reasons and the impugned judgment suffers from serious infirmities and deserves to be reversed.

7. Learned counsel for the respondents, on the other hand, justified and supported the impugned judgment and submitted that the trial court rightly disbelieved the evidence of the related witnesses for want of independent corroboration and has given cogent reasons for acquitting the respondents. Learned counsel for the respondents further submitted that in an appeal against acquittal even if two views are possible from the evidence on record, the view favouring the accused persons has to be adopted and no interference is warranted in the order of acquittal. Reliance was placed in this behalf on the decisions of the Apex Court rendered in the case of *Ganesh Bhavan Patel and another Vs. State of Maharashtra* reported in AIR 1979 Supreme Court page 135. *Harijana Thirupala and others Vs. Public Prosecutor. High Court of A.P., Hyderabad* reported in AIR 2002 Supreme Court page 2821. *State of Goa Vs. Saniay Thakran and another* reported in (2007)3 Supreme Court Cases page 755. *State of Raiasthan Vs. Mohan Lal* reported in AIR 2009 Supreme Court page 1872. *Mahtab Singh & another Vs. State of U.P.* repoitod in AIR 2009 Supreme Court page 2298.

8. We have gone through the impugned judgment and perused the entire evidence on record.

9. In order to bring home the guilt of the respondents the prosecution examined as many as five eyewitnesses, namely, Chhotelal (P.W-3). Durjan (P.W-4), Khillu (P.W-5), Halke (P.W-6) and Nonibai (P.W-7), besides two medical witnesses, namely, Dr. R.K. Khare (P.W-8) and Dr. S.R. Gupta (P.W-9) and certain other formal witnesses. Complainant Chhotelal (P.W-3), is the real brother of deceased Nandkishore, who also lodged the FIR (Ex.P-3) with the Police Civil Lines, Chhatarpur. Other eyewitnesses are also his relatives.

10. Complainant Chhotelal (P.W-3) categorically deposed in his evidence that at the relevant time about 7:00 or 7:15 in the evening when he was at home. he heard the screams of his brother Nandkishore. who was near Athai Chowk; when he went there, he found that respondents Paramlal, Ramlal, Shriram, Hakku and one Jaggu were assaulting his brother Nandkishore with lathi; when he whooped as to why they were assaulting him, they all fled away from the spot. According to Chhotelal (P.W-3), his brother Nandkishore had injuries on his head on both the temples, as well as on his scapular region and the wrist and was unconscious. He then lifted his brother and took him to the house, sprinkled water over him. yet he did not speak: then he brought him to the Police Station Civil Lines, Chhatarpur and lodged the FIR (Ex.P-3). As per evidence of Chhotelal (P.W-3). after recording of the report, injured Nandkishore was sent to the hospital and doctor had advised him to take to Gwalior, but by the time he could arrange money till next morning. Nandkishore expired. Complainant Chhotelal (P.W-3) also testified his signatures on the FIR (Ex.P-3).

11. The evidence of complainant Chhotelal (P.W-3) also stands duly corroborated by the testimony of Durjan (P.W.-4). According to Durjan (PW-4), on hearing the screams of his brother Nandkishore, who was returning from the field, he rushed

to the spot near Athai and found that resoondents Paramlal. Ramlal. Hakku and Shriram were assaulting Nandkishore by lathi, and he had received lathi blows on his head and other parts of the body and fell unconscious due to injuries. Durjan (P.W-4) also deposed that the deceased was taken to Chhatarpur Police Station from where he was sent to the hospital, but he did not regain consciousness and next day Nandkishore died at 12 'O'clock in the noon. There is also similar evidence of Khillu (P.W-5), Halke (P.W-6) and Nonibai (P.W-7), who also stated that they had seen the respondents assaulting Nandkishore (deceased) by lathi causing him injuries and that Nandkishore died in the hospital as a result of injuries.

12. There is also corroborative medical evidence on record of Dr. R.K. Khare (P.W-8) and Dr. S. R. Gupta (P.W-9). Dr. S.R. Gupta (P.W-9) had conducted MLC of injured Nandkishore on 14.10.90 and found following injuries on his body :-

(1) Contusion 4cm x 3cm on right TM joint above TM Joint.

(2) Contusion 3cm x 2cm on left temporal region in front of ear.

(3) Contusion 4cm x 2cm right parietal region behind parietal protuberance.

(4) Contusion 2½ cm x 2 cm left hand dorsum.

13. According to Dr. S.R. Gupta (P.W-9), patient Nandkishore was in unconscious state and his condition was serious and was admitted in the surgical ward and he had advised X-ray of his skull and left hand. In the opinion of Dr. S.R. Gupta (P.W-9), the injuries of Nandkishore were caused by hard and blunt object within 24 hours. His MLC report (Ex.P-7) duly signed by him is also placed on record.

14. Dr. R.K. Khare (P.W-8), who conducted the postmortem examination on the dead body of deceased Nandkishore on 14.10.90, also found the following antemortem injuries on his body :-

(1) Contusion- 3cm present over right temporo-mandibular joint.

(2) Contusion- 3cm x 2cm left temporal region, in front of ear.

(3) Contusion- 2cm right parietal region.

(4) Contusion- 2½ cm left hand over the dorsum.

(5) Abrasion 1 ½cm right shoulder upper part.

15. On internal postmortem examination of the deceased, Dr. R.K. Khare (P.W-8) found as follows :-

"Right parietal bone fractured extending from midline downwards, vertically, extradural haematoma present over right side of cromium subdural haematoma present over right cerebral hemisphere".

16. In the opinion of Dr. R.K. Khare (P.W-8), the cause of death of the

deceased was coma as a result of head injury caused by hard and blunt object and death of deceased Nandkishore (hereinafter referred to as 'deceased') had occurred within two to four hours since the postmortem examination. His postmortem report (Ex.P-6) is also placed on record.

17. The aforesaid witnesses, especially the five eyewitnesses were cross-examined in extenso. However, despite cross-examination, there is no escape from the conclusion that deceased Nandkishore died as a result of head injury, as clearly evident from the medical evidence, and thus he met a homicidal death.

18. As regards the ocular evidence, the trial court has disbelieved the evidence of five eyewitnesses including complainant Chhotelal (P.W-3) holding their evidence doubtful and suspicious for various reasons. One of the main reasons assigned by the trial court for discarding their evidence, is that the names of the several eyewitnesses examined by the prosecution were not mentioned in the FIR (Ex.P-3) and the independent witnesses named as eyewitnesses were not examined by the prosecution, and all the five eyewitnesses were inter se related and their presence on the scene of occurrence was doubtful, plus they gave an invented version of having seen the murderous assault on the deceased. The trial court also held that the FIR (Ex.P-3) had interpolations in the dates and the time of its recording, which were not explained by the prosecution by examining the ascribe of the FIR (Ex.P-3), therefore, the FIR (Ex.P-3) was also doubtful and no compliance of Section 157 of Cr.P.C. was made to lend assurance to the correctness of the dates and facts mentioned in the FIR (Ex.P-3).

19. The trial court also held that the time of recording of the FIR (Ex.P-3) was noted as 1 P.M. on 14.10.90, while the time of death of deceased as recorded in merg inquest report (Ex.P-5), was shown to be 0:45 hours on 14.10.90. whereas the MLC report (Ex.P-7) of the deceased indicated the time of his medical examination as 1:30 A.M. on 14.10.90, which revealed a strange situation. According to learned Trial Judge, when the time of death of deceased was mentioned as 0:45 hours on 14.10.90 in the merg inquest report (Ex.P-5), how he could remain alive at 1:30 A.M. when he was shown to have been medically examined by doctor as shown in his MLC (Ex.P-7): in the aforesaid situation, the interpolations and the overwriting in the dates in the FIR (Ex.P-3) assumed significance rendering the whole prosecution case doubtful and suspicious.

20. We have carefully examined the aforesaid aspect and also considered the submissions made in this behalf. Now it is clearly evident from the testimony of complainant Chhotelal (P.W-3) that he had lodged the FIR (Ex.P-3) at Police Station Civil Lines, Chhatarpur and he also testified his signatures on Ex.P-3, which were marked as A to A and thus he validly proved the FIR. Complainant Chhotelal (P.W-3) also categorically deposed that after the incident, he had taken his brother Nandkishore (deceased) in unconscious condition first to his house, and when he did not regain consciousness, he took him to Chhatarpur Police Station by bullock-cart, and he reached Civil Lines Police Station around 12 or

1 'O'clock at night, where he lodged the report (Ex.P-3), which also bore his signatures.

21. There are no reasons to doubt the aforesaid statement of complainant Chhotelal (P.W-3), which remained virtually unchallenged in cross-examination and from his evidence, there remains no manner of doubt that soon after the incident complainant Chhotelal lodged the FIR (Ex.P-3) around 1 'O'clock at night on the same day. No doubt, there is some overwriting in the dates with "initials", probably of the ascribe, showing the date of incident as 13.10.90 and date of recording of the FIR as 14.10.90 in place of 13.10.90, but that does not create any suspicion as to the actual date of the recording of the FIR, as it is a matter of common experience that such mistakes usually occur when the date of the calender changes after 12 '0' clock at night. This position is also reflected from the date mentioned as 13.10.90 below the signatures of A.S.I., which per se indicates the reason for overwriting in correcting the date of recording of the FIR as 14.10.90 after 12 'O'clock at night. Thus, some overwriting of the dates with initials in the FIR (Ex.P-3) is found to be self explanatory and did not require any clarification as to the overwriting in the dates. Moreover, if the trial court was vacillated in this behalf and had any doubt or required any clarification or explanation from the ascribe of the FIR, it could have very well summoned the ascribe of FIR. In our considered opinion, such a small overwriting in the date with "initials" in the facts and circumstances of the instant case, does not create any suspicion as to the factum of the lodging of FIR (Ex.P-3) by complainant Chhotelal (P.W-3) around 1 'O'clock at night after the occurrence, particularly when no such questions as to the time and dates of lodging of the FIR were put in cross-examination to complainant Chhotelal (P.W-3). who was the author of the FIR and who duly proved his signatures and lodging of the FIR at Police Station Civil Lines. Chhatarpur around 1 'O'clock at night.

22. Similarly, no questions in cross-examination were put to the Investigating Officer U.S. Naidu (P.W-10), who had prepared the merg inquest report (Ex.P-5) as to the recording of the time as 0:45 hours as the time of death of Nandkishore, who could have explained as to how the time of death of deceased Nandkishore was recorded as 0:45 hours on 14.10.90 in the merg inquest report when he was medically examined by Dr. S.R. Gupta at 1:30 A.M. on 14.10.90. It is also pertinent to mention that Durjan (P.W-4), the brother of the deceased, who was also a witness to merg inquest report (Ex.P-5), also categorically deposed that Nandkishore died next day at 12 'O'clock in the noon, which fact also remained unrebutted and unchallenged in the cross-examination, and which clearly indicates that recording of the time of death of deceased as 0:45 hours was a slip of pen or a human error in place of 12.45 P.M. Be that as it may, in absence of any dispute as to the time of death at 12 'O'clock in the noon on 14.10.90, as categorically deposed by Durjan (P.W-4). the factum of death of the deceased at 12 'O'clock in the noon on 14.10.90 could not be viewed with suspicion. Needless to point out

that Dr. R.K. Khare (P.W-8), who conducted the postmortem examination of the deceased on 14.10.90 at 4 'O'clock, as per PM report (Ex.P-6). also opined that death of the deceased occurred within 2 to 4 hours since the postmortem examination.

23. In view of the aforesaid facts, in our opinion, it could not be said or suspected that the FIR (Ex.P-3) was ante dated and ante timed and therefore, non compliance, if any. of Section 157 of Cr.P.C. could not be said to be fatal to prosecution so as to throw its case. particularly when the investigation in the case had soon started, as is evident from the testimony of Investigating Officer U.S. Naidu (P.W-10) and the other witnesses.

24. No doubt, complainant Chhotelal (P.W-3), Durjan (P.W-4). Khillu (P.W-5). Halke (P.W-6) and Nonibai (P.W-7) are inter se related witnesses, as also related to the deceased, but It is well settled, as reiterated by the Apex Court in the case of *Pulicherla Nagaraju @ Nagaraja Reddy Vs. State of Andhra Pradesh* reported in 2006 AIR SCW page 4143 that the evidence of a witness cannot be discarded merely on the ground that he is either partisan or interested or closely related to the deceased, if it is otherwise found to be trustworthy and credible.

25. Similarly, the evidence of number of eyewitnesses could not be discarded or disbelieved merely because their names were not mentioned as eyewitnesses in the FIR (Ex.P-3). The Apex Court in the case of *State of Madhya Pradesh Vs. Dharkole @ Govind Singh and others* reported in AIR 2005 Supreme Court page 44 held that non mentioning of the names of the eyewitnesses in the FIR by itself cannot be a ground to doubt their evidence as there is no requirement of mentioning the names of all the witnesses in the FIR. In the instant case complainant Chhotelal (P.W-3) has also given a reasonable and natural explanation that he was not conversant of such requirement that names of family members, who reached the place of occurrence, should be mentioned in the FIR, which appears to be sound and acceptable.

26. Moreover, when we scan the testimony of the five abovementioned eyewitnesses, no glaring inconsistency or infirmity is found in their evidence The few omissions or contradictions with their respective police statements attempted to be brought on record are not found to be so material or vital so as to distrust their basic version that they saw the respondents assaulting the deceased (Nandkishore) by lathi. Some exaggerations or wordy difference in the narration of the incident or sequence of events is bound to occur in the testimony of the witnesses and for that reason the entire evidence of the number of eyewitnesses cannot be thrown and discarded, if the sum and substance and essence of their version is found to be reliable and trustworthy.

27. Even if it is assumed for argument's sake, as submitted, that the wife of the deceased, namely, Nonibai (P.W-7) and Khillu (P.W-5), Halke (P.W-6) did not

actually witness the occurrence and their presence on the scene of occurrence was doubtful, there are no cogent reasons to doubt or suspect the testimony of complainant Chhotelal (P.W-3) and his brother Durjan (P.W-4). who reached the place of occurrence immediately on hearing the screams of Nandkishore (deceased). There is no inconsistency in the evidence of complainant Chhotelal, who also lodged the FIR (Ex.P-3) and his brother (P.W-4): both of them categorically deposed that they reached the place of occurrence one after the other on hearing the screams of their brother Nandkishore (deceased) and saw four respondents assaulting him by lathi near Athai. The trial court suspected their evidence on the ground that it could not have been possible for them to have seen the respondents assaulting the deceased from the distance of 100 ft. when the incident occurred at about 7:30 in the evening when it gets quite dark. Again there was nothing on record to indicate that there was no source of light on the place of occurrence or visibility was so low that it was not possible for them to have identified the assailants. Besides, there was nothing on record to indicate that complainant Chhotelal (P.W-3) and his family members had any enmity with the respondents so as to falsely implicate them. It also does not appeal to reason that complainant Chhotelal (P.W-3) or other relatives of the deceased would save his real assailant and would unnecessarily and falsely implicate the respondents without any rhyme or reason.

28. The trial court also discarded the evidence of complainant Chhotelal (P.W-3) on the ground that he claimed to have given the statement to the Police on the same day when his brother died, i.e. on 14.10.90. while his statement under Section 161 of Cr.P.C. was recorded by the Police on 15.10.90, which indicated that his statement recorded on 14.10.90 favouring the respondents was suppressed and a fresh statement was manipulated by the Investigating Officer on 15.10.90, though such suggestions were denied by the Investigating Officer U.S. Naidu (P.W-10). Again in face of the FIR (Ex.P-3), which was lodged by complainant Chhotelal (P.W-3) himself soon after the incident, such a suspicion or imputation appears to be without any basis. Needless to say that complainant Chhotelal (P.W-3) is a rustic villager and it is not expected of him that he would give one statement one day and manipulate another next day. Similarly, it does not appear from the evidence on record that the Investigating Officer had any axe-to-grind against any of the respondents so as to manipulate false statements against the respondents in order to falsely implicate them.

29. Needless to repeat that there are no reasons to doubt the oral testimony of complainant Chhotelal (P.W-3) that he saw the four respondents assaulting the deceased by lathi, which also stands substantially corroborated by the FIR (Ex.P-3) as well as by the evidence of Durjan (P.W-4). Complainant Chhotelal (P.W-3) has given a natural version that he had not named the fifth accused Jaggu as assailant in the FIR and he named him in his evidence in view of the statements made by the female members of his family, and he himself did not know whether

Jaggu was there or not at the place of occurrence. Thus, the evidence of complainant Chhotelal (P.W-3) is found to be quite natural and trustworthy and does not create any doubt as to the veracity of his statement that he witnessed the respondents assaulting his brother by lathi near Athai, which also stands duly corroborated by the testimony of Durjan (P.W-4) as well as finds substantial corroboration from the medical evidence on record. Apparently, there is no inconsistency or variance in the ocular and medical evidence.

30. Thus in our considered view, the ocular evidence, particularly the evidence of complainant Chhotelal (P.W-3) and Durjan (P.W-4) has been erroneously discarded by the trial court without any cogent and justifying reasons. It is well settled that the evidence of the eyewitness cannot be rejected or brushed aside for want of independent corroboration if it is found to be credible and reliable after careful scrutiny thereof. The Apex Court in the case of *Pattu Lal Vs. State of Punjab* reported in AIR 1996 Supreme Court page 3197 has held that evidentiary value of a deposition, which is otherwise admissible and reliable is not just wiped out in the absence of corroboration. Thus the trial court erred in holding that the testimony of the eyewitnesses was not acceptable for want of independent evidence.

31. The other reasons assigned by the trial court for acquittal of the respondents are also not found to be proper. The trial court held that the merg inquest report (Ex.P-5), which was prepared in presence of complainant Chhotelal (P.W-3) and Durjan (P.W-4), never disclosed the names of the respondents as being the assailants of the deceased, nor there was any mention of their names in the PM requisition form, which rendered their complicity doubtful. Again in face of the FIR (Ex.P-3), wherein the names of the respondents were mentioned as assailants ab-initio, the mere non-disclosure of the names of the respondents in the merg inquest report did not create any suspicion with regard to the involvement of the respondents in the murderous assault on the deceased. The Apex Court in its three Judges' Bench decision rendered in the case of *Radha Mohan Singh @ Lal Saheb & Ors. Vs. State of U.P.* reported in AIR 2006 Supreme Court page 951 has held that there is absolutely no requirement of law of mentioning of the FIR, name of the accused or the names of the eyewitnesses etc, in the merg inquest report. It would be profitable to refer to the following observation made by their Lordships in the aforesaid case :-

> "It is well settled by a catena of decisions of this court that the purpose of holding an inquest is very limited, viz., to ascertain as to whether a person has committed suicide or has been killed by another or by an animal or by machinery or by an accident or has died under circumstances raising a reasonable suspicion that some other person has committed an offence. There is absolutely no requirement in law of mentioning the details of the FIR, names of the accused or the names of the eyewitnesses or

the gist of their statement nor it is required to be signed by any eyewitness."

32. The trial court also suspected the prosecution case on the ground that the respondents were not arrested till 23.10.90, though the incident had occurred on 15.10.90 and the prosecution evidence did not disclose that the respondents were absconding. Again, If the Investigating Officer committed any mistake in the investigation or did not arrest the respondents till a particular date. i.e. 23.10.90, the evidence of eyewitnesses could not be overthrown or discarded on such a ground, nor any delay in the arrest of the respondents affects the credibility of the eyewitnesses or gives rise to any reasonable doubt in the prosecution case. The Apex Court in the case of *Chhotanney & Ors. Vs. State of Uttar Pradesh & Ors.* reported in AIR 2009 Supreme Court page 2013 has held that doubts must be reasonable, actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it. as opposed to mere vague apprehensions.

33. The trial court also doubted the seizure of lathi at the instance of respondents in absence of its corroboration by the public witnesses to memorandum and seizure memo, and noted some infirmities in the memorandum and seizure memo prepared by the Investigating Officer U.S. Naidu (P.W-10), but again any doubt or suspicion regarding the seizure of the lathi at the instance of respondents could not be a ground for acquittal of the respondents when there was bulk of direct evidence against them.

34. The trial court also doubted the involvement of the respondents on the ground that they had no motive to kill the deceased and prosecution failed to prove any such motive by the evidence on record. Needless to emphasize that when there is reliable ocular evidence on record, question of motive is hardly significant. The Apex Court in the case of *Yunis @ Kariya Vs. State of Madhya Pradesh* reported in AIR 2003 Supreme Court page 539 has also held that establishment of motive is not a sine-qua-non for proving the prosecution

35. The trial court on the basis of minor inconsistencies and 'improvements in the statements of the five eyewitnesses has doubted their presence on the spot and disbelieved their evidence, but as already discussed above, upon close scrutiny of the evidence of all five abovementioned eyewitnesses, we do not find any such serious infirmity so as to discard their evidence in toto, and particularly the evidence of complainant Chhotelal (P.W-3) and Durjan (P.W-4) is found to be quite cogent and trustworthy and the evidence of these two eyewitnesses alone coupled with the corroborative medical evidence can become the basis for conviction of the respondents for causing death of Nandkishore.

36. There can be no dispute with the legal preposition, as submitted by the learned counsel for the respondents, that in an appeal against acquittal even if two views are possible from the evidence on record, the view favouring the accused

person should be adopted and interference should not be made. At the same time, however, as held by the Apex Court in the case of *Kallu alias Masih and others Vs. State of M.P.* reported in (2006)10 Supreme Court Cases page 313 while deciding the appeal against acquittal the power of the appellate court is no less than the power exercised while hearing the appeals against conviction and in both the types of appeals power exists to review the entire evidence and if the trial court unreasonably disbelieves the evidence of eyewitnesses on insufficient ground, interference in the order of acquittal can be made.

37. We need not repeat that upon careful scanning of the entire evidence on record, we find that the evidence of the eyewitnesses, particularly that of complainant Chhotelal (P.W-3) and Durjan (P.W-4) coupled with the corroborative medical evidence is reliable and acceptable and it leads to only one conclusion that the four respondents assaulted the deceased by lathi causing him several injuries resulting into his death: there is no other view possible from the evidence available on record. It is also clearly evident from the ocular evidence on record that the four respondents collected near Athai in the village with a planning and attacked the deceased when he was returning in the evening from the well with his cattle and conjointly assaulted him with lathi causing such injuries that he fell unconscious and ultimately died. It is thus manifest that the resoondents intentionally caused his death.

38. The citations referred to by learned counsel for the respondents reported in AIR 1971 Supreme Court page 1586. AIR 1993 Supreme Court page 1469. AIR 1994 Supreme Court page 250. 2004(3) M.P.H.T. page 406. (2004) 9 Supreme Court Cases page 193. (2006) 9 Supreme Court Cases page 731. (2006) 12 Supreme Court Cases page 626. AIR 2002 Supreme Court page 175 are distinguishable on facts and are of no assistance to the respondents in the facts and circumstances of the instant case.

39. In the wake of aforesaid and for foregoing reasons, we are of the view that the trial court has recorded the acquittal of the respondents on flimsy grounds and discarded the ocular evidence without any compelling and justifying reasons. We have no hesitation to say that the view taken by the trial court and the findings recorded by it are against the evidence on record and can be termed as perverse.

40. In the aforesaid circumstances and in view of the evidence available on record, we set aside the impugned judgment of the acquittal of the respondents and find them guilty for intentionally causing death of Nandkishore. Accordingly, we convict the four respondents under Section 302/34 of IPC and sentence each of them to imprisonment for life.

41. Respondents are on bail. They shall surrender to their bail bonds to serve out the life sentence.

Appeals accordingly allowed and stands disposed of.

Appeal allowed.

I.L.R. [2010] M. P., 2368

APPELLATE CRIMINAL

Before Mr. Justice S.L. Kochar & Mrs. Justice S.R. Waghmare

6 May, 2010*

RAMESH CHANDRA & anr. ... Appellants

Vs.

STATE OF M.P. ... Respondent

Evidence Act (1 of 1872), Section 3, Penal Code, 1860, Sections 302, 392, 397, 411, 413 & 414 - ***Circumstantial evidence - Conviction for robbery and murder based on (1) Deceased allegedly seen with accused in jeep on relevant date by three witnesses, (2) On instance of one accused parts of stolen jeep were recovered from other accused, (3) One accused was identified by witnesses during T.I. Parade - Held - Witnesses not previously known to the accused and they had also seen the accused in police station and C.I.D. office prior to T.I. Parade - The parts of jeep recovered had no identification, forming part of stolen jeep - Conviction & sentence set aside.*** **(Paras 3, 7, 10 & 13)**

साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड संहिता, 1860, धाराएँ 302, 392, 397, 411, 413 व 414 – परिस्थितिजन्य साक्ष्य – लूट एवं हत्या के लिए दोषसिद्धि (1) सुसंगत तारीख को तीन साक्षियों द्वारा मृतक को कथित रूप से अभियुक्त के साथ जीप पर देखे जाने, (2) एक अभियुक्त की प्रेरणा पर चुराई गई जीप के पुर्जे अन्य अभियुक्त से बरामद होने, (3) साक्षियों द्वारा शिनाख्त परेड के दौरान एक अभियुक्त की शिनाख्त करने, पर आधारित – अभिनिर्धारित – साक्षी अभियुक्त को पहले से नहीं जानते थे तथा उन्होंने अभियुक्त को थाने एवं सी.आई.डी. कार्यालय में शिनाख्त परेड के पूर्व देखा था – बरामद किये गये जीप के पुर्जे, चोरी की गयी जीप के होने की कोई पहचान नहीं – दोषसिद्धि एवं दण्डादेश अपास्त।

Case referred:

AIR 1972 SC 283.

R.C. Mehra, for the appellants.

Girish Desai, Dy.A.G., for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by **S.L. Kochar, J.** :–Since both the appeals arise out of one impugned judgment, therefore, decided by this common judgment.

2. The appellants have preferred both these appeals against the one impugned judgment dated 21.1.2002 passed in S.T. No.120/95 by learned Additional Sessions Judge, Narsinghgarh, District Rajgarh (Biaora) M.P., whereby convicted and sentenced the appellants as under :-

*Cr.A. No.404/2002 (Indore)

Name of the appellant/s	Conviction	Sentence and fine
Ramesh Chandra and Shiv.	u/S 302 of the Indian Penal Code (for short "the IPC")	RI for life with fine of Rs. 10,000/- to each. In default of payment of fine, they shall suffer additional SI for six months.
Ramesh Chandra and Shiv.	u/S 392 read with Section 397 of "the IPC"	RI for ten years with fine of Rs.10,000/- to each. In default of payment of fine, they shall suffer additional SI for six months.
Shahid, Pappan and Shoaib.	u/S 411 & 413 of "the IPC"	RI for 7 years with fine of Rs. 10,000/- each. In default of payment of fine, they shall suffer additional SI for six months.
Shahid, Pappan and Shoaib.	u/S 414 of "the IPC"	RI for one year to each.

The substantive jail sentences of appellants Shahid, Pappan alias Mohd. Salim and Shoaib have been directed to run concurrently.

3. According to the prosecution case, deceased Chandu alias Ramchandra was residing in Talen and was driving jeep No.M.P.04-F.2192. On 25.21995 appellants Shiv and Ramesh Chandra hired the jeep and went along with Chandu alias Ramchandra. They were seen, while going, by witnesses Basanti Bai, Purushottam, Anil and Ram Singh. Both the appellants committed murder of Chandu alias Ramchandra in Seenka forest causing injury by sharp edged weapon, and threw his dead body in the forest; thereafter taken away the jeep. Appellants sold the parts of the jeep after dismantling it, to appellants Shahid, Pappan alias Mohd. Salim and Shoaib. On 26.2.1995, Sharif resident of village Patelpura and Siddhulal had seen the dead body, in Seenka forest, of an unknown person and lodged the report in Eklera outpost, Police Station Talen. Merg No.2/95 was registered and in presence of the witnesses, inquest report was prepared. Dead body of the deceased was sent for postmortem examination, which was conducted by PW-13 Dr. S.N. Karodia. The postmortem report is Ex.P/12. Dead body of deceased was later on identified by his brother. From the spot, blood stained and controlled earth were seized, and seized articles were sent for examination to Forensic Science Laboratory. During the course of patrolling, Sub Inspector Shri Rathore arrested the appellant Ramesh Chandra in suspicious condition near Agrawal Dharmkanta Kabadkhana, when he was selling tape recorder and cassette. On interrogation, Ramesh Chandra disclosed about the incident. On the basis of statement of Ramesh Chandra, other accused persons were arrested

and on their disclosure statements, parts of the jeep were recovered. Appellants Ramesh Chandra and Shiv were put for Test Identification Parade, arranged in jail, and in the said parade only appellant Ramesh Chandra was identified by 4 witnesses, whereas Shiv was not identified by any witness. Investigating officer recorded the statements of the witnesses, who were acquainted with the facts of the case and on completion of investigation, filed the charge sheet against the appellants Ramesh Chandra and Shiv under Section 302, 394, 120-B and 201 of "the IPC" and against other appellants under Section 411, 413 and 414 of "the IPC".

4. Appellants refuted the charges and pleaded their false implication, therefore, put to trial. They have examined two witnesses in their defence. Learned trial Court after examining the prosecution and defence witnesses and hearing both the parties, convicted and sentenced the appellants, as indicated herein-above.

5. We have heard the learned counsel for the parties and also perused the entire record minutely.

6. Before the trial Court as well as before this Court the homicidal death of deceased has not been challenged, even otherwise in view of the evidence of PW-13 Dr. Karodia, who found as many as 16 external injuries on the person of deceased; major of which were caused by sharp edged weapon. The thyroid cartilege of deceased were cut. On internal examination, underneath the injury no.1, stab wound on left side of the neck was found. He found cut on all vital organs especially sub clavicle vessels. In the opinion of Dr. Karodia, deceased died because of excessive bleeding as well as internal hemorrhage resulting into shock, and injuries could be caused by sharp edged weapon. He proved postmortem report (Ex.P/12).

7. It emerged from the impugned judgment that conviction of the appellants Ramesh Chandra and Shiv is based on the evidence of PW-9 Ram Singh, PW-10 Anil and PW-12 Basanti Bai. All these three witnesses were not knowing the appellants Ramesh Chandra and Shiv and had seen them for the first time, when they had gone with the deceased in a jeep. All these three witnesses have specifically stated that they had seen the appellants for the first time on the date of going with deceased in a jeep, and thereafter before going to jail for taking part in Test Identification Parade in police station as well as in office of C.I.D. police. In Test Identification Parade Shiv was not identified by any witness, and Ramesh Chandra was identified by three witnesses, but in our considered view the evidence of Test Identification Parade looses its all sanctity and value because prior to holding the Test Identification Parade, appellants Ramesh Chandra and Shiv were already shown to the witnesses, therefore, the holding of Test Identification Parade was nothing but a farce, just to complete the formality. The importance of Test Identification Parade has been discussed elaborately by Supreme Court in case of *Hasib Vs. State of Bihar* [AIR 1972 SC 283] in Paragraph-6 & 7, which reads as under :-

Para-6. As observed by this Court in *Vaikuntam Chandrappa V. State of Andhra Pradesh*, AIR 1960 SC 1340, the substantive evidence is the statement of a witness in Court and the purpose of test identification is to test that evidence, the safe rule being that the sworn testimony of the witness in Court as to the identity of the accused who is a stranger to him, as a general rule, requires corroboration in the form of an earlier identification proceeding. If there is no substantive evidence about the appellant having been one of the dacoits when P.W. 10 saw them on January 28, 1963 then the T.I. parade as against him cannot be of any assistance to the prosecution.

Para-7. But otherwise too the identification proceedings in the present case do not inspire confidence. It appears that several test identification parades were held for identifying the accused persons. So far as the present appellant is concerned P.W. 10 appears to have identified him on February 14, 1963 though the appellant had been arrested as early as January 29, 1963 at about 4.15 a.m. Now, identification parades are ordinarily held at the instance of the investigating officer for the purpose of enabling the witnesses to identify either the properties which are the subject-matter of alleged offence or the persons who are alleged to have been concerned in the offence. Such tests or parades belong to the investigation stage and they serve to provide the investigating authority with material to assure themselves if the investigation is proceeding on right lines. It is accordingly desirable that such test parades are held at the earliest possible opportunity. Early opportunity to identify also tends to minimise the chances of the memory of the identifying witnesses fading away by reason of long lapse of time. But much more vital factor in determining the value of such identification parades is the effectiveness of the precautions taken by those responsible for holding them against the identifying witnesses having an opportunity of seeing the persons to be identified by them before they are paraded with other persons and also against the identifying witnesses being provided by the investigating authority with other unfair aid or assistance so as to facilitate the identification of the accused.

8. In view of the above, the dock identification after about an year, in Court, would not be sufficient to place reliance for convicting appellants Shiv and Ramesh Chandra for the offence of committing murder without corroboration by the evidence of valid test identification during the course of investigation.

9. There are some major contradictions, improvements and embellishments in the statements of these witnesses regarding going of the appellants Ramesh

Chandra and Shiv with deceased and hiring the jeep, but we do not feel it necessary to discuss the same in view of major deficiency in the prosecution case about establishing the identity of the appellants.

10. The appellants Shahid, Pappan alias Mohd. Salim and Shoaib have been convicted for receiving the stolen property, as described herein-above, but their conviction is also not sustainable because the name and number plate of the jeep, chassis number and engine number were not traced and different-different parts of the jeep said to have been seized, but there is no evidence laid by the prosecution to establish that the seized parts of the jeep were the parts of the same jeep, which was taken by deceased Chandu.

11. PW-16 Sunil owner of the jeep regarding tape recorder and other articles of the jeep, has not stated anything in examination in chief and in cross-examination he has stated that jeep was given to him on Supurdginama. In further cross-examination, he has stated that Court had given the parts of the jeep on supurdginama, thereafter he got it assembled and incurred expenses of Rs.7,000/- Further say of this witness is that he kept jeep with him for about three months and the same was taken away by finance company because the jeep was purchased by him on hire-purchase agreement. Neither the parts of the jeep were got identified during the course of investigation nor jeep was identified in Court by witnesses PW-9 Ram Singh, PW-10 Anil and PW-12 Basanti Bai. Statement of PW-16 Sunil is of no use because he had not seen the deceased going in a jeep.

12. For establishing the fact that from the possession of these appellants property of the offence was seized, prosecution has not adduced any substantive piece of evidence, therefore, only on the basis of recovery these appellants cannot be convicted because the important link is missing to prove the ingredients of Section 411 and 413 of "the IPC". Prosecution has to establish beyond reasonable doubt that the seized property from the exclusive possession of the appellants, was the property of the offence, but failed to prove the same.

13/ In the light of aforesaid discussion, we allow both the appeals. Conviction and sentence, as passed by learned trial Court against the appellants, are hereby set aside. They are on bail, their bail and surety bonds stand discharged.

14/ Original judgment is kept in Criminal Appeal No.404/2002, a copy whereof be placed in the record of Criminal Appeal No.228/2002.

Appeal allowed.

I.L.R. [2010] M. P., 2373
APPELLATE CRIMINAL
Before Mrs. Justice Sushma Shrivastava
7 May 2010*

GIRISH KUMAR ... Appellant
Vs.
STATE OF M.P. ... Respondent

A. **Penal Code (45 of 1860), Sections 376, 506-I** - *Rape - Testimony of the prosecutrix against the appellant if found to be clear, cogent and trustworthy and it inspires confidence, it can be acted upon without any corroboration.* (Para 20)

क. दण्ड संहिता (1860 का 45), धाराएँ 376, 506–I – बलात्संग – अभियोक्त्री की अपीलार्थी के विरुद्ध साक्ष्य यदि स्पष्ट, अकाट्य एवं विश्वसनीय होना पायी जाती है एवं विश्वास हेतु प्रेरित करती है तो उस पर बिना किसी सम्पुष्टि के अवलम्ब किया जा सकता है।

B. **Penal Code (45 of 1860), Section 376** - *Rape - Merely because the victim was more than sixteen years of age, that cannot be a ground to hold that she was a consenting party - Also the mere fact that the prosecutrix was found habitual to sexual intercorse by Doctor, shall be no ground to suspect her testimony as against the appellant.* (Para 17)

ख. दण्ड संहिता (1860 का 45), धारा 376 – बलात्संग – मात्र इसलिए कि पीड़ित की आयु 16 वर्ष से अधिक थी, वह यह अभिनिर्धारित करने का आधार नहीं हो सकती कि वह सहमत पक्षकार थी – मात्र यह तथ्य कि चिकित्सक द्वारा अभियोक्त्री को मैथुन का अभ्यस्त होना पाया गया, अपीलार्थी के विरुद्ध उसके साक्ष्य पर संदेह का कोई आधार नहीं होगा।

C. **Criminal Procedure Code, 1973 (2 of 1974), Section 154** - ***FIR - Delay in lodging*** - *In the backdrop of threat and intimidation caused by the appellant to the prosecutrix, which resulted in delay in lodging the FIR by twenty five days, her testimony cannot be viewed with suspicion, particularly when there are no cogent reasons for false implication.* (Para 19)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – प्रथम सूचना रिपोर्ट – दर्ज कराने मे विलम्ब – अपीलार्थी द्वारा अभियोक्त्री को कारित धमकी और अभित्रास की पृष्ठभूमि में, जिसके परिणामस्वरूप प्रथम सूचना रिपोर्ट दर्ज कराने में 25 दिनों का विलम्ब हुआ, उसकी साक्ष्य को संदेह की दृष्टि से नहीं देखा जा सकता, विशेषतः तब जब कि झूठा फंसाये जाने का कोई प्रत्यायक हेतु नहीं है।

Cases referred :

AIR 2000 SC 1812, 2004 SC 2884, AIR 2005 SC 1248(1), AIR 2009 SC 711, AIR 2009 SC 1010, 2005 AIR SCW 6009.

Imtiaz Hussain, for the appellant.
Amod Gupta, Panel Lawyer, for the respondent/State.

*Cr.A. No.1453/1995 (Jabalpur)

JUDGMENT

SUSHMA SHRIVASTAVA, J. :–Appellant has challenged his conviction and order of sentence passed by Sessions Judge, Seoni in Special Case No.4/95, decided on 20.10.95.

2. Appellant has been convicted under Section 376, 506-I of IPC and sentenced to rigorous imprisonment for seven years with fine of Rs.100/- and rigorous imprisonment for six months, for the respective offences, by the impugned judgment. Both the sentences were directed to run concurrently.

3. According to prosecution, on 13.10.94 about 6/7 'O'clock in the evening at village Karkoti when prosecutrix, a member of Scheduled Caste aged about fourteen years, had gone to latrine on the outskirt of the village and was coming back, appellant caught hold of her, took her near the bank of the lake and fell her under a tree: when prosecutrix tried to scream, appellant took out a knife, gagged her mouth and committed forcible sexual intercourse with her. Prosecutrix began weeping under pain and seeing blood on her private part, appellant then threatened to kill her and asked her to go to her house and also intimidated her not to disclose the incident to anyone. Prosecutrix came back to her house, but out of fear and bashfulness she did not disclose the incident to anyone. However, when she developed pain in her abdomen, she narrated the whole incident to her mother on 6.11.94 and thereafter, went to Police Station to lodge the FIR. On the basis of her report, an offence was registered against the appellant and was investigated. The underwear of the prosecutrix worn at the time of incident produced at the Police Station was seized from her. Prosecutrix was sent for medical examination. On being arrested, appellant was also sent for medical examination. The vaginal slide of the prosecutrix and seminal slide of the appellant collected during their medical examination were sent for forensic examination. After due investigation, appellant was prosecuted under Section 376. 506-II of IPC and 3(1)(xi) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (hereinafter referred as 'Act') and was put to trial.

4. Appellant abjured the guilt and pleaded false implication due to enmity.

5. Learned Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, acquitted the appellant of the charge under Section 3(1)(xi) of the Act, but found him guilty for commission of offences under Section 376 and 506-I of IPC and sentenced him as aforesaid, by the impugned judgment, which has been challenged in this appeal.

6. Learned counsel for the appellant submitted that the trial court erroneously convicted the appellant on the basis of sole testimony of the prosecutrix, despite negative medical evidence and delayed FIR. Learned counsel for the appellant further submitted that the trial court failed to consider that the prosecutrix did not disclose the incident to anyone for nearly twenty five days and there was no satisfactory explanation for undue delay of twenty five days in lodging the FIR.

According to learned counsel for the appellant, though the trial court came to a finding that the age of the prosecutrix was more than sixteen years, yet it failed to consider that the prosecutrix was a consenting party and even as per the medical report, she was habitual to sexual intercourse. Learned counsel for the appellant also submitted that the trial court failed to consider that the appellant was falsely implicated and the FIR was lodged at the instance of Sarpanch due to party rivalry in the village.

7. Learned counsel for the respondent/State, on the other hand, justified and supported the conviction of the appellant.

8. Perused the evidence on record. Prosecutrix (P.W-3) deposed in her evidence that at the relevant time about 6 or 7 'O'clock in the evening, she had gone to answer the call of nature near the lake and when she was returning back, appellant came from the backside, gagged her mouth and took her under a tree, fell her on the ground and pulled her underwear, sat on her, inserted his male organ into her private part and committed sexual intercourse with her. According to prosecutrix (P.W-3), appellant had gagged her mouth, so she could not scream and tried to kick him, but appellant did not leave her and when she began weeping, appellant took out a knife and threatened her not to disclose the incident to her parents.

9. Prosecutrix (P.W-3) further deposed that out of fear and bashfulness, she did not divulge the incident to her parents, but when she developed abdominal pain and vomiting, then on inquiry by her mother she narrated the whole incident to her mother. Her mother then went to sarpanch of the village, who advised to report the matter with the Police, then prosecutrix lodged the report (Ex.P-3) with the Police. Prosecutrix (P.W-3) also testified her signatures on the FIR (Ex.P-3).

10. Mahatlal (P.W-4), the father of the prosecutrix also corroborated this fact that on being informed of the incident of rape with his daughter from his wife after fifteen-twenty days, they went to Sarpanch of the village and apprised him of the incident, thereafter prosecutrix lodged the report with the Police. Shiv Prasad (P.W-5), the village Kotwar also corroborated this fact that he had gone to Police station with the Prosecutrix and she had lodged the report with the Police.

11. Prosecutrix (P.W-3) was cross-examined in extenso. However, despite cross-examination, nothing has been elicited in her evidence so as to discredit her version that when she was coming back after answering the call of nature, appellant caught hold of her, gagged her mouth and fell her on the ground and committed sexual intercourse with her. Her evidence unequivocally reveals that appellant had intimidated her, therefore, she did not disclose the incident to her parents out of fear and bashfulness. Although it has come in her evidence that it was the time of immersion of 'Durgaji' and there were lights around the place of occurrence and there was human traffic, but she categorically stated in para 9 of her deposition that she did not narrate the incident to anyone on the spot, as

nobody was present there at that time. Though it was a time of 'Naudurga', but sexual offences are committed by the offenders besieging an opportunity when the victim is found or seen lonely. Therefore, there are no reasons to doubt that when the prosecutrix was returning back alone in the evening, appellant caught hold of her, took her under the tree. fell her on the ground and committed sexual intercourse. The manner in which the appellant committed sexual intercourse with the prosecutrix. as narrated by her, per se indicates that she was subjected to forcible sexual intercourse.

12. The mere fact that prosecutrix (P.W-3) did not disclose the incident for a pretty long time to her mother, does not cast any doubt or suspicion over her testimony. Prosecutrix (P.W-3), who was a teenager, categorically deposed in her evidence that appellant had threatened and intimidated her and also had shown a knife alarming her not to disclose the incident to anybody. The aforesaid explanation given by the prosecutrix appears to be reasonable and satisfactory. It is not unnatural for a young girl to have been frightened and shocked by such an act and threats given by the appellant. The incident, as narrated by the prosecutrix (P.W-3), finds substantial corroboration from the FIR (Ex.P-3) lodged by her with the Police.

13. Although prosecutrix (P.W-3) was confronted with the FIR (Ex.P-3) and her Police Statement (Ex.P-5) as to the omission of certain facts stated by her in her evidence, but the omissions are not vital and material and nothing substantial has been brought forth so as to disbelieve her version that appellant committed rape with her. Even otherwise, the FIR is not the encyclopedia of the whole prosecution case and need not contain minute deals of the entire episode. More so, it has been clearly mentioned in the FIR (Ex.P-3) lodged by the victim girl (P.W-3) that she did not disclose the incident to her parents out of fear and bashfulness and when she developed pain in her abdomen, she narrated the whole incident to her mother a day prior to the lodging of the FIR.

14. The fact that the prosecutrix was working with the Sarpanch of the village or her mother had gone to Sarpanch and informed him of the incident before lodging of the report, cannot be a ground to reject or suspect the testimony of the prosecutrix (P.W-3). It is not uncommon with the rustic villagers first to inform such incidents to the village Sarpanch before going to the Police. The suggestion made in her cross-examination that one Baijnath, the brother of appellant had contested the election against the village Sarpanch and there was party rivalry, is far fetched suggestion for false implication of the appellant and does not appeal to reason. Had it been a case of false implication at the instance of Sarpanch due to party rivalry, the report would have been lodged against the brother of the appellant, who contested the election and not against the apoellant.

15. The main thrust of the submission of learned counsel for the appellant has been that the prosecutrix, being more than sixteen years of age, as found by trial court, was a consenting party, and therefore, that was the reason for not disclosing the incident to her parents for twenty five days and she also conceded ."यदि मेरी माँ

नहीं पूछती तो मैं अपनी माँ को घटना का हाल नहीं बताती।'' However, such a statement obtained from the prosecutrix (P.W-3) on a hypothetical question in cross-examination, does not necessarily imply that the prosecutrix was a consenting party, particularly when she categorically deposed in her sworn testimony that out of fear and bashfulness she did not disclose the incident to her parents. Moreover, it nowhere transpires from the evidence of prosecutrix (P.W-3) that she was familiar with the appellant or had any contact or affair with him so as to be consenting party in the incident. On the other hand, prosecutrix (P.W-3) clearly deposed in para 6 of her deposition that she had never talked to the appellant prior to the incident. Appellant has also not claimed any prior acquaintance or an affair with the prosecutrix (P.W-3). Thus the plea of her being consenting party to the incident, does not appeal to reason, nor any such suggestions or facts are brought forth in her evidence so as to infer that the prosecutrix was a consenting party. On the other hand, the vivid description of the incident given by prosecutrix (P.W-3) in para 1 and para 6 of her deposition clearly indicates that she was subjected to forcible sexual intercourse.

16. Although Dr. A. Varma (P.W-2), who medically examined prosecutrix (P.W-3), did not find any external or internal injury on her person and did not give any definite opinion as to the commission of rape with her, but that also does not negate the statement of the prosecutrix. When the prosecutrix (P.W-3) was medically examined twenty five days after the incident, no fresh injury of any kind was expected to be detected on her body. The Apex Court in the case of *State of Rajasthan Vs. N.K.* reported in AIR 2000 Supreme Court Page 1812 has held that the absence of visible mark of injuries on the person of prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any injuries or that she had not offered any resistance at the time of commission of crime; and absence of injuries on the person of prosecutrix is not necessarily an evidence of falsity of allegation or an evidence of consent on the part of prosecutrix. It was also reiterated by the Apex Court in the case of *Dastagir Sab and another Vs. State of Karnataka* reported in AIR 2004 Supreme Court page 2884, that the absence of injury on the person of prosecutrix would not by itself be sufficient to discard the prosecution case.

17. Moreover, merely because the victim was more than sixteen years of age, as found by the trial court, that cannot be a ground to hold that she was a consenting party. The mere fact that the prosecutrix (P.W-3) was found habitual to sexual intercourse by Dr. A. Varma (P.W-2). is no ground to suspect her testimony as against the appellant. Even if the girl is habitual to sexual intercourse. as observed by the Apex Court in the case of *State of U.P. Vs. Pappu alias Yunus and another* reported in AIR 2005 Supreme Court page 1248(1). each and every person has no right or licence to intrude upon her privacy without her consent and to ravish her.

18. Needless to emphasize that the delay of twenty five days in lodging the FIR,

as vehemently submitted by the learned counsel for the appellant, is also no ground to discard the testimony of the prosecutrix (P.W-3), particularly when she has given a cogent and satisfactory explanation that she did not disclose the incident to her parents out of fear and bashfulness. The Apex Court in the case of *State of U.P. Vs. Manoj Kumar Pandey* reported in AIR 2009 Supreme Court page 711 has held that the normal rule regarding the duty of the prosecution to explain the delay in lodging the FIR and the lack of prejudice and/or prejudice caused because of such delayed lodging of FIR does not per se apply to cases of rape. It would also be profitable to reproduce the following observation made by their Lordships in this behalf in the case of *State of Himachal Pradesh Vs. Prem Singh* reported in AIR 2009 Supreme Court page 1010:-

> "So far as the delay in lodging the FIR in question is concerned, the delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family member before coming to the Police Station to lodge a complaint. In a tradition bound society prevalent in India, more particularly, rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR."

19. In the instant case. as discussed hereinabove, prosecutrix (P.W-3) gave a possible and natural explanation that she did not disclose the incident of rape to her parents out of fear and bashfulness. In the backdrop of threat and intimidation caused by the appellant to the prosecutrix, which resulted in delay in lodging the FIR by twenty five days, her testimony cannot be viewed with suspicion. particularly when there are no cogent reasons for false implication of the appellant at the instance of prosecutrix (P.W-3).

20. In fact, upon careful scanning of the entire evidence of the prosecutrix (P.W-3), her testimony against the appellant is found to be clear, cogent and trustworthy and it inspires confidence and can be acted upon without any corroboration. , The submission of learned counsel for the appellant that the mother of the prosecutrix, to whom she narrated the incident, was not examined to corroborate the testimony of prosecutrix (P.W-3), also has no merit, when the testimony of the prosecutrix herself is found to be reliable, acceptable and trustworthy. It is well settled, as reiterated by the Apex Court in the case of *State of Himachal Pradesh Vs. Asha Ram* reported in 2005 AIR SCW page 6009 that the testimony of the prosecutrix alone can form the basis of conviction, if it inspires confidence and is found to be reliable.

21. In view of the foregoing discussion and the evidence as available on record, the conviction of the appellant under Section 376 and 506-I of IPC, as recorded by the trial court, does not call for any interference in appeal.

22. There are no special or adequate reasons to reduce the sentence of seven

years' rigorous imprisonment awarded to the appellant, which is minimum prescribed under Section 376(1) of IPC and there are also no reasons to reduce the sentence of six months under Section 506-I of IPC.

23. Appeal has no merit. Appeal, therefore, fails and is dismissed.

24. Appellant is on bail. He shall surrender to his bail bonds to serve out the remaining part of his sentence.

Appeal dismissed.

I.L.R. [2010] M. P., 2379
APPELLATE CRIMINAL

Before Mr. Justice S.L. Kochar & Mr. Justice Brij Kishore Dube

17 May, 2010*

RADHIYA @ RADHESHYAM ... Appellant

Vs.

STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Sections 148, 149 & 302 - *Eye witnesses' account is not duly corroborated by medical evidence - I.O. failed to assign any reason as to why these witnesses were examined after 4-5 days of the incident - Statement of witnesses regarding time of lodging of Dehati Nalishi, contradictory - Conviction and sentence passed by trial Court set aside - Appeal allowed.* (Paras 10, 12 to 17)

दण्ड संहिता (1860 का 45), धाराएँ 148, 149 व 302 – प्रत्यक्षदर्शी साक्षियों का विवरण चिकित्सीय साक्ष्य से भलीभांति सम्पुष्ट नहीं हुआ – अन्वेषण अधिकारी इस बात का कारण बताने मे विफल रहा कि इन साक्षियों का परीक्षण घटना के 4–5 दिन बाद क्यों किया गया – देहाती नालिशी दर्ज कराने के समय के संबंध मे साक्षियों के कथन परस्पर विरोधी – विचारण न्यायालय द्वारा पारित दोषिसिद्धि एवं दण्डादेश अपास्त – अपील मंजूर।

Cases referred :

(2009) SCC (Cri) 212.

R.R. Trivedi, for the appellant.

G. Desai,Dy. A.G., for the respondent.

J U D G M E N T

This Judgment shall also govern disposal of both the appeals as they arise out of the common judgment.

2. Since appellant Samandarsingh had died during pendency of appeal, therefore his appeal stands abated and his name has been deleted from the cause title of memo of appeal vide order dated 6.1.09 of this court.

2. Appellant Radhiya @ Radheshyam has filed Criminal Appeal No. 981 of 2000 and Appellants No.1 to 3 have filed Criminal appeal No.1066 of 2000 against

*Cr.A. No.981/2000 (Indore)

the impugned judgment and order of conviction and sentence passed by learned Sessions Judge, Rajgarg (Biaora) in ST No.76 of 1998 by which all the appellants stand convicted and sentenced as under:-

Name of appellant	offence u/s.	sentence
1. Radhiya @ Radheshyam	Sec,148 IPC	2 years RI with fine of Rs.500/- in default to undergo six months RI.
	Sec. 149/302	Life Imprisonment. with fine of Rs.1000/-, in default to undergo one year R.I..
2. Banesingh	Sec,148 IPC	2 years RI with fine of Rs.500/- in default to undergo six months RI.
	Sec. 149/302	Life Imprisonment. with fine of Rs.1000/-, in default to undergo one year R.I..
3. Amarsingh	Sec,148 IPC	2 years RI with fine of Rs.500/- in default to undergo six months RI.
	Sec. 149/302	Life Imprisonment. with fine of Rs.1000/-, in default to undergo one year R.I..
4. Mangilal	Sec,148 IPC	2 years RI with fine of Rs.500/- in default to undergo six months RI.
	Sec. 149/302	Life Imprisonment. with fine of Rs.1000/-, in default to undergo one year R.I..

All the sentences shall run separately.

3. According to the prosecution case, before two days of the incident i.e. on 5.4.1998 in the evening at about 5 pm, complainant PW-2 Nandram had gone to village Koila along with other villagers for attending marriage of the son of Onkar Patel and they were returning back including Jagannath (deceased) to their village Teelapura. When they reached near the house of Kanwarji situated in village Chandpura, all the five accused reached over there armed with Lathis and Stones and on extortion made by accused Amarsingh, they started assaulting Jagannath by Lathis and Stones. Accused Amarsingh caused several injuries by pelting Stones. Jagannath (deceased) succumbed to the injuries on the spot itself.

PW-2 complainant Nandram met on the way at cross road of village Khandur to PW-7 Head Constable Hazarilal Sharma and lodged Dehati Nalish Ex. P.2. On the basis of Dehati Nalish, FIR (not proved) was registered by PW-11 Mr. A. K. Agrawal, T. I. On the basis of Dehati Nalish, FIR Ex. P.1 was registered at Bhojpur Police Station and this FIR (Ex.P.1) was produced before T. I. Rajgarh by PW-1 Constable Rugnathsingh.

4. The Investigating Officer after preparation of inquest report Ex.P.5, sent the dead body for post mortem examination to the hospital and the same was conducted by PW-8 Dr. V.K.Jha. Post Mortem report is Ex. P.6. PW-11 A. K. Agrawal, T. I. after registration of FIR in Rajgarh Police Station, prepared the spot map Ex.P.9 and also recorded the statements of witnesses who were acquainted with the facts of the case. On arrest of accused persons as per their disclosure statements under sec.27 of Evidence Act, Lathis were seized. After completion of investigation, five accused were charge sheeted for commission of murder of Jagannath, punishable under secs. 148, 302 and 302 read with sec.149 of the Penal Code.

5. All the accused denied the charges levelled against them and claimed for trial.They have examined three witnesses in defence, whereas, prosecution has examined in all 12 witnesses and got exhibited about 24 documents to prove its case.

6. Learned Sessions Judge after trial found the prosecution case proved, convicted and sentenced the appellants as noted herein above.

7. We have heard learned counsel appearing for the parties and also perused the entire record minutely. It emerged from the record that conviction recorded by the Trial Court is based on eye witnesses account of PW-2 Nandram, PW-3 Deviram, both cousin brothers of deceased Jagannath, PW-6 Shankar, an independent witness as well as PW-10 Shivlal, son of deceased Jagannath.

8. Before the Trial Court as well as this Court, homicidal death of deceased Jagannath has not been disputed, otherwise also, on the basis of the evidence of PW-8 Dr. VK Jha, it is fully proved. Dr. VK Jha also proved post mortem Ex. P.6. During post mortem examination, Dr. Jha had found three external injuries on the dead body of deceased Jagannath, caused by hard and blunt object and in his opinion, Jagannath had died because of injury to Skull, causing damage to brain matters and fracture of fronto parietal bone.

9. Learned counsel appearing for the appellants submitted that on internal examination of Skull, Dr. Jha had found it in putrefied condition and in para-7 of his statement, he also opined that the dead body was completely decomposed and the same could take 7-8 days.. According to the opinion of Dr. Jha recorded in paras 7, 8 and 9, deceased Jagannath could die prior to the date of incident i.e. 5.4.1998 at 5 pm. In the light of aforesaid opinion of Dr. Jha PW-8, prosecution has failed to establish that deceased Jagannath had died on 5.4.1998 at or about 5

pm and statements of eye witnesses do not find support from medical evidence about the date and time of incident.

10. Having given our anxious consideration to the evidence of medical expert, we are of the opinion that eye-witnesses' account is not duly corroborated by medical evidence of Dr. Jha about actual date and time of commission of murder of Jagannath. The evidence of Dr. VK Jha PW-8 has given great jolt to the prosecution case.

11. Now we would examine the evidence of eye witnesses, whether their testimonies are free from all doubts to place reliance ?

12. PW-3 Devram, PW-6 Shankar and PW-10 Shivlal were interrogated by I. O. PW-11 AK Agrawal on 10.4.1998. The I.O. Mr. Agrawal has failed to assign any reason as to why these witnesses were examined after 4-5 days of the incident. Delay in recording statements of eye witnesses or disclosure by the eye witness/ s, simplicitor is not sufficient to fragile the prosecution case, if the same is explained by reasonable and plausible explanation, but, in the instant case, prosecution has failed to give any explanation for delay in disclosure to Police by the witnesses as well as delay in recording the statements of eye witnesses by the I. O., though their names were mentioned specifically in FIR and PW-2 Nandram and PW-3 Devram are the real cousin brothers of deceased Jagannath.

13. Further, there is one more serious lapse in prosecution case i.e. PW-2 Nandram has deposed in para-8 of his statement that on the next day of the incident, he had gone to Police Station, where he met a clerk who told him that after spot inspection, report would be written. Thereafter, Police reached on the spot and after inspecting the same, his report was recorded. Further say of this witnesses is that he reached at the Police Station at about 8 am. and returned back in a Jeep on the spot at 11am.. Thereafter, at about 12 .00 noon, his report was recorded. He has further stated that he was not having Wrist-watch, therefore, he cannot say whether report was recorded at 2.00 pm. Thus, it is clear from his evidence that he was not sure whether report was recorded at 12.00 noon or at about 2.00 pm.

14. PW-2 Nandram in para 24 has stated that Station House Officer told him that Jagannath was not assaulted by inhabitants of village Chandpur, he (this witness) is telling lie and his version would be verified on seeing the body of Jagannath about number of injuries. He has also stated that dead body of Jagannath was seen by Investigating Officer and he told him that he made a correct complaint and recorded his report while sitting near the dead body. This statement of Nandram is contradictory to his statement given in para-2 of examination-in-chief, wherein, he has deposed that Jagannath was taken to Bhojpur Police Station in injured condition where he (Nandram) lodged the report and in para-3, he stated that deceased Jagannath was taken to Khilchipur hospital where on examination by Doctor, he was declared dead.

15. The aforesaid statements of Nandram about lodging of the report, medical evidence about time of death of deceased and delay of five days in recording of statements of eye witnesses are sufficient to infer that infact they were not the eye witnesses of the incident and simple intimation of death was given to Police and Police after reaching on the spot, concocted a case at the instance of relatives of the deceased.

16. Supreme Court in the case of *Ramesh Baburao Devaskar and others Vs. State of Maharashtra* [(2009) Supreme Court Cases (Cri.) 212)] has held that FIR was recorded after inquest inquiry and the same was also recorded not immediately, but, after visit of the place of occurrence by Investigating Officer alongwith the witnesses, such FIR cannot be relied upon. More or less, similar is the situation in the instant case regarding recording of FIR/Dehati Nalish. The version about recording of Dehati Nalish, Ex.P.2, PW-7 Head Constable Hazarilal Sharma, who has also prepared inquest report Ex.P.5, is not corroborated by the author of Dehati Nalish PW-2 Nandram. Both have given contradictory statements about lodging of Dehati Nalish Ex.P.2. According to Nandram, no report like Dehati Nalish Ex.P.2 was recorded, but, he lodged the final report at Police Station. At the same time, in cross-examination, he has given contradictory statement that his report was not recorded and the same was recorded on the spot after visit of the spot by the Investigating Officer/Police and inspection of the body of deceased. Yet there is one more serious infirmity in the instant case, in comparison to the case of *Ramesh Baburao* (supra) i.e.time and date of the incident is contradicted by medical evidence of Dr. VK Jha.

17. Ex-consequently, both these appeals filed by appellants are allowed. Their conviction and sentence passed by learned Sessions Judge are hereby set-aside. Their bail bonds stand discharged.

Appeal allowed.

I.L.R. [2010] M. P., 2383

APPELLATE CRIMINAL

Before Mr. Justice U.C. Maheshwari

18 May, 2010*

STATE OF M.P. ... Appellant

Vs.

PAPPOO @ SALEEM & ors. ... Respondents

Evidence Act (1 of 1872), Sections 137 & 138 - *Charge u/ss. 452, 327 & 506-B of IPC framed, and after evidence, case was fixed for judgment - Later on, additional charge of Ss. 325/34 & 323/34 of IPC were framed and witnesses were recalled for further cross-examination - Out of them, two witnesses could not be produced - It was contended on behalf of State that*

*Cr.A. No.507/1994 (Jabalpur)

the Court should have considered the evidence of these two witnesses for charge u/ss. 452, 327 & 506-B IPC as the cross-examination was already over - Held - As per settled proposition of law the deposition of witnesses could not be taken into consideration if the same is not complete in accordance with the provision of Ss. 137 & 138 - Appeal against acquitted dismissed. (Paras 6 & 8)

साक्ष्य अधिनियम (1872 का 1), धाराएँ 137 व 138 – भा.द.सं. की धारा 452, 327 एवं 506–बी के अंतर्गत आरोप विरचित किये गये और साक्ष्य के उपरांत मामला निर्णय के लिए नियत किया गया – बाद में भा.द.सं. की धारा 325/34 एवं 323/34 के अतिरिक्त आरोप विरचित किये गये तथा साक्षियों को अतिरिक्त प्रतिपरीक्षा के लिए पुनः बुलाया गया – जिनमें से दो गवाह उपस्थित नहीं किये जा सके – राज्य की ओर से अभिकथन किया गया कि न्यायालय को भा.द.सं. की धारा 452, 327 एवं 506–बी के अन्तर्गत आरोप के लिये इन दो साक्षियों की साक्ष्य पर विचार किया जाना चाहिये था क्योंकि प्रतिपरीक्षा पहले ही समाप्त हो गयी थी – अभिनिर्धारित – विधि की स्थापित प्रतिपादनाओं के अनुसार यदि साक्षियों का अभिसाक्ष्य धारा 137 एवं 138 के उपबंधानुसार पूर्ण नहीं है तो उसे विचार में नहीं लिया जा सकता – दोषमुक्ति के विरूद्ध अपील खारिज।

Cases referred :

AIR 1937 Oudh 168, 2003(1) MPLJ 606, AIR 1978 SC 59, AIR 1974 SC 344.

B.P. Pandey, Dy.G.A., for the appellant.

None, for the respondents.

J U D G M E N T

U. C. Maheshwari J.:–This appeal is directed on behalf of the appellant/ State under Section 378 of Cr. P. C. being aggrieved by the judgment dated 1.3.1994 passed by the Chief Judicial Magistrate Balaghat in Criminal Case No.790/ 87 acquitting the respondents from the charge punishable under Section 452, 327, 506-B, 325/34 and 323/34 of IPC.

2. The facts giving rise to this appeal in short are that on 17.3.1987 at about 4.00 pm one Baldeo Kumar accompanied with Shiv Charan and Yogendra was taking tea in his office at the same time the respondents including the deceased respondent No.2 Deva under the influence of intoxicated substance entered in his office and demanded the donation of Holi Festival. On asking by Baldeo Kumar that such festival is over and he has already given the donation earlier in that regard, on which the respondents and deceased respondent Deva after abusing with filthy language to Baldeo Kumar and other persons named above beaten them and also gave threat to kill them. In such incident Baldeo has sustained some grievous injuries. The matter was reported to the police on which an offence was registered against the respondents under Section 452, 294, 323, 506-B and 34 of IPC. The injured persons were taken to hospital where their MLC reports were prepared and under the advice of doctor x-ray of injured Baldeo and Yogendra was carried out in which the crack (fracture) on base of distilphalonx of left thumb of Baldeo was revealed. On completion of the investigation the respondents

and deceased accused were charge sheeted for the offence under Section 452, 327 and 506-B of IPC.

3. After committing the case to the Sessions Court initially the charge of Section 452, 327 and 506-B of IPC were framed against the respondents. They abjured the guilt, on which the trial was held, in which as many as six witnesses were examined by the prosecution to prove its case while one Bhola Singh was examined as court witness. Thereafter accused statement was recorded on 5.5.1989. Subsequent to it on 19.3.1989 one witness was examined by the respondents in their defence. After closing the defence vide order dated 19.6.1989, the case was posted for 23.6.1989 for final argument. The same was adjourned for 26.6.1989 and on 26.6.1989 final arguments were heard and case was fixed for 4.7.1989 to deliver the judgment. On such date instead to deliver the judgment by mentioning the reasons additional charges for the offence under Section 325/34 and 323/34 were also framed against the respondents. They again abjured the guilt with respect of such charges, on which at the request of the defence all the examined prosecution witnesses were directed to be recalled for further cross-examination. Subsequently on 12.7.1990 with respect of additional charge the defence counsel prayed to recall only three witnesses namely Yogendra Agrawal (P.W.1), Baldeo (P.W.6) and Shivcharan ((P.W.6) for their further cross-examination. In compliance of such order on the same day the present witness Baldeo was further cross-examined by the defence and the case was adjourned for cross-examination of said Yogendra and Shivcharan. For one reason or another inspite extending various opportunities between 31.7.90 to 22.1.1994 the prosecution could not produce such witnesses for further cross-examination and case was posted for defence evidence and ultimately on 1.3.1994 the final arguments were heard and considering the circumstance that respondents could not get the opportunity of complete cross-examination of the prosecution witnesses namely Yogendra and Shiv Charan with respect of the additional/ amended charges held that there statement being incomplete could not be taken into consideration to draw any inference against the respondents and in the lack of any independent evidence in support of the victim the respondents were acquitted from all alleged charges, on which the State has come forward with this appeal challenging such acquittal of the respondents.

4. Shri B. P. Pandey, learned Dy. Government Advocate after taking me through evidence led by the prosecution said that at the initial stage the charge of section 452, 327 and 506-B of IPC were framed against the respondents for which entire trial was held and at the stage of delivery of judgment additional charges of Section 325/34 and 323/34 of IPC were framed and subsequent to it only with respect of such additional charges the alleged witnesses were recalled for further cross-examination. Out of them Baldeo was cross-examined by defence and to secure the presence of above mentioned other witnesses made best efforts but could not secure there presence for further cross-examination. In such premises firstly he

said that even after framing the additional charges of aforesaid section the additional evidence was not necessary and case ought to have been decided by the trial Court on the basis of available evidence. In any case if Yogendar and Shivcharan could not be further cross-examined by the defence with respect of additional charges even then their testimony could have been considered by the trial court on merits to decide the case with respect of earlier framed charges of Section 452, 327 and 506-B of IPC. Only on account of non-production of some witnesses for further cross-examination by ignoring the evidence adduced by the prosecution with respect of earlier charges the respondents could not be acquitted by the trial court and prayed for setting aside the judgment of the trial court with a prayer to convict the respondents by allowing this appeal.

5. After examining the record of the trial court and perusing the impugned judgment, I am of the considered view that trial court has not committed any error in acquitting the respondents from the alleged charges.

6. True, it is that at the initial stage the charges of section 452, 327 and 506-B of IPC were framed against the respondents and after holding the trial the case was fixed for delivery of judgment on 4.7.1989 and on on such date instead to deliver the judgment the trial Court has framed additional charge of Section 325/34 and 323/34 of IPC against the respondents. So for additional framed charges of Section 323/34 of IPC is concerned, I am of the view that such charge was covered under Section 327 of IPC and for that purpose no further cross-examination of any examined witnesses was required because of on appreciation of evidence instead the offence of Section 327 of IPC the offence of Section 323 of IPC is made made out then by virtue of Section 222 of CrPC the trial court could have punished the respondents under Section 323 of IPC, as the same is a minor offence of section 327 of IPC. So far the charge under Section 325/34 of IPC is concerned the same was not covered by any of the existing charge framed earlier. Therefore, further cross-examination of examined prosecution witnesses subject to request of the respondents was necessary and in that regard the trial court has not committed any error in extending such liberty to the defence and directing the prosecution to produce the above mentioned three witnesses namely, Yogendar, Baldeo and Shivcharan for their further cross-examination. It is apparent on record as stated above that inspite extending various opportunities except Baldeo Prasad no other examined witnesses namely Yogendar and Shivcharan were produced for their further cross-examination, on which the evidence of prosecution was closed. As per settled proposition of law the deposition of witnesses could not be taken into consideration if the same is not complete in accordance with the provision of Section 137 and 138 of Evidence Act. The statement of witness could be treated to be completed only after his cross-examination and if he is re-examined by the prosecution then after recross-examination. In such premises the right of the other party to cross-examine the witnesses is not only a formality but the same is a substantive right of such party to prove his case and defence.

Such view is fully fortified by the decision of Oudh High Court in the matter of *Ram Kumar Vs. Emperor* reported in AIR 1937 Oudh 168, in which it was held as under :

> "The testimony of a witness is not legal evidence unless it is subjected to cross-examination; and where no opportunity has been given to the accused's counsel to test the veracity of the principal prosecution witnesses, or where owing to the refractory attitude of the witness the Court is constrained to terminate all of a sudden and prematurely the cross-examination of the witness, the evidence of such a witness is not legal testimony and cannot be the basis of a judicial pronouncement."

7. The aforesaid case law is also taken into consideration by this Court in the matter of *Lallu Vs. State of M. P.* reported in 2003 (1) MPLJ 606.

8. In view of aforesaid legal position the depositions of Yogendar and Shivcharan could not be said to be complete statement. In such premises, the evidence of such witnesses could not be taken into consideration to draw any inference against the respondents/ accused.

9. At this stage I would like to mention here that after framing the additional charges the accused like respondents could not be deprived from recross-examination of the earlier examined prosecution witnesses. On extending such opportunity to the accused like respondent then they had a unfettered right to cross- examine such witnesses in the light of entire scenario of the case and with all available defences. This possibility could not be ruled out that on recross-examination of such witnesses the defence might have proved their other available defence also but on account of non production of such witnesses the respondents have been deprived for the same. In such premises it is held that the trial court has not committed any error in excluding the statement of Yogendra and Shivcharan from consideration.

10. After excluding the depositions of above mentioned witnesses Yogendra and Shivcharan only the testimony of Baldeo uncorroborated from any independent evidence remains on record. According to the deposition of Baldeo he had some enmity with the respondents, thus unless his testimony is supported by any independent source of evidence his sole testimony is not sufficient to convict the respondents My. such view is fully supported by the decision of the Apex Court in the matter of *Bir Singh and others, v. The State of U.P.,* reported in AIR 1978 SC 59, in which it is held as under :

> "9. . . . . It is true that it was not incumbent on the prosecution to examine each and every witness so as to multiply witnesses and burden the record. This rule however does not apply where the evidence of the eye-witnesses suffers from various infirmities and could be relied upon only if

properly corroborated. In the instant case all the eye-witnesses had serious animus against the accused and they were interested in implicating the accused. The substitution of Ram Dularey Singh in the general diary was a suspicious circumstance. The fact that the police was not able to recover any weapon or to explain how the appellants got hold of the guns was yet another circumstances that required a reasonable explanation from the prosecution. According to the finding of the learned Sessions Judge even the F.I.R. was ante-timed and although the High Court has not accepted this finding we feel, that the High Court on this aspect has entered into the domain of speculation. In view of these special circumstances it was incumbent on the prosecution to examine the two witnesses at least to corroborate the evidence and if they were not examined the Sessions Judge was justified in drawing an adverse inference against the prosecution. At any rate it cannot be said that if under these circumstances the Sessions Judge was not prepared to accept the evidence of these witnesses his judgment was wrong or unreasonable. It may be that the High Court could have taken a different view but that at by itself as held by this court is not a sufficient ground for reversing an order of acquittal.

11. In view of the aforesaid, in the lack of any independent evidence in support of the complainant's deposition mere on his deposition the respondents could not be convicted in the case.

12. Besides the above, it is also settled proposition of law that on appreciation of evidence if two views are possible then out of them favourable to the accused should be adopted and if such view has already been adopted by the trial Court then at the appellate stage by re-appreciation of evidence the other view for holding the conviction against the respondents by setting aside their acquittal could not be adopted. My such view is based on a decision of the Apex Court in the matter of *"Harchand Singh v. State of Haryana"* reported in AIR 1974 S C 344. In such premises also the findings of the impugned judgment does not require any interference at this stage.

13. In such premises, I have not found any perversity, infirmity or illegality in the impugned judgment of acquittal of the respondents. Consequently, this appeal being devoid of any merits is hereby dismissed.

Appeal dismissed.

I.L.R. [2010] M. P., 2389
APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saksena & Mr. Justice G.S. Solanki

22 July, 2010*

SANJAY DEEVAN ... Appellant

Vs.

STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Sections 302, 364 & 201 - *Kidnapping & murder of a boy of 10 years - Held - The deceased child was last seen alive in the company of appellant and thereafter, his dead body was discovered from the forest on the information furnished by the appellant - The inevitable conclusion is that it was appellant only, who had kidnapped the child/deceased from the guardianship of his parents and committed his murder by throttling him, though the motive for commission of the crime remained shrouded in mystery.* (Para17)

दण्ड संहिता (1860 का 45) धाराएं 302, 364 व 201 – 10 वर्षीय बालक का व्यपहरण और हत्या – अभिनिर्धारित – मृत बालक को जीवित अवस्था में अंतिम बार अपीलार्थी के साथ देखा गया और उसके पश्चात्, उसका शव अपीलार्थी द्वारा दी गई सूचना पर जंगल से खोजा गया – अवश्यंभावी निष्कर्ष यह है कि वह केवल अपीलार्थी ही था जिसने बालक/मृतक का उसके माता–पिता की संरक्षता से व्यपहरण किया और उसका गला घोंटकर उसकी हत्या की, यद्यपि अपराध करने का हेतु रहस्यमय बना रहा।

Cases referred:

(2002) 1 SCC 702, (2002) 8 SCC 45, (2005) 12 SCC 438, (2006) 10 SCC 172, AIR 2002 SC 3206, AIR 1971 SC 2016.

S.C. Datt with *Siddharth Datt,* for the appellant.

Prakash Gupta, Panel Lawyer, for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by RAKESH SAKSENA, J. :–Appellant has filed this appeal against the judgment dated 2.5.1994 passed by Second Additional Sessions Judge, Hoshangabad in Sessions Trial No. 192/91, convicting him under Sections 302, 364 & 201 of the Indian Penal Code and sentencing him to imprisonment for life, rigorous imprisonment for ten years with fine of Rs. 1000/- and rigorous imprisonment for three years with fine of Rs. 1000/- on each count respectively. Sentences directed to run concurrently.

2. In short, the prosecution case is that on 24.8.1991, N.K.Vyas lodged report with the police that his son Prateek @ Bittu, aged about 10 years, who had gone out at about 5 O' clock in the evening for playing, did not come back home. A missing report was recorded in Rojnamcha No. 1955. On enquiry, it was revealed

*Cr.A. No.495/1994 (Jabalpur)

that the appellant was seen carrying Prateek @ Bittu on a scooter at 'Jind Baba Place' and 'Bus Stand', Hoshangabad. Since a letter was also received by N.K.Vyas in the past, in which name of appellant was mentioned, it was suspected that he might have kidnapped Prateek. After enquiry, a case under Section 364 of the Indian Penal Code was registered against him and the First Information Report (Ex. P/33) was recorded. On 25.8.1991, at about 19.45 hours appellant was arrested and on his information Ex. P/4, vide recovery memo Ex. P/5 dead body of Prateek was recovered from the forest of Budhni on the same day at about 23 hours. Merg intimation Ex. P/34 was recorded. Spot map Ex. P/6 and inquest memorandum Ex. P/7 were drawn. Dead body of Prateek was sent for postmortem examination. Dr. S.N.Katariya (PW8), Assistant Surgeon of District Jail, Hoshangabad conducted the postmortem examination of the body and found that the cause of death of Prateek was asphyxia due to throttling. Death was homicidal in nature. Postmortem report is Ex. P/16. After investigation, charge sheet was filed against the appellant under Sections 364, 302 and 201 of the Indian Penal Code.

3. During trial, appellant abjured his guilt. According to him, he was falsely implicated. In the night of 24.8.1991, two constables had come to his house and enquired about the missing child. On his expressing ignorance they left him, but on the next day i.e. on 25.8.1991, they took him to police station and booked in the case. In his defence, he examined Inspector Sunder Singh (DW1), Clerk of S.P. Office; M.L.Batham (DW2), Reader of S.D.M., Ganesh Prasad Rathore (DW3) and Constable Santosh Kumar Sharma (DW4).

4. In support of its case, prosecution examined 16 witnesses. There was no direct evidence in the case, it rested on the circumstantial evidence. Learned trial Judge relying mainly on the evidence of N.K.Vyas (PW1), Pradeep Verma (PW2), Amar Singh Rajput (PW3), who had seen the deceased in the company of accused, Brajesh Kashyap (PW4), Investigating Officers S.K.Pathak (PW14) and K.M.Vyas (PW15) held the appellant guilty and convicted and sentenced him as mentioned above. Aggrieved by the impugned judgment of conviction, appellant has filed this appeal.

5. We have heard the learned counsel for the parties.

6. Learned counsel for the appellant submitted that the evidence of prosecution witnesses having last seen the deceased together with the appellant was not sufficient to hold the appellant guilty of kidnapping and committing murder of deceased. The evidence of Pradeep Verma (PW2) and Amar Singh (PW3) was not reliable. Amar Singh (PW3) had not stated that he had seen the deceased child in the company of appellant, therefore, it could not be held that the deceased was seen with the appellant. He submitted that the circumstantial evidence adduced by the prosecution was not trustworthy. The evidence of alleged recovery of the dead body at the instance of appellant, was not reliable because appellant did not say that he threw or concealed the dead body of child at the place where from it

was recovered. He placed reliance on the decisions rendered by the Apex Court in *Subhash Chand Vs. State of Rajasthan*-(2002) 1 SCC 702, *Bodhraj @ Bodha and others Vs. State of Jammu and Kashmir*-(2002) 8 SCC 45, *Jaswant Gir Vs. State of Punjab*-(2005) 12 SCC 438, *Ramreddy Rajesh Khanna Reddy and another Vs. State of A.P.*-(2006) 10 SCC 172, *Ashish Batham Vs. State of Madhya Pradesh*-AIR 2002 SC 3206 & *Bakshish Singh Vs. State of Punjab*-AIR 1971 SC 2016. On the other hand, learned counsel for the State, justified and supported the judgment of conviction.

7. It was not disputed that deceased Prateek @ Bittu was the son of N.K.Vyas and had died of homicidal injuries. His dead body was found in the forest of Budhni on 25.8.1991. The body was identified by Jagdish Prasad (PW5), Uncle of deceased. After inquest, body was sent for postmortem examination. Dr. S.N.Katariya (PW8) conducted the postmortem examination and vide his report Ex. P/16 found following injuries on the body of deceased:-

(i) Contusion on the left cheek and left eye,

(ii) contusion on the right cheek and right eye,

(iii) abrasion on the anterior side of neck, 2" broad & 3" long, horizontally present over the glottis region on anterior side of neck,

(iv) abrasion three in number 1/4"x1/10" in size, present on right side of neck region and two abrasions on the left side of neck,

(v) contusion on the anterior side of neck region 3" below the glottis present, size 4"x3",

(vi) contusion on anterior side of chest region 5"x3" in size &

(vii) mouth was open, tongue bitten between the teeth and rigor mortis present on lower extremities.

In the opinion of doctor, cause of death of deceased was asphyxia due to throttling and injury to vital organ and lungs. The time of death was between 24 hours to 36 hours within duration from the postmortem examination. Thus, it was clearly established that the death of deceased was homicidal in nature.

8. The principle question now before us is whether Prateek @ Bittu was kidnapped and murdered by the appellant. Complainant N.K.Vyas (PW1) deposed that in the evening of 24th August, 1991, when he came back from his Office, he did not find Prateek. Despite vigorous search, his whereabouts could not be located, therefore, at about 8.00 P.M., he lodged missing report with the police. On next day i.e. 25th August, 1991, Pradeep Verma came to his house and informed that he had seen Prateek going on a scooter with Sanjay Deewan. Since petrol of the scooter of Sanjay Deewan had run out, he had helped him by towing his scooter to Fozdar Petrol Pump. N.K.Vyas further deposed that on 6th August, 1991, he had also received a letter intimidating him. All these facts were disclosed by this witness to police officers and the aforesaid letter was also handed over to police.

9. Pradeep Verma (PW2) stated that when he was present at his farm house, situated at Babai Road, near Jind Baba, he saw appellant with Prateek. Appellant told him that his petrol had run out, then he took a rope from Ramnath (PW9) and with it towed his scooter to Fozdar Petrol Pump. According to him, at about 9 O' clock in the night, he came to know that child Prateek was missing, therefore, he went to inform Mr. Vyas, but he did not find any body at the house. In the next morning at about 9.30 A.M., he again went to the house of Mr. Vyas and informed him what he had seen. Police seized the rope and the scooter from his possession with the help of which he had pulled the scooter of appellant. The evidence of Pradeep Verma (PW2) finds support from the evidence of N.K.Vyas (PW1) and also Ramnath (PW9) from whom he had obtained rope for towing the scooter of appellant. Ramnath (PW9) stated that at about 5.30 P.M., when he was at his shop situated near Jind Baba, Pipariya Road, Pradeep Verma came to him and asked for a rope for towing a scooter. The scooter was of a boy with whom a young boy was also present. Pradeep Verma (PW2) was subjected to a lengthy cross examination, but nothing emerged to render his evidence unreliable. Apart from it, Amar Singh (PW3) also disclosed that at about 6.30 P.M. on 24.8.1991 when he was at Budhni Triangle, at the Hotel of his brother, he saw appellant going on a scooter with a child of about 8 years. After some time, when he went at the road and was waiting for a bus to Hoshangabad, he again saw appellant coming back. At this time no body was with him. Though, some discrepancies and omissions were detected in his evidence, but they were not material or of substantive nature. It is also true that a criminal case about liquor and one for theft of wood was registered by police and forest officers against him, but merely on that count his evidence cannot be discarded which otherwise appears natural and consistent. It is true that Ramnath (PW9) and Amar Singh (PW3) did not know deceased, but still their evidence furnished corroboration to the testimony of Pradeep (PW2) that he saw appellant with deceased child at the relevant point of time. We are not impressed by the argument advanced by learned counsel for the appellant that since Pradeep Verma (PW2) and Amar Singh (PW3) had not seen the deceased at or near about the place where the dead body of deceased was found their evidence was not incriminating against the appellant. It is to be noted that Pradeep Verma (PW2) had seen the appellant going with the child at Hoshangabad Babai Road and Amar Singh (PW3) had seen them at Hoshangabad Budhni Road which in fact are different points of the same road.

10. In case of *Subhash Chand* (supra), the Apex Court observed that " to constitute the evidence of last seen together, the evidence must definitely permit an inference being drawn that the victim and the accused were seen together at a point of time in close proximity with the time and date of commission of crime." In the case in hand, according to N.K.Vyas (PW1) deceased was missing from the house since about 5 O' Clock in the evening. Pradeep Verma (PW2) saw the deceased in the company of appellant at about 5.30 P.M. and Amar Singh (PW3) saw them together at about 6 P.M. going on the scooter towards Budhni.

11. In *Bodhraj @ Bodha* (supra) the Supreme Court held that "the theory of

last seen together comes into play where the time-gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible and that it would be hazardous to come to a conclusion of guilt in cases where there is no other positive evidence to conclude that the accused and the deceased were last seen together." According to prosecution witnesses, they saw the deceased Prateek in the company of appellant at about 5.30-6.00 P.M. on 24.8.1991 and his dead body was recovered on 25.8.1991 at about 23 hours. According to Dr. S.N.Katariya (PW8) death of deceased had occurred within duration of 24-36 hours from the time of postmortem examination. Postmortem was done at about 9.30 A.M. on 26 August, 1991. Thus, there appears no inconsistency between the evidence of last seen together and the death of deceased. Apart from it, deceased was merely a child of about 8-10 years, who was kidnapped, therefore, it was not possible for him to have parted the company of appellant for going to any other destination. The facts of the case of *Jaswant Gir* (supra) are different. The evidence of last seen together was found doubtful because the appellant was going in a direction different from the destination of deceased and there was no apparent reason why deceased should have chosen to go in the vehicle which was proceeding in some other direction. In the case in hand, the deceased child was the pillion rider of the scooter driven by the accused.

12. After appreciating the evidence of Pradeep Verma (PW2) and Amar Singh (PW3) in the light of aforesaid enunciation of law, we find no iota of doubt that the appellant was last seen with the deceased, and that there was no such time-gap between the time of death of deceased and the time when the deceased was seen with the appellant to give rise to any other inference in favour of appellant.

13. Another piece of evidence relied on by the prosecution is about the recovery of the dead body of deceased on the information furnished by the appellant under Section 27 of the Evidence Act. Appellant was arrested on 25.8.1991 at about 7.45 P.M. Brajesh (PW4) deposed that after arrest, the appellant disclosed to police that the dead body of Prateek was lying in the forest of Budhni. This information was recorded by the police in memorandum Ex. P/4. Though, according to him, it was also mentioned by the appellant that he had killed the deceased by throttling, but the admissible portion of the information is only that the dead body was lying in the forest and he had thrown the clothes and slippers of deceased in the river. After recording the above information, he and appellant along with police inspector went to the place where the dead body was lying. By vehicle they went for about 1 ½ Kms. on the road then appellant led them to the place where the dead body was lying. The recovery of the dead body was recorded in memorandum Ex. P/5. The evidence of Brajesh Kashyap (PW4) finds support from the evidence of Jagdish (PW5), Sandesh Kumar (PW6), Photographer Manoj Malviya (PW7) and Investigating Officer S.K.Pathak (PW14). S.K.Pathak (PW14) categorically

stated that appellant proceeded ahead and got the dead body recovered from the forest. He denied that he had seen the dead body lying in the forest before hand.

14. Learned counsel for the appellant argued that in the information memorandum Ex. P/4, merely it was mentioned that the dead body was lying there, therefore, it cannot be assumed that it was thrown or concealed by the appellant as the body was lying at an open place. He placed reliance on the decision rendered by the Apex Court in *Bakshish Singh* (supra). In our opinion, the facts of Bakshish Singh's case were different. Where only incriminating evidence against the appellant was of his pointing the place where the dead body of deceased had been thrown. The Apex Court held that it was not a conclusive circumstance though it raised a strong suspicion against the appellant. Even if he was not a party to the murder, he could have come to know the place where the dead body of deceased had been thrown. But in the present case, the appellant led to Investigating Officer and to witnesses in the forest of Budhni and pointed out the place where the dead body was lying. It is apparent from map of the place Ex. P/6, from where the body was recovered, that the place was about 82 paces away from the Salkanpur-Budhni road, inside the forest and was not visible from the road. After closely examining the evidence of aforesaid witnesses, we are of the view that it has been clearly established that the dead body of deceased child Prateek was recovered on the information given by the appellant, and that there was nothing on record to indicate that the fact of the dead body lying in the forest was known to any body else. Apart from it, there appeared absolutely no reason for the appellant to have the knowledge about the dead body lying in the forest. Even if the dead body was not concealed, the exclusive knowledge about its presence in the forest could be readily attributed to appellant.

15. As far as the evidence adduced by the appellant that the Jeep in which the police had gone to recover the dead body, had gone to Salkanpur twice, it has been admitted by Santosh Kumar Driver (DW4) that second time he had carried the photographer to the spot from where the body was recovered. In this regard, Investigating Officer S.K.Pathak (PW4) categorically denied that he saw the dead body before it was recovered on the information furnished by the appellant. In our opinion, trial Court rightly disbelieved the evidence adduced by the appellant in his defence.

16. Learned counsel for the appellant submitted that the prosecution utterly failed to prove that the appellant had any motive to abduct the child Prateek and to commit his murder, therefore, it could not be held that the appellant was the perpetrator of the offence. The evidence adduced by the prosecution though may give rise to strong suspicion, but that cannot form basis of conviction of the appellant. According to him in the case of *Ashish Batham* (supra) the Supreme Court held that "mere suspicion, howsoever, strong or probable it may be, is no effective substitute for the legal proof required to substantiate the charge of commission of a crime and grave the charge is, greater should be the standard of

proof required. There is a long mental distance between `may be true' and `must be true'."

17. It is true that prosecution could not adduce any evidence about the motive on the part of the appellant for committing the offence, but in our opinion, where the evidence even though circumstantial, is of conclusive nature and indicates only the guilt of accused and rules out any other probability pointing the innocence of the accused, shall not restrain the Court from drawing the inference of the guilt of the accused. In this case, it has been satisfactorily proved by the prosecution evidence that the deceased child was last seen alive in the company of appellant and thereafter, his dead body was discovered from the forest on the information furnished by the appellant, therefore, in our opinion the inevitable conclusion is that it was appellant only, who had kidnapped the child Prateek from the guardianship of his parents and committed his murder by throttling him, though the motive for commission of the crime remained shrouded in mystery.

18. For the reasons stated hereinabove, we are of the definite view that the trial Court committed no error in holding the appellant guilty and in convicting him for the offences under Sections 364, 302 and 201 of the Indian Penal Code. Accordingly, the conviction and sentence of the appellant by the Court below are affirmed. Appeal is, accordingly, dismissed.

Appeal dismissed.

I.L.R. [2010] M. P., 2395
APPELLATE CRIMINAL
Before Mr. Justice R.C. Mishra
31 August 2010*

MURARILAL SHARMA ... Appellant
Vs.
STATE OF M.P. ... Respondent

Criminal Procedure Code, 1973 (2 of 1974), Section 85(3) - *Restoration of attached property - Requirements and procedure stated - Appeal allowed.* (Paras 7 to 9)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 85(3) – कुर्क संपत्ति का प्रत्यावर्तन – अपेक्षाएँ एवं प्रक्रिया अभिकथित – अपील मंजूर।

S.K. Bakshi, for the appellant.
Ajay Tamrakar, for the respondent/State.

J U D G M E N T

R.C. Mishra, J. :–This is an appeal under Section 86 of the Criminal Procedure Code (for short 'the Code'). The appellant is aggrieved by the order-dated 17.07.2009 passed by Special Judge (under the Narcotic Drugs and

*Cr.A. No.1401/2009 (Jabalpur)

Psychotropic Substances Act (for short 'the Act'), Katni in MJC No. 02/2008 rejecting application, under Section 85(3) of the Code for release of his house, bearing no.631 and located at Gayatri Nagar, Katni and all the movable properties stored therein from attachment and restoration thereof.

2. The appellant who, at the relevant point of time, was working as Constable in Excise Department at Katni, was shown as absconding in the charge-sheet submitted against co-accused Raju @ Girdharilal and Pappu @ Shivdatt on 28.6.2007 after due investigation into the case registered as Crime No.238/2007 at Kotwali Katni in respect of the offences punishable under Section 8 read with S.20 of the Act.

3. The prosecution version disclosed in the charge-sheet and the documents annexed may be summarized thus -

(i) In the night intervening 7th and 8th April, 2007, pursuant to credible information received at the police station that the appellant along with co-accused namely Raju and Pappu was carrying ganja in a Marshal Jeep, bearing registration no. MP-21-C-0464, a raid was arranged at Lamtra Gate at Katni and the vehicle was intercepted but it was not stopped by co-accused Raju, the driver thereof, instead, he drove the vehicle at a faster speed and in the process, dashed it against the check-post barrier installed on Katni Shahdol Road. Ultimately, the vehicle was abandoned at a short distance from the barrier and the appellant was able to escape whereas his companions were apprehended. From the Jeep, a total quantity of 94 Kgs. of Ganja was recovered.

(ii) At the instance of Raju, as many as 27 gunny bags containing 834.65 Kgs. of Ganja were recovered from co-accused Rajendra Shukla's house located in village Nanwara-Kala.

4. A bare perusal of the record would reveal that in the wake of appellant's continuous abscondance, the house and the movables found therein were attached on 13.06.2008 whereas he had surrendered to custody on 23.05.2009 only after dismissal of his Special Leave Petition, against this Court's order rejecting prayer for anticipatory bail application, by the Apex Court.

5. After his surrender, the appellant moved the application, under Section 85(3) of the Code, on 28.05.2009 for restoration of all the attached properties inter alia on the ground that the proceedings initiated for attachment and sale of his properties had already been rendered infructuous. Thereafter, on 18.06.2009, he filed a list of 10 witnesses, whom he proposed to summon to support his explanation for disobedience of proclamation but for the reasons assigned in the order passed on the same day, learned Special Judge permitted him to call only Vishwabandu Choudhary and Rakesh Mishra as witnesses. However, the appellant examined himself and Vishwabandu only. Thereafter, on 13.07.2009, he submitted yet

another application for setting aside the order of attachment and restoration of the attached properties.

6. The appeal has been preferred primarily on the following grounds -

(i) There was no justification for continuance of the attachment as the purpose thereof had already been fulfilled with his surrender to custody.

(ii) a reasonable opportunity was not granted to him to substantiate his explanation for abscondance.

7. In view of the provisions of Section 85(3) of the Code, the ground no.(i) is apparently misconceived as upon his surrender, the appellant was still required to prove that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant and that he had no such notice of the proclamation so as to enable him to attend within the time specified therein.

8. Coming to the ground no.(ii), it may be observed that a reasonably sufficient opportunity was not granted to the appellant to prove the aforesaid pre-conditions for release of the properties from attachment.

9. In the result, the appeal is allowed and the matter is remanded to the trial Court with a direction to pass a fresh order after affording reasonable opportunity to the appellant to lead evidence in support of his explanation. It is also expected that entire enquiry shall be conducted as far as possible within a period of two months from the date of receipt of certified copy of this judgment.

Appeal allowed.

I.L.R. [2010] M. P., 2397
APPELLATE CRIMINAL
Before Mr. Justice R.C. Mishra
17 September, 2010*

LAXMI SAHU ... Appellant
Vs.
STATE OF M.P. ... Respondent

Criminal Procedure Code, 1973 (2 of 1974), Section 441, Rules and Orders (Criminal), Rules 382 & 383 - *Trial Judge while declining to accept the bail bond furnished by surety referred the question of his solvency to Tahsildar - Held - The order directing inquiry into solvency of the surety by the Tahsildar does not have any legal sanction.* (Paras 2 & 6)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 441, नियम और आदेश (दाण्डिक), नियम 382 व 383 – विचारण न्यायाधीश ने प्रतिभू द्वारा जमानत पत्र प्रस्तुत किये जाने पर उसकी शोध क्षमता के प्रश्न को तहसीलदार को निर्दिष्ट किया – अभिनिर्धारित – प्रतिभू की शोध क्षमता की जाँच तहसीलदार को निर्देशित करने संबंधी आदेश को विधिक मंजूरी नहीं है।

*Cr.A. No.441/2010 (Jabalpur)

P.K. Saxena, for the appellant.

S.K. Kashyap, Dy.G.A., for the respondent/State.

ORDER

R.C. Mishra, J. :–Heard on IA No.15314/10 for modification in the order dated 2/8/2010 suspending sentences awarded to the appellant for the offences under Section 376 and 506 of the IPC.

2. According to learned counsel for the appellant, a clarification in the order-dated 2/8/2010 is required in view of the fact that learned trial Judge, while declining to accept the bail bond furnished by Jiyalal, has referred the question of his solvency to Tahsildar despite the fact that he had also produced Bhu-Adhikar and Rin Pustika issued by the Competent Revenue Authority to satisfy the Court.

3. However, no modification in the order, which is couched in the usual form, would be necessary as the relevant guidelines are already available in Rule 382 and 383 of the Rules and Orders (Criminal) and the Note appended thereto. For a ready reference, these Rules may be reproduced as under :-

> 382. Whenever the solvency of a surety is to be verified a statement of his assets and liabilities declared to be true and complete to the best of his knowledge and belief should be obtained from him and verified before he is accepted. Only realizable assets should be taken into consideration.
>
> 383. The responsibility for accepting a surety as solvent for the required amount is primarily that of the presiding officer who has demanded the security either of his own accord or on being directed to do so by a superior court, and in ordinary cases he should discharge it himself by making such summary enquiry as in the circumstances of the case he may think fit. When the case is important or the amount of security demanded is large the presiding officer may ask the nazir or the naib-nazir to enquire into the solvency of the surety and submit a report or ask the surety to produce a certificate of solvency from the tahsildar.

Note-It is nowhere laid down that the production of a solvency certificate is essential and in most cases a summary enquiry by the presiding officer or nazir or naib-nazir should sufficient. This should not, however, be considered as in any way limiting the right of a presiding officer to demand a solvency certificate in case of doubt or involving large sums. In every case it is the duty of the presiding officer to regulate this procedure in the manner that will cause least inconvenience to parties consistent to parties consistent with efficient control.

4. Further, the provision of Sub-Section (4) of Section 441 of the Code of Criminal Procedure, which is later in point of time, also does not confer any power on a Judicial officer to direct inquiry by a Revenue Officer. It reads-

441. Bond of accused and sureties.

(1).....

(2).....

(3).....

(4) For the purpose of determining whether the sureties are fit or sufficient, the court may accept affidavits in proof of the facts contained therein relating to the sufficiency or fitness of the sureties, or, if it considers necessary, may either hold an inquiry itself or cause an inquiry to be made by a Magistrate subordinate to the court, as to such sufficiency or fitness.

5. Accordingly, if the learned Judge was not satisfied with the solvency of the Surety, he could have held an inquiry himself or cause an inquiry to be made by a judicial Magistrate as to sufficiency or fitness of the surety.

6. Thus, viewed from any angle, the order directing inquiry into solvency of the surety by the Tahsildar does not have any legal sanction.

7. With these observations, the I.A. stands dismissed.

8. Registrar General is directed to place the matter before Hon'ble the Chief Justice for appropriate action.

9. C.C. as per rules. *Order accordingly.*

I.L.R. [2010] M. P., 2399

ARBITRATION CASE

Before Mr. Justice Rajendra Menon

23 September 2010*

ITI LIMITED ... Petitioner

Vs.

STATE OF M.P. ... Respondent

Arbitration and Conciliation Act (26 of 1996), Section 11(6) - *Appointment of an Arbitrator - Objection on ground of (i) The existence of the remedy of adjudication to the petitioner under the M.P. Madhyastham Adhikaran Adhiniyam, 1983, (ii) Certain concealment of fact by the petitioner before entering into agreement, (iii) Merit of the dispute and justification of the respondents in terminating the agreement - Held - Since (i) There is provision in agreement for resolution of dispute by appointing an arbitrator, (ii) Contract is basically terminated for the breach of agreement and non-performance of the contract and not only on the ground of concealment of facts, (iii) It is beyond the jurisdiction of High Court to go into the said area on merit of the dispute in these proceedings - All the objections are unsustainable - Petition allowed.* (Para 5 to 9)

*A.C. No.17/2010 (Jabalpur)

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) – मध्यस्थ की नियुक्ति – उसके सम्बन्ध में (i) याची को म.प्र. माध्यस्थम् अधिकरण अधिनियम, 1983 के अन्तर्गत न्यायनिर्णयन के उपचार के अस्तित्व, (ii) याची द्वारा करार करने के पूर्व तथ्य के कतिपय छिपाव, (iii) विवाद के गुणदोष और करार समाप्त करने में प्रत्यर्थियों के न्यायोचित्य के आधार पर आक्षेप – अभिनिर्धारित – चूंकि (i) करार में मध्यस्थ की नियुक्ति द्वारा विवाद के विनिश्चय के लिए उपबंध है, (ii) संविदा करार के भंग और संविदा के अननुपाल के कारण मूलतः पर्यवसित होती है न कि केवल तथ्यों के छिपाव के आधार पर, (iii) यह उच्च न्यायालय की अधिकारिता के परे है कि इन कार्यवाहियों में कथित क्षेत्र में विवाद के गुणदोषों पर विचार करे – सभी आक्षेप अपोषणीय हैं – याचिका मंजूर।

Cases referred :

2010(2) MPHT 13.

Piyush Dharmadhikari, for the petitioner.

Yogesh Dhande, for the respondent.

JUDGMENT

RAJENDRA MENON, J. :–This is an application filed by the petitioner under Section 11 (6) of the Arbitration and Conciliation Act. 1996 seeking appointment of an Arbitrator. Petitioner is an undertaking of Government of India functioning under the Ministry of Communication and Information Technology. The respondent State of M.P. and Inspector General of Registration and Superintendent of Stamp floated tenders for appointment of various agencies for the purpose of providing Turnkey Solution towards Commissioning, Management and maintenance of data centres in various places in the State of M.P. through a wide area network including supply and installation of services, desktop systems and Peripheral for implementation of Property Administration System in the department or Registration and Stamps. Tender of the petitioner having been accepted, an agreement was entered into as is evident from Annexure A/1. Clause 13 of the said agreement contemplates an arbitration clause for resolution of dispute in case of difference or any other matter connected with the agreement.

2. Record indicates that due to. non performance of the contract and on the ground of delay in execution of work, various show cause notices were given to the petitioner, petitioner submitted the reply and finally vide order Annexure A/9 dated 12.5.2009, the contract in question was cancelled. The Performance Bank Guarantee to the tune of Rs.2,04,50,472/- was forfeited and further a penalty of 20% of the gross bid value amounting to Rs.4,09,00,945/- was imposed, petitioner has filed this application seeking appointment of Arbitrator as the respondents refused to respond to the claim made by the petitioner for appointment of Arbitrator made vide Annexure A/10.

3. On notice being issued, respondents have filed a reply and three objections are raised in the reply. The first objection pertains to existence of the remedy of adjudication to the petitioner under the M.P. Madhyastham Adhikaran Adhiniyam, 1983. (herein after referred to as 'Adhiniyam of 1983') and therefore, non

maintainability of this application. The second objection pertains to certain concealment of fact by the petitioner before entering into agreement. It is stated in the order Annexure A/9 and in the reply to this application under Section 11(6) of the Arbitration and Conciliation Act that before entering into the agreement petitioner's company was facing proceedings to be declared as a Sick Industry under the Sick Industrial Company (Special) Provisions Act, 1985. As the agreement was entered into by concealment of this fact, no arbitrator can be appointed. The third objection is with regard to merit of the dispute and justification of the respondents in terminating the agreement.

4. Having heard learned counsel for the parties and on perusal of the record, this Court is of the considered view that at this stage for the purpose of appointment of an Arbitrator exercising jurisdiction in a proceeding under Section 11 (6) of the Arbitration and Reconciliation Act, 1996 all the objections are unsustainable.

5. As far as first objection with regard to availability of remedy under the Adhiniyam of 1983 is concerned, records indicates that under Clause 13 of the Agreement there is a provision for resolution of dispute by appointing an Arbitrator. Supreme Court in the case of *VA Tech Escher Wyass Flovel Ltd. Vs. M.P.S.E. Board and another* - 2010 (2) MPHT 13 has laid down the principle that if an agreement provides for an Arbitration clause then the provisions of M.P. Madhyastham Adhikaran Adhiniyam 1983 will not apply. In the said case it is held by the Supreme Court that the provisions of Adhiniyam 1983 stands superseded by virtue of Act of 1996 i.e. the Arbitration and Conciliation Act, 1996. To that effect it is held by the Supreme Court that the Adhiniyam of 1983 stands repealed impliedly by virtue of Act of 1996. In view of the availability of arbitration clause in the agreement in question, first objection raised by the respondents is unsustainable.

6. The second objection pertains to concealment of certain facts with regard to establishment of petitioner being the Sick Industry. As far as termination of the contract is concerned, a perusal of the order Annexure A/9 indicates that termination is on various grounds particularly with regard to non performance and on the ground of delay in execution of work committed, breach of various provisions of the agreement, for the said default apart from terminating the agreement in question penalty is also imposed. In that view of the matter, it is a case where the contract is basically terminated for the breach of agreement and non performance of the contract and therefore, the dispute has to be resolved by resolution through an arbitrator and therefore, it cannot be said that agreement was cancelled only on the ground of concealment of facts. It is seen from the order that the agreement in question and the work is cancelled mainly on the ground of breach of contract and non performance of the agreement and therefore, second objection raised is also unsustainable.

7. As far as the third objection is concerned, it is beyond the jurisdiction of this Court to go into the said area on merit of the dispute in these proceeding under

Section 11(6) of the Arbitration and Conciliation Act, 1996. That apart it is also pointed out that with regard to recovery of penalty amount of Rs. 4,09,00,945/- by way of issuance of RRC under the M.P. Land Revenue Code, 1959, petitioner has filed a writ petition. Shri Piyush Dharmadhikari points out that writ petition is not filed for challenging the imposition of penalty. It is stated by Shri Dharmadhikari that the manner of recovery being contrary to certain judgments of a Full Bench of this Court, on the mode of recovery is challenged in the said writ petition. The power of the respondents to impose the penalty and justification for imposing the same is not subjudice in the writ petition. I am of the considered view that Shri Dharmadhikari is right in contending so, in the writ petition the only question which is being considered is as to whether the recovery ordered without adjudication of the question with regard to propriety, legality and justification for imposing penalty by way of issuance of RRC is not involved. The manner in which the recovery is made is only to be adjudicated in the writ petition. The legality or otherwise of the penalty imposed is to be decided by an arbitrator and therefore on this ground the claim for appointment of Arbitrator cannot be rejected.

8. Keeping in view the totality of the circumstances and finding the dispute to have arising between the parties and there being a provision to resolve the dispute by constituting an arbitral tribunal, this application is allowed. Justice S. P. Khare, a Retired Judge of this Court and stationed at Bhopal is appointed as an Arbitrator. Registry is directed to forward a copy of this order to Hon'ble Shri S. P. Khare, Retired Judge. Parties shall also appear and file a copy of this order before Hon'ble Shri S. P. Khare, Retired Judge.

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

Petition allowed.

I.L.R. [2010] M. P., 2402
CIVIL REVISION
Before Mr. Justice U.C. Maheshwari
17 September, 2010*

R. HANFI ... Applicant
Vs.
YOGENDRA SINGH DASHMER ... Non-applicant

Stamp Act (2 of 1899), Sections 35 & 36 - *Once the document is exhibited while recording the statements of witnesses and the same is not objected by the other side at that stage, then the other side does not have any right or authority to challenge its admissibility at any subsequent stage on the ground of deficit or non-payment of the stamp duty.* (Para 7)

स्टाम्प अधिनियम (1899 का 2), धाराएँ 35 व 36 – साक्षियों के कथन अभिलिखित किये जाते समय जब एक बार दस्तावेज प्रदर्शित हो जाता है और दूसरे पक्ष द्वारा उसके संबंध में

*C.R. No.316/2005 (Jabalpur)

उस प्रक्रम पर कोई आपत्ति नहीं की जाती है, तब दूसरे पक्ष को किसी पश्चात्वर्ती प्रक्रम पर स्टाम्प शुल्क की कमी या असंदाय के आधार पर उसकी ग्राह्यता को चुनौती देने का कोई अधिकार या प्राधिकार नहीं होता।

Cases referred :

AIR 1991 Orissa 166, 1980 MPLJ 592, 1976 MPLJ Short Note 71.

Anurag Tiwari, for the applicant.

B.M. Prasad, for the non-applicant.

ORDER

U.C. MAHESHWARI, J. :–The applicant /defendant has directed this revision under Section 115 of CPC being aggrieved by the judgment and decree dated 16.2.2005, passed by the IInd Additional District Judge, Balaghat, in Civil Regular Appeal No. 5-B/04 affirming the judgment and decree dated 5.1.2004 passed by the 1st Civil Judge, Class-I, Balaghat in Civil Original Suit No. 4-B/03 decreeing the suit of the respondent against him for the sum of Rs.20,000/-alongwith the interest @ 8% p.a. from the date of filing the suit, i.e. 31.3.03 and the costs.

2. The facts giving rise to this revision in short are that the respondent herein filed the aforesaid suit against the applicant contending that the applicant had taken the loan of Rs. 20,000/- from him on 15.2.02, for which he also executed an acknowledgment deed on the same day. Subsequently when such sum was not repaid by the applicant, then he gave him a demand notice dated 10.3.03, inspite its service, the same was not complied with. On the contrary, it was replied on false pretext stating that no such transaction had taken place between him and the respondent. With these pleadings the impugned money suit was filed by the respondent against the applicant.

3. In written statements of the respondent by denying the averments of the plaint, it is stated that with malafide intention the respondent after obtaining some blank papers from his department having his signatures, by fabricating the forged acknowledgment deed on it filed the impugned suit on false pleadings. As such no alleged transaction took place between him and the respondent and the prayer for dismissal of the suit is made.

4. In view of pleadings of the parties, after framing the issues and recording evidence, on appreciation of the same, the suit of the respondent was decreed against the applicant, as stated above. On challenging such decree by the applicant, before the appellate court, on consideration by affirming the same his appeal was dismissed, on which the applicant has come to this court. As the subject matter being money suit of less than Rs. 25,000/-, in view of Section 102 of CPC, barring the Second Appeal under Section 100 of CPC, the applicant-defendant has preferred this revision.

5. Applicant's counsel after taking me through the pleadings of the parties, evidence available on record and the exhibited documents argued that on proper

appreciation of such evidence, the suit of the respondent ought to have been dismissed by both the courts below but the same was decreed under wrong appreciation of the evidence. According to him the respondent herein could neither prove the alleged loan transaction nor the execution of alleged acknowledgment deed by the applicant. In continuation, she said that alleged acknowledgment deed being not written or executed on requisite revenue ticket or stamp is not admissible under the existing law. Thus, the decree being based on such document is not sustainable. In support of this contention, he placed his reliance on a decision of Hon'ble Orissa High Court in the matter of *Naladhar Mahapatra and another Vs. Seva Dibya and others* reported in AIR 1991, Orissa, Page 166. However, in response of query of the court whether objection regarding admissibility of such document, the acknowledgment deed, (Ex. P-1) was taken by the applicant at the appropriate stage of the case in the trial court when the same was being exhibited in the case, on which he fairly conceded that no such objection was taken at that stage or even at the stage of First Appeal. The same was taken in the appellate court and now is being taken in this revision and prayed for admission and allowing this revision.

6. Having heard the counsel, after perusing the record and the impugned judgments, I am of the considered view that in the available circumstances the concurrent findings of both the courts below decreeing the impugned suit, on appreciation of evidence, do not require any interference under the revisional jurisdiction of this court vested under Section 115 of CPC.

7. It is settled proposition of law that once the document is exhibited while recording the statements of witnesses and the same is not objected by the other side at that stage, then after marking exhibits, the other side did not have any right or authority to challenge its admissibility at any subsequent stage on the ground of deficit stamp or of non payment of the stamp duty. Long before on arising the occasion, such question was answered by this court in the matter of *Munnalal Kailashchandra Vs. Jagannath Prasad (Dead by L.Rs.) and others* reported in 1980, M.P.L.J, Page 592 and also in the matter of *Kanchedi Lal Vs. Patel Ram Prasad* reported in 1976 M.P.L.J. Short Note 71. So the arguments advanced by the applicant's counsel that the acknowledgment deed, Ex. P-1 is not admissible document for any purpose has neither appealed me nor sustainable under the existing legal position. Thus, on such count the judgment of the courts below could not be said to be contrary to law as under any error of jurisdiction vested in such courts. On the other hand there is sufficient circumstance to draw an inference that same has been passed in consonance with the available evidence and in conformity with the existing legal position. Therefore, the impugned judgments and decree do not require any interference at this stage under the revisional jurisdiction of this court.

8. So far the arguments of the applicant's counsel saying that evidence has not been properly appreciated by the courts below is concerned, it is suffice to say

that on appreciation of the recorded evidence both the courts have concurrently decreed the suit of the respondent against the applicant for the alleged sum and such concurrent findings being in consonance with the available evidence, the same could not be interfered by re-appreciation of evidence under Section 115 of CPC. So this revision does not require any consideration on such question also.

9. In view of aforesaid discussion, in the lack of any apparent perversity, infirmity or in the absence of anything against the propriety of law the impugned judgments do not require any interference at this stage under the revision jurisdiction of this court. Therefore, this revision being devoid of any merits, is hereby dismissed at the stage of motion hearing. There shall be no order as to the costs.

Revision dismissed.

I.L.R. [2010] M. P., 2405

CRIMINAL REFERENCE

Before Mr. Justice Rakesh Saksena & Mr. Justice G.S. Solanki

5 July, 2010*

IN REFERENCE

Vs.

MOHAMMAD SHAFIQ @ MUNNA @ SHAFI

A. Evidence Act (1 of 1872), Section 157 - *Statement of injured, recorded by doctor as dying declaration, is not inadmissible and it can be used as a former statement to corroborate the testimony of its maker.* (Para 29)

क. साक्ष्य अधिनियम (1872 का 1), धारा 157 – चिकित्सक द्वारा मृत्युकालिक कथन के रूप में अभिलिखित क्षतिग्रस्त का कथन अग्राह्य नहीं है और उसे करने वाले के परिसाक्ष्य की सम्पुष्टि करने के लिए पूर्ववर्ती कथन के रूप में उसका उपयोग किया जा सकता है।

B. Evidence Act (1 of 1872), Section 118 - Child witnesses - *Witnesses aged 11 & 4 years (the daughters of the accused), who got injured in the same incident and admittedly present in the single room house of accused can be relied - Especially when the presence of accused at the scene of occurrence is not challenged and the evidence of these two witnesses is supported by medical and other evidence.* (Para 19 & 25)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 118 – बालक साक्षी – 11 और 4 वर्ष के साक्षियों (अभियुक्त की पुत्रियाँ), जिन्हें उसी घटना में क्षतियाँ आयीं और स्वीकृत रूप से अभियुक्त के एक कमरे के मकान में उपस्थित थीं, पर विश्वास किया जा सकता है – विशेषकर जब घटनास्थल पर अभियुक्त की उपस्थिति को चुनौती नहीं दी गयी हो और इन दोनों साक्षियों के साक्ष्य का चिकित्सीय एवं अन्य साक्ष्य से समर्थन होता हो।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 313 - *When an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be*

*Cr.Ref. No.1/2010 (Jabalpur)

untrue, then the same becomes an additional link in the chain of circumstances. (Para 26)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 313 – जब अभियुक्त के समक्ष उस पर दोषारोपण करने वाली कोई परिस्थिति रखी जाती है और वह अभियुक्त या तो कोई स्पष्टीकरण नहीं देता या ऐसा स्पष्टीकरण देता है जो असत्य पाया जाता है, तब यह परिस्थितियों की श्रृंखला में एक अतिरिक्त कड़ी हो जाता है।

D. Penal Code (45 of 1860), Section 309 - *Merely by the presence of injuries on the body of accused and his presence at the place where his family members were murdered, it could not be inferred that the accused inflicted injuries to himself also.* (Para 34)

घ. दण्ड संहिता (1860 का 45), धारा 309 – मात्र अभियुक्त के शरीर पर क्षतियों की मौजूदगी और उस स्थान पर, जहाँ उसके परिवार के सदस्यों की हत्या हुई, उसकी उपस्थिति से यह अनुमान नहीं निकाला जा सकता कि अभियुक्त ने स्वयं को भी क्षतियाँ पहुँचायी।

E. Penal Code (45 of 1860), Sections 302 & 307 - *Murder of wife and daughter and attempt of murder of 2 daughters - Evidence of two injured daughters supported by medical evidence and other evidence - Presence of accused not challenged and the explanation of accused that some unknown person caused injuries to victim found not truthful - Held - The offence is proved.* (Paras 19 & 28)

ङ. दण्ड संहिता (1860 का 45), धाराएँ 302 व 307 – पत्नी और पुत्री की हत्या और 2 पुत्रियों की हत्या का प्रयत्न – दो क्षतिग्रस्त पुत्रियों की साक्ष्य चिकित्सीय साक्ष्य व अन्य साक्ष्य से समर्थित – अभियुक्त की उपस्थिति को चुनौती नहीं दी गयी और अभियुक्त का स्पष्टीकरण कि किसी अज्ञात व्यक्ति ने पीड़ित को क्षतियाँ कारित कीं, सही नहीं पाया गया – अभिनिर्धारित – अपराध साबित होता है।

F. Criminal Procedure Code, 1973 (2 of 1974), Section 366 - *Death sentence - The accused brutally committed the murders of his wife and two innocent minor daughters - He also attempted to cause death of two other minor daughters while all the victims were sleeping in the room - He did not appear remorseful at any stage after commission of the crime - He killed his wife when she was carrying a full term pregnancy - He committed the offence with extreme brutality against all the female members of his family at the time when his three sons were away - Can not be impressed by the submission that on account of extreme poverty, the offence was committed - Case comes within the category of 'rarest of rare case' - Death sentence affirmed.* (Paras 39 & 40)

च. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 366 – मृत्यु दण्डादेश – अभियुक्त ने नृशंसतापूर्वक अपनी पत्नी और दो अबोध अप्राप्तवय पुत्रियों की हत्या की – उसने दो अन्य अप्राप्तवय पुत्रियों की मृत्यु कारित करने का प्रयत्न भी किया जब सभी पीड़ित कमरे में सो रहे थे – उसने अपराध करने के बाद किसी भी प्रक्रम पर पश्चाताप प्रकट नहीं किया – उसने अपनी पत्नी की हत्या तब की जब वह पूर्ण अवधि की गर्भावस्था धारण किये हुए थी – उसने अपने परिवार

की सभी महिला सदस्यों के विरुद्ध अति निर्दयता से अपराध उस समय किया जब उसके तीन पुत्र बाहर थे – इस निवेदन से प्रभावित नहीं हुआ जा सकता कि अति गरीबी के कारण अपराध किया गया – मामला 'विरलतम से विरल मामले' की कोटि में आता है – मृत्यु दण्डादेश की पुष्टि की गयी।

Cases referred :

AIR 1998 SC 2726, AIR 2001 SC 482, AIR 2003 SC 1088, (2006) 10 SCC 681, (1980) 2 SCC 684, (1983) 3 SCC 470, AIR 1975 SC 1320, AIR 1996 SC 787, AIR 1996 SC 3011, AIR 2000 SC 2679, AIR 2007 SC 697.

J.K. Jain, Dy.A.G., for the State.

S.C. Datt with *Siddharth Datt,* for the accused.

J U D G M E N T

The Judgment of the Court was delivered by RAKESH SAKSENA, J. :–Learned IV Additional Sessions Judge, Bhopal, has award the sentence of death to respondents/accused and has made reference of the proceedings to this Court for confirmation of the death sentence passed by the impugned judgment. The appellant has challenged the conviction and the sentence of death and other sentences awarded to him by the trial court. Since the reference and the appeal arise out of the same impugned judgment, both are being disposed of by this common judgment.

2. Appellant Mohd. Shafiq has filed the appeal against the judgment dated 18.1.2010, passed by the IV Additional Sessions Judge, Bhopal, in Sessions Trial No-329/2009, convicting him under Sections 302, 307 and 309 of the Indian Penal Code and sentencing him to death for committing murders of Sanjida, Rubina and Amina with fine of Rs.3000/-, rigorous imprisonment for 10-10 years with fine of Rs.1000/- 1000/- on two counts and simple imprisonment for one year, on each count respectively. Sentences of imprisonment have been directed to run concurrently.

3. The prosecution case is that on 4.2.2009 Head Constable Ramkripal of Police Station, Habibganj, district Bhopal, received information that some incident had taken place in a house situated near Ahle Hadis Maszid in New Kabad Khana locality. Somebody's neck had been chopped and blood was spread. After recording this information in General Diary, Sub Inspector Chandraveer Singh Rathore (PW-11) and Head Constable Devi Singh rushed to the spot in the mobile van. Chandraveer Singh Rathore found five persons lying injured in pool of blood. He shifted the injured persons to hospital. Injured Amina and Rubina, who were the daughters of the appellant, were declared dead. Sanjida, wife of accused, died on 5.2.2009. Other two daughters of accused viz. Arsi and Ayna were injured. Dead bodies of three deceased persons were sent for postmortem examination and injured girls were sent for treatment and medico legal examination. A dying declaration (Ex. P/39) of injured Ayna @ Seema was recorded by Executive Magistrate Chandra Shekhar Shrivastava. During investigation, an iron hammer, a Churi, blood stained clothes, bed sheets etc. were seized from the room and were sent to FSL for

chemical examination. Since there were injuries on the body of appellant also, he was also sent for medical examination. Some pieces of papers, purporting to be suicidal notes, were seized from the room where the incident took place. The first information report (Ex.P/26) was recorded by Nagendra Kumar Pateria (PW-16), Station Officer of Police Station Hanumanganj, Bhopal under Sections 307, 302 and 309 of the Indian Penal Code.

4. After investigation, charge sheet was filed and the case was committed for trial. The defence of the appellant was that some unknown person had committed murders of his wife and two daughters and also caused injuries to him and other daughters. Prosecution witnesses spoke false against him under the influence of his in-laws.

5. Prosecution, to substantiate its case, examined 19 witnesses. Daughters of appellant viz. Ayna (PW-1) and Arsi (PW-6) were examined as eyewitnesses in the case. Raeesa Bi (PW-7), the sister of deceased Sanjida, who reached the spot immediately after the occurrence, was also examined. Chandra Shekhar Shrivastava (PW-18), the Executive Magistrate deposed about recording of dying declaration (Ex.P/39) of Seema @ Ayna. Dr. Jayanti Yadav (PW-2), Dr. Ravi Upadhyay (PW-3), Dr. Neelam Shrivastava (PW-4), Dr.Mahendra Pal Singh (PW-12), Dr. Devendra Sharma (PW-13) and Dr.Keshav S. Budhwani (PW-17) were examined to prove the injuries found on the bodies of victims as well as the appellant.

6. Learned Additional Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, held the accused/appellant guilty and convicted and sentenced him as mentioned earlier. The appellant has challenged his conviction and sentence by this appeal, whereas the learned trial judge has referred the proceedings of the case to this Court for confirmation of death sentence awarded to accused/appellant.

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

8. It was no longer disputed that deceased Amina, Rubina and Sanjida died of homicidal injuries and Arsi and Ayna suffered grievous injuries.

9. Dr. jayanti Yadav (PW-2), Assistant Professor in Forensic Department of Gandhi Medical College, Bhopal, conducted postmortem examination of the dead bodies of Rubina and Amina. Rubina was a girl aged about 14 years. Dr. Jayanati Yadav (PW-2) found following injuries on the body of Rubina:

> "A Lacerated wound present over right forehead situated obliquely 5 x 3 cms. With medial upper end bone above mid of right eyebrow scalp ecchymosed internally over right parieto temporal region. Right temporal muscle ecchymosed.
>
> A depressed fracture triangular in shape present over right frontal bone with its base over coronal suture and directed anteriorly.

> Posteriorly radiating fracture goes from lateral edge upto tempro parietal suture and continue over it as sutural fracture going downwards beyond mastoid upto right middle cranial fossa. Size of depressed fracture is 1.5x1x1.5 cm.
>
> Another depressed fracture present over right parietal bone from medial to parietal eminence.
>
> Underneath subdural haemorrhage present all over vault. Sub arachnoid haemorrhage all over. Contusion present over base of frontal and temporal region,"

In the opinion of doctor, death of deceased was caused due to shock and haemorrhage as a result of injuries. The injuries were caused by hard and blunt object. Death was homicidal in nature. Duration of death was within six hours since postmortem examination (11.05 am/4.2.2009). Postmortem report of Rubina is Ex.P/1.

Dr. Jayanti Yadav (PW-2) also performed the postmortem examination of the body of Amina, a girl aged about 16 years, and found following injuries on her body:

> "Lacerated wound present over right forehead 2.5 above lateral end of left eyebrow 3.5x3 cms oblique with lower end medial.
>
> Scalp is ecchymosed on left temporal region. Left temporalis muscle ecchymosed on upper and lower aspect.
>
> Underneath depressed fracture of skull of size 2 x 1 cm and sagital plane present over left fronto temporal bone. Sub dural haemorrhage present over right side vault and sub arachnoid haemorrhage present all over."

According to Dr. Jayanti Yadav, death of Amina was caused due to shock and haemorrhage as a result of injuries caused by hard and blunt object. Death was homicidal in nature. Duration of death was within six hours since postmortem examination. Postmortem report of Amina is Ex.P/2.

10. Dr. Neelam Shrivastava (PW-4), who was posted in Medico Legal Institute, Bhopal, conducted the postmortem examination of the body of deceased Sanjida, wife of accused Mohd. Shafiq. She found:

> "A surgically stitched lacerated wound present on the forehead from medial end of left eyebrow running obliquely upward on right forehead up to hairline with 6 stitches of size 9 cms long and 4 cms above right eyebrow. Underneath scalp was haemorrhagic. Frontal and parietal bones were fractured into multiple pieces. Depressed fracture with radiating fracture of size 2 cms to 6 cms backward transversely. Sub dural and sub arachnoid haemorrages were present all over. CSF was haemorrhagic. She

also found a normal male foetus of 21 cm x 20 cm x 13 cm (8-9 months old in the uterus)."

In her opinion, death of Sanjida was due to cardio respiratory failure as a result of head injury and its complications. Injury was sufficient to cause death in ordinary course of nature and was caused by hard and blunt object. Death was homicidal in nature. Postmortem report of Sanjida is Ex.P/6.

11. According to Inspector Nagendra Kumar Pateria (PW-16) on 4.2.2009 alongwith other articles he seized an iron hammer (Article-A) from the spot vide seizure memo Ex.P/21. This hammer was sent for chemical examination to FSL, Sagar. As per reports of FSL (Ex.P/34 and Ex.P/36), human blood was found on the hammer. This hammer was also sent to Dr. Jayanti Yadav (PW-2) for obtaining her opinion whether the injuries found on the bodies of Rubina and Amina could have been caused by the said hammer. Dr. Jayanti Yadav (PW-2), vide her report Ex. P/3, opined that the injuries found on the bodies of Amina and Rubina and described in their respective postmortem examination reports could have been caused by such type of weapon.

12. From the above evidence, it is clearly evident that deceased Rubina, Amina and Sanjida died due to homicidal injuries found on their heads by some heavy hard and blunt object.

13. Dr. Ravi Upadhyay (PW-3), RSO, Gandhi Medical College, Bhopal, examined the injuries of Ayna and Arsi on 4.2.2009. He found following injuries on the body of Ayna:-

"(1) Lacerated wound 4x1.5 cm on right frontal region with palpable fracture.

(2) Lacerated wound at mid occipital 2 x 1 cm.

(3) Lacerated wound behind right ear- 2x1 cm."

He referred the injured for X-ray examination of her skull. In his opinion, the nature of injury was grievous. The injury report of Ayna is Ex.P/4.

Dr. Ravi Upadhyay (PW-3) found following injuries on the body of Arsi:-

"(1) Lacerated wound over occipital region 2 x 0.5 cm.

(2) Swelling on right parietal region of skull.

(3) Right black eye."

He referred the injured for X-ray examination of her skull. In his opinion, injuries were grievous in nature. The injury report of Arsi is Ex.P/5.

14. According to Dr. Keshav S. Budhwani (Ex.P/17), Assistant Surgeon of Gandhi Medical College, he also examined injured Arsi and found fractures in her skull bones. The injury report given by him is Ex. P/37.

15. Dr. Swati Paliwal (PW-19), RMO Radiologist of Medical College, Bhopal performed the X-ray examinations of injured Arsi and Ayna. According to him

also, there were fractures in the skull bones of Arsi. Her X-ray report is Ex.P/41. Since X-ray plate of Ayna was not clear, she performed CT Scan examination and found a fracture on the forehead of Ayna. CT Scan report is Ex.P/42. The evidence of the aforesaid doctors has not been challenged. Thus, it is established that Arsi and Ayna suffered grievous head injuries. Though it has not been specifically stated by the doctors that the injuries were dangerous to life, yet from the nature of injuries and the part of body on which these injuries were found, it can be inferred with certainty that the injuries were dangerous to life.

16. Learned counsel for the appellant, however, submitted that the trial Court gravely erred in placing implicit reliance on the evidence of alleged eyewitnesses Seema @ Ayna (PW-1) and Arsi (PW-6). They were child witnesses and their evidence was not reliable. The possibility of their being tutored could not be ruled out. He submitted that it was not established that appellant committed murders of Rubina, Amina and Sanjida and attempted to cause death of Ayna and Arsi. He also submitted that it was not established that appellant attempted to commit suicide, as there was no evidence on record in this regard. On the other hand, learned counsel for the State justified and supported the conviction of the appellant.

17. We have gone through the entire evidence on record. Seema @ Ayna (PW-1), the daughter of appellant, categorically stated that in the night when she was sleeping with her mother and sisters, on hearing some sound, she saw her father inflicting blow of hammer on the head of her mother. When she tried to run away, her father started assaulting her also. She suffered injuries on her head and back. She further stated that there was -only one room in the house in which all the persons were sleeping. Only door of the room remained closed in the night. Her father also assaulted Rubina with the hammer. She became unconscious after receiving injuries. After discharge from the hospital, she lived with her aunt (Mami). She stated that on the day of incident they had come back after attending a marriage feast. When they were sleeping, light was on. She firmly denied that she gave her statement before the Court on being tutored by her Mumani (Mami).

18. Another daughter of appellant viz Arsi (PW-6), aged about 4 years, pointing to her father deposed that he assaulted her mother by a hammer on her head. He also assaulted to her (witness) on her head with a plate. In cross-examination, she stated that at the time when she was assaulted, she was awake and the light was on. She did not see any injury on the neck of her father and that at that time none had come to her house.

19. Seema @ Ayna (PW-1), is a girl of 11 years. She and Arsi happened to be the daughters of accused. There appeared no reason for their speaking false against their father. No suggestion was put to Arsi that she was tutored by anybody. Ayna firmly denied the suggestion that she had given the statement on asking of her aunt (Mumani). There were no contradictions or discrepancies in the statement of these child witnesses. It is true that Ayna (PW-1) stated that she saw the assault on her mother and sister Rubina only, and Arsi (PW-6) saw the assault on

her mother and herself but this cannot be said to be a discrepancy. Since there was light in the room, it cannot be said that she could not have seen the assailant. Merely because the child witnesses did not say about the assault on all the deceased persons, it cannot be held that they did not see the occurrence especially when their presence in the single room house of their father has not been challenged. The evidence of both the witnesses finds support from the medical evidence i.e. postmortem examination reports of deceased Sanjida and Rubina, who were found to have suffered injuries on their heads by a hard and blunt object like a hammer. A hammer was also seized from the place of occurrence by Inspector Nagendra Kumar Pateria (PW-16) in presence of Abdul Hakim (PW-15). This hammer was sent for chemical examination to Forensic Science Laboratory, Bhopal and vide FSL report Ex. P/34 it was found to have human blood stains.

20. Evidence of Ayna and Arsi finds further support from the evidence of Raeesa Bi (PW-7), the elder sister of deceased Sanjida. Raeesa Bi was married to elder brother of appellant. According to her, when she was called by Raees, the son of appellant, in the morning, she went to the house of appellant and saw Sanjida and four daughters of accused lying injured. None of them were speaking. Ayna and Arsi were unconscious. Appellant was standing at the place of occurrence. There were some injuries on his neck.

21. In the case of *Panchhi v. State of UP*-AIR 1998 SC 2726 it has been held by the Apex Court that it cannot be said that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. Evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. It is more a rule of practical wisdom than a law.

22. In the case of *Suryanarayana v. State of Karnataka*-AIR 2001 SC 482 it has been held that the evidence of a child witness cannot be discarded only on the ground of her being of teen age. The fact of a child witness would require the Court to scrutinies the evidence with care and caution. If the evidence is shown to have stood the test of cross-examination and there is no infirmity in the evidence, then a conviction can be based upon such testimony alone. Corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness.

23. While considering the acceptability of the evidence of a child of about 6 years of age, the Apex Court in *Bhagwan Singh v. State of M.P.*-AIR 2003 SC 1088 observed that "the law recognizes the child as a competent witness but a child particularly at such a tender age of six years, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding,

is not considered by the court to be a witness whose sole testimony can be relied without other corroborative evidence. The evidence of child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, always the court looks for adequate corroboration from other evidence to his testimony."

24. In the above case, accused persons had caused the death of mother of the child of six years of age at mid night and the child after having seen his mother being assaulted by accused went back to sleep and the prosecution did not examine the person to whom the child met first after the incident and took him to other village. It was said that child did not narrate the incident to that person. In these circumstances, the trial Court as well as the Apex Court found it hazardous to rely on the sole testimony of the child in the absence of any corroboration.

25. In the instant case, we find that the evidence of child witnesses Ayna (PW-1) and Arsi (PW-6) is natural and untutored. It is clear, cogent and trustworthy. Apart from it, it finds corroboration from the medical evidence also. Both the girls had suffered injuries, which have been proved by Dr. Ravi Upadhyay (PW-3), Dr.Keshav S. Budhwani (PW-17) and Dr. Swati Paliwal (PW-19). We are of the considered opinion that the trial Court committed no error in relying on the testimony of these two child eyewitnesses.

26. Apart from the evidence of eyewitnesses, the circumstances proved by the prosecution indicate that it was only appellant who inflicted injuries to deceased persons as well as to injured victims. In *Trimukh Maroti Kirkan v. State of Maharashtra*-(2006) 10 SCC 681 the Apex Court observed that "it is necessary to keep in mind Section 106 of the Evidence Act, which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him". It was observed that "where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation." It must be kept in mind that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances. The Apex Court observed that "where an accused is alleged to have committed murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, tt has been consistently held that if the

accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime."

27. On applying the above principles in the instant case, we find that in the night the appellant was in his dwelling house where his four daughters and wife were asleep. In the morning, when Raeesa Bi (PW-7) reached at the place of occurrence, she found appellant present at the spot. It was stated by Raeesa Bi that the appellant also had injury on his neck. On being brought by a constable. Dr. Mahendra Pal Singh (PW-12), RSO Hamidiya Hospital had examined the appellant and had found two injuries on his body; (1) incised wound (sharp edged) on upper abdomen below bilateral sub coastal region horizontal 30 x 8 cms and (2) incised wound 18 x 5 cms in neck horizontal extending upper part of thyroid cartilage. Ext. Jugular vain was cut, upper part of thyroid cartilage was cut. In the opinion of doctor, injury no. I was simple in nature and for injury No.2 appellant was referred to ENT expert. The injury report is Ex.P/16. Dr. Devendra Sharma (PW-13) RSO, ENT, Hamidiya Hospital, Bhopal examined the injuries of appellant on 4.2.2009. He found an incised wound size 18 x 5 cms on neck horizontally, extending up to thyroid cartilage. External jugular vain was cut. In his opinion, the injury was grievous in nature.

28. In the statement of accused recorded under Section 313 of the Code of Criminal Procedure, accused, in answer to question No.6, admitted that he, his wife and daughters were sleeping on the floor of the house, but in answer to question No. 107, he stated that he was falsely implicated, some unknown person had assaulted his wife and daughters. Thus, it is undisputed that the appellant was present in his house in the night when his wife and daughters were assaulted, however, his explanation that some unknown person had caused injuries to victims does not appear truthful for the reason that he even did not make any hue and cry when the victims were assaulted and also when he received injuries. He even did not disclose anything to Raeesa Bi (PW-7) and to other persons, who reached at the spot in the morning. His conduct is clearly suspicious and the explanation offered by him appears patently false. It is also important to note that while other victims received injuries by a heavy hard and blunt object like a hammer, he was found to have suffered injuries by a sharp edged weapon. Thus, in addition to the evidence of eyewitnesses Ayna (PW-1) and Arsi (PW-6), the principle recognized in the case of *Trimukh Maroti Kirkan* (supra) becomes clearly applicable and offering of false explanation by the appellant becomes an additional piece of incriminating circumstance against him.

29. On 4.2.2009, Executive Magistrate Chandra Shekhar Shrivastava (PW-18) recorded the statement of Seema @ Ayna (PW-1) in the hospital. This statement was recorded by way of her dying declaration. Ayna (PW-1) disclosed to him that in the night she was assaulted by Shafiq, her father. The dying declaration is Ex. P/39. Learned trial judge discarded this evidence from

consideration on the ground that it was in the nature of hearsay evidence as Seema @ Ayna was alive. In our opinion, the trial judge committed error in ignoring this piece of evidence. Since this statement was not recorded by police officer, therefore, it was not inadmissible. Though it could not have been accepted as a dying declaration under Section 32 of the Indian Evidence Act, yet it could be used as a former statement made by Ayna (PW-1) in order to corroborate her testimony as a witness, relating to occurrence in view of the provisions of Section 157 of the Indian Evidence Act. There appeared no reason for the Executive Magistrate to have recorded the said statement as dying declaration (Ex. P/39) false. Thus, the evidence of Ayna that she was assaulted by her father stands further corroborated by her statement (Ex.P/39).

30. After sincerely scanning and scrutinizing the evidence of eyewitnesses Seema @ Ayna (PW-1) and Arsi (PW-6) and the other circumstances, found proved, we are of the considered opinion that it has been established beyond doubt that it was the appellant only and none else who committed murders of his wife Sanjida and daughters Rubina and Amina by a hammer and attempted to commit murder of his daughters viz. Ayna and Arsi. The trial court was fully justified to convict him for the offences under Sections 302 and 307 of the Indian Penal Code. The finding of conviction for these offences is therefore affirmed.

31. As far as the commission of offence under Section 309 of the Indian Penal Code is concerned, there is no direct evidence on record. From the evidence of Raeesa Bi (PW-7) it stood proved that the appellant was found at the place of occurrence in the morning and there were injuries on his body. His injuries were examined by Dr. Mahendra Pal Singh (PW-12) on 4.2.2009. These injuries were the incised wounds on his abdomen and neck. The external jugular vain of the neck was cut. On being referred to ENT expert, Dr. Devendra Sharma (PW-13) also examined his injuries and found a 18 x 5 cms incised wound on his neck extending to thyroid cartilage. This injury was grievous in nature. The injuries were caused by sharp edged weapon. A Chhuri was seized vide seizure memo Ex, P/21 from the spot by Investigating Officer Nagendra Kumar Pateria (PW-16). As per the FSL report (Ex. P/34'), human blood was detected on this Chhuri. On the basis of this evidence, learned trial Judge concluded that the only possible inference, which could be drawn, was that appellant had caused these injuries himself in an attempt to commit suicide.

32. According to Investigating Officer Nagendra Kumar Pateria (PW-16), he sought a query from Dr. Mahendra Pal Singh that whether the injuries found on the body of accused Shaifq could be self inflicted. Dr. Mahendra Pal Singh (PW-12) replied the query (Ex.P/32) opining that the said injuries could be self inflicted. We are afraid that this opinion of doctor Mahendra Pal Singh (PW-12) cannot be accepted as an admissible piece of evidence, because he did not depose it before the Court about this fact. This statement made by doctor to the police officer was clearly inadmissible under law.

33. Another piece of evidence is the seizure of an alleged suicide note, which was seized by Investigating Officer Nagendra Kumar Pateria (PW-16) vide seizure memo Ex. P/21. It was recorded on the back of an invitation card, its envelop and on some other small pieces of papers. It indicated that the author of the note was taking this step because of poverty. He was unable to get any job; he was unable to provide food to his three sons and four daughters; his wife was also pregnant. Learned trial judge held this evidence inadmissible because it was not proved by the prosecution by tendering any evidence to indicate that the writing of the note was that of accused, but at the same time he concluded that the other evidence was sufficient to hold the accused guilty under Section 309 of the Indian Penal Code.

34. In our opinion, merely by the presence of injuries on the body of accused and his presence at the place where his family members were murdered, it could not be inferred that the accused inflicted injuries to himself also. In the statement recorded under Section 313 of the Code of Criminal Procedure he stated that some unknown person had inflicted injuries to him as well as to his other family members. Though this explanation we have already found false, yet in the absence of any positive evidence of clinching incriminating nature, we are unable to hold that accused attempted to commit suicide. It is true that the circumstances make it appear probable and give rise to a strong suspicion that he attempted to commit suicide, but the suspicion howsoever strong, cannot take place of proof. In our opinion, therefore, the conviction of the accused under Section 309 of the Indian Penal Code, recorded by the trial Court, cannot be approved and the same deserves to be set aside.

35. On the question of sentence, learned counsel for the appellant submitted that the appellant was a very poor person, who had no adequate means to earn livelihood and provide bread to his wife and seven children. In the state of acute mental stress and frustration he was compelled to take the extreme step. He also suffered agony and, therefore, himself attempted to end his life by causing injuries to himself. Still there are three minor sons to be looked after by him. The case does not fall in the category of a rarest of rare case calling for imposition of death penalty.

36. In *Bachan Singh v. State of Punjab*-(1980) 2 SCC 684 the Apex Court observed that there are numerous circumstances justifying passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasized that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expensive construction by the courts in accord with the sentencing policy writ large in Section 354 (3). Judges should never be bloodthirsty.

37. In *Machhi Singh & others vs. State of Punjab*-(1983) 3 SCC 470 the Apex Court observed that the following guidelines, which emerge from *Bachan*

Singh case will have to be applied to the facts of each case where the question of imposition of death sentence arises:

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime.

(iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up.

38. In case of *Maghar Singh vs. State of Punjab*-AIR 1975 SC 1320 the death sentence awarded to accused was approved by the Apex Court as there was a preplanned cold-blooded dastard murder. As many as 17 injuries were caused on the deceased, most of which were on vital part of her body. In *Raoji v. State of Haryana*-AIR 1996 SC 787 also the Apex Court affirmed the death sentence to accused where he committed murder of his wife who was in advance stage of pregnancy and three minor children for no fault on their part. He also attacked his mother with the axe. The brutality and cruelty with which the crime had been committed, in view of the Apex Court, shocked the conscience of the society. After causing death of four persons he did not become remorseful and went to his neighbour's house and attempted to kill his wife while she was asleep. In case of *Umashanker Panda vs. State of M.P.* AIR 1996 SC 3011 accused, while all members of family were asleep in a room, started killing his wife with a sword. When his daughter tried to save her mother, accused inflicted wounds on her. Other children were also attacked. As a result of assault, his wife and two children succumbed to injuries. The attack was premeditated and not on account of any provocation or mental derange. The Apex Court in these circumstances fell satisfied that their appeared no mitigating circumstances for not imposing death sentence. In *Ramdeo Chauhan vs. State of Assam*-AIR 2000 SC 2679 the Apex Court observed that it is true that the life sentence is a rule and death sentence is an exception, but when the crime committed by the appellant was not only shocking, but also jeopardized the society, the award of lesser sentence only on the ground of the appellant being a youth at the time of occurrence cannot be considered as a mitigating circumstances. In this case the accused was convicted for causing death of four persons of family by sharp edged weapon. In *Bablu v. State of Rajasthan*-AIR 2007 SC 697 accused was alleged to have killed his wife, three daughters and son under drunkenness. The Apex Court held that acts of the

accused were not only brutal but also inhuman for no fault. Merely because accused claimed to be under state of drunkenness at the relevant point of time it did not in any way dilute his acts and the case fell under rarest of rare category.

39. Keeping in view the above proposition of law with respect to imposition of death sentence, we find no mitigating circumstances in favour of appellant for not imposing the death penalty on him. He brutally committed the murders of his wife and two innocent minor daughters. He also attempted to cause death of two other minor daughters while all the victims were sleeping in the room. He did not appear remorseful at any stage after commission of the crime. Though it was said that he attempted to commit suicide on the basis of some writings found on the piece of papers at the place of occurrence, but the appellant on all the occasions including in his statement recorded under Section 313 of the Code of Criminal Procedure stated that some unknown person had committed the crime. He killed his wife when she was carrying a full term pregnancy. He committed the offence with extreme brutality against all the female members of his family at the time when his three sons were away. We are not impressed by the submission for leniency made by the learned counsel for the appellant that on account of extreme poverty, the offence was committed. We do not wish that society may get a signal that a person guilty of committing such a heinous and diabolical crime is dealt liberally on that account. Such type of dastardly act should not be taken as a solution of any problem. In our considered opinion, the case comes within the category of 'rarest of rare case' calling for the extreme penalty of death sentence.

40. In the result, the reference made by the trial Court is accordingly answered. The sentence of death awarded to accused/appellant Mohammad Shaifq @ Munna @ Shafi is affirmed. The conviction of the appellant under Section 307 of the Indian Penal Code and the sentence awarded to him by the trial Court is also affirmed. However, the conviction of the appellant under Section 309 of the Indian Penal Code and the sentence awarded to him on this count is set aside.

41. Subject to above modification, for the aforesaid reasons, Criminal Appeal No.157/2010 is dismissed.

Order accordingly.

I.L.R. [2010] M. P., 2418
CRIMINAL REVISION
Before Mrs. Justice Indrani Datta
07 July, 2010*

SONU ... Applicant
Vs.
STATE OF M.P. ... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 233 & 311 - *A*

*Cr.R. No.511/2010 (Gwalior)

witness already examined as a prosecution witness cannot be later on permitted to be cited as a defence witness. (Para 8)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2) – धाराएँ 233 व 311 – अभियोजन साक्षी के रूप में पूर्व से ही परीक्षित किसी साक्षी को बाद में प्रतिरक्षा साक्षी के रूप में प्रस्तुत करने की अनुज्ञा नहीं दी जा सकती।

Arun Pateriya, for the applicant.
T.C. Bansal, Public Prosecutor, for the non-applicant/State.
V.K. Saxena with *R.K. Sharma,* for the complainant.

ORDER

INDRANI DATTA, J. :–Heard on I.A. No.10860/10, which is an application under Section 301(2) CrPC for permission to assist the public prosecutor in the case.

Application is allowed. Counsel for complainant is permitted to assist the P.P. at the time of hearing.

With the consent of parties matter is finally heard.

1. Applicant has filed this revision petition under Section 397/401 CrPC against the order dated 13.05.2010 passed by the learned Special Judge, Gwalior in Special Case No.124/2002 by which the application filed by the respondent/State that prosecution witness Mamta cannot be permitted to be examined as defence witness has been accepted.

2. Facts in a nutshell giving rise to this revision are that applicant and co-accused are facing Special Case No.124/2002 in the Court of Special Judge (Dacoity) Gwalior for offence punishable under Section 302/34 IPC, Section 25/27 of Arms Act and Section 11/13 of MPDVPK Act. In that Court Mamta was examined on 21.3.03 as prosecution witness and she is alleged to be eye-witness of the incident. Thereafter, she submitted an affidavit on 31.3.2010 in the trial court in favour of the present applicant and co-accused stating therein that when her statement was recorded on 21.3.03 she was under pressure and she has not seen the incident of Vishnumangal's murder and she is not a witness of occurrence. Thereafter, one application was preferred under Section 311 of CrPC by the present applicant before the trial Court for recalling Mamta for further cross-examination that application was rejected on 16.04.10. Against that order, the applicant preferred one revision i.e. Cri. Revision No.348/10 that revision was withdrawn by applicant with liberty to move application before the concerned trial court for recalling Mamta and it was directed that if any such application is moved then it should be considered as per law. Thereafter, list of defence witness was filed and case was fixed for evidence of defence witness on 17.5.10. In that list name of Mamta was mentioned as witness No.6. Meanwhile on 10.05.2010 prosecution raised an objection that Mamta should not be permitted to be examined as defence witness as she has already been examined as prosecution witness.

On 13.5.10 learned trial court accepted the application filed by prosecution and refused to grant permission for examining Mamta as defence witness. Against that order this revision is preferred.

3. It is contended on behalf of the applicant that the learned trial court has erred in accepting the application filed by the prosecution and not permitting Mamta to be examined as defence witness.. It is further submitted that her examination as defence witness is necessary for proper disposal of the case as she has sworn her affidavit in favour of the applicant and as per averment of affidavit she has given statement previously in the court under pressure hence her previous statement is not considerable. It is further submitted that Mamta has thereafter filed a Private Complaint in the Court of JMFC Gwalior against complainant Sanjay on 31.3.10 in which her statement was recorded under Section 200 of Cr.P.C. on 23.6.10, in which she has narrated that she has sworn affidavit on her own will. It is further submitted that the learned trial court should have considered all these documents and should have given permission for examining Mamta as defence witness as her examination is necessary and it is also imperative to appreciate her evidence for just decision of the case.

4. Learned counsel for the State as well as Counsel for complainant vehemently opposed the revision and submitted that incident of murder of Vishnumangal occurred in the year 2002 and in that case all the co-accused have been convicted and present applicant remained absconding for five years, Mamta was examined as prosecution witness in presence of present applicant, thereafter application for recalling Mamta for further cross-examination has already been rejected, therefore, she cannot be permitted to be examined as defence witness. Reliance is placed on *Umar Mohammad and Others v. State of Rajasthan,* (2009) 3 SCC (Cri.) 244. In that case PW-1 who was examined in court on 5-7-1994 purported to have filed an application on 1-5-1995 stating that five accused persons named therein were innocent. Said application was rejected by trial court and revision application filed there against also rejected by High Court. It was held by Apex Court that it was not a case where stricto sensu the provisions of S.311 could have been invoked. Very fact that such an application was got filed by PW1 nine months after his deposition is itself pointer to the fact that he had been won-over. It is absurd to contend that he, after a period of four years and that too after his examination-in-chief and cross-examination was complete, would file an application on his own will and volition. Furthermore, reliance is placed on *Mishrilal and Others v. State of M.P. and others* 2005 SCC (Cri.) 1712 in which it is held that once the witness was examined-in-chief and cross-examined fully, such witness should not have been recalled and re-examined to deny the evidence he had already given before the court, even though that witness had given an inconsistent statement before any other court or forum subsequently. A witness could be confronted only with a previous statement made by him.

5. Placing reliance on the above citations, learned counsel for the State as

well as Counsel for complainant submitted that Mamta was examined in the year 2003 and after seven years she has filed one affidavit on 31.3.10. Apparently that affidavit is filed after long span of time and the possibility that she has been won-over cannot be ruled out particularly when she has been examined as prosecution witness in presence of applicant. It is further asserted that the learned trial court has rightly allowed the application of the State for not permitting Mamta to be examined as defence witness. There is no perversity in that order and the same is impeccable and does not warrant any interference by this Court.

6. Considered rival submissions of parties and perused the documents on record.

7. Arguments advanced on behalf of the learned counsel for the respondent/ State as well as complainant seem to be reasonable and acceptable. Apparently, Mamta was examined in the year 2003, she kept mum and silent for a long span of seven years and application filed on behalf of the applicant for calling her for examination has already been rejected, she cannot now be examined as defence witnesses on the basis of affidavit sworn by her after a long span of seven years.

8. In case of *State of M.P. v. Badri Yadav & Anr.* AIR 2006 SC 1769 witnesses were examined by prosecution as eye-witnesses on 18-12-1990, cross-examined and discharged. Thereafter, an application under Section 311, CrPC. was rejected. It is observed by Supreme Court that witnesses were recalled purportedly to exercise of power under sub-section (3) of Section 233, Cr.P.C. and examined as DW-1 and DW-2 on behalf of the accused on 17-7-1995. This was clearly for the purpose of defeating the ends of justice, which is not permissible under the law. That apart, in the present case both PWs are related to the deceased. Being the close relative and friend of the deceased there is no rhyme and reason to depose falsely against the accused and allowing the real culprit to escape unpunished. On 21-9-1989, their statements were recorded under Section 164, CRP.C. before the Magistrate. On 18-12-1990, their depositions were recorded before the Sessions Judge. In both the statements they have stated that they were eye-witnesses and witnessed the occurrence. Both of them have stated that they saw the accused assaulting the deceased with knives and swords. They were subjected to lengthy cross-examination but nothing could be elicited to discredit the statement-in-chief. Their examination as defence witnesses was recorded on 17-7-1995 when they resiled completely from the previous statements as prosecution witnesses. It, therefore, clearly appears that the subsequent statements as defence witnesses were concocted as well as afterthought. They were either won over or were under threat or intimidation from accused. No reasonable power, properly instructed in law, would have acted upon such statements. Prima facie prosecution witnesses in their subsequent affidavits made a false statement which they believed to be false or did not believe to be true. It was held that these witnesses are liable for perjury for giving false evidence punishable under Section 193, IPC.

9. Considering the above legal aspect and overall facts and circumstances of the case, this petition deserves to be dismissed as the order of learned trial court is proper and legal. Learned trial court has rightly accepted the application of the State. There is no perversity in the order of the court below. Accordingly, the petition being bereft of any merit, is hereby dismissed.

Petition dismissed.

I.L.R. [2010] M. P., 2422
CRIMINAL REVISION
Before Mr. Justice Anil Kumar Sharma
22 July, 2010*

ANITA PAWAR ... Applicant
Vs.
DHARMENDRA SIKARWAR & anr. ... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Sections 156(3), 173(2) & 190(1)(a) - *After sending a case for investigation on a private complaint to the police u/s 156(3) Cr.P.C. and on submission of the police report, the case cannot be treated as instituted upon police report because cognizance of the offence has already been taken on the basis of complaint filed by the complainant - The report submitted u/s 156(3) Cr.P.C. cannot be treated as Police Report u/s 173(2) Cr.P.C. - Revision allowed.* (Para 8)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 156(3), 173(2) व 190(1)(ए) – व्यक्तिगत परिवाद पर द.प्र.सं. की धारा 156(3) के अंतर्गत अन्वेषण के लिए मामला पुलिस को भेजने के बाद एवं पुलिस द्वारा रिपोर्ट प्रस्तुत करने पर, मामला पुलिस रिपोर्ट पर संस्थित नहीं माना जा सकता, क्योंकि अपराध का संज्ञान परिवादी द्वारा फाइल किये गये परिवाद के आधार पर पूर्व में ही लिया जा चुका है – द.प्र.सं. की धारा 156(3) के अन्तर्गत प्रस्तुत रिपोर्ट द.प्र.सं. की धारा 173(2) के अंतर्गत पुलिस रिपोर्ट नहीं मानी जा सकती – पुनरीक्षण मंजूर।

Cases referred :
(2006) 1 SCC 460, (2010) 1 SCC (Cri.) 1301.

S.S. Rajput, for the applicant.
Sanjay Gupta, for the non-applicant No.1.
T.C. Bansal, Public Prosecutor, for the non-applicant No.-2.

ORDER

ANIL SHARMA, J. :–The only question involved in this revision is whether in a case instituted on a private complaint under Section 190 Cr.P.C. after the report filed by the Police under Section 156 (3) Cr.P.C. on the direction of the Magistrate, the case can be treated as filed under Section 173 (2) of Cr.P.C.

2. Learned Judicial Magistrate First Class, Guna by its order dated 19/1/2010 rejected the application filed by the complainant for framing charges on the basis

*Cr.R. No.326/2010(Gwalior)

of Police Report without taking evidence before the charge. In revision, the Additional Judge to the Court of Fourth Additional Sessions Judge, (Fast Track) Guna has allowed the revision petition filed by the complainant and directed that after receiving the report under Section 156 (3) Cr. P.C. it is not necessary to take evidence before framing charge and since the Court has already taken cognizance on Police Investigation Report submitted under Section 156 (3) Cr.P.C., the cognizance shall be treated as taken under Section 190 (1) (b) Cr.P.C.

3. It means learned Additional Sessions Judge while mentioning the provisions of Section 190 (1) (b) has overlooked the provisions of that Section. Section 190 Cr.P.C. reads as under:-

> "190. Cognizance of offences by Magistrates.- (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-
>
> (a) upon receiving a complaint of facts which constitute such offence;
>
> (b) upon a police report of such facts;
>
> (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.
>
> (2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

4. From a bare reading of the Section 190 Cr.P.C., it is clear that cognizance of the offence shall be deemed to have been taken as soon as the complaint of facts which constitutes such offence has been received by the Magistrate. The second mode is upon a police report of such facts. Therefore, it is clear that as soon as the complaint is filed, cognizance shall be deemed to be taken by the Magistrate concerned.

5. The Judicial Magistrate may proceed to take statements of the complainant and his witnesses under Sections 200 and 202 of Cr.P.C. or he can refer the matter to be investigated by the Police Officers under Section 156 (3) of Cr.P.C. Section 156 of the Cr.P.C. reads as under:-

> "156. Police Officer's power to investigate cognizable case.-(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.
>
> (2) No proceeding of a police officer in any such case shall at any

stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned."

6. The learned counsel for the respondent has relied on the judgment of *Mohd. Yousuf vs. Afaq Jahan (Smt.) and another,* (2006) 1 SCC 460 in which it has been held that if a complaint has been sent for investigation to the officer-in-charge of the Police Station under Section 156 (3), it is the duty of the officer in charge of the police station to register an FIR even when the Magistrate explicitly does not say so. Simply by registering the FIR, for investigating the matter under Section 156 (3) of Cr.P.C. it is not necessary for the officer in charge of the Police Station to file challan under Section 173 (2) Cr.P.C. he can submit a report to the concerned Magistrate who shall then issue process under Section 204 of Cr.P.C. and the case will be treated as complaint case and the procedure for trial will be mentioned in the case instituted otherwise than on police report provided under Section 242 to 247 of Chapter XIX of Cr.P.C.

7. Learned counsel for the petitioner has cited a judgment of the Hon. Apex Court in the case of *Ajay Kumar Ghose vs. State of Jharkhand and another,* (2010) 1 SCC (Cri.) 1301 in which while discussing the difference between case instituted on basis of police report and case instituted otherwise than on police report it has been held that in first category, prosecution gets opportunity to lead evidence only after charge is framed whereas in second category complainant gets two opportunities to lead evidence, first before charge is framed and second after charge is framed.

8. Therefore, it is clear from the above that simply by sending a case for investigation on a private complaint to the Police under Section 156 (3) of Cr.P.C., on submission of the police report the case cannot be treated as instituted upon police report because cognizance of the offence has already been taken on the basis of complaint filed by the complainant. It is in continuation of provisions of Section 190 (1) (a) of Cr.P.C. that report under Section 156 (3) of Cr.P.C. submitted before the trial Court after which either the Magistrate can issue process against the accused or the complaint can be rejected. The report submitted under Section 156 (3) Cr.P.C. cannot be treated as Police Report under Section 173 (2) of Cr.P.C., therefore, it is clear that the order dated 30/3/2010 passed by learned Additional Sessions Judge cannot be said to be legal and the order passed by the learned Judicial Magistrate First Class dated 19/1/2010 in Criminal Case No. 27/ 2009 was proper and was in accordance with the procedure prescribed for warrant case instituted otherwise other than on Police Report.

9. Resultantly, the petition is allowed. The order passed by learned Additional Session Judge, Guna dated 30/3/2010 is hereby set aside. Consequently the order

dated 19/1/2010 passed by learned Judicial Magistrate First Class, Guna is hereby affirmed. The revision filed by the accused against the cognizance although dismissed by this Court as mentioned in the order of the trial Court, this does not mean that this Court has directed the case instituted to be as Police case or procedure prescribed in the Police case be followed.

Petition allowed.

I.L.R. [2010] M. P., 2425
MISCELLANEOUS CIVIL CASE
Before Mr. Justice U.C. Maheshwari
10 September, 2010*

JYOTI BANGDE (SMT.) ... Applicant
Vs.
SANJAY BANGDE ... Non-applicant

Civil Procedure Code (5 of 1908), Section 24 - *Transfer of matrimonial case - In the matter of difficulties and convenience, the women requires more consideration in comparison of men.* (Para 8)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 24 – विवाह विषयक मामले का अंतरण – कठिनाईयों और सुविधा के मामले में, पुरुषों की तुलना में महिलाओं पर अधिक ध्यान देना आवश्यक है।

Case relied on :

(2008) 3 SCC 659.

Manish Tiwari, for the applicant.
Rakesh Sagar, for the non-applicant.

ORDER

U.C. MAHESHWARI, J. :–This petition is preferred by the applicant/wife under section 24 of the CPC for transferring the Civil Original Suit No.61-A/09 filed by the respondent/husband under section 13(l)(ia)(ib) of the Hindu Marriage Act, 1955 in the Family Court Sagar, from such Court to the competent court at Bhopal. It is noted that on earlier occasion, M.C.C No. 1036/09 was also filed on behalf of the applicant in this regard but the same was dismissed as withdrawn by extending liberty to the applicant to file the fresh petition by mentioning the additional and elaborate facts vide order dated 6.10.09. Accordingly, on earlier occasion, no such petition has been decided on merits. In such circumstances, the same is being decided on merits.

2. The facts giving rise to this petition are that the respondent herein, being husband of the applicant, on arising some matrimonial dispute between them, filed the aforesaid civil suit under section 13(l)(ia)(ib) of the Hindu Marriage Act, 1955 for decree of divorce in the Family Court, Sagar, while at the instance of the

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*M.C.C. No.1480/2009 (Jabalpur)

applicant, a criminal case under section 12 of the Protection of Women from Domestic Violance Act, is pending in the court of JMFC Bhopal. As per further averments of it, the applicant, being woman, under the compelling circumstances created by the respondent, is residing with the family of his father at Bhopal. His father being old aged person is not in a position to accompany her for attending the above ~ mentioned case on every date at Sagar and except the father there is no any other person in the family of her parents to accompany her for attending the case at Sagar. It is also stated that the applicant being unemployed person, is not having any source of income and, in such circumstance, she is unable to afford the traveling and other expenses for attending the case at Sagar. Besides that she is under apprehension that on her going to Sagar she may be subjected to any untoward incident by the respondent. With these averments the applicant has filed this petition.

3. In reply of the respondent all the aforesaid grounds for transferring the case are denied. In addition it is stated that in compliance of the direction of the trial court he is paying the interim alimony and the expenses of the applicant to attend the case at Sagar. In this regard some documents are also annexed with the reply. It is also stated that in pendency of such case, since the date of its institution, on coming the applicant to Sagar for defending the case, no untoward incident has taken place. Even otherwise, no police report has been lodged by the applicant in this regard till today. As per further averments, the petition is preferred only for harassing the respondent. Earlier to this petition, some petition was also filed. The same was withdrawn and now without mentioning any change in the circumstance or the particulars, the same is filed with same averments and prayed for dismissal of the petition.

4. The applicant's counsel by referring the facts stated in the petition made an additional submission that out of the aforesaid wedlock of the applicant and the respondent, they have been blessed with a daughter who being aged 6 years, is also residing with the applicant and except the applicant, no any other person is available in her parental family to look after such daughter as her father being old aged person is not in a position to lookafter such daughter and prayed to allow this petition.

5. On the other hand, responding the aforesaid arguments, respondent's counsel by referring the averments of the reply said that the case is at the stage of recording the evidence of the applicant and her witnesses and, in such premises, only in. 2-3 dates, it may be concluded by the trial court. He also argued that he is paying the interim alimony and the expenses of the litigation as directed by the trial court, therefore, there is no necessity to transfer the case from Sagar to any other court of Bhopal and prayed for dismissal of this petition.

6. Having heard the parties I have gone through the petition as well as the papers placed on the record.

7. According to the applicant, in her parental family, except her old aged father, no one else is available to look after her daughter aged six years residing with her and the father being old aged person is not in a position to accompany with the applicant and being woman, she all-alone is not in a position to go and defend the case at Sagar. True it is, the distance of Sagar from Bhopal is near about 200 KM but while considering the rival contention of the parties, this court has to keep the welfare of their minor daughter residing with the applicant. It is apparent from the papers placed on the record that except the applicant, no one else is available in her parental family to lookafter her daughter and, in such situation, if the case is not transferred from Sagar to Bhopal then in that circumstance not only the applicant but her daughter has also to face the inconvenience and that may affect the future welfare of such daughter.

8. Besides this, it is undisputed fact that the respondenl/husband is resident of Sagar and in view of the nature of their matrimonial dispute as the petition for divorce has been filed by the respondent on the ground of desertion and cruelty both and, in such premises, the apprehension in the mind of the applicant that on going to Sagar she may be subjected to any untoward incident by the respondent could not be discarded. It is also settled principle of the law that in the matter of difficulties and convenience, the women requires more consideration in comparison of men.

9. In the matter of transferring the cases from one court to another, this court has to consider the circumstance as laid down by the Apex Court in the matter of *Kulwinder Kaur Vs, Kandi Friends Education Trust*-(2008)3 SCC 659 in which it was held as under :-

> "22. Although the discretionary power of transfer of cases cannot be imprisoned within a strait jacket of any cast-iron formula unanimously applicable to all situations, it cannot be gainsaid that the power to transfer a case must be exercised with due care, caution and circumspection.
>
> 23. Reading Ss.24 and 25 of the Code together and keeping in view various judicial, pronouncements, certain broad propositions as to what may constitute a ground for transfer have been laid down by the Courts. They are balance of convenience or inconvenience to plaintiff or defendant or witnesses; convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit; issues raised by the parties; reasonable apprehension in the mind of the litigant that he might not get justice in the Court in which the suit is pending; important questions of law involved or a considerable section of public interested in the litigation; 'interest of justice' demanding for transfer of suit, appeal or other

proceeding etc. Above are some of the instances which are germane in considering the question of transfer of a suit appeal or other proceeding. They are, however, illustrative in nature and by no means be treated as exhaustive. If on the above or other relevant considerations, the Court feels that the plaintiff or the defendant is not likely to have a 'fair trial' in the Court from which he seeks to transfer a case, it is not only the power but the duty of the Court to make such order."

Keeping in view the principle laid down in the cited case, on examining the case at hand, the balance of convenience appears in favour of the applicant as she and her witnesses are residing at Bhopal. It is noted that as per submission of the respondent's counsel, his witnesses have already been examined and only the witnesses of the applicant are to be examined in the matter.

10. In view of the aforesaid discussion, because of a minor daughter, when applicant herself is not in a position to go and defend the case at Sagar then it would not be possible for her to produce the witnesses of Bhopal for examination at Sagar and if such witnesses are not examined by her then she could not put her defence properly in the matter and, in such premises, fair justice could not be carried out between the parties. Thus, the balance of convenience is in favour of the applicant and if the case is not transferred then she has to face more inconvenience in defending the case at Sagar. So, keeping in view, the available circumstances of the case, in order to hold fair trial of the case between the parties and also taking into consideration the convenience of the applicant, this petition deserves to be allowed.

11. Therefore, by allowing this petition, the above mentioned Civil Suit No.61-A/09 pending in the Family Court, Sagar is hereby ordered to be transferred from such Court to the Family Court Bhopal for its further trial and adjudication. There shall be no order as to the cost.

Petition allowed.

I.L.R. [2010] M. P., 2428

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Rakesh Saksena & Mr. Justice S.C.Sinha.

30 April 2010*

MOHD. ASLAM & anr. ... Applicants

Vs.

STATE OF M.P. ... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 265, Official Language Act, M.P. 1957, Section 3 - *The accused can not be held prejudiced by filing of charge sheet and other documents in English language*

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* M.Cr.C. No.10254/2008 (Jabalpur)

and not providing Hindi translation where he is well represented by the counsel, who is well versed in English - Petition dismissed. (Para 16)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 265, राजभाषा अधिनियम, म.प्र. 1954, धारा 3 – आरोप पत्र एवं दस्तावेज अंग्रेजी भाषा में प्रस्तुत किये जाने से एवं उनका हिन्दी अनुवाद उपलब्ध न कराने से अभियुक्त पर विपरीत प्रभाव पड़ना अवधारित नहीं किया जा सकता, जहाँ कि उसका प्रतिनिधित्व ऐसे अधिवक्ता द्वारा किया गया हो जो अंग्रेजी में सुविज्ञ है – याचिका खारिज।

Cases referred :

AIR 1992 MP 256.

Rajendra Kumar Gupta, for the applicants.

Rajeev Mishra, for the non-applicant.

ORDER

The Order of the Court was delivered by RAKESH SAKSENA, J. :–Applicants have filed this petition under section 482 of the Code of Criminal Procedure challenging the order dated 24.9.2008 passed by Special Judge for CBI cases, Bhopal in Special Case No.11/2008 dismissing the application filed by them under section 265 of the Code of Criminal Procedure requesting that prosecution be directed to furnish Hindi translation of the documents filed by it in English along with the charge sheet filed against them.

2. CBI, ACB, Bhopal filed the charge sheet against the applicants under sections 120-B,420,467,468,471 of the Indian Penal Code and section 13(1)(d) read with section 13(2) of the Prevention of Corruption Act. This charge sheet was in English language. First Information Report, statements of witnesses and most of the documents filed along with the charge sheet were in English. Applicants filed application under section 265 Cr.P.C. stating that they did not have adequate knowledge of English language, therefore, they were incapable to defend themselves because the documents filed along with the charge sheet against them were in English language. According to them, their language was Hindi and since official language of the Court was also Hindi, they were entitled to have Hindi translation of the documents filed by the prosecution in the case, therefore, they prayed that prosecution be directed to supply the Hindi translation of the documents which were in English language.

3. It is apposite to quote Section 265(1) of the Code of Criminal Procedure which reads as under:-

> 265. Language of record and judgment.- (1) Every such record and judgment shall be written in the language of the Court.

4. Since section 265 of the Code of Criminal Procedure is limited to the provisions comprised in Chapter XXI-Summary Trials under section 260 of the Code of Criminal Procedure, the provisions of section 265 are not applicable to cases triable as warrant-cases and sessions trials. The case in hand was triable as warrant-case by Special Judge C.B.I.

5. In respect of language of record and the evidence pertaining to warrant-cases and the trials before Court of Sessions, section 277 of the Code of Criminal Procedure provides :-

> **277. Language of record of evidence.**- In every case where evidence is taken down under section 275 or section 276,-
>
> (a) if the witness gives evidence in the language of the Court, it shall be taken down in that language;
>
> (b) if he gives evidence in any other language, it may, if practicable, be taken down in that language, and if it is not practicable to do so, a true translation of the evidence in the language of the Court shall be prepared as the examination of the witness proceeds, signed by the Magistrate or presiding Judge, and shall form part of the record;
>
> (c) where under clause (b) evidence is taken down in a language other than the language of the Court, a true translation thereof in the language of the Court shall be prepared as soon as practicable, signed by the Magistrate or presiding Judge, and shall form part of the record:
>
> Provided that when under clause (b) evidence is taken down in English and a translation thereof in the language of the Court is not required by any of the parties, the Court may dispense with such translation.

6. From bare perusal of above provision, it is apparent that it requires the Court to record evidence in the language of the witness and if the witness gives evidence in any other language, it may, if practicable, be taken down in that language, and if it is not practicable to do so, a true translation of the evidence in the language of the Court shall be prepared. It has been further provided that if the evidence is taken down in English and the translation thereof in the language of the Court is not required by any of the parties, the Court may dispense with such translation.

7. As far as the language and contents of judgment are concerned, section 354 of the Code of Criminal Procedure provides:-

> **354. Language and contents of judgment. (1)** Except as otherwise expressly provided by this Code, every judgment referred to in section 353,-
>
> (a) shall be written in the language of the Court;

8. From the above statutory provisions, it is borne out that recording of the evidence may be in any other language, but in case it is other than the language of the Court, a true translation shall be prepared and further that the judgment to be pronounced in every trial in any Court of original jurisdiction under section 353 of

the Code of Criminal Procedure shall be written in the language of the Court except expressly provided by the Code itself.

9. The aforesaid referred provisions do not restrict or caste an obligation on any of the parties before the Court to submit the documents or the charge sheet only in the language of the Court.

10. Learned counsel for the applicants submitted that the official language for the official purposes of the State of Madhya Pradesh is Hindi, therefore, prosecution deserved to be directed to supply Hindi translation of the documents submitted by it in English. Section 3(1) of the Madhya Pradesh Official Language Act, 1957 (for brevity referred to as M.P.Act) is reproduced hereunder:-

> **3. Official Language for Official purposes of the State.-** [1] Subject as hereinafter provided, Hindi shall be the official language of the State for all purposes except such purposes as are specifically excluded by the Constitution and in respect of such matters as may be specified by Government from time to time by notification.

11. Learned counsel for the applicants drew our attention to the notification issued by the State Government under the provisions of section 137 of the Civil Procedure Code which runs as follows:-

> *Notfn. No.45940-F.N.7(a)-5-76-B-XXI. Dated 22.11.1976, Pub. in M.P. Rajpatra (Ext.). d.23.11.1976,p.3323]-* In exercise of the powers conferred by sub-section (2) of section 137 of the Code of Civil Procedure, 1908 (No. V of 1908), the State Government hereby declares that with effect from the 26th January, 1977-
>
> (i) The Hindi in Deonagri script shall be the language of the all courts subordinate to the High Court of Madhya Pradesh; and
>
> (ii) The applications to and proceedings in such courts shall be written in the Deonagari script.

12. It is true that as provided by section 3 of M.P. Act, the official language of the State for all purposes except such purposes as specifically excluded by the Constitution and as specified by the Government by notification shall be 'Hindi', but it does not debar the prosecution to file the charge sheet in English. As far as the notification quoted hereinabove is concerned, it pertains to the provisions of the Code of Civil Procedure and Civil Courts.

13. All the provisions under the Code of Criminal Procedure relate to the record of proceedings and the judgment of the Criminal Court other than High Court and Supreme Court. In section 364 Cr.P.C., it has been provided that if the original judgment is recorded in a language different from that of the Court and the accused

so requires, a translation thereof into the language of the Court shall be added to such record.

14. Learned counsel for the applicants placing reliance on *Dr. Shiv Roop Sharma v. R.K. Shrivastava* [AIR 1992 MP 256], urged that the prime concern and the duty of the Court is the dispensation of justice and the language should not come in the way of dispensation of justice. In *Dr.Shiv Roop Sharma* (supra), it was observed that while it is true that the person seeking justice cannot be driven out of the Court on account of language, it is also equally true that an advocate, as an officer of the Court, is equally expected to honour the official language of the Court. Direction by Magistrate, accepting an application in English and in future to make applications before it in Hindi could not be said to contravene Art.345 and that the direction of the Magistrate was well supported by section 3 of M.P. Act. In our opinion, the question and the occasion in the above case was different. In that case, Judicial Magistrate directed the petitioner, a practicing advocate appearing for the accused in the criminal case, to make further applications in Hindi. Learned Magistrate had entertained the application filed in English but asked the learned counsel to make applications in future in Hindi. It was observed in para 6 :-

> 6. Article 345 of the Constitution empowers the State Legislature, to adopt Hindi as the official language of the State, accordingly it has been adopted in the State by passing the aforesaid Act. The Govt. of Madhya Pradesh by Notification No.45950-Fa.No. 7(A)-5-76-B-21, dt. 22-11-76 published in Gazette (Extraordinary) on 23-11-1976 and 28-3-1974 has notified that Hindi shall be the language of all subordinate Courts in the State. The High Court of Madhya Pradesh by its memo, dt. 20-1-77 has directed all its subordinate Courts, through its District and Sessions Judges, to use and enforce Hindi, in all its civil and criminal proceedings. Section 272 of the Criminal P.C. empowers the State Govt. to determine what shall be for the purposes of Code, the language of each Count within the State other than the High Court. The notifications referred to above, clearly show the determination of the State Government that Hindi shall be the language of all Courts in the State except High Court.

15. This gives some indication that parties before the Court are expected to honour the official language of the Court, however, filing of the charge sheet containing documents and statements recorded in English language, in our view, cannot be held to be illegal or otherwise prohibited.

16. It is true that an accused person would be in much better position to defend his case, if he would himself be able to go through the material collected in the charge sheet against him, but, since applicants in this case are represented by the counsel who is well versed in English, which is apparent from the fact that they

filed their vakalatnama in English, it cannot be held that they would be prejudiced by filing of the charge sheet in English.

17. Taking into consideration all the above circumstances, we are of the opinion that the trial Court committed no error in rejecting the application filed by the applicants for supply of Hindi translation of the documents filed with the charge sheet in English.

18. Petition is, accordingly, dismissed.

Petition dismissed.

I.L.R. [2010] M. P., 2433
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice P.K. Jaiswal
18 May 2010*

SULABH JAIN ... Applicant
Vs.
STATE OF M.P. ... Non-applicant

Evidence Act (1 of 1872), Section 32 - *A statement given by deceased (the wife) to the D.I.G. (Police) in a previous enquiry may be treated as a dying declaration against accused (husband).*

In a Sessions Trial on charge of murder against applicant/accused, the father of deceased (wife of accused) filed an application for treating the statement of deceased given by her before D.I.G. Police - The said statement was given by her 2½ months before the incident and alleging that the applicant had been threatining to kill her - Held - Her statement recorded before the then D.I.G., Bhopal would be admissible in evidence as per sub-section (1) of Section 32 of the Evidence Act - The learned Trial Court has not committed any legal error in allowing the application vide impugned order dated 26.04.2010. (Para 11)

साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृतक (पत्नि) द्वारा पूर्ववर्ती जाँच में उप महानिरीक्षक (पुलिस) को दिया गया कथन अभियुक्त (पति) के विरुद्ध मृत्युकालिक कथन के रूप में माना जा सकता है।

Cases referred :

AIR 1939 PC 47, 1974 CrLJ 1200, AIR 2000 SC 2602, AIR 2001 SC 2944.

Manish Datt, for the applicant.
Chanchal Sharma, G.A., for the non-applicant/State.

ORDER

P.K. Jaiswal, J. :–Heard on the question of admission.

The petitioner who is accused in Sessions Trial No.383/09, pending before

*M.Cr.C. No.4249/2010 (Jabalpur)

the Sessions Judge, Bhopal and is charged under Section 302/34 of IPC and under Section 25 and 27 of Arms Act, 1959, is challenging the order dated 26.4.2010 passed by Sessions Judge, Bhopal, whereby the learned Sessions Judge has allowed the application filed on behalf of the complainant for requisition of the record of complaint dated 17.12.2008, statement of the deceased recorded therein and other documents and treating the statement of deceased Princy Jain recorded before the DIG, Bhopal under Section 32 of the Evidence Act as dying declaration and called the then DIG, Bhopal for evidence.

2. On 2.3.2009 an FIR was lodged by the first informant Shefali Goel (PW-12) that an incident took place on 2.3.2009 at 18:30 hours in which Princy Jain (since deceased) sustained gun shot injury. The Police Station M.P. Nagar, Bhopal has registered Crime No. 129/2009 for the offence under Section 302 of IPC. It is alleged that the petitioner is said to have caused gun shot injury to Princy Jain. The Court statement of PW-1 to PW-14 were recorded between 20.8.2009 to 26.3.2010.

3. During the trial an application was filed by 0m Prakash, father of the deceased Princy Jain wherein it was stated that prior to the incident of 2.3.2009, at Police Station Ganj Basoda, Adesh Jain, uncle of the accused Sulabh Jain has lodged false report against deceased Princy Jain and his family members and in this connection 0m Prakash Jain has submitted an application on 17.11.2008 to the DIG, Bhopal alleging that he and his family members are being harassed by Sulabh Jain and his family members at which the then DIG (Ashok Awasthi) had got recorded the statement of 0m Prakash, Nikesh, Princy (deceased) etc. It is stated that in these statements Princy Jain had alleged that the present applicant Sulabh Jain had been threatening to kill her and he may do some untoward with her. It is prayed by the complainant that the statement of deceased Princy Jain given to DIG, Bhopal be treated as dying declaration under Section 32 of the Evidence Act.

4. No written reply was filed by the applicant. When the matter was fixed for argument on the said application on 26.4.2010, learned counsel for the applicant orally opposed the application and prayed for its dismissal.

5. The learned Trial Judge after appreciating the argument of learned counsel for the parties and also considering the fact that one Purse of the deceased was seized vide property seizure memo dated 2.3.2009 and in the said purse, one letter written by deceased Princy Jain to Police Station M.P. Nagar, Bhopal was also seized in which she had lodged a complaint against the present applicant Sulabh Jain, in the interest of justice to both the parties, allowed the application and directed the then DIG Shri Ashok Awasthi to remain present along with record i.e. application dated 17.11.2008 and statement of deceased and other persons recorded by the then DIG before the Court and for recording of his statement issued summon to Shri Ashok Awasthi for 17.5.2010.

6. Learned counsel for the applicant submits that the said statement of deceased Princy Jain recorded before the DIG, Bhopal in pursuance to the complaint lodged by the father of the deceased on 17.11.2008, pertains to some different incident and the same cannot be treated as a dying declaration as admissible under Section 32 (1) of the Evidence Act as it is not one in the series of the same incident or transaction. He further submits that the learned Trial Judge has committed an error of law in allowing the application filed on behalf of the complainant for treating the statement of Princy Jain recorded by the Dy. Inspector General of Bhopal under Section 32 of the Evidence Act, as dying declaration and calling of Shri Ashok Awasthi, the then DIG, Bhopal for evidence. It is further submitted that letter dated 2.3.2009 which was seized by the police was never written by Princy Jain and genuineness of the said letter is completely doubtful. In support of the said contention, he drew my attention to para 44 and 45 of the statement of Shefali Goel (PW-12) and Ex.P/14 the report of handwriting expert and statement of Handwriting Expert K.K. Sahukar (PW-10). He would further drew my attention to the decision of Privy Council in the case of *Pakala Narayana Swami Vs. Emperor,* AIR 1939 Privy Council 47, Division Bench decision of this Court in the case of *Onkar Vs. State of Madhya Pradesh,* 1974 Cr.L.J. 1200 and decision of the Apex Court in the case of *Sudhakar and another Vs. State of Maharashtra,* AIR 2000 SC 2602.

7. In *Pakala Narayana Swami* (supra), the victim of the offence, before he started to go to another village, made a statement to his wife that the wife of the accused had written and asked him to go and receive payments due to him. This statement was sought to be proved at the trial and the Privy Council held that such a statement was inadmissible in evidence under section 32(1) of the Evidence Act as a circumstance of the transaction, which resulted in death. The Privy Council also observed that the phrase "circumstances of the transaction" in the section conveyed some limitations. In *Onkar Vs. State of M.P.* (supra) while following the decision of Privy Council in *Pakala Narayana Swami* (supra), the Division Bench of this Court has explained the nature of circumstances contemplated by Section 32 of the Evidence Act thus:

> "The circumstances must have some proximate relation to the actual occurrence and they can only include the acts done when and where the death was caused.....Thus a statement merely suggesting motive for a crime cannot be admitted in evidence unless it is so intimately connected with the transaction itself as to be a circumstance of the transaction. In the instant case evidence has been led about statements made by the deceased long before this incident which may suggest motive for the crime. In *Allijan Munshi v. State,* AIR 1960 Bombay 290 : (1960 Cri LJ 894) the Bombay High Court has taken a similar view."

8. In the case of *Sudhakar and another vs State of Maharashtra* (supra),

the statement of prosecutrix was recorded by the Police after 11 days from the date of incident. She committed suicide after more than five and half months. The prosecution did not directly state the fact regarding cause of death, the Apex Court held that there is no legal evidence on record that the prosecutrix at or about the time of making the statement had disclosed her mind for committing suicide allegedly on account of the humiliation to which she was subjected to on account of rape committed on her person. The prosecution evidence does not even disclose the cause of death of the deceased. The prosecution did not directly state any fact regarding cause of death and, therefore, statement of prosecutrix cannot be treated as dying declaration as it was not in the series of circumstances of the transactions which resulted in death of deceased. No cogent and reliable evidence to connect the accused with commission of crime was found. Para 10 and 11 is relevant which reads as under :-

> "10-11. There is no legal evidence on record that the prosecutrix at or about the time of making the statement had disclosed her mind for committing suicide allegedly on account of the humiliation tc which she was subjected to on account of rape committed on her person. The prosecution evidence does not even disclose the cause of death of the deceased. The circumstances stated in Exhibit P-59 do no suggest that a person making such a statement would, under the normal circumstances, commit suicide after more than five and a half months. The High Court was, therefore, not justified in relying upon Exhibit P-59 as a dying declaration holding it that the said statement was in series of circumstances of the transaction which resulted in the death of the deceased on 21-12-1994. The conviction of the persons accused of offences cannot be based upon conjectures and suspicions. Statement Exhibit P-59 if not treated as a dying declaration, there is no cogent and reliable evidence which can connect the accused with the commission of the crime. In that event the other arguments advanced on behalf of the appellants assume importance. Other circumstances such as delay in lodging the FIR, medical examination of the prosecutrix, the non examination of material witnesses and turning hostile of witnesses including the Dnyaeshwar Mujmul and Dnyaneshwar Adhav are also required to be taken note of. It has also to be kept in mind that after the incident on 9th July, 1994, the prosecutrix is shown to have attended the school on 10th and 11th July, 1994 as well. Her mother in cross-examination also stated that Ms. Rakhi had told her about the incident only on 12th July, 1994 at about 5.00 p.m. PW-3, the father of the prosecutrix deposed in the Court that:

"Rakhi did not tell me on 17th, 18th, 19th July, 1994 that she wanted to file a complaint. I did not ask Rakhi whatever she wanted to file a criminal complaint. I did not disclose before the police on 20-7-1994 that Rakhi told me that she wanted to file criminal complaint."

9. A complaint in writing made to the police by a person who dies sometime thereafter, expressing apprehension of death at the hands of certain person is admissible in evidence under Ss. 32 (1) &.8 of the Evidence Act, when the person whose conduct is the source of the apprehension, is charged with the offence of murder of the person making the complaint. The statement is admissible as relating to "the circumstances of the transaction which resulted in his death", within S. 32(1). It cannot be held in such cases that there was no proximate connection between the death of the complainant and the complaint from the fact that the complaint was made nerely two and half months before the death. Thus, on complaint lodged by father of the deceased to Police in which statement of the deceased was recorded and she expressed her apprehension of death at the hands of accused before two and half months before the death is admissible under Section 32 of the Evidence Act.

10. The Apex Court in the case of *Patel Hiralal Vs. State of Gujarat* reported in AIR 2001 SC 2944 held that by Section 32(1) two categories of statements are made admissible in evidence and further made them as substantive evidence. They are : (1) his statement as to the cause of his death (2) His statement as to any of the circumstances of the transaction which resulted in his death. The second category can envelop a far wider amplitude than the first category. The words 'statement as to any of the circumstances' are by themselves capable of expanding the width and contours of the scope of admissibility. When the word 'circumstances' is linked to "transaction which resulted in his death' the sub-section casts the net in a very wide dimension. Anything which has a nexus with his death, proximate or distant, direct or indirect, can also fall within the purview of the sub-section. As the possibility of getting the maker of the statements in flesh and blood has been closed once and for all the endeavour should be how to include the statement of a dead person within the sweep of the sub-section and not how to exclude it therefrom. Admissibility is the first step and once it is admitted the Court has to consider how far it is reliable. Once that test of reliability is found positive the Court has to consider the utility of that statement in the particular case.

11. Here in the present case, on the basis of written complaint, lodged by the father of the deceased, statement of the deceased-Princy Jain was recorded before the then DIG, Bhopal in which she expressed apprehension of her death at the hands of present applicant and thereafter within a period of two and half-months she died, therefore her statement recorded before the then DIG, Bhopal would be admissible in evidence as per sub-section (1) of Section 32 of the Evidence

Ac: The learned Trial Court has not committed any legal error in allowing the application vide impugned order dated 26.4.2010.

12. For the above mentioned reasons, petition filed by the petitioner under Section 482 of the Code of Criminal .Procedure, 1973 has no merit and is according dismissed.

Petition dismissed.

I.L.R. [2010] M. P., 2438
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice I.S. Shrivastava
14 October, 2009*

BALARAM ... Applicant
Vs.
STATE OF M.P. ... Non-applicant

A. **Criminal Trial** - *Counter Cases - Same Public Prosecutor / Additional Public Prosecutor appearing in both the cases - Held - Same Public Prosecutor cannot appear in both the cases from the side of the prosecution, which are the cross cases of each other - District Magistrate is directed to appoint separate Public Prosecutor in both the sessions trial.* (Para 5)

क. दांडिक विचारण – प्रतीप (काउंटर) प्रकरण – वही लोक अभियोजक/अतिरिक्त लोक अभियोजक दोनों प्रकरणों में उपस्थित हुआ – अभिनिर्धारित – अभियोजन की ओर से ऐसे दोनों प्रकरणों में जो कि परस्पर काउंटर/प्रतीप प्रकरणों के रूप में है वही लोक अभियोजक उपस्थित नहीं हो सकता – जिला मजिस्ट्रेट को दोंनों सत्र प्रकरणों में पृथक लोक अभियोजक नियुक्त करने का निदेश दिया गया।

B. **Advocacy** - *General principles and legal ethics summarised.* (Para 4)

ख. वकालत – सामान्य सिद्धान्त एवं विधिक नीतिशास्त्र संक्षेपतः वर्णित।

Virendra Sharma, for the applicant.
Mamta Shandilya, P.L., for the non-applicant/State.

ORDER

I.S. Shrivastava, J. :–Sessions Trial no. 198/2009 *(State of M. P. Vs. Hiralal)* and Sessions Trial no. 653/2008 *(State of M.P. Vs. Gopal and others)* are pending in the Court of 9th ASJ, Ujjain. The same public prosecutor / additional public prosecutor is appearing in these cases, which is against the criminal jurisprudence. The same Govt Lawyer is appearing in both the cases and examining all the witnesses which is illegal, as one defence lawyer cannot proceed in both the cases at the stage of final arguments because one party is aggressor even then the public prosecutor has to support both the cases, hence it has been prayed that suitable directions be issued in the interest of justice.

*M.Cr.C. No.6682/2009 (Indore)

2. Heard the learned Panel Lawyer on the issue,.

3. The public prosecutors appearing in the sessions trial are also advocate and their selection is made from the advocates. Hence, they are bound with the principles of advocacy and professional ethics.

4. The general principles of advocacy and legal ethics may be summarized as follows.

1) Solicitation of work and advertising are prohibited.

2) Payment of commission to procure clients is unprofessional.

3) Sources of relations between counsel and client : It is evident that as counsel is also to conform to the ethical code prescribed for him by law and usage, he cannot be a mere agent or mouthpiece of his client to carry out his biddings. Where client dies, re-employment by the legal representative of the deceased becomes necessary.

4) Primary characteristics of the relation.

i) Relationship is personal

a) Counsel should keep himself constantly in touch with his client. He should inform him of every step that is being taken with respect to the case. This has two advantages. It ensures confidence of the client. It also enables the client to give such instructions as he considers necessary

b) There can be no "develling" or delegation of his duties by the advocate to another, counsel except with the assent of the client. A practice of delegation of functions on the ground of conflicting engagements, sickness, etc, no doubt exists but it is desirable that the client should be made aware that the work would be delegated if it becomes necessary.

c) If the Counsel has engaged a clerk for assistance that does not diminish his responsibility for the clerk's defaults or negligence.

d) It is not proper for the advocate to allow his assistant to dispose of the work of the client. A client pays for the skill of the counsel employed and while the later may avail of the help assistant, he must bestow on the work his personal attention, knowledge and skill.

ii) The relationship in fiduciary.

a) It is a relation of trust and confidence, or of trustee and cestui trust

b) It is advisable as a rule that the Counsel should not enter into business transactions with his client. Law contemplates that the client is very much under the influence of his counsel, and accordingly does not permit contractual freedom between them.

c) The advocate must keep clear and accurate accounts of all moneys received from or on behalf of his client.

d) The Counsel should return papers and documents to the client the moment the case has terminated.

e) It follows also form the relation being of trust and confidence that the counsel cannot delegate his duties without the client's consent.

f) The counsel, while accepting the retainer should disclose to his client any matters which might affect the relation or the client's direction in choosing him as his counsel.

g) After engagement the counsel must not revise agreement regarding his remuneration, or, while the business in which he had been employed is unfinished, accept presents and gifts from the client.

h) It is the duty of advocate not to use information which has been confided to him as advocate to the detriment of the client, and this duty continues even after the relation of advocate and client has ceased.

I) It is the duty of advocate not to appear for two clients whose interests are in conflict.

j) It is the right of the client to discharge any time his advocate whom he no longer trusts or on whose skill and ability he no longer relies.

k) The advocate must not divulge his client's secrets or confidences.

l) The Counsel owes to the client complete fidelity to his interests.

m) The Counsel cannot change side and appear for the opposite party in subsequent proceedings in the same suit.

When the Counsel has already been consulted by one party to the litigation and he has given him his opinion, it is improper for him later on to appear for the opposite party, firstly, because such a position will force him to the unedifying spectacle attacking his own opinion which would embarrass him in the discharge of his duty, and secondly, because it is possible that the client in taking his opinion may have disclosed confidential information which the advocate is duty bound not

to use to his detriment. But if the client himself refuses to retain him, then the advocate is at liberty to appear for the opposite side but the confidential information obtained must not be used, and if that it is found impossible, then he should forgo the chance of appearing on the opposite side.

> **iii) An advocate is representative of his client and not his mouthpiece :-** He is governed by the rules of his professional etiquette and is not to act according to the whims of his client merely because it suits the latter's wishes. Even if the client's interest so requires, he will not knowingly misstate the law, or willfully misstate the facts or tutor witnesses, or fabricate or tamper with documents, or make reckless allegations in the pleadings, or put in pleas which are known to be false, or put in a forged document or produce a perjured witness.

5. Hence according to the principles of law and ethics, the same public prosecutor cannot appear in both the cases from the side of the prosecution which are the cross cases of each other, because he has to support the case of the one client only. Hence, the District Magistrate is directed to appoint separate public prosecutor in both the sessions trial.

6. With the above directions, this petition is disposed of.

7. A copy of this order be sent to the District & Sessions Judge, Ujjain for necessary compliance.

C c as per rules.

Petition disposed of.
