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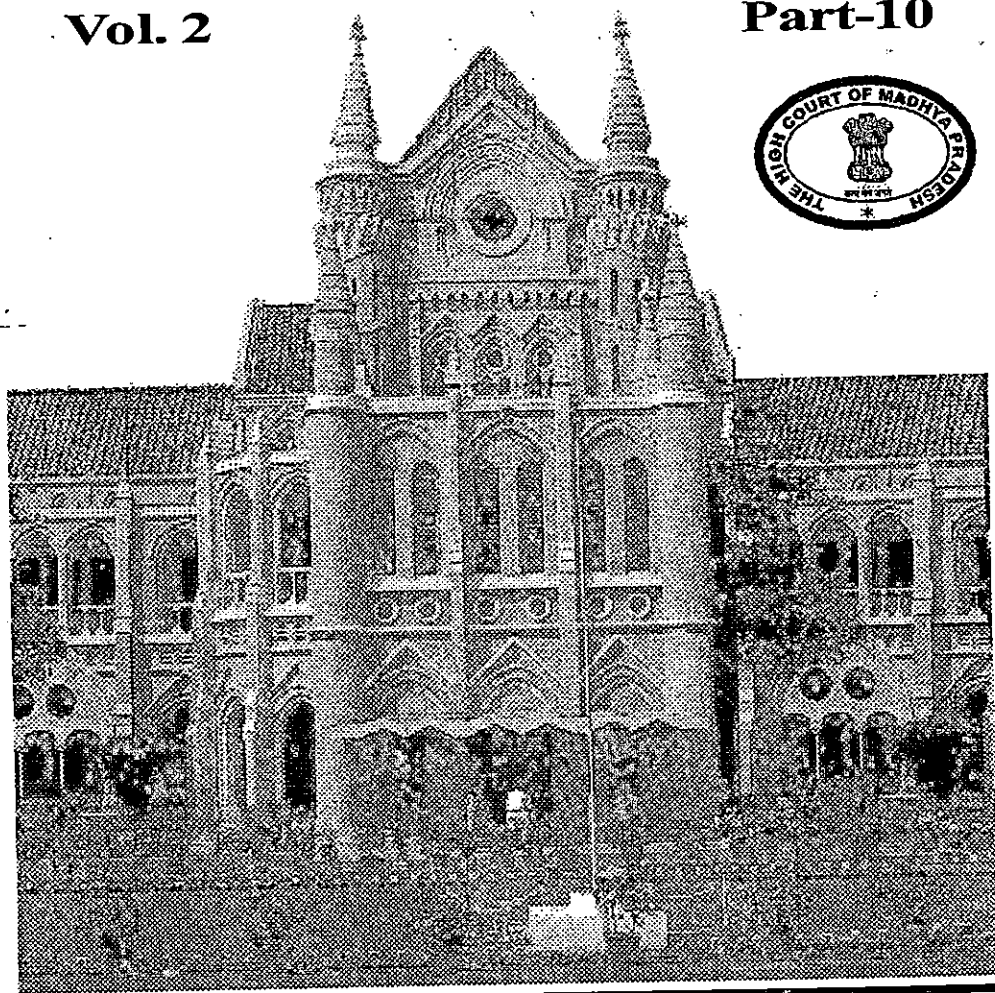
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APPOINTMENT TO THE MADHYA PRADESH HIGH COURT

We congratulate Smt. Vimla Jain on her appointment as Judge of the High Court of Madhya Pradesh. Smt. Vimla Jain took oath of the High Office on 13th of September, 2010.



JUSTICE VIMLA JAIN

Born on 11-06-1952 in Village Vidwas (Surkhi) District Sagar, M.P. Took primary education in her village and higher secondary education in Sagar. Was married in the year 1968. After marriage, obtained degrees of M.A., L.L.B. and B.Ed. from Vikram University, Ujjain. Joined MP State Judicial Service as Civil Judge Class II at Indore, on 12th August 1978. Promoted as Civil Judge Class-I in the year 1984, as Chief Judicial Magistrate in the year 1989 and as officiating District Judge in the year 1991. Worked as Additional District & Sessions Judge at Bhopal, Dewas and Shivpuri. Also worked as Additional Commissioner Gas Relief, Bhopal and as District & Sessions Judge at Datia, Sehore and Tikamgarh. Worked as Special Judge, Raisen and as Principal Judge, Family Court, Gwalior.

Was granted Selection grade on 17-11-1997 and super time scale on 23-02-2005. Was posted as District and Sessions Judge, Rajgarh from 12-03-2009 to 10-09-2010.

Has co-authored with her husband, Environmental Laws in India, M.P. Town Development Laws Manual and M.P. Educational Laws Manual. Published a number of articles in different periodicals.

Elevated as Additional Judge of the High Court of Madhya Pradesh on Sept. 13, 2010.

We wish Smt. Justice Vimla Jain, a successful tenure on the Bench.

APPOINTMENT TO THE MADHYA PRADESH HIGH COURT

We congratulate Shri Mohammad Anwar Siddiqui on his appointment as Judge of the High Court of Madhya Pradesh. Shri Mohammad Anwar Siddiqui took oath of the High Office on 13th of September, 2010.



JUSTICE MOHAMMAD ANWAR SIDDIQUI

Born on July 1, 1951. Joined the legal practice as an Advocate in the year 1974. Also worked as part-time law lecturer in Saifia College from 1975 to 1976. Was Head of the Department, Faculty of law Ravindra College Bhopal for two years before joining the Judicial services. Joined Judicial Service as Civil Judge, Class-II on 07-08-1978, Promoted as Civil Judge, Class-I on 24th August, 1984, as C.J.M. on 29th June, 1989 and as officiating District Judge on 09-08-1991. Was granted Selection grade on 08-05-1999 and super time scale on 01-04-2005. Has worked at different places i.e. Sehore, Bilaspur, Shujalpur, Beohari, Jawad, Basoda, Jagdalpur, Betul, Shajapur, Alirajpur, Gwalior, Chhatarpur, Tikamgarh Sehore and Mandla. Worked as Special Judge, Chhatarpur for trial of cases under SC/ST (Prevention of Atrocities' Act) w.e.f. August 2002. Was Posted as Director, Public Prosecution, Bhopal before elevation.

Elevated as Additional Judge, of the High Court of Madhya Pradesh on Sept. 13, 2010.

We wish Shri Justice Mohammad Anwar Siddiqui, a successful tenure on the Bench.

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

I welcome and congratulate Hon'ble Justice Smt. Vimla Jain and Justice Mohammad Anwar Siddiqui on their elevation as Judges of this Court.

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

Hon'ble Justice Smt. Vimla Jain was born on 11th June 1952. She joined judicial service as Civil Judge Class-II, on 12.08.1978, promoted as Civil Judge Class-1, on 24th November 1984, as Chief Judicial Magistrate on 5th July 1989 and as officiating District Judge on 22.10.1991. She was granted selection grade on 17.11.1997 and super-time scale on 23.02.2005. She has worked in different capacities at Indore, Bhopal, Dewas, Shivpuri, Raisen, Datia, Sehore, Tikamgarh, Gwalior and Rajgarh., Before elevation she was posted as District and Sessions Judge, Rajgarh.

Hon'ble Justice Mohammad Anwar Siddiqui was born on 1st July 1951. He joined Judicial Service as Civil Judge, Class-II, on 07.08.1978, promoted as Civil Judge, Class-1 on 24th August, 1984, as C.J.M. on 29th June, 1989 and as officiating District Judge on - 09.08.1991. He was granted selection grade on 08.05.1999 and super-time scale on 01.04.2005. He has worked at different places i.e. Sehore, Bilaspur, Shujalpur, Beohari, Jawad, Basoda, Jagdalpur, Betul, Shajapur, Alirajpur, Gwalior, Chhatarpur, Tikamgarh, Sehore and Mandla . He has worked as Special Judge, Chhatarpur for trial of cases under SC/ST (Prevention of Atrocities Act) w.e.f August, 2002. Presently he is posted as Director, Public Prosecution, Bhopal.

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

rigmarole which has crept into our system. My Lords will infuse a spirit consistent with the democratic system and the legal requirement.

My Lords know that "litigation is often taken as a battle to be won." In the new set-up, the values which we are developing, has to be compromise oriented. This doctrine has to be tested on the anvil of present environment so that a sufferer at the grass root level may not feel frustrated from our legal system.

Though legal hair splitting may some time become necessary but the justice-oriented approach may be developed so that the truth may not be subdued in sterile arguments. Justice Krishna Ayyar has at time and again drawn attention of the jurists towards the seriousness of the problem which might prove to be chaotic and even result in the loss of faith of a common man in the very legal + system of the nation .

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

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

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

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

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

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

This moment is filled with joy and celebration for My lords Hon'ble Justice Smt. Vimla Jain and Hon'ble Justice Shri Mohammad Anwar Siddiqui, as they have been appointed as Additional Judges of this prestigious High Court which was established in the year 1956.

The appointment of My Lord is at a time when the Judicial System is passing through a phase of great discussion. May it be amongst the legal fraternity or within the public. My Lords have been assigned a challenging task of upholding the rule of law and the sacred Constitution of India. The confidence reposed by the Collegium is to be maintained by My lords.

In a recent article written by Justice M. Y. Eqbal, Judge Jharkhand High Court, it has been stated by him:-

"It is a widely acknowledged fact that the glory of Judiciary has been eroding fast and it is the need of the hour to restore it's glory. A number of initiatives are being taken to revamp the Judiciary under the title of Judicial Reforms."

A question arises why such articles are coming up, casting aspersions on the glory of Judiciary? To my mind the glory of the judicial system depends upon the quality of both the Bar and the Bench. To some extent the concept of National law Schools is a step forward in attracting the best of the talent for the legal field. The Bench is also required to be comprised out of the best with people having outstanding legal acumen, integrity and character. It is however not the domain of the Bar to say anything after one is appointed as a Judge. We feel that once someone is appointed as a Judge, he is full of integrity, character and possesses outstanding legal acumen.

In the words of Marcus Aurelius, "A man should be upright, and not be kept upright. A person of integrity will do the right thing even when nobody is watching. Mahatma Gandhi said that, "The truest test of civilization, culture and dignity is character and not clothing.

It is my belief that a Judge with character will not euccumb to any uneven happening, by virtue of his place of posting. The recommendation in this regard by the Law Commission in its 230th report is uncalled for. It is necessary that care in respect to the legal acumen and integrity should be taken before one is appointed as a Judge; and if that is done in true sense the glory of the judicial institution would never fade.

We also think that the Bar and the Bench both are required to function in harmony. The Bar and the Bench cannot afford to talk in terms of I and YOU. Both Bar and the Bench have to talk in terms of 'WE'. It is only then we can

think of providing justice for the teeming millions of the Nation. It should be our constant endeavour to see that our relationship is strengthened day by day.

The expectations of the Bar about the quality of a Judge can be summed up in the words of Socrates:-

He should hear patiently
Answer courteously
Conceive easily
Deliver quickly.

We earnestly believe that My Lords would demonstrate their legal skills embedded in them by virtue of their vast and rich experience and would stand upto the expectations of the Bar. We also hope that My Lords would show their fearlessness to the cause of Justice and will stand as angels for millions of those who crave for Justice.

I assure My Lords that the cooperation of the Bar in fulfilling your duties would always be our privilege.

With these words I on behalf of the M.P. High Court Bar Association and also on my own behalf, once again warmly welcome you and hope for a bright and successful tenure and pray that all the goodness of the almighty be showered upon you.

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

I deem it to be my proud privilege to offer felicitations to your Lordships on your appointment as Judges of this High Court. We welcome Hon'ble Smt. Justice Vimla Jain and Hon'ble Shri Justice Mohammad Anwar Siddiqui.

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

My Lords, this Bar is known for its high traditions. It is full of illustrious seniors and energetic bright young members who are extremely respectful and courteous. We the members of the Bar, have great expectations from your Lordships. My Lords will bring to your task a wealth of experience, the vast knowledge of law, an almost inexhaustible fund of patience, tolerance and

compassion and above all what lawyers always appreciate in a Judge, unfailing courtesy, affection and regard to the Bar.

My Lords, from the side of the Bar, with firm conviction we assure your Lordships of our fullest co-operation in discharging your functions.

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

Shri K. N. Fakhruddin, Member, State Bar Council of M. P., while felicitating the new Judges, said :-

On behalf of State Bar Council of Madhya Pradesh I welcome and congratulate Hon'ble Justice Vimla Jain and Hon'ble Justice Mohammad Anwar Siddiqui on there appointment as Judges of M.P. High Court.

Hon'ble Justice Vimla Jain was born on 11th June 1952; with the blessing of almighty god she started her carrier and became a Civil Judge in 1978; and thereafter held various promotional posts and assignments after joining the Judicial services; and discharged her duties efficiently. Before gracing the prestigious post my-lord was District and Session Judge Rajgarh. Because of great knowledge of law and deep experience the litigants and people at large will be benefitted by My Lords appointment.

My Lord Hon'ble Justice Mohammad Anwar Siddiqui was born on 1st July 1951, a religious person who started his carrier with blessing of Almighty Allah and joined the chamber of Former Justice Faizanuddin, Judge of this court thereafter. After doing LLM he had also done part time teaching at Saifia College, Bhopal. In 1978 became Civil Judge Class-11 and thereafter held various important promotional posts; and discharged his duties efficiently and before his appointment on this prestigious post he was gracing the office of Director Public Prosecution. With his vast experience and deep knowledge of law definitely citizens of State and High Court will gain. In his career he has given many important judgments and orders.

I hope my lords will understand the problems of poor persons and litigants; and will wipe their tears by solving there problems.

It is a great honour that mylord Justice Vimla Jain and mylord Justice Mohammad Anwar Siddiqui are adoring the august office as Judges of this Court which has high traditions & culture and in the capacity of Judge they will be deciding the fate and future of many citizens of this state. The advocates fraternity have only expectation that is patient hearing with positive approach. That for most of the litigants High Court is the last stage.

Once again I congratulate and express our best wishes to both of you on behalf of State Bar Council of M.P. for a very successful tenure as judge of this Hon'ble Court.

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

Before this august gathering, today I have the honour of introducing two great legal personalities. My Lord Smt. Justice Vimla Jain & My Lord Shri Justice Mohammad Anwar Siddiqui. It is a great pleasure for all of us to welcome Hon'ble Judges to this great temple of justice. We offer our heartiest welcome and congratulations to Hon'ble newly appointed judges.

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

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

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

This galaxy of judicial stalwarts have entered in this province of Justice Delivery in the year 1978. These two legal luminaries were successful in selection process and they never looked behind and continued to proceed successfully to the present stage of elevation to the highest peak of state judiciary.

My Lord Smt Justice Vimla Jain

Born on 11th June 1952 started her judicial journey in the year 1978 as Civil Judge Class II, promoted as Civil Judge Class - I in the year 1984. With the passing of the time your Lordship has been promoted to various important Offices of the state judiciary namely, CJM in the year 1989, Officiating District Judge in the year 1991.

My Lord has also worked in different capacities at Indore, Bhopal, Dewas, Shivpuri, Raisen, Datia, Tikamgarh, Gwalior and Rajgarh. Before gracing the high office of Hon'ble High Court Judge she was District and Session Judge, Rajgarh.

Now it is the time to sketch out the great personality of our newly appointed Hon'ble Judge of this Court Hon'ble Shri Justice Mohammad Anwar Siddiqui.

My Lord Shri Justice Mohammad Anwar Siddiqui

Born on 1st July 1951. In the year 1978 My Lord joined the Judicial Services as Civil Judge, Class II, promoted to various important offices of the Judiciary of the State namely Civil Judge Class I in the year 1984, Chief Judicial Magistrate in the year 1989, Officiating District Judge in the year 1991.

My Lord has also held very important positions at various district places in the state of Madhya Pradesh.

My Lord has also the credit of Special Judge at Chattarpur for trial of cases under Schedule Tribe and Schedule Castes (Prevention of Atrocities Act) w.e.f August 2002. Before gracing the High Office of High Court of MP My Lord was the Director, Public Prosecution, Bhopal.

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

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

At last but not the least, I once again on behalf of Government of India, law officers of the Central Government and my own behalf, I sincerely offer my whole hearted welcome and best wishes to Smt. Justice Vimla Jain and Hon'ble Shri Justice Mohammad Anwar Siddiqui to the noble temple of justice.

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

I welcome both of your lordships' appointments as Judges of the High Court of MP.

My lord Smt. Vimla Jain Joined Judicial service as Civil Judge Class II on 12.08.1978 thereafter because of your hard work &, interpridity you became a District Judge and later got suppertime Scale on 23.02.2005. She was posted as District Judge Rajgarh from where you have been elevated as High Court Judge.

My Lord Hon'ble Shri Justice M.A.Siddiqui joined the judicial service in the year 1978. Lastly you were working as Director of Public Prosecution, Bhopal from which post you have been elevated as a High Court Judge.

My lords, office of a High Court Judge is very onerous. It carries many responsibilities, Coolness in court room, Hearing patiently, delivering justice promptly & without delay kindness towards members of the Bar.

I quote from Claude McCollach an American Jurist - When my father become a judge I said to him "Be kind to the young lawyers." When I became a judge he said to me "Be kind to the old lawyers."

My lords, on behalf of senior advocates council & on my own behalf, I welcome you as Judges of this High Court.

It will be our satisfactions to see each of you to blossom as examples of the best virtue of judicial culture.

Lastly I congratulate both of you on your appointment as Judges of the Court.

Reply to ovation by Hon'ble Mrs. Justice Vimla Jain

At the outset, I pay reverence to God and Saints for their blessings. I always pray to them to provide me strength, courage and confidence so that I may prove myself worthy of this important seat of justice.

I am grateful to Hon'ble Shri Chief Justice S. Rafat Alam Saheb. I am grateful to Hon'ble Shri Justice A.K. Patnaik Ji, Judge of the Supreme Court and the Judges of the collegium Hon'ble Shri Justice R.S. Garg Ji, former Chief Justice of Gauhati High Court and Hon'ble Shri Justice Dipak Misra Ji, Chief Justice of Delhi High Court who have found me fit for this position. I am equally grateful to Hon'ble sitting and former judges of this High Court for their constant guidance and good wishes.

I would especially like to thank my husband, Shri Suresh Jain, former IAS officer and now Chairman, State Expert Appraisal Committee, Government of India, Ministry of Environment and Foresy for his continuous support & encouragement throughout my career. I would also like to thank my daughter, Vidyut & son-in-law Nitin, son Vikas & daughter-in-law Veenu, daughter Vidhi and son-in-law. Rajesh and son Vidhan & daughter-in-law Nidhi and my grand children for their support & cooperation.

I express my heartiest gratitude to my mother-in-law Smt. Keshar Devi who has been providing free education to thousands of the most deprived children for last 20 years in village Nainagiri District Chhatarpur and my father-in-law late Shri Singhai Satish Chandra whose services for poorest persons had been highly commendable.

I am grateful to my father Shri Sunderlal Ji, who had been Sarpanch for 22 years without any opposition in early years of independent India and set high traditions of hard work, honesty, justice and public welfare and my mother Smt. Sumati Rani who is a pious and religious lady with loving smile on her face. I thank all my relatives and friends.

I thank from my heart to the learned speakers of the day for their kind words expressed on the occasion of my elevation.

I extend my heartfelt thanks to my colleagues, Staff Members and Members of the Bar of Indore, Bhopal, Dewas, Shivpuri, Raisen, Datia, Sehore, Tikamgarh, Gwalior and Rajgarh Districts for their cooperation in discharge of my duties.

I also thank all my well wishers who are present here.

As I end my reply, I would like to recite few lines from my daily prayer to God:

कोई बुरा कहे या अच्छा, लक्ष्मी आवे या जावे ।

लाखों वर्षों तक जीऊँ या मृत्यु आज ही आ जावे ॥

अथवा कोई कैसा ही भय या लालच देने आवे ।

तो भी न्याय-मार्ग से मेरा कभी न पग डिगने पावे ॥

Thank you all

Jai Hind

Reply to ovation by Hon'ble Mr. Justice Mohammad Anwar Siddiqui:-

At the very outset, I express deep gratitude to the Almighty, the most benevolent and merciful, for showering his blessings on me.

I take this opportunity to extend my gratitude to Hon. Shri Justice A.K. Patnaik, Former Chief Justice of this High Court and presently, Judge, Supreme Court of India and other members of the Collegium of the High Court and the Collegium of Supreme Court for considering me.

I also pay gratitude and regards to Hon. Justice Shri S Rafat Alam Saheb, Chief Justice for administering the oath to me

I am getting a bit nostalgic on this occasion. My father Late Mohd. Ismail was a Police Inspector. He was an honest officer to the core of his heart. He could not afford more than a bicycle throughout his service career. But he has given me great noble values in Virasat. My father always guided me to Join legal fraternity since the very beginning of my student career. I am deeply indebted to my father and my mother Mrs. I. Q. Begum. Fortunately, she is alive to bless on this great occasion

I joined the active legal practice as an Advocate in the year 1974 under the able guidance of Mr. Faizanuddin Saheb who later became Judge of this High Court and Judge of the Supreme Court. After working for some months with him, I joined the office of Mr Aziz Ahmed Siddiqui Saheb, a leading Criminal Lawyer of Bhopal. I am fortunate that he is very much present here to bless me on this occasion.

I also worked as part time Law Lecturer in Saifia College from 1975 to 1976. I was head of the Department, Faculty of Law at Ravindra College Bhopal for two years before joining the judicial services.

I am grateful to my wife Mrs. Rasheda Siddiqui for her support. Despite being seriously ill, she took pains to witness this great occasion. My Son Yusuf Siddiqui, my daughters Nuhrul-huda Siddiqui, Amarah Khan and Huma Siddiqui have always cooperated with me during my long strenuous journey as Judge of subordinate Courts.

I am thankful to my Son-in-Law Mr. Zubair Siddiqui who has traveled all the way from Saudi Arabia to witness the occasion. My family has always supported and encouraged me.

I shall be failing my duties if don't remember my port-folio Judges who have guided me. Hon. Shri Justice K.K. Lahoti, Hon. Shri Justice S.L. Kochar, Hon. Shri Justice Subhash Samvatsar, Hon Shri Justice W.A. Shah and Hon. Shri Justice Ajit Singh Saheb have constantly guided me as port-folio Judges of my Districts

Although Hon. Shri Justice S.A. Naqvi was not my port-folio Judge, but he has always guided and supported me as senior colleague. He is also present on this occasion to bless me.

I am thankful to all the Hon. Judges, present and former, for their guidance and support.

I am thankful to all my colleagues, seniors and juniors, all of my staff members, with whom I have worked in last 32 years. Many of them are here. My happiness is multiplied by their presence

I am very much thankful to the speakers who have spoken nice words for me though I don't consider myself worthy for them

I am grateful to all my well-wishers and all the guests who have assembled here to witness the occasion.

I understand the social obligations attached with the honour of Judge-ship. I understand the importance and gravity of responsibility entrusted to me as Judge of this Hon. Court. I also understand the expectations of the Bar, the Bench and all the stake-holders of justice. The oath of office reminds me these obligations, responsibilities and expectations.

I will try to best of my ability, understanding and experience to fulfill the expectations and obligations. I shall try my level best to discharge the duties as a Judge under the guidance of Hon the Chief Justice and with the cooperation of the Bar

Thank you very much.

NOTES OF CASES SECTION

Short Note

(40)*

Shantanu Kemkar, J

BARWANI SUGAR

Vs.

UNION OF INDIA & ors.

A. Essential Commodities Act (10 of 1955), Section 3(3D) & (3E), Sugar (Control) Order, 1966, Clause 4 & 5 - Levy Sugar - Restriction imposed on sale of Sugar to the extent of 20% - Permissibility - Held - The restriction has been imposed to ensure that the consumer get adequate sugar throughout the year at fair price and the cane growers who provide sugar cane also get fair price - It has been applied uniformly to all the sugar mills in the country in public interest, is a reasonable restrictions. (Para 12)

क. आवश्यक वस्तु अधिनियम (1955 का 10), धारा 3 (3डी) व (3ई), चीनी (नियंत्रण) आदेश, 1966, खण्ड 4 व 5 - उद्ग्रहित चीनी - 20% की सीमा तक चीनी के विक्रय पर निर्बंधन लगाया गया - अनुज्ञेयता - अभिनिर्धारित - यह सुनिश्चित करने के लिए निर्बंधन लगाया गया कि उपभोक्ता को उचित मूल्य पर पूरे वर्ष पर्याप्त चीनी मिल सके और गन्ना उत्पादक जो गन्ना उपलब्ध कराते हैं उन्हें भी उचित मूल्य मिल सके - उसे जनहित में देश की सभी चीनी कारखानों को समानता से लागू किया गया, वह युक्तियुक्त निर्बंधन है।

B. Administrative Law - Policy decision - Scope of judicial review - Held - The policy decision is in the domain of the executive authority of the State and the Court should not embark on the uncharted ocean of public policy and should not question the efficacy unless it does not offend any provision of the statute or the Constitution of India. (Para 13)

ख. प्रशासनिक विधि - नीति निर्धारण - न्यायिक पुनर्विलोकन का विस्तार - अभिनिर्धारित - नीति निर्धारण राज्य के प्रशासनिक प्राधिकार के अधीन है और न्यायालय को लोक नीति के अनधिकृत महासागर में नहीं उतरना चाहिये और प्रभावकारिता पर आक्षेप नहीं लेना चाहिये जब तक वह कानून अथवा भारत के संविधान के किसी उपबंध का उल्लंघन नहीं करती।

C. Constitution, Article 19(2) - Reasonable restriction - Determination - Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interest of the general public and not from the standpoint of the interests of persons upon whom the restrictions have been imposed or upon abstract consideration. (Para 13)

ग. संविधान, अनुच्छेद 19(2) - युक्तियुक्त निर्बंधन - निर्धारण - निर्बंधन की युक्तियुक्तता का निर्धारण समान्य लोगों के हित के दृष्टि कोण से वस्तुनिष्ठ रूप से करना होगा न कि संक्षिप्त विचार पर उन व्यक्तियों के हितों के दृष्टि कोण से जिन पर निर्बंधन लगाये गये।

D. Practice and Procedure - Interim order - Whether binding - Held - The interim order does not have a binding force. (Para 15)

घ. पद्धति और प्रक्रिया - अंतरिम आदेश - क्या बाध्यकारी है - अभिनिर्धारित - अंतरिम आदेश में बाध्यकारी शक्ति नहीं है।

NOTES OF CASES SECTION

E. Constitution, Article 141 - Practice and Procedure - Dismissal of SLP in limine - Effect - *The effect of such a non-speaking order of dismissal without anything more only means that Supreme Court has decided only that it is not a fit case where the special leave petition should be granted - The said order does-not constitute law laid down by the Supreme Court for the purpose of Article 141 of the Constitution.* (Para 15)

इ. संविधान, अनुच्छेद 141 - पद्धति और प्रक्रिया - विशेष इजाजत याचिका का आरंभ में ही खारिज किया जाना - प्रभाव - बिना कारण दिये खारिजी के ऐसे आदेश के प्रभाव का अर्थ बिना और कुछ केवल यह है कि उच्चतम न्यायालय ने केवल यह विनिश्चित किया है कि वह मामला विशेष इजाजत याचिका मंजूर किये जा सकने वाला उचित मामला नहीं है - उक्त आदेश संविधान के अनुच्छेद 141 के प्रयोजन हेतु उच्चतम न्यायालय द्वारा अधिकथित विधि स्थापित नहीं करता।

Cases referred :

JT 1997(6) SC 97, 2010(2) MPLJ 43, (2003) 5 SCC 437, W.P. No.3896/2008 decided on 09.09.2008, (1996) 11 SCC 399, AIR 1966 SC 2124, (2001) 3 SCC 635, 2006(2) MPHT 123.

A.M. Mathur with Abhinav Dhanodkar, for the petitioners.

Atul Sreedharan, for the respondent Nos.1 & 2.

S.S. Garg, for the respondent Nos.3 & 4.

***W.P. No.3248/2010 (Indore) D/- 21 June, 2010.**

Short Note

(41)*

Arun Mishra & S.C. Sinho, JJ

GEETA BAKADE (DR.) & anr.

Vs.

STATE OF M.P. & ors.

Medical and Dental Post Graduate Entrance Examination Rules, M.P. 2010, Medical and Dental Post Graduate Entrance Examination Rules, M.P. 2009 - *Petitioner, an in-service category candidate, who is already having diploma/degree of P.G., restricted from choosing another discipline - The Rules were challenged as violative of Article 14 of Constitution and illegal restriction has been made - Held - The Rules cannot be said to be putting total embargo on the choice of the petitioners but it has the effect of streamlining their choice - The Rules have also not been shown to be repugnant to any directive issued by the Medical Council of India - Petition dismissed.*

चिकित्सा और दंत स्नातकोत्तर प्रवेश परीक्षा नियम, म.प्र. 2010, चिकित्सा और दंत स्नातकोत्तर प्रवेश परीक्षा नियम, म.प्र. 2009 - याची सेवारत श्रेणी का अभ्यर्थी, जिसके पास पहले से ही स्नातकोत्तर डिप्लोमा/डिग्री है, उसे अन्य शाखा चुनने से निर्बंधित किया गया - नियमों को संविधान के अनुच्छेद 14 के उल्लंघनकारी होने तथा अवैध निर्बंधन लगाये जाने को

NOTES OF CASES SECTION

चुनौती दी गयी – अभिनिर्धारित – नियम याचियों की पसंद पर पूरी तरह से प्रतिबंध लगाने वाला नहीं कहा जा सकता है, परन्तु यह उनकी पसंद को सुप्रवाहित करने का प्रभाव रखता है – नियम भारतीय चिकित्सा परिषद् द्वारा जारी किसी निदेश के विरुद्ध होना भी दर्शाया नहीं गया है – याचिका खारिज।

Cases referred :

AIR 2007 MP 162, AIR 2003 SC 2952.

Manhar Dixit & Hitendra Singh, for the petitioner.

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

Brian D'silva with Vrushal Bhide, for the intervenor.

*W.P.No. 5049/2009 (Jabalpur), D/- 22 July, 2010.

Short Note

(42)*

U.C. Maheshwari, J

GHANSHYAM @ GHANSHU

Vs.

STATE OF M.P.

Penal Code (45 of 1860), Sections 363 & 366, Evidence Act, 1872, Section 3 - *Prosecutrix at her own instance came from her parental home and thereafter accompanied with the appellant went and visited to various places then, the offence either for taking her from the lawful custody without consent of her parents or of the kidnapping could not be deemed established against the appellant - On premises that later on appellant did not insist her to go back to her parental home and contrary to it, by facilitating he visited various places on her consent with her, the conviction is not sustainable - Appeal allowed - Appellant acquitted.*

दण्ड संहिता (1860 का 45), धाराएँ 363 व 366, साक्ष्य अधिनियम, 1872, धारा 3 – अभियोक्त्री अपनी मर्जी से अपने माता-पिता के घर से आयी और तत्पश्चात् अपीलार्थी के साथ विभिन्न स्थानों की यात्रा की, तब अपीलार्थी के विरुद्ध या तो उसे उसके माता-पिता की वैध अभिरक्षा से बिना सहमति ले जाने का या व्यपहरण का अपराध स्थापित होना नहीं माना जा सकता – इस आधार पर कि बाद में अपीलार्थी ने उसे उसके माता-पिता के घर लौट जाने के लिये आग्रह नहीं किया और उसके विपरीत सुकर बनाकर वह उसकी सहमति से उसके साथ विभिन्न स्थानों पर गया, उसकी दोषसिद्धि बनाये रखने योग्य नहीं है – अपील मंजूर – अपीलार्थी दोषमुक्त।

Case relied on :

AIR 1965 SC 942.

S.P. Sinha with Ashok Sinha, for the appellant.

Umesh Pandey, G.A., for the respondent.

*Cr.A. No.240/1995 (Jabalpur), D/- 11 May, 2010.

NOTES OF CASES SECTION

Short Note

(43)*

S.K. Gangele & I.S. Shrivastava, JJ.

INSTITUTE OF TECHNOLOGY
& MANAGEMENT

Vs.

GOVT. OF M.P. & anr.

Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Vinियमन Avam Shulk Ka Nirdharan) Adhiniyam, M.P. (21 of 2007), Section 9 - Held - Act of the Admission and Fees Regulatory Committee (AFRC) in determination of fee is quasi judicial in nature and it is obligatory on the part of AFRC to pass reasoned order after considering all the document and claimes submitted by the institution in accordance with regulation of 2008.

निजी व्यावसायिक शिक्षण संस्था (प्रवेश का विनियमन एवं शुल्क का निर्धारण) अधिनियम, म.प्र. (2007 का 21), धारा 9 - अभिनिर्धारित - शुल्क का निर्धारण करने की एडमिशन एण्ड फीस रेग्युलेटरी कमेटी (ए.एफ.आर.सी.) की कार्यवाही न्यायिक कल्प प्रकृति की है और 2008 के विनियमन के अनुसार सभी दस्तावेज और दावों पर विचारोपरांत सकारण आदेश पारित करना ए.एफ.आर.सी. के लिये बाध्यकारी है।

Cases referred :

(2006) 3 SCC 208, (2005) 7 SCC 627, (2002) 8 SCC 481, (2003) 3 SCC 186, (2007) 6 SCC 81, AIR 1986 SC 617, AIR 2006 SC 1465, (2001) 5 SCC 664, (2005) 6 SCC 537, (2003) 6 SCC 697, ILR (2009) M.P. 2269, (2009) 7 SCC 751, (1985) 3 SCC 398, AIR 2008 SC 1339, (2009) 2 SCC 494, (2002) 5 SCC 685.

A.M. Mathur, K. Sampath, V.K. Bharadwaj with Raja Sharma, for the petitioner.

Vivek Khedkar, G.A., for the respondent No.1.

Purushindra Kaurav & Sangam Jain, for the respondent No.2.

*W.P. No.5760/2009 (Gwalior), D/- 11 May, 2010.

Short Note

(44)*

S.K. Gangele & Mrs. Indrani datta, JJ.

MANJU RAJAK (SMT.)

Vs.

PARVINDER SINGH

A. Hindu Marriage Act (25 of 1955), Section 13 - Desertion - Burden is always upon petitioner spouse to prove beyond any reasonable doubt that non-petitioner abandoned him without reasonable cause and there was no bona fide attempt on non-petitioner's part throughout the statutory period of two years.. (Para 15)

क. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13 - अमित्यजन -

NOTES OF CASES SECTION

युक्तियुक्त शंका से परे यह साबित करने का भार संदा ही याची पति या पत्नी पर होगा कि प्रत्यर्थी ने बिना किसी समुचित कारण के उसका परित्याग कर दिया है और प्रत्यर्थी की ओर से दो वर्ष की वैधानिक कालावधि के दौरान कोई सद्भाविक प्रयास नहीं किया गया।

B. Hindu Marriage Act (25 of 1955), Sections 13 & 13-B - Irretrievable break down of marriage - No decree for divorce can be granted on that ground by Family Court. (Para 17)

ख. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13 व 13-बी - विवाह का असुधार्य भंग - इस आधार पर कुटुम्ब न्यायालय द्वारा विवाह विच्छेद की कोई डिक्री पारित नहीं की जा सकती।

Cases referred :

1995(I) MPWN SN 140 (SC), AIR 2005 SC 3297, AIR 1964 SC 40, (2002) DMC 177 SC = 1 (2202) SLT 103 = AIR 2002 SC 591, AIR 2009 SC 2254 = 2009(3) SCJ 168, ILR (2009) MP 2739.

P.C. Chandil, for the appellant.

Mahavir Pathak, for the respondent.

***F.A. No.225/2008 (Gwalior), D/- 13 April, 2010.**

Short Note

(45)*

Sanjay Yadav, J

M.P. HUMAN RIGHTS COMMISSION

Vs.

STATE OF M.P. & ors.

Protection of Human Rights Act, 1993 (10 of 1994), Sections 14 & 16 - Whether the findings in a D.E. in respect of conduct of police personnel leading to breach of human rights of a citizen, will have a precedent over the findings of the Human Rights Commission recorded earlier - Held - On the basis of such enquiry the Commission returns a finding and directs the employer to take action - It will not be within the power of authorities to dilute the finding of the Commission in a domestic enquiry. (Para 19)

मानव अधिकार संरक्षण अधिनियम, 1993 (1994 का 10), धाराएँ 14 व 16 - क्या किसी पुलिस कर्मचारी के आचरण, जिसके द्वारा किसी नागरिक के मानव अधिकारों का उल्लंघन हुआ, के संबंध में किसी विभागीय जाँच के निष्कर्ष, मानवाधिकार आयोग के पूर्व में अभिलिखित निष्कर्षों के ऊपर पूर्वनिर्णय का प्रभाव रखेंगे - अभिनिर्धारित - ऐसी जाँच के आधार पर आयोग निष्कर्ष देता है और नियोक्ता को कार्यवाही करने के लिये निदेशित करता है - यह प्राधिकारियों की शक्ति के अंदर नहीं होगा कि आयोग के निष्कर्ष की शक्ति आंतरिक जाँच में कम करे।

Ashish Shorti, for the petitioner.

R.P. Tiwari, G. A. for the respondent Nos.1 & 4.

B.N. Mishra, for the respondent Nos.2 & 3.

***W.P. No.28038/2003 (Jabalpur), D/- 16 July, 2010.**

NOTES OF CASES SECTION

Short Note

(46)*

R.S. Jha, J

NARENDRA KUMAR SINGH &
RAJ KUMAR JAIN

Vs.

MPSEB & anr.

Service Law - The petitioners initially appointed as Assistant Engineer were subsequently promoted as Executive Engineer vide order dated 07.02.2005 on probation - They were reverted back by impugned order dated 12.05.2010 on the ground that they have not successfully completed their period of probation, as they were not awarded 2 'B' grades during period of the years 2006, 2007 & 2008 - Held, - The period of probation of the petitioners includes the entire period of service rendered by them on probation on the promotional post of Executive Engineer i.e. from 07.02.2005 to 12.05.2010 - Thus the respondent authorities are required to consider the entire service record of the period of probation for the purpose of considering the case of the petitioners for confirmation on the post of Executive Engineer - The petitions were allowed and order dated 12.05.2010 quashed - The matter reverted back for reconsideration taking into consideration the entire period of probation i.e. from 07.02.2005 to 12.05.2010.

सेवा विधि - याची पूर्व में सहायक यंत्री के पद पर नियुक्त, बाद में परीक्षा पर दिनांक 07.02.2005 द्वारा कार्यकारी यंत्री के पद पर पदोन्नत - परीक्षा अवधि सफलतापूर्वक पूर्ण न करने के आधार पर याची को आलोच्य आदेश दिनांक 12.05.2010 द्वारा पदावनत कर दिया गया जैसे कि उन्हें वर्ष 2006, 2007 एवं 2008 के दौरान 2 'बी' ग्रेड दिया ही नहीं गया - अभिनिर्धारित - याची की परीक्षा अवधि में याचियों द्वारा कार्यकारी यंत्री के पदोन्नत पद पर परीक्षा के दौरान पूर्ण सेवाकाल अर्थात् 07.02.2005 से 12.05.2010 सम्मिलित है - इस प्रकार प्रत्यर्थी प्राधिकारी द्वारा याचियों को कार्यकारी यंत्री के पद पर स्थायी करने संबंधी प्रकरण हेतु उनके परीक्षा अवधि के पूरे सेवा अभिलेख पर विचार करने की आवश्यकता है - याचिका स्वीकृत तथा आदेश दिनांक 12.05.2010 अपास्त - दिनांक 07.02.2005 से 12.05.2010 तक के सेवाकाल पर विचार करने हेतु प्रकरण वापस प्रेषित किया गया।

Case relied on :

AIR 1996 SC 2093.

D.K.Dixit, for the petitioners

P.S. Nair with Rajas Pohankar, for the Respondents

*W.P. No.7666/2010(S) and W.P. No. 7146/2010 (s) (Jabalpur), D/- 22 July, 2010.

NOTES OF CASES SECTION

Short Note

(47)*

Rakesh Saxena &

Smt. Sushma Shrivastava, JJ.

PAPPU @ KAMOD

Vs.

STATE OF M.P.

Penal Code (45 of 1860), Sections 302 & 304 - No evidence that there was a sudden fight between the appellant and his wife (the deceased) and the appellant acted in a heat of passion upon a sudden quarrel - Appellant himself has not stated anything in this regard in his examination u/s 313 Cr.P.C. - Repeated blows were wielded on the scalp of deceased with force caused 3 injuries, sufficient to cause death - The benefit of Exception 4 to S. 300 IPC can not be given to appellant - Conviction of appellant u/s 302 IPC upheld - Appeal dismissed.

दण्ड संहिता (1860 का 45), धाराएँ 302 व 304 – कोई साक्ष्य नहीं कि अपीलार्थी तथा उसकी पत्नी (मृतक) के बीच अचानक लड़ाई हुई थी और अपीलार्थी ने अचानक हुई लड़ाई से क्रोध के आवेश में आकर कृत्य किया – अपीलार्थी ने द.प्र.सं. की धारा 313 के अंतर्गत अपने परीक्षण में स्वयं इस संबंध में कुछ नहीं कहा है – मृतक के सिर पर कई शक्तिशाली आघात किये गये जिससे 3 क्षतियाँ कारित हुई, जो मृत्यु कारित करने के लिये पर्याप्त थीं – अपीलार्थी को भा.द.सं. की धारा 300 के अपवाद 4 का लाभ नहीं दिया जा सकता – भा.द.सं. की धारा 302 के अंतर्गत अपीलार्थी की दोषसिद्धि की पुष्टि की गई – अपील खारिज।

Cases referred :

(2002) 2 SCC 1430, 2004(1) MPHT 168, 2004(1) MPHT 258 (SC), 2006(4) MPHT 66 (CG), 2004(2) MPHT 408, 2008(3) MPHT 485, (2008) 9 SCC 707.

Hemant Namdeo, for the appellant.

Chanchal Sharma, G.A., for the respondent/State.

*Cr.A. No.2690/2000 (Jabalpur), D/- 22 January, 2010.

Short Note

(48)*

N.K. Mody, J

PRADEEP KUMAR & anr.

Vs.

SHIVSHANKAR

A. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(c) - Disclaimer of title - What amounts to - Held - The essential characteristic of disclaimer of title by tenant is that it must amount to a renunciation by the tenant of his character of tenant, either by setting up a title in another or by claiming title in himself - A mere renunciation of tenancy without more, though it may operate as a surrender, cannot amount to a disclaimer.

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(सी) – हक

NOTES OF CASES SECTION

से इनकारी – की कोटि में क्या आता है – अभिनिर्धारित – भाड़ेदार द्वारा हक से इनकारी का आवश्यक लक्षण यह है कि वह भाड़ेदार द्वारा उसकी भाड़ेदार की हैसियत के त्याग की कोटि में आना चाहिए, या तो किसी और में हक स्थापित कर अथवा स्वयं में हक का दावा करके – बिना और कुछ, मात्र अभिधृति का त्याग, यद्यपि वह अभ्यर्पण के रूप में प्रभावी हो सकता है, हक से इनकारी की कोटि में नहीं आ सकता।

B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(c)
- *Tenant denying title of landlord, has also claimed ownership of third party*
- *He also lodged a complaint against the landlord - He also alleged that landlord got to manage removal of record and manipulation in record of Government - No error in passing decree of eviction against him - Appeal dismissed.*

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(सी) – भाड़ेदार ने भू-स्वामी के हक से इनकार करते हुए तृतीय पक्ष के स्वामित्व का भी दावा किया – उसने भू-स्वामी के विरुद्ध शिकायत भी दर्ज करायी – उसने यह भी अभिकथन किया कि भू-स्वामी अभिलेख हटाने में और सरकार के अभिलेखों में छलसाधन कराने में सफल रहा – उसके विरुद्ध बेदखली की डिक्री पारित करने में कोई त्रुटि नहीं – अपील खारिज।

Cases referred :

AIR 2002 SC 1264, 2007(2) MPLJ 52, 2008(1) MPACJ 178, 1986(II) MPWN 42, AIR 2007 SC 2511, 1997(2) JLJ 193, 2004(II) MPWN 86, 2005(II) MPWN 86, 2005(II) MPACJ 112, 1995 Supp (2) SCC 728, 1994 MPLJ 619.

S.C.Agrawal, for the appellants.

Tarun Kushwaha with S.R. Saxena, for the respondents.

*S.A. No.31/2003 (Indore), D/- 22 July, 2010.

Short Note (49)*

Abhay M. Naik, J

REG.VIDHICHAND
DHARAMSHALA TRUST
Vs.
SHYAM SINGH & ors.

A. Civil Procedure Code (5 of 1908), Order 41 Rule 23A - Remand
- *Plaintiff orally making statement of not pressing certain issues, though pleaded in plaint - Trial Court after recording such statement left the issues undecided - Held - No illegality committed by trial Court - Defendant failed to show any prejudice caused - Order of remand directing trial Court to decide such issues, is illegal and unwarranted - Appeal allowed.* (Paras 10 to 12)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 23ए – प्रतिप्रेषण – वादी का कतिपय विवादकों पर बल न देने का मौखिक कथन, यद्यपि वादपत्र में अभिवचन किया गया – विचारण न्यायालय ने ऐसा कथन अभिलिखित करने के पश्चात् विवादकों को अनिर्णीत छोड़ दिया – अभिनिर्धारित – विचारण न्यायालय द्वारा कोई अवैधता कारित नहीं की गई – प्रतिवादी कोई

NOTES OF CASES SECTION

प्रतिकूल प्रभाव कारित होना दर्शाने में विफल रहा – विचारण न्यायालय को ऐसे विवादकों का विनिश्चय करने के लिए निदेशित करने वाला प्रतिप्रेषण का आदेश अवैध तथा अनधिकृत है – अपील मंजूर।

B. Civil Procedure Code (5 of 1908), Order 41 Rule 27 -
Application made by Registrar Public Trust to Court sought to file as additional evidence - Held - The application would not help the Court to decide controversy as finding of the Court on the application has not been submitted - Application rejected. (Paras 14 & 15)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 27 – अतिरिक्त साक्ष्य प्रस्तुत करने हेतु पंजीयक लोक न्यास द्वारा आवेदन किया गया – अभिनिर्धारित – विवाद का निपटारा करने के लिए आवेदन न्यायालय की सहायता नहीं करेगा क्योंकि आवेदन पर न्यायालय का निष्कर्ष प्रस्तुत नहीं किया गया है – आवेदन नामंजूर।

C. Accommodation Control Act, M.P. (41 of 1961), Section 3 -
Notification of exemption to public trust registered under M.P. Public Trust Act - If defendant succeeds in establishing by cogent evidence that the utilization of entire income has not been made for trust, a suit for eviction by trust under shelter of exemption of S. 3 read with notification is liable to be dismissed in absence of existence of any of the grounds enumerated u/s 12(1) of the Act. (Para 20, 21, 22)

ग. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 3 – म.प्र. लोक न्यास अधिनियम के अंतर्गत रजिस्ट्रीकृत लोक न्यास को छूट की अधिसूचना – यदि प्रतिवादी तर्कपूर्ण साक्ष्य द्वारा यह स्थापित करने में सफल होता है कि संपूर्ण आय का उपयोग न्यास के लिए नहीं किया गया है, धारा 3 सहपठित अधिसूचना की छूट के आश्रय के अंतर्गत न्यास द्वारा बेदखली के लिए वाद अधिनियम की धारा 12(1) के अंतर्गत दिये गये आधारों में से किसी के अस्तित्व के अभाव में खारिज किये जाने योग्य है।

Cases referred:

1982 MPWN SN 172, 1999(2) JIJ 380, 1975 JIJ 432.

Mohan Babu Mangal, for the Appellant.

V.K. Bhardwaj with Raja Sharma, for the Respondents.

*M.A. No.1119/2009 (Gwalior), D/- 14 May, 2010.

Short Note

(50)*

N.K. Mody, J

RUPINDERSINGH ANAND

Vs.

SMT.GAJINDER PAL KAUR & ors.

A. Civil Procedure Code (5 of 1908), Order 41 Rules 1 & 22 - A
Cross-objection, in an appeal against an order appealable under Order 43 Rule 1 CPC, can be made.

NOTES OF CASES SECTION

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 1 व 22 – सि.प्र. सं. के आदेश 43 नियम 1 के अंतर्गत अपील योग्य आदेश के विरुद्ध अपील में प्रत्याक्षेप प्रस्तुत किया जा सकता है।

B. Succession Act (39 of 1925), Sections 57 & 213 - Probate - Letter of administration - When not necessary - A probate will not be required to be obtained by a Hindu in respect of a Will made outside those territories or covering the immovable properties situated outside those territories.

ख. उत्तराधिकार अधिनियम (1925 का 39), धाराएँ 57 व 213 – प्रोबेट – प्रशासन पत्र – कब आवश्यक नहीं – उन राज्यक्षेत्रों के बाहर की गयी अथवा उन राज्यक्षेत्रों के बाहर स्थित स्थावर सम्पत्तियों को समाविष्ट करने वाली किसी वसीयत के संबंध में किसी हिन्दू द्वारा प्रोबेट अभिप्राप्त करना आवश्यक नहीं होगा।

C. Civil Procedure Code (5 of 1908), Order 39 Rules 1 & 2 - Temporary injunction - While deciding the application under Order 39 Rules 1 & 2 CPC the registered Will and codicil cannot be ignored only because it is unprobated.

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – अस्थायी व्यादेश – सि.प्र.सं. के आदेश 39 नियम 1 व 2 के अंतर्गत आवेदन का विनिश्चय करते समय रजिस्ट्रीकृत वसीयत और कोडपत्र को केवल इसलिए नजर अंदाज नहीं किया जा सकता कि उसका प्रोबेट जारी नहीं किया गया है।

Cases referred :

AIR 1927 Mad 1054, (2001) 4 SCC 325; (2006) 10 SCC 442, 1991(I) MPJR 352, 2005(4) MPLJ 160, AIR 1958 MP 348 (relied upon)

G.M. Chaphekar with R.T. Thanewala, for the appellant.

B.L. Pavecha with Nitin Pathak, for the respondent No.1.

M.L. Agrawal with Mukesh Tare, for the respondent Nos.2 & 3.

A.S. Garg with Aditya Garg, for the respondent Nos.4 & 10 to 12.

***M.A. No.3195/2009 (Indore), D/- 23 April, 2010.**

Short Note

(51)*

Arun Mishra &

Mrs. Sushma Shrivastava, JJ

SATISH VISHWAKARMA

Vs.

**ASSTT. COMMISSIONER OF
INCOME TAX CIRCLE 1(1),
BHOPAL & anr.**

A. Income Tax Act (43 of 1961), Section 148 - Reopening of assessment - Condition precedent - Held - Two conditions must exist; (1) the Income Tax Officer has reason to believe that income, chargeable to Income Tax had been under-assessed; and (2) that he has also reason to believe that

NOTES OF CASES SECTION

such "under assessment" had occurred by reason of either (i) omission or failure on the part of an assessee to make a return of his income (ii) omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment for that year.

क. आयकर अधिनियम (1961 का 43), धारा 148 – निर्धारण फिर से करना – पुरोभाव्य शर्त – अभिनिर्धारित – दो शर्तें अस्तित्व में होनी चाहिए – (1) आयकर अधिकारी के पास कारण हो यह मानने का कि आयकर के लिए प्रभाय आय को अवनिर्धारित किया गया था; और (2) यह कि उसके पास यह मानने का भी कारण हो कि ऐसा अवनिर्धारण कारित हुआ या तो (i) आय की विवरणियां देने में निर्धारिती की ओर से लोप अथवा चूक होने से या (ii) उस वर्ष के निर्धारण के लिए आवश्यक सारवान तथ्यों को पूर्णतः और सही रूप में प्रकट करने में लोप या चूक होने के कारण।

B. Income Tax Act (43 of 1961), Section 148 - Reopening of assessment - Power of Assessing Officer - The Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment.

ख. आयकर अधिनियम (1961 का 43), धारा 148 – निर्धारण फिर से करना – निर्धारण अधिकारी की शक्ति – निर्धारण अधिकारी को फिर से करने की शक्ति है, परन्तु यह तब जबकि मूर्त सामग्री है इस निष्कर्ष पर पहुँचने के लिए कि आय को निर्धारण से बचाया गया है।

C. Income Tax Act (43 of 1961), Section 148 - Reopening of assessment - When not permissible - If an Income Tax Officer draws an inference which appears subsequently to be erroneous, mere change of opinion with regard to that inference would not justify initiation of action for reopening assessment.

ग. आयकर अधिनियम (1961 का 43), धारा 148 – निर्धारण फिर से करना – कब अनुज्ञेय नहीं है – यदि आयकर अधिकारी ऐसा अनुमान लगाता है जो बाद में त्रुटिपूर्ण प्रतीत होता है, मात्र उस अनुमान संबन्धी राय के बदल जाने से निर्धारण फिर से करने की कार्यवाही आरंभ करना न्यायोचित नहीं है।

Cases referred :

2010(187) Taxman 312 (SC), 2002(2) MPLJ 81, 2008(11) ITJ 696 (MP), ITR No.33/1999 decided on 24.09.2007, AIR 1969 SC 944, AIR 1961 SC 372, 1976(103) ITR 437, 1999(236) ITR 34, 1961(41) ITR 191, (1991) 2 SCC 558, AIR 1967 SC 523.

H.S. Shrivastava with Abhijit Shrivastava, for the petitioners.

Sanjay Lal, for the respondents.

***W.P. No.8173/2009 (Jabalpur), D/- 13 April, 2010.**

NOTES OF CASES SECTION

Short Note

(52)*

Rakesh Saksena & G.S. Solanki, JJ

SHABANA BI (SMT.)

Vs.

STATE OF M.P.

A. Evidence Act (1 of 1872), Sections 3 & 32, Penal Code, 1860, Section 302 - Appeal against conviction based on dying declaration - Deceased made two dying declarations, one to doctor implicating the accused and her mother and another to Executive Magistrate implicating the accused/appellant only - Very close relation of deceased viz. mother-in-law and husband who met the deceased first, did not say that deceased disclosed to them that it was the accused who set fire to her - The evidence of dying declaration is not wholly reliable - Conviction and sentence set aside.

क. साक्ष्य अधिनियम (1872 का 1), धाराएँ 3 व 32, दण्ड संहिता, 1860, धारा 302 - मृत्युकालिक कथन पर आधारित दोषसिद्धि के विरुद्ध अपील - मृतक ने दो मृत्युकालिक कथन किये, एक चिकित्सक को, अभियुक्त और उसकी माँ को आलिप्त करते हुए और दूसरा कार्यपालक मजिस्ट्रेट को, केवल अभियुक्त/अपीलार्थी को आलिप्त करते हुए - मृतक के अत्यंत नजदीकी रिश्तेदार अर्थात् सास एवं पति जो मृतक से पहले मिले उन्होंने यह नहीं कहा कि मृतक ने उनको यह प्रकट किया कि वह अभियुक्त था जिसने उसे आग लगायी - मृत्युकालिक कथनों की साक्ष्य पूर्णतः विश्वसनीय नहीं - दोषसिद्धि एवं दण्डादेश अपास्त।

B. Evidence Act (1 of 1872), Section 32 - Dying declaration - Evidentiary value of - Though, it cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated, yet the rule requiring corroboration is a rule of prudence.

ख. साक्ष्य अधिनियम (1872 का 1), धारा 32 - मृत्युकालिक कथन - साक्षिक मूल्य - यद्यपि इसे विधि का अत्यांतिक नियम नहीं माना जा सकता कि जब तक कि संपुष्टि न हो मृत्युकालिक कथन दोषसिद्धि का एक मात्र आधार नहीं बन सकता, तब भी संपुष्टि की आवश्यकता का नियम, प्रज्ञा का नियम है।

Cases referred :

(2002) 6 SCC 710, (2006) 13 SCC 130.

Ahadulla Usmani, for the appellant

Prakash Gupta, Panel Lawyer, for the respondent.

*Cr.A. No.384/2005 (Jabalpur), D/- 12 August 2010.

NOTES OF CASES SECTION

Short Note

(53)*

Sanjay Yadav, J

SHYAM KISHORE MALVIYA

Vs.

STATE OF M.P. & ors.

Municipalities Act, M.P. (37 of 1961), Sections 164 & 167 - *Natural Justice* - *Petitioner a sub-lessee dispossessed without affording opportunity of hearing as contemplated u/s 164 - Held - There is non-compliance of the provisions contained u/s 164(3) and thus, a denial of an opportunity to the petitioner to satisfy the Chief Municipal Officer in respect of the demand, if any, qua the shop - The action u/s 167 of the Act suffers from vice of illegality and arbitrariness - Petition allowed.*

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धाराएँ 164 व 167 - नैसर्गिक न्याय - याची, एक उप-पट्टेदार को धारा 164 के अन्तर्गत अनुध्यात सुनवाई का अवसर दिये बिना बेदखल किया गया - अभिनिर्धारित - धारा 164(3) में अन्तर्विष्ट उपबंधों का अपालन हुआ है और इस प्रकार याची को दुकान के रूप में मॉग, यदि कोई हो, के सम्बंध में मुख्य नगरपालिका अधिकारी को सन्तुष्ट करने का अवसर देने से इंकार किया गया - अधिनियम की धारा 167 के अन्तर्गत की गयी कार्यवाही अवैधता एवं मनमानेपन के दोष से ग्रसित है - याचिका मंजूर।

A.D. Mishra, for the petitioner.

B.N. Misra, G.A., for the respondent/State.

Rahul Rawat, for the respondent No. 2 to 4.

*W.P. No.4052/2007 (Jabalpur) D/- 25 June, 2010.

Short Note

(54)*

N.K.Mody, J

SONA BAI (SMT.) & ors.

Vs.

ANAND KUMAR & ors.

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(a) & (c), Civil Procedure Code, 1908, Section 100 - *Relation between landlord & tenant being finding of fact - Scope of interference in Second Appeal - Held - If there is no concurrent findings of facts of the Courts below then the relation between landlord & tenant can be interfered in a Second Appeal.*

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ए) व (सी), सिविल प्रक्रिया संहिता, 1908, धारा 100 - भू-स्वामी और भाड़ेदार के बीच संबंध तथ्य का निष्कर्ष होते हुये - द्वितीय अपील में हस्तक्षेप का विस्तार - अभिनिर्धारित - यदि निचले न्यायालयों के तथ्यों के कोई समवर्ती निष्कर्ष नहीं हैं तब भू-स्वामी और भाड़ेदार के बीच संबंध में द्वितीय अपील में हस्तक्षेप हो सकता है।

Cases referred :

(2002) 3 SCC 375, 2010(I) MPWN 80, AIR 1963 SC 302.

NOTES OF CASES SECTION

N.K. Maheshwari, for the appellants.

B.L. Pavacha with Nitin Phadke, for the respondents.

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

Short Note

*(55)**

Rakesh Saxena &
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 मृतिका 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.**

**I.L.R. [2010] M. P., 2007
SUPREME COURT OF INDIA**

Before Mr. (Dr.) Justice B.S. Chauhan & Mr. Justice Swatanter Kumar

8 July, 2010*

DINESH CHANDRA PANDEY

... Appellant

Vs.

HIGH COURT OF M.P. & anr.

... Respondents

A. Service Law - Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 14(8) - *Departmental enquiry against judicial officer - Legal assistance during course of D.E. denied - Petitioner participated in entire departmental proceeding without challenging order rejecting application for assistance by legal practitioner - Petitioner himself was equally qualified and was trained as presenting officer and he could even ask for assistance for fellow colleague with similar experience and status as that of presenting officer which he choose not to do - Having given up the right, he can not now be permitted to turn back and raise a grievance in this respect.* (Paras 9 & 10)

क. सेवा विधि, — सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 14(8) — न्यायिक अधिकारी के विरुद्ध विभागीय जाँच — जाँच के दौरान कानूनी सहायता अस्वीकृत — इस हेतु प्रस्तुत आवेदन को निरस्त किये जाने संबंधी आदेश को चुनौती दिये बिना याची ने सम्पूर्ण विभागीय जांच कार्यवाही में भाग लिया — याची स्वयं भी प्रस्तुतकर्ता अधिकारी के समान योग्यता रखता था तथा वह प्रस्तुतकर्ता अधिकारी के समान पद एवं अनुभव वाले अपने किसी सहकर्मी की सहायता लेने हेतु निवेदन कर सकता था, उसने ऐसा नहीं किया — अपने इस अधिकार का त्याग करने के उपरांत, उसे वापस जाने की तथा इस संबंध में कोई आपत्ति करने की अनुमति नहीं दी जा सकती।

B. Service Law - Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 14(8) - *Expression 'may' would have to be construed as directory and not absolutely mandatory with reference to the facts & circumstance of a given case.* (Para 7)

ख. सेवा विधि — सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, धारा 14(8) — प्रस्तुत प्रकरण के तथ्य एवं परिस्थितियों के संदर्भ में शब्द 'सकना' का अर्थ एक निर्देश के रूप में न कि आज्ञा-सूचक रूप में निकाला जाना चाहिये था।

C. Constitution, Article 136 - Service Jurisprudence - *Departmental enquiry against judicial officer - Allegation of possession of disproportionate assets to known source of income - Appellant took incorrect defense contrary to his return and failed to discharge the onus placed upon him - Order of disciplinary authority can not be interfered - Appeal dismissed.* (Para 11)

ग. संविधान, अनुच्छेद 136 — सेवा विधि शास्त्र — न्यायिक अधिकारी के विरुद्ध विभागीय जाँच — ज्ञात स्रोतों से आय से अधिक सम्पत्ति रखने का आरोप — अपीलाधी

2008] Dinesh Chandra Pandey vs. High Court of M. P. [I.L.R.[2010]M.P.,
ने अपने विवरण के विपरीत त्रुटिपूर्ण बचाव लिया तथा अपने उत्तरदायित्व का निर्वहन करने में
असफल रहा - अनुशासनिक अधिकारी के आदेश में हस्तक्षेप नहीं किया जा सकता - अपील
खारिज।

Cases referred :

(1991) 2 SCC 283, (1983) 1 SCR 828, (2001) 1 SCC 509, AIR 2003 SC
511.

J U D G M E N T

The Judgment of the Court was delivered by
SWATANTER KUMAR, J. :- Dinesh Chandra Pandey, appellant herein, was appointed
to the post of Civil Judge in the M.P. Judicial Service (Class II) on 27th January,
1982. On completion of the training period, he joined as Civil Judge, Dhamtari on
12 th September, 1982. During his tenure as Civil Judge, certain irregularities
were noticed by the competent authority and on 7th December, 1988, a charge-
sheet was served upon him, primarily, on the ground that he was possessed
of disproportionate money/assets to his known sources of income. He was served
with a charge sheet containing two articles of charges. One out of them (Charge
2) had not been proved while other Charge (Charge 1) stood proved against the
delinquent officer. Article 1 which had been established reads as under:

"That the said Shri D.C. Pandey while his posting as Civil
Judge, Class-II and J.M.F.C. Raipur had a Bank account in
State Bank of India Account No. SB/8833, the balance whereof
swelled from Rs.2170.01 to Rs.35036.92 paise within the period
from January 1984 to 6th May, 1985, his explanation in this
behalf having been found unconvincing considering the
disproportionateness of the said increase in his bank balance to
his salary income and pattern and frequency of deposits the said
increase in balance is capable of no other reasonable
explanation than that of illicit gains as the source of money which
renders his integrity gravely doubtful."

2. The allegations were denied by him and on 30 th January, 1989 he submitted
that he owns 37 acres of land in Bilaspur and has agricultural income to the extent
of Rs. 50,000/- p.a. It is out of this agricultural income that he has been depositing
amounts in the bank and has not committed any violation of service regulations or
other offence which would attract disciplinary action against him. The competent
authority decided to conduct a regular departmental enquiry and appointed Shri
G.R. Pandya, District & Sessions Judge, Raipur as enquiry officer. Besides
appointing an enquiry officer, the High Court also appointed Shri Ram Krishna
Behar, Addl. Judge as Presenting Officer. During the course of enquiry, the
appellant made an application for permission to engage a legal practitioner to
assist him in the departmental enquiry. This request was declined by the High
Court vide order dated 4th December, 1989. The appellant participated in the

enquiry and the enquiry officer submitted his report on 4 th April, 1990 and returned the finding of guilt against the appellant. The concluding paragraphs of the report read as under:

"Shri Pandey was saving Rs.600/- p.m. out of his salary and, therefore, this amount was quite insufficient for making such a large saving. More saying of Shri Pandey received the amounts frequently from his mother is not sufficient. Something more was required to explain the deposits. This type of explanation was already given by Shri Pandey during the preliminary inquiry and was already found unsatisfactory, hence further opportunity was given to Shri Pandey, by holding this inquiry to give reasonable and convincing explanation regarding the source of his income. I am sorry to say that Shri Pandey could not assess the seriousness of the matter and went on repeating that the money was sent by his mother. The mother of Shri Pandey as well as the customers who had purchased the produce of the messenger who used to bring the money frequently from Bilaspur to Raipur have not been examined. Under these circumstances, bald statement of Shri Pandey that money was received by him from his mother does not appear to be correct. Thus, I come to the conclusion that charge no. 1 regarding the frequent deposits made by Shri Pandey within a span of short period is proved against him.

3. Disciplinary authority, after receiving the said report, issued show cause notice to the appellant on 16th March, 1991 informing the appellant that finding of the enquiry officer on Article (1) had been accepted and as to why punishment should not be imposed upon him to which he submitted a detailed reply. The disciplinary authority vide its order dated 10th June, 1992, opined that the stand taken by the appellant was not satisfactory and consequently, imposed the punishment of removal from service. The appellant preferred an appeal against this order before the Governor which also came to be dismissed vide order dated 3rd February, 1993. The order of removal from service, as confirmed by the appellate authority, was challenged by the appellant by filing a Writ Petition being Misc. Petition No. 3847 of 1992 in the High Court which also came to be dismissed by the Ld. Single Judge vide its order dated 1st July, 2003. Still dissatisfied with the judgment of the Court, Letter Patent Appeal was filed which also met the same fate and was dismissed by the Division Bench of the Madhya Pradesh High Court vide order dated 17th December, 2004. The legality and correctness of this order has been challenged by the appellant in the present appeal under Article 136 of the Constitution.

4. As would be evident from the above narrated facts, the charge against the appellant was a very limited one. In fact, the deposit of the amount in the bank was not disputed by the appellant. However, he rendered the explanation that he

had agricultural land from where he was getting Rs. 50,000/-p.a. as income and had, therefore, deposited these amounts in the bank during the period stated in the charge sheet i.e. between January, 1984 to May, 1985. He had also taken up the stand before the Courts that while he was functioning as a Civil Judge (Class II), Dhamtari in December, 1982, a crime had taken place in which one Shri Pandri Rao Pawar, Advocate and one of his nephew were involved. They had caused serious injuries to the brother of Shri H.L. Warda, the then Judicial Magistrate, 1st Class, Dhamtari who had lost his one eye in the assault. A case under Sections 294, 325, 506B of IPC was registered. The appellant herein had rejected their bail application and did not succumb to the pressure brought in by the advocate which resulted in enmity between the parties. It was also alleged that the said advocate filed a complaint on 9th December, 1982 against the appellant stating therein that one witness Dayaram Sahu in Criminal Case No. 1153 of 1986 under Section 325/34 IPC was directed to be handcuffed without any justification and later on the appellant was transferred from Dhamtari and posted to Raipur. As such there was a different motive for taking disciplinary action against the appellant than what was apparent from the record of the disciplinary proceedings. According to the appellant, he was possessed by sufficient means as he had income from salary as well as agricultural activity. In light of the facts given by him, there was no occasion to frame any charge against the appellant. Further, the contention is that none of the article of charges have been proved against the delinquent in accordance with law.

5. On the contrary, the learned counsel appearing for the respondents contended that this Court should not re-appreciate the evidence. The enquiry officer, the disciplinary authority, the learned Single Judge and even the Division Bench have accepted the fact that the appellant had been rightly charged with Article 1, which stands proved and, as such, no interference is called for on merits or even on the question of quantum of punishment. It is also stated by him that in terms of Govt. Servant Conduct Rules, 1985, which are applicable to the members of the Judicial Service in the State of Madhya Pradesh, a Government servant who either fails to file a return prescribed in sub-rule (i) or files a return for any year, which does not fully disclose all the property that is required to be indicated or otherwise conceals any such property, would amount to misconduct. Further, the argument raised is that the Enquiry Officer has examined all the relevant aspects and after being satisfied that there was no plausible explanation for depositing the money in the bank at such short intervals, no fault can be found with the finding of the Enquiry Officer. Referring to the behaviour of a common prudent person/ agriculturist, the income from agriculture could hardly be on day-to-day basis. It was nobody's case that vegetable or allied crop was being grown on the land in question. In normal course, the money would be available to agriculturist only when the crop is harvested and sold in the market. No such evidence had been produced by the appellant during the course of enquiry. Thus, no interference is called for.

6. The challenge to the impugned order is, primarily, on two grounds. Firstly, the appellant had asked for assistance of a legal practitioner which had been unfairly denied to him. Denial of assistance of a legal practitioner tantamount to violation of principles of natural justice as well as M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 (for short "1966 Rules"), and, as such, the entire departmental proceedings as well as the impugned order of punishment are vitiated. Secondly, the enquiry officer as well as the High Court have not appreciated the evidence in its proper perspective and has failed to accept plausible defence raised by the appellant in regard to deposit of money in the bank. The order of removal from service, thus, is based on no evidence and is required to be set aside. In support of this contention learned counsel referred to Rule 14(8) of the 1966 Rules as well as Judgment of this Court in the case of *J.K. Aggarwal v. Haryana Seeds Development Corporation Ltd.* [(1991) 2 SCC 283] and *Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni*, [(1983) 1 SCR 828]. The 1966 rules are applicable to the member of judicial services of the State of Madhya Pradesh as the Government, in consultation with the High Court, has only framed one set of Rules i.e. M.P. Judicial Service (Classification, Recruitment and Conditions of Service) Rules, 1955 (which primarily deal with the eligibility, methodology relating to appointment to the judicial services of the States and its cadre etc. As far as the disciplinary rules are concerned, it is a common case of the parties that the above 1966 Rules are the Rules applicable to the members of judicial services. These Rules came into force from the date of their publication. They deal with power to suspend, conduct departmental enquiry, the procedure which is to be adopted in a departmental enquiry and punishments which can be inflicted upon an officer by the Competent Disciplinary Authority. While Rule 10 deals with the punishment and penalties which can be imposed on the member of the service, Rules 12 and Rule 13 deal with the Disciplinary Authority and the authority who can institute the proceedings. While Rule 14 deals not only with imposition of punishment but also gives the entire procedure which is required to be followed by the Enquiry Officer as well as the Disciplinary Authority before inflicting any punishment upon the charged officer, Rule 14(8) deals with providing of legal assistance or engagement of a legal practitioner during the course of a departmental enquiry. As the reliance has been placed by both the parties on this Rule, it will be useful to reproduce the same here:

"Rule 14(8): The Government servant may take the assistance of any other Government servant to present the case on his behalf, but may not engage a legal practitioner for the purpose unless the Presenting Officer appointed by the disciplinary authority is a legal practitioner, or, the disciplinary authority, having regard to the circumstances of the case, so permits."

7. The bare reading of this Rule shows that the Government servant may take

the assistance of any other Government servant to represent his case but may not engage a legal practitioner for the purpose unless the presenting officer appointed by the authority is a 'legal practitioner' or the disciplinary authority, having regard to the circumstances of the case, so permits. The expression 'may' cannot be read as 'shall'. The normal Rule is that a delinquent officer would be entitled to engage another officer to present his case. But if the presenting officer is a 'legal practitioner', he may normally be permitted to engage a legal practitioner. The third category is where the disciplinary authority having regard to the circumstances of the case so permits. It is, therefore, not absolutely mandatory that the disciplinary authority should permit the engagement of a legal practitioner irrespective of the facts and circumstances of the case. There is some element of discretion vested with the authority which, of course, has to be exercised properly and in accordance with the settled principles of service jurisprudence. The Courts have taken a view that where expression 'shall' has been used it would not necessarily mean that it is mandatory. It will always depend upon the facts of a given case, the conjunctive reading of the relevant provisions along with other provisions of the Rules, the purpose sought to be achieved and the object behind implementation of such a provision. This Court in the case of *Sarla Goel v. Kishan Chand* [(2009) 7 SCC 658], took the view that where the word 'may' shall be read as 'shall' would depend upon the intention of the legislature and it is not to be taken that once the word 'may' is used, it per se would be directory. In other words, it is not merely the use of a particular expression that would render a provision directory or mandatory. It would have to be interpreted in light of the settled principles, and while ensuring that intent of the Rule is not frustrated. Further, in the case of *Malaysian Airlines Systems BHD (II) v. Stic Travels (P.) Ltd.*, [(2001) 1 SCC 509], this Court took the view that word 'may' in Section 11(1) of the Arbitration and Conciliation Act, 1996 is not to be construed as 'must' or 'shall', as the word 'may' has not been used in the sense of 'shall', the provision is not mandatory. In the light of these principles, we are of the considered view that the expression 'may', used in Rule 14(8) of 1966 Rules would have to be construed as directory and not absolutely mandatory with reference to the facts and circumstances of a given case. Of course, it would be desirable that wherever the presenting officer is a legal practitioner, the delinquent officer should be given the option and may be permitted to engage a legal practitioner if he so opts. But this Rule is hardly of any assistance and help to the appellant in the present case. The Presenting Officer was an Additional District Judge. He was possessed of similar qualification, professionally or otherwise, as was the appellant himself. The appellant could have asked for permission to engage and take assistance of any other judicial officer of that rank or of any rank that he wanted which request ought to have been considered by the Disciplinary Authority. It will be entirely uncalled for that an Additional Judge should be termed as a legal practitioner and, therefore, vesting in the appellant a right to engage a legal practitioner or an advocate for defending him in the departmental proceedings. It will be rather

appropriate to apply the principles of contextual interpretation in the facts and circumstances of the case. In the case of *Muddada Chayanna vs. K. Narayana* [AIR 1979 SC 1320], it was held by this Court that interpretation of statute, contextual or otherwise, must further and not frustrate the object of the statute. In other words, the expression 'medical practitioner' appearing in the Maharashtra Nurses Act, 1966 should be given a meaning in the context in which it is sought to be applied to achieve the real object of the statute. It is also to be kept in mind that while dealing with the provisions of the statute, the Court would not adopt an approach or give meaning to an expression which would produce unintelligible, absurd and unreasonable result and would render the legislative intent unworkable or totally irreconcilable with the provisions of the statute (*Bhavnagar University vs. Palitana Sugar Mills Pvt. Ltd.* [AIR 2003 SC 511]). The learned counsel for the appellant referred to P. Ramanatha Aiyar's Law Lexicon to emphasise that the expression 'legal practitioner' appearing in Rule 14(8) would cover even a judicial officer. He relied upon the following explanations given to this expression:

"Legal practitioner" defined (See also Advocate of a High Court; Barrister; Government pleader; Pleader; Public Prosecutor; Recognized agent) Act 18, 1879, S. 3; Act 18, 1881, S. 4(2); Act 16, 1887, S.4(16); Act 17, 1889, S 3(13); Act 23, 1923, S.2; Act 21, 1926, S.2

'Legal Practitioner' means an advocate vakil or attorney of any High Court, a pleader, mukhtaro revenue agent. Act XVIII of 1879 (Legal Practitioners), S.3]"

8. The above referred explanations clearly show that a judge in service cannot be termed as a legal practitioner, as it will mean and include only an Advocate or a vakil of Court practicing in a Court, may even be a Barrister, Special Pleader, solicitors depending on the facts of a given case. Rule 2 (e) of the Central Administrative Rules, 1987 also defines the word 'legal practitioner'. However, it, in turn, requires that this expression shall have the same meaning as is assigned to it under the Advocates Act, 1961. In that Act the word 'legal practitioner' has been defined under Section 2(i) to mean an advocate or vakil of any High Court, a pleader mukhtar or revenue agent. In other words, this is an expression of definite connotation and cannot be granted an extended or inclusive meaning, so as to include what is not specifically covered. A Judge may be law graduate holding a Bachelor Degree in Law from any University established by law in India but this by itself would not render him as a 'legal practitioner'. On the contrary, there is a definite restriction upon the Judge from practicing law. Such an implied inclusion, as argued by the appellant, would not only lead to absurdity but would even offend the laws in force in India. John Indermaur, Principles of the Common Law 169 (Edmund H. Bennett ed., 1st Am.ed. 1878 explains the term as follows :

"Legal practitioners may be either barristers, special pleaders

not at the bar, certified conveyancers, or solicitors. The three latter may recover their fees, but the first may not, their acting being deemed of a voluntary nature, and their fees merely in the light of honorary payments; and it follows from this, that no action lies against them for negligence or unskilfulness."

9. Thus, the expression 'legal practitioner' is a well defined and explained term. It, by any stretch of imagination, cannot include a serving Judge who might have been appointed as a presenting officer in the departmental proceedings. Besides this legal aspect of the matter, even on principle of fairness we do not think that the order has caused any prejudice to the appellant. The appellant could have asked for appointment of any colleague whose assistance he wanted to take and who would have been as well qualified and experienced as the presenting officer. The request of the appellant has been rightly rejected by the disciplinary authority. Furthermore, the application was made on 7th December, 1988 itself and thereafter the appellant took no steps whatsoever to challenge the order of the Disciplinary Authority declining assistance of an advocate. On the contrary, he participated without any further protest in the entire departmental enquiry and raised no objections. The Enquiry Officer conducted the proceedings in a just, fair manner and in accordance with rules. In fact, there is no challenge to that aspect of the matter. In the application, the appellant had stated "that the complainant neither has necessary experience nor the required skill to handle his defence in such circumstances." This statement *ex facie* is not correct. The appellant must have dealt with variety of cases during his tenure as a Judge. He was fully capable of defending himself in the departmental enquiry. In the alternative he could easily ask for assistance of any senior colleague from the service if he was under pressure of any kind that the Presenting Officer was senior to him and belonged to Higher Judicial Service. He did not exercise this choice, at any stage, for reasons best known to him. However, he made an application praying for permission to engage an advocate and nothing else. Charge against the appellant was not of a very complicated nature, which a person having qualification and experience of the appellant would not be able to defend. In these circumstances, we are of the considered view that no prejudice whatsoever has been caused to the interest of the delinquent officer. These are the rules primarily of procedure, an element of prejudice would be one of the necessary features, before departmental proceedings can be held to be vitiated on that ground. The reliance placed upon the case of *J.K. Aggarwal* (supra) is totally unwarranted. In that case, the Court came to the conclusion that refusal to sanction the service of lawyer in the inquiry proceedings was not a proper exercise of discretion under the Rule resulting in failure of justice. The Court held that the discretion was vested in the disciplinary authority in terms of Rule 7(5) of the relevant Rules. The language of that Rule was entirely different and permission to engage a legal practitioner was relatable to the nature of the punishment which could be imposed upon the delinquent officer

in the departmental proceedings. If the charges were likely to result in dismissal of the person from service, in that event, that officer may with the sanction of the Enquiry Officer be permitted to be represented through a counsel. Language of this Rule is entirely different from the language of the Rule in question in the present case. On the basis of the facts of that case and Rule 7(5) of the said Rules the Court held:

"The right of representative by a lawyer may not in all cases be held to be a part of natural justice. No general principle valid in all cases can be enunciated. In non-statutory domestic tribunals, Lord Denning in the Court of Appeal in England favoured such a right where a serious charge had been made which affected the livelihood or the right of a person to pursue an avocation and observed:

"I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He also has a right to speak by counsel or solicitor."

But this was not followed by Lyell, J. in Pett case (No.2)

It would appear that in the inquiry, the respondent-Corporation was represented by its Personnel and Administration Manager who is stated to be a man of law. The rule itself recognizes that where the charges are so serious as to entail a dismissal from service the inquiry authority may permit the services of a lawyer. This rule vests a discretion. In the matter of exercise of this discretion one of the relevant factors is whether there is likelihood of the combat being unequal entailing a miscarriage or failure of justice and a denial of a real and reasonable opportunity for defence by reasons of the appellant being pitted against a presenting officer who is trained in law. Legal Adviser and a lawyer are for this purpose somewhat liberally construed and must include "whosoever assists or advises on facts and in law must be deemed to be in the position of a legal adviser". In the last analysis, a decision has to be reached on a case to case basis on the situational particularities and the special requirements of justice of the case. It is unnecessary, therefore, to go into the larger question "whether as a sequel to an adverse verdict in a domestic enquiry serious civil and pecuniary consequences are likely to ensue, in order to enable the person so likely to suffer such consequences with a view to giving him a reasonable opportunity to defend himself, on his request, should be permitted to appear through a legal practitioner" which was kept open in Board of Trustees of the Port of Bombay v. Dilip Kumar. However, it was held in that case (SCC p. 132, para 12).

"...In our view we have reached a stage in our onward march to fair play in action that where in an enquiry before a domestic tribunal the delinquent officer is pitted against a legally trained mind, if he seeks permission to appear through a legal practitioner the refusal to grant this request would amount to denial of a reasonable request to defend himself and the essential principles of natural justice would be violated...."

On a consideration of the matter, we are persuaded to the view that the refusal to sanction the service of a lawyer in the inquiry was not a proper exercise of the discretion under the rule resulting in a failure of natural justice; particularly, in view of the fact that the Presenting Officer was a person with legal attainments and experience. It was said that the appellant was no less adept having been in the position of a Senior Executive and could have defended, and did defend, himself competently; but as was observed by the learned Master of Rolls in Pett case that in defending himself one may tend to become "nervous" or "tongue-tied". Moreover, appellant, it is claimed, has had no legal background. The refusal of the service of a lawyer, in the facts of this case, results in denial of natural justice."

10. Thus, the appellant can hardly take any help from that case. Even in the case of *Dilipkumar Raghavendranath Nadkarni* (supra), the Board of Trustees had appointed its law officer as a presenting officer. The Presenting Officer was legally trained and experienced in handling departmental enquiries, it was in those circumstances that this Court found, as a matter of fact, that there was violation of principles of natural justice and that a legally expert person has been permitted to be engaged by the delinquent worker. In that case the provisions similar to the present provisions also came into force during the pendency of the departmental proceedings. The Court remanded the matter and directed re-conducting of the departmental enquiry with specific liberty to the workman to cross-examine all the witnesses afresh in accordance with law. The facts of that case are thus entirely different from the case in hand wherein no such ground is made out. Firstly, the petitioner himself was equally qualified and trained as the presenting officer and/or he could even ask for assistance for a fellow colleague with similar experience and status as that of the presenting officer which he choose not to do. Having given up the right, he cannot now be permitted to turn back and raise a grievance in that regard. This contention of the appellant is without any merit.

11. Coming to the other aspect of the case, that there is perversity in appreciation of the evidence in the impugned judgment under appeal, we may notice that the finding of facts arrived at by the enquiry officer was not interfered with by the learned single Judge as well as the Division Bench of the Madhya Pradesh High

Court, it is hardly permissible for this Court to disturb such findings of fact in exercise of its jurisdiction under Article 136 of the Constitution of India. Besides that, we must notice that the conduct of the appellant can hardly be appreciated in regard to deposit of money in the Bank regularly during the entire period of 1984-85. The Department had showed that the deposits have been made and the bank balance of the appellant, on a particular date, was beyond the known sources of his income to which, the appellant has raised a defence that he owned the land and the income received was an agricultural income. However, he produced no evidence during the departmental enquiry to show that some person was making payment to him and/or some person was depositing the money in the Bank so received from agricultural activity in every 2-3 days. Once a person is carrying on agricultural activities like the appellant, the obvious result thereof would be that there would be persons who would be carrying on agricultural activities on the land on his behalf, would be harvesting the crops and then selling the same on his behalf and that there would be persons who would be buying such crops and disposing the crops in the open market directly or indirectly. Thus, these persons would have been easily available to the appellant to be produced in departmental enquiry to substantiate his defence. No such effort was ever made by the appellant. Non-examination of these witnesses and non-production of necessary documents must lead to draw an adverse inference against the appellant. In any case, the appellant cannot take advantage of that fact and contend that the inquiry officer has failed to appreciate evidence in its correct perspective. At this stage, we may also notice that during the course of hearing, we had called for the original personal file of the officer where he had filed property returns to the Department. In the property return for the year 1984-85 (copy of which is stated to have been produced before the Enquiry Officer), which is the relevant year, the appellant is shown to have 1/3 rd share in the agricultural land located at two different places. There is a specific column relating to income from agriculture. In that form it was filled in by the appellant as 'uncertain' (anishchit). This return had been filed on 27 th March, 1985. In other words, on that date he did not know whether he had earned any amount from the agricultural income or not. The period in question was January, 1984 to May 1985, thus, for the substantial period, he was fully aware of his income received from agricultural activity but he still chooses to keep it vague and not declare his true income in the return. Now, in the departmental proceedings and in the reply to the charge-sheet, he submitted that there was an income of more than Rs.50,000/- p.a. and that he owned 37.53 acres of land in village Bilaspur at two different places. It is again strange that he did not disclose in his reply that this was a land jointly owned with his brothers and family members and what was the extent of his holding individually. In the return, he himself claimed one-third share in the property. The total land indicated at two different places being 26 acres + 18 comes to 44 acres and one third of which, merely 14 acres approximately, would be the land owned by him and not 37 acres as claimed.

This, itself shows that the appellant has not approached the Court with clean hands and has not disclosed true facts which were known to him alone. In the departmental proceedings, he took incorrect defence contrary to his return and failed to discharge the onus placed upon him. In the departmental enquiry, the appellant produced no income tax returns to show that in addition to his salary, he had other sources of income and what was the extent of income from these sources. In his written statement of defence he never took up the plea that any such returns were filed and he made no effort to bring on record the copies of such income-tax returns, if at all filed. The delinquent officer could have stated in his statement if he was not filing any return and reason thereof. We are certainly of the considered view that it was obligatory on the part of the delinquent officer to disclose all such relevant facts which were only within his personal knowledge. He belongs to a service which is looked upon by the public at large as a service cadre of high integrity and professional values. The Judges are expected to apply stringent social and moral values to their standard of living. It was expected of the appellant to disclose all true and correct information and documents in his power and possession before the Enquiry Officer. It was not required of him to with-hold relevant material and take such a defence which could not be substantiated during the course of departmental enquiry. Having failed to produce relevant documentary evidence as well as examine the witnesses, the appellant cannot argue that the Disciplinary Authority or the Courts have not appreciated the evidence in its correct perspective. We are unable to accept the contention of the appellant that the findings are based on no evidence or are perverse in any manner whatsoever.

12. For the reasons afore stated, we find no merit in this appeal. The same is dismissed however, without any order as to costs.

Appeal dismissed.

**I.L.R. [2010] M. P., 2018
SUPREME COURT OF INDIA**

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

9 August, 2010*

LAKHAN

... Appellant

Vs.

STATE OF M.P.

... Respondent

Evidence Act (1 of 1872), Section 32, Penal Code, 1860, Section 302 - Appellant convicted for murder of his wife/deceased (died due to burn injuries) on ground of her second dying declaration, rejecting the first one - Conviction challenged on ground that the first dying declaration, which was recorded by Executive Magistrate, should have been accepted as compared to second,

recorded by ASI unauthorisedly - Held - The trial Court and the High Court rightly discarded the first dying declaration in view that the deceased was taken to hospital by her father-in-law & mother-in-law and the medical report does not support her first dying declaration, on the contrary the second dying declaration fully stands corroborated not only by the medical evidence but oral dying declarations made by the deceased to her parents also and she was not in a precarious condition - Appeal dismissed. (Paras 25 & 28).

साक्ष्य अधिनियम (1872 का 1), धारा 32, दण्ड संहिता, 1860, धारा 302 - अपीलार्थी को उसकी पत्नि/मृतक (जलने की चोटों के कारण मौत हुई) के प्रथम मृत्युकालिक कथन को अस्वीकार करते हुए, उसके द्वितीय मृत्युकालिक कथन के आधार पर दोषसिद्ध किया गया - दोषसिद्धि को इस आधार पर चुनौती दी गयी कि प्रथम मृत्युकालिक कथन जिसे कार्यपालक मजिस्ट्रेट द्वारा अभिलिखित किया गया था उसे स्वीकार किया जाना चाहिए था दूसरे की तुलना में जिसे ए.एस.आई. द्वारा अनाधिकृत रूप से अभिलिखित किया गया था - अभिनिर्धारित - विचारण न्यायालय तथा उच्च न्यायालय ने उचित रूप से प्रथम मृत्युकालिक कथन को नामंजूर किया इस दृष्टिकोण से कि मृतक को उसके ससुर व सास द्वारा अस्पताल ले जाया गया था और चिकित्सीय प्रतिवेदन उसके प्रथम मृत्युकालिक कथन को सहायता प्रदान नहीं करता, इसके विपरीत द्वितीय मृत्युकालिक कथन पूर्णतः संपुष्ट होता है न केवल चिकित्सीय साक्ष्य द्वारा परंतु मृतक द्वारा उसके माता-पिता को दिये मौखिक मृत्युकालिक कथन से भी तथा वह दैवाधीन स्थिति में नहीं थी - अपील खारिज।

Cases referred :

AIR 1958 SC 22, AIR 1974 SC 332, AIR 1976 SC 1994, AIR 1981 SC 617, (2001) 5 SCC 254, (2003) 12 SCC 490, (2005) 9 SCC 113, AIR 2007 SC 2020, (2010) 2 SCC 85, (2010) 5 SCC 451, (1998) 9 SCC 303, (1999) 6 SCC 545, (1999) 9 SCC 562, (2008) 2 SCC 516, AIR 1974 SC 2165, (2007) 12 SCC 562, (2004) 9 SCC 713, AIR 2008 SC 1426, (1999) 2 SCC 126, (2008) 5 SCC 468, (1993) 2 SCC 684, (2009) 12 SCC 671, (2009) 15 SCC 120.

J U D G M E N T

The Judgment of the Court was delivered by **DR. B.S. CHAUHAN, J.** :- This appeal has been preferred against the judgment and order dated 9.7.2008, passed by High Court of Madhya Pradesh, at Jabalpur, in Criminal Appeal No.2304/2000 by which the High Court has dismissed the said appeal, affirming the judgment and order of the Sessions Judge, Sagar, dated 31.8.2000 in Sessions Trial No.180/2000 and convicted the appellant under Section 302 of the Indian Penal Code, 1860 (hereinafter called "IPC") and sentenced him to life imprisonment.

2. Facts and circumstances giving rise to this case are that the appellant got married to Smt. Savita (hereinafter referred to as "deceased") on 22.6.1999. She was brought to the hospital by her in-laws on 27.2.2000 at about 7 p.m. in a burnt condition. Dr. Subhash Jain informed the Police Station, Gopalganj, about the arrival of the deceased, Smt. Savita, and a police party arrived at the hospital. The dying declaration was recorded by the Executive Magistrate, Smt. Madhu

Nahar (DW.1), vide Exh.D/2, wherein, the deceased stated that when she was cooking, kerosene oil had been put behind her back, and when she moved herself back, her Saree caught fire. On 29.2.2000, ASI, Damodar Prasad Mahure (PW-19), on the instructions of the Superintendent of Police recorded the second dying declaration (Ex.P/2), wherein, the deceased stated that appellant brought a kuppi (a metallic container for lighting) full of kerosene and poured it on her body and as a result of which kerosene oil spread all over her body. Thereafter, the fire was lit by chimney by him and she was burnt. She also stated that she had been brought to the hospital by her in-laws. After recording the dying declaration dated 29.2.2000, ASI Damodar Prasad (PW-19), recorded the Dehati Nalishi (Ex.P/14), at 10.40 p.m. on its basis. The kupee, as referred to in the dying declaration, was seized from the house of the appellant on 2.3.2000.

3. Smt. Savita died on 20.3.2000, and thus, there was an alteration of offences from 307/201 IPC to 302 IPC. After completing the investigation, charge sheet was filed against the appellant before the court and the case was committed to the Court of Sessions where the appellant was tried. During trial, the prosecution examined as many as 19 witnesses and in the form of documentary evidence, reliance was placed on the statement of Savita, deceased, in the form of dying declaration dated 29.2.2000 (Ex.P/2), Dehati Nalishi (Ex.P/14), FIR (Ex.20), deposition of ASI (PW-19) dated 29.2.2000 and case diary etc. In defence, appellant placed reliance on the statement of the deceased dated 27.2.2000 (Ex.D/2), and examined Smt. Madhu Nahar (DW.1). The appellant made a statement under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter called as "Cr.P.C."), that he was, by no means, involved in the case. However, the appellant did not explain under what circumstances his wife was burnt. The trial Court, vide judgment and order dated 31.8.2000, found the appellant guilty of offence under Section 302 IPC and accordingly sentenced him to imprisonment for life.

4. Being aggrieved, the appellant preferred Criminal Appeal No. 2304 of 2000 before the High Court of Madhya Pradesh, at Jabalpur, which has also been dismissed vide judgment and order dated 9.7.2008. Hence, this appeal.

5. Shri Sudhir Kulshreshtha, learned counsel appearing for the appellant, has submitted that it is a case of circumstantial evidence as no eye-witness has been examined by the prosecution in support of its case. There has been no allegation of a demand of dowry, though the marriage had taken place only 9-10 months prior to the death of the deceased, Savita. The only allegation against the appellant had been of harassment, as alleged by the parents of the deceased, who were examined as prosecution witnesses before the trial Court. There were two dying declarations in the case. The first was recorded by Ms. Madhu Nahar, the Executive Magistrate (DW.1), which should have been accepted in toto, without raising any doubt to its veracity as compared to the dying declaration, unauthorisedly recorded by Shri Damodar Prasad Mahure, the ASI (PW.19), subsequently. Where

there are two dying declarations, the first dying declaration recorded by the Magistrate should have been relied upon, particularly when both the witnesses to the second dying declaration had been declared hostile. Therefore, the appeal deserves to be allowed.

6. Per contra, Shri Siddharth Dave along with Ms. Vibha Datta Makhija, learned counsel for the respondent-State, has vehemently opposed the appeal contending that the first dying declaration had been recorded by the Executive Magistrate when the deceased, Savita, had been tutored by her in-laws who had brought her to the hospital. At that time the deceased was under duress/influence of her in-laws. However, there cannot be any doubt regarding contents of the second dying declaration recorded by the police officer, particularly when it stands corroborated with other relevant evidence. The appeal lacks merit and is liable to be dismissed.

7. We have considered the rival submissions made by learned counsel for the parties. Counsel from both the sides have canvassed their submissions solely on the issue as to which of the dying declarations should have been relied upon by the courts below. No other issue is being agitated. Therefore, we restrict ourselves only to examining the limited issue of which dying declaration can be relied upon in the facts and circumstances of this case.

8. The doctrine of dying declaration is enshrined in the legal maxim "*Nemo moriturus praesumitur mentire*", which means "a man will not meet his maker with a lie in his mouth". The doctrine of Dying Declaration is enshrined in Section 32 of the Indian Evidence Act, 1872 (hereinafter called as, "Evidence Act") as an exception to the general rule contained in Section 60 of the Evidence Act, which provides that oral evidence in all cases must be direct i.e. it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

9.. This Court has considered time and again the relevance/probative value of dying declarations recorded under different situations and also in cases where more than one dying declaration has been recorded. The law is that if the court is satisfied that the dying declaration is true and made voluntarily by the deceased, conviction can be based solely on it, without any further corroboration. It is neither a rule of law nor of prudence that a dying declaration cannot be relied upon without corroboration. When a dying declaration is suspicious, it should not be relied upon without having corroborative evidence. The court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased must be in a fit state of mind to make the declaration and must identify the assailants. Merely because a dying declaration does not contain the details of the occurrence, it cannot be rejected and in case there is merely a brief statement, it is more reliable for the reason that the shortness of the statement is itself a guarantee of its veracity. If the dying declaration suffers from some infirmity, it cannot alone form the basis of conviction.

Where the prosecution's version differs from the version given in the dying declaration, the said declaration cannot be acted upon. (vide : *Kushal Rao v. State of Bombay*, AIR 1958 SC 22; *Rasheed Beg & Ors. v. State of Madhya Pradesh*, AIR 1974 SC 332; *K. R. Reddy & Anr. v. The Public Prosecutor*, AIR 1976 SC 1994; *State of Maharashtra v. Krishnamurti Laxmipati Naidu*, AIR 1981 SC 617; *Uka Ram v. State of Rajasthan*, (2001) 5 SCC 254; *Babulal & Ors. v. State of M.P.*, (2003) 12 SCC 490; *Muthu Kutty & Anr. v. State*, (2005) 9 SCC 113; *State of Rajasthan v. Wakteng*, AIR 2007 SC 2020; and *Sharda v. State of Rajasthan*, (2010) 2 SCC 85].

10. In *Munnawar & Ors. v. State of Uttar Pradesh & Ors.* (2010) 5 SCC 451, this Court held that a dying declaration can be relied upon if the deceased remained alive for a long period of time after the incident and died after recording of the dying declaration. That may be evidence to show that his condition was not overtly critical or precarious when the dying declaration was recorded.

11. A dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by officer of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim, however, circumstances showing anything to the contrary should not be there in the facts of the case. [vide *Ravi Chander & Ors. v. State of Punjab*, (1998) 9 SCC 303; *Harjit Kaur v. State of Punjab*, (1999) 6 SCC 545; *Koli Chunilal Savji & Anr. v. State of Gujarat*, (1999) 9 SCC 562; and *Vikas & Ors. v. State of Maharashtra*, (2008) 2 SCC 516.]

12. In *Balak Ram v. State of U.P.*, AIR 1974 SC 2165, the question arose as to whether a dying declaration recorded by a higher officer can be discarded in case of multiple dying declarations. The Court held as under:-

"The circumstances surrounding the dying declaration, though uninspiring, are not strong enough to justify the view that officers as high in the hierarchy as the Sub-Divisional Magistrate, the Civil Surgeon and the District Magistrate hatched a conspiracy to bring a false document into existence. The Civil services have no platform to controvert allegations, howsoever grave and unfounded. It is therefore, necessary that charges calculated to impair their career and character ought not to be accepted except on the clearest proof. We are not prepared to hold that the dying declaration is a fabrication."

13. In *Sayarabano @ Sultanabegum v. State of Maharashtra*, (2007) 12 SCC 562, two Dying Declarations had been recorded. As per the first declaration, the deceased had met with an accident. She was hit by the kerosene lamp which fell on her body and caught fire. While recording the second declaration, the

Judicial Magistrate asked her why she was changing her statement. The deceased replied that her Mother-in-Law had told her not to give any statement against the family members of her in-laws and that was the reason, why she had not involved any person in the earlier statement. But, in fact, it was her Mother-in-Law who threw the kerosene lamp on her and thus, she was burnt. She also stated that her Mother-in-Law was harassing her. In such a situation, this Court held that the second dying declaration was true and inspired confidence. Ill treatment of the deceased was clearly established and completely proved on the basis of the evidence of other witnesses.

14. In case, there are inconsistent dying declarations, the Court must rely upon any other evidence, if available, as it is not safe to act only on inconsistent dying declarations and convict the accused. [Vide *Lella Srinivasa Rao v. State of A.P.*, (2004) 9 SCC 713].

15. In *Sher Singh & Anr. v. State of Punjab*, AIR 2008 SC 1426, a case of bride burning, three dying declarations had been recorded. In the first dying declaration, the deceased had denied the role of the accused persons. In second dying declaration deceased attributed a role to the accused but the said declaration did not contain the Certificate of the Doctor that the deceased was in a fit state of mind to make a declaration, however, the Magistrate, who recorded the declaration, certified that the deceased was in a conscious state of mind and was in a position to make the statement to him. The third dying declaration was recorded by a police officer after the Doctor certified that she was in a fit state of mind to give the statement. This Court held that the conviction could be based on the third dying declaration as it was consistent with the second dying declaration and the oral dying declaration made to her uncle, though with some inconsistencies. First declaration was made immediately after she was admitted in the hospital and was under threat and duress by her Mother-in-Law that she would be admitted in hospital only if she would give a statement in favour of the accused persons.

16. In *Paras Yadav & Ors. Vs. State of Bihar* (1999) 2 SCC 126, this Court held that a statement of the deceased recorded by a police officer in a routine manner as a complaint and not as a dying declaration can also be treated as dying declaration after the death of the injured and relied upon if the evidence of the prosecution witnesses clearly establishes that the deceased was conscious and was in a fit state of health to make the statement.

17. In *Chairman & Managing Director, V.S.P. & Ors. v. Goparaju Sri Prabhakara Hari Babu*, (2008) 5 SCC 468, this Court, placing reliance upon the earlier Judgment in *Kundula Bala Subrahmanyam & Anr. v. State of Andhra Pradesh*, (1993) 2 SCC 684, held that it is not the plurality of dying declarations but the reality thereto that aids weight to the prosecution's case. If a dying declaration is found to be voluntary, reliable and made in a fit mental condition, it

can be relied upon without any corroboration. If there is more than one dying declaration, they should be consistent. In case of inconsistencies between two or more dying declarations made by the deceased, the Court has to examine the nature of inconsistencies namely, whether they are material or not and in such a situation, the Court has to examine the multiple dying declarations in the light of the various surrounding facts and circumstances.

18. In *Heeralal v. State of Madhya Pradesh*, (2009) 12 SCC 671, this Court considered the case having two dying declarations, the first recorded by a Magistrate, wherein it was clearly stated that the deceased had tried to set herself ablaze by pouring kerosene on herself. However, the subsequent declaration was recorded by another Magistrate and a contrary statement was made. This Court set aside the conviction after appreciating the evidence and reaching the conclusion that the courts below came to abrupt conclusions on the purported possibility that the relatives of the accused might have compelled the deceased to give a false dying declaration. No material had been brought on record to justify such a conclusion.

19. In *State of Andhra Pradesh v. P. Khaja Hussain*, (2009) 15 SCC 120, this Court set aside the conviction as there was a variation between the two dying declarations about the manner in which the deceased was set on fire and for the reason that there was no other evidence to connect the accused with the crime.

20. In view of the above, the law on the issue of dying declaration can be summarized to the effect that in case, the Court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. In case, there are multiple dying declarations and there are inconsistencies between them, generally, the dying declaration recorded by the higher officer like a Magistrate can be relied upon, provided that there is no circumstance giving rise to any suspicion about its truthfulness. In case, there are circumstances wherein the declaration had been made, not voluntarily and even otherwise, it is not supported by the other evidence, the Court has to scrutinize the facts of an individual case very carefully and take a decision as to which of the declarations is worth reliance.

21. The case at hand requires to be examined in the light of the aforesaid settled legal propositions in this regard. In the instant case, the first dying declaration reads as under:-

"I was cooking and kerosene was put behind, I did not see to it. When I turned back on my knee, my sari caught fire"

However, the deceased has further stated that she was brought to the hospital by her Father-in-Law and Mother-in-Law. The declaration was recorded by the

Executive Magistrate after getting a certificate from the Doctor that the deceased was in a fit physical and mental condition to give the statement.

22. The second dying declaration was recorded by Shri Damodar Prasad Mahure, Assistant Sub-Inspector of Police (PW.19). He was directed by the Superintendent of Police on telephone to record the statement of the deceased, who had been admitted in the hospital. In that statement, she had stated as under :-

"On Sunday, in the morning, at about 5.30 AM, my husband Lakhan poured the kerosene oil from a container on my head as a result of which kerosene oil spread over my entire body and that he (Lakhan) put my Sari a fire with the help of a Chimney, due to which I got burnt."

She had also deposed that she had written a letter to her parents requesting them to fetch her from the matrimonial home as her husband and in-laws were harassing her.

The said dying declaration was recorded after getting a Certificate from the Doctor stating that she was in a fit physical and mental condition to give the statement.

23. As per the Injury Report and the medical evidence it remains fully proved that the deceased had the injuries on the upper part of her body. The Doctor, who had examined her at the time of admission in hospital, deposed that she had burn injuries on her head, face, chest, neck, back, abdomen, left arm, hand, right arm, part of buttock and some part of both the thighs. The deceased was 65% burnt. At the time of admission, the smell of kerosene was coming from her body.

24. After appreciating the evidence on record the High Court observed as under :-

"It is a matter of common knowledge that if a person would move back and his/her body comes in contact of some burning object, on the front side of the body i.e. chest, abdominal region, face etc. would not burn. In the first dying declaration, the deceased has said that while moving back, her Sari caught fire. We have also gone through the reasonings assigned by learned Sessions Judge in para 17 of the judgment and we find the reasons to be quite cogent."

25. Undoubtedly, the first dying declaration had been recorded by the Executive Magistrate, Smt. Madhu Nahar (DW.1), immediately, after admission of the deceased, Savita, in the hospital and the Doctor had certified that she was in a fit condition of health to make the declaration. However, as she had been brought to the hospital by her Father-in-Law and Mother-in-Law and the medical report does not support her first dying declaration, the trial Court and the High Court have rightly discarded the same. Even before us, Shri Kulshreshtha, learned counsel appearing for the appellant, has not been able to explain under what

circumstances in the accident case as disclosed by the deceased in her first declaration, the deceased could get the injuries only on the upper part of the body and smell of kerosene was coming from her body. The second dying declaration fully stands corroborated not only by the medical evidence but oral dying declarations made by the deceased to her parents, i.e. Phool Singh (PW.1) and Sushila (PW.3) who were examined in the court.

26. Sh. Damodar Prasad Mahure, ASI, (PW.19), in his cross-examination, has explained that he was not aware of the factum of recording of the first Dying Declaration of the deceased on 27.02.2000. Therefore, there was no reason for him to ask the deceased about the same. More so, it is evident that Dr. Umesh Kumar Shastri certified the mental and physical condition of the deceased at the time of recording of the second Dying Declaration, while at the time of recording of the first Dying Declaration, Dr. Subhash Jain (PW13) certified the mental and physical condition of the deceased. Undoubtedly, the witnesses of the second Dying Declaration namely, Premchand Jain (PW9) and Sanjay (PW18) turned hostile and did not support the prosecution case, however, they have admitted their signatures on the Dying Declaration and could not give any explanation as to why they had attested the said Declaration. Thus, in view of the above, the second Dying Declaration cannot be held to be a fabrication.

27. In the instant case, the deceased Savita was brought to the hospital by her Mother-in-Law and Father-in-Law and she was under their influence. The Trial Court is right in making an observation that generally, most women do not accuse their husbands for sentimental and religious reasons.

28. Thus, in view of the above, we reach the following inescapable conclusions on the questions of fact :-

(a) After having the burn injuries, Savita, deceased, was brought to the hospital by her Father-in-Law and Mother-in-Law and they had tutored not to give any statement against her family members.

(b) The first Dying Declaration was recorded by the Executive Magistrate, Smt. Madhu Nahar (DW.1), after getting a Certificate from the Doctor, in which Savita did not make allegation against any of her family members, rather, she said that it was an accident. However, such a statement is not supported by the medical evidence for the reason that the injuries on her body were found on the upper part of her body and it was not possible to have such burn injuries in case of the kind of accident as she had disclosed in the first Declaration.

(c) The second Dying Declaration was recorded by a Police Officer on the instruction of the Superintendent of Police after getting a Certificate of fitness from the Doctor, which is corroborated by the medical evidence and free from any suspicious

circumstances. More so, it stands corroborated by the oral declaration made by the deceased to her parents, Phool Singh (PW.1), father and Sushila (PW3), mother.

(d) A kuppi, the container, was recovered by the Investigating Officer from the house of the appellant.

(e) Savita, deceased, died on 20.03.2000, after about 21 days of recording of the second Dying Declaration. Thus, it is evident that she was not in a precarious condition or unable to make the statement, rather this fact suggests that she was in a stable condition.

(f) There is nothing on record to show for what reason, the witnesses would depose falsely against the appellant.

29. In view of the above, we are of the view that in the facts and circumstances of this case, the concurrent findings of fact recorded by the Courts below do not warrant any interference from this Court. The appeal lacks merit and is accordingly dismissed.

Appeal dismissed.

**I.L.R. [2010] M. P., 2027
SUPREME COURT OF INDIA**

Before Mr. Justice Altamas Kabir & Mr. Justice A.K. Patnaik
13 August, 2010*

STATE OF M.P.

... Appellant

Vs.

HARISHANKAR BHAGWAN PD. TRIPATHI

... Respondent

Prevention of Corruption Act (2 of 1947), Section 5(1) r/w 5(2), Penal Code, 1860, Section 161 - Acquittal of respondent that the sanction for prosecution was improper and given without application of mind, though the trap was found to have been proved - Held - While granting sanction the officer concerned is not required to indicate that he had personally scrutinized the file and had arrived at the satisfaction for granting sanction - The narration of events granting sanction for prosecution clearly indicates the case and the reason for grant of such sanction - Matter remitted for passing orders on the merits of case. (Paras 13 & 14)

अष्टाचार निवारण अधिनियम (1947 का 2), धारा 5(1) सहपठित 5(2), दण्ड संहिता, 1860, धारा 161 - प्रत्यर्थी की दोषमुक्ति की अभियोजन के लिये मंजूरी अनुचित थी और मस्तिष्क का उपयोग किये बिना ही दी गयी, यद्यपि ट्रैप को साबित किया जाना पाया गया - अभिनिर्धारित - मंजूरी प्रदान करते समय संबंधित अधिकारी से यह अपेक्षित नहीं कि यह दर्शाये कि उसने व्यक्तिगत रूप से फाइल की संविक्षा की थी और मंजूरी प्रदान करने के लिये उसका

2028] State of M. P. vs. Harishankar Bhagwan Pd. Tripathi [I.L.R.[2010]M.P., समाधान हुआ था - अभियोजन के लिये मंजूरी प्रदान करने की दशाओं का वर्णन स्पष्ट रूप से, मामला तथा ऐसी मंजूरी प्रदान करने के लिये कारण दर्शाता है - मामले के गुणदोषों पर आदेश पारित करने के लिये मामला प्रतिप्रेषित किया गया।

Cases referred :

(1996) 1 SCC 542, (2005) 4 SCC 81.

J U D G M E N T

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

2. This appeal is directed against a judgment of acquittal passed by the First Additional Sessions Judge and Special Judge, Shahdol, in Special Case No.5/87, acquitting the Respondents in respect of offences punishable under Section 161 of the Indian Penal Code (I.P.C.) and Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act, 1947, hereinafter referred to as the "1947 Act".

3. According to the prosecution case, the complainant, Ramavtar, submitted an application in the Office of the District Excise Officer, Shahdol, for a licence to collect Mahua. At that time, Ghanshyamdas @ G.D. Sharma had been serving as Special Inspector, Excise and the sole Respondent herein, Harishankar Bhagwan Pd. Tripathi, was serving as a Clerk in the said establishment. The complainant, Ramavtar, claimed to have deposited a sum of Rs.200/- for the licence fee in the State Bank and upon inquiry from the said Ghanshyamdas, he allegedly demanded a sum of Rs.2000/- from the complainant as illegal gratification for getting the licence. Eventually, a written complaint was made by Ramavtar to the Lokayukt (Rewa) of the Special Police, Rewa, which was received by the Deputy Superintendent of Police on 04.06.1986.

4. At this juncture, it may be noted that Ghanshyamdas, who had been made the Respondent No.1 in the Special Leave Petition, died during the pendency of the petition and the proceedings against him have, therefore, abated.

5. Once the written complaint was made, the Office of the Special Police Establishment arranged for a trap and 20 currency notes of Rs.100/- denomination each were treated with phenolphthalein powder and were kept in the right pocket of the kurta worn by Ramavtar. He was directed to hand over the treated currency notes to Ghanshyamdas and was also cautioned against touching the currency notes before they were handed over to Ghanshyamdas.

6. According to the prosecution case, the notes in question were handed over by the complainant, Ramavtar, to Ghanshyamdas, who kept 18 of the notes with himself, while giving two of the notes to the sole Respondent, Harishankar. Immediately thereafter, on being given a pre-arranged signal, the trap party came inside and apprehended both the Respondents. Their hands were washed with a solution of Sodium Carbonate, upon which the water turned pink in colour. A charge-sheet was submitted before the Special Judge, who, after going through

the charge-sheet, framed charges against the accused punishable under Section 161 I.P.C. and also Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act, 1947. The trial Judge acquitted the Respondents not on the ground that the prosecution had failed to prove its case, but upon holding that the sanction which had been accorded for the prosecution of the accused, was improper and had been given without application of mind. Though, the learned Special Judge found the trap to have been proved, he acquitted the Respondents on the ground that the sanction to prosecute the accused had been granted without application of mind.

7. Aggrieved by the judgment of acquittal passed by the learned Special Judge, the prosecuting agencies filed Criminal Appeal No.294 of 1994 before the Jabalpur Bench of the Madhya Pradesh High Court, which, by its judgment and order dated 31st March, 2008, reiterated the findings of the trial Court and dismissed the appeal upon holding that the sanction accorded by the State Government under Section 6 of the Act suffered from non-application of mind, since in the sanction order only the facts of the prosecution case had been mentioned and no reason had been given for according sanction in regard thereto. In the absence of a valid sanction, the High Court dropped the proceedings against Ghanshyamdas, against whom the appeal has abated. As far as the sole Respondent, Harishankar Bhagwan Prasad Tripathi, is concerned, the High Court held that in the absence of any demand made by the said Respondent, the provisions of Section 5(1)(d) of the 1947 Act were not attracted and even the recovery of Rs.200/- from Harishankar was not sufficient to hold him guilty of the charges levelled against him. The High Court, accordingly, dismissed the appeal as against the sole Respondent, Harishankar.

8. Ms. Vibha Datta Makhija, learned Advocate appearing for the Appellant, State of Madhya Pradesh, took us to the order dated 9th February, 1987, according sanction under Section 6(1)(c) of the Prevention of Corruption Act, 1947, to initiate prosecution against Ghanshyamdas and Harishankar for the offences punishable under Section 161 I.P.C. and Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act, 1947, and the other Acts for the time being in force in this connection. Learned counsel pointed out that the facts of the case, as would appear from the records maintained by the Office of the Lokayukt, had been clearly set out and a satisfaction was also arrived at from the facts as recorded and from the perusal thereof, that prosecution was required to be initiated against both the accused in a Court of law. Ms. Makhija submitted that the trial Court had wrongly held that no valid sanction for prosecution had been proved, inasmuch as, the same was proved by Shri R.N. Singh, the Superintendent of Police, Lokayukt Office (PW-5). Ms. Makhija submitted that the learned Courts below had erred in acquitting the Respondents only on the said ground after having found them to be guilty of the offence with which they had been charged.

9. Placing reliance on the judgment of this Court in *State of Maharashtra vs.*

2030] State of M. P. vs. Harishankar Bhagwan Pd. Tripathi [I.L.R.[2010]M.P., *Ishwar Piraji Kalpatri & Ors.* [(1996) 1 SCC 542], Ms. Makhija submitted that this Court had held that while according sanction there was nothing in law which required a statement to be made by the Sanctioning Officer that he had personally scrutinized the file and had arrived at the required satisfaction. The statement made by the Sanctioning Authority that it had fully examined the material before it and after considering all the facts and circumstances discussed therein was satisfied that a prima facie case was made out against the accused person and that it was necessary in the interest of justice to prosecute him in the Court, indicated that the material on record had been examined by the officer concerned who had applied his mind before according sanction. Reference was also made to the decision of this Court in *C.S. Krishnamurthy vs. State of Karnataka* [(2005) 4 SCC 81], where in a similar situation where grant of sanction had been questioned, this Court held that the sanction order should speak for itself and in case the facts do not so appear, it must be proved by leading evidence that all the particulars were placed before the Sanctioning Authority for due application of mind. If the sanction order itself is eloquent enough, then in that case only formal evidence has to be led by the Sanctioning Authority or any other evidence to prove that the sanction had been accorded by a competent person upon due application of mind.

10. Ms. Makhija submitted that having regard to the above, the sanction order was sufficiently clear to indicate that the Sanctioning Authority had applied its mind to the records of the office of the Lokayukt while granting sanction for prosecuting the two accused persons.

11. In view of the death of the Respondent No.1, Ghanshyamdass, during the pendency of the appeal, Ms. Makhija's submissions were opposed on behalf of the remaining Respondent, Harishankar Bhagwan Prasad Tripathi, and the submissions made before the trial Court as well as the High Court, were reiterated by Mr. Kuldip Singh, learned Advocate. In addition, it was once again emphasized that the sole Respondent had not made any demand for illegal gratification, nor was any evidence led by the prosecution to make out such a case against him. On the other hand, except for the fact that a sum of Rs.200/- from out of the treated notes had been recovered from his possession, there is nothing else to indicate that he was in any case involved in the conspiracy to obtain bribe for grant of excise licence. Learned counsel urged that in such circumstances, the sole Respondent had been rightly acquitted by the Courts below.

12. Having carefully considered the submissions made on behalf of the respective parties, we are unable to agree with the reasoning of both the learned Special Judge as also the High Court in dismissing the case of the prosecution on the ground that proper sanction had not been obtained to prosecute the accused persons. Both the Courts have come to an erroneous finding that although the trap which had been laid had been proved, the circumstances in which a sum of Rs.200/- was recovered from the sole Respondent, had not been properly

I.L.R.[2010]M.P.,] Raju Bai L.R. Dimak Chand vs. Collector, Balaghat [2031 considered. No attempt has been made by the defence to explain as to how the tainted currency came to be in the possession of the sole Respondent, except for the statement that the same had been handed over to him by Ghanshyamdas. Unless there was an understanding between the sole Respondent and Ghanshyamdas, since deceased, there can be no reason for Ghanshyamdas to have given the sole Respondent a part of the money which he had received by way of illegal gratification.

13. Even with regard to the grant of sanction, it is quite clear that the records of the Lokayukt's Office had been examined by the Principal Secretary, Government of Madhya Pradesh, while granting such sanction for prosecution. As has been indicated by this Court in *Ishwar Piraji Kalpatri's case* (supra), while granting sanction the officer concerned is not required to indicate that he had personally scrutinized the file and had arrived at the satisfaction for granting sanction. The narration of events granting sanction for prosecution clearly indicates the case and the reason for grant of such sanction. In the present case also the order granting sanction does not, in our view, suffer from any infirmity which prompted the Courts below to acquit the accused persons.

14. This appeal, accordingly, succeeds. The order of the learned Special Judge, Shahdol, dated 19th May, 1993 in Special Case No. No.5/87, acquitting the accused of the charges framed against them under Section 161 I.P.C. and Section 5(1)(d) read with Section 5(2) of the 1947 Act and the judgment of the Madhya Pradesh High Court dated 31st March, 2008 in Criminal Appeal No.294 of 1994 are hereby set aside. The appeal is, therefore, allowed and the matter is remitted to the learned Special Judge, Shahdol, for passing appropriate orders on the merits of the case.

Appeal allowed.

I.L.R. [2010] M. P., 2031

FULL BENCH

Before Mr. Justice Arun Mishra, Mr. Justice R.S. Jha &

Mr. Justice Sanjay Yadav

7 September, 2010*

RAJU BAI (SMT.) (DEAD)

THROUGH L.R. DIMAK CHAND

Vs.

COLLECTOR, BALAGHAT & anr.

... Petitioner

... Respondents

Land Revenue Code, M.P. (20 of 1959), Section 241 and Rules published by notification No.218-6477-VI-N-(Rules) dated 06.01.1960 in the M.P. Rajpatra dated 22.01.1960 framed in exercise of powers u/s 241 of the Code - Held - (1) *The reminder communication incorporated in Rule 4 need not be filed immediately on the lapse of the first three months from the*

2032] Raju Bai L.R. Dimak Chand vs. Collector, Balaghat [I.L.R.[2010]M.P.,
date of filing the original application, (2) The provision of Rule 4 does not envisage filing of repeated or more than one reminder, (3) The deemed permission stipulated in Rule 4 comes into operation only on the lapse of three months from the date of filing the one and only reminder/communication, (4) In case a reply is communicated to the petitioner by the Collector then the running of time of three months on the lapse of which the deemed communication comes into operation is arrested and in such cases the Collector has the power and authority to take his time in deciding the application, (5) The permission or the deemed permission granted under Rule 4 is limited to and remains alive only till the end of the calendar year in which it has been granted, (6) The judgement in the case of Raghuvir Singh Vs. Board of Revenue & ors. [1984 RN 382] is hereby over-ruled not being good law.
 (Para 31)

मू. राजस्व संहिता, म.प्र. (1959 का 20), धारा 241 और संहिता की धारा 241 के अंतर्गत शक्तियों के प्रयोग में विरचित नियम जिन्हें म.प्र. राजपत्र दिनांक 22.01.1960 में अधिसूचना क्रमांक 218-6477-VI-N-(नियम) दिनांक 06.01.1960 द्वारा प्रकाशित किया गया - अभिनिर्धारित - (1) मूल आवेदन की प्रस्तुति के दिनांक से, पहले तीन महीनों के समाप्त होने के तुरंत बाद नियम 4 में सम्मिलित अनुस्मारक संसूचना प्रस्तुत करना आवश्यक नहीं है, (2) पुनरावृत्त अथवा एक से ज्यादा अनुस्मारक प्रस्तुत करना नियम 4 का उपबंध परिकल्पित नहीं करता, (3) नियम 4 में अनुबंधित समझी गयी अनुज्ञा, केवल एक व एकमात्र अनुस्मारक/संसूचना प्रस्तुति के दिनांक से तीन महीने की समाप्ति पर ही प्रवर्तनीय होगी, (4) यदि कलेक्टर द्वारा याची को जवाब संसूचित किया गया है तब तीन महीनों का चालू समय जिसके समाप्त होने पर समझी गयी संसूचना प्रवर्तित होगी वह रुक जायेगा और ऐसी स्थिति में आवेदन का निर्धारण करने में अपना समय लेने की कलेक्टर को शक्ति एवं प्राधिकार है, (5) नियम 4 के अंतर्गत प्रदान की गयी अनुज्ञा अथवा समझी गयी अनुज्ञा केवल उस कलेण्डर वर्ष की समाप्ति तक सीमित तथा जीवित रहती है जिस वर्ष उसे प्रदान किया गया है, (6) एतद्वारा रघुवीर सिंह विरुद्ध राजस्व मंडल व अन्य [1984 RN 382] मान्य विधि नहीं होने से उलट दिया गया।

Cases referred :

1984 RN 382, M.P. No.75/1983 *Kanhaiyalal Vs. State of M.P. & ors.* decided on 24.06.1983, AIR 1969 SC 1297, (2009) 9 SCC 352, (2008) 14 SCC 530, (2007) 5 SCC 211, (2003) 4 SCC 488.

Sanjay Sharma, for the petitioner.

R.D. Jain, A.G. with Purushaindra Kaurav, Dy.A.G., for the respondents.

ORDER

The Order of the Court was delivered by **R.S. JHA, J.** :- This petition has been referred to a Full Bench by the learned Single Judge by order dated 21.1.2002 doubting the correctness of the decision of this Court rendered in the cases of *Raghubir Singh vs. Board of Revenue and Others*, 1984 RN 382 and *Kanhaiyalal vs. State of M.P. and Others*, (M.P. No.75 of 1983) decided on 24.6.1983.

2. The brief facts, leading to the present reference, are that the petitioner, who is Bhumiswami of Khasra No.268/2, area 0.607 hectares of village Changotola, Patwari Circle No.3, Tehsil and District Balaghat, filed an application on 24.2.1997 before Collector, Balaghat for permission to cut three Bija trees standing on her fields. As no order or communication was received by the petitioner in response to the application, filed by her, she gave a reminder on 26.6.1997 which was received by the Collector on 21.8.1997 and, thereafter, again on 4.12.1997, 5.2.1998 and ultimately on 2.4.1998 as is evident from a perusal of the order passed by the Collector dated 31.5.1999. Ultimately, on receiving no response the petitioner proceeded to cut the Bija trees on 2.4.1998.

3. A show cause notice was issued to the petitioner on 7.7.1998 by the respondent authorities under section 241(4) of the Madhya Pradesh Land Revenue Code, 1959 (hereinafter referred to as 'the Code') and thereafter by order dated 31.5.1999 a penalty of Rs.200/- was imposed upon the petitioner and twenty pieces of wood obtained from cutting the Bija trees were confiscated. The appeal, filed by the petitioner, before the Commissioner, Jabalpur Division, Jabalpur against the order dated 31.5.1999 passed by the Collector also suffered dismissal by order dated 5.11.1999. Being aggrieved by which the petitioner has filed the present petition before this Court.

4. It was submitted by the learned counsel for the petitioner before the learned Single judge that in accordance with Rule 3 & 4 of the Rules published by notification No.218-6477-VI-N(Rules) dated 6.1.1960 in the M.P. Rajpatra dated 22.1.1960 framed in exercise of powers under section 241 of the Code, as the petitioner applied for cutting of the Bija trees on 24.2.1997 and thereafter submitted several reminders to which she did not receive any reply within a further period of three months, it was deemed that the Collector has agreed to the cutting of the Bija trees and consequently the petitioner proceeded to cut the Bija trees on 2.4.1998 which act on her part is in conformity with the provisions of Section 241 read with Rule 3 & 4 of the Rules notified thereunder and, therefore, the impugned orders passed by the Collector and the Commissioner be quashed and the 20 pieces of wood be released to her.

5. Refuting the claim of the petitioner, it was submitted by the respondents before the learned Single Judge in the return that the Bija trees have been cut by the petitioner without obtaining any permission as required by the Rules and have further contended that even if the provisions of granting deemed permission to the petitioner is applied, the said deemed permission was operative only till the end of the calendar year and, therefore, the felling of trees by the petitioner in the next calendar year amounts to violation of the provisions of Section 241 of the Code and the Rules framed there under and in such circumstances the impugned orders passed by the Collector and Commissioner being in conformity with law, do not call for any interference by this Court.

6. Before the learned Single Judge, the learned counsel for the petitioner had

2034] Raju Bai L.R. Dimak Chand vs. Collector, Balaghat [I.L.R.[2010]M.P., relied upon the judgment rendered in the case of *Raghubir Singh* (supra) and *Kanhaiyalal* (supra). The relevant facts in the case of *Raghubir Singh* (supra) were that the petitioner therein had applied on 12.6.1979 seeking permission to cut trees under section 241 of the Code before the Collector. An enquiry was made on the application filed by the petitioner and on 19.10.1979 the Tehsildar Seoni-Malwa submitted a report recommending grant -of permission inspite of which no permission was given to the petitioner therein. On 8.7.1980 an application was filed by the petitioner therein by way of a reminder before the respondent Collector in response to which the petitioner received a reply dated 30.9.1980 from the Collector informing him that the matter had been sent for further investigation to the SDO Harda on 12.9.1980 and a final decision in the matter shall be taken only after receipt of the report from the SDO. A similar reply was again received by the petitioner from the Collector on 31.10.1980. However, as the petitioner did not hear anything from the Collector thereafter, he filed another application by way of a reminder on 22.7.1982 requesting for decision on the earlier application filed by him for permission to cut trees which was received by the Collector on 24.7.1982. As no reply was received from the respondents, the petitioner therein assumed that he had been granted permission to cut trees on the lapse of a period of three months in view of the provisions of Rule 4 of the Rules notified under section 241 of the Code and started cutting the trees. The Naib Tehsildar Seoni-Malwa issued a show cause notice to the petitioner on 4.11.1982 in response to which the petitioner submitted that the permission would be deemed to have been granted to him after a lapse of a period of three months from 22.7.1982 in the absence of any reply from the respondents and on that count no fault can be found with the cutting of trees. The submission of the petitioner therein was not accepted by the Collector who by order dated 10.2.1983 imposed a fine of Rs.1,000/- and confiscated the felled trees. The appeal, filed by the petitioner, before the Additional Commissioner and Board of Revenue also suffered dismissal.

7. In the background of the aforesaid facts, the learned Single Judge in the case of *Raghubir Singh* (supra) interpreted the Rules in the following manner in para-4 of the judgment:-

"4. In view of the admitted facts, the entire controversy between the parties is confined to the interpretation of Rule 4 of the Rules. Rule 4 of these Rules reads as under-

"if the applicant does not receive any communication from the Collector on his application within a period of three months, he shall by another written communication call the attention of the Collector and if no reply is received within a further period of three months; the Collector shall be deemed to have agreed to the cutting applied for, without any reservation of trees."

A bare reading of this Rule shows that it is the intention of the Rule Making Authorities to dispose of the application within a

period of three months. This Rule is, however, an exception to the general rule regarding disposal of application within three months and provides for making representation by the petitioner so as to remind the Collector of his application so that the necessary orders may be passed within three months thereafter. Clearly the intention appears to be to affect disposal of the application either by granting permission or refusing the same. The intention does not appear to be either to avoid passing an order or to extend the period of limitation indefinitely. There is also no bar to making more than one written communication to the Collector, calling his attention to the delay involved in disposal of the application in his office. It is true that if, inspite of the written communication, on reply is received, legal fiction operates when the petitioner become entitled to cut trees as if he has been permitted. This is also the interpretation of this Rule done by this Court in *Kanhaiyalal v. State of M.P.* (Miscellaneous Petition No.75 of 1983, decided on 24.5.1983). the submission of the respondents, however, is that once a reply has been given to the communication of the petitioner dated 8.7.1980, he was not entitled to send another communication on 22.7.1982 and was not entitled to affect cutting after three months thereafter. It is not possible to agree with this interpretation of the learned counsel for the respondents, as it has the effect of defeating the very purpose for which these Rules have been made. The Rules are intended to affect disposal of the application either by granting permission or refusing such permission. A reply given by the respondent-collector, in the context of Rule 4, cannot be accepted as authorising the Collector to extend the period of limitation provided by this Rule indefinitely by not passing any order on the application. Then, there is no warrant for the submission that if, inspite of a communication from the petitioner, his application remains pending, he cannot send another communication to the Collector. Such an interpretation would again defeat the purpose of the Rule. Under the circumstances, it must be held that the petitioner had a right to send a second communication to the Collector, particularly when his application remained pending inspite of the reply of the Collector dated 31.10.1980. If right to send a second communication is held to be included in Rule 4, there would be no escape from the conclusion that consequence of not deciding his application within a period of three months thereafter, would follow as a matter of course. It would also follow that the respondent-collector was bound to decide his application within a period of three months from the date of this communication dated 22.7.1982 and since he has failed

to do so, the fiction will become fully operative and the Collector shall be deemed to have agreed to the cutting applied for without any reservation. In this view of the matter, no fault can be found with the action of the petitioner if he having waited for three months, assumed that the Collector had given him authority, and, thereafter he affected felling of trees."

8. In the case of *Kanhaiyalal* (supra) which was decided by a Division Bench, the petitioner a Bhumiswami had applied on 21.2.1979 for permission to fell 374 trees standing on his land but as no orders were passed on his application, he sent a reminder on 21.1.1982 and thereafter on receiving no response, proceeded to fell the trees in May 1982 which were seized and ultimately by order dated 23.4.1983 the trees were confiscated. The Division Bench of this Court allowed the petition, filed by the petitioner therein, on considering the provisions of Rule 3 & 4 of the Rules notified under section 241 of the Code and held that the permission for cutting the trees was deemed to have been granted to the petitioner on expiry of a period of three months from 21.1.1982 i.e. the date on which he filed a reminder application and, therefore, the order of confiscation of the trees was not in accordance with law.

9. From a perusal of the aforesaid two judgments of this Court, it is clear that this Court in the case of *Raghubir Singh* (supra) has held that there is no bar to making more than one written communication to the Collector for calling his attention to the delay in the disposal of the application seeking permission to cut trees and that the deemed permission would come into operation immediately after a lapse of a period of three months from the date of the reminder even in cases where a reply is given to the reminder filed by the petitioner but no final decision is taken on the application seeking permission as the object of the rules is to effect disposal of the application by either granting permission or refusing the same, therefore, the reply given by the Collector does not extend the period of limitation provided in the Rules indefinitely. It has also been held that the petitioner has a right to send a second communication to the respondents in case his application remains pending and the deemed permission would become operative on the lapse of three months from the date of filing of the second or the last communication. It has also been held, in view of the interpretation of the Rules given by the Division Bench in the case of *Kanhaiyalal* (supra), that in spite of written communication no reply is received, legal fiction operates and the petitioner becomes entitled to cut trees as if he has been granted permission.

10. In the instant case, the learned Single Judge doubting the correctness of the decision in the case of *Raghubir Singh* (supra) as well as *Kanhaiyalal* (supra) as interpreted by this Court in the case of *Raghubir Singh* (supra) has referred the petition for decision by a Full Bench by stating the following:-

"10) The real crux of the matter is whether a deemed permission would arise at any point of time or it would deem to have been

granted after expiry of the stipulated period. The rule envisages that the applicant can make any written communication. Does it necessarily mean such written communication can be made after any lapse of time?

11) That apart, other question that arises for reconsideration is whether the word "another" would mean many as understood in the case of *Raghubir Singh* (supra) and whether the concept of "Calendar Year" would scuttle the deemed permission by end of December of every year.

12) In view of my proceeding analysis, the decision rendered in the case of *Raghubir Singh* (supra) as well as in the case of *Kanhaiyalal* (supra) require reconsideration by a Larger Bench. Accordingly, it is directed the matter be placed before my Lord the Chief Justice for constitution of an appropriate Larger Bench."

11. To properly appreciate the issues requiring adjudication in the present petition it is necessary to take into consideration the provisions of Section 241 of the Code and Rules 3, 4 & 5 framed therein. From a perusal of the provisions of Section 241 of the Code it is clear that the intent and object of this Section is to prevent the theft of timber from any Government forest and for that purpose in the public interest to regulate the felling and removal of timber in the villages adjoining Government forest and in furtherance thereof to declare areas of such villages to be notified area for the purpose of Section 241 of the Code.

12. It is, therefore, clear that the object and purpose of Section 241 of the Code is the prevention of theft of timber from in and around Government forests and for that purpose to regulate the cutting of trees in the adjoining areas. Rules 3, 4 & 5 of the Rules notified under section 241 of the Code, which are relevant for the purpose of decision in the present petition, are in the following terms:-

"3(1) On receipt of such application, the Collector shall immediately send the duplicate copy to the Divisional Forest Officer for his information. He shall then ascertain which timber trees from among those applied to be cut, require to be retained in public interest the cutting of all timber trees in the holding other than those which he orders to be retained:

[Provided that in the case of a Bhumiswami belonging to a tribe which has been declared to be aboriginal tribe under sub-section (6) of section 165 of the M.P. Land Revenue Code, 1959, the Collector shall grant such permission if he is satisfied that the provisions of the M. P. Protection of Aboriginal Tribes (Interest in Trees) Act, 1956, have been duly complied with.]

4. If the applicant does not receive any communication from the Collector on his application within a period of three

months, he shall by another written communication call the attention of the Collector and if no reply is received within a further period of three months, the Collector shall be deemed to have agreed to the cutting applied for, without any reservation of trees.

5. (1) Permission granted in writing by the Collector to a Bhumiswami under rule 3, or deemed to have been granted under rule 4, shall hold good for the calendar year in which it has been granted or deemed to have been granted.

(2) A Bhumiswami shall have to obtain fresh permission from the Collector in case the work of felling and extraction in the holding is to continue beyond the calendar year in which the permission was so granted."

13. A conjoint reading of the Rules makes it abundantly clear that on receipt of an application for felling of trees, the Collector shall send a copy to the Divisional Forest Officer and shall, thereafter, cause an enquiry to be made on the said application. Sub rule 2 of Rule 3 lays down that the Collector shall communicate to the applicant the decision on his application within three months of receipt of the same. Rule 4 provides that if no communication is received from the Collector by the applicant on his application within three months, the applicant by another written application shall call the attention of the Collector and if no reply is received by him within a further period of three months thereafter, it shall be deemed that the Collector has agreed to the cutting of the trees applied for without reservation. Rule 5 lays down that the permission granted under Rule 3 or deemed permission granted under Rule 4 shall hold good for the calendar year in which it has been granted or deemed to have been granted. Rule 5(2) stipulates that in case the work of felling and extraction of trees in the holding is not completed and is required to be continued beyond the calendar year in which the permission was granted the Bhumiswami shall have to obtain fresh permission from the Collector.

14. The answer to the first issue referred to by the learned Single Judge in para-10 has to be found in the interpretation of Rule 4 of the Rules. Rule 4 lays down that in case a communication from the Collector on the application is not received by the petitioner within three months he/she shall, by another written communication, call the attention of the Collector to this fact by filing a reminder. Apparently, the Rule does not prescribe or lay down any specific period after the lapse of the first three months within which a reminder by way of a communication is to be filed before the Collector. In the absence of such a stipulation, it cannot be said that the Rules prohibit filing of a reminder even after lapse of some time after the end of the first period of three months.

15. We are constrained to say so as a bare perusal of the rule makes it explicitly clear that the rule does not cast any mandatory obligation upon the Collector to

decide the application seeking permission to fell trees within three months of filing the same nor does it prescribe any consequences thereof in the first stage. The rule also does not prescribe that the reminder communication has to be filed immediately on the lapse of the first three months or within a specific time thereafter. The only duty cast upon the Collector is to reply to the reminder communication sent by the petitioner within three months of filing the same failing which permission to cut trees would be deemed to have been granted. As the rule is silent in this respect and as there is no ambiguity in the language of the rule it is not possible for this Court to read something into the rule which is otherwise explicit and clear and the rule has to be interpreted in accordance with the clear and unambiguous language used therein.

16. At the same time, it does not mean that the petitioner can file a reminder after an indefinite period of time. It necessarily allows the applicant to file a reminder communication within a reasonable period of time. What is reasonable period of time would depend on the facts of each case. The relevant extracts of the definition of reasonable time given in the Advanced Law Lexicon by P. Ramanatha Aiyar, Third Edition is as follows:-

"Reasonable time. "That is a reasonable time that preserves to each party the rights and advantages he possesses and protects each party from losses that he ought not to suffer."

"REASONABLE TIME" is defined to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case.

In determining what is a reasonable time or an unreasonable time, regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the fact of the particular case.

Reasonable time always depends on the circumstances of the case. (Kinney) The expression 'reasonable time' means so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. *Veerayee Ammal V. Seeni Ahmad*, (2002) 1 SCC 134, para (13) AIR 2001 SC 2920."

17. In the case of *State of Gujarat vs. Patel Raghav Natha and others*, AIR 1969 SC 1297 the Supreme Court while considering what was reasonable time within which the Commissioner should exercise his revisional powers in the absence of any period of limitation or prescription as to time under the statutory provisions has held that the power must be exercised within a reasonable period of time which in that given case was held to be a few months or more depending upon the facts of each case. The aforesaid view has been consistently followed

2040] Raju Bai L.R. Dimak Chand vs. Collector, Balaghat [I.L.R.[2010]M.P., by the Supreme Court in the cases of *SantoshKumar Shivgonda Patil and Others vs. Balasaheb Tukaram Shevale and Others*, (2009)9 SCC 352; *B. T. Jayaram vs. State of Karnataka*, (2008) 14 SCC 530; *Pune Municipal Corporation vs. State of Maharashtra and Others*, (2007) 5 SCC 211; and *Collector and Others vs. P. Mangamma and Others*, (2003)4 SCC 488.

18. In the case of *P. Mangamma* (supra) the Supreme Court while dealing with the question as to what is the reasonable time has held as under-

"5. A reasonable period would depend upon the factual circumstances of the case concerned. There cannot be any empirical formula to determine that question. The court/authority considering the question whether the period is reasonable or not has to take into account the surrounding circumstances and relevant factors to decide that question.

6. In *State of Gujarat v. Patel Raghav Natha*, (1969) 2 SCC 187 it was observed that when even no period of limitation was prescribed, the power is to be exercised within a reasonable time and the limit of the reasonable time must be determined by the facts of the case and the nature of the order which was sought to be varied. It would be hard to give an exact definition of the word "reasonable". Reason varies in its conclusions according to the idiosyncrasy of the individual and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic stands now like the jingling of a child's toy. But mankind must be satisfied with the reasonableness within reach; and in cases not covered by authority, the decision of the Judge usually determines what is "reasonable" in each particular case; but frequently reasonableness "belongs to the knowledge of the law, and therefore to be decided by the courts". It was illuminatingly stated by a learned author that an attempt to give a specific meaning to the word "reasonable" is trying to count what is not a number and measure what is not space. It means prima facie in law reasonable in regard to those circumstances of which the actor, called upon to act reasonably, knows or ought to know, [See *Municipal Corpn. of Delhi v. Jagan Nath Ashok Kumar* (1987) 4 SCC 497 and *Gujrat Water Supply & Sewage Board v. Unique Erectors (Gujarat) (P) Ltd.*, (1989) 1 SCC 532]. As observed by Lord Romilly, M.R. in *Labouchere v. Dawson*, (1872) LR 13 Eq. Ca 322, it is impossible a priori to state what is reasonable as such in all cases. You must have the particular facts of each case established before you can ascertain what is reasonable under the circumstances. Reasonable, being a relative term is essentially what is rational according to the dictates of

reason and not excessive or immoderate from the facts and circumstances of the particular case.”

19. From a perusal of the above, it is clear that the reminder communication has to be filed by the applicant within a reasonable time during which the application can reasonably be expected to remain alive which would require consideration of various facts such as the intent of the applicant to pursue his application, the amount of vigilance exercised by him, whether he was prevented by circumstances to file a reminder communication earlier or whether he had by his actions and conduct, abandoned the pursuit of his application and so on. The aforesaid list is not exhaustive. The reasons could be varied and different in each case and would have to be examined in the facts of each case.

20. In view of the aforesaid conclusion recorded by us, it cannot be said that the Division Bench judgment in the case of *Kanhaiyalal* (supra) wherein it was held that the petitioner was deemed to have been granted permission to cut the trees after the lapse of three months from the date of a reminder which was filed two years after the date of the first application, to be bad law. It is worth taking note of the fact that this issue was neither raised or decided by the Division Bench but was relied upon by the learned Single Judge in the case of *Raghubir Singh* (supra) to hold that the deemed permission comes into effect on the lapse of three months from the date of filing the reminder. The judgment in the case of *Kanhaiyalal* (supra) is, accordingly, approved with a stipulation that the reminder application must be filed within a reasonable period of time and whether it is within a reasonable time or not would depend upon the facts of each case.

21. The second issue referred for adjudication by the learned Single Judge in para-11 of the referral order is in two parts. We proceed to deal with the first part of the issue i.e. as to whether the word “another” used in Rule 14 would mean “many” as understood and interpreted by this Court in the case of *Raghubir Singh* (supra). Etymologically the word “another” is a combination of “an+other” which is a determiner meaning “one more, in addition to a former number; a second or additional one”. In the Oxford Advanced Learner’s Dictionary in Current English, Seventh Edition the word “another” has been defined to mean “one more; an extra thing or person”. Macmillan English Dictionary also defines “another” as “one more person or thing of the same type as before”. In Collins Cobuild English Dictionary for Advanced Learners, Major New Edition, Third Edition 2001 it has been defined as “one more, a different one”. In Websters New International Dictionary of the English Language, another has been defined as “one more, in addition to a former number”. From the aforesaid it is clear that the word “another” means “one other and no more”.

22. When we read Rule 4 by properly applying the aforesaid meaning to the word “another” used therein i.e. “one other” which meaning is clear and unambiguous as it does not envisage any other interpretation, it becomes luminously clear that the Rules permit filing of one other reminder and that the further period

2042] Raju Bai L.R. Dimak Chand vs. Collector, Balaghat [I.L.R.[2010]M.P., of three months on the lapse of which it is deemed that the petitioner has been granted permission has to be counted from the date of the first reminder filed by the petitioner after the lapse of the initial first three months. It is also clear that the use of the word "another" in the Rules contemplates and envisages filing of only one other reminder and not a series of reminders and, therefore, the deemed permission by operation of the provisions of Rule 4 comes into existence on the lapse of three months from the date of filing the first reminder and that the subsequent reminders, if any, filed by the petitioner are neither recognized nor contemplated by the provisions of the Rules. In such circumstances the conclusion recorded in the case of *Raghubir Singh* (supra) to the effect that the rule envisages filing of several reminders and that the petitioner would be deemed to have been granted permission to cut the trees on the lapse of three months from the date of filing the last of a series of reminders, in our considered opinion, does not lay down the correct law and is hereby over-ruled.

23. For the sake of completeness it would be appropriate to clarify at this stage that there is no statutory mandate in Rule 4 to the effect that a final decision has to be taken by the authority within three months from the date of filing of the reminder. On the contrary, a bare perusal of the Rules clearly indicates that the duty cast upon the Collector on receiving the reminder is to 'reply' to and not to decide the reminder within three months and in such circumstances if the Collector files a reply to the reminder filed by the petitioner and states that further enquiry into the application for cutting the trees is pending before the authorities, it would be sufficient and would immediately halt the running of the period of three months prescribed by the Rules and in that case the deemed fiction in Rule 4 would not come into operation on the lapse of three months and the petitioner would not be deemed to have been granted permission to cut trees on the lapse thereof and the fate of his application would depend upon the final decision on his application.

24. In view of the aforesaid analysis the conclusion to the contrary, recorded by the learned Single Judge in the case of *Raghubir Singh* (supra), is apparently not in conformity with the provisions of Rule 4 and it cannot be said to be good law and is, accordingly, over-ruled.

25. We now proceed to advert to the second issue referred to for decision in para-11 of the referral order, that is, as to whether the concept of "Calendar Year" would scuttle the deemed permission by the end of December of every year ?

26. The answer to the aforesaid question is inherent and inbuilt in the provisions of Rule 5 framed under section 241 of the Code, which was not taken into consideration either in the case of *Raghubir Singh* (supra) or *Kanhaiyalal* (supra) and which clearly lays down that the permission granted in Rule 4 shall hold good only for the calendar year in which it has been granted or deemed to have been granted and that the Bhumiswami shall have to obtain fresh permission from the Collector in case the work of felling and extraction continues beyond the calendar

year. In view of the clear and specific terms of Rule 5 it is manifest that the deemed permission granted under Rule 4 automatically comes to an end by operation of law at the end of the calendar year in which it has been granted and, therefore, in case an applicant fails to fell the trees, in the calendar year in which the permission is deemed to have been granted, he cannot do so on the lapse of the calendar year and has to file a fresh application under Rule 5 (2) for obtaining permission.

27. As is apparent from a reading of the judgment in the case of *Raghubir Singh* (supra) the learned Single Judge failed to take into consideration the provisions of Rule 5 and on that count upheld the act of the petitioner therein of felling the trees even beyond the calendar year in which the deemed permission was granted.

28. In view of the conclusion recorded by us as aforesaid, the judgment in the case of *Raghubir Singh* (supra) which holds to the contrary does not lay down the correct law and is hereby overruled on this issue also.

29. In the instant case as the entire petition has been referred to this Full Bench for deciding the correctness of the Judgments in the case of *Raghubir Singh* (supra) or *Kanhaiyalal* (supra) the learned counsel for the parties are also heard on merits of the case. In the case at hand, the petitioner initially applied for grant of permission to cut three Bija trees on 24.2.1997 and there after filed another reminder on 26.6.1997 which was received by the Collector on 21.8.1997. In accordance with the interpretation of the provisions of Rule 3&4 given by us in the preceeding paragraph the petitioner was deemed to have been granted permission to cut the trees on the lapse of three months from 21.8.1997 i.e. with effect from 21.11.1997. She was, therefore, entitled to and required to fell the trees by the end of December 1997 in view of the provisions of Rule 5 of the Rules framed under section 241 of the Code. As she failed to do so, the deemed permission granted under Rule 4 lapsed by the afflux of time, that is, by the end of the calendar year and the petitioner was required to file a fresh application seeking permission which she failed to do. On the contrary she filed repeated reminders and thereafter proceeded to cut the trees on 2.4.1998 which in our considered opinion was contrary to the provisions of Section 241 of the Code and the Rules framed therein. The Collector, taking into consideration the aforesaid facts, has recorded a finding that the cutting of trees by the petitioner on the lapse of the calendar year in which the deemed permission was granted was contrary to law, and consequently imposed a penalty of Rs.200/- and confiscated the 20 pieces of wood which the petitioner has obtained from felling the three Bija trees.

30. We are of the considered opinion that no fault can be found with the aforesaid order of the Collector dated 31.5.1999 which is apparently in conformity with the provisions of law as interpreted by us in the preceding paragraphs and does not suffer from any perversity or manifest illegality. For the same reason the order passed by the Commissioner rejecting the petitioner's appeal also cannot be found fault with.

2044] Raju Bai L.R. Dimak Chand vs. Collector, Balaghat [I.L.R.[2010]M.P.,

31. In the light of the aforesaid, the conclusions and findings recorded by us are summed up as under for the sake of clarity:-

(a) The reminder communication incorporated in Rule 4 need not be filed immediately on the lapse of the first three months from the date of filing the original application' but must be filed within a reasonable period of time which would depend on the facts of each case;

(b) The provision of Rule 4 does not envisage filing of repeated or more than one reminder in view of the use of the word 'another' therein as the word 'another' means 'one other' and nor several other reminders.

(c) The deemed permission stipulated in Rule 4 comes into operation only on the lapse of three months from the date of filing the one and only reminder/communication envisaged in Rule 4 and this period is not extended by filing repeated reminders which are not contemplated or envisaged by Rule 4;

(d) In case the application for permission is not finally decided within three months or the extended period of three months but a reply is communicated to the petitioner by the Collector then the running of time of three months on the lapse of which the deemed communication comes into operation is arrested and in such cases the Collector has the power and authority to take his time in deciding the application, without being fettered by the time limit prescribed in Rule 4 as the very object of the provision of Section 241 of the Code is to prevent theft of timber from any Government forest and adjoining areas.

(e) The permission granted under Rule 3 or the deemed permission granted under Rule 4 is limited to and remains alive only till the end of the calendar year in which it has been granted and thereafter automatically lapses and in case the petitioner wants to undertake felling operations or continue with the same even beyond the calendar year, he/she has to apply afresh under Rule 3.

(f) In view of the aforesaid conclusions, the judgment in the case of *Raghubir Singh* (supra) is hereby over-ruled not being good law while the judgment in the case of *Kanhaiyalal* (supra) is explained and has to be understood in terms of Clause (a) of the conclusion recorded in this paragraph.

32. In accordance with the above conclusions in the instant case the order imposing penalty and order of confiscation passed by the Collector, Balaghat dated 31.5.1999 and the appellate order dated 5.11.1999 passed by the Commissioner, Jabalpur Division, Jabalpur are hereby affirmed and upheld.

33. For the aforesaid reasons the reference to this Full Bench is answered in terms of paragraph 31 (supra) and the petition filed by the petitioner being meritless is, accordingly, dismissed. In the facts and circumstances of the case there shall be no order as to the costs.

Petition dismissed.

I.L.R. [2010] M. P., 2045
WRIT PETITION
Before Mr. Justice S.C. Sharma
12 March, 2010*

PRADEEP DANTRE

Vs.

STATE OF M.P. & anr.

... Petitioner

... Respondents

Prisoners' Release on Probation Act, M.P. (16 of 1954) - Petitioner was convicted u/s 302 of IPC - Application for release on probation on completion of 11 years - Held - Petitioner can not be released on probation prior to completion of 14 years as specified in notification - However, his case can be considered for release on probation even prior to completion of 14 years as he is in jail for more than 10 years - Manner of commission of crime is also relevant consideration for release on probation - State has dealt with the aspect while considering the case of petitioner - No irregularity of any kind has taken place while rejecting the case of petitioner for release on probation - Petition dismissed.

(Paras 8 & 9)

बंदियों का परीक्षा पर छोड़ा जाना अधिनियम, म.प्र. (1954 का 16) - याची को भा.द.सं. की धारा 302 के अंतर्गत दोषसिद्ध किया गया - 11 वर्ष पूर्ण होने पर परीक्षा पर छोड़े जाने हेतु आवेदन - अभिनिर्धारित - जैसा कि अधिसूचना में निर्दिष्ट है याची को 14 वर्ष की अवधि पूर्ण होने से पूर्व परीक्षा पर नहीं छोड़ा जा सकता - तथापि 14 वर्ष पूर्ण होने के पूर्व भी परीक्षा पर छोड़े जाने के उसके मामले पर विचार किया जा सकता है क्योंकि वह 10 वर्ष से अधिक समय से कारागार में है - परीक्षा पर छोड़े जाने हेतु अपराध करने का ढंग भी सुसंगत विचार है - याची के मामले पर विचार किये जाते समय राज्य ने इस पहलू पर कार्यवाही की - याची के परीक्षा पर छोड़े जाने के मामले को नामंजूर करते समय किसी प्रकार की कोई अनियमितता नहीं हुयी है - याचिका खारिज।

Cases referred:

W.P. No.5268/2007 (Man Singh Vs. State of M.P. & ors.), (2003) 6 SCC 144, 1994 MPLJ 792, AIR 1990 SC 1984.

D.K. Katare, for the petitioner.

Nidhi Patankar, for the respondents/State.

ORDER

S.C. SHARMA, J. :-The petitioner before this Court has filed this present

petition being aggrieved by an order dated 28.2.2008 passed by the State Government rejecting the application of the petitioner preferred by him under the provisions of M.P. Prisoners' Release on Probation Act, 1954.

2. The contention of the petitioner is that he was convicted for an offence under Section 302 of I.P.C. vide judgment of conviction dated 7.3.1984 and a criminal appeal against the aforesaid judgment has been dismissed by this Court on 30th November, 1999. He has further stated that a S.L.P. preferred by the petitioner before the Apex Court has also been dismissed on 5.5.2000. The petitioner has stated that he is in jail since the year 2000 and an application was submitted by him for his release under the Provisions of M.P. Prisoners Release on Probation Act, 1954 and the matter was recommended by Superintendent of Jail, Station House Officer, Police Station Inderganj and also by various authorities. The petitioner's contention is that other persons in whose cases also recommendations were made, they have been released on probation, however, the petitioner has not been released on probation and the respondent/State has passed the impugned order which is a non-speaking order, i.e. order dated 28th February, 2008. The petitioner has also argued before this Court that the impugned order is bad in law and in similar circumstances of this case in the case of *Man Singh Vs. State of M.P. & Others* (W.P. No.5268/07 decided on 11.9.2008), this Court has quashed an identical order and the matter has been remanded back to the State Government to pass a fresh order keeping in view the Provisions of Probation Act. The petitioner has prayed for quashing of the aforesaid order.

3. Learned counsel for the petitioner has relied upon the judgment delivered by the Apex Court in the case of *Arvind Yadav Vs. Ramesh Kumar and Others* (2003) 6 SCC 144. His contention is that the conduct of the petitioner while he was in custody should have been looked into by the authorities while passing the impugned order. The learned counsel for the petitioner has also relied upon the judgment delivered by Full Bench in the case of *Gangacharan Baijnath Prasad Vs. State of Madhya Pradesh and Others*, 1994 M.P.L.J 792. His contention is that the respondents/State has only considered his conduct prior to his conviction and the order has not been passed in consonance with the provisions of M.P. Prisoners' Release on Probation Act, 1954.

4. The learned counsel for the petitioner has also relied upon a judgment delivered in the case of *S.N. Mukherjee Vs. Union of India* (AIR 1990 S.C.1984) and his contention is that in case a decision is given by an administrative authority, reasons must be recorded and the order passed by the administrative authority should be a well reasoned order. His contention is that in the present case the order passed by the respondents is not a reasoned order. Learned counsel for the petitioner has also submitted that the wife of the petitioner is not well and she is suffering from cancer and the impugned order dated 28th February, 2008 deserves to be quashed and the petitioner deserves to be released on probation.

5. A reply has been filed on behalf of the respondents/ State and the contention of the respondents/State is that that case of the petitioner was considered on merits and a detailed speaking order has been passed vide order dated 28.2.2008 assigning the reasons for not releasing the petition on probation. The respondents/ State has relied upon the a judgment in the case of *Arvind Yadav Vs. Ramesh Kumar and Others* (2003) 6 SCC 144. Learned counsel for the respondents/ State has enclosed Annexure R/2 dated 24.12.2008 which provides that for the purpose of release on probation, a convict should have undergone minimum 14 years imprisonment (actual) and as in the present case, the petitioner has undergone only 11 years, he is certainly not entitled for release on probation.

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

7. In the present case, it is an admitted fact that the petitioner was convicted for an offence under Section 302 of Indian Penal Code vide judgment of conviction dated 7.3.1984 and has stated in the writ petition that he has completed about 11 years of rigorous imprisonment(actual). The Notification as contained in Annexure R/2 dated 24.3.2008 which is an amendment in the M.P. Prisoners' Release on Probation Act, 1954, reads as under:-

“कमांक एफ 3-40/2007/3/मध्यप्रदेश प्रिजनर्स रिलीज ऑन प्रोबेशन एक्ट, 1954 (कमांक 15 सन् 1954) की धारा 9 द्वारा प्रदत्त शक्तियों को प्रयोग में लाते हुए, राज्य सरकार, एतद् द्वारा, मध्यप्रदेश बंदी परिवीक्षाधीन सम्मोचन नियम, 1964 में निम्नलिखित संशोधन करती है, अर्थात :-

—:: संशोधन ::—

उक्त नियमों में, नियम 4 में, पूर्ण विराम के स्थान पर कोलन स्थापित किया जाए तथा उसके पश्चात् निम्नलिखित परंतुक अंतःस्थापित किए जाएं, अर्थात :-

“परंतु ऐसे बंदियों के मामले में, कारागार से समय पूर्व निर्मुक्ति के लिए विचार किया जाएगा जिन्हें भारतीय दण्ड संहिता, 1860 (1860 का 45) की धारा 302 तथा 305 के अधीन या अन्य दण्ड विधियों के उपबंधों के अधीन, इस शर्त के अधीन रहते हुए आजीवन कारावास, जिसमें मृत्यु दण्ड भी एक सजा है, से दण्डादिष्ट किया गया है, कि ऐसे बन्दी ऐसी विधियों के उपबंधों के अधीन ऐसे विचारण के लिए वर्जित नहीं हैं । निर्मुक्ति के लिए पात्रता उसके बिना परिहार के दण्डादेश के वास्तविक कारावास के 14 वर्ष का दण्ड भुगतने के पश्चात् ही होगी:

परंतु यह और कि आजीवन कारावास का दण्ड भुगत रहे अन्य समस्त बंदियों की समय पूर्व निर्मुक्ति के लिए विचारण केवल तभी किया जाएगा जब उन्होंने कम से कम 10 वर्ष का कारावास परिहार सहित भुगत लिया हो और दण्डादेश में बिना परिहार के 07 वर्ष का वास्तविक कारावास पूर्ण कर लिया हो:

परन्तु यह भी कि उपरोक्त परंतुको में की कोई भी बात उन बंदियों को लागू नहीं होगी जिनके मामले माननीय राज्यपाल महोदय को भारत के संविधान के

अनुच्छेद 161 के अधीन विचारण के लिए मानवीय आधारों के विशेष कारणों से भेजे जाते हैं।”

मध्यप्रदेश के राज्यपाल के नाम से

तथा आदेशानुसार

(के.सी. राही)

उपसचिव

मध्यप्रदेश शासन, जेल विभाग.”

8. Keeping in view the aforesaid as the petitioner has put in jail only for 11 years of imprisonment, he cannot be released on probation prior to completion of 14 years as per the aforesaid Notification. However, his case can be considered for release on probation even prior completion of 14 years as he is in jail for more than ten years. This Court has carefully gone through the order dated 28.2.2008 and the State Govt. has passed a reasoned order assigning the reasons in paragraph 5 of the order dated 28.2.2008 for not releasing the petitioner under the M.P. Prisoners' Release on Probation Act, 1954.. The Apex Court in the case of *Arvind Yadav Vs. Ramesh Kumar and Others* (2003) 6 SCC 144, in paragraph 7 has held as under:-

"7. Apart from the fact that there are factual infirmities in the impugned judgment, it is also to be borne in mind that the victim and the family of the victim who have suffered at the hands of the convict have also some rights. The convicts have no indefeasible right to be released. The right is only to be considered for release on licence in terms of the Act and the Rules. The Probation Board and the State Government are required to take into consideration the relevant factors before deciding or declining to release a convict. In the present case, the Probation Board had not recommended the release. The State Government had confirmed the order of the Board. The writ petition had failed before the learned Single Judge. The facts of individual cases were not considered by the Division Bench. In the case of Ramesh Kumar, the stand of the State Government was that he along with six others had formed an unlawful assembly and murdered Jitendra, son of Shashi Mohan Yadav on 29.9.1994 in Hoshangabad, Madhya Pradesh causing seventeen injuries on him with swords, knives and gupti and that Ramesh Kumar was the accused in fourteen cases field under various sections of the Indian Penal Code. The manner of commission of crime is a relevant consideration. In a given case, the manner of commission of offence may be so brutal that it by itself may be a good sole ground to decline the licence to release. The Rules provide for a detailed procedure for consideration of application for release. Once rejected, again

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application for release can be made after two years. The Board
comprises of the Home Secretary of the State Government or
any other empowered officer, IG of Prisons or Deputy IG and
another member".

9. From bare perusal of the aforesaid judgment it is evident that the
Apex Court has held that the manner of commission of crime is also a relevant
consideration and in the present case, the respondent/State in paragraph 5 has
dealt with the aforesaid aspect while considering the case of the petitioner for
release on probation and, therefore, this Court is of the considered opinion that no
irregularities of any kind has taken place while rejecting the case of the petitioner
for release on probation under M.P. Prisoners' Release on Probation Act, 1954.

10. Resultantly, no case for interference is made out and the writ petition is
hereby dismissed. However, the petitioner shall be free to apply again for release
in accordance with law.

Petition dismissed.

I.L.R. [2010] M. P., 2049

WRIT PETITION

Before Mr. Justice Arun Mishra & Mr. Justice Sushma Shrivastava

25 March, 2010*

PAWAN KUMAR JAIN (M/S)

... Petitioner

Vs.:

THE COMMERCIAL TAX OFFICER & ors.

... Respondents

**A. Commercial Tax Act, M.P. 1994 (5 of 1995), Sections 2(t)(ii)
& 9-B - Value Added Tax on material consumed in process of works contract
- Sale includes transfer of property in goods "Whether as goods or in some
other form" - Transfer of goods in any form involved in the execution of
works contract is a case of resale and tax has to be paid. (Para 6)**

क. वाणिज्यिक कर अधिनियम, म.प्र., 1994 (1995 का 5), धारा 2(t)(ii) व
9-बी - संकर्म संविदा की प्रक्रिया में प्रयोग की गयी सामग्री पर मूल्य वर्धित कर -
विक्रय के अंतर्गत संपत्ति माल का अंतरण सम्मिलित है "या तो माल के रूप में या किसी और स्वरूप
में" - संकर्म संविदा के निष्पादन में अंतर्गस्त किसी भी स्वरूप में माल का अंतरण, पुनः विक्रय का
मामला है और कर का भुगतान करना होगा।

**B. Commercial Tax Act, M.P. 1994 (5 of 1995) - Circular issued
by Sales Tax Authority contrary to statutory provisions - Can not override
statutory provision. (Para 7)**

ख. वाणिज्यिक कर अधिनियम, म.प्र., 1994 (1995 का 5) - विक्रय कर
प्राधिकारी द्वारा जारी किया गया परिपत्र कानूनी उपबंधों के प्रतिकूल है - कानूनी उपबंधों पर
अध्यारोही नहीं हो सकता।

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Cases referred:

(2002) 35 VKN 91, (2001) 26 LTD 1 (MP), (2001) 26 LTD 13 (MP), 88 STC 204, 1979 (43) STC 195.

Mukesh Agrawal, for the petitioner.

Purushendra Kaurav, Dy.A.G., for the respondents.

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :-Writ petitions have been preferred by the assesses raising the question whether section 9-B of the M.P. Commercial Tax act, 1994 is applicable to the works contract, if yes, then what is the mode of determination of commercial tax.

2. Facts are being referred to from W.P. No. 15798/2006. Petitioner is engaged in the business of construction works of Central Public Works Department and Telecom Departments. In the course of the execution of the works contracts, buildings material like Gitti, Sand, Cement, Timber, Plywood, aluminum, steel, bricks etc. are used Iron, steel and cement is supplied by the respective government departments for whom the work is executed.

3. The assessment under Madhya Pradesh Commercial Tax Act 1994 (hereinafter referred to as the 'Act') for the period 01.04.2000 to 31.03.2001 was completed. Order (P/1) dated 28.1.2004 was passed. The main dispute raised before the Assessing Officer was whether Value Added Tax (VAT) as contained in Section 9-B of the Act is leviable on material consumed in the process of works contract. The submission of the petitioner before the Assessing Officer was that section 9-B is not applicable. VAT has been imposed u/s 9-B on purchases of all the materials including cement. Under section 9-B VAT is levied on the resale of goods. In the execution of work, cement, iron/steel, aluminum section, plywood, paint and timber are not used as such. Cement is mixed with gitti, sand along with iron steel and it becomes concrete in the construction work. Other items are also not used as such, but, are converted in the form of door, windows etc. The timber used as shuttering material is not transferred in the works contract but after it is used is taken out and is again used. Thus, there is no resale of these goods as original identity of these goods is lost when used in works contract. The resale ordinarily means sale of goods in the same form in which they were purchased without subjecting them to any process. Though there is sale as defined u/s 2(t)(ii) of the Act, but, it is not a resale for levy of VAT under section 9-B of the Act, value of these goods cannot be subjected to VAT under section 9-B. It is further submitted that the expenditure incurred on account of labour etc. cannot form a part of the contractual transfer price, simply because they are not valuable consideration for any goods. Revision was preferred against the assessment order. Revision has been dismissed vide order (P/5) dated 21.3.2006. Aggrieved by the assessment order and order passed in revision, writ petitions have been preferred. Facts and grounds in other cases are similar.

4. Shri Mukesh Agrawal, learned counsel appearing on behalf of the petitioners has submitted that there is circular issued by the Commissioner pointing out that the items consumed in the works contract cannot be said to be covered in the resale as provided u/s 9-B of the Act said circular is binding on the assessing authority. It is also submitted that section 9 is invoked at point when goods are purchased by the petitioners, thus, u/s 9-B on resale tax could not have been levied on the petitioners. He has relied upon the decisions to be referred later.

5. Shri Purushendra Kaurav, learned counsel appearing on behalf of the State has supported the orders. It is submitted that section 9-B is independent provision, the definition of sale in section 2(t)(ii) has to be read together with section 9-B of the Act and it leaves not an iota of doubt that even when the goods are consumed in any form in works contract the tax has to be paid on it in case of resale. Thus, tax has been rightly exacted. There is no infirmity in the order. Circular of the Commissioner which is contrary to the provisions of law cannot be said to be binding on the Court. Circular was also not referred to before the assessing authority as well as in the course of revision by the assessee.

6. The main question for consideration is whether the resale takes place in a case where the goods are used in the similar or other form in the execution of the works contract can be subjected tax to section 9-B of the Act. Section 2(t)(ii) defines sale thus :

2. Definitions.-

(t) Sale with all its grammatical variations and cognate expressions means any transfer of property in goods for cash or deferred payment or for other valuable consideration and includes

(ii) a transfer of property in goods whether as goods or in some other form, involved in the execution of a works contract;"

Section 9-B of the Act is as follows :

9-B. Levy of tax in special circumstances- (1) Every dealer liable to pay tax under this Act, whose turnover in the year preceding the commencement of the Madhya Pradesh Vanijyik Kar (Sanshodhan) Adhiniyam, 1998 exceeds rupees ten lacs and every other dealer whose turnover in a year first exceeds rupees ten lacs shall, from the commencement of the aforesaid Act or from the date on which the turnover exceeds rupees ten lacs, as the case may be, be liable to pay tax on the resale of any goods specified in Part II to VI of Schedule II at the rate of 4 per cent in case of declared goods and 8 per cent in case of other than declared goods on such part of his turnover in respect of the said goods which remains after deducting therefrom-

(1).....’

(ii) sale price of such goods at the hands of the registered dealer from whom they have been purchased;

(iii) the amount arrived at in accordance with the provisions of sub-clause (v) of clause (w) of Section 2.

(2) Every dealer who is liable to pay tax under sub-section (1) shall continue to be so liable until the expiry of two consecutive years during each of which his turnover has not exceeded the limits specified in sub-section (1) and on the expiry of such period his liability to pay tax shall cease.”

It is apparent that in case there is transfer of goods in any form involved in the execution of the works contract is a case of resale and tax has to be paid u/s 9-B which provides levy of the tax in special circumstances. The applicability of the provision depends on the turn over. It is not in dispute that the goods are specified in Part II to VI of Schedule II. The resale as provided in Section 9-B has to be considered with the definition of sale. The sale in Section 2(t)(ii) includes transfer of property in goods “whether as goods or in some other form”. The submission raised by the petitioners that as the goods are not used in same form then it would not amount to resale cannot be accepted in view of above provision. In our opinion, the tax has been rightly levied u/s 9-B of the Act.

7. Coming to circular dt-1.5.1997 issued by the Commissioner relied upon by the petitioners: in the aforesaid circular it was mentioned that resale as provided in section 9-B covers sale of good made in the same form in which form it has been purchased. It is further provided that in case such goods are used in process of construction, it would not amount to resale. We are not able to succumb the aforesaid interpretation adopted by the Commissioner. In view of provision of section 2(t)(ii) read with section 9-B of the Act circular cannot override the statutory provision nor interpretation made contrary to intentment of the statutory provision can be said to be binding. The Apex Court in *Commissioner of Sales Tax, Uttar Pradesh Vs. Indra Industries*, (2002) 35 VKN 91 has laid down that circular issued by sales tax authorities is not binding on Courts, it is binding on the taxing authority.

8. Section 68 has also been referred to by the counsel appearing on behalf of the petitioners. Section 68(1) provides that if any question is raised by a dealer in respect of the ‘rate of tax’ on any goods, the Commissioner shall, within six months from the date of receipt of the application made by the dealer for this purpose in the prescribed manner and on payment of such fee as may be prescribed, make an order determining the rate of tax on such goods in accordance with such procedure as may be prescribed. The said provision is with respect to rate of tax, moreover the determination cannot be binding to nullify statutory intentment. This Court has held in *Indra Marshal Oil Engines*

I.L.R.[2010]M.P.,] Pawan Kumar Jain (M/s) vs. The Comm. Tax Officer [2053 V. State of M.P., (2001) 26 LTD I (MP) that Order, determining rate of tax by Commr. Without examining the case of that particular commodity in light of relevant entries and without rendering any finding, is not sustainable. Similarly, in *Somani Bros V. Commr. Of Sales Tax. M.P.*, (2001) 26 LTD 13 (MP) this court held that Rate of tax, determined by Commr. Without examining that the particular commodity in the light of relevant entries and factual material filed by the petitioner cannot be said to be sustainable. Even determination of rate of tax cannot be said to be binding overlooking the factual matrix and legal aspects. In the instant case, circular of Commissioner was rightly not relied upon before the assessing authority as well as in the course of revision. In our opinion, circular does not lay down the correct position and is of no utility to buttress the submission raised by the petitioners in view of provision of 2(t)(ii) read with section 9-B of the Act.

9. The learned Counsel on behalf of petitioners has relied upon the decision of the Apex Court in *Gannon Dunkerley & Co. Vs. State of Rajasthan*, 88 STC204. The decision is of no help to the petitioners, question arose before the Supreme Court of competence to tax deemed sale in the course of inter-State. At the same time with respect to value of the goods involved in the execution of the contract it was observed that measure of tax may be arrived at by reducing from value of works contract expenses incurred on labour and other services, where account books are not maintained or not reliable percentage of value of works contract may be taken for deduction. In the instant case no factual matrix has been laid down so as to examine determination of value of work contract and consequent tax liability in the light of the decision of the Apex Court with respect to levy of tax after making certain deduction.

10. Reliance has also been placed on the decision of the Apex Court in *Ram Singh & Sons Engineering Works Vs. Commissioner of Sales Tax. U.P.*, 1979 43 STC 195 in which question arose whether contract is for work and labour or contract of sale, distinguishing tests were laid down. It was held that as soon as the crane comes into being, it is the property of the customer and there is, therefore, no transfer of property in it by the manufacturer to the customer as a chattel. In the instant case, question involved is that of resale. Thus decision is of no help to espouse the submission raised by the petitioners' counsel.

11. In view of the aforesaid discussion, we find no merits in the writ petitions. Writ petitions being devoid of merits deserve dismissal and are hereby dismissed. However, parties are left to bear their own costs as incurred.

Petition dismissed.

DEEPA DUBEY (MRS.)

... Petitioner

Vs.

UNION OF INDIA

... Respondent

Constitution, Articles 226 & 227 - Disciplinary enquiry - Charge framed and petitioner placed under suspension - Petitioner sought quashment of, on the ground that it amount to intimidation and victimization - Held - The charges levelled against petitioner are regarding filing of false complaint, bringing disrepute to the establishment and showing disrespect for higher authorities - The petitioner also has an alternative remedy of filing an appeal against placing her under suspension - No ground for interference - Petition dismissed.

(Paras 5 to 7 & 16)

संविधान, अनुच्छेद 226 व 227 - अनुशासनात्मक जांच - आरोप विरचित किये गये और याची को निलंबन के अधीन रखा गया - याची ने अभिखंडन चाहा, इस आधार पर कि यह अभित्रास तथा सताये जाने के समान है - अभिनिर्धारित - याची के विरुद्ध लगाये गये आरोप, झूठी शिकायत प्रस्तुत करने, स्थापना को कलंकित करने तथा उच्च प्राधिकारियों के प्रति अनादर दर्शाने के संबंध में है - याची के पास उसे निलंबन के अधीन रखने के विरुद्ध अपील प्रस्तुत करने का वैकल्पिक उपचार भी उपलब्ध है - हस्तक्षेप का कोई आधार नहीं - याचिका खारिज।

Cases referred :

(2006) 12 SCC 28, (1997) 11 SCC 368, (1993) Supp (3) SCC 483, (1996) 11 SCC 498, (1995) Supp.(1) SCC 180.

Siddharth Gupta, for the petitioner.

ORDER

R.S.JHA, J. :- Heard Shri Siddharth Gupta, learned counsel for the petitioner on the question of admission as well as interim relief.

2. The petitioner has filed this petition being aggrieved by order dated 19-3-2010 suspending the petitioner and the charge sheet dated 31-3-2010.

3. The brief facts leading to the filing of this petition are that the petitioner is a teacher working in Army School No.1, GRC, of the respondents at Jabalpur. It is alleged by the petitioner that she was harassed at her working place by the Principal. As her complaints against him were not addressed to by the higher authority, she filed a complaint before the Rajya Mahila Ayog on 31-10-2009 and news in that respect was published in the newspaper. On the complaint of the petitioner, the Rajya Mahila Ayog visited the establishment of the respondent and it is thereafter the respondent authority initiated proceedings against her by issuing the impugned order of suspension and the charge sheet.

4. It is submitted by the learned counsel for the petitioner that the issuance of order of suspension and the charge sheet both deserve to be quashed as the same have been issued against the petitioner only on account of her approaching the Rajya Nahila Ayog. It is submitted that such proceedings cannot be initiated by the respondent authority as the petitioner has the right to approach the Rajya Mahila Ayog or the competent Court of law in case of violation of her right and, therefore, the impugned order of suspension and charge sheet deserve to be quashed. It is further alleged that the charges against the petitioner in the charge sheet are also unsustainable and suffer from mala fide in view of the fact that the petitioner has levelled specific allegations against the Principal regarding harassment at the place of work and trying to force her into a relationship with him and, therefore, the charge sheet deserves to be quashed as it amounts to intimidation and victimization.

5. I have heard the learned counsel for the petitioner at length. From a perusal of the charge sheet, it is clear that the charges levelled against the petitioner are in respect of violation of the provisions of the Rules governing the petitioner's service regarding filing of false complaint, bringing disrepute to the establishment and showing disrespect for higher authorities. In the circumstances, the contention of the petitioner that the charges have been levelled against the petitioner only on account of the petitioner having approached the Rajya Mahila Ayog prima facie appear to be unsubstantiated.

6. It is also undisputed that the petitioner has an alternative remedy of filing an appeal against the order of suspension dated 19-3-2003 before the higher authority.

7. In view of the aforesaid circumstances, I find no ground for interfering with the impugned order of suspension or the charge sheet at this stage specifically in view of the settled law as laid down in the case of *Union of India and Another vs. Kunisetty Satyanarayana*, (2006) 12 SCC 28 wherein it has been held that in such cases no cause of action arises and that the High Court is not required to judge the correctness of the charges in a writ petition nor does it sit as disciplinary authority.

8. The Supreme Court in the aforementioned case has held as under :-

"13. It is well settled by a series of decisions of this Court that ordinarily no writ lies against a charge-sheet or show-cause notice vide *Executive Engineer, Bihar State Housing Board v. Ramesh Kumar Singh*, *Special Director v. Mohd. Ghulam Ghouse*, *Ulagappa v. Divisional Commr., Mysore*, *State of U.P. v. Brahm Datt Sharma*, etc.

14. The reason why ordinarily a writ petition should not be entertained against a mere show-cause notice or charge-sheet is that at that stage the writ petition may be held to be premature. A mere charge-sheet or show-cause notice does not give rise to any cause of action, because it does not amount to an adverse order

which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ petition lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of anyone. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance.

15. Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge-sheet.

16. No doubt, in some very rare and exceptional cases the High Court can quash a charge-sheet or show-cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such a matter."

9. In the case of *State of Punjab and Others vs. Ajit Singh*, (1997) 11 SCC 368, the Supreme Court while setting aside the order of the High Court, wherein it had quashed the charge-sheet, has gone on to observe that the High Court cannot go into the merits of the allegations on the basis of which the charge-sheet has been issued and record a finding that there is no merit in the charges levelled against the person specifically in cases where documents have to be produced as evidence to establish the charges in the disciplinary proceedings and has held as under:-

"3. We are, however, of the view that the High Court was in error in setting aside the charge-sheet that was served on the respondent in the disciplinary proceedings. In doing so the High Court has gone into the merits of the allegations on which the charge-sheet was based and even though the charges had yet to be proved by evidence to be adduced in the disciplinary proceedings. The High Court, accepting the explanation offered by the respondent, has proceeded on the basis that there was no merit in the charges levelled against the respondent. We are unable to uphold this approach of the High Court. The allegations are based on documents which would have been produced as evidence to prove the charges in the disciplinary proceedings. Till such evidence was produced it could not be said that the charges contained in the charge-sheet were without any basis whatsoever."

10. The Supreme Court has further held that the scope of interference of this Court under Article 226 of the Constitution of India in orders of suspension specially

in cases where statutory alternative remedy is available, is limited to cases of lack of jurisdiction, mala fides or perversity and it has been further held that the question as to whether charges are malicious, baseless or vindictive cannot be decided at the stage of issuance of the order of suspension and it is always advisable to allow the disciplinary proceedings to go on unhindered. It has also been observed that whether or not the employee should or should not continue in service during enquiry is a matter to be assessed by the authorities concerned and ordinarily, the Court should not interfere in orders of suspension (See *U.P.Rajya Krishi Utpadan Mandi Parishad and others v. Sanjiv Rajan*, 1993 Supp. (3) SCC 483).

11. Similar view has also been taken by the Supreme Court in the cases of *Dy. Inspector General of Police vs. K. S. Swaminathan*, (1996) 11 SCC 498 and *Union of India and Another vs. Ashok Kacker*, (1995) Supp (1) SCC 180.

12. In the present case it needs no emphasis to state that the petitioner would get full opportunity to raise all issues in her defence in the departmental proceedings and that the authority would be required to address itself to each of them and pass reasoned orders in that respect while proceeding with the departmental enquiry in accordance with the Rules.

13. The petitioner submits that the respondents be directed to supply all the relevant documents on the basis of which the charge sheet has been issued.

14. In response Smt. Kanak Gaharwar, learned counsel who has entered appearance on behalf of the respondents submits that those documents that can be supplied shall be supplied and the others may be inspected by the petitioner in the office of the respondent and photocopy thereof may be obtained on payment of cost.

15. In view of the statement of the learned counsel for the respondents as the respondents are willing to supply the copy of the relevant documents, no order from this Court is necessary.

16. In view of above, the petition deserves to be and is hereby dismissed.

Petition dismissed.

I.L.R. [2010] M. P., 2057

WRIT PETITION

Before Mr. Justice Shantanu Kemkar

26 April, 2010*

MAHESH

Vs.

STATE OF M.P. & ors.

... Petitioner

... Respondents

A. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 85(1) - *Challenge of appointment of Panchayat Karmi by resolution - Order of appointment is appealable to SDO, however having*

fought the matter before various forums and having regard to the fact that the matter stood decided on merits also, the second respondent cannot be directed to go before the SDO for litigating the issue once again afresh. (Para 8)

क. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 85(1) – संकल्प द्वारा पंचायत कर्मों की नियुक्ति को चुनौती – नियुक्ति का आदेश एस.डी.ओ. को अपील योग्य है, तथापि विभिन्न फोरमों के समक्ष मामला लड़ने के बाद तथा इस तथ्य को ध्यान में रखते हुए कि मामला गुणदोषों पर भी विनिश्चित हुआ था, द्वितीय प्रत्यर्थी को विवाद का पुनः नये सिरे से वादकरण करने के लिए एस.डी.ओ. के समक्ष जाने के लिये निदेशित नहीं किया जा सकता।

B Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 85(1) - Resolution - The scheme required that the marks obtained in the 10th Class shall decide the fate of the candidate then that only ought to have been done. (Para 8)

ख. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 85(1) – संकल्प – स्कीम की अपेक्षा है कि 10वीं कक्षा में प्राप्त अंक अभ्यर्थी के भाग्य का फैसला करेंगे, तब केवल वही करना चाहिए था।

Cases referred :

ILR (2008) M.P. 1370 = 2008(4) MPLJ 647.

Ajay Jain, for the petitioner.

Vivek Patwa, Dy.G.A., for the respondent Nos.1, 3, 4 & 5

Romesh Dave, for the respondent No.2.

ORDER

SHANTANU KEMKAR, J. :-Aggrieved by the order dated 23.03.2010 (Annexure P-17) passed by the Competent Authority of the State Government allowing the revision filed by the 2nd respondent against the order passed by the Additional Commissioner the petitioner has filed this petition under Article 226 of the Constitution of India.

2. The brief facts necessary for disposal of this petition are that petitioner was appointed on the post of Panchayat Karmi vide resolution dated 12.04.2006 passed by the Gram Panchayat Walka, Tahsil Bhikangaon, District Khargone on the basis of majority. The said resolution of appointment of the petitioner as Panchayat Karmi was assailed by the 2nd respondent before the Collector Khargone. The Collector Khargone vide order dated 21.03.2007 (Annexure P-9) recorded the finding that the resolution of the Panchayat appointing the petitioner as Panchayat Karmi is legal and just at the same time he also held that the said resolution cannot be cancelled by him under the provisions of Section 85 (1) of the Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam. He accordingly dismissed the case filed by the 2nd respondent.

3. Aggrieved the 2nd respondent filed a Writ Petition No. 2365 of 2007 (s) before this Court challenging the order dated 21.03.2007 passed by Collector.

Khargone. On 04.05.2007 this Court permitted the 2nd respondent to withdraw the petition with liberty to file appeal against the impugned order of the Collector within 30 days before the Appellate Authority. Accordingly, the 2nd respondent filed an appeal no. 227/2006-07 before the Appellate Authority. The Appellate Authority/Additional Commissioner, Indore Division vide order dated 28.09.2007 (Annexure P-12) held that the appointment of the petitioner on the post of Panchayat Karmi by the Gram Panchayat on the basis of decision taken by majority of votes to be just and proper, as a result dismissed the appeal filed by the 2nd respondent.

4. The said order of Additional Commissioner was assailed by the 2nd respondent before the State Minister, Panchayat and Rural Development Department who is the Competent Authority of the State Government for deciding the revision. The revision was allowed vide order dated 11.04.2008 (Annexure P-15). The order dated 11.04.2008 passed in revision was challenged before this Court in Writ Petition No.2972/2008 (s). This Court noticing the fact that the said order dated 11.04.2008 was passed by the Competent Authority of the State Government was passed without affording opportunity of hearing to the petitioner, disposed of the Writ Petition with the consent of the parties vide order dated 22.10.2010 directing the said authority to decide the revision filed by the 2nd respondent afresh after giving opportunity of hearing to the parties.

5. In pursuance to the order dated 22.10.2010 passed in Writ Petition No. 2972 of 2008 (s) the Revisional Authority of the State Government gave opportunity of hearing to the parties and after considering their contentions set aside the order passed by the Collector and the Additional Commissioner and also cancelled the petitioner's appointment on the post of Panchayat Karmi. It has been held by the Revisional Authority that though the 2nd respondent was entitled for appointment having received more marks than the petitioner in the 10th standard examination he has wrongly not been given appointment and the petitioner who received less marks was wrongly given appointment. Aggrieved the petitioner has filed this petition.

6. The contention of the petitioner is that his appointment on the post of Panchayat Karmi could not have been challenged by the 2nd respondent before the Collector. He argued that this petition deserves to be allowed quashing the impugned order and by directing the second respondent to file an appeal before the Sub Divisional Officer. He submits that in view of the law laid down by the Division Bench of this Court in the case of *Devidayal Raikwar Vs. State of M.P. and other* 2008 (4) MPLJ 647 = I.L.R. (2008) MP 1370 the petitioner's appointment could only have been challenged before the Sub Divisional Officer by way of an appeal. In the circumstances according to him the impugned orders passed by the Collector, Additional Commissioner and the State Government are without jurisdiction and cannot be sustained and are liable to be quashed. He further submits that his appointment could not have been cancelled by applying the circular dated 13.08.2007 which came into existence after his appointment.

7. Having considered the contention raised by the petitioner. I find no merit in the same.

8. In the case of *Devidayal Raikwar* a Division Bench of this Court allowed the writ appeal by modifying the order of single Bench directing the petitioner to avail alternative remedy under Section 85 of the Adhiniyam so as to challenge the resolution of appointment on the post of Panchayat Karmi by the Gram Panchayat. It has been held that the order of appointment on the post of Panchayat Karmi is appealable before the Sub Divisional Officer. It is clear from the said order that the Writ Petition was filed challenging directly the resolution. In the present case as would be clear that the second respondent did not challenge the said resolution directly before this Court. He on the other hand approached to the Collector, then this Court, thereafter on the basis of liberty granted by this Court to the Additional Commissioner then the competent authority of the State Government then again the matter was remitted by this Court to the Competent Authority of the State Government with the consent parties. In the circumstances at this point of time having fought the matter before various Forums and having regard to the fact that the matter stood decided on merits also, the second respondent cannot be directed to go before the Sub Divisional Officer for litigating the issue once again afresh. This is more so as even on merits, undisputedly the 2nd respondent secured more marks than the petitioner in the 10th standard examination of the system of 10+2 and as such was entitled to get appointment, in view of the law laid down by a Division Bench of this Court, Bench at Indore in the case of *Devilal Son of Bherulal Patidar Vs. State of M.P. and others* vide order dated 20.03.2009 passed in Writ Petition No. 5579 of 2008 (s). The Division Bench after examining the Scheme for appointment on the post of Panchayat Karmi has held that the requirement under the Scheme is that in the system of 10+2 somebody should be 10th passed then acquisition of better qualification would not provide any further benefit in favour of such person. If the Scheme required that the marks obtained in the 10th class shall decide the fate of the candidate then that only ought to have been done. Admittedly the 2nd respondent was having higher marks than the petitioner in the 10th standard of 10+2 system, however ignoring the merit, the petitioner was appointed only on the basis of majority of votes casted in his favour in the meeting of the Gram Panchayat. In the circumstances in view of the law laid down by a Division Bench of this Court in the case of *Devilal, son of Bherulal Vs. State of M.P. and other* (supra) the petitioner's contention that the order of the Revisional Authority be quashed and the second respondent be directed to file appeal before the Sub Divisional Officer to challenge his appointment cannot be accepted. Merely because at the relevant time the 2nd respondent instead of approaching the Sub Divisional Officer had approached the Collector, and thereafter, to the Additional Commissioner and thereafter to the Revisional Authority of the State Government the order passed by the Revisional Authority cannot be set aside by directing the parties to litigate once again from

the initial stage in the appeal before the Sub Divisional Officer. The Collector, the Additional Commissioner had not only dismissed the 2nd respondent's application and appeal on the ground of maintainability but have also adverted to the merits of the matter. Similarly the Revisional Authority of the State Government has also examined the contentions raised by the parties on merits on the touchstone of the scheme framed by the State Government for making appointments on the post of Panchayat Karmi. On examination the Revisional Authority of the State Government has recorded the finding that the petitioner's appointment on the basis of majority of votes was illegal and being made ignoring the merits has been set aside. The view taken by the State Government is supported by the view expressed by a Division Bench of this Court in the case of *Devilal, Son of Bherulal Vs. State of M.P. and others* (supra).

9. The petitioner's contention that since he was appointed prior to issuance of the circular dated 13.08.2007 and as such the circular dated 13.08.2007 providing appointments to be based upon merits, cannot be applied, to his appointment is wholly misconceived, even earlier the circulars dated 27.01.2006 no where provides that the appointments are to be made ignoring the merit. Even otherwise when the matter was subjudice at the instance of the second respondent it cannot be said that the petitioner's appointment was unquestionable being made prior to issuance of circular dated 13.08.2007.

10. In the circumstances I find no merit in this Writ Petition. The petition is accordingly dismissed in limine.

Petition dismissed.

I.L.R. [2010] M. P., 2061

WRIT PETITION

Before Mr. Justice Arun Mishra & Mrs. Justice Sushma Shrivastava
28 April, 2010*

ASHISH RAJ (DR.)

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

Constitution, Article 51-A & 226, Medical and Dental Post Graduate Entrance Examination Rules, M.P. 2010, Rule 19(1)(c) - *In-service candidates, who have done Post Graduation in one subject will not be eligible for admission in other subject - The restriction is in consonance with requirement of medical field which requires expert of particular field - Striving towards the excellence in particulars field is the fundamental duty which is the underlying idea of Rule - Rule can not be said to be violative of any right of petitioner - Petition dismissed.*

(Paras 4 & 5)

संविधान, अनुच्छेद 51-ए व 226 – चिकित्सा और दंत स्नातकोत्तर प्रवेश परीक्षा नियम, म.प्र. 2010, नियम 19(1)(सी) – सेवारत अभ्यर्थी, जिन्होंने एक विषय में स्नातकोत्तर कर लिया है अन्य विषय में प्रवेश हेतु अर्ह नहीं होंगे – यह निर्बंधन चिकित्सा क्षेत्र की अपेक्षाओं के अनुरूप है जो किसी विशेष क्षेत्र के विशेषज्ञ की अपेक्षा करता है – किसी विशिष्ट क्षेत्र में उत्कृष्टता की ओर अग्रसर होना मौलिक कर्तव्य है जो नियम का अन्तर्निहित विचार है – नियम याची के किसी अधिकार का उल्लंघनकारी होना नहीं कहा जा सकता – याचिका खारिज।

Arpan Pawar, for the petitioner.

Purushendra Kaurav, Dy.A.G., for the respondents.

O R D E R

The Order of the Court was delivered by ARUN MISHRA, J. :—The writ petition has been filed by the petitioner assailing the constitutional validity of Rule 1.9(1)(c) of M.P. Medical & Dental Post Graduate Entrance Examination Rules, 2010 {hereinafter referred to as the Rules of 2010}. The rule provides that in service candidates who have done post graduation in one subject {degree/diploma} will not be eligible for admission in another subject. It is submitted in the petition that the petitioner completed the MBBS course in the year 1999; thereafter he joined the course of diploma in Obstetrics & Gynecology in the year 2004. He has been appointed as Assistant Surgeon through PSC on 24.9.2003. He joined the services on 28.5.2004. He has served in the rural area. The petitioner was shown to be qualified in post graduate entrance test 2010, counselling started from 3.4.2010. The State Government has issued a sponsorship certificate dated 3.4.2010 which restricted the petitioner to opt for only Obstetrics & Gynecology on the ground that the petitioner is holding diploma in the same subject. The petitioner has submitted that restriction imposed is unreasonable & arbitrary. Rule 1.9(1)(c) of the Rules of 2010 is unreasonable, arbitrary and discriminatory. There is no logic behind it. In cases of other candidates, the rule has been relaxed on earlier occasions. The said rule deserves to be struck down.

2. Shri Arpan Pawar, learned counsel for the petitioner has submitted that Rule 1.9(1)(c) of the Rules of 2010 imposes unreasonable restriction by restricting the post graduation in the same subject in which diploma or degree is held. The rule illegally interferes in right to obtain education in the subject of the choice of the petitioner hence, the same is ultra vires. He has also submitted that on earlier occasions, the rule has been relaxed and permission has been given to certain incumbents to undertake different course than the diploma or degree which was held by them. The petitioner has been discriminated with.

3. After hearing learned counsel for the petitioner, we are of the opinion that there is no merit in the petition. Rule 1.9(1)(c) of the Rules of 2010 is quoted below:-

"(c) The in-service candidates, who have done Post Graduation in

one subject (degree/diploma) will not be eligible for admission in another subject.”

4. Admittedly, the petitioner holds the diploma in Obstetrics & Gynecology. Thus, as per the aforesaid rule, he can undertake the MS course in Obstetrics & Gynecology. He cannot opt for other stream of post graduation course. The rule contains reasonable restriction and cannot be said to be violative of Article 14 of the Constitution of India, it cannot be said to be arbitrary or unreasonable provision. In case a person is having degree or diploma in a particular subject, he becomes the expert of that subject and he is known for that expertise. One cannot be expected to be expert of several subjects. A person of medicine cannot claim that he should be permitted to undertake post graduation course in surgery or vice versa. Similar is the case with other subjects. The restriction which has been imposed is considering the expertise gained while obtaining degree/diploma. It is open for the petitioner to undertake the degree course in the same subject in which he holds the diploma. The restriction imposed is in consonance with the requirement of the medical field which requires expert of a particular field. It is unknown to the medical science that a person is having the post graduation degree of medicine and surgery or that of Obstetrics & Gynecology at the same time. It would defeat the very concept of expertise to be obtained while doing degree/diploma course in a particular subject. The rule intends that a person should become the expert of the subject which is known to him for which he has already acquired the skill by pursuing degree/diploma course.

5. Thus, the restriction which has been imposed cannot be said to be unconstitutional in any manner. Striving towards the excellence in a particular field is the fundamental duty of incumbent which has found expression under Article 51-A of the Constitution of India which is the underlying idea of Rule 1.9(1)(c) of the Rules of 2010. Thus, the rule cannot be said to be violative of any of the right of the petitioner.

6. Coming to the submission raised by the petitioner's counsel that the rule has been relaxed in certain other cases, however, the counsel was unable to point out any rule providing the relaxation to the extent claimed by the petitioner. In case there was any violation of the rule earlier, the petitioner cannot claim that he has been discriminated with. The plea of discrimination is available in cases of equality before law not for violating the rule and the provisions of law. Equality cannot be claimed so as to met out illegal treatment which is not permissible under the provisions of law.

7. In view of the aforesaid discussion, we find no merit in the writ petition. The same is hereby dismissed.

Petition dismissed.

I.L.R. [2010] M. P., 2064

WRIT PETITION

Before Mr. Justice S.C. Sharma

29 April, 2010*

LAJJARAM PANDEY

... Petitioner

Vs.

M.P. STATE INFORMATION COMMISSION & ors.

... Respondents

Constitution, Article 226, Right to Information Act (22 of 2005), Section 20 - *Petition for imposing penalty against appellate authority - Held - Section provides for imposition of penalties only in respect of Central Information Officer or State Public Information Officer but not in respect of appellate authority - Moreover, M.P. State Information Commission has arrived at a conclusion that no action is required in respect of imposition of penalty upon Public Information Officer and order has not been challenged - No order imposing penalty could be passed - Petition dismissed.* (Para 6)

संविधान, अनुच्छेद 226, सूचना का अधिकार अधिनियम (2005 का 22) धारा 20 – अपीलीय प्राधिकारी के विरुद्ध शास्ति अधिरोपित करने हेतु याचिका – अभिनिर्धारित – धारा केवल केन्द्रीय सूचना अधिकारी या राज्य लोक सूचना अधिकारी के सम्बन्ध में शास्ति अधिरोपित करने का उपबन्ध करती है न कि अपीलीय प्राधिकारी के सम्बन्ध में – इसके अतिरिक्त, म.प्र. राज्य सूचना आयोग इस निष्कर्ष पर पहुँचा है कि लोक सूचना अधिकारी पर शास्ति अधिरोपित किये जाने के सम्बन्ध में कोई कार्यवाही किये जाने की आवश्यकता नहीं है तथा आदेश को चुनौती नहीं दी गयी है – शास्ति अधिरोपित किये जाने का कोई आदेश पारित नहीं किया जा सकता – याचिका खारिज।

Lajjaram Pandey, Petitioner in person.

None, for the respondent No.1.

Pawan Dwivedi, for the respondent No.2

None, for the respondent No.3.

ORDER

S.C. SHARMA, J.:—In the present case, the petitioner a practising advocate, Kailaras, district Morena has filed the present writ petition for issuance of an appropriate writ, order or direction for initiating action in the matter of imposition of penalty against the respondent No.2 as per section 20 of the Right to Information Act, 2005 (hereinafter referred to as the Act of 2005). The contention of the petitioner is that the High Court of Madhya Pradesh has issued a notification under the provisions of the Act of 2005, notifying the Public Information Officers as well as the appellate authorities and the petitioner as per the provisions of section 6(1) of the Act of 2005, has preferred an application seeking certain information. It has been categorically stated that an application was preferred before the District and Sessions Judge, Morena seeking certain information. The

petitioner has further stated that the Public Information Officer (respondent No.3) has processed the matter, however, he sought instructions in the matter from the respondent No.2 (appellate authority). The petitioner has further stated that the respondent No.2 (appellate authority) has issued a letter dated 11th January, 2007 to the In-charge, Copying section, not to grant copies in the light of section 8(l)(j) of the Act of 2005. The petitioner has also stated that the Public Information Officer has failed to dispose of his application within the prescribed period of thirty days as provided under section 17 of the Act of 2005 and, therefore, a first appeal was preferred under section 19 of the Act of 2005 before the appellate authority. The petitioner has further stated that the appellate authority as notified by the High Court is the District and Sessions Judge, Morena and, no order was passed by the appellate authority and finally an appeal was also preferred before the State Information Commission and an order was passed by the State Information Commission as contained in Annexure P/1 for granting information under the Act of 2005. The petitioner has further stated that the State Information Commission while passing an order dated 10th April, 2008 has also directed for issuance of show cause notice to the Public Information Officer for imposition of punishment upon him. The grievance of the petitioner is that no further action has been taken in the matter and, therefore, an appropriate writ, order or direction be issued in the peculiar facts and circumstances of the case for imposition of penalty upon the respondent No.2. The petitioner has prayed for the following reliefs:

- (1) The writ of Mandamus and or Certiorari or any other appropriate writ, order or direction may kindly be issued whereby the part of the impugned order dated 10th April, 2008 (Annexure P/1) lacking initiation of action of imposing penalty against the respondent No.2 as per section 20 of the Act be quashed.
- (2) That, the respondent No. 1 may kindly be directed to initiate action as per section 20 of the Act for imposing penalty against the appellate authority respondent No.2 in accordance with law;
- (3) Any other relief as this Hon'ble Court deems fit, may kindly be granted doing justice in the matter."

2. A reply has been filed on behalf of the respondent No.2 and the respondent No.2 has categorically stated in the reply which is duly supported by an affidavit that the respondent No.2 was not the Chief Information Officer at any point of time. The respondent No.2 has not denied that the petitioner has submitted an application to the Public Information Officer under the Act of 2005 and has also categorically stated that some clarification was sought by the Officer-in-charge of the copying section and he has clarified to the Officer-in-charge of the copying section vide letter dated 11th January, 2007 that the information as desired by the petitioner cannot be furnished to him. The respondent No. 2 has also stated that an appeal was preferred by the petitioner in the matter and the State Information Commission has passed an order dated 10th April, 2008 for taking action against

2066] Lajjaram Pandey vs. M. P. Information Commission [I.L.R.[2010]M.P., the Public Information Officer. The respondent No.2 has categorically stated before this Court that he was not the Public Information Officer and, therefore, by no stretch of imagination, a punishment can be imposed upon him as per the provisions of section 20 of the Act of 2005 as he was simply an appellate authority in the matter. The respondent No.2 has also enclosed an order dated 18th August, 2008 passed by the State Information Commission wherein after receiving explanation from the Public Information Officer, the matter has been closed. The respondent No.2 has prayed for dismissal of the writ petition.

3. Heard the petitioner present in person as well as the learned counsel appearing for the respondent No. 2.

4. In the present case, it is an admitted fact that the respondent No.3 was notified as the Public Information Officer by the High Court of Madhya Pradesh in exercise of the powers conferred under section 4(1) of the Act of 2005 and the respondent No.2 was notified as an appellate authority. The petitioner has filed an application under section 6(1) of the Act of 2005 before the Public Information Officer, i.e., District and Sessions Judge, Morena (respondent No. 3). The petitioner has not preferred any application before the respondent No.2. The record further reveals that the officer-in-charge of the copying section has sought some clarification from the respondent No.2 and the respondent No.2 has written a letter dated 11th January, 2007 to the Officer-in-Charge, copying section and on the basis of this letter, the requisite information was not furnished by the Public Information Officer. The petitioner has preferred an appeal in the matter and the appellate authority has passed a detailed order on 10th April, 2008 directing the Public Information Officer to supply the desired information to the petitioner and the same has also been done. The petitioner who is present in the Court has categorically stated that he has received the desired information in the matter. In the present case, the relief prayed by the petitioner is to punish the respondent No.2. This Court has carefully gone through the order dated 10th April, 2008 passed by the State Information Commission which reflects that the proceedings were initiated for taking action against the Public Information Officer. A final order dated 28th July, 2008 passed by the State Information Commission is also on record wherein the State Commission has closed the matter after receiving a reply from the respondent No. 3. This order has not been challenged by the petitioner before this Court. The petitioner has prayed for taking action against the respondent No. 2, who is the appellate authority in the matter.

5. Section 20 of the Act of 2005 which deals with the penalties reads as under:

20. Penalties - (1) Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any

reasonable cause, refused to receive an application for information or has not furnished information within the time specified under Sub Section (1) of Section 7 are malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall impose a penalty of two hundred and fifty rupees each day till application is received or information is furnished, so however, the total amount of such penalty shall not exceed twenty-five thousand rupees:

Provided that the Central Public Information Officer or the State Public Information Officer, as the case may be, shall be given a reasonable opportunity of being heard before any penalty imposed on him:

Provided further that the burden of proving that he acted reasonably and diligently shall be on the Central Public Information Officer or the State Public Information Officer, as the case may be.

(2) Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Officer, as the case may be, has, without any reasonable cause and persistently, failed to receive an application for information or has not furnished information within the time specified under Sub Section (1) of Section 7 are malafidely denied the request for information or knowing given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing information, it shall recommend for disciplinary action the Central Public Information Officer or the State Public Information Officer, as the case may be, under the Service Rules applicable to him.

6. The aforesaid statutory provision as contained in section 20 of the Act of 2005 provides for imposition of penalties by the Central Information Commission or the State Information Commission only in respect of the Central Public Information Officer or the State Public Information Officer. The aforesaid statutory provision does not provide for imposition of any penalty upon the appellate authority. This Court has carefully scanned the relief clause in the writ petition and the petitioner has prayed for imposition of penalty upon the respondent No.2. The petitioner himself has filed a document as Annexure P/2 and the aforesaid notification issued by the High Court of Madhya Pradesh makes it very clear that

the respondent No.2 at the relevant point of time was the appellate authority as per the provisions of the Act of 2005. Resultantly, as the respondent No.2 was the appellate authority, no order of imposing penalty could have been passed under section 20 of the Act of 2005 and, therefore, keeping in view the provisions of section 20 of the Act of 2005, the question of initiating action for imposing penalty against the respondent No.2 does not arise in the matter. This Court has also carefully gone through the letter dated 11th January, 2007 and is of the considered opinion that the aforesaid letter was written in good faith by the appellate authority and it was not a direction to the officer-in-charge of the copying section. Not only this, the Madhya Pradesh State Information Commission after hearing the respondent No.3 has arrived at a conclusion that no action is required further in the matter in respect of imposition of penalty upon the Public Information Officer. This Court is of the considered opinion that the respondents No.2 and 3 have acted in good faith in the peculiar facts and circumstances of the case and, therefore, no case for interference is made out in the matter.

7. The writ petition sans merit and the same is accordingly dismissed. No order as to cost.

Petition dismissed.

I.L.R. [2010] M. P., 2068

WRIT PETITION

Before Mr. Justice Sanjay Yadav

3 May, 2010*

KULDEEP SINGH PUNJABI & anr.

... Petitioners

Vs.

STATE OF M.P. & ors.

... Respondents

Constitution, Article 226, M.P. Revenue Book Circular, Rule 31, Section IV, Sr.No.1 - Allotment of Nazul Plot - Condition of allotment prohibiting alienation and forfeiture of property in breach of condition - Subsequent lease agreement does not contain term prohibition alienation and terms provided for assignment by transfer - Order of cancellation of allotment and direction for cancellation of lease due to transfer by lessee - Held - Specific terms prohibiting alienation being not incorporated in the later covenant will not be binding on the parties to agreement - Allotment can not be cancelled - Orders quashed - Petition allowed. (Paras 16 & 19)

संविधान, अनुच्छेद 226, म.प्र. राजस्व पुस्तक परिपत्र, नियम 31, धारा IV अनु. क्र. 1 - नजूल प्लॉट का आवंटन - अन्य संक्रामण पर प्रतिबंध, आवंटन की शर्त और शर्त के उल्लंघन पर सम्पत्ति का समपहरण - पश्चात्पूर्ती पट्टा (लीज) करार में प्रतिबंध, अन्य संक्रामण शब्द समाविष्ट नहीं और अंतरण द्वारा समनुदेशन के लिये शर्तों में उपबंध - आवंटन के रद्दकरण का आदेश तथा पट्टाधारक द्वारा अंतरण किये जाने के कारण पट्टे (लीज) के रद्दकरण

के निर्देश - अभिनिर्धारित - बाद की प्रसविदा में अन्यसंक्रामण पर प्रतिबंध की विनिर्दिष्ट शर्तों के समाविष्ट न होने से, करार के पक्षों पर बंधनकारी नहीं होगी - आवंटन रद्द नहीं किया जा सकता - आदेश अभिखंडित - याचिका मंजूर।

Ravish Agrawal with K.S. Jha, for the petitioners.

Hartish Agnihotri, G.A., for the respondent/State.

ORDER

SANJAY YADAV, J :- Petitioners challenge the order dated 28.1.1998 whereby, the State Govt. respondent no.1 cancelled the Permanent lease of the Nazul land bearing plot No.22, Nazul sheet No.7 admeasuring 429 Sq. ft situated at Kareliganj, District Narsinghpur allotted to the petitioner on permanent lease by order dated 8.2.1995; as also the consequential order dated 28.3.1998, 1.4.1998 and 16.4.1998.

2. The facts briefly are that, on an application by the petitioner for an allotment of Nazul land and the proposal by the Collector Narsinghpur and a recommendation by Commissioner, Jabalpur Division, Jabalpur in a Revenue Case No.83-A/20(1) -90-91, the State Government granted sanction to allot Nazul land in Nazul sheet No.7, Plot No.22 area 429 Sq. ft situated at Kareliganj, District Narsinghpur on a permanent lease for commercial purpose on the special conditions along with general conditions of lease.

3. In pursuant to the order of allotment and on depositing the requisite premium, additional premium, the lease rent and the interest, lease deed on 7.7.1995 was executed which was duly registered on 11.7.1995. Thereafter, the petitioner raised construction over the said land after being granted no objection on 2.9.1995.

4. Later on 4.12.1995 the petitioner No.1 sold the said land to petitioner No. 2 vide registered sale deed. This transaction was perceived as violation of breach of the allotment order by the Nazul Officer during process of mutation who preferred the matter to Collector.

5. Collector, Narsinghpur after issuing a show cause notice and considering the reply forwarded its proposal to the State Government through the Commissioner vide memo dated 10.4.1997 for cancellation of lease, holding that the transfer of land by virtue of sale deed was in breach of condition of grant of lease. The State Government vide order dated 28.1.1998 cancelled the order of allotment dated 8.2.1995 and directed the cancellation of lease deed. Pursuant whereof the revenue authorities came in action to resume the possession.

6. The petitioner herein challenges the order of cancellation as also the action in pursuance to such cancellation of allotment.

7. It is contended that, the proceedings on and from 31.8.1996 is a nullity as the Collector has no authority to issue notice for cancellation of lease executed by the State Government. It is further contended that, the lease deed dated

7.7.1995 did not create clog on the right of the petitioner no.1 to transfer the land in question. It is urged that clause 7, instead when construed in a right perspective permits such such transfer. It is further contended that prior subsequent to the proceedings initiated by the Collector, the petitioner no.1 deposited the lease rent which were duly accepted by the respondent. It is urged that the acceptance of lease rent by the State Government amounted to condonation of breach of the lease as per Rule 31, Section IV, Sr.1.No of Revenue Book Circular. The learned senior counsel accordingly submits that the entire action of the respondents regarding cancellation of allotment order and the lease deed is a nullity and deserves to be quashed. Relying on the judgment in *Mohammad Din and others V. Imam Din and another*: AIR (35) 1948 PC 33, it is urged by the learned senior counsel that there being no conditions stipulated in the agreement dated 7.7.1995 having an effect that the petitioner no.1 is prohibited from alienating the Nazul Land in question. It was beyond the powers of authority concern to have cancelled the lease on the ground of alienation.

8. Furthermore, placing reliance on second proviso to clause 8 of the lease agreement, it is contended on behalf of the petitioner that the breach, if any, of the term of lease agreement, the same is compoundable and the respondents having not exercised such an option are not justified in cancelling the lease. It is accordingly urged that, the order cancelling the allotment of Nazul land and the consequential action thereon being illegal deserves to be set aside and the respondents be directed to restore the lease.

9. The respondents on their turn refutes the averments. Placing reliance on the provision of section 182 of the M.P. Land Revenue Code of 1959 that the petitioner being not a Bhumiswami has no absolute right over the property in question. It is further contended that the allotment of Nazul plot to the petitioner was subject to the special conditions stipulated in the allotment letter dated 8.2.1995, whereunder, it was categorically mentioned under condition No.3 that the allottee will not alienate the property in question. It is urged that non incorporating of the above terms in the lease deed dated 7.7.1995 will not absolve the petitioner from the applicability of special conditions wherewith the Nazul land was granted to the petitioner. It is contended that since the petitioner no.1 sold the land to petitioner no.2 in violation of the condition of allotments the authorities concern were well within their rights to cancel the order of allotment and the lease deed executed on 7.7.1995. The respondents further refute the contention that the term of lease executed on 7.7.1995 super imposed the special terms and conditions stipulated in the allotment letter dated 8.2.1995. Furthermore, refuting the contention regarding bar being created by the provision in the revenue book circular as also the fact regarding depositing the lease rent after the proceedings, it is submitted on behalf of the respondents that the same does disempower the Collector to take action and that taking of lease rent does not tantamount to condonation of breach. It is urged that, there being specific breach

of specific condition stipulated in the allotment letter, the action against the petitioner is just and proper and calls for no interference.

10. Having considered the rival submissions, the question which falls for consideration is whether the right of petitioner as lessee of a Nazul Land would be governed only by the terms of the lease deed executed on 7.7.1995 or also by the special terms which find mention in allotment letter but not expressly incorporated in the lease deed. And whether the deposit of lease rent all through would tantamount to condonation of the breach if any.

11. In respect of second aspect as to whether the deposit of lease rent all through by the petitioner no.1 would tantamount to condonation of breach if any, reference can be had of the judgment in *Murtidhar Jalan (Since deceased) through legal representatives V. State of Meghalaya and others* : (1997)5 SCC 480 wherein their Lordships were pleased to observe:

“3. The appellant had filed a civil suit for perpetual injunction seeking declaration of his title as landholder of the property. The trial Court granted the decree. But on appeal, the High Court reversed it in the First Appeal No. 58/90 dated December 20, 1996. The Division Bench of the High Court affirmed that order in appeal. The question is : whether the appellant is entitled to the declaration of his title in respect of the property. Shri Goswami, learned senior Counsel for the appellant, contends that initially the appellant had come into possession of the property in his character as a tenant by virtue of perpetual lease for 99 years; after the expiry of the initial period of lease in 1965 though the Government had not renewed the lease, nonetheless, the Government had impliedly renewed the same by accepting the rent. The property was required for a public purpose and that the Government continued to be in possession of the property as a tenant recognising title of the appellant. Therefore, the High Court was clearly in error in rejecting the claim of the appellant and confirming the decree of the appellate Court. In support thereof, he places reliance on *Bishan Das v. State of Punjab*, AIR 1961 SC 1570. We find no force in the contention. It is an admitted position that renewal was not granted. Thereby, the previous lease stood expired and the relationship as tenant and landlord came to be terminated. He accepted the title of the Government; thus thereafter, he continued to be in possession as a trespasser. It is true that a lower level officer accepted the rent; and recognition was obviously made on a mistaken impression that the land was required for a public purpose; but on the basis thereof, it cannot be construed that the title of the appellant was confirmed by the conduct of the Government. Accordingly, the declaration of title as land-holder

cannot be granted. The High Court, therefore, was right in refusing to grant the relief. It is not a case of taking possession without due process of law. The possession only continues to a facet of the facts. Apart from that there is no other documentary evidence on the basis of which it could be concluded that the title of the Government is defeated by acceptance of the rent or by requisition of the property by mistaken act on the part of the Government.

12. In view of above, unless it is held that the petitioner was in lawful possession of the property in question, the payment of rent would in any manner tantamount to condonation of breach. This thus leads to consideration of main issue as to whether the petitioner was within his right to have transferred his Nazaul Land in favour of petitioner no.2 and the consequences thereof.

13. For ascertaining an answer necessary it would be to have a probe into respective stipulation of the allotment letter and the lease deed dated 7.7.1995.

14. The allotment of land in question vide letter dated 8.2.1995 admittedly was for commercial purpose with a stipulation that the same should not be used for any other purpose than allotted and is not to be alienated either by sale or lease. The terms of allotment further stipulates that the breach of condition would lead to cancellation of allotment and the lease and the forfeiture of the property. Condition 2,3 and 4 of the allotment letter dated 8.2.1995 were in following terms:

2 भूमि उपयोग अन्य उपयोग के लिये नहीं होगा अन्यथा अनाधिकृत कब्जेदार मान कर भूमि शासन में निहित कर ली जायेगी। या भूमि का पूर्ण बाजार मूल्य देय पेनल्टी आदि के साथ लिया जायेगा।

3 भूमि या उसके किसी भाग या उस पर बने किसी भी भवन आदि को उक्त उल्लिखित उपयोग के अलावा न तो किसी अन्य व्यक्ति को उपयोग करने दिया जावेगा और न ही किराये पर दिया जावेगा। न ही विक्रय किया जायेगा या किसी अन्य प्रकार से किसी अन्य उपयोग के लिये दिया/उपलब्ध कराया जायेगा।

4 यदि कभी भी उक्त भूमि उपयोग उक्त प्रयोजन के लिये उपयोग नहीं होता है, या बाद में कभी बंद कर दिया जाता है, तो भूमि तथा उस पर निर्मित भवनों एवं सम्पत्तियों के साथ शासन में निहित हो जावेगी और आवंटितों को उसका मुआवजा देय नहीं होगा।

15. The petitioner no.1 and the respondent State Government later on entered into an agreement i.e., "lease of Intra Municipal Nazul for Building purpose" which besides other terms and conditions, contained the stipulation regarding "assignment", in paragraph (7) of providing therein"

"7. The lessee shall upon every assignment of the premises or any part thereof and within one calender month thereafter deliver a notice of such assignment to the Collector setting forth the names and description of the parties to every such assignment and the

particulars and effect thereof. So also the lessee's successor-in-interest, whether by transfer or by inheritance, shall be bound to give a notice with similar particulars within a month after entering into possession. "

16. Evidently, the special provisions as contained in the allotment letter prohibiting alienation of the lease and plot was not incorporated in the lease agreement. Whereas the condition No.7 in clear terms provided for assignment by transfer. Therefore, going by the principle of statutory interpretation, i.e., "Expressio Unius est exclusio alterius" i.e. the express of one thing implies the exclusion of other. The specific terms of the allotment being not incorporated in the later covenant will not be binding on the parties to the agreement. The submissions by the respondent regarding violation of the terms and conditions of allotment order dated 8.2.1995 therefore cannot be accepted.

17. In *Mohammad Din* (supra) their Lordships while dealing with the aspect of "proprietary rights to tenant" were pleased to observe:

"10.....The real question is whether it was competent for the executive authority under the form of granting proprietary rights to grant something very different and in fact to create an estate of a kind unknown to the law. For the result of a grant with such a condition is to deprive the grantee of proprietary rights of an essential right of property, viz, the free power of disposition and moreover to fetter it not by an absolute bar against alienation nor by such a bar except with the consent of a particular person, but by a bar against alienation "except with the concurrence of the reversioners," a body of persons presumably altering from time to time and perhaps at no time easily ascertainable. Their Lordships do not find any justification for such a condition in the Act or any Rules that have been brought to their notice.

11. For here the specific subject matter of the grant is "the proprietary rights." That and nothing else may be granted or refused. To purport to grant "proprietary rights" but to withhold an essential proprietary right, viz, the free power of alienation, is neither the one thing nor the other. The withholding of such a right may be referred to as a condition, but its effect, as already stated, is to create an estate unknown to the law and to grant not "proprietary rights" but something less which is not susceptible of terms of legal definition. Their Lordships think that the original grant by the Deputy Commissioner, who clearly acted within his competence, should stand and the so called condition imposed by the superior executive authority, which was in their view incompetent, should be disregarded...."

18. In *Union of India V. Shiv Dayal Soin & Sons P.Ltd:* AIR 2003 SC 1877 their Lordships were pleased to observe:

“6.....As a canon of statutory interpretation, *expressio unius est exclusio alterius*, what is expressly mentioned in one place but not in another must be taken to have been deliberately omitted. The argument raised by the learned counsel for the appellant proceeds on assumption that a house by its meaning and definition is capable of being used exclusively for residential purposes and not for non-residential purposes which is not a correct interpretation of sub-clause (vii) of Clause 1 of Appendix XIII.”

19. For the above reasons, this Court is of considered opinion that the order dated 28.1.1998 and the consequential orders thereof are not sustainable and are therefore quashed. However, this will not preclude the respondents from exercising their powers under clause 7 and 8 of the lease agreement dated 7.7.1995.

20. Lastly, though efforts were made by the respondent to establish that the grant of lease would be governed by the provisions of M.P. Land Revenue Code 1959 and the corresponding right thereunder to the State Government of reentry on the breach of condition of allotment is of no avail because as revealed from the record produced by the respondent State Government, the allotment of a Nazul land for commercial purpose being under the Revenue Book Circulars and Code of 1959, resort cannot be had for the provisions of Code of 1959 for interpreting the lease agreement.

21. The petition is allowed to the extent above. No costs.

Petition allowed.

I.L.R. [2010] M. P., 2074
WRIT PETITION
Before Mr. Justice J.K. Maheshwari
5 May, 2010*

PRAMOD KUMAR GUPTA

... Petitioner

Vs.

STATE OF M.P. & anr.

... Respondents

Service Law - Constitution, Article 226 - Departmental Enquiry - Inordinate delay of 10 years in initiation of D.E. and 4½ years of delay in continuation of said enquiry not convincingly explained - Continuation of enquiry may severely prejudice promotion prospects of petitioner - Charge sheet and D.E. liable to be quashed - Respondents directed to pass appropriate orders in the matter of grant of senior selection scale to petitioner and if found fit, to extend benefit at par to the incumbent juniors - Petition allowed. (Paras 15 to 17)

सेवा विधि – संविधान, अनुच्छेद 226 – विभागीय जाँच – विभागीय जाँच प्रारम्भ करने में 10 वर्ष का असाधारण विलम्ब तथा विभागीय जाँच 4-1/2 वर्ष तक चलते रहने के बावद विश्वासोत्पादक स्पष्टीकरण नहीं दिया गया – जाँच लंबित होने से प्रार्थी की पदोन्नति संभावना गंभीर रूप से प्रभावित हो सकती है – आरोप पत्र एवं विभागीय जाँच अपास्त किये जाने योग्य है – प्रत्यर्थियों को प्रार्थी के ज्येष्ठ चयन वेतनमान के प्रकरण में उचित आदेश पारित करने एवं उसे योग्य पाये जाने पर उसे उससे कनिष्ठ पदधारकों के समान लाभ प्रदान करने का निदेश दिया – याचिका मंजूर।

Cases referred :

(2005) 6 SCC 636, AIR 1990 SC 1308, AIR 1998 SC 1833; 2003(4) MPLJ 183, W.P.(S) No.1479/06 (Jayant Kumar Satpute Vs. State of M.P.), W.P.(S) No.1243/2006 (Satish Kumar Tiwari Vs. State of M.P.).

G.M. Chaphekar assisted by Vandana Kasrekar, for the petitioner.
Vivek Patwa, Dy.G.A., for the respondent No.1.

ORDER

J.K. MAHESHWARI, J. :- This petition has been filed under Article 226 of the Constitution of India seeking following relief:-

(i) That the Charge Sheet dated 18.7.2005 (Annexure P-6) may be ordered to be quashed and further departmental enquiry proceedings pending against the petitioner may also be directed to be struck down.

(ii) The order of refusal of grant of Senior Selection Scale dated 15.6.2009 (Annexure P/19) may be ordered to be quashed.

(iii) The Respondent No. 1 be directed to reconsider the case of the petitioner for grant of Senior Selection Scale and to allow such benefits at par to the other incumbent or similarly situated officers by opening the sealed cover envelope.

(iv) The respondents be also directed not to take any action causing prejudice to the petitioner in the matter of grant of IAS cadre as par to other similarly situated officers.

2. The brief facts of case are that petitioner was selected by M.P.P.S.C. On the post of Dy. Collector as per order dated 13.1.1986, which is properly known as State Administrative Service (in short hereinafter referred to as the SAS). On completion of 6 years of service benefit of senior scale i.e. Rs.10,000-14,000/- designating him as Joint Collector w.e.f. 1.1.93 has been allowed. On having blameless career selection scale i.e. of 12,000-16,500/- has further been allowed designating him as Additional Collector w.e.f. 1.1.1999 vide order dated 14.12.1999. At present he is posted as Chief Executive Officer, Indore Development Authority, Indore on deputation and discharging his duties on the said post.

3. In the year 1995, when he was posted on deputation as Commissioner Municipal Corporation, Ujjain in Urban Administration and development department

a complaint was made against one Radheshyam and other persons including petitioner. In the said complaint, it was said that Vikram Vatika, Ujjain, which was the ownership of the Vikram University has been illegally delivered on license to one Narendra Bhadoriya by them. On the said complaint a case was registered by the Lokayukt Police and started investigation thereupon. As per intimation of the Dy. Secretary, Urban Administration and Development Department (Borrowing Department) dated 1.10.2003 addressing to the Principal Secretary, GAD (parent department), it was jointly decided that the departmental action, if any, against the petitioner to the said irregularities can only be taken after the enquiry by the Lokayukt Establishment, if he found guilty. The Lokayukt Sangathan vide its letter dated 3.1.2006 Annexure-P/12 intimated to GAD in reply to their letter dated 18.12.2005 that no evidence was found against the petitioner, however the Challan in Court has not been filed against him, but filed against Radheshyam Bhadoriya and Shrilal Mohd Khan and others on 15.9.2004. It is stated initially GAD has decided to not to initiate departmental enquiry, till report of Lokayukt, but without awaiting such report, charge sheet has been issued on 18.7.2005 Annexure-P/6, alleging that Vikram Vatika was not the land of Municipal Corporation, Ujjain, however the license/lease may not be granted by the Corporation, by passing the resolution in Mayor-in-Council dated 30.5.95, and petitioner being Commissioner has not raised any objection to it. It is also stated that such lease/license is contrary to spirit of Section 80 of Municipal Corporation Act and under Madhya Pradesh Nagar Palik Nigam (Achal Sampatti Ka Antaran) Rule -1994, the said Act is amounting to misconduct.

4. At the time of issuance of charge sheet petitioner was posted as Joint Director, Madhya Pradesh Rajya Krishi Vipnan Board, Bhopal, however, it was received to him as per Annexure P-6. On receiving the charge sheet application to supply and to inspect the documents as specified in the list of documents, was submitted as per Annexure P-7/A & P-7/B. Vide letter dated 8.11.2005 (Annexure P-8) he was called on 11.11.2005, but such letter was received on 14.11.2005 in his office, on which date he was on leave, however, submitted application on 25.11.2005 (Annexure-P/10) to give another date. Thereon GAD called him to remain present on 4.1.2006; during inspection, original documents were not found in record, except the photocopies while documents Nos 1 to 14 were not allowed to inspect. By submitting application aforesaid issues were raised, but it was not replied. After about 3 ½ years, again a letter was issued on 8.6.2009 for inspection of the documents, as per Annexure P-15, stating that the certified copies of the documents have been received by GAD from Urban Administration Department, however, petitioner may inspect those documents. On inspection of those documents petitioner has put up a note on the note sheet that the original documents are not available, which formed the basis to initiate action against him, however, departmental enquiry may be stayed up till showing the original. In the meantime petitioner has received a letter dated 14.7.09, stating that reply may

be filed within a week, otherwise ex parte may be proceeded. Petitioner had submitted the reply with preliminary submission, that the original documents have not been shown and photocopies have also not been supplied; but on the basis of inspection and memory reply is being filed, which is Annexure P-21. After Lokayukt report the Urban Administration Department was not willing to initiate any action, but the GAD want to continue the enquiry. It is the contention of petitioner that continuation of departmental enquiry after more than 15 years by GAD is unreasonable and arbitrary. It is stated that as per GAD circulars Annexure P-22 and P-23 the enquiry ought to have closed within 13 to 14 months from the date of initiation, but in the present case no plausible explanation to issue charge sheet after 10 years for the cause of 1995 has been given. It is also contended that even on demand documents were not supplied up to three and half years. Thus without showing original documents and allowing him to inspect the original record, only on the basis of certified copy the departmental enquiry has been started, and in the month of November 2009, appointing enquiry Officer, never acted unreasonably.

5. It has specifically averred that the action to initiate the enquiry is arbitrary, unreasonable and biased because the petitioner was transferred from Indore to Alirajpur vide order dated 19.10.2008 during the election period. The said action was challenged by him in Writ Petition No.6652/12008, wherein interim order was passed and finally it was decided in favour of petitioner as per order dated 5.12.2008. On having prejudiced the GAD has retaken enquiry, and during the said period grant of senior selection scale was denied, though incumbent juniors granted such benefit. The representation filed by him was also rejected vide order dated 15.6.2009 (Annexure P-19). It is contended that the selection scale was granted to him in the year 1999 while initiation of enquiry was of the year 1995, however, at the time of granting selection scale, the said departmental enquiry was pending, thus, misconduct, if any, be treated as waved of. It is also said that if the benefit of selection scale has been allowed during pendency of enquiry, then at the time of grant of senior selection scale refusal on the said pretext is arbitrary and mala fide. It is also contended that the SAS officers up to the Batch of 1985 have already been awarded the IAS Cadre, and in near future he is in zone of consideration to award IAS Cadre. Thus, to cause serious prejudice to him after 15 years protracted enquiry may liable to be quashed, and the respondents may be directed to extend the benefit of senior selection scale from due date and to consider his case for promotion for IAS Cadre on its turn.

6. The respondents have filed their reply stating that when the petitioner was posted as Commissioner, Municipal Corporation, Ujjain in 1995, he had delivered the "Vikram Vatika" on license/lease to the private person against the provisions of the Act, and Rules. It is said that the show cause notice dated 18.8.1996 was served and after receiving the reply dated 15.10.1996, recommendation to initiate the enquiry was made by the Urban Administration Department to the GAD, as

per letter dated 15.3.1999 Annexure R-1. In furtherance to such recommendation the charge sheet was issued by GAD on 18.7.2005. In the charge sheet it is alleged that petitioner had placed it before the standing committee and Mayor-in-Council, Indore who has passed the resolution No.128 dated 6.5.1995 granting license of the said Vikram Vatika to a private person. On passing the resolution by the MIC no objection has been raised by petitioner and the matter has also not referred to State Government. It is further alleged that he had executed the agreement and handed over the possession of the said Vatika to one Narendra Singh Bhadoria, which may amount to misconduct. To explain the delay it is stated that department cannot be blamed for delay, it is the petitioner, who had filed the reply on 21.7.2009 after about four years of issuance of charge sheet. It is also said, the record of the case was with the Lokayukt Sangathan and not with the department, however, delay in inspection of documents as alleged by petitioner is beyond their control. In reply to exoneration by Lokayukt Sangathan it is said that the action taken by the petitioner is not in accordance to Section 80 (1) (5) of the Municipal Corporation Act, and the agreement executed to lease out the said Vatika is amounting to transfer of land of Corporation, which cannot be done without permission of the State Government. In view of the said it is submitted that the enquiry ought to have done on merit, of the facts.

7. In parawise reply it is said that the petitioner being a Commissioner of the Municipal Corporation had entered into an agreement with Narendra Singh Bhadoria and allegedly changed the terms of the contract which is detrimental to the interest of the Vikram University i.e. the owner of the Vikram Vatika and because the due procedure has not been followed by the petitioner, however, the departmental action has rightly been started. It is also stated that the reply to charge sheet has not been filed by petitioner and get prolonged the dates for the reason one or another, therefore, the delay as alleged is only attributable to him and not the respondents. It is further contended that the Lokayukt Sangathan has not opined regarding innocence of petitioner, however, the respondents are well empowered to initiate the departmental action by its own, and the recommendation of Lokayukt Sangathan to initiate departmental enquiry is not required. It is further said that the letter written by the Urban Administration Department or by the GAD to drop the proceedings, are either suggestion or proposals, However, looking to the seriousness of the charge, the departmental enquiry has rightly been started. It is said that against the order passed in writ petition, an appeal has been preferred, however, department is having no bias against petitioner. The GAD circulars (Annexure P-20 and P-21) of completion of departmental enquiry within a period of 13 to 14 months and other averments have not been disputed by respondents. In view of the said submissions prayer is made to dismiss the petition as there is no delay on their part.

8. Petitioner by filing the rejoinder refuted the allegations of delay in filing reply by him. It is contended that despite repeated requests and on submitting

applications to supply the documents on 27.7.2005, 9.9.2005, 4.10.2005, 25.11.2005, 16.12.2005, 6.1.2006, 6.3.2006 and 16.6.2009; neither the inspection of the original documents was permitted nor supplied the documents well in time. It is specifically said that he has not made any interpolation in the alleged agreement as on the face of it, it was executed by Mr. Radheshyam Sharma, who may have done some interpolation to which he was found guilty by the Lokayukt Sangathan, and Challan has been filed against him, however, the averments of reply, regarding execution of agreement by petitioner is completely against the record. On account of these reasons the Lokayukt Sangathan found that Radheshyam Sharma, Lal Mohammad and Narnedra Singh Bhadoria are involved therein and the Challan has been filed against them. It is also said that the provisions of Section 80 of the Municipal Corporation Act are having no application in the facts of this case as the land was not vested with the Corporation, therefore, the contents of the reply filed by State are contrary to the record.

9. Learned Sr. Advocate Shri G. M. Chaphekar contends that as per the allegations the cause of action relates to May 1995, the charge sheet Annexure P-6 has been issued on 18.7.2005 after inordinate delay of 10 years, but no convincing explanation has been put forth by the respondents. After issuance of the charge sheet and on having made various demands original documents have not supplied and the inspection was permitted on 16.6.2009 in furtherance to the intimation dated 8.6.2009 (Annexure P-15) after three and half years. Immediately petitioner has submitted the reply on 21.7.2009 (Annexure P-21), thus from the date of allowing the inspection, the reply has been submitted by the petitioner within the reasonable time. In view of the said facts it is urged that there is no convincing explanation on the part of the respondents why they have taken about four years in allowing inspection of the documents. Therefore, the delay in filing of the reply is not on his part, but it is due to inaction on the part of the respondents. Such delay is fatal, therefore, in the light of the judgment of the apex Court in the case of *P. V. Mahadevan Vs. MD. T. N. Housing Board*, (2005) 6 SCC 636, the charge sheet and continuation of enquiry is liable to be quashed.

10. It is further contended by him that the cause of action arose to the respondents for initiation of departmental enquiry where the present petitioner was posted on deputation in Housing and Environment Department. The said department had made the proposal to the Principal Secretary, GAD for initiation of the departmental enquiry as per Annexure R-1 dated 15.3.1999. Thereafter, it was pending with the GAD, but no early step to issue charge has taken. In the meantime as per note sheet dated 14.11.2002 the GAD was of the opinion that the enquiry ought to have initiation after report of the Lokayukt. Accordingly, the Urban Administration Department has issued a letter dated 1.10.2003 to the GAD agreeing by their decision and said that after the report of the Lokayukt if petitioner found guilty then only enquiry may be started. In the enquiry of Lokayukt Establishment petitioner was not found at fault, however, in the year 2004 Challan has been filed

against guilty officers leaving petitioner. As per note sheet of the GAD dated 7.6.2004 the said opinion of GAD and of Urban Administration Department has again been concurred. But surprisingly vide note sheet dated 7.5.2005 again a proposal was sent for initiation of departmental enquiry as there is no bar to initiate it, and impugned charge sheet has been issued on 18.7.2005; while the intimation to the Lokayukt Establishment of not filing of the Challan against petitioner, has been received to the department on 3.1.2006 as apparent from Annexure P-12. Thereafter, 3½ years' time has been taken in inspection of the documents. On 30.5.2006 it was decided that the matter be placed before Sub Committee of Ministers to drop the enquiry and the proposal to drop it was prepared on 7.8.2006 on account of exoneration of petitioner by the Lokayukt Establishment. Again vide note sheet dated 15.9.2006 it is said that the matter is not required to be referred before Sub Committee as the initiation of the enquiry is not based on the information of Lokayukt. Again a proposal dated 18.9.2006 was submitted for closing the enquiry thereupon the Chief Minister of the State put a remark on 1.5.2009 that after receiving the reply from the officer the enquiry may be dropped. Accordingly, the inspection was permitted after the delay of three and half years and on receiving reply, in place of dropping the enquiry, the presenting officer and inquiry officer has been appointed vide order dated 9.12.2009, and directed to hold the enquiry. In view of the said note sheets, learned senior counsel contends that the delay is not on his part but it is attributable to respondents only. He has placed reliance on a judgment of apex Court in the case of *State of Madhya Pradesh Vs. Bani Singh and another*, AIR 1990 SC 1308 and submitted that in said judgment the departmental enquiry initiated after 12 years on acquittal in criminal case, was found fatal and quashed the charge sheet. Reliance has further been placed on the judgment of apex Court in the case of *State of Andhra Pradesh Vs. N. Radhakishan*, AIR 1998 SC 1833, wherein the apex Court found that the departmental enquiry after the delay of six years is fatal and it has been quashed. Reliance has also been placed on Division Bench judgment of this Court in the case of *Sadashiv Shivram Garud and others Vs. Food Corporation of India and others*, 2003 (4) M.P.L.J. 183, wherein also this Court has quashed the charge sheet and continuation of such departmental enquiry on the ground of delay and laches. Two other judgments of Single Bench of this Court in the cases of *Jayant Kumar Satpute Vs. State of M.P. - W. P. (s) No.1479/2006* and *Satish Kumar Tiwari Vs. State of Madhya Pradesh and another*, W. P. (s) No.1243/2006, have relied upon; wherein also the departmental enquiry has been quashed on the ground of delay and laches.

11. It is further contended by Shri Chaphekar, learned Sr. Advocate that delay to initiate the departmental enquiry causing serious prejudice to him, because during such period he has denied grant of Senior Selection Scale, although incumbent juniors have extended such benefit. It is contended that the departmental enquiry of year of 1995 was pending, but in the year of 1999 Selection Scale was allowed,

at that point of time no such objection had taken, but at the subsequent stage of grant of senior selection scale the objection as raised due to bias, because his transfer from Indore Development Authority to Alirajpur has been challenged by him before this Court and the said petition was ultimately allowed, quashing his transfer. The reason to continue the protracted enquiry would clear, that the petitioner is the officer of the SAS Cadre of year 1986, while the officers of SAS Cadre up to year 1985 have already been granted I.A.S. When his promotion has fallen due, then after 15 years the departmental enquiry has been started against him. It causes serious prejudice, mental agony to the petitioner, however, in such circumstances the delay which causes the prejudice to the petitioner is fatal. Therefore, the charge sheet and the departmental enquiry may be quashed, and the direction to grant selection scale may be issued.

12. On the other hand Shir Vivek Patwa, Dy. G. A. submits that the enquiry by the Lokayukt Establishment for the said cause is a different action, then initiation of departmental enquiry, however, the respondent department has decided to continue with the departmental enquiry against the petitioner, even on exoneration by the Lokayukt Establishment as he was not innocent in the said enquiry. After taking such decision if departmental enquiry is initiated, for the serious lapses on his part, it cannot confer any right to him seeking quashment only on the ground of delay and laches. It is further submitted that the delay in continuation of the departmental enquiry is not on the part of respondents only, but it is attributable to petitioner also as he has filed reply after three and half years of issuance of charge sheet. Therefore, the petitioner himself is trouble shooter, and for his own doing he cannot embarked upon of delay on the part of the respondents. It is also contended by him that the departmental enquiry was initiated in the year 2005 by issuing the charge sheet and the Senior Selection Scale was allowed to the incumbent juniors later, however, his representations has rightly been rejected, as the recommendation of the screening committee has been kept in sealed cover, which is apparent from letter dated 15.6.2009 (Annexure P-19). It is contended that due to quashment of order of his transfer by this Court, there cannot be any bias to the department, however, the submissions as made by the petitioner are of no substance. At last it is submitted that so far as the State Administrative Services cadre of the year 1986 is concerned it is a matter of record and if the SAS officers of the year 1986 is under consideration it may be consider as per law. In view of the said it is urged that the petition filed by the petitioner may be ordered to be dismissed.

13. After hearing the rival submissions of counsel appearing on behalf of the parties and on going through the charge sheet Annexure P-6 dated 18.7.2005, it is apparent that the cause to initiate departmental enquiry arose on 30.5.1995 and the charge sheet has been issued after more than 10 years. On perusal of the record it reveals that the Urban Administration Department had made the proposal of initiation of departmental enquiry, vide letter dated 15.3.1999 Annexure R-1,

though show cause notice was issued to the petitioner on 16.8.1996 and reply thereof was filed by him on 14.10.1996, as apparent from the documents attached with Annexure R-1. There is no explanation why more than 2 ½ years have been spent by the Urban Administration Department to make a proposal to the parent department (GAD) to initiate departmental enquiry against petitioner. Thereafter in the note sheet of the GAD dated 20.9.2000 it was realized by them about 5 - 6 years delay has occurred in initiating departmental enquiry, and on the basis of the photocopies enquiry may be started. The proposed charges were framed by the Urban Administration Department, but ultimately on 14.11.2002 again it was decided that the enquiry should be started after obtaining report from the Lokayukt Establishment. Accordingly, a proposal was sent by the GAD to Urban Administration Department, which was approved by the Urban Administration Department, vide intimation dated 1.10.2003 (Annexure P-5). As per note sheet of the Minister dated 28.5.2004 it was further decided that the departmental action may be started only after receiving the report of Lokayukt Establishment, if delinquent found guilty, at present no action is expected against him. Thus, it is apparent that the GAD and Urban Administration Department, both have decided that after receiving the report from the Lokayukt Establishment, if the delinquent found guilty the departmental enquiry may be proposed against him. The said decision has again been concurred by the Minister of GAD vide its note sheet dated 28.5.2004 as well as by the Additional Secretary of the department vide its note sheet dated 7.6.2004. Surprisingly, a fresh note sheet had written by GAD for initiation of departmental enquiry dated 7.5.05 and in furtherance thereto a charge sheet was issued on 18.7.2005. It is to be noted here that the Lokayukt Establishment has not found any material or evidence against the petitioner to file Challan, while others found guilty. It has not been explained that under what circumstances earlier decision taken by the Urban Administration Department and the GAD vide Annexure P-5 dated 1.10.2003 has been reviewed and why the GAD has again decided to initiate the departmental enquiry. It is further seen from the record that after issuance of the charge sheet petitioner was called for the inspection of the documents vide letters dated 18.7.2005, 8.11.2005 and 30.12.2005, but on account of non-availability of the original record the inspection may not be possible. Thereafter, the petitioner was again called for inspection after three and half years as apparent from the document Annexure P-15. There is no explanation why three and half years time has been taken by the department in obtaining the certified copies from the Lokayukt Establishment, through the Urban Administration Department. It is undisputed that after inspection within 1 ½ month the reply has been filed by the petitioner keeping his right reserve to raise the points on availability of the original documents. In the meantime the GAD department has itself send a proposal dated 15.9.2006 for closer of the departmental enquiry by a Sub Committee and a further proposal for closing the enquiry dated 18.9.2006. As per note sheet of Chief Minister dated 1.5.2009, it is apparent that the enquiry should be dropped after receiving reply from the

concerning officer, then under what circumstances again the enquiry was started, it has not been explained. As per the GAD circulars Annexure P-22 and P-23, it is apparent that the departmental enquiry ought to have been completed maximum within the period of 14 months. In the present case the department has not explained why the Urban Administration department has taken four years in making proposal of initiation of departmental enquiry. It has further not explained why the GAD has taken six years thereafter in issuance of the charge sheet. Why three and half years time has been spent by the department to allow inspection of the documents has also not been duly explained. Thus no convincing explanation of such a delay is available in the return filed by the respondents. The stand taken in the return regarding initiation of departmental enquiry independent to the Lokayukt enquiry is no doubt true, but it is not explained why the department has not simultaneously initiated the enquiry proceedings in the year of 1995 itself. It is surprising that initiation of the departmental enquiry was on the proposal of the Urban Administration Department, as apparent from Annexure R-1 dated 15.3.1999, thereafter both the departments i.e. Urban Administration Department and GAD has decided that enquiry may be started after the report of the Lokayukt, and the GAD concurred it by note sheet dated 7.6.2004. In the meantime Lokayukt Establishment was not found any evidence against the petitioner, therefore, the Urban Administration Department has issued a letter Annexure P-14 dated 12.9.2006 and said that no action is proposed against petitioner. The GAD has acknowledged the same and the proposal was submitted on 18.9.2006 for closing of the enquiry. Thereafter, the Chief Minister as per his note sheet dated 1.5.2009 observed to drop the proceedings after taking reply. Thus Urban Administration Department after its decision dated 1.10.2003 and on receiving the report of the Lokayukt of exonerating of petitioner, has not made any proposal for initiation of the departmental enquiry. Nothing is available on record before this Court, what has persuade to GAD to initiate departmental enquiry again, though the cause of action relates to the posting of petitioner in Urban Administration Department, which was satisfied by the report of Lokayukt. Thus, there was no necessity to GAD to initiate the departmental enquiry contrary to their consent; the said conduct of the GAD has remain unexplained in the return.

15. In view of the foregoing discussion, it is apparent that there is a massive delay of 10 years in issuance of the charge sheet from the cause of action, and more than six years from the date of proposal (Annexure R-1) of the Urban Administration Department. The explanation of delay as submitted is not convincing in the opinion of this Court. It is further seen that after issuance of the charge sheet more than three and half years have been spent by GAD in permitting inspection of the documents, to which also no convincing explanation is on record. During such period the incumbent juniors have been allowed Senior Selection Scale keeping the recommendation of the petitioner in sealed cover. It causes serious prejudice for no fault of the petitioner. As per GAD circulars the

departmental enquiry ought to have been completed maximum within a period of 14 months. The said instructions have been issued with a view to avoid protracted enquiry proceedings. In the facts it is apparent that GAD had itself decided to not to hold departmental enquiry up till found guilty by the Lokayukt Establishment. Now after 15 years again the enquiry has been started arbitrarily. It is not disputed by the respondents that the SAS officers up to the year 1985 has been considered for grant of IAS cadre and the petitioner is of the year 1986, however, continuation of enquiry may seriously prejudice to his promotion prospects. Thus, inference can be drawn, of biased attitude of the GAD for the reasons best known to them. The said action is against their own circulars of avoiding protracted enquiry. The apex Court in the cases of *P. V. Mahadevan Vs. MD. T. N. Housing Board* (supra) *State of Madhya Pradesh Vs. Bani Singh and another* (supra) and *State of Andhra Pradesh Vs. N. Radhakishan* (supra) has held that if there is a delay in initiation of departmental enquiry and is not convincingly explained, such action is seriously prejudicial to the employee then the departmental enquiry may be quashed, on the ground of delay and laches.

16. In view of the foregoing discussion in the opinion of this Court there is an inordinate delay of 10 years in initiation of departmental enquiry and the explanation in this regard is not convincing; further the delay in continuation of the said enquiry for 4½ years has also not been properly explained, which cannot be attributable to petitioner, in view of the aforesaid facts. In the opinion of this Court at this stage continuation of the departmental enquiry causes serious prejudiced to petitioner, however, the charge sheet and the departmental enquiry is liable to be quashed. In view of the aforesaid discussion rejection of the representation for grant of Senior Selection Scale dated 15.6.2009 (Annexure P-19) is also liable to be quashed.

17. Accordingly, this petition is allowed and the Charge Sheet dated 18.7.2005 (Annexure P-6) is quashed, consequentially, the departmental enquiry is hereby quashed. The order of rejection of representation for grant of Senior Selection Scale dated 15.6.09 Annexure P-19 is also quashed, with a direction to the respondents to reopen the seal cover and to pass appropriate orders in the matter of grant of Senior Selection Scale to the petitioner. It is made clear here that if the petitioner found fit for grant to such benefit, it be extended to him at par to the incumbent juniors with in the period of three months. In the facts and circumstances of the case there shall be no order as to costs.

Petition allowed.

I.L.R. [2010] M. P., 2085

WRIT PETITION

Before Mr. Justice Shantanu Kemkar

6 May, 2010*

YOGESH TEMBHURNE

... Petitioner

Vs.

M.P. PROFESSIONAL EXAMINATION BOARD & anr.

... Respondents

Service Law - Appointment of Patwari - Petitioner not included in the select list for providing incorrect information - Held - When furnishing of the said information was only for the statistical purposes - Any bona fide mistake by the petitioner which was not with view to have some undue advantage could not have been made basis for not including the petitioner's name in the select list.

(Para 12)

सेवा विधि - पटवारी की नियुक्ति - याची द्वारा गलत जानकारी दिये जाने के कारण उसे चयन सूची में सम्मिलित नहीं किया गया - अभिनिर्धारित - जब जानकारी प्रस्तुत किया जाना केवल सांख्यिकीय उद्देश्य के लिये था - याची द्वारा की गयी कोई सद्भाविक त्रुटि जो कि कोई अनुचित लाभ लेने के लिये नहीं की गयी थी तो ऐसी त्रुटि को उसका नाम चयन सूची में शामिल न करने का आधार नहीं बनाया जा सकता था।

L.C. Patne, for the petitioner.

Vivek Sharan, for the respondent No.1.

Vivek Phadke, for the respondent No.2.

O R D E R

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

2. Aggrieved by non inclusion of his name in the select list issued by the first respondent M.P. Professional Examination Board (for short the Board) for appointment on the post of Patwari in the Office of the Collector (Revenue), District Ujjain the petitioner a candidate belonging to the Schedule Caste has filed this petition under Article 226 of the Constitution of India.

3. Briefly stated, on the basis of an advertisement issued by the Board inviting applications for appointment on the post of Patwari for various Districts of the State of Madhya Pradesh the petitioner submitted his application (Annexure R-1/2) for such appointment in Ujjain District, on the proforma prescribed by the Board for making the application. After receipt of his application the Board issued him the admit card (Annexure P/7) allowing him to appear in the examination. The petitioner appeared in the said examination and as per the result sheet (Annexure P/8) issued by the Board he secured 137.84 marks.

4. The grievance of the petitioner is that though he secured 137.84 marks his name has not been included in the select list. According to him in view of the marks obtained by him his name should have been placed at merit serial no.5 of

2086] Yogesh Tembhurne vs. M. P. Prof. Exam.Board [I.L.R.[2010]M.P., General Category select list and in Schedule Caste Category it should have been at merit serial no.1 of the select list. Thus according to him though he got merit position in the examination, the action of the Board in not including his name in the select list is illegal and arbitrary.

5. The first respondent Board has filed reply. It has been stated by the Board that the Patwari Selection Examination, 2008 was held to fill up District wise vacant posts of Patwari. Total posts to be filled up were 2194 for general vacancy and 124 posts were for backlog vacancies. At Ujjain District total 55 posts which were available were of general vacancy and no post was for backlog vacancy. Out of the said 55 posts, 14 posts were for Schedule Caste, 2 posts were for Schedule Tribe, 8 posts were for Other Backward Class and 31 posts were for Unserved Category.

6. It is the case of Board that in Column no.14 of the application form the petitioner furnished incorrect information. In the said column no.14 if the candidate is of Schedule Caste/Tribe Category he was required to mention that out of the three types of vacancies namely General Backlog or both the categories the proposal is for which Category of vacancy. However though for Ujjain District no post was available in backlog category vacancy and all the posts were of General vacancy, the petitioner mentioned for backlog vacancy. Thus according to the Board the petitioner did not fill up the application form correctly, in the circumstances his name has not been included in the select list.

6. Heard learned counsel for the parties.

7. From the averments made by the parties it is clear that undisputedly the petitioner secured 137.84 marks and he was entitled to be placed at serial no.5 of the merit list of General Category candidates in the select list issued by the first respondent. However his name has not been placed in the select list in view of his filling of Column no.14 of the form incorrectly.

8. In order to appreciate as to whether the decision of Board not to include the petitioners name in the select list is justified, it would be necessary to consider the nature of the information which has been wrongly furnished by the petitioner in the application form and the effect of such wrong furnishing of the information on his selection.

9. The relevant directives issued by the State Government for holding Patwari Selection Examination, 2008 on which both parties have placed reliance are extracted below:

2.1 ओ.एम.आर. आवेदन पत्र भरने की प्रक्रिया :-

चौखाने ☐ काले डाट पेन से एवं गोले ☐ में चाही गई जानकारी केवल एच.बी. पेंसिल से भरी जावे । चौखाने में केवल अंग्रेजी के कैपिटल लेटर तथा अंग्रेजी के अंक का प्रयोग करें। एक चौखाने में केवल एक अक्षर या एक अंक ही लिखा जाये। दो शब्दों के बीच में एक चौखाना छोड़े। त्रुटिवश गलत

जानकारी भरने पर उसे सफाई से मिटाकर सुधार कर लें। प्रविष्टियाँ भरने में हुई त्रुटियों के लिये अभ्यर्थी स्वयं जिम्मेदार होगा।

महत्वपूर्ण :

1- यदि ओ.एम.आर. आवेदन-पत्र की किसी कड़िका में बॉक्स में भरी गई एवं इससे संबंधित गोले में भर गई जानकारी में अंतर प्राया जाता है तो गोले में पेंसिल से भरी गई जानकारी को अंतिम माना जाएगा।

2- आवेदन पत्र जमा होने के उपरान्त ओ.एम.आर. फार्म में की गई प्रविष्टि को बदलने के संबंध में किसी भी प्रकार की पूछताछ या पत्र व्यवहार नहीं किया जाएगा।

3- अभ्यर्थियों को ओ.एम.आर. आवेदन पत्र में निर्देशानुसार अपना फोटो चिपकाकर एवं नियत स्थान पर हस्ताक्षर कर भेजना अनिवार्य होगा अन्यथा आवेदन निरस्त माना जायेगा। (फोटो के पीछे परीक्षा का नाम अभ्यर्थी अपना नाम, शहर एवं ओ.एम.आर. आवेदन-पत्र कमाँक अवश्य लिखें)

4- चयन परीक्षा 48 जिला मुख्यालयों पर आयोजित की जाएगी। आवश्यकता होने पर उम्मीदवारों की संख्या के आधार पर जिला मुख्यालयों से भिन्न स्थानों पर भी परीक्षा केन्द्र निर्धारित किए जा सकेंगे जिसकी जानकारी चयन परीक्षा के प्रवेश पत्र पर अंकित की जाएगी।

2.2 आवेदन पत्रों का परीक्षण/स्कूटनी :-

ओ.एम.आर. (OMR) आवेदन पत्र में आवेदन द्वारा सभी जानकारी नियम पुस्तिका को पढ़कर, समझकर भरना होगा। नियम पुस्तिका में दिये गये नियमों के अनुसार सम्मिलित होने की पात्रता तय करने की जिम्मेदार भी स्वयं आवेदक की होगी। OMR आवेदन पत्र में * से चिह्नित जानकारी के रिक्त होने पर आवेदक का परीक्षा का परीक्षा परिणाम घोषित नहीं किया जायेगा।

OMR आवेदन पत्र में किसी भी प्रकार की त्रुटि के सुधार के लिये पत्राचार मान्य नहीं होगा।

2.5 डुप्लीकेट टेस्ट एडमिट कार्ड (Duplicate TAC) :-

यदि किसी अभ्यर्थी को परीक्षा के पूर्व तक परीक्षा प्रवेश-पत्र (TAC) प्राप्त नहीं होता है, तो डुप्लीकेट टेस्ट एडमिट कार्ड मण्डल की वेबसाईट www.vyapam.nic.in से डाउनलोड (Download) कर सीधे परीक्षा में सम्मिलित हो सकता है।

नोट:-प्रवेश पत्र जारी होने के उपरांत त्रुटि के दृष्टिगोचर होने पर मण्डल उसे रद्द/निरस्त करने का अधिकार सुरक्षित रखता है।

10. Rule 2.1 provides that for the mistakes committed in filling entries in the form the candidate shall himself be responsible. Rule 2.2 provides that in the application form if the information which is required to be furnished as shown in asterisk (*) is not filled up, the result of the examination of such candidate shall

2088] Yogesh Tembhumne vs. M. P. Prof. Exam.Board [I.L.R.[2010]M.P.,
not be declared. Rule 2.5. provides that in case after issuance of the admit card if any mistake is noticed the Board shall have power to suspend or cancel the admit card.

11. Admittedly on submission of the form it was scrutinised by the Board. After scrutiny the petitioner was allowed by the Board to appear in the examination. It is also not in dispute that his result was declared. His name has not been shown in the select list for the reason that he furnished incorrect information. The said information required to have been furnished for the statistical purposes, in view of the specific foot note put by the Board in the application form. On going through the contents of the application form (Annexure R/1-2) it reveals that the information which was required to be furnished in * (asterisk), the same was to be furnished mandatorily for getting admission in examination and for declaration of result. The said foot note in application form provides that the other informations are only for the statistical purposes. Thus undisputedly the information required under column no. 14 which was not correctly furnished up by the petitioner, was only for the purpose of statistical use and the only object of seeking such information was for collecting the statistics. The furnishing of the same was not mandatory in nature as there is no * (asterisk) mark in column no. 14 of the application form.

12. Thus when according to the Board itself furnishing of the said information was only for the statistical purposes if by bonafide mistake the petitioner has incorrectly filled up the same which was not with view to have some undue advantage out of it and when it is also not the case of the Board in my considered view the same could not have been made basis for not including the petitioner's name in the select list. It is also pertinent to mention that the Board did not cancel the petitioner's application form on scrutiny on the basis of furnishing such incorrect information, on the contrary the Board issued the admit card and allowed him to participate in the examination and thereafter declared his result too. In such circumstances the action of the Board in not including his name in the select list is illegal and arbitrary. In the absence of allegation of suppression of material information or furnishing wrong information for deriving undue advantage, or furnishing incorrectly any mandatory informations, the impugned action of the Board cannot be justified.

13. As a result in my considered view the petition deserves to be and is hereby allowed.

14. The respondents are directed to include the petitioner's name in the select list of Ujjain District and are also directed to send him for Patwari training, treating him to be a selected candidate for the same. No orders as to costs.

Petition allowed.

I.L.R. [2010] M. P., 2089

WRIT PETITION

Before Mr. Justice Sanjay Yadav

10 May, 2009*

DURGA PRASAD

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

Criminal Procedure Code, 1973 (2 of 1974), Section 340 - Launch of prosecution - When not warranted - Held - An inadvertent statement with no ill motive is not sufficient and cannot form the basis for launching a prosecution u/s 340 of Cr.P.C. (Para 9)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 340 - अभियोजन का प्रारम्भ - कब न्याय संगत नहीं - अभिनिर्धारित - असावधानी पूर्वक किया गया कथन - जो किसी दुराशय से नहीं किया गया वह द.प्र.सं. की धारा 340 के अंतर्गत पर्याप्त नहीं है एवं अभियोजन प्रारम्भ किये जाने का आधार नहीं बन सकता है।

Cases referred :

AIR 1973 SC 2190, 1988(2) Crimes 124.

R.K. Sanghi, for the petitioner.

ORDER

SANJAY YADAV, J. :-Heard on admission.

2. A wrong statement alleged to have been made in an affidavit filed before Registrar, Public Trust cum Sub Divisional Officer, Jabalpur in a proceeding under Section 14 of the M.P. Public Trust Act, 1951 vide Annexure P/4 (10.3.2006) and Annexure P/5 (22.3.2006) leading to passing of the order dated 20.4.2006 whereby the permission has been granted to the applicant therein to sell 0.400 hectare of land being part of 0.796 hectare of Khasra No. 35/2 P.C 34 village Lamti is the cause for mandamus as sought in this writ petition under Article 226/227 of the Constitution of India that the "Hon'ble Court may be pleased to punish the Respondent No. 3 and 4 for filing false affidavits and any other relief that this Hon'ble Court deems fit and just may also be granted, or an appropriate writ/direction or order may be issued to the respondent No. 2 to enquire the matter again and may initiate proceedings under Section 340 of Cr.P.C. against the Respondent No. 3 and 4 and the order dated 20.4.2006 (Annexure P-6) may be declared a nullity being obtained by fraud."

3. The Statement which appeared in the affidavit, Annexure P/4 and P/5 respectively was:

5. " यह कि ट्रस्ट भूमि 0.796 है, पर किसी प्रकार का वाद न्यायालय में नहीं है ।"
(Annexure P/4)

"6. "यह कि ट्रस्ट के चार सदस्य शहर के बाहर रहते हैं ।"

(Annexure P/5)

4. Registrar, Public Trust, recording his satisfaction that the land in question is lying vacant and that there is loss of income as no agriculture activity is being carried out because of Urbanization (Construction of roads and houses) granted the permission on 20.4.2006 to sell the property in question.

5. Grievance of the petitioner is that, because of the wrong statement made by the applicants, i.e., respondent Nos. 3 and 4, permission was granted. It is urged that on the date when statement was made, a suit for declaration and injunction at the instance of respondent Nos. 3 and 4 and others was pending. It is urged that in the said suit instituted on 13.9.1989, the relief sought was for declaring the sale-deed dated 28.6.1988 executed by Bhuribai (since deceased) in favour of the petitioner herein as null and void.

6. Pertinent it is to note that, the suit was decreed on 29.8.2006 in favour of respondent Nos. 3 and 4 in the following term

45. अतः उक्त निष्कर्ष के फलस्वरूप वाद अंशतः स्वीकार कर आज्ञापत्र किया जाता है तथा निम्न आशय की डिक्री दी जाती है :-

(1) वादी मूर्ति राम जानकी मंदिर, जो कि लोक न्यास है, वादग्रस्त भूमि ख0न0-35/2 रकबा 1.214 हे0 (03 एकड़) स्थित मौजा लमती नंबर बंदोबस्त-642, तहसील व जिला जबलपुर का स्वामी है ।

(2) उक्त भूमि के संबंध में स्व0 भूरी बाई द्वारा दि0 28-6-88/14-7-88 को प्रति क्र0-1 दुर्गाप्रसाद पटेल के पास में निष्पादित पंजीकृत विक्रय पत्र प्रारम्भतः अवैध एवं शून्य है यह घोषित किया जाता है तथा उसके पश्चात वाद के लंबित रहने के दौरान दुर्गाप्रसाद पटेल द्वारा उक्त भूमि के संबंध में प्रति क्र0-2 से लेकर प्रति क्र0-23 तक को निष्पादित किये गये विक्रय पत्र प्रारम्भतः प्रभावहीन एवं शून्य है तथा उनसे उक्त प्रतिवादीगण को कोई स्वत्व प्राप्त नहीं होती है ।

(3) वादी प्रतिवादीगण से विवादित भूमि का आधिपत्य प्राप्त करने का अधिकारी है ।

(4) प्रतिवादीगण को विवादित भूमि का किसी भी प्रकार से अन्तरण करने या उस पर किसी भी प्रकार का निर्माण आदि करने से स्थाई रूप से निशेधित किया जाता है ।

(5) प्रतिवादीगण स्वयं का वाद व्यय वहन करेंगे तथा प्रति क्र0-1 वादी का वाद व्यय वहन करेगा ।

(6) अधिवक्ता शुल्क प्रमाणित होने पर नियमानुसार देय होगी ।

उक्तानुसार जयपत्र निर्मित हो ।

7. The petitioner is silent about as to whether the judgment and decree is subjected to challenge in higher forum.

8. Be that as it may, the question is whether the statement as it appear in the document Annexure P/4 and P/5 would attract the provisions of Section 340 of Cr. P.C. as the petitioner intends to invoke.

Section 340 Cr. P.C stipulates

“340. Procedure in cases mentioned in section 195. (1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,-

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a Court by sub-section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub-section (4) of section 195.

(3) A complaint made under this section shall be signed,-

(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;

(b) in any other case, by the presiding officer of the Court or by such officer of the Court as the Court may authorize in writing in this behalf.

(4) In this section, “Court” has the same meaning as in section 195.”

In *Santokh Singh v. Izhar Hussain and another* (AIR 1973 SC 2190), their Lordships were pleased to observe :

"11. Every incorrect or false statement does

not make it incumbent on the court to order prosecution. The court has to exercise judicial discretion in the light of all the relevant circumstances when it determines the question of expediency. The court orders prosecution in the larger interest of the administration of justice and not to gratify feelings of personal revenge or vindictiveness or to serve the ends of a private party. Too frequent prosecutions for such offences tend to defeat its very object. It is, only in glaring cases of deliberate falsehood where conviction is highly likely, that the court should direct prosecution.”

In *Vimla v. Ranjini Murugan and others* (1988 (2) Crimes 124) it is observed by learned Chief Justice, High Court of Madras:

“18. Now, the application filed by the petitioner is for making a complaint of offences under sections 193 and 199 of the Indian Penal Code. The crucial question which has to be decided is whether the petitioner who is not a party to the proceeding at all can be permitted to invoke the provision of section 340 of the Code of Criminal Procedure. The power under section 340 Cri. P.C. is a drastic power which makes certain conduct in relation to a judicial proceeding in the nature of making a false declaration or giving false evidence punishable. This power cannot be permitted to be utilized by a party to serve his own ends or to satisfy his own urge for revenge, as seems to have been done in the present case. The burden of proof of the petition of the petitioner is that the first respondent has married her husband and it was only with the intention of marrying her husband, that she secured a decree of divorce on false allegations. She also alleges that those false allegations were admitted by the second respondent not only to facilitate the granting of the divorce to the first respondent but also to facilitate the marriage of the first respondent with the husband of the petitioner. Assuming for a moment that she may have a valid grievance against the first respondent, if in fact a marriage has taken place between the first respondent and the husband of the petitioner which fact itself is still in dispute, it is difficult to see how the petitioner can be permitted to use the process of the court to ventilate her personal grievance. Proceeding under section 340 Cri.P.C. is not intended to serve personal ends of parties. The provisions are certainly not enacted to be utilized for the benefit of an individual much less they can be invoked by one who is not directly connected with the suit or the proceeding in relation to which the offence is alleged to have been committed. Assuming what the petitioner states is

correct, even if the granting of the divorce in favour of the first respondent has facilitated her alleged second marriage, the alleged injury inflicted upon the petitioner by virtue of the second marriage other husband cannot be directly attributed to the divorce granted to the first respondent. If the marriage between the first respondent and the second respondent had irretrievably broken down, about which there does not seem to be much doubt, and the second respondent did not want to contest the divorce proceedings, that was a matter essentially between the first and the second respondent and it was not for the petitioner to say whether the second respondent should have or should not have contested the divorce proceeding."

23. I may refer with advantage to two decisions of this Court in *Rangaswami v. Gunamal* and *K. Narayanswami v. T. Kolandaivelu in the Rangaswami's case* (supra) this Court pointed out that the bare fact that it was noticed later that false evidence was given in a proceeding will not be sufficient for concluding expediency of prosecution and that the danger of parties vindictively proceeding against their opponents by initiating proceedings under section 476 Cr.P.C. has to be kept in mind. In *Narayanawamy's case* (supra) this court pointed out that the bare fact that subsequently it was noticed that false evidence was given in a proceeding by itself will not be sufficient for concluding the expediency of prosecution. The learned Judge followed the decision of this Court in *Ramaswami's case* (supra). It was therefore pointed out that when an application is made under section 340 of the Code of Criminal Procedure, it cannot be allowed as a matter of course, and in considering the expediency of the matter, the Court must consider whether there is any ulterior object which the party seeking to invoke the power under section 340 Cri. PC wants to achieve indirectly by using the course as an instrument for its own ends."

9. Therefore, in view of above and the obtaining facts of present case an inadvertent statement with no ill motive is not sufficient and cannot form the basis for launching a prosecution under Section 340 Cr.P.C. 1973.

10. Regarding the relief that the order, dated 20.4.2006 (Annexure P/6) be declared a nullity, in the considered opinion of this Court, in absence of any material that the order is without jurisdiction, no interference is warranted.

11. In the result petition fails and is hereby dismissed in limine.

Petition dismissed.

2094] Ashish Kumar Shrivastava vs. Western Coal Fields Ltd. [I.L.R.[2010]M.P.,

I.L.R. [2010] M. P., 2094

WRIT PETITION

Before Mr. Justice K.K. Lahoti

22 June, 2010*

ASHISH KUMAR SHRIVASTAVA

... Petitioner

Vs.

WESTERN COAL FIELDS LTD. & anr.

... Respondents

Constitution, Article 226 - Compassionate appointment - Claimed to be adopted son - Adoption deed not registered - Consent of mother of petitioner for adoption not on record - Due to presence of natural son, adoption was not permissible - Adoption contrary to Ss. 5 & 11 of the Hindu Adoption and Maintenance Act, 1956 - Petitioner not entitled for compassionate appointment - Petition dismissed. (Paras 10, 14 & 16)

संविधान. अनुच्छेद 226 – अनुकम्पा नियुक्ति – दत्तक पुत्र होने का दावा – दत्तक विलेख पंजीकृत नहीं – दत्तक ग्रहण के लिए याची की माँ की सहमति अभिलेख पर नहीं – नैसर्गिक पुत्र की उपस्थिति के कारण दत्तक ग्रहण अनुज्ञेय नहीं था – दत्तक ग्रहण, दत्तक एवं भरण-पोषण अधिनियम, 1956 की धारा 5 एवं 11 के प्रतिकूल – याची अनुकम्पा नियुक्ति के लिए हकदार नहीं – याचिका खारिज।

Cases referred:

(1995) 5 SCC 673, AIR 1967 SC 109, (1980) 1 SCC 63, (2008) 13 SCC 119, (1980) 4 SCC 462.

Dinesh Upadhyaya, for the petitioner.

Greeshm Jain, for the respondents.

ORDER

K.K. LAHOTI, J.:-The Petitioner has sought following reliefs:-

"(i) Quash the impugned order dt. 19.12.2003 and 11.10.2005 Annexure P-1 and P-2 respectively.

(ii) Command the respondents to issue appointment order to the petitioner on compassionate ground.

(iii) And also be pleased to issue any other writ/order/direction deemed fit and proper in the facts and circumstances of the order."

2. Facts of the case are that the petitioner moved an application for his compassionate appointment on the ground that his adoptive mother Smt. Shantibai died in harness, so he be appointed on compassionate ground. Petitioner's adoptive mother Smt. Shantibai executed deed of adoption dated 19.5.1994 Annexure P/5 in favour of petitioner in which she acknowledged that her late husband Sahablal and she, both, had taken the petitioner in adoption in the childhood of petitioner in the presence of persons of Samaj. Petitioner was brought up by her and residing alongwith her. For confirmation of aforesaid, the adoption-deed

I.L.R.[2010]M.P.,] Ashish Kumar Shrivastava vs. Western Coal Fields Ltd. [2095 was executed. It is pertinent to mention that the deed is notarised and is not a registered document.

3. Smt-Shantibai died on 1.1.1995. Thereafter, petitioner moved an application for his compassionate appointment with the respondents. The claim was turned down vide order dated 19.12.2003 against which petitioner filed Writ Petition No.286/2004(s) which was disposed of finally on 22.6.2005 an order of this Court, thus:-

"In this petition, petitioner has assailed an order (P.1) passed by respondent no. 1 by which application filed by petitioner seeking compassionate appointment has been disallowed on the ground that he is not son of deceased employee Smt. Shantibai.

Perusal of the order (P.1) indicates that finding has been recorded in para 6 of the order that petitioner is not real son of the deceased Smt. Shantibai, however, claim of the petitioner was that he was adopted by deceased which aspect was required to be gone into by the respondents in objective manner and it was not the case of the petitioner that he was real son of the deceased Smt. Shantibai, thus, case requires reconsideration on the question whether petitioner was adopted son of the deceased employee. Let opportunity of hearing be granted to the petitioner; necessary enquiry be made by the respondents about the claim of the petitioner; let fresh reasoned order be passed after due enquiry within a period of 4 months.

Writ petition is allowed allowed to the extent indicated above.
Parties to bear their own costs as incurred."

4. Thereafter, petitioner moved a fresh representation Annexure P/1, but it was dismissed vide Annexure P/2, on following grounds:-

(i) That, the husband of Shantibai namely late Sahablal was working at Chandmata Colliery. He died on 15.10.1987. After his death, his wife Shantibai moved an application for her employment in which she disclosed Lakhanlal as her son and Laxmi Bai as her daughter. On the basis of said application, Shanti Bai was extended an employment by the respondents.

(ii) The adoption-deed dated 19.5.1994, Annexure P/5, which was produced by the petitioner, was found against the provisions of Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as "the Act") on the ground that Mahendra Kumar, the natural father of the petitioner was alive who had given petitioner in adoption to Smt. Shantibai. That the deed of adoption was not in accordance with section 5 of the said Act and cannot be recognised legally. That as per section 9 of the Act, if natural mother of the child is alive then her consent was also required. In the deed of adoption, there was no consent of natural mother.

(iii) That as per section 11 of the Act, if son is adopted then at the time of the adoption, no son, son's son or son's son's son should be alive. As per deed of adoption, late Sahablal was grand-father of the petitioner and father of petitioner or son of Sahablal namely Mahendra Kumar was alive, so during life-time of Mahendra Kumar, petitioner could not be adopted. Apart from this, on 19.5.1994, another son of Shantibai namely Deepak was also alive so at that time, such adoption was not permissible.

(iv) That as per the Rules of Company, only a dependent can be extended employment, only when dependent is unable to maintain himself. The dependent cannot claim compassionate employment as a mode of employment.

(v) That Smt. Shantibai died on 1.1.1995. In the year 1998, petitioner attained the age of majority. As per Rules of Company, the compassionate appointment can be granted immediately after the death, if claim is found as per the Rules. But after 7 years of death, such appointment cannot be accepted.

(vi) That the petitioner was neither the son of Shantibai nor legally adopted son, so he is not entitled for compassionate appointment.

On these grounds, application was rejected. Thereafter, again this petition has been filed seeking aforesaid relief.

5. Respondent on notice filed reply and reiterated the same contentions which are found place in the impugned order Annexure P/2.

6. Learned counsel for petitioner submitted:-

(i) That there was no son of Smt. Shantibai, so the petitioner was rightly adopted by Smt. Shantibai. There is no provision in Hindu Adoptions and Maintenance Act, 1956 restricting an adoption even in case step-son is alive.

(ii) That the Legislation in its wisdom has not prohibited in Section 11(i) for such an adoption. The Legislation in its wisdom has intentionally not included step-son in section prohibiting adoption of a son in case an adopted son is alive.

Stating aforesaid, it was submitted that the impugned order be quashed and the respondents be directed to extend compassionate appointment to the petitioner.

7. Shri Greeshm Jain, learned counsel appearing for respondents supported the impugned order. He submitted that the deed of adoption was invalid. Under Sections 5 and 11 of the Act, such adoption was not valid. Deed of adoption Annexure P/5 was not a valid document. On the basis of such unregistered-deed,

I.L.R.[2010]M.P.,] Ashish Kumar Shrivastava vs. Western Coal Fields Ltd. [2097 compassionate appointment cannot be directed. Reliance is placed to a judgment of the Apex Court in *Chairman, Bihar Rajya Vidyut Board Vs. Chhathu Ram* (1999) 5 SCC 673 and submitted that this petition may be dismissed.

8. Before considering the rival contentions of the parties, it would be appropriate if the glaring facts of the case may be stated. Late Sahadlal was an employee of the respondent Company. From his first wife, he was having a son namely Mahendra Kumar, natural father of petitioner. After death of his first wife, he married to Shantibai. After death of Sahablal, Shantibai applied for compassionate appointment which was granted to her and she was working as Safai Karmachari under the respondents. She died on 1.1.1995. As per case of the petitioner, petitioner was adopted during his childhood by Sahablal and Shantibai and he was brought up by Shantibai after the death of Sahablal. A document in the name of adoption-deed was also executed by Smt Shantibai on 19.5.1994 in which these facts were stated that Ashish Kumar, petitioner, was adopted in the childhood in the presence of reputed persons of Samaj by both of them (Smt. Shantibai and Sahiblal) and to give legal effect to the adoption, deed dated 19.5.1994 was executed. It was also stated that the document was executed by herself and by her step-son namely Mahendra Kumar who had agreed to give Ashish Kumar in adoption and Ashish Kumar was adopted by her. The deed was executed, witnessed and attested by a notary.

9. Shri Greeshm Jain, learned counsel for respondents relied on the judgment of the Apex Court in *Chhathu Ram* (supra) in which the Apex Court has held that without registration, no presumption can be drawn under Section 16 of the Act relating to validity of the adoption. In view of the law of the Apex Court, the deed cannot be seen for a valid adoption. Section 17(1)(b) of the Registration Act, 1908 provides that registration of such document was compulsory. The Apex Court in *Jahuri Sah & others Vs. Dwarika Prasad Jhunjhunwala* AIR 1967 SC 109 held that a deed of adoption merely records the fact that an adoption had taken place and nothing more. Such a deed cannot be likened to a document which by its sheer force brings a transaction into existence. It is no more than a piece of evidence and the failure of a party to produce such a document in a suit does not render oral evidence in proof of adoption inadmissible. In view of the law laid by the Apex Court even if a document was inadmissible, other evidence could have been taken into consideration in support of the contention of the petitioner that he was an adopted son of Smt. Shantibai.

10. Now the crucial question may be examined; whether the adoption of petitioner by Smt. Shantibai was legal in view of the specific provisions as contained in the Hindu Adoptions and Maintenance Act, 1956. Section 5 of the Act provides that after the commencement of the Act, no adoption shall be made by or to a Hindu except in accordance with the provisions contained in Chapter-II of the Act and any adoption made in contravention of the said provisions shall be void. Section 5 further provides that an adoption which is void shall neither create any right in the

2098] Ashish Kumar Shrivastava vs. Western Coal Fields Ltd. [I.L.R.[2010]M.P., adoptive family in favour of any person which he could not have acquired except by reason of the adoption, nor destroy the right of such person in the family of his birth.

Section 8 provides that a Hindu female whose husband is dead can adopt son or daughter in adoption. Section 9(2) of the Act provides that father has a right to give in adoption, but such right shall not be exercised save with the consent of the mother. In this case, there is nothing on record or in the document Ex.P.5 that consent of the mother of the petitioner was obtained in the adoption of the petitioner by Smt. Shantibai and in absence of the consent of the mother, even in document Ex.P.5, such adoption was not valid.

Section 11 specifically provides that if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of the adoption. The aforesaid provision specifically provides that in the presence of any of aforesaid, adoption cannot be made and in contravention of such provision, adoption shall be void.

11. In this case, it is not in dispute that Mahendra Kumar son of Sahablal from his first is alive. His relationship with Shantibai was of step son. During life time of Mahendra Kumar whether Shantibai could have adopted the petitioner is a question to be considered. Section 11(1) of the Hindu Adoptions and Maintenance Act specifically provides as under:-

Section 11. Other conditions for a valid adoption-In every adoption, the following conditions must be complied with-

(i) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son ((whether by legitimate blood relationship or by adoption) living at time of adoption;

The aforesaid provision specifically provides that if the adoption is of a son, the adoptive mother by whom the adoption is made must not have a Hindu son (whether by legitimate blood relationship or by adoption) living at the time of the adoption. This provides vital rule relating to law of adoption of a son and specifically prohibits that in case a living son or adopted son, no adoption can be made. This section provides the conditions which are absolute and non-compliance of it will render the adoption invalid.

12. Son is understood, in common parlance, a natural son born to a person after marriage. It is a direct blood relationship in which son is usually understood. Son usually connotes and includes not only natural son but also son's son namely grand-son and where personal law permits adoption, it also includes adopted son. Even illegitimate son may be treated as legitimate as for example son referred to in section 16 of the Hindu Marriage Act.

13. Whether a son or daughter includes step-son or step-daughter was before the Apex Court in *Shakutala Sawhney Vs. Kaushalya Sawhney* (1980) 1 SCC

63. The Apex Court considered the provisions as contained in section 15(1)(a) of the Hindu Succession Act, 1956 in para 3 of the judgment held thus:-

3. The question of law canvassed before us turns on the meaning of "son" and "daughter" in the setting of Section 15(1)(a) of the Act. Do the expressions include step-son and step-daughter or embrace only the son and daughter of the deceased female propositus? The text and the context and the application of traditional rules of statutory interpretation leave the position in an unsatisfactory dilemma of dual import. Even an equitable approach may not necessarily help reach a just solution, because equity shifts as the situation varies, as illustrations presented to us convinced us. Thus, the problem is a little tricky and may well arise frequently. Contradictory positions already taken by different High Courts add to the difficulty and result in the deleterious uncertainty of the law which may well incite, as it has done here, close relations to quarrel over property. Blood may be thicker than water, but wealth breaks all relations in a world of material value sets. The Supreme Court may, when the High Courts disagree, resolve the logomachic conflict by exercising its preference guided by the language and the milieu and following the customary canons of statutory interpretation. While its decision will be binding on account of Article 141 of the Constitution, it may still be fallible because the intendment of Parliament is best brought out by legislative clarification. In the present instance, we have a hunch that the specific point of claim by step-sons and step-daughters to inherit to the estate of a deceased female has escaped Parliament's attention while fashioning the legislation. This is not surprising when we appreciate the push and pressure, hurry and worry of law-making modalities. In such a situation, when a sharp conflict has shown up in the rulings of courts, the matter should not be left in doubt or to forensic-linguistic exercises but must be settled by legislative action on the part of Parliament, making explicit its policy on this branch of the Hindu Succession Act. Inaction leads to more litigation, speculation and compulsion for judicial legislation by the Supreme Court. Drafting lapses are understandable but when differences of interpretation come into the open, delay in correctional parliamentary performance is fraught with negative litigative potential. We are hopeful that the Indian draftsmen will disprove the old English jingle:

"I'm the parliamentary draftsman
I compose the country's laws
And of half the litigation
I'm undoubtedly the cause."

The Apex Court left the question open to be considered by the Parliament. Section 11 of the Act includes the son by legitimate blood relationship. The legitimate blood relationship has been specifically used in Section 11 of the Act. The son by pre-deceased wife of Sahablal was step son of Shantibai. For all purposes, he would succeed the property of Sahablal and also of Shantibai. During life time of male issue, whether an adoption can be made has been considered by the Apex Court *Salekh Chand Vs. Satya Gupta* (2008) 13 SCC 119 wherein the Apex Court in para 21 of the judgment held thus:-

"it is not disputed that even under the old Hindu Law, adoption during life time of a male issue was specifically prohibited. In addition, I have observed that such an adoption even if made would be contrary to the concept of adoption and purpose thereof, and reasonable. Without entering into the arena of controversy, whether there was such a custom, it can be said even if there was such a custom, the same was not a valid custom."

14. Now the case may be examined from a different angle. Adopted son of Shantibai shall be treated as an adopted son of her husband Sahiblal and of Shantibai. When Sahiblal is having a natural son namely Mahendra Kumar, then a second son cannot be adopted by his second wife. Apparently in the presence of a natural son namely Mahendra Kumar, Shantibai was not entitled to adopt petitioner Ashish Kumar. Apart from this, the adoption Deed of Shantibai Annexure P-5 specifically refers that the petitioner was adopted by her during the life time of her husband Sahiblal. In the set of these facts, apparently the adoption of petitioner by Shantibai was not legal. The Apex Court in *Shanti Bai vs. Miggo Bai* [1980(4) SCC 462] considering the question of adoption by a widow under Banaras School of Hindu Law held that the adoptive mother can take in adoption to any one with the authority of her deceased husband.

15. In this case as stated hereinabove, though Shanti Bai stated that petitioner was adopted during the life time of Sahiblal by Sahiblal and Shantibai in the presence of natural son of Sahiblal namely Mahendra Kumar, such adoption was not permissible.

16. In view of the aforesaid, Shantibai was not entitled to adopt the petitioner herein during life time of Mahendra Kumar, son of first wife of her husband. The aforesaid adoption was contrary to Section 11(i) of the Act. In view of the aforesaid, if the respondents turned down the case of the petitioner on the ground that he was not an adopted son of Shantibai and was not entitled to seek compassionate appointment, no fault is found. This petition is found without merit and is accordingly dismissed with no order as to costs.

Petition dismissed.

I.L.R. [2010] M. P., 2101

WRIT PETITION

Before Mr. Justice R.S. Jha.

02, July, 2010*

GURUDAYAL GUPTA

... Petitioner

Vs.

SATPURA NARMADA KSHETRIYA

GRAMIN BANK, CHHINDWARA & anr.

... Respondents

Service Law - A lower stage in the incremental scale - Meaning - Held
- It cannot be given a restrictive meaning or be interpreted as "one lower stage in the incremental scale" - "A lower stage in incremental scale" can only mean any one of the lower stages in the incremental scale including the lowest and that is the only meaning that can be assigned to the rule. (Para 15)

सेवा विधि - वेतनमान के निम्नतर प्रक्रम - अर्थ - अभिनिर्धारित - इसे संकुचित अर्थ नहीं दिया जा सकता अथवा "वेतनमान के एक निम्नतर प्रक्रम" के रूप में अर्थान्वयन नहीं किया जा सकता - वेतनमान के निम्नतर प्रक्रम का अर्थ वेतनमान के किसी भी निम्नतर प्रक्रम जिसमें निम्नतम प्रक्रम भी सम्मिलित है, से हो सकता है एवं इसका यही एकमात्र अर्थ नियम को दिया जा सकता है।

Cases relied upon :

(1999) 7 SCC 739, (1999) 1 SCC 759, 2004-II-LLJ 858 (deferred).

Akash Chaudhary, for the petitioner.

Ashosh Shroti, for the respondents.

ORDER

R.S. JHA, J. :-The petitioner has filed this petition being aggrieved by order dated 25-3-1996 and order dated 23-11-1995 by which two separate punishments have been imposed upon the petitioner.

2. The brief facts leading to the filing of the present petition are that the petitioner was working in the establishment of the respondent-bank as senior clerk/cashier in Sohagpur Branch of District Hoshangabad. On 10-8-1990/15-9-1990 a charge sheet was issued to the petitioner levelling six charges upon him. The first charge related to misbehaviour with his senior officer, the second charge related to an incident when the petitioner snatched and tore a draft, the third charge was of refusing to sign the manifold, the charge No. 4 was dereliction and negligence in performance of duty, charge No. 5 was to the effect that the petitioner refused to carry out orders without being given the same in writing and the charge No. 6 was that his behaviour with his colleagues was not proper.

3. The petitioner filed his reply to the charge sheet and thereafter a duly constituted departmental enquiry was held against him and an enquiry report was submitted

by the enquiry officer on 18-9-1995 in which charges No. 1, 2, 3 and 5 were found proved while charges No. 4 and 6 were not found proved. The enquiry officer submitted his report to the disciplinary authority with a recommendation for imposing punishment of removal from service. After giving a notice to the petitioner the disciplinary authority passed the impugned order dated 25-3-1996 imposing a punishment of reduction to the minimum of the grade upon the petitioner. It is stated by the learned counsel for the petitioner that he did not file any departmental appeal against the order dated 25-3-1996 and has directly approached this Court by filing the present petition.

4. It is further stated by the learned counsel for the petitioner that during the pendency of the first departmental enquiry a second charge sheet was issued to the petitioner on 9-8-1991 levelling five charges upon the petitioner all being related to misbehaviour. There were allegations against the petitioner of misbehaviour with the Branch Manager of the respondent-bank on various instances and of leaving the office premises before the work was over by forcefully making wrong entries in the attendance register. The enquiry officer submitted a report in respect of the aforesaid charges exonerating the petitioner but the disciplinary authority recorded a desert note on 5-10-1995 and issued a notice in that respect to the petitioner and thereafter by the impugned order dated 23-11-1995 imposed a punishment of withholding of one increment for one year non-cumulatively after holding that charges No. 1, 2, 4 and 5 stood proved on the basis of the evidence and additional documents on record. The petitioner filed an appeal against the order dated 23-11-1995 which was also dismissed by order dated 14-3-1996.

5. It is submitted by the learned counsel for the petitioner that the impugned order dated 25-3-1996 imposing punishment of reduction to the minimum of grade and the second impugned order dated 23-11-1995 imposing a punishment of withholding one increment for one year deserve to be quashed as the impugned orders suffer from non-application of mind and non-appreciation of the evidence on record and also on account of the fact that the punishment imposed upon the petitioner is grossly disproportionate to the misconduct alleged to have been committed by the petitioner. The learned counsel has also assailed the order dated 25-3-1996 on the ground that the punishment imposed of reduction to the minimum of the grade is not prescribed by the rules and is therefore contrary to law. It is also submitted that the charges per se do not constitute a misconduct and, therefore, even if they are found proved, no punishment could have been imposed upon the petitioner.

6. Per contra, the learned counsel appearing for the respondents submits that there is sufficient evidence on record to establish the charges against the petitioner and that in view of the established charges the punishment imposed upon the petitioner is commensurate to the misconduct committed by the petitioner. It is submitted that this Court does not sit over disciplinary proceedings as an appellate authority and, therefore, the reappraisal of evidence sought for by the petitioner

is not permissible in law. The learned counsel for the respondents submits that the impugned orders of punishment being based on cogent evidence on record do not warrant any interference by this Court. It is further submitted that the penalty imposed upon the petitioner by order dated 25-3-1996 is specifically within the purview of regulation 30(c) of the Staff Service Regulations, 1980 governing the services of the employees of Kshetriya Gramin Bank, Hoshangabad, therefore, the petition filed by the petitioner being meritless deserves to be quashed.

7. I have heard the learned counsel appearing for the parties at length and have also perused the record of the departmental enquiry which has also been produced before this Court.

8. It is settled law that interference by this Court in disciplinary proceedings is limited to cases of no evidence., perversity and wednesbury unreasonableness as has been held by the Supreme Court in the cases of *Yoginath D. Bagde Vs. State of Maharashtra and another* (1999) 7 SCC 739 and *Apparel Export Promotion Council v. A.K.Chopra*, (1999) 1 SCC 759.

9. In the instant case it is submitted by the learned counsel for the petitioner that there is no evidence on record to establish any of the charges against him much less charges of misconduct and, therefore, the impugned orders deserve to be set aside.

10. The respondents in the return have filed the entire proceedings including the statements of witnesses a perusal of which indicates that there is material on record to substantiate the charges against the petitioner which has been analysed in detail in the enquiry report and in such circumstances as this Court is not required to reappraise or reappraise the evidence and arrive at a different conclusion when the disciplinary authority, with due application of mind to the facts, documents and the evidence on record, has arrived at a conclusion which is reasonably possible. In such circumstances, the present case cannot be said to be one of no evidence or perversity. The conclusions recorded by the authorities are also in accordance with and in consonance with the documents and evidence on record and cannot be said to be suffering from any wednesbury unreasonableness.

11. It is stated by the learned counsel for the petitioner that the punishment imposed upon the petitioner is not prescribed by the rules and is beyond the purview thereof and as such deserves to be set aside. The learned counsel submits that regulation 30(c) empowers the authority to impose punishment of "degradation to a lower post or grade or to a lower stage in the incremental scale". It is submitted by the learned counsel for the petitioner that the regulation only permits the authority to impose a punishment of lowering by one stage in the incremental scale and not to the minimum of the scale as the use of "a" before the words "lower stage" indicates that the lowering can only be by one stage. The learned counsel has sought support for the aforesaid submission by relying upon a judgment of the Rajasthan High Court rendered in the case of *Satya Narain Gupta v. UCO Bank and others*, 2004-II-LLU 858.

12. The learned counsel for the respondents, on the other hand, submits that the rule permits the authority to impose a punishment of lowering down the grade of an employee to any of the stages in the incremental scale and "a" used in the regulation shall include the plural in view of the provisions of Section 13(2) of the General Clauses Act, 1897. It is submitted that the regulation empowers the authority to reduce the scale of an incumbent to any of the lower stages in the incremental scale.

13. In the case of *Satya Narain Gupta* (supra) the relevant regulation that was considered by the Rajasthan High Court in paragraph 26 was in similar terms and provides imposition of punishment to reduction to a lower grade of post or to a lower stage in a time scale. The Court in paragraph 47 went on to hold that the rule meant reduction by only one stage from the stage the petitioner at the relevant point of time was working and not on the lowest stage.

14. I am in respectful disagreement with the judgment relied upon by the learned counsel for the petitioner of the Rajasthan High Court in the case of *Satya Narain Gupta* (supra). The issue involved in the present petition basically involves interpretation of the word "to a lower stage in the incremental scale" as the rule permits imposition of a punishment of degradation to a lower stage in the incremental scale. A bare reading of the regulation indicates that the words "a lower stage" are followed by the words "in the incremental scale". Contrary to popular belief "a" does not mean "one". On the contrary grammatically speaking "a" is an indefinite article and is not a definite one. One of the meanings assigned to it in the Oxford Advanced Learner's Dictionary, Seventh Edition is any or every. P. Ramnath Aiyar's Advanced Law Lexicon, 3rd Edition states "a" is often used as equivalent to "any" (see in re, Sanders, 54 LIQB 331).

15. In view of the aforesaid, the words "a lower stage in the incremental scale" can only mean to any one of the lower stages in the incremental scale. In my considered opinion it cannot be given a restrictive meaning or be interpreted as "one lower stage in the incremental scale". Had the rule making authorities intended to make the rule a restrictive one, they would have clearly stated by "one" stage in the incremental scale instead of making an open ended rule by stating a lower stage in the incremental scale. "A lower stage in the incremental scale" can only mean any one of the lower stages in the incremental scale including the lowest and that is the only meaning that can be assigned to the rule. In view of the aforesaid interpretation, I am in respectful disagreement with the judgment of Rajasthan High Court rendered in the case of *Satya Narain Gupta* (supra). At the same time I have taken a view that the regulation empowers the authority to impose a punishment of lowering down to any one of the lower stages in the incremental scale and not to more than one lower stage at the same time, i.e. only one punishment at a time the reliance placed by the respondents on rule 13(C) of the General Clauses Act is misplaced and cannot be accepted.

16. As I have interpreted the regulation to mean degradation to any one of the lower stages in the incremental scale which also includes the lowest of the scale, in my considered opinion the punishment of reduction to the minimum of the scale imposed upon the petitioner is within the purview of Regulation 30(c) of the Regulations governing the petitioner's services and, therefore, cannot be found fault with as it is within the power of the authority to impose such punishment.

17. It is next contended by the learned counsel for the petitioner that the impugned order dated 23-11-1995 imposing punishment of withholding one increment for one year was assailed by the petitioner in appeal which was heard and decided by the same authority of the Bank who had imposed the penalty and who is the disciplinary authority.

18. The respondents, in rebuttal of the aforesaid contention, have stated that the appellate authority of the petitioner is the Board of the Bank and the Chairman of the Bank who is the disciplinary authority of the petitioner is also Chairman of the Board of Directors which is the appellate authority., however, at the time when the petitioner's appeal was taken up for consideration by the Board, the minutes clearly state that the Chairman of the Bank excluded himself from the proceedings and in such circumstances in view of the aforesaid factual position, the contention of the petitioner to the contrary also does not merit consideration as it is in fact the Board of Directors who have duly considered and rejected the appeal filed by him and not the Chairman.

19. In view of the aforesaid facts and circumstances of the case I do not find any ground to interfere with the impugned orders dated 25-3-1996 and 23-11-1995, therefore, the petition filed by the petitioner being meritless is accordingly dismissed. In the facts and circumstances of the case there shall be no order as to costs.

Petition dismissed.

I.L.R. [2010] M. P., 2105

WRIT PETITION

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

16 July, 2010*

MOHD. YUNUS & ors.

... Petitioners

Vs.

DEVJANI & ors.

... Respondents

A. Civil Procedure Code (5 of 1908), Order 12 Rules 2, 2A, 3A & 4 - *Admissions of facts and documents - Stage at which it is permitted - Held - For admission of facts, the period has been specified, while for admission of the documents no such period has been specified either under Order 12 Rule 2 or 3A of CPC or in the Civil Courts Rules and Orders.* (Para 9)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 12 नियम 2, 2ए, 3ए व 4 – तथ्यों एवं प्रलेखों की स्वीकृति – अनुज्ञात किये जाने की अवस्था – अभिनिर्धारित – तथ्यों की स्वीकृति हेतु अवधि विनिर्दिष्ट की गयी है, जबकि दस्तावेजों की स्वीकृति हेतु ऐसी अवधि न तो सिविल प्रक्रिया संहिता के आदेश 12 नियम 2 में और न तो 3ए में अथवा न ही दीवानी न्यायालय नियम एवं आदेश में विनिर्दिष्ट है।

B. Civil Procedure Code (5 of 1908), Order 12 Rule 2 - Admission of document - Stage at which it is permitted - Held - The admission of a document may be made by the parties at any stage, if permitted by the Court. (Para 9)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 12 नियम 2 – दस्तावेजों की स्वीकृति हेतु अनुज्ञात अवस्था – अभिनिर्धारित – यदि न्यायालय द्वारा अनुमत हो तो, पक्षकारों द्वारा दस्तावेजों की स्वीकृति किसी भी अवस्था में की जा सकती है।

Case relied upon :

AIR 1980 P&H 139.

Vikas Pandey, for the petitioners.

Mahendra Sharma, for the respondent Nos.1 to 8.

ORDER

J.K.MAHESHWARI, J. :-The petitioners (defendants 1 to 4 and 6 to 10) have filed this petition under Article 227 of the Constitution of India assailing the orders passed by 2nd Civil Judge Class-II, Sihora in Civil Suit No.48-A/2008 dated 24/10/2009, by which the application filed by the plaintiffs under Order 12, Rule 2 of the Code of Civil Procedure has been allowed and the order dated 01/01/2010, by which the application filed by the petitioners under Section 151 of the Code of Civil Procedure seeking direction to produce the evidence of defendant No.5 first has been rejected.

2. The plaintiffs/respondents 1 to 8 have filed a suit seeking declaration of title, possession and permanent injunction against the petitioners and respondent No.9 with respect to the land of Mouza Muskuri, Nazool Bandobast 687/639 Patwari Halka No.50/78, Division Khitola, Tahsil Sihora, District Jabalpur of Khasra No.100 area 1.084 hectare (hereinafter referred to as 'the disputed land'). The said land was purchased by defendant No.5 (respondent No.9-Fatima Bi) by registered sale deed dated 8/2/1955. After Bandobast (settlement) Khasra number was changed as 116 and 121. It is further averred that the predecessor in title Fatima Bi has executed a sale deed on 12/7/1989 on payment of consideration of Rs.13,000/- in the name of father of plaintiffs namely Ramtahal S/o Batiram Patel and delivered the possession of the disputed land. However, the plaintiffs who are the wife and sons of Ramtahal have become absolute owners after his death. Defendants 1 to 4 and 6 to 10 have prepared a document with the forge signature of the predecessor Fatima Bi of transfer in their favour of the said land by unregistered document. It is said that the valuation of the said land while executing the sale deed in favour of the plaintiffs in the year 1989 was Rs.13,000/-. However,

any unregistered document of valuation more than Rs.100/- does not confer the title by transfer as per Section 17 of the Registration Act, 1908. It is further said that on the basis of such a document mutation was ordered in the name of defendants 1 to 4 and 6 to 10 without following the rules, therefore, the said mutation is invalid. It is also averred that on the basis of the said mutation, sale deeds which were executed by defendants 1 to 4, in favour of defendants 6 to 10 are void ab- initio. However, no title of the disputed land can be transferred by defendants 1 to 4 in favour of defendants 6 to 10 by executing various sale deeds. In view of the said averments, prayer is made for declaration of title on the disputed land and to declare the sale deed, if any executed, as void and for delivery of possession of the said land in favour of the plaintiffs seeking injunction not to alienate the disputed land by demolishing the construction, if any.

3. Defendants 1 to 4 and 6 to 10 have filed a joint written statement stating that the real owner of the disputed land is Mohd. Yunus S/o Mohd. Yusuf who had purchased the said disputed land and take over the possession in the year 1955. The said land has been transferred by him in favour of defendants 1 to 4, therefore, they are the real owners of the said property and the sale deed has been executed in favour of defendants 6 to 10, however, the plaintiffs do not have any title or right in the disputed land. It is also stated that the suit for declaration, possession is barred by time. The valuation has not been properly done and, therefore, on this count also the suit is liable to be dismissed.

4. Shri Vikas Pandey, learned counsel appearing on behalf of the petitioners has vehemently argued that the application under Order 12 Rule 2 of the Code of Civil Procedure filed by the plaintiffs to admit the documents i.e. sale deeds Ex. P/1 and P/2 from defendant No.5 after recording the evidence of the plaintiffs has been filed with a collusion and at a belated stage, which is liable to be dismissed. He has placed reliance on a judgment of *Balwant Singh Gill and others V. Gurdev Singh Brar and others*, AIR 1980 Punjab and Haryana 139. It is urged that filing such an application for admission of documents at such belated stage is against the scheme of the Code of Civil Procedure. It is further urged that defendant No.5 is in collusion with the plaintiffs who has admitted those documents in reply to such an application. The trial Court without considering such objection has allowed the prayer as made by the plaintiffs. It is also contended by him that the application filed by the defendants under Section 151 to call defendant No.5 to produce his evidence first has been rejected without any plausible reason. It is said that defendant No.5-Fatima Bi has executed a sale deed in favour of the plaintiffs as alleged in the suit. She has admitted the documents on filing an application by the plaintiffs, however, she is a colluding party with the plaintiffs. In such circumstances, her statement should be recorded first thereafter the remaining defendants may be allowed to lead their evidence. Therefore, the application filed by the defendants under Section 151, CPC may be allowed and the trial Court may be directed to first record the evidence of defendant No.5.

5. Per contra, Shri Mahendra Sharma, learned counsel appearing on behalf of the respondents/plaintiffs has drawn attention of this Court that defendant No.5 had proceeded ex-parte, however, an application was filed on 22/4/2009 to set aside the ex-parte proceedings, which was allowed as per order dated 19/6/2009. Thereafter the plaintiffs have filed an application on 23/9/2009 under Order 12 Rule 2, CPC for admission of the documents i.e. sale deed executed in her favour on 28/1/1957 (Ex.P/2) and the sale deed executed by her in favour of the plaintiffs on 12/7/1989 (Ex.P/1). In such circumstances, there is no delay to move such an application for admission of the documents. The trial Court has duly considered all the aspects while passing the order dated 24/10/2009 and rightly allowed the application. It is further contended that the application under Section 151, CPC filed by the defendants to produce the evidence of defendant No.5 first has rightly been rejected because while passing the order, it is observed by the trial Court that all defendants may simultaneously file their affidavits. In view of the aforesaid, the trial Court has not committed any error to the orders impugned.

6. After having heard learned counsel appearing for the parties, it is not in dispute that documents dated 28/1/1957 (Ex.P/2) and document dated 12/7/1989 (Ex.P/1) have been exhibited by the plaintiffs. Ex.P/2 is a document executed in favour of defendant of the disputed land while Ex.P/1 is the sale deed executed in favour of plaintiffs by defendant No.5. It is also not in dispute that defendant No.5 was proceeded ex-parte in the case and by moving an application, ex-parte proceedings were set aside as per order dated 19/6/2009 and in the meantime, the evidence of the plaintiffs were closed. The application under Order 12 Rule 2, CPC has been filed by the plaintiffs on 23/9/2009 seeking admission of the said documents from defendant No.5. It has been admitted by her by filing reply and affidavit before the trial Court.

7. Section 30 of the Code of Civil Procedure confers powers to the Court to pass the orders if necessary or reasonable for admission of the documents and the facts, as per Order 12 of the Code of Civil Procedure. To appreciate the rival submissions of the learned counsel for the parties, it would be necessary to reproduce the relevant legal provisions of Order 12 Rule 2, 2A, 3A and 4 of the Code of Civil Procedure.

“1.

2. **Notice to admit documents.-** Either party may call upon the other party to admit, within seven days from the date of service of the notice any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense.

2A. Document to be deemed to be admitted if not denied after service of notice to admit documents.- (1) Every document which a party is called upon to admit, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of that party or in his reply to the notice to admit documents, shall be deemed to be admitted except as against a person under a disability:

Provided that the Court may, in its discretion and for reasons to be recorded, require any document so admitted to be proved otherwise than by such admission.

(2) Where a party unreasonably neglects or refuses to admit a document after the service on him of the notice to admit documents, the Court may direct him to pay costs to the other party by way of compensation.

3A. Power of Court to record admission.- Notwithstanding that no notice to admit documents has been given under rule 2, the Court may, at any stage of the proceedings before it, of its own motion, call upon any party to admit any document and shall, in such a case, record whether the party admits or refuses or neglects to admit such document.

4. Notice to admit facts.- Any party, may, be notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party to admit, for the purposes of the suit only, any specific fact or facts, mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs:

Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion in favour of any person other than the party giving the notice."

8. As per Order 12 Rule 2 of the Code of Civil Procedure, either party may call upon the other party to admit the document within seven days from the date of service of the notice, saving all just exceptions. It has further been specified that on refusal or neglect for such admission the cost to prove any such document shall be paid by such party irrespective to the result of any suit. Under Order 12 Rule 3A, CPC the Court is empowered that in absence of moving an application under Rule 2 of Order 12, CPC at any stage of proceedings, such power may be exercised for admission of the document by the Court.

9. As per sub clause (1) of rule- 143 of Civil Courts Rules and Orders, the Court is bound to take such recourse on appropriate occasions and to pass appropriate order as per the procedure prescribed therein. Sub-clause (4) of Clause 143 emphasis the duty of the Court with the aid of Rule 3A of Order 12, CPC. In default of exercise of such power, the District Judge, while having inspection of the Court, may take note of the working of the Judge for the purpose of systematic and effective implementation of the provisions of law. In view of the foregoing legal position, it is apparent that invocation of the powers of the Court to record admission has been implicit under Rule 3A of Order 12, CPC while under Rule 2 of Order 12, CPC, the parties to the suit are free to take recourse on admission by issuing a notice. Emphasis has been added in the Civil Courts Rules and Orders for strict adherence of such procedure. It is to be noted here, that for the purpose of Rule 2 of Order 12, stage has not been specified while for admission of the facts under Rule 4 of Order 12, CPC such procedure is required to be followed not later than nine days before the date of hearing fixed by the Court. Thus, for admission of facts, the period has been specified while for admission of the documents no such period has been specified either under Order 12 Rule 2, or 3A of CPC or in the Civil Courts Rules and Orders. In view of the foregoing discussion, it is apparent that the admission of a document may be made by the parties at any stage, if permitted by the Court.

10. In the present case, the documents which have been exhibited, have been admitted by defendant No.5 after setting aside the ex-parte proceedings against him on an application moved by the plaintiffs, which is allowed. However, in the opinion of this Court, the trial Court while passing the order dated 24/10/2009 allowing the application under Order 12 Rule 2, CPC of the plaintiffs has not committed any error. In fact the trial Court has rightly observed the procedure as prescribed under the law. The judgment of *Balwant Singh Gill and others* (supra) relied upon by the petitioner is having no application in the present case as it deals the issue of Order 12 Rule 4 of CPC i.e. admission of facts. The language of Order 12 Rule 4 of CPC makes it clear that the admission of the facts may be made by any party by notice in writing at any time not later than nine days before the day fixed for hearing. Thus, while admission of the facts the parties are required to issue notice for admission of the facts within nine days from the date of hearing. While under Order 12 Rule 2 of CPC no such time has been specified. Therefore, the admission of the documents may be made at any stage of the suit.

11. Now Issue of the rejection of application filed by the defendants under Section 151, CPC, whereby defendants 1 to 4 and 6 to 10 have made a prayer to lead the evidence of defendant No.5 first, requires consideration.

12. In the present case, the plaintiffs are claiming their title on the basis of the sale deed executed by defendant No.5 on their favour. The plaintiffs' evidence has now been closed and the case has been fixed for defendants' evidence. Defendant No.5 has admitted documents Ex.P/1 and P/2. However, if the evidence

of defendant No.5 has been adduced first, it would not cause any prejudice to either party. On perusal of the order impugned dated 1/1/2010, it is apparent that the trial Court has directed to produce the affidavits of the defendants. However, it is suffice to observe that on filing the affidavit by defendant No.5, her cross-examination may be made first on such affidavit prior to the cross-examination on the affidavits of remaining defendants.

13. Accordingly, the petition filed by the petitioners is hereby dismissed in view of the foregoing observations. In the facts and circumstances of the case, parties to bear their own costs.

Petition dismissed.

I.L.R. [2010] M. P., 2111

WRIT PETITION

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

09 August 2010*

BHOPAL CITIZEN'S FORUM

... Petitioner

Vs.

STATE OF M.P. & Ors.

... Respondents

A. Nagar Tatha Gram Nivesh Adhiniyam, M.P. (23 of 1973) (As amended act No.22 of 2005), Section 23A - *Provision is intra vires.*

(Para -10)

क. नगर तथा ग्राम निवेश अधिनियम, मध्यप्रदेश (1973 का 23) (अधिनियम क्र० 2005 का 22, द्वारा यथा संशोधित), धारा 23 A - उपबंध अधिकाराधीन है ।

B. Nagar Tatha Gram Nivesh Adhiniyam, M.P. (23 of 1973) (As amended by Act No.22 of 2005) Section 23-A (2)-*Manner of publication of notice of modification of development plan or Zoning plan by State Government in section 23-A(2) is mandatory in nature.*

ख. नगर तथा ग्राम निवेश अधिनियम, मध्यप्रदेश (1973 का 23) (अधिनियम क्र० 2005 का 22 द्वारा यथा संशोधित), धारा 23 -A(2)- धारा 23-A (2) में राज्य सरकार द्वारा विकास परियोजना अथवा जोनिंग परियोजना के परिवर्तन की सूचना के प्रकाशन की रीति आज्ञापक स्वरूप की है ।

C. Nagar Tatha Gram Nivesh Adhiniyam, M.P. (23 of 1973) (As amended by Act No. 22 of 2005) Section 23 - A (2) - *Mandatory provision of section 23-A(2) not complied with - all subsequent actions have to be held to be invalid and no sanctity can be attached to the draft modified plan.*

In present case - (i) Notice with regard to draft modification plan was not published continuously for two consecutive days in two daily news papers. (ii)Draft modified plan was not affixed in

a conspicuous place in the office of Collector, inviting objections and suggestions

Held - Draft modified plan has not been published in the manner prescribed. Notification dated 14.03.2008 and 05.09.2007, quashed. (Para 36, 37)

ग. नगर तथा ग्राम निवेश अधिनियम, मध्यप्रदेश (1973 का 23) (अधिनियम क्र० 2005 का 22 द्वारा यथा संशोधित), धारा 23 -A (2)- धारा 23-A(2) आज्ञापक उपबंध का अनुपालन नहीं किया गया- सभी पश्चात्तवर्ती कार्यवाहियां अवैध मानी जानी होगी और परिवर्तित परियोजना प्रारूप से कोई मंजूरी संबद्ध नहीं की जा सकती।

प्रस्तुत मामले में - (i) परिवर्तित परियोजना के प्रारूप संबंधी नोटिस दो दैनिक समाचारपत्रों में लगातार दो दिनों तक प्रकाशित नहीं की गई थी (ii) आक्षेप एवं सुझाव आमंत्रित करते हुए, परिवर्तित परियोजना का प्रारूप कलेक्टर के कार्यालय में ध्यानाकर्षी स्थान पर नहीं लगाया गया था।

अभिनिर्धारित-परिवर्तित परियोजना का प्रारूप विहित रीति से प्रकाशित नहीं किया गया है। अधिसूचना दिनांकित 14-3-2008 एवं 05-09-2007, अभिखंडित।

D. Interpretation of Statute - *Once the validity of a provision or statute is challenged, all the grounds ought to have been raised and it would be presumed that all grounds which could validly be raised were raised and considered by the Court. A litigant or a party cannot be permitted to challenge the validity or vires of the provision on the plea that the ground being raised was not decided or a particular aspect was not expressly considered in the earlier proceeding.* (Para 10)

घ. परिनियम का निर्वचन- जब किसी उपबंध या परिनियम की विधिमान्यता को चुनौती दी गई है, सभी आधारों को उठाना चाहिये था और यह उपधारित किया जायेगा कि, वैध रूप से उठाये जा सकने वाले सभी आधार, उठाये गये थे तथा उनपर न्यायालय द्वारा विचार किया गया था। किसी वादी अथवा किसी पक्ष को, इस अभिवचन पर कि उठाये गये आधार का विनिश्चय नहीं किया गया अथवा पूर्वतर कार्यवाही में किसी विशिष्ट पहलू पर स्पष्ट रूप से विचार नहीं किया गया, उपबंध की विधिमान्यता अथवा शक्तिमत्ता को चुनौती देने की अनुमति नहीं दी जा सकती।

Cases referred:

(2007) 8 SCC 705, (2004) 11 SCC 417, (2008) 4 SCC 144, (1999) 6 SCC 464, (1991) 4 SCC 54, (2005) 12 SCC 369, (2006) 3 SCC 434, 2007 MPHT 221, 1996 Cr.L.J.665, (2007) 6 SCC 448, (2009) 8 SCC 582, AIR SC 912, 1962 SC 113, AIR SC 263, (1987) 2 SCC 407, (2000) 7 SCC 372.

Siddharth Gupta, for the petitioner.

Prashant Singh, Addl. A. G. with Sanjay Dwivedi, G.A., for the respondents No.1, 3 & 6

Ajay Mishra with Pratyush Tripathi, for the respondent No.4

Smt.P.L.Shrivastava, for the respondent No.5

R.B.Tiwari, for the respondent No.7

S.K.Rao, for the respondent No.8.

ORDER

The Order of the Court was delivered by S.R. ALAM, Chief Justice :- Petitioner, which is a forum of retired IAS, IPS officers and other eminent citizens of State of Madhya Pradesh, through this public interest litigation has challenged the validity of section 23-A of Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973, as amended by Amendment Act, 2005, (hereinafter referred to as the 'Act'), as well as notifications dated 14.3.2008 and 05.9.2007, Annexures-P-1 and P-2 respectively, issued by the State Government in exercise of powers under Section 23-A of the Act. By the impugned notifications the land use of various sites in the city of Bhopal has been changed from public/semi public purpose to commercial in order to facilitate the construction of Five Star Hotel, a Commercial Complex and an Oceanarium on lands measuring 10.19 acres over Khasra Nos.1431 and 1432 which situate adjacent to Minto Hall and for the construction of Central Business District on land measuring 15 acres in and around South T.T. Nagar Market surrounding area, which is purely a residential area. Similarly, petitioner in WP No.8886/2008 is non-Government organization, which has also challenged the validity of Section 23-A of the Act as well as notifications dated 14th March, 2008 and 5th September, 2007. Since common questions of law and fact are involved in both the writ petitions and also as agreed to by the learned counsel for the parties, they were heard together and are being decided by this common order.

2. For reference, facts as stated in W.P. No.9505/2008(PIL) are being referred to for convenience. It is averred in the writ petition that Minto Hall was constructed in the year 1909 and epitomizes the extant awareness of Paladian Architecture. Since 1956 till construction of new Vidhan Sabha, the sessions of Madhya Pradesh Legislative Assembly were held in Minto Hall. Adjoining to aforesaid Minto Hall a vast open land and dense plantation attributing scenic beauty is situated. According to development plan of 2005 of Bhopal, the aforesaid site has been designated for the purpose of "Administrative Complex/Units, Institutions". The aforesaid area situate on a hilly region in proximity of lower lake, one of the major water sources of the city.

3. The State Government in exercise of powers under Section 23-A of the Act issued a notification dated 14.3.2008 (annexure P/1) by which the land use of the land measuring 10.5 acres situate adjacent to Minto Hall has been changed from public/semi public to commercial whereupon the State Government intends to construct "Mega Commercial Complex", a 200 roomed Five Star Hotel with an oceanarium. Similarly, by another notification dated 05.9.2007 (Annexure-P-2) the land use of the land situate around 15 acres of land in South T.T. Nagar has been changed in order to facilitate construction of 'Central Business District'. In the aforesaid factual backdrop the petitioner has approached this Court for declaration of Section 23-A of the Act as ultravires and for quashing of the aforesaid notifications dated 14.3.2008 and 5.9.2007.

4. Respondents No. 1, 2, 3 & 6 have filed return, inter alia, contending that instant writ petition is not a genuine public interest litigation, but, in fact, against the public interest. The petitioner has no locus standi to challenge the amendment which has been incorporated in Section 23-A of the Act. It has been averred that before issuance of the notifications, which have been impugned in the instant writ petition, a notice was published in daily newspaper on 31.1.2008, namely, "Nav Bharat" and "Raj Express" inviting objections and suggestions from the public in general with regard to proposed change of land use of the lands adjoining Minto Hall. Similarly, in respect of proposal of change of land use in respect of an area situate adjoining to South T.T. Nagar objections were invited. However, not a single objection was received. Minto Hall is being converted into Modern Convention Centre and its utility to the public at large is being ensured. Presently, Minto Hall is an unoccupied building which is getting ruined with the passage of time. To bring back the lost glory of Minto Hall, the State Government has appointed an experienced Conservation Architect Firm, M/s Cultural Resource Conservation Initiative New Delhi (CRCI). The aforesaid firm after detailed study of the said building has submitted a report on Conservation and Revitalization plan of Minto Hall as City Trade and Convention Centre. The total project area i.e. 15.72 acres including Minto Hall and adjoining land i.e. land measuring 10.19 acres shall be transferred to Model Agency, the respondent No.7. The total project area has been divided into two parts i.e. an area of 5.53 acres of Minto Hall Complex and remaining area i.e. 10.19 acres. As per the Development Plan the complete project area has a land use of 'public/semi public' with FAR of 1.0.

5. It has further been averred that in order to ensure free flow of traffic a committee was constituted which has submitted its report. It has been further averred in the return that there is no residential locality surrounding Minto Hall, the proposed site of Conventional Centre. Thus, there is no intrusion into the privacy, safety and peaceful living of common man due to this project. The project is conceptualized with the aim of Conservation and Revitalization of Minto Hall as a Convention and Trade Centre, a land mark infrastructure development in Bhopal, in wider interest of its citizens. Adequate care has been taken while planning the project regarding issues like water supply, sewerage, drainage capacity/layout, traffic arrangements, electricity, open spaces and such other amenities with a view not to cause any impact on the surrounding areas. It has been claimed that the project will not have any adverse impact on the public amenities. The height of any component of the project shall not be more than the sky line of the existing Minto Hall building. A sewerage treatment plant at the proposed project site will be installed to ensure that there is no adverse impact on the Lower Lake. Widening of existing 24 meter road and a provision for new 24 meter road through project land will help to bear the existing as well as traffic load which may be generated in future. It has been further averred that construction of Five Star Hotel and a retail space of approximately 4 lac sq.ft. is necessary

for the purpose of providing convenient star accommodation to the delegates arriving for attending convention/meeting and to financially support the operation and for maintenance of the non viable main activity of "Convention Centre". The Government of India was proposing to build a world class conventional centre in some part of the central India. A request was made by the Chief Minister of the State of Madhya Pradesh and in view of the efforts made by the State Government, Ministry of Commerce and Industries Department, the Government of India has agreed that a modern State of Art Convention Centre should be set up in Bhopal. The Ministry of Commerce, Government of India has deputed a Team of Indian Trade Promotion Organization to visit Bhopal and to make a spot assessment about the possibility of converting Old Vidhan Sabha building in Bhopal into a modern convention centre. Thereafter, the Project is being developed by the State Government. It has been further stated that Indian Trade Promotion Organization had jointly set up exhibition and Convention Centre with Karnataka Trade Promotion Organization and Tamil Nadu Trade Promotion Organization and similar plans are underway in the State of West Bengal. Thus, Minto Hall was selected for the purpose of setting up of an area for Convention Centre after exercise made at the top level with the help of Indian Trade Promotion Organization.

6. Shri Siddharth Gupta, learned counsel for the petitioners submitted that the Act needs to be interpreted in purposive manner while construing Section 23-A of the Act. In support of the aforesaid proposition he has placed reliance on a decision of the Supreme Court reported in *Chairman, Indore Vikas Pradhikaran vs. Pure Industrial Coke and Chemicals Pvt. Ltd.*, (2007) 8 SCC 705. It has further been contended that powers under Section 23-A of the Act cannot be invoked as a matter of routine and it is permissible to invoke Section 23-A only in unavoidable situations and circumstances. Powers under Section 23-A of the Act can be permitted to be exercised only while keeping in mind and balancing the proportionality of action sought to be taken with the aims, object and cognate provisions. In support of the submission reliance has been placed on the decision of Supreme Court in *Nandkishore Ganesh Joshi vs. Commissioner, Municipal Corporation of Kalyan & Dombivali*, (2004) II SCC 417. It has further been submitted that in the facts and circumstances there is no justification for invocation of Section 23-A of the Act and no ground is available to the State Government to invoke the powers under Section 23-A of the Act. It has further been contended that whether circumstances justifying the invocation of Section 23-A of the Act exist or not can be ascertained only from the record and not from the subsequent explanations filed by way of affidavit. For this proposition, learned counsel has placed reliance on *Bhikhubhai Vithalbhai Patel Vs. State of Gujrat*, (2008) 4 SCC 144. It has further been contended that the proposed activities in the land in the premises in question if allowed to be undertaken pursuant to the impugned notification, it would seriously not only deteriorate the beauty of the entire premises of the old Vidhan Sabha, i.e. Minto Hall, but shall have serious adverse impact on environment of the city and also disturb the ecological balance.

7. Learned counsel for the petitioners further argued that a bare glance of Bhopal Development Plan (Annexure-P-12) would clearly show that the city of Bhopal is amidst hill top with lower lake which is one of the major water resources of the city on its foot hills. If any commercial development is permitted in the area, it would inevitably have adverse impact on the lake situate down the hill. The argument proceeds that no material with respect to exercise of change of land use under section 23-A of the Act has been produced by the respondents nor any study has been conducted to find out as to whether the site in question is suitable for such intense commercial development and mega projects. While referring to the Development plan, it is contended that development plan also prescribes that existing residential area should not be over loaded beyond a particular capacity as that would have serious implications over various civil amenities like water supply, sewerage disposal, parking requirements and other amenities. It has been contended that there are large patches of land which have already been earmarked for commercial development in Bhopal city which could be utilized for the proposed International Convention Centre, 5 Star Hotel, etc. The argument proceeds that in modern planning and development the issue relating to environment and pollution occupy an important place; promotion of environmental protection implies maintenance of eco-friendly environment as a whole comprising of man-made and natural environment, therefore, the impugned notifications and the action of the State Government cannot be approved. In this connection, learned counsel for the petitioner has relied on decisions of Apex Court in *M. I. Builders (P) Ltd. Vs. Radhey Shyam Sahu*, (1999) 6 SCC 464 and *Bangalore Medical Trust Vs. B.S. Muddappa*, (1991) 4 SCC 54.

8. On the other hand, Mr. Prashant Singh, learned Additional Advocate General for the State contended that before issuance of notifications (Annexures-P/1 and P/2), notices dated 29.1.2008 were published in two news papers, by which objections were invited with regard to proposed change in land use. However, no objection was received from anybody including the petitioners. International Convention Centre is being set up in view of initiative which has been taken by the State Government. A committee of experts has examined the pros and cons of the project and thereafter a decision to set up the project has been taken. It has further been contended that there is no element of public interest involved in the instant writ petition. The Minto Hall is being converted into Modern Conventional Hall by experienced Conservation Architect Firm, M/s. Cultural Resource Conservation Initiative New Delhi (CRCI) which has successfully undertaken various works of conservation of main structure of heritage in India. After a series of long discussions and deliberations, the project has been undertaken which is in larger public interest. Learned counsel for the respondents has placed reliance on decisions of the Supreme Court in *National Centre for Human Settlements & Environment Vs. Union of India and others*, (2005) 12 SCC 369 and *Bombay Dyeing & Mfg. Co, Ltd. (3) vs. Bombay Environmental Action Group and others*, (2006) 3 SCC 434 in support of his proposition.

9. So far the challenge to the constitutional validity of section 23-A, as amended by Amendment Act 22 of 2005, is concerned, it is no more *res Integra* and is concluded by a judgment of Division Bench of this Court in *Madan Parmaliya vs. State of Madhya Pradesh and others*, 2007 (2) M.P.H.T. 221. The Division Bench held as under :

“It will be clear from Clause (a) of Sub-section (1) of Section 23-A of the Adhiniyam that the modifications in the development plan or the zoning plan under Clause (a) of Sub-section (1) of Section 23-A are to be for proposed projects of the Government of India or the State Government and its enterprises or for any proposed projects related to development of a State or for implementing a scheme of a Town and Country Development Authority and all these proposes by their very nature are public purposes. A reading of Clause (b) of Sub-section (1) of Section 23-A of the Adhiniyam as substituted by Act No. 22 of 2005 quoted above would also show that the State Government may on application from any person or an association of persons make modifications to the development plan or zoning plan for the purpose of undertaking an activity or scheme which is considered by the State Government and the Director on the advice of the committee constituted by the State Government for this purpose, “to be beneficial to the society”. “To be beneficial to the society” also mean “for public purpose”. Thus, the contention of Mr. Dalai that by the omission of words “for urgent public purpose”, from Section 23-A of the Adhiniyam by Act No. 22 of 2005, the State Government would be free to modify the development plan or the zoning plan even for a purpose other than public purpose has no merit”.

10. We do not find any reason to take a different view. Further, when the learned counsel for the petitioners was confronted with the view taken by the Division Bench in the aforesaid case and it was pointed out that the validity of the aforesaid provision has already been upheld by the Division Bench, he did not put forth any new reason or ground to disagree with the view taken by the earlier Division Bench. Besides that once the validity of a provision or statute is challenged, all the grounds ought to have been raised and it would be presumed that all grounds which could validly be raised were raised and considered by the Court. A litigant or a party cannot be permitted to challenge the validity or vires of the provision on the plea that the ground being raised was not decided or a particular aspect was not expressly considered in the earlier proceeding. In that event there can be no finality in litigation and public policy. A litigant can go on challenging the validity of the provisions of the Act or notification at different times on different grounds which would be contrary to the doctrine of *resjudicata* and the doctrine of binding

judicial precedent. Our view further finds support from the constitutional Bench judgment of the apex court in the case of *Ambika Prasad Mishra Vs. State of U.P.*, reported in AIR 1980 SC 1762 wherein it has been held that every new discovery or argumentative novelty cannot undo or compel reconsideration of a binding precedent. It does not lose its authority merely because it was badly argued, inadequately considered and fallaciously reasoned. Similar view was expressed by a larger Bench of five Hon'ble Judges of Allahabad High Court in the case of *Rana Pratap Singh Vs. State of Uttar Pradesh*, reported in 1996 Cr.L.J. 665.

11. For the aforesaid reasons, the attack on the validity of the amended section 23-A need not detain us long as we are bound by the judgment of the Division Bench in *Madan Parmaliya* (supra). We, therefore, hold that Section 23-A of the Act, as amended by the Amending Act 2005, is intra vires.

12. Before proceeding to deal with the challenge to the validity of the notifications (Annexures-P/1 and P/2) dated 14.3.2008 and 5.9.2007, it would be appropriate to examine the case law on the scope of judicial review with regard to the change in land use. In *Greater Kailash Part II Welfare Association and others vs. DLF Universal Limited and others*, (2007) 6 SCC 448, the residents of Greater Kailash Part II being aggrieved by the change of user of the plot into a multiplex cum commercial complex filed the appeal before the apex court on the ground inter alia that it would cause great hardship to the inhabitants because the area is already congested and there are continuous traffic jams and large number of visitors would come to the multiplex cum commercial complex which would completely breakdown the traffic system and the same being in violation of the master plan of Delhi the permission granted for the construction be set aside and by issuance of a writ of Prohibition the respondents may be restrained from raising construction. The Apex court having found that the respondents since have complied with all the requirements of the law held that decision of executive authorities based on opinion of experts deserves to be respected. The Court in exercise of powers under Article 226 of the Constitution of India cannot sit in appeal over the decision of the Executive authorities.

13. Similar view is expressed in *Delhi Development Authority Vs. Rajendra Singh and others* (2009) 8 SCC 582, wherein once again dealing with the scope of interference in the matter of change of land use, the Supreme Court held that decision of an expert body cannot be interfered with by the Court without adequate contra material. Thus, from the aforesaid exposition of law, it is clear that the Government is best Judge to decide whether a particular piece of land can be used for what purpose. However, where a challenge is made to the decision of the Government with regard to change of land use, the scope of judicial scrutiny is limited to find out whether the decision suffers from any illegality or infraction of any statutory provision or is arbitrary.

14. We may now advert to the provisions of the Act. The purpose and object of the enactment of the Act as mentioned in the preamble is to make provision for

planning and development and use of land and to make better provision for preparation of development plan and zoning planning with a view to ensuring that town planning scheme are made in a proper manner and their execution is made effective.

15. Section 17 of the Act provides the contents of development plan which shall take into account any draft five year and Annual Development Plan. Section 17-A of the Act authorizes the State Government to constitute a Committee to consider and suggest modifications and alterations in the draft development plan prepared by the Director under section 14 of the Act; and to hear the objections after publication of the draft development plan under section 18 and suggest modifications or alterations, if any, to the Director. Section 17-A of the Act reads as under :

"17-A. Constitution of committee.(1) The State Government shall constitute a committee of the following namely :-

- (a) Mayor of the Municipal Corporation or President of the Municipal Council or Nagar panchayat, as the case may be, which wholly or partly fall within the planning area;
 - (b) President of the Zila Panchayat which wholly or partly fall within the planning area;
 - (c) Members of Parliament representing constituencies which wholly or partly fall within the planning area;
 - (d) All Members of the State Legislative Assembly representing the constituencies which wholly or partly fall within the planning area;
 - (e) Chairman of the Town and Country Development Authority, or Special Area Development Authority, if any, which wholly or partly fall within the planning area;
 - (f) President of the Janpad Panchayat which wholly or partly fall within the planning area;
 - (g) Sarpanchas of the Gram Panchayats which wholly or partly fall within the planning area;
 - (h) Other persons not exceeding seven to represent specific interests to be nominated by the State Government;
 - (i) An officer not below the rank of Deputy Director, Town and Country Planning to be nominated by the Director, who shall be the Convener of the Committee;
- (2) The Committee constituted under sub-section (1), shall :-
- (a) consider and suggest modifications and alterations in the draft development plan prepared by the Director under Section 14;

- (b) hear the objections after publication of the draft development plan under Section 18 and suggest modifications or alterations, if any, to the Director.
- (3) The Convener of the Committee shall record in writing all the suggestions, modifications and alterations recommended by the committee under sub-section (2) and thereafter forward his report to the Director.

16. After receipt of the report from the Convener of the Committee constituted under section 17-A, the Director is required to consider the report and publish the draft development plan prepared under section 14 of the Act in such manner as may be prescribed, inviting objections and suggestions in writing within 30 days from the date of publication of notice, as provided under section 18 of the Act which reads as under :

18. Publication of draft development Plan.- (1) On receipt of the report from the Convener of the Committee under sub-section (3) of Section 17-A, the Director shall consider the report of the Committee and in consultation with the Committee constituted under sub-section (1) of section 17-A publish the draft development plan prepared under Section 14 in such manner as may be prescribed together with a notice of the preparation of the draft development plan and the place or places where the copies may be inspected, inviting objections and suggestions in writing from any person with respect thereto, within thirty days from the date of publication of such notice, such notice shall specify in regard to the draft development plan the following particulars, namely-

- i) the existing land use maps;
- ii) a narrative report, supported by maps and charts, explaining the provisions of the draft development plan;
- iii) the phasing of implementation of the draft development plan as suggested by the Director;
- iv) the provisions for enforcing the draft development plan and stating the manner in which permission for development may be obtained;
- v) approximate cost of land acquisition for public purposes and the cost of works involved in the implementation of the plan.

(2) The committee constituted under subsection (1) of Section 17-A shall not later than ninety days after the publication of the notice under subsection (1), consider all the objections and

suggestions as may be received within the period specified in the notice under sub-section (1) and shall, after giving reasonable opportunity to all persons affected thereby of being heard, suggest such modifications, in the draft development plan as it may consider necessary, and submit, not later than six months after the publication of the draft development plan, the plan as so modified, to the Director together with all connected documents plans, maps and charts.

(3) The Director shall, within 30 days of the receipt of the plan and other documents from the committee submit all the documents and plans so received along with his comments, to the State Government.

Sub-section (1) of Section 18, therefore, mentions the particulars with regard to draft development plan required to be published in the notice as mentioned in (i) to (v) of sub-section (1). After receipt of the objections and suggestions, if any, pursuant to the notice, the Committee constituted under sub section (1) of section 17-A shall consider the same and after affording reasonable opportunity to all the persons affected thereby of being heard, may suggest such modification in the draft development plan as it may consider necessary and submit, not later than six months after the publication of draft development plan, the plan so modified to the Director along with all connected documents, plans, maps and charts. The Director thereafter within thirty days of the receipt of the plan from the Committee shall submit the plan and the documents so received from the Committee along with his comments to the State Government.

17. Section 19 deals with the sanction of development plan by the State Government. Section 19 of the Act reads as under :

19. Sanction of development plans.-(1) As soon as may be after the submission of the development plan under section 18 the State Government may either approve the development plan or may approve it with such modifications as it may consider necessary or may return it to the Director to modify the same or to prepare a fresh plan in accordance with such directions as the State Government may deem appropriate.

(2) Where the State Government approves the development plan with modifications, the State Government shall, by a notice published in the Gazette, invite objections and suggestions in respect of such modifications within a period of not less than thirty days from the date of publication of the notice in the Gazette.

(3) After considering objections and suggestions and after giving a hearing to the persons desirous of being heard, the State Government may confirm the modification in the development plan.

(4) The State Government shall publish a public notice in the Gazette and in such other manner as may be prescribed of the approval of the development plan approved under the foregoing provisions and the place or places where the copies of the approved development plan may be inspected.

(5) The development plan shall come into operation from the date of publication of the said notice in the Gazette under sub-section (4) and as from such date shall be binding on all the Development Authorities constituted under this Act and all local authorities functioning within the planning area.

Thus, Section 19 of the Act inter-alia provides that after submission of the development plan under Section 18, the State Government may either approve the development plan or may approve it with such modification as it may consider necessary or may return it to the Director to modify the same or to prepare a fresh plan in accordance with such directions as the State Government may deem appropriate. Sub-section (2) of Section 19 mandates that where the State Government approves the development plan with modifications, the State Government shall by a notice published in the Gazette, invite objections and suggestions in respect of such modifications within a period of not less than thirty days from the date of publication of notice in the Gazette. After considering the objections and suggestions and after giving a hearing to the person desirous of being heard, the State Government may confirm the modification in the development plan.

18. Therefore, from perusal of Sections 17 to 19 of the Act, it is apparent that a detailed procedure has been prescribed by the Act which is required to be followed while preparation of the development plan. Public participation is envisaged by the aforesaid provisions of the Act at two stages firstly at the stage of preparation of draft development plan and secondly at the stage of sanction of the development plan by the State Government in case the State Government chooses to sanction the development plan with some modifications.

19. Section 20 of the Act provides for preparation of zoning plans whereas Section 21 provides about the contents of zoning plan. Section 20 and 21 of the Act are extracted below for ready reference :

“20. Preparation of Zoning Plans.- The Local Authority may on its own motion at any time after the publication of the development plan, or thereafter it so required by the State Government shall, within six months of such requisition, prepare a Zoning Plan.

21. Contents of zoning plan.-(1) The zoning plan shall enlarge the details of land use as indicated in the development plan and shall -

(a) indicate the land liable to acquisition for public purpose for the purposes of the Union Government, the State Government, a Town and Country Development Authority, a Special Areas Development Authority, a local authority, a public utility or any other authority established by or under any enactment for the time being in force.

Provided that no land shall be so designated unless the acquisition proceedings are likely to be completed within ten years of the preparation of the plan;

(b) define in detail and provide for areas reserved for agriculture, public and semi public open spaces, parks, playground, gardens, recreational areas, green-belts and nature reserves;

(c) allocate in detail areas or zones for residential, commercial, industrial, agricultural and other purposes;

(d) define and provide for the complete road and street pattern for the present and in the future and indicate the traffic circulation;

(e) lay down in detail the projected road and street improvements;

(f) indicate and provide for areas reserved for public buildings, institutions, and civic developments;

(g) assess, make projections for and provide for the future requirements of amenities, services and utilities such as municipal transport, electricity, water and drainage;

(h) prescribe in detail the zoning regulations for each zone; with a view to facilitating an individual lay out and regulating the location, height number of storeys and the size of buildings and other structures, the size of the courtyards, courts and other open spaces and the use of the buildings, structures and land;

(i) define areas which have been badly laid out or areas which have developed so as to form slums, and provide for their proper development and/or relocation;

(j) designate areas for future development and expansion;

(k) indicate the phasing of the programme of development.

(2) The zoning plan may, and, if possible, shall, indicate,-

(a) control over architectural features, elevation and frontage of buildings and structures; and

(b) the details of development of specific areas for housing, shopping centres, industrial areas, educational and cultural institutions and civic centres.

20. Section 18 and 19 of the Act is made applicable for preparation and publication of zoning plan under section 20 and 21 by inserting Section 22 which reads as under :

"22. Provisions of section 18 and 19 to apply to zoning plan.-

The provisions of sections 18 and 19 shall apply for the preparation, publication approval and operation of zoning plan as they apply in respect of the development plan.

Thus, by virtue of section 22 of the Act provisions of section 18 and 19 have been made applicable in the preparation of zoning plan.

21. The next important provision contained in the Act is Section 23 which provides for review and modifications of development plan or zoning plan. Section 23 of the Act reads as under :

"23. Review and modifications of development Plan or Zoning Plan.-(1) the Director may, on his own motion or if so

required by the State Government shall undertake a review and evaluations of the development plan.

(2) The Director may if necessary propose modification of the plan under sub-section (1).

(3) The Director shall, if so required by the State Government proceed to review and propose modifications of any planning unit of a development plan.

(4) the Local Authority shall on its own motion or if so required by the State Government or the Director undertake review and evaluation of the Zoning Plan.

(5) The provisions of Sections 18 and 19 shall, so far as may be, apply to the modifications under sub-section (2), review and modification under sub-section (3) and review and evaluation under sub-section (4) as these provisions apply in relation to the preparation, publication and approval of a development plan.

Thus, Section 23 of the Act provides that the Director may on his own motion or if so required by the State Government shall undertake a review and evaluation of the development plan. Sub-section (5) of Section 23 of the Act makes the provision of Sections 18 and 19 of the Act applicable for carrying out modification of the development plan and zoning plan as well. Therefore, the Act envisages participation of the public and an opportunity of hearing to public in general even in respect of modification in the development plan.

22. The next relevant and important provision for the purpose of this case is Section 23-A of the Act which provides for modification of development plan or zoning plan by the State Government in certain circumstances. Section 23-A of the Act, as it stood prior to amendment by the Amendment Act of 2005 reads as under :

"23-A. Modification of Development Plan or Zoning Plan by State Government in certain circumstances.-(1) The State Government, on its own motion or on the request of Development Authority, may make modification in the Development Plan or the Zoning Plan for urgent public purpose. The modification so made in the Development Plan or Zoning Plan shall be an integrated part of the revised Development Plan or Zoning Plan.

(2) The State Government shall publish the draft of modified plan together with a notice of the preparation of the draft modified plan and the place or places where the copies may be inspected, continuously for two days in such two daily news papers which are in the approved list of Government for advertisement purpose having circulation in the area to which it relates and a copy thereof shall be affixed in a conspicuous place in the office of the Collector, inviting objections and suggestions in writing from any person with respect thereto within fifteen days from the date of publication of such notice.

After considering all the objections and suggestions as may be received within the period specified in the notice and shall, after giving reasonable opportunity to all persons affected thereby or being heard, the State Government shall confirm the modified plan.

(3) The provisions of Sections 18, 19 and 22 shall not apply for modification made by the State Government.

The unamended Section 23-A provides that State Government on its own motion or on the request of the development authority may make modification in the development plan or zoning plan for urgent public purpose. Sub-section (3) of Section 23-A of the Act excluded the applicability of provision of Sections 18, 19 and 22 for the purposes of carrying out modifications for urgent public purposes. However, under sub-Section (2) of Section 23-A of the Act, the State Government was required to publish a draft modified plan together with notice of preparation of draft modified plan and the place or places where the copies may be inspected continuously for two days in such two daily newspapers which are in the approved list for Government for advertisement purpose having circulation in the area to which it relates and a copy thereof was required to be affixed in a conspicuous place in the office of the Collector inviting objections and suggestions in writing from any person with respect thereto within fifteen days from the date of publication of such notice. After considering the objections and suggestions and after giving reasonable opportunity to all persons affected thereby of being heard, the State Government was empowered either to confirm or to modify the plan. The Legislature in its wisdom even while excluding the provisions of Sections 18, 19 and 22 of the Act, in respect to modification of development plan or zoning plan by the State Government for urgent public purpose, incorporated the conditions

of publication of notice and opportunity of hearing to the affected persons. Thus, the Act provides for two provisions namely Section 23 and Section 23 A for modification of development plan. Section 23A of the Act is a special provision and resort to the same can be had for urgent public purpose only.

23. In the light of recommendations made by the Committee of experts constituted by the Government of India, Ministry of Home Affairs, National Disaster Management Division in the month of September, 2004, with a view to provide for "multi national hazard safety" under the development plan, or amendment were proposed in the Act. Provisions of Section 23-A of the Act were amended by the Amending Act of the year 2005 with a view to provide separate provision in the Act to make modification in the development plan for implementation of the project of Town & Country Development Authority as well as development projects of Central Government or State Government and its enterprises.

24. From perusal of statement of objects and reasons of the Amendment Act, 2005, it is clear that amendment in Section 23-A of the Act was made with a view to provide special consideration to the cases mentioned therein with a view to curtail the delay in the process of modification in development plan. Relevant extract of statement of objects and reasons appended to bill reads as under:-

"As there is no separate provision in the Act to make modifications in the development plan for the implementation of the projects of a Town and Country Development Authority as well as the development projects of the Central Government or the State Government and its enterprises. The amendment in Section 23-A will provide special consideration to these cases and will curtail the delay in the process of modification in development plan."

25. Section 23-A of the Act as amended by Amendment Act of 2005 reads as under:-

"23-A. Modification of Development Plan or Zoning Plan by State Government in certain circumstances.-(1)(a) the State Government, may on its own motion or on the request of Town & Country Development Authority, make modification in the development plan or the zoning plan for any proposed project of the Government of India or the State Government and its enterprises or for any proposed project related to development of the State or for implementing a scheme of a town and country Development Authority, and the modification so made in the development plan or zoning plan, shall be an integral part of the revised development plan or zoning plan.

(b) The State Government may, on an application from any person or any association of persons for modification of development plan

or zoning plan for the purpose of undertaking an activity or scheme which is considered by the State Government or the Director, on the advice of the committee constituted by the State Government for this purpose, to be beneficial to the society, make such modification in the development plan or zoning plan as may be deemed necessary in the circumstances of the case and the modification so made in the development plan or zoning plan shall be an integral plan or zoning plan shall be an integral part of the revised development plan or zoning plan.

26. It is relevant to mention here that though the amendment was made by the State Legislature in Section 23-A with the object to provide for modification in the development plan for implementation of projects of Town and Country Development Authority as well as development projects of Central Government or the State Government and its enterprises, yet sub-Section (2) of Section 23-A which requires the State to publish a draft of modified development plan continuously for two days in such two daily newspapers which are in the approved list of the Government having circulation in the area and to make available copies for inspection at a conspicuous place in the office of the Collector inviting objections and suggestions in writing from any person within 15 days and the requirement of consideration of objections and suggestions and to afford reasonable opportunity of hearing to all persons affected thereby was kept intact.

27. At this stage, it is relevant to reproduce para 11 of the return as well as para 4 of the additional return, which has been filed on behalf of respondents No. 1, 2, 3 and 6:-

"11. That the notification dated 14.3.2008 was issued whereby the proposal of changing the land use of 10.19 acres land part of Khasra No. 1431 and part of Khasra No. 1432 in Bhopal city from 'public/semi public' to 'commercial' in "Bhopal Development Plan, 2005" with specific condition regarding FAR 1:1.75 (for commercial through FAR is 2.5 maximum height of the building shall be fixed by the Home Department, the proposed width of road towards Minto Hall would be 24 meters from lower lake to Minto Hall. The notification has been issued by the Housing and Environment Department, Govt. of M.P. on 31.1.2008 in the Hindi Daily newspaper "Nav Bharat" and "Raj Express" inviting objections and suggestions from the public. Copy of the newspaper clippings are filed herewith as Annexure R-2. Thus the procedure as laid down under the law was followed before issuance of the said notification. In the same manner notification was also issued in respect of C.B.D. Project on 5.9.2007, which is filed by the petitioner as Annexure P/2."

"4. Before issuance of Annexure P/1 and P/2, notification was

published in newspapers under the provisions of Section 23-A(1)(A) inviting objections or suggestions from the general public within a period of 15 days of their publication. Copy enclosed as Annexure R-10. In response to these advertisements published in two prominent daily newspapers, no objections were raised by the petitioner and thereafter following the due procedure, notifications Annexure P/1 and P/2 were issued. Thus, it is apparent that petitioners who profess themselves to be prominent citizen comprising of former bureaucrats had not objected to the said change of land from residential, public and semi-public to commercial and thus by implication had expressed their faith in the said conversions. Now, after failing to participate in the legal process of making objections/suggestion to the proposed change in the land use and having missed the bus to propose detailed objections (not the cursory one as have been raised in the petition), petitioners have invented the mechanism of PIL to circumvent the legal provisions of Nagar Tatha Gram Nivesh Adhiniyam, 1973. In the humble information of the answering respondents, petitioners cannot be allowed to misuse the forum of PIL for their failure to avail the legal remedy provided under the provisions of the 1973 Act.”

28. Thus, from perusal of averments made in the return, it is clear that notice of draft development plan was published only in two daily newspapers namely “Nav Bharat” and “Raj Express” dated 31st January, 2008. There is neither any averment in the return nor any notice has been annexed with the return indicating that notice with regard to draft modified plan was published continuously for two consecutive days in two daily newspapers. From perusal of the return, we also gather that there is no averment in the return that draft modified plan was affixed in a conspicuous place in the office of Collector, inviting objections and suggestions in writing from any person with respect thereto within 15 days from date of publication of such notice. It has only been stated in the notice published in the newspaper that copy of draft development plan shall be available in the office of Joint Director, Town & Country Planning and in the office of Collector for inspection. Thus, from perusal of the averments made in the return as well as documents annexed with the return, it is graphically clear that the draft modified plan has not been published in the manner prescribed in sub-section (2) of Section 23-A of the Act.

29. Now the question arises for consideration is as to whether the provisions contained in Section 23-A of the Act are directory or mandatory and if the draft modified plan has not been published in the manner prescribed under Section 23-A(2) of the Act, what would be its consequence.

30. To find out as to whether a particular provision is a mandatory or directory

one has to carefully look to the real intention of the legislature and the scope of the statute. The intention of the Legislature has to be gathered not only from the phraseology of the provision but also by considering its nature, design and the consequences which would follow from construing it one way or the other. The Apex court in *State of U.P. Vs. Manbhodanlal Shrivastava*, AIR 1957 SC 912, has approved the following passage from Crawford on 'Statutory Construction' which reads as under:

"The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other".

31. In *Bhikraj Jaipuria V. Union of India*, AIR 1962 SC 113, the Supreme Court has held that question whether a particular provision was mandatory or directory has to be adjudged in the light of intention of legislature as disclosed by the object, purpose and scope of the Statute. Again in *Govindlal Chhaganlal Patel Vs. Agriculture Produce Market Committee*, AIR 1976 SC 263, the Apex Court approving the aforesaid passage from the Crawford on 'Statutory Construction' held as under :

"Thus, the governing factor is the meaning and intent of the legislature, which should be gathered not merely from the words used by the legislature but from a variety of other circumstances and considerations. In other words, the use of the word 'shall' or 'may' is not conclusive on the question whether the particular requirement of law is mandatory or directory. But the circumstances that the legislature has used a language of compulsive force is always of great relevance and in the absence of anything contrary in the context indicating that a permissive interpretation is permissible, the statute ought to be construed as peremptory. One of the fundamental rules of interpretation is that if the words of a statute are themselves precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature.

32. The Apex court again reiterated the similar view in *B.P. Khemka Pvt Ltd. Vs. Birendra Kumar Bhowmik*, (1987) 2 SCC 407, *State of M.P. Vs. Pradeep Kumar* (2000) 7 SCC 372 and *Sarla Goel V. Krishanchand*, (2009) 7 SCC 658.

33. If the object of the enactment will be defeated by holding the same to be directory, it will be construed as mandatory. (*See: Principles of Statutory*

Interpretation, Justice G.P. Singh, 12th Edition page 391). If certain requirement or conditions are provided by a statute in public interest, the same cannot be waived. (See: *Principles of Statutory Interpretation, Justice G.P. Singh, 12th Edition page 395*). It is equally well settled in law that the word "shall" is ordinarily mandatory, but it is sometimes not so interpreted if the context or the intention otherwise demand. (See: *Sainik Motors Vs. State of Rajasthan, AIR 1961 SC 1480*).

34. In the aforesaid backdrop of well settled principles of statutory interpretation, let us examine the provisions contained in Section 23-A(2) of the Act to find out as to whether the same are mandatory and are required to be adhered to strictly. The Legislature had amended provisions of Section 23-A of the Act by Amendment Act of 2005 with a view to make provision for modification in the development plan for implementation of project of Town & Country Development Authority as well as development project of Central or State Government and its enterprises. The amendment was incorporated with the object to curtail the delay in the process of modification of development plan. For carrying out the modification in the development plan, provisions of Sections 18, 19 and 22 have been excluded. At the cost of repetition, we may once again state that Section 18 of the Act provides for publication of draft development plan and its consideration by a Committee constituted under Section 17-A of the Act within a period of 90 days from the date publication of draft development plan. Section 19 deals with sanction of the development plan which once again mandates the State Government to publish the development plan if it sanctions the same with some modification and to afford an opportunity of hearing. The aforesaid provisions have not been made applicable in respect of Section 23-A of the Act. However, even while amending Section 23-A of the Act, sub-section (2) of Section 23 of the Act which requires publication of draft development plan and invitation of objections and suggestions and for affording reasonable opportunity of hearing to the affected persons has been kept intact in the statute book. The Scheme of the Act as well as the object of Section 23-A shows the intention of legislature that in the matter of preparation of Development Plan and its modification, participation of public in general and affording an opportunity of hearing to aggrieved person is envisaged by the legislature. The object of providing for publication of notice contained in section 23-A(2) of the Act, is to invite objections from public in general, who would be affected. The purpose of such publication is in furtherance of the democratic process and to provide reasonable opportunity of being heard to those who are likely to be adversely affected. As stated supra, Section 23-A of the Act is a special provision and provides for a shortcut procedure for modification of development plan which is to be resorted to in the case of an urgent public purpose. The procedural requirement for invoking the power under section 23-A has to be fulfilled while exercising power under the said section. In this connection we may refer to decisions of the Supreme Court in the cases of *Mohan Singh and others*

Vs. International Airport Authority of India and others, (1997)9 SCC 132 and *Union of India and others V. Mukesh Hans, etc.*, AIR 2004 SC 4307. Thus taking into account the scheme of the Act, intention of legislature and use of word "shall" in Section 23-A(2) of the Act, we have no hesitation to hold that the manner of requirement of publication of notice contained in Section 23-A(2) of the Act is mandatory in nature.

35. There is another aspect of the matter. It is well settled in law that if the statute prescribes a mode of doing a particular act in a particular manner, that act has to be done in that manner alone and all other modes of its performance are necessarily forbidden. (*See: Ramchandra Keshav Adke (dead) by Lrs. Vs, Govind Joti Chavare and others*, AIR 1975 SC 915 and *Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and others*, (2002) 1 SCC 633.

36. Since provisions of Section 23-A(2) of the Act have been held to be mandatory in nature and since the notice with regard to draft modified plan has not been published in accordance with provisions of sub section (2) of Section 23 of the Act, all subsequent actions have to be held to be invalid and no sanctity can be attached to the same as it is well settled in law that any action taken in breach of a mandatory provision would be invalid. (*See: Hazarimal Kuthiala Vs, ITO Ambala Cantt.*, AIR 1961 SC 200 and *Ramdeen Maurya Vs. State of U.P.* [2009] 6 SCC 735.)

37. For the aforementioned reasons, notifications dated 14.3.2008 and 5.9.2007 issued by the State Government are hereby quashed. However, the State Government shall be at liberty to take action in the matter in accordance with law. Though submissions were made at length with regard to adverse impact, which the proposed project would have on ecosystem of lower lake and surrounding areas and it was further contended that no study was conducted to ascertain whether site in question is suitable for intense commercial development, we are not adverting to aforesaid submissions as we have no doubt that the State Government while dealing with the matter afresh would take into account all relevant factors which are necessary and required to preserve the ecology and to provide pollution free atmosphere in the area and will also explore the available viable alternatives for the proposed commercial development.

38. Accordingly, the writ petitions are allowed. However, there shall be no orders as to cost.

Petition allowed.

WRIT PETITION

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

12 August, 2010*

RATNA SHRIVASTAV (Smt.)

... Petitioner

Vs.

Mr.M.M. BHARGAVA & anr.

... Respondents

Civil Procedure Code (5 of 1908), Order 6 Rule 17 - *Petition challenging the order of amendment permitting plaintiff to amend relief clause by inserting relief of vacant possession of plot after demolition of construction - Held - The amendment necessary for the just decision of this case - By inserting amendment, nature of the suit is not changed - On the contrary, relief clause has become very specific by allowing such amendment - Petition dismissed with costs.* (Para 5)

सिविल प्रक्रिया संहिता (1908 का 5) – आदेश 6, नियम 17 – निर्माण के मंजित किये जाने के पश्चात वादी को प्लॉट के खाली कब्जे के अनुतोष की समाविष्टि द्वारा अनुतोष खंड में संशोधन की अनुमति देने वाले संशोधन के आदेश को याचिका में चुनौती – अभिनिर्धारित – इस मामले के न्यायोचित निराकरण के लिये संशोधन आवश्यक संशोधन के समावेशन से वाद का स्वरूप नहीं बदला है – इसके विपरीत, ऐसा संशोधन मंजूर करने से अनुतोष खंड अधिक विनिर्दिष्ट बन गया है – याचिका व्यर्थ के साथ खारिज ।

H.C. Kohli, for the petitioner/defendant.

B.P. Gupta, for the respondent/plaintiff.

ORDER

This petition is directed against an order dated 8.3.2010 by 6th Civil Judge Class-1, Jabalpur in Civil Suit No.64-A/2009 between the parties by which an application filed by the plaintiff/respondent under Order 6 rule 17 CPC was allowed and the respondent/plaintiff was permitted to amend relief clause by inserting following relief:-

"vacant possession of the plot after demolition of the construction"

2. The petitioner assailed the order on the following grounds:-

(i) That the suit was filed on 5.11.2001 and on 9.12.2001, the Commissioner inspected the spot and found that construction of the petitioner was already complete and the application was filed after 9 years of filing of the Commissioner's report. The plaintiff earlier moved an application under Order 6 rule 17 CPC on 8.11.2006, but in that application also no relief for possession was prayed.

(ii) It is submitted that the amendment was barred by limitation.

He has referred Article 113 of the Limitation Act in support of his contention that after accruing cause of action, the amendment has been sought after 9 years while it ought to have been made within 3 years from the date of accruing cause of action. Petitioner has placed reliance to a judgment of the Apex Court in *Vidyabai Vs. Padmalatha* AIR 2009 SC 1433 in support of his contention.

3. Shri Gupta, learned counsel for respondent/plaintiff supported the order. It is submitted by Shri Gupta that the suit was filed on 5.11.2001 and during pendency of the suit, inspite of an undertaking given by the defendants, construction was raised for which a specific relief has been prayed by way of amendment for vacant possession of the plot. It is submitted by Shri Gupta that aforesaid amendment was necessary for the just decision of the case and the trial Court rightly allowed the amendment. He has placed reliance to a judgment of the Apex Court in *Ragu Thilak D.John Vs. S.Rayappan and others*, AIR 2001 SC 699 in support of his contention.

4. From the perusal of the record, it appears that a suit has been filed for declaration, perpetual injunction and mandatory injunction against the petitioner and the respondent No.2. The relief clause 14(a) to (e) is relevant and can be referred profitably to decide the controversy between the parties, which reads as under:-

"14. That the plaintiff is entitled for a legal decree against defendants for the following reliefs:-

(a) That a decree be passed in favour of the plaintiff that the defendants or any other person is not entitled to interfere in the possession of the plot for which details are given in para 1 of the plaint which belongs to ownership and possession of the plaintiff.

(b) That a mandatory injunction be issued against defendants restraining them to raise the construction and to restore the possession of plot by issuance of mandatory injunction.

(c) That perpetual injunction be issued against the defendants not to interfere in the possession, raise construction over the plot.

(d) That cost be allowed.

(e) That any other relief which this Hon'ble Court deems fit be allowed to the plaintiff."

5. The plaintiff has prayed amendment in relief clause in which he has sought amendment that the 'vacant possession' after demolition of the construction' be permitted to be inserted in para 14(b). In para 14(b) of the relief clause, the plaintiff had already sought relief of mandatory injunction against the defendants for restraining them to raise illegal construction and to restore the possession of

2134] Ratna Shrivastav (Smt.) vs. Mr. M.M. Bhargava [I.L.R.[2010]M.P., the plot by issuance of mandatory injunction. A specific relief was prayed by the plaintiff for the mandatory injunction in this regard and by way of amendment, aforesaid relief has been made specifically for restoring possession of the plot in favour of the plaintiff by removing the construction raised by the defendants. Though it is disputed by the defendants that construction was raised during pendency of the suit, as before filing of the suit it was complete, while the averments in the application are that this construction was raised by the defendants during pendency of the suit. However, it is a matter of evidence which is to be decided by the trial Court after recording evidence of the parties.

6. Though it is true that the evidence of the plaintiff is over and the defendants' evidence is to commence in the case and as per proviso to Rule 17 of Order 6 CPC, after commencement of the trial normally such an amendment cannot be allowed, but the Apex Court has made the position clear in *State Bank of Hyderabad Vs. Town Municipal Council* (2007) 1 SCC 765 that the amended proviso to Order 6 rule 17 CPC inserted with effect from 1.7.2002 is not applicable in the cases which are filed before 1.7.2002. In the light of the aforesaid judgment, contention of the petitioner that after commencement of the trial, such amendment could not be allowed is found without merit.

7. By the aforesaid amendment, the plaintiff is amending relief clause specifically that possession of the plot be restored to the plaintiff by removing construction raised by the defendant's. Though in para 14(b) of the plaint, in relief clause, the plaintiff has already prayed for a mandatory injunction against defendants, but to make the relief specific, such amendment if made, no fault is found. So far as contention of the petitioner that on the date of filing of the application, such relief was barred by limitation is concerned, he has placed reliance to Article 113 of the Limitation Act. For ready reference, Article 113 of the Limitation Act is quoted which reads as under:-

113	Any suit for which no period of limitation is provided elsewhere in this schedule	Three years	When the right to sue accrues
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8. Aforesaid Article is residuary Article and is not applicable in the present case. The suit was based on title. Article 65 of the Limitation Act will be applicable in the present case by which limitation of 12 years is provided from the date when possession of the defendants became adverse. Prima facie aforesaid amendment was not barred by limitation, so contention of the petitioner that the amendment was sought after period of limitation, is also repealed. However, the defendants can raise a plea of limitation in the written statement by way of consequential amendment and if raised, it shall be considered by the trial Court.

9. The Apex Court in *Ragu Thilak D.John* (supra) considered the legal position in respect of allowing the amendment and referring to earlier judgment of the Apex Court in *B.K.N.Pillai Vs. P.Pillai* AIR 2000 SC 614, made the position clear in para 5:-

"...The purpose and object of Order 6, Rule 17 C.P.C. is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and this Court. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the Courts while deciding such prayer should not adopt hypertechnical approach. Liberal approach should be the general rule particularly to cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to hamper the Courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled for multiplicity of litigation."

10. In the case, the defendants allegedly raised the construction during pendency of the suit, plaintiff is entitled for a decree of possession against the defendants. Apart from this, it is stated by the plaintiff/respondent that an undertaking was given by the defendants in this regard, but inspite of this, construction was raised. However, all these facts are to be seen by the trial Court in the trial. But from the perusal of amendment application, it appears the amendment was necessary for the just decision of this case. By inserting amendment, nature of the suit is not changed. On the contrary, relief 14(b) has become very specific by allowing such amendment.

11. In view of the aforesaid, we do not find any error in the impugned order passed by the trial Court warranting our interference under Article 227 of the Constitution of India. This petition is found without merit and is dismissed with costs.

C.C. as per rules.

Petition dismissed.

I.L.R. [2010] M. P., 2135

WRIT PETITION

Before Mr. Justice Rajendra Menon

09 September 2010*

ANIL KUMAR PUROHIT (Dr.) & ors.

... Petitioners

Vs.

Dr. HARI SINGH GAUR VISHWA VIDHYALAYA

SAGAR & ors.

... Respondents

A. Constitution, Article 226 - Writ of Mandamus - Regularization of appointment - Petitioners, appointed as samvida (Contract) Teacher, were

2136] Anil K. Purohit vs. Dr. Hari Singh Gaur V.V. Sagar [I.L.R.[2010]M.P., later on considered fit for regularization by Executive council of University on 01.05.2008 and their matter was sent for approval of State Government - In the meantime the University was converted into Central University - Central University took a decision on 22.08.2009 to refer the case to H.R.D. Ministry, Govt. of India for considering the question of their regularization - The petitioners Challenged the resolution (dated 22.08.2009) and sought Mandamus to the University for enforcing the resolution dated 01.05.2008. - Held - The appointment of petitioners was made by a selection committee which was inferior to the one as is required u/s 49 of M.P. Vishwavidhyalaya Adhiniyam 1973. - As the appointment made, falls within the category of "illegal appointment" as held by the Supreme Court in the case of Umadevi (Supra), Illegal appointments cannot be regularized by issuing Writ of Mandamus. (Para 18)

क. संविधान, अनुच्छेद 226 - परमादेश रिट- नियुक्ति का नियमितीकरण - याची संविदा शिक्षक के रूप में नियुक्त किये गये, बाद में विश्वविद्यालय की कार्यपरिषद द्वारा 01.05.2008 को उन्हें नियमितीकरण के लिये उपयुक्त समझा गया और उनका मामला अनुमोदन के लिये राज्य सरकार को भेजा गया - इसी बीच विश्वविद्यालय, केंद्रीय विश्वविद्यालय में संपरिवर्तित किया गया - उनके नियमितीकरण के प्रश्न पर विचार करने के लिये केन्द्रीय विश्वविद्यालय ने मामला मानव संसाधन विकास मंत्रालय को भेजने का निर्णय 22.08.2009 को लिया - याचियों ने दिनांक 22.08.2009 के निर्णय/संकल्प को चुनौती दी और दिनांक 01.05.2008 के संकल्प को लागू करने के लिये विश्वविद्यालय को परमादेश चाहा - अभिनिर्धारित - याचियों की नियुक्ति चयन समिति द्वारा की गयी थी जो कि 50 प्रो विश्वविद्यालय अधिनियम 1973 की धारा 49 के अंतर्गत अपेक्षित से निम्नतर है - चूंकि की गयी नियुक्ति, "अवैध नियुक्ति" की श्रेणी में आती है जैसा कि उच्चतम न्यायालय द्वारा उमादेवी के मामले में अभिनिर्धारित किया गया है, परमादेश रिट जारी कर अवैध नियुक्तियों नियमित नहीं की जा सकती।

B. Constitution, Articles 14 and 16 - Public Appointments - The equality of opportunity is held to be a hallmark in the matter of public appointment.

When the advertisement issued is for appointment on adhoc or contract basis and if such appointee is regularized under the process of regularization the same stands vitiated as it deprives the constitutional right to equality in the matter of opportunity to seek public appointment to many prospective candidates who would have otherwise applied but for the manner in which the advertisement was issued. (Para 15 & 19)

ख. संविधान, अनुच्छेद 14 व 16 - लोक नियुक्तियों - लोक नियुक्ति के मामले में अवसर की समानता को प्रामाणिकता का मानक माना गया है।

जब जारी किया गया विज्ञापन तदर्थ अथवा संविदा आधार पर नियुक्ति के लिये होता है और यदि ऐसा नियुक्त व्यक्ति नियमितीकरण की प्रक्रिया के अंतर्गत नियमित किया जाता है, तब वह दूषित हो जाता है क्योंकि वह बहुत सारे संभावी अभ्यर्थियों को, जो अन्यथा आवेदन कर सकते थे, यदि उस प्रकार से विज्ञापन जारी न किया गया होता लोक नियुक्ति चाहने के लिए समानता का अवसर देने वाले संवैधानिक अधिकार से वंचित करता है।

Cases referred :

(2006) 4 SCC 1, (2007) 5 SCC 326, (2006) 7 SCC 684, (2010) 2 SCC 422, (2009) 6 SCC 611, AIR 2009 SC 869, AIR 1992 SC 1865, (2006) 11 SCC 42, (2006) 1 SCC 667, (2008) 7 SCC 70, (2009) 1 SCC 180, AIR 1998 SC 1153, AIR 1989 MP 181, AIR 2009 SC 2875, 1992 Suppl.(3) SCC 217.

Rajendra Tiwari, with T. K. Khadka, Atul Awasthy, Harpreet Ruprah, Assem Dixit, R. P. Prajapati and Rajesh. Chand, for the petitioners.

Smt. Shobha Menon with Rahul Choubey and Alok Vagecha, for Dr. Hari Singh Gaur Vishwa Vidhyalaya, Sagar.

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

ORDER

RAJENDRA MENON, J. :-As common questions of law and facts are involved in all these petitions and as the reliefs claimed are also identical, all these petitions are being heard and decided by this common order.

2. For the sake of convenience, pleadings and documents available in the record of W.P.No.89/2010 are being referred to.

3 The petitioners, herein, were appointed as Samvida (Contract) Teachers and feel aggrieved by the action of the respondent University in not regularizing their services, inspite of a resolution passed by the Executive Council of the University on 01-05-2008. Seeking a mandamus to the University for enforcing the resolution passed by the Executive Council on 01-05-2008, the petitioners have filed these writ petitions..

4 All the petitioners are qualified, hold Master's Degree, Doctoral Degree and other qualifications as is prescribed by the University Grant Commission for appointment on the post of teachers in the University. According to the petitioners they fulfill the requisite eligibility criteria for being appointed as Lecturers/Assistant Professors/ Readers in the University, have passed the requisite National Eligibility Test (NET) organized by the University Grants Commission, possess the requisite qualification and each of the petitioners have filed documents and certificates in support of their contentions.

5. Respondent Dr. Hari Singh Gaur Vishwa Vidhyalaya Sagar is a Central University and has been so constituted w.e.f. 15-01-2009, vide Gazette notification dated 20-03-2009, issued in accordance to Section -1 of the Central Universities Act, 2009. By the aforesaid Act, Regional Universities like Guru Ghasidas Vishwavidyalaya (Chhattisgarh State), Dr. Harisingh Gaur Vishwavidyalaya (State of M.P.) and Hemvati Nandan Bahuguna Garhwal University (State of Uttarakhand) were incorporated and established as Central Universities under the Central Act. There is no dispute in this regard. Prior to coming into force of the Central University Act and incorporation and establishment of the Dr. Harisingh Gaur Vishwavidyalaya, as a Central University, it was a "Vishwavidyalaya" incorporated

2138] Anil K. Purohit vs. Dr. Hari Singh Gaur V.V. Sagar [I.L.R.[2010]M.P., and established under the M.P. Vishwa Vidyalaya 1973 (hereinafter referred to as Adhiniyam 1973). It is the case of the petitioners that Dr. Harisingh Gaur Vishwavidyalaya was initially established under the Adhiniyam 1973 and in a meeting of the Coordination Committee of various Universities held on 26-06-2006, a Scheme for appointment of Samvida (Contract) Teacher was approved. The Scheme as approved is contained in Annexure P-4. According to the petitioners on the basis of the decision of the Coordination Committee of various Universities, Dr. Harisingh Gaur Vishwavidyalaya issued an advertisement on 29-08-2006, inviting applications in the prescribed form from eligible candidates for appointment as Samvida(contract) teachers for the academic session 2006-07 in the various teaching departments of the Universities as is indicated in the advertisement. In the advertisement, the conditions stipulated for appointment were the same as was incorporated by the Coordination Committee in the Scheme Annexure P-4. It is the case of the petitioners that in pursuance to the advertisement they appeared and participated in the process of selection and all the petitioners were appointed after due interview and selection on various posts initially for a period of 6 months on a consolidated remuneration of Rs.8000/-

6. The petitioners have filed the call letters received by them for participating in the interview and selection process i.e. Annexure P-7 and the orders of appointment as Annexures P-8 and P-9 respectively. It is the case of the petitioners that as per the advertisement and the scheme Annexure P-4, even though the appointment was initially for a period of 6 months, it could be renewed for another period of 6 months after the work of the teacher was assessed by a duly constituted Assessment Committee appointed by the 'Kulpati', thereafter the said appointment could continue for a maximum period of 3 years. It is the case of the petitioners that after assessment of their work, finding their work to be satisfactory, they were continued for a further period of two years, as is evident from the order Annexure P-11. While the petitioners were so working, certain representations were made by some of the contract teachers on 21-04-2008, seeking their regularization in service, the matter was placed before the Executive Council of the University in its meeting held on 01-05-2008 and accordingly, vide resolution Annexure P-12, it is the case of the petitioners that the Executive Council took a decision to regularize the services of the petitioners. However, the Executive Council further resolved to seek approval of the State Govt. and also resolved that the financial burden for the same shall be borne by the University. According to the petitioners, the Executive Council having decided to regularize the petitioners, it was not at all necessary for the University to seek any further approval or concurrence from the State Government as the University itself was competent to appoint the petitioners after due approval of the Executive Council in accordance to the "Adhiniyam 1973".

7. However, when the matter was so pending, it is case of the petitioners that the University was converted into a Central University and the Executive Council

of the Central University which met on 22-08-2009 took a decision to refer the case of the Samvida teachers to the HRD Ministry, Govt. of India for considering the question of their regularization. Minutes of the meeting of this Executive Council is filed as Annexure P-19 dated 22-08-2009 and the Central Government in the Ministry of Human Resources Department having rejected the claim of the petitioners for regularization, the petitioners have filed these writ petitions and the reliefs claimed for in the writ petitions are, to issue a mandamus to the University to give effect to the resolution passed by the Executive Council earlier vide Annexure P-12 on 01-05-2008 and to treat the petitioners to be regularized in the regular establishment by virtue of this resolution. Further a writ of prohibition for restraining the respondent University from issuing fresh advertisement and initiating process of selection is also prayed for.

8. Shri Rajendra Tiwari, learned Senior Counsel ably assisted by other counsels appearing for the petitioners took me through various provisions of Adhiniyam 1973, as contained in Sections 62 and 65, the powers of the University as contemplated under Section 11 of the Adhiniyam, the powers of the Kuladhipati, Kulpati, constitution of the Academic Council, various other authorities of the University like Academic Council, Financial Committee and particularly referring to the provision of section 23 i.e. constitution of the Executive Council the powers of the Executive Council and Ordinance No.4 issued by the University and the powers of the Coordination Committee emphasized that the University is a separate legal entity having its own perpetual succession and a common seal and the entire power for appointment of teachers in various departments of the University is conferred on the Executive Council under the Adhiniyam 1973. It was emphasized by Shri Rajendra Tiwari, learned senior counsel that the Executive Council is the Supreme authority entitled to take any decision with regard to appointment of teaching staff to the University and for the said purpose, approval and sanction of the State Government is not warranted. It was emphasized by him that when the Executive Council met on 01-05-2008 and took a decision to regularize services of the petitioners, the Executive Council had full power and authority to do so. It was not necessary for the Executive Council to refer the question of regularization of the petitioners for approval of the State Government. Contending that the Executive Council having decided to regularize the services of the petitioners and as no further approval of the State Government is required in accordance to the statutory provisions of Madhya Pradesh Vishwavidyalaya Adhiniyam, 1973, Shri Rajendra Tiwari argued that the decision of the Executive Council for referring the question of regularization to the State Government was not at all necessary and the resolution itself indicates that the decision was taken by the Executive Council to regularize the petitioners.

9. Taking me through the decision of the Executive Council as contained in Annexure P-12, Shri Rajendra Tiwari, learned counsel for the petitioners submitted that the decision of the Executive Council was based on the facts that the

petitioners have been appointed after following a due process of selection by constituting an appropriate Selection Committee. Advertisement at the National level was issued, the petitioners fulfill all the requirement as contemplated by the UGC and the AICTE, they are appointed against the vacant posts after following the roster for reservation. It is indicated by Shri Tiwari that the Executive Council after taking note of these factors found that the petitioners were duly appointed to the post by a duly constituted selection committee and therefore, it took a decision to regularize the petitioners services. Accordingly, it is stated that as the Executive Council itself is empowered to regularize the petitioners and as the power for appointment under Adhiniyam 1973 is vested in the University, it was not at all necessary to refer the case to the State Government and as the decision is taken by the Executive Council in accordance with law, this court can issue a mandamus for implementing the decision of the Executive Council taken on 01-05-2008. It was argued by him that this decision of the Executive Council has become final and even after the University became Central University, this resolution has neither been withdrawn or cancelled and therefore, further resolution of the Central University taken on 22-08-2009 is wholly illegal and cannot exist as the petitioners already stood regularized before the University became a Central University and therefore, the respondents should be restrained from proceeding any further in the matter in accordance to that decision taken after 22-08-2009.

10. Referring to the terms and conditions of appointment of the petitioners, constitution of the Selection Committee, procedure followed for appointment of the petitioners and the decision of the Executive Council dated 01-05-2008, Shri Rajendra Tiwari, emphasized that it is a case where petitioners were duly appointed in accordance to the procedure prescribed by the Statute for appointment to the teaching staff of the University and merely because initially the appointment is shown to be on contract basis that does not mean that the appointment is irregular or illegal, it was emphasized by him that as the petitioners were regularly appointed to the post, the Executive Council rightly took a decision to regularize them and this decision can be enforced by a mandamus and the respondents without any justification are refusing to enforce this decision of the Executive Council, which has attained finality. Emphasizing that the petitioners appointment is in accordance with law and therefore, they are entitled to the benefit, Shri Tiwari prays for granting relief. Shri Rajendra Tiwari also took me through the provision of Ordinance No.4 of the University to emphasize that the petitioners are duly appointed to the post and after their contract appointments are converted into regular appointment by the Executive Council the Central University cannot retract from this decision and therefore, it is submitted that merely because the Executive Council of the University on 01-05-2008, took a decision to send the same for approval of the State Government which is not warranted under law, the respondents cannot deny the benefits to the petitioners on the ground that the State Government has not given its approval. It was

submitted by Shri Rajendra Tiwari that the selection committee was constituted in accordance to the scheme approved by the Coordination Committee and the requirement of section 49 of the Adhiniyam 1973 and therefore, the Executive Council which was fully empowered to pass the resolution has done so in accordance with law. It is also pointed out that after the University was granted status of Central University the salary of the petitioners was sanctioned at Rs. 25000/- per month and subsequently at Rs.28000/- but the said benefit has not been given to the petitioners. Accordingly contending that the Executive Council was empowered to regularize the services of the petitioners and the Executive Council has done so in accordance to law, a mandamus be issued to accept and act as per the aforesaid decision of the Executive Council.

11. Smt. Shobha Menon, learned Senior Counsel for the University opposed the prayer and pointed out that the appointment of the petitioners were in accordance to the scheme Annexure P-4 for appointment of Samvida/Contract teachers, it was not a regular appointment as contemplated under Section 49 of the Adhiniyam 1973. The Selection Committee constituted as per the decision of the Coordination Committee vide Annexure P-4 is not the same as is contemplated under section 49 and as the petitioners are not appointed to the regular post after following the regular mode of appointment as contemplated under section 49 of the Adhiniyam it is stated that the decision of the Executive Council for regularization cannot be enforced by a writ of mandamus. By taking me through various provisions of the M.P. Vishwavidyala Adhiniyam, 1973, Smt. Shobha Menon, tried to emphasize that as the finance control of the University is with the State Government the respondents cannot claim regularization without due approval and concurrence of the State Government. That apart it was submitted by her that the Executive Council could not order for regularization of the petitioners service as this was only a contract appointment under a Scheme and the same cannot be regularized in the manner done, contrary to the statutory provisions, placed reliance on the judgment rendered by a Constitution Bench of Supreme Court in the case of *Secretary State of Karnataka V. Umadei* (2006) 4 SCC 1,, the principles laid down in paras 43 and 45 thereon and further placing reliance on the following judgment :

Kendriya Vidyalaya Sangathan and others Vs. L.V.Subramanyeswara and another (2007) 5 SCC 326

Surinder Prasad Tiwari Vs. U.P.Rajya Krishi Utpadan Mandi Parishad and others, (2006) 7SCC 684

Union of India and another Vs. Kartick Chandra Mondal and another (2010) 2 SCC 422

Mohd. Abdul Kadir and another Vs. Director General of Police, Assam and others (2009)6 SCC 611

State of Haryana and Ors. Vs. Shakuntla Devi, AIR 2009 SC

2142] Anil K. Purohit vs. Dr. Hari Singh Gaur V.V. Sagar [I.L.R.[2010]M.P.,
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State of Gujarat and another Vs. P.J. Kampavat and others,
AIR 1992 SC 1865

V.C.Banaras Hindu University and others Vs. Shrikant, (2006)
11 SCC 42

State of U.P. Vs. Neeraj Awasthi and others (2006) 1 SCC 667

*Yashwant Birla and others Vs. Pt. Ravishankar Shukla
University and others*, 2001 (1) M.P.H.T.253(DB)

P.S.Gopinathan Vs. State of Kerala and others (2008) 7 SCC
70

*Sethi Auto Service Station and another Vs. Delhi Development
Authority and others*, (2009) 1 SCC 180

Dr.(Mrs.) Meera Massey Vs. Dr. S.R.Mehrotra and others, AIR
1998 SC 1153

*Ku.RashmiBala Saxena and others Vs. Jiwaji University,
Gwalior and others*, AIR 1989 MP 181

Harinder Kaur & Ors. Vs. Union of India & Ors. AIR 2009
SC 2875

Smt. Shobha Memon emphasized that the petitioners regularization, ordered by the Executive Council is wholly illegal, unconstitutional, contrary to the provisions of Articles 14 and 16 of the Constitution of India and therefore, cannot be enforced by a mandamus. It was argued by learned Senior Counsel that the procedure followed for appointment in the present case is not the one contemplated for appointment to the regular post under section 49. Referring to the advertisement and the requirement contained therein, it was argued that in the advertisement itself it is indicated that the appointment is on contract basis initially for a period of 6 months to be extended, if required for 6 months but not beyond 3 years. It was argued by her that when such a advertisement seeking candidature for appointment on contract basis is only issued, many other eligible candidates, who are unemployed and who are interested in seeking appointment may not apply in response to such a advertisement because they may not be interested in getting appointed on contract basis. If an advertisement for appointment on regular basis was issued many candidates so interested would have applied. It is stated that the appointment made in this manner by inviting applications for contract appointment cannot be converted into a regular appointment by resolution of the Executive Council, as the same is discriminatory in nature and the right of various other eligible and deserving candidates is not taken note of and who may not have applied because of the manner in which the advertisement was issued, accordingly contending that the requirement of Articles 14 and 16 of the Constitution is not fulfilled and ignoring all these aspects the Executive Council

has decided to regularize the petitioners, which is unsustainable, Smt. Shobha Menon sought for dismissal of this writ petition. By taking me through various provisions of the Adhiniyam, the method of regular appointment and the method for appointment undertaken in the present case, emphasized that the appointment made under a scheme for contract appointment cannot be converted into a regular appointment in the manner done and therefore, no mandamus can be issued. Further contending that the decision of the Executive Council of the University taken on 01-05-2008 is not a legal or valid decision, it was only a proposal and such a proposal cannot be enforced in the manner prayed for Smt. Shobha Menon seeks for rejecting the claim made. It was emphasized by her that concurrence and approval of the State Government to the proposal of the Executive Council was necessary and therefore, the regularization is not complete. Taking me through the requirement of the scheme for appointment as contained in Annexure P-4, the procedure for appointment followed and the undertaken given by the petitioners filed alongwith the return Smt. Shobha Menon argued that it is a case when the petitioners knew that they are being appointed on contract basis, their appointment is temporary, they are not entitled to any regularization and therefore, claim now made by them being contrary to their undertaking cannot be enforced by a mandamus. The decision of the Executive Council of the University and the order of the Central Government as contained in Annexure RJ-7 dated 20-01-2010 to terminate the services of the petitioners whose contract was to come to an end on 01-04-2010 is a proper decision, accordingly, she prays for dismissal of the writ petition. Detailed written submission incorporation various objections in this regard alongwith judgments relied upon is filed by Smt. Shobha Menon for perusal of this Court; the same shall be referred to as and when required.

12. I have heard the learned counsel for the parties at length and perused the records. Even though during the course of hearing, counsel for either party canvassed the respective contentions on their behalf and pointed out that the regularization ordered by the Executive Council is correct or otherwise. On consideration of the totality of the circumstances, the facts and legal question involved, I am of the considered view that this is a case where initial appointments of the petitioners were made on contract basis for a period of 6 months, it was extended and subsequently regularized. The question therefore would be as to whether regularization of the contract appointment is in accordance to law and as to what would be the effect of such regularization? whether it is in violation to the mandate of Articles 14 and 16 of the Constitution of India, as canvassed by Smt. Shobha Menon, learned counsel for the University.

13. It is therefore, thought appropriate to examine the legal principle governing appointment to public servant and the principles with regard to regularization of appointment made to public servant and the procedure followed in the present case. Further even though various judgments were relied by Smt. Shobha Menon in support of her contentions and Shri Rajendra Tiwari, learned Senior Counsel by

2144] Anil K. Purohit vs. Dr. Hari Singh Gaur V.V. Sagar [I.L.R.[2010]M.P., referring to each and every judgments refuted the aforesaid contentions and submitted that the judgments are not applicable in the facts and circumstances of the case. This court is of the considered view that the law relating to appointment to public service and the question of regularization of these appointments made to public service is now well settled and decided by a Constitutional Bench of the Supreme Court in the case of *Secretary, State of Karnataka and others Vs. Umadevie and others*, (2006) 4 SCC-1. That being so it would be appropriate to take note of the law laid down by the Supreme Court in the case of *Uma Devi* (supra). It has been held by the Supreme Court in the case of *Uma Devi* (Supra) that the public employment has to be as per the mandate of the Constitution and the law laid down there under. Appointments are to be made in accordance to procedure established by law and equity of opportunity in the hallmark of such appointment, it would be appropriate at this stage to take note of the Principle laid down by the Supreme Court in the case of *Uma Devi* (supra). After referring to the mandate of the Constitution, the Supreme Court in paras 2, 4 and 5 of the judgment has laid down the following principles :

“2. Public employment in a sovereign socialist secular democratic republic, has to be as set down by the Constitution and the laws made thereunder. Our constitutional scheme envisages employment by the Government and its instrumentalities on the basis of a procedure established in that behalf. Equality of opportunity is the hallmark, and the Constitution has provided also for affirmative action to ensure that unequals are not treated equals. Thus, any public employment has to be in terms of the constitutional scheme.

4. ----- The Union, the States, their departments and instrumentalities have resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commission or otherwise as per the rules adopted and to permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. ---

----- A class of employment which can only be called 'litigious employment', has risen like a phoenix seriously impairing the constitutional scheme. Such orders are passed apparently in exercise of the wide powers under Article 226 of the Constitution of India. Whether the wide powers under Article 226 of the Constitution is intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as

recognized by our Constitution, has to be seriously pondered over. It is time, that Courts desist from issuing orders preventing regular selection or recruitment at the instance of such persons and from issuing directions for continuance of those who have not secured regular appointments as per procedure established. The passing of orders for continuance, tends to defeat the very Constitutional scheme of public employment. It has to be emphasized that this is not the role envisaged for High Courts in the scheme of things and their wide powers under Article 226 of the Constitution of India are not intended to be used for the purpose of perpetuating illegalities, irregularities or improprieties or for scuttling the whole scheme of public employment. Its role as the sentinel and as the guardian of equal rights protection should not be forgotten.

5. -----This Court has also on occasions issued directions which could The question arises, equity to whom? Equity for the handful of people who have approached the Court with a claim, or equity for the teeming millions of this country seeking employment and seeking a fair opportunity for competing for employment? When one side of the coin is considered, the other side of the coin, has also to be considered and the way open to any court of law or justice, is to adhere to the law as laid down by the Constitution and not to make directions, which at times, even if do not run counter to the Constitutional scheme, certainly tend to water down the Constitutional requirements. It is this conflict that is reflected in these cases referred to the Constitution Bench.

(Emphasis supplied)

Thereafter requirement of maintaining equity arising out of giving temporary appointment etc. is discussed in para-13 in the following manner :

“13. What is sought to be pitted against this approach, is the so called equity arising out of giving of temporary employment or engagement on daily wages and the continuance of such persons in the engaged work for a certain length of time. Such considerations can have only a limited role to play, when every qualified citizen has a right to apply for appointment, the adoption of the concept of rule of law and the scheme of the Constitution for appointment to posts. It cannot also be forgotten that it is not the role of courts to ignore, encourage or approve appointments made or engagements given outside the constitutional scheme. In effect, orders based on such sentiments or approach would result in perpetuating illegalities and in the jettisoning of the scheme of public employment adopted by us while adopting the

Constitution. The approving of such acts also results in depriving many of their opportunity to compete for public employment. We have, therefore, to consider the question objectively and based on the constitutional and statutory provisions. (Emphasis supplied)

Thereafter various judgments of the Supreme Court in the matter of public employment, regularization of service are taken note of and in para-41 the decision of the another Constitution Bench in the case of *Indra Sawhney Vs. Union of India*, 1992Suppl.(3) SCC 217 is taken note of and certain provisions reproduced and finally in para-41 it is held by the Supreme Court that the binding decisions indicated by the Supreme Court are clear imperatives that adherence to Articles 14 and 16 of the Constitution is a must in the process of public employment. Finally the matter is so dealt with in paras 43, 44 and 45 .

“43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely

because, an employee had continued under cover of an order of Court, which we have described as 'litigious employment' in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.

44. The concept of 'equal pay for equal work' is different from the concept of conferring permanency on those who have been appointed on ad hoc basis, temporary basis, or based on no process of selection as envisaged by the Rules. This Court has in various decisions applied the principle of equal pay for equal work and has laid down the parameters for the application of that principle. The decisions are rested on the concept of equality enshrined in our Constitution in the light of the directive principles in that behalf. But the acceptance of that principle cannot lead to a position where the court could direct that appointments made without following the due procedure established by law, be deemed permanent or issue directions to treat them as permanent. Doing so, would be negation of the principle of equality of opportunity. The power to make an order as is necessary for doing complete justice in any cause or matter pending before this Court, would not normally be used for giving the go-by to the procedure established by law in the matter of public employment-----”

45. While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain -- not at arms length -- since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would

not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution of India. (Emphasis supplied)

14. Again in para - 47 the nature of appointment of temporary contract basis is take note of the promise flowing out of such appointment is indicated in the following manner :

“47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such

a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.” (Emphasis supplied)

and after taking note of all these aspect, the principle is laid down in para 50 in the following manner:

“50. It is argued that in a country like India where there is so much poverty and unemployment and there is no equality of bargaining power, the action of the State in not making the employees permanent, would be violative of Article 21 of the Constitution. But the very argument indicates that there are so many waiting for employment and an equal opportunity for competing for employment and it is in that context that the Constitution as one of its basic features, has included Articles 14, 16 and 309 so as to ensure that public employment is given only in a fair and equitable manner by giving all those who are qualified, an opportunity to seek employment. In the guise of upholding rights under Article 21 of the Constitution of India, a set of persons cannot be preferred over a vast majority of people waiting for an opportunity to compete for State employment. The acceptance of the argument on behalf of the respondents would really negate the rights of the others conferred by Article 21 of the Constitution, assuming that we are in a position to hold that the right to employment is also a right coming within the purview of Article 21 of the Constitution. The argument that Article 23 of the Constitution is breached because the employment on daily wages amounts to forced labour, cannot be accepted. After all, the employees accepted the employment at their own volition and with eyes open as to the nature of their employment. The Governments also revised the minimum wages payable from time to time in the light of all relevant circumstances. It also appears to us that importing of these theories to defeat the basic requirement of public employment would defeat the constitutional scheme and the constitutional goal of equality. (Emphasis supplied)

15. On a complete scanning of the aforesaid judgment of the Supreme Court, it would be seen that the equality of opportunity is held to be a hallmarks in the matter of public appointment. It is emphasized by the Supreme Court that any process initiated for appointment which results in keeping out those who are qualified for applying for a post and depriving them to compete for appointment to the post is violative of Articles 14 and 16 of the Constitution of India. Equity for the million who are unemployed and their right to seek fair opportunity to compete for appointment is held to be a constitutional mandate. That apart it is emphasized by the Supreme Court that if illegal appointment is made the same cannot be regularized, what could be regularized is only an irregularity committed in appointment, if the statutory Rules and Regulations for appointment are violated, the same would be an illegality and not an irregularity. If paras 43 and 44 of the judgments are taken note of, the marked portion would indicate that proper competition among qualified persons is required for appointment and if a contract appointment is made without proper competition among qualified persons, such appointment is illegal. Deviating from the principle of granting equal opportunity to participate in the process of selection and appointment to public employment is deprecated by the Supreme Court in the case of *Umadevi* (supra).

16. Even though during the course of hearing, Smt. Shobha Menon. Learned Senior Counsel had referred to various other judgments as is indicated in para - 11 of this order but in view of the principles laid down by the Constitution Bench of the Supreme Court in the case of *Umadevi* (supra), it is not necessary to refer to those judgments now, most of the judgments either lay down the same principle or have followed the dictum of the Supreme Court in the case of *Umadevi*(supra). In that view of the matter, it is not now necessary to burden this order with all these judgments. It is therefore, now appropriate to consider as to what process for appointment and regularization in the present case was followed and to analysis as to whether the same is in conformity with the mandate of the Supreme Court as indicated hereinabove. Accordingly, it would be appropriate at this stage to analysis the procedure followed from the stage when the decision was taken by the Coordination Committee to make appointment of Samvida/ contract teachers.

17. The minutes of the meeting of the Coordination Committee ultimately became the scheme for appointment in question as contained in Annexure P-4 and if the said scheme is taken note of it is seen that the scheme approved was for appointing Samvida/contract teachers against the sanctioned post through advertisement. It was decided that the contract teachers would be paid a consolidated salary of Rs.8000/- per month and higher consolidated salary may be offered on the basis of qualification and other consideration after approval of the Selection Committee. Clause-3 of the scheme contains the provisions for consideration of the Selection Committee and reads as under :

“3. Selection will be made by a Selection Committee comprising of:

- (a) Kulpati or his Nominee - Chairman
- (b) Dean to be nominated by the Kulpati
- (c) Two subject experts to be nominated by the Kulpati
- (d) Members belonging to SC/ST/OBC to be nominated by the Kulpati .

Presence of one subject expert.....

Thereafter it is indicated that the appointment should be made for a period of six months. Attempt should be made to fill the post as early as possible on regular baais and if this is not possible then the contract may be renewed for a further period of 6 months or less after assessing the performance by a committee appointed by the Kulpati. However, the appointment is not to go beyond the period of 3 years. Thereafter in clauses 10 and 11 a provisions for undertaking is incorporated and the petitioners have given undertaken in this regard. The advertisement Annexure P-5 indicates the same conditions as is contained in the Scheme Annexure P-4 is incorporated . The petitioners were called for interview and have been appointed initially for a period of 6 months, extended for a further period of six months after assessment of performance and subsequently it has been extended for a further period of 2 years, i.e. for a total period of 3 years and the appointments were to come to an end on 01-04-2010. It is the case of the petitioners that even though they are appointed on contract basis but as they were duly selected by a duly constituted selection committee, which is in accordance to law their regularization is proper. The Executive Council also in its meeting has so indicated. That being so it is thought appropriate to examine the requirements contemplated under section 49 of the Adhiniyam 1973 for regular appointment.

18. Chapter-IX of the Adhiniyam 1973 contains the provisions for appointment to the teaching post in the University and sub Section 2 of Section 49 contemplates the provisions for constitution of the Selection Committee and the same is reads as under :

“49(2) The members of the committee of selection shall be :

- (i) Kulpati- Chairman,
- (i-a) (x x x)
- (ii) (x x x)
- (iii) one expert to be nominated by Kuladhipati from a panel, A panel, submitted by the academic council of three experts in the subject, not connected with the University in any manner whatsoever.

(iv) Three subject experts, not connected with the University in any manner whatsoever to be nominated by the Kuladhipati. Provided that atleast one of three experts shall be nominated from category of Scheduled Castes,, Scheduled Tribes nor other Backward classes. In case of non- availability of an expert from these categories, one Administrative Officer not below the rank of Commissioner, who belongs to reserved categories, shall be nominated.

(v) (x x x)

(3) Three members of the selection committee shall form a quorum.

(4) The Committee shall investigate the merits of the various Candidates, and shall recommend to the Executive Council the names, if any, of persons whom it considers suitable for the posts, arranged in order of merit.”

Provided that no recommendation shall be made unless at least two experts nominated under clause (iii) and (iv) of sub-section (2) are present in the meeting in which recommendation is to be decided upon.”

If the constitution of the Selection Committee as contemplated under section 49(2) is compared with the Selection Committee constituted under the Scheme Annexure P-4, it is apparent that the Selection Committee constituted, which appointed the petitioners on contract basis is not a proper or duly constituted Selection Committee as required under the provisions of Section 49(2). Chairman of the Selection Committee under the scheme was to be either the Kulpati or his nominee, however under sub section 2 of section 49, the Kulpati had to be the Chairman. The Selection Committee which was constituted in the present case under the Scheme did not contain the Kulpait as its Chairman but it was a nominee of the Kulpati who participated in the selection proceedings as the Chairman. That apart section 49 contemplates nomination of one expert by the Kuladhipati of the University. No such nomination by the Kulpadhipati as an expert is contemplated in the Scheme, Annexure P-4. Instead two subject experts are nominated by the Kulpati. Section 49(2) contemplates presence of 3 subject experts, not connected with the University to be nominated by the Kuladhipati. If requirement of section 49(2) in the matter of constitution of the Selection Committee and the Selection Committee constituted under the Scheme are analyzed, it would be clear that the Selection Committee constituted under the Scheme was not meeting the requirement of the statutory provisions and therefore, Smt. Shobha Menon is right in contending that the appointment was made by a Selection Committee which was inferior to the one as is required under Section 40 of the Adhiniyam 1993. It is therefore, a case where the appointment is made

in an illegal manner, contrary to the requirement of law and therefore, if the principles laid down in the case of *Uma Devi* (supra) are applied in the matter of appointment in question and the procedure followed in the present case seen, it has to be held that the appointment is illegal, it is contrary to the provisions of law. An illegal appointment cannot be regularized and therefore, the Executive Council has committed an error in regularizing the appointment which was illegal. To that extent this court has no hesitation in accepting the contention of the University.

19. That apart the matter can be viewed from a different prospective also, if the requirement contemplated by the Constitutional Bench of the Supreme Court in the case of *Uma Devi* (supra) with regard to fulfilling the mandate of Articles 14 and 16 of the Constitution of India in the matter of granting equal opportunity to all concerned to participate in the process of public employment is taken note of it would be seen that in the present case advertisement Annexure P-5 issued was clearly for appointment as contract teachers for the academic session 2006-07 and that also for a period of 6 months initially. When such advertisement for appointment is issued, many eligible, deserving candidates may feel disinterested in seeking appointment on contract basis. On the contrary If regular process of appointment is initiated and a proper advertisement for regular appointment was issued then all such candidates would have applied and participate in the process of selection, the very nature of advertisement issued makes a lot of difference and therefore, when the advertisement issued is for appointment on adhoc or contract basis and if such appointee is regularized under the process of regularization the same stands vitiated as it deprives the constitutional right to equality in the matter of opportunity to seek public appointment to many prospective candidates who would have otherwise applied but for the manner in which the advertisement was issued. That being so, it is case where the provisions of Articles 14 and 16 of the Constitution of India are violated and the right of equal opportunity to seek appointment as laid down by the Supreme Court in the case of *Uma Devi* (Supra) is violated. Accordingly, on this ground also regularization ordered by the Executive Council stands vitiated as it is in contravention to the requirement of the constitutional mandate as contemplated under Articles 14 and 16 of the Constitution of India.

20. Accordingly, taking note of the procedure followed in the present case in the light of the principles as laid down by the Supreme Court, I am of the considered view that the Executive Council in regularizing such an appointment which was made contrary to procedure contemplated under law has committed an error and therefore, no mandamus can be issued by this court for implementing such a resolution of the Executive Council which is contrary to the mandate of the constitution and the law laid down by the Supreme Court in the case of *Uma Devi* (Supra) having so held, I am of the considered view that now it is not necessary for this court to go into various other aspect of the matter which was

2154] State of M.P. Thro. Collector Dhar vs. Vinayak Rao [I.L.R.[2010]M.P.,
canvassed by both the parties during the course of hearing. Once it is found by
this court that the appointments of the petitioners were illegal, being in total
disregard to the requirement of law and when it is found that such an appointment
cannot be regularized, no further interference can be made in these writ petitions
and therefore, now it is not necessary to go into various other questions and the
one with regard to whether the approval of the State Govt. was necessary or not

21. Accordingly in the facts and circumstances of the case finding the claim
made by the petitioners to be wholly unsustainable, contrary to law, no relief can
be granted. However, as and when the respondent University undertakes a process
for regular appointment to the post in question they shall permit the petitioners to
participate in the same and by granting them age relaxation to the extent of
work done by them on contract basis, permit the petitioners to participate in the
process of selection.

22. Accordingly in the facts and circumstances of the case, finding no merit
in the claim made by the petitioners, all these petitions are dismissed, without
any order so as to costs.

Petition dismissed.

I.L.R. [2010] M. P., 2154

APPELLATE CIVIL

Before Mr. Justice Prakash Shrivastava

29 April, 2010*

STATE OF M.P. THROUGH COLLECTOR, DHAR

... Appellant

Vs.

VINAYAK RAO

... Respondent

**Civil Procedure Code (5 of 1908), Order 1 Rule 10 - Application for
impleadment during pendency of Second Appeal - Suit for declaration of
title of pond against State - Applicants claiming customary rights to take
water from pond - Separate suit filed by applicants is also pending -
Application for impleadment already rejected by the trial Court and rejection
order of trial Court attained finality - Held - Applicants claiming independent
right and issue raised is foreign to present controversy in appeal - Application
can not be allowed, hence rejected.** (Paras 9, 11, 13, 14, 15)

सिविल प्रक्रिया संहिता (1908 का 5). आदेश 1 नियम 10 – द्वितीय अपील के लंबित होने के दौरान पक्षकार बनाने के लिये आवेदन – राज्य के विरुद्ध तालाब के हक की घोषणा के लिये वाद – आवेदक तालाब से पानी लेने के रुढ़िगत अधिकार का दावा कर रहे हैं – आवेदकों द्वारा प्रस्तुत पृथक वाद भी लंबित है – विचारण न्यायालय द्वारा पक्षकार बनाने का आवेदन पहले ही नामंजूर कर दिया गया और विचारण न्यायालय का नामंजूरी आदेश अंतिम हो गया – अभिनिर्धारित – आवेदकों ने स्वतंत्र अधिकार का दावा किया और उठाया गया विवाद्य अपील में वर्तमान विवाद के लिये असंगत है – आवेदन मंजूर नहीं किया जा सकता, इसलिए नामंजूर किया गया।

Cases referred :

AIR 1980 Raj 21, AIR 1977 SC 898, AIR 2010 SC 1099.

G.M. Chaphekar with Nidhi Bohra, for the appellants.

B.L. Pavecha with Akshat Pahadia, for the respondents.

ORDER

PRAKASH SHRIVASTAVA, J. :- Heard on I.A.No.2283 of 2010, which is an application under Order 1 Rule 10 of the CPC read with Order 41 Rule 20 of the CPC for impleadment and I.A.No.2282 of 2010, which is an application under section 151 of the CPC for temporary injunction.

2. These applications have been filed by the Villagers of Village Hatod, Tehsil Sardarpur, Distt. Dhar, pleading that they have a right to take water on the pond situated at Khasra No.936 in Village Hatod, Tehsil Sardarpur, which is subject matter of the present appeal.

3. Learned counsel appearing for the applicants submits that the applicants had filed separate suit for declaration of their right to take water from the pond. In that suit the application for temporary injunction was rejected against which the appeal was also rejected and in the writ petition the liberty has been granted by this Court to file the application under Order 1 Rule 10 of the CPC in the present appeal. He further submitted that the villagers have customary rights to take water from the pond, therefore, they be impleaded in the present appeal and their injunction application be allowed.

4. Learned counsel appearing for the respondents submitted that the application filed under Order 1 Rule 10 CPC and also the application for injunction are misconceived. He submitted that the applicants were not party in the suit, therefore, they have no right to file such application in the appeal, their similar application was rejected by the Trial Court, they cannot initiate parallel proceedings and since they are asserting Independent right, therefore, they cannot come to the Court in the present appeal. Learned counsel for the respondents had relied upon several judgment in support of his submissions.

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

6. In the present matter, the respondents had filed suit for declaration and permanent injunction, which was decreed by the Trial Court and the decree was affirmed by the First Appellate Court. This second appeal has been admitted on 06.08.01 by formulating the substantial questions of law relating to admissibility and effect of documents Exhibits D/1 to D/22 and vesting of suit pond in government.

7. Under Order 1 Rule 10 the court has the power to add a party whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle all the questions involved in the suit. In the present matter, looking to the narrow scope of the second appeal the presence of

2156] State of M.P. Thro. Collector Dhar vs. Vinayak Rao [I.L.R.[2010]M.P., the applicants is not necessary for deciding the question of law formulated in the appeal.

8. Learned counsel appearing for the respondent referring to the judgment of the Orissa High Court in the matter of *Radhakrushna Choudhary V/s. Radhakrushna Mohaprabhu and another* reported in AIR 1971 Orissa 274, submitted that a person who was not a party in the original forum cannot be added as a party in the appeal for the first time. Such an argument cannot be accepted in view of express of language of Order 1 Rule 10 (2) CPC. which gives discretion to the Court to add or strike out parties "at any stage of proceedings". This expression gives wide power to add or strike out parties even at the appellate stage.

9. It is also worth noting that the applicants are asserting their independent right and the person who is asserting his independent right need not be impleaded as party in a pending suit. The Supreme Court in the matter of *Ramesh Hirachand Kundanmal V/s. Municipal Corporation of Greater Bombay and Other* reported in (1992) 2 SCC 525, while considering the scope of Order 1 Rule 10 (2) of the CPC has held merer fact that fresh litigation can be avoided is no ground to allow application under Order 1 Rule 10 CPC when the applicant has no direct interest in the subject matter of the litigation and addition of the respondent would result in substitution or addition of new cause of action which would only widen the issue required to adjudicate and settle or joining of the party would embarrass the plaintiff or would require raising of issue not germane to suit.

10. The Rajasthan High Court also in the matter of *Ramesh Chandra V/s. Mukhtyar Singh and Others* reported in AIR 1980 (Rajasthan) 21 has held that in a suit for declaration and possession a third party claiming independent title applying under Order 1 Rule 10 CPC cannot be allowed to join since it would raise the question foreign to the controversy.

11. Same is the position in the present matter also. In the present matter the respondent is claiming his title on pond against the government whereas., the claim of the applicant for taking water from suit pond is based upon easementry/ customary right, which is an issue foreign to present controversy.

12. Learned counsel appearing for the respondent has also relied upon the judgment of the Supreme Court in the matter of *Manish Goel V/s. Rohini Goel* reported in AIR 2010 S.C. 1099 and in the matter of *Jai Singh V/s. Union of India and Others* reported in AIR 1977 S.C. 898 wherein, it has been expressed that a person cannot be permitted to pursue the parallel remedies.

13. The record indicates that the independent suit C.S.No.37-A of 2009, filed by the applicants is pending in which they are asserting their right to take water from the disputed pond. Their right will be adjudicated in their pending suit. The application under Order 39 Rules 1 and 2 in the said suit filed by the applicants has already been rejected. Appeal against that order has also been rejected and

this Court while passing the order dated 10th March, 2010 in Writ Petition No. 1108 of 2010, had only granted a liberty to the applicants to file appropriate application in second appeal on the basis of the statement made by the counsel for the applicants. In view of this, no benefit can be derived by the applicants on the basis of the order dated 10.03.10 passed in Writ Petition No.1108 of 2010.

14. It is also worth noting that the applicants had moved an application under Order 1 Rule 10 of the CPC before the Trial Court on the similar ground and the Trial Court by order dated 27.01.97 had rejected the said application holding that the applicants were neither necessary party nor proper party in the present suit. The said order has attained finality. There is no change of circumstances to take a different view.

15. For the aforesaid reasons, the application I.A.No.2283 of 2010 filed under Order 1 Rule 10 of the CPC cannot be allowed and the same is hereby rejected. Since the application for impleadment has been rejected, therefore the I.A.No.2282 of 2010, which is filed by the applicants for temporary injunction has lost its relevance and the same is also rejected.

Application rejected.

I.L.R. [2010] M. P., 2157

APPELLATE CIVIL

Before Mr. Justice Piyush Mathur

29, April, 2010*

UCO BANK

Vs.

M/S. SHANKAR ENTERPRISES & ors.

... Appellant

... Respondents

A. Civil Procedure Code (5 of 1908) - Section 34 - Interest-Rate of Interest - Held - *The Legislature has provided that the Court may order payment of interest at such rate as the Court deems reasonable to be made on the 'principal sum adjudged' from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum, for any period prior to the institution of the suit, with further interest at such rate not exceeding 6% per annum and the Proviso appended to Section 34 meet such exigencies, when the rate of interest is specified or not specified in an agreement.* (Para 10)

क सिविल प्रक्रिया संहिता (1908 का 5) - धारा 34 - ब्याज - ब्याज दर - अभिनिर्धारित- विधायिका ने यह प्रावधान किया है कि न्यायालय निर्णीत मूलधन पर वाद की दिनांक से डिक्री पारित करने की दिनांक तक ऐसी दर से जैसा कि वह युक्तियुक्त समझे, ब्याज का भुगतान करने हेतु आदेश कर सकती है, ऐसे मूलधन पर निर्धारित/निर्णीत ब्याज के अतिरिक्त, वाद संस्थित होने के पूर्व किसी अवधि के लिये, अधिकतम 6 प्रतिशत प्रतिवर्ष की दर से ब्याज तथा धारा-34 का परन्तुक इस प्रकार की अत्यावश्यकताओं को पूरा करता है, जब किसी अनुबंध में ब्याज की दर निर्दिष्ट हो अथवा न हो ।

B. Civil Procedure Code (5 of 1908) - Section 34 - Grant of Pendente lite Interest-No Rate of Interest specified- Permissibility - Held - Where there exists no evidence about the mutually agreed rate of interest, or contractual interest or the rate at which the Nationalized Bank charge interest, on the commercial transactions, the Court can conveniently award pendente lite interest up to a maximum of 6% per annum. (Para 10)

ख सिविल प्रक्रिया संहिता (1908 का 5) - धारा 34 - वाद लंबित कालावधि हेतु ब्याज की स्वीकृति- ब्याज दर निर्दिष्ट नहीं- अनुज्ञेयता- अभिनिर्धारित- जब परस्पर सहमति से तय की गयी ब्याज दर अथवा संविदात्मक ब्याज अथवा वाणिज्यिक संव्यवहार पर राष्ट्रीयकृत बैंक द्वारा ब्याज प्रसारित करने की दर के संबंध में जहां कोई साक्ष्य उपलब्ध न हो तो न्यायालय अधिकतम 6 प्रतिशत प्रतिवर्ष की दर से वाद लंबित रहने की कालावधि का ब्याज आसानी से स्वीकृत कर सकती है ।

C. Civil Procedure Code (5 of 1908) - Section 34 - Grant of Pendente lite Interest-Principles to be followed- Held-The issue of interest pendente lite would certainly be governed by the peculiar facts and circumstances of the case - The Court would be justified in exercising its discretion to award pendente lite interest, at a rate found reasonable, in the discretion of the Court. (Para 12)

ग सिविल प्रक्रिया संहिता (1908 का 5) - धारा 34 - वाद कालावधि ब्याज- अनुकरणीय सिद्धांत-अभिनिर्धारित- वाद कालीन ब्याज का विवाद्यक निश्चित रूप से प्रकरण के विशेष तथ्यों एवं परिस्थितियों से नियमित होगा- न्यायालय द्वारा विवेकाधिकार का प्रयोग करते हुए उचित समझी गयी दर से स्वीकृत वाद कालीन ब्याज न्यायसंगत होगा ।

D Civil Procedure Code (5 of 1908) - Section 34, Order 34 Rule 11- Grant of Pendente lite Interest-Trial court granting 5% Interest pendente lite-Held Permissibility-The Scheme of the payment of interest as reflected in Section 34 and Order 34 of CPC provide for payment of 6% interest as the outer limit for the rate of interest - It could not be said that the Trial Court had erred in awarding 5% rate of interest on the principal sum for the period of the suit. (Para 17)

घ सिविल प्रक्रिया संहिता (1908 का 5) - धारा-34, आदेश 34 नियम 11-वादकालीन ब्याज की स्वीकृति-विचारण न्यायालय द्वारा 5 प्रतिशत वादकालीन ब्याज स्वीकृत - अभिनिर्धारित- अनुज्ञेयता- सिविल प्रक्रिया संहिता की धारा 34 एवं आदेश 34- ब्याज भुगतान की प्रणाली जैसी की सि०प्र०सं० की धारा 34 एवं आदेश 34 में परिलक्षित ब्याज भुगतान की प्रणाली ब्याज भुगतान हेतु 6 प्रतिशत ब्याज दर की अधिकतम सीमा का प्रावधान करती है- यह नहीं माना जा सकता कि विचारण न्यायालय ने मूलधन की राशि पर 5 प्रतिशत की दर से ब्याज भुगतान स्वीकृत करके त्रुटि की है ।

Cases referred :

1992(2)SCC 375, 2009(2)SCC 294 Distinguished, 1998(2)SCC 317, 2002(1)SCC 367, 2009(7)SCC 372, 1990(JLJ)139, AIR 2000 MP 145, Relied upon.

Shri P.K. Patni, Counsel, for the appellant.

None, appeared inspite of Notices, for the respondents.

J U D G M E N T

PIYUSH MATHUR, J. :-The United Commercial Bank (UCO Bank) has preferred this First Appeal against the Judgment and decree passed by the Vth Additional District Judge, Gwalior, in Civil Original Suit No.6-B/1986, where in the suit preferred by the Bank, for the recovery of dues of Rs.1,68,593.91 Paise (which stood paid-up during pendency of Suit) pendente lite interest @ 5% has been awarded and the Appellant-Bank claims herein that instead of 5%, the Court should have awarded contractual rate of interest. This Appeal relates only to this solitary issue as to whether a Civil Court possess the power and discretion to grant interest as per the rate mutually agreed between the parties or at a lower rate for the period during which the suit remained pending with the Court (pendente lite interest only).

2. The facts of the case reveal that Shankar Enterprises being a Partnership Firm had obtained financial assistance from the Appellant-Bank and a Term Loan of Rs.65,000/- and a Cash Credit Facility of Rs.60,000/- was sanctioned in favour of the Firm, for which the Respondents No. 4 and 5 stood Guarantors and the Respondents no. 2 and 3 being Partners of the Firm were equally made responsible for the return of the Loan amount.

3. When the Partnership Firm, its Partners and Guarantors could not deposit the Loan amount including interest, a suit was filed on Date 12.09.1983 by the Bank for the recovery of Rs.1,68,593.91 Paise but during the pendency of the Suit, Defendant No.3 had deposited the entire Suit amount of Rs.1,68,593.91 Paise on Date 03.02.1988 vide Cheque No.101595 (including Principal and Interest Amounts) and upon its presentation before the Trial Court, the Counsel for the Bank had received the Cheque, although the same was not immediately encashed by the Bank, due to undisclosed reasons, but the fact remains that the entire due amount was deposited by the Respondents during the pendency of the Suit.

4. While the Suit was pending with the Trial Court, Defendant No.5-Govind Narayan Shah expired and his name was deleted from the array of Defendants, whereafter the Bank filed an Application for attachment and another Application was filed by Defendant No.4 seeking issuance of Interim Orders for attachment before the Judgment, against the amount of Leave Salary and Gratuity, payable to Defendant No.3 by his Employer J.C. Mills, Gwalior, for realization of due amount and the Trial Court allowed the Application of Defendant No.4 by an Order Dated 05.08.1988 and issued an Attachment Order for the amounts payable to the Defendant No.3.

5. Mr. Vishwamitra Gaur-Respondent No.3 preferred a Miscellaneous Appeal against the Order of Attachment before the High Court, where this Court, while disposing of Miscellaneous Appeal No.106/88 (*V.M. Gaur Vs. United Commercial Bank*) observed in its Order Dated 06.03.1991 as follows:

"It is undisputed fact of the case that the amount claimed in the suit as principal and interest has been duly deposited. The question which remains only to be decided is that of interest pendente lite and that of costs. In regard to those two questions there can be no scope for any evidence of any party to be taken and it is a question of discretion merely of the trial Court to be exercised in deciding the claim of the plaintiff for interest and costs."

6. A perusal of the Order passed by this Court reveal that the Trial Court was directed to decide the claim of the Bank in relation to the interest and costs only, in view of deposit of the entire Suit amount, therefore, the Trial Court focused only on the issue of interest and costs (as none of the parties challenged High Court's Order further) and the impugned Judgment came to be passed by the Vth Additional District Judge on Date 12.04.1991, only in relation to the issue of pendente lite interest and costs, where the Court instead of awarding contractual interest, has awarded 5% interest for the period commencing from Date 12.09.1983 till 03.02.1988, on the due amount quantified in the Suit at Rs.1,68,593.91 Paise.

7. I have heard Shri R. K. Patni, Learned Counsel for the Appellant and perused the entire record of the case and since none appeared on behalf of the Respondents, the matter was carefully examined and considered.

8. The record reveal that in the event of deposit of the entire suit amount and in view of an Order passed by this Court on Date 06.03.1991, the Plaintiff and the Defendant did not lead any evidence (Oral or Documentary) in support of their respective contentions, therefore, the Agreement or the Conditions of Loan including the rate of interest could not be proved by the Plaintiff-Bank or the Defendants leaving this Court with no choice except to read the contents of the unexhibited documents filed by the Plaintiff-Bank alongwith the Plaint. The Loan Saction Order Dated 10.10.1977 simply provides for the Conditions for grant of loan and it nowhere mention about the rate of interest, but the Agreement executed between the Plaintiff and the Defendant contain a condition in Clause (6) that the Borrower shall pay interest @ 13% over the Reserve Bank Rate subject to a minimum of 13% interest per annum, but the other Columns which provide for other exigencies, when a Borrower would fail to discharge his liability, remained blank, as the Bank Officials did not mention any amount or rate of interest in the other Columns of the Agreement, which makes it difficult for this Court to ascertain, even while perusing the Agreement, as to what was the rate of interest, for which the parties had agreed, which would become "contractual rate of interest" for the purposes of ascertaining the rate of interest, leviable on the principal sum, advanced on behalf of the Bank. In this circumstance, it cannot be said that the contractual rate of interest in the present case would be 13% or 15%, in absence of a definite proof about the Agreement of the Parties, on a particular rate of interest.

9. Shri P. K. Patni Learned Counsel for the Appellant-Bank has placed reliance on a Judgment of the Supreme Court reported as (1999) 2 SCC 375 *State Bank*

of India Vs. Yasangi Venkateswara Rao to demonstrate that when a contract exists between the Parties regarding the rate of interest, then the compound interest can be charged in respect of the amount advanced against a mortgage and the Court cannot interfere in the matter. With great respect, this Judgment has no application to the controversy at hand, in as much as there exists no specified rate of interest, for which the parties of the present Suit had agreed to abide themselves and unless there exist a mutual agreement for the payment of rate of interest, the analogy propounded in the Judgment could possibly be not pressed into service. Shri P. K. Patni has placed reliance on a similar Judgment of the Supreme Court reported as (2009) 2 SCC 294, *Deepa Bhargava & Another Vs. Mahesh Bhargava & Others*, which also propound for an analogy, where the Parties agreed for a particular rate of interest, but this Judgment, with great respect, has no application to the present controversy as there exist no proof of mutually agreed rate of interest.

10. The Code of Civil Procedure contains specific provisions in Section 34 which clothe a Court with the power to order for payment of interest, (including interest pendente lite), where the Legislature has provided that the Court may order payment of interest at such rate as the Court deems reasonable to be made on the 'principal sum adjudged' from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum, for any period prior to the institution of the suit, with further interest at such rate not exceeding 6% per annum and the Proviso appended to Section 34 meet such exigencies, when the rate of interest is specified or not specified in an agreement. Similar is a provision of payment of interest, contained in Order 34 Rule 11 of the CPC, where the Legislature has empowered the Court to order for payment of interest, at the rate, agreed between the parties or failing such rate, at such rate not exceeding 6% per annum, as the Court deems reasonable. A comparative analysis of Section 34 and Order 34 Rule 11 of CPC. provide sufficient guidance to the Court for ordering interest and pendente lite interest to the Plaintiff. In the present case, the Plaintiff-Bank could not establish as to what was the contractual rate of interest and similarly the Bank has also not established as to what was the rate of interest, prevailing at that point of time, at which a Nationalized Bank was charging interest in relation to the commercial transactions. Therefore this Court feels that where there exists no evidence about the mutually agreed rate of interest, or contractual interest or the rate at which the Nationalized Bank charge interest, on the commercial transactions, the Court can conveniently award pendente lite interest upto a maximum of 6% per annum.

11. The provision of Code of Civil Procedure and Interest Act and the provisions of Usurious Loans Act had come up for consideration before the Supreme Court in a case reported as (1998) 2 SCC 317, *N.M. Veerappa v. Canara Bank*, where the Supreme Court had analyzed the scope of all these provisions, while screening the effect of the amendment made in the Year 1929 and concluded in relation to the payment of interest, qua the discretion of the Court to award interest

pendente lite that the Court shall have the discretion to award interest, lessor than the rate of contractual rate of interest. The relevant Paragraph (18) of the Judgement is quoted herein below :

"18. From the aforesaid rulings the following principles can be summarised. (a) Before 1929, it was obligatory for the Court to direct the contract rate of interest to be paid by the mortgagor on the sum adjudged in the preliminary decree, from the date of suit till the date fixed for payment as per Order 34 Rule 2(c)(i) or Order 34 Rule 4(1) or Order 34 Rule 7(c)(i), respectively in suits for foreclosure, sale or redemption. (b) But after the 1929 Amendment, because of the words used in the main part of Order 34 Rule 11, namely that "the Court may order payment of interest" it is no longer obligatory on the part of the Court while passing preliminary decree to require payment at the contract rate of interest from date of suit till the date fixed in the preliminary decree for payment of the amount. It has been so held in *Jaigobind case*⁵ by the Privy Council and by this Court in *S.P. Majoo case*³ that the new provision gives a certain amount of discretion to the Court so far as pendente lite interest is concerned and subsequent interest is concerned. (c) It is no longer obligatory to award the contractual rate after date of suit and up to the date fixed for redemption as above stated even though there was no question of the contractual rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918. (d) Even if the Court otherwise wants to award interest, the position after the 1929 and 1956 Amendments is that the Court has discretion to fix interest from date of suit under Order 34 Rule 11(a)(i) up to date fixed for payment in the preliminary decree, the same rate agreed in the contract, or, if no rate is so fixed, such rate as the Court deems reasonable on the principal amount found or declared due on the mortgagor is concerned. (e) The Court has also power to award from the date of suit under Order 34 Rule 11(a)(iii) a rate of interest on costs, charges and expenses as per the contract rate or failing such rate, at a rate not exceeding 6%. This is the position of the discretionary power of the Court, from the date of suit up to the date fixed in the preliminary decree as the date for payment. (f) Again under Order 34 Rule 11(b) so far as the period after the date fixed for payment is concerned, the Court, even if it wants to exercise its discretion to award interest up to date of realization or actual payment, on the aggregate sums specified in clause (a) of Order 34 Rule 11, could award interest at such rate as it deemed reasonable."

12. The aforesaid view is holding good uptill now as in a recent Judgment reported as (2002) 1 SCC 367 *Central Bank of India v. Ravindra*, the Supreme Court has observed that the award of interest pendente lite is the discretion of the Court, as it is essentially governed by Section 34 CPC, dehors the contract between the parties. The Relevant Paragraph (8) of this Judgment is quoted herein below:

"(8) Award of interest pendente lite and post-decree is discretionary with the court as it is essentially governed by Section 34 CPC dehors the contract between the parties. In a given case if the court finds that in the principal sum adjudged on the date of the suit the component of interest is disproportionate with the component of the principal sum actually advanced the court may exercise its discretion in awarding interest pendente lite and post-decree interest at a lower rate or may even decline awarding such interest. The discretion shall be exercised fairly, judiciously and for reasons and not in an arbitrary or fanciful manner."

13. The analogy of charging of interest in respect to recovery of a debt or damages, had been examined by the Supreme Court in yet another case reported as (2009) 7 SCC 372 *Thazhathe Purayil Sarabi & Ors. Vs. Union of India & Another* to ascertain as to whether the Court possess the power and discretion to grant interest under Section 34 of CPC, wherein the Court has found that Section 34 of CPC empowers the Court to grant interest at the current rate of interest or contractual rate as deemed reasonable to be paid on the principal sum adjudged to be payable and/or awarded from the date of claim or from the date of the order or decree for recovery of the outstanding dues. The Supreme Court has ruled that interest may be claimed on any amount decreed or awarded for the period during which the money was due and yet remained unpaid to the claimants and since in the present matter the entire principal sum adjudged to be paid by the Defendants-Respondents was paid during the pendency of the suit itself, the issue of interest pendente lite would certainly be governed by the peculiar facts and circumstances of the case and the Court would be justified in exercising its discretion to award pendente lite interest, at a rate found reasonable, in the discretion of the Court.

14. In some of the Judgments of the Madhya Pradesh High Court, it has been observed that it is the discretion of the Court under Section 34 of CPC to award pendente lite interest and it is not a mandatory requirement of law to grant interest at the contractual rate, as the same rest with the discretion of the Court, to prescribe the rate of interest, for the period during which the suit remained pending with the Court. In a Judgment of this Court, reported as 1990 JLJ 139 *Punjab National Bank Vs. Shri Jukhtar Singh & Another*, the Court has found that it possess the discretion to award pendente lite interest under Section 34 of the Code and when it is not a commercial transaction for the Guarantor, the Court would be justified in its discretion to award a lesser rate of interest, when it deals with the case of a guarantor. The other Judgment of this Court is reported in AIR 2002 MP 145.

Union Bank of India Vs. Chhatarpur Siliment Sales Corporation & Ors, wherein a similar view has been taken by this Court.

15. The facts of the present case reveal that the Borrower-Defendant No.2 had almost not contested the suit, but his father-in-law being Defendant no.3 and Guarantor had contested the suit and in absence of Defendant no.2, had paid the entire suit amount, out of his Life Time Savings, received from his Employer at the time of retirement from service and had paid interest on the principal sum uptill Date 03.02.1998, when an amount of Rs.1,68,593.91 Paise was tendered by payment of Cheque, during the pendency of the Suit. The Learned Trial Court had considered the financial constraints of the retired litigant, who had suffered five heart attacks and operated upon twice for subdural haemotoma and other ailments while remaining in the Hospital for several months and for also getting operated for cataract of both eyes and complete loss of monthly income. The Court has considered that Defendant No.3-Vishwamitra Gaur being retired employee and sole bread earner of the family had paid the entire suit amount, by adjusting his pensionary service benefits against the debts of his son-in-law and in those peculiar circumstances, the Trial Court had found that the pendente lite interest at the rate of 5% per annum would be the most appropriate rate of interest, for the period commencing from Date 12.09.1983 to 03.02.1988. The Trial Court has also taken into consideration that the Bank has failed to make any efforts to find out the person or property of Defendant No.2, who was the Principal Borrower, whereafter it could not be said that without considering the facts of the case or the surrounding circumstances, the Court has passed an order granting 5% interest as pendente lite interest on the principal sum, while allowing the payment of costs of the suit in proportion to the suit amount. Therefore, this Court find that the Trial Court has properly exercised its discretion in the peculiar facts and circumstances of the case.

16. It would not be out of place to mention that the entire suit amount tendered by the Defendant No.3 through a Cheque was accepted by the Counsel for the Bank and the Cheque was not encashed for quite sometime by the Bank and that might have persuaded the Bank Officials to ask for a higher amount of rate of interest as pendente lite interest, but when the Bank has failed to encash the Cheque issued for the entire due amount, for the recovery of which, the suit was filed, it could not be understood as to why 5% rate of interest as pendente lite interest would be inappropriate in the peculiar facts and circumstances of the case.

17. The Scheme of the payment of interest as reflected in Section 34 and Order 34 of CPC provide for payment of 6% interest as the outer limit for the rate of interest therefore it could not be said that the Trial Court had erred in awarding 5% rate of interest on the principal sum for the period commencing from 12.09.1983 to 03.02.1988, in the event when the Bank had failed to establish the prevailing rate of interest or contractual rate of interest and this Court feel that even without

this evidence, the Trial Court was justified in awarding 5% pendente lite interest, while exercising its discretion in the background of peculiar facts and circumstances of the case. Therefore the Appeal preferred on behalf of the Bank being bereft of any merits, deserves to be dismissed and accordingly the Appeal is dismissed. However, there shall be no order as to Costs.

Appeal dismissed.

I.L.R. [2010] M. P., 2165
APPELLATE CIVIL
Before Mr. Justice R.K. Gupta.
7 May, 2010*

GIRISH SHRIVASTAVA & ors.

... Appellants

Vs.

N.K. PATERIA & ors.

... Respondents

Civil Procedure Code (5 of 1908), Order 39 Rules 1 & 2, Transfer of Property Act, 1882, Section 44 - Agreement to sale with delivery of possession by one co-owner (who later died) in favour of plaintiff - Other co-owners sold out the property to the defendant - Plaintiff filed a suit for specific performance - Upon application of plaintiff for temporary injunction, the Court directed that the land in question was not to be sold to any person - Against the order the M.A. is filed - Held - Since the document/agreement is only notarized and not registered and without consent of other co-owners, it is doubtful that the plaintiff will have even a prima facie case in his favour for enforcing such an agreement - The suit itself was filed after 3 years of the agreement & death of executor - Thus, the right of purchaser can not be restricted in any manner for an indefinite period-Order passed by trial Court granting injunction set aside - Appeal allowed. (Paras 12 to 20)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2, सम्पत्ति अन्तरण अधिनियम, 1882, धारा 44 - वादी के पक्ष में एक सहस्वामी (जिसकी बाद में मृत्यु हो गयी) द्वारा कब्जे के परिदान के साथ विक्रय करार - अन्य सहस्वामियों द्वारा सम्पत्ति का विक्रय प्रतिवादी को किया - वादी ने विनिर्दिष्ट पालन का वाद प्रस्तुत किया - अस्थायी व्यादेश के लिए वादी के आवेदन पर न्यायालय द्वारा यह निदेश दिया गया कि प्रश्नगत भूमि को अन्य व्यक्ति को विक्रय न किया जावे - इस आदेश के विरुद्ध विविध अपील प्रस्तुत की गयी - अभिनिर्धारित - चूंकि दस्तावेज/करार मात्र नोटरीकृत है न कि रजिस्ट्रीकृत और यह अन्य सहस्वामियों की बिना स्वीकृति के है, अतः यह शंकास्पद है कि वादी अपने पक्ष में ऐसे करार को प्रवर्तित कराने के लिए प्रथम दृष्टया प्रकरण रखते हैं - वाद स्वयं भी करार एवं निष्पादक की मृत्यु के 3 वर्ष बाद प्रस्तुत किया गया - इस प्रकार क्रेता के अधिकार को किसी भी प्रकार अनिश्चित काल के लिए निर्बंधित नहीं किया जा सकता - विचारण न्यायालय द्वारा व्यादेश जारी किये जाने संबंधी आदेश अपास्त - अपील मंजूर।

Cases referred :

2004(4) MPHT 475, 2009(1) MPLJ 176, (2008) 7 SCC 46, (2005) 10 SCC 728.

R.S. Tiwari, for the appellants

R.K. Sanghi, for the respondents.

ORDER

R.K. GUPTA, J. :- Heard on merits

This is an appeal preferred by the defendants against the order passed on 13/04/2010 by Second Additional District Judge, Jabalpur in Civil Suit No. 38-A/2005, whereby the court below has granted temporary injunction.

2. At the time of hearing counsel appearing on behalf of the respondent no.1/plaintiff Shri R.K. Sanghi took notice and the matter was heard finally. I.A. No. 5242/2010 is application for dispensing with the services of notice on the respondent no.2, since the original plaintiff appears who is contesting the suit, therefore I.A. is allowed and notice to other respondent is dispensed with.

3. The facts leading to the present case are that the present appellants being defendants have purchased the suit land from the respondent no.2,3,4 & 5. The plaintiff filed a suit for specific performance. An agreement dated 02/04/2002 wherein the deceased Luis Dissuja executed an agreement to sell the land to the respondent no.1/plaintiff. The alleged agreement is not registered it is only a notarized agreement. In the said agreement it was agreed to sale the land @ Rs. 100/- sq ft and as an advance 5,00,000/- were paid by the Respondent no.1/plaintiff and it was agreed that the sale deed shall be executed within two years. The possession of the said land was also handed over to the plaintiff.

4. After execution of the agreement the Mr. Dissuja expired on 28/05/2002. The plaintiff also made an allegation in the plaint that he was not aware of the other co-owners. It is contended that the agreement since was not performed by the respondents therefore, notice was given and inspite of the notice there had been no performance of the contract, therefore, a civil suit was filed before the trial Court. An application for temporary injunction was also moved. The purchasers/appellants were impleaded as defendants. It is also alleged that they have purchased the suit land from the respondents no.2,3,4&5 who are the co-owners of the joint property.

5. It was contended by the defendants that Mr. Dissoja was not the exclusive owner of the property and the agreement was executed by him without their knowledge, therefore, it was the case that the said agreement is not binding on them. It was also stated that since the agreement is notarized and the possession of the land has already been taken over by the plaintiff, therefore it becomes a conveyance within the meaning of Stamps Act. The question with regard to the limitation was also raised because the civil suit was filed on 06/04/2005, though the agreement was executed on 28/05/2002. The trial Court considered the application for interim injunction and while considering the same the court has taken into account the prima facie case, balance of convenience, and the irreparable loss. The Court has ultimately directed that the land in question was not be sold to any person and against the said order the present M.A is filed.

6. On behalf of the appellant it is contended that inspite of the fact that there was no prima facie case in favour of the plaintiff, the Court below should not have granted injunction.

7. Apart from the aforesaid, it is also contended that the alleged agreement was not registered inspite of the fact that it required to be registered but is only notarized. It is reflected from agreement that the possession was handed over to the plaintiff, yet the court below has committed serious illegality in granting injunction. It is also to be seen that it was a joint property and a sale deed by respondents no. 2,3,4 & 5 is executed in favour of the appellant and therefore in view of Section 44 of the Transfer of Property Act the share of the executor of the agreement to sale as an owner remains uncertain and therefore in the absence of any suit for partition no injunction should have been granted.

8. It is also contended on behalf of the respondent that in the instant case there was an agreement to sale and therefore the respondent no.2 & 3 are bound under the law to execute the said agreement as they are the successors of the deceased being the family members of the deceased therefore, agreement of sale is binding on them.

9. For the purposes of ascertaining the prima facie case it is to be seen that the document i.e the agreement of sale is only a notarized document, the same has not been registered even though the possession of the land in question is taken by the plaintiff as per agreement.

10. In view of the aforesaid, once the possession is handed over then agreement to sale becomes a "conveyance" within the meaning of Stamps Act and in the instant case Schedule 1-A Entry no.5 E of the Indian Stamps Act, 1899 applied.

11. The Division Bench of this Court in *Shiv Kumar Saxena and others Vs. Manish Chand Sinha and another*, 2004(4) M.P.H.T, 475 has also taken similar view that by virtue of an agreement of sale if the possession is handed over then it becomes conveyance and it requires to be registered.

12. The enforcement of such agreement for specific performance is filed as it has been noticed that it is only notarized and has not been registered.

13. In view of the aforesaid, at this stage it is very difficult to conceive that the said agreement is enforceable and can be acted upon for the purposes of Section 35 of the Stamps Act, 1899. The said document being a conveyance was required to be registered u/s 17 of the Registration Act, 1908. The matter as such has been considered by this Court in a judgment which is reported in 2009(1) MPLJ 176 (*Narbada Prasad Agrawal Vs. Tarun Bhawasar*).

14. The next question arises with regard to the right to sale of the whole property by Joseph Fransis. As per the plaint allegations there is no dispute that respondent no.2,3,4 & 5 are also co-owners and the suit for specific performance is filed against them. In the said agreement there is nothing that the other co-owners

have also consented to sale the suit land. The question with regard to the same of a joint property by one owner has been considered by the Apex Court in *Hardeo Rai Vs. Sakuntala Devi & others* 2008(7) SCC 46 and paragraphs 22 to 26 of the said judgment reads as under:-

22. For the purpose of assigning one's interest in the property, it was not necessary that partition by metes and bounds amongst the coparceners must take place. When an intention is expressed to partition the coparcenary property, the share of each of the coparceners becomes clear and ascertainable. Once the share of a coparcener is determined, it ceases to be a coparcenary property. The parties in such an event would not possess the property as "joint tenants" but as "tenants-in-common". The decision of this Court in *SBI*¹, therefore, is not applicable to the present case.

23. Where a coparcener takes definite share in the property, he is owner of that share and as such he can alienate the same by sale or mortgage in the same manner as he can dispose of his separate property.

24. We have noticed the representation made by the appellant. If the representation to the respondents' father was incorrect, the appellant should have examined his brothers. He should have shown that such a representation was made under a mistaken belief. He did nothing of that sort.

25. In *M.V.S. Manikayala Rao v. M. Narasimhaswami* this Court stated the law thus: (AIR p. 478, para 5)

"5. it is well settled that the purchaser of a coparcener's undivided interest in joint family property is not entitled to possession of what he has purchased."

26. Thus, even a coparcenary interest can be transferred subject to the condition that the purchaser without the consent of his other coparceners cannot get possession. He acquires a right to sue for partition.

15. Further the Apex Court in 2005(10) SCC, 728 (*Shanmughasundaram and others Vs. Diravia Nadar (dead) by Lrs and another*) paragraph 30 of the same reproduced as under:

30. Section 12 of the Specific Relief Act, in our considered opinion, would be of no assistance in the situation obtaining here. In the absence of sisters being parties to the agreement, the vendee can at best obtain undivided interest of two brothers in the property. Section 12 of the Specific Relief Act cannot be invoked by the vendee to obtain sale of undivided share of the two brothers with

a right to force partition on the sisters who were not parties to the agreement of sale. Such a relief under Section 12 cannot be obtained by a vendee, on purchase of an undivided share of the property of some of the co-owners, against other co-owners who were not parties to the sale agreement.

16. Thus, on the basis of the aforesaid judgments it is still doubtful that the plaintiff will have even a prima facie case in his favour for enforcing such an agreement.

17. On the basis of the same, it is crystal clear that in the absence of any consent of co-owners there is no right to transfer the land to the plaintiff by the deceased by way of agreement though the purchaser can enforce the same with regard to the share who has agreed to sale the land by way of a suit for partition. But in the present case the share remains uncertain as to which share in partition would have gone to the seller. The Apex Court held that it will appropriate to bring a partition suit.

18. The question in the present case is the irreparable loss also. The agreement was executed on 02/04/2002. The original executor expired on 28/05/2002 and suit itself was filed on 06/04/2005. Thus, the right of purchaser can not be restricted in any manner for an indefinite period.

19. Section 44 of the Transfer of Property Act reads as under:-

44. Transfer by one co-owner Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same' but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

20. In view of the aforesaid, I do not find any justification in granting injunction. Accordingly the order passed by the trial Court of injunction on 13/04/2010 passed in civil suit no. 38-A/05 stands set aside.

Appeal stands allowed.

Appeal allowed.

2170] Sharad Kumar Mishra vs. Shriram Trans.Fin.Co. Ltd. [I.L.R.[2010]M.P.,

I.L.R. [2010] M. P., 2170

APPELLATE CIVIL

Before Mr. Justice R.K. Gupta

9 August, 2010*

SHARAD KUMAR MISHRA

... Appellant

Vs.

SHRIRAM TRANSPORT FINANCE

COMPANY LTD. & ors.

... Respondents

Civil Procedure Code (5 of 1908), Order 9 Rule 9 & Order 43, Motor Vehicles Act, 1988, Section 104, Motor Vehicles Rules, M.P. 1994, Rule 240 - *Application for restoration under Order 9 Rule 9 CPC rejected by the MACT - No appeal would lie under Order 43.* (Para 7)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 व नियम 9 एवं आदेश 43, मोटर यान अधिनियम 1988, धारा 104, मोटर यान नियम, म.प्र. 1994, नियम 240 - सि.प्र. सं. के आदेश 9 नियम 9 के अंतर्गत पुनर्स्थापन का आवेदन मोटर दुर्घटना दावा अधिकरण द्वारा अस्वीकृत किया गया - आदेश 43 के अंतर्गत कोई अपील नहीं होगी।

S. Dwivedi, for the appellant.

G. Jain, for the respondents.

ORDER

R.K. GUPTA, J.:—This is an appeal preferred by the claimant under Order 43 Rule 1 of the Code of Civil Procedure, 1908 challenging the order dated 03/12/2008 passed by Motor Accident Claims Tribunal, Raisen, wherein tribunal has rejected the application under Order 9 Rule 9 of the CPC.

2. Learned counsel appearing on behalf of the respondent raised a preliminary objection that the present appeal is not maintainable under Order 43 Rule 1 of the CPC.

3. In the present case, It is to be seen that there is no dispute that by virtue of section 169 of the Motor Vehicle Act, 1988, wherein procedure and powers of Claims Tribunals are enumerated and accordingly the claims tribunal shall have all the powers of a Civil Court for the purposes of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the claims tribunal shall be deemed to be a civil court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973. Sub-section (3) of Section 169 of the CPC further stipulates that subject to any rules that may be made in this behalf, the claims tribunal may, for the purpose of adjudicating upon any claim for compensation, choose one or more persons possessing special knowledge of any matter relevant to the inquiry to assist it in holding the inquiry.

4. The State of M.P. has framed the rules regulating the procedure before the claim tribunal and accordingly Rule 240 prescribes that a procedure to be followed by claims tribunal in holding inquiries, wherein the application of certain provisions of Code of Civil Procedure, 1908: Save as otherwise expressly provided in the Act or these rules, the following provisions of the First Schedule to the Code of Civil Procedure, 1908 (V of 1908), namely those contained in Order V rules 9 to 13 & 15 to 20. Order IX, Order XVIII, rules 3 to 10 Order XVI, rules 2 to 21, Order XVII, Order XXI and Order XXIII, rules 1 to 3 shall apply to proceedings before a claim tribunal insofar as they may be applicable thereto.

5. On the basis of the aforesaid now it is clear that the Motor Accident Claims Tribunal is constituted by virtue of the provision is contained under the Motor Vehicle Act, 1988 and has to be regulated under the provision of Act, 1988. Thus the provision of whole of Civil Procedure Code has not been made applicable to the claims tribunal. So far as the Order 43 of CPC is concerned, nowhere the same has been adopted to regulate as a procedure by the counts constituted under the Motor Vehicle Act, 1988. Order 43 cannot be read in isolation, but it is to be read along with section 104 of the CPC which provide that an appeal shall lie from certain orders and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders enumerated in Section 104 of the CPC.

6. In view of the aforesaid, the question with reference to the preliminary objection is raised for consideration is that when the claims tribunal is constituted under the special law i.e. Motor Vehicle Act, 1988 and Section 104 of CPC prescribed with save as otherwise expressly provided in the body of this Code or by any law for the time being in force? So far as the Motor Vehicle Act, 1988 is concerned it does not adopt that order passed Motor Accident Claims Tribunal, the appeal shall lie to the High Court by virtue of Section 104 of the CPC along with Section 43 of the CPC.

7. In view of the aforesaid, I am o f the view that the order passed by the MACT rejecting the application filed before it, no appeal under Order 43 shall lie.

8. During the course of the arguments, learned counsel for the appellant sought oral permission that the present appeal may be converted into a revision according Section 115 of the CPC. In this reference it is to be seen that this Court has still doubts with regard to the applicability of Section 115 of the CPC against such orders and accordingly the permission cannot be granted.

9. This Court records and appreciate for the and guidance extended to this Court by Shri Ravish Agrawal, Senior Advocate for determining the objection raised by the respondent.

10. Shri Agrawal, Senior Advocate who assisted the Court brought to the notice of this Court in the matter of *National Insurance Company Ltd. Vs. Shrikant Vinod Tiwari*, 2007 (3) MPLH 130.

11. Office is directed to return the certified copy of the impugned order to the counsel for the appellant.

12. Accordingly, the Appeal stands dismissed.

Appeal dismissed.

I.L.R. [2010] M. P., 2172
APPELLATE CRIMINAL
Before Mr. Justice K.S. Chauhan
 5 January, 2010*

KISHORI LAL

... Appellant

Vs.

STATE OF M.P.

... Respondent

Explosive Substances Act (6 of 1908), Section 5 - Appellant convicted for keeping explosive substance in his temporary house - Seizure witnesses interested and not of locality - Discrepancy in evidence of seizure officer and witnesses - No evidence that seized articles were sealed at spot, impression seal was affixed at the draft memo to FSL or sealed articles were kept in safe custody in the Maalkhana - The evidence not collected to the effect that house was in exclusive possession of appellant - No evidence to show that the appellant was having explosive substance for unlawful object - Held - Essential ingredient to prove the offence is lacking - Conviction and sentence of appellant set aside. (Paras 8, 10 & 12)

विस्फोटक पदार्थ अधिनियम (1908 का 6), धारा 5 - अपने अस्थायी मकान में विस्फोटक पदार्थ रखने के लिये अपीलार्थी की दोषसिद्धि - जप्ती के साक्षी हितबद्ध हैं और परिक्षेत्र के निवासी नहीं हैं - जप्ती अधिकारी एवं साक्षियों की साक्ष्य में अंतर है - कोई साक्ष्य नहीं कि जप्त वस्तुएं मौके पर सील की गई थी, एफ.एस.एल. को ड्राफ्ट मेमो पर छापित सील लगाई गयी थी अथवा जप्त वस्तुओं को मालखाने में सुरक्षित अभिरक्षा में रखा गया था - इस परिणाम की कोई साक्ष्य एकत्रित नहीं की गयी कि मकान अपीलार्थी के अनन्य अधिपत्य में था - यह दर्शाने वाली कोई साक्ष्य नहीं कि अपीलार्थी अपने पास विस्फोटक पदार्थ गैर कानूनी उद्देश्य के लिये रखा था - अभिनिर्धारित - अपराध साबित करने के लिए आवश्यक घटक का अभाव है - अपीलार्थी की दोषसिद्धि एवं दंडादेश अपास्त ।

Cases referred :

VII (2008) SLT 390, (2004) 10 SCC 562.

S.C. Datt with Pushpendra Dubey, for the appellant.

Vivek Agrawal, G.A., for the respondent/State.

J U D G M E N T

K.S. CHAUHAN, J. :-This criminal appeal under Section 374(2) of the Code of Criminal Procedure has been filed by the appellant being aggrieved by the impugned judgment, finding and sentence dated 4/9/1997 passed by the Sessions

Judge, Panna in ST No.95/1996 whereby the appellant has been convicted under Section 5 of the Explosive Substances Act, 1908 (hereinafter referred to as the "Act, 1908") and sentenced to RI for 5 years.

2. The prosecution case in short is that R.K.Mishra, A.S.I., Outpost Maheba received an information regarding making fire crackers by the appellant, therefore he conducted raid at his residence and seized explosive substances from the possession of the appellant. He was having no licence for manufacturing of such fire-crackers. He was arrested. FIR was taken down accordingly. Crime No. 67/93 under Section 5 of the Act, 1908 was registered against the appellant at Police Station Amanganj. Spot map was prepared. The statements of the witnesses were recorded. The seized articles were sent for chemical examination to FSL, Sagar from where report received. Sanction for prosecution was obtained from the District Magistrate, Panna. After completing the usual investigation the charge sheet was filed in the Court of JMFC, Panna, who committed the case to the Sessions Court for trial.

3. This appellant was charged under Sections 5 of the Act, 1908. He denied the guilt and claimed to be tried mainly contending that he is innocent and has been falsely implicated. Prosecution examined as many as six witnesses. The appellant did not examine any witness in his defence. After appreciating the evidence trial Court found him guilty for the offence charged and sentenced thereto as stated hereinabove in para no. 1 of this judgment. Being aggrieved by the impugned judgment, finding and sentence, the instant appeal has been preferred by the appellant on the grounds mentioned in the memo of appeal.

4. Shri S.C.Datt, learned senior counsel for the appellant submitted that the Court below has not appreciated the evidence in proper perspective. It has not been proved that the explosive substances were seized from the exclusive possession of this appellant. There is no evidence that the explosive substances were sealed at the spot. The specimen seal was not affixed at the draft memo sent to FSL, Sagar. That substances were not produced before the Court during the trial. All the ingredients to prove the offence under Section 5 of the Act, 1908 have not been proved, therefore the finding of guilt is erroneous which deserves to be set aside and appellant is entitled for acquittal. He has placed reliance on the decisions rendered in the case *Noor Aga Vs. State of Punjab*, VII (2008) SLT 390 and in the case *Jitendra & another Vs. State of MP*, (2004) 10 SCC 562.

5. On the contrary, Shri Vivek Agrawal, learned counsel appearing on behalf of the respondent/State supported the impugned judgment, finding and sentence mainly contending that the appellant was preparing fire crackers without any licence and the prosecution has proved the case beyond reasonable doubt against him, hence finding of guilt is proper and does not call for any interference.

6. The main point for consideration in this appeal is that whether the trial Court has committed an illegality in convicting and sentencing the appellant under Section 5 of the Act, 1908.

7. R.K.Mishra (PW-5) received information on 24/5/1993 at about 9:00 AM that Halke and Kishorilal were making fire crackers at their houses. This information was written in Rojnamcha Sanha No.346 dated 24/5/1993 which is Ex.P-13, but he did not conduct the raid on that date. No reason was assigned for not conducting the raid on that date, however in the cross examination he stated that since the appellant is of criminal tendency, therefore he did not make the raid on that day, but this reason is prima facie incorrect because he has not produced any criminal record of this appellant. It shows his suspicious conduct. It appears that he was waiting for conducting such raid for some ulterior motive otherwise he should have immediately rushed to the spot as soon as he received such information of committing such crime.

8. It is borne out from the record that he conducted the raid alongwith force on the next day. According to him, the appellant took out the explosive substances from his temporary house and produced, which were seized vide seizure memo (Ex.P-3), but he has not recorded any disclosure statement regarding the discovery of such explosive substances. No evidence is collected that the house in question was in exclusive possession of this appellant and he was owner of it. The seizure witnesses were not made of that locality which is imperative under sub-Section 4 of Section 100 of Cr.P.C., one witness is of village Kakarhi and another is of village Vikrampur, whereas the incident is of village Maheba. What was the reason of not making the seizure witnesses of village Maheba, it goes to show that this witness was any how trying to implicate the appellant in this case. In spite of doing so even these witnesses did not support him and clearly stated that no such explosive substance was seized from the possession of appellant and never gone to the house of appellant. No such substance was produced by the appellant before police. Sardar Singh (PW-2) has stated that police obtained his signature at police station by calling him from the Amanganj market. Thus these witnesses have not given evidence regarding the contents of seizure memo (Ex.P-2). Thus there is discrepancy in the evidence of R.K.Mishra (PW-5) and seizure witnesses Suraj Prasad Awasthi (PW-1) and Sardar Singh (PW-2).

9. Amar Bahadur Singh (PW-6) Head Constable has given the evidence in this respect that he is not the witness of any document. No document has been proved to show his presence at the time of conducting such search. It is not safe to rely upon the evidence of such witness.

10. There is no evidence that the seized articles were sealed at the spot. There is no evidence that any impression seal was affixed at the draft memo sent to FSL, Sagar. There is no evidence that the seized articles were kept in safe custody in the Maalkhana. The explosive substances were seized on 25/5/1993 and were sent for chemical examination on 11/8/1993 after about 3 months, therefore

it was obligatory on the part of the prosecution to adduce the evidence that such substances were kept in safe custody and were not tampered with. No such evidence is adduced. The evidence has not been collected to the effect that the house was in exclusive possession of this appellant. Thus the evidence is lacking in this regard. No independent witness has supported the prosecution case. The evidence of R.K.Mishra (PW-5) and Amar Bahadur Singh (PW-6) is not reliable for the reasons stated hereinabove. They are interested witnesses and it is not safe to convict the appellant on the evidence of these witnesses.

11. The provisions of Section 5 of the Act, 1908 are as follows:-

"5. Punishment for making or possessing explosives under suspicious circumstances.—Any person who makes or knowingly has in his possession or under his control any explosive substance or special category explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall unless he can show that he made it or had it in his possession or under his control for a lawful object, be punished,—

(a) in the case of any explosive substance, with imprisonment for a term which may extend to ten years, and shall also be liable to fine;

(b) in the case of any special category explosive substance, with rigorous imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine".

12. The prosecution has not adduced any evidence to show that he was having explosive substance for unlawful object. Thus the essential ingredient to prove offence under Section 5 of the Act is lacking in this case. The prosecution has failed to prove the case beyond reasonable doubt against the appellant. Court below has committed an illegality in convicting him under Section 5 of the Act. Finding is erroneous which deserves to be set aside and the appellant is entitled for acquittal.

13. Consequently, the appeal succeeds and is allowed. Conviction and sentence of the appellant under Section 5 of the Act, 1908 recorded by the Court below are hereby set aside. He is acquitted from the offence under Section 5 of the Act, 1908. He is on bail, his bail bonds are discharged.

Appeal allowed.

I.L.R. [2010] M. P., 2176

APPELLATE CRIMINAL

Before Mrs. Justice Sushma Shrivastava

18 January, 2010*

RAVINDRA KUMAR & anr.

... Appellants

Vs.

STATE OF M.P.

... Respondent

A. Essential Commodities Act (10 of 1955), Section 3/7, Food Stuffs (Civil Supply & Distribution) Scheme, M.P. 1991, Clause 9(1) & 9(2) - Scheme of 1991 was formulated and is a part of Food Stuff Distribution Control Order, 1960, made u/s 3 r/w S.5 of the Act and so breach of any condition of scheme is punishable under the Act. (Para 8)

क. आवश्यक वस्तु अधिनियम (1955 का 10), धारा 3/7, खाद्य पदार्थ (नागरिक पूर्ति एवं वितरण) स्कीम, म.प्र. 1991, खण्ड 9(1) व 9(2) - 1991 की स्कीम का विनिर्माण किया गया और वह खाद्य पदार्थ वितरण नियंत्रण आदेश, 1960 का भाग है जो अधिनियम की धारा 3 सहपठित धारा 5 के अधीन बनाया गया है और इसलिए स्कीम की किसी शर्त का उल्लंघन अधिनियम के अंतर्गत दंडनीय है।

B. Essential Commodities Act (10 of 1955), Section 3/7, Food Stuffs (Civil Supply & Distribution) Scheme, M.P. 1991, Clause 9(1) & 9(2) - Appellants, the salesmen of fair price shop failed to maintain and produce the distribution register for inspection before the Food Inspector - Being a matter covered u/s 3(2) Clause (h)(i) of E.C. Act is liable to be convicted u/s 7(1)(a)(i), and not u/s 3/7 of the E.C. Act - Conviction modified to that extent. (Paras 19, 20 & 21)

ख. आवश्यक वस्तु अधिनियम (1955 का 10), धारा 3/7, खाद्य पदार्थ (नागरिक पूर्ति एवं वितरण) स्कीम, म.प्र. 1991, खण्ड 9(1) व 9(2) - अपीलार्थी जो उचित मूल्य की दुकान के बिक्रीकर्ता हैं विवरण रजिस्टर बनाये रखने और खाद्य निरीक्षक के समक्ष प्रस्तुत करने में असफल रहे - आवश्यक वस्तु अधिनियम की धारा 3(2) खण्ड (एच)(i) के अंतर्गत मामला सम्मिलित होने से, दोषसिद्धि आवश्यक वस्तु अधिनियम की धारा 7(1)(ए)(i) के अंतर्गत होनी चाहिए और न कि धारा 3/7 के अंतर्गत - दोषसिद्धि उस सीमा तक उपांतरित की गयी।

Cases referred :

AIR 1981 MP 203, AIR 1981 SC 2001, 2005(1) MPLJ 430, 2005(4) MPLJ 117, 2008 CrLJ 1712 (MP), 2009(1) MPHT 186 (rel. on), 2001 (I) MPJR SN 32.

Govind Upadhyay, for the appellants.

L.D.S. Baghel, G.A., for the respondent/State.

J U D G M E N T

SUSHMA SHRIVASTAVA, J. :-Appellants have preferred this appeal challenging their conviction and order of sentence passed by Special Judge, Sagar in Special Case No.5/99, decided on 5.08.99.

2. Appellants have been convicted under Section 3/7 of the Essential Commodities Act, 1955 (hereinafter referred to as 'Act') for violating Clause 9(1) and 9(2) of Madhya Pradesh Food Stuffs (Civil Supply and Distribution) Scheme, 1991 (hereinafter referred to as 'Scheme') and sentenced to rigorous imprisonment for six months with fine of Rs.500/- each, in default simple imprisonment for three months, by the impugned judgment.

3. As per prosecution case, at the relevant time appellants were working as salesmen at Fair Price Shop of Co-operative Society, Nanhi Deori. On 30.12.98 Assistant Food Officer B.S. Sharma alongwith other officers of Food and Co-operative Department inspected the aforesaid fair price shop at Nanhi Deori and it was found that appellants were selling sugar and kerosene oil at higher rate than fixed by the Collector. Appellants also failed to produce the distribution register, required to be maintained in fair price shop, for inspection before the officers of Food and Civil Supplies. Appellants thus violated Clause 9(1), 9(2) and 12 of the Scheme as well as Clause 4(g) of kerosene (Restriction on Use and Fixation of Price) order 1993. A written report was, therefore, prepared by Food Inspector R.P. Gupta and submitted at Police Station Kesli, on the basis of which an offence was registered against the appellants and was investigated. After due investigation, appellants were prosecuted under Section 3/7 of the Essential Commodities Act, 1955 and were put to trial.

4. Appellants abjured the guilt and pleaded false implication.

5. Learned Special Judge, after trial and upon appreciation of the evidence adduced in the case, came to hold that the violation of Clause 4(g) of kerosene (Restriction on Use and Fixation of Price) order, 1993 and Clause 12 of the Scheme was not proved against the appellants, but found them guilty for violating Clause 9(1) and 9(2) of the Scheme for failure to maintain and produce the distribution register for inspection before the Food Inspector and convicted and sentenced them under Section 3/7 of the Act as aforesaid by the impugned judgment, which has been challenged in this appeal.

6. Learned counsel for the appellants firstly submitted that the appellants could not be convicted for violation of any of the provisions of the Scheme, which is not an order issued under Section 3 of the Act. Placing reliance on the Division Bench decision of this Court rendered in the case of *M.P. Ration Vikreta Sangh, Jabalpur and others Vs. State of M.P. and another* reported in AIR 1981 (M.P.) page 203, which was affirmed by the Apex court in the case reported in AIR 1981 Supreme Court page 2001 (*M.P. Ration Vikreta Sangh Society & others Vs. State of M.P.*), it was submitted that the 'Scheme' was made in exercise of the executive power of the State and was not an order issued under Section 3 of the Act and as such its violation is not punishable under Section 7 of the Act, which envisages punishment for breach of provisions of the order made under Section 3 of the Act. Reliance was also placed in this behalf on the three decisions

rendered by this Court in the case of *Prakash Babu Raghuwanshi Vs. State of M.P.* reported in 2005 (1) M.P.L.J. Page 430, *Shiv Kumar Vs. State of M.P.* reported in 2005 (4) M.P.L.J. Page 117 and *Arvind Kumar Vs. State of M.P.* reported in 2008 Cr.L.J. Page 1712 (M.P.).

7. Learned counsel for the State, on the other hand, submitted that the Scheme of 1991 was issued under Clause 4 of the M.P. Food Stuff Distribution Control order, 1960 issued under Section 3 of the Act and was thus an order as defined in Section 2(c) and (cc) of the Act.

8. The question whether the Scheme of 1991 is part of M.P. Food Stuff Distribution Control Order, 1960 or not and is an order under Section 3 read with Section 5 of the Act was considered in detail by this Court in the case of *Kishore Kumar Dixit and another Vs. State of M.P.* reported in M.P.H.T.2009(1) page 186 and it was held that after amendment and insertion of independent Clause 4 in the M.P. Food Stuff Control Order, 1960 by the State Government by notification No.F-9-113-89-XXIX-2 published in the Extra Ordinary Gazette dated 21.2.1991, power has been given to the State Government to make the Scheme and under this provision the Scheme of 1991 was formulated and is thus part of Food Stuff Distribution Control Order, 1960 made under Section 3 read with Section 5 of the Act and therefore, breach of any condition of the Scheme would be punishable under Section 7 of the Act.

9. The legal position was crystallized as under in the aforesaid judgment of *Kishore Kumar Dixit* (supra):-

“It is crystal clear that by insertion of independent Clause 4 in Order 1960 (supra), the power has been given to the State Government to make Scheme and under this provision, Scheme 1991 was formulated and is in operation. The earlier Scheme of 1981 was made on the basis of definition Clause 2(d) in M.P. Food Stuffs (Distribution Control) Order, 1960 and according to Division Bench judgment rendered in case of *Jabalpur Ration Vikreta Sangh* (supra), on the basis of Clause 2(d) Scheme could not be formulated but same could be followed and was made under executive power of the State as per Article 162 of the Constitution. Such is not the position after amendment in Order, 1960 authorising State Government to make Scheme as per independent Clause 4 and Scheme 1991 has been formulated and applied by the State Government and in the considered view of this Court Scheme of 1991 is the part of Order 1960 made under Section 3 read with Section 5 of the Act, therefore, breach of any condition of the Scheme would be punishable under Section 7 of the Act.”

10. Similar view was also taken by this Court in an earlier judgment rendered in the case of *Jeevanlal and others Vs State of M.P. & others* reported in (2001)1

M.P.J.R. Short Note 32 and it was held that after amendment of 1991 in the M.P. Food Stuff Control Order, 1960, there can be no manner of doubt that the Scheme, 1991 made in pursuance of the amended Clauses is not a mere executive order of the State Government, but it is a statutory order within the meaning of Section 3 of the Act, the contravention of which would be an offence under Section 7 of the Act. The aforesaid judgment of *Jeevanlal and others* (supra) as well as the other three judgments rendered in the case of *Prakash Babu Raghuwanshi, Shiv Kumar and Arvind Kumar* (Supra) taking contrary view were also considered in the case of *Kishore Kumar Dixit Vs. State of M.P.* (supra) and it was held that in the aforementioned three cases of *Prakash Babu Raghuwanshi, Shiv Kumar and Arvind Kumar* (supra) Clause 4 of the Control Order 1960 and formation of the fresh Scheme, 1991 in pursuance thereof as well as the case of *Jeevanlal* (supra) were not considered at all and therefore, all these three judgments could not be considered as precedent as they were rendered per incuriam.

11. It was also held in the case of *Kishore Kumar Dixit Vs. State of M.P.* (supra) that after amendment in Clause 4 of the Control Order 1960 and formation of fresh Scheme 1991 in pursuance thereof, there can be no application of a judgment rendered in the case of *Jabalpur Ration Vikreta Sangh* (supra) affirmed by the Supreme Court.

12. In view of the legal position as enunciated and elaborated in the case of *Kishore Kumar Dixit Vs. State of M.P.* (supra) the submission of the learned counsel for the appellants that the Madhya Pradesh Food Stuffs (Civil Supply and Distribution) Scheme, 1991 is not an order issued under Section 3 of the Act and its violation cannot be made the basis of conviction under Section 3/7 of the Act sans merit.

13. Learned counsel for the appellants next submitted that violation of Clause 9(1) and 9(2) of the Scheme was not proved against the appellants, as the Fair Price Shop belonged to the Society. It was also submitted that the Assistant Food Officer Bhawani Shankar Sharma (P.W.-12) was not competent to make inspection of the registers etc. of the Fair Price Shop under Clause 9(2) of the Act and being posted at Banda at the relevant time, he had no jurisdiction to inspect the Fair Price Shop at Nanhi Deori. It was further submitted that penalty for violation of Clause 9(1) and 9(2) of the Scheme could be forfeiture of the security amount etc. under Clause 13 of the Scheme and not the punishment under Section 7 of the Act.

14. Learned counsel for the State, on the other hand, submitted that the shop of the society is run by its members/salesmen, and under Clause 9(1) and 9(2) of the Scheme shopkeepers of the Fair Price Shops are required to maintain the prescribed registers and to produce them for inspection by the various officers mentioned in Clause 9(2) of the Scheme. It was also submitted by the State counsel that the Assistant Food Officer was very much competent to make an inspection at the Fair Price Shop of Nanhi Deori:

15. On perusal of the record of the trial court, it is revealed that appellant no. 1 Ravindra Kumar was admittedly Assistant Manager of the Co-operative Society, Nanhi Deori at the relevant time and both the appellants were admittedly working as salesmen at the Fair Price Shop, Nanhi Deori. There is also bulk of evidence on record that both the appellants were working as salesmen at Fair Price Shop, Nanhi Deori and they used to distribute the Food Stuff. Thus, they were liable under Clause 9 (1) and 9(2) of the Scheme to maintain the prescribed registers and to produce them for inspection before the various officers mentioned in Clause 9(2) of the Scheme.

16. It is clearly evident from the testimony of Assistant Food Officer Bhawani Shankar Sharma (P.W-12) that on inspection of the Fair Price Shop at Nanhi Deori on 30.12.98 alongwith Deputy Registrar, Co-operative Society and other officers of the Co-operative Department, appellants failed to produce the distribution/daily sales registers; and the registers which were produced by them were virtually stock registers of some other Fair Price Shop of Gram Panchayat, Mukhaura, Khamariya and Deori Khurd. The trial court has also mentioned in the impugned judgment that the appellants failed to produce distribution register (daily sales register) even during the trial. In view of these unrebutted facts, the finding of the trial court that the appellants failed to maintain distribution register (वितरण रजिस्टर) and produce the same for inspection as required under Clause 9(1) and 9(2) of the Scheme, cannot be said to be incorrect.

17. There are no reasons to disbelieve the statement of Assistant Food Officer Bhawani Shankar Sharma (P.W-12) that Deputy Registrar of Co-operative Society as well as other Officers of Co-operative Department were also present with him at the time of inspection at Fair Price Shop of Nanhi Deori on 30.12.98. As such, inspection done by Assistant Food Officer B.S. Sharma (P.W-12) alongwith other authorized officers, could not be said to be invalid merely because he was posted at Banda at that time in the same District. There is nothing on record to show that Assistant Food Officer B.S. Sharma (P.W-12) was lower in rank than that of Food Inspector and not authorized under Clause 9(2) of the Scheme to inspect the registers. The objection taken by learned counsel for the appellants in this behalf has thus no merit.

18. Although Clause 13 of the Scheme also provides certain penalty like forfeiture of the security amount etc., but as discussed above, violation of any of the Clauses of the Scheme of 1991, which is part of the M.P. Food Stuff Distribution Control order, 1960 issued under Section 3 of the Act is also punishable under Section 7 of the Act.

19. In the wake of aforesaid, the finding of guilt recorded as against the appellants for violating Clause 9(1) and 9(2) of the Scheme of 1991 and their conviction under Section 3/7 of the Act cannot be said to be illegal so as to warrant any interference in appeal. However, violation of Clause 9(1) & (2) of the Scheme of 1991 being with regard to maintenance of the prescribed registers and failure

to produce registers, being a matter covered under Section 3(2) Clause (h)(i) of the Essential Commodities Act, comes within the purview of Section 7(1)(a)(i) of the Act. With the aforesaid modification, the conviction of the appellants under Section 3/7 of the Act deserves to be maintained.

20. As regards the sentence, no minimum sentence of imprisonment is prescribed under Section 7(1)(a)(i) of the Act. As such, since the appellants have been found guilty for a technical offence like failure to maintain and produce the distribution/sales register for inspection committed about eleven years ago, interest of justice would be subserved if both the appellants are sentenced, in the peculiar facts and circumstances of the case, to imprisonment till rising of the court with an additional fine of Rs.1,000/- (one thousand only) each.

21. Appeal is, therefore, partly allowed. The conviction of appellants under Section 3/7 of the Act is modified to be under first part of Section (7)(1)(a) of the Act. The impugned sentence of imprisonment awarded to them is also modified and reduced to imprisonment till rising of the court with an additional fine of Rs.1000/-(one thousand only) to be deposited by each of the appellants within two months from today, failing which they shall undergo simple imprisonment for one month. Appellants shall also appear before the trial court on a date to be fixed by it for undergoing sentence till rising of the court.

Appeal is accordingly disposed of.

Appeal disposed of.

I.L.R. [2010] M. P., 2181

APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saxena & Mrs. Justice Sushma Shrivastava

25 February, 2010*

KODULAL @ LAXMAN

... Appellant

Vs.

STATE OF M.P.

... Respondent

A. Penal Code (45 of 1860), Section 84 - *Plea of insanity - PWs admitted in cross-examination that appellant was insane and he also used to take treatment - Jailor's evidence and Doctor's certificate indicates that the appellant was treated for schizophrennia during 06.12.98 to 18.06.99 in mental hospital - But, no medical evidence on record to indicate that before or at the time of commission of offence, appellant was suffering from any mental disorder or insanity so as to be incapable of understanding the nature of his act - Plea of insanity found rightly rejected by trial Court. (Para 23)*

क. दण्ड संहिता (1860 का 45), धारा 84 - उन्मत्तता का अभिवाक् - अभियोजन साक्षियों ने प्रतिपरीक्षण में स्वीकार किया कि अपीलार्थी विक्षिप्त था और वह उपचार भी

लेता था - जेलर की साक्ष्य तथा चिकित्सक के प्रमाण पत्र से प्रतीत होता है कि 6.12.98 से 18.6.99 तक अपीलार्थी का सीजोफ्रेनिया (पागलपन) के लिए मानसिक चिकित्सालय में उपचार किया गया - परन्तु अभिलेख पर यह उपदर्शित करने के लिए कोई चिकित्सीय साक्ष्य नहीं कि अपराध कारित करने से पूर्व या अपराध कारित करते समय अपीलार्थी किसी मानसिक विकार या उन्मत्तता से पीड़ित था जिससे वह अपने कार्य की प्रकृति को समझने में असमर्थ हो - उन्मत्तता का अभिवाक् विचारण न्यायालय द्वारा अस्वीकार किया जाना संही पाया गया।

B. Penal Code (45 of 1860), Sections 302, 304 Part I - 'Murder' or 'culpable homicide' - Some dispute occurred between appellant and his wife (the deceased), prior to occurrence - Later, the appellant, on getting late as his wife delaying in cooking food, was enraged and he assaulted his wife with a pestle on her head, resulting her death - The act of appellant, being in a heat of passion on the spur of moment without any premeditation and giving a solitary below comes within the purview of S. 304 Part I of IPC - Conviction altered. (Paras 25 & 26)

खा. दण्ड संहिता (1860 का 45), धाराएँ 302, 304 भाग I - 'हत्या' या 'आपराधिक मानव वध' - घटना से पूर्व अपीलार्थी और उसकी पत्नि (मृतक) के बीच कोई विवाद हुआ - बाद में खाना बनाने में उसकी पत्नि द्वारा विलंब के कारण देरी होने से अपीलार्थी क्रोधित हुआ और उसने अपनी पत्नि के सिर पर मूसर से हमला किया, जिसके परिणामस्वरूप उसकी मृत्यु हो गयी - अपीलार्थी का कृत्य अचानक क्रोध के आवेश में बिना किसी पूर्वचिन्तन के होने से और एकमात्र बार करना भा.द.सं. की धारा 304 भाग I के क्षेत्र के भीतर आता है - दोषसिद्धि परिवर्तित की गई।

Cases referred :

(1998) 7 SCC 177, AIR 1964 SC 1563, AIR 1994 SC 34.

Surendra Verma, 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 SUSHMA SHRIVASTAVA, J. :-Appellant has preferred this appeal challenging his conviction and order of sentence passed by Sessions Judge, Damoh in S.T.No. 112/99, decided on 29.09.2000.

2. Appellant has been convicted under Section 302 of I PC for committing murder of his wife Meera @ Mayarani and sentenced to imprisonment for life with fine of Rs.300/-, in default rigorous imprisonment for three months, by the impugned judgment.

3. According to prosecution, on 4.11.98 about 10 'O'clock in the morning at village Umrav, appellant was cutting black plum tree standing in front of his house, which was objected to by his wife Meera @ Mayarani (hereinafter referred to as the 'deceased'). This enraged the appellant and he threatened his wife that he would cut and kill her. Thereafter appellant walked away towards the village and asked his wife to cook food, as he wanted to go to Bandakpur. When Meera @

Mayarani was cooking food inside her dwelling hut, appellant came there, began taking meals and asked for water from his daughter Bhaggobai. The girl, took sometime in giving water, appellant gave her beating with small stick and then went inside and assaulted his wife Meera @ Mayarani by a wooden pestle (मूसर) on her head. As a result, her head got ruptured and she fell down. Appellant then came out and fled away. Bhaggobai, the daughter of deceased, who witnessed the incident, started weeping and screaming. On hearing her screams, her two sisters, who had gone to the field, and other villagers came there and found Meera @ Mayarani lying injured and dead.

4. The FIR of the incident was lodged by village Kotwar Ganku at Police Station Pathariya, District Damoh, on the basis of which an offence was registered against the appellant and was investigated. Merg intimation was also recorded at his instance and merg inquest report was prepared. The dead body of deceased Meera @ Mayarani was sent for postmortem examination. Blood stained earth and plain earth was seized from the spot. The spot map was also drawn. During investigation, the pestle (मूसर) used in the commission of offence was seized at the instance of appellant. His blood stained clothes were also seized. Blood stained clothes of the deceased were also seized by the Police. The seized articles were sent for forensic examination. After due investigation, appellant was prosecuted under Section 302 of I PC and was put to trial.

5. Appellant abjured the guilt and pleaded innocence and also took the plea of insanity.

6. Learned Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, rejected the plea of insanity set up by the appellant and found him guilty for committing murder of his wife under Section 302 of I PC, convicted and sentenced him as aforesaid by the impugned judgment, which has been challenged in this appeal.

7. We have heard learned counsel for the parties.

8. It was no longer disputed that deceased Meera @ Mayarani met a homicidal death. It is also reflected from the medical evidence of Dr. B.P. Ahirwal (P.W-6) that deceased died of head injury. Dr. B.P. Ahirwal (P.W-6), who conducted the postmortem examination on the dead body of deceased, found antemortem lacerated wound 8cm x 3cm muscle deep and 3cm x 3cm muscle deep over occipital region with depressed fracture of occipital bone and destruction of brain matter. A contusion measuring 3cm x 1cm over forehead towards left side was also found. In the opinion of Dr. B.P. Ahirwal (P.W-6). the cause of death of Meera @ Mayarani was coma as a result of fracture of the skull bone and destruction of brain.

9. There are no reasons to discard or disagree with the aforesaid medical evidence, which remained un rebutted and unchallenged. It is thus clearly evident that death of deceased Meera @ Mayarani was homicidal in nature.

10. Learned counsel for the appellant, however, submitted that the trial court gravely erred in rejecting the plea of insanity put forth by the appellant and failed to consider that even after the occurrence appellant was treated for mental disease like schizophrenia, and erroneously convicted him without there being any cogent evidence against him. In the alternative, it was submitted that appellant had no motive or intention to kill his wife and his case would not travel beyond the ambit of Section 304 Part II of IPC.

11. Learned counsel for the State, on the other hand, justified and supported the conviction of the appellant.

12. We have gone through the entire evidence on record.

13. The main evidence is that of Bhaggobai (P.W-1), the daughter of the deceased. Bhaggobai (P.W-1) is a child witness aged about six-seven years, who was present at the time of occurrence and witnessed the entire episode. Bhaggobai (P.W-1) categorically deposed in her evidence that appellant, her father had assaulted her mother by means of pestle (मूसर) on her head, as a result of which she died. According to Bhaggobai (P.W-1), when appellant assaulted her mother by pestle on her head, she was present there. Bhaggobai (P.W-1) further deposed that her mother had prevented the appellant from cutting black plum tree, therefore, he had assaulted her by pestle and when she screamed, her uncle Jagdish and others had come there.

14. Jagdish (P.W-4) also corroborated this fact that on hearing the screams of Bhaggobai (P.W-1), he had gone to the place of appellant and found his wife lying injured and dead and Bhaggobai (P.W-1) told him that appellant had assaulted her mother by pestle. Imartibai (P.W-2), another daughter of the deceased, also deposed that when she came back with goats from the field, she saw the appellant going towards the hillock and found her mother dead at home and she was informed by Bhaggobai (P.W-1) that her mother was assaulted by appellant by wooden pestle.

15. Karan Singh (P.W-3) has also deposed that on hearing the screams of the children, he had gone to the place of appellant and found his wife lying dead with head injury and he had come to know that appellant had assaulted him. Village Kotwar Ganku (P.W-9) also testified the lodging of the FIR (Ex.P-6), which was recorded by Sub-Inspector S.C.Sharma (P.W-12) at Police Station, Pathariya.

16. Although some of the other witnesses like Radhabai (P.W-5), Munnalal (P.W-8) and Ramprasad (P.W-10) did not adhere to their statements that appellant's daughter Bhaggobai (P.W-1) had informed them that her mother (deceased) was assaulted by appellant, there is clear cut evidence of Bhaggobai (P.W-1) to the effect that appellant had assaulted the deceased by pestle (मूसर) and thereby caused her death.

17. Bhaggobai (P.W-1) was extensively cross-examined, but nothing has been elicited so as to distrust her statement that appellant had assaulted her mother

(deceased) by pestle. On the other hand, she gave a detailed narration of the incident during her cross-examination. Bhaggobai (P.W-1) stated in her cross-examination that when appellant assaulted her mother by pestle, she was cooking food and appellant was taking food and he assaulted her too by small stick when she took time in giving him water. According to Bhaggobai (P.W-1), appellant had to go to Bandakpur and her mother was taking time in cooking food, therefore, he assaulted her by pestle. She also deposed that there was none else present at that time in her house and as soon as she cried and screamed, her uncle etc. had come there. The statement, as given by Bhaggobai (P.W-1), both in chief-examination and cross-examination is found to be clear, cogent and trustworthy and it has a ring of truth. Her evidence on the whole is found to be natural, credible and she does not appear to be a tutored witness.

18. Needless to emphasize that Bhaggobai (P.W-1) is also daughter of the appellant, as that of the deceased, so there can hardly be any doubt that she would give a tutored version so as to falsely implicate her father. In fact, upon careful scrutiny of the entire evidence of Bhaggobai (P.W-1), her evidence is found to be natural, reliable and trustworthy. Although, Bhaggobai (P.W-1) is a child witness, but her evidence cannot be rejected on this ground. As held by the Apex Court in the case of *Panchhi and others Vs. State of UP* reported in 1998(7) Supreme Court Cases page 177 it is not the law that if a witness is child, his evidence shall be rejected even it is found reliable, though the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is an easy prey to tutoring.

19. Moreover, there is corroborative evidence of Imartibai (P.W-2) and Jagdish (P.W-4), who reached there immediately after the occurrence on hearing the screams of Bhaggobai (P.W-1), to whom she narrated that her mother was assaulted by appellant by means of pestle. Their evidence also lends assurance to the version of the child witness Bhaggobai (P.W-1)

20. Thus, in view of the evidence available on record, we have no hesitation in accepting the finding recorded by the trial court that appellant assaulted his wife Meera @ Mayarani by means of pestle and thereby caused her death.

21. As regards the plea of insanity, it is well settled that when a plea of legal insanity is set up, it must be proved that at the time of commission of the offence the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The Apex Court in the case of *Dahyabhai Chhaganbhai Thakkar Vs. State of Gujarat* reported in AIR 1964 Supreme Court page 1563 held that there is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 84 of the Indian Penal Code the accused may rebut it by placing before the court all the relevant evidence- oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings. The Apex Court further held that crucial point

of time for ascertaining the state of mind is the time when the offence was committed. Whether the accused was in such a state of mind as to be entitled to benefit of Section 84 of Indian Penal Code can only be established from the circumstances, which proceeded, attended and followed the crime.

22. In view of the legal position enunciated above, the core question to be examined is whether the appellant could establish his state of insanity at the time of commission of the offence in the instant case.

23. Although Bhaggobai (P.W-1) and Imartibai (P.W-2) as well as Sukhlal (P.W-13) admitted in cross-examination that appellant was insane and he also used to take treatment of the insanity, but there is no medical evidence on record to indicate that before or at the time of commission of offence, appellant was suffering from any mental disorder or insanity so as to be incapable of understanding the nature of his act. Though the evidence of Tejsingh Kushwaha, Jailer, District Jail Damoh (D.W-1) indicates that appellant was treated in the Mental Hospital, Gwalior from 6.12.98 to 18.6.99 and as per doctor's certificate (Ex.D-3), appellant was treated for schizophrenia during this period, but again there is no such positive medical or other evidence on record to indicate that appellant was suffering from any such mental disease or insanity at the time of commission of the offence on 4.11.98, so as to be capable of understanding the nature of his act. On the other hand, it is revealed from the evidence of Bhaggobai (P.W-1) that appellant had fled away after the incident of assault at his wife. It also transpires from her evidence that appellant wanted to go to Bandakpur and the deceased was taking time in cooking food, he, therefore, assaulted her. His conduct in disappearing from the spot after the occurrence indicates that he understood the nature of his act and therefore, in order to save himself he escaped and fled away. The trial court has also given the cogent reasons for drawing an inference that appellant was sane enough at the time of commission of the offence and was capable of knowing the nature of his act. The mere statement of Jagdish (P.W-4) that Bhaggobai told him that appellant assaulted her mother in a fit of insanity, in absence of any such cogent evidence and circumstances justifying such inference, cannot be taken to hold that appellant acted in a fit of insanity. The plea of insanity of the appellant has, therefore, been rightly rejected by the trial court.

24. The last submission of learned counsel for the appellant has been that the appellant had no motive or intention to kill the deceased and he acted under an impulse, being enraged by delay in cooking food by his wife and in a heat of passion upon sudden quarrel, without any premeditation he gave a single pestle blow to deceased which resulted into her death, his case would, therefore, come within the ambit of Section 304 of IPC. Reliance was also placed in this behalf on the decision rendered in the case of *Joseph Vs. State of Kerala* reported in AIR 1994 Supreme Court page 34.

25. We have considered the aforesaid submission. It transpires from the evidence of Bhaggobai (P.W-1), the sole eyewitness to the incident that some

dispute occurred between the appellant and his wife over cutting of black plum tree standing in front of their house prior to the occurrence. It is further revealed from her evidence that the appellant wanted to go to Bandakpur and he was getting late, as his wife was delaying in cooking food, which enraged him and he assaulted his wife in a heat of passion on the spur of moment without any premeditation and gave a solitary blow by pestle on her head resulting into her death.

26. In the aforesaid facts and circumstances of the case, we are of the considered opinion that the act of the appellant would come within the purview of Section 304 Part I of IPC. The conviction of the appellant under Section 302 of IPC, therefore, deserves to be altered to one under Section 304 Part 1 of IPC.

27. As regards the sentence, appellant has already undergone imprisonment for more than ten years. Therefore, custodial sentence of ten years' rigorous imprisonment with fine of Rs.300/-, as already imposed by the trial court, in default further imprisonment for three months, would meet the ends of justice in the facts and circumstances of the case.

28. Appeal is, therefore, partly allowed. The conviction of the appellant under Section 302 of IPC is altered to one under Section 304 Part I of IPC and life imprisonment awarded to him is modified and reduced to the period of rigorous imprisonment for ten years, with fine of Rs.300/-, in default further rigorous imprisonment for three months.

29. As appellant has already undergone the sentence imposed on him, he shall be released forthwith, if not required, in any other case.

30. Appeal stands allowed to the extent indicated above.

Appeal allowed.

I.L.R. [2010] M. P., 2187

APPELLATE CRIMINAL

Before Mr. Justice Piyush Mathur

25 March, 2010*

STATE OF MADHYA PRADESH

... Appellant

Vs.

VEERU ALIAS VEER SINGH

... Respondent

Penal Code (45 of 1860), Section 216-A, Dakaiti Aur Vyapharan Prabhavit Ksheshtra Adhiniyam, M.P. 1981 Sections 11 & 13, Arms Act, 1959 Sections 25(1-B)(a) & 30 - Charges under - SDO(P) who remained active from stage of receiving information till arrest memo of respondent, not examined - There exists material contradiction in testimony of two witnesses - Entry of Roznamcha regarding movement & return of police party not produced - Gun licence was also found valid in name of father of

respondent - No scope of interfering with the acquittal passed by Special Judge - Appeal dismissed.

(Paras 7 to 12)

दण्ड संहिता (1860 का 45), धारा 216-ए, डकैती और व्यपहरण प्रभावित क्षेत्र अधिनियम, म.प्र. 1981, धाराएँ 11 व 13, आयुध अधिनियम, 1959 धाराएँ 25(1-बी)(ए) व 30 - के अंतर्गत आरोप - एस.डी.ओ. (पुलिस) जो सूचना प्राप्त करने के प्रक्रम से प्रत्यर्थी के गिरफ्तारी मेमो तक सक्रिय रहा, उसका परीक्षण नहीं किया गया - दो साक्षियों की परिसाक्ष्य में तात्त्विक विरोधाभास अस्तित्वमान - पुलिस पार्टी के संचलन एवं वापसी के संबंध में रोजनामचे की प्रविष्टि प्रस्तुत नहीं की गयी - प्रत्यर्थी के पिता के नाम से बंदूक की अनुज्ञप्ति भी वैध पायी गयी - विशेष न्यायाधीश द्वारा पारित दोषमुक्ति के आदेश में हस्तक्षेप की कोई गुंजाइश नहीं - अपील खारिज।

B.D. Mahore, Dy.G.A., for the appellant.

Mukesh Sharma, for the respondent.

J U D G M E N T

PIYUSH MATHUR, J. :- This Appeal against acquittal has been preferred by the State of Madhya Pradesh, on being aggrieved by the Judgment of acquittal passed by Special Judge, Morena in Special Case No. 03/2001 on Date 22.04.2002, whereby Respondent Veeru @ Veer Singh, Budh Singh and Bhagirath have been acquitted from the Charges framed against them under Section 216-A of the Indian Penal Code read with Section 11, 13 Madhya Pradesh Dakaiti Evam Vyapaharan Prabhavit Kshetra Adhiniyam as also under Section 25 (1B) (a) and Section 30 of the Arms Act

2. The Prosecution has demonstrated during trial that upon receiving intimation on Date 28.08.2000, about the movement of the dacoits in the ravines (with live cartridges, Rifle and large cash amount) an ambush was set up for apprehending them by the Station House Officer of Police Station Dimni. The prosecution has further demonstrated that a known Dacoit Ramesh Kushwaha, against whom prices money was also declared, was moving in the territories of Kwaari River Ravines, where Veer Singh S/o Bhagirath Singh was found to be in possession of arm and ammunition, for supplying the same to the declared Dacoit Ramesh Kushwaha.

3. The Prosecution has examined as many as 10 Prosecution witnesses to establish the charges against the Respondent but all the independent witnesses, PW-1 Ramnath, PW-2 Parsa and PW-3 Prakash had turned hostile, although the other Prosecution Witnesses, who are Police Constables, Arms Clerk, Head constables, ASI and Station House Officer have all deposed in favour of the Prosecution story.

4. Upon completion of the Investigation a Charge sheet was submitted against Three Accused persons, namely, Veeru alias Veer Singh S/o Bhagirath Singh, Budh Singh S/o Bhagirath Singh and Bhagirath Singh S/o Khare Singh Tomar and charges were framed under Sections 216-A of the Indian Penal Code read with

Section 13 of Madhya Pradesh Dakaiti Evam Vyapaharan Prabhavit Kshetra Adhiniyam and under Section 25 (1B) (a) and Section 30 of the Arms Act and after recording the Prosecution Evidence and conducting Trial the Special Judge, Morena has found that the Prosecution has failed to establish all the charges, framed against the Accused/Respondents and has ultimately acquitted the Respondents from all the charges, by its judgment Dated 22.04.2002. The State of Madhya Pradesh has preferred the present Appeal against acquittal of the Respondents and this Court had been pleased to grant Leave to Appeal only in relation to Respondent Veeru and his father Bhagirath Singh Vide order Dated 28th September, 2002. The record further reveals that Respondent Bhagirath Singh Tomar has expired on Date 19.03.2009, where after his name was deleted from the Cause Title and as such the present Appeal relates only to Respondent Veeru alias Veer Singh S/o Bhagirath Singh..

5. I have heard Shri B.D. Mahore, Deputy Govt. Advocate appearing for the Appellant/State of M.P. and Shri Mukesh Sharma, Learned Counsel for Respondent and have perused the record of the case.

6. The Statements of the Prosecution witnesses, namely, Shivraj Singh PW-5, Ramanand Sharma PW-7, Kuber Singh Yadav PW-8 and Maheshchandra Sharma PW-10 broadly demonstrate that soon upon receiving an intimation about the movement of a Dacoit Ramesh Kushwaha, the S.D.O.(Police) Mr. Manoj Rai had formed an ambush party, for apprehending Dacoits near Village Viruhrua, which is situated on the banks of Kwaari River, when at about 1:30 PM in the afternoon one person, who was later identified as Veeru, appeared on the scene, along with a Rifle and live cartridges and when his search was conducted, he was found carrying Rs. 33,000/- along with him. The Prosecution witnesses have revealed in their testimony that Veeru was not carrying 'gun license' along with him and he was not in a position to explain as to how he was carrying a large amount of Rs. 33,000/- in the ravines.

7. P.W.-5 Shivraj Singh and P.W.-8 Kuber Singh are the two Head Constables who had accompanied the S.D.O. (P) who had disclosed in their statements that S.D.O. (Police), Manoj Rai had made the preliminary interrogation of Respondent Veeru and had also taken the Shotgun, Ten Live Cartridges and Rs.33,000/- from the possession of Respondent Veeru and it is quite surprising that Prosecution has not examined S.D.O.(P) Mr. Manoj Rai as Prosecution witnesses even when several independent acts have been attributed to him by all the Prosecution Witnesses, right from the stage of receiving the information, till the preparation of Arrest Memo of Respondent Veeru.

8. A close scrutiny of the Statements of P.W.-5 Shivraj Singh and P.W.-8 Kuber Singh Yadav further reveals that there exists material contradiction in the testimony of these two witnesses in relation to the fact of the arrest of Respondent Veeru and other independent acts of receiving information, establishing the ambush

and the presence of the Police party and distance of the house of Respondent from the banks of River, which creates sufficient doubt about the veracity of even these Witnesses, who had not turned hostile and the Trial Court seems to have correctly analyzed the testimony of the Prosecution witnesses, when it reaches a conclusion that the testimony of the Witnesses is contradictory to each other and suffers from material inconsistency.

9. The movement action of the Police Party from the Police Station and its return to the Police Station requires mention in the Roznamcha, in view of the procedure prescribed in the Police Regulations but when the statements of P.W.-5 Shivraj Singh and P.W.-8 Kuber Singh are examined, it emerges on the record that in spite of disclosing the fact of making of the entries in Roznamcha, no such document or its extract was produced by the Prosecution for proving the correctness of the fact of receiving the information, forming of an ambush party and the other evidence leading to arrest of accused and return of the party along with the seized articles (Shotgun, Live Cartridges and Cash Amount). This also has been correctly found by the Trial Court to be completely untrustworthy, for the simple reason that when the Head Constables had deposed about the fact of recording details of all the events in the Roznamcha, the Prosecution was having documentary record to establish the timings of receiving information as also the details of the information, for connecting the present Respondent with the Offense, more so when the ambush was not established for apprehending Veeru, but it was established for a known Dacoit Ramesh Kushwaha.

10. The defense had examined D.W.-1 Jagdish, who states in his testimony that Respondent Veeru and Bhagirath are the Son and Father and the Shotgun, allegedly recovered from the possession of Veeru was in fact belong to his Father Bhagirath Singh and was recovered while making raid/search of the House of Bhagirath and by breaking open the Almirah and the Shotgun, Ten Live Cartridges and Cash Amount of Rs. 33,000/- were all taken out from the Almirah, by Police. The Defense has also established that a valid Arms License was issued by the Licensing Authority in the name of the Father and was valid till 31st December, 2000, whereas the weapon was seized on Date 28st. August 2000 from the possession of Veeru, which means that the License of the Gun was subsisting at the time when it was seized from the possession of the Respondent. Therefore the Trial Court has correctly analyzed the issue regarding the validity and existence of the Arms License, while acquitting the Respondents from the charges leveled against them, under Sections 25 (1-B)(a) and 30 of the Arms Act. Similarly, the Prosecution has further failed to establish the charges framed against the Respondents under Section 13 of Madhya Pradesh Dakaiti Evam Vyaparan Prabhavit Kshetra Adhiniyam, upon having no material to connect the guilt with the accused and by not collecting the material elements required for sustaining charges under these provisions of the Adhiniyam.

11. Therefore I find no scope of interfering with the Judgement of acquittal

passed by the Special Judge, whereby the Respondents have been acquitted from the charges leveled against them under Section 216-A of the Indian Penal Code and under Section 13 of the Madhya Pradesh Dakaiti Evam Vyaparan Prabhavit Khshetra Adhiniyam and Section 25 (1B) (a) of the Arms Act.

12. Consequently the Appeal preferred by the State of Madhya Pradesh against the acquittal of the Respondents fails and is hereby dismissed. The Bail Bonds of the Respondents, obtained for the present Appeal, are hereby discharged.

Appeal dismissed.

I.L.R. [2010] M. P., 2191
APPELLATE CRIMINAL
Before Mr. Justice R.C. Mishra
19 April, 2010*

NANNU SAHU

... Appellant

Vs.

STATE OF M.P.

... Respondent

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8 & 20(b)(ii)(B) - Appellant was held with 15.250 Kgs of Ganja - During trial the seized contraband 'Ganja' was not produced as article of evidence, before the Court - Held - Prosecutor-in-charge failed to request and trial judge failed to direct for production of the samples of contraband during trial as expected from them in wake of principle laid down in Zahira's case - Case remitted for getting the sample marked as articles of evidence and also to the defence for challenging the identity thereof. (Para 12)

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8 एवं 20(बी)(ii)(बी) - अपीलार्थी 15.250 किलोग्राम गांजे के साथ पकड़ा गया - विचारण के दौरान अभिग्रहीत विनिषिद्ध गांजा साक्ष्य की वस्तु के तौर पर न्यायालय के समक्ष प्रस्तुत नहीं किया गया - अभिनिर्धारित - भारसाधक अभियोजक निवेदन करने में विफल रहा और विचारण न्यायाधीश विचारण के दौरान विनिषिद्ध गांजे का नमूना प्रस्तुत करने के लिए निदेशित करने में असफल रहा जैसा कि जाहिरा के मामले में अधिकथित सिद्धांत के आलोक में उनसे अपेक्षित था - नमूना साक्ष्य की वस्तु के रूप में चिन्हित कराने और उसकी पहचान को चुनौती देने के लिए बचाव हेतु मामला प्रतिप्रेषित किया गया।

Cases referred :

AIR 2003 SC 4236, 2005(2) JLI 363, 2010(1) MPHT 90, 2002 CrLJ 3211, AIR 2002 SC 1334, AIR 1963 SC 1531, (2002) 10 SCC 187, 2005(4) MPHT 438, AIR 2004 SC 3114, (1999) 6 SCC 110, 2009(III) MPWN 9, (2009) 8 SCC 539, AIR 2005 SC 2265, AIR 1999 SC 2378.

S.R. Tamrakar, for the appellant.

R.N. Yadav, P.L., 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 27.11.2007 passed by Special Judge (under the Narcotic Drugs and Psychotropic Substances Act, 1985) (for short 'the Act'), Jabalpur in Special Case No. 19/2007 whereby the appellant was convicted under Section 8 read with S.20(b)(ii)(B) of the Act and sentenced to undergo R.I. for 7 years and to pay fine of Rs.50,000/- and in default, to suffer R.I. for 2 years.

2. Prosecution story, in short, is that on 25.03.2007 at about 2.30 p.m., N.R. Ghudawat (PW7), who was posted as Sub-Inspector at P.S. Omti, Jabalpur, received a credible information that the appellant, while carrying Ganja on a bicycle for the purpose of sale, was expected to arrive at the turn of St. Norbert School located near Bhanvartal Garden. After recording the corresponding information in the Rojnamcha and observing all other statutory formalities, he proceeded towards the spot along with other members of the police force and panch witnesses namely Jameel Khan (PW1) and Basant Sonkar (PW4). At about 4.40 p.m., the appellant was seen coming from the side of bus-stand pedaling a cycle with a white plastic bag on its carrier. He was apprised of his legal right whereunder he could require presence of Gazetted Officer or Magistrate for the purpose of search. However, he declined to exercise the right. Accordingly, with his consent only, the bag was searched. It was found to contain a total quantity of 15.250 Kgs. of Ganja. The contraband was duly seized and two samples of 25 gms. each were drawn. One of the samples was forwarded to FSL, Sagar. The corresponding report (Ex.P-20) indicated that the sample contained Ganja that is cannabis hemp within the meaning of Section 2(iii)(b) of the Act.

3. The appellant pleaded false implication at the instance of one Shri Khampariya who, at the relevant point of time, was posted as ASI at P.S. Garha, Jabalpur. To bring home the charge, the prosecution examined as many as 7 witnesses including the detecting officer and the panch witnesses. No evidence was led in defence. Upon a critical appraisal of the evidence on record, learned trial Judge, for the reasons assigned in the impugned judgment, proceeded to hold the appellant guilty of the offence charged with.

4. In the memo of appeal, legality and propriety of the conviction have been questioned on the following grounds -

- (i) Non-compliance with the statutorily mandatory provisions of Sections 42 and 50 of the Act.
- (ii) Absence of signatures of the panch witnesses on the panchnama (Ex.P-29) relating to search of the Detecting Officer N.R. Ghudawat and other members of the raiding party.
- (iii) Non-corroborative evidence of Basant Sonkar (PW4), cited as one of independent witnesses to the proceedings relating to search, seizure and sampling of the contraband.

- (iv) Absence of explanation as to where the seized property was kept before being forwarded to the FSL for chemical examination.

In addition, learned counsel for the appellant, placing reliance on decision of the Supreme Court in *Jitendra v. State of M.P.* AIR 2003 SC 4236, has strenuously contended that the appeal deserves to be allowed on the solitary ground of non-production of the seized contraband as article of evidence before the trial Court. Attention has also been invited to the fact that in a series of judgments passed by co-ordinate Benches of this Court including those rendered in (i) *Abdul Gani v. State of M.P.* 2005 (2) JLJ 363 and (ii) *Harish v. State of M.P.* 2010 (1) MPHT 90, convictions have been set aside on the aforesaid ground.

5. However, a close analysis of the judgment in *Jitendra's case* (supra) would reveal that the Apex Court had only disapproved the observations made by a single Bench of this Court in *Jitendra v. State of M.P.* 2002 CRI. L. J. 3211 that non-production of the contrabands before the trial Court was not fatal to the prosecution case in view of the fact that the defence also did not insist upon production of the contraband. Still, the appeal against conviction was not allowed solely on the ground of non-production of Charas and Ganja allegedly seized from the possession of the accused-appellant as articles of evidence before the trial Court but also for the following reasons-

(i) No independence witness as to the recovery of the narcotic drugs from the possession of the accused was examined.

(ii) The final report, under Section 173 of the Code of Criminal Procedure (for short 'the Code'), was submitted either without being aware of or without reading the report of the FSL.

For this, reference may be made to Para "9" of the judgment that reads as under -

"Taking the cumulative effect of all the circumstances, it appears to us that the material placed on record by the prosecution does not bring home the charge beyond reasonable doubt. We are of the view that upon the material placed on record it would be unsafe to convict the appellants. They are certainly entitled to the benefit of doubt."

(Emphasis supplied)

6. It is well settled that a decision is an authority for what it decides and not for what could be inferred from the conclusion. As explained by the Supreme Court in *Padmasundara Rao (dead) v. State of T.N.* AIR 2002 SC 1334, there is always peril in treating the words of a judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.

7. In this view of the matter, the decision of the Apex Court in *Jitendra's case* (above) can not be treated as an authority for the proposition that in each and every case, non-production of the contraband before the trial Court would entail acceptance of the appeal against finding of guilt. The obvious reason is that when in a criminal appeal, the appellate Court set aside the conviction on the ground of gross irregularities at the trial, the question still remains as to what order to be passed, that is, whether to acquit the accused or to order a re-trial and the Court has to select the alternative which will be more conducive to the ends of justice, looking to all the circumstances of the case.

8. Powers of the appellate Court have been defined in Section 386 of the Code and sub-Section (b)(i) thereof provides that in an appeal from a conviction, it may reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial. Nature, ambit and scope of this power of the Appellate Court (that was conferred by analogously worded sub-section (1)(b) of Section 423 of the Old Code) have already been examined by a five-judge of the Supreme Court in *Ukha Kolhe v. State of Maharashtra* AIR 1963 SC 1531. Speaking for the majority, J.C. Shah, J (as his Lordship then was) explained the legal position in the following terms -

An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of re-trial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons.

9. Moreover, decision of the Apex Court in *Balwinder Sinah v. State of Punjab* (2002) 10 SCC 187 fortifies the view that sub-Section (b)(i) (supra) also contemplates remand of the case for a limited purpose. In that case, the Court was required to deal with a situation wherein deposition of a witness namely Babu Ram, though signed by the Presiding Judge of the Designated Court, did not bear signature of the witness. It was observed that instead of keeping aside the

entire statement purported to be the testimony of the witness, it would be more expedient to remit the case to the trial Court for filling up the said deficiency by recalling and re-examining the witness afresh.

10. Further, a co-ordinate Bench of this Court in *Manoj Rawat v. State of M.P.* 2005 (4) MPHT 438 though in a case relating to offence under the Public Gambling Act, 1867, affirmed the order of the appellate Court, remanding the case for re-trial for the purpose of exhibiting the seized instruments of gaming as articles of evidence before the trial Court. While doing so, learned Judge referred to the guideline laid down by the Supreme Court in *Zahira Habibulla H. Sheikh v. State of Gujarat* AIR 2004 SC 3114 to the effect that the Presiding Judge should not be a spectator and a mere recording machine but must ensure that the trial is fair. In that case, the Apex Court quoted the following observations made in an earlier decision rendered in *Rajendra Prasad v. Narcotic Cell thr. Its officer in Charge, Delhi* (1999) 6 SCC 110 -

"It is a common experience in criminal Courts that defence counsel would raise objections whenever Courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act, 1872 by saying that the Court could not "fill the lacuna in the prosecution case". A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage "to err is human" is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which a Court cannot fill up."

11. As explained in *Zahira's* case only. Section 391 of the Code is another salutary provision which clothes the Courts with the power to effectively decide an appeal. Though Section 386 envisages the normal and ordinary manner and method of disposal of an appeal, yet it does not and cannot be said to exhaustively enumerate the modes by which alone the Court can deal with an appeal. Section 391 is one such exception to the ordinary rule and if the appellate Court considers additional evidence to be necessary, the provisions in Section 386 and Section 391 have to be harmoniously considered to enable the appeal to be considered and disposed of also in the light of the additional evidence as well. However, whether a retrial under Section 386 or taking up of additional evidence under Section 391 is the proper procedure will depend on the facts and circumstances of each case for which no strait-jacket formula of universal and invariable application can be formulated.

12. Now, adverting to the facts of the present case, it may be pointed out that the seized contraband and its samples were deposited in the Malkhana of the Court on 23/10/2007. However, the prosecutor-in-charge of the case apparently due to sheer ignorance of the legal position as settled by the Apex Court in

Jitendra's case (supra) did not prefer to request the trial Judge to call the samples of the contraband made over to the Nazir for being produced as articles of corroborative evidence against the appellant at the time of the examination of Detecting Officer N.R. Ghudawat (PW7) on 01.11.2007. It is relevant to note that statement of Jameel Khan (PW1), one of the panch witnesses, who came forward to support the prosecution version, had already been recorded on 24.09.2007. Moreover, in the wake of the principle laid down in *Zahira's case* (above), the trial Judge was also expected to ensure a fair trial by directing production of the samples of the contraband, which was in the custody of the Court only, at least at the examination of the Investigating Officer.

13. In such a situation, while allowing the prayer for suspension of sentence, vide order-dated 10.03.2010, a question was posed as to why the case should not be remitted for a decision afresh after affording opportunity to the prosecution for getting the samples marked as articles of evidence and also to the defence for challenging the identity thereof.

14. In response, learned counsel for the appellant, while making reference to the decision of this Court in *Hind Spinners, Dewas v. Jagdish Chandra* 2009 (III) MPWN 9, has submitted that sending the case for re-trial even for a limited purpose would not be proper in view of the fact that the appellant has been in custody since 25.03.2007. However, fact of the matter is that even if the doctrine of proportionality is applied, the offence of being found in an illicit possession of 15.250 Kgs. of Ganja would carry custodial sentence for a term of 7 ½ years. The judgment in *Hind Spinners's case* (supra), though based on the verdict of the Supreme Court in *Ukha Kolhe's case* (ibid), is also of no avail to the appellant as, in that case, both the parties in a complaint relating to the offence under Section 138 of the Negotiable Instruments Act, 1881, were aggrieved by the order of the appellate Court directing re-trial.

15. Although, it is necessary to delve into the merits of the contentions relating to compliance with statutory provisions governing the search and seizure yet, for arriving at the conclusion on the point as to whether the resuscitation of a three-year-old matter would be in the public interest, a passing reference may be made to the recent developments in this field of law. Accordingly, even the non-compliance with the provision of Section 42(2) of the Act may not vitiate the trial if it does not cause any prejudice to the accused (See. *Karnail Singh v. State of Haryana* (2009) 8 SCC 539). This apart, in *State of H.P. v. Pawan Kumar* AIR 2005 SC 2265, the Apex Court, while explaining that provision of Section 50 of the Act would not apply to search of bag or briefcase or any such article being carried by the accused, struck a note of caution that drug traffickers should not go scot-free on technical pleas. Besides this, as observed by the Supreme Court in *State of Punjab v. Baldev Singh* AIR 1999 SC 2378, the social malady of drug abuse has already acquired the dimensions of an epidemic. Viewed from this angle, remand of the case would also serve a public purpose.

16. As observed in *Zahira's* case, the community acting through the State and the public prosecutor is also entitled to justice. The case of the community deserves equal treatment at the hands of the Court in the discharge of its judicial functions.

17. For these reasons, it would not be in the interests of justice to acquit the appellant solely on the ground of non-production of the seized property in evidence before the trial Court. Still, taking note of the fact that the appellant has already suffered imprisonment for a period of 3 years and has not been able to deposit the fine amount in pursuance of the order-dated 10.03.2010 suspending the custodial sentence, he is entitled to be released on bail.

18. To sum up, in the peculiar facts and circumstances of the case, the case deserves to be remitted to the trial Court for a limited purpose of getting the samples of the contraband produced as articles of evidence in the examination of panch witness namely Jameel Khan (PW 1) and Investigating Officer N.R. Ghudawat (PW 7). Let it be clarified that this Court is not ordering a de novo trial. However, nothing contained herein shall be construed as any expression of opinion on the merits of the case. It shall still be open to the appellant to raise all such pleas as are available under law before the trial Court.

19. Consequently, without entering into the merits of the other contentions raised against legality and propriety of the conviction, the appeal is allowed and the impugned conviction and the consequent sentences are hereby set-aside. The matter is remanded to the trial Court for decision afresh after affording an opportunity to the prosecution to recall panch witness namely Jameel Khan (PW1) and Investigating Officer N.R. Ghudawat (PW 7) for a limited purpose of getting it samples identified. Needless to say that the defence would also be afforded reasonable opportunity to cross-examine the corresponding witness on the point and in the light of any new incriminating circumstance brought on record, the appellant shall be re-examined under S.313 of the Code and be given an opportunity to lead evidence in rebuttal of the presumption under Sections 35 and 54 of the Act. This exercise be completed as far as practicable within a period of 3 months from the date of receipt of the record.

20. It is further directed that the appellant shall be released on bail on his furnishing a personal bond in the sum of Rs.25,000/- (Rupees Twenty Five Thousand) with a solvent surety in the like amount to the satisfaction of the trial Court for his appearance during trial.

21. Copy of this Judgment be forwarded to the Principal Secretary, Department of Law and Legislative Affairs, Bhopal for initiating appropriate action against the public prosecutor-in-charge of the case for conducting the prosecution in a negligent manner in utter ignorance of the principle of law laid down by the Apex Court in *Jitendra's* case (supra).

Appeal allowed.

I.L.R. [2010] M. P., 2198

APPELLATE CRIMINAL

Before Mr. Justice S.L. Kochar & Mrs. Justice S.R. Waghmare

3 May, 2010*

SHIV CHARAN

... Appellant

Vs.

STATE OF M.P.

... Respondent

Penal Code (45 of 1860), Sections 302, 341 & 506-B - Appeal against conviction of appellant on basis of sole evidence of wife of deceased - Held - In view of direct conflict between medical evidence and ocular account given by solitary eye witness, who has only deposed against appellant and acquitted co-accused, is not sufficient to base conviction of appellant - Conviction and sentence set aside.
(Paras 10,12)

दण्ड संहिता (1860 का 45), धाराएँ 302, 341 व 506-बी - मृतक की पत्नी की एकमात्र साक्ष्य के आधार पर अपीलार्थी की दोषसिद्धि के विरुद्ध अपील - अभিনিर्धारित - चिकित्सीय साक्ष्य तथा एकमात्र प्रत्यक्षदर्शी साक्षी के मौखिक वृत्तांत जिसने केवल अपीलार्थी के विरुद्ध वचन किया है और सह-अभियुक्त को दोषमुक्त किया है, के मध्य सीधे विरोधाभास की दृष्टि से, अपीलार्थी की दोषसिद्धि आधारित करना पर्याप्त नहीं है - दोषसिद्धि एवं दंडादेश अपास्त।

Case referred :

(2003) 6 SCC 380.

R.N. Gupta, for the appellant.*Girish Desai, Dy.A.G.*, for the respondent/State.**J U D G M E N T**

The Judgment of the Court was delivered by **S.L. KOCHAR, J.** :-The appellant has filed this appeal against the judgment dated 19.3.2009 passed by the learned Second Additional Sessions Judge, (FTC) Bhaora District Rajgarh, in S.T.No. 182/2007 whereby appellant Shiv Charan has been convicted under Section 341 IPC and sentenced to undergo imprisonment for one month and under Section 506-B with one years rigorous imprisonment and under Section 302 IPC imprisonment for life, it is directed that the sentences to run concurrently.

2. According to the prosecution case on 17.8.2007 in the evening at 5 PM deceased Ramprasad was returning back to his house with bullock from his field and when he reached on the road, he was belaboured by six accused having lathi and farsi. Ramprasad sustained injury on head, abdomen and left hand. Incident was witnessed by several witnesses out of which P.W.6 Kesarbai who is wife of the deceased who lodged the Dehati Nalishi recorded by the concerned Police. Deceased was admitted in the Hospital and examined by P.W.4 Dr. Sharad Sahu who also issued MLC Report Ex.P/6 Deceased remained Hospitalised for about

9 days and died. On receiving information, the Police reached in the Hospital and prepared Inquest Report and sent the dead body for Post Mortem Examination which was conducted by P.W.11 Dr. Anil Garg. Post Mortem is Ex.P/13. Investigating Officer arrested the accused persons and on their disclosure statement, seized the weapons, and he had also recorded the statements of the witnesses who were acquainted with the facts of the case. On completion of investigation, charge sheet was filed against six accused including the appellant for commission of offence under Section 148, 302/149, 341, 294 and 506-B of the IPC.

3. The accused persons refuted the charges and pleaded innocence, therefore, put to trial. They have not examined any witness in defence. Learned Trial Court while acquitting other five accused convicted and sentenced the appellant as noted hereinabove.

4. We have heard the learned Counsel for the parties and also perused the entire record of the Trial Court carefully.

5. It is clear from the record that conviction of the appellant is based on solitary testimony of P.W.6 Kesarbai wife of the appellant who was declared hostile by the prosecution because she had not named four accused in her court statement and deposed only against appellant and acquitted co-accused Motilal. Motilal has been acquitted because his over act as described by Kesarbai that he caused injury on private part of the deceased by lathi wrapped with iron wire at its top, is not corroborated by medical evidence.

6. The moot question for us to decide here is the solitary testimony of Kesarbai against the appellant is sufficient to base conviction or not ?

7. Kesarbai has stated that appellant gave a blow by farsi on head and Motilal struck a lathi on private part of the deceased because of which deceased fell and became unconscious. She was declared hostile and confronted with her case diary statement as well as first information report by the prosecutor wherein she has refused to name the acquitted four accused.

8. The learned Trial Court has disbelieved the statement of Kesarbai against co-accused Motilal because no injury was found by Doctor on private part of Motilal.

9. P.W-4 Dr. Sharad Sahu on external examination of deceased noted one swelling on left elbow joint, one abrasion on right thigh and acute abdominal pain. He advised for X-Ray of skull, elbow joint and abdomen. He has nowhere mentioned in his Report Ex.P/6 about presence of any external injury of any kind on the head of deceased. In court statement also he has not deposed about presence of any external injury on the head of the deceased, whereas P.W-8 Dr. Smt. Kulu Girwal found one abrasion on chest, one surgical stitched wound on left hand and there was separation of radius bone from elbow joint and abrasion on scapula region and on right temporo parietal region there was surgical stitched wound. On

internal examination she found sub dural and sub arachnoid haemorrhage and in her opinion deceased died because of Cardio Respiratory Failure on account of several injuries found on the person of deceased and their complications. In the opinion of Smt. Kelu, the injuries could be caused by hard and blunt object.

10. Dr. Sahu and Dr. Kelu both had not found any external/internal injuries caused by any sharp edged weapon. Farsi seized from the possession of the appellant was not shown to them in the Court. It is not the prosecution case that appellant used the farsi from its blunt side, therefore, it can be presumed that farsi was used for which it is meant and it is a sharp edged heavy object but no external injury found by both the Doctors on skull of the deceased caused by sharp and hard object like farsi. In this view of the matter, there is a direct conflict between medical evidence and ocular account given by solitary eye-witness wife of the deceased Kesarbai. Supreme Court in case of *Thaman Kumar Vs. State of Union Territory of Chandigarh* (2003) 6 Supreme Court Cases 380 has held, about appreciation of conflicting evidence of Doctor with eye-witness/witnesses account, as under:

"The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eyewitnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third categories no such inference can straight away be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony."

11. In view of the aforesaid Supreme Court dicta, the appellant is entitled to get benefit because there is total absence of injury which can be normally caused by a weapon i.e. farsi. Farsi is a sharp edged weapon and if sharp side was used, the deceased could have sustained incised wound but no such incised injury was found on his person.

12. In view of the above, we are of the opinion, that solitary testimony of wife of the deceased is not sufficient to base conviction of the appellant, therefore, this appeal is allowed. Conviction and sentence of the appellant as passed by Trial Court are, hereby, set-aside and the Trial Court is directed to release the appellant forthwith if not wanted in any other case.

Office is directed to send the copy of the judgment along with the record immediately to the Trial Court.

Appeal allowed.

I.L.R. [2010] M. P., 2201

APPELLATE CRIMINAL

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

12 May, 2010*

HARICHARAN

... Appellant

Vs.

STATE OF M.P.

... Respondent

Penal Code (45 of 1860), Sections 363, 366, 376(2)(f) & 302, Evidence Act, 1872, Section 3 - *Circumstantial evidence - Three witnesses seen the appellant forcibly taking away the deceased (a minor girl) with him - Dead body found in a well after 3 days - Positive medical evidence regarding rape and death on relevant day - The chain of circumstances are so complete on which basis inference can be drawn against the appellant/accused that he is the person who committed the aforesaid offence of kidnapping, commission of rape on the deceased and also caused death of the deceased by throwing her into a well - Conviction and sentence affirmed.* (Paras 12, 15 & 18)

दण्ड संहिता (1860 का 45), धाराएँ 363, 366, 376(2)(एफ) व 302, साक्ष्य अधिनियम, 1872, धारा 3 - परिस्थितिक साक्ष्य - तीन साक्षियों ने मृतक (एक अवयस्क बालिका) को बलपूर्वक अपने साथ ले जाते हुए अपीलार्थी को देखा - तीन दिन पश्चात कुएं में मृत शरीर पाया गया - सुसंगत दिन बलात्संग एवं मृत्यु के संबंध में सकारात्मक चिकित्सीय साक्ष्य - परिस्थितियों की कड़ियां इतनी सम्पूर्ण हैं कि उसके आधार पर अपीलार्थी/अभियुक्त के विरुद्ध यह निष्कर्ष निकाला जा सकता है कि वही व्यक्ति है जिसने व्यपहरण का उक्त आरोप कारित किया, मृतक के साथ बलात्संग कारित किया और कुएं में फेंककर मृतक की मृत्यु भी कारित की - दोषसिद्धि एवं दण्डादेश की पुष्टि की गयी।

Cases referred :

AIR 1998 SC 2899, (2008) 12 SCC 748, (2008) 13 SCC 257.

O.P. Mathur, for the appellant.

M.P.S. Bhadouria, P.P., for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by S.S. DWIVEDI, J. :- The appellant has preferred this appeal under Section 374

(2) of the Code of Criminal Procedure aggrieved by the judgment of conviction and sentence dated 08th November, 2001 passed by the Additional Sessions Judge, Ganjbasoda, District Vidisha in Sessions Trial No. 139/2000, whereby, the appellant has been found guilty for the offences punishable under Sections 363, 366, 376 (2)(f) and also Section 302 of the Indian Penal Code and sentenced to three years' rigorous imprisonment with fine of Rs. 200/-, five years' rigorous imprisonment with fine of Rs. 200/-, ten years' rigorous imprisonment with fine Rs. 200/- and imprisonment for life with a fine of Rs. 200/- respectively and in default of payment of fine, he has to suffer further one month's rigorous imprisonment on each count. All sentences are directed to run concurrently.

2. Briefly stated facts of the case are; on 23/09/1999 one Mathura Prasad - (PW 1) lodged a First Information Report at Police Station Basoda, District Vidisha that on the last night of 22-09-1999 at about 10 PM when he was in the temple situated at village Pachma; at that time one Khanchan Bai and Sandhya came to him and stated that the appellant/accused Haricharan forcibly taken away his minor girl Sita Bai. He immediately rushed to him then on the way his wife Keshar Bai (PW-7) met him and she also stated that the appellant/accused forcibly taken away the minor girl Sita Bai with him. He searched the minor girl Sita Bai and the appellant/accused, but both of them were missing. On 25/09/1999, the dead body of the minor girl Sita Bai was found in a well situated in the village concerned. On the basis of this information, the police registered a case, prepared an inquest report and prepared inquest Panchnama of the dead body of Sita Bai, a minor girl aged about ten years and sent the dead body of the deceased Sita Bai for Post mortem examination. The post Mortem examination has been performed by Dr. D.K. Jain (PW/8) with a panel of three doctors and found the dead body was in decomposed condition, there are injury marks on the abdominal area and on the private part of the dead body, there are also swelling in the vaginal area of the deceased. The death of found to be caused within three to five days. The private part of the deceased had been examined by lady Assistant surgeon Dr. Hansa Shah (PW/9) and she also found that the blood was oozing from the private part of the dead body and labia majora and labia minora are also found to be bluish in colour, two slides have also been prepared in respect of the vaginal discharge and the hymen was also found to be ruptured. The slides after sealing it properly given to the constable for its further chemical examination and proved the report Ex.P/18. During investigation, the statements of witnesses have been recorded, the appellant/accused has been arrested and after due investigation, a charge-sheet has also been filed.

3. The appellant/accused abjured the guilt and his defence is of false implication. The learned trial Court after due appreciation of the entire evidence on record by the impugned judgment held the appellant/accused guilty for the offences punishable under Sections 363, 366, 376 (2)(f) and also under Section 302 of the Indian Penal Code and sentenced him as stated hereinabove; aggrieved by which, the appellant has preferred this appeal.

4. Heard the learned counsel for the appellant as well as learned Public Prosecutor appearing for the State and perused the record.

5. It is submitted on behalf of the appellant that no eye witness is available against the appellant, on the basis of which, this can be found proved that the appellant is the person who committed murder of deceased Sita Bai. The prosecution is rest upon only on the circumstantial evidence of last-seen with the deceased and that itself is not a conclusive proof for the guilt of the accused and the learned trial Court has wrongly held the appellant/accused guilty for the alleged offences

6. The learned counsel for the appellant has also placed reliance on a decision of the Apex Court in the case of *State of Punjab vs. Sarup Singh* AIR.1998 SC 2899, wherein, it is held that "only on the basis of circumstantial evidence of last-seen with the deceased, no inference about the guilt of the accused - Sarup Singh can be drawn on the basis of circumstantial evidence of last-seen." Therefore, prayed for setting aside the impugned judgment of conviction and sentence passed by the trial Court.

7. The learned Public Prosecutor for the State supported the impugned judgment and prayed for dismissal of the appeal.

8. To bring home the charges as levelled against the appellant, the first mitigating circumstance available against the appellant is that he is the person who had forcibly taken away the deceased minor girl Sita Bai with him. For this, the prosecution had examined Sandhya (PW/6) as witness, who clearly stated that when she together with Sita Bai returning from the temple to their house, at that time near culvert, the appellant/accused Haricharan came and he caught the deceased Sita Bai and took her forcibly with him. Sita Bai started weeping but the accused had assured her that he will give her something, then this witness immediately rushed to the house of Sita Bai and narrated the incident to her mother and then she also informed to the father who was at that time in the temple concerned. In detail cross-examination of this witness, some minor contradiction has been brought by the defence with regard to narration of the incident to the father of Sita Bai in the temple, which is not there in the previous statement of PW/1 recorded during investigation. For this minor contradiction, the entire statement of Sandhya (PW/6), who is admittedly a child aged about 12 years who actually saw the appellant/accused forcibly taking Sita Bai with him, can be disbelieved.

9. The aforesaid statement of Sandhya (PW/6) has got further support by the statement of Kesarbai (PW/7), the mother of the deceased Sita Bai who also narrated that when she has been informed about forcibly kidnapped of her daughter Sita Bai by the appellant/accused, then she immediately rushed to the spot and she also saw the appellant/accused going towards village Semari with her minor daughter Sita Bai. Thereafter she immediately rushed to her husband and narrated about the incident. In the cross-examination of this witness, nothing substantial came,

on which basis, the aforesaid statement that this witness Kesarbai also saw the appellant/accused with Sita Bai, the deceased going toward village Semari can be disbelieved.

10. The aforesaid witness Sandhya (PW/6) and Kesarbai (PW/7) and Mathura Prasad (PW/1) father of the deceased also stated that the dead body of the Sita Bai was found in a well situated in the village concerned. Then, Mathura Prasad (PW/1) immediately informed the police and lodged the report Ex. P/1. The police came on the spot and the dead body of deceased Sita Bai was recovered from the well on 25/09/1999. The appellant/accused forcibly kidnapped the minor girl Sita Bai on 22/09/1999. The time of death is ascertained by the autopsy surgeon by the statement of Dr. D.K. Jain, (PW/8) and after the examination of the dead body found that the death is occurred within three to five days. This period clearly indicates the point of time 22/09/1999 when the accused was lastly seen with the deceased Sita Bai when he forcibly taken away the deceased Sita Bai with him.

11. The motive of causing death of Sita Bai is also apparent on the basis of statement of a medical witness Dr. Hansha Shah (PW/9), who had examined the private part of the deceased Sita Bai and found that the hymen had been ruptured and blood was oozing from the private part. This clearly indicates that before her death, the deceased Sita Bai was subjected for the forcibly intercourse by the accused and thereafter she had been thrown in a well from where the dead body has been recovered nearabout three days after the incident.

12. Thus, the aforesaid circumstances, clearly indicates the involvement of the appellant/accused in the incident that he actually kidnapped the minor girl Sita Bai and thereafter committed rape on her and then for saving himself from the punishment for the alleged offences of rape, he thrown the prosecutrix Sita Bai into a well from where three days after the dead body has been recovered.

13. Thus, we are of the considered opinion that the circumstantial evidence of last-seen with the accused as stated by the Sandhya (PW/6) and Kesarbai (PW/7) and thereafter recovery of dead body from the well which is found to be dead nearabout three days before recovery and this also supported by the medical evidence that the before the death, the deceased Sita Bai was subjected to forcibly intercourse, thus, chain of circumstances are so conclusive, on the basis of which an interference can be drawn that the accused/appellant is the person who kidnapped the minor girl Sita Bai, committed rape on her and thereafter thrown her into a well and thereby caused her death.

14. The learned counsel placed reliance on the decision of the Apex Court in the case of *Sarup Singh* (supra), but the facts of the aforesaid case are different to the facts of the present case. In the aforesaid case, only on the basis of recovery of certain articles from the possession of the accused, on the point of circumstantial evidence of last-seen, the Apex Court has held that the chain of circumstances are not conclusive therefore affirmed the acquittal of the accused Sarup Singh.

15. In the present case, there are ample evidences available on record which indicate that the appellant/accused forcibly taken away the minor girl Sita Bai with him, thereafter as per medical evidence, rape has been committed on her and thereafter she had been thrown into the well and thereby also caused death of the minor girl Sita Bai. The death is also found to be of the same period when the accused was lastly seen with the deceased and in such circumstance, the evidences available against the accused are sufficient to hold him guilty for the aforesaid offences.

16. The Hon'ble Apex Court in the latest decision in the case of *Manivel and others vs. State of Tamil Nadu*. (2008) 12 SCC 748 while dealing with the circumstantial evidence of last-seen with the deceased after discussing the entire case law on the point has held hereas under:

"14. So far as the last seen aspect is concerned it is necessary to take note of two decisions of this Court. In *State of U.P. v. Satish* (2005) 3 SCC 114 it was noted as follows:

"22. The last-seen theory comes into play where the time gap between the point of time when the accused and the 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. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs 3 and 5, in addition to the evidence of PW 2."

15. In *Ramreddy Rajesh Khanna Reddy v. State of A.P.* (2006) 10 SCC 172 it was noted as follows:

"27. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and 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. Even insuch a case the courts should look for some corroboration."

17. Similar view has been reiterated by the Apex Court in another decision in the case of *Kusuma Ankama Rao vs. State of Andhra Pradesh*. (2008) 13 SCC 257. wherein while accepting the circumstantial evidence of last-seen with the deceased has held herein under:

"10. We may also make a reference to a decision of this Court in *C. Chenga Reddy v. State of A.P.*, (1996) 10 SCC 193 wherein it has been observed thus:

'21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.'

18. Considering the aforesaid law laid down by the Hon'ble Apex Court, we are of the considered opinion that the circumstantial evidence available against the accused is that he is the person who has forcibly taken away the deceased Sita Bai with him and the medical evidence supported the fact that the rape has been committed on deceased Sita Bai, her death is also within the period when the appellant/accused has kidnapped the prosecutrix Sita Bai. Therefore, the chain of circumstances are so complete on which basis inference can be drawn against the appellant/accused that he is the person who committed the aforesaid offence of kidnap, commission of rape on the deceased and also caused death of the deceased by throwing her into a well.

19. Thus, in view of the aforesaid discussion, we are of the considered opinion that the learned Trial Court has rightly held the appellant/accused guilty for the offences punishable under Sections 363, 366, 376 (2) (f) and also under Section 302 of the Indian Penal Code and also rightly sentenced him for these offences and, therefore, the aforesaid findings of conviction and sentence recorded by the trial Court are hereby affirmed. The appeal preferred by the appellant/accused being devoid of any substance, is dismissed accordingly.

Appeal dismissed.

I.L.R. [2010] M. P., 2206

CRIMINAL REFERENCE

Before Mr. Justice Rakesh Saxena & Mr. Justice G.S.Solanki

16 July, 2010*

IN REFERENCE

Vs.

RAHUL

...Applicant

...Non applicant

A Evidence Act (1 of 1872), Section 3, Penal Code, 1860, Sections 302, 376 - Rape and murder - Case based on circumstantial evidence- Held - Accused was seen going towards place of incident - T-Shirt recovered

* Criminal Reference No.2/2010 (Jabalpur)

on instance of accused, found having blood stains of more than one person - Similar male D.N.A. profile in the blood sample of accused, nail clipping of accused and vaginal smear slide of deceased, - Accused was also injured and an abrasion was found by doctor- It is well established that it was the appellant who only and non else committed murder and rape. Conviction u/s 376 & 302 of I.P.C. is affirmed. (Para 58, 59)

क साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड संहिता, 1860, धारा 302, 376 - बलात्कार एवं हत्या- प्रकरण परिस्थितिजन्य साक्ष्य पर आधारित- अभिनिर्धारित- अभियुक्त को घटना स्थल की तरफ जाते हुए देखा गया- अभियुक्त के बयान पर बरामद टी-शर्ट पर एक से अधिक व्यक्तियों के खून के धब्बे पाये गये- अभियुक्त के खून, नाखूनों की कतरन एवं मृत्तिका के योनिस्त्राव की स्लाइड की नर D.N.A. रूपरेखा समान- अभियुक्त को भी चोटें आयीं थी तथा चिकित्सक ने एक खरोंच पायी थी- यह भलीभांति सुस्थापित है कि सिर्फ अपीलार्थी ने ही हत्या एवं बलात्कार किया है किसी और ने नहीं - भा0द0सं0 की धारा 376 एवं 302 के अंतर्गत की गयी दोषसिद्धि की पुष्टि ।

B. Penal Code (45 of 1860), Section 302 - Death Sentence - *The act of accused is heinous and requires to be condemned but at the same time it cannot be said that it is rarest of the rare case where accused requires to be eliminated from the society. Therefore, looking to the age (about 19 years) of the accused and antecedents, there appears no justifiable reason to impose the death Sentence on him. Sentence of death modified and commuted to imprisonment for life.* (Para 62)

ख दण्ड संहिता (1860 का 45), धारा 302- मृत्युदण्ड - अभियुक्त का कृत्य घृणित एवं निंदनीय है किन्तु इसे विरल से विरलतम प्रकरण नहीं कहा जा सकता जहां अभियुक्त की समाज से मौजूदगी हटाने की आवश्यकता हो अतः अभियुक्त की आयु (19 वर्ष) एवं उसके पूर्ववृत्त को देखते हुए उस पर मृत्युदण्ड आरोपित किये जाने का कोई न्यायसंगत कारण प्रतीत नहीं होता, मृत्युदण्ड को आजीवन कारावास में परिवर्तित किया गया ।

C Criminal Procedure Code, 1973 (2 of 1974)-Sections 53, 53-A - *Blood sample collected by Lab Technician of 15 years experience on the direction of pathologist of District Hospital, can not be said to be not taken by Medical Practitioner. There was no illegality in collecting the blood sample.* (Para 46)

ग दण्ड प्रक्रिया संहिता, 1973 (1974 का 2) धारा 53, 53-A- 15 वर्ष के अनुभव रखने वाले प्रयोगशाला तकनीकज्ञ द्वारा जिला अस्पताल के पैथालॉजिस्ट के निर्देश पर रक्त का नमूना एकत्र किया गया, यह चिकित्सा व्यवसायी द्वारा नहीं लिया गया ऐसा नहीं माना जा सकता । रक्त नमूना लेने में कोई अवैधता नहीं है ।

Cases referred :

AIR 1980 SC 1314, AIR 2007 SC 2316, AIR 2008 SC 1021, AIR 2007 SC 2316, AIR 1979 SC 1949, AIR 2001 SC 2226, AIR 2002SC 70, (2001) 2.SCC 28.

S.K.Rai, G.A., for the State.

Surendra Singh with K.S.Rajput, for the Non applicant.

J U D G M E N T

The Judgment of the Court was delivered by G.S. SOLANKI, J. :- Learned Additional Judge to the Court of First Additional Sessions Judge, Khandwa (MP), has awarded the sentence of death to respondent/accused and has made reference of the proceedings to this Court for confirmation of the death sentence passed by the impugned judgment.

2. The appellant Rahul S/o Narendra Singh Tomar has filed the appeal against the conviction and sentence of death and other sentences awarded to him by the trial Court.

3. Since the reference and the appeal arise out of the same impugned judgment, both are being disposed of by this common judgment.

4. The appellant has challenged the judgment dated 23.2.2010 passed by the Additional Sessions Judge to the Court of First Additional Sessions Judge, Khandwa, in Sessions Trial No. 129 of 2009, convicting him under Sections 376 and 302 of the Indian Penal Code and sentencing him imprisonment for life with fine of Rs. 1,000/-, in default of payment of fine to further undergo rigorous imprisonment of one year and death sentence for committing murder of Arti respectively.

5. In short the prosecution case is that complainant Jagdish Singh (PW1) lodged a report on 20.2.2009 (Ex.P.1) at police station Chhaigaon Makhan that at about 11.00 a.m., when he was returning with his cattle through the field named 'Korku Wala Khet', he saw that his grand daughter Arti was washing clothes with other ladies i.e. wife of Sardar Singh, wife of Jitendra Singh, Rinku Bai (PW10) and Suman Bai (PW3). At the same Well his cattle drank water. At about 1 O'clock he again went to the same Well but no one was found there and clothes and slippers of Arti were lying there. His wife Umabai (PW4) also followed him. Both of them searched near the Well, then they found the dead body of Arti lying in Nallah situated between the field of Kishore Singh and Dinesh Singh. They noticed that face of Arti was crushed by stones. Clothes of Arti were torn and three blood stained stones were lying near the dead body. According to him, when he was returning with his cattle, he had seen accused Rahul going towards the 'Korku Wala Khet'. This fact was also noticed by Laxmi Bai (PW5). He alleged that 5-6 months before accused/appellant Rahul had trespassed in his house, therefore, he doubted that offence had been committed by the accused/appellant.

6. During investigation, Shivsingh Bhadoria (PW18), prepared a spot map (Ex. P/3), inquest Panchnama (Ex.P/2) and seized blood stained stones, sample of blood stained earth and plain earth vide seizure memo (Ex. P/4). Dead body of Arti was sent for postmortem vide requisition (Ex.P/19).

7. Dr. S. Dixit (PW16) and lady doctor Laxmi Dodwe performed the autopsy on 21.2.2009 and found that head and face of deceased were crushed. They also found that her hymen was torn, reddened margin and posterior Fourchette was

red and a small contusion was also there. They further observed multiple linear abrasions and contusions of different sizes and pink to dark brown colour on both forearms, front of neck, over right breast, over back and both buttocks, over front of right thigh. They opined that cause of death was cardio respiratory failure due to crushing injury of head, mode of death was Coma and Syncope. The injuries around external genitalia were suggestive of some forceful penetration, slide of vaginal smear was prepared and sent for examination. All injuries were ante-mortem in nature. A packet of clothes of deceased and two slides of vaginal smear were packed and sealed and handed over to Constable No. 428 Satyendra Singh, who brought the dead body for postmortem.

8. Head Constable, Mukesh Yadav (PW17) seized same articles from Constable Satyendra Singh vide seizure memo Ex. P/21.

9. Shivsingh Bhadoria (PW18) arrested accused/ appellant Rahul on 22.2.2009 vide arrest memo (Ex.P/5). He seized blood stained shirt at the instance of the accused/appellant vide seizure memo (Ex.P/7) and also seized a trouser from the body of the accused/appellant vide seizure memo (Ex.P/8). He also seized the nail clippings of the hands of accused/appellant vide seizure memo (Ex.P/17).

10. Accused/appellant Rahul was sent for medical examination, who was examined by Dr. Ashutosh Pare (PW15). He found a small linear abrasion $\frac{1}{4} \times \frac{1}{4}$ on the base of his right thumb and opined that accused/appellant was capable for performing sexual intercourse. He prepared his semen slide and took his underwear and sealed and handed over to the Police Constable No. 306, Kripa Shankar Yadav, who brought the accused to the hospital. Dr. Ashutosh Pare (PW15) expressed inability to collect blood sample for DNA analysis due to lack of facility at Chhaigaon and, therefore, he referred the accused/appellant for collection of blood for DNA test, to the District Hospital, Khandwa.

11. Ramchandra (PW11), Lab Technician of District Hospital, Khandwa took the blood sample of accused/appellant on the direction of Pathologist, and sealed with identification form. Sample was seized from Technician Ramchandra vide seizure memo (EX.P/10).

12. Head Constable, Mukesh Yadav (PW17) seized the sealed packet of underwear, semen slide and impression of seal of hospital from Constable Kripa Shankar Yadav vide seizure memo (Ex.P/22).

13. All seized articles like blood sample of accused/appellant Rahul in EDTA-VIAL Article-A, three blood stained stones Article-B, Blood stained soil Article-C, Control Soil Article-D, cloths packet of deceased Arti Article-E, two vaginal smear slides of deceased Arti Article-F, semen slide of accused Rahul Article-G, underwear of accused/appellant Rahul Article-H, blood stained T. Shirt of accused/appellant Article-I, Trouser of accused/appellant Article-J, Nail parts of hands of accused Rahul Article-K alongwith identification form of accused/appellant, photocopy of F.I.R., photocopy of Postmortem report, photocopy of

Panchayatnama of dead body, photocopy of all seizure memo's, forwarding note and sample of seal were sent for DNA comparison and analysis of blood sample of accused/appellant Rahul to State Forensic Science Laboratory, Sagar vide Memo No. SP/KWA/FSL/46/09 dated 24.2.2009 (EX.P/ 23). All eleven sealed articles were received on 26.2.2009 by Assistant Chemical Examiner of Forensic Science Laboratory, Sagar and receipt (Ex.P/25) was issued in that behalf.

14. The Assistant Chemical Examiner of State Forensic Science Laboratory, Sagar found similarity in male DNA profile of blood and nail clippings of accused/appellant Rahul and vaginal smear of deceased Arti and opined that on the basis of DNA Examination, accused Rahul cannot be excluded from the crime. His DNA report is (Ex.P/26).

15. After completing the investigation, accused/appellant was charge-sheeted. Learned Sessions Judge framed the charges under Sections 376 and 302 of the Indian Penal Code against the accused/appellant. Accused denied the charges, and pleaded that he was detained in police station for 5-6 days and falsely implicated.

16. Learned Additional Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, held that accused/appellant was guilty and convicted and sentenced him as mentioned herein above.

17. The appellant has challenged his conviction and sentence by this appeal, whereas the learned Additional Sessions Judge has referred the proceedings of the case to this Court for confirmation of death sentence awarded to accused/appellant.

18. We have heard the learned counsel for the parties and perused the evidence on record.

19. It was not disputed that deceased Arti died of homicidal injuries.

20. Dr. S. Dixit (PW16), Medical Officer of District Hospital Khandwa conducted the postmortem examination along with lady doctor Laxmi Dodwe on 21.2.2009 and found that head of Arti was crushed upto to nose, skull bones were broken and brain matter was coming out of it. They also found multiple linear abrasions and contusions of different sizes on both forearms, front of neck, over right breast, over back and both buttocks, over front of right thigh.

21. On internal examination they found that hymen was torn with reddened margin and posterior Fourchette was red with a small contusion.

22. In the opinion of doctors, death of deceased was caused due to cardio respiratory failure due to crushing injury of head and mode of death was Coma and Syncope. (Postmortem report of deceased Arti is Ex.P/19-A). This statement of Dr.Dixit was not challenged by defence. The trial Court, after considering the injuries found on the body of the deceased, arrived to the conclusion that death was homicidal in nature. On consideration of the injuries found on the dead body, we are also of the view that death of Arti was homicidal.

23. Learned counsel for the appellant submitted that there was no eye witness in this case and trial Court erred in relying the circumstantial evidence produced by prosecution. The trial Court wrongly relied on the circumstances that accused/appellant was going towards the scene of occurrence where the dead body was lying, while it was also admitted fact that near the place of incidence, field of appellant was also situated.

24. Shri Surendra Singh, learned senior counsel for the appellant vehemently argued that trial Court has given undue weightage on DNA test report (Ex. P/26) which has been based on the basis of evidence of Ramchandra (PW11), who was not the authorized person to collect the blood sample as well as he was himself unaware about the process as to why and for what purpose the samples were being collected. In such a situation the DNA test report cannot be relied on due to faulty/illegal procedure of collecting the blood sample. He also submitted that seizure of blood stained T. Shirt at the instance of accused also doubtful because discovered article was lying in open place which could be easily noticed by anyone. The seizure of sample of nails is also doubtful. In these circumstances, the evidence produced by prosecution was not sufficient to make out the case against the accused under Section 376 and 302 of the IPC. The charges were not proved beyond reasonable doubt against the appellant and, therefore, the judgment passed by the trial Court is erroneous and appellant is entitled for benefit of doubt.

25. On the other hand, Shri S.K. Rai, learned Government Advocate justified and supported the conviction of the appellant.

26. We have gone through the entire evidence on record and examined the circumstances which are proved by prosecution, like :- accused/appellant was seen going towards the place of incident. Jagdish Singh (PW1) has categorically stated that at about 11 O'clock when he was returning with cattle, he saw that accused/appellant Rahul was going towards the field 'Korku Wala Khet. He admitted in para-5 of his cross-examination that field of Dinesh was situated in East side of his field and the Well and the field of the accused situated in West of the Well. Field of Laxmibai was situated in North of the Well.

27. Laxmibai (PW5) supported the version of Jagdish Singh and stated that when she was returning after picking the chili from her field at that time Jagdish Singh (PW1) was returning with cattle and at the same time she noticed that accused/appellant was going towards the field. She also admitted that the field of the accused is also situated near her field. The name of Laxmibai finds place in the FIR.

28. Dinesh Singh (PW13) also supported the version of complainant Jagdish Singh (PW1). According to him, Jagdish Singh had informed him about the incident. Jagdish had also informed him that accused/ appellant Rahul had met him on the way when he was returning with cattle. Dinesh Singh is an independent witness and the fact that Rahul met him on the way, going towards

the place of incident, was just narrated to him by Jagdish, who was returning after seeing the dead body of Arti. This fact falls under *res gestae* and cannot be said to be hearsay evidence.

29. No doubt the field of Rahul was also situated near the place of incident but the time was odd when Rahul was going towards his field/place of incident because it was a time when normally agriculturist would return to their home after finishing the works on field. Such as witness Laxmibai (PW5) was returning to home after picking the chili from her field.

30. We are conscious that this circumstances alone is not sufficient to prove the crime but this circumstances only proved that accused/appellant Rahul was seen in the vicinity/near the place of incidence, at or about the time of incidence.

31. Prosecution also tried to prove another fact that accused/appellant was found running away from the place of incident when complainant Jagdish Singh (PW1) and his wife Umabai (PW4) were searching Arti. Umabai and Jagdish both stated this fact in their examination-in-chief but this particular fact did not find place in their police statement recorded under Section 161 Cr.P.C. (Ex.D/1 and Ex.D/2) respectively, as well as this fact was also found missing from the FIR (Ex.P/1). Therefore, we hold that this fact is clearly an improvement and exaggeration and cannot be said to be proved.

32. One more fact to which the trial Court has given weightage is that accused had an evil-eye on Arti. In this regard, we perused the statement of Joyti Sawhare (PW8) (elder sister of the deceased), who stated that once Arti told to her that she was afraid from Rahul. But Jyoti did not disclose this fact to her grandparents Jagdish Singh (PW1) and Umabai (PW4), in our opinion, this fact cannot be accepted as proved.

33. Now we are examining the process adopted in seizure of T. Shirt, nail clippings, blood sample of accused/appellant Rahul and vaginal smear of deceased Arti, which are foundation of DNA profile report (Ex. P/26).

34. Learned counsel for the appellant argued on the strength of AIR 1980 SC 1314, (*The State of Rajasthan Vs. Daulat Ram*) that prosecution has failed to examine those person, in whose custody samples, had travelled before, reaching the Forensic Science Laboratory, Sagar, hence DNA profile report (Ex. P/26) cannot be accepted as gospel truth, but facts of *Daulat Ram's Case* were different, where, at one point of time office of the Superintendent of Police refused to receive the samples, because label on Samples was not in order and that position was admitted in that case. Such situation does not arise in the case in hand. It is true that various persons who handled the samples were not examined but seal impressions on samples were found intact by the Assistant Chemical Examiner of Forensic Science Laboratory, Sagar and it was proved that vide receipt (Ex.P/25) as well as (Ex.P/26) in which it was specifically mentioned that eleven sealed articles were received through Constable No. 311, Dinesh, P.S. Chhaigaon

Makhan with sample seal and seals of Medical Officer, MH Khandwa, DH Khandwa and Police Station Chhaigaon Makhan were found intact.

35. Now we have to examine step by step process in which samples were collected and sealed.

36. Shiv Singh Bhadoria (PW18), Investigating Officer stated in para-5 of his statement that he arrested the accused/appellant Rahul on 22.2.2009 and prepared arrest memo (Ex. P/5). On interrogation, appellant informed that he concealed blood stained Shirt, in the Medh of Vikram Singh's field. In presence of Panch witnesses, Investigating Officer seized the T. Shirt from the bushes of Beri situated at the Medh of the field of Vikram Singh and prepared the seizure memo (Ex. P/7). Panch witnesses Sardar Singh (PW6) and Bhagwan Singh (PW9) also corroborated the version of Investigating Officer.

37. We noticed that one more Sardar Singh S/o. Jaswant Singh (PW2), claimed that he was the Panch witness of memorandum (Ex.P/6) and seizure memo (Ex. P/7) but when we went through the record of the trial Court we found that there was one more witness Sardar Singh, who was witness of inquest report and seizure memo of articles found at the scene of incident. This Sardar Singh S/o. Jaswant Singh (PW2) was the father of the deceased. He was examined on 12.10.2009 and just on the next date i.e. 13.10.2009 prosecution realized the mistake and filed an application. Same was disposed of by trial Court, vide order dated 13.10.2009 and after realizing the mistake, trial Judge called Sardar Singh S/o. Jaswant Singh (PW2) and inquired from him that how he appeared before the Court and deposed, then he explained that he was the father of deceased Arti, therefore, he was present before the Court and when name of Sardar Singh was called he went in and deposed before the Court. Trial Court fairly narrated all these facts in para-2 of the impugned judgment as admitted facts. In this situation statement of Sardar Singh S/o. Jaswant Singh (PW2) cannot be read as version of Panch witness of (Ex.P/6 and Ex. P/7).

38. Panch witness Sardar Singh S/o. Ganpat Singh (PW6) is an independent witness. He categorically stated that police brought Rahul from Chhaigaon Makhan to Bhojkhedi in the police van and he signed the arrest memo (Ex. P/5). He also stated that appellant Rahul was interrogated by the police and he informed the police that clothes were kept in the bushes of Beri then he proceeded with police party to the field of Vikram Singh, accused produced the blood stained T. Shirt from the bush of Beri, which was seized vide memo (Ex. P/7). He categorically explained in para-5 of his cross-examination that primarily he signed the memo in front of middle school and then he signed another memo in the field of Vikram Singh from where clothes were seized. Another witness Bhagwan Singh (PW9) also corroborated the said facts and specifically stated that Panch witness Sardar Singh S/o. Ganpat Singh (PW6) was with the police party. In cross-examination in para-4, he admitted that there was some previous litigation between his wife Basubai and father of appellant, Narendra Singh. He also

admitted that complainant Jagdish Singh is son of his father's elder brother but after careful examination of his statement, as a whole, in which he admitted the presence of another Panch witness Sardar Singh S/o. Ganpat Singh (PW6), who was an independent witness, despite previous enmity and previous litigation, his statement is found trustworthy.

39. The learned counsel for the appellant argued that discovered articles were lying in open place which could be detected even on casual search by investigating officer. He placed reliance on AIR 2007 SC 2316 (*State of Madhya Pradesh Vs. Nisar*) and AIR 2008 SC 1021 (*Mani Vs. State of Tamil Nadu*) and drew our attention to the cross-examination of Sardar Singh S/o. Jaswant Singh (PW2) in which he admitted that clothes were seized from the place which was about 45 feet away from the place where the dead body was lying, but as we have noticed herein above that this Sardar Singh S/o. Jaswant Singh (PW2) was not the Panch witness of memorandum (Ex. P/6) and seizure memo (Ex. P/7), he was father of deceased Arti and he was a person, who could speak anything, therefore, statement of this witness cannot be relied upon because he appears a complete liar. Panch witness Sardar Singh S/o. Ganpat Singh (PW6) only admitted that bushes of Beri were situated near the way and this way was going towards the field of Kishore Singh i.e. place of incident. This witness was real witness of seizure memo and defence could not dare to ask the distance of place of seizure of T. Shirt from the place of incidence. Such distance was not questioned in the statement of investigating officer, Shiv Singh Bhadoria (PW18) and another Panch witness Bhagwan Singh (PW9). Cross-examination of para-3 of Sardar Singh S/o. Ganpat Singh (PW6) reveals that field of Vikram Singh is a open field where the small bushes of Beri were situated and appellant picked up the T. Shirt from those Beri bushes. In this fact situation the authorities relied on by learned counsel for the appellant, are clearly distinguishable. In the case of *Mani* (supra), discovered articles were lying open merely 300 feet away from the body of the deceased and that too were discovered after more than 10 days of incident.

40. In AIR 2007 SC 2316 (*State of Madhya Pradesh Vs. Nisar*) facts were different. In that case dead body of one deceased Kandhai was found and thereafter report was lodged and another body of Chherkoo was recovered on the information of accused Nisar which was lying just about 100 paces from the dead body of Kandhai, in that fact situation, the Hon'ble Apex Court observed that the dead body of second deceased Chherkoo could be detected by investigating officer as in casual search.

41. The facts of the case in hand are totally different in which blood stained T. Shirt was seized from the small bushes of Beri. In AIR 1979 SC 1949 (*Pohalya Motya Valvi Vs. State of Maharashtra*) it was observed by Apex Court that the recovery of blood stained article becomes incriminating not because of its recovery at the instance of accused but the element of criminality tending to connect the accused with the crime lies in the "authorship of concealment".

42. In case in hand, the place where the blood stained T. Shirt was concealed was situated in the way, going towards the village of Bhojkhedi, from the place of incidence. In this situation the small bushes of Beri, were ideal place to conceal the incriminating articles. It appeared natural. Therefore, we are of the opinion that prosecution succeeded in proving the circumstance that blood stained T. Shirt was recovered at the instance of appellant Rahul.

43. Shivsingh Bhadoria (PW18). Investigating Officer stated that he seized the nail clippings of accused/appellant Rahul and sealed them vide seizure memo (Ex. P/17). Narayan (PW14) corroborated the version of Shivsingh Bhadoria (PW18) and stated that nail clippings of appellant were cut in presence of him and the same have been kept in polythene. He is an independent witness and a villager who is unknown to accused and complainant therefore, his testimony is believable. On perusal of Ex.P/17, we find that nail clippings were sent in the packet of polythene, therefore it is proved that nail clippings were seized in presence of independent witness.

Blood sample

44. Dr. Ashutosh Pare (PW15) stated that he was posted as Medical Officer at Community Health Centre, Chhaigaon Makhan. On 23.2.2009 accused/appellant Rahul was brought by Constable No.306, Kripa Shankar Yadav with requisition memo (Ex.P/18). He examined the appellant and found that a small linear abrasion of $\frac{1}{4} \times \frac{1}{4}$ inch on the base of his right thumb, which may be caused by hard and blunt object. Duration was approximately 48 to 72 hours. He also examined the genitalia of accused/appellant and opined that he was capable of performing the sexual intercourse. He further stated that police requested to take blood sample for DNA profile but due to lack of facility of investigation at Community Health Centre, Chhaigaon Makhan, he referred the appellant for blood sample to District Hospital, Khandwa. His statement is duly corroborated by his report (Ex.P/18-A).

45. Ramchandra (PW11) stated that he was working since 15 years as Lab Technician in the District Hospital, Khandwa. The blood sample of appellant Rahul was taken by him. He has specifically stated that the sample of blood as well as identification form of accused/appellant were filled by him and sealed vide memo (Ex. P/10). This fact is corroborated by Investigating Officer, Shivsingh Bhadoria (PW18) in para-7 of his statement.

46. Learned counsel for the appellant submitted that blood sample was not taken by medical practitioner. In this way it violated the provisions of Section 53 and 53-A of Code of Criminal Procedure but in our opinion it is not the violation of above mentioned provision, because Ramchandra (PW11) specifically stated that Pathologist directed him to collect the blood sample of appellant. He also admitted that Pathologist told him that samples were to be given to police. He also admitted that the name and address of accused were filled in the identification form. Although he said that, he did not know, for what purpose the sample was

taken. In this situation where Lab Technician of 15 years experience, who collected the blood on the direction of pathologist of District Hospital, Khandwa, it cannot be said that sample was not taken by medical practitioner because it is a matter of common experience that normally samples are collected by Lab Technicians under the direction of registered practitioner/pathologist. Further more the actual examination of blood was conducted by Assistant Chemical Examiner of Forensic Science Laboratory, Sagar, therefore, in our opinion there was no illegality in collecting the blood sample by witness Ramchandra (PW11).

Vaginal Smear

47. Dr. S. Dixit (PW16) stated that after performing the autopsy on the dead body of Arti, he prepared the two slides of vaginal smear and gave for chemical examination and prepared the postmortem report (Ex.P/19-A). This version is duly corroborated by postmortem report (Ex.P/19-A) in which this fact is written in the column, meant for, 'opinion about the articles which were sent for further examination by chemical examiner, smear scientist or any other specialist'. It was written in this column "two slides of vaginal smear packed and sealed".

48. Mukesh Yadav (PW17) stated that constable Satyendra brought the sealed packet from District Hospital, Khandwa after postmortem of Arti which was produced before him. He seized them vide seizure memo (Ex.P/21). He admitted in his cross-examination that he only wrote 'sealed packet' in seizure memo (Ex.P/21) but he explained that by mistake he did not write the word 'sealed packet' but we already mentioned herein above that Dr. S. Dixit (PW16) wrote in specific column meant for the articles which are preserved for further medical examination that two slides of vaginal smear were packed and sealed. He further found corroboration by receipt (Ex. P/25) issued by Assistant Chemical Examiner as well as report of Assistant Chemical Examination (Ex.P/26) in which 11 sealed articles were received which were sealed by MH Khandwa, DH Khandwa and Police Station Chhaigaon Makhan and all seals are found intact.

49. Shivsingh Bhadoria (PW18) stated that he forwarded all seized articles for medical examination to the State Forensic Science Laboratory, Sagar, vide (Ex.P/23) with the forwarding note of Superintendent of Police vide (Ex.P/24). On 24.2.2009 and 26.2.2009 they were received, by Assistant Chemical Examiner vide receipt (Ex. P/25). He further stated that he received the report of Assistant Chemical Examiner Ex.P/26 which was filed with charge-sheet. He however admitted in his cross examination that in seizure memo Exhibits (P/4, P/7, P/8 and P/17) though there is a column No. 13 for impression of seal but no impression of seal was pasted there.

50. On this fact, learned counsel for the appellant submitted that it is doubtful that articles seized vide Exhibits (P/4, P/7, P/8 and P/17) were sealed. On perusal of seizure memos Exhibits (P/4, P/7, P/8 and P/17), we find that in all seizure memos it has been specifically mentioned that articles were sealed. Further Panch

witness also stated that articles were sealed before them. In this situation it cannot be held that articles were not sealed at the time of their respective seizures.

DNA Profile

51. Ex.P/26 is the report of Scientific Officer and Assistant Chemical Examiner of DNA Finger Printing Unit, State Forensic Science Laboratory, Sagar. It is admissible under Section 293 of Code of Criminal Procedure. This report reveals that eleven sealed packets were received through constable Dinesh of Police Station Chhaigaon Makhan on 26.2.2009 and all the seals were found intact.

52. Ex.P/23 reveals that blood sample of accused Rahul was sent in EDTA - VIAL which is marked - A, blood stained T. Shirt of Rahul was marked - I, nail clippings of appellant Rahul was marked - K, two vaginal smear slides of deceased Arti were marked-F. This memo was sent with enclosure of identification form, photocopy of FIR, photocopy of postmortem report, photocopy of panchayatnama, photocopies of seizure memos, forwarding note and sample seal. EX.P/ 24 is a certificate of authority given by Superintendent of Police for examination of articles sent to Chemical Examiner. In this way provisions of Section 53 and 53-A of Code of Criminal Procedure were duly complied with.

53. On perusal of report Ex.P/26 we find that Assistant Chemical Examiner extracted the DNA by organic extraction process and he amplified 16 genetic marker through Multiplex PCR procedure and obtained genotyping profile through AmpF/STR identifier Kit and AmpF/STR Y Filer Kit and analysed the results by Genemapper Software V3.5 and opined that

(i) A mixed DNA profile was found in blood stained T. Shirt (Ex.P/1), i.e. of more than one person.

(ii) there was similar male DNA profile in the blood sample of Rahul Article-A, nail clippings of Rahul, Article-K and vaginal smear slide of deceased Arti, Article-F,

(iii) on the basis of DNA examination accused Rahul cannot be excluded from the crime.

54. On the basis of third opinion that "accused Rahul cannot be excluded from the crime", the learned counsel for the appellant submitted that DNA profiling is mainly used for exclusion of a person and this procedure cannot be said to be accurate and it depends on the adequacy of laboratory procedures and the competence of experts who performed the tests. For this purpose, he referred Modi's Medical Jurisprudence and Toxicology (Twenty Third Edition), page 542 in which learned author discussed the problems with DNA profiling and observed that the adequacy of laboratory procedures and the competence of the experts who testify, should remain open to inquiry. Learned counsel also cited AIR 2001 SC 2226 (*Smt. Kamti Devi and another Vs. Poshi Ram*) in which it has been observed that result of DNA test is said to be scientifically accurate but that is

not enough to escape from the conclusiveness of Section 112 of the Evidence Act. In that case ultimately Hon'ble Apex Court maintained the judgment of first Appellate Court that the husband had no access or opportunity for sexual intercourse with defendant no. 1 for more than 280 days before Roshan Lal (defendant No.2) was begotten by the plaintiff. Facts of above case were different therefore, above authority is not helpful to the appellant.

55. As far as laboratory procedure, and the competence of the expert is concerned, it is true that Expert Dr. Pankaj Shrivastava, Scientific Officer and Assistant Chemical Examiner has not been examined in this case, but his report (Ex.P/26) is admissible in evidence under Section 293 Cr.P.C. In case prosecution did not think necessary to produce this Assistant Chemical Examiner, then it was open to accused/appellant to call him for the purpose of testing his competence of performing the DNA profile, if he thought it necessary. In (Ex.P/26) it is specifically mentioned that (DNA Fingerprinting Unit has passed International Quality Control tests for DNA Examination) conducted by Institute of Legal Medicine and Forensic Science, Charite-University of Berlin, Germany and Laboratory of Genetic Identification, University of Granada, Spain). It shows that Scientific Officer and Assistant Chemical Examiner of State Forensic Science Laboratory, Sagar were highly qualified persons and DNA Fingerprinting Unit had passed International Quality Control test of DNA Examination.

56. In our country, DNA profile test found reliable, in 1991, in Rajiv Gandhi assassination case, the human-bomb Dhanu's dismembered body parts were established to belong to the same individual by using DNA profiling. Similarly, Shivarasan, the master mind behind the assassination was identified by DNA profiles. The DNA profiling was also recognized in that sensational Naina Shani murder case in July 1995.

57. In India, at present DNA profiling is done at Centre of DNA Fingerprinting and Diagnostics Unit and in some State Forensic Science Laboratory (FSLs). CDFD claims that this technology provides exclusion as well as positive identification with virtually 100% precision. The above mentioned facts find place at page 541 of the same Modi's Medical Jurisprudence and Toxicology. The same author commented at page 523 that:

"In case of sexual offences, it is a common practice on the part of the medical personnel to collect swabs or smears from the vagina of the victim and the urethra of the accused. The finding of the spermatozoa in the vaginal swabs or smears provides a substantial evidence of recent intercourse. The same may be considered true to a lesser extent in the case of urethral smears or swabs. The detection of X and Y chromatin bodies by fluorescence microscopy of the female leucocytes (in case bleeding occurred) or vaginal epithelial cells and spermatozoa (or

their heads) in urethral and vaginal swabs or smears respectively, can considerably extend the scope of providing reliable physical evidence in sexual offences. The detection of the vaginal fluid in stains on the garments or other personal cloth articles of the accused does not seem to have been given the importance it deserves in sexual offence cases. The routine application of specific and highly sensitive methods like electrophoretic isoenzyme methods and fluorescence microscopy is likely to lead to a greater utilisation of stains of vaginal fluid on articles seized for the investigation of sexual crimes."

58. After sincerely scanning and scrutinizing the evidence on record and other circumstances viz:-

(i) accused/appellant Rahul was seen going towards the place of incident, in other word 'his presence was established in the vicinity, found proved',

(ii) The blood stained T. Shirt belonging to accused/appellant was recovered at his instance.

(iii) DNA profile of blood sample of Rahul, Article-A and his nail clippings Article-K were found similar to the male DNA profile found in vaginal smear slide Article-F of deceased Arti.

59. As far as other DNA profile found in the DNA profile of blood stained T. Shirt of Rahul, we are of the opinion that appellant Rahul was also injured and an abrasion on the base of his right thumb was found by Dr. Ashutosh Pare (PW15). His report is (Ex.P/18-A). In this situation, T. Shirt might have contained blood stains of Rahul and other blood stains of deceased Arti.

60. Therefore, we are of the considered opinion that it has been established beyond reasonable doubt that it was the appellant who only and none else committed murder of Arti as well as raped her. The trial Court was fully justified in convicting the appellant for the offence under Sections 376 and 302 of IPC. The finding of conviction is therefore affirmed.

61. On the question of sentence, learned counsel for the appellant submitted that the appellant was 19 years of age and there is nothing on the record to show that he was having any criminal record and he was a grave danger to the society at large and required to be condemned; it cannot be said to be the rarest of rare case. He relied on AIR 2002 SC 70 (*Bantu Vs. State of Madhya Pradesh*) and (2001) 2 SCC 28 (*Mohd. Chaman Vs. State (NCT of Delhi)*).

62. In the present case, there is nothing on record to indicate that the appellant was having any criminal record nor it can be said that he will be a grave danger to the society at large. It is true that his act is heinous and requires to be condemned but at the same time it cannot be said that it is rarest of the rare case where accused requires to be eliminated from the society. Therefore, looking to the age

(about 19 years) of the accused and antecedents, there appears no justifiable reason to impose the death sentence on him.

63. Accordingly, we confirm the conviction of appellant under Section 302 IPC but modify the sentence by commuting the sentence of death to the imprisonment for life. For the offence under Section 376 IPC, the sentence of rigorous imprisonment for life and fine of Rs. 1,000/- as awarded by the trial Court is affirmed. Both the sentences to run concurrently.

64. In the result, the reference made by the trial Court is accordingly answered. Subject to above modification, for the aforesaid reasons, Criminal appeal No. 515/2010 is partly allowed.

Order accordingly.

I.L.R. [2010] M. P., 2220
CRIMINAL REVISION
Before Mr. Justice U.C. Maheshwari
 4 February, 2010*

HEERALAL

... Applicant

Vs.

THE STATE OF M.P.

... Non-applicant

Penal Code (45 of 1860), Section 420 - Applicant was convicted for cheating the complainant by inducing and obtaining from him a sum for providing a job of peon in Tahsildar Office - Held - Alleged receipts and letter not proved to be written by the applicant - Sole testimony of complainant is contradictory from the averments of FIR lodged by him and also is inconsistent inter se - The complaint also not in position to identify the applicant - Such witness could not be relied on for holding conviction - Conviction and sentence set aside. (Para 8)

दण्ड संहिता (1860 का 45), धारा 420 - शिकायतकर्ता के साथ उत्प्रेरण द्वारा छल करने के लिये और तहसीलदार के कार्यालय में मृत्यु का कार्य दिलवाने के लिये उससे रकम प्राप्त करने के लिये आवेदक को दोषसिद्ध किया गया - अभिनिर्धारित - कथित रसीद तथा पत्र आवेदक द्वारा लिखा गया होना साबित नहीं किया गया - शिकायतकर्ता की एकमात्र साक्ष्य, उसके द्वारा दर्ज कराई गयी प्रथम सूचना रिपोर्ट के प्रकथनों के विरोधात्मक है और एक दूसरे के मुकाबले असंगत भी है - शिकायतकर्ता आवेदक को पहचानने की स्थिति में भी नहीं है - दोषसिद्धि निर्धारित करने के लिये ऐसे साक्षी पर विश्वास नहीं किया जा सकता - दोषसिद्धि एवं दण्डादेश अपास्त।

Case referred :

AIR 1979 SC 1408.

L.N. Shagle, for the applicant.

Sushila Paliwal, G.A., for the non-applicant.

J U D G M E N T

U.C. MAHESHWARI, J. :-The applicant – accused has preferred this revision under Section 397, r/w Section 401 of Code of Criminal Procedure challenging his conviction and sentence under Section 420 of IPC. Initially Judicial Magistrate Ist Class Sagar on holding trial in criminal case no. 1172/99 convicted him under Section 465 and Section 420 of IPC for one year RI with fine of Rs.250/-, in default of it further one month RI and three years RI with fine of Rs.500/-, in default it, further one month RI respectively under such Sections, vide judgment dated 17.11.1999. On filing the appeal, on re-appreciation of the evidence, the Sessions Judge, Sagar, vide judgment dated 29.12.1999 in Criminal Appeal No. 164/99 by allowing in part while acquitting the applicant from the charge of Section 465 of IPC by maintaining his conviction under Section 420 of IPC reduced his sentence upto to one year RI with fine of Rs.500/- and in default of it further one month imprisonment.

2. The facts giving rise to this revision in short are that the complainant Kamlesh on 28.5.1986 came to Collector Office, Sagar to submit the application for his appointment on the post of Peon where after receiving such application by the applicant on his demand Rs. 10/- was also paid by the complainant to him. Thereafter, the applicant by giving assurance to get his work done from the employment office asked the complainant to come on 31.5.1986. Thereafter, in the same manner applicant called the complainant round about 8-9 occasions and told him that he will manage in the Tahsildar Office to provide him a job of Peon. In this regard with dishonest intention to commit fraud with the complainant, the applicant had demanded and obtained Rs.175/- on 24.7.1986, Rs.250/- on 29.7.1986. He also obtained Rs.100/- for medical fee and Rs.150/-, with respect to satisfy some query, from the applicant. After making the aforesaid payment to the applicant the complainant received an appointment letter dated 5.8.1986 through post, according to which the complainant was given temporary appointment on the post of Peon in Tahsil office from 1.9.1986 with a further direction to join the duty on such date. After receiving such order on the above mentioned date the complainant went to give joining report in the abovementioned office, then he came to know that by practicing the fraud after obtaining the abovementioned sum by fabricating a forged appointment letter he has been cheated by the applicant, on which the matter was reported by the complainant with the Police Station Gopalganj, on which FIR, (Ex.P-2) was registered. In the course of investigation the concerned papers and receipts of the payment given by the complainant to the applicant, and the abovementioned forged appointment letter were seized. Interrogatory statements of the witnesses were recorded. The concerned papers were sent to the Hand Writing Expert for his opinion. On concluding the investigation, the applicant was charge sheeted for the offence under Section 420, 467 and 468 of IPC.

3. On framing the charges for the offence under Section 465 and 420 of IPC,

the applicant abjured the same, on which after recording the evidence, on appreciation of the same, the trial court after holding guilty to the applicant for such offence punished him with the sentence, as mentioned above.

4. On preferring an appeal by the applicant, the same was allowed in part and he was acquitted from the charge of Section 465 of IPC but by affirming his conviction under Section 420 of IPC his jail sentence awarded by the trial court is reduced upto the period, as mentioned above. The same is under challenge in this revision.

5. Shri L.N. Shakale, learned appearing counsel for the applicant by referring the recorded evidence said that same has not been appreciated with proper approach and contrary to that the applicant has been convicted. He also argued that the receipt of the payment, Ex. P-3 and P-7 and Inland Letter, Ex. P-6 in the lack of any admissible evidence by holding that the same were written by the applicant mere on assumption and presumption he was held guilty by both the courts below. In continuation it was said that such exhibited papers could not be a foundation for holding guilty to the applicant unless the same are proved by any admissible evidence showing that the same were written by the applicant with intention to commit the fraud and also after obtaining money from the complainant. He also argued that the prosecution has examined as many as six witnesses in the case, out of them except the complainant Kamlesh, all other witnesses have not stated any incriminating thing against him. Narayan Prasad, (PW-2), the witness of the seizure memo, (Ex. P-1), whereby the abovementioned exhibited papers were seized turned hostile at trial. So far the complainant- Kamlesh (PW-1) is concerned, firstly he said that looking to the inter se inconsistency in his deposition as he stated something in his chief contrary to the FIR just to incriminate the applicant and in cross examination he deposed some different story and declined even to identify the applicant as person who committed the alleged fraud with him his deposition is not trustworthy. It was also argued that for extending the acquittal under Section 465 of IPC the available evidence was discarded by the appellate court then on the basis of the same evidence the applicant conviction under Section 420 of IPC could not be upheld. In such premises, he prayed for acquittal of the applicant by allowing this appeal and in alternative he submitted that in any case if this court does not find fit to grant the benefit of acquittal, then taking into consideration that the applicant is facing the mental agony of the case, since last 23 years and now he has attained the age of 65, then instead to maintain the awarded jail sentence, the same be reduced upto the period, which he has already suffered as undergone, i.e. during trial nine days and fourteen days from the date of judgment of the appellate court till passing the order of suspension of his jail sentence by this court.

6. On the other hand, responding the aforesaid arguments, Smt. Sushila Paliwal, learned Govt. Adv by justifying the impugned judgment and its findings said that the same is based on proper appreciation of evidence and also in conformity with

law. It does not require any interference at this stage. According to her no error, illegality or perversity has been committed by the appellate court in affirming the conviction of the applicant for the offence under Section 420 of IPC and prayed for dismissal of this revision.

7. Having heard, I have perused the record of the trial court as well of the Appellate Court.

8. It appears from the impugned judgment of the appellate court that the applicant has been convicted and sentenced under the abovementioned offence of Section 420 of IPC on the sole testimony of the complainant- Kamlesh -(PW-1) who in his deposition proved the documents Ex. P-3 and Ex. P-7 as alleged receipts given by the applicant to the complainant after obtaining some money and Ex. P-6 in the last letter as alleged written by the applicant. Except the statements of the complainant, the exhibited documents have not been proved to be written by the applicant by any other admissible evidence. It is settled proposition of law that when the entire case is based on the sole testimony of the complainant and no witness supporting the prosecution case is available, then the court is duty bound to scrutinize the evidence very carefully and cautiously. On appreciation of the entire statement, if it appears that the deposition of such witnesses is contradictory from the averments of the FIR, lodged by him, then such deposition could not be a foundation for holding the conviction. Apart from this, if the deposition of such witness is inter se inconsistent in the same trial, then on account of such material inconsistency, the deposition of such witness could not be considered for holding conviction to the accused. It is apparent from the deposition of the complainant- Kamlesh, (PW-1) that in para 1 to 4 till some extent he tried to support the case of the prosecution but not with the consonance of the averments of the FIR and also identified to the applicant in the court but in para 7 of his cross examination he specifically said that he could not identify the person whom he contacted in the Collectorate and handed over the money on the alleged occasions. Further he stated that he is not in a position to identify the applicant as the same person who committed fraud with him. Such averments of his statement is showing apparent inconsistency in his statements in the same trial. In such premises, I am of the view that such witness could not be relied for holding the conviction against the applicant, unless the same is supported with the averments of FIR or with any other evidence. It is apparent that no such other evidence is available on the record, as stated above.

9. My aforesaid view is fully fortified by the decision of the Apex Court in the matter of *Suraj Mal Vs. The State (Delhi Administration)* reported in AIR 1979, SC 1408 in which it was held as under:-

“Where witnesses make two inconsistent statements in their evidence either at one stage or at two stages, the testimony of such witnesses become unreliable and unworthy of credence and

in the absence of special circumstances no conviction can be based on the evidence of such witnesses.”

(Placitum)

10. In view of the aforesaid discussion, the judgments of both the courts below holding conviction against the applicant for the offence under Section 420 IPC being without proper appreciation of evidence is perverse and the same is not sustainable under the law. Consequently by allowing this revision, the judgments of the courts below holding conviction against the applicant under Section 420 of IPC alongwith its sentence is hereby set aside and the applicant is acquitted from such charge. The amount of fine, if deposited by him be refunded to him. His bail bond is hereby discharged. Accordingly, this revision is allowed.

Revision allowed.

I.L.R. [2010] M. P., 2224

CRIMINAL REVISION

Before Mr. Justice N.K. Mody

30 April, 2010*

CHANDA (SMT.) & anr.

... Applicants

Vs.

SANJAY CHOUHAN

... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 125 - Maintenance sought by wife & child on ground of cruelty and desertion - Petition opposed by husband on ground that the wife is living in adultery - The Family Court after holding summary inquiry dismissed the petition - Held - The presumption of legitimacy is presumption of law - When a child is born out of a wedlock, there is a presumption in favour of his legitimacy and presumption of legitimacy largely depends on the presumed fact that the parties to a marriage have necessary access to each other - Where the legitimacy of a child is questioned, it is the duty of the Court to examine the evidence with a view that the evidence adduced is enough to rebut the presumption - Revision allowed. (Paras 10 & 11)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 - क्रूरता और अभित्यजन के आधार पर पत्नी एवं बालक द्वारा भरण पोषण चाहा गया - पति द्वारा याचिका पर आक्षेप इस आधार पर कि पत्नी व्यभिचारी जीवन जी रही है - कुटुंब न्यायालय ने संक्षिप्त जांच कराने के पश्चात याचिका खारिज की - अभिनिर्धारित - धर्मज की उपधारणा, विधि की उपधारणा है - जब शादी के बंधन से शिशु का जन्म होता है, तब उसके धर्मज होने के पक्ष में उपधारणा होती है और धर्मज की उपधारणा मुख्यतः इस उपधारित तथ्य पर निर्भर होगी कि शादी के पक्षों की एक दूसरे तक आवश्यक पहुंच हो - जहां बालक के धर्मज पर प्रश्न किया गया, यह न्यायालय का कर्तव्य होगा कि साक्ष्य का परीक्षण इस दृष्टि से करे कि पेश की गई साक्ष्य, उपधारणा का खंडन करने के लिये पर्याप्त है - पुनरीक्षण मंजूर।

Cases referred :

AIR 1971 Gujrat 33, AIR 1987 SC 1049, (2008) 2 SCC 316, 1986 MPLJ 105, AIR 1993 MP 142, 2010(2) MPHT 126, 2010(2) MPHT 166.

Anita Gour, for the applicants.

Arvind Gokhale, for the non-applicant.

ORDER

N.K. MODY, J. :-Being aggrieved by the order dated 04/12/2008 passed by II Additional Family Court, Indore in criminal case No.785/2008 whereby the petition filed by the petitioners for grant of maintenance was dismissed, the present petition has been filed.

2. Short facts of the case are that petitioners filed a petition for grant of maintenance on 04/08/2008 under Section 125 of Cr.P.C. wherein it was alleged that petitioner No.1 is the wife of respondent and the marriage of petitioner No.1 was solemnized with respondent on 13/05/2006. It was alleged that at the time of marriage certain articles were given as gift by the parents of petitioner No.1 as per their statues. It was alleged that petitioner No.1 kept well by the respondent for a period of 4 months approximately and thereafter petitioner No.1 was subjected to cruelty by her maternal aunt-in-law etc. and on account of demand of dowry she was abused. It was alleged that upon refusal by petitioner No.1 she was threatened for divorce and also for dire consequences. Further case of the petitioner No.1 was that on 13/01/2007 respondent dropped the petitioner No.1 at her parents house on the eve of Sankranti and thereafter respondent never turned-up to take back. It was alleged that petitioner No.1 was blessed with a daughter who is petitioner No.2 herein on 20/11/2007. It was alleged that for their needs petitioners are having no means while respondent is a man of means and is earning Rs.8,000/- per month. It was prayed that the petition filed by the petitioners be allowed and the maintenance be awarded @ Rs.5,000/- per month.

3. The petition was contested by the respondent by filing the reply wherein all the allegations made in the petition were denied. It was denied that petitioner No.1 was subjected to cruelty on account of demand of dowry. On the contrary it was alleged that character of petitioner No.1 is doubtful as petitioner No.1 was in contact with one Santosh who was not the relative of petitioner No.1. It was alleged that petitioner No.1 was receiving the phone calls from Santosh at the residence of Latif Bhai. It was alleged that upon asking her not to receive the phone calls of Santosh at the residence of Latif Bhai, petitioner No.1 was abusing and threatened for committing suicide. It was alleged that petitioner No.1 left the matrimonial house on 13/01/2007 and thereafter petitioner No.1 never came in contact with respondent. It was alleged that on 03/02/2007 parties entered into an agreement whereby it was decided that petitioner No.1 and respondent shall live separately and the agreement was executed in the presence of parents of petitioner No.1. It was alleged that petitioner No.1 is not a lady of good character. It was alleged that petitioner No.1 is living an adulterated life. It was alleged that since

the petitioner No.1 delivered a daughter on 28/11/2007 while as per agreement dated 03/02/2007 petitioner No.1 is not living with the respondent, this itself shows that the petitioner No.2 is not the legitimate child of petitioner No.1 from the respondent. It was alleged that in the facts and circumstances of the case respondent is not liable for payment of maintenance. It was prayed that the petition filed by the petitioners be dismissed. After holding summary inquiry learned trial Court dismissed the petition filed by the petitioners against which the present petition has been filed.

4. Mrs. Anita Gour learned counsel for the petitioners argued at length and submit that the impugned order passed by learned trial Court is illegal, incorrect and deserves to be set-aside. It is submitted that in the facts and circumstances of the case, there was no justification in holding that the petitioner No.1 is living a life in adultery. It is submitted that burden to prove was on the respondent that the petitioner No.1 is living a life in adultery but there was no evidence on the basis of which it could have been found proved. It is submitted that even if it is assumed that petitioner No.1 was living in adultery, then too, maintenance could not have been refused to petitioner No.2. Learned counsel placed reliance on a decision in the matter of *Maganlal Budhaiabhai Patel Vs. Bai Dahi* AIR 1971 Gujarat 33 wherein Gujarat High Court had a occasion to take into consideration the word "living in adultery" and observed that living in adultery means following an almost continuous course of adulterous conduct and not to a single lapse from virtue one or two lapses of virtue would no doubt be acts of adultery but are insufficient to show that the respondent was "living in adultery" and, therefore, the appellant has to prove a course of conduct over some period with repetition of acts of adultery, with one or more persons. With the use of the continuous present tense for attracting the operation of the phrase "is living in adultery" it would not be enough for the spouse who was living in adultery for some time in the past and it has to be shown that the period during which the wife was living an adulterous life was so related, in proximity of time to the filing of the petition, that one can reasonably infer that the petitioner had a fair ground to believe, about the time of the filing of the petition that the spouse was living in adultery. Further reliance is placed on a decision of Hon'ble Apex Court in the matter of *Smt. Dukhtar Jahan Vs. Mohammed Farooq* AIR 1987 SC 1049 wherein the child born within 7 months time after marriage and there was no claim that it was prematurely born Hon'ble Apex Court held that on the sole ground that the child had been born in about 7 months' time after the marriage it could not be concluded that the child should have been conceived even before the marriage. Giving birth to a viable child after 28 weeks' duration of pregnancy is not biologically an improbable or impossible event. The refusal of the claim for maintenance for the child was therefore improper. It was also against the rule of evidence contained in S. 112 of the Evidence Act. The wife was a rustic and illiterate woman and as such her opinion that the child was not born prematurely could suffer from error of judgment. Further reliance is placed on a decision in the matter of *Chaturbhuj Vs. Sita Bai*

(2008) 2 SCC 316 wherein Hon'ble Apex Court has observed that where wife was surviving by begging, would not amount to her ability to maintain herself. It can also be not said that the wife has been capable of earning but she was not making an effort to earn. Whether the deserted wife was unable to maintain herself, has to be decided on the basis of the material placed on record. Where the personal income of the wife is insufficient she can claim maintenance under Section 125 Cr.P.C. The test is whether the wife is in a position to maintain herself in the way she was used to in the place of her husband. The wife should be in a position to maintain standard of living which is neither luxurious nor penurious but what is consistent with status of a family. The expression "unable to maintain herself" does not mean that the wife must be absolutely destitute before she can apply for maintenance under Section 125 Cr.P.C. On the strength of aforesaid position of law learned counsel for the petitioners submit that the petition filed by the petitioners be allowed and the impugned order passed by learned trial Court be set-aside.

5. Mr. Arvind Gokhale learned counsel for the respondent submits that after taking into consideration all the facts and circumstances of the case and keeping in view the fact that petitioner No.2 is not the legitimate son of the respondent, learned trial Court has rightly rejected the petition filed by the petitioners. It is submitted that undisputedly the petitioner No.2 born on 28/11/2007 while the petitioner No.1 was living separately w.e.f. 11/01/2007. It is submitted that in the facts and circumstances of the case learned trial Court has rightly held that the petitioner No.2 is not the son of the respondent. It is submitted that respondent has also filed a suit for declaration about the legitimacy of petitioner No.2. Learned counsel placed reliance on a decision in the matter of *Hargovind Soni Vs. Ramdulari* 1986 MPLJ 105 wherein this Court has held that proof of adultery generally based on circumstantial evidence. Further reliance is placed on a decision in the matter of *Rajendra Agrawal Vs. Smt. Sharda Devi* AIR 1993 M.P. 142 wherein while dealing with in a case of adultery, this Court observed that solitary instance of voluntary sexual intercourse by wife with other person is enough for grant of decree of divorce. It is submitted that in view of the aforesaid position of law and keeping in view the evidence on record the findings of learned trial Court is in accordance with law which requires no interference. It is submitted that the petition filed by the petitioners be dismissed.

6. Section 112 of Evidence Act reads as under:

Birth during marriage, conclusive proof of legitimacy.-

The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

7. In the matter of *Premal Vs. Leelabai*, 2010 (2) MPHT 126 this Court has held that presumption of legitimacy of the son, is rebuttable for which evidence must be strong, distinct, clear, satisfactory and conclusive. In the matter of *Poorti @ Usha Sharma (Smt.) Vs. Vinay Kumar*, 2010(2) MPHT 166 Divisional Bench of this Court has held that the words "conclusive proof" occurred in Section 112 of the Act, which is defined under Section 4 of the Act that when one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

8. In the present case reliance is placed by the respondent on the discharge card Ex.P/1 of the petitioner which was issued by M.Y. Hospital, Indore. In Ex. P/1 while mentioning menstrual history, last menstrual period is mentioned as 13/02/07. In the evidence it has come that the petitioner was living separately with the respondent w.e.f. 13/01/07, while the petitioner gave birth to the child on 28/11/07, therefore, it is submitted that it is proved that the respondent is not father of the petitioner.

9. From perusal of the record it appears that respondent and the petitioner has appeared in evidence and no other evidence was adduced by any of the parties. In the opinion of this Court learned trial Court has not taken into consideration various important aspects of the case, which are as under:-

i. Petitioner in her examination-in-chief has stated that after giving the birth to a child intimation was sent to her matrimonial house and her maternal aunt-in-law and sister-in-law (Mami & Nadand) came to see newly born baby. There is no cross-examination on the petitioner in this regard. Thus, this piece of evidence is the uncrossed testimony of the petitioner.

ii. Allegation against the petitioner No.1 was that the petitioner No.1 is having illicit relation with one Santosh, for whom the petitioner has stated that Santosh is like her brother and is married having three children. There is no cross-examination on this part of the statement as well.

iii. Only allegation against the petitioner is that the petitioner No.1 was receiving phone calls from Santosh, which were being received by the petitioner No.1 at the house of the neighbours of the respondent. No member of the family and the respondent could courage to come in witness box to say that the petitioner No.1 was living in adultery and the petitioner No.2 is not legitimate son of the petitioner No.1.

10. It is settled position of law that the presumption of legitimacy is a presumption of law. When a child is born out of a wedlock, there is a presumption in favour of his legitimacy and presumption of legitimacy largely depends on the presumed fact that the parties to a marriage have necessary access to each other.

11. Since strong, distinct, clear, satisfactory and conclusive evidence has not been adduced by the respondent to rebut the presumption, then only on the basis of the fact that the petitioner has stated in her statement that petitioner lived with the respondent lastly in the month of January, 2007 and then there was no relationship between them, it can not be said that the petitioner No.2 is not the legitimate son of the respondent, specially when the petitioner No.1 is not much educated. In the opinion of this Court, where the legitimacy of a child is questioned, it is the duty of the Court to examine the evidence with a view that the evidence adduced is enough to rebut the presumption. The Court has to keep in mind the net result because it is a question of the status of son/daughter. The moment court decides that child is illegitimate, he will be treated as bastard in the society.

12. In the present case, petitioner No.1 is a woman of category of below poverty line. The petition could only be filed by the petitioners through legal aid committee with a delay of 204 days. Inspite of making all the efforts Smt. Anita Gaur who is counsel for the petitioners could not communicate the petitioner No.1 to remain present in Court at the time of hearing inspite of giving number of adjournments. Counsel for the petitioners submit that she met petitioner No.1 lastly when the petition was filed and she was having hardly any money to survive.

13. In the facts and circumstances of the case and after re-appreciation of evidence on record, this Court is of the view that the learned Court below committed error in dismissing the petition filed by the petitioners and also in holding that the petitioner No.2 is not the legitimate child of the respondent.

14. So far as amount of maintenance is concerned, petitioners have stated that the income of the respondent is Rs.7-8 thousand per month, while respondent has stated that the respondent is driver by profession and is earning Rs.1,800/- per month. Statement of respondent is unbelievable. Now a days minimum income of a driver is Rs.4-5 thousand per month.

15. In the facts and circumstances of the case, petition filed by the petitioners is allowed and the impugned order passed by the learned Court below is set aside holding that the petitioners are entitled and the respondent is liable to pay maintenance @ Rs.1,500/- per month w.e.f. 04/12/08 when the trial Court dismissed the petition. Since the amount of arrears is sizable, therefore, it is directed that respondent shall pay a sum of Rs.2,000/- per month, out of which Rs.500/- shall be towards arrears. In case respondent fails to pay the amount regularly, then the petitioners shall be entitled to take appropriate steps to recover the entire amount.

16. With the aforesaid observations, petition stands disposed of.

C.C. as per rules.

Petition disposed of.

I.L.R. [2010] M. P., 2230
MISCELLANEOUS CRIMINAL CASE
Before Mrs. Justice Indrani Datta
 24 June, 2010*

MURLI DHAR

... Applicant

Vs.

ISHWAR DAYAL GIRDHANI

... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 178(d), Negotiable Instruments Act, 1881, Section 138 - Cheque drawn at Bank of Kota (Rajasthan), Presented by complainant at Bank of Datia (M.P.) as he is having account in that Bank - Cheque stood dishonoured at Datia - Thereafter, notice was issued from Datia - Held - Petitioner's application that Datia Court is not having territorial jurisdiction has been rightly dismissed by trial Court - Petition dismissed. (Para 15)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 178(डी), परक्राम्य लिखत अधिनियम, 1881, धारा 138 - बैंक ऑफ कोटा (राजस्थान) पर आहरित घनादेश - शिकायतकर्ता द्वारा बैंक ऑफ दतिया के समक्ष प्रस्तुत किया गया क्योंकि उस बैंक में उसका खाता था - दतिया में घनादेश का अनादरण - उसके बाद दतिया से नोटिस जारी किया गया - अभिनिर्धारित - विचारण न्यायालय द्वारा याचिकाकर्ता का आवेदन कि दतिया न्यायालय को क्षेत्राधिकार नहीं है सही तौर पर खारिज किया गया - याचिका खारिज।

Cases referred :

(2009) 1 SCC 720, 2007 CrLJ 115, 2000(1) MPLJ 1, 2008(3) CCSC 1619 (SC).

Jitendra Sharma, for the applicant.

S.K. Sharma, for the non-applicant.

O R D E R

INDRANI DATTA, J. :-Admit.

With the consent of parties, matter heard finally.

2. Petitioner has filed this petition under Section 482 CrPC for setting aside the order dated 22.07.2009 passed by learned Second ASJ Datia in Criminal Revision No.47/09 upholding the order dated 27.1.09 passed by CJM Datia in Case No.985/09 whereby application for dismissing the complaint for want of territorial jurisdiction filed by the petitioner /accused was dismissed by that Court.

3. Facts in compendium are that respondent filed a complaint under Section 138 Negotiable Instruments Act before the Court of CJM Datia mentioning therein that wife of petitioner Poonam Girdhani purchased a house No.3A/38 situated at Mahaveer Nagar Kota Rajasthan which was registered in the name of Smt. Jethibai W/o. Shri Harish Thavarani by way of an agreement. After entering into agreement complainant met the petitioner who is a property dealer for purpose of

transferring house and for taking possession of the house. Thereafter respondent / complainant handed over entire documents concerning house. The petitioner then started avoiding complainant and refused to return the document obtained from complainant and asked her to sale said house to petitioner. The respondent has no alternative and in compelling circumstances, he accepted the proposal and the house was valued by petitioner worth Rs.16 lac whereas market value was worth Rs.21 lac. The petitioner agreed to pay Rs.3.75 lac in respect of necessary deposits in Rajasthan Housing Board and Rs.3.18 lac towards 50% benefit amount of sale-transaction and executed a consent letter dated 22.4.08 but respondent has not received the possession of the house. Thereafter petitioner gave Rs.50,000/- in cash and Rs.6.45 lac by cheque to be drawn at Bank of Rajasthan to complainant.

4. Complainant presented the cheque No.892111 dated 09.06.2008 in State Bank of India, Agricultural Branch, Datia but bank informed that due to stop-payment, cheque has been returned without payment. Then notices were sent by respondent to petitioner by registered post and UPC post and thereafter complaint has been filed in the Court. On the complaint filed by the respondent, learned CJM Datia has taken cognizance and issued summons against the petitioner/accused. Petitioner appeared in that court and filed one application for transferring the case on the anvil that the Datia court is not having territorial jurisdiction and that application was rejected. Against that order one revision No.47/09 was preferred, which also met with dismissal, giving rise to this petition.

5. It is contended by learned counsel for petitioner that orders passed by the learned Sessions Court as well as learned trial court are illegal and bad in law. It is asserted that entire transaction has occurred at Kota Rajasthan and the Cheque in question is returned unpaid by Bank of Rajasthan, Branch Maa Bharati Talwandi, Kota. Nothing has happened at Datia except issuing notice by respondent / complainant, therefore, CJM Court at Datia has no jurisdiction to try the matter. Hence that order is to be set aside.

6. Learned counsel for the petitioner drew this Court's attention to a citation in *Harnam Electronics Private Limited and Another v. National Panasonic India Private Limited* (2009) 1 SCC 720. In that case it was observed that appellant was carrying on business in Chandigarh. Cheque was issued and dishonoured in Chandigarh, complainant sent a notice from Delhi and then filed complaint at Delhi. It is held by the Apex Court that a court derives a jurisdiction only when the cause of action arose within its jurisdiction. Distinction must be borne in mind between the ingredient of an offence and commission of a part of the offence. While issuance of a notice by the holder of a negotiable instrument is necessary, service thereof is also imperative. Only on a service of such notice and failure on the part of the accused to pay the demanded amount within a period of 15 days thereafter, the commission of an offence is completed. Giving of notice, therefore, cannot have any precedent over the service. Delhi High Court has no jurisdiction to try the case and the case has to be transferred to Chandigarh.

7. Furthermore, reliance is placed on a citation in *Ahuja Nandkishore Dongre v. State of Maharashtra & Anr.* 2007 Cri.L.J. 115 in which Bombay High Court Nagpur Bench has held that Cheque as a negotiable instrument is required to be discharged at place mentioned therein. Jurisdiction has to be gathered from place where money was intended to be paid. Court at another place within whose jurisdiction cheque was merely presented for realization cannot be said to have jurisdiction to try the offence.

8. Placing reliance on the above citations it is contended on behalf of the petitioner that entire transactions were occurred at Kota. Merely sending notice from Datia or presenting a cheque at Datia will not render the case in territorial jurisdiction of Datia Court. Hence a proper direction for transferring the case is to be issued.

9. In backlash, learned counsel for the respondent opposed the petition and submitted that orders passed by both the courts below are legal and proper and no interference is warranted. It is urged that disputed cheque was presented for encashment in the State Bank of India, Agriculture branch, Datia and when the cheque was issued in favour of respondent/complainant by the petitioner it was clearly intended that the cheque was being issued to be presented in the Bank at Datia because it is only the place where the respondent is having his account, hence cheque was issued account-payee and notice was also issued from Datia. Thus, the Court at Datia has territorial jurisdiction to try the matter. It is further submitted that as per the provisions enshrined in Section 178 (d) CrPC when offence is consisted of several acts done in different areas, it may be enquired into or tried by Court over any of such local areas and in the present case one of the ingredients of offence is committed in Datia and therefore Court of Datia has legal jurisdiction to try the matter. Hence this petition is to be dismissed.

10. Heard the rival contentions of parties and perused the documents on record.

11. So far as judgment relied upon by petitioner in *Harman Electronics Private limited* (supra) is concerned, the facts of the case are distinguishable from the case at hand. In that case entire transactions were held at Chandigarh and not a single transaction was held at Delhi. While in the present case, cheque was presented at Datia. So far as another citation in the case of *Ahuja Nandkishore Dongre* (supra) is concerned, in the light of Apex Court's observation made in *K. Bhaskaran v. Sankaran Vaidhyan Balan and another* 2000 (1) MPLJ 1, I do not agree with the view expressed by Bombay High Court, Nagpur Bench.

12. Admittedly the petitioner / accused gave a cheque No.892111 dated 09.06.2008 for an amount of Rs.6.45 lac drawn at Bank of Rajasthan Branch Maa Bharati Talwandi Kota and that is account payee cheque, which was presented by complainant on 9.6.08 in the State Bank of India, Agriculture Branch, Datia as he is having account in that bank and the said cheque stood dishonoured at Datia. Thereafter, notice was issued from Datia.

13. In case of *K. Bhaskaran* (supra) concerning territorial of the Court, Apex Court has held that in case of dishonour of cheque, complaint can be filed at any of the places where any of the following acts took place (1) drawing of the cheque; (2) presentation of the cheque to the Bank; (3) returning the unpaid cheque by the drawee bank; (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount; (5) failure of the drawer to make payment within 15 days of the receipt of the notice. It is not necessary that all the above five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at five different localities. A concatenation of all the above five is a sine quo non for the completion of the offence under section 138. Thus it is clear, if the five different acts were done in five different localities any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under section 138 of the Act in view of section 178(d) of the Code of Criminal Procedure. In other words, the complainant can choose any one of those courts having jurisdiction over any one of the local areas within the territorial limits of which any one of those five acts was done.

14. In case of *Smt. Shamshad Begum v. B. Mohammed* 2008 (3) CCSC 1619 (SC) the Apex Court while deciding the question of territorial jurisdiction of Court in case of proceedings under Section 138 of Negotiable Instruments Act, 1981 has followed the ratio of same principle as have already been laid down by the Apex Court in case *K. Bhaskaran* (supra).

15. Considering the overall facts and circumstances of the case it is apparent that cheque is dishonoured from Bank at Datia and notice was sent to petitioner/accused from Datia, therefore, cause of action arises at Datia. Thus, learned courts below have rightly dismissed the application of the petitioner. There is no perversity in the orders of both the courts below. Accordingly, the petition being sans merit, is hereby dismissed.

16. Consequently, interim order dated 04.02.2010 stands vacated.

Petition dismissed.

I.L.R. [2010] M. P., 2233
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice P.K. Jaiswal
15 July, 2010*

SANTOSH

... Applicant

Vs.

STATE OF M.P. & anr.

... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 145 - During pendency of civil suit an order u/s 145 Cr.P.C. was passed by S.D.M. directing applicant not to interfere over the land in question - Order challenged by

applicant on ground that parallel proceeding should not be permitted to continue - Held - Mere pendency of the Civil suit will not ipso-facto operate bar to the proceedings u/s. 145 of Cr.P.C. (Para 9)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 145 – सिविल वाद के लम्बित रहने के दौरान एस.डी.एम. द्वारा द.प्र.सं. की धारा 145 के अंतर्गत आदेश पारित किया गया जिसके द्वारा आवेदक को प्रश्नगत भूमि में हस्तक्षेप न करने का निर्देश किया – आवेदक द्वारा आदेश को इस आधार पर चुनौती दी गयी कि समान्तर कार्यवाहियों को जारी रखने की अनुज्ञा नहीं होनी चाहिये – अभिनिर्धारित – केवल सिविल वाद का लंबन स्वयंमेव ही धारा 145 द0प्र0स0 की कार्यवाहियों में वर्जन होना प्रवर्तित नहीं करता है।

S.M. Sanyal, for the applicant.

C.R. Karnic, for the non-applicant No.1.

Ajay Mishra, for the non-applicant No.2.

ORDER

P.K. JAISWAL, J. :- This is a petition under Section 482 of Cr.P.C., for quashment of order dated 14.7.08, passed by District & Sessions Judge, Indore in Criminal Revision No.745/09 and attachment order dated 14.7.09, passed by Sub Divisional Officer & Executive Magistrate, Sanyogitaganj area, Indore in Case No.182/09 in a proceedings under Section 145 of Cr.P.C.

2. It is not a matter of any dispute between the parties that the defendant and his wife are the co-sharer of the suit land. However, the plaintiff claims exclusive possession of the suit property on the basis of an alleged agreement shown to have been executed by the wife of non-applicant No.2 – defendant Alok Garg. He claims that after the said agreement he had entered into the actual exclusive possession of the land in question.

3. The non-applicant No.2/defendant contested the claim made by the applicant-plaintiff and his exclusive possession. He relied upon an order of diversion passed qua the land in question by the competent authority and later on permission granted to him for raising construction. The civil suit was filed by the plaintiff - applicant on 15.4.09. On 5.5.09 status quo order was passed by the trial Court. Later on said status quo order was vacated and application for grant of temporary injunction was rejected by the trial Court on 23.6.09. The applicant challenged the said order by filing miscellaneous appeal, which was dismissed on 20.1.10.

4. The two Courts, noticing the aforesaid document and the material available on record had held that the applicant-plaintiff had failed to indicate his actual possession over the land in question. The applicant challenged the said orders by filing writ petition under Article 227 of the Constitution of India. The said writ petition (W.P. No.1208/2010) was dismissed by the Division Bench of this Court by holding that the plaintiff had failed, prima facie, to prove his actual physical possession over the land in question.

5. Prior to the filing of suit the non-applicant No.2 (party No.2) lodged a report on 11.4.09 before the Police Station Palasia, Indore, to the effect that the applicant

is trying to forcibly occupy the disputed property and the said dispute may cause breach of peace between the parties. The said Police Station submitted its report/Istgasa under Section 145 of Cr.P.C. on 18.4.09. The learned Magistrate considering the said 'Istgasa' registered a case and passed an order dated 14.7.09 and on 6.8.09 under Section 145 of Cr.P.C. and directed the applicant not to interfere over the land in question i.e., 0.367 hectares of Survey Nos.247/7, 260/1 & 261/1 and the applicant was restrained from interfering with the possession of the non-applicant No.2, till the matter is decided by the competent Court.

6. Learned counsel for the applicant drew my attention to the decision of the Apex Court in the case of *Ram Sumer Puri Mahant v/s State of UP & others* (AIR 1985 SC 472) and submitted that when a civil litigation is pending for the property wherein the question of possession is involved and has been adjudicated, initiation of a preliminary criminal proceedings under Section 145 of Cr.P.C., would not be justified. He submitted that the parallel proceedings should not be permitted to continue and in the event of a decree of the civil court, the criminal court should not be allowed to invoke its jurisdiction particularly when the possession is being examined by the civil court and the parties are in a position to approach the civil court for interim orders, such an order or appointment of receiver for adequate protection of the property during pendency of the dispute. Multiplicity of litigation is not the interest of the parties nor should public time be allowed to be wasted over the meaningless litigation. With the aforesaid, it is submitted by the learned counsel for the applicant that criminal proceedings pending before the Sub Divisional Magistrate be dropped and the impugned orders passed by the Courts below be quashed.

7. Shri Ajay Mishra, learned counsel for the non-applicant No.2 drew my attention to the orders passed by civil court as well as by this court and submitted that the courts below have found that the non-applicant No.2 was not in possession of the property and, therefore, the writ petition filed by the applicant was dismissed and the applicant had failed to prove his actual possession over the land in question and the dispute between the parties were likely to cause breach of peace and, therefore, he initiated a proceedings under Section 145 of Cr.P.C. He further submits that the order passed by the Apex Court in the case of *Ram Sumer Puri Mahant's case* (supra) has been totally misunderstood by the learned counsel for the applicant. It is further submitted that in that case, a title suit for the possession and injunction in respect of certain property was instituted before the civil court. The civil suit was dismissed on February 28'1981 and after dismissal of the civil suit litigation, proceedings under Section 145 of Cr.P.C. were initiated with regard to the same property and in that proceedings, the Magistrate passed a preliminary order under Section 145(1) of Cr.P.C. and also attached the property and, therefore, the Apex Court has held that multiplicity of litigation is not in the interest of parties nor should public time be allowed to be wasted over meaningless litigation and quashed the order of the learned Magistrate, passed in that case. The said case was later on considered by the Apex Court in the case of *Jhunamal @*

Devandas v/s State of MP & others (AIR 1988 SC 1973) and gave the following dictum in paragraph 7, which reads as under:-“

“We fail to understand how the High Court in this case took advantage of the decision of this Court in *Ram Sumer's case*. The ratio of the said decision is that a party should not be permitted to litigate before the criminal Court when the civil suit is pending in respect of the same subject matter. That does not mean that a concluded order under S.145 Cr.P.C., made by the Magistrate of competent jurisdiction should be set at naught merely because the unsuccessful party has approached the civil Court. An order made under S.145 Cr.P.C. deals only with the factum of possession of the party as on a particular day. It confers no title to remain in possession of the disputed property. The order is subject to decision of the civil Court. The unsuccessful party therefore must get relief only in the civil Court. He may move the civil Court with properly constituted suit. He may file a suit for declaration and prove a better right to possession. The civil Court has jurisdiction to give a finding different from that which the Magistrate has reached.”

8. It is well settled that the Court, while dealing with a proceedings under Section 145 of Cr.P.C., is mainly concerned with possession of the property in dispute on the date of preliminary order and dispossession, if any, within two months prior to that date, the Court is not required to decide either title to the property or right of the possessions of the same. The question for determination before this Court in the present petition is one relating to the validity or otherwise of the order passed by the learned Sub Divisional Magistrate under Section 145 of Cr.P.C. and the order passed by the Revisional Court.

9. On perusal of the impugned order it is not in dispute that the non-applicant No.2 is in possession of the property and prior to the date of filing of the suit he was in possession of the property. The injunction application filed by the applicant was dismissed on 23.6.09. As per finding recorded by the Courts below the non-applicant No.2 is in possession over the property in question and the applicant made attempt to forcibly occupy disputed property and there being an apprehension of breach of peace and, therefore, proceedings under Section 145 of Cr.P.C. was initiated by the non-applicant No.2 and in view of the law laid down by the Apex Court in the case of *Jhunamal @ Devandas* (supra) the said proceedings is maintainable. Mere pendency of the civil suit will not ipso facto operate bar to the proceedings under Section 145 of Cr.P.C. by the Magistrate.

10. In view of the above, I do not see any justification to interfere with the impugned order passed by the learned Sub Divisional Magistrate. I do not see any force in the present petition. It is hereby dismissed.

Petition dismissed.

I.L.R. [2010] M. P., 2237

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Rakesh Saxena & Mr. Justice G.S. Solanki

15 July, 2010*

SURESH KUMAR SINGH

... Applicant

Vs.

STATE OF M.P. & anr.

... Non-applicants

Evidence Act (1 of 1872), Sections 63 & 65 - The question of admissibility, reliability and the probative value of its evidence can be judged by the trial Court subsequently at appropriate stage - Shutting out of relevant evidence would serve no purpose.

Trial Court allowed the application and permitted the complainant to produce a copy of the cassette subject to condition that the admissibility and the probative value of the cassette shall depend upon the proof of requisite conditions as provided in the provisions. Order challenged by petitioner on grounds that (1) it was not established by the complainant that the original cassette had been destroyed or lost, therefore, no secondary evidence by way of producing another copy of cassette can be made, (2) Since it was not established that the cassette contained the voice of accused and the complainant, and since it was not kept intact in any proper custody, the permission to produce the same in evidence can not be granted after about seven years of the alleged occurrence, (3) There was nothing on record to indicate that the cassette sought to be produced by way of secondary evidence was prepared from the original cassette on the directions of officers of Lokayukta Department. In these circumstances, the possibility that the cassette might have been tampered, could not be ruled out.

Held - The question of admissibility, reliability and the probative value of its evidence can be judged by the trial Court subsequently at appropriate stage. Shutting out of relevant evidence would serve no purpose. The trial Court kept in mind all the necessary precautions and permitted the complainant to produce the copy of the cassette in evidence, therefore, no interference is called for in the said order. Petition dismissed.

(Paras 7, 12 & 13)

साक्ष्य अधिनियम (1872 का 1), धाराएँ 63 व 65 - उसकी साक्ष्य की ग्राह्यता, विश्वसनीयता और प्रमाण देने वाले मान का विचारण न्यायालय द्वारा पश्चातवर्ती उचित प्रक्रम पर मूल्यांकन किया जा सकता है - सुसंगत साक्ष्य अलग करने से किसी प्रयोजन की पूर्ति नहीं होगी।

विचारण न्यायालय ने आवेदन मंजूर किया और परिवादी को कॅसेट की कॉपी प्रस्तुत करने की अनुमति दी, इस शर्त पर कि कॅसेट की ग्राह्यता और प्रमाण

देने वाले उसके मान उपबंधों में दी गयी आवश्यक शर्तों को साबित होने के उपर निर्भर करेगा। याची द्वारा आदेश को इस आधार पर चुनौती दी गयी कि (1) परिवादी द्वारा यह स्थापित नहीं किया गया कि मूल कैंसेट नष्ट की गयी अथवा खो गयी, इसलिए, अन्य प्रति को प्रस्तुत कर कोई द्वितीयक साक्ष्य नहीं दी जा सकती, (2) चूंकि यह स्थापित नहीं किया गया कि कैंसेट में अभियुक्त तथा परिवादी की आवाजे थी और चूंकि उसे उचित अभिरक्षा में अदिकल नहीं रखा गया, कथित घटना के लगभग सात वर्ष पश्चात उसे साक्ष्य में प्रस्तुत करने की अनुमति प्रदान नहीं की जा सकती, (3) अभिलेख पर यह दर्शाने वाला कुछ नहीं था कि कैंसेट जिसे द्वितीय साक्ष्य के रूप में प्रस्तुत करने के लिये कहा गया है वह लोकायुक्त विभाग के अधिकारियों के निर्देशन पर मूल कैंसेट से तैयार की गयी थी इन परिस्थितियों में, कैंसेट के साथ छेड़छाड़ होने की संभावना से इनकार नहीं किया जा सकता।

अभिनिर्धारित — उसकी साक्ष्य की ग्राह्यता, विश्वसनीयता और प्रमाण देने वाले मान का विचारण न्यायालय द्वारा पश्चातवर्ती उचित प्रक्रम पर मूल्यांकन किया जा सकता है — सुसंगत साक्ष्य अलग करने से किसी प्रयोजन की पूर्ति नहीं होगी। विचारण न्यायालय ने सभी आवश्यक सावधानियों को ध्यान में रखा और परिवादी को साक्ष्य में कैंसेट की प्रति प्रस्तुत करने की अनुमति दी, इसलिए उक्त आदेश में हस्तक्षेप का कोई प्रयोजन नहीं बनता। याचिका खारिज।

Cases referred :

1985 (Supp) SCC 611, (2009) 5 SCC 417, (1976) 2 SCC 17, AIR 1964 SC 72.

Anil Khare with Namrata Kesharwani, for the applicant.

Aditya Adhikari, for the non-applicant No.1.

H.S. Dubey & S.S. Bisen, for the non-applicant No.2.

ORDER

The order of the Court was delivered by **RAKESH SAKSENA, J.** :—By this petition filed under Section 482 of the Code of Criminal Procedure, petitioner has challenged the order dated 18.1.2010 passed by Special Judge (Lokayukt), Jabalpur in Special Case No. 8/2004, disposing of the application filed by the complainant/respondent no.2 under Sections 63 and 65 of the Indian Evidence Act, seeking permission to adduce secondary evidence.

2. In brief, facts of the case are that the petitioner/accused S.K.Singh, who was posted as Inspector in Special Police Establishment (Lokayukta Office), Jabalpur laid a trap against respondent no.2 Hardayal Dubey, Food Inspector, Jabalpur and registered Crime No. 128/2002 under Sections 7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act. When S.K.Singh was investigating the said offence, he demanded Rs. 1,65,000/- from Hardayal Dubey, as bribe for showing favour to him. It is said that on 7.6.2002 and 27.6.2002, he obtained Rs. 30,000-30,000/- by abusing his position as a public servant. Hardayal Dubey made complaint against him to Lokayukta Department. Petitioner is, therefore, facing trial on the said charges.

3. According to prosecution, before making complaint to Lokayukta, respondent/complainant Hardayal Dubey had recorded a conversation which allegedly took place between him, the petitioner and the witness Shailesh Sharma. Complainant produced the said cassette before the Office of Special Police Establishment, Lokayukta, Bhopal. This cassette, by Bhopal Office, was then sent to Divisional Office, Lokayukta, Jabalpur, where its transcript was prepared and the cassette was sealed. After requisite investigation, charge sheet was filed. Along with the charge sheet, though transcript and seizure memo of the cassette were produced before the Court, yet the cassette was produced in the Court in a sealed packet subsequently on 22.5.2006, on an application filed by Hardayal Dubey. On 13.10.2008, when the cassette was played in the Court, in a tape recorder, in presence of both the parties, no sound emerged from it.

4. Complainant as well as the prosecution moved applications before the trial Court seeking permission to adduce secondary evidence in respect of the tape recording on the ground that on the instructions of Lokayukta Police, complainant had prepared a copy of the cassette and had kept with him because there was possibility of the tampering of the cassette because the complaint was against an Inspector of Lokayukta. This copy of the cassette was adduced in evidence in Special Case No. 10/2003, in which Hardayal Dubey was being prosecuted. By order dated 15.4.2009, trial Court dismissed the application filed by the complainant on the ground that he was not authorized to conduct the prosecution; he could only assist the public prosecutor. The application filed by the public prosecutor was also rejected on the ground that the application was not in accordance with the provisions of Section 65 of the Evidence Act and was not supported with any affidavit. The prosecution, however, was granted liberty to file a fresh application in accordance with the provisions of the said Act and by filing an affidavit in support of it. Prosecution, thereafter, chose not to file any application. The aforesaid order was challenged by the complainant before the High Court in Criminal Revision No. 1025/2009. The High Court by order dated 10.12.2009 permitted the complainant to move appropriate application under Sections 63 and 65 of the Evidence Act since State did not make such application. The High Court ordered as under:

“If the complainant files such an application, it shall be dealt with by the trial Court according to law on its own merits. Trial Court shall be free to decide the question of admissibility of the secondary evidence after giving adequate opportunity of hearing to all the concerned parties, on the said application.”

5. Complainant moved a fresh application on 14.12.2009 before the trial Court making prayer that copy of the recorded cassette which was filed in Special Case No. 10/03 (State Vs. Hardayal Dubey) be called and taken on record. This prayer was opposed by the accused, however, the trial Court by the impugned order, on 18.1.2010, allowed the said application and permitted the complainant to produce

a copy of the cassette subject to condition that the admissibility and the probative value of the cassette shall depend upon the proof of requisite conditions as provided in the provisions of Sections 63 and 65 of the Evidence Act.

6. Aggrieved by the said order, petitioner (accused) has filed this petition.

7. Learned counsel for the petitioner submitted that it was not established by the complainant that the original cassette had been destroyed or lost, therefore, no secondary evidence by way of producing another copy of cassette can be made. Since it was not established that the cassette contained the voice of accused and the complainant, and since it was not kept intact in any proper custody, the permission to produce the same in evidence cannot be granted after about seven years of the alleged occurrence. There was nothing on record to indicate that the cassette sought to be produced by way of secondary evidence was prepared from the original cassette on the directions of Officers of Lokayukta Department. In these circumstances, the possibility that the cassette might have been tampered could not be ruled out. He placed reliance on the ratio of *Ram Singh and others Vs. Col. Ram Singh* [1985 (Supp) SCC 611] and *All India Anna Dravida Munnetra Kazhagam Vs. L.K.Tripathi and others* [(2009) 5 SCC 417].

8. On the other hand, learned counsel for the respondent no.2 Hardayal Dubey, submitted that since the accused was an Officer of Lokayukta, there was apprehension that the original cassette which was handed over to Lokayukta might be tampered with, therefore, he had prepared a copy of the said cassette on the instructions of the Officers of Lokayukta. This cassette was adduced in defence in Special Case No. 10/2003 pending against him in the Court of Special Judge, Jabalpur. It was produced by the defence witness Shailesh Sharma, who was also a party in the conversation. He submitted that the original cassette was not produced by the prosecution with the charge sheet. Later on, when it was produced and played before the Court, it had no sound, therefore, the production of the copy of the cassette was essential. The question about the admissibility and probative value of the evidence of the tape recording can be decided at appropriate stage by the trial Court instead of debarring the production of secondary evidence in the Court.

9. In *Ziyauddin Burhanuddin Bukhari Vs. Brijmohan Ramdass Mehra and others* [(1976) 2 SCC 17], the Apex Court held:

“Tape-records of speeches are “documents” under Section 3 of the Evidence Act and stand on no different footing than photographs. A contemporaneous tape-record of a relevant conversation or speech would be part of *res gestae*. The use of tape-records is not confined to purposes of corroboration and contradiction only, but, when duly proved by satisfactory evidence of what was found recorded and of absence of tampering, it could,

subject to the provisions of the Evidence Act, be used as substantive evidence. Thus, when it was disputed or in issue whether a person's speech, on a particular occasion, contained a particular statement there could be no more direct or better evidence of it than its tape-record, assuming its authenticity to be duly established. The Apex Court observed about the admissibility of the tape-records in evidence on satisfying the following conditions:

- (a) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it.
- (b) Accuracy of what was actually recorded has to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, has to be there so as to rule out possibilities of tampering with the record.
- (c) The subject-matter recorded has to be shown to be relevant according to rules of relevancy found in the Evidence Act.
- (d) Court should receive such evidence with caution and it should be satisfied, beyond reasonable doubt, that the record has not been tampered with."

10. In *Ram Singh and others* (supra) the Apex Court observed that the tape-recorded statement is admissible in evidence, subject to the following conditions:-

- "(1) The voice of the speaker must be identified by the maker of the record or other persons recognizing his voice. Where the maker is unable to identify the voice, strict proof will be required to determine whether or not it was the voice of the alleged speaker.
- (2) The accuracy of the tape-recorded statement must be proved by the maker of the record by satisfactory evidence; direct or circumstantial.
- (3) Possibility of tampering with, or erasure of any part of, the tape-recorded statement must be totally excluded.
- (4) The tape-recorded statement must be relevant.
- (5) The recorded cassette must be sealed and must be kept in safe or official custody &
- (6) The voice of the particular speaker must be clearly audible and must not be lost or distorted by other sounds or disturbances."

The same principles about the admissibility of the tape-recorded version were reiterated by the Apex Court in case of *All India Anna Dravida Munnetra Kazhagam* (supra).

11. It is true that the copy of cassette sought to be produced by the complainant

by way secondary evidence, was not kept sealed in custody of police or any authority, but still its authenticity could be decided after it is produced in the Court and is proved by the oral and/or circumstantial evidence on record. It is on record that when original cassette was produced by the complainant before the Officers of Lokayukta, it was kept in safe custody and was sent to Office of Lokayukta, Jabalpur, where its transcription was prepared. Still when the original cassette was produced in the Court by the prosecution, it had no voice. It can be assumed that it contained recorded voice when the transcript was prepared by the Officers. In these circumstances, it can be concluded that the original cassette had been destroyed. In case of tape recording, erasure of recording or sound can be deemed to be the loss or destruction of the original, therefore, a copy of the tape recording made from the original by mechanical process subject to proof of its accuracy can be held to be the secondary evidence of the original. However, everything depends upon the proof and exclusion of the possibility of tampering with or eraser of any part of the tape recorded statement.

12. Though, the cassette sought to be produced in the present case has been produced in Special Case No. 10/2003, by witness Shailesh Sharma, it may be relevant in the case if it is proved to be a genuine and untampered piece of evidence about the conversation alleged to have taken place between the accused and the other prosecution witness. The question of admissibility, reliability and the probative value of its evidence can be judged by the trial Court subsequently at appropriate stage. Shutting out of relevant evidence would serve no purpose. In *S. Pratap Singh Vs. State of Punjab*-AIR 1964 SC 72, the Apex Court observed that:

“There are few documents and possibly there is no piece of evidence which could not be tampered with, but that would certainly not be a ground on which Courts could reject the evidence as inadmissible or refuse to consider it. In the ultimate analysis the factor mentioned would have a bearing only on the weight to be attached to the evidence and not its admissibility. Doubtless, if in any particular case there is a well-grounded suspicion, not even say proof, that a tape recording has been tampered with that would be a good ground for the Court to discount wholly its evidentiary value.”

13. After examining the impugned order, we find that the trial Court kept in mind all the necessary precautions and permitted the complainant to produce the copy of the cassette in evidence, therefore, in our opinion no interference is called for in the said order.

14. For the foregoing reasons, we find no substance in this petition. It is, accordingly, dismissed.

Petition dismissed.