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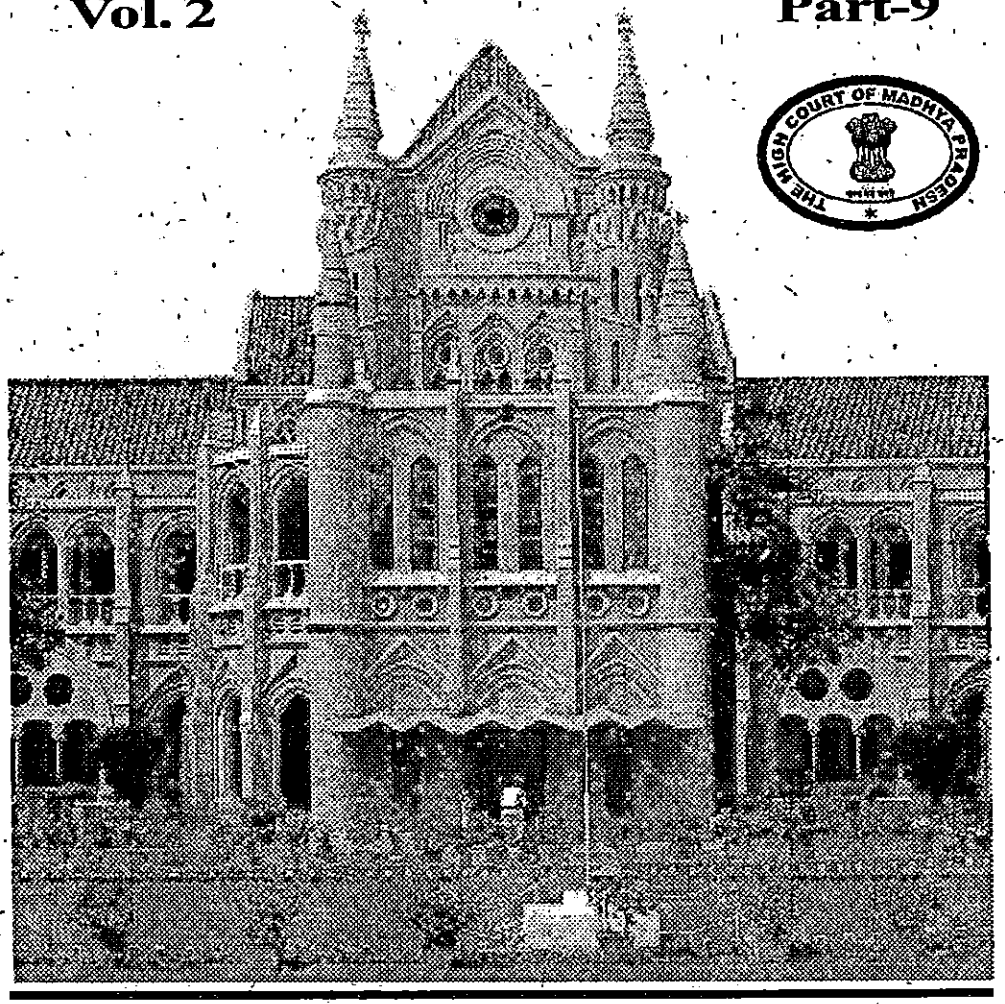
Vol. 2 **Part-9**



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(Note An asterisk (*) denotes Note number)

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पर सुआधारित है और अभियुक्त के पक्ष मे निकाला गया निष्कर्ष उससे संभव था, उच्च न्यायालय का इस आधार पर हस्तक्षेप न्यायोचित नहीं होगा कि अलग दृष्टिकोण भी लिया जा सकता था और यद्यपि उच्च न्यायालय साक्ष्य का पुनःमूल्यांकन करने के लिए हकदार था, दोषमुक्ति का आदेश अपास्त करने तथा दोषसिद्धि का आदेश पारित करने के लिए सारवान एवं अप्रतिरोध्य कारण होने चाहिए। (गोपाल सिंह वि. म.प्र. राज्य) SC---1847

साक्ष्य अधिनियम (1872 का 1), धारा 3 – परिस्थितिजन्य साक्ष्य – मामले का आधार – भा.द.सं. की धारा 302 व 201 के अंतर्गत दोषसिद्धि – अभिनिर्धारित, – चिकित्सक ने सकारात्मक रूप से अभिसाक्ष्य नहीं दिया कि मृतक की क्षतियों की प्रकृति मानव वध संबंधी थी – कथित न्यायिकेतर संस्वी.ति का साक्ष्य संदेहास्पद था और साक्ष्य मे अग्राह्य भी था – तथ्य, कि अपीलार्थी को अंतिम बार मृतक के साथ देखा गया, भी शंका की परिधि से परे साबित नहीं हुआ – अपीलार्थी के शरीर पर की क्षतियों से आवश्यक रूप से यह निष्कर्ष नहीं निकलता कि ये क्षतियाँ मृतक पर हमला करने में हुईं – विचारण न्यायालय द्वारा अभिलिखित दोषसिद्धि अपास्त। (गेंदौआ (श्रीमति) वि. म.प्र. राज्य) ...1973

साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड संहिता, 1860 धाराएं 307, 148, 302 व 326 सहपठित 149 – साक्ष्य का अधिमूल्यन – शिकायतकर्ता पक्ष के साथ परामर्श के पश्चात् प्रथम सूचना रिपोर्ट अभिलिखित की गई और विरूद्ध पक्ष के अधिकतम व्यक्तियों को उल्लिखित किया गया – मृतक के शरीर पर चोटों की संख्या (3), अधिक होती यदि 12 व्यक्तियों/अभियुक्तों ने हमला किया होता – घटना का स्थान स्पष्ट नहीं – प्रत्यक्षदर्शी साक्षी जो मृतक के साथी तथा नजदीकी रिश्तेदार हैं – साक्षियों ने अभियोजन कथा को समय–समय पर बदला है – तीन अभियुक्तों की चोंटों को अभियोजन साक्षियों द्वारा स्पष्ट नहीं किया गया–शंका का लाभ देते हुए दोषसिद्धी और दण्डादेश अपास्त – अपील मंजूर। (चंपालाल वि. म.प्र. राज्य) ---*25

साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड संहिता, 1860, धारा 376(1) – अभियुक्त को अभियोक्त्री की एकमात्र साक्ष्य के आधार पर दोषसिद्ध किया गया और उच्च न्यायालय द्वारा दोषसिद्धि की पुष्टि की गई – अभिनिर्धारित – मामले में अभियुक्त/अपीलार्थी को एक गंभीर चोट सहित 6 चोटें आईं, साक्षी जो कथित रूप से मौके पर तुरंत पहुँचे थे, ने अभियोक्त्री का समर्थन नहीं किया और उन्हें पक्षद्रोही घोषित किया गया, अभियोजन कथा कि अपीलार्थी एक 31 वर्षीय युवक को काफी वृद्ध महिला द्वारा काबू किये जाने की बात पर विश्वास करना कठिन है, अन्वेषण अधिकारी ने अभियुक्त के इस बचाव का सत्यापन नहीं किया कि वह अभियोक्त्री के घर अपनी गाय बरामद करने गया था और उसके बाद हुए झगड़े में दोनों को चोटें आईं, अभियोक्त्री का पति, जो उसके साथ पुलिस थाना गया था, कठघरे में नहीं आया और चिकित्सक भी बलात्संग के तथ्य की पुष्टि करने में अक्षम रहा, मामले को एक असामान्य मामला बनाता है।

इस सुझाव के साथ कोई विवाद नही हो सकता है कि अभियोक्त्री की साक्ष्य आपवादिक परिस्थितियों को छोड़कर विश्वास किये जाने योग्य है। परन्तु दूसरी ओर अभियोक्त्री पर उसकी कहानी में आयी अनधिसंभाव्यताओं को विचार में लिये बिना विश्वास करना ही चाहिये, यह एक ऐसा तर्क है जिसे कभी स्वीकार नही किया जा सकता – परीक्षण सदैव इसका होता है कि क्या प्रस्तुत कहानी प्रथम दृष्टया विश्वास पैदा करती है – दोषसिद्धि अपास्त। (दिनेश जायसवाल वि. म.प्र. राज्य) SC---1839

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मे चुनौती देने मे विलंब – वाद भूमि प्रतिवादी के नाम से नामांतरित – नामांतरण कार्यवाहियों मे वादी पक्षकार नहीं – अभिनिर्धारित – कब्जा धारक वादी को न्यायालय के पास जाना अपेक्षित नहीं जब तक कि उसके कब्जे मे बाधा कारित नहीं होती – विपरीत नामान्तरण के आदेश के कारण वाद लाना उससे अपेक्षित नहीं है क्योंकि नामान्तरण अपने आप मे हक प्रदान नहीं करता । (जसप्रीस कोर (श्रीमति) वि. रामकृष्ण) ...1939

परिसीमा अधिनियम (1963 का 36), धारा 5 – विलंब के लिए माफी – राज्य एवं व्यक्तिगत वादी के लिये प्रयोज्यता – अभिनिर्धारित – परिसीमा की विधि राज्य और इस राष्ट्र के नागरिकों के मध्य कोई विभेद नहीं करती – परिसीमा की विहित अवधि के भीतर राज्य को न्यायालय के पास जाना चाहिए – जब "राज्य" अमुर्त हस्ती के तौर पर विलंब के लिये माफी की प्रार्थना करता है तब कड़े सबूत की मांग के परिणामस्वरूप कभी कभी न्यायहानि होती है। (प्यारे लाल वि. म.प्र. राज्य) ---*33

परिसीमा अधिनियम (1963 का 36), धारा 5 – विलंब के लिए माफी – राज्य कर्मचारियों का कपट अथवा उपेक्षा का कोई तत्व नहीं – उचित प्रक्रिया – अभिनिर्धारित – तब भी जब कोई तत्व अस्तित्व में नहीं यह मानने के लिये कि विलंब कारित करने में या तो कपट खेला गया अथवा राज्य कर्मचारियों की मौनानुमति से कपट करित किया गया, जानबूझकर उपेक्षा के कारण अथवा सरकार के कुछ कर्मचारियों के विशेषज्ञ कला कौशल के परिणामस्वरूप – केवल विलंब के लिये माफी देने और अपील की गुणदोषों पर सुनवाई के पश्चात् ही गुणदोषों पर निर्णय तक पहुँचा जा सकता है। (प्यारे लाल वि. म.प्र. राज्य) ---*33

परिसीमा अधिनियम (1963 का 36), धारा 5 – विलंब के लिए माफी – विधि का कोई प्रश्न अंतर्ग्रस्त नहीं – उचित प्रक्रिया – अभिनिर्धारित – विलंब के लिए माफी प्रदान करने की प्रार्थना पर विचार करते समय मामले में अंतर्ग्रस्त विधि के प्रश्न के महत्व पर न्यायालय को ध्यान केन्द्रित करना होगा क्योंकि जब विधि के किसी महत्वपूर्ण प्रश्न के अंतर्ग्रस्त न होते हुये, विलंब की लंबी समयावधि के पश्चात् जब राज्य न्यायालय के पास आता है तब विलंब के लिये माफी देने से कोई सफलतापूर्ण प्रयोजन नहीं निकलेगा। (प्यारे लाल वि. म.प्र. राज्य) ---*33

परिसीमा अधिनियम (1963 का 36), धारा 5 – विलंब के लिय माफी – पर्याप्त कारण – न्यायालय का कर्तव्य – अभिनिर्धारित – विलंब के लिये माफी के आवेदन का निराकरण करते समय प्रत्येक न्यायालय को सतर्क रहना चाहिये यह निश्चित करने की क्या लोक संपत्ति हस्तगत करने हेतु लोक रिष्टि कारित करने के लिए कुछ व्यक्तियों के कुशल प्रबंध के परिणामस्वरूप विलंब कारित हुआ है और जब न्यायालय की संतुष्टि होती है तब प्रत्येक मामले की विशिष्ट परिस्थितियों में विलंब की समयावधि की ओर ध्यान दिये बिना और उसे माफी देकर, वह कारणों की पर्याप्तता निश्चित कर सकता है। (प्यारे लाल वि. म.प्र. राज्य) ---*33

मोटर यान अधिनियम (1988 का 59), धारा 67 – सड़क परिवहन पर नियंत्रण की शक्ति – अधिकारिता – अभिनिर्धारित – लोगों को प्रस्तावित की गयी सुविधाओं को तथा परमिट धारकों में अलाभकर स्पर्धा को रोकने की वांछनीयता को ध्यान में रखते हुए सड़क परिवहन पर नियंत्रण की शक्ति केवल राज्य सरकार को निहित की गई है और इस सबंध में समय समय पर

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Publishing Shortly
50 Years Digest
of I.L.R.

Hon'ble Shri Justice Shyam Sunder Dwivedi

Born on 31.08.1948. Joined Judicial Service as Civil Judge, Class-II, on 08-04-1970, promoted as Civil Judge, Class-I on 14.06.1982, as C.J.M. on 25.02.1984 and promoted as officiating District Judge on 20.04.1987, granted selection grade on 23.11.1994, super-time scale on 08.06.1998. Worked as Additional Registrar, High Court of M.P., Jabalpur from 22.10.1992 to May, 1994, as District Judge (Vig.), Indore from 04.08.2000 to February, 2002 and as Registrar (Vig.), High Court of M.P., Jabalpur from 05.04.2004 to March, 2005. At the time of appointment as Additional Judge, was posted as District & Sessions Judge, Indore.

Elevated as Addl. Judge of M.P. High Court on 18.10.2005. Took oath as Permanent Judge on 02.02.2007 and demitted office on 30.08.2010.

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

Hon'ble Shri Justice A. K. Shrivastava, Admn. Judge, bids farewell to the Demitting Judge :–

Today we have assembled here to felicitate farewell ovation to Hon'ble Shri Justice Shyam Sunder Dwivedi who is demitting the office today after rendering his valuable service to this temple of justice. I am observing that all of us are having tears in our eyes and smile on the face at this occasion. His Lordship was born on 31.8.1948. After completing his graduation in the year 1967, he passed his LLB in the year 1969. Later on, he was enrolled as an Advocate in July 1969 and started practice under the able guidance of his late father Babu Mohanlalji Dwivedi, an eminent and very respectable lawyer of Mandsaur. His Lordship joined judicial service as Civil Judge, Class II, on 8.4.1970 and was promoted as Civil Judge, Class-1, on 14.6.1982. He became Chief Judicial Magistrate on 25.2.1984 and thereafter His Lordship was promoted as officiating District Judge on 20.4.1987. His Lordship also worked as Additional Registrar at the Principal Seat Jabalpur from 22.10.1992 to May, 1994, District Judge (Vig.) from 4.8.2000 to February, 2002 and Registrar (Vig.) at Principal Seat Jabalpur from 5.4.2004 to March, 2005. Soon before his elevation, His Lordship was serving on the post of District & Sessions Judge at Indore. Looking to the ability, judicial approach, depth in law and over all performance, His Lordship's name was recommended for elevation to the Bench and ultimately His Lordship adorned the seat of Judge of this High Court on 18th October, 2005.

I am personally acquainted to My Lord since beginning of his career. Although before my elevation I was not having any occasion to appear before His Lordship when he was serving in higher judicial services, but I have seen His Lordship's working when he was Registrar (Vig.) at Jabalpur and when he became Judge of this High Court.

Friends as you know His Lordship was sitting with me in Division Bench for a considerable long period after my posting at this Bench and while hearing the cases, I found his personality akin to that of a Sun who rises during the dawn hours. It has been stated in *Ved,* I quote-

एषायुक्त परावतः सूर्यस्योदयनादधि ।

शतं रथेभिः सुभगोषा इयं वि यात्यभि मानुपान् ॥

unquote -

> "The dawn receives her beams from beyond the rising place of the sun. Borne on hundreds of rays carrying light, the auspicious dawn advances on her way in different directions."

The judicial approach of My Lord is excellent and is well known to all of you. The four fold responsibilities of a Judge in the words of Socrates are:-

"To hear courteously;
to answer wisely;
to consider soberly: and
to decide impartially."

All these four qualities are inherent in My Lord. Late Madho Rao Scindia, who was commonly known as Madho Maharaj in Gwalior State, in **Darbar Policy** relating to the legislative and judicial department of Gwalior State framed several guidelines for a judicial officer and one of the most important guideline which the ex-ruler framed was, I quote-

"Judicial Officers and all other officers should clearly understand that the moment they sit down on their chair or Gaddi in the Court Room they are at once divested of their private individuality-i.e., they cease to be Mr. So and so- and at once assume the role of the Darbar. This being so, they are called upon to administer justice without fear or favour always realizing the full magnitude of their responsibilities and the honour attaching to their position. These are words which you should always keep before your mind's eye and which you will do well never to forget."

unquote-

His Lordship is owning all these qualities while delivering justice.

One very rare and peculiar feature I found in His Lordship while hearing the case is that he used to hear the cases just like a *Yogi Purush* whose characteristic has been highlighted in *Shreemad Bhagwat Geeta*. In 12th Chapter where Yog of devotion has been explained. Lord Shrikrishna has characterized *Yogi Purush,* I quote-

''समः शत्रौ च मित्रे च तथा मानापमानयोः ।

शीतोष्णासुखदुःखेषु समः सङ्गविवर्जितः ॥

unquote-

"He who (behaves) alike to foe and friend, also to good and evil repute and who is alike in cold and heat, pleasure and pain and who is free from attachment."

These qualities I found in His Lordship while administering justice in the Court as well as out of the Court.

His Lordship has delivered several landmark judgments which are highlighting the legal fraternity. It is my personal assessment that the judges of a Judge are the lawyers and the popularity of Justice Dwivedi in the Advocates indicates that how and in what manner and fashion they have accepted My Lord, and therefore, now when His Lordship is demitting the office, the members of

the Bar are having tears in their eyes. The behaviour of His Lordship towards the lawyers is always polite and graceful.

Friends one should admire that when love and skill work together expect a master piece and this has proven by His Lordship while endeavouring the justice.

Several landmark judgments which His Lordship has given will certainly highlight the Bench and the Bar and the legal fraternity at large.

I on behalf of the High Court and on my behalf congratulate My Lord for his successful judicial career and pray Almighty God that he may live with great joy and enthusiasm.

Shri M.P.S. Raghuvanshi, Addl. Advocate General, bids farewell :–

Hon'ble Justice Shri S.S. Dwivedi is completing his tenure as a judge today. There are lesser number of Judges who are remembered after they demit their office and Hon'ble Justice .Shri S.S. Dwivedi is one of them whose memory would continue in the minds of advocates and whose absence will be felt in judicial circles of Gwalior. Often innovative, never controversial and believer in equitable dispensation of Justice, your lordship has become ideal in your own way. Your Lordship Born on 31-08-1948 and appointed as Civil Judge Class II on 08-04-1970, promoted as Civil Judge Class I, on 14-06-1982 as CJM on 25-02-1984 and promoted officiating District Judge on 20-04-1987. He was posted as an Additional Registrar of this prestigious High Court on 22-10-1992 at Main Seat Jabalpur. He than was alevated as Judge of this prestigious High Court in 2005 Your lordship then posted at Gwalior in 2007.

Your contribution as a Judge will always guide the new advocates and will be a treasure for members of Bar Several controversial issues were solved by your Lordship and we can find in Your long tenure, Judgments on every subject and your approach was always pro-public. In the field of criminal law your lordship have rendered a large number of important decisions which will be guiding to new advocates in future.

You believed in doing justice which should be full and complete Your ultimate vision was to intepret the law in such a way as to achieve the final goal for which the legal concept have been developed. Your lordship interpreted the law in such a manner that the purpose and object of law-makers is not frustrated.

While adjudging a case, a Judge should not be oblivious of the sense of justice and norms of humanity. Your Lordship believed that while doing justice the requirement of constitution and fate of a man sitting on the last point should not be ignored. You tried to wipe out the tears of those who were in distress.

Your belief is that the proper role of a Judge is to do justice between the parties and if there is any rule while comes in the way of justice then the Judge can legitimately ignore it, provided it is within the legitimate limit. You

believein the words of. Thomas Ruller that "Be you ever so high, the law is above you".

Your lordship always emphasized and behaved in a cool quite and temperate manner and your lordship never lost temper under any provocation.

In a span of five years, Your Lordship has pronounced several judgements which would be remembered in the years to come. Your crusade for law reforms and commitment to poorer sections of society as also dedication towards work was endearing. Your quest for justice was heartening. Your ideas have gone too far but always within the limits of law and your quality of work will always be remembered.

I on my own behalf and on behalf of State Govt. pray your Lordship's and his family members happy and healthy life so that You may enlighten the new generation in the times to come.

Shri Prem Singh Bhadoriya, Adv. President M. P. High Court Bar Association, Gwalior, bids farewell :–

आज का यह विशिष्ट क्षण हम सभी के लिये भावनात्मक होकर अत्यन्त महत्वपूर्ण हैं जब हम सब मध्य प्रदेश उच्च न्यायालय के माननीय न्यायमूर्ति श्री एस0 एस0 द्विवेदी जी के यशस्वी और सफल कार्यकाल पूर्ण करने पर उन्हें भावभीनी बिदाई दे रहें है।

माननीय न्यायमूर्ति का जन्म मंदसौर के एक लोक प्रिय विधि व्यवसायी श्री मोहनलाल द्विवेदी जी के परिवार में जेष्ठपुत्र के रूप में दिनॉक 31.08.1948 को हुआ था और जन्म से ही विधि का पिता से प्राप्त ज्ञान के आधार पर आपकी व्यक्तिगत विधि की रूचि के रहते हुए आपने बी. ए, एल.एल.बी. की उपाधि वर्ष 1969 में प्राप्त की और विधि की उपाधि प्राप्त करने के उपरांत आपने मध्य प्रदेश राज्य अधिवक्ता परिषद में पंजीयन कराने के उपरांत पिता के सानिध्य में वकालत का व्यवसाय प्रारम्भ किया।

आपके अधिवक्ता के रूप में व्यवसायरत रहने के दौरान ही आपको 8 अप्रैल 1970 को प्रदेश की न्यायिक सेवा में व्यवहार न्यायाधीश वर्ग–2 पद पर नियुक्त किया गया जहां से आपका न्यायिक सेवा में योगदान प्रारम्भ हुआ ।

म.प्र. न्यायिक सेवा में आपको शनैःशनैः दिये गये दायित्वों का आपके द्वारा सफलतापूर्वक निर्वाहन करते हुए 25 फरवरी 1984 को मुख्य न्यायिक दण्डाधिकारी एवं 20.04.1987 को एडीशनल डिस्ट्रिक्ट जज एवं अक्टूबर 1992 को रजिस्ट्रार ज्यूडीशियल मुख्यपीठ जबलपुर एंव 20 अप्रैल 1995 को उनको जिला एवं सत्र न्यायाधीश छतरपुर बनाया गया । तदोपरांत वे अपने पदीय कर्तव्यों के दौरान विजिलेंस डी.जे. इंदौर, रजिस्ट्रार विजिलेंस भोपाल एवं जिला एंव सत्र न्यायाधीश के रूप में आपने इंदौर व जबलपुर में भी अपनी सेवाऐं दी ।

माननीय न्यायमूर्ति श्री द्विवेदी जी के दीर्घ विधि अनुभव के चलते उन्हें 18 अक्टूबर 2005 को इस महान न्याय मंदिर में न्यायमूर्ति के रूप में नियुक्त किया गया आपने इस उच्च न्यायालय के महान न्यायमूर्ति के पद का अत्यंत शालीनता और सादगी के साथ अपने कर्तव्यों का निर्वाहन किया ।

आपके व्यवहार में सदैव सहजता, मधुरता और अपनत्व की जो भावना झलकती थी वो सदैव हमारे लिए अत्यंत प्रेरणादायी रही । न्यायदान की प्रक्रिया में आपने जिस प्रकार पक्षकारों के मन की पीड़ा को समझकर प्रकरणों का त्वरित निराकरण किया जिससे अभीभाषक एवं सभी पक्ष सदैव संतुष्ट नजर आये ।

आने वाले समय में आपकी अनुपस्थिति से इस न्याय मंदिर में जो शून्य और रिक्तता उत्पन्न होगी वह हमेशा महसूस होती रहेगी ।

न्यायदान में आपका योगदान अमूल्य एवं अभिनंदनीय है। आपके सफल कार्यकाल पूर्ण करने पर आपसे यह अनुरोध करता हूँ कि, इस अर्द्धविराम के बाद प्रभामान होने वाली समय की गति के साथ.साथ आप उसी सहजता एवं सुलभता के साथ प्रदेश के विधि व्यवसायियों एवं समाज के अन्य वर्गों के सामाजिक विकास में एवं दीनहीन की सेवा में अपना रचनात्मक योगदान देकर समाज के विकास में नयी भूमिका का निर्वाहन करेंगे ।

इन्हीं शुभकामनाओं के साथ मैं अपनी ओर से एवं म. प्र. उच्च न्यायालय अभिभाषक संघ ग्वालियर के सभी सदस्यों की ओर से एवं विधिजगत की ओर से आपके प्रति कृतज्ञता एवं आभार व्यक्त करता हूँ । एवं आपके उत्तम स्वास्थ्य एवं मंगल पारिवारिक जीवन की कामना करता हूँ ।

धन्यवाद सहित ।

Shri V. K. Bharadwaj, Vice President, State Bar Council, bids farewell :–

आज हमारे प्रिय न्यायमूर्ति श्री एस0 एस0 द्विवेदी, सेवानिवृत्त हो रहे हैं । श्री द्विवेदी जी मेरे मत में अपने कार्य मात्र से मुक्त हो रहे हैं, ना कि अपने कर्तव्यों से, आपको मैंने सर्वप्रथम आपके ग्वालियर प्रवास के दौरान ही देखा है । न्याय पीठ पर संपूर्ण कार्य दिवस बिना थकावट के एवं दौरान कार्य संपादन, आपकी चुटकियों ने वातावरण को कभी बोझिल होने नहीं दिया ।

हम सब आपकी प्रत्युत्पन्नमति के कायल हैं । अभिभाषक संघ के द्वारा आयोजित कार्यक्रम में आपने अभिभाषकों के संबंध में जो कहा है वह विशेषतः ही सत्य व उचित है एवं आपके ऐसा व्यक्त करने से हम सभी अभिभाषकों का सम्मान बढ़ा है । ऐसा कहा जाता है कि **Bar are Judges of Judges** लेकिन मेरा मानना है कि हर व्यक्ति अपने स्वयं का सर्वोच्च न्यायधीश होता है, क्योंकि उसके पास स्वयं लेखा.जोखा आइने की तरह साफ होता है ।

आशा है आप समाज के लिये सर्वोत्तम बुजुर्ग सिद्ध होंगे ।

अतः मैं अपने भाव निम्न प्रकार व्यक्त करता हूँ :–

फूलों की हर कली खुशबू दे आपको,
सूरज की हर किरण रोशनी दे आपको ।
हम तो सिर्फ कामना कर सकते हैं,
देने वाला हर खुशी दे आपको ।।

Farewell Speech Delivered by Hon'ble Shri Justice S.S. Dwivedi :–

I am very much grateful for the kind words and the sentiments expressed by you on the occasion of my demitting the office of the Judge of the High Court. I consider myself to be the most fortunate for having all the time the love and affection from all of you ignoring my shortcomings and failures.

I, first of all, pay respect to Almighty God for showering blessing on me due to which I could complete my long journey as a Judge so gracefully. It is also because of kind blessing of my parents and also due to the good wishes of you all.

I started my career as a Judge of subordinate court on 8th April, 1970, a young boy of Twenty One and half, since then with the kind love and affection and noble guidance of the members of the Bar of various places where I had been posted, I could complete successfully my journey as a Judge for near about 35 years in the District Court and for near about 5 years as a Judge of this High Court. Today I have completed three years and one month at Gwalior Bench. I have a feeling of full satisfaction that I could work satisfactorily here because members of Gwalior Bar have always given me full cooperation which has been of immense assistance to me in the matter of dispensation of justice.

On this occasion I have privilege to remember shower of elder brotherly love by the Hon'ble Chief Justices, Hon'ble Shri Justice R.V. Raveendran, Hon'ble Shri Justice A.K.Patnaik and Hon'ble Shri Justice S.R.Alam, who are kind enough to give me noble guidance in my working as a Judge. I am also highly obliged to my esteemed brother Senior Judges Justice S.K.Kulshrestha, Justice Arun Mishra, Justice S.L.Kochar. Justice K.K.Lahoti. Justice A.K.Gohil. Justice S.Samvatsar, Justice A.K.Shrivastava, Justice S.K.Gangele, Justice Sheela Khanna, Justice A.M.Naik, Justice B.M.Gupta, Justice A.P.Shrivastava and Justice Indrani Datta, with whom I sit in Division Bench in all the three Benches during my tenure and learnt how the case can be understood and disposed off quickly and efficiently.

Today I have fullest satisfaction with my working. This feeling can be expressed by following example :

> **"Once Late Justice R-S.Pathak, Former Chief Justice of India used a nice metaphor when asked to him how he would like to be remembered as a Judge, he told with becoming humility-**
>
> **"Every Judge when he leaves the court must satisfy himself that he has left a little brick of his own making in that great institution."**

Similarly, I also feel that I too did a little contribution to this temple of justice.

I must pleasantly acknowledge and feel thankful to my learned brother Judges, who have fondly treated me and extended immense cooperation whenever I needed in my judicial functioning and or in personal necessity.

Last but not the least, I am also thankful to my family members, my wife and my children - daughters Megha, Varsha, Radhika and son Kamal present on this occasion for cooperating with me in every walk of my life, without their cooperation I could not have completed my long journey of Forty Years as a Judge. With me they have also borne the inconvenience during their studies due to my repeated transfer from one place to other on within every two-three years but never complained for the same.

I am also thankful to my personal staff - P.S. Shri Yogesh Verma, P.A. Shri Jitendra Parouha, Reader Shri Agarwal, Peon Shri Kalicharan and other staff of the Registry, due to their full cooperation I could work so efficiently here at Gwalior. I wish them all a very happy, prosperous and cheerful life.

Before concluding my reply, I would like to thank ALMIGHTY GOD again for successful completion of my journey as Judge with the following lines of "RAMCHARIT MANAS" :

''प्रभू की कृपा भयउ सब काजू, जन्म हमार सफल भय आजू ।

and

सो सब तब प्रताप रघुराई, नाथ न कछू मोरि प्रभुताई ।''

While bidding Adieu, I thank you all once again.

NOTES OF CASES SECTION

Short Note

(24)*

U.C. Maheshwari, J

ASHOK KUMAR
Vs.
SMT. MEENA

A. Civil Procedure Code (5 of 1908), Section 100, Accommodation Control Act, M.P. 1961, Section 12(1)(f) - *Concurrent findings of fact - Interference - Permissibility - Held - The concurrent findings on the ground of bona fide genuine requirement enumerated u/s 12(1)(e) & (f) of the Act, being based on appreciation of evidence is finding of facts, the same could not be interfered u/s 100 of CPC.*

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100, स्थान नियंत्रण अधिनियम, म.प्र. 1961, धारा 12(1)(एफ) – तथ्यों के समवर्ती निष्कर्ष – हस्तक्षेप – अनुज्ञेयता – अभिनिर्धारित – अधिनियम की धारा 12 (1)(ई) एवं (एफ) में वर्णित वास्तविक आवश्यकताओं के आधार पर समवर्ती निष्कर्ष, साक्ष्य मूल्यांकन पर आधारित होकर तथ्य का निष्कर्ष है, सि.प्र.सं. की धारा 100 के तहत उसमें हस्तक्षेप नहीं किया जा सकता।

B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) - ***Bona fide requirement*** - *Landlord residing in other town - Can he seek eviction on the ground of bona fide requirement - Held - The landlord, who is residing out side the town of disputed premises on proving his/her bona fide genuine requirement to start the business in such town is entitled to get decree of eviction against the tenant.*

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12 (1)(एफ) – वास्तविक आवश्यकता – अन्य शहर में निवास करने वाला मकान मालिक – क्या वह वास्तविक आवश्यकताओं के आधार पर बेदखली का निवेदन कर सकता है – अभिनिर्धारित – मकान मालिक, जो कि उस शहर से जहां विवादित परिसर स्थित है से अन्यत्र निवास कर रहा है शहर में व्यापार प्रारंभ करने की सद्भाविक आवश्यकता को सिद्ध करके किरायेदार के विरूद्ध बेदखली की डिक्री प्राप्त करने का अधिकारी है।

C. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) - ***Bona fide tequirement*** - *Tenant disputing bona fide requirement on the ground other shops are also available though occupied by other tenants - Permissibility -Held - Court, as rationing authority, cannot insist or direct the plaintiff to get the eviction of some other shop as such the plaintiff is a sole Judge to decide that which shop or premises is suitable and convenient for his/her alleged need.*

ग. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ) – वास्तविक आवश्यकता – किरायेदार द्वारा वास्तविक आवश्यकता को अन्य दुकानों के उपलब्ध होने जिन्हें अन्य किरायेदारों के कब्जे के आधार पर विवादित – अनुज्ञेयता – अभिनिर्धारित – एक राशनिंग प्राधिकारी के रूप में न्यायालय वादी को किसी अन्य दुकान से बेदखली करवाने के लिये दबाव या निर्देश नहीं दे सकता क्योंकि अपनी आवश्यकता हेतु कौन सी दुकान उपयुक्त या सुविधाजनक है यह तय करने का अधिकार सिर्फ वादी को ही है।

Cases referred :

(1995) 6 SCC 580, AIR 1998 SC 2730, AIR 1999 SC 2213, (1999) 6 SCC 222, AIR 1981 SC 1711, 2009(1) MPLJ 343, (2000) 1 SCC 679, 1997(2) JLJ 122, AIR 2008 SC 773, 2009(2) MPLJ 158.

Pranay Verma, for the appellant.

Sankalp Kochar, for the respondent.

***S.A. No.63/2010 (Jabalpur), D/- 16 July, 2010.**

Short Note

*(25)**

S.L. Kochar & S.K. Seth, JJ

CHAMPALAL & ors.

Vs.

STATE OF M.P.

A. Criminal Procedure Code, 1973 (2 of 1974), Section 154 - *FIR* *- FIR is not a substantive piece of evidence and can only be used for corroboration and contradiction to the statements of its author given in Court, but at the same time, its importance cannot be lost sight of because it brings the investigating agency into movement for the purpose of investigation and if it is found that the FIR is a concocted piece of evidence and brought into existence after due deliberation and consultation then further prosecution story becomes suspicious and the Court is required to be very careful in appreciating the evidence of prosecution witnesses.*

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – प्रथम सूचना रिपोर्ट – प्रथम सूचना रिपोर्ट साक्ष्य का सारभूत हिस्सा नहीं है और उसका उपयोग केवल न्यायालय में दिये गये कथनकार के बयानों की संपुष्टि और खंडन करने के लिये किया जा सकता है, परंतु उसी समय उसके महत्व को अनदेखा नहीं किया जा सकता क्योंकि अन्वेषण के प्रयोजन हेतु वह अन्वेषण ऐजेंसी को संचलित करता है और यदि यह पाया जाता है कि प्रथम सूचना रिपोर्ट कूटरचित साक्ष्य है और उसे सम्यक विचार विमर्श तथा परामर्श के पश्चात् अस्तित्व में लाया गया है तब आगे अभियोजन कथा संशयास्पद हो जाती है और न्यायालय से अपेक्षित है कि अभियोजन साक्षियों की साक्ष्य का अधिमूल्यन बहुत सावधानी से करे।

B. Evidence Act (1 of 1872), Section 3, Penal Code, 1860, Sections 307, 148, 302 & 326 r/w 149 - *Appreciation of evidence - FIR recorded after consultation with complainant party and mentioning maximum persons belonging to opposite faction - Number of injuries (3) on person of deceased would be more if 12 persons/accused would have assaulted - Place of incident not clear - Eye-witnesses who are partisan & close relatives of deceased - Witnesses changed the prosecution story time to time - Injuries of 3 accused not explained by prosecution witnesses - Conviction and sentence set aside by giving benefit of doubt - Appeal allowed.*

ख साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड संहिता, 1860 धाराएं 307,

148, 302 व 326 सहपठित 149, – साक्ष्य का अधिमूल्यन – शिकायतकर्ता पक्ष के साथ परामर्श के पश्चात् प्रथम सूचना रिपोर्ट अभिलिखित की गई और विरूद्ध पक्ष के अधिकतम व्यक्तियों को उल्लिखित किया गया – मृतक के शरीर पर चोटों की संख्या (3), अधिक होती यदि 12 व्यक्तियों/अभियुक्तों ने हमला किया होता – घटना का स्थान स्पष्ट नहीं – प्रत्यक्षदर्शी साक्षी जो मृतक के साथी तथा नजदीकी रिश्तेदार हैं – साक्षियों ने अभियोजन कथा को समय–समय पर बदला है – तीन अभियुक्तों की चोंटों को अभियोजन साक्षियों द्वारा स्पष्ट नहीं किया गया–शंका का लाभ देते हुए दोषसिद्धी और दण्डादेश अपास्त – अपील मंजूर।

Cases referred :

(1999) 9 SCC 525, (2002) 2 SCC 755, (2004) 12 SCC 311, (2004) 9 SCC 193, (2005) 5 SCC 258, (2005) 5 SCC 272, AIR 1973 SC 501, AIR 1980 SC 638, (2008) 3 SCC 709, (2008) 14 SCC 614, (2009) 2 SCC (Cri) 260, (2003) 9 SCC 426.

Jai Singh with *Raghuvir Singh*, for the appellants.

G. Desai, Dy.A.G., for the respondent/State.

***Cr.A. No.451/2000 (Indore), D/- 13 April, 2010.**

Short Note

*(26)**

Shantanu Kemkar & S.K. Seth, JJ

CHHENU @ YUNUS

Vs.

STATE OF M.P. & anr.

A. National Security Act (65 of 1980), Section 3(2) - ***Detention of a person already in detention - Whether warranted - Held - A detention order can validly be passed if the authority is aware of the fact that he is actually in custody - If he has reason to believe on the basis of the reliable material that there is a possibility of his being released on bail and that on being so released, the detenu would in all probabilities indulge in prejudicial activities.***

क. राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(2) – पूर्व से निरुद्ध व्यक्ति का निरोध – क्या न्यायसगंत है – अभिनिर्धारित – निरूद्ध किये जाने का आदेश वैध रूप में तभी पारित किया जा सकता है जबकि प्राधिकारी को उसके वास्तव में अभिरक्षा में होने का तथ्य ज्ञात हो – यदि उसे यह विश्वास करने का कारण हो कि विश्वसनीय तथ्यों के आधार पर उसे जमानत पर छोड़े जाने की संभावना है तथा इस प्रकार रिहा होने पर बन्दी व्यक्ति के अवैध गतिविधियों में आलिप्त होने की सभी संभावनायें है।

B. National Security Act (65 of 1980), Section 3(2) - ***Detention of a person already in detention - Whether the detaining authority was aware of the fact that the detenu on being suspected of having committed a serious offence, was already in jail - Held - There is nothing to indicate the awareness of the detaining authority that detenu was already in jail and yet the impugned detention order was made - This clearly exhibits non-application of mind - Order quashed.***

ख. राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(2) – पूर्व से निरुद्ध व्यक्ति का निरोध – क्या निरोध प्राधिकारी को इस बात का ज्ञान था कि निरुद्ध व्यक्ति किसी गम्भीर अपराध को किये जाने के संदेह पर पूर्व से जेल में था – अभिनिर्धारित – निरोध प्राधिकारी के इस ज्ञान को उपदर्शित करने के लिए कुछ नहीं है कि निरुद्ध व्यक्ति पहिले से जेल में था और फिर भी आक्षेपित निरोध का आदेश किया गया था – यह स्पष्टतः बुद्धि का उपयोग न किये जाने का द्योतक है – आदेश निरस्त।

Cases referred :

AIR 1964 SC 334, (1990) 3 SCC 309, (1989) 4 SCC 418, AIR 1990 SC 1196, AIR 1991 SC 1640, (1992) 1 SCC 1, JT 1994(1) SC 350, (1982) 2 SCC 43, AIR 1982 SC 1543.

Rahul Vijayvargiya, for the petitioner.

A.S. Kutumbale, Addl.A.G., for the respondents.

***W.P. No.5601/2010 (Indore), D/- 5 July, 2010.**

Short Note

(27)*

Rajendra Menon, J

H.L. TANEJA (DECEASED) THROUGH L.RS. & ors.

Vs.

JITENDRA MOHAN KHUNGAR & ors.

A. Companies Act (1 of 1956), Section 10 - *Power of the High Court - Held - While exercising limited jurisdiction in a proceeding u/s 10-F of the Act the High Court does not sit over the order of the Company Law Board, as if it is exercising appellate jurisdiction - The High Court is only required to consider substantial questions of law.*

क. कम्पनी अधिनियम (1956 का 1), धारा 10 – उच्च न्यायालय की शक्ति – अभिनिर्धारित – अधिनियम की धारा 10–एफ के अन्तर्गत कार्यवाही के सम्बंध में सीमित अधिकारिता का प्रयोग करते हुये उच्च न्यायालय कम्पनी लॉ बोर्ड के आदेश पर अपने अपीलीय क्षेत्राधिकार/अधिकारिता का प्रयोग करते हुये निर्णय पारित करने का अधिकार नहीं रखता है – उच्च न्यायालय को केवल सारभूत विधिक प्रश्नों पर विचार करने की आवश्यकता है।

B. Companies Act (1 of 1956), Section 399 - Right to apply u/ss. 397 & 398 - *Who can apply - Held - In the case of a company having a share capital not less than 100 members of the company or not less than one-tenth of the total number of the members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company can institute the proceedings.*

ख. कम्पनी अधिनियम (1956 का 1), धारा 399 – धारा 397 तथा 398 के अन्तर्गत आवेदन करने का अधिकार – कौन आवेदन कर सकता है – अभिनिर्धारित –

किसी ऐसी कम्पनी जिसमें कम से कम 100 सदस्य अथवा कुल सदस्य संख्या के 1/10 सदस्यगण जो भी कम हो की अंश पूंजी हो, अथवा कोई सदस्य या सदस्यगण कम्पनी की जारी अंशपूंजी का कम से कम 1/10 हिस्सा धारण करते हों, कार्यवाही संस्थित कर सकते है।

C. Companies Act (1 of 1956) - ***Applicability of Limitation Act before Company Law Board - Held - The Company Law Board is a quasi-judicial authority and, therefore, the provisions of S. 137 of the Limitation Act will not apply.***

ग. कम्पनी अधिनियम (1956 का 1) – कम्पनी लॉ बोर्ड के समक्ष परिसीमा अधिनियम की प्रयोज्यता – अभिनिर्धारित – कम्पनी ला बोर्ड एक अर्धन्यायिक प्राधिकारी है अतएव, परिसीमा अधिनियम की धारा 137 के प्रावधान लागू नहीं होंगे।

D. Companies Act (1 of 1956) - ***Act of oppression or mis-management - Challenge - Delay - Held - When a case of mis-management or apprehension of oppression' and mis-management of a company u/s 397/ 398 is alleged, the same would be a continuous act, which may continue up to the date of presentation of a petition or till the damage caused by the act of oppression or mis- management is not rectified or made good.***

घ. कम्पनी अधिनियम (1956 का 1) – उत्पीड़न कृत्य अथवा कुप्रबधंन – चुनौती –विलम्ब – अभिनिर्धारित – धारा 397/398 के तहत जब किसी कम्पनी द्वारा कुप्रबंधन अथवा उत्पीड़न का अंदेशा तथा कम्पनी में कुप्रबंधन अभिकथित हो, वह निरन्तर कृत्य होगा, जो कि याचिका दायर करने की तारीख अथवा जबतक कि उत्पीड़क अथवा कुप्रबधंकीय कृत्य से कारित क्षति की पूर्ति होने तक रहेगा।

E. Arbitration and Conciliation Act (26 of 1996), Section 8 - ***Power to refer parties to arbitration where there is an arbitration agreement - Meaning - Held - The section contemplates seeking reference to an arbitral tribunal, for which the dispute has to be between the parties to the arbitral agreement and the dispute should be with regard to execution of the agreement, wherein the arbitration agreement is incorporated.***

ङ. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 8 – जहां मध्यस्थता अनुबंध होने पर मध्यस्थता के पक्षकारों को निर्दिष्ट करने की शक्ति – अर्थ –अभिनिर्धारित –इस धारा का उद्देश्य मध्यस्थता अनुबंध के पक्षकारों के मध्य जिस विवाद के सम्बंध में मध्यस्थता अनुबंध समाविष्ट है उसके निष्पादन संबंधी विवाद को मध्यस्थता अधिकरण को निर्दिष्ट करना है।

Cases referred :

AIR 1960 Gujrat 96, AIR 1965 SC 1535, 1975 MPLJ 857, AIR 1981 SC 2128, 1985 MPLJ 160, AIR 1995 SC 1205, AIR 2005 SC 809, AIR 1970 SC 209, AIR 1985 SC 1279, 1992(73) Company Cases 572, 1996(87) Company Cases 398, (2008) 3 SCC 363, AIR 1965 SC 1535, AIR 1981 SC 1298, AIR 2008 SC 1738, V 128 (2006) DLT 425, 2009(152) Company Cases 75 (BOM.), (TN) 2009 Page 2194, V 123 (2005) DLT 114, (2009) 152 Company Cases 637 (Bom.), (2003)

5 SCC 531, AIR 1990 Delhi 32, (2008) 3 SCC 363, AIR 2008 SC 1738, (2008) 6 SCC 750, (2010) 99 SCL 303 (MP).

Ajay Mishra with *P. Tripathi,* for the appellants.
Sankalp Kochar, for the respondent Nos.1 to 3.
None, for other respondents.

***M.A. Com. No.1/2006 (Jabalpur), D/- 19.05.2010.**

Short Note

*(28)**

S.C. Sharma, J

KANSHIRAM KUSHWAHA
Vs.
CHIEF CONSERVATOR Of FOREST & anr.

A. Kashtha Chiran (Viniyam) Adhiniyam, M.P. (13 of 1984) - ***Renewal of license - Denial - When not proper - The petitioner's licence was not renewed for the reason that his name was not included in the list sent to the Apex Court in the case of T.N. Godawarman - The petitioner was very much having a licence when the order was passed by the Apex Court and, therefore, mistake was on the part of the officers in not forwarding the name of the petitioner pursuant to order passed by the Hon'ble Supreme Court - Petitioner cannot be victimised for a mistake/lapses committed by the D.F.O. or by the Conservator of Forest.***

क. काष्ठ चिरान (विनियम) अधिनियम, म.प्र. (1984 का 13) – लाइसेंस का नवीनीकरण – अस्वीकार – कब उचित नहीं – याचिकाकर्ता का लाइसेंस इस कारण से नवीनीकृत नहीं किया गया क्योंकि उसका नाम, टी.एन. गोदावर्मन के प्रकरण के सम्बंध में उच्चतम न्यायालय को प्रेषित की गयी सूची में वर्णित नहीं था – जब शीर्ष न्यायालय द्वारा आदेश पारित किया गया उस समय याचिकाकर्ता लाइसेंस धारण करता था, माननीय उच्चतम न्यायालय द्वारा पारित आदेश के संदर्भ में याचिकाकर्ता का नाम न भेजना, अधिकारियों की त्रुटि थी – संभागीय वन अधिकारी अथवा वन संरक्षक द्वारा की गयी त्रुटियों की वजह से याचिकाकर्ता को नुकसान नहीं पहुँचाया जा सकता।

B. Kashtha Chiran (Viniyam) Adhiniyam, M.P. (13 of 1984) - ***Renewal of license - Denial - When not proper - It is evident that the Apex Court has not issued any order or direction to that effect that existing license should not be renewed and, therefore, the respondents cannot reject the case of the petitioner for grant of renewal on the ground that his name was not included in the list forwarded to the Apex Court.***

ख. काष्ठ चिरान (विनियम) अधिनियम, म.प्र. (1984 का 13) – लाइसेंस का नवीनीकरण – अस्वीकार – कब उचित नहीं – यह स्पष्ट है कि शीर्ष न्यायालय ने इस आशय के कोई आदेश या निर्देश नहीं जारी किये कि वर्तमान लाइसेंस का नवीनीकरण न किया जाय

अतएव, प्रत्यर्थी याचिकाकर्ता द्वारा लाइसेंस नवीनीकरण हेतु प्रस्तुत प्रकरण को इस आधार पर कि उसका नाम शीर्ष न्यायालय को प्रेषित सूची में सम्मिलित नहीं है, निरस्त नहीं किया जा सकता है।

Cases referred :

(1997) 2 SCC 271, (1997) 2 SCC 267.

Subodh Choudhary, for the petitioner.

Vivek Phadke, G.A., for the respondents.

***W.P. No.7009/2009 (Indore), D/- 29 June, 2010.**

Short Note

*(29)**

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

KRISHI UPAJ MANDI SAMITI & anr.

Vs.

M/S AGRO SOLVENT PRODUCTS (P) LTD.

A. Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Section 19 - *Power to levy market fee - Held - If the goods are used for manufacturing purpose as raw material, therefore, the question of passing on the tax liability to the consumer would not arise.*

क. कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धारा 19 – मण्डी शुल्क उद्ग्रहीत करने की शक्ति – अभिनिर्धारित – यदि वस्तुओं का उपयोग निर्माण हेतु कच्चे माल के रूप मे होता है, इसलिए कर दायित्व उपभोक्ता पर डाले जाने का प्रश्न नहीं उठता।

B. Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Section 19 - *Power to levy market fee - Unjust enrichment - Learned Single Judge held that goods which are being used as raw material for manufacturing purpose would not be liable to pay market fees but declined refund of the tax already levied on the principle of unjust enrichment - Held - The principle of doctrine of unjust enrichment is not applicable where the goods are used as raw material for manufacturing and the company is liable for refund of the money collected as Mandi fee by the Mandi.* (Para 15)

ख. कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धारा 19 – मण्डी शुल्क उद्ग्रहीत करने की शक्ति – अनुचित संवृद्धि – विद्वान एकल न्यायाधीश ने यह अभिनिर्धारित किया कि वस्तुएँ, जिनका उपयोग निर्माण के प्रयोजन हेतु कच्चे माल के रूप मे किया जा रहा है, मण्डी शुल्क का भुगतान करने के लिए दायी नहीं होंगी, लेकिन पूर्व मे लगाये गये कर की वापसी अनुचित संवृद्धि के सिद्धांत के आधार पर मनाही की – अभिनिर्धारित – अनुचित संवृद्धि का सिद्धांत वहाँ लागू नहीं होता है, जहां वस्तुओं का उपयोग निर्माण हेतु कच्चे माल के रूप मे होता है तथा कम्पनी मण्डी द्वारा मण्डी शुल्क के रूप मे प्राप्त धन की वापसी के लिए दायी है।

Cases referred :

(2001) 3 SCC 135, (1984) 4 SCC 516, AIR 1992 SC 224, (2006) 7 SCC 322, (2003) 2 SCC 494, (1999) 9 SCC 162, (2007) 4 SCC 155, (2007) 7 SCC 39, AIR

1989 SC 627, (2000) 6 SCC 264, 2000(1) JLJ 391, (1998) 8 SCC 250, AIR 1967 SC 1895, (2002) 3 SCC 135, (1984) 4 SCC 516, AIR 1967 SC 1895, 2006 AIR SCW 6017, (1998) 6 SCC 250, (1988) 1 SCC 401, (2001) 2 SCC 549, 1993 Supp. (1) SCC 361.

S.P. Jain & Vivek Jain, for the appellants.
Nandita Dubey, for the respondent.

***W.A. No.610/2007 (Gwalior), D/- 14 July, 2010.**

Short Note
(30)*

J.K. Maheshwari, J

MEENA RATHORE (SMT.)
Vs.
CBI, ACB, Bhopal

A. Penal Code (45 of 1860), Sections 177, 181 & 420 - *Cheating - Society is the owner of the land - At the time of submitting application for approval to AICTE application to obtain loan was submitted to Bank and loan was sanctioned to the extent of 7.5 cores for construction of building - In undertaking and affidavit, applicant did not disclose that the land is mortgaged with Bank - Held - Property can be mortgaged at a later date for the purposes of raising finance for development of technical institution - Affidavit loaded on web portal contrary to approval process - Intention of AICTE is not that land cannot be mortgaged - No offence u/s 420 made out as intention of dishonestly inducing the delivery of property with a view to cause damage or harm to that person in body, mind, reputation or property is missing.*

क. दण्ड संहिता (1860 का 45), धाराएँ 177, 181 व 420 – छल – सोसायटी भूमि की स्वामी है – अनुमोदन के लिए एआईसीटीई को आवेदन प्रस्तुत करते समय ऋण प्राप्त करने के लिए बैंक को आवेदन प्रस्तुत किया और भवन के निर्माण के लिए 7.5 करोड की सीमा तक ऋण मंजूर किया गया – परिवचन तथा शपथपत्र में आवेदक ने यह प्रकट नहीं किया कि भूमि बैंक को बंधक है – अभिनिर्धारित – तकनीकी संस्था के विकास के लिए वित्त जुटाने के प्रयोजनों के लिए संपत्ति को बाद के दिनांक को बंधक किया जा सकता है – वेब पोर्टल पर भरा गया शपथपत्र अनुमोदन प्रक्रिया के विपरीत है – एआईसीटीई का यह आशय नहीं है कि भूमि बंधक नहीं हो सकती – चूंकि उस व्यक्ति के शरीर, मन, मान या संपत्ति को क्षति अथवा हानि कारित करने के उद्देश्य से बेईमानी पूर्वक संपत्ति परिदत्त करने के लिए उत्प्रेरित करने का आशय अनुपस्थित है, धारा 420 के अंतर्गत कोई अपराध नहीं बनता।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 482 - *Quashing of complaint - Where a statute provide a thing to be done in particular manner for a particular remedy, then appropriate action should be taken thereunder - If AICTE is of opinion that affidavit is false, it should have taken action for cancellation of approval of the year 2009 - Registration of offence by CBI unwarranted.*

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – परिवाद अभिखंडित करना – जहाँ कोई कानून उपबंधित करता है कि किसी विशिष्ट उपचार के लिये कोई कार्य किसी विशिष्ट ढंग से किया जाए, तब उसके अधीन उचित कार्यवाही करनी चाहिये – यदि एआईसीटीई का यह मत है कि शपथपत्र मिथ्या है तो उसे वर्ष 2009 के अनुमोदन के रद्दकरण की कार्यवाही करनी चाहिये थी – सीबीआई द्वारा अपराध दर्ज करना अनुचित।

C. Penal Code (45 of 1860), Sections 177 & 181, Criminal Procedure Code, 1973, Sections 2(d) & 195 - ***Complaint - Challan filed by CBI on some information of somebody in Court would not partake the character of a complaint as provided under S. 2(d) - Court cannot take cognizance of complaint filed by CBI, until and unless oral or written complaint by public servant of AICTE is made.***

ग. दण्ड संहिता (1860 का 45), धाराएँ 177 व 181, दण्ड प्रक्रिया संहिता, 1973, धाराएँ 2(डी) व 195 – परिवाद – किसी व्यक्ति की सूचना पर सीबीआई द्वारा न्यायालय में प्रस्तुत किया गया चालान, परिवाद के लक्षणों में भाग नहीं लेगा जैसा कि धारा 2(डी) के अन्तर्गत उपबंधित है – न्यायालय सीबीआई द्वारा प्रस्तुत परिवाद का संज्ञान नहीं ले सकता जब तक कि एआईसीटीई के लोक सेवक द्वारा मौखिक अथवा लिखित परिवाद नहीं किया जाता।

Cases referred :

1992 Supp.(1) SCC 335, 2009(2) MPLJ (Cri) 694, (2007) 10 SCC 110, M.Cr.C. No.4725/2007 decided on 15.09.2008, AIR 1969 SC 355, (2004) 1 SCC 691, (2009) 1 SCC 706.

Sudha Shrivastava, for the applicant.

Vivek Sharan, A.S.G. with *Amit K. Upadhyaya,* for the non-applicant/ CBI with *Reena Sharma,* Inspector,CBI, Bhopal.

***M.Cr.C. No.2447/2010 (Indore), D/- 28.04.2010.**

Short Note

(31)*

R.S. Jha, J

MUKESH TRIPATHI

Vs.

REGISTRAR GENERAL & anr.

Service Law - ***Recruitment of Clerk-Steno / Assistant Grade-III - Rejection of application forms of candidates on ground that the certificates of diploma have not been issued by a university recognised by UGC or by DOEACC or by a Govt. Polytechnic College - Held - It is clear and apparent that none of the certificates have been issued by the affiliating institutions i.e. the concerned universities, the DOEACC or the Government and, therefore, none of them conform to the requirement - No fault in rejection of the petitioners' forms - Petition dismissed.*** ILR (2010) MP 1050 (ref.)

सेवा विधि – क्लर्क–स्टेनो/सहायक ग्रेड–तीन की भर्ती – अभ्यर्थियों के आवेदन फार्म इस आधार पर अस्वीकार किये गये कि डिप्लोमा प्रमाण पत्र यूजीसी द्वारा मान्यता प्राप्त

विश्वविद्यालय द्वारा या डीओईएसीसी द्वारा या शासकीय पॉलीटेक्निक महाविद्यालय द्वारा जारी नहीं किये गये – अभिनिर्धारित – यह स्पष्ट और दृश्यमान है कि कोई भी प्रमाण पत्र संबद्ध संस्थान् अर्थात संबंधित विश्वविद्यालय, डीओईएसीसी या सरकार द्वारा जारी नहीं किया गया है, इसलिए उनमें से कोई भी अपेक्षा के अनुरूप नहीं होता – याचियों के फार्म अस्वीकार करने मे कोई त्रुटि नहीं – याचिका खारिज. ILR (2010) MP 1050 (संदर्भित).

Surendra Mishra, for the petitioner.

V.S. Shroti with *A.P. Shroti,* for the respondent No.1.

***W.P. No.3755/2010 (Jabalpur), D/- 30 April, 2010.**

Short Note
(32)*

Piyush Mathur, J

PISTA DEVI GOYAL (SMT.)
Vs.
BRIJ MOHAN GARG

A. Accommodation Control Act, M.P. (41 of 1961), Section 23-A(b) - *A widow, who is a co-owner and landlady of the premises can in her own right initiate proceedings for eviction u/s 23-A(b), without joining other co-owners/ co-landlords as party to the proceedings, on being the owner of the property for commencing business of any of her major sons, even when her major sons, who are also the co-owners/co-landlords have not been joined as party to the proceedings and it would not affect the locus of the landlady or the maintainability of the proceedings - The consent of the other co-owners for instituting the proceedings for eviction of the tenant would not be required and the bona fide requirement to evict the tenant could be established without even suggesting for the consent of co-owner about the institution of the eviction proceedings.*

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23–ए(बी) – कोई विधवा, जो भवन की सहस्वामिनी और भूस्वामिनी है, सम्पत्ति की स्वामी होने पर अन्य सह–स्वामियों/सह–भूस्वामियों को कार्यवाहियों के पक्षकार के रूप में जोड़े बिना, अपने निज के अधिकार से उसके वयस्क पुत्रों में से किसी का कारबार प्रारम्भ करने के लिए धारा 23–ए(बी) के अन्तर्गत बेदखली के लिए कार्यवाहियाँ प्रारम्भ कर सकती है, जब उसके वयस्क पुत्रों, जो सह–स्वामी/सह–भूस्वामी भी हैं, को भी कार्यवाहियों के पक्षकार के रूप में नहीं जोड़ा गया हो और यह भूस्वामिनी के स्थान या कार्यवाहियों की पोषणीयता को प्रभावित नहीं करेगा – बेदखली की कार्यवाहियाँ संस्थित करने के लिए अन्य सह–स्वामियों की सहमति अपेक्षित नहीं होगी और किरायेदार को बेदखल करने की वास्तविक आवश्यकता बेदखली की कार्यवाहियाँ संस्थित करने के बारे में सह–स्वामी की सहमति के लिए सुझाव दिये बिना भी साबित की जा सकती थी।

B. Accommodation Control Act, M.P. (41 of 1961), Section 23-A(b) - *The presence and/or absence of other co-owners would be of no use or rather it would be inconsequential for all the purposes, because it would not alter the nature of claim preferred by the widow landlady and would not take away the proceedings beyond of the scope of S.23-A(b).*

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23–ए(बी) – अन्य सह–स्वामियों की उपस्थिति और/अथवा अनुपस्थिति किसी उपयोग की नहीं होगी बल्कि यह सभी प्रयोजनों के लिए महत्वहीन होगी, क्योंकि यह विधवा भूस्वामिनी द्वारा पेश दावे की प्रकृति को परिवर्तित नहीं करती और कार्यवाहियों को धारा 23–ए(बी) के क्षेत्र के परे नहीं ले जाती।

Cases referred :

AIR 1976 SC 2335, 1989 MPRCJ 88, 1990 JLJ 97 (FB), (2006) 2 SCC 724, AIR 2001 MP 235, (1976) 4 SCC 184, (1994) 4 SCC 250, (2002) 6 SCC 16, (2008) 5 SCC 449, (2009) 10 SCC 223.

Kamal Jain, for the Applicant.

Arvind Dudawat, for the non-applicant.

***C.R. No.151/2006 (Gwalior), D/- 6 April, 2010.**

Short Note

(33)*

Piyush Mathur, J

PYARELAL

Vs.

STATE OF M.P. & ors.

A. Limitation Act (36 of 1963), Section 5 - *Condonation of delay - Applicability for State & individual litigant - Held - The Law of Limitation makes no distinction amongst the State and the citizens of this country - The State has to approach the Court well within the prescribed period of limitation - When the "State" as an abstract entity prays for condonation of delay, the requirement of strict proof sometimes leads to miscarriage of justice.*

क. परिसीमा अधिनियम (1963 का 36), धारा 5 – विलंब के लिए माफी – राज्य एवं व्यक्तिगत वादी के लिये प्रयोज्यता – अभिनिर्धारित – परिसीमा की विधि राज्य और इस राष्ट्र के नागरिकों के मध्य कोई विभेद नहीं करती – परिसीमा की विहित अवधि के भीतर राज्य को न्यायालय के पास जाना चाहिए – जब "राज्य" अमुर्त हस्ती के तौर पर विलंब के लिये माफी की प्रार्थना करता है तब कड़े सबूत की मांग के परिणामस्वरूप कभी कभी न्यायहानि होती है।

B. Limitation Act (36 of 1963), Section 5 - *Condonation of delay - Sufficient cause - Duty of the Court - Held - Every Court should remain cautious at the time of deciding an application seeking condonation of delay for ascertaining as to whether the delay was caused as a result of skillful management of some individuals, with a view to commit public mischief, for capturing the public property and when the Court feels satisfied, then it can ascertain the sufficiency of the cause, by ignoring the length of the delay and condone it, in peculiar circumstance of each case.*

ख. परिसीमा अधिनियम (1963 का 36), धारा 5 – विलंब के लिय माफी – पर्याप्त कारण – न्यायालय का कर्तव्य – अभिनिर्धारित – विलंब के लिये माफी के आवेदन का निराकरण करते समय प्रत्येक न्यायालय को सतर्क रहना चाहिये यह निश्चित करने की क्या लोक संपत्ति हस्तगत करने हेतु लोक रिष्टि कारित करने के लिए कुछ व्यक्तियों के कुशल प्रबंध के

परिणामस्वरूप विलंब कारित हुआ है और जब न्यायालय की संतुष्टि होती है तब प्रत्येक मामले की विशिष्ट परिस्थितियों में विलंब की समयावधि की ओर ध्यान दिये बिना और उसे माफी देकर, वह कारणों की पर्याप्तता निश्चित कर सकता है।

C. Limitation Act (36 of 1963), Section 5 - *Condonation of delay - No Question of law involved - Proper course - Held - The Court has to concentrate on the importance of the question of law involved in a matter, while considering the prayer for grant of condonation of delay because when the State approaches the Court after a long lapse of delay without there being any important question of law involved in the matter, no fruitful purpose could be served in condoning the delay.*

ग. परिसीमा अधिनियम (1963 का 36), धारा 5 – विलंब के लिए माफी – विधि का कोई प्रश्न अंतर्ग्रस्त नहीं – उचित प्रक्रिया – अभिनिर्धारित – विलंब के लिए माफी प्रदान करने की प्रार्थना पर विचार करते समय मामले में अंतर्ग्रस्त विधि के प्रश्न के महत्व पर न्यायालय को ध्यान केन्द्रित करना होगा क्योंकि जब विधि के किसी महत्वपूर्ण प्रश्न के अंतर्ग्रस्त न होते हुये, विलंब की लंबी समयावधि के पश्चात् जब राज्य न्यायालय के पास आता है तब विलंब के लिये माफी देने से कोई सफलतापूर्ण प्रयोजन नहीं निकलेगा।

D. Limitation Act (36 of 1963), Section 5 - *Condonation of delay - No element of fraud or negligence of State Officials - Proper course - Held - Even when there exist no material to find that there was either a fraud played or with the connivance of the State Officials a fraud was committed in causing delay, due to deliberate negligence or as a result of master-craftsmanship of some employees of Government - A decision on merits could be arrived at only after condoning the delay and hearing the appeal on merits.*

घ परिसीमा अधिनियम (1963 का 36), धारा 5 – विलंब के लिए माफी – राज्य कर्मचारियों का कपट अथवा उपेक्षा का कोई तत्व नहीं – उचित प्रक्रिया – अभिनिर्धारित – तब भी जब कोई तत्व अस्तित्व में नहीं यह मानने के लिये कि विलंब कारित करने में या तो कपट खेला गया अथवा राज्य कर्मचारियों की मौनानुमति से कपट करित किया गया, जानबूझकर उपेक्षा के कारण अथवा सरकार के कुछ कर्मचारियों के विशेषज्ञ कला कौशल के परिणामस्वरूप – केवल विलंब के लिये माफी देने और अपील की गुणदोषों पर सुनवाई के पश्चात् ही गुणदोषों पर निर्णय तक पहुँचा जा सकता है।

Cases referred :

(2000) 1 MP 113, S.A. No.166/2007 decided on 12.09.2008, (1996) 10 SCC 634, (2008) 17 SCC 448, (2008) 14 SCC 582, (2009) 13 SCC 199.

U.K. Jain & A.K. Jain, for the Applicant.

Praveen Newaskar, Dy.G.A., for the non-applicant No.1/State.

***C.R. No.146/2006 (Gwalior), D/- 28 April, 2010.**

NOTES OF CASES SECTION

Short Note

(34)*

Shantanu Kemkar, J

RADHESHYAM

Vs.

UNION OF INDIA & ors.

A. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Narcotic Drugs and Psychotropic Substance Rules, 1985 - *Cancellation of license - Petitioner's license for cultivation of opium poppy cancelled as he was not eligible as per the General Conditions of Contract - Held - The general conditions for grant of license have got force of law and it govern the eligibility test for grant of license.*

क स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61) – स्वापक औषधि और मनःप्रभावी पदार्थ नियम, 1985 – अनुज्ञप्ति का निरस्तीकरण – याची की अफीम की खेती करने की अनुज्ञप्ति निरस्त की गई क्योंकि वह संविदा की सामान्य शर्तो के अनुसार पात्र नहीं था – अभिनिर्धारित – अनुज्ञप्ति प्रदान करने के लिए सामान्य शर्तों को विधि की शक्ति प्राप्त है और अनुज्ञप्ति प्रदान करने के लिए वह पात्रता कसौटी को शासित करता है।

B. Promissory Estoppel - *Grant of license for cultivation of opium poppy - Petitioner alleged that once the license has been granted it cannot be cancelled on the principle of promissory Estoppel - Held - When the grant of license to the petitioner is illegal on the ground of their ineligibility under the law - The principle of promissory estoppel has no application in such cases.*

ख. वचन विबंध – अफीम की खेती करने के लिए अनुज्ञप्ति देना – याची का अभिकथन कि एक बार अनुज्ञप्ति प्रदान करने के बाद उसे वचन विबंध के सिद्धांत पर निरस्त नहीं किया जा सकता – अभिनिर्धारित – जब विधि के अधीन उनकी अपात्रता के आधार पर याचियों को अनुज्ञप्ति प्रदान करना अवैध है – वचन विबंध का सिद्धांत ऐसे मामलों मे लागू नहीं होगा।

C. Constitution, Article 226 - *Public policy - Judicial review - Held - It is not open for the Courts to interfere into the conditions of policy - What condition of the policy would be best suited is not for the Courts to decide but it is in the domain and prerogative of the State to fix and to change its policies from time to time in changing circumstances.*

ग संविधान, अनुच्छेद 226–लोकनीति– न्यायिक पुनर्विलोकन – अभिनिर्धारित – नीति की शर्तो मे न्यायालय हस्तक्षेप नहीं कर सकते हैं – नीति की कौन सी शर्त सबसे उचित होगी यह न्यायालय निर्धारित नहीं करेगा परन्तु बदलती परिस्थितियों मे समय समय पर नीतियां निश्चित करना और बदलना राज्य के अधिकारी क्षेत्र तथा परमाधिकार मे है।

D. Constitution, Article 226 - *Public policy - Judicial review - Held -It is neither the domain of the Court nor within the scope of judicial review to embark upon an enquiry whether a particular public policy is wise or a better public policy can be evolved - The Courts would not be inclined to*

strike down the policy at the behest of the petitioner merely because it has been urged that another policy would have been fairer, wiser or more scientific or logical.

घ. संविधान, अनुच्छेद 226– लोकनीति–न्यायिक पुनर्विलोकन – अभिनिर्धारित – यह न्यायालय के न तो अधिकार क्षेत्र मे है और न ही न्यायिक पुनर्विलोकन की परिधि मे कि वह कोई जांच आरंभ करे कि क्या कोई विशिष्ट लोक नीति विवेकपूर्ण है अथवा बेहतर लोकनीति विकसित की जा सकती है – याची के लिए न्यायालय नीति खंडित करना नही चाहेगा मात्र इसलिए कि यह अनुरोध किया गया है कि अन्य नीति ज्यादा निष्पक्ष, विवेकपूर्ण या अधिक वैज्ञानिक अथवा तर्कपूर्ण हो सकता था।

E. Constitution, Article 226 - *Public policy - Judicial review - Held - The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizen or is opposed to the provisions of Constitution or any statutory provision or manifestly, arbitrary Courts cannot interfere with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available.*

ङ. संविधान, अनुच्छेद 226–लोकनीति– न्यायिक पुनर्विलोकन – अभिनिर्धारित – सरकार की नीति का परीक्षण करते समय न्यायिक पुनर्विलोकन की विषय सीमा यह जांच करने की है कि क्या यह नागरिक के मूल अधिकारों का उल्लंघन करती है अथवा संविधान या किसी परिनियम के प्रावधानों के विरूद्ध है अथवा न्यायालय स्पष्टतः मनमानेपूर्ण तरीके से नीति में हस्तक्षेप नहीं करेगी इस आधार पर कि यह त्रुटिपूर्ण है अथवा एक बेहतर, उचित या विवेकपूर्ण विकल्प उपलब्ध है।

Cases referred :

AIR 1979 SC 621, (1998) 4 SCC 117, (2004) 9 SCC 362, (2007) 4 SCC 737, (2001) 3 SCC 635, (1997) 9 SCC 495.

G.M. Chaphekar with *Subodh Abhyankar, Vivek Dalal, Akash Sharma, R.R. Trivedi, S.R. Porwal, P.R. Bhatnagar, Manoj Manav, Archana Kher, A.K. Saraswat, D.S. Jhala,* for the petitioners.

Girish Desai with *Manoj Soni*, for the respondents.

***W.P. No.1872/2010 (Indore), D/- 1 April, 2010.**

Short Note

(35)*

R.S. Jha, J

RAJESH SINGH
Vs.
STATE OF M.P. & ors.

A. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rules 9(1)(a), 9(2)(a) - *Distinction between - Under Rule 9(1) a Govt. servant may be placed under suspension where a disciplinary proceeding is contemplated or is pending against him or where a case against him in respect of any criminal offence is under investigation, inquiry or trial - Under Rule*

9(2)(a) makes it clear that a Govt. Servant shall be deemed to have been placed under suspension by an order of the appointing authority from the date of his detention, if he is detained in custody for a period exceeding forty-eight hours.

क सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 9(1)(ए), 9(2)(ए) – दोनों के मध्य विभेद – नियम 9(1) के अंतर्गत शासकीय सेवक को निलंबन के अधीन रखा जा सकता है जहाँ उसके विरूद्ध अनुशासनात्मक कार्यवाही अनुध्यात की जाती है अथवा लंबित है अथवा जहाँ उसके विरूद्ध किसी अपराध से संबंधित कोई मामला अन्वेषण, जाँच या विचारण के अधीन है – नियम 9(2)(ए) के अंतर्गत यह स्पष्ट है कि शासकीय सेवक को निरोध के दिनांक से नियोक्ता प्राधिकारी के आदेश द्वारा निलंबन के अधीन माना जावेगा यदि उसे अड़तालीस घण्टों से अधिक की कालावधि के लिए निरोध मे रखा जाता है।

B. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rules 9(1)(a), 9(2-a) - *The employee/petitioner placed under suspension on account of Rule 9(2-a) and not under Rule 9(1)(a) - Issuance of charge-sheet beyond 45 days would have no effect or impact on his order of suspension which would continue until modified or revoked by the competent authority.*

ख. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 9(1)(ए), 9(2)(ए) – कर्मचारी/याची को नियम 9(2)(ए) के अंतर्गत निलंबन के अधीन रखा गया न कि नियम 9(1)(ए) के अंतर्गत – 45 दिनों के बाद आरोप पत्र जारी किये जाने का उसके निलंबन के आदेश पर कोई प्रभाव अथवा समाघात नहीं होगा जो सक्षम प्राधिकारी द्वारा परिवर्तित अथवा वापस लिये जाने तक जारी रहेगा।

Ashok Lalwani, for the petitioner.
Sudhir K. Shrivastava, G.A., for the respondent/State.

***W.P. No.3906/2009 (Jabalpur), D/- 9 July, 2010.**

Short Note
(36)*

P.K. Jaiswal, J

SATYAPAL G. PURSWANI
Vs.
CENTRAL BANK OF INDIA & ors.

A. Service Law - *Disciplinary Enquiry - Scope of judicial review - Held - Power of judicial review available to the Court under the Constitution takes in its stride domestic enquiry as well and it can interfere with the conclusions reached therein if there is no evidence to support the findings or the findings recorded were such as could not have been reached by an ordinary prudent man or the findings were perverse or made at the dictates of the superior authority.*

क. सेवा विधि – अनुशासनात्मक जाँच – न्यायिक पुनर्विलोकन की व्याप्ति – अभिनिर्धारित – संविधान के अन्तर्गत न्यायालय को उपलब्ध न्यायिक पुनर्विलोकन की शक्ति के साथ

आन्तरिक जाँच की भी शक्ति है और वह उसमें दिये निष्कर्षों में हस्तक्षेप कर सकता है यदि निष्कर्षों का समर्थन करने के लिए कोई साक्ष्य न हो या अभिलिखित निष्कर्ष ऐसे थे जिन पर सामान्य प्रज्ञा वाले व्यक्ति द्वारा नहीं पहुँचा जा सकता था या निष्कर्ष विपर्यस्त थे या वरिष्ठ प्राधिकारी के आदेश पर किये गये थे।

B. Service law - ***Disciplinary Enquiry - Quantum of punishment - Scope of interference - Held - The scope of judicial review is limited to the deficiency in the decision making process and not the decision unless the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the Court there is no scope for interference and if the Court comes to the conclusion that the punishment is shockingly disproportionate, it would be appropriate to direct the disciplinary authority or the appellate authority to reconsider the penalty imposed or it may make an exception in rare case and impose appropriate punishment with cogent reasons in support thereof.***

ख. सेवा विधि – अनुशासनात्मक जाँच – दण्ड की मात्रा – हस्तक्षेप की व्याप्ति – अभिनिर्धारित – न्यायिक पुनर्विलोकन की व्याप्ति निर्णयन प्रक्रिया में कमी तक सीमित है न कि निर्णय तक, जब तक कि अनुशासनात्मक प्राधिकारी या अपीलीय प्राधिकारी द्वारा अधिरोपित दण्ड न्यायालय की अंतश्चेतना को आघात न करता हो, हस्तक्षेप की कोई गुंजाईश नहीं है और यदि न्यायालय इस निष्कर्ष पर पहुँचता है कि दण्ड घातक रूप से अनुपातहीन है, यह समुचित होगा कि अनुशासनात्मक प्राधिकारी या अपीलीय प्राधिकारी को निदेशित किया जाए कि अधिरोपित दण्ड पर पुनर्विचार करे या विरल मामले में अपवाद करके तर्कपूर्ण कारणों के साथ उचित दण्ड दे सकता है।

C. Service Law - ***Disciplinary Enquiry - Misconduct of the Bank Officer - What amounts to? - Held - It is no defence available to say that there was no loss or profit resulted in the case when the officer employed acted without authority - The very discipline of an organization more particularly a Bank is dependent upon each of its offices and officers acting and operating within their allotted sphere - Acting beyond once authority is by itself a breach of discipline and a misconduct.***

ग. सेवा विधि – अनुशासनात्मक जाँच – बैंक अधिकारी का अवचार – किससे बनता है ? – अभिनिर्धारित – यह कहने का कोई बचाव उपलब्ध नहीं है कि जब नियुक्त अधिकारी ने बिना प्राधिकार कार्य किया तब उसके परिणामस्वरूप मामले में कोई हानि या लाभ नहीं हुआ – किसी संगठन और विशेष रूप से बैंक का अनुशासन उसके प्रत्येक कार्यालय एवं अधिकारियों पर निर्भर करता है जो उनके आवंटित कार्यक्षेत्र में कार्यरत और संचालित हैं – अपने प्राधिकार के परे कार्य करना अपने आप में अनुशासन का भंग और अवचार है।

Cases referred :

(1987) 4 SCC 611, (2000) 3 SCC 450, (2008) 5 SCC 569, AIR 2008 SC 2862.

Indira Nair with *P. Shankaran*, for the petitioner.

Ajay Mishra with *Rajendra Gupta*, for the respondents.

***W.P. No.13381/2004(S) (Jabalpur), D/- 4 March, 2010.**

NOTES OF CASES SECTION

Short Note

(37)*

Arun Mishra & Brij Kishore Dube, JJ

SMRITI PATEL
Vs.
STATE OF M.P. & ors.

A. Rules of Legal Education, 2008, Rule 28 - ***Age on admission - Common Law Admission Test - Age relaxation - No age relaxation given to OBC candidates - Held - The Bar Council of India has not intended to supersede the condition stipulated by the university aiming for high degree of professional commitment - It has prescribed the maximum age - Criterion laid down by the CLAT cannot be said to adversely impinged upon the standard prescribed by the Bar Council of India.***

क. विधिक शिक्षा नियम, 2008, नियम 28–प्रवेश हेतु आयु –सामान्य विधि प्रवेश परीक्षा – आयुसीमा में छूट – अन्य पिछड़ा वर्ग के अभ्यर्थियों को आयुसीमा में कोई छूट नहीं दी गयी – अभिनिर्धारित – भारतीय अधिवक्ता परिषद् का आशय उच्च कोटि की वृत्तिक वचनवद्धता के लक्ष्य की प्राप्ति हेतु विश्वविद्यालय द्वारा निर्धारित शर्त को निरस्त करना नहीं है – उसने अधिकतम आयुसीमा निर्धारित की है – सा.वि.प्र.प. द्वारा अधिकथित मापदण्ड भारतीय अधिवक्ता परिषद द्वारा विहित मानक को प्रतिकूल रूप से प्रभावित करने वाला नहीं कहा जा सकता।

B. Rules of Legal Education, 2008, Rule 28 - ***Age on admission - Common Law Admission Test - Age relaxation - No age relaxation given to OBC candidates - Held - CLAT has aimed high degree of professional commitment by catching the students immediately after passing 12th examination as normally the students clear the 12th exams at the age of 17-18 years and for maintaining the discipline in the college decision has been taken in public interest - It is not violative of Rule 28.***

ख. विधिक शिक्षा नियम, 2008, नियम 28–प्रवेश हेतु आयु –सामान्य विधि प्रवेश परीक्षा – आयुसीमा में छूट – अन्य पिछड़ा वर्ग के अभ्यर्थियों को आयुसीमा में कोई छूट नहीं दी गयी – अभिनिर्धारित – सा.वि.प्र.प. का लक्ष्य विद्यार्थियों को 12वीं परीक्षा उत्तीर्ण करने के तुरन्त बाद ग्रहण कर उच्च कोटि की वृत्तिक वचनवद्धता प्राप्त करना है क्योंकि सामान्यतया विद्यार्थी 17–18 वर्ष की आयु में 12वीं परीक्षा उत्तीर्ण कर लेते हैं और महाविद्यालय में अनुशासन बनाये रखने हेतु लोकहित में निर्णय लिया गया है – यह नियम 28 के उल्लंघनकारी नहीं है।

C. Public Service (SC, ST & OBC) Reservation Act, M.P. (21 of 1994), Section 18 - ***Reservation of seats - Common Law Admission Test - Age relaxation - No age relaxation given to OBC candidates - Held - S. 18 only deals with SC, ST and OBC shall have the same meaning assigned to them and it was open for the core committee of the university to lay down the age criterion for CLAT.***

ग. लोक सेवा (अनुसूचित जाति/जनजाति/अन्य पिछड़ावर्ग) आरक्षण अधिनियम, म.प्र. (1994 का 21) – धारा 18 – सीटों का आरक्षण – सामान्य विधि प्रवेश परीक्षा – आयुसीमा में छूट – अन्य पिछड़ा वर्ग के उम्मीदवारों को आयुसीमा में कोई

छूट नहीं दी गयी – अभिनिर्धारित – धारा 18 केवल अनुसूचित जाति, अनुसूचित जनजाति एवं अन्य पिछड़ा वर्ग से सम्बंधित है, जिनका वही अर्थ होगा जो उन्हें समनुदिष्ट किया गया है और सामान्य विधि प्रवेश परीक्षा हेतु आयु के मापदण्ड निर्धारित करना विश्वविद्यालय की कोर समिति की स्वेच्छा पर होगा।

D. Constitution, Article 15(4) - ***Common Law Admission Test - Age relaxation - No age relaxation given to OBC candidates - Held - A conscious decision has been taken by CLAT in public interest which cannot be said to be illegal or arbitrary or violating provisions of Article 15(4) of the Constitution.***

घ. संविधान, अनुच्छेद 15(4) – सामान्य विधि प्रवेश परीक्षा – आयुसीमा में छूट – अन्य पिछड़ा वर्ग के अभ्यर्थियों को आयुसीमा में कोई छूट नहीं दी गयी – अभिनिर्धारित – सामान्य विधि प्रवेश परीक्षा द्वारा लोकहित में सावधानी पूर्वक सजग निर्णय लिया गया है जिसे अवैध या मनमाना अथवा संविधान के अनुच्छेद 15(4) के उपबंधों का उल्लघंन करने वाला नहीं कहा जा सकता।

Cases referred :

AIR 2004 SC 1861, (2007) 2 SCC 202, (1999) 7 SCC 120, AIR 1971 SC 1762, AIR 1964 SC 1823, AIR 1992 P&H 308, AIR 1985 Kar 223, 2005(3) MPLJ 87, (1997) 11 SCC 417, (2010) 3 SCC 119, (2008) 6 SCC 1, 1992 Supp(3) SCC 217.

Siddharth Gupta & Nishant Jain, for the petitioners.
Sankalp Kochar, for the N.L.I.U.
Purushendra Kaurav, Dy.A.G., for the State.

***W.P. No.5817/2010 (Jabalpur), D/- 7 May, 2010.**

Short Note
(38)*

R. C. Mishra, J

TARUN SHARMA
Vs.
VISHWAS SARANG

Representation of the People Act (43 of 1951), Section 100(1)(a)– Grounds for declaring election to be void– ***'Office of Profit'–Meaning–Explained–Held–If a profit does actually accrue from an office, it is an 'office of profit', no matter how it accrues–An office of profit is an office, which is capable of yielding a profit that means any pecuniary gain. (Paras 19 & 20)***

लोक प्रतिनिधित्व अधिनियम (1951का 43), धारा 100(1)(a)– निर्वाचन को शून्य घोषित करने के आधार – 'लाभ का पद'– अर्थ – स्पष्ट किया गया – अभिनिर्धारित –यदि पद से वास्तविक रूप से लाभ प्रोद्भूत होता है, वह 'लाभ का पद' है, इससे कोई फर्क नहीं पड़ता कि वह कैसे प्रोद्भूत होता है – लाभ का पद ऐसा पद है जिसमें लाभ प्राप्त करने अर्थात कोई आर्थिक अभिलाभ प्राप्त करने की क्षमता है ।

Cases referred :

1994 AIR SCW 2028, AIR 1958 Bom 314, 1962(2) SCR 422, (1971) 3 SCC 870, AIR 2006 Sc 2119, AIR 1970 Sc 694, AIR 1974 SC 2355,(2001) 8 SCC 233, AIR 1985 HP 22, AIR 1976 SC 1031, AIR 1977 SC 2103, AIR 1970 SC 228, AIR 2004 SC 1107, (2000) 4 SCC 406, (2004) 4 SCC 460, AIR 1997 SC 1006, (2004) 3 ACC 1, AIR 1954 SC 2002, 1898 AC 735, AIR 1961 SC 1152, (1977) 1 SCC 511, AIR 1993 Kar 54, AIR 1969 SC 262, 1975 SC 1067.

Shekhar Sharma, for the petitioners.

P. D.Gupta., for the respondent.

***Election Petition No. 27/2009 (Jabalpur), D/- 21 June, 2010.**

Short Note

*(39)**

Abhay M. Naik & Anil Sharma, JJ

TILAK PRADHAN

Vs.

SMT. RANJANA PRADHAN & ors.

A. Civil Procedure Code (5 of 1908), Section 151, Order 39 Rule 4 -*Order of injunction may be discharged, varied or set aside - What amounts to - Plaintiff claiming 1/3rd share in the suit property - Order of temporary injunction restraining the defendant from alienation has attained finality - One of defendants being patient of heart disease, diabetes and blood-pressure required substantial money for medical treatment and survival - Held - In such a situation, S. 151 CPC may be invoked and plaintiff may be directed to choose the best 1/3rd for protection of his interest so as to enable him to reap the fruits of the decree in case of success - This will not amount to discharge, variance or setting aside of the order of temporary injunction because the same is protected in letter and spirit.*

क सिविल प्रक्रिया संहिता (1908 का 5), धारा 151, आदेश 39 नियम 4 – निषेधाज्ञा के आदेश को उन्मोचित, परिवर्तित अथवा निरस्त किया जा सकता है – जो समतुल्य है – वादी वाद सम्पत्ति में एक तिहाई हिस्से का दावा करता है – प्रतिवादी को सम्पत्ति के अन्य सक्रांमण से विरत रहने हेतु पारित अस्थाई निषेधाज्ञा अन्तिमतता प्राप्त कर चुकी है–एक प्रतिवादी को हृदय रोग, मधुमेह तथा रक्तचाप का रोगी होने के कारण चिकित्सा तथा जीवन यापन हेतु पर्याप्त धन की आवश्यकता है – अभिनिर्धारित–ऐसी स्थिति में धारा 151 सि.प्र.सं. पर अवलम्ब लिया जा सकता है तथा वादी को अपने हित सुरक्षित रखने के लिये 1/3 का चुनाव करने के लिये निर्देशित किया जा सकता है जिससे कि वह प्रकरण में उसके पक्ष में पारित डिक्री के परिणाम का लाभ उठा सके – यह अस्थाई निषेधाज्ञा के आदेश के उन्मोंचन, परिवर्तन या निरस्त करने की कोटी में नहीं आयेगा क्योंकि वह लेटर एवं स्पिरिट से सुरक्षित है।

B. Civil Procedure Code (5 of 1908), Sections 94, 151, Order 39 Rules 1 & 2 - *Grant of injunction - Duty of the Court - Held - The Court while passing an order in favour of a party shall not be ignorant of the*

rights of the opposite party and shall equally carry an obligation that its order though, shall grant protection to the applicant but the efforts shall be made in special circumstances to achieve it simultaneously by taking care of the opposite party -Court shall always make an effort that while granting an order of injunction, the opposite party may not be put to unnecessary loss.

ख. सिविल प्रक्रिया संहिता (1908 का 5), धाराएँ 94, 151 आदेश 39 नियम 1 एंव 2 – निषेधाज्ञा देना – न्यायालय का कर्तव्य – अभिनिर्धारित – न्यायालय किसी एक पक्षकार के पक्ष में आदेश पारित करते समय विरोधी पक्षकार के अधिकारों को नजर अंदाज नहीं करेगा तथा इस बात का समान रूप से ध्यान रखेगी कि उसका आदेश यद्यपि आवेदक को सहायता पहुँचाता है परंतु साथ ही साथ विशेष परिस्थितियों में विरोधी पक्षकार के हित का ध्यान रखेगी – निषेधाज्ञा का आदेश पारित करते समय न्यायालय सदैव उस बात का ध्यान रखेगी कि विरोधी पक्षकार को अनावश्यक हानि न पहुँचे।

Cases referred :

AIR 1962 SC 527, AIR 2006 SC 3275, AIR 1995 SC 2372, AIR 1996 SC 1946, AIR 2004 SC 3992, 1981 JLJ 639.

Vivek Khedkar, for the petitioner.

P.C. Chandil, for the respondent Nos.1 to 4.

Anil Bansal, for the respondent No.5.

Kamal Jain, for the respondent Nos.6 to 8.

Vishal Mishra, G.A., for the respondent No.9.

***W.P. No. 5408/2009 (Gwalior), D/- 19 May, 2010.**

I.L.R. [2010] M. P., 1839
SUPREME COURT OF INDIA
Before Mr. Justice Harjit Singh Bedi & Mr. Justice J.M. Panchal
12 January, 2010*

DINESH JAISWAL ... Appellant
Vs.
STATE OF M.P. ... Respondent

Evidence Act (1 of 1872), Section 3, Penal Code, 1860, Section 376(1) - *Accused convicted upon basis of sole testimony of prosecutrix and conviction affirmed by the High Court - Held - In the case the accused/ appellant had received 6 injuries including one grievous injury, the witnesses who were allegedly reached at spot soon after did not support the prosecutrix and declared hostile, the prosecution story that the appellant a young man of 31 years had been overpowered by a much older woman is rather difficult to believe, the I.O. did not verify the defence of accused that he had gone to prosecutrix house to recover his cow and in a quarrel that followed both had received injuries, the husband of prosecutrix who had accompanied her to police station did not come to witness box and doctor was also unable to confirm the factum of rape, makes the case rather unusual one.*

There can be no quarrel with the proposition that the evidence of prosecutrix is liable to be believed save in exceptional circumstances. But on the other hand a prosecutrix must be believed irrespective of the improbabilities in her story, is an argument that can never be accepted. The test always is as to whether the given story prima facie inspires confidence - Conviction set aside. (Paras 4 & 5)

साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड संहिता, 1860, धारा 376(1) – अभियुक्त को अभियोक्त्री की एकमात्र साक्ष्य के आधार पर दोषसिद्ध किया गया और उच्च न्यायालय द्वारा दोषसिद्धि की पुष्टि की गई – अभिनिर्धारित – मामले में अभियुक्त/अपीलार्थी को एक गंभीर चोट सहित 6 चोटें आईं, साक्षी जो कथित रूप से मौके पर तुरंत पहुँचे थे, ने अभियोक्त्री का समर्थन नहीं किया और उन्हें पक्षद्रोही घोषित किया गया, अभियोजन कथा कि अपीलार्थी एक 31 वर्षीय युवक को काफी वृद्ध महिला द्वारा काबू किये जाने की बात पर विश्वास करना कठिन है, अन्वेषण अधिकारी ने अभियुक्त के इस बचाव का सत्यापन नहीं किया कि वह अभियोक्त्री के घर अपनी गाय बरामद करने गया था और उसके बाद हुए झगड़े में दोनों को चोटें आईं, अभियोक्त्री का पति, जो उसके साथ पुलिस थाना गया था, कठघरे में नहीं आया और चिकित्सक भी बलात्संग के तथ्य की पुष्टि करने में अक्षम रहा, मामले को एक असामान्य मामला बनाता है।

इस सुझाव के साथ कोई विवाद नही हो सकता है कि अभियोक्त्री की साक्ष्य आपवादिक परिस्थितियों को छोड़कर विश्वास किये जाने योग्य है। परन्तु दूसरी ओर अभियोक्त्री पर उसकी कहानी में आयी अनधिसंभाव्यताओं को विचार में लिये बिना विश्वास करना ही चाहिये, यह एक ऐसा तर्क है जिसे कभी स्वीकार नही किया जा सकता – परीक्षण सदैव इसका होता है कि क्या प्रस्तुत कहानी प्रथम दृष्टया विश्वास पैदा करती है – दोषसिद्धि अपास्त।

*Cr.A. No.956/2005

ORDER

The facts leading to the appeal are as under :

At about 4.00 P.M. on 8th July, 1987 the prosecutrix (PW-1) was alone in her house situated in Village Magrohar, Police Station Rampur Naiken. The appellant, who was known to her, entered the house and after having inflicted three tangi blows on her head and hands, raped her. The prosecutrix also, in defence, snatched the tangi from the appellant and caused several injuries on his head while he was leaving the room. As a result of the injuries suffered, both became unconscious. In the meanwhile, Sampat the husband of the prosecutrix, arrived at the scene and she told him about what had happened. She also called Babulal (PW-2) her son and Shivbalak (PW-3) a distant relative, and they along with several other persons reached the spot. The prosecutrix thereafter accompanied by her husband Sampat, Babulal and the others afore referred lodged the First Information Report (Exhibit P-1) at Police Chowki Khaddi on the same day at about 7.30 p.m. The prosecutrix was also sent for a medical examination which was carried out the next day by Dr. Kalpana Ravi (PW-5), who found three injuries on her and further recorded that as she was a married woman of 42 years, it had not been possible to give a categoric opinion about any recent sexual encounter. The appellant was also examined by Dr. S.B. Khare (PW-6) and his report Ex. P-6/A revealed six injuries, several of them on the head including Injury No. 6, which was grievous as his teeth had been knocked out. On the completion of the investigation a charge for offences punishable under Sections 376, 323 and 506 of the Indian Penal Code was framed. The appellant denied the charge and was brought to trial. During the course of the trial, PWs 2 and 3, Babulal and Shivbalak the son and relative of the prosecutrix who had reached the place of incident, soon after the alleged rape, were declared hostile and they gave a version contrary to what had been deposed to by the prosecutrix. The trial court also found, endorsing the view of Dr. Kalpana Ravi (PW-5), that as the prosecutrix was a married woman, it was impossible to give a categoric opinion about any recent sexual intercourse but relying on the sole testimony, of the prosecutrix, sentenced the appellant to undergo rigorous imprisonment for 10 years under Section 376 of Indian Penal Code and to other terms of imprisonment for the other offences. The High Court dismissed the appeal and confirmed the sentence. The matter is before us after the grant of special leave.

2. The learned counsel for the appellant has raised three arguments during the course of hearing. He has first pointed out that the two primary witnesses, both relatives of the prosecutrix, including Babulal her son had been declared hostile and had not supported the prosecutrix's case and as the story preferred by her was far fetched, it could not be believed. It has also been submitted that the medical evidence which could be a corroborating factor, too was uncertain, as Dr. Kalpana Ravi had stated that the factum of rape could not be ascertained. The learned counsel has finally emphasised that the defence version that the appellant

had reached the house of the prosecutrix to recover his cow and in a quarrel between them that followed, both had suffered injuries and that he had thereafter been falsely implicated in a case of rape. To highlight this argument, the learned counsel has referred us to the medical evidence of Dr. S.B. Khare (PW-6).

3. Mr. C.D. Singh, the learned counsel for the respondent State has however submitted that the prosecutrix case was liable to be believed and has relied upon the judgment of this court in [Motilal vs. State of Madhya Pradesh] 2008 SCC (Vol.11) 20. It has also been submitted that the evidence clearly showed that the appellant had been arrested from the house of the prosecutrix which proved the factum of rape.

4. We have heard the learned counsel for the parties at length. We find that this case is rather an unusual one. The fact that the appellant was in the house of the prosecutrix is admitted on both sides. The prosecution story that the appellant a young man of 31 years had been overpowered by a much older woman is rather difficult to believe. The injuries received by the appellant are given below :-

1. Parted wound, whose shape is 1.5 c.m. X 1/5 c.m. on the right side of the hand.
2. Swelled injury, whose shape is 1.5 c.m. X 1 inch, which is on the upper side of the right hand.
3. Swelled injury, whose shape is 1/2" X 1/2", which is on the elbow of the left hand.

The injury of accused are given below :-

1. Parted wound, whose shape is 1 ½ inch X 1/2 c.m. X 1 c.m. on the middle of the head.
2. Parted wound, whose shape is 1" X 1/2 c.m. X 3 m.m. on the front side of the head.
3. Parted wound, whose shape is 1/2" X 1/2" c.m. X 3 m.m. on the right of the head.
4. Swelled injury, whose shape is 1/2" X 1/2".
5. Swelled injury, whose shape is 1" X 1/2" on the chin.
6. Two central incisers tooth and right canine tooth of upper jaw were broken and the enamles were swelled.

Injury No. 6 is a grievous one. As per the prosecutrix she had caused these injuries to the appellant during the time of rape and thereafter that the accused had caused her three minor injuries as well whereas the case of the appellant is that he had gone to her house to recover his cow and in a quarrel that followed both had received injuries. In any case as the investigating officer had not verified the statement of the appellant some corroboration for the prosecutrix's story was required. As already mentioned, her son Babulal and Shivbalak, a relative, who

had reached the place of incident, were both declared hostile and did not support the prosecutrix. We find that even her husband Sampat who had accompanied her to the police station to lodge the report did not come into the witness box and the doctor was also unable to confirm the factum of rape.

5. Mr. C.D. Singh has however placed reliance on *Moti Lal's case* (supra) to contend that the evidence of the prosecutrix was liable to be believed save in exceptional circumstances. There can be no quarrel with this proposition (and it has been so emphasised by this Court time and again) but to hold that a prosecutrix must be believed irrespective of the improbabilities in her story, is an argument that can never be accepted. The test always is as to whether the given story prima facie inspires confidence. We are of the opinion that the present matter is indeed an exceptional one.

6. As already mentioned above, in our opinion, the story given by the prosecutrix does not inspire confidence. We thus allow this appeal, set aside the impugned judgments and direct that the appellant be acquitted.

Appeal allowed.

I.L.R. [2010] M. P., 1842

SUPREME COURT OF INDIA

Before Mr. Justice Harjit Singh Bedi and Mr. Justice C. K. Prasad

29 April, 2010*

PATIRAM ... Appellant

Vs.

STATE OF M.P. ... Respondent

Criminal Procedure Code, 1973 (2 of 1974), Section 378(4) - *Appeal against acquittal - Findings of fact which are well based should not be interfered with – Even if two views were possible the one in favour of accused had indeed been taken.* (Para 5)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 378(4) – दोषमुक्ति के विरुद्ध अपील – तथ्य के निष्कर्ष जो सुआधारित हों, में हस्तक्षेप नहीं किया जाना चाहिए और यद्यपि दो विचार संभव थे तो भी एक जो अभियुक्त के पक्ष में रहा अवश्य ही लिया गया था।

ORDER

On 8th June, 1990 the appellant herein who was a milk vendor by profession, was checked by K.P. Roy (PW.2), while carrying three containers of milk on his bicycle. On being questioned he revealed his name as Thola son of Dhola Yadav, resident of Khursipal, P.S. Gadarwara and the milk that he was carrying was buffalo milk for sale. The Food Inspector expressed his desire to purchase the milk for the purpose of analysis and after following the requisite procedures collected the sample and sent it to the laboratory for analysis. The

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*Cr.A. No.1404/2003

Public Analyst opined that the milk did not conform to the prescribed standards under law for buffalo milk and was, therefore, adulterated.

2. A complaint under Sec.7(1) read with Section 16(1) (a)(i) of the Prevention of Food Adulteration Act, 1954,was accordingly filed.

3. The Trial Magistrate during the course of an elaborate judgment held that the prosecution had not been able to prove that the appellant was indeed the person from whom the milk had been seized as the connecting evidence with regard to his identity was not forthcoming, in the light of the fact that the only witness, Jagdish, had not supported the prosecution. The Trial Court accordingly acquitted the accused.

4. An appeal was thereafter taken to the Madhya Pradesh High Court by the State and the learned single Judge by the impugned order reversed the order of acquittal and convicted and sentenced the accused for the offence concerned. This matter is before us after the grant of special leave.

5. We have gone through the judgment of the Courts below and the evidence recorded in this matter very carefully. We find that the Trial Court had given very elaborate and cogent reasons for arriving at its conclusion that the identity of the appellant had not been proved. We are of the opinion that this finding of fact which was well based should not have been interfered with by the High Court and even if two views were possible the one in favour of the accused had indeed been taken. It is now well settled that the presumption of innocence which is available to an accused is strengthened by an acquittal by the Trial Court and the Appellate Court should therefore be slsow while interfering in the matter. We therefore reverse the judgment of the High Court and restore that of the Trial Court and order the acquittal of the appellant.

6. The appellant is on bail. His bail bonds shall stand discharged.

The Appeal is allowed.

Appeal allowed.

I.L.R. [2010] M. P., 1843

SUPREME COURT OF INDIA

Before Mr. Justice Harjit Singh Bedi & Mr. Justice C.K. Prasad

7 May, 2010*

RAMESH KUMAR ... Appellant

Vs.

STATE OF M.P. ... Respondent

A. Evidence Act (1 of 1872), Section 3 - ***Appreciation of evidence - It has to be borne in mind that the intention of the accused is gathered from the nature of the weapon used, the part of the body chosen for assault and other attending circumstances.*** (Para 12)

*Cr.A. No.186/2008

क साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्ष्य का अधिमूल्यन – यह ध्यान मे रखना चाहिए कि अभियुक्त का आशय, प्रयोग किये गये आयुध की प्रकृति, हमले के लिये चुने गये शरीर के अंग तथा अन्य विद्यमान परिस्थितियों से एकत्र होता हो।

B. Penal Code (45 of 1860), Sections 302/34, 326/34 - *Assault by accused persons by "Lathi" and "Danda" resulting death of two persons - Injuries found on person of the deceased do not indicate so imminently dangerous that it must in all probability cause death or such bodily injury is likely to cause death - The part of body chosen cannot be said to be a vital part of the body - The injuries are contusions - The ingredients of the offence of murder is not made out - The conviction of appellants u/s 302/34 altered to S.326/34 IPC and sentenced to imprisonment for 7 years.* (Paras 12 & 13)

ख. दण्ड संहिता (1860 का 45), धाराएँ 302/34, 326/34 – अभियुक्त व्यक्तियों द्वारा लाठी एवं डंडे से किये गये हमले के परिणामस्वरूप दो व्यक्तियों की मृत्यु हुई – मृतक के शरीर पर पाई गयीं क्षतियाँ आसन्न रूप से इतनी घातक प्रतीत नहीं होतीं कि वह सभी अधिसंभाव्यताओं में मृत्यु कारित करेगी अथवा ऐसी शारीरिक क्षति कारित करेगी जिससे मृत्यु कारित होना संभाव्य हो – चुना गया शरीर का अंग, शरीर का मार्मिक अंग नहीं कहा जा सकता है – क्षतियाँ, खरोंचें हैं – हत्या के अपराध के घटक नहीं बनते हैं – अपीलार्थियों की भा.द.सं. की धारा 302/34 के अंतर्गत दोषसिद्धि को धारा 326/34 मे परिवर्तित किया गया और 7 वर्ष के कारावास से दण्डादिष्ट किया गया।

JUDGMENT

The Judgment of the Court was delivered by **C.K. Prasad, J.** :–Both the appeals arise out of the common judgment dated 9 th October, 2006 passed by the Division Bench of the Madhya Pradesh High Court in Criminal Appeal No.946 of 1993 and Criminal Appeal No.953 of 1993, hence, they were heard together and are being disposed of by this common Judgment.

2. Ramesh Kumar (appellant in Criminal Appeal No.186 of 2008) and Gopal Prasad (appellant in Criminal Appeal No.185 of 2008), besides Pradhuman Prasad and Dwarika Prasad were put on trial for commission of the offence under Section 341/34 and 302/34 of the Indian Penal Code. All of them were found guilty on both counts by judgment dated 21st September, 1993 passed by the Additional Sessions Judge, Sidhi in Sessions Trial No.17 of 1992. All of them were sentenced to undergo imprisonment for life and rigorous imprisonment for six months for the offence under Sections 302/34 and 341/34 of the Indian Penal Code respectively. Ramesh Kumar as well as Dwarika Prasad, Gopal Prasad and Pradhuman aggrieved by the judgment and order of conviction and sentence preferred appeals before the High Court which were registered as Criminal Appeal No.946/1993 and Criminal Appeal No.953/1946 respectively.

3. During the pendency of the appeal Dwarika Prasad died and his appeal had abated.

4. The High Court by the impugned Judgment had affirmed the appellants'

conviction and sentence. Conviction and sentence of Pradhuman Prasad, though has been maintained by the High Court but he has not chosen to file any appeal before this Court, perhaps on the ground that he had already undergone the sentence awarded to him.

5. According to the prosecution, a litigation was going on between the accused Dwarika Prasad and PW.4 Chander Bhan Yadav, PW.6 Ram Sahai and other persons and on 29.11.1991 the informant Chander Bhan Yadav had gone to Civil Court, Sidhi to attend the hearing of the case along with Ramdhani (deceased) and PW.6 Ram Sahai. After attending the hearing of the case, according to the prosecution, while they were returning to their home and reached near Tola Parkhure in village Bihirya, all the four accused, which included the two appellants herein, who were hiding behind the tree came out and accused Dwarika pointed his gun on Ramdhani, whereas convict Pradhuman and appellant Ramesh assaulted him by "lathi" and "danda". Appellant Gopal Prasad then attempted to beat Ram Sahai, who along with the informant ran away from the place of occurrence. Chander Bhan Yadav gave report to the Police and on the basis of that Crime No.411 of 1991 was registered under Section 341/307/34 of the Indian Penal Code at Police Station Kotwali, Sidhi. The injured Ramdhani died later on and consequently offence under Section 302/34 of the Indian Penal Code was also added.

6. Police after usual investigation submitted chargesheet and ultimately the appellants were committed to Court of Sessions to face the trial. They were charged for wrongful confinement and murder of Ramdhani in furtherance of their common intention; punishable under Section 342/34 and 302/34 of the Indian Penal Code. Appellants denied to have committed any crime and claimed to be tried.

7. In order to bring home the charges, prosecution, altogether examined ten witnesses out of whom PW.4 Chander Bhan Yadav and PW.6 Ram Sahai claimed to be eye-witnesses to the occurrence. PW.7 Dr. S.P. Khare happens to be an Assistant surgeon and had conducted the postmortem examination on the dead body of the deceased Ramdhani. He had also proved the postmortem report. He had found the following external injuries on the person of the deceased :

(1) Contusion linear in shape 10X2 Cm. reddish in colour present on the rt. Infra scapular region in axillary line obliquely placed;

(2) Contusion linear in shape 8X2 Cm. reddish blue in colour present on left infra-scapular region in axillary line obliquely placed;

(3) Contusion linear in shape 10X2 Cm. present over upper scapular region and reddish blue in colour;

(4) Contusion 6X2 Cm. present over left lumber region;

(5) Contusion linear in shape 10X2 Cm. reddish blue in colour present over upper scapular region on rt. side;

(6) Contusion over mid scapular region 6X2 Cm. on rt. Side reddish in colour; and

(7) Contusion over left arm on lat. Aspect, just above elbow joint 4X2 Cm. overlying which lacerated wound present 2X1 Cm. clotted blood present over the wound.

8. According to the Doctor external injury Nos.1 and 2 had led to the fracture of the ribs of the deceased.

9. Relying on the evidence of PW.7 Dr. Khare and the postmortem report the trial court came to the conclusion that Ramdhani died a homicidal death. Further, relying on the evidence of the eyewitnesses PW.4 Chander Bhan Yadav and PW.6 Ram Sahai, the trial court came to the conclusion that the prosecution had proved appellants' participation in the crime beyond all reasonable doubt and convicted and sentenced the appellants as above. Appellants preferred separate appeals, which have been dismissed by the impugned judgment.

10. Mr. S.K. Dubey, Senior Advocate appearing on behalf of the appellants submits that in view of the evidence on record he legitimately cannot assail the conviction of the appellants but in his submission, even if the case of prosecution is accepted in its entirety, no offence under Section 302/34 of the Indian Penal Code is made out. He submits that the allegations proved at best make out a case under Section 326 of the Indian Penal Code.

11. Ms. Vibha Datta Makhija, learned Counsel appearing on behalf of the respondent submits that the allegations proved clearly make out a case under Section 302/34 of the Indian Penal Code and the courts below did not err in convicting the appellants as above.

12. We have considered the rival submissions and the submissions made by Mr. Dubey commend us. We have extracted in the preceding paragraph of our judgment; injuries sustained by the deceased and from a perusal thereof it is difficult to hold that the appellants intended to cause such bodily injuries which they knew to be likely to cause the death. From that it is also not imperative that the appellants intended to cause bodily injury which is sufficient in the ordinary course of nature to cause death. The injuries found on the person of the deceased also do not indicate that it is so imminently dangerous that it must in all probability cause death or such bodily injury is likely to cause death. It has to be borne in mind that the intention of the accused is gathered from the nature of the weapon used, the part of the body chosen for assault and other attending circumstances. Here in the present case according to the prosecution the weapon used for commission of the crime is "lathi" and "danda" and the part of the body chosen cannot be said to be a vital part of the body. Further the injuries are contusions. It seems that the deceased was not taken to the hospital immediately after the occurrence and

he died. Perhaps, his life could have been saved had he given the medical aid immediately. In view of what we have observed above the ingredients for the offence of murder is not made out. However, the appellants have caused grievous hurt by dangerous weapon in furtherance of their common intention and as such the facts proved make out the offence under Section 326/34 of the Indian Penal Code.

13. Accordingly, the conviction of the appellants under Section 302/34 is set aside and altered to Section 326/34 of the Indian Penal Code. We are of the opinion that sentences to undergo imprisonment for a period of seven years shall meet the ends of justice and we order accordingly. We do not find any error in their conviction and sentence under Section 342/34 of the Indian Penal Code and the same is maintained.

14. In the result, the appeals are partly allowed with the aforesaid modifications in the conviction and sentence.

Appeal partly allowed.

I.L.R. [2010] M. P., 1847
SUPREME COURT OF INDIA
Before Mr. Justice Harjit Singh Bedi & Mr. Justice A.K. Patnaik
12 May, 2010*

GOPAL SINGH & ors. ... Appellants
Vs.
STATE OF M.P. ... Respondent

A. Evidence Act (1 of 1872), Section 3 - ***Appreciation of evidence - The trial Court based its judgment of acquittal on facts that (i) oral dying declaration given to witnesses and not supported by doctor, is doubtful, (ii) the FIR is belated and not forwarded to the Magistrate promptly, (iii) the evidence of sole eye-witness is not believable and natural - In appeal, the High Court reversed the acquittal - Held - It is now well settled that if the trial court's judgment is well based on the evidence and the conclusion drawn in favour of the accused was possible thereof, the High Court would not be justified in interfering on the premise that a different view could also be taken and though the High Court was entitled to reappraise the evidence there should be substantial and compelling reasons for setting aside an acquittal order and making one of conviction.*** (Para 7)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्ष्य का अधिमूल्यन – विचारण न्यायालय ने दोषमुक्ति का उसका निर्णय इन तथ्यों पर आधारित किया कि (i) मौखिक मृत्युकालिक कथन, साक्षियों को दिया गया तथा चिकित्सक द्वारा समर्थन नहीं किया गया, शंकास्पद है (ii) प्रथम सूचना रिपोर्ट विलंबित है तथा मजिस्ट्रेट को तत्परता से अग्रेषित नहीं की गई, (iii) एकमात्र

*Cr.A. No.1297/2008

प्रत्यक्षदर्शी साक्षी की साक्ष्य विश्वसनीय एवं प्राकृतिक नहीं है – अपील में उच्च न्यायालय ने दोषमुक्ति को उलट दिया – अभिनिर्धारित – यह अब सुस्थापित है कि यदि विचारण न्यायालय का निर्णय साक्ष्य पर सुआधारित है और अभियुक्त के पक्ष मे निकाला गया निष्कर्ष उससे संभव था, उच्च न्यायालय का इस आधार पर हस्तक्षेप न्यायोचित नहीं होगा कि अलग दृष्टिकोण भी लिया जा सकता था और यद्यपि उच्च न्यायालय साक्ष्य का पुनःमूल्यांकन करने के लिए हकदार था, दोषमुक्ति का आदेश अपास्त करने तथा दोषसिद्धि का आदेश पारित करने के लिए सारवान एवं अप्रतिरोध्य कारण होने चाहिए।

B. Evidence Act (1 of 1872), Section 32 - *Dying declaration - An oral dying declaration made to a person who had very serious enmity with the accused should be accepted with a little hesitation and reservation.* (Para 9)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – मौखिक मृत्युकालिक कथन जो उस व्यक्ति को किया गया जिसकी अभियुक्त से बहुत गंभीर वैमनस्यता थी, कुछ संकोच तथा शर्तों के साथ स्वीकार करना चाहिए।

JUDGMENT

The Judgment of the Court was delivered by **HARJIT SINGH BEDI, J.** :– The prosecution story is as under:

1. On the 19th June 1990, the two deceased Rajmohan and Niranjan Singh had gone to Jammusarkala to buy sugar and while they were returning to their village and were passing through the nearby forest, they were severely beaten by the six accused with "lathis", "lohangis" and "farsas". Information of the incident was given by Maina Banjara PW3 to Daulat Singh PW4 and Sumer Singh PW10. Sumer Singh and Maina Banjara and several others then returned to the spot whereafter Niranjan Singh and Rajmohan (injured) made oral dying declarations that they had been beaten by the six accused with the aforementioned weapons. The two died a short while later. Intimation of the incident was also received in Police Station Berasia at 3.40 p.m. by telephone and was recorded in Ex.P-3 on which Sub-Inspector O.P.Katiyar PW13 reached the place of incident along with a police force and found the dead bodies. A Ruqa was recorded at 4.40 p.m. at the site and on its basis a formal FIR was registered in the Police Station. The dead bodies were thereafter dispatched to the hospital for post-mortem which was performed by Dr. R.K.Sharma PW1 who found 28 injuries on each of the two deceased. During the course of the investigation, the accused were arrested and on the basis of their disclosure statements, the weapons of offence were also recovered. The police also ascertained that the two parties were very closely related inter-se and that there was gross enmity between them with respect to certain agricultural land. On the completion of the investigation, the accused were charged for an offence punishable under Section 302 read with Section 34 of the IPC as they pleaded not guilty, they were brought to trial.

2. The prosecution in support of his case relied primarily on the eye - witness account of Feran Singh PW5 and on the oral dying declarations made by the two deceased to Daulat Singh PW4, Harnath Singh PW9, Sumer Singh PW10 and

Shivraj Singh PW11. In addition, the prosecution relied on the recoveries made pursuant to the disclosure statements of the accused. The prosecution case was then put to the accused and the plea taken was of serious enmity on account of a land dispute between them and Daulat Singh PW4 as the latter was keen to take over their agricultural land. The trial court recorded a comprehensive judgment and discussed the evidence under two broad heads (1) the eye witness evidence of Feran Singh PW5 and (2) the circumstantial evidence which included the motive behind the incident and the dying declaration of the deceased and the recoveries of the weapons of offence. The Court then examined the evidence of the prosecution in the background of the motive and observed that Maharaj Singh accused was the son of Balwant Singh from his first wife and the other accused were sons of Maharaj Singh whereas PW4 Daulat Singh and PW9 Harnath Singh were also sons of Balwant Singh though from a second wife and Feran Singh PW5 was son of Daulat Singh PW and Shivraj Singh PW11 was son of Sumer Singh PW10, meaning thereby all the witnesses belonged to one large group. The Court also observed that from the evidence on record, it was amply clear that the relations between the two sets of brothers were very strained and several criminal litigations inter-se them and pertaining to a land dispute had started in the year 1984 and were subsisting even on the date of murder and that the periodic quarrels between them had caused great friction in the family. The Court then went on to examine the prosecution story and recalled that two different stories had been projected by the prosecution, first, that a report had been filed by Daulat Singh PW at the Police Station immediately after the crime had been committed at about 1 p.m. and the second that information had been received on telephone as per Ex.P3 at 3.45 p.m. on which Sub-Inspector Katiyar PW13 had reached the place of incident at 4p.m and after spot inspection at 4.45 p.m. had initiated the recording of the FIR. The Court, however, disbelieved the statement of Sub Inspector that he had reached the place of incident at 4 p.m. observing that if the information had been received at 3.45 p.m. it would not have been possible for him to have covered the 18 km distance through a very rustic rural road within 20 minutes. The Court, accordingly, held that on account of the discrepancy with regard to the lodging of the FIR at 1 p.m. or after 4.45 p.m., the only inference that could be drawn was that till 1p.m. the names of the accused were not known and that the report of 1 p.m. had been withheld by the prosecution. The Court then went into the alternative that assuming that the FIR had indeed been recorded shortly after 4.45 p.m. and the incident had taken place at 10 or 10.30 a.m. about one km away from the village and the time taken in conveying the information to the village by Maina Banjara to Daulat Singh and Sumer Singh, it appeared to be a case of a delayed FIR. The Court further observed that there was no evidence to show as to when the copy of the FIR had been received by the Magistrate, as provided by Section 157 of the Code of Criminal Procedure and finally concluded on this aspect by observing:

"it could be safely deduced that the FIR was finalized deliberately as an after-thought, after having dispatched the dead bodies for post-mortem examination. Under these circumstances, namely the way in which the FIR was filed, as to whether in point of fact, the FIR was registered at 4.45 p.m. or at 1 p.m., and the details regarding the crime, non-despatch of a copy thereof to the Magistrate, non-compliance of immediate recording of the incidence of crime, omission of the names of the accused persons in the text of the respective panchnamas on the bodies and also in the merge statements thereof, on perusal of all these circumstances, I come to the conclusion that the report was lodged with unwarranted delay and the prosecution has since failed to provide any logical explanation thereof. Under the above circumstances, prima facie the story put forth by the prosecution is highly doubtful."

3. The Court then examined the dying declarations that have been allegedly made by the two deceased shortly before their deaths to Daulat Singh PW4, Harnath Singh PW9 and Sumer Singh PW10. The Court referred to the broad principle underlying the recording of a dying declaration and emphasized that its veracity had to be adjudged carefully as the maker was not available for cross-examination and the Court was thus called upon to exercise great caution and for that purpose two broad factors had to be kept in mind, firstly, that the person making the dying declaration was physically capable of making it, and secondly that the statement, if made, represented the true state of affairs. The Court then examined the statement of the witnesses to the dying declaration and observed that as the evidence inter-se them was completely discrepant as to the manner in which the dying declaration had been made, a serious doubt was cast on the truthfulness of their testimony. The Court also referred to the evidence of Dr. R.K.Sharma PW, the doctor who had performed the post-mortem examinations, and had found 28 wounds on each body, and observed that as per the statement of the doctor both the injured would have been rendered unconscious within 10 to 15 minutes looking to the critical nature of the wounds. The Court then tested the prosecution story on this basis and opined the incident had occurred around 9 or 10 a.m., as suggested, and Daulat Singh and Sumer Singh had taken an hour to reach the place of incident (as Daulat Singh had virtually admitted that they had reached the site of at 11 a.m.), it appeared to be extremely doubtful that Rajmohan and Niranjan Singh were in a position to make any statement. The Court also examined the statement of Harnath Singh PW9 and observed that it was a blatant lie and that it would have been impossible for him to reach the place of incident to become a witness to the oral dying declarations. The Court, accordingly, concluded that the statements of the aforesaid witnesses were totally contradictory and illogical and in point of fact the deceased were not in a position to make any

statement and that under these circumstances, "the story of the dying declaration was totally made up, unnatural and non-dependable." The Court also examined the evidence of the solitary eye witness Feran Singh PW son of Daulat Singh and recorded a positive finding that the story projected by him was totally unnatural inasmuch that he had rushed to the village from the site after seeing the incident about I km away where his father, uncle, brothers, cousins and the entire family had been present, but he did not tell them as to what had happened but had, in fact, hidden himself on the plea that he feared for his own safety. The Court ultimately concluded that the evidence was against normal human behaviour and could not be deemed to be trust-worthy. The Court also held that the investigation in the matter was completely irresponsible and shoddy and the police had made no attempt to ascertain the identity of the person who had made the telephone call leading to the recording of Ex.P3 at 3.40 p.m. and the prosecution story appeared to have been built on the assumption that as the relations between the parties were strained, it were the accused and accused alone, who were responsible for the double murders. The trial court, accordingly, acquitted the accused.

4. Aggrieved by the judgment of acquittal, the State of Madhya Pradesh filed an appeal in the High Court and the appeal has been allowed. The judgment of the High Court is under challenge before us after the grant of special leave.

5. It has been urged by Mr. Fakhruddin, the learned senior counsel for the appellants, that the High Court was remiss in upsetting the order of acquittal as the trial court had by a very cogent and detailed judgment considered every aspect of the matter and acquitted the accused, and that the High Court had ignored the basic principle that if the view taken by the trial court was possible on the evidence, no interference should be made. It has been highlighted that the trial court had considered the evidence under two broad heads and recorded a positive finding that the first report of the incident at about 1 p.m. had been suppressed by the prosecution and the report recorded after 4.45 p.m. was, thus, not the first information report but even assuming that it was the first report, the fact that there was no evidence to show that the special report had been delivered to the Magistrate belied the prosecution story that it had been recorded at about 4.45 p.m. It has also been pointed out that the serious animosity between the parties was proved on record and several litigations that were continuing since 1984 was the evident cause for the false implication of the accused, who were the father, Maharaj Singh and his five sons. It has further been submitted that the prosecution had placed primary reliance on the dying declarations made by the two deceased to four different persons and in the light of the statement of Dr. Sharma PW that the injured could not have remained conscious for more 10 or 15 minutes after sustaining the injuries, the story of the oral dying declarations allegedly made about two hours thereafter could not be believed. It has further been pointed out that the conduct of Feran Singh PW5 the solitary eye witness was completely unnatural and belied his presence.

6. Mrs. Vibha Dutta Makhija, the learned counsel appearing for the State has, however, supported the judgment of the High Court and has argued that the High Court was justified in believing the prosecution story as the incident had happened all of a sudden and a quick and clock work like investigation could not be expected in India's rural set up.

7. We have considered the arguments advanced by the learned counsel for the parties. The High Court's power while converting an acquittal into a conviction is no longer a matter of speculation and debate. It is now well settled that if the trial court's judgment is well based on the evidence and the conclusion drawn in favour of the accused was possible thereof, the High Court would not be justified in interfering on the premise that a different view could also be taken and though the High Court was entitled to reappraise the evidence there should be substantial and compelling reasons for setting aside an acquittal order and making one of conviction.

8. A bare perusal of the record and the findings recorded by the trial court reveal that the present case is not one of the category which would call for interference by the High Court. The trial court has given positive findings with regard to the various aspects of the prosecution story already referred to above. The High Court has, in the course of its judgment, not been able to meet the reasons which weighed with the trial court in drawing its conclusion. The fact that the first report had been recorded at about 1 p.m. and suppressed by the prosecution has been largely ignored by referring to the first information recorded at about 4.45 p.m. after the Ruqa had been sent by Sub- Inspector Katiyar from the place of incident to the Police Station. The High Court has also ignored the fact that there was no evidence to show as to when special report had been dispatched to or received by the Magistrate. The inference drawn by the Trial Court, therefore, that the first information of 1 p.m. had been suppressed by the prosecution as the names of the assailants were not known and that there was no evidence to confirm the time of the recording of the FIR shortly after 4.45 p.m. as there was no evidence of the dispatch or delivery of the special report, which cast clearly suspicion even on this part of the prosecution story, has not been dealt with by the High Court.

9. The High Court has examined the reliability of the oral dying declarations made by the two deceased to the four witnesses but while observing that there were substantial discrepancies inter-se each of them, has still chosen to rely on their statements. The Court has ignored the statement of Dr. Sharma PW who opined that the injured would have been rendered unconscious within 10 to 15 minutes after receiving their injuries by opining that this fact would vary from person to person. This would undoubtedly be true, but the doctor's statement is only one of the factors which had weighed with the Trial Court in rendering its opinion. Even otherwise, an oral dying declaration made to a person who had very serious enmity with the accused should be accepted with a little hesitation and reservation.

10. We also find that the High Court has accepted the statement of Feran Singh PW5 as the eye witness of the incident ignoring the fact that his behaviour was unnatural as he claimed to have rushed to the village but had still not conveyed the information about the incident to his parents and others present there and had chosen to disappear for a couple of hours on the specious and unacceptable plea that he feared for his own safety.

11. We are, therefore, of the opinion that the judgment of the High Court is erroneous for the above reasons. We, accordingly, allow the appeal and direct the acquittal of the accused. If they are in custody, they shall be released forthwith. If they are on bail, their bail bonds shall stand discharged.

Appeal allowed.

I.L.R. [2010] M. P., 1853

SUPREME COURT OF INDIA

Before Mr. Justice Altamas Kabir & Mr. Justice H.L. Gokhale

14 May, 2010*

DURGA PRASAD & anr. ... Appellants

Vs.

STATE OF M.P. ... Respondent

A. Penal Code (45 of 1860), Sections 304-B & 498-A, Evidence Act, 1872, Sections 3 & 113-B - *Appreciation of evidence - Except for certain bald statements made by PWs.1 & 3 (mother & brother of deceased) alleging that the victim had been subjected to cruelty and harassment prior to her death, there is no other evidence to prove that the victim committed suicide on account of cruelty and harassment to which she was subjected just prior to her death, which, in fact, are the ingredients of the evidence to be led in respect of S. 113-B of the Act, 1872, in order to bring home the guilt against an accused.* (Para 14)

क. दण्ड संहिता (1860 का 45), धाराएं 304–बी व 498–ए, साक्ष्य अधिनियम, 1872, धाराएँ 3 व 113–बी – साक्ष्य का अधिमूल्यन – सिवाय अ.सा.–1 व 3 (मृतक की माँ और भाई) द्वारा किये गये कतिपय सपाट कथनों के जिनमें यह अभिकथन किया गया कि पीड़ित को उसकी मृत्यु से पूर्व क्रूरता और प्रताड़ना के अधीन रखा गया, यह साबित करने के लिए अन्य कोई साक्ष्य नही है कि पीड़ित ने क्रूरता और प्रताड़ना के कारण आत्महत्या की, जिसके अधीन उसे मृत्यु के ठीक पूर्व रखा गया, जो कि वस्तुतः, अभियुक्त के विरूद्ध दोष सिद्ध करने के लिये अधिनियम, 1872 की धारा 113–बी के संबंध में दी जाने वाली साक्ष्य के घटक हैं।

B. Penal Code (45 of 1860), Sections 304-B & 498-A, Evidence Act, 1872, Sections 3 & 113-B - *Appreciation of evidence - In order to bring home a conviction u/s 304-B IPC, it will not be sufficient to only lead evidence showing that cruelty or harassment had been meted out to the victim,*

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*Cr.A. No.1081/2010

but that such treatment was in connection with the demand for dowry - The prosecution failed to fully satisfy the requirements of both S. 113-B of Act, 1872 and S. 304-B of IPC - Conviction set-aside. (Para 17)

ख दण्ड संहिता (1860 का 45), धाराएँ 304–बी व 498–ए, साक्ष्य अधिनियम, 1872, धाराएँ 3 व 113–बी – साक्ष्य का अधिमूल्यन – भा.द.सं. की धारा 304–बी के अंतर्गत दोषसिद्धि सिद्ध करने के लिए केवल यह दर्शाने वाली साक्ष्य कराना पर्याप्त नहीं होगा कि पीड़िता को क्रूरता अथवा प्रताड़ना भुगताई गई, बल्कि यह कि ऐसा व्यवहार दहेज की मांग से संबंधित था – अभियोजन अधिनियम 1872 की धारा 113–बी तथा भा.द.सं. की धारा 304–बी की अपेक्षाओं का पूर्णतः समाधान करने मे असफल रहा – दोषसिद्धि अपास्त।

Cases referred :

(2008) 1 SCC 202, (2004) 13 SCC 174, (2009) 3 SCC 799.

JUDGMENT

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

2. This appeal is directed against the judgment and order dated 28th April, 2009, passed by Jabalpur Bench of the Madhya Pradesh High Court, dismissing Criminal Appeal No.103 of 2000, which had been directed against the judgment of conviction and sentence under Section 498-A and Section 304-B Indian Penal Code. By the said judgment, the learned Sessions Judge had sentenced the Appellants to undergo rigorous imprisonment for 3 years and to pay a fine of Rs.1,000/- and in default of payment of fine to undergo rigorous imprisonment for 3 months under Section 498-A IPC and to undergo rigorous imprisonment for 7 years and to pay a fine of Rs.5,000/- and in default of payment of such fine, to undergo rigorous imprisonment for a further period of 3 years. Upon consideration of the materials on record, the High Court was of the view that the prosecution had proved its case beyond all reasonable doubts and that the appeal, therefore, deserved to be dismissed.

3. Appearing in support of the appeal, Mr. R.P. Gupta, learned Senior Advocate, contended that both the Courts below had erred in convicting the Appellants on the basis of evidence on record. Mr. Gupta submitted that in the absence of any evidence to prove the charges under Sections 304-B and 498-A IPC, the trial Court, as also the High Court, had erred in merely relying on the presumption available under Section 304-B regarding the death of a woman by any burn or bodily injury or otherwise than under normal circumstances, within 7 years of her marriage, in coming to a conclusion that there would be a natural inference in such circumstance under Section 113-A and 113-B of the Indian Evidence Act, 1872, that the accused persons had caused the death of Kripa Bai by torturing her physically and mentally so as to drive the deceased to commit suicide. Mr. Gupta submitted that both the Courts below appear to have overlooked the fact that in order to prove a case of dowry death it would have to be shown that in addition to the fact that the death took place otherwise than in normal circumstances within

7 years of marriage, that soon before her death, the wife was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry. It was pointed out by Mr. Gupta that in the explanation to Sub-Section (1) of Section 304-B it had been mentioned that for the purpose of the said Sub-Section, "dowry" shall have the same meaning as under Section 2 of the Dowry Prohibition Act, 1961.

4. Mr. Gupta also submitted that the provisions of Section 113-A of the Indian Evidence Act were not applicable in this case since no case for abetment of suicide by the husband or any of the husband's relatives had been alleged. On the other hand, the case sought to be made out is one under Section 113-B relating to presumption as to dowry death. Mr. Gupta submitted that the provisions in Section 113-B relating to presumption as to dowry death are similar to that of Section 304-B IPC. He urged that in order to arrive at the presumption of dowry death, it would have to be shown by the prosecution that soon before her death, such woman had been subjected to cruelty or harassment for, or in connection with, any demand for dowry, which would lead to a presumption that such person caused the dowry death.

5. Mr. Gupta submitted that in the instant case, the Appellants had not been convicted under the provisions of the Dowry Prohibition Act, but under Section 304-B and 498-A IPC. Mr. Gupta submitted that the prosecution had not established that prior to the death of the victim Kripa Bai, she had been either subjected to cruelty or harassment for, or in connection with, any demand for dowry, particularly, when the Appellants had not been convicted under the provisions of the Dowry Prohibition Act, 1961.

6. It was pointed out that the only evidence on which reliance had been placed both by the trial Court, as well as the High Court, for convicting the Appellants, was the evidence of Vimla Bai, PW.1, the mother of the deceased and Radheshyam, PW.3, the brother of the deceased. In fact, the prosecution story was that since no dowry had been received from the family of the victim, she had been beaten and treated with cruelty. There is no other evidence regarding the physical and mental torture which the deceased was alleged to have been subjected to. Mr. Gupta urged that the marriage of the Appellant No.1 with the deceased was performed as part of a community marriage being celebrated on account of the poverty of couples who could not otherwise meet the expenses of marriage and that even the few utensils which were given at the time of such community marriage were given by the persons who had organized such marriages.

7. Mr. Gupta submitted that the evidence in this case was wholly insufficient to even suggest that the victim had been subjected to cruelty or harassment which was sufficient to compel her to commit suicide. In support of his submissions, Mr. Gupta firstly referred to the decision of this Court in *Biswajit Halder @ Babu Halder & Ors. vs. State of W.B.* [(2008) 1 SCC 202], wherein, in facts which

were very similar, it was held that there was practically no evidence to show that there was any cruelty or harassment for, or in connection with, the demands of dowry. There was also no finding in that regard.It was further observed that this deficiency in evidence proved fatal for the prosecution case and even otherwise mere evidence of cruelty and harassment was not sufficient to attract Section 304-B IPC. It had to be shown in addition to that such cruelty or harassment was for, or in connection with, demand of dowry. Mr. Gupta urged that since the Appellants had not been convicted under the provisions of the Dowry Prohibition Act, 1961, the charge under Section 304-B would also fail since the same was linked with the question of cruelty or harassment for, or in connection with, the demand for dowry.

8. Mr. Gupta then urged that even the evidence of PW.3, Radheshyam, and also that of PW.2, Ashok Kumar, were full of omissions as to their statements before the police authorities and their evidence during the trial. Mr. Gupta submitted that such omissions were also fatal to the prosecution case since the same was mere embellishment and improvement of the evidence led by the prosecution. In this regard, Mr. Gupta referred to the decision of this Court in *Shri Gopal & Anr. vs. Subhash & Ors.* [(2004) 13 SCC 174]. In the said decision, while dealing with statements made by prosecution witnesses under Section 162 Cr.P.C. and omissions made during their evidence in Courts, this Court held that the same would amount to contradiction and their evidence on such point would not, therefore, be acceptable.

9. Mr. Gupta urged that both the trial Court, as well as the High Court, did not take into consideration any of the aforesaid matters while convicting the Appellants under Sections 304-B and 498-A IPC. Mr. Gupta urged that in such circumstances, the judgment and order of the trial Court, as well as that of the High Court, affirming the said judgment, are liable to be set aside.

10. Opposing the submissions made by Mr. R.P. Gupta, learned Senior Advocate, Ms. Vibha Datta Makhija, learned Advocate appearing for the State of Madhya Pradesh, submitted that the trial Court had considered the evidence of Vimla Bai, PW.1, the mother of the deceased and Radheshyam, PW.3, the brother of the deceased, in coming to a finding that their evidence was sufficient to bring home the guilt of the Appellants under Sections 498-A and 304-B IPC.

11. Ms. Makhija also reiterated the submissions which had been made before the trial Court regarding the presumption that was to be drawn both under Section 304-B IPC, as also under Section 113-B of the Indian Evidence Act, 1872, having regard to the fact that Kripa Bai had committed suicide within 7 years of her marriage. Ms. Makhija submitted that once it was found that by their actions the Appellants had driven Kripa Bai to commit suicide, the provisions of Section 304-B IPC were immediately attracted and the Appellants, therefore, had been rightly convicted by the trial Court under Sections 498-A and 304-B IPC. Ms. Makhija

urged that the evidence of PWs.1 and 3 were sufficient to meet the requirements of both Sections 113-B of the Indian Evidence Act and Section 304-B IPC.

12. Ms. Makhija then contended that as had been laid down by this Court in the case of *Anand Kumar vs. State of M.P.* [(2009) 3 SCC 799], in order to counter the presumption available under Section 113-B, which is relatable to Section 304-B, a heavy burden has been shifted on to the accused to prove his innocence. Having regard to the language of Section 113-B of the Indian Evidence Act, which indicates that when a question arises as to whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman was subjected to cruelty or harassment by such other person or in connection with any demand for dowry, the Court shall presume that such person had caused such dowry death. Ms. Makhija urged that the aforesaid wording of Section 113-B of Evidence Act and the use of the expression "shall" would clearly indicate that the Court shall presume such death as dowry death provided the conditions in Section 113-B were satisfied and it would then be for the accused to prove otherwise.

13. Ms. Makhija, thereupon, urged that the order of conviction passed by the trial Court holding the Appellants guilty under Sections 498-A and 304-B IPC, confirmed by the High Court, did not warrant any interference by this Court.

14. Having carefully considered the submissions made on behalf of the respective parties, we are inclined to allow the benefit of doubt to the Appellants having particular regard to the fact that except for certain bald statements made by PWs.1 and 3 alleging that the victim had been subjected to cruelty and harassment prior to her death, there is no other evidence to prove that the victim committed suicide on account of cruelty and harassment to which she was subjected just prior to her death, which, in fact, are the ingredients of the evidence to be led in respect of Section 113-B of the Indian Evidence Act, 1872, in order to bring home the guilt against an accused under Section 304-B IPC.

15. As has been mentioned hereinbefore, in order to hold an accused guilty of an offence under Section 304-B IPC, it has to be shown that apart from the fact that the woman died on account of burn or bodily injury, otherwise than under normal circumstances, within 7 years of her marriage, it has also to be shown that soon before her death, she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry. Only then would such death be called "dowry death" and such husband or relative shall be deemed to have caused the death of the woman concerned.

16. In this case, one other aspect has to be kept in mind, namely, that no charges were framed against the Appellants under the provisions of the Dowry Prohibition Act, 1961 and the evidence led in order to prove the same for the purposes of Section 304-B IPC was related to a demand for a fan only.

17. The decision cited by Mr. R P. Gupta, learned Senior Advocate, in *Biswajit*

Halder's case (supra) was rendered in almost similar circumstances. In order to bring home a conviction under Section 304-B IPC, it will not be sufficient to only lead evidence showing that cruelty or harassment had been meted out to the victim, but that such treatment was in connection with the demand for dowry. In our view, the prosecution in this case has failed to fully satisfy the requirements of both Section 113-B of the Evidence Act, 1872 and Section 304-B of the Indian Penal Code.

18. Accordingly, we are unable to agree with the views expressed both by the trial Court, as well as the High Court, and we are of the view that no case can be made out on the ground of insufficient evidence against the Appellants for conviction under Sections 498-A and 304-B IPC. The decision cited by *Ms. Makhija in Anand Kumar's case* (supra) deals with the proposition of shifting of onus of the burden of proof relating to the presumption which the Court is to draw under Section 113-B of the Evidence Act and does not help the case of the State in a situation where there is no material to presume that an offence under Section 304-B IPC had been committed.

19. In that view of the matter, we allow the Appeal and set aside the judgment of the trial Court convicting and sentencing the Appellants of offences alleged to have been committed under Sections 498-A and 304-B IPC. The judgment of the High Court impugned in the instant Appeal is also set aside. In the event, the Appellants are on bail, they shall be discharged from their bail bonds, and, in the event they are in custody, they should be released forthwith.

Appeal allowed.

I.L.R. [2010] M. P., 1858

SUPREME COURT OF INDIA

Before Mr. Justice P. Sathasivam & Mr. Justice Anil R. Dave

23 July, 2010*

STATE OF M.P. ... Appellant

Vs.

NERBUDDA VALLEY REFRIGERATED PRODUCTS COMPANY PVT. LTD. & ors. ... Respondents

A. Constitution, Article 226, Revenue Book Circular, Section 18 - *Interference by the High Court against the order of the original authority, which is based on factual details, is not warranted under writ jurisdiction - When the ultimate order of Nazul Officer can be canvassed before Collector, the High Court ought not to have exercised its extraordinary jurisdiction under Art. 226 as an appellate court over the finding of fact arrived at.* (Para 12)

क. संविधान, अनुच्छेद 226, राजस्व पुस्तक परिपत्र, धारा 18 – मूल प्राधिकारी के आदेश, जो तथ्यपूर्ण वर्णन पर आधारित है, के विरूद्ध उच्च न्यायालय द्वारा रिट अधिकारिता के

*C.A. No.5883/2010

अंतर्गत हस्तक्षेप न्यायसंगत नहीं है – जब नजूल अधिकारी के अंतिम आदेश की संयाचना कलेक्टर के समक्ष की जा सकती है, तब पहुंचे गये तथ्य के निष्कर्ष पर उच्च न्यायालय को अपीलीय न्यायालय के रूप में अनुच्छेद 226 के अंतर्गत अपनी असाधारण अधिकारिता का प्रयोग नहीं करना चाहिए था।

B. Constitution, Article 226 - *When a matter is remitted to the original authority to decide the issue, the said authority must be allowed to take a decision one way or the other in accordance with the statutory provisions, rules and regulations applicable to the same - There cannot be any restriction to pass an order in such a way de hors to the statutory provisions or regulations / instructions applicable to the case in particular.* (Para 14)

ख. संविधान, अनुच्छेद 226 – जब मामला विवाद्यक के विनिश्चय के लिए मूल प्राधिकारी को प्रतिप्रेषित किया जाता है तब उक्त प्राधिकारी को उसे लागू कानूनी उपबंधों, नियमों तथा विनियमनों के अनुसार एक या अन्य प्रकार से निर्णय लेने की अनुमति देनी होगी – ऐसा आदेश पारित करने के लिए, जो मामले मे विशिष्टतंया लागू होने वाले कानूनी उपबंधों अथवा विनियमनों/अनुदेशों से असंबद्ध है, कोई निर्बंधन नही हो सकता।

Cases referred :

(2001) 6 SCC 569, (2005) 6 SCC 499.

J U D G M E N T

The Judgment of the Court was delivered by **P. Sathasivam, J.** :–Delay condoned in S.L.P.(C) No. 35734 of 2009. Leave granted in both the special leave petitions.

2. Being aggrieved by the final order dated 26.09.2008 passed by the High Court of Madhya Pradesh at Jabalpur in Writ Petition No. 5469 of 2008 setting aside the order dated 15.04.2008 passed by the Nazul Officer rejecting the application moved by the Respondent-Nerbudda Valley Refrigerated Products Company Pvt. Ltd. (hereinafter referred to as "the Company") for the grant of No Objection Certificate (NOC) to raise constructions on the leased land after changing the land use from industrial purpose to commercial purpose, the State of Madhya Pradesh has filed appeal arising out of S.L.P.(C) No. 35734 of 2009. Pursuant to the order of the High Court, the respondent-Company alleging that though the Nazul Officer passed an order, has not granted NOC and disposed of the same not in accordance with the Circular of the State Government, filed a Contempt Petition (C) 173 of 2009 before the High Court. By order dated 13.10.2009, the High Court after finding that the Nazul Officer has dealt with the matter beyond the Circular dated 14.02.1966 of the State Government and not followed its earlier order, directed him to personally present before the Court on 27.10.2009 to explain his "misconduct" in passing such order. Questioning the said order, the State of Madhya Pradesh has also filed SLP (C) 35732 of 2009. Since both the orders of the High Court relate to the same issue, these appeals are being disposed of by this judgment.

3. Heard Mr. Ravindra Shrivastav, learned senior counsel for the appellant and Mr. S. Gopakumaran Nair, learned senior counsel for the respondent.

4. The issues which arise for consideration in these appeals are:-

(i) Whether the High Court has exceeded its jurisdiction under Article 226 of the Constitution of India while setting aside the order dated 15.04.2008 passed by the Nazul Officer in a writ petition when an alternative remedy is available to respondent no. 1 to challenge the said order before the Collector as per Section 18 of the Revenue Book Circular?

(ii) Whether the High Court is justified in directing the Nazul Officer to present personally to explain his "misconduct"?

5. Before considering the above issues, it is useful to refer certain factual details which necessitated the Nazul Officer to pass an order declining to grant NOC. The State of Madhya Pradesh as early as on 14.03.1939 executed the lease of 12 acres of land in favour of the respondent-Company for a term of 30 years from 14.03.1939 to 13.03.1969 for the purpose of developing trade in refrigerated food stuffs and industries at the ground rent of Rs. 1/- per acre per annum for the first 30 years of the lease. The Government of Madhya Pradesh, vide notification dated 14.02.1966, instructed the Nazul Officer to examine the question of ownership of the land as per rules and regulations so that the Government land could not be encroached at the time of construction of the building. This notification empowers the Nazul Officer to examine the question of ownership of the land on which the construction has to be raised. As Respondent No. 1 has violated the terms and conditions of the lease and exceeded the scope and purpose of the lease by raising constructions on the leased land without prior approval or permission of the State Government, the Additional Collector, Bhopal, on 03.05.1982, issued a show cause notice asking the respondent to explain as to why the lease not to be determined. In view of the dispute between the parties, the issue was referred to Arbitration as per clause 12 of the lease deed dated 14.03.1939 for amicable settlement. The Arbitrator, by his award dated 03.07.1985, held that there is no prohibition in the lease deed that respondent No. 1 would not raise constructions to develop industry, trade and commerce. The said award was challenged by the appellant-State in Misc. Appeal No. 166 of 1988 before the High Court of Madhya Pradesh and the High Court upheld the award passed by the Arbitrator on 03.07.1985. Pursuant to the said order of the High Court, the appellant-State renewed the lease deed for 3.82 acres of land for a period of 30 years commencing from 1969 to 1999 in favour of the respondent. The Government of Madhya Pradesh, vide its letter dated 04.05.1999, permitted the respondent-Company to change the use of leased land from industrial purpose to commercial or residential purpose on payment of lease rent, as payable on the land used or changed for commercial or residential purpose, as per the commercial rate assessed according to the rules and regulations and also directed the Collector, District Bhopal, to recover the said rent as per the rules and regulations.

6. The appellant-State again renewed the lease deed for 3.13 acres of land for 30 years from 14.03.1999 to 13.03.2029 in favour of the respondent-Company. Vide letter dated 16.01.2004, the appellant-State permitted the respondent-Company to change the use of leased land from industrial purpose to commercial and residential purpose on payment of lease rent as assessed as per the rules and regulations. The Joint Director, Town & Country Planning, Bhopal sanctioned the plan for 3 years for residential, commercial development on the leased land presented by the respondent. The Government of Madhya Pradesh, vide its letter dated 19.01.2007, directed the Collector, Bhopal that where the use of leased land is changed, then the rent on such leased land shall be re-assessed as per the rules and regulations. On 06.03.2007, the respondent-Company made an application for grant of NOC before the Nazul Officer, Bhopal, for raising commercial and residential constructions on the leased land without paying the lease rent of Rs. 30,41,10,240/- assessed as per rules and regulations on the change of use of leased land to commercial and residential purpose.

7. The respondent filed a Writ Petition No. 15400 of 2007 before the High Court of Madhya Pradesh praying for issuance of Writ of Mandamus directing the Nazul Officer to decide the application for grant of NOC pending before him. On 25.02.2008, the Tehsildar issued advertisement in the newspapers inviting objections against granting of NOC to the respondent-Company for change of use of leased land. One Aziz Udeen, Partner M/s Chandan Mal Looks & Co. had registered his objection against granting NOC to the respondent-Company on the ground that there is a dispute between the respondent and his company regarding the land for which the respondent is seeking NOC and Civil Suit No. 503 of 2006 is already pending before the Civil Judge.

8. By order dated 20.03.2008, in Writ Petition No. 15400 of 2007, the High Court directed the Nazul Officer/Appropriate Authority to take a decision on the application of the respondent-Company for grant of NOC. In compliance of the said order, the Nazul Officer, Bhopal, asked for certain documents and sought information from the respondent-Company to decide the application. The respondent-Company failed to submit those documents and information sought for despite several reminders. After hearing the parties, the Nazul Officer, by order dated 15.04.2008, rejected the application for grant of NOC. Aggrieved by the said order, the first respondent preferred Writ Petition No. 5467 of 2008 before the High Court of Madhya Pradesh. In the said writ petition, the State had taken the preliminary objection that the writ petition is not maintainable as alternative remedy was available to the respondent under Section 18 of the Revenue Book Circular. In spite of the said objection, by order dated 26.09.2008, the High Court directed the respondent-Company to submit the documents and information sought for by the Nazul Officer and also directed the Nazul Officer to decide the application of the respondent for grant of NOC by passing a speaking order. In the same order, the High Court directed the Nazul

Officer to consider only the circular dated 14.02.1966 and the Arbitration Award while deciding the application for NOC. Again, the Nazul Officer asked certain documents and sought for information from the respondent-Company and after hearing the respondent the Nazul Officer, by order dated 02.02.2009, rejected the application for grant of NOC. Questioning the said order, the respondent preferred Contempt Petition (C) No. 173 of 2009 before the High Court. The High Court, on 13.10.2009, while issuing notice in the Contempt Petition, observed that the Nazul Officer is trying to frustrate and circumvent the directions issued by the High Court directing him to explain his "misconduct".

9. Mr. Ravindra Shrivastav, learned senior counsel appearing for the State objected to the order of the High Court by pointing out that under Section 18 of the Revenue Book Circular, against the order of the Nazul Officer, an effective remedy by way of appeal would lie before the Collector. According to him, when such remedy is available, the High Court is not justified in exercising its extraordinary jurisdiction under Article 226. He also pointed out that even after the direction of the High Court, the Nazul Officer has passed an order only in accordance with law, hence, if the first respondent is aggrieved, it can be challenged in the manner known to law before the Collector. However, it filed a contempt petition and the High Court directed personal appearance of the Nazul Officer to explain his "misconduct" for not passing orders as per the earlier order. According to the learned senior counsel for the State, the Nazul Officer has passed an order as per the provisions of the statute, circulars and Government instructions. On the other hand Mr. S. Gopakumaran Nair, learned senior counsel for the respondent-Company supported the order of the High Court and pleaded for dismissal of both the appeals.

10. We have carefully considered the rival contentions and perused the relevant materials.

11. Coming to the first objection as to the exercise of jurisdiction by the High Court under Article 226 in respect of the order dated 15.04.2008 passed by the Nazul Officer, it is pointed out that an effective remedy by way of an appeal to the Collector is provided under Section 18 of the Revenue Book Circular which reads as under:-

> **"Section 18-Sale and Disposal of Land**
>
> 2.117. All land which is the property of Government should ordinarily be sold through the Director of Land Records. Agricultural or pastoral land acquired for public purposes should, when it is no longer required by Government, be disposed of in accordance with the instructions in paragraph 3 of M.P. Revenue Book Circular 1-5.
>
> 2.118. If any Nazul land in charge of the W.D. is to be relinquished, a reference should be made by the C.E. to the

Collector who will deal with the land under the Provisions of the M.P. Revenue Book Circular IV-I, paragraph 29.

2.119. When any Government land or other immovable public property is made over to a local body for public, religious, educational or any other specified purposes, the grant should be subject to the following conditions in addition to any other that may be prescribed:-

(1) that the property shall be liable to be resumed by Government;

(a) if it is used for any purpose other than that specified; or

(b) in the case of buildings, if they are allowed to fall into disrepair;

(2) that the property should be at any time resumed by Government, the compensation payable shall in no case exceed-

(a) the amount paid to Government by the local body less depreciation on buildings, if any, calculated in accordance with Paragraph 3.036 of Chapter III-"Buildings" for the period during which the property was in charge of the local body or the present value of the property, whichever is less;

(b) the cost or present value, whichever is less, of any buildings or other works constructed on the property by the local body."

12. A perusal of the order of the Nazul Officer shows that grant of NOC depends upon various factors and fulfillment of certain conditions. It is also not in dispute that the said officer is better equipped with to decide the application for grant of NOC. Undoubtedly, while deciding such an application, Nazul Officer has to consider not only the circulars but also rules and regulations framed by the State Government. Even otherwise, when the ultimate order of Nazul Officer can be canvassed before Collector, the High Court ought not to have exercised its extraordinary jurisdiction under Art. 226 as an appellate court over the finding of fact arrived at by the Nazul Officer. In this context, it is useful to refer the following decisions:

In *Punjab National Bank vs. O.C. Krishnan & Ors.*, (2001) 6 SCC 569, this Court held:-

"6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred.

> Even though a provision under an Act cannot expressly oust the jurisdiction of the court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."

In State of *Himachal Pradesh and Ors. vs. Gujarat Ambuja Cement Ltd. and Anr.* (2005) 6 SCC 499, this Court observed as under:-

> "17. We shall first deal with the plea regarding alternative remedy as raised by the appellant-State. Except for a period when Article 226 was amended by the Constitution (42nd Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self imposed limitation. It is essentially a rule of policy, convenience and, discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction of discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy provided the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction."

13. There is broad separation of powers under the Constitution between three organs of the State, i.e., the Legislature, the Executive and the Judiciary. It is also well established principle that one organ of the State should not ordinarily encroach into the domain of another. Even if the order of the first authority, in the case on hand, Nazul Officer, requires interference, it is for the appellate authority to look into it and take a decision one way or the other and it is not an extraordinary case which warrants direct interference by the High Court under Art. 226. It is relevant to note that the Nazul Officer has adverted to a relevant fact that the Government, while renewing the lease of 3.13 acres of land from 14.03.1999 to 13.03.2029 in favour of the respondent-Company, permitted it to change the use of leased land from industrial purpose to commercial or residential purpose on payment of the lease rent, as payable on the land used or changed for commercial or residential purpose. In such circumstances, if the said direction is applicable, it is but proper on the part of the respondent to comply with it. Even if the stand of the respondent-Company is acceptable and if they are aggrieved of the order of the Nazul

Officer, they are free to challenge the same before the Collector as pointed above. In our opinion, interference by the High Court against the order of the original authority, which is based on factual details, is not warranted under writ jurisdiction.

14. Coming to the second submission, in view of our conclusion about the order of the High Court dated 26.09.2008, we are satisfied that the second issue is to be answered against the respondent. Here again, this Court, in a series of decisions, has held that when a matter is remitted to the original authority to decide the issue, the said authority must be allowed to take a decision one way or the other in accordance with the statutory provisions, rules and regulations applicable to the same. There cannot be any restriction to pass an order in such a way de hors to the statutory provisions or regulations/instructions applicable to the case in particular. As pointed out earlier, even if there is any error, it is for the Collector/ Government to set it right and the High Court is not justified in asking the officer to personally present and explain his "misconduct". In our considered view, the High Court has exceeded its jurisdiction in issuing such a direction.

15. In the light of the above discussion, we set aside the impugned order of the High Court dated 26.09.2008 passed in Writ Petition No. 5469 of 2008 and the order dated 13.10.2009 in Contempt Petition No. 173 of 2009. We make it clear that if the matter is still pending with the Nazul Officer, he is at liberty to pass appropriate orders in accordance with the earlier directions of the High Court as well as the rules and regulations, instructions and circulars issued by the Government which are applicable to the matter in issue uninfluenced by any of the observations made by the High Court. It is further made clear that if the Nazul Officer has already concluded and passed an order and the respondent-company is aggrieved of the same, it is free to avail the remedy under Section 18 of the Revenue Book Circular and in that event it is for the Collector to consider and pass orders in accordance with law.

16. With the above directions, both the appeals are allowed. No order as to costs.

Appeal allowed.

I.L.R. [2010] M. P., 1865

SUPREME COURT OF INDIA

Before Mr. Justice J.M. Panchal & Mrs. Justice Gyan Sudha Mishra

4 August, 2010*

D.K. SHRIVASTAVA ... Appellant

Vs.

STATE OF M.P. & anr. ... Respondents

A. Evidence Act (1 of 1872), Section 3 - *Appreciation of evidence* *- The duty of the Judge is to consider the evidence objectively and*

*Cr.A. No.1430/2010

dispassionately, examine it in the light of probabilities and decide which way the truth lies - The impression formed by the Judge about the character of evidence will ultimately determine the conclusion which he reaches. (Para 8)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्ष्य का अधिमूल्यन – न्यायाधीश का यह कर्तव्य है कि साक्ष्य का वस्तुपरक रूप से तथा निष्पक्षता से विचार करे, अधिसंभाव्यताओं के प्रकाश में उसका परीक्षण करे और यह विनिश्चित करे कि किस मार्ग पर सत्य पोषित होता है – साक्ष्य के स्वरूप के बारे मे बनी न्यायाधीश की धारणा अंततः उस निष्कर्ष को निर्धारित करेगी जिस पर वह पहुँचता है।

B. Judicial restraint - *All judicial minds may not react in the same way to the said evidence and it is not unusual that evidence which appears to be respectable and trustworthy to one Judge may not appear to be respectable and trustworthy to another Judge - That explains why in some cases Courts of Appeal reverse conclusions of facts recorded by the trial court on its appreciation of oral evidence - The knowledge that another view is possible on the evidence adduced in present case should have acted as a sobering factor and led to learned Judges of the appellate court to the use of temperate language in recording judicial conclusions.* (Para 8)

ख न्यायिक अवरोध – सभी न्यायिक मस्तिष्कों की उक्त साक्ष्य के प्रति समान प्रतिक्रिया नहीं हो सकती और यह असामान्य नहीं है कि साक्ष्य जो एक न्यायाधीश को महत्वपूर्ण एवं विश्वसनीय प्रतीत होती है वह दूसरे न्यायाधीश को महत्वपूर्ण एवं विश्वसनीय प्रतीत न हो – इससे स्पष्ट होता है कि क्यों कुछ मामलों मे अपीली न्यायालय, मौखिक साक्ष्य के मूल्यांकन पर विचारण न्यायालय द्वारा अभिलिखित तथ्यों के निष्कर्षो को पलट देता है – यह ज्ञान कि वर्तमान मामले मे प्रस्तुत साक्ष्य पर अन्य दृष्टिकोण संभव है इसका प्रभाव संयमी तत्व के रूप मे पड़ा होगा और अपीलीय न्यायालय के विद्वान न्यायाधीश न्यायिक निष्कर्षो को अभिलिखित करने मे संयमी भाषा का प्रयोग करने के लिए अग्रसर हुए।

Cases referred :

(2005) 6 SCC 767, (1963) 3 SCR 722.

O R D E R

Leave granted.

2. This appeal is directed against judgment dated November 17, 2008 rendered by the Division Bench of High Court of Judicature at Jabalpur (Madhya Pradesh) by which Criminal Appeal No. 2119 of 2008, filed by the respondent No. 2 against his conviction recorded under Section 302 read with Section 34 IPC and Section 201 read with Section 34 IPC and imposition of sentence of R.I. for life and fine of Rs.500/- in default R.I. for four months for commission of offence under Section 302 read with Section 34 IPC as well as R.I. for seven years and fine of Rs.500/- in default R.I. for four months for commission of offence punishable under Section 201 read with Section 34 IPC, by the learned First Additional Sessions Judge, Damoh vide judgment dated August 30, 2008 in Sessions Trial No. 219 of 2005, is allowed and certain adverse remarks have been made against the appellant, who is a Judicial Officer.

3. The brief facts leading to filing of the present appeal may be noted.

On August 28, 2005, an FIR was lodged at Police Station, Nohta, District Damoh, Madhya Pradesh against the respondent No. 2 by first informant Achhe Lal Ahirwar alleging that respondent No. 2 and others had committed an offence punishable under Section 302 IPC read with Section 34 and Section 201 IPC read with Section 34 for murdering one Reenu Ahirwar.

After usual investigation, charge sheet was laid before the competent court and case was committed for trial to the court presided over by the present appellant. It may be mentioned that several witnesses were examined by the prosecution and documents were also produced in support of its case against respondent No. 2 and others. On appreciation of evidence adduced by the prosecution, the appellant concluded that it was proved by the prosecution beyond pale of doubt that deceased Reenu Ahirwar had died a homicidal death. The appellant further concluded that the respondent No. 2 herein was responsible for causing murder of the deceased and no case was made out by the prosecution against the other accused. In view of the above conclusions, the appellant by judgment dated August 30, 2008, rendered in Sessions Trial No. 219 of 2005, convicted the respondent No. 2 under Section 302 read with Section 34 IPC and Section 201 read with Section 34 IPC and sentenced him to undergo life imprisonment and pay fine of Rs.500/- in default R.I. for four months for commission of offence under Section 302 read with Section 34 IPC and R.I. of seven years and fine of Rs.500/- in default R.I. for four months for commission of offence under Section 201 read with Section 34 IPC.

4. Feeling aggrieved, the respondent No. 2 preferred Criminal Appeal No. 2119 of 2008 before the High Court of Judicature at Jabalpur (Madhya Pradesh). The appeal was heard by Division Bench comprising Mr. Justice R.S. Garg (as he then was) and Mr. Justice U.C. Maheshwari. The Division Bench was of the view that the conviction of the respondent No. 2 recorded by the appellant was not justified at all. Therefore, by judgment dated November 17, 2008, the High Court acquitted the respondent No. 2. However, while acquitting the respondent No. 2, the learned Judges comprising the Bench made disparaging remarks against the appellant and, therefore, the appellant has approached this Court for expunging the same.

5. On service of notice, Mr. M.K. Shrivastava, who is discharging duties as Additional Superintendent of Police, District Damoh (M.P), has filed reply affidavit mentioning inter alia that in the incident in question, murder of a young boy had taken place for which the respondent No. 2 and others were prosecuted. It is further pointed out in the reply that the High Court was not justified in setting aside well considered conviction of respondent No. 2 nor was there any occasion for the High Court to pass unwarranted remarks against the appellant, who was discharging duties as learned Sessions Judge. What is mentioned in the reply is

that the High Court has made observations against the appellant without properly considering the witness account as well as the evidence against the respondent No. 2 and the fact is that the respondent No. 2 was a well known bad element in the area and that large number of cases against him were registered with the police. Mr. Shrivastava, Additional Superintendent of Police has annexed a list of cases registered against respondent No. 2 in support of his case that respondent No. 2 is a well known bad element in the area. Mr. Shrivastava has further pointed out that in view of several reported decisions of the Supreme Court, expressing the opinion that the Superior Court must not pass any comments on the judicial work of the subordinate court except when the same is conducted in an extra judicious matter, the disparaging remarks made by the High Court against the appellant, which are not justified at all, should be set aside and the appeal should be allowed.

6. This Court has heard Mr. Jayant Kumar Mehta, learned counsel for the appellant as well as Ms. Vibha Datta Makhija, learned Government pleader for the respondent State. Though the respondent No. 2 is duly served, he has neither appeared through his lawyer nor in person nor has filed reply controverting the averments made in the SLP.

7. From the impugned judgment, it is evident that the High Court was not inclined to place reliance on the prosecution witnesses and on re-appreciation of evidence it has acquitted the respondent No. 2. However, this Court is of the firm view that there was no occasion for the High Court to make sweeping and disparaging remarks against the appellant, who had convicted the respondent No. 2 while discharging his duties as Judicial Officer. This Court has, time and again, laid down in several reported decisions that while hearing an appeal, the High Court must exercise restraint and should not pass unwarranted and disparaging remarks against the judicial officers. However, from the impugned judgment it appears that the reported decisions had no sobering effect on the learned Judges constituting the Division Bench and following disparaging remarks have been made by them against the appellant: -

> "It has also come on the record that the accused Dallu does not have palms. When this argument was raised before the learned Court below surprisingly the Court in its zeal to convict the accused recorded an absurd finding that after providing liquor to the deceased the accused murdered him and nail marks found on and around the neck could be caused by toe nails."
>
> xxx xxx xxx xxx
>
> "Before parting with the case, we propose to observe that in a criminal matter the benefit of every doubt has to go to the accused. There is no burden upon the accused to discharge any

liability and the prosecution is required to prove the allegations made by them. The conviction of a person cannot be recorded on the basis of whims of a particular Judge or on a particular understanding. We are also forced to observe that recording of the conviction by a Judge is no guarantee that the Judge is honest and acquittal recorded by the Judge cannot lead to an allegation that the Judge is not conducting himself fairly. When in case like present the accused is convicted then a wrong message is conveyed to the Society and the people who are interested in the matter start believing that the Judges/the Courts do not appreciate the true facts and are deciding the matter on their own whims and fancies. The observation made by the learned Judge in relation to the nail marks caused by the toe nail is not only fanciful but is absolutely perverse and shocks the human understanding and prudence. Even while acquitting the accused, we must observe that acquittal or conviction should be recorded on the strength of the evidence available on the record. There must be proper blending of facts, law and understanding. If people start doubting understanding of the Court then that would be a serious dent to the respect of the Court. If the public loses confidence in the system then that again would be a bad day for all of us.

We direct that a copy of this judgment be sent to the concerned Judge for his future guidance and a copy be kept in his service record."

In this connection, the learned counsel for the appellant has placed reliance on the decision in *Samya Sett vs. Shambhu Sarkar and another* [(2005) 6 SCC 767]. After review of the law on the point, this Court has made following pertinent observations in paragraphs 9 to 20 of the reported decision: -

"9. This Court has, in several cases, deprecated the practice on the part of Judges in passing strictures and in making unsavoury, undeserving, disparaging or derogatory remarks against parties, witnesses as also subordinate officers.

10. In *Alok Kumar Roy v. Dr. S.N. Sarma and Anr.* [1968 (1) SCR 813], the vacation Judge of the High Court of Assam and Nagaland passed an interim order during vacation in a petition entertainable by the Division Bench. After reopening of the Court, the matter was placed before the Division Bench presided over by the Chief Justice in accordance with the High Court Rules. The learned Chief Justice made certain remarks as to "unholy haste and hurry" exhibited by the learned vacation Judge in dealing with the case. When the matter reached this Court, Wachoo, C.J., observed: (SCR pp. 819 F-820 A)

"It is a matter of regret that the learned Chief Justice thought fit to make these remarks in his judgment against a colleague and assumed without any justification or basis that his colleague had acted improperly. Such observations even about Judges of subordinate courts with the clearest evidence of impropriety are uncalled for in a judgment. When made against a colleague they are even more open to objection. We are glad that Goswami, J. did not associate himself with these remarks of the learned Chief Justice and was fair when he assumed that Dutta, J. acted as he did in his anxiety to do what he thought was required in the interest of justice. We wish the learned Chief Justice had equally made the same assumption and had not made these observations castigating Dutta, J. for they appear to us to be without any basis. It is necessary to emphasis that judicial decorum has to be maintained at all times and even where criticism is justified it must be in language of utmost restraint, keeping always in view that the person making the comment is also falliable."

(emphasis supplied)

11. In *State of M.P. v. Nandlal Jaiswal and Ors.*, [(1986) 4 SCC 566], disparaging and derogatory remarks were made by the High Court against the State Government. When the matter came up before this Court and a complaint was made against these remarks, it was observed by this Court that the remarks were "totally unjustified and unwarranted".

12. Bhagwati, C.J. stated: (SCC p. 615, para 43) "We may observe in conclusion that judges should not use strong and carping language while criticizing the conduct of parties or their witnesses. They must act with sobriety, moderation and restraint. They must have the humility to recognize that they are not infallible and any harsh and disparaging strictures passed by them against any party may be mistaken and unjustified and if so, they may do considerable harm and mischief and result in injustice."

13. In *A.M. Mathur v. Pramod Kumar Gupta* [(1990) 2 SCC 533], which was an offshoot of Nandlal Jaiswal, certain observations were made by the High Court against the conduct of Advocate General of the State. Quoting Justice Cardozo and Justice Frankfurter, the Court stated that the Judges are flesh and blood mortals with individual personalities and with normal human traits. Still judicial restraint and discipline are as necessary to the orderly administration of justice as they are to the effectiveness of the army. The duty of restraint should be the constant theme of judges,

observed the Court: "This quality in decision making is as much necessary for judges to command respect as to protect the independence of the judiciary."

14. The Court further added: (p.539, para 14) "14. The Judge's Bench is a seat of power. Not only do judges have power to make binding decision, their decisions legitimate the use of power by other officials. The judges have the absolute and unchallengeable control of the court domain. But they cannot misuse their authority by intemperate comments, undignified banter or scathing criticism of counsel, parties or witnesses. We concede that the court has the inherent power to act freely upon its own conviction on any matter coming before if for adjudication, but it is a general principle of the highest importance to the proper administration of justice that derogatory remarks ought not to be made against persons or authorities whose conduct comes into consideration unless it is absolutely necessary for the decision of the case to animadvert on their conduct."

15. In 'K', A Judicial Officer, in re [(2001) 3 SCC 54], one of us (R.C. Lahoti, J.), (as his Lordship then was) again considered the relevant decisions on the point and said: (SCC p. 62, paras 6-7)

"6. Several cases are coming to our notice wherein observations are being made against the members of subordinate judiciary in the orders of superior forums made on judicial side and judicial officers who made orders as presiding Judges of the subordinate Courts are being driven to the necessity of filling appeals to this Court or petitions before the High Courts seeking expunging of remarks or observations made and sometimes strictures passed against them behind their back. We would, therefore like to deal with a few aspects touching the making of observations or adverse comments against judicial officers and methodology to be followed if it becomes necessary.

7. A Judge entrusted with the task of administering justice should be bold and feel fearless while acting judicially and giving expression to his views and constructing his judgment or order. It should be no deterrent to formation and expression of an honest opinion and acting thereon so long as it is within four-corners of law that any action taken by a subordinate judicial officer is open to scrutiny in judicial review before a superior forum with which its opinion may not meet approval and the superior court may upset his action or opinion.

> The availability of such fearlessness is essential for the maintenance of judicial independence. However, sobriety, cool, calm and poise should be reflected in every action and expression of Judge." (emphasis supplied)

16. In *State of Bihar v. Nilmani Sahu and Anr.* [(1999)] 9 SCC 211], while disposing of the Special Leave Petition against an order passed by a single Judge of the High Court of Patna, this Court observed: (SCC p. 212, para 1)

> "We find that the view taken by the learned single Judge, Justice P.K. Dev, with due respect, if we can say so, is most atrocious".

17. Feeling aggrieved by the remarks, an application was made in a disposed of Special Leave Petition and it was submitted to this Court that the remarks were not necessary. Allowing the application and deleting the remarks, this Court stated that they were "wholly inappropriate".

18. It is universally accepted and we are conscious of the fact that judges are also human beings. They have their own likes and dislikes; their preferences and prejudices. Dealing with an allegation of bias against a Judge, in Linahan, Re [(1943) 138 F IInd 650], Frank J. stated:

> "If, however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the Judge, then no one has ever had a fair trial, and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions and the processes of education, formal and informal, create attitudes which precede reasoning in particular instances and which, therefore, by definition are prejudices."

19. Justice John Clarke has once stated:

> "I have never known any judges, no difference how austere of manner, who discharged their judicial duties in an atmosphere of pure, unadulterated reason. Alas! we are 'all the common growth of the Mother Earth' - even those of us who wear the long robe." (emphasis supplied)

20. Similar was the view of Thomas Reed Powell, who said:

> "Judges have preferences for social policies as you and I. They form their judgments after the varying fashions in which you and I form ours. They have hands, organs, dimensions, senses, affections, passions. They are warmed

by the same winter and summer and by the same ideas as a layman is."

8. Similarly, Ms. Vibha Datta Makhija, learned counsel for the State Government, has drawn attention of this Court to the decision in *Ishwari Prasad Mishra vs. Mohammad Isa* [(1963) 3 SCR 722]. In the said case, the appellant had instituted a suit for specific performance of an agreement of sale executed by the respondent. The genuineness of the said agreement was disputed by the respondent. The trial court had decreed the suit. But, on appeal the High Court had reversed the findings of the trial court and dismissed the suit. While dismissing the suit, this Court found that disparaging remarks were made by the High Court against the learned Judge of the trial court, therefore, this Court was compelled to lay down guidelines as to how the Hon'ble High Court Judges should conduct themselves while hearing an appeal and refrain from making unwarranted observations against the learned Judges of the trial court. It would be apt to reproduce those weighty observations which are found as under: -

"Before we part with this appeal, it is necessary that we should make some observations about the approach adopted by the High Court in dealing with the judgment of the trial court which was in appeal before it. In several places the High Court has passed severe strictures against the trial Court and has, in substance, suggested that the decision of the trial Court was not only perverse but was based on extraneous considerations. It has observed that the mind of the learned Subordinate Judge was already loaded with bias in favour of the plaintiff and that the plaintiff had calculated that such of the evidence as he would produce "along with the pull and weight that would be harnessed from behind would be sufficient to carry him through." Similarly, in criticising the trial Court for accepting the evidence of Jamuna Singh, the High Court has observed that the presumption made by the trial Court that teacher, as a rule, is a respectable person, "is not any legal appreciation of the evidence but a way found to suit the convenience of the court for holding in favour of the plaintiff". It would thus be seen that in reversing the decision of the trial Court, the High Court has suggested that the trial Court was persuaded by extraneous considerations and that some pull and weight had been used in favour of the appellant from behind. We are constrained to observe that the High Court was not justified in passing these strictures against the

trial Judge in dealing with the present case. Judicial experience shows that in adjudicating upon the rival claims brought before the courts it is not always easy to decide where truth lies. Evidence is adduced by the respective parties in support of their conflicting contentions and circumstances are similarly pressed into service. In such a case, it is, no doubt, the duty of the Judge to consider the evidence objectively and dispassionately, examine it in the light of probabilities and decide which way the truth lies. The impression formed by the Judge about the character of the evidence will ultimately determine the conclusion which he reaches. But it would be unsafe to overlook the fact that all judicial minds may not react in the same way to the said evidence and it is not unusual that evidence which appears to be respectable and trustworthy to one Judge may not appear to be respectable and trustworthy to another Judge. That explains why in some cases courts of appeal reverse conclusions of facts recorded by the trial Court on its appreciation of oral evidence. The knowledge that another view is possible on the evidence adduced in a case, acts as a sobering factor and leads to the use of temperate language in recording judicial conclusions. Judicial approach in such cases should always be based on the consciousness that one may make a mistake; that is why the use of unduly strong words in expressing conclusions or the adoption of unduly strong intemperate, or extravagant criticism against the contrary view, which are often founded on a sense of infallibility should always be avoided. In the present case, the High Court has used intemperate language and has even gone to the length of suggesting a corrupt motive against the Judge who decided the suit in favour of the appellant. In our opinion, the use of such intemperate language may, in some cases, tend to show either a lack of experience in judicial matters or an absence of judicial poise and balance. We have carefully considered all the evidence to which our attention was drawn by the learned counsel on both the sides and we are satisfied that the imputations made by the High Court against the impartiality and the objectivity of the approach adopted by the trial judge are wholly unjustified. It is very much to be regretted that the High Court should have persuaded itself to use such extravagant language in criticising the trial Court, particularly when our conclusion in the present appeal shows that the trial Court was right and the High Court

was wrong. But even if we had not upheld the findings of the trial Court, we would not have approved of the unbalanced criticism made by the High Court against the trial Court. No doubt, if it is shown that the decision of the trial Court in a given case is a result of corrupt motive, the High Court must condemn it and must take due further steps in the matter. But the use of strong language and imputation of corrupt motives should not be made light-heartedly because the Judge against whom the imputations are made has no remedy in law to vindicate his position."

8. In view of the clear proposition of law laid down in the above-mentioned cases, this Court is of the firm opinion that the High Court was not justified at all in making unwarranted, uncharitable, disparaging and derogatory remarks, which have tendency to effect adversely the judicial career of the appellant. The criticism of the appellant by the High Court was not necessary at all for the disposal of criminal appeal filed by respondent No. 2. As observed earlier Mr. M.K. Shrivastava, Additional Superintendent of Police, District Damoh, Madhya Pradesh, in his reply affidavit has asserted that the High Court was not justified in reversing the well considered conviction of respondent No. 2. There is every possibility that in an appeal against judgment of the High Court acquitting the respondent No. 2 this Court may restore the judgment of the trial court. The question, which arises for consideration, would be whether this Court would be justified in criticising the learned Judges of the High Court while reversing their judgment as they have done while upsetting the judgment delivered by the appellant. The answer must be emphatic `no'. It is no doubt, the duty of the Judge to consider the evidence objectively and dispassionately, examine it in the light of probabilities and decide which way the truth lies. The impression formed by the Judge about the character of evidence will ultimately determine the conclusion which he reaches. But it would be unsafe to overlook the fact that all judicial minds may not react in the same way to the said evidence and it is not unusual that evidence which appears to be respectable and trustworthy to one Judge may not appear to be respectable and trustworthy to another Judge. That explains why in some cases Courts of Appeal reverse conclusions of facts recorded by the trial court on its appreciation of oral evidence. The knowledge that another view is possible on the evidence adduced in present case should have acted as a sobering factor and led to learned Judges of the High Court to the use of temperate language in recording judicial conclusions. The remarks, if not expunged as prayed for, are likely to do more harm to the learned Judges of subordinate courts and would deter them from performing their judicial functions independently and boldly which in term likely to effect their judicial independence. The observations made by the High Court "we are forced to observe that recording of the conviction by a Judge is no guarantee that the Judge is honest and acquittal recorded by the Judge cannot

lead to an allegation that the Judge is not conducting himself fairly. When in case like present the accused is convicted than a wrong message is conveyed to the Society and the people who are interested in the matter start believing that the Judges/Courts do not appreciate the true facts and are deciding the matter on their own whims and fancies" are totally unwarranted and should not have been made while disposing of the appeal filed by the respondent No. 2. While deciding the appeal filed by the respondent No. 2, the High Court was concerned with the question of appreciating the evidence, whether the appellant was justified in convicting the respondent No. 2 or not and if the High Court was of the opinion that the evidence did not inspire confidence of the Court, was entitled to acquit the respondent No. 2 but there was no occasion for the High Court to personally criticize and go on making thoroughly unwarranted remarks suggesting about the character of the appellant.

9. On the facts and in the circumstances of the case, this Court is of the opinion that remarks made by the High Court against the appellant will have to be expunged and the appeal will have to be allowed.

10. For the foregoing reasons, the appeal succeeds. The remarks made by the Division Bench of the High Court of Judicature at Jabalpur (Madhya Pradesh) in Criminal Appeal No. 2119 of 2008 decided on November 17, 2008 against the appellant are hereby expunged. The direction given by the High Court that a copy of judgment of the High Court be sent to the appellant for his future guidance and a copy be kept in his service record is hereby set aside. The appeal accordingly stands disposed of.

Appeal disposed of.

I.L.R. [2010] M. P., 1876
FULL BENCH
Before Mr. Justice Dipak Misra, Mr. Justice K.K. Lahoti
& Mr. Justice Rajendra Menon
27 October, 2009*

BANK OF MAHARASHTRA & anr. ... Appellants
Vs.
MANOJ KUMAR DEHARIA & anr. ... Respondents

A. **Service Law** - *Compassionate appointment - The grant of compassionate appointment is not a vested legal right - It is only benefit granted in certain circumstances de hors the normal rule of appointment and when the employer has a right to evolve an appropriate policy after considering various factors for granting such a benefit, the considerations have to be made in accordance with the policy that is prevailing at that time.* (Para 33)

क. सेवा विधि – अनुकंपा नियुक्ति – अनुकंपा नियुक्ति का अनुदान निहित विधिक

*W.A. No.1007/2007 (Jabalpur)

अधिकार नहीं है – यह केवल ऐसा लाभ है जिसे नियुक्ति के सामान्य नियम से असंबद्ध कतिपय परिस्थितियों में प्रदान किया जाता है और जब ऐसा लाभ प्रदान करने के लिये विभिन्न कारकों पर विचार करने के पश्चात् नियोक्ता को उचित नीति विकसित करने का अधिकार हो तब नीति जो उस समय विद्यमान हों उसके अनुसार विचार किया जाना चाहिए।

B. Service Law - ***Compassionate appointment - Policy - When the employer or the Government is at liberty to evolve a scheme for granting such appointment from time to time, then the consideration for appointment has to be made in accordance with the Scheme or Policy that is in existence.*** (Para 33)

ख सेवा विधि – अनुकंपा नियुक्ति – नीति – जब नियोक्ता अथवा शासन समय समय पर ऐसी नियुक्ति प्रदान करने हेतु स्कीम विकसित करने के लिए स्वतंत्र होते हैं तब नियुक्ति के लिये विचार, स्कीम या नीति जो अस्तित्व में है, के अनुसार करना होगा।

C. Service Law - ***Compassionate appointment - It would be the obligation of the employer to deal with the application with immediacy and promptitude so that the grievance of a family in distress gets a fair treatment in accordance with law.*** (Para 33)

ग सेवा विधि – अनुकंपा नियुक्ति – यह नियोक्ता की बाध्यता होगी कि आवेदन पर अविलंब और तत्परता से कार्यवाही करे ताकि व्यथित कुटुम्ब की शिकायत के साथ विधिनुसार उचित व्यवहार हो सके।

Cases referred :

2002(2) MPHT 320, 2008(1) MPLJ 492 (overruled).

Ashish Shroti, for the appellants.

R.K. Sanghi, for the respondents.

ORDER

The Order of the Court was delivered by **RAJENDRA MENON, J.** :–In the light of the decision rendered in *T. Swamy Dass Vs. Union of India and Others,* 2002 (2) MPHT 320, and the perceptual shift with regard to 'compassionate appointment' and the recurring problem that is faced during the process of adjudication, a Division Bench to put the controversy to rest, referred the following singular question with alternatives to be addressed by a larger Bench:

> "In a case of compassionate appointment pursuant to the death of a deceased employee, which policy of the Government is to be applied:-
>
> 1. The policy prevailing at the time of the death of employee?
>
> OR
>
> 2. The policy prevailing at the time of application for compassionate appointment?
>
> OR

3. The policy prevailing at the time of consideration of the application for compassionate appointment?"

2. Facts, in brief, are that the respondent, Manoj Kumar Deharia, filed a writ petition before this Court claiming compassionate appointment and seeking quashment of an order-dated 31.5.2004 passed by the appellant-bank, rejecting his claim. It was the case of the respondent that his father, Late Lochan Singh Deharia, while working as a clerk, died in harness on 1.11.1996. On 28.11.1996, he submitted an application seeking compassionate appointment to the appellant. The Branch Manager of the bank concerned forwarded the said application to the Regional Office,on 19.2.1997. When the application was submitted on 28.11.1996, the Scheme for compassionate appointment in the Bank was in accord with the Circular/Policy dated 25.1.1989. However, with effect from 27.2.1997 a New Policy came into existence and by the time the respondent's application, forwarded on 19.2.1997 by the Branch Manager reached the Regional Office, the New Policy dated 27.2.1997 had come into force. Accordingly, the appellant Bank considered the claim of the respondent for appointment on compassionate grounds in accordance with the New Policy and finding him ineligible, rejected his claim by the order impugned in the writ petition dated 31.5.2004.

3. It was the case of the respondent before the writ court that his father had expired on 1.11.1996, he had submitted his application on 28.11.1996 and the application was forwarded by the Branch Manager on 19.2.1997. That being so, it was submitted, his application should have been processed and decided in accordance with the conditions incorporated in the Circular/Policy dated 25.1.1989 and in considering his claim in accordance to the New Policy, which came into effect from 27.2.1997, the appellants have committed grave error and, therefore, interference in the matter was warranted. The writ court vide order-dated 20.3.2007, passed in W.P.(S) No.7038/2004, held that the claim of the respondent cannot be rejected on the basis of the new policy, which was not in vogue when the application was submitted or when his father had expired, and should have been decided on merits as per the old policy, and accordingly remanded for fresh consideration within four months. The present appeal under section 2(1) of the M.P. Uchcha Nyayalaya (Khand Nyay Peeth Ko Appeal) Adhiniyam, 2005 was filed by the Bank assailing the said order passed by the learned Single Judge in the writ petition. While hearing the appeal on 14.1.2008, the Division Bench framed the aforesaid questions of law and referred the matter for consideration by a Full Bench. Thus, the matter has been placed before us.

4. Before adverting to consider the questions referred, it is thought appropriate to consider the legal principles governing grant of compassionate appointment, rights accruing to a person claiming compassionate appointment and the manner in which such a claim is to be decided.

5. Compassionate appointment is an exception to the normal rule for appointment to public service which contemplates appointment on merit through open invitation.

Grant of compassionate appointment to a family member of the deceased employee is based on certain exceptions carved out from the general rule of appointment and is based on a Scheme or Rule framed in this regard. In *Haryana State Electricity Board and Another Vs. Hakim Singh,* (1997) 8 SCC 85, it has been held by the Supreme Court that the rule of appointment to public service is on merit and through open invitation. This is the general and normal route through which one can get into public employment. However, every rule has exceptions and it is true for employment to public service also, and these exceptions are required to be evolved to meet certain exceptional contingencies. One such exception is to grant appointment to dependants of a deceased employee by accommodating the said person in a suitable vacancy. It is held by the Supreme Court that the object of granting such an appointment is to give succour to the family, which has been suddenly plunged into penury due to untimely death of the sole breadwinner. It has been held and cautioned by the Supreme Court in the aforesaid case that the object of providing such an ameliorating relief should not be taken as opening an alternative mode of recruitment to public service.

6. After taking note of the principle laid down in the case of *Hakim Singh* (supra), Supreme Court in the case of *Director of Education (Secondary) and Another Vs. Pushpendra Kumar and Others,* (1998) 5 SCC 192, has laid down the following dictum:

> "8. The object underlying a provision for grant of compassionate employment is to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread earner which has left the family in penury and without any means of livelihood. Out of pure humanitarian consideration and having regard to the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made for giving gainful appointment to one of the dependents of the deceased who may be eligible for such appointment. Such a provision makes a departure from the general provisions providing for appointment on the post by following a particular procedure. Since such a provision enables appointment being made without following the said procedure, it is in the nature of an exception to the general provisions. An exception cannot subsume the main provision to which it is an exception and thereby nullify the main provision by taking away completely the right conferred by the main provision. Care has, therefore, to be taken that a provision for grant of compassionate employment, which is in the nature of an exception to the general provisions, does not unduly interfere with the right of other persons who are eligible for appointment to seek employment against the post which would have been available to them, but for the provision enabling appointment being made on

compassionate grounds of the dependent of a deceased employee. In *Umesh Kumar Nagpal v. State of Haryana,* 1994 (4) SCC 138: (1994 AIR SCW 2305) this Court has taken note of the object underlying the rules providing for appointment on compassionate grounds and has held that the Government or the public authority concerned has to examine the financial condition of the family of the deceased and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. In that case the Court was considering the question whether appointment on compassionate grounds could be made against posts higher than posts in Classes III and IV. It was held that such appointment could only be made against the lowest posts in non-manual and manual categories. It was observed:-

"The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependent of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz., relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned." *(Emphasis supplied)*

7. The concept of granting compassionate appointment and the purpose of granting the same has been the subject matter of adjudication in various cases and therefore, it would be relevant at this stage to refer to some of the decisions in the field. In *Commissioner of Public Instructions and Others Vs. K.R. Vishwanath,* (2005) 7 SCC 206, after following the earlier principles laid down in the cases of *State of Haryana and Others Vs. Rani Devi and Another,* (1996) 5 SCC 308; *Life Insurance Company of India Vs. Asha Ramchandra Ambekar (Mrs) and Another,* (1994) 2 SCC 718; and, *Umesh Kumar Nagpal Vs. State of Haryana and Others,* (1994) 4 SCC 138, the principle and the object with regard to compassionate appointment is laid down by the Supreme Court in the following manner:

"9. As was observed in *State of Haryana v. Rani Devi* ((1996) 5 SCC 308 : 1996 SCC (L&S) 1162 : AIR 1996 SC 2445), it need not be pointed out that the claim of person concerned for

appointment on compassionate ground is based on the premises that he was dependant on the deceased employee. Strictly this claim cannot be upheld on the touchstone of Articles 14 or 16 of the Constitution. However, such claim is considered as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. That is why it is necessary for the authorities to frame rules, regulations or to issue such administrative orders which can stand the test of Articles 14 and 16. Appointment on compassionate ground cannot be claimed as a matter of right. Die-in-harness scheme cannot be made applicable to all types of posts irrespective of the nature of service rendered by the deceased employee. In *Rani Devi case* ((1996) 5 SCC 308 : 1996 SCC (L&S) 1162 : AIR 1996 SC 2445) it was held that scheme regarding appointment on compassionate ground if extended to all types of casual or ad hoc employees including those who worked as apprentices cannot be justified on constitutional grounds. In *LIC of India v. Asha Ramchhandra Ambekar* ((1994) 2 SCC 718 : 1994 SCC (L&S) 737 : (1994) 27 ATC 174) it was pointed out that High Courts and Administrative Tribunals cannot confer benediction impelled by sympathetic considerations to make appointments on compassionate grounds when the regulations framed in respect thereof do not cover and contemplates such appointments. It was noted in *Umesh Kumar Nagpal v. State of Haryana*((1994) 4 SCC 138 : 1994 SCC (L&S) 930 : (1994) 27 ATC 537) that as a rule in public service appointment should be made strictly on the basis of open invitation of applications and merit. The appointment on compassionate ground is not another source of recruitment but merely an exception to the aforesaid requirement taking into consideration the fact of the death of employee while in service leaving his family without any means of livelihood. In such cases the object is to enable the family to get over sudden financial crisis. But such appointments on compassionate ground have to be made in accordance with the rules, regulations or administrative instructions taking into consideration the financial condition of the family of the deceased. *(Emphasis supplied)*

8. In *State of J&K and Others Vs. Sajad Ahmed Mir,* (2006) 5 SCC 766, after taking note of the judgments rendered earlier in the cases of *Rani Devi* (supra), *Asha Ramchandra Ambekar* (supra) and *Umesh Kumar Nagpal* (supra), it has been so held by the Supreme Court:

"11. We may also observe that when the Division Bench of the High Court was considering the case of the applicant holding that

he had sought 'compassion', the Bench ought to have considered the larger issue as well and it is that such an appointment is an exception to the general rule. Normally, an employment in Government or other public sectors should be open to all eligible candidates who can come forward to apply and compete with each other. It is in consonance with Article 14 of the Constitution. On the basis of competitive merits, an appointment should be made to public office. This general rule should not be departed except where compelling circumstances demand, such as, death of sole bread earner and likelihood of the family suffering because of the set back. Once it is proved that in spite of death of bread earner, the family survived and substantial period is over, there is no necessity to say 'goodbye' to normal rule of appointment and to show favour to one at the cost of interests of several others ignoring the mandate of Article 14 of the Constitution.

12. In *State of Haryana and Ors. v. Rani Devi and Anr.* [(1996) 5 SCC 308 : AIR 1996 SC 2445], it was held that the claim of applicant for appointment on compassionate ground is based on the premise that he was dependant on the deceased-employee. Strictly this claim cannot be upheld on the touchstone of Article 14 or 16 of the Constitution. However, such claim is considered reasonable as also allowable on the basis of sudden crisis occurring in the family of the employee who had served the State and died while in service. That is why it is necessary for the authorities to frame rules, regulations or to issue such administrative instructions which can stand the test of Articles 14 and 16. Appointment on compassionate ground cannot be claimed as a matter of right."

(Emphasis supplied)

9. Again, in the case of *I.G. (Karnik) and Others Vs. Prahalad Mani Tripathi*, (2007) 6 SCC 162 = (2007) 2 SCC (L&S) 417, it has been held that recruitment to the State services is normally governed by Rules framed under the statute or the provisos appended to Article 309 of the Constitution. It has been further ruled that in the matter of appointment, the State is obligated to give effect to the constitutional scheme of equality as envisaged under Articles 14 and 16 of the Constitution, and that all appointments, therefore, must conform to the said constitutional scheme, but an exception is carved out to this normal rule in favour of children or other relatives to an employee, who dies while in service. Thereafter, in the said case the Supreme Court has held thus:

"7. Public employment is considered to be a wealth. It in terms of the constitutional scheme cannot be given on descent. When such an exception has been carved out by this Court, the same must be

strictly complied with. Appointment on compassionate ground is given only for meeting the immediate hardship which is faced by the family by reason of the death of the bread earner. When an appointment is made on compassionate ground, it should be kept confined only to the purpose it seeks to achieve, the idea being not to provide for endless compassion. (Emphasis supplied)

8. In *National Institute of Technology v. Niraj Kumar Singh* this Court has stated the law in the following terms: (SCC p. 487, para 16)

> "16. All public appointments must be in consonance with Article 16 of the Constitution of India. Exceptions carved out therefore are the cases where appointments are to be given to the widow or the dependent children of the employee who died in harness. Such an exception is carved out with a view to see that the family of the deceased employee who has died in harness does not become a destitute. No appointment, therefore, on compassionate ground can be granted to a person other than those for whose benefit the exception has been carved out. Other family members of the deceased employee would not derive any benefit thereunder."

9. In *State of Rajasthan v. Umrao Singh* this Court has categorically stated that once the right is consummated, any further or second consideration for higher post on the ground of compassion would not arise.

10. Again in *State of Haryana v. Ankur Gupta* this Court held: (SCC p.707, para 6)

> "6. As was observed in *State of Haryana v. Rani Devi* it need not be pointed out that the claim of the person concerned for appointment on compassionate ground is based on the premise that he was dependent on the deceased employee. Strictly, this claim cannot be upheld on the touchstone of Article 14 or 16 of the Constitution of India. However, such claim is considered as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. That is why it is necessary for the authorities to frame rules, regulations or to issue such administrative orders which can stand the test of Articles 14 and 16. Appointment on compassionate ground cannot be claimed as a matter of right. Die-in-Harness Scheme cannot be made applicable to all types of posts irrespective of the nature of service rendered by the

deceased employee. In *Rani Devi case* it was held that the scheme regarding appointment on compassionate ground if extended to all types of casual or ad hoc employees including those who worked as apprentices cannot be justified on constitutional grounds. In *LIC of India v. Asha Ramchhandra Ambekar* it was pointed out that the High Courts and Administrative Tribunals cannot confer benediction impelled by sympathetic considerations to make appointments on compassionate grounds when the regulations framed in respect thereof do not cover and contemplate such appointments. It was noted in *Umesh Kumar Nagpal v. State of Haryana* that as a rule, in public service appointments should be made strictly on the basis of open invitation of applications and merit. The appointment on compassionate ground is not another source of recruitment but merely an exception to the aforesaid requirement taking into consideration the fact of the death of the employee while in service leaving his family without any means of livelihood. In such cases the object is to enable the family to get over sudden financial crisis. But such appointments on compassionate ground have to be made in accordance with the rules, regulations or administrative instructions taking into consideration the financial condition of the family of the deceased."

10. From the enunciation of law laid down therein, it is clear that employment to government and other public services should be open to all eligible candidates and by open competition on merit. This is in consonance with the mandate of Articles 14 and 16 of the Constitution. This general rule can be departed from only when compelling circumstances demand and one such circumstance is the death of the sole breadwinner of a family. However, it is held by the Supreme Court that appointment on compassionate ground is governed by Rules and Regulations or Scheme and taking into consideration instructions framed in this regard and the same should confirm to the requirement of Articles 14 and 16 of the Constitution. That apart, the principles clearly indicates that grant of compassionate appointment is not a right, vested in nature, available to a person. It is a benefit granted dehors the normal mode of recruitment and, therefore, it is to be granted strictly in accordance to the Scheme or Policy formulated in this regard.

11. Having determined the nature and object of such an appointment, it would be now appropriate to consider the contentions advanced by the learned counsel for the parties in the backdrop of the aforesaid principles and objects underlying

grant of compassionate appointment. Shri Ashish Shroti, learned counsel for the appellant-bank, argued that when grant of compassionate appointment is not a vested right available to an individual and is governed by the Schemes, Policies or the Special Rules formulated in this regard, the appointment has to be governed strictly in accordance with the Policy that is in vogue at the time of consideration. It was emphasized by him that the employer has a right to formulate a Scheme or Policy granting this extraordinary benefit keeping in view the requirement of the establishment and various other factors and the same can change from time to time. In that view of the matter, it was urged by him that the appointment has to be done as per the Scheme which is in existence at the time of consideration, because consideration is made when appointment is to be granted and when appointment is to be strictly in consonance with the Scheme or Policy formulated, then the Scheme which is in existence at the time of consideration is only relevant for grant of appointment. Placing reliance on the following authorities Shri Shroti submitted that the reference be answered by holding that the appointment on compassionate grounds is to be made on the basis of the Policy existing at the time of consideration and not on the basis of the Policy which was in existence at the time when the employee concerned had expired or the claim is made for appointment. The decisions relied upon by Shri Shroti are: *Punjab National Bank and Another Vs. R. Latha* [W.A. (MD) No.411/2006 and W.A.M.P.(MD) No.1/ 2006 dated January 8, 2007]; *Punjab State Electricity Board and Others Vs. Malkiat Singh,* (2005) 9 SCC 22; *National Hydroelectric Power Corporation and another Vs. Nanak Chand and another,* AIR 2005 SC 106; *S.B. International Ltd. Vs. Asstt. Director of General of FT and others,* AIR 1996 SC 2921; *Union Bank of India and Others Vs. M.T. Latheesh,* 2006) 7 SCC 350; *State Bank of India and Another Vs. Somvir Singh,* (2007) 4 SCC 778; *State Bank of India and Another Vs. Vikas Dubey and Others* [Civil Appeal No.7003 of 2005]; *M.P. Ram Mohan Raja Vs. State of TN and others,* (2007) 9 SCC 78; and, *State Bank of India and others Vs. Jaspal Kaur,* (2007) 9 SCC 571.

12. Inviting our attention to the principles laid down in *P.T.R. Exports (Madras) Pvt. Ltd. and Others Vs. Union of India,* AIR 1996 SC 3461 and *State of Tamil Nadu Vs. M/s Hind Stone etc.*, AIR 1981 SC 711, Shri Shroti submitted that when grant of a benefit is based on certain policies or schemes formulated by the Government or public sector undertakings, then any person claiming benefit of such Policy or Scheme is entitled for consideration on the basis of the Policy or Scheme as is in existence at the time of consideration. It is further submission that as compassionate appointment does not confer any vested right, it is akin to grant of a license or a lease as per a Policy and in that view of the matter, such grant can be made only on the basis of the Policy prevailing on the date when the grant is to be made and not on the basis of a Policy which has been changed.

13. Refuting the aforesaid contentions and pointing out that grant of

compassionate appointment is made to tide over the crisis that has fallen on a family due to death of the sole breadwinner and, therefore, the claim has to be evaluated on the basis of the Policies and Scheme existing at the time of submission of the claim, Shri R.K. Sanghi, learned counsel, contended that an application for grant of compassionate appointment has to be considered in accordance with the Policy that is in existence when the application is submitted and cannot be considered on the basis of a Policy which may have changed, detrimental to the interest of the claimant after submission of his application. It was emphasized by Shri Sanghi that if such a procedure is permitted then the employer can always keep an application pending till change of Policy and thereafter reject the application on the ground of change of Policy so as to frustrate the legitimate right of an individual to claim compassionate appointment. It was argued by him that a Division Bench of this Court in the case of *T. Swamy Dass* (supra) and a Single Bench of this Court in the case of *Heeralal Baria Vs. M.P. State Electricity Board and another,* 2008(1) MPLJ 492, have approved grant of compassionate appointment on the basis of Policy prevailing on the date of the application and the same should be approved. It is canvassed by him that the decision rendered in *T. Swamy Dass* (supra) is based on an earlier judgment of the Supreme Court, in *Smt. Sushma Gosain and others Vs. Union of India and others,* AIR 1989 SC 1976 = 1989 (4) SCC 468, and as the claimant cannot be punished for the delay caused by the employer in processing the application and the claimant cannot be put to loss because of the deliberate delay on the part of the employer in processing the application. It was submitted by him by drawing analogy with the settled principles governing selection to public employment that a selection process once initiated cannot be changed in between by new sets of conditions, similarly an application under process for grant of compassionate appointment cannot be dealt with in any manner which is contrary to the procedure prevalent for grant of such appointment, when the application was made. Hence, submitted Shri Sanghi, the principle laid down in the case of *T. Swamy Dass* (supra) should be made applicable and the application for compassionate appointment should be processed in accordance with the Policy that was prevailing at the time of submission of the application. Reliance is also placed by Shri R.K. Sanghi on another judgment of the Supreme Court, in the case of *State Bank of India and others Vs. Jaspal Kaur,* (2007) 9 SCC 571, and the observations made in paragraph 26 of the aforesaid judgment:

> "Finally in the fact situation of this case, Shri Sukhbir Inder Singh (late), Record Assistant (Cash & Accounts) on 1.8.1999, in the Dhab Wasti Ram, Amritsar Branch, passed away. The respondent, widow of Shri Sukhbir Inder Singh applied for compassionate appointment in the appellant Bank on 5.2.2000 under the scheme which was formulated in 2005. The High Court also erred in deciding the matter in favour of the respondent applying the

scheme formulated on 4.8.2005, when her application was made in 2000. A dispute arising in 2000 cannot be decided on the basis of a scheme that came into place much after the dispute arose, in the present matter in 2005. Therefore, the claim of the respondent that the income of the family of the deceased is Rs.5855 only, which is less than 40% of the salary last drawn by late Shri Sukhbir Inder Singh, in contradiction to the 2005 scheme does not hold water."

14. After the case was closed for judgment on 7.5.2009, learned counsel for the respondent by filing I.A.No. 4742/09, has invited attention of this Court to a judgment of the Orissa High Court, in the case of *Smt. Sabi Bawa v. Grid Corporation of Orissa Limited and others*, 1999(3) SLR 81, to contend that in the said case the Scheme prevailing at the time of death was said to be the one on the basis of which consideration is to be made. On a close scrutiny of the said judgment rendered by the Orissa High Court, it would be seen that in the said case when the death of the employee concerned occurred in the year 1983, a scheme was in operation. Case for compassionate appointment of the claiment was considered as per the said scheme, it was rejected after consideration and in a Writ Petition filed, directions were given for consideration in a particular manner as per the same scheme. When the dispute was pending, another Writ Petition was filed after the cliam was again rejected and it seems that during this period, a new scheme came into force in the year 1992, and the matter was considered as per the new scheme, it was due to the said fact that direction was given to consider the claim as per the old scheme, which was prevailing. Infact in this case the claim was considered and decided as per the old scheme of 1983 and this consideration gave rise to the dispute. The matter was considered and decided as per the old scheme and the dispute arose with regard to enforcement of the right or consideration as per the old scheme. Thus, it is evident that the dispute has risen when the claim was considered as per a particular scheme and due to direction of the High Court, subsequent change in the shceme was not given effect to for the purposes of consideration.

15. The core question that requires to be adverted to is whether a claim for appointment on compassionate grounds should be evaluated in accordance with the Policy that was prevailing when the application is submitted seeking such appointment or as per the Policy prevailing at the time of consideration of the application. As already indicated herein before, compassionate appointment is granted as an exception by carving out a procedure dehors the normal rule for appointment to public service with the sole objective of giving some benefit to members belonging to the family of a deceased employee and to mitigate the hardship which falls on the family due to death of the breadwinner. In *Smt. Sushma Gosain* (supra), it has been held by the Supreme Court that this being the purpose of granting compassionate appointment, such appointments should be provided

immediately to redeem the family, which is in distress. In *I.G. (Karmik)* (supra), it is observed by the Supreme Court that appointment on compassionate grounds is made for the purpose of mitigating the hardship of the family and is not a process for providing endless compassion. It is also clear from the principles laid down that appointment on such grounds' is an exception carved out contrary to the constitutional mandate and no vested right accrues to any person to claim such an appointment.

16. In *State of Haryana Vs. Ankur Gupta,* (2003) 7 SCC 704, it has been held by the Supreme Court that it is necessary for the authorities to formulate regulations or schemes in such a manner that they withstand the test of Articles 14 and 16, because appointment on compassionate grounds cannot be claimed as a matter of right, but it has to be evolved in such a manner that the Scheme is formulated taking into consideration the financial conditions of the family of the deceased and the means of livelihood available to them.

17. In *National Institute of Technology Vs. Niraj Kumar Singh,* 2007(1) SCC (L&S) 668, it has been held by the Supreme Court that all public appointments should be in consonance with Article 16 of the Constitution of India.

18. Thus understood, compassionate appointment is neither a vested right, which can be exercised at any time even after the crisis created by the death of the earning member is over, nor is it a hereditary right, it cannot be bequeathed. These principles are laid down in the cases of *Haryana State Electricity Board Vs. Naresh Tanwar,* (1996) 8 SCC 23; *Srikanth Vs. Chief Engineer, Karnataka Electricity Board,* 1996 (1) SLR 118; and, *Ashok Kumar Maiti Vs. State of West Bengal,* 1995 Lab IC 2175.

19. At this juncture it is worth noting that in *Directorate of Education (Secondary) Vs. Pushpendra Kumar* [(1998) 5 SCC 192], a Three Judge Bench of the Supreme Court has explained the purpose for granting compassionate appointment and the exceptional nature of this appointment is indicated and it is held that while granting such an appointment, care should be taken to ensure that application of this right does not interfere with the right of other persons who are eligible to seek appointment in public service.

20. In *P.T.R. Exports (Madras) Pvt. Ltd.* (supra) and *M/s Hind Stone* (supra), relied upon by Shri Shroti, even though the Supreme Court was dealing with matters pertaining to grant of export license and lease for mining, but after taking note of the fact that grant of export license and mining lease is not a vested right, principle laid down is that grant on the basis of such a right has to be in accordance with the Policies prevailing when the grant is to be made and not on the basis of the Policy which was in vogue at an early stage, it is held by the Supreme Court that such grant of license or lease depends upon the Policy prevailing on the date of grant of license or permit. Even though the criteria laid down and consideration for grant of a mining lease or import license may be different from the requirement

of granting compassionate appointment, but this Court cannot lose sight of the fact that while granting compassionate appointment, various factors have to be taken note of: i.e... availability of vacancy, financial condition of the dependents, man power requirements of the establishment, its financial position, the concept of discipline in the organization and various other factors relevant for deciding the question of granting compassionate appointment. That being so, the employer is granted liberty to formulate a Policy in such a manner that the same caters to the requirement, as may be existing from time to time and the employer should have an opportunity to change his policy with regard to compassionate appointment depending upon various factors that may also change from time to time.

21. In *Punjab National Bank and Another Vs. R. Latha* [W.A. (MD) No.411/ 2006 and W.A.M.P.(MD) No.1/2006 dated January 8, 2007], Madras High Court considering the decisions in the case of *P.T.R. Exports* (supra) and *M/s Hind Stone* (supra) has held that right to compassionate appointment is neither a fundamental right nor a legal right. It is only an exception to the general rule and that being so, the same has to be decided as per the Scheme which comes into operation and which is prevalent at the time of consideration and not on the basis of an earlier Scheme, which has been changed.

22. It is submitted by Shri Sanghi that the conntroversy has been put to rest by the Supreme Court in the case of *Jaspal Kaur* (supra). On a close scrutiny of the aforesaid judgment, it would be seen that the case has been decided on the facts of that case and the observations made and the directions issued in paragraph 26 does not lay down the law as convassed by Shri R.K. Sanghi. In the said case, after the employee had died namely one Shri Sukhbir Inder Singh, his widow applied for compassionate appointment on 5.2.2000, in accordance to the policy that was in vogue in the year 2000. On 7.1.2002, the competent authority of the Bank rejected the application after considering it in accordance to the Scheme and after evaluating the financial position of the family. This decision of the Bank was challenged before the Punjab & Haryana High Court, and the High Court by its order dated 11.12.2003, directed for reconsideration of the case in accordance to the policy of 2000 that was in vogue at the relevant time. After such reconsideration, the Dy. General Manager of the Bank on 5.3.2004 again rejected the claim after considering the finacial condition of the family. The said rejection was again challenged before the Punjab & Haryana High Court and on 20.9.2005, the High Court allowed the Writ Petition and directed for grant of compassionate appointment. The second order passed by the High Court and on 20.9.2005, was subject matter of adjudication before the Supreme Court, in the case of *Jaspal Kaur* (supra) and when the matter was pending before the Supreme Court it was brought to the notice of the Court by the Bank that a new policy has been formulated on 4.8.2005 and according to this Policy the claimants were not entitled for compassionate appointment. It was in the backdrop of the

above factual aspects that the High Court in paragraph 26 made the observations and directions, reproduced hereinabove.

23. A perusal of the same would indicate that the Supreme Court was of the view that a dispute which arose in 2000 cannot be decided on the basis of a scheme that came into existence much after the dispute arose i.e.. in the year 2005. The aforesaid observation, as is evident from the opening words of paragraph 26 - "Finally in the fact situation of this case", would clearly indicate that dispute in the said case arose in the year 2000 much before the Scheme of 2005 came into force, and the direction to consider the case as per the Scheme of 2000 was because the claim was initially adjudicated, on 7.1.2002, when the Bank declined the claim of the dependent and the High Court decided the matter for the first time in the year 2002. The case before the Supreme Court was one in which the claim was decided by the Bank in accordance to the Scheme of 2000 and directions were issued by the High Court in two writ petitions, after evaluating the matter in accordance to the Scheme prevailing when the dispute arose in the year 2000 and 2002. Therefore, in the light of the aforesaid peculiar factual aspect of the matter the observations and directions were issued in paragraph 26. The same cannot be construed to be a legal principle laid down by the Supreme Court to be applicable in all cases. It is the considered view of this Court that the observations made in paragraph 26, relied upon by Shri R.K. Sanghi, is based on the factual situation that was existing in the case before the Supreme Court i.e.. the decision of the Bank dated 7.1.2002 after evaluating the claim as per the policy of 2000 and further direction of the High Court to reconsider the matter much before the Scheme of 2005 came into existence. Accordingly, the said judgment also does not help the appellant.

24. In this context, we fruitfully state that a decision has to be treated as precedent for what it decides. The Supreme Court in the case of *Ambica Quarry Works v. State of Gujarat*, AIR 1987 SC 1073, has held thus:

> "18. The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides and not what logically follows from it."

25. In the matter of *Bhavnagar University v. Palitana Sugar Mill (P) Limited*, (2003) 2 SCC 579, it is so observed by the Supreme Court as under:

> "59..... It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision."
>
> (Emphasis supplied)

26. Similarly, the said principle is considered in various other cases also. In the case of *Bharat Petroleum Corporation Limited v. N.R. Vairamani*, 2004 (8) SCC 579, it is so held by the Supreme Court in paragraphs 9 to 12:

"9. Courts should not place reliance on decisions without disclosing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorems nor as provisions of a statute and that took taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, pharases and prvisions of a statute, it may become necessary for jusges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock. co. Ltd. v. Horton,* 1951 AC 737, Lord Mac Dermott observed (All ER p.14 C-D):

" The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J, as though they were part of an Act of Parliament and applying the rules of intepretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge,...'

10. In *Home Office V. Dorset Yacht Co. Ltd,* 1970 AC 1004, Lord Reid said,

'Lord Atkin's speech.... is not to be treated as if it were a statutory definition. It will require qualification in new circumstances.' (All ER p. 297g).

Megarry, J. in Shepherd Homes Ltd. v. Sandham (No.2) (1971) 1 WLR 1062, observed (All ER p. 1274d):

'One must not, of course, construe even a reserved judgment of even Russell, L.J. as it were an Act of Parliament;'

And, in *British Railways Board v. Herrington,* 1972 AC 877, Lord Morris said: (All ER p. 761c)

'There is always peril in treating the words of a speech or a judgment as though they were 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.

11. Circumstantial flexibility, one additional or different fact may make a world of difference between consclusions in two

cases. Disposal of cases by blindly placing reliance on a decision is not proper.

12. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

> 'Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the tempation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.
>
> * * * * *
>
> Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it.' "
>
> (Emphasis supplied)

27. The matter was again considered in the case of *Oriental Insurance Company Limited v. Smt. Raj Kumari and others*, AIR 2008 SC 403, and the principle is laid down in the following manner:

> ".....A decision is an authority for what it actually decides. What is of the essence in a decision is its ration and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a Court has been decided is alone binding as a precedent. Observations of courts are neither to be read as Euclid's Theorems nor as provisions of the statute and that too taken out of their context."

The aforesaid authorities have been considered recently by the *Supreme Court in Sarva Shramik Sanghatana (KV), Mumbai v. State of Maharashtra and others*, (2008) 1 SCC 494, and the principle affirmed after taking note of certain observations made by Lord Halsbury, reproduced in paragraph 14 in the case of *Sarva Shramik Sanghatana* (KV) (supra), which reads as under:

> "14. On the subject of precedents Lord Halsbury, L.C., said in *Quinn v. Leathem*, 1901 AC 495: (All ER p.7G-I)
>
> > 'Before descussing *Allen v. Flood*, 1898 AC 1, and what was decided therein, there are two observations of a general character which I wish to make; and one is to repeat what I

> have very often said before-that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

28. Yet in another decision in *Rajbir Singh Dalal (Dr.) v. Chaudhari Devi LalUniversity, Sirsa and Another*, (2008) 9 SCC 284, their Lordships have opined thus:

> "34. The decision of a court is a precedent if it lays down some principle of law supported by reasons. Mere casual observations or directions without laying down any principle of law and without giving reasons does not amount to a precedent.
>
> 35. *In State of Punjab v. Baldev Singh*, (1999) 6 SCC 172, a Constirution Bench of this Court observed (vide SCC para 43) that a decision is an authority for what it decides (i.e.. the principle of law it lays down)and not that everything said therein constitutes a precedent.
>
> 36.*In Karnataka SRTC v. Mahadeva Shetty*, (2003)7 SCC 197, (vide SCC para 23) this Court observed that the only thing binding as an authority upon a subsequent Judge is the principle upon which the case was decided.
>
> 37. As observed by this Court in *State of Orissa v. Sudhansu Sekhar Misra*, AIR 1968 SC 467, (vide AIR para 13): (AIR pp.651-52, para 13)
>
> > '13. ...A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observations found therein nor what logically follows from the various observations made in it....."

29. In this context, we may take note of another principle. A judgment is not to be read as a statute. It has been so held in *Union of India and others v. Dhanwanti Devi and others*, 1996 AIR SCW 4020:

> "Therefore, in order to understand and appreciate the binding force of a decision it is always necessary to see what were the facts in

the case in which the decision was given and what was the point which had to be decided. No judgment can be read as if it is a Statute. A word or a clause or a sentence in the judgment cannot be regarded as a full exposition of law. Law cannot afford to be static and therefore, Judges are to employ an intelligent technique in the use of precedents." (Emphasis supplied)

Further, in the case of *'Bharat Petroleum Corporation Limited (supra)*, the following observations, relevent for the case in hand, reads as under:

"9. ....Observations of courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. .....

....Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. ...' (Emphasis supplied)

Thus, particular fact can make a lot of difference. Their Lordships have decided in the facts of the case. Hence, it cannot be held that the dictum of the said decision in that application for compassionate appointment is to be considered keeping in view the scheme when the application was submitted. A ratio of a decision as has been held their Lordships, is not to be understood by inference.

30. In a given case, the employer as stated by Shri R.K. Sanghi and as observed by the Division Bench in the case of *T. Swamy Dass* (supra), may cause undue delay without any just cause or reason or with some ulterior motive. Thought on a first glance the submission looks quite attractive, but on deeper scrutiny and reflective consideration it cannot be held, as a principle of law, that the claim of compassionate appointment has to be decided on the basis of the Policy that was prevailing at the time of submission of the application. Be it noted Shri R.K. Sanghi has commended us to the decision in *Balbir Kaur v. Steel Authority of India Limited,* (2000)6 SCC 493. The decision in that case is based on a right, which accrued to the claimant for grant of compassionate appointment on the basis of a tripartite agreement entered into by the Management of Steel Aurhotity of India Limited. The agreement was binding on the parties and when compassionate appointment was denied on the ground of monetary compensation being provided,which was found to be contrary to the tripartite agreement, interference was made in the matter. That being so, the inspiration sought to be drawn by learned counsel is not available, as the decision is absolutely distinguishable having a different foundation altogether.

31. It is, therefore, clear that compassionate appointment is not a vested right nor is it a hereditary right. Its grant is based on the Policies and Scheme which are framed by carving out an exception to the General Rule governing public

appointment. Once it is held that it is an exception to the General Rule and is granted in accordance with the Scheme or Rules formulated, then considerations to be made for grant of the appointment would be governed by the provision of the Rules or the Scheme and in that view of the matter when the Rules and the Guidelines play a dominant role, considerations have to be made in accordance with the Rules and Scheme which are applicable at the time of grant. As the entitlement for compassionate appointment is to be evaluated in accordance with the Schemes and Rules formulated in that regard, there cannot be any shadow of doubt that consideration and evaluation are required to be made in accordance to the existing Policies and not on the basis of a Policy or Scheme, which has become extinct. In that view of the matter, consideration has to be in accordance to the Policy applicable when the matter is taken up for consideration and not on the basis of any other Scheme or Policy, which has lapsed or superceded. The aroresaid being the position of law, the view expressed in *T. Swamy Dass (supra) and Heeralal Baria (surpa)* is not correct.

32. Though we have held that an application for compassionate appointment is to be considered as per the scheme in vogue at the time of consideration we would like to add that in the scheme of things and regard being had to the nature of benefit conferred, the employer, as a model one, should not sit on the same and decide in quite promptitude for the simple reason such applications warrant immediate delineation.

33. In view of the foregoing discussion, we proceed to record our conclusions as follows:

(a) That grant of compassionate appointment is not a vested legal right. It is only a benefit granted in certain circumstances dehors the normal rule of appointment and when the employer has a right to evolve an appropriate policy after considering various factors for granting such a benefit, the considerations have to be made in accordance with the Policy that is prevailing at that point of time.

(b) When it is held that compassionate appointment is not a vested right and when grant of such appointment is governed by the Rules and Policies prevailing in an establishment, then consideration as per the Rules existing is required to be made and consideration on the basis of a Policy, which is given up by the employer and which has no application at that point of time cannot be insisted upon.

(c) Having regard to the exceptional nature of this appointment and taking note of the fact that it is granted under a special Scheme carved out dehors the normal mode of recruitment, the same has to be governed as per the Policies or Provisions

governing such appointment prevalent at a particular point of time when consideration is to be made, and not on the basis of a Policy which was in vogue and has been given up by the employer due to changed circumstances.

(d) As compassionate appointment is granted by carving out a special Scheme contrary to the normal mode of recruitment and when the employer or the government is at liberty to evolve a Scheme for granting such appointment from time to time, then the consideration for appointment has to be made in accordance with the Scheme or Policy that is in existence.

(e) The decisions sendered in *T. Swamy Dass* (supra) and *Heeralal Baria* (supra) do not lay down the correct law and are hereby overruled.

(f) Any right flowing from a settlement between the employer and employees' union or association has to be in a different compartment.

(g) It would be the obligation of the employer to deal with the application with immediacy and promptitude so that the grievance of a family in distress gets a fair treatment in accordance with law.

34. The Reference is accordingly answered.

Matter be placed before the Division Bench for decision on the appeal on merits.

Reference answered accordingly.

I.L.R. [2010] M. P., 1896

FULL BENCH

Before Mr. Justice Ajit Singh, Mr. Justice Rakesh Saksena & Mr. Justice R.C. Mishra

6 August, 2010*

RAM PRATAP ... Appellant

Vs.

STATE OF M.P. ... Respondent

High Court of Madhya Pradesh Rules, 2008, Rules 15 & 22 - *Non-obstante clause in Rule 22 of Chapter IV of the High Court of M.P. Rules, 2008 does not overrides the guideline, as incorporated in Rule 15 of the same Chapter, for listing of a subsequent application for suspension of sentence/grant of bail.* (Para 11)

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*Cr.A. No.1609/2005 (Jabalpur)

मध्यप्रदेश उच्च न्यायालय नियम, 2008, नियम 15 व 22 – दण्डादेश के निलंबन/जमानत के अनुदान के लिए पश्चात्वर्ती आवेदन को सूचीबद्ध करने के लिए म.प्र. उच्च न्यायालय नियम, 2008 के अध्याय IV के नियम 22 में सर्वोपरि खण्ड इसी अध्याय के नियम 15 में सम्मिलित मार्गदर्शक सिद्धांत के अभिभावी नहीं होता।

Cases referred :

ILR (2009) MP 2643, AIR 1987 SC 1613, 1993 MPLJ 1, 2000(1) MPLJ 354, 2004(4) MPLJ 238, AIR 1952 SC 369, AIR 1980 SC 2147, AIR 1992 SC 81.

Sharad Verma with *Himanshu Chourasiya*, for the appellant.

Vivek Agrawal, G.A., for the respondent/State.

ORDER

The Opinion of the Court was delivered by **R.C. Mishra, J.** :–Though not framed by the referring Division Bench, question to be answered, is

> "whether non-obstante clause in Rule 22 of Chapter IV of the High Court of M.P. Rules, 2008 overrides the guideline, as incorporated in Rule 15 of the same Chapter, for listing of a subsequent application for suspension of sentence/grant of bail".

2. The appellant stands convicted for murder of his wife and sentenced to life imprisonment. His first application for suspension of sentence and grant of bail was dismissed as withdrawn by a Division Bench comprising Deepak Verma, J. (as His Lordship then was) and one of us (Rakesh Saksena, J.) whereas the second one (I.A. No.4089/2009) was moved only after transfer of Deepak Verma, J. to Karnataka High Court. On being requested to nominate Judges constituting a Division Bench to hear the repeat application, Hon'ble the Chief Justice, presumably in exercise of the power conferred by Rule 22, directed listing of the case before regular Division Bench. When the matter came up for hearing before the regular Division Bench comprising R.S. Garg and U.C. Maheshwari, JJ., a question of propriety was raised by learned Deputy Advocate General in view of the fact that one of the members of the Division Bench that dismissed the earlier application was available to hear it. In response, learned counsel for the appellant submitted that a Division Bench consisting of A.K. Shrivastava and Sushma Shrivastava, JJ. had already overruled a similar objection, by an elaborate order-dated 21.1.2009 passed in Criminal Appeal No.1744/2004 *(Jagga @ Jagat Singh v. State of M.P.)*, holding that non-obstante clause occurring in Rule 22 does override the other rules including Rule 15. Doubting correctness of the view, the Division Bench postponed hearing of the successive application by making the following observations:

> *"The Division Bench in Criminal Appeal No.1744/2004 (Jagga @ Jagat Singh v. State of M.P.) in our opinion failed to take into consideration that if the general power is to be exercised then such power is to be exercised in the interest of justice to*

avoid and not to contaminate the process. Without entering into any further discussion, we are of the considered opinion that the order-dated 21.1.2009 passed by the Division Bench in the matter of Jagga @ Jagat Singh v. State of M.P. (Criminal Appeal No.1744/2004) deserves to be considered by a larger Bench. The matter be placed before Hon'ble Chief Justice for appropriate orders with a request that as hundreds of the cases are to be affected the matter may be placed before the Full Bench at its earliest".

3. Before proceeding to answer the reference, attention may be directed to Rule 15 and Rule 22, which read thus -

15. Subsequent applications for Bail -All subsequent applications under sections 389(1), 438 and 439 of the Code of Criminal Procedure, 1973, shall be listed before the same Judge/bench who/which had decided the first application, even if earlier application was dismissed for want of prosecution, or dismissed as not pressed or withdrawn.

...

...

22. Notwithstanding anything hereinbefore contained in these Rules, the Chief Justice may, by a special or general order, direct a particular case (s) or a particular class (es) of cases to be listed before a particular bench.

4. Apparently, Rule 15 is based on epoch-making decision of the Supreme Court in *Shahzad Hasan Khan v. Ishtiaq Hasan Khan* AIR 1987 SC 1613 mandating that the subsequent bail applications must be placed before the same Judge who had passed the earlier orders and who was available. However, we are not required to discuss ramifications of the guidelines laid down in *Shahzad Hasan Khan's* case as corresponding opinions have already been well set out by as many as three Full Benches of this Court respectively in *Narayan Prasad v. State of M.P.* 1993 MPLJ 1, *Santosh v. State of M.P.* 2000(1) MPLJ 354 and *Gopal v. State of M.P.* 2004(4) MPLJ 238 (of which one of us Ajit Singh, J. was also a member). For the sake of convenience, answers governing the references may be reflected as under–

Answer	***Given in***
Successive applications for bail (suspension of sentence) must be placed before the same Judge/ Bench so long as he/it is available	***Narayan Prasad's*** *case*
Successive bail applications in a pending appeal or bail application under Section 439 of the Code should be considered by the Bench which has	***Santosh's*** *case*

considered the first bail application unless the Bench, which decided the earlier application, is not available for a sufficient duration.	
(a) When a first application for bail preferred in a pending appeal under section 389(1) of the Code has been considered by a Division Bench and faced rejection and thereafter the second bail application is filed and due to the non-availability of earlier Division Bench, a second Division Bench deals with the matter and rejects the application, the other successive and subsequent bail applications should go before the said Bench and not before the Bench that has been given the roster to deal with such matter. (b) If the first application for bail has been preferred under section 389 of the Code and has been rejected by a Bench and if one of the members of the Bench is available, the subsequent bail applications should be listed before a Bench of which he is a member and it should not go before the regular Bench as per roster. (Emphasis supplied)	*Gopal's* case

5. The Division Bench in *Jagga's* case (supra) did not purport to follow the Full Bench decision in *Gopal's* case (ibid) inter alia on the ground that non-obstante clause in Rule 22, brought into force w.e.f. 1.11.2008, has to be construed as a proviso to all other rules including Rule 15. However, as pointed out already, Rule 15 has the binding force of the Apex Court decision in *Shahzad Hasan Khan's* case that also entails consequential duty on Hon'ble the Chief Justice. Obviously, the non-obstante clause in Rule 22 cannot override Article 141 of the Constitution of India, which enacts that the law declared by the Supreme Court shall be binding on all Courts within the territory of India.

6. The matter can also be viewed from other angles. Difference in the phraseology of Rule 15 and 22 is suggestive of a well-marked distinction in the respective objects behind these rules. Rule 22 beginning with a non-obstante clause is general in nature whereas Rule 15 is a special one as it governs listing of subsequent applications for suspension of sentence and grant of bail. As explained by Hon'ble Shri Justice G.P. Singh (formerly the Chief Justice of this Court) at Page 368 of his celebrated work titled as "Principles of Statutory Interpretation" (Twelfth Edition)

> "A special enactment or rule cannot be held to be overridden by a later general enactment or simply be cause the latter opens up with a non-obstante clause".

7. Thus, based on the maxim *"Generalia specialibus non derogant"* (the general does not detract from the specific), the rule of interpretation is that general provision yields to the special provision. Further, in the words of Prof. Reed Dickerson, learned author of Interpretation and Application of Statutes, "a non obstante tail should not wag a statutory dog".

8. In *Aswini Kumar Ghose v. Arabinda Bose* AIR 1952 SC 369, the Supreme Court had the occasion to explain the proper approach to interpret a non obstante clause. It was held that if the enacting part is clear, the non-obstante clause cannot cut down its scope and as re-expressed by V. R. Krishna Iyer, J. in his inimitable style, such a clause cannot whittle down the wide import of the principal part (*Maru Ram v. Union of India* AIR 1980 SC 2147 referred to).

9. Adverting to the case in hand, it may be observed that as there is no apparent inconsistency between the Rules, the scope of Rule 15 cannot be cut down by resorting to the non-obstante clause in Rule 22 (See. *R.S. Raghunath v. State of Karnataka* AIR 1992 SC 81). This apart, the Rule of harmonious construction is that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible effect should be given to both. Applying these well settled principles, it can easily be concluded that Rule 22 is merely enabling and not a barring provision as it only reserves the inherent residuary powers of the Chief Justice to direct listing of cases not covered by any special Rule such as Rule 15.

10. Having considered the matter from different angles, we are clear and we say it respectfully that the view taken by the Division Bench in *Jagga's case* (supra) does not lay down the correct view of the law and it is, accordingly, overruled.

11. The question is, therefore, answered in the negative. The obvious consequence is that the opinion expressed by the Full Bench in *Gopal's case* (above) is reaffirmed and supplemented with our answer that the non obstante clause in Rule 22 does not override Rule 15.

Reference answered accordingly.

I.L.R. [2010] M. P., 1900
WRIT PETITION
Before Mr. Justice Shantanu Kemkar
15 February, 2010*

GANPATLAL VYAS ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Service Law - *Civil Services (Pension) Rules, M.P. 1976, Rule 42(1)(a) - Voluntary retirement - Petitioner working as peon - He applied on*

*W.P. No.5988/2007(S) (Indore)

07.11.2006 seeking voluntary retirement w.e.f 07.02.2007 - Application accepted on 09.11.2006 and communicated to petitioner on 07.02.2007 - Petitioner withdrew the said application on 02.12.2006 - Held - The application seeking withdrawal of the application for voluntary retirement much before the effective date of voluntary retirement and having regard to the reasons stated by him seeking withdrawal of the application for voluntary retirement the respondents ought to have allowed his prayer. (Para 6)

सेवा विधि – सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 42(1)(ए) – स्वैच्छिक सेवानिवृत्ति – याची भृत्य के रूप में कार्यरत – उसने 07.02.2007 से स्वैच्छिक सेवानिवृत्ति चाहते हुए 07.11.2006 को आवेदन किया – आवेदन 09.11.2006 को स्वीकार किया गया और याची को उसकी सूचना 07.02.2007 को दी गयी – याची ने 02.12.2006 को उक्त आवेदन वापस लिया – अभिनिर्धारित – स्वैच्छिक सेवानिवृत्ति के आवेदन की वापसी चाहने वाला आवेदन स्वैच्छिक सेवानिवृत्ति की प्रभावी तारीख से काफी पूर्व था और उसके द्वारा स्वैच्छिक सेवानिवृत्ति के आवेदन की वापसी चाहने वाले आवेदन में कथित कारणों को ध्यान में रखते हुए प्रत्यर्थियों को उसकी प्रार्थना स्वीकार करनी चाहिए थी।

Cases referred :

AIR 1987 SC 2354, 2004(2) MPHT 533, 2007(1) MPHT 173, 2003(2) MPHT 7 (NOC).

Rekha Shrivastava, for the petitioner.

Vivek Patwa, Dy.G.A., for the respondents.

ORDER

SHANTANU KEMKAR, J. :–The petitioner was working on the post of peon in the office of Deputy Registrar, Neemuch under the Commercial Tax Department of the State Government. He gave a notice of three months to the respondents on 07.11.2006 (Annexure P-1) along with Form No. 28 under Rule-42.(1)(a) of the Madhya Pradesh Civil Services (Pension) Rules, 1976 (for short 'Pension Rules') seeking his voluntary retirement w.e.f. 07.02.2007. Before expiry of the notice period the petitioner submitted an application on 02.12.2006 (Annexure P-3) seeking withdrawal of his application dated 07.11.2006 for voluntary retirement. However, on 07.02.2007 the fourth respondents communicated its decision dated 09.11.2006 (Annexure P-10) to the petitioner informing him that his prayer for voluntary retirement has been accepted. Aggrieved the petitioner has filed this petition.

2. The case of the petitioner is that he having applied for withdrawal of the application for voluntary retirement by giving reasons much prior to the effective date given in the notice for voluntary retirement his prayer for withdrawal of the application for voluntary retirement ought to have been considered favourably in view of Rule-42(2) of the Pension Rules. He submits that the action of the respondents in not allowing his application for withdrawal of application for voluntary retirement is illegal and is contrary to the law laid down by the Supreme Court in the case of *Balram Gupta Vs. Union of India & another* (AIR 1987

Supreme Court 2354), and the orders of this Court in the case of *Jauhari Vs. Madhya Pradesh Laghu Udyog Nigam Maryadit, Bhopal* (2004 (2) M.P.H.T. 533), *Director General, Employees State Insurance Corporation & Another Vs. Puroshottam Malani* (2007 (1) M.P.H.T. 173) and in *Jaggannath Prasad Vs. M. P. State Electricity Board & others* 2003 (2) M.P.H.T. 7 (NOC). In the circumstances a prayer has been made by the petitioner that the impugned order dated 09.11.2006 (Annexure P-10) which was communicated on 07.02.2007 be quashed and the petitioner be directed to be reinstated with the consequential benifits.

3. The respondents have filed reply and have stated that the petitioner's application dated 07.11.2006 giving notice of three months for voluntary retirement was allowed on 09.11.2006. His application dated 02.12.2006 for withdrawal of application for voluntary retirement was considered but it was not found fit to allow the same. In support copy of the note-sheet has been filed as Annexure R-11. Thus, according to the respondents no case is made out to interfere into the impugned order and the action of the respondents.

4. Having heard learned counsel for the parties and after considering the provision contained in Rule-42 of the Pension Rules as also law laid down in the case of *Balram Gupta Vs. Union of India & another* (supra), *Jauhari Vs. Madhya Pradesh Laghu Udyog Nigam Maryadit, Bhopal* (supra), *Director General, Employees State Insurance Corporation & Another Vs. Puroshottam Malani* (supra) and *Jaggannath Prasad Vs. M. P. State Electricity Board & others*(supra). I am of the view that this petition deserves to be allowed. Admittedly the petitioner had submitted an application dated 07.11.2006 seeking voluntary retirement w.e.f. 07.02.2007 in Form-28 by giving three months notice as per the requirement of Rule 42(1)(a) of the Pension Rules. Before the intended date of voluntary retirement he submitted an application dated 02.12.2006 for withdrawal of the said application. However, as would be clear from the note-sheet Annexure R-11 the petitioner's prayer of withdrawal of the application for voluntary retirement was rejected and for the first time on 07.02.2007 the respondents served upon the petitioner the order dated 09.11.2006 accepting his application for voluntary retirement. The prayer of the petitioner was rejected by the respondents observing no sufficient ground exists to allow the petitioner to withdraw his application for voluntary retirement. On going through the application dated 02.12.2006 it is revealed that the petitioner did assign the reasons for withdrawal of his application for voluntary retirement. It was stated by the petitioner that in the interest of the future of his family he wants to withdraw his prayer for voluntary retirement. The reason for withdrawal was a justified reason and in all fairness keeping in view the powers vested in it under Rule 42 (2) of the Pension Rules the fourth respondent ought to have allowed the prayer of withdrawal of application for voluntary retirement made by the petitioner.

5. In some what similar facts and circumstances in the case of *Balram Gupta*

Vs. Union of India & another (supra) the Supreme Court had allowed such prayer for withdrawal with a direction to put back in job the employee with all consequential benefits. It was observed by the Supreme Court :–

> "Undue delay in intimating to the public servant concerned the action taken on the letter of resignation may justify an inference that resignation has not been accepted. But in the facts of the instant case the resignation from the Government servant was to take effect at the subsequent date prospectively and the withdrawal was long before that date. Therefore, the appellant, in our opinion, had locus."

It was further observed that :–

> "Approval is not ipse dixit of the approving authority who has the statutory authority must act reasonably and rationally. What is important in this connection to be borne in mind is not what prompted the desire for withdrawal but what is important is what prompted the Government from withholding the withdrawal".

The Supreme Court also observed that :–

> "In the circumstances of the case, it must be held that there was no valid reason for withholding the permission by the Government. It must be held further that there has been compliance with the guidelines because the appellant has indicated that there was a change in the circumstances, namely, the persistent and personal requests from the staff members and relations which changed his attitude towards continuing in Government service and induced the appellant to withdraw the notice. In the modern and uncertain age it is very difficult to arrange one's future with any amount of certainty, a certain amount of flexibility is required, and if such flexibility does not jeopardise Government or administration, administration should be graceful enough to respond and acknowledge the flexibility of human mind and attitude and allow the appellant to withdraw his letter of retirement."

6. Having regard to the aforesaid.I am of the view that the petitioner having submitted the application seeking withdrawal of the application for voluntary retirement much before the effective date of his voluntary retirement and having regard to the reasons stated by him seeking withdrawal of the application for voluntary retirement the fourth respondent ought to have allowed his prayer for withdrawal of the application for voluntary retirement more particularly when it is not the case of the respondents that acceptance of application for voluntary retirement of the petitioner would jeopardise the administration. In not allowing the prayer so made and in allowing the application for voluntary retirement the respondents have committed gross illegality. The action of the respondents is

contrary to Rule-42 of the Pension Rules and the law laid down in cases referred to above.

7. Accordingly the petition is allowed the impugned order dated 09.11.2006 (Annexure P-10) and the further proceedings on the basis of the said order and the decision taken vide Annexure R-11 are quashed. The petitioner is directed to be reinstated in service with consequential benefits. Parties to bear their own costs.

Petition allowed.

I.L.R. [2010] M. P., 1904

WRIT PETITION

Before Mr. Justice R.S. Garg & Mr. Justice U.C. Maheshwari

15 March, 2010*

ANANDI PRASAD DWIVEDI & anr. ... Petitioners

Vs.

STATE OF M.P. ... Respondent

A. Civil Procedure Code (5 of 1908), Order 47 Rules 1, 4, 7 & 8 - *Review - Proper remedy in case review application is allowed or dismissed - Held - When a Court hearing the review application rejects the same then the order shall not be appealable but if an order granting review application is allowed then the party aggrieved may object to it at once by an appeal from the order grating the application - Such an appeal is to be filed under Order 43 Rule 1(w) CPC while the order can also be challenged after final judgment/decree or order is passed in the main proceedings.* (Paras 8 & 9)

क सिविल प्रक्रिया संहिता (1908 का 5), आदेश 47 नियम 1, 4, 7 व 8 – पुनर्विलोकन – उचित उपचार, जब पुनर्विलोकन आवेदन मंजूर या खारिज किया जाता है – अभिनिर्धारित – जब पुनर्विलोकन आवेदन की सुनवाई करने वाला न्यायालय उसे अस्वीकार करता है तब आदेश अपील योग्य नहीं होगा परन्तु यदि पुनर्विलोकन आवेदन प्रदान करने वाला आदेश मंजूर होता है तब व्यथित पक्ष आवेदन मंजूरी के आदेश के तुरंत बाद अपील द्वारा उसका विरोध कर सकता है – ऐसी अपील सि.प्र.सं. के आदेश 43 नियम 1(डब्ल्यू) अंतर्गत दाखिल करनी होगी जबकि मुख्य कार्यवाहियों में पारित अंतिम निर्णय/डिक्री अथवा आदेश हो जाने के पश्चात् भी आदेश को चुनौती दी जा सकती है।

B. Civil Procedure Code (5 of 1908), Order 47 Rules 1 & 8 - *Review - Procedure when the application for review is granted - Stated.* (Para 10)

ख सिविल प्रक्रिया संहिता (1908 का 5), आदेश 47 नियम 1 व 8– पुनर्विलोकन – प्रक्रिया जब पुनर्विलोकन के लिये आवेदन मंजूर किया जाता है – विवरण दिया गया।

Uma Kant Sharma with R.K. Patel, for the petitioner.

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*W.P. No.2390/2010(I) (Jabalpur)

ORDER

The facts are leading to a impossible situation. The petitioner herein filed a suit which was dismissed and thereafter, the regular first appeal was filed before the first appellate Court. The First Appellate Court allowed the appeal, set aside the judgment and decree passed by the trial Court and remanded back the matter to the trial Court to proceed in accordance with the directions of the appellate Court. It appears that thereafter the plaintiff/appellant filed an application before the appellate Court under Order 47 Rule 1 CPC for review of the judgment and decree. The Appellate Court took up the application for review and after hearing both the parties without making any observation or recording a finding that the earlier order of remand was right or wrong, set aside the earlier order and dismissed the regular first appeal which was earlier allowed. After disposal of the application for review and dismissal of the appeal, the first appellate Court did not issue a direction for framing a decree..

2. The plaintiff is before this Court under Article 227 of the Constitution of India with a submission that the learned first appellate Court while taking up the application for review was not entitled to set aside the judgment and decree under which the matter was remanded to the trial Court but at best could dismiss the application for review or if it was of the opinion that the earlier judgment remanding the matter was bad then the appellate Court was required to recall the earlier judgment and decree and rehear the parties on merits of the appeal.

3. After hearing learned counsel for the petitioner, we are of the opinion that if we hold that the review petition was allowed because earlier judgment and decree remanding the matter was set aside then the impugned order will have to be challenged under Order 43 Rule (1) (w) of the Code of Civil Procedure. In the alternative, if we hold that after granting the review the appellate Court has dismissed the appeal without issuing a direction for framing the decree then the order passed by the learned Court below would be deemed to be a judgment under Section 96 of Code of Civil Procedure and a regular second appeal would lie. In any case, the petition under Article 227 of the Constitution of India would not be maintainable.

4. It is to be remembered and observed by all the Courts that whenever an application for review is filed then after hearing the parties the Court hearing the application, if is of the opinion that the review application has to be allowed then, it has to allow the application, set aside the impugned order and, relegate the parties back to the position where they were before the order impugned was passed. If the order is recalled/reviewed then the parties would be asked to submit their arguments and after hearing afresh, the Court will have to pass a fresh order on the merits.

5. Order 47 of the Code of Civil Procedure relates to review. Sub-rule {1} of Rule 1 of Order 47 would show that a party desirous to obtain a review of the decree passed or order made against him may apply for a review of judgment to

the Court which passed the decree or made the order. A fair understanding of Sub-rule {1} of Rule 1 of Order 47 would clearly provide that a party may make an application for review of the judgment and the order. The question is whether while granting the application for review, a Court is entitled to set aside the earlier judgment & decree and pass a fresh judgment & decree/order.

6. Rule 4 of Order 47 clearly provides that where the Court is of the opinion that the application should be granted, it shall grant the same provided that no such application shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree or order, a review of which is applied for and ..... {b}.....

7. After hearing both the parties, when a Court is of the opinion that the earlier judgment {review of which is sought} is wrong or bad or there is a mistake or error apparent on the face of record then it shall recall its earlier judgment & decree or order and pass an order to rehear the original case.

Rule 7 of Order 47 of the Code of Civil Procedure reads as under –

> **"7. Order of rejection not appealable–Objection to order granting application.** [(1) An order of the Court rejecting the application shall not be appealable, but an order granting an application may be objected to at once by an appeal from the order granting the application or in an appeal from the decree or order finally passed or made in the suit]."

8. When a Court hearing the review application rejects the same then the order shall not be appealable but if an order granting review application is allowed then the party aggrieved may object to it at once by an appeal from the order grating the application. Such an appeal is to be filed under Order 43 Rule 1 {w} of the Code of Civil Procedure.

9. Rule 7{1} further provides that the order passed by the Court can also be challenged by filing an appeal from the decree or order finally passed or made in the suit {in our opinion, the word 'suit' shall include an appeal or such other proceedings}. Sub-rule {1} of Rule 7 contemplates two situations. The first situation contemplated under Sub-rule {1} of Rule 7 of Order 47 is to challenge the order granting review by filing an appeal which in our opinion would lie under Order 43 Rule 1 {w} of the Code of Civil Procedure while the order can also be challenged after a final judgment/decree or order is passed in the main proceedings.

10. An application for review if is allowed then in our opinion proceedings Under Rule 8 of Order 47 are to be drawn. Rule 8 provides that when an application for review is granted, a note thereof shall be made in the register and the Court may at once rehear the case or make such order in regard to rehearing as it thinks fit. When a Judge decides to grant an application for review, he should record an order to that effect and a note thereof should be made in the register under Rule 8 of Order 47. Decree which is passed subsequent to grant of review, is a new

decree superseding the original one. We have to understand a distinction between grant of a review application and passing of a fresh decree or order after the review is granted. Granting of an application for review merely amounts to a decision to rehear the case.

11. In the present matter, the Court below, we will again reiterate, has created an impossible situation because it decided the review application and at the same time under the same order set aside the earlier judgment & decree and dismissed the appeal of the plaintiff which was earlier allowed.

12. Of late, we are finding that most of the Courts while granting the review application are changing the final judgment/order earlier delivered and are thereby creating impossible situation.

13. Learned counsel for the petitioner, at this stage, submits that the petitioner be allowed to withdraw the petition with liberty to file appropriate proceedings before the High Court.

14. The petition is allowed to be withdrawn with the observations aforesaid.

Petition allowed.

I.L.R. [2010] M. P., 1907
WRIT PETITION
Before Mr. Justice Shantanu Kemkar
5 April, 2010*

BHERULAL ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994) ***- Appointment of Panchayat Karmi - Scheme - Eligibility - Candidate should be 10th pass - Held - Selection should be decided on the basis of eligibility criteria - Acquisition of better qualification would not provide any further benefit - Order of appointment in favour of candidate having highest marks in 10th standard upheld - Petition dismissed.*** (Para 10)

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1) – पंचायत कर्मी की नियुक्ति – स्कीम – पात्रता – अभ्यर्थी 10वीं उत्तीर्ण होना चाहिये – अभिनिर्धारित – चयन का विनिश्चय पात्रता मानदंड के आधार पर होना चाहिये – बेहतर अर्हता का अर्जन कोई अतिरिक्त लाभ प्रदान नहीं करेगा – 10वीं में उच्चतम अंक रखने वाले अभ्यर्थी के पक्ष में नियुक्ति के आदेश की पुष्टि की गयी – याचिका खारिज।

Case referred :

ILR (2008) MP 1370.

Milind Phadke, for the petitioner.

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*W.P. No.5486/2009(S) (Indore)

Vivek Patwa, Dy.G.A., for the respondent Nos.1 to 5.
Jyoti Tiwari, for the respondent No.6.
M.A. Bohra, for the respondent No.7.

ORDER

SHANTANU KEMKAR, J. :–Heard.

2. Briefly stated the petitioner was appointed on the post of Panchayat Karmi vide resolution dt.9.4.2007 passed by the Gram Panchayat Rajpura, Jila Panchayat Jeerapur, District Rajgarh. The said resolution was challenged by the seventh respondent Toofansingh before the Sub Divisional Officer (for short SDO) Khilchipur in appeal no.37B-121/2006-07. However the appeal was dismissed by the SDO vide order dt.2.6.2007 (Annexure P/6) holding it to be not maintainable. Aggrieved the seventh respondent preferred a revision before the Additional Collector, Rajgarh (Biaora). The Additional Collector, Rajgarh vide order dt.12.6.2007 (Annexure P/7) set aside the order passed by the SDO, holding that against the decision of the Gram Panchayat making appointment on the post of Panchayat Karmi the appeal was maintainable before the SDO. As a result the order of SDO passed on 1.6.2007 was set aside and the matter was remanded to the SDO, Khilchipur for fresh decision.

3. The said order of the Additional Collector was challenged by the petitioner before the Additional Commissioner in revision no.174/R/2006-07. The Additional Commissioner vide order dt.5.6.2008 set aside the order dt.2.6.2007 passed by the SDO as also the order dt.12.6.2007 passed by the Additional Collector and remanded the matter to the Additional Collector for deciding the matter in view of the observations made by it in paragraph 11 of the order dt.5.6.2008 (Annexure P/8).

4. The aforesaid order passed by the Additional Commissioner was challenged by the petitioner in Writ Petition No.4329/2008(s). The said writ petition was disposed of by this Court vide order dt.10.12.2008 by setting aside the order dt.5.6.2008 passed by the Additional Commissioner, with a direction that any of the adverse remarks/observations made by the Additional Commissioner, for and against either of the parties, would not be taken into consideration by the Collector, in proceedings on remand, which have been ordered by the Additional Commissioner, vide order dt.5.6.2008. It was clarified that the Collector shall adjudicate the controversy afresh, in accordance with law, and on the basis of the material available on record.

5. In pursuance to the directions issued by this Court the Collector examined the matter and remitted it to the SDO for deciding the appeal on merits. In pursuance to the orders passed by the Collector the SDO vide order dt.5.6.2009 (Annexure P/10) gave opportunity of hearing to the parties and allowed the appeal filed by the seventh respondent Toofansingh holding that the decision taken by the Gram Panchayat for making appointment of the petitioner Bherulal on the post of Panchayat Karmi has not been taken on the basis of consideration of the respective

merits but has been taken on the basis of majority. It has been observed by the SDO that the chart showing merits of the parties prepared by the Gram Panchayat clearly establishes that the seventh respondent Toofansingh secured 68.6% in tenth standard which was much more than the petitioner. In the circumstances the SDO directed the Gram Panchayat to issue appointment order in favour of the seventh respondent.

6. Feeling aggrieved by the said order dt.5.6.2009 passed by the SDO the petitioner preferred a revision before the Additional Collector, Rajgarh. The Additional Collector, Rajgarh vide order dt.6.8.2009 passed in revision no.57/A-89/2008-09 dismissed the revision filed by the petitioner holding that the seventh respondent who was having highest marks in the tenth standard was best suitable on merits for giving appointment on the post of Panchayat Karmi. In the circumstances the Additional Collector maintained the order passed by the SDO on 5.6.2009. Feeling aggrieved the petitioner has filed this petition.

7. The contention of learned counsel for the petitioner is that after passing of the order by this Court on 10.12.2008 the Collector, Rajgarh was required to decide the controversy involved in the matter and he could not have remitted the matter to the SDO. He further submits that in view of the order dt.5.6.2009 passed by the Additional Commissioner only the Collector was empowered to take decision when the resolution passed by the Gram Panchayat was under challenge. On the other hand the respondents have supported the impugned order passed by the SDO and by the Additional Collector.

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

9. Admittedly the grievance of the seventh respondent was against the appointment of the petitioner on the post of Panchayat Karmi by a resolution passed by the Gram Panchayat. In the circumstances in view of the law laid down by a Division Bench of this Court in the case of *Devidayal Raikwar Vs. State of M.P. and others* I.L.R.(2008) M.P. 1370 in which it has been held that the appointment of Panchayat Karmi pursuant to resolution is appellable, the appeal which was filed by the seventh respondent challenging the resolution of Gram Panchayat for appointment of the petitioner on the post of Panchayat Karmi was maintainable before the SDO. Initially the SDO had dismissed the appeal filed by the seventh respondent holding it to be not maintainable. When the matter traversed upto this court, this court remitted the matter to the Collector for adjudicating the controversy afresh in accordance with law and on the basis of material available on record. As the appeal challenging the appointment made by Gram Panchayat on the post of Panchayat Karmi was to be decided on merits by the SDO in view of the law laid down in the case of *Devidayal Raikwar* (supra) the Collector remitted the matter to the SDO for deciding the appeal of the seventh respondent afresh on merits. The SDO after consideration of the record found that the seventh respondent was having better marks in tenth standard still the petitioner was given

appointment by the Gram Panchayat only on the basis of majority. He therefore set aside the appointment of the petitioner and ordered to give appointment to the seventh respondent. The said order has been upheld by the Additional Collector.

10. Having regard to the aforesaid in my considered view no case is made out to interfere into the impugned orders. Undisputedly the seventh respondent had secured highest marks in the tenth standard examination of the system of 10+2 examination The Division Bench of this Court in the case of *Devilal S/o.Bherulal Patidar Vs. State of M.P. and others* [Writ Petition No.5579/2008(s)] after examining the scheme for appointment on the post of Panchayat Karmi in its order dt.20.3.2009 has held that the requirement under the scheme is that in the system of 10+2 somebody should be 10th pass 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 seventh respondent was having highest marks in the tenth standard of the 10+2 system amongst all the candidates. In the circumstances the impugned orders of the S.D.O.and the Collector being in conformity with the order passed by a Division Bench of this Court in the case of *Devidayal Raikwar* (supra) and the order passed in the case of *Devilal S/o.Bherulal Patidar* (supra) the same needs no interference.

9. Thus I find no merit in this writ petition. Accordingly the petition fails and is hereby dismissed. As a consequence the interim order passed by this Court on 13.8.2009 stands vacated.

C.C.within three days.

Petition dismissed.

I.L.R. [2010] M. P., 1910
WRIT PETITION
Before Mr. Justice Rajendra Menon
6 April, 2010*

JINENDRA KUMAR JAIN & ors. ... Petitioners
Vs.
STATE OF M.P. & ors. ... Respondents

Service Law - Constitution, Article 226 - *Selection - M.P.P.S.C. Examination* *- Names of petitioners appeared in waiting list - During validity period of waiting list some posts fell vacant due to either non-joining of selected candidates or resignation of selected candidates after joining - Held - As vacancy arose is same vacancy for which advertisements were issued and the selection process took place, the same will go to the candidates in waiting list so long as the waiting list is within the validity period and alive - Petition allowed.* (Paras 7, 8, 11 & 12)

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*W.P. No.3796/2009(S) (Jabalpur)

सेवा विधि – संविधान, अनुच्छेद 226 – चयन – एम.पी.पी.एस.सी. परीक्षा – प्रतीक्षा सूची मे याचियों के नाम आये – प्रतीक्षा सूची की विधिमान्यता की कालावधि के दौरान, या तो चयनित अभ्यर्थियों के पद ग्रहण न करने के कारण अथवा चयनित अभ्यर्थियों के पद ग्रहण करने के पश्चात त्याग पत्र देने के कारण कुछ पद रिक्त हुए – अभिनिर्धारित – चूंकि उन्ही रिक्तियों में से रिक्ति उत्पन्न हुई जिनके लिए विज्ञापन जारी किये गये थे और चयन प्रक्रिया हुई थी, वह रिक्ति प्रतीक्षा सूची के अभ्यर्थियों को जाएगी जब तक कि प्रतीक्षा सूची विधिमान्यता की कालावधि के भीतर तथा जीवित है – याचिका मंजूर ।

Cases referred :

2006(2) MPLJ 312, JT 1994(3) SC 559, 1980 MPLJ 287, M.P. No.1368/1982 (Dr. B.P. Pawar & ors. Vs. State of M.P. & ors.) decided on 22.06.1983.

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

Puneet Shroti, Panel Lawyer, for the respondent Nos.1, 3, 4 & 5.

K.S. Wadhwa, for the respondent No.2.

ORDER

Rajendra Menon, J. :–As common questions are involved in all the three petitions and as challenge is made to a common order passed on 17.2.2009, by the Public Service Commission, Indore, all these petitions are being decided by this common order. For the sake of convenience, documents and other material available in Writ Petition No.3796/2009(S) is being referred to.

2. M.P. Public Service Commission Examination 2000-01 was notified vide advertisement issued on 9.12.1999. The Examination was to be conducted for filling up various posts in the State services. Initially, the examination was scheduled to commence on 30.4.2000. However, it seems that the original schedule was not adhered to and the Examination for the year 2000-01 was held in combination with the Public Service Commission Examination for the year 2003, which was notified by another advertisement on 9.10.2003. The main examination which was initially to be held in the year 2004, commenced and was held in May 2006, interviews were held between February to April 2009 and the main list of candidates, as per merit, was notified by the PSC on 11.6.2007. This list was valid for a period of one year i.e.. from 11.6.2007 to 10.6.2008 and alongwith the main list a Supplementary List also known as the 'Waiting List' was published on 11.6.2007. This Supplementary List had a validity period of 18 months i.e... from 11.6.2007 to 12.12.2008.

3. The publication of the list as indicated hereinabove and its validity are not in dispute. Candidates from the main list were allocated to the Excise Department and it is alleged by the petitioner that 11 posts fell vacant due to either non-joining of the selected candidates or resignation by some of the selected candidates, after joining. As these vacancies arose during the validity period of the Supplementary List i.e.. prior to 12.12.2008, respondent No.3, the Excise Commissioner, wrote letters to the Director General of Jails, Jail Headquarters, Bhopal and the Registrar Co-operative Societies, Bhopal to forward the bio-data

of the petitioners, whose names are included in the Supplementary List, for appointment. Documents in this regard are filed as Annexures P/4 to P/7. In consequence thereof, the Jail Headquarters vide Annexure P/8 dated 22.9.2008 sought for willingness of petitioner No.1 Jinendra Kumar Jain, in W.P.No.3796/2009(S), and the said petitioner gave his willingness vide Annexure P/9-A. Similarly, willingness of petitioner No.4 Manmohan Sharma, in W.P.No.3797/2009(S), was also sought for vide Annexure P/10 and it is the case of each of the petitioners that in their cases also willingness were sought for. However, after such correspondence, it is stated that matter went before respondent No.2 for his concurrence to the proposal for appointment of candidates from the Supplementary List. Respondent No.2 gave his dissenting letter vide Annexure P/1 dated 17.2.2009 and, therefore, petitioners are before this Court seeking quashment of Annexure P/1 dated 17.2.2009 and a direction to fill up the vacant posts available during the validity period of the Supplementary List, from the candidates as per seniority and merit in the Supplementary List.

4. Smt. Shobha Menon, learned Senior Advocate for the petitioners, taking me through the correspondence available in this regard, particularly the communications from the office of respondent Nos. 3, 4 and 5 with regard to availability of vacancy and the entitlement of the candidates listed in the Supplementary List for appointment, argued that when vacancies arose due to either non-joining or relinquishment of service by the joined candidate during the currency of the select list, then in the light of the law laid down by a Bench of this Court in the case of *Kanchan Saxena Vs. State of MP and another,* 2006(2) MPLJ 312, the dissent recorded by respondent No.2 in Annexure P/1 dated 17.2.2009, is unsustainable. By filing a rejoinder so also by bringing on record certain communications with regard to appointment of one Shri Kishore Kumar Aharwal, whose name was also in the Supplementary List, in the light of the law laid down in the case of *Kanchan Saxena* (supra), as contained in I.A.No.11763/2009, learned Senior Advocate argued that in the case of Shri Kishore Kumar Aharwal, PSC vide document No.1 to I.A.No.11763/2009 has taken a stand which is contrary to the one made in Annexure P/1, this is highly discriminatory and unsustainable. Accordingly, on the aforesaid grounds learned Senior Advocate prays for grant of relief as claimed in the writ petition. It is stated that when Shri Kishore Kumar Aharwal, whose name was also included in the Supplementary List, is granted benefit, similar benefit should be extended to the present petitioners also.

5. Respondent No.2 PSC represented by Shri K.S. Wadhwa, admit the fact with regard to the validity period of the list in question i.e... the Supplementary List, but their only objection is that once the selected candidate has joined the post, then the subsequent vacancy created either by resignation or due to new vacancy being created cannot be filled up from the candidates whose names are included in the waiting list. Pointing out that the aforesaid principle is laid down by

the Supreme Court in the case of *Gujarat State Dy. Executive Engineers' Association Vs. The State of Gujarat and Others,* JT 1994 (3) SC 559 so also by two Division Bench of this Court, in the case of *V.K. Seth Vs. State of MP and another,* 1980 MPLJ 287, and in an unreported judgment in Misc. Petition No.1368/1982 *(Dr. B.P. Pawar and four others Vs. State of MP and two others)* decided on 22.6.1983, Shri K.S. Wadhwa submits that the principle laid down in the case of *Kanchan Saxena* (supra) has been decided without taking note of the Division Bench judgments in the case of *V.K. Seth* (supra) and *Dr. B.P. Pawar* (supra), therefore, now no relief can be granted to the petitioners.

6. Having heard learned counsel for the parties and on a perusal of the records it is clear that the factual assertions made are not in dispute. It is an admitted position that names of each of the petitioners appear in the Supplementary List and the validity period of the same is of 18 months, and the said period of 18 months is from 11.6.2007 to 10.12.2008. It is also not in dispute that some of the candidates, who had joined in pursuance to the offer made to them on the basis of their position in the main list have resigned and have left the job and, therefore, the vacancies have risen during the validity period of the Supplementary List. The question is as to whether these vacancies can be filled up by candidates from the Supplementary List or these are vacant posts, which have to be filled up by initiating fresh recruitment process.

7. The answer to the said question is available in the judgment of *Gujarat State Dy. Executive Engineers' Association* (supra) relied upon by Shri K.S. Wadhwa. The said judgment is also relied upon by the learned Judge of this Court in the case of *Kanchan Saxena* (supra). In paragraph 8 of the said judgment i.e... in the case of *Gujarat State Dy. Executive Engineers' Association* (supra), Supreme Court has dealt with the matter in the following manner:

> "8. Coming to the next issue, the first question is what is a waiting list?; can it be treated as a source of recruitment from which candidates may be drawn as and when necessary?; and lastly how long can it operate? These are some important questions which do arise as a result of direction issued by the High court. A waiting list prepared in service matters by the competent authority is a list of eligible and qualified candidates who in order of merit are placed below the last selected candidate. How it should operate and what is its nature may be governed by the rules. Usually it is linked with the selection or examination for which it is prepared. For instance, if an examination is held say for selecting 10 candidates for 1990 and the competent authority prepares a waiting list then it is in respect of those 10 seats only for which selection or competition was held. Reason for it is that whenever selection is held, except where it is for single post, it is normally held by taking into account not only the number of vacancies existing on the date when

advertisement is issued or applications are invited but even those which are likely to arise in future within one year or so due to retirement etc. It is more so where selections are held regularly by the Commission. Such lists are prepared either under the rules or even otherwise mainly to ensure that the working in the office does not suffer if the selected candidates do not join for one or the other reason or the next selection or examination is not held soon. A candidate in the waiting list in the order of merit has a right to claim that he may be appointed if one or the other selected candidate does not join. But once the selected candidates join and no vacancy arises due to resignation etc. or for any other reason within the period the list is to operate under the rules or within reasonable period where no specific period is provided then candidate from the waiting list has no right to claim appointment to any future vacancy which may arise unless the selection was held for it. He has no vested right except to the limited extent, indicated above, or when the appointing authority acts arbitrarily and makes appointment from the waiting list by picking and choosing for extraneous reasons." (Emphasis supplied)

The underlined portion would indicate that a candidate whose name appears in the waiting list in the order of merit has a right to claim that he should be appointed if one or other of the selected candidate does not join. It is further seen that if a selected candidate joins and thereafter no vacancies arise due to resignation or for any other reason within the period the list is in operation, a candidate from the waiting list has no right to claim appointment on any future vacancy. The aforesaid judgment is very clear, it contemplates a condition that if a candidate as per merit does not join then the said post would go to a candidate in the waiting list, if the validity period of the waiting list is not over. Similarly, if a candidate after joining resigns and a vacancy arises during the period the list is in operation then the candidate from the waiting list has a right to claim appointment on the post. This judgment does not help the respondents as canvassed by Shri K.S. Wadhwa. This judgment only says that a future vacancy that may arises and which is not related to a vacancy that is not filled up by a selection conducted or subsequently again becomes vacant due to resignation of the selected candidate, cannot be filled up from a candidate in the waiting list. This judgment and the observations as is made hereinabove in paragraph 8 has been applied in the case of *Kanchan Saxena* (supra) and it has been held in the said case that if the selected candidate resigns and the vacancy so arises within the validity period of the list, then a candidate in the reserve list or waiting list can be appointed.

8. That being so, I am of the considered view that the principle laid down by the Supreme Court in the case of *Gujarat State Dy. Executive Engineers' Association* (supra) and followed by *Kanchan Saxena* (supra) has been totally

misinterpreted by the respondents in the present case. In the present case also, as the selected candidate after joining had resigned and the vacancy that arose is the same vacancy for which advertisements were issued and the selection process took place, the same will go to the candidate in the waiting list or Supplementary List so long as the waiting list or the Supplementary List is within the validity period and alive. The vacancy so arising cannot be treated as a new vacancy for which the selection was not conducted.

9. The judgment rendered by the Division Bench of this Court in the case of *V.K. Seth* (supra) and *Dr. B.P. Pawar* (supra) are clearly distinguishable and will not apply in the present case. In the case of *Dr. B.P. Pawar* (supra), two posts of Readers in Anatomy alongwith various others posts were advertised by the PSC. Pursuant to the advertisement a select list was prepared and the selected candidates joined on the post. However, subsequently one more post of Reader became vacant and the Commission recommended the name of respondent No.3, in the said case, for appointment. This appointment was challenged and it was held that this subsequent vacancy that is created cannot be filled up by the wait listed candidate as it was a vacancy which was created subsequent to the selection process and was not the one for which the original selection process was held. For holding so, learned Division Bench relied upon an earlier judgment in the case of *V.K. Seth* (supra), where also the same principle was reiterated.

10. In the case of *V.K. Seth* (supra), four posts of specialists in Opthalmology were advertised. The selected candidates as per merit list joined and were working in the post when due to transfer of certain other person holding a different post, a subsequent post became vacant and this post was claimed by a candidate in the reserve list. This was not a case where the vacancy notified and advertised became vacant during the currency of the waiting list or the reserve list, but it was a case where the vacancy that arose was a new and subsequent vacancies, which had no connection with the earlier advertisement and process of selection held. That being so, the principle laid down in the cases of *Dr. B.P. Pawar* (supra) and *V.K. Seth* (supra) will not apply in the present case, on the contrary the principle laid down in paragraph 8 by the Supreme Court, in the case of *Gujarat State Dy. Executive Engineers' Association* (supra), and followed by this Court in the case of *Kanchan Saxena* (supra) will apply and if the principle laid down therein are followed, then the dissenting note given by respondent No.2 vide Annexure P/1 on 17.2.2009 is contrary to the said principle and is liable to be quashed.

11. That apart, from a perusal of the documents available on record vide I.A.Nos.11763/2009 and 12793/2009, indicate that the principle laid down in the case of *Kanchan Saxena* (supra) has been interpreted in the same manner by the MP PSC itself and vide Document I to these applications, and on such interpretation one Shri Kishore Kumar Aharwal, whose name was included in the Supplementary List, has been granted appointment. It is surprising that in Document I to I.A.Nos.11763/2009 and 12793/2009, PSC has interpreted the judgment in

the case of *Kanchan Saxena* (supra) in the manner which is in conformity with the law laid down in the case of *Gujarat State Dy. Executive Engineers' Association* (supra), and in the case of the petitioners a totally different interpretation based on judgments of the Division Bench is advanced, which is totally misconceived and the said judgments of the Division Bench, in the cases of *Dr. B.P. Pawar* (supra) and *V.K. Seth* (supra) are distinguishable on facts.

12. Accordingly, finding the petitioners to be entitled for consideration of their cases for appointment on the vacancies that have risen either due to non-joining of selected candidates as per merit list or resignation or otherwise of the said candidates, respondents are directed to consider the case of the petitioners for appointment to such post, which fell vacant due to the aforesaid eventuality and after applying the principles laid down in the case of *Kanchan Saxena* (supra), proceed to grant benefit to the petitioners at par with that of Shri Kishore Kumar Aharwal. Necessary action for granting benefit to the petitioners be taken within a period of two month from the date of receipt of certified copy of this order.

13. Petitions stand allowed and disposed of with the aforesaid, without any order so as to costs.

Petition allowed.

I.L.R. [2010] M. P., 1916
WRIT PETITION
Before Mr. Justice Sanjay Yadav
8 April, 2010*

HARGOVIND NAGAICH ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. Forest Produce (Conservation of Biodiversity and Sustainable Harvesting) Rules, M.P. 2005, Rule 5 - *Power to declare Closed Area - Divisional Forest Officer issuing a notification prohibiting of extraction of Salai Gum - Notification challenged on the ground that DFO has no jurisdiction to issue notification - Held - It is thus within the powers of the DFO posted in a territorial Forest Division, being an official authorized under Rules, 2005 to issue notification u/r 5.* (Para 15)

क. वन उपज़ (जैव विविधता का संरक्षण एवं पोषणीय कटाई) नियम, म.प्र. 2005, नियम 5 – निषिद्ध क्षेत्र घोषित करने की शक्ति – प्रभागीय वन अधिकारी द्वारा जारी सलाई गम निकालने से प्रतिबंधित करने वाली अधिसूचना – अधिसूचना को इस आधार पर चुनौती कि प्रभागीय वन अधिकारी को अधिसूचना जारी करने की अधिकारिता नही – अभिनिर्धारित – क्षेत्रीय वन प्रभाग में पदस्थ प्रभागीय वन अधिकारी नियम, 2005 के अधीन प्राधिकृत होते हुए, नियम 5 के अधीन अधिसूचना जारी करना उसकी शक्तियों के भीतर है।

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*W.P. No.11625/2008 (Jabalpur)

B. Forest Produce (Conservation of Biodiversity and Sustainable Harvesting) Rules, M.P. 2005, Rule 5 - *Power to declare Closed Area - Divisional Forest Officer issuing a notification prohibiting of extraction of Salai Gum for more than singular area - Held - It is mandatory under the Rule to specify the area, but to say that composite area cannot be included, is not the object of Rule 5 - The notification issued for entire Protected and Reserved Forest is in consonance to Rule 5.* (Para 17)

ख. वन उपज (जैव विविधता का संरक्षण एवं पोषणीय कटाई) नियम, म.प्र. 2005, नियम 5 – निषिद्ध क्षेत्र घोषित करने की शक्ति – एक से अधिक क्षेत्र के लिए सलाई गम निकालने से प्रतिबंधित करने वाली प्रभागीय वन अधिकारी द्वारा जारी अधिसूचना अभिनिर्धारित क्षेत्र विनिर्दिष्ट करना नियम के अंतर्गत बाध्यकारी है परंतु यह कहना कि संयुक्त क्षेत्र सम्मिलित नही किया जा सकता, यह नियम 5 का उद्देश्य नही है – संपूर्ण संरक्षित तथा आरक्षित वन के लिए जारी की गयी अधिसूचना नियम 5 के अनुरूप है ।

C. Forest Act (16 of 1927), Section 2(4), Forest Produce (Conservation of Biodiversity and Sustainable Harvesting) Rules, M.P. 2005, Rule 5 - *Forest Produce - Salai Gum - Held - Salai Gum is a Forest Produce and a notification in respect of it can be issued under Rule 5.* (Para 18 & 19)

ग. वन अधिनियम (1927 का 16), धारा 2(4), वन उपज (जैव विविधता का संरक्षण एवं पोषणीय कटाई) नियम, म.प्र. 2005, नियम 5 – वन उपज – सलाई गम – अभिनिर्धारित – सलाई गम वन उपज है तथा उसके संबंध मे नियम 5 के अंतर्गत अधिसूचना जारी की जा सकती है।

V.N. Kankane with *Lalit Pandey,* for the petitioner.
Harish Agnihotri, G.A., for the respondents.

ORDER

Sanjay Yadav, J. :–Though many a reliefs have been sought by the petitioner in the present writ petition; viz. (i) That this Hon'ble Court may kindly be pleased to direct the respondents to produce the entire record leading to the passing of the impugned advertisement passed by the respondent No. 2 DFO Burhanpur as contained in Annexure P/1, P/3 & P/4 respectively, (ii) That, this Hon'ble Court may be pleased to direct the respondent No. 2 not to take any coercive steps against the petitioner by issuance of writ of Mandamus and to further direct him to release the seized article forthwith (iii) that this Hon'ble Court may further be pleased to command the respondent No. 2 by a writ of mandamus to allow the petitioner to continue his business/trade of Salai Gond, in view of the circulars contained in Annexure P/7 to P/9 above as also in view of Section 2 (b) and 5 of the Madhya Pradesh Van Upaj (Jaiv Vividta Ka Sanrakshan Aur Poshriya Katai) Niyam, 2005.

2. However, learned counsel for the petitioner as per his undertaking dated 18.3.2010 has confined his submission, questioning the validity of notification issued in succession since last four years under Rule 5 of the Madhya Pradesh Forest

Produce (Conservation of Biodiversity and sustainable Harvesting) Rules, 2005 (hereafter referred to as Rules of 2005).

3. Rules of 2005 are framed by the State Government in exercise of its power conferred by clause (b) of Section 76 of the Indian Forest Act, 1927 for the conservation of biodiversity (Flora and Fauna) and Sustainable Harvesting of Forest Produce from Government Forests.

4. Questioning the legality of the order issued by Divisional Forest Officer (Samanya) Forest Division, Burhanpur prohibiting extraction of Salai Gum from Forest Range Aseer, Nepanagar, Khaknar, Burhanpur and Amullah, Kamtha Circle, all protected and reserved forest from time to time for the period of one year each, it is contended that, under Rules 2005 it is beyond the powers of the Divisional Forest Officer to issue notification regarding prohibition of extraction of Salai gum. It is further submitted that even the notice which is to be issued in pursuance to Rule 5 of the Rules 2005 the same can be only for a singular forest area and not for composit forest area. It is further contended on the strength of the notification dated 28.6.2003 issued by the State Govt. in exercise of powers conferred by sub-section (1) of Section 22-A of the Madhya Pradesh Van Upaj (Vyapar Viniyam) Adhiniyam 1969 whereby w.e.f. 1.7.2003 Harra and all types of gum except Kullu gum ceased to be a specified forest produce in whole of the State of Madhya Pradesh, that it is beyond the powers of the Divisional Forest Officer prohibiting the extraction and conservation of Salai gum that would tentamount to violation of the right of the petitioner to carry out trade.

5. It is on these ground that the petitioner seeks quashment of the notification issued in pursuance to Rule 5 of the Rules 2005.

6. The State Government on its turn supports the action contending inter alia that it is within the powers of the D.F.O to issue notification under Rule 5 of the Rules, 2005 as the D.F.O's have been authorized vide notification dated 13.5.2005. Furthermore, it is contended that even if the Salai Gum is not a specified forest produce under Adhniyam 1969, the same can still be dealt with under Rule 2005 which are framed in exercise of powers under Section 76 (b) and the "forest produce" as defined under Section 2 (4) of the Indian Forest Act, 1927 will include with its fold the Salai Gum. It is further contended that the provision as contained under rule 5 of the Rules, 2005 speaks of specified Forest area and not a singular area and, therefore, it is within the powers of the State Govt. or the authorized officer to issue a composite notification for comprising of forest ranges, reserved forests and protected forests area. Having thus submitted, it is contended that the petition being devoid of substance deserves to be dismissed.

7. Heard the learned counsel for the parties at length.

8. Few background facts would be necessary for proper appreciation of the rival submissions.

9. The petitioner resident of Maharanipur, Jhansi is engaged in the business of

Gum including Salai gum and to facilitate the business he has taken on rent a godown situated at Burhanpur named and styled as 'Super Sizing Mill'. That in pursuance to a notification issued on 29.3.2005 under Rule 5 of Rules 2005 regarding prohibition of extraction of Salai gum from the area stipulated therein the petitioner informed the authorized officer, on 4.4.2005 having possession of 158 quintals and 26.500k.gs of Salai gum. The notification issued on 29.3.2005 was for the period from 1.4.2005 to 31.3.2006. Subsequent thereafter notifications were issued from time to time, i.e., 15.3.2007 for the period 1.4.2007 to 31.3.2008 (Annexure P/3); 20.3.2008 for the period 1.4.2008 to 31.3.2009 (Annexure P/4).

10. That, during currency period of notification dated 20.3.2008 a notice was issued to the Godown owner Shri Hazi Kaleem Uddin where the concern of the petitioner, i.e., 'Super Sizing Mill', is located, on 11.6.2008 calling uypon him to explain the circumstances under which the Salai gum was found stocked in the Godown. The said Hazi Kaleen Uddin responding to the notice stated that the premises is being let out to Hargoving Nagaich, i.e., the petitioner and he has been informed about the proceedings. Pertinent it is to note that the information which was sought for from said Hazi Kaleem Uddin was in pur;suance to a seizure effected on 7.6.2008 as is evident from Annexure R-6. It is at this stage, i.e., the seizure that the petitioner has preferred a criminal revision and without waiting for the outcome has rushed to this Court for quashment of notification dated 29.3.2005 (Annexure P/1), 15.3.2007 (Annexure P/3) and 20.3.08 (Annexure P/4) and a direction to the respondents to release the seized article forthwith.

11. Since the action against the petitioner is during the currency of the notification dated 20.3.2008 and whereas the notification issued in earlier point of time having expired on completion of term and since no cause of action accrued during the currency of those notifications, the validity of notification dated 20.3.2008 is only gone into, as no cause of action accrue to the petitioner qua notifications dated 29.3.2005, and 15.3.2007.

12. The notification dated 20.3.2008 is apparently in exercise of powers under Rule 5 of the Rules 2005 issued by Divisional Forest Officer (Samanya) Burhanpur.

13. Section 2 (b) of the Rules 2005 defines Authorized Officer which means

> "2 (b) "Authorised Officer" means an officer authorized under these rules by the State Government who shall not be below the rank of a Deputy Conservator of Forest for exercising the powers specified in these rules;"

14. The State Govt. in exercise of its power under clause (b) of Rule 2 issued a notification on 13.5.2005 published in Madhya Pradesh Gazette Part I page 877 dated 27.3.2005 (Annexure R/9) which is in the following terms:

Bhopal, the 13th May 2005

No. F-25-135-2004-X-3.- In exercise of the powers conferred

by clause (b) of rule 2 of the Madhya Pradesh Forest Produce (Conservation of Biodiversity and Sustainable Harvesting) Rules, 2005, the State Government hereby, authorize all Divisional Forest Officers (Territorial and Wildlife), all Directors/Deputy Directors of National Parks and Divisional Managers of the Madhya Pradesh State Forest Development Corporation, as Authorised Officers for the purposes of the said rules.

By order and in the name of the Governor
Of Madhya Pradesh
RATAN PURWAR, Secy."

15. Thus with effect from 13.5.2005 the Divisional Forest Officer (Territorial and Wildlife) are authorized as Authorized Officer under Rules 2005. A controversy is raised that the authorization having of the Divisional Forest Officers (Territorial and Wildlife) and not of the Divisional Forest Officer (Samanya) the notification dated 20.3.2008 issued by a Divisional Forest Officer (Samanya) is without any authority. Though none of the parties to this petition have brought on record any statutory classification/caderising of the Divisional Forest Officers having different nomenclature; however, it is gathered from the record that the posting of a Divisional Forest Officer (Samanya) is a territorial posting which is different than the posting as in Production or Wildlife. It is thus within the powers of the Division Forest Officer posted in a territorial Forest Division, being an official authorized under Rules 2005 to issue notification under Rule 5.

16. Next contention of the petitioner that under Rule 5 notification can only be issued for a singular forest area, if accepted would than tantamount to violate the mandate of Rule 5 which stipulates:

"5. Power to declare Closed Area.- The State Government or the authorized officer may declare certain forest areas as closed areas for a specified period, for the collection or extraction of any forest produce, in order to ensure the sustainable harvesting of such forest produce in future.

17. Thus, though it is mandatory under the Rule to specify the area, but to say that composite area cannot be included, is in the considered opinion of this Court, not the object of Rule 5. Thus, the notification in question which is issued for entire Protected and Reserved Forest is in consonance to Rule 5 and does not call for interference.

18. Regarding the contention that Salai gum being excluded from the ambit of specified forest produce under Adhiniyam 1969, suffice it to say that said exclusion does not exclude the forest produce under Rules 2005 which owe its existence to Indian Forest Act, 1927 whereunder the Forest Produce is defined under Section 2 (4) as under

(4) "forest-produce" includes–

(a) the following whether found in, or brought from, a forest or not, that is to say timber, charcoal, caoutchouc, catechu, wood-oil, resin, natural varnish, bark, lac, mahua flowers, mahua seeds,4[kuth] and myrabolams, and

(b) the following when found in, or brought from a forest, that is to say

(i) trees and leaves, flowers and fruits, and all other parts or produce not herein before mentioned, of trees,

(ii) plants not being trees (including grass, creepers, reeds and moss), and all parts or produce of such plants,

(iii) wild animals and skins, tusks, horns, bones, silk, cocoons, honey and wax, and all other parts or produce of animals, and

(iv) peat, surface soil, rock and minerals (including lime-stone, laterite, mineral oils, and all products of mines or quarries);

STATE AMENDMENTS

Madhya Pradesh.- (A) In section 2, in clause (4), in sub-clause (a),-

(i) after the word "lac" insert the words "shellac, gum".

[Vide Madhya Pradesh Act 9 of 1965, sec. 2 (w.e.f. 20.3.1965]

(ii) after the words "Mahua seeds" insert the words "tendu leaves"

[Vide Madhya Pradesh Act 1 of 1990, sec. 3]

(B) in section 2, in clause (4), in sub-clause (b), after item (iv) add the following item, namely:-

"(v) standing agricultural crops".

(Vide Madhya Pradesh Act 9 of 1965, sec. 2 (w.e.f. 20.3.1965).]

19. Thus, Salai gum being a 'forest produce' the notification issued under Rule 5 of Rules 2005 cannot be found fault with.

20. In view of above analysis, the petition fails and is hereby dismissed. However, no costs.

Petition dismissed.

I.L.R. [2010] M. P., 1922

WRIT PETITION

Before Mr. Justice Rajendra Menon

12 April, 2010*

SHAILENDRA KUMAR SAHU ... Petitioner

Vs.

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

Service Law - *Policy for regularization - The candidate to be regularized should be a candidate whose appointment at the initial stage is irregular and he should have been appointed 10 years back and working continuously and should have been appointed on the basis of fulfillment of criteria laid down in recruitment rules - At the time of appointment petitioner was not possessing qualification of Diploma or Degree in Engineering which is minimum criteria for appointment to the post of Sub-Engineer - His appointment would fall in the category of illegal appointment - Held - The criteria of possessing Diploma or Degree for period of 10 years laid down in policy is a criteria laid down on the basis of principles of law as has emerged from judgment of Supreme Court in Umadevi's case [(2006) 4 SCC 1] - State Government and Competent Authority have not committed any error in rejecting claim of petitioner.* (Paras 15, 16, 19 & 20)

सेवा विधि – नियमितीकरण के लिए नीति – नियमित किया जाने वाला अभ्यर्थी ऐसा अभ्यर्थी होना चाहिए जिसकी प्रारम्भिक अवस्था पर नियुक्ति अनियमित हो और वह 10 वर्ष पूर्व नियुक्त किया जाना चाहिए था और नियमित कार्यरत हो और भर्ती नियमों में अधिकथित मानक के पूरा करने के आधार पर नियुक्त किया जाना चाहिए था – नियुक्ति के समय याची इंजीनियरिंग में डिप्लोमा या डिग्री की अर्हता नहीं रखता था जो कि उप–इंजीनियर के पद पर नियुक्ति के लिए न्यूनतम मानक है – उसकी नियुक्ति अवैध नियुक्ति की श्रेणी में आयेगी – अभिनिर्धारित – नीति में अधिकथित 10 वर्ष की कालावधि के लिए डिप्लोमा या डिग्री रखने का मानक उच्चतम न्यायालय के उमादेवी के मामले [(2006) 4 SCC 1] में उत्पन्न विधि के सिद्धांतों के आधार पर अधिकथित मानक है – राज्य सरकार और सक्षम प्राधिकारी ने याची का दावा नामंजूर कर कोई त्रुटि कारित नहीं की है।

Cases referred :

(2006) 4 SCC 1, AIR 1967 SC 1071, (1979) 4 SCC 507, (2009) 4 SCC 342.

Atul Anand Awasthy, for the petitioner.

Puneet Shroti, Panel Lawyer, for the respondents.

ORDER

Rajendra Menon, J. :–Challenging the order-dated 2.8.2008 – Annexure P/4, imposing certain conditions with regard to eligibility criteria for regularization of the petitioner, who is working as a daily wage Sub-Engineer, this writ petition has been filed.

2. Petitioner claims to have been appointed as a daily wage employee in the Department on 1.12.1993. Thereafter, on 31.3.2004, in view of certain orders

*W.P. No.9614/2008(S) (Jabalpur)

passed by the Labour Court he was classified as a permanent employee within the meaning of the Industrial Employment Standing Orders, Act and Rules. It is the case of the petitioner that while in service he appeared in an examination conducted by the Rajiv Gandhi Proudyogiki Vishwavidyalaya (University of Technology of Madhya Pradesh) in December 2000 – February 2001 and obtained a Diploma in Mechanical Engineer.

3. On 5.2.2008 vide Annexure P/2, a Notification was issued wherein daily wage employees, who had worked for more than 10 years, were granted an opportunity to participate in an examination for being regularized in service and to fill up the existing vacant posts of Sub-Engineers in the Department of Public Health Engineering. It is the grievance of the petitioner that even though on the basis of his qualification i.e... Diploma, and the fact that he has completed 10 years service, the Head of the Department vide Annexure P/3 empanelled the petitioner in the list of eligible candidates entitled to appearing in the selection process, but by the impugned order a condition is imposed that only such of the employees, who have been in service for more than 10 years and the Diploma or the Degree course and certificate obtained by them should also be of a period of more than 10 years can participate in the selection procedure. It is stated that on the ground that petitioner has obtained Diploma only 8 years ago, as such he is ineligible, his candidature is rejected and, therefore, petitioner is before this Court challenging the condition to that effect imposed in the circular – Annexure P/4.

4. Interalia contending that in the original Notification – Annexure P/2, no such condition is imposed and in the recruitment rules i.e.. M.P. Public Health Department (Non-Gazetted) Class III Recruitment and Service Condition Rules, 1972, the only requirement is of possessing a Diploma or Degree in Engineering and as petitioner fulfils the said qualification, it is stated that the condition imposed by the order impugned is impermissible. By making certain amendments to the writ petition and by filing a document – Annexure P/14, it was tried to be emphasized that in the light of certain orders passed by the Gwalior Bench in a writ petition, Writ Petition No.3794/2008(S) – *Siyaram Sharma Vs. State of MP,* cut-off date of 10.4.2006 has been fixed to calculate the eligibility criteria and as on the said date petitioner had completed 10 years service so also possessed a Diploma in Engineering, this entitled him to seek participation in the process for regularization, accordingly, petitioner has filed this writ petition, on these grounds.

5. It is further pointed out by Shri Atul Anand Awasthy, learned counsel for the petitioner, that certain employees, who had obtained Diploma while in service and in whose cases also the period after obtaining Diploma is less than 10 years, have been appointed as is evident from Annexure P/16, on this count also relief is sought for in the matter. Accordingly, contending that petitioner fulfils the requisite criteria laid down for consideration and his claim is being improperly rejected on grounds, which are not permissible and totally unjustified, learned counsel prays for interference into the matter.

6. It was also pointed out during the course of hearing that in the light of the interim order passed by this Court, petitioner had participated in the examination and according to the petitioner in his category he is at Serial No.1 of the merit list and, therefore, regularization is sought for on the aforesaid grounds.

7. Respondents have resisted the claim of the petitioner and it is pointed out by the respondents that after the judgment rendered by the Supreme Court, in the case of *Secretary, State of Karnataka and others Vs. Umadevi (3) and others*, (2006) 4 SCC 1, the State Government issued a circular on 16.5.2007 vide Annexure A/1, in the matter of regularizing of employees as a one time measure on certain conditions that are contemplated in the said circular. It is the case of the State Government that the Notification for examination – Annexure P/2 was issued on 5.7.2008 in accordance to the policy of the State Government as contained in Annexure R/1 dated 16.5.2007 and the clarification issued by the impugned Notification – Annexure P/4 is based on the principles laid down by the Supreme Court in the case of *Umadevi* (supra) and the conditions stipulated in the Circular – Annexure R/1.

8. It is the case of the respondents that only such of the employees are entitled to be considered for regularization who fulfilled the requisite criteria as per the recruitment rule at the time of their initial engagement itself as a daily wage employee. It is stated that as per the policy formulated in Annexure R/1, based on the law laid down in the case of *Umadevi* (supra), employees who have completed 10 years of service and whose appointment was irregular, were entitled to be considered for regularization. It is stated that under the recruitment rules, to be eligible for appointment as a Sub Engineer a person has to be a Degree or Diploma holder in Engineering and only such appointments/engagement can be treated as irregular appointment, if on the initial date of engagement the employee fulfilled the requisite criteria laid down in the recruitment rules. It is argued that only such employees, who have completed 10 years of service in accordance to the principles laid down by the Supreme Court in the case of *Umadevi* (supra), in paragraph 53, and who on the initial date of appointment i.e.. 10 years back were possessing the requisite qualification as per the recruitment rules, would fall in the category of irregular appointments and only their services can be regularized. Other appointments are illegal appointments and cannot be regularized. Accordingly, contending that the criteria laid down in Annexure P/4 is a reasonable criteria, based on the principles laid down in the case of *Umadevi* (supra), respondents resist the claim of the petitioner.

9. I have heard learned counsel for the parties at length and have perused the record.

10. It is clear that on the initial date of appointment of the petitioner on 1.12.1993, he was not holding the requisite qualification of Diploma or Degree in Engineering. It was only obtained by him in February 2001 i.e.. about 8 years prior to the process of regularization. The question therefore, would be as to whether the

criteria fixed for possessing the requisite qualification also for a period of 10 years is a just and reasonable criteria and is sustainable.

11. As regularization in question is being undertaken by the State Government as a one time measure, in the light of the directives issued by the Supreme Court, in paragraph 53 of *Umadevi's case*, it would be appropriate at this stage to consider as to what is the principle laid down by the Supreme Court in this regard.

12. The Constitutional Bench of the Supreme Court in the case of *Umadevi* (supra) found that appointments made on daily wage by various State Governments and Statutory Authorities fell in two different categories. These were 'illegal appointments' and 'irregular appointments'. As far as 'illegal appointments' are concerned, it is held that there is no question of regularization of an illegality committed. However, 'irregular appointments' and appointees under this category, who have worked for 10 years or more and who at the initial stage of engagement as daily wages employees possessed the requisite qualification for appointment, were entitled to be considered for regularization as a one-time measure. The aforesaid is laid down by the Supreme Court in the case of *Umadevi* (supra), after taking note of the principles laid down in the case of *State of Mysore Vs. S.V. Narayanappa,* AIR 1967 SC 1071, and in the case of *B.N. Nagarajan Vs. State of Karnataka,* (1979) 4 SCC 507. In this regard, the principles laid down by the Supreme Court in the case of *Umadevi* (supra), in paragraphs 15, 16, 17 and 53 is reproduced hereinunder:

> "15. Even at the threshold, it is necessary to keep in mind the distinction between regularization and conferment of permanence in service jurisprudence. In *STATE OF MYSORE Vs. S.V. NARAYANAPPA* [1967 (1) S.C.R. 128], this Court stated that it was a mis-conception to consider that regularization meant permanence. In *R.N. NANJUNDAPPA Vs T. THIMMIAH & ANR.* [(1972) 2 S.C.R. 799], this Court dealt with an argument that regularization would mean conferring the quality of permanence on the appointment. This Court stated:-
>
> > "Counsel on behalf of the respondent contended that regularization would mean conferring the quality of permanence on the appointment, whereas counsel on behalf of the State contended that regularization did not mean permanence but that it was a case of regularization of the rules under Article 309. Both the contentions are fallacious. If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution, illegality cannot be regularized. Ratification or regularization is possible of an act which is within the power and province of the authority, but there has been some non-compliance with

procedure or manner which does not go to the root of the appointment. Regularization cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules."

16. In *B.N. Nagarajan & Ors. Vs. State of Karnataka & Ors.* [(1979) 3 SCR 937], this court clearly held that the words "regular" or "regularization" do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments. This court emphasized that when rules framed under Article 309 of the Constitution of India are in force, no regularization is permissible in exercise of the executive powers of the Government under Article 162 of the Constitution in contravention of the rules. These decisions and the principles recognized therein have not been dissented to by this Court and on principle, we see no reason not to accept the proposition as enunciated in the above decisions. We have, therefore, to keep this distinction in mind and proceed on the basis that only something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized and that it alone can be regularized and granting permanence of employment is a totally different concept and cannot be equated with regularization.

17. We have already indicated the constitutional scheme of public employment in this country, and the executive, or for that matter the Court, in appropriate cases, would have only the right to regularize an appointment made after following the due procedure, even though a non-fundamental element of that process or procedure has not been followed. This right of the executive and that of the court, would not extend to the executive or the court being in a position to direct that an appointment made in clear violation of the constitutional scheme, and the statutory rules made in that behalf, can be treated as permanent or can be directed to be treated as permanent.

xxx xxx xxx xxx

53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *S.V. NARAYANAPPA (supra), R.N.* NANJUNDAPPA (supra), and B.N. NAGARAJAN (supra),

and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme." *(Emphasis Supplied)*

13. From the aforesaid principle, it would be clear that if the appointment made initially is illegal, contrary to the statutory rules or regulation or constitutional provision, then such an illegal appointment cannot be regularized. What could be regularized under the one time measure contemplated under paragraph 53 above, are the 'irregular appointments' made. 'Irregular appointments' would be such appointments which is made contrary to the procedural requirement, but where the appointee was a candidate, who was fulfilling the requisite requirement as per the recruitment rules.

14. The principle so laid down by the Supreme Court in the case of *Umadevi* (supra) by the Constitutional Bench is further explained and clarified in the case of *State of Karnataka and others Vs. G.V. Chandrashekhar,* (2009) 4 SCC 342, and the meaning and import of the directions contained in paragraph 53, of the judgment in the case of *Umadevi* (supra), is explained by the Supreme Court in the said case. Infact interpretation of paragraph 53, in *Umadevi's case,* is undertaken in the said case of *G.V. Chandrashekar* (supra) and explanation is to the same effect as has been indicated hereinabove. For the sake of convenience, the observations made by the Supreme Court in paragraph 29, in the case of *G.V. Chandrashekar* (supra), may be taken note of, which clarifies the position and reads as under:

In *Postmaster General; Kolkata & Others vs. Tutu Das (Dutta),* [(2007) 5 SCC 317], this Court held as under:-

"20. The statement of law contained in para 53 of Umadevi cannot also be invoked in this case. The question has been considered by this Court in a large number of decisions. We would, however, refer to only a few of them.

21. In *Punjab Water Supply & Sewerage Board v. Ranjodh Singh* referring to paras 15, 16 and 53 of *Umadevi* (3) this Court observed :

"17. A combined reading of the aforementioned paragraphs would clearly indicate that what the Constitution Bench had in mind in directing regularization was in relation to such appointments, which were irregular in nature and not illegal ones.

18. Distinction between irregularity and illegality is explicit. It has been so pointed out in *National Fertilizers Ltd. v. Somvir Singh* in the following terms: (SCC pp. 500-01, paras 23-25)

`23. The contention of the learned counsel appearing on behalf of the respondents that the appointments were irregular and not illegal, cannot be accepted for more than one reason. They were appointed only on the basis of their applications. The Recruitment Rules were not followed. Even the Selection Committee had not been properly constituted. In view of the ban on employment, no recruitment was permissible in law. The reservation policy adopted by the appellant had not been maintained. Even cases of minorities had not been given due consideration.

24. The Constitution Bench thought of directing regularisation of the services only of those employees whose appointments were irregular as explained in *State of Mysore v. S.V. Narayanappa, R.N. Nanjundappa v. T. Thimmiah and B.N. Nagarajan v. State of Karnataka* wherein this Court observed: [*Umadevi* (3) case, SCC p. 24, para 16]

"16. In *B.N. Nagarajan v. State of Karnataka* this Court clearly held that the words `regular' or `regularisation' do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments."

25. Judged by the standards laid down by this Court in the aforementioned decisions, the appointments of the respondents are illegal. They do not, thus, have any legal right to continue in service.' " *(Emphasis Supplied)*

15. If the policy formulated by the State Government as contained in Annexure R/1 on 16.5.2007 is scanned, it would be seen that this is a one time measure initiated by the State Government to regularize the 'irregular appointments' made, which had continued for more than 10 years. In paragraph 3 of the aforesaid Circular, the import of the words 'irregular appointments' and 'illegal appointments' as explained by the Supreme Court in the case of *Umadevi* (supra) is explained and in paragraph 4.1, 'illegal appointment' is clarified and certain categories are indicated which includes classes of persons who do not fulfil the criteria as per the recruitment rules and whose appointment are without any authority. In the circular – Annexure R/1 itself appointments contrary to the recruitment rules is classified as 'illegal appointment' and in paragraph 5.1, of the aforesaid circular, the procedure for evaluating the eligibility criteria and the guidelines to the Scrutiny Committee is indicated and the criteria clearly shows that the candidate to be regularized should be a candidate whose appointment at the initial stage is 'irregular' and he should be fulfilling the criteria laid down in paragraph 5.1, which includes that he should have been appointed 10 years back and working continuously and he should have been appointed on the basis of fulfillment of criteria laid down in the recruitment rules. Further in paragraph 5.5, the Scrutiny Committee is cautioned to regularize only 'irregular appointments' and 'illegal appointments' are not to be regularized.

16. It is clear that the policy laid down in Annexure R/1 dated 16.5.2007 is in conformity with the requirements of law laid down by the Supreme Court in the cases of *Umadevi* (supra) and *G.V. Chandrashekar* (supra) and if the case of the petitioner is scrutinized in the backdrop of the aforesaid principles, it would be seen that on 1.12.93 when he was appointed, he was not possessing the qualification of Diploma or Degree in Engineering, which is the minimum criteria for appointment to the post in question. That being so, his initial appointment on 1.12.1993 would fall in the category of 'illegal appointment'. However, to regularize his service on the ground that he has completed 10 years of service, respondents have liberally construed the provision and are permitting such persons to participate in the process of regularization, who have worked for 10 years continuously and at the same time possess the minimum criteria laid down in the recruitment rules during this period of 10 years. It is, therefore, clear that the criteria of possessing the Degree or Diploma for a period of 10 years laid down in the circular – Annexure P/4 and impugned in this petition is a criteria laid down on the basis of principles of law as has emerged from the judgments referred to hereinabove and in doing so, I am of the considered view that the State Government and the competent authority has not committed any error. They are justified in doing so and the same is in conformity with the requirement of legal principles.

17. The justification for imposing the condition in the impugned order can be considered in a different manner. In accordance to the law laid down in the case of *Uma Devi* (supra) and the policy contained in the Circular Annexure R/1 dated 16.5.2007 only such appointments or engagements are to be regularized which fall in the category of "irregular appointment", that apart, the irregular appointment has to be continuously for a period of 10 years. That being so when petitioner did not possess the requisite Diploma/ Degree in Engineering, even though he was working for 10 years, his appointment will fall in the category of "illegal appointment", it is only from the date he acquires the qualification and thereafter works for 10 years continuously that his appointment will fall within the ambit of 'irregular appointment'. This would be achieved only when petitioner has worked for a period of 10 years after obtaining the requisite Degree or Diploma.

18. As far as contention of the petitioner that certain persons indicated in Annexure P/16, having less period of Diploma i.e.. less than 10 years have been appointed is concerned, respondents in their additional return have denied the said fact and it is stated that Annexure P/16 is prepared by the petitioner and not an authentic document. On the contrary, respondents themselves have filed various documents alongwith their additional return as Annexure R/2 collectively to show that no person having the criteria of Diploma or Degree less than 10 years are appointed. In that view of the matter, contention of the petitioner that he is being discriminated cannot be accepted.

19. Even otherwise, when the law warrants certain criteria to be fulfilled, in contravention to the said criteria, plea of discrimination cannot be made by the petitioner. At best, petitioner may point out the irregularities, if any, in the matter of regularization and it would be for the State Government to rectify the irregularity or illegality in case any error has been committed or benefit granted to non-deserving candidates in the matter.

20. Accordingly, for the grounds and reasons indicated hereinabove, this Court is of the considered view that in laying down the criteria impugned in this petition, as contained in Annexure P/4, respondents have not committed any error warranting interference.

21. The petition is accordingly dismissed.

Petition dismissed.

I.L.R. [2010] M. P., 1931

WRIT PETITION

Before Mr. Justice S.C. Sharma

15 April, 2010*

SANJEEV KUMAR BATHAM & ors. ... Petitioners

Vs.

STATE OF M.P. & anr. ... Respondents

Service Law - Industrial Training (Gazetted) Services Recruitment Rules, M.P. 2008, Rule 8 - *Appointment of Principal Class I & II - Eligibility - The candidature of the petitioner rejected for the reason that they were holding B.E. Degree in Computer Science and executive instructions provided that B.E Degree with Civil, Mechanical, Electrical and Electronics are only eligible - The recruitment rules provided B.E. in any discipline - Held - The executive instructions issued by the State Government to the Public Commission cannot supersede the Statutory Recruitment Rules in the matter of recruitment for the post of Principal Class I and Class II i.e. the M.P. Industrial Training (Gazetted) Services Recruitment Rules, 2008.* (Para 8)

सेवा विधि – औद्योगिक प्रशिक्षण (राजपत्रित) सेवा भर्ती नियम, म.प्र. 2008, नियम 8 – प्रधानाचार्य वर्ग–I व II की नियुक्ति – पात्रता – याची की अभ्यर्थिता अस्वीकार की गयी इस कारण कि वे संगणक शास्त्र में बी.ई. की डिग्री धारक थे और कार्यपालक अनुदेशों में उपबंधित था कि केवल सिविल, मैकेनिकल, इलेक्ट्रिकल और इलेक्ट्रोनिक्स के साथ बी.ई. डिग्री धारक ही पात्र हैं – किसी भी शाखा में बी.ई., भर्ती नियमों में उपबंधित – अभिनिर्धारित – राज्य सरकार द्वारा लोक आयोग को जारी किये गये कार्यपालक अनुदेश, प्रधानाचार्य वर्ग I और वर्ग II के पदों की भर्ती के मामले में कानूनी भर्ती नियमों को अधिक्रांत नहीं कर सकते अर्थात म.प्र. औद्योगिक प्रशिक्षण (राजपत्रित) सेवा भर्ती नियम, 2008.

Cases referred :

(2009) 7 SCC 205, (2004) 2 SCC 297.

Arun Dudawat, for the petitioners.

Nidhi Patankar, Dy.G.A., for the respondent No.1/State.

R.D. Jain with *Rajmani Bansal*, for the respondent No.2/M.P.P.S.C.

O R D E R

S.C. SHARMA, J. :–The petitioners before this Court have filed this present petition being aggrieved by rejection of their candidatures for the post of Principal Class-I and Class-II.

2. The contention of the petitioners are that they are holding the Bachelor of Engineering Degree in subject of Computer Science and they are serving the Government Industrial Training Institute, Gwalior, Morena and Khaniyadhana respectively. The petitioners have further stated that the appointment to the post of Principal Class-I and Class-II are done in the State of Madhya Pradesh in

*W.P. No.5038/2009(S) (Gwalior)

respect of Industrial Training Institute as per the provisions of Recruitment Rules known as Madhya Pradesh Industrial Training (Gazetted) Services Recruitment Rules, 2008 and under the aforesaid Rules the essential qualification prescribed is a Degree in Engineering from any recognized University and two years' practical experience of working in any training institute or reputed business concern. The petitioners' contention is that they are holding a degree in Engineering from Rajiv Gandhi Proudhyogiki Vishwavidyalaya, Bhopal, which is a recognized University and are also having two years' practical experience to their credit and therefore they are entitled for consideration for appointment to the post of Principal Class-I and Class-II. The petitioners have also stated that an advertisement was issued by the Madhya Pradesh Public Service Commission on 16/02/2009 inviting applications for Principal Class-I and Class-II and the petitioners have submitted their applications in a prescribed formate. The petitioners' grievance is that their applications have been turned down vide impugned orders dated 06th October, 2009, Annexures P/9 and P/11 on the ground that they have not fulfilled the requisite essential qualification. The petitioners' grievance is that they are fulfilling the requisite essential qualification and therefore by no stretch of imagination such an orders could have been passed by the respondent/Public Service Commission. The petitioners have also stated that one Ku. Jyoti Paste also holds a Bachelor Degree in Engineering in Computer Science, however, her candidature has not been rejected by the respondent/Public Service Commission.

3. A reply has been filed on behalf of the respondent/Public Service Commission and stand of the respondent/Public Service Commission is that the petitioners have obtained a B.E. degree with specialization in Computer Science and, therefore, they are not eligible for the post of Principal Class-I and Class-II. The respondents have also stated that in respect of post in question a requisition was sent to the Madhya Pradesh Public Service on 09/05/2003 and the Commission sought clarification from the Technical Education Training Department vide communication dated 16/12/2003 and the State Government vide communication dated 19/01/2004 has clarified that as per the Recruitment Rules, a person should have a Bachelor Degree in Engineering with specialization in Electrical, Mechanical, Civil and Electronics. The respondent/Commission has further stated that as per the clarification issued by the State Government, an advertisement was issued on 16/02/2009 and as the petitioners are having a Bachelor of Engineering Degree with specialization in Computer Science were not permitted to participate in the process of selection. The respondent/Commission in its return is silent in respect of Ku. Jyoti Paste. The respondent/Commission has made an attempt to justify its advertisement only on the basis of communication of the State Government dated 19/01/2004. The learned counsel appearing for the respondent/Commission has also stated before this Court that during the pendency of the present petition a written test was conducted and persons have also been called for interviews and the interviews are also over, however, the result has not

been declared, meaning thereby, the process of selection is yet to be completed by the respondent/Public Service Commission.

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

5. In the present case, the petitioner No. 1 and No. 2 have acquired the qualification of Bachelor in Engineering (Computer Science Engineering) from Rajiv Gandhi Proudyogiki Vishwavidyalaya, Bhopal and the petitioner No. 3 has acquired the qualification of Bachelor in Engineering (Computer Science Engineering) from Devi Ahilya Vishwavidyalaya, Indore. Thus, all the three petitioners have obtained a degree of Bachelor of Engineering (Computer Science Engineering) from a recognized University.

6. The Governor of Madhya Pradesh in exercise of powers conferred under the proviso to Article 309 of the Constitution of India has framed Rules relating to recruitment and conditions of service for the post of Principals of Madhya Pradesh Industrial Training known as Madhya Pradesh Industrial Training (Gazetted) Services Recruitment Rules, 2008 and the aforesaid Rules provide for a procedure in respect of appointment on the post of Principal Class-I and Class-II. Schedule III of the aforesaid Recruitment Rules read with Rule 8 reads as under:

SCHEDULE – III
(See rule 8)
Essential Qualification and age limit

Name of the Department	Name of the Service & Posts	Minimum Age limit	Upper Age limit	Prescribed Qualification	Remark
(1)	(2)	(3)	(4)	(5)	(6)
Technical Education & Training Department (Directorate of Training)	1. Principal Class-I	25	35	**Essential Qualification** A Degree in Engineering from any Recognized University: OR A Diploma in Engineering from any Recognized University or Mandel or Board **Experience** For Degree Holder –2 years practical experience of working in any Training Institute or any reputed business concern.	

			For Diploma Holder – 7 years practical experience of working in any Training Institute or any reputed business concern.
1. Principal Class-II	25	35	**Essential Qualification** A Degree in Engineering from any Recognized University: OR A Diploma in Engineering from any Recognized University or Mandel or Board **Experience** For Diploma Holder –5 years practical experience of working in any Training Institute or any reputed business concern.

The aforesaid statutory provisions of law provide that a candidate should have a degree in Engineering from any recognized University. It also provides for two years' practical experience of working in any Training Institute or any reputed business concern. All the three petitioners are having a degree in Engineering from a recognized University and they are having the experience also as provided under the statutory Rules as they are employed at Government Industrial Training Institute, Gwalior, Morena and Khaniyadhana respectively.

7. The respondent/Public Service Commission has made an attempt before this Court to justify its advertisement on the basis of some communication issued in the year 2004 vintage. The aforesaid communication is dated 19/01/2004, whereas, the Recruitment Rules were notified in the official Gazette on 08th June, 2009. The Recruitment Rules does not exclude the persons who have obtained a degree in Engineering in Computer Science and therefore, the advertisement issued by respondent/Public Service Commission which debars persons to submit their candidatures in case they have obtained a degree in Engineering in Computer Science specialization is certainly bad in law. Not only this, the aforesaid advertisement places a restriction upon all those persons who have obtained Bachelor degree in Engineering with specialization in any other discipline and permits only those persons to apply for the post of Class-I and Class-II, who have obtained an Engineering degree in discipline of Electrical, Mechanical, Civil and Electronics. Thus, the advertisement itself issued by the respondent/Commission is contrary to the statutory to the provisions of Madhya Pradesh Industrial Training

(Gazetted) Services Recruitment Rules, 2008 and therefore, the consequential rejection of the petitioners' candidatures vide impugned order dated 06th October, 2009 is bad in law.

8. The Apex Court in the case of *General Manager, Uttaranchal, Jal Sansthan vs. Laxmi Devi and others* reported in (2009) 7 SCC 205 has held that the executive instructions cannot run contrary to the statutory provisions. A similar view was also expressed by the Apex Court in the case of *DDA and others vs. Joginder S. Monga and others* reported in (2004) 2 SCC 297 , wherein, the Apex Court has held that in case where a conflict has arisen between a statute and an executive instruction undisputably the formal will prevail over the latter and, therefore, this Court is of the considered opinion that the executive instructions issued by the State Government to the Public Service Commission cannot supersede the statutory Recruitment Rules.

9. Resultantly, the writ petition is allowed. As the respondent/Public Service Commission has not concluded the process of selection and large number of candidates were deprived to participate on account of illegal and arbitrary condition imposed in the advertisement, the advertisement issued by the Madhya Pradesh Public Service Commission dated 16/02/2009 is hereby quashed. The consequential rejection of the petitioners' candidatures dated 06th October, 2009 is also hereby quashed. The respondent/Public Service Commission is granted a liberty to issue a fresh advertisement strictly in consequence with the provisions of the Madhya Pradesh Industrial Training (Gazetted) Services Recruitment Rules, 2008. The writ petition is allowed with the following directions:

(a) The impugned advertisement dated 16/02/2009 is hereby quashed.

(b) The order dated 06th October, 2009 rejecting the candidatures of the petitioners is also hereby quashed.

(c) The respondent/Public Service Commission is directed to issue a fresh advertisement strictly in consonance with the provisions of Madhya Pradesh Industrial Training (Gazetted) Services Recruitment Rules, 2008 after deleting the illegal and arbitrary condition, by which, only the persons belonging to Electrical, Mechanical, Civil and Electronics discipline are held to be entitled for the post of Principal Class-I and Class-II, within a period of 60 days from the date of receipt of a certified copy of this order.

10. With the aforesaid, the writ petition stands allowed. No order as to costs. Certified copy as per rules.

Petition allowed.

I.L.R. [2010] M. P., 1936
WRIT PETITION
Before Mr. Justice Sanjay Yadav
27 April, 2010*

RATICHAND ... Petitioner
Vs.
STATE OF M.P. ... Respondent

Rajya Suraksha Adhiniyam, M.P. 1990 (4 of 1991), Section 29 - *Delegation of powers - Competence to delegate - Externment - Held - The State Government alone can delegate the power as contemplated u/s 13 - Such delegation of power cannot be in favour of a person who is below the rank of a District Magistrate - If there is exercise of the delegated powers by the State Government the delegation of same cannot be to an officer below the rank of a District Magistrate - The District Magistrate cannot further delegate the power of passing order of externment - The order of externment passed by Additional District Magistrate quashed.* (Para 9)

राज्य सुरक्षा अधिनियम, म.प्र., 1990 (1991 का 4), धारा 29 – शक्तियों का प्रत्यायोजन – प्रत्यायोजित करने की क्षमता – निष्कासन – अभिनिर्धारित – अकेले राज्य सरकार शक्ति को प्रत्यायोजित कर सकती है जैसा कि धारा 13 के अंतर्गत अनुध्यात है – शक्ति का ऐसा प्रत्यायोजन ऐसे व्यक्ति के पक्ष मे नहीं किया जा सकता जो जिला मजिस्ट्रेट के दर्जे से नीचे का हो–यदि राज्य सरकार द्वारा प्रत्यायोजित शक्ति को प्रयुक्त किया गया हो तो उसका प्रत्यायोजन जिला मजिस्ट्रेट के दर्जे से नीचे के अधिकारी को नही किया जा सकता – निष्कासन का आदेश पारित करने की शक्ति को जिला मजिस्ट्रेट और आगे प्रत्यायोजित नहीं कर सकता – अतिरिक्त जिला मजिस्ट्रेट द्वारा पारित निष्कासन का आदेश अभिखंडित।

Saroj Deharia, for the petitioner.
Prakash Gupta, Panel Lawyer, for the respondent/State.

ORDER

SANJAY YADAV, J. :–Heard on admission.

Sole question which crops up for consideration in the present petition under Article 226 of the Constitution of India filed at the instance of petitioner who suffered an externment order dated 26.6.2009 passed by the Additional District Magistrate Chhindwara under Section 5 of Madhya Pradesh Rajay Suraksha Adhiniyam 1990 affirmed by the appellate authority by its order dated 26.8.2009 is as to whether the Additional Magistrate was within its power to have exercised jurisdiction under Section 5 of the Adhiniyam 1990, which otherwise is conferred on the District Magistrate.

2. The facts giving rise to the core issue briefly, are that the petitioner was proceeded against under the provisions of Adhiniyam 1990 when the Additional District Magistrate, Chhindwara on the basis of the requisition by Superintendent

*W.P. No.10117/2009 (Jabalpur)

of Police Chhindwara caused a show cause notice to the petitioner under Section 8 (1) of the Adhiniyam 1990. The said show cause notice was issued by Additional District Magistrate in purported exercise of its power under Section 5. The proceedings so initiated resulted in the order dated 26.6.2009, whereby, the petitioner was externed from Revenue District Chhindwara and the adjacent districts of Seoni, Narsinghpur, Hoshangabad, Betul for a period of one year. The petitioner being aggrieved of the said order preferred an appeal before the Commissioner under Section 9 of Adhiniyam 1990 on the ground that though innocent the action taken against the petitioner was on the basis of old and stale cases and the cases which were reported to be the cause resulted in acquittal and that the petitioner has been falsely implicated.

3. Being aggrieved the petitioner is before this Court. Though many a grounds have been raised by the petitioner regarding the correctness of the impugned order; however, the main issue which crops up for consideration is as to whether it was within the power of Additional District Magistrate to have exercised the powers under Section 5 of the Adhiniyam 1990.

4. On 7.10.2010 while issuing notices to respondents the respondents were called upon to seek instructions as to whether the Additional District Magistrate, Chhindwara was empowered to take proceedings for externment of the petitioner under the Adhiniyam 1990. In response whereof, the respondents have filed their return wherein it is contended that the Sub Divisional Magistrate was exercising the powers on the basis of work distribution effected by Collector, Chhindwara and since there was a proper delegation of power to the Additional District Magistrate, Chhindwara, it was within his right to proceed as per the provisions of Adhiniyam 1990.

5. To appreciate the submissions put-forth by the respective counsel regarding the delegation of power, worth it would be to note few provisions as contained under Adhiniyam 1990.

6. Section 3 of Adhiniyam provides for that if a District Magistrate is satisfied with respect to any person that he is acting or is likely to be act in a manner prejudicial to the security of the State or the maintenance of public order and that, in order to prevent him from so acting it is necessary in the interest of general public to make a restriction order imposing the conditions stipulated therein.

7. Section 5 empowers the District Magistrate to pass orders regarding removal of persons about to commit offence. Whereas, Section 6 empowers the District Magistrate for removal of persons convicted of certain offences.

8. However, before taking recourse to these powers the District Magistrate has to cause a hearing as is contemplated under Section 8 of the Adhiniyam 1990. None of these provisions empower the Collector to delegate his power to any other authority. In other words the District Magistrate has to exercise the powers so conferred by the Statute himself and not to delegate the same. It is Section 13 and Section 29 which provides for delegation of power.

Section 13 stipulates:

> **13. Power of externment of State Government.-** (1) The State Government or the officer specially empowered by the State Government in that behalf, may, in like circumstances and in like manner, exercise the powers exercisable in a district by the District Magistrate under Sections 3, 4, 5 or 6 with this modification that it shall be lawful for the State Government or the officer specially empowered to direct the members of such gang or body, or persons or immigrants, or persons convicted, as the case may be, to remove themselves from and not to enter or return or any district or districts or parts thereof.
>
> (2) The provisions of Sections 7, 8, 10, 11 and 12 and of Section 9 where the order is passed by the officer specially empowered by the State Government under sub-section (1) shall mutates mutandis apply to the exercise of any powers under this section as they apply to the exercise of any powers under Sections 3, 4, 5 or 6.
>
> (3) Where the order is passed by the State Government under sub-section (1), the State Government may, either on its own motion or on an application of the person aggrieved, review any order passed by itself and pass such order in reference thereto as it thinks fit:
>
> Provided that no order shall be varied or reversed unless notice has been given to the person concerned to appear and be heard in support of such order."

Section 29 provides for:

> **29. Delegation of powers and duties of State Government.-** The State Government may by order, direct that any power or duty which is conferred or imposed on the State Government by this Act except the power of imposing collective fines under Section 21 and of framing rules under Section 30, shall under such conditions, if any, as may be specified in that direction be exercised or discharged by any officer subordinate to it, not below the rank of a District Magistrate."

9. Close reading of both the provisions thus make it clear that though it is within the power of State government and State Government alone to delegate the power as contemplated under Section 13, such delegation of power cannot be in favour of a person who is below the rank of a District Magistrate; meaning thereby , even if there is exercise of the delegated powers by the State Government the delegation of same cannot be to an officer below the rank of a District Magistrate.

10. In view of above since the Adhiniyam 1990 does not confer power on District Magistrate to delegate the power, the distribution memo (Annexure R-1) whereby, the Additional District Magistrate has been conferred with the power to take action under Sections 3, 4, 5 and 5 of Adhiniyam 1990 is a nullity in the eyes of law. The exercise of power by the Additional District Magistrate on the basis of distribution memo is void and have no sanction of law.

11. In view of above analysis this Court is of considered opinion that exercise of power of Additional District Magistrate Chhindwara in Adhiniyam 1990 being without any sanction of law is a nullity in the eyes of law.

12. In view of this the order dated 26.6.2009 is quashed; consequently the order dated 26.8.2009 also crumbles.

13. The petition is allowed to the extent above. However, no costs.

Petition allowed.

I.L.R. [2010] M. P., 1939
WRIT PETITION
Before Mr. Justice S.K. Gangele & Mr. Justice Abhay M. Naik
19 May, 2010*

JASPREET KAUR (SMT.) & anr. ... Petitioners
Vs.
RAMKRISHNA & ors. ... Respondents

A. Civil Procedure Code (5 of 1908), Order 6 Rule 17 - ***Amendment of pleadings - Permissibility*** - *Plaintiff had not filed evidence on affidavit and filed application for amendment - Held - Proviso to Order 6 Rule 17 CPC will not come into play, if the trial, is not commenced.* (Para 8)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – अभिवचनों का संशोधन – अनुज्ञेयता – वादी ने शपथपत्र पर साक्ष्य प्रस्तुत नही की और संशोधन का आवेदन प्रस्तुत किया – अभिनिर्धारित – आदेश 6 नियम 17 सि.प्र.सं. का परन्तुक लागू नहीं होगा यदि विचारण आरंभ नहीं हुआ है।

B. Land Revenue Code, M.P. (20 of 1959), Section 110 - ***Mutation - Delay in challenge in civil suit*** - *Suit land mutated in the name of defendant - The plaintiff not a party to mutation proceedings - Held - Plaintiff in possession is not required to approach the Court unless disturbance is caused into his possession - He is not required to sue due to adverse mutation order because mutation by itself does not confer title.* (Para 10)

ख. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 110 – नामांतरण – सिविल वाद मे चुनौती देने में विलंब – वाद भूमि प्रतिवादी के नाम से नामांतरित – नामांतरण कार्यवाहियों में वादी पक्षकार नहीं – अभिनिर्धारित – कब्जा धारक वादी को न्यायालय के पास जाना

*W.P. No.4731/2009 (Gwalior)

अपेक्षित नहीं जब तक कि उसके कब्जे में बाधा कारित नहीं होती – विपरीत नामान्तरण के आदेश के कारण वाद लाना उससे अपेक्षित नहीं है क्योंकि नामान्तरण अपने आप में हक प्रदान नहीं करता।

Cases referred :

(2009) 2 SCC 409, AIR 2008 SC 2171, AIR 2008 SC 2234 (Distinguished), (2001) 2 SCC 472, AIR 2006 SC 1647, (2008) 4 SCC 102, (2002) 7 SCC 559, (2006) 6 SCC 498 (Relied upon).

K.N. Gupta with *H.K. Shukla & Anmol Khedkar,* for the petitioners.

D.D. Bansal, for the respondent Nos.1 & 2.

ORDER

The Order of the Court was delivered by ABHAY M. NAIK, J. :–This petition under Article 227 of the Constitution of India has been preferred against the impugned order dt.7.9.2009 passed by the Court of First Civil Judge Class 2, Ashok Nagar, in Civil Suit No.53A/09 allowing thereby an application for amendment in the plaint.

2. Plaintiffs/respondents No.1 and 2 instituted a suit for declaration of title and perpetual injunction mainly with the allegations that the suit land belonged to Ramsingh and Ganpat Singh, who were real brothers. Plaintiffs are sons of Ramsingh. Ganpatsingh died issueless. Consequently, Ramsingh became the sole Bhumiswami and occupant of the suit land. Both were Bhumiswami and occupants of the suit land, though Bhu Adhikar and Rin Pustika was issued in the name of Ramsingh. After the death of both of them, plaintiffs alone became Bhumiswami and occupants of the suit land. They had sown the crop of gram in the year 2006. Husband of defendants/petitioners came on the site in February 2007 and threatened the plaintiffs to harvest the crop of gram on the ground that the suit land was purchased by defendants/petitioners from Hariom Singh, the defendant/ respondent No.3. On enquiry, plaintiff learnt that Hariom Singh has executed it on the strength of a Will allegedly executed by Ganpat Singh in his favour. It is stated in the plaint that Ganpat Singh did not execute any Will in favour of Hariom Singh and the alleged Will is a forged and concocted document. Hence the suit.

3. Defendants/petitioners submitted their written statement with allegation that Ganpat alone was the Bhumiswami and occupant of the suit land, which was mutated in the name of Hariom Singh on the strength of order dt. 26.8.1997 passed by the court of Naib Tahsildar, Ashok Nagar in case No.10A-96-97. It was denied that Ramsingh had any right, title or interest in the suit land. His possession was also denied. Defendants/petitioners having purchased the suit land from Hariom Singh vide registered sale deed dt. 13th February 2007 are Bhumiswami and occupants of the suit land. Accordingly, the suit is liable to be dismissed.

4. Issues were framed by the trial court on 8.1.2008. Adjournments for evidence were obtained by the plaintiffs. However, an application for amendment (Annexure P/3) was submitted by plaintiffs on 2.5.2009 before commencement of the evidence. Leave was sought from the trial court to incorporate paragraph 5(A) in

the plaint by way of amendment to the effect that the alleged will was fraudulently prepared by impersonation. It bears forged thumb impression of Ganpat Singh as well as of Ramsingh. Both of them used to put signatures. They did not execute the alleged Will and did not put thumb impression on it. The alleged Will was prepared fraudulently, which is evident from the fact that the witnesses before the Naib Tahsildar have stated that Ganpat Singh and Ramsingh had signed the Will, whereas the said will does not contain any signature at all; it contains merely a forged thumb impression in the name of Ganpat Singh and Ramsingh. It is also evident from the fact that Ganpat Singh had earlier executed a registered Will dt. 17.8.1990, which contains signatures of Ganpat Singh as well as of Ramsingh.

Relief pertaining to invalidity of order dt. 26.8.2007 of Naib Tahsildar was also sought to be added by way of amendment.

5. Defendants/petitioners by submitting their written reply opposed the application for amendment on various counts.

6. Learned trial Judge after hearing the arguments, allowed the application for amendment vide order dt. 7.9.2009. Hence the petition.

7. Shri K.N.Gupta, learned senior advocate and Shri D.D.Bansal, learned advocate made their respective submissions, which have been considered in the light of the material on record.

8. It is submitted on behalf of the petitioners that the proposed amendment is not based on subsequent events and the same having not been applied for with due diligence can not be legally allowed. Reliance for this purpose has been placed on the decision of the Apex Court in the case of *Vidyabai and others v. Padmalatha and another* (2009) 2 SCC 409, wherein it is held that the court has no jurisdiction to allow an amendment unless it is satisfied that in spite of due diligence the party could not have sought leave to amend before commencement of the trial. Aforesaid law has been pronounced in the light of Rule 17 of Order 6 CPC, which was substituted w.e.f. 1.7.2002. We feel it proper to reproduce the same -

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

Prior to substitution, there was no proviso to Rule 17. Dealing with the said proviso, it has been observed by the Supreme Court of India that the same has been couched in mandatory form and the court's jurisdiction to allow an application for amendment is taken away unless the conditions precedent therefor are satisfied

viz. it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial. In the case of *Vidyabai* (supra), affidavits containing chief examination were produced by way of evidence and the case was fixed for cross examination on the said affidavits. In the case in hand, no such affidavit was produced up to the time, the application for amendment was submitted. Proviso to Rule 17 would come into play only after commencement of trial. Effect of the proviso is that if an application for amendment is submitted after commencement of trial, the litigant seeking amendment must establish that the application for amendment could not have been moved earlier in spite of due diligence. Analogically, if the trial is not commenced, proviso to Rule 17 will not come into play and the same in such a situation would have no applicability. This being so, the petitioners do not derive any benefit from *Vidyabai's* decision (supra).

9. It is further submitted on behalf of the petitioners that mutation order was passed on 26.8.1997. Challenge to it by application for amendment dt. 2.5.2009 is hopelessly barred by limitation. The same, therefore, could not have been allowed.

In the case of *Ashutosh Chaturvedi v. S.Prano Devi and others* (AIR 2008 SC 2171) amendment was sought to seek preferential right in the light of Section 22 of Hindu Succession Act after a period of 13 years from execution of the sale deed by the defendant. In this background, it was held that the fresh suit would have been barred on the date of application for amendment and therefore the amendment was not allowed.

Similarly, reliance on AIR 2008 SC 2234 *(Chander Kanta Bansal v. Rajinder Singh Anand* is also of no meaning because the application for amendment was submitted after closure of evidence.

10. In the present case though the defendants/ petitioners stated in the written statement that their predecessors namely Hariom Singh acquired title by virtue of Will, the said Will was not produced at all by the defendants. Since the Will was not made available to the plaintiffs even for inspection, they could collect the information only by obtaining certified copy from the proceedings from the court of Naib Tahsildar, Ashok Nagar on 20th April 2009. Plaintiffs as per plaint averment are in possession of the suit land. They are within their right to approach the court of law whenever disturbance is caused to their possession. They were not required to sue merely on the basis of mutation because mutation by itself does not confer title. Moreover, it may be seen that the plaintiffs were not party to the mutation proceedings. Relief against the mutation order would be incidental to the prayer of the plaintiff for declaration of title. If the plaintiffs succeed in establishing that the alleged Will in favour of predecessor in title of defendants/petitioners is not genuine, the mutation order shall have to go. Since the suit for main relief is not beyond limitation, objection of the defendants/petitioners with regard to incidental relief has no force and the same is hereby rejected.

11. It is further contended that the nature of the suit would be changed by the proposed amendment.

On perusal, it is found that no change in the nature of the suit would be caused by the proposed amendment. Otherwise also, change in nature is not necessarily always a ground to disallow amendment in view of the law laid down by the Supreme Court of India in the case of *Ragu Thilak D.John v. S.Rayappan* 2001 (2) SCC 472.

12. Lastly, it is submitted that the application for amendment being malafide could not have been allowed.

This contention is also without any substance because no malafide could be demonstrated.

13. It may be seen that that the proviso to Rule 17CPC being inapplicable, the litmus paper test for allowing amendment is whether the amendment is necessary for complete and correct adjudication of the controversy involved between the parties. We may profitably refer to the Supreme Court decision in the case of *Rajesh Kumar Aggarawal v. K.K.Modi & Ors.* (AIR 2006 SC 1647) for this purpose, wherein it is held :-

> "16. The object of the rule is that Courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.
>
> 17. Order VI, Rule 17 consist of two parts whereas the first part is discretionary (may) and leaves it to the Court to order amendment of pleadings. The second part is imperative (shall) and enjoins the Court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties.
>
> 18. In our view, since the cause of action arose during the pendency of the suit, proposed amendment ought to have been granted because the basic structure of the suit has not changed and that there was merely change in the nature of relief claimed. We fail to understand if it is permissible for the appellants to file an independent suit, why the same relief which could be prayed for in the new suit cannot be permitted to be incorporated in the pending suit.

14. In any case, allowing of amendment will not cause prejudice or loss to the defendants. Petitioners would have definitely opportunity to meet out the same on merits. We may refer here to the decision of the Supreme Court of India in the case of *Puran Ram v. Bhaguram and another* (2008) 4 SCC 102, wherein it has been observed in para 18 as under :-

> "18. We may now take into consideration as to whether the High Court, in the exercise of its power under Article 227 of the Constitution, was justified in rejecting the application for amendment of the plaint, which, in the discretion of the trial court, was allowed. We are of the view that the High Court ought not to have interfered with the order of the trial court when the order of the trial court was passed on sound consideration of law and facts and when it cannot be said that the order of the trial court was either without jurisdiction or perverse or arbitrary."

15. We may also successfully refer here the apex court decision in the case of *Sampath Kumar v. Ayyakannu and another* (2002) 7 SCC 559, wherein it has been observed :-

> "Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In the former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amended. In the latter cases the question of prejudice to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No straitjacket formula can be laid down. The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment. "

16. Amendment with regard to the alleged Will is also to elaborate the earlier pleadings, whereby the validity of the alleged Will was disputed. Thus, no wrong has been committed by the learned trial Judge in allowing the amendment. We may also refer profitably to the Supreme Court's decision in the case of *Baldev Singh v. Manohar Singh* (2006) 6 SCC 498 for this purpose. This being so, extra ordinary power under Article 227 of the Constitution of India can not be legally invoked in the present case.

17. In view of the aforesaid discussion, writ petition is hereby dismissed, however, without order as to costs.

Petition dismissed.

I.L.R. [2010] M. P., 1945

WRIT PETITION

Before Mr. Justice K.K. Lahoti

21 June, 2010*

CHITRAREKHA SAULAKHE (KU.) ... Petitioner

Vs.

SURESH SAULAKHE & ors. ... Respondents

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 86(1) & 86(2) - ***Power of State Government to issue order directing Panchayat for execution of work in certain cases - Appointment of Panchayat Karmi - When justified - Panchayat Karmi appointed u/s 86(1) of the Adhiniyam, but the Sarpanch of Gram Panchayat did not allow him to join - Held - Once an appointment was already made u/s 86(1) of the Adhiniyam, then there was no question of any appointment u/s 86(2) of the Adhiniyam, until & unless earlier appointment is set aside by a competent authority.*** (Para 10)

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 86(1) व 86(2) – कतिपय मामलों में कार्य के निष्पादन के लिये पंचायत को निर्देशित करने का आदेश जारी करने की राज्य सरकार की शक्ति – पंचायत कर्मी की नियुक्ति – कब न्यायानुमत – पंचायत कर्मी की नियुक्ति अधिनियम की धारा 86(1) के अन्तर्गत की गई किन्तु ग्राम पंचायत के सरपंच ने उसे पदग्रहण करने नहीं दिया – अभिनिर्धारित – एक बार यदि अधिनियम की धारा 86(1) के अंतर्गत नियुक्ति की गई थी तब अधिनियम की धारा 86(2) के अंतर्गत किसी नियुक्ति का कोई प्रश्न नहीं था जब तक कि सक्षम प्राधिकारी द्वारा पूर्वतर नियुक्ति अपास्त न की गई हो।

P.C. Paliwal, for the petitioner.

Varun Kumar, for the respondents.

Smt. Sheetal Dubey, G.A., for the State.

ORDER

K. K. Lahoti, J.:–This petition is directed against an order dated 9.3.2009 Annexure P-2 by the Additional Commissioner, Jabalpur Division, Jabalpur in revision Case No.565/A-89/07-08 by which an order passed by the Collector, Balaghat in Case No. 36/A-89/07-08 dated 21.5.2008 Annexure P-1 was affirmed.

2. These orders are challenged by the petitioner on the ground that the petitioner was duly appointed under Section 86(2) of the M.P. Panchayat Raj and Gram Swaraj Adhiniyam,1993, so the Collector and Commissioner erred in setting aside the appointment of petitioner. That the appointment of the petitioner under Section 86(2) was duly confirmed by the Collector so there was an error of jurisdiction in setting aside the order. Though respondent No.1 selected as Panchayat Karmi by Gram Panchayat on merits but his appointment was not legal and in this regard the Collector and the Commissioner erred in not considering the factual position in

*W.P. No.4600/2009 (Jabalpur)

proper perspective. That the petitioner obtained higher marks in comparison to Respondent No.1 so she was entitled for the appointment.

Learned counsel appearing for respondent No.1 supported the orders passed by the Collector and Commissioner.

3. To appreciate the rival contention of the parties, it would be appropriate if factual position in the case is stated. In compliance of order dated 23.7.2007, by the Collector, Balaghat. The Gram Panchayat, Naitara invited applications for the posts of Panchayat Karmi. In response to it five applications were received. Those applications were considered by the Gram Pancahayt in its meeting dated 25.8.2007. A list of candidates on the basis of merit was prepared in which Mukesh s/o Dhannu Lal was first in merit. At serial No.2 Meena Kumar d/o Tularam, at Serial No.3 Ku. Lalita d/o Khoobchand, at serial No.4 Suresh s/o Pendarilal, respondent No.1 and at Serial No.5 Chandravati d/o Sadan, were short listed alongwith similarly other persons. Petitioner herein, Ku. Chitrarekha had not applied for the post. Mukesh s/o Dhannu was not selected as he was the son of Panch. Other two candidates in the merit list were Meena Kumar and Lalita, but their age was below 18 years, on the date of application, so these two girls were also not selected.

At serial No.4 Suresh, and at No. 5 Chandrawati were placed. Both these persons achieved 64.24% marks. As respondent No.1 Suresh was elder in age in comparison to Chandrawati so the gram Panchayat passed a resolution for the appointment of respondent No.1 as Pancahayt Karmi. The resolution of Gram Pancahyat was sent for approval to the concerned officer.

4. Respondent No.1 as per the resolution and appointment of Gram Panchayat submitted his joining but the Sarpanch of Gram Pancahayat had not joined him so he made a complaint to the Chief Executive Officer, Janapad Panchayat and to the Collector, Balaghat .

5. As no appointment was made by the Gram Panchayat within the time period, so the Collector, Balaghat had directed the Chief Executive Officer, Janpad Panchayat under Section 86(2) of the Act to initiate proceedings for the appointment of Panchayat Karmi. He had invited applications in which three applications were received by him. In the merit, he had found that the petitioner Ku. Chitrarekha was meritorious in comparison to others and he recommended her name for appointment. Her appointment order was issued on 29.1.2008. She joined on 31.1.2008.

6. In the meantime the Collector, Balaghat directed an enquiry into the matter and the S.D.O. Balaghat after holding enquiry submitted a report to the Collector, Annexure R-9 in which he found that in fact respondent No.1 was duly selected as Panchayat Karmi by Gram Panchayat as per its resolution and his appointment order was issued on 30.8.2007, but he was not permitted to join. But the Coordinator Officer submitted his incorrect note and because of it, the matter was proposed

under Section 86(2) and the Chief Executive Officer was directed to appoint the Panchayat Karmi under Section 86(2) of the Act.

7. The Collector, Balaghat considered the entire matter vide order Annexure P-1 and found that Suresh Saulakhe was duly selected on the basis of majority. Though respondents Suresh Sulakhe and Smt. Chandrawati were having equal marks on merit but the Panchas selected Suresh Saulakhe on the basis of majority. Suresh Saulakhe was also two years elder in comparison to Smt. Chandrawati and her selection and appointment on the post was not illegal. Agreeing with the report of S.D.O., the Collector found that the appointment of Respondent Suresh Sulakhe was in accordance with law and cancelled the appointment of the petitioner made by the Janpad Panchayat, Balaghat under Section 86(2) of the Act and the appointment order of Gram Panchayat, Naitra dated 30.8.2007 in respect of respondent No.1 was held valid. Against the said order petitioner herein filed a revision before the Additional Commissioner, Jabalpur Division, Jabalpur who vide order Annexure P-2 affirmed the order of the Collector against which this petition has been filed.

8. From the perusal of the aforesaid facts, it is apparent that a due process of selection took place by the Gram Panchayat and as per the resolution Annexure R-1 dated 25.8.2007, the Gram Panchayat selected respondent Suresh on the basis of merit and majority. The aggrieved person against the aforesaid selection could have been Ms. Chandrawati but she never challenged the appointment of respondent Suresh Sulakhe. When an appointment under Section 86(1) of the Act was duly made by the Gram Panchayat and on 30.8.2007 an order in favour of respondent No.1 was issued for his appointment as is apparent from the perusal of Annexure R-2 there was no question of appointment of Panchayat Karmi under Section 86(2) of the Act.

9. Section 86 of the Act is reads as under :-

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

to the same protection and the same extent under this Act as the Panchayat or its officers or servants whose powers are exercised."

Section 86(1) of the Act provide that the prescribed authority may by an order direct the Gram Panchayat to perform any duty imposed upon it. As is apparent from the perusal of the resolution of Gram Panchayat dated 25.8.2007 that the selection process in compliance of order dated 23.7.2008 by the Collector, Balaghat took place in which respondent No.1 was selected and appointed by the Gram Panchayat.

10. Section 86(2) of the Act comes into play when the directions issued under sub section 1 of Section 86 of the Act is not complied with then the prescribed authority could have issued such directions. In this case it appears that Coordinator submitted a wrong report to the Collector, Balaghat on the basis of which a direction under Section 86(2) of the Act was issued to the Chief Executive Officer, Jabalpur for appointment of Panchayat Karmi. Once an appointment was already made under Section 86(1) of the Act, then there was no question of any appointment under Section 86(2) of the Act until and unless earlier appointment is set aside by a competent authority. In this case as stated hereinabove the respondent No.1 was selected on the basis of merit on 25.8.2007 and an appointment order was issued on 30.8.3007 then until and unless such order is cancelled or set aside, no appointment under section 86(2) of the Act could have been made.

In view of the aforesaid position, the entire process under Section 86(2) of the Act was without any jurisdiction. The Collector and the Commissioner both have found that the respondent No.1 was duly appointment under section 86(1) of the Act and rightly set aside subsequent appointment of petitioner under Section 86(2) of the Act, in which no error of jurisdiction is found.

This petition is found without merit and is dismissed with no order as to costs.

Petition dismissed.

I.L.R. [2010] M. P., 1948
WRIT PETITION
Before Mr. Justice Ajit Singh
29 June, 2010*

PURSHOTTAMLAL SAHU & anr. ... Petitioners
Vs.
STATE OF M.P. & ors. ... Respondents

A. Motor Vehicles Act (59 of 1988), Section 67 - *Power to control road transport - Jurisdiction - Held - Power to control road transport having regard to the advantages offered to the public and desirability of preventing uneconomic competition among holders of permit is vested only in the State*

*W.P. No.11182/2005 (Jabalpur)

Government and the State Government may issue directions in this regard from time to time by notification in the official gazette to the Regional Transport Authority. (Para 4)

क. मोटर यान अधिनियम (1988 का 59), धारा 67 – सड़क परिवहन पर नियंत्रण की शक्ति – अधिकारिता – अभिनिर्धारित – लोगों को प्रस्तावित की गयी सुविधाओं को तथा परमिट धारकों में अलाभकर स्पर्धा को रोकने की वांछनीयता को ध्यान में रखते हुए सड़क परिवहन पर नियंत्रण की शक्ति केवल राज्य सरकार को निहित की गई है और इस संबंध में समय समय पर राज्य सरकार शासकीय राजपत्र में अधिसूचना द्वारा क्षेत्रीय परिवहन प्राधिकारी को निर्देश जारी कर सकती है।

B. Motor Vehicles Act (59 of 1988), Section 72 - *Regional Transport Authority passing a general resolution for public convenience and to stop competition amongst the transporters - Held - S. 72 does not confer power on the Regional Transport Authority to either pass a resolution or a general order for the purposes of controlling road transport - The resolution which is in the form of general order has apparently been passed by the Regional Transport Authority without any power and authority under law.* (Para 4)

ख. मोटर यान अधिनियम (1988 का 59), धारा 72 – क्षेत्रीय परिवहन प्राधिकारी ने लोक सुविधा के लिये तथा परिवाहकों में स्पर्धा रोकने के लिये सामान्य संकल्प पारित किया – अभिनिर्धारित – धारा 72 सड़क परिवहन नियंत्रित करने के प्रयोजन हेतु क्षेत्रीय परिवहन प्राधिकारी को न तो संकल्प और न ही सामान्य आदेश पारित करने की शक्ति प्रदान करती है – संकल्प जो समान्य आदेश के स्वरूप में है, प्रकट रूप से क्षेत्रीय परिवहन प्राधिकारी द्वारा विधि के आधीन बिना किसी शक्ति एंव प्राधिकार के पारित किया गया है।

Brajesh Dubey, for the petitioners.
Samdarshi Tiwari & Dildar Singh, G.A., for the respondents.

ORDER

Ajit Singh, J. :–In this petition filed under Article 226 of the Constitution the question which calls for consideration is whether the Regional Transport Authority, Jabalpur (respondent no.2) is competent to pass a resolution dated 23.6.2005, Annexure P3.

2. By the impugned resolution Regional Transport Authority, Jabalpur with an object to control road transport having regard to the convenience of public and vehicle owners and also to avoid cut throat competition amongst transporters issued a general order that while considering the applications for approval of temporary/ permanent stage carriage permit following conditions shall be taken into account.

> "1. On those routes having distance of more than 50 kms. vehicles having sitting capacity of 30+2 and more shall be given stage carriage permit to ply the routes.
>
> 2. On those routs having distance between 30 to 50 kms. vehicles having sitting capacity of 22+2 and more shall be given stage carriage permits to ply the routes.

3. On those routes having distance of less than 30 kms. vehicles of less than 22+2 sitting capacity shall be given stage carriage permits to ply the routes.

4. If village applied does not fall within distance prescribed in paras 1 and 2 aforesaid, distance up to 10 km. and 5 km. respectively shall be increased.

5. Large buses shall be given preference over small buses on any route."

3. The petitioners are holders of stage carriage permit. They have challenged the impugned resolution on the ground that Regional Transport Authority has absolutely no power under the motor Vehicles Act, 1988 (in short "the Act") to pass the same. The respondents on the other hand have contended that Regional Transport Authority is empowered to pass the resolution under section 72 of the Act.

4. Under section 67 of the Act power to control road transport having regard to the advantages offered to the public and desirability of preventing uneconomic competition among holders of permit is vested only in the State Government and the State Government may issue directions in this regard from time to time by notification in the official gazette to the Regional Transport Authority. Further, sub-section (3) of section 68 provides that Regional Transport Authority shall give effect to the directions issued under section 67 by the State Government. Section 72 does not confer power on the Regional Transport Authority to either pass a resolution or a general order for the purposes of controlling road transport. Under this section, Regional Transport Authority can only impose conditions enumerated therein when an application for grant of stage carriage permit is made. The resolution which is in the form of general order has apparently been passed by the Regional Transport Authority without any power and authority under law. I, therefore, have no hesitation in quashing the same.

5. The petition is accordingly allowed and the resolution dated 23.6.2005, Annexure P2, is quashed.

Petition allowed.

I.L.R. [2010] M. P., 1950
WRIT PETITION
Before Mr. Justice R.S. Jha
9 July, 2010*

MATHURA PRASAD YADAV ... Petitioner
Vs.
STATE OF M.P. ... Respondent

Service Law - *Daily wages employee - Challenged his disengagement on attaining the age of 60 years - Held - The petitioner's services are not*

*W.P. No.601/2009(S) (Jabalpur)

governed by any rules which prescribe an age of superannuation - He cannot claim continuance in service as of right up to the age of 62 years - Petition dismissed. *(Para 7)*

सेवा विधि – दैनिक वेतन कर्मचारी – 60 वर्ष की आयु पूर्ण होने पर उसके वियोजन को चुनौती – अभिनिर्धारित – याची की सेवाएँ ऐसे किसी नियम से शासित नहीं होती है जो अधिवार्षिकी की आयु विहित करता हो – वह अधिकार के तौर पर 62 वर्ष की आयु तक सेवा में बने रहने का दावा नहीं कर सकता – याचिका खारिज।

Cases referred :

2010(2) MPLJ 662 = ILR (2010) MP 1032, (2006) 1 MPHT 379.

Sanjay Roy, for the petitioner.

Sudhir K. Shrivastava, Panel Lawyer, for the respondent/State.

ORDER

R.S. JHA, J. :–The petitioner has filed this petition being aggrieved by communication dated 05-12-2008 by which the petitioner, who is a daily wage employee working in the establishment of the respondents, has been disengaged on attaining the age of 60 years with effect from 31-12-2008.

2. It is submitted by the learned counsel for the petitioner that the petitioner is entitled to continue in service up to the age of 62 years as the age of superannuation prescribed for the employees of the Forest Department is 62 years.

3. The respondents have filed their return stating therein that the petitioner is a daily wage employee who was not engaged on a vacant sanctioned post by following the prescribed procedure and his services are also not governed by the Work Charged and Contingency Paid Employees (Recruitment and Conditions of Service) Rules, 1976 and in such circumstances the claim made by the petitioner for being continued in service up to the age of 62 years is misconceived as the age of superannuation prescribed for regular employees of the service by the rules is not applicable to daily wage employees.

4. From a perusal of the documents filed along with the petition, it is apparent that the petitioner is a daily wage employee and his engagement is on day to day basis. The learned counsel for the petitioner has not filed any statutory Rule on record which prescribes 62 years as the age of superannuation for daily wage employees on the basis of which he can claim to continue in service as of right up to the age of 62 years. It is pertinent to note here that it has been held by a Full Bench of this Court in the case of *Ashok Tiwari v. M.P. Text Book Corporation and another* 2010 (2) MPLJ 662 that the services of such daily wage employees are not governed by rules and they are not part of any service as their engagement is on day to day basis.

5. The petitioner in his support, has filed a circular of the General Administration Department dated 21-01-2004 wherein in Para-6 it is stated that those daily wagers who have attained the age of 62 years may not be re-engaged.

From a perusal of the said circular, it is apparent that it relates to taking back of the daily wage employees who had been removed on the ground that they had been engaged after 31-12-1988 and in that context the aforesaid has been stated by the Department in Para-6. Apparently, the aforesaid circular has no applicability to the petitioner's case nor does it prescribe any age of superannuation for daily wage employee engaged in the department.

6. The reliance and assistance sought by the learned counsel for the petitioner on the Full Bench judgment of this Court in the case of *Vishnu Mutiya v. State of M.P.* (2006) 1 MPHT 379 is also misconceived as in that case the petitioners who were working on the post of gang men and whose services were governed by the provisions of the Work Charged and Contingency Paid Employees (Recruitment and Conditions of Service) Rules, 1976 were held to be entitled to benefit of the rules which prescribed the age of superannuation as 62 years.

7. In the instant case, as the petitioner's services are not governed by any rules which prescribe an age of superannuation and as his appointment is on daily wages on day to day basis, he cannot claim continuance in service as of right up to the age of 62 years as a daily wager stands on a totally different footing from an employee who is appointed on a sanctioned and vacant post in accordance with the provisions of the rules and is part of the service under the rules.

8. In the circumstances, no fault can found with the impugned communication disengaging the petitioner. The petition filed by the petitioner being misconceived is accordingly dismissed.

Petition dismissed.

I.L.R. [2010] M. P., 1952

WRIT PETITION

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

15 July, 2010*

MASZID CHANDAL BHATA PRABANDH COMMITTEE ... Petitioner

Vs.

SECRETARY, LOCAL SELF DEPARTMENT ... Respondent

Constitution, Article 226, Wakf Act (43 of 1995), Sections 54 & 55 - ***Public Interest Litigation - Writ petition seeking issuance of writ of mandamus for directing removal of encroachment from Maszid, filed - Held - The writ petition as PIL declined to be entertained in view of Ss. 54 & 55 of the Wakf Act providing an adequate and efficacious remedy to an aggrieved person.*** (Paras 6 & 7)

संविधान, अनुच्छेद 226, वक्फ अधिनियम (1995 का 43), धाराएँ 54 व 55 – लोक हित वाद – मस्जिद से अतिक्रमण हटाने के निदेश के लिए परमादेश रिट जारी करने की माँग करते हुए रिट याचिका दाखिल की गयी – अभिनिर्धारित – वक्फ अधिनियम की धारा 54 एवं

*W.P. No.2725/2008 (Jabalpur)

55, जो व्यथित व्यक्ति को पर्याप्त और प्रभावकारी उपचार उपबंधित करती है, को दृष्टिगत रखते हुए लोक हित वाद के रूप में रिट याचिका ग्रहण करने से इंकार किया गया।

Case referred :

(2003) 7 SCC 546 (relied on).

Anil Kumar Jain, for the petitioner.

Kumaresh Pathak, Dy.A.G., for the respondent Nos.1 to 5.

S.A. Wakil, for the respondent No.6.

ORDER

In the instant writ petition which has been filed as public interest litigation, petitioner inter-alia seeks issuance of writ of Mandamus, directing respondent No. 3 Commissioner, Municipal Corporation, Jabalpur to remove the encroachment from Chandalbhata Maszid, Marhotal, Damoh road, Jabalpur.

2. Learned counsel for the petitioner submitted that several persons have encroached the land belonging to Chandalbhata Masjid despite several representations made to various authorities as well as to the Wakf Board, but no action in the matter has been taken till date. Learned counsel for the petitioner has drawn our attention to averments made in para 9 of the return filed on behalf of Wakf Board in which it is stated that Wakf Board has collected the information regarding the encroachers. It has further been averred in para 6 of the return that M.P. Wakf Board may initiate proceedings against the encroachers under Section 54 of the Wakf Act, 1955 (hereinafter referred to as the 'Act' for short). However, even the Wakf Board has failed to exercise the statutory powers vested in it.

3. On the other hand, Shri S.A. Wakil, learned counsel appearing for the Wakf Board, fairly submitted that appropriate steps for removal of the encroachment as provided under Section 54 read with Section 55 of the Act, shall be taken. Section 54 of the Act reads as under:

> *"54. Removal of encroachment from wake property.-*
>
> *(1) Whenever the Chief Executive Officer considers whether on receiving any complaint or on his own motion that there has been an encroachment on any land, building, space or other property which is wakf property and, which has been registered as such under this Act, he shall cause to be served upon the encroacher a notice specifying the particulars of the encroachment and calling upon him to show cause before a date to be specified in such notice, as to why an order requiring him to remove the encroachment before the date so specified should not be made and shall also send a copy of such notice to the concerned mutawalli.*
>
> *(2) The notice referred to in sub-section (I) shall be served in such manner as may be prescribed.*

(3) If, after considering the objections, received during the period specified in the notice, and after conducting an inquiry in such manner as may be prescribed, the Chief Executive Officer is satisfied that the property in question is wakf property and that there has been an encroachment on any such wakf property, he may, by an order; require the encroacher to remove such encroachment and deliver possession of the land, building, space or other property encroached upon to the mutawalli of the wakf.

(4) Nothing contained in sub-section (3) shall prevent any person aggrieved by the order made by the Chief Executive Officer under that sub-section from instituting a suit in a Tribunal to establish that be has right, title or interest in the land, building, space or other property:

Provided that no such suit shall be instituted by a person who has been let into possession of the land, building, space or other property as a lessee, licensee or mortgagee by the mutawalli of the wakf or by any other person authorised by him in this behalf.

4. We have considered the submissions made by the learned counsel for the parties.

5. It is apparent that Chief Executive Officer either on the complaint made to it or suo-motu can initiate proceedings under Section 54 of the Act for removal of encroachment. Section 54 provides that the Chief Executive Officer shall give a show cause notice to the encroachers specifying the particulars of the encroachment and; thereafter, if the encroachers do not appear within the specified date, he shall pass an appropriate order directing to remove the encroachment. However, if the encroacher appears and files objection, the Chief Executive Officer shall consider the objection and thereafter conduct inquiry in the manner prescribed and after having been satisfied that a wakf property has been encroached upon; he will pass an order for removal of such encroachment. However, if the encroachment is not removed, the Chief Executive Officer shall report the matter to the Sub Divisional Magistrate under Section 55 of the Act. Section 55 of the Act is reproduced below for the facility of reference:

"55. Enforcement of orders made under Sec. 54.- Where the person, ordered under sub-section (3) of Sec. 54 to remove any encroachment, omits or fails to remove such encroachment, within the time specified in the order or, as the case may be, fails to vacate the land, building, space or other property to which the order relates within the time aforesaid, the Chief Executive Officer may apply to the Sub-Divisional Magistrate

within the local limits of whose jurisdiction the land, building, space or other property is situated for evicting the encroacher, and, thereupon, such Magistrate shall make an order directing the encroacher to remove the encroachment, or, as the case may be, vacate the land, building, space or other property and to deliver possession thereof to the concerned mutawalli and in default of compliance with the order, remove the encroachment or, as the case may be, evict the encroacher from the land, building, space or other property and may, for this purpose, take such police assistance as may be necessary."

From perusal of the aforesaid provision, it is clear that if the encroacher fails to remove encroachment within the time specified, the Chief Executive Officer may approach the Sub Divisional Magistrate and such Sub Divisional Magistrate shall direct the encroachers to remove the encroachment within a specified time and to deliver possession to the concerned mutawalli and if the encroacher fails to carry out the directions, the Sub Divisional Magistrate shall remove the encroachment and evict the encroacher from the land by taking police assistance as may be required.

6. Thus, from perusal of Sections 54 and 55 of the Wakf Act, it is clear that the Act itself provides an adequate and efficacious remedy to an aggrieved person. Supreme Court in the case of *Guruvayoor Devaswom Managing Committee and another Vs. C.K. Rajan and others,* (2003) 7 SCC 546, while setting aside the order of the High Court passed in public interest litigation held as under:

> "60. ..... That may be so but the Act is a self-contained code. Duties and functions are prescribed in the Act and the Rules framed thereunder. Forums have been created thereunder for ventilation of the grievances of the affected persons. Ordinarily, therefore, such forums should be moved at the first instance." .....

7. Thus, in view of aforesaid enunciation of law by the Supreme Court, we decline to entertain the instant writ petition as public interest litigation.

8. However, the petitioner would be at liberty to approach the Wakf Board by making an appropriate application under Section 54 of the Act. In case such an application is made, the Wakf Board shall proceed in accordance with law and decide the same preferably within a period of four months.

9. With the aforesaid direction the writ petition stands disposed of.

Petition disposed of.

I.L.R. [2010] M. P., 1956

WRIT PETITION

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

3 August, 2010*

BINDU PATEL (KU.) ... Petitioner

Vs.

STATE OF M.P. & anr. ... Respondents

Public Prosecution (Gazetted) Service Recruitment Rules, M.P. 1991, Rule 8(i)(a), Schedule III Column 3 - *Rule prescribes the minimum age limit for the post of ADPO to be 24 years - Vires of rule challenged on the ground that minimum age limit for Civil Judge Examination is 21 and mind has not been applied in fixing minimum age limit - Held - Fixation of minimum age limit is not illegal or arbitrary and the posts of Civil Judges are different than that of ADPOs - Petition dismissed.* (Para 14)

लोक अभियोजन (राजपत्रित) सेवा भर्ती नियम, म.प्र. 1991, नियम 8(i)(a), अनुसूची III कॉलम 3 – नियम सहायक जिला लोक अभियोजन अधिकारी के पद के लिए न्यूनतम आयु सीमा 24 वर्ष विहित करता है – नियम की शक्तिमत्ता को इस आधार पर चुनौती दी गयी कि सिविल न्यायाधीश परीक्षा के लिए न्यूनतम आयु सीमा 21 वर्ष है और न्यूनतम आयु सीमा निश्चित करने में मस्तिष्क का प्रयोग नहीं किया गया है – अभिनिर्धारित – न्यूनतम आयु सीमा का नियतन अवैध या मनमाना नहीं है और सिविल न्यायाधीशों के पद सहायक जिला लोक अभियोजन अधिकारियों के पदों से भिन्न हैं – याचिका खारिज।

Cases referred :

AIR 1997 SC 2964, W.P. No.1710/2008 (Dr. D.R. Sharma Vs. State of M.P. & ors.), (1996) 3 SCC 454.

Parag Chaturvedi, for the petitioner.

P.K. Kaurav, Dy.A.G., for the respondent No.1/State.

O R D E R

The Order of the Court was delivered by ARUN MISHRA, J. :–The petitioner has challenged the vires of Rule 8{i}{a} and Column No.3 of Schedule III of Madhya Pradesh Public Prosecution {Gazetted Service Recruitment Rules, 1991 {hereinafter referred to as 'Rules of 1991'} which prescribes the minimum age limit to be 24 years for appearance in the examination for the post of Assistant District Public Prosecution Officer {in short 'ADPO}.

2. The petitioner has submitted that she had passed five years LLB course {P/1} on 16.7.2008 with 1st division. On 29.12.2008, advertisement {P/2} was published in Rozgar Nirman Employment newspaper for the post. of ADPOs.

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*W.P. No.770/2009 (Jabalpur)

200 posts of ADPOs were advertised. Qualification for the afore-referred posts was the degree in law from any recognized University or equivalent and persons possessing 1st division or two years practice at Bar or higher qualification shall be preferred.

3. Rule 3{i}{a} of the Rules of 1991 provides that the candidate must have attained the age as specified in Column {3} of Schedule III and below the age specified in Column {4} of the said Schedule. In Column {3} of Schedule III of the Rules of 1991, the minimum age limit prescribed is 24 years whereas maximum age limit prescribed is 30 years.

4. The petitioner has submitted that fixation of age of 24 years is illegal & arbitrary whereas fixation of minimum age limit should be 21 years and maximum age limit should be 35 years. The petitioner was of 23 years & five months of age. For appearance in Civil Judges examination, the minimum age limit fixed is 21 years. Mind has not been applied while fixing the minimum age limit resulting into unjust & arbitrary operation of the Rules of 1991. Experience of 2 years' practice at Bar is not mandatory. Thus, deprivation to the candidates between 21 to 24 years is illegal.

5. A return has been filed by respondent No.1/State contending that an incumbent can pass class 12th examination at the minimum age of 17 years and thereafter three years are required for graduation and three years for obtaining degree in law. Thus, fixation of age as 24 years is in accordance with law.

6. In Writ Petition No. 1710/2008 *{D.R.Sharma Versus State of M.P.& Others}*, an incumbent has assailed the age limit of 35 years, which has been dismissed vide order {R/1} dated 5.9.2008, the Gwalior Bench of this Court has opined that parity cannot be sought by he petitioner vis a vis to the Civil Judges as the posts of Civil Judge are different then that of ADPOs.

7. A return has also been filed by respondent No.2/Public Service Commission supporting Rule 8{i}{a} of the Rules of 1991.

8. Shri Parag Chaturvedi, counsel for petitioner has submitted that an incumbent having 1st division in LLB course has to be given priority. Fixation of age of 24 years for the post of ADPOs becomes arbitrary when for the post of Civil Judge, the minimum age limit prescribed is 21 years. There is no rhyme or reason to fix the minimum age limit for the post of ADPOs as 24 years.

9. Shri P.K.Kaurav, Deputy Advocate General for respondent No.1/ State has supported Rule 8{i}{a} of the Rules of 1991 as well as fixation of minimum age. He has also submitted that the posts in question are different. Parity between different services cannot be claimed. Fixation of age is within domain of policy decision of the State. It is not amenable for interference in writ jurisdiction.

10. Rule 8 of the Rules of 1991 is quoted below;-

"Rule 8 Condition of eligibility for direct recruitment.

In order to be eligible to be selected, a candidate must satisfy the following conditions,namely:-

{l}Age-{a} He must have attained the age as specified in column {3} of Schedule III and not attained the age as specified incolumn {4} of the said Schedule on the first day of January next following the date of commencement of selection

{b} XXX .XXX XXX XXX XXX

SCHEDULE III

{See Rule 8}

Name of Department	Name of Post in the service	Minimum age limit	Maximum age limit	Education Qualification
1	2	3	4	5
Home Department	The Madhya Pradesh Prosecution Service Assistant District Prosecution Officer	24 years	30 years	A degree in Law from any recognised University or equivalent and persons possessing First division or 2 years practice at Bar or Higher Qualifications shall be preferred.

11. After hearing learned counsel for the parties, we are of the opinion that there is no merit in the writ petition for the reasons to be mentioned hereinafter.

12. It is apparent that for the post of ADPOs, degree in law from any recognized University or equivalent qualification is necessary. It is necessary to mention here that the persons possessing 1st division in LLB course or two years' practice at Bar or higher qualification shall be preferred.

13. It is apparent that a person after attaining the age of three years is given admission in nursery class and while passing 10+2 examination, normally he attains the age of 17 years and thereafter one has to complete three years' course of graduation and further three years' course of LLB. Even in the case of a student opting for five years' course can clear the five years' course at the age of 22-23 years. As per Rules of 1991, priority is given to the student possessing 1st division in LLB course or two years' practice at Bar or higher qualification. Considering the priority clause of two years' practice at Bar or having higher qualification than LLB course i.e. LLM etc, it is obvious, that practice of 2 years' at Bar is to be preferred or higher qualification of LLB/LLM etc. It would obviously consume additional years after passing of LLB course.

14. Thus, fixation of minimum age limit of 24 years cannot be said to be illegal or arbitrary at all. Merely by the fact that the petitioner is having 60% and could clear five years' LLB course at the age of 23 years cannot be made a ground to assail the vires of Rule 8{i}{a} of the Rules of 1991. The posts of Civil Judges are different then that of ADPOs. The posts of ADPOs require special skill which can be acquired by an incumbent practicing at Bar hence, an incumbent with two years' practice at Bar is to be preferred. ADPOs are supposed to practise in the Court in criminal matters and represent the State government in criminal cases. Thus, fixation of minimum age limit of 24 years has the purpose behind it of appointing the persons of special skill/experience having atleast 2 'years' practice at Bar. The intendment is that the persons appointed on priority basis are not absolutely raw hands.

15. The Supreme Court in *Dr. Amilal Bhat Versus State of Rajasthan & Others* AIR 1997 SC 2964 while dealing with question whether Rule 11 {3} of Rajasthan Medical Services {Collegiate Branch} Rules 1962, which prescribes the maximum age of the applicants with reference to 1st of January following the last date fixed for receipt of applications has held that basically the fixing of a cut off date for determining the maximum or minimum age required for a post is in the discretion of rule making authority or the employer as the case may be. The Supreme Court has further observed that the matter of fixation of the age limit is a policy matter and the Court cannot interfere in such a policy matter. Fixation of age is not shown to be arbitrary one. In the instant case, as matter is realm of policy, we decline to interfere.

16. A Division Bench of this Court in Writ Petition No. 1710/2008 *{D.R.Sharma Versus State of M.P.& Others}* vide order {R/l} dated 5.9.2008 has observed that parity cannot be claimed by ADPOs in the matter of fixation of age with the Civil Judges, two posts being different. In this context, the Apex Court in *V.M.Gadre & Others Versus M.G.Diwan & Others* {1996} 3 SCC 454 has also laid down that parity between' different services cannot be claimed. The Court has no power to grant relief on the ground of parity between different services. The services of Civil Judges are different then that of ADPOs. Thus, the petitioner cannot claim interse parity, besides we have found . justification in fixing of the minimum age limit to be 24 years for the post considering the priority given to the ADPOs having two years' practice at Bar and priority is also given to the person having higher qualification then that of LLB.

17. At this stage, it is also submitted by Shri Parag Chaturvedi, counsel for petitioner that since the petitioner has appeared in the examination of ADPOs on the basis of interim order passed by this Court, she should be permitted to appear in the interview as now she attains the age of 24 years.

The submission cannot be accepted for the reason that the petitioner was not entitled to appear in the examination having not completed eligibility criteria and her merit has to be considered not with the students of this year but with the

students of that year itself. She had not completed 24 years of age on 1.1.2009. Consequently, no relief can be granted to the petitioner as she was not entitled to appear in the written examination itself.

18. Resultantly, we find the petition to be devoid of merits. The same is hereby dismissed. No costs.

Petition dismissed.

I.L.R. [2010] M. P., 1960
APPELLATE CIVIL
Before Mr. Justice Prakash Shrivastava
19 May, 2010*

HIRALAL ... Appellant
Vs.
MANGILAL ... Respondent

A. Evidence Act (1 of 1872), Section 101 - *Burden of proof - When not necessary - Held - Any rule of burden of proof is irrelevant when the parties have led evidence and that evidence has been considered.* (Para 18)

क. साक्ष्य अधिनियम (1872 का 1), धारा 101 – साबित करने का भार – कब आवश्यक नहीं – अभिनिर्धारित – साबित करने का भार का नियम अप्रासंगिक है जब पक्षकारों ने साक्ष्य प्रस्तुत की है तथा साक्ष्य पर विचार किया गया है।

B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) - *Bona fide requirement for non residential purpose - Pleadings - Landlord having alternative residential accommodation not expressly pleaded in the plaint - Effect - Held - If a plea is covered by issue by implication then mere fact that the plea was not expressly taken in pleading would not necessary disentitle a party from relying upon it if it is satisfactorily proved by evidence.* (Para 18)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ) – अनिवासीय प्रयोजन हेतु सद्भावी आवश्यकता – अभिवचन – मकान मालिक के पास वैकल्पिक आवास होने के सम्बंध में वादपत्र में स्पष्ट अभिवचन नहीं है – प्रभाव – अभिनिर्धारित – यदि अभिवचन विवाद्यकों के अभिप्राय द्वारा समाविष्ट है तब मात्र यह तथ्य की तर्क का स्पष्ट रूप से अभिवाक नहीं किया गया, किसी पक्षकार को आवश्यक रूप से इस पर अवलम्ब करने से अनाधिकृत नहीं करेगा यदि यह साक्ष्य द्वारा भलीभांति सिद्ध हो।

Cases referred :

1992(2) JLJ 260, (1999) 1 SCC 141, (2001) 2 SCC 355, (1999) 6 SCC 222, AIR 1991 SC 1040, (2006) 6 SCC 94, AIR 1981 SC 1711, 1989 MPRCJ NOC 30, 2005(II) MPACJ 207, AIR 1953 SC 235, AIR 1958 MP 304, (2003) 9 SCC 151, 2001(3) MPHT 371, 2003(II) MPACJ 142.

S.C. Bagadiya, for the appellant.
V.K. Jain, for the respondent.

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*S.A. No.818/2007 (Indore)

JUDGMENT

PRAKASH SHRIVASTAVA, J. :–THIS second appeal under Section 100 of the Code of Civil Procedure has been filed against the judgment dated 12.09.2007 whereby the first appellate Court by dismissing the appeal has affirmed the judgment of the Trial Court. The Trial Court by the judgment dated 28.11.2006 had decreed the suit for eviction filed by the Respondent under Section 12 (1) (f) of the M. P. Accommodation Control Act, 1961 ["Act" hereafter].

2. This Court by order dated 13.05.2008 had admitted the appeal on the following substantial question of law :-

> **"Whether in absence of necessary pleadings, as envisaged under Section 12 (1) (f) of the M. P. Accommodation Control Act, the two Courts below erred in substantial error of law in decreeing the suit of the plaintiff ?"**

3. Shri S.C.Bagadiya, learned Senior Advocate appearing for the appellant submitted that the Respondent had not pleaded and disclosed in the plaint that two other houses are available with the son of the Respondent for whose need the accommodation was sought, therefore, the Courts below have committed an error in decreeing the suit filed by the Respondent. He further submitted that the alternate accommodation in the form of two houses is available with the Respondent and that the burden to prove the non-availability of alternate accommodation was wrongly placed upon the present appellant.

4. Shri V.K.Jain, learned counsel appearing for the Respondent submitted that the suit shop is needed for starting the business of the Respondent's son, therefore, it was not necessary to plead and disclose the two houses which are residential houses. Even otherwise by way of evidence it has been established that the two houses are not suitable for business, therefore, even if there is some lacuna in the pleading that will not be fatal. He further submitted that once the parties have led the evidence, the question of burden of proof looses its significance.

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

6. The suit premises is a shop and the suit for eviction was filed by the Respondent pleading that the suit shop was required by the Respondent for starting the business of his major son Mahesh Kumar. In the plaint he pleaded that "apart from the suit shop, no other accommodation in the ownership of the plaintiff is available in the Indore City". The Trial Court while decreeing the suit by the judgment dated 28.11.2006 found that the Respondent had proved the bona fide need for starting the business of his son and also that for the said need the Respondent does not have any other suitable alternate accommodation in the town concerned. The aforesaid finding of fact has been affirmed by the first appellate Court.

7. Before the Trial Court during the cross-examination, the plaintiff's witness PW-2 Mahesh had disclosed that he had a house in Scheme No.71 which was

occupied by the tenant and another house in Gumasta Nagar which was under construction.

8. The two Courts below have examined the issue of availability of alternate accommodation in the light of the aforesaid two accommodations disclosed by PW-2 Mahesh for whose need the suit was filed. The aforesaid two accommodations have not been found to be business premises. When the specific query was put to DW-1 at the time of his cross-examination in respect of the nature of the aforesaid two accommodations, the counsel appearing for the appellant before the Trial Court had objected to the said question and prevented DW-1 from disclosing or admitting the nature of the two accommodation. The disclosure made by PW-2 shows that one of the accommodation is under construction and other is occupied by the tenant. Therefore, the two Courts below rightly found that no alternate accommodation is available with the Respondent which could satisfy the need for business.

9. To prove the suit for eviction under Section 12 (1) (f) of the Act, a landlord is required to establish that the landlord or such person for whose need the accommodation is required, has no other reasonably suitable non-residential accommodation of his own in his occupation in the town concerned. Section 12 (1) (e) of the Act relates to the ground of eviction for bona fide need of his residence and Section 12 (1) (f) of the Act relates to the ground of eviction for non-residential purposes. The Supreme Court in the matter of *Prem Narayan Barchhiha v/s Hakimuddin Saifi*, reported in 1992 (2) JLJ 260, has considered the scheme of Sections 12 (1) (e) and (f) of the Act and has held that the two clauses are distinct and independent grounds having different ingredients and are thus mutually exclusive. While considering the issue of pleading for the purposes of Section 12 (1) (f) of the Act, the Supreme Court has held that a landlord seeking eviction under Section 12 (1) (f) of the Act need not plead in the plaint that he is in occupation of residential accommodation which is not suitable for non-residential purposes. Such a pleading is held to be irrelevant pleading for the purpose of clause (f) in view of the plain language of section. The Supreme Court in the matter of *Prem Narayan Barchhiha* (Supra) held that :-

> "13. ... ... It is no part of the obligation of the landlord seeking eviction of a tenant under Clauses (f) of Section 12 (1) of the Act to aver in his plaint/petition the facts that he is in occupation of residential accommodation and that it is no suitable for non-residential purposes. These facts are not the requirement of clauses (f) and are irrelevant to make out a case under that clause. To read such a requirement in the said clause (f) would amount to doing violence to language of the clause nay rewriting the clause which is far beyond the principle of iron out the creases and is clearly impermissible.

14. It is futile to contend that accommodation is a neutral word taking in its fold both residential as well as non-residential purposes, the landlord ought to disclose the residential accommodation in his possession and show that it is not reasonably suitable for non-residential purposes when he is seeking eviction of the tenant from accommodation let for non-residential purposes. The Court cannot burden the landlord with additional conditions of disclosing particulars of residential accommodation in his possession and proving that it is not reasonably suitable for non-residential purposes. Non-suiting him on such grounds will mean non-suiting him on extraneous grounds. It follows that the appellant has fulfilled the fourth requirement of clause (f) also."

10. In view of the aforesaid position of law, it was not necessary for the Respondent to plead and disclose in the plaint the details of the two houses at Scheme No.71 and at Gumasta Nagar, one of which was in occupation of a tenant and the other was under construction. These two premises have not been found to be commercial premises by the Courts below. Even if these two residential houses were available with the Respondent, they were not required to be pleaded in a suit for eviction for non-residential accommodation in view of the aforesaid judgment of the Supreme Court.

11. It is also worth noting that during the trial of the suit, PW-2 Mahesh during his cross-examination himself had disclosed that he had a house in Scheme No.71 which was occupied by the tenant and a house at Gumasta Nagar under construction. Even if the pleadings were deficient in this regard, the said deficiency is not fatal since the details of the two houses were disclosed by PW-2 in his oral evidence. The appellant had cross-examined PW-2 in this regard. The cross-examination of DW-1 was also done in respect of these houses, therefore, the parties had gone to trial with the aforesaid fact before them and no prejudice has been caused to any of the party.

12. It is the settled position in law that non-disclosure of landlord about his having alternate accommodation is not fatal to the eviction proceedings if both the parties understood the case and placed material before the Court and the case of neither party was prejudiced. If the material relating to the alternate accommodation has come on record and has been adequately dealt with by the Court, then no prejudice is caused. The said view is supported by the judgment of the Supreme Court in the matter of *Ram Narain Arora v/s Asha Rani and others,* reported in (1999) 1 SCC 141; and in the matter of *M. L. Prabhakar v/s Rahiv Singal,* reported in (2001) 2 SCC 355.

13. In the matter of *Ram Narain Arora* (Supra), the Supreme Court held that :-

"(11) There cannot be a pedantic or a dogmatic approach in the matter of analysis of pleadings or of the evidence adduced

thereto. It is no doubt true that if the pleadings are clearly set out, it would be easy for the court to decide the matter. But if the pleadings are lacking or vague and if both parties have understood what was the case pleaded and put forth with reference to requirement of law and placed such material before the court neither party is prejudiced. If we analyse from this angle, we do not think that the High Court was not justified in interfering with the order made by the Rent Controller."

14. The judgment of the Supreme Court in the matter of *Ram Narain Arora* (Supra) has been followed in the matter of *M. L. Prabhakar* (Supra).

15. It is also worth noting that in the case of bona fide requirement of landlord, the availability of the alternate accommodation needs consideration keeping in view the landlord's subjective choice, from among the more than one accommodation available to him and such a choice needs to be respected by the Court, if once the Court is satisfied after applying objective standards regarding the bona fide of the landlord for the premises or additional premises. Such a view is supported by the judgment of the Supreme Court in *Shiv Sarup Gupta v/s Dr. Mahesh Chand Gupta,* reported in (1999) 6 SCC 222.

16. So far as the issue of burden of proof is concerned, the initial burden of proof to establish non-availability of alternate accommodation was on the Respondent – landlord. The Respondent had pleaded that no alternate accommodation was available with him to satisfy the need in town concerned, and had adduced the evidence in this regard. PW-2 had also disclosed that two other accommodations out of which one was occupied by the tenant and other was under construction. The appellant failed to produce any evidence to show that PW-2 was making a wrong statement or these two accommodation or any one of them was available with the Respondent to satisfy the need of his business. The finding of fact has rightly been recorded by the two Courts below that the suit accommodation do not satisfy the need of business.

17. The Supreme Court in the matter of *Raghunathi and another v/s Raju Ramappa Shetty,* reported in AIR 1991 SC 1040, has held that once the parties have permitted to produce evidence in support of their respective cases and it is not their grievance that any evidence was shut out the question of burden of proof loses significance and remains only academic.

18. The aforesaid view is reiterated by the Supreme Court in the matter of *Standard Chartered Bank v/s Andhra Bank Fionancial Services Ltd. and others,* reported in (2006) 6 SCC 94, by holding that any rule of burden of proof is irrelevant when the parties have led evidence and that evidence has been considered.

19. While dealing with the similar issue, the Supreme Court in the matter of *Standard Chartered Bank* (Supra) has held that if parties know that a plea was

involved in trial and if such a plea is covered by issue by implication then in such a case mere fact that the plea was not expressly taken in pleading would not necessary disentitle a party from relying upon it if it is satisfactorily proved by evidence.

20. This Court also in the matter of *Omprakash s/o Satyanarayan and others v/s Anand Kumar s/o Hukumchand Patni and others,* decided on 19.02.2008 – Second Appeal No.807 of 2007, in the similar circumstances has taken the view that want of pleading and coming up of the material relating to the matter not placed before on record through pleading is immaterial as the parties right from the beginning had the relevant material on record and the two Courts below adequately dealt with that, therefore, no prejudice was caused to the tenant side.

21. Learned counsel appearing for the appellant has relied upon the judgment of the Supreme Court in the matter of *Hasmat Rai and another v/s Raghunath Prasad,* reported in AIR 1981 SC 1711. The learned counsel for the Respondent has not disputed the ratio of the said judgment but the said judgment has no application in the facts of the present case since it is not a case of no pleading in respect of non-availability of alternate accommodation but present is a case where the Respondent had sought eviction on the ground of bona fide need for business and had not pleaded the two residential accommodations belonging to him.

22. Learned counsel appearing for the appellant has also placed reliance upon the judgment of Single Bench of this Court in the matter of *Krishnakumar Bahal v/s Shankarlal Agrawal,* reported in 1989 MPRCJ NOC 30; *Satyanarayan Solanki v/s Murai Samaj Dharmashala Nyas*, reported in 2005 (II) MPACJ 207; the judgment dated 12.04.2007 in the matter of *Jainuddin v/s Ajitsingh* in Civil Revision No.201 of 2006; but these judgments do not help the appellant since they relate to the complete absence of pleading in the plaint about non-availability of alternate accommodation. In the present case the Respondent had pleaded that no suitable alternate accommodation for the business in the town concerned is available with the Respondent.

23. Learned counsel appearing for the appellant has also placed reliance upon the judgment of the Supreme Court in the matter of *Messrs Trojan & Co. v/s RM. N. N. Nagappa Chettiar*, reported in AIR 1953 SC 235; and the judgment of this Court in the matter of *Mulam Chand Chhoteylal Modi v/s Kanchhedilal Bhaiyalal and others,* reported in AIR 1958 MP 304, wherein it has been held that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. In the present case also the Courts below have not travelled beyond the pleadings of the parties. On the contrary in view of the judgment of the Supreme Court in the matter of *Prem Naryan Barchhiha* (Supra) it was not necessary for the Respondent to plead the residential accommodation in his ownership when the need was for commercial premises.

24. The counsel for the appellant has also relied upon the judgment of the Supreme Court in the matter of *Kishan Chand v/s Jagdish Pershad and others*, reported in (2003) 9 SCC 151, which relates to the concealment of an alternate residential Flat while seeking eviction for bona fide need for residence. But in the present case there is no concealment of any non-residential premises by the Respondent when he is seeking eviction from the suit premises which is a non-residential premises on the ground of non-residential need.

25. The judgment of this Court in the matter of *Ashok Kumar v/s Kishan Singh,* reported in 2001 (3) MPHT 371, also does not help the appellant since in the present case presumption of availability of alternate business premises cannot be drawn since the details of two other premises owned by the Respondent's son have come on record and they have not been found to be business premises nor they are available for occupation of the Respondent.

26. The counsel for the appellant has relied upon the judgment of this Court in the matter of *Mahesh Chandra v/s Bhagwati Prasad,* reported in 2003 (II) MPACJ 142, but that is also a case of total absence of mandatory statutory pleading but that is not the present case.

27. It is also worth noting that in the present case the two Courts below have concurrently found that the Respondent has been successfully able to prove the bona fide need for starting the business of his son and non-availability of the suitable alternate business accommodation for that purpose. The finding in respect of the bona fide need and availability of alternate accommodation are pure finding of fact and they have not shown to be perverse in any matter.

28. In view of the aforesaid analysis, the question of law is answered in favour of the Respondent by holding that the two Courts below have not committed any substantial error of law in decreeing the suit filed by the Respondent seeking eviction under Section 12 (1) (f) of the Act.

29. The appellant has also filed applications, I.A. No.10780/2009 and I.A.No.10781/2009 under Order VI Rule 17 of the CPC for amending the written-statement and under Order XLI Rule 27 of the CPC for filing additional documents respectively stating that during pendency of the appeal, the Respondent had entered into an agreement to sell the suit premises in favour of Shrichand Chandwani and a notice relating to sell of suit premises was publised by Shri Sudarshan Joshi, Advocate which shows that the need projected by the Respondent for the suit premises is not bona fide.

30. On perusal of the reply to these applications filed by the Respondent, it is noticed that the Respondent is aged about 72 years and is suffering from heart ailment and other diseases and the alleged agreement was got executed by Shrichand Chandwani, who is brother-in-law of the appellant, fraudulently from the Respondent colluding with the appellant and taking advantage of his close relations with the Respondent. The said agreement was fraudulently obtained to

frustrate the present eviction proceedings. Alleged notice in news paper was published by Shri Sudarshan Joshi, Advocate who is the Advocate of the appellant. The Respondent has placed on record the documents in support of the aforesaid facts. He has also filed copy of the public notice published by the Respondent in the news paper in response to the notice published by the appellant, denying any such agreement of sale and informing the general public that such an agreement to sell was fabricated and false. It appears that the appellant has filed the present applications only with a view to frustrate the eviction decree which has been concurrently passed by the two Courts below against him. Thus, the applications, **I.A.No.10780/2009** and **I.A.No.10782/2009** are rejected.

31. The appeal is accordingly dismissed. No order as to costs.

Appeal dismissed.

I.L.R. [2010] M. P., 1967
APPELLATE CIVIL
Before Mr. Justice R.K. Gupta
8 July, 2010*

EXECUTIVE ENGINEER & anr. ... Appellants
Vs.
SMT. KALAWATI & ors. ... Respondents

A. Workmen's Compensation Act (8 of 1923) - *Death by a dog bite - Could it be termed as during the course and arisen out of employment - Held -Deceased was required to remain present in the office and while performing the work, suddenly a mad dog entered in the office and bit the deceased which means that the incident occurred during the course and arisen out of employment - The employer can be forced to pay compensation.* (Para 8)

क. कर्मकार प्रतिकर अधिनियम (1923 का 8) – कुत्ते के काटने से मृत्यु – क्या यह नियोजन के अनुक्रम में और उससे उत्पन्न हुआ माना जा सकता था – अभिनिर्धारित – मृतक को कार्यालय में उपस्थित रहना आवश्यक था और कार्य करते समय एक पागल कुत्ते ने कार्यालय में प्रवेश किया और मृतक को काट लिया जिसका अर्थ है कि घटना नियोजन के अनुक्रम में घटित हुई और उससे उत्पन्न हुई – नियोक्ता को प्रतिकर अदा करने के लिए बाध्य किया जा सकता है।

B. Workmen's Compensation Act (8 of 1923), Section 4A(3) - *Penalty - Power of the Commissioner - The manner in which it is to be exercised - Held - The Commissioner of Workmen Compensation Act before imposing the penalty has to record some findings for imposition of either the maximum penalty or some penalty whatever the facts and circumstances permit to impose the percentage of penalty.* (Para 16)

ख. कर्मकार प्रतिकर अधिनियम (1923 का 8), धारा 4ए(3) – शास्ति –

*M.A. No.662/2005 (Jabalpur)

आयुक्त की शक्ति – ढंग जिसमें इसका प्रयोग किया जाना है – अभिनिर्धारित – कर्मकार प्रतिकर अधिनियम के आयुक्त को शास्ति अधिरोपित करने के पूर्व, या तो अधिकतम शास्ति या कोई शास्ति जो भी शास्ति की प्रतिशतता अधिरोपित करने के लिए तथ्य और परिस्थितियाँ अधिरोपित करना अनुज्ञेय करते हों, के अधिरोपण के लिए कुछ निष्कर्ष अभिलिखित करने होंगे।

Sharad Punj, for the appellants.
Sanjay Jain, for the respondents.

ORDER

R.K. Gupta, J. :–This is an appeal under Section 30 of the Workmen Compensation Act being aggrieved by the order dated 11.2.2004 passed by the Commissioner for Workmen Compensation by which he has allowed the claim and has also allowed the penalty up to the extent of 50% as enumerated under Section 4-A of the Workmen Compensation Act.

2. This Court by an order dated 18.12.2009 admitted the appeal on the following substantial questions of law:-

> "1. Whether the employee's death due to dog bite can be termed as arising out of and in the course of employment and if not, whether the employer can be forced to pay compensation?
>
> 2. Whether in absence of the notice u/s. 10 of the workmen Compensation Act, 1923 from the claimant/claimants the non-awareness of the employer can be penalized by a penalty to the tune of 50% of the amount of award u/s 4A(3) Workmen Compensation Act, 1923.
>
> 3. On the factual scenario when the dog bite two people including the deceased employee, the deceased employee did not take any diligent precaution which resulted in his death while the other persons took precaution and is still surviving. In this scenario the action of the deceased for not taking the treatment can be termed as "willful negligence" on his part or not?"

3. With reference to first question, it is to be seen that claimant has examined herself. She has specifically stated in her statement that on 20.1.93, her husband deceased Raghunath was on duty along with Lineman and other persons, a mad dog entered in the office and has bitten the deceased. He was admitted in Hospital wherein during treatment he expired on 15.3.93. She has further stated that on the same day, another person Dhannalal Dasore was also bitten by the said dog but he has not expired.

4. The next witness is Dhannalal Dasore who has been examined by the claimants who also suffered with the dog bite. He has corroborated the statement given by the claimants and submitted that on the relevant date, the said dog has bitten him and thereafter he entered in the M.P.E.B. Office and also bitten deceased Raghunath. He has further stated that he has taken treatment but deceased Raghunath has not taken any treatment, as a consequence of the same, he died.

5. The next witness is Ismial Khan who was also an employee of M.P.E.B. and at the relevant time he was also on duty along with deceased Raghunath. He has stated that deceased was employed as a Helper with the appellants. He has further stated that on the relevant date, suddenly a mad dog entered in the office and has bitten the deceased. This witness states that deceased died because of dog's bite.

6. In the present case, the appellants have not examined any witness to controvert the aforesaid facts. Keeping in view the questions of law on which the appeal has been admitted, it is to be seen that the factum of death of the deceased due to dog bite is not disputed. The only question on which the appeal has been admitted is whether the employee's death due to dog bite can be termed as arising out of and in the course of employment and if not, whether the employer can be forced to pay compensation?

7. In the present case, there is ample evidence in the statement of witnesses which I have discussed in earlier paragraphs. Deceased was require to remain present in the office. There is no dispute of the same that at the time when he was performing his duties in the office along with his colleagues, suddenly, a mad dog entered in the office and bitten the deceased resulting into hydrophobia and subsequently death has occurred. In the present case, as I have discussed earlier the employer has not adduced any evidence to prove that death of deceased was not due to dog bite. The question as such has not been framed while admitting the appeal.

8. In view of the aforesaid, since the deceased was require to remain present in the office and while performing the work, suddenly a mad dog entered in the office and has bitten the deceased, that itself shows that in the present case, a mad dog entered in the office and bitten the deceased during the course and arisen out of employment. It is not the case of the employer that on the relevant date the deceased was not require to remain present in the office and thus he was not on duty so that it could have been concluded by this Court that dog bite has not resulted in any accident which arouse during the course and arisen out of employment.

9. It is also not the case of the employer that there were safety measures provided to the employees even thereafter the incident in question took place and deceased sustained injuries by dog bite.

10. In view of the aforesaid, the first question is answered against the appellant.

11. The next question in the present case on which the appeal is admitted is whether in absence of the notice u/s. 10 of the workmen Compensation Act, 1923 from the claimant/claimants the non-awareness of the employer can be penalized by a penalty to the tune of 50% of the amount of award u/s 4A(3) Workmen Compensation Act, 1923.

12. In the present case, Commissioner for Workmen Compensation while allowing the claim has also imposed a penalty up to the extent of 50%. The question in the present case is as per the question so framed, this Court is required to look into the aspect whether the award passed by the Commissioner for imposing penalty to its maximum up to 50% is proper. The question as such in the present case is whether no notice is required to be given under Section 10 to the claimants.

13. Section 10 only contemplates that Commissioner shall not entertained the claim unless notice of the accident has been given in the manner provided under Section 10. The aforesaid Section further stipulates that claim application as such can also be entertainable if the employer had knowledge of the accident from some source and is only with respect to control of the jurisdiction to entertain an application by the Commissioner of Workmen Compensation and thus this will have no effect on the scope of Section 4-A (3) of the Workmen Compensation Act, 1923.

14. Section 4-A(3) provides for imposition of penalty if the claim amount is not paid or deposited by the employer within 30 days from the date the amount is due.

15. In the present case, on the date of alleged accident, the amount was not due i.e. when the deceased was biten by the dog on 20.1.93, the said compensation was not due as there was no death on that date. The amount can be said to be due on 15.3.93 when the deceased expired. Ex. P/1 is the death certificate which has been proved by the claimant. There is nothing on record that after the death of the deceased, the claimant has submitted any application to the employer requesting to pay compensation because of dog bite and injuries suffered by the deceased on 20.1.93. In view of the aforesaid, it cannot be said that the amount was taken immediately after 30 days either on 20.1.93 or on 15.3.93 so that the employer was under an obligation to deposit the amount to compensate before the Commissioner for Workmen Compensation and terms of Section 8 of the Act.

16. Apart from the aforesaid, the Commissioner of Workmen Compensation Act has not given any reason for imposing maximum penalty as provided under Section 4-A of the Act. Before imposing the penalty, some findings are required to be given by the Commissioner for imposition of either the maximum penalty or some penalty whatever the facts and circumstances permit to impose the percentage of penalty. Under the circumstances, I hold that Commissioner for Workmen Compensation was not justified in imposing a maximum penalty up to the extent of 50% and accordingly direct that 20% penalty shall be the adequate penalty keeping in view the facts and circumstances of the case.

17. With regard to question no.3 on which the appeal is admitted, merely because one person received treatment of dog bit who was also suffering with the injuries and is survived, that by itself is enough to prove the willful negligence on the part of the deceased in not receiving the treatment.

18. The employer has not appeared in the witness box to state that no sufficient treatment was given to the deceased and, for this reason, he could not be saved.

19. Apart from this, merely because no sufficient treatment was taken by the deceased that by itself would not be sufficient to dislodge the claim of the claimants on the ground of negligence in obtaining treatment.

20. The employer did not adduce any evidence to show that death has no nexus with the dog bite i.e. the injuries which deceased suffered which resulted into his death.

21. In view of the aforesaid, the question no.3 on which the appeal is admitted does not arise in the present case even though the appeal is admitted on the said question.

22. Accordingly, keeping in view the facts and circumstances of the case, the present appeal is partly allowed and out of the 50% of the amount deposited by the present appellants towards compensation, 30% shall be refunded by the Commissioner, Workmen Compensation forthwith.

23. Appeal stands partly allowed.

Appeal partly allowed.

I.L.R. [2010] M. P., 1971
APPELLATE CRIMINAL
Before Mr. Justice U.C. Maheshwari
12 March, 2010*

STATE OF M.P. ... Appellant
Vs.
KANHAIYALAL ... Respondent

Penal Code (45 of 1860), Section 304-A - *On highway, if pedestrian crosses the road without taking note of approaching bus, the driver cannot be held guilty in absence of reliable evidence regarding speed of offending vehicle and negligental act of driver.* (Para 5)

दण्ड संहिता (1860 का 45), धारा 304–ए – राजमार्ग पर, यदि राहगीर बस के समीप आने को ध्यान में रखे बिना सड़क पार करता है, तो दोषी वाहन की गति और चालक के उपेक्षापूर्ण कृत्य के सम्बन्ध में विश्वसनीय साक्ष्य के अभाव में चालक को दोषी नहीं ठहराया जा सकता।

Case relied on:

AIR 1972 SC 221.

Vivek Agrawal, G.A., for the appellant.

JUDGMENT (Oral)

U. C. Maheshwari J.:–This appeal is directed on behalf of the appellant/ State under Section 378 of Cr. P. C. being aggrieved by the judgment dated 13.12.1994 passed by the Judicial Magistrate First Class Begumganj, District Raisen in Criminal Case No. 183/90 acquitting the respondent from the charge punishable under Section 304-A of IPC.

*Cr.A. No.980/1995 (Jabalpur)

2. As per case of the prosecution on 17.5.1990, the deceased Kallu and his father Moolchand (P.W.1) were coming from their village to Begumganj by the Bullock Cart, on reaching from approach road to Barra Road said Kallu stepped down from the Bullock Cart and while he was crossing the road for other side to have the drinking the water the alleged offending bus bearing registration No. CIF-244 driven by the respondent in a rash and negligent manner came there and dashed him, resultantly, he sustained injuries and succumbed to it on the spot. On lodging the report by his father Moolchand (P.W.1) after preparing the spot map and inquest Panchnama the dead body was sent to hospital where his postmortem was carried out. After holding the investigation the respondent was charge sheeted for the offence under Section 304-A of IPC.

3. On framing the charge of aforesaid offence the respondent abjured the same, on which the evidence was recorded. On appreciation of the same the respondent is acquitted from such charge by the trial Court, the same is under challenge in this appeal at the instance of the appellant/State

4. Shri Vivek Agrawal, learned Government Advocate by referring the evidence available in record said the prosecution had successfully proved the alleged offence against the respondent but under wrong appreciation of such evidence the trial Court acquitted the respondent under wrong premises and prayed for setting aside the impugned judgment and convicting the respondent for the alleged offence by allowing this appeal.

5. Having heard the counsel keeping in view the arguments advanced by the State counsel, I have carefully examined the record and also perused the impugned judgment. In order to prove the case on behalf of the prosecution as many as six witnesses have been examined. Out of them three witnesses namely Mool Chand (P.W.1), Jagdish Prasad (P.W2) and Kanchhedi (P.W.3) are examined as eyewitnesses. According to their depositions the alleged accident took place on highway where the deceased Kallu after stepping down from the bullock Cart was crossing the road to fetch the water, which was available to other side of the road. So far the speed of the offending vehicle is concerned, all three witnesses have stated that same was plied on high speed but no one has stated exact speed of the bus. Out of aforesaid witnesses Jagdish Prasad (P.W.2) being driver of the tractor might have observed the speed of offending vehicle but in his deposition he had not stated anything about actual or approximate speed of the offending vehicle. In the absence of reliable evidence regarding the speed of offending vehicle and/or any negligental act of the respondent with respect of his driving regarding offending bus he could not be convicted for the alleged offence under Section 304-A of IPC.

6. It appears from the impugned judgment that on appreciation of the evidence taking into consideration the aforesaid circumstance along with the factum that identification of respondent as driver of the offending bus has not been proved by

the admissible evidence acquitted the respondent from the alleged charge. Such approach of the trial Court even on re-appreciation of evidence at this stage does not appear to be perverse or contrary to record.

7. It is settled proposition of law that on the highway or public way if pedestrian crosses the road without taking note on approaching bus there is every possibility of his dashing against the bus without the driver becoming aware of it. In such situation the bus driver cannot save accident however the same was driven slowly and therefore the driver of offending vehicle cannot be held to be negligent and convicted on such count. Such principle is laid down by the Apex Court in the matter of *Mahadeo Hari Lokare Vs. State of Maharashtra* reported in AIR 1972 SC 221. In such premises also there is no scope in the case at hand to hold the conviction against the respondent at this stage.

8. In such premises, I have not found any perversity, infirmity or illegality in the impugned judgment of acquittal of the respondent passed by the trial Court. Consequently, this appeal being devoid of any merits is hereby dismissed.

Appeal dismissed.

I.L.R. [2010] M. P., 1973
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena & Mr. Justice S.C. Sinho
23 April, 2010*

GENDAUA (SMT.) ... Appellant
Vs.
STATE OF M.P. ... Respondent

Evidence Act (1 of 1872), Section 3 - ***Circumstantial evidence - Case based on - Conviction u/s 302 & 201 of IPC - Held, - Doctor did not depose positively that injuries of deceased were homicidal in nature - The evidence of alleged extra-judicial confession was doubtful and also inadmissible in evidence - Fact that appellant was last seen in company of deceased also not established beyond periphery of doubt - Injuries on person of appellant did not necessarily rise to inference that these injuries were sustained in assaulting the deceased - The conviction recorded by the trial Court set aside.*** (Paras 10, 11, 15 & 16)

साक्ष्य अधिनियम (1872 का 1), धारा 3 – परिस्थितिजन्य साक्ष्य – मामले का आधार – भा.द.सं. की धारा 302 व 201 के अंतर्गत दोषसिद्धि – अभिनिर्धारित, – चिकित्सक ने सकारात्मक रूप से अभिसाक्ष्य नहीं दिया कि मृतक की क्षतियों की प्रकृति मानव वध संबंधी थी – कथित न्यायिकेतर संस्वीकृति का साक्ष्य संदेहास्पद था और साक्ष्य में अग्राह्य भी था – तथ्य, कि अपीलार्थी को अंतिम बार मृतक के साथ देखा गया, भी शंका की परिधि से परे साबित नहीं हुआ – अपीलार्थी के शरीर पर की क्षतियों से आवश्यक रूप से यह निष्कर्ष नहीं निकलता कि ये क्षतियाँ मृतक पर हमला करने में हुईं – विचारण न्यायालय द्वारा अभिलिखित दोषसिद्धि अपास्त।

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*Cr.A. No.1531/2007 (Jabalpur)

Cases referred :

AIR 1996 SC 607, AIR 2007 SC 1218.

V.K. Rathore, for the appellant.

J.K. Jain, Dy.A.G., for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by RAKESH SAKSENA, J. :–Appellant has filed this appeal against the judgment dated 25th May, 2007 passed by learned Sessions Judge, Sidhi in Sessions Trial No. 115/2006, convicting her under Sections 302 and 201 of the Indian Penal Code and sentencing her to imprisonment for life with fine of Rs. 5000/- and rigorous imprisonment for three years on each count, respectively.

2. In short, facts of the prosecution case are that appellant Gendaua was married to Jagannath. After `Gauna', she visited her husband's house 2-3 times. Subsequently, she stopped going to his house, and generally lived at her parent's house. Despite efforts, since she did not go to live with Jagannath, he kept Durgawati, daughter of Baijnath Prajapati, as his second wife. Durgawati was though married to some other person, but her husband had deserted her. After some time, when Durgawati started living with Jagannath, appellant also went to the house of Jagannath, and started living with him. Durgawati and Gendaua lived in separate rooms of the house of Jagannath. It is alleged that in the morning of 22.5.2006, Durgawati went to forest taking a `Dholi' (a big basket of bamboo strips) for plucking `tendu leaves'. After some time, appellant also went to forest for plucking leaves. At about 10.30 a.m., appellant came back weeping to her house and informed Jagannath that Durgawati, who had climbed over the tree for plucking leaves had fallen down and died and that her body was lying under the tree. Jagannath informed the incident to his brother Motilal Prajapati and along with him and appellant went to forest and found Durgawati lying dead. There were injuries on her head, forehead and nose. Motilal Prajapati (PW2) went to police station, Kusmi and informed the police about the incident whereupon Head Constable Ram Singh (PW8) registered a marg report Ex. P/2.

3. Dy. S.P. N.N.Jharia (PW11) on the same day reached the spot and prepared inquest memorandum Ex. P/5. He seized blood stained and plain earth, broken pieces of bangles and slippers from the spot vide seizure memo Ex. 5-A. Dead body of Durgawati was sent for postmortem examination to Community Health Centre, Kusmi. Dr. Avinash John (PW5) with the assistance of Dr. Raj Bahadur Singh conducted postmortem examination of the dead body of Durgawati on 23.5.2006. He found crush injuries on her forehead, nose and on the back side of scalp and gave postmortem report Ex. P/9.

4. In the course of marg enquiry, it was revealed that a quarrel had occurred between the appellant and Durgawati over a dispute about `Dholi', wherein appellant scuffled with Durgawati and when Durgawati fell down, appellant caused injuries

to her by stone, as a result of which she died. It was also found that appellant dragged the body of Durgawati and put it near the 'tendu tree' and gave false information to her husband that Durgawati had fallen down from the tree. After marg inquiry, on 23.5.2006, Police Inspector N.K.Singh (PW13) registered the First Information Report Ex. P/15 under Section 302 of the Indian Penal Code against the appellant. During investigation, he arrested the appellant and on her information recovered and seized a stone lying hidden in the leaves vide seizure memo Ex. P/7. He also seized 'Dholi' and a saree vide seizure memo Ex. P/8 from the appellant. Appellant was also sent for medical examination. Dr. Umesh Kumar Singh (PW6) vide injury report Ex. P/10-A found some abrasions on the hands of appellant. After completion of the investigation, police filed the charge sheet against the appellant.

5. Appellant abjured her guilt and pleaded false implication. According to her, she was falsely implicated. Witnesses stated against her under the influence of police.

6. Learned Sessions Judge, after trial and upon appreciation of the evidence, adduced in the case held the appellant guilty and convicted her of the charges under Sections 302 and 201 of the Indian Penal Code. Aggrieved by the impugned judgment, appellant has filed this appeal challenging her conviction.

7. We have heard the learned counsel of both the parties and perused the evidence and material on record.

8. It has not been disputed that deceased Durgawati died of injuries. However, according to prosecution, the injuries on her body were homicidal in nature, whereas according to defence, Durgawati had sustained injuries by a fall from the tree. Dr. Avinash John (PW5), on postmortem examination found following injuries on the body of deceased: (i) right eye of the deceased closed, left eye protruded, tongue protruded and swollen, blood oozing from left eye, nose, peeling of skin over right shoulder, sternum right hand and elbow joint (ii) depressed fracture of frontal bone above right eye (iii) fracture of occipital bone (iv) depressed fracture of nasal bone (v) depressed fracture of frontal bone and right temparo parietal bone of the scalp (vi) abrasion over left shoulder and (vii) fecal matter passed out.

In the opinion of doctor, deceased died due to shock due to ante mortem crush injury by hard object. The injury of scalp was sufficient to cause death in ordinary course of nature.

9. In the cross examination Dr. Avinash John stated that these injuries were not possible by fall from the tree because if some body would fall from the tree, he would stretch his hands in his defence and in those circumstances he would receive injuries on hands also. He also stated that in a fall and in a scuffle all the injuries were not possible. In his opinion, the injuries found on the body of deceased were not of accidental nature.

10. After perusal of the postmortem report Ex. P/9-A and the evidence of Dr. Avinash John (PW5), we find that it has no where been stated that the injuries found on the body of deceased were homicidal. In our opinion, though doctor stated that if the person would fall from a height, he would receive some injuries on his/her hands also, but this cannot be accepted as a gospel truth because in case of sudden fall, the injured may not be in a position to use hands to ward off the injuries of head. Since, Dr. Avinash John (PW5) did not depose positively that the injuries found on the body of deceased were homicidal in nature, it cannot be held established that the injuries found on the body of deceased were homicidal in nature.

11. Learned counsel for the appellant submitted that there was no direct evidence in the case. The prosecution adduced only circumstantial evidence to prove its case, however, the trial Court gravely erred in placing implicit reliance on the circumstances sought to be established by the prosecution. He submitted that the evidence of extra judicial confession allegedly made by the appellant before Dinesh Prasad Tiwari (PW4) was not reliable as the possibility that it was made in the presence of police could not be ruled out. We have gone through the evidence of Dinesh Prasad Tiwari (PW4). According to Dinesh Tiwari, he did not know the appellant or the deceased before the incident. Deceased Durgawati was the second wife of Jagannath. He heard that appellant and Durgawati went to pluck 'tendu leaves' in the forest where Durgawati died. Further this fact was disclosed by appellant at the place of incident in presence of number of persons. She disclosed that she did not go for plucking leaves with Durgawati in the morning because it was dark, and Durgawati alone went to forest taking a 'Dholi'. After some time, she also went to forest and met Durgawati, but Durgawati refused to hand her over 'Dholi' to her then she scuffled with her, due to which Durgawati fell down. According to Dinesh Tiwari (PW4), appellant further disclosed that when Durgawati fell down, she picked up stones from the vicinity and assaulted Durgawati with them, as a result of which, she died. She told that she dragged Durgawati to some distance and put her beneath a tree. At that time, Durgawati was breathing. She, then, went to river and washed the stains of blood on her clothes and informed her husband that Durgawati fell from the tree and died. In cross examination, this witness admitted that he knew the appellant after the occurrence. He had gone to the place of occurrence on the next day when dead body was not there. In para-5 of his statement, he admitted that police seized the pieces of bangles from the spot and also recovered a stone on being pointed out by the appellant. From the above facts, it appears that the aforesaid confessional statement was made before number of persons and also in the presence of police. The incident is said to have taken place on 22.5.2006 at about 10 a.m., whereas this witness stated that he heard the appellant confessing her guilt before every body on the next day when the seizures were being made from the spot. Dy. S.P. N.N.Jharia (PW11) stated that on receiving report on 22.5.2006, he went to spot

and conducted inquest proceedings in presence of witnesses and also seized pieces of bangles from the spot. Inspector N.K.Singh (PW13) stated that after marg enquiry, he registered the case under Section 302 of the Indian Penal Code against the appellant and recorded first information report Ex. P/15. On 23.5.2006, he went to spot and also arrested the appellant. On the same day, on disclosure statement being given by the appellant, he recovered a blood stained stone near the place of incident hidden under the leaves. This clearly goes to indicate that on the next day of the incident when the aforesaid extra judicial confession was made by the appellant before Dinesh Prasad Tiwari (PW4), the police was present. In these circumstances, in our opinion, the evidence of alleged extra judicial confession relied on by the prosecution was doubtful and also inadmissible in evidence. Apart from it, Dinesh Prasad Tiwari was also confronted with his police statement Ex. D/4, wherein he no where stated that the appellant made any confession that she assaulted Durgawati by stone. The trial Court was not justified in relying on the aforesaid extra judicial confession on the ground that at least the part of statement of the appellant that she was present with the deceased and had dragged the body of deceased was established. Since it can be clearly inferred that all of the incriminating statements alleged to have been made by the appellant, were made, in the presence of police, they were not admissible in evidence and the trial Court committed serious error in holding that the extra judicial confession made to Dinesh Prasad Tiwari (PW4) was reliable and acceptable.

12. It is also significant to note that Dinesh Prasad Tiwari (PW4) was not known to appellant and was also not a person in authority in whom she could have reposed confidence. In these circumstances, credibility of PW4 becomes doubtful especially in the absence of any independent corroboration. Apex Court in *Balwinder Singh Vs. State of Punjab*- AIR 1996 S.C. 607 held that:

> "An extrajudicial confession by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extrajudicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance. The courts generally look for independent reliable corroboration before placing any reliance upon an extrajudicial confession."

We accordingly hold that the evidence of extrajudicial confession is not acceptable.

13. The evidence of deceased being last seen together with the appellant was nothing else than the aforesaid extra judicial confession of the appellant. None of the witnesses of the prosecution stated that the deceased had gone to forest with the deceased or that she was with her at the time of her death. Since we have found that the evidence of extra judicial confession was not reliable, this piece of circumstantial evidence also fails.

14. N.K.Singh (PW13) stated that in the presence of witnesses, Hubbalal Singh and Chhatrapal Singh, appellant disclosed that she had hidden the blood stained stone under the leaves. He recorded her statement in the memorandum Ex. P/6, and then before the aforesaid witnesses, appellant took out the stone kept under the leaves which he seized vide memorandum Ex. P/7. Hubbalal Singh (PW3), the attesting witness of aforesaid memorandums stated that though the information recorded in the memorandum Ex. P/6 was given by the appellant, but she did not get the stone recovered. In fact, police itself searched and found the stone lying near `tendu leaves'. Evidence of this witness about recovery of the aforesaid blood stained stone militates against the evidence of N.K. Singh (PW13). Hubbalal Singh (PW3) was not declared hostile by the prosecution, therefore, his evidence has to be treated as a part of the prosecution case. Other witness Chhatrapal Singh was not examined in the Court. Apart from it, the stone was recovered from an open place, accessible to all. Thus, in our opinion, it cannot be accepted beyond doubt that the said blood stained stone was recovered on the information given by the appellant.

15. The evidence of Baijnath Prajapati (PW1), the father of deceased, Motilal Prajapati (PW2), the brother of Jagannath and Hubbalal Singh (PW3) that they heard that appellant had gone for plucking the leaves with Durgawati, was clearly hearsay in nature and was therefore not admissible in evidence. According to Motilal Prajapati (PW2), appellant had told him that she had gone with Durgawati to pluck leaves, where Durgawati had fallen from the tree and died. Similarly, Hubbalal Singh (PW3) stated that he had received information that both the wives of Jagannath had gone to pluck the leaves in the forest where Durgawati died. He stated that the appellant disclosed before the police that she had a quarrel with the deceased. Thus, the evidence of these witnesses does not make out an admissible piece of evidence and the fact that appellant was last seen in the company of deceased does not stand established beyond the periphery of doubt.

16. Evidence of Dr. Umesh Kumar Singh (PW6) is that on the examination of the person of appellant he found (i) an abrasion on the middle finger of her left hand (ii) an abrasion on the elbow of left hand and (iii) an abrasion on her left palm. The first injury was caused by some sharp edged weapon and other two injuries were caused by some hard blunt object. According to prosecution, these injuries were sustained by the appellant while assaulting the deceased with the stone. The trial Court also held that since appellant did not explain how these injuries were received by her, it could be inferred that she suffered these injuries while assaulting the deceased with a stone. We are unable to agree with the finding recorded by the trial Court in this regard. Even if some trivial injuries were found on the person of appellant, it did not essentially give rise to inference that these injuries were sustained by her in assaulting the deceased. Even according to prosecution, the appellant had also gone to pluck `tendu leaves'; the possibility of suffering minor scratches on the hand by bushes or the branches of trees could

not be ruled out, therefore, in our opinion, trial Court committed error in concluding that injuries found on the hands of appellant formed an incriminating piece of evidence against her.

17. In *Ram Singh Vs. Sonia and others*-AIR 2007 SC 1218, the Apex Court observed:

> "39. The principle for basing a conviction on the basis of circumstantial evidence has been indicated in a number of decisions of this Court and the law is well settled that each and every incriminating circumstances must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. This Court has clearly sounded a note of caution that in a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The Court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It has also been indicated that when the important link goes, the chain of circumstances get snapped and the other circumstances cannot in any manner, establish the guilt of the accused beyond all reasonable doubts. It has been held that the Court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof, for some times unconsciously it may happen to be a short step between moral certainty and legal proof. It has been indicated by this Court that there is a long mental distance between 'may be true' and 'must be true' and the same divides conjectures from sure conclusions."

18. After a critical scrutiny of the circumstances sought to be proved by the prosecution keeping in view the legal position enunciated above, we find that the prosecution failed to establish that deceased died a homicidal death and that the appellant caused her death. The finding of conviction recorded by the trial Court, therefore, deserves to be set aside.

19. It was also contended by the learned counsel for the appellant that at the time of occurrence appellant was juvenile, therefore, the trial was bad in law. By order dated 5.10.2009, we had directed the learned Sessions Judge, Sidhi to hold an enquiry for determining the age of the appellant on the date of incident. In compliance of the said order, learned Sessions Judge held enquiry and submitted its report on 19.1.2010 concluding that on the date of incident i.e. 22.5.2006, appellant

was under 18 years of age i.e. a juvenile. Under Section 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for brevity referred to as `Act') the claim of juvenility may be raised before any court and it shall be recognized at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this `Act' and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of the `Act'. If the Court finds a person to be a juvenile on the date of commission of the offence, it shall forward the juvenile to the Board for passing appropriate orders, and the sentence, if any, passed by a court shall be deemed to have no effect. Special provision has been enacted in Section 20 of the `Act' in respect of pending cases, wherein it has been provided that all the proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and the if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence. The explanation attached to Section 20 of the Act provided that:

> **Explanation-** "In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of clause (1) of section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed."

20. Since after examining the case on merits, we have found the appellant not guilty, therefore, no order need be passed by us in respect of the question of dealing the appellant as juvenile.

21. For the reasons discussed hereinabove, we set aside the impugned judgment of conviction of appellant passed by the trial Court and acquit her of the charges levelled against her. Appellant be released forthwith, if not required in any other case.

22. Appeal allowed.

Appeal allowed.

I.L.R. [2010] M. P., 1981
APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saksena & Mr. Justice G.S. Solanki

11 August, 2010*

ANUSUIYA SINGH & ors. ... Appellants

Vs.

STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Sections 302, 304 Part-II r/w 34 - *The incident occurred in a sudden quarrel in which accused caused such injury to deceased which resulted in his unfortunate death - The real genesis regarding occurrence is not placed on record, so, one cannot reach the conclusion as to who was the aggressor in the incident - Appellants/accused have not taken undue advantage or have acted in a cruel or unusual manner - In these circumstances, the offence committed by appellants in relation to deceased falls under exception 4 of S. 300 IPC and they are liable to be convicted for committing culpable homicide, not amounting to murder.* (Paras 26 & 29)

दण्ड संहिता (1860 का 45), धाराएँ 302, 304 भाग–II सहपठित धारा 34 – घटना आकस्मिक झगड़े में घटित हुई जिसमें अभियुक्त ने मृतक को ऐसी क्षति कारित की जिसके परिणामस्वरूप उसकी दुर्भाग्यवश मृत्यु हुई – घटना के सम्बन्ध में वास्तविक उत्पत्ति अभिलेख पर नहीं रखी गयी, इसलिए कोई व्यक्ति इस निष्कर्ष पर नहीं पहुँच सकता कि घटना में आक्रमणकर्ता कौन था – अपीलार्थियों/अभियुक्तों ने अनुचित लाभ नहीं लिया है अथवा क्रूरतापूर्ण या असामान्य ढंग से कार्य नहीं किया है – इन परिस्थितियों में, अपीलार्थियों द्वारा मृतक के सम्बन्ध में किया गया अपराध भा.द.सं. की धारा 300 के अपवाद 4 के अन्तर्गत आता है और वे हत्या की कोटि में न आने वाला आपराधिक मानव वध करने के लिए दोषसिद्ध किये जाने योग्य हैं।

Vijay Nayak with *Anand Nayak,* for the appellants.

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

JUDGMENT

The Judgment of the Court was delivered by **G.S. Solanki, J.** :–The Additional Sessions Judge, Rewa vide impugned judgment dated 12.02.2002, in ST No. 71/2000 recording conviction of appellants/accused under Section 302/34 of IPC and Under Section 323/34 of IPC(on four count), sentenced them to undergo life imprisonment and to pay fine of Rs. 1,000/- (to each) with default stipulation , and RI for 1 year (to each) respectively.

2. Being aggrieved, appellants/accused have preferred this appeal under Section 374(2) of the Code of Criminal Procedure.

3. The prosecution case, in short, is that on 7th December, 1999 at about 5.30 a.m. in village Narora, PS Chourhata, complainant, Ramashray(PW-5) went to call of nature, he saw that accused Vishwanath(acquitted) is watering the field (which is disputed between complainant and his brother), from the pump, of

*Cr.A. No.369/2002 (Jabalpur)

sister-in-law of complainant. She is also sister-in-law of Vishwanath. Then complainant Ramashray (PW-5) asked to his sister-in-law that she is distributing the water to other persons of village, but why she is not giving the same water to him ,while he is ready to pay for the same. On this she replied that she will give him slipper.

4. On this altercation, accused Vishwanath stopped watering the disputed field, and went to his house but after some time he came back with Chhatrapati(A-2) and Vanshpati(A-3). They abused and grappled with complainant. Matter was intervened and pacified by Anusuiya Singh(A-1). Then all of them went to their respective homes, except complainant Ramashray. Thereafter, when complainant was returning, just before his house Anusuiya Singh(A-1) intercepted him, abused and gave lathi blows on his chest and feet, due to which he fell down. On shouting of complainant his wife Ram Sundri(PW-6), sons Virendra (PW-7), Narendra(PW-8), Sukhendra (deceased) came to rescue him. Then Anusuiya (A-1) gave a lathi blow to Ram Sundri(PW-6) on her head. Vanshpati gave a lathi blow near the eye of Sukhendra(deceased). Anusuiya(A-1) gave a lathi blow on the right hand and head of Virendra. According to complainant, on listening the hue and cry, Vanshpati (A-3), Chhatrapati(A-2), Daya Prakash(A-4), Vishwanath and Deep Narayan, already reached from their respective houses and took part in the incident. It was further alleged that if he was not rescued by his brother-in-law, Suryapal Singh (PW-9) and other villagers he would have been killed. He further alleged that accused persons threatened him and told that today he is saved but he will be killed in future.

5. Complainant lodged a report (Ex.P-29) at out-post Noubasta of Police Station, Chourhata. Injured persons were sent to Gandhi Hospital, Rewa where Dr. S.K. Pathak(PW-10) examined them but Sukhendra(son of complainant) succumbed to his injuries at about 3 p.m. on 7.12.99. Dead body of Sukhendra was sent for post-mortem. Dr. V.K. Sharma(PW-1) performed the autopsy on the dead body and opined that death was by shock, due to intracranial haemorrhage in head. Death was homicidal in nature. He prepared post-mortem report, Ex. P-1.

6. Offence under Sections 341,294,323,325,506-B and 302 read with 34 of IPC was registered against the appellants/accused. During investigation spot map was prepared. Blood stained and normal earth was seized from the spot. Appellants/accused were arrested. Lathis were seized at the instance of appellants/accused. Clothes of deceased were received from the hospital and clothes and lathis seized from appellants Vanshpati and Anusuiya were sent for chemical examination to FSL, Sagar. The Assistant Medical Examiner found blood on lathis seized from appellants Vanshpati and Anusuiya.

7. After completion of investigation, co-accused Deep Narayan was prosecuted in Juvenile Court and appellants were charge-sheeted and committed to Court of Session.

8. Learned Additional Sessions Judge, framed the charge under Sections 147,302/149,225/149 of I.P.C. and 323/149 of I.P.C. against the appellants/accused.

9. They abjured the guilt and pleaded that on 07.12.1999 at 5.30 a.m. on hearing the hue and cry of appellant Daya Prakash, Anusuiya(A-1) went to rescue him. But he was beaten by the wife of complainant Ramsundri and his sons. Vanshpati (A-3) , Chhatrapati (A-2), Deep Narayan, also arrived there. They were also assaulted by complainant party. Anusuiya(A-1), Vanshpati and Daya Pakash received injuries and examined by Dr. S.K.Pathak(PW-10). They also lodged the report(Ex. D-10) and examined defence witnesses Dr. Abhitabh Awasthy as DW-1 and Munna lal Bunkar as D.W-2.

10 On appraisal of the evidence on record, learned Additional Sessions Judge acquitted co-accused Vishwanath, of the charges levelled against him, but convicted and sentenced the appellants as mentioned hereinabove.

11. Learned counsel for the appellants submitted that the trial Court erred by not appreciating the evidence in its proper perspective. The incident was not fairly investigated. The complainant party was aggressor and occurrence took place suddenly on the spur of the moment. Therefore, the finding of conviction recorded by trial Court is erroneous, and liable to be set aside.

12. On the other hand, learned counsel for the State justified and supported the impugned judgment and the finding of the trial Court.

13. It is no longer disputed that death of Sukhendra was homicidal in nature . Dr. V.K. Sharma(PW-1) who performed autopsy on the dead body of Sukhendra found following injuries :- (i) Hematoma below skull skin in right parietal temporal region to Occipital region, size 12X10 c.m.(ii) Extradural hematoma on the temporal region, size 10X8 c.m. (iii) there was fracture in temporal parietal bone, size 12 c.m. (iv) Subdural haematoma on right side of brain,(v) subarchnoid haemorrhage on both side of brain. All injuries were ante-mortem, can be caused by hard and blunt object. He opined that death of Sukhendra was caused by shock, due to intracranial haemorrhage. Death was homicidal in nature. He prepared post-mortem report(Ex. P-1).

14. Dr. V.K. Sharma, is independent witness and his testimony remained intact during cross-examination. In these circumstances, it can be safely concluded that death of Sukhendra was homicidal in nature.

15. Prosecution case rests on the testimony of four injured witnesses namely complainant Ramashray (PW-5), wife of complainant Ram Sundri(PW-6), sons of complainant Virendra (PW-7) and Narendra(PW-8).

16. We have perused the testimonies of Suryapal Singh(PW-9) and Ajay Singh (PW-11) both of them are related witness of complainant and they reside in other village. They remained unable to explain that how they came to the village of complainant. According to both of them Muneem(PW-2) was also with them.

Muneem was independent witness and he did not support the versions of Suryapal Singh(PW-9) and Ajay Singh(PW-11). In this circumstances, presence of Suryapal Singh(PW-9) and Ajay Singh(PW-11) is doubtful at the place of incident. In our opinion trial Court rightly disbelieved them, we also ignore their testimonies.

17. Ramashray(PW-5) stated that there was a dispute between him and his brother regarding vacant plot which is lying adjacent to their house. Accused Vishwanath was taking water from the pump of his sister-in-law to irrigate said disputed plot. Then he told to his sister-in-law that she is distributing the water to other persons but why she is not giving water to him even when he is ready to pay for the same. In reply she said that she will give him slipper. On this point of time, Vishwanath stopped watering and went towards his house. After some time, he returned with Vanshpati(A-3), Chhatrapati(A-2) and abused complainant and grappled with him. Anusiya intervened and pacified them. All of them then dispersed.

18. According, to complainant when he was returning, just before his house, Anusuiya intercepted him and gave a lathi blow on his feet and second blow on his chest. Due to which he fell down. On his hue and cry, his wife Ram Sundri(PW-6), Virendra(PW-7) and Narendra(PW-8), Sukhendra(deceased) came to rescue. Simultaneously other accused persons Chhatrapati, Vishwanath, Deep Narayan, Daya Prakash, Vanshpati came over there and encircled them. Anusuiya gave a lathi blow on the head of Sukhendra. Vanshpati gave lathi blow on the eye of Sukhenda and other accused Vishwanath, Dayaprakash and Chhatrapati also beat Sukhendra. According to complainant all the accused persons gave lathi blows to his wife Ram Sundri and his sons. Witnesses Suryapal(PW-9) and Ajaypal (PW-11) when came to rescue them then accused persons fled away saying that today he has been saved but he will be killed in future. Complainant further stated that he lodged the report(Ex.P-29). He admitted in cross-examination that in the beginning appellant Vanshpati, Chhatrapati, Daya Prakash and Deep Narayan were not present at the place of occurrence. They arrived there after hearing the hue and cry. He further admitted that all the three injuries to Sukhendra were caused by accused Anusuiya and Vanshpati. He pleaded ignorance regarding injuries of accused Vanshpati and Anusuiya.

19. Learned counsel for the appellants vehemently argued that incident was not fairly investigated. Complainant party was aggressor and the occurrence took place suddenly. In the light of these argument we have to examine the materials placed before us.

20. It is true that accused persons were also injured in this very incident but all the prosecution witnesses viz. complainant Ramashray(PW-5), Ram Sundri(PW-6), Virendra (PW-7) and Narendra(PW-8) expressed ignorance regarding injuries found on the person of appellants/accused Anusuiya (A-1), Vanshpati(A-3) and Daya Prakash(A-4). Dr. S.K. Pathak(PW-10) deposed that he examined injuries of Anusuiya (A-1), Vanshpati (A-3) and Daya Prakash(A-4) also on 07.12.1999 and prepared MLC reports Ex. D-7,D-8 and D-9 respectively. It was done by him

simultaneously when he examined and treated injured persons of complainant party. He further deposed that injuries found on the person of accused persons were caused by hard and blunt objects. According to him, he suspected fracture on the body of Anusuiya and Vanshpati therefore, he referred them to Orthopedic Department.

21. S.P. Chaturvedi(PW-12), investigating officer admitted that Daya Prakash(A-4) lodged a report of Marpeet which was registered in Rojnamcha Sanha No. 98 Ex. D-10C and he sent Anusuiya(A-1), Vanshpati(A-3) and Daya Prakash(A-4) for their medical examination.

22. On perusal of Ex. D-10C it reveals that sister-in-law of complainant, is real maternal aunt of Daya Prakash(A-4). Daya Prakash is son of Vishwanath, in this way she(Siya devi) is sister-in-law of Vishwanath (acquitted accused). It further reveals that complainant Ramashray raised the dispute regarding field which was being watered by Vishwanath. At this point of time, Anusuiya(A-1) pacified the matter by saying that they should verify the possession on disputed plot with the help of Patwari.

23. Dharmendra Prasad Saket(PW-4) Patwari, admitted that disputed field, Araji No. 9 is divided in three parts. No. 9/1 is recorded in the name of Shiv Balak Singh, No. 9/2 is recorded in the name of Arun Singh and No. 9/3 is recorded in the name of Soukhi lal Singh. But all these numbers are in possession of complainant Ramashray and his brother Jay Ram Singh. It is also important to note that Vishwanath is a son of Shiv Balak Singh. In this way real dispute was regarding the possession of disputed field but unfortunately prosecution failed to place the real genesis of the incident before the Court and investigated the matter one sided.

24. The incident reported by Daya Prakash(A-4) in Sanha report (Ex.D-10C) is different to FIR (Ex.P-29). According to Ex. D-10C when matter was pacified by Anusuiya(A-1), at about 6 O' clock, complainant Ramashray returned and near his house abused Anusuiya(A-1) and grappled with him. At the same time, Ram Sundri(PW-6) and his sons Virendra Narendra and Sukhendra also came there and pelted earthen clods. On hue and cry of Anusuiya, other appellants Vanshpati , Chhatrapati and Deep Narayan rushed to rescue him.

25. Facts on record indicate that the matter was not fairly investigated and true genesis of the incident was not brought before the Court.

26. We are conscious that on mere non explanation of injuries on the body of accused persons, whole of the prosecution case can not be thrown out, but at the same time this fact and circumstance can not be altogether ignored. Keeping in mind the above facts we have examined the statements of injured witnesses Ram Sundri(PW-6), Virendra(PW-7) and Narendra(PW-8). Though all of them corroborate the version of complainant but there are some improvements and exaggerations from their respective police statements Ex. D-2,D-3 and D-4. Despite these improvements, their testimonies can not be disbelieved because

they are injured persons and their presence is also well established by the report lodged by Daya Prakash(A-4), Ex. D-10. Their testimonies find support by medical evidence of Dr.S.K. Pathak(PW-10) who examined and treated them and found simple injuries on their person as well as on the body of Sukhendra(deceased). The testimony of complainant is substantially corroborated by the FIR(EX. P-29). In these circumstances, where real genesis regarding occurrence is not placed on record, one can not reach the conclusion as to who was the aggressor in the incident. Then only fact we find proved is that the incident occurred in a sudden quarrel in which accused caused such injury to Sukhendra which resulted in his unfortunate death.

27. Chhatrapati(A-2), Vanshpati(A-3) and Daya Prakash(A-4) reached to the place of incident hearing the hue and cry. This fact also finds support from the FIR of complainant(Ex.P-29). In these circumstances, only one inference can drawn that they committed the offence without premeditation in a sudden fight.

28. Some of injured persons admitted that Sukhendra(deceased) was beaten by Anusuiya(A-1) and Vanshpati(A-3) only. But considering the facts that all appellants gave lathi blows to the members of complainant party including deceased, other appellant can not be excluded from their vicarious liabilities for joining the common intention.

29. Now we have to see that whether incident took place in the heat of passion upon a sudden quarrel and whether any appellants/accused took undue advantage or acted in a cruel or unusual manner. As we discussed hereinabove that Anusuiya(A-1), Vanshpati(A-3) and Daya Prakash(A-4) also received injuries by hard and blunt object it means that they were also assaulted, but at the same time they had also given lathi blows to the complainant party. It shows that appellants/ accused have not taken undue advantage or have acted in a cruel or unusual manner. In these circumstances, the offence committed by appellants in relation to Sukhendra(deceased) falls under exception 4 of Section 300 of IPC and they are liable to be convicted for committing culpable homicide, not amounting to murder.

30. As discussed hereinabove we are of the considered opinion that trial Court committed error in recording the conviction of appellants for the offence punishable under Section 302/34 of IPC. Therefore, we set aside their conviction and sentence under Section 302/34 of IPC and convict them under Section 304 Part II read with Section 34 of IPC.

31. In regard to sentence, on perusal of record, we find that Anusuiya(A-1), Vanshpati(A-3) are in jail from 16.11.2000 to till date i.e. about 9 years and 7 months. Chhatrapati(A-2) was in custody from 17.12.99 to 18.07.2000 and 12.12.2002 to till date i.e. about 8 years. Daya Prakash(A-4) was in custody from 09.12.99 to 03.03.2000 and 12.12.2002 to till date i.e. about 7 years and 8 months. Considering the period of their custody, if their sentences are reduced to period of

sentence already undergone by them, it would meet the ends of justice. Therefore, appellants are sentenced to period of sentence already undergone by them.

32. As regard to simple injuries caused to complainant Ramashray, witnesses Ram Sundri, Virendra and Narendra, conviction and sentence recorded under Section 323/34 of IPC by the trial Court is hereby affirmed. Substantive sentences to run concurrently.

33. The appeal filed by the appellants is partly allowed to the extent mentioned hereinabove.

Appeal partly allowed.

I.L.R. [2010] M. P., 1987
CIVIL REVISION
Before Mr. Justice Piyush Mathur
31 March, 2010*

TULSIRAM & ors. ... Applicants
Vs.
GAMBHIR SINGH & ors. ... Non-applicants

A. Civil Procedure Code (5 of 1908) - *Transfer of case - Permissibility - Held - It is a cardinal principle of law that unless the nature of the two suits pending between identical set of parties are not similar then the two cases either diverse in nature or pending amongst different set of litigation could not be tried together merely on account of commonness of the suit property.* (Para 7)

क सिविल प्रक्रिया संहिता (1908 का 5) – वाद का अंतरण – अनुज्ञेयता – अभिनिर्धारित – यह विधि का मुख्य सिद्धांत है कि जब तक कि समान संवर्ग के पक्षों के बीच लंबित दोनों वादों की प्रकृति एक समान नहीं है तब तक या तो अलग–अलग प्रकृति के या दो भिन्न संवर्ग के मुकदमों में लंबित वह दोनों वाद मात्र वाद सम्पत्ति समान होने के कारण उनका एक साथ विचारण नहीं किया जा सकता।

B. Civil Procedure Code (5 of 1908) - *Transfer of case - Power of the Court - Held - The power of the Court to transfer the suit is certainly wide in terms of S. 24 of CPC which empowers the District Court and the High Court to transfer the suit or appeal for their trial or disposal to any Court subordinate to it and competent to try and dispose of the same, but the Court exercise this power only in such circumstance where it become imperative for the Court to exercise the power for meeting the ends of justice.* (Para 8)

ख. सिविल प्रक्रिया संहिता (1908 का 5) – वाद का अंतरण – न्यायालय की शक्ति – अभिनिर्धारित – वाद अंतरित करने की न्यायालय की शक्ति सि.प्र.सं. की धारा 24 के पद में निश्चित रूप से व्यापक है, जो जिला न्यायालय तथा उच्च न्यायालय को वाद अथवा अपील किसी भी अधीनस्थ तथा उसका विचारण और निराकरण करने के लिये सक्षम न्यायालय को विचारण अथवा निराकरण

*C.R. No.138/2009 (Gwalior).

करने के लिए अंतरित करने की शक्ति प्रदान करती है, परंतु न्यायालय इस शक्ति का प्रयोग केवल ऐसी परिस्थितियों में करता है, जहाँ न्याय करने के लिए इस शक्ति का प्रयोग करना न्यायालय के लिए अत्यावश्यक हो जाता है।

Cases referred :

2000(I) MPWN 215, (2008) 3 SCC 659.

M.K. Gupta, for the applicants.

R.S. Pawaiya, for the non-applicant No.1.

ORDER

PIYUSH MATHUR, J. :–This Revision Petition has been preferred by the Petitioners on being aggrieved by the Order, passed by the District Judge, Gwalior in Civil Misc. Case No. 72/09 *(Tulsiram and Others Vs. Gambhir Singh and Others)* on Date 13.08.2009, whereby the application of the petitioners, preferred under Section 24 of Code of Civil Procedure, seeking Transfer of the Civil Suit No. 31-A/09 has been rejected on the ground that the two Suits are different in nature and are pending amongst different set of parties, which can not be tried together or in one Court.

2. I have heard Shri M.K. Gupta, Learned Counsel for the Petitioners and Shri R.S. Pawaiya, Learned Counsel for the Respondent No. (1) and I have perused the Order and documents annexed with the record of this case.

3. The Petitioners Tulsiram and Others have moved an application before the District Judge, Gwalior under Section 24 C.P.C. by demonstrating that the respondent Gambhir Singh had filed a Civil Suit No. 47-A/09 without impleading him as a party, although Tulsiram and Others have filed Civil Suit No. 31-A/2009 in relation to the same property and for achieving uniformity of the Judgment it is required in the interest of justice to Transfer the Civil Suit No. 31-A/09 pending before the 3rd Civil Judge, Class-II, Gwalior to the 9th Additional District Judge, Gwalior, where the Civil Suit No. 47-A/09 is pending.

4. Shri M.K. Gupta, Learned Counsel for the Petitioners submits that the two Suits relate to the same property situated at Survey No. 88 at village Jodhpura and if two separate judgments are passed, then a very peculiar situation would arise, which may not meet the ends of justice. He referred to the judgment of this Court reported as 2000(1) MPWN 215 *Gaya Prasad Vs. Kishorilal* to demonstrate that when both the Suits relate to the same property wherein parties are also identical then the Suit should be tried together.

5. Shri R.S. Pawaiya, Learned Counsel for the Respondent No. 1 submits that the nature of the two Suits are quit different and the parties are also different, therefore neither the joint trial is required nor permissible in the eyes of law. He further submits that the applicant has no relationship with the deceased Kharga who was the original owner of the property and being a stranger to the property and the family, the petitioner has no right to secure Transfer of two Suits for conduction of a joint trial.

6. A perusal of the impugned Order passed by the District Judge reveals that the Civil Suit No. 47-A/09 has been instituted for securing the relief of declaration of specific performance of contract / agreement, wherein the respondent Gambhir Singh had entered into an agreement Dated 06.02.1990 for purchasing Survey No. 88 for a consideration of Rs. 65,000/-, whereas Civil Suit No. 31-A/09 is a Suit wherein the present petitioner Tulsiram has claimed himself to be a legal representative of the deceased Kharga and sought cancellation of the Order of mutation as also for recording his name and possession in the revenue record. The petitioner has also claimed restoration of possession of the property in the Suit.

7. The Trial Court while examining the nature of the two Suits has found that although the disputed property described in the two Suits is comprised in Survey No. 88, but the nature of the dispute and the parties to the Suit are different. It is a cardinal principle of law that unless the nature of the two Suits pending between identical set of parties are not similar then the two cases either diverse in nature or pending amongst different set of litigation could not be tried together merely on account of commonness of the Suit property. Therefore the judgment cited by the Counsel for Petitioners shall not help him.

8. The power of the Court to Transfer the Suit is certainly wide in terms of Section 24 of CPC which empowers the District Court and the High Court to Transfer the Suit or Appeal for their trial or disposal to any Court subordinate to it and competent to try and dispose of the same, but the Court exercise this power only in such circumstance where it become imperative for the Court to exercise the power for meeting the ends of justice.

9. The Supreme Court has observed in a case reported as (2008) 3 SCC 659 *Kulwinder Kaur v. Kandi Friends Education Trust* that the power to Transfer a case must be exercised with due care, caution and circumspection. For ready reference relevant paragraph of this judgment are quoted herein below :

> *"22. Although the discretionary power of transfer of cases cannot be imprisoned within a straitjacket of any cast-iron formula unanimously applicable to all situations, it cannot be gainsaid that the power to transfer a case must be exercised with due care, caution and circumspection.*
>
> *23. Reading Sections 24 and 25 of the Code together and keeping in view various judicial pronouncements, certain broad propositions as to what may constitute a ground for transfer have been laid down by courts. They are balance of convenience or inconvenience to the plaintiff or the defendant or witnesses; convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit; issues raised by the parties;*

reasonable apprehension in the mind of the litigant that he might not get justice in the court in which the suit is pending; important questions of law involved or a considerable section of public interested in the litigation; "interest of justice" demanding for transfer of suit, appeal or other proceeding, etc. Above are some of the instances which are germane in considering the question of transfer of a suit, appeal or other proceeding. They are, however, illustrative in nature and by no means be treated as exhaustive. If on the above or other relevant considerations, the court feels that the plaintiff or the defendant is not likely to have a "fair trial" in the court from which he seeks to transfer a case, it is not only the power, but the duty of the court to make such order."

10. Therefore while examining the nature of the two Suits and after giving anxious consideration to the rival submissions of the ligating parties and looking to the nature of the two Suits (as also the two different set of parties) and the dissimilar relief claimed in the two Suits, this Court do not find any jurisdictional error in the impugned Order passed by the District Judge, Gwalior, while rejecting the application preferred under Section 24 of the Code of Civil Procedure.

11. Consequently the Revision fails and is hereby dismissed. Needless to observe that the Interim Order passed on Date 16.12.2009 restraining the Courts below to proceed with the Trial, gets vacated upon dismissal of this Revision Petition.

A copy of this Order be transmitted to the District Judge, Gwalior.

Revision dismissed.

I.L.R. [2010] M. P., 1990
CRIMINAL REVISION
Before Mr. Justice N.K. Mody
6 April, 2010*

MANOJ ... Applicant
Vs.
STATE OF M.P. ... Non-applicant

A. Prevention of Food Adulteration Act (37 of 1954), Section 16(1)(a)(i) - *Petitioners were prosecuted u/s 7/16 of the Act for violation of Rule 32(e) of the Food Adulteration Rules, 1955 - Violation of Rule 32(e) which has been declared to be ultra-vires, can not be said to be an offence - Conviction of petitioner for misbranding on account of violation of Rule 32(e) cannot be allowed to sustain.* (Para 11)

क खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 16(1)(ए)(i) –

*Cr.R. No.531/2008 (Indore)

खाद्य अपमिश्रण नियम, 1955 के नियम 32(ई) के उल्लंघन के लिये याचियों को अधिनियम की धारा 7/16 के अंतर्गत अभियोजित किया गया – नियम 32(ई) जिसे अधिकारातीत घोषित किया गया है, का उल्लंघन अपराध नहीं कहा जा सकता – नियम 32(ई) के उल्लंघन के कारण मिथ्या छाप के लिये याची की दोषसिद्धि कायम नहीं रखी जा सकती है।

B. Prevention of Food Adulteration Act (37 of 1954), Section 16(1)(a)(ii) - *Documents filed by the prosecution itself, which goes to show that on the relevant date petitioner was possessing the license - Petitioner was possessing the license on the date of alleged offence, therefore, the conviction of the petitioner on that account also can not be allowed to sustain.* (Para 11)

ख खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 16(1)(ए)(ii) – स्वयं अभियोजन द्वारा प्रस्तुत दस्तावेज यह दर्शाते हैं कि सुसंगत तारीख को याची के पास लायसेंस था – कथित अपराध की तारीख को याची के पास लायसेंस था, इसलिए इस कारण भी याची की दोषसिद्धि कायम रखने की इजाजत नहीं दी जा सकती है।

Cases referred :

1972 FAC 1 (SC), 2003(3) MPHT 168.

P.K. Sharma, for the applicant.

Manish Joshi, P.L., for the Non-applicant.

ORDER

N.K. Mody, J. :–This order shall also govern the disposal of Cr.R. No.436/07, as in both the cases parties are one and the same and in both the cases petitioner has been convicted for an offence punishable under the provisions of Food Adulteration Act.

2. Cr.R.531/08 is filed against the judgment dated 30/04/08 passed by XII ASJ, Indore in Cr. A. No.208/08, which is arising out of judgment dated 05/03/08 passed by JMFC, Indore in Criminal Case No.4955/08, whereby the petitioner was convicted for an offence punishable under Section 16(1)(A)(i) of Prevention of Food Adulteration Act with imprisonment of six months and fine of Rs.1,000/- and under Section 16(1)(A)(ii) of Prevention of Food Adulteration Act with imprisonment of three month and fine of Rs.1,500/- was confirmed.

3. Cr.R. No.436/07 is filed against the judgment dated 19/03/07 passed by VII Additional Sessions Judge, Indore in Cr.A. No.81/07 whereby the judgment dated 24/01/07 passed by Special JMFC, Indore in Criminal Case No.4741/04 whereby petitioner was convicted under Section 16(1)(A)(i) and 16(1)(A)(ii) of Food Adulteration Act for a period of three month and fine of Rs.500/-, was confirmed.

4. In Cr.R. No.531/08 petitioner was prosecuted by the respondent under the provision of Prevention of Food Adulteration Act, 1954, (which shall be referred hereinafter as an Act), alleging that on 28/04/04 when Food Inspector took inspection of shop (Sagar Foods) of petitioner and purchased Synthetic Sweetened Carbonated Bevrage which was for sale. It was alleged that the sample was taken and after the report of analyst it was found that the same was misbranded.

It was prayed that the petitioner be convicted. After the trial it was found that the Synthetic Sweetened Carbonated Bevrage, which was in possession of the petitioner was misbranded. Hence the petitioner was convicted and was sentenced as stated above and in appeal the conviction was maintained.

5. While, in Cr.R. No.436/07 petitioner was prosecuted by the respondent under the provision of Prevention of Food Adulteration Act, 1954, alleging that on 28/04/04 when Food Inspector took inspection of shop (Sagar Foods) of petitioner and purchased Qurocol Relax Brand Orange Synthetic Sweetened Carbonated Beverages which was for sale. It was alleged that the sample was taken and after the report of analyst it was found that the same was misbranded. It was prayed that the petitioner be convicted. After the trial it was found that the Qurocol Relax Brand Orange Synthetic Sweetened Carbonated Beverage, which was in possession of the petitioner was misbranded. Hence the petitioner was convicted and was sentenced as stated above and in appeal the conviction was maintained.

6. Learned counsel for the petitioner in both the petitions argued at length and submits that petitioner has been convicted illegally while petitioner has not committed any offence. It is submitted that mandatory provisions of the Act were not complied with, hence the prosecution itself was bad in law. Learned counsel further submits that the learned Courts below committed error in not properly appreciating the evidence which resulted incorrect judgment and is liable to be set aside in these revisions. It is submitted that the learned Courts below committed error in not considering that material omissions and contradictions appearing in the testimony of the prosecution witnesses. It is submitted that from the report of public analyst Ex.P/15 in Cr.R. No.531/08 and Ex.P/10 in Cr.R. No.436/07 and the statement of Food Inspector who was the sole witness, it is evident that there was no case of adulteration, but it was a case of misbrand as per Rule 32 (e), e(x) of the Rules. It is submitted that since the Rule itself has been declared ultra-vires, therefore, the impugned judgment passed by the learned Courts below deserves to be quashed.

7. In alternative learned counsel submits that in Cr.R. No.531/08 petitioner was in jail w.e.f. 30/04/08 and the jail sentence was suspended by this Court Vide order dated 14/05/08, while with Cr.R. No.436/07 petitioner was in jail w.e.f 19/03/07 and the jail sentence was suspended by this Court vide order dated 28/03/07. It is submitted that looking to the nature of offence and the fact that petitioner has already served part of jail sentence, the same may be reduced to the period already undergone.

8. Learned counsel for the State submits that after due appreciation of evidence both the Courts below have found the petitioner guilty for the aforesaid offnece. It is submitted that revisional jurisdiction of this Court is limited and no interference is called for in the concurrent findings recorded by the Courts below.

9. From perusal of the record it is evident that the charge against the petitioner was that the article which was seized from the petitioner was mis-branded and

the petitioner was not possessing the license, thus, petitioner has committed an offence which is punishable under Section 7(i)(iii)/16(i)(A)(i)(ii) of the Act.

10. In exercise of powers conferred by the provisions of Food Adulteration Act, 1954, Central Government has framed the Rules, which are known as Food Adulteration Rules, 1955 (which shall be referred hereinafter as "Rules"). Rule 42 of the Rules deals with form of labels. Rule 50 of the Rules deals with the conditions of license, while Rule 32(e) of the Rules deals with package of food to carry a label. Rule 32(e) of the Rules reads as under:

> A distinctive batch number or lot number or code number, either in numericals or alphabets or in combination, the numericals or alphabets or their combination, representing the batch number or lot number or code number being preceded by the words "Batch No" or Batch or "Lot No" or "Lot" or any distinguishing prefis;
>
> Provided that in case of canned food, the batch number may be given at the bottom, or on the lid of the container, but the words "Batch No." given at the bottom or on the lid, shall appear on the body of the container.

11. In the matter of *Dwarka Nath Vs. M.C.D.*, 1972 FAC 1(SC) Rule 32(e) of the Rules has been declared as ultra-vires . Following the said decision this Court in the matter of *Hariram Vs. State of M.P.*, 2003(3) MPHT 168 in a case where petitioners were prosecuted under Section 7/16 of the Act for violation of Rule 32(e) of the Rules held that the violation of Rule 32(e) of the Rules which has been declared to be ultra-vires, its violation can not be said to be an offence and the petitioners were discharged. In the circumstances conviction of the petitioner for misbranding on account of violation of Rule 32(e) of the Rules cannot be allowed to sustain.

12. So far as the fact that the petitioner was not possessing the license at the relevant time is concerned, the date of alleged offence is 28/04/04 in both the cases and in both the cases samples were taken at about 11:00 am. In Cr.R. No.531/08 Ex.P/8 is the license which was valid for the period w.e.f. 01/04/03 to 31/03/04. In Cr.R. No.436/07 the license is Ex.P/5 and Ex.P/6 which were valid for the period w.e.f. 01/04/03 to 31/03/04 and 01/04/04 to 31/03/05 respectively. These documents have been filed by the prosecution itself, which goes to show that on the relevant date petitioner was possessing the license. In the license which has been issued by Municipal Corporation, Indore it is mentioned that the license is being given under the provisions of Food Adulteration Act.

13. Rule-50 of the Rules lays down that no person shall manufacture, sell, stock, distribute or exhibit for sale any article of food, including prepared food or ready to serve food except under a license.

14. Since the petitioner was possessing the license on the date of alleged offence, therefore, the conviction of the petitioner on that account also can not be allowed to sustained. In view of the aforesaid position of facts and law, this Court is of the

view that the conviction of the petitioner under Section 16(1)(A)(i) & (ii) for violation of Section 7 (i)(iii) is illegal, incorrect and deserves to be set aside.

15. In view of this, both the petitions are allowed and the impugned judgments passed by the learned Courts below are set aside. Consequently petitioner stands acquitted.

16. With the aforesaid observations, petition stands disposed of. A copy of this order be placed in the record of Cr.R. No.436/07.

Petition disposed of .

I.L.R. [2010] M. P., 1994
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice N.K. Mody
26 March, 2010*

KISHORE GOYAL ... Applicant
Vs.
HANIF PATEL ... Non-applicant

Negotiable Instruments Act (26 of 1881), Sections 7, 138 & 142 - ***Cognizance - Cognizance of the matter can be taken upon complaint in writing by payee or holder in due course of cheque - Cheque was issued in favour of father of non-applicant - No where in complaint it is stated that payee has died and who are legal representatives - No where stated that how non-applicant is entitled for the cheque amount - The complaint is not maintainable - Petition allowed.*** (Para 6)

परक्राम्य लिखत अधिनियम (1881 का 26), धाराएँ 7, 138 व 142 – संज्ञान – मामले का संज्ञान चैक के पाने वाले या सम्यक् अनुक्रम–धारक द्वारा लिखित परिवाद पर लिया जा सकता है – चैक अनावेदक के पिता के पक्ष में जारी किया गया – परिवाद में यह कहीं भी उल्लिखित नहीं है कि पाने वाले की मृत्यु हो गयी है और विधिक प्रतिनिधि कौन हैं – कहीं भी उल्लिखित नहीं कि अनावेदक किस प्रकार चैक की राशि का हकदार है – परिवाद पोषणीय नहीं है– याचिका मंजूर।

Cases referred :

1996 CrLJ 3153, (2002) 2 SCC 642, ILR (2008) MP SN 60, AIR 1964 Punjab 497.

S.P. Joshi, for the applicant.
Balendu Dwivedi, for the non-applicant.

O R D E R

N.K. Mody, J. :–Being aggrieved by the order dated 17/07/2009 passed by JMFC, Indore in criminal case No.15233/2009 whereby the application filed by the petitioner for dismissal of the complaint was dismissed, the present petition has been filed.

2. Short facts of the case are that the respondent filed a complaint under

*M.Cr.C. No.5342/2009 (Indore)

Section 138 of Negotiable Instruments Act (which shall be referred hereinafter as "NI Act") alleging that a cheque was issued by the petitioner for a sum of Rs.1,00,000/- on 10/09/2007 in favour of Kudrat Patel, father of the respondent. It was alleged that the cheque was presented by the respondent for collection through its banker which was returned by the concerned Bank with a memorandum bearing remark "account closed". It was alleged that vide notice dated 20/11/2007 demand was made by the respondent but neither the notice was replied nor the cheque amount was paid, thus, petitioner committed an offence alleged to have been committed under Section 138 of NI Act. It was prayed that after taking cognizance of the offence, petitioner be convicted. Upon presentation of complaint cognizance of the offence was taken by learned trial Court and notices were issued to the petitioner. Upon issuance of notice the petitioner approached this Court by filing a petition for quashment of complaint which was numbered as M.Cr.C. No.2846/2009 and was disposed of by this Court vide order dated 24/04/2009 wherein it was directed that the petitioner shall move an appropriate application before the learned Court below. It was further directed that if such an application is filed, then, after giving an opportunity of hearing to the respondent the same shall be decided by learned Court below in accordance with law without being impressed with the fact that cognizance of the offence has already been taken against the petitioner. In compliance of the order passed by this Court application was filed by the petitioner before learned Court below and after giving an opportunity of hearing to the respondent the application was dismissed by learned Court below vide order dated 17/07/2009 against which the present petition has been filed.

3. Learned counsel for the petitioner argued at length and submits that the impugned order passed by learned trial Court is illegal, incorrect and deserves to be set-aside. It is submitted that from the complaint it is evident that the alleged cheque was issued by petitioner in favour of Kudrat Patel while the complaint has been filed by respondent/Hanif Patel who is claiming himself to be the son of Kudrat Patel. It is submitted that in the complaint it is no where stated by the respondent that when Kudrat Patel died. It is submitted that in the complaint it is also no where stated how the respondent is entitled to prosecute the petitioner while the cheque was issued in favour of Kudrat Patel. Learned counsel submits that in the facts and circumstances of the case, the impugned order passed by learned trial Court whereby the application filed by the petitioner was dismissed is illegal, incorrect and deserves to be set-aside. Learned counsel placed reliance on a decision of Kerala High Court in the matter of *P.K. Koya Moideen Vs. G. Hariharan* 1996 Cri.L.J. 3153 wherein the cheque was drawn in the name of father of complainant and subsequent to issuance of cheque father of complainant died and thereafter the complaint was filed by the complainant claiming payment in the capacity of executor of father's will Hon'ble Kerala High Court held that genuineness of will also to be adjudicated and such executor of will therefore

cannot be termed as 'holder in due course'. It is submitted that in the facts and circumstances of the case, petition filed by the petitioner be allowed and the impugned order passed by learned trial Court be set-aside and the prosecution initiated by the respondent be quashed.

4. Mr. Balendu Dwivedi, learned counsel for the respondent submits that cognizance of the offence has already been taken by learned trial Court. It is submitted that since respondent was the son of deceased in whose favour cheque was issued, therefore, learned trial Court committed no error in dismissing the application filed by the petitioner. Learned counsel for the respondent placed reliance on a decision of Hon'ble Apex Court in the matter *A.V. Murthy Vs. B.S. Nagabasavanna* (2002) 2 SCC 642 wherein Hon'ble Apex Court has observed that in view of Section 118 and 139 of the Negotiable Instruments Act, Section 25(3) of the Contract Act, 1872 and in the presence of a documentary evidence which might amount to acknowledgment reviving the period of limitation, the present case was not one where the cheque was drawn in respect of a debt or liability, which was completely barred from being enforced under law. However, these are matters to be agitated before the Magistrate by way of defence of the respondent. But at this stage of the proceedings, to say that the cheque drawn by the respondent was in respect of a debt or liability which was not legally enforceable, was clearly illegal and erroneous. Therefore, it is held that the Sessions Court and the High Court erred in quashing the complaint proceedings. Further reliance is placed on a decision of this Court in the matter of *Ramprasad Vs. Smt. Sudhaben* ILR M.P. Series notes of cases 60 wherein cheque was drawn in favour of a person who was died and complaint was filed on behalf of L.Rs. this Court held that complaint is maintainable. Reliance is placed on a decision in the matter of *Padam Parshad Vs. Lok Nath Ishwar Sarup* AIR 1964 Punjab 497 wherein suit was filed on the basis of promissory note by heirs of holder of promissory note Full Bench of Punjab High Court held that suit is maintainable. It is submitted that petition filed by the petitioner is having no merits and the same be dismissed.

5. As per Section 142 of NI Act cognizance of the offence can be taken upon the complaint in writing to payee or the holder in due course of the cheque. The word payee, holder and holder in due course is defined in Section 7, 8 and 9 of NI Act which reads as under:-.

> **7. Drawer, Drawee.** The maker of a bill of exchange or cheque is called the drawer "; the person thereby directed to pay is called the "drawee".
>
> **"Drawee in case of need"** When in the bill or in any endorsement thereon the name of any person is given in addition to the drawee to be resorted to in case of need, such person is called a "drawee in case of need ".
>
> **"Acceptor"** After the drawee of a bill has signed his assent upon

the bill, or, if there are more parts thereof than one, upon one of such parts, and delivered the same, or given notice of such signing to the holder or to some person on his behalf, he is called the "acceptor".

"Acceptor for honour" [When a bill of exchange has been noted or protested for nonacceptance or for better security,] and any person accepts it supra protest for honour of the drawer or of any one of the endorsers , such person is called an "acceptor for honour".

"Payee" The person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid, is called the "payee".

8."Holder" - The " holder" of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.

Where the note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction.

9. "Holder in due course" "Holder in due course" means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof, if [payable to order,] before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

6. In the present case cheque is in favour of deceased/Kudrat Patel. In the complaint it is no where stated that when Kudrat Patel has died. Similarly except in title no where it has been stated by the respondent that how the respondent is entitled for the cheque amount. It is also not mentioned in the complaint that who are the legal representatives of deceased/Kudrat Patel and prior to his death any will was executed by the deceased or not ? Since the complaint has been filed by a person in whose favour no cheque was issued by the petitioner, therefore, in the opinion of this Court no cognizance could have been taken against the petitioner for an offence alleged to have been committed by the petitioner keeping in view sub-section (a) of Section 142 of NI Act. In view of this, the petition filed by the petitioner is allowed and the impugned order passed by learned trial Court and also the complaint filed by the respondent stands quashed. Petitioner stands discharged. C.C. as per rules.

Petition allowed.

I.L.R. [2010] M. P., 1998

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.C. Sinho

3 May, 2010*

OM PRAKASH CHATURVEDI ... Applicant

Vs.

STATE OF M.P. ... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 451 - *Application by complainant for Supurdgi of gun subject matter of robbery, dismissed by CJM holding that the gun is subject matter of evidence during trial - Revision also dismissed by ASJ - Held - Where stolen or looted articles are seized by police it should be released on Supuradnama to the person who prima facie establish his possession over the articles - Petition allowed.* (Para 7)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 451 – लूट की विषय वस्तु बंदूक की सुपुर्दगी के लिए परिवादी द्वारा प्रस्तुत आवेदन मुख्य न्यायिक मजिस्ट्रेट द्वारा खारिज किया गया यह मानते हुए कि बंदूक विचारण के दौरान साक्ष्य की विषय वस्तु है – पुनरीक्षण को भी अतिरिक्त सेशन न्यायाधीश द्वारा खारिज किया गया – अभिनिर्धारित – जहाँ चोरी की गई अथवा लूटी गई वस्तुएँ पुलिस द्वारा अभिग्रहीत की जाती हैं तो उसे सुपुर्दनामे पर उस व्यक्ति को दे देना चाहिए जो उन वस्तुओं पर प्रथम दृष्टया अपना कब्जा साबित करता है – याचिका मंजूर।

Case referred :

AIR 2003 SC 638.

V.C. Rai, for the applicant.

Arvind Singh, Panel Lawyer, for the non-applicant.

ORDER

S.C. Sinho, J. :–Applicant has filed this petition under Section 482 of Cr.P.C. against the order dated 30.11.2009 passed by II Additional Sessions Judge, Rewa in Criminal Revision No. 293/09, whereby confirming the order dated 4.2.2009 passed by Chief Judicial Magistrate, Rewa in Criminal Case No. 317/2009.

2. The brief facts of the case are that police station, Chorhata, district Rewa has registered Crime No. 312/2008 under Section 392 of the IPC against the accused persons on a F.I.R., lodged by applicant/complainant, an Ex-serviceman posted as Security Guard in J.P. Cement Rewa. Applicant has licensed gun no. 16285-04 with licence no. 13690021 AL/X. The accused persons have looted the gun of the applicant because of which applicant is facing great hardships. He further stated in the application that if the gun is not given to him on supuradnama there is danger of its parts being rustic and damaged. The learned C.J.M. Vide order dated 4.2.2009 (Ex. P-2) dismissed the application holding that the gun is the subject matter of evidence during trial. The revisional Court also dismissed the revision by impugned order (Ex.

*M.Cr.C. No.1214/2010 (Jabalpur)

P-1), holding that the applicant has challenged the order of C.J.M., after six months and since then the circumstances has changed as such revision has become infructuous and further given liberty to applicant to apply again before C.J.M. Rewa u/s 451 of Cr.P.C.. if advised so.

3. Learned counsel for the applicant Shri V.C. Rai submitted that applicant is an Ex-serviceman and working as Security Guard in J.P. Cement, Rewa. He has licensed gun No. 16285-04 with a valid licence No. 13690021 AL/X.He has lodged the report that the accused persons in the said case have looted the gun, both the Courts below have rejected his application for interim custody of gun under Section 451 of the Cr.P.C.

4. Learned Panel Lawyer Shri Arvind Singh, supported the impugned order.

5. The gun was seized from the custody of accused but they have not come with the claim that gun do not belongs to the applicant or belongs to him. Applicant has specifically stated that seized gun No. 16285/04 is owned by him, who is a Ex-serviceman and has licence No. 13690021 AL/X, and he is working as a Security Guard in J.P. Cement Factory, and gun is required for his duty.

6. Learned counsel for the applicant submits that Apex Court has laid down that in no circumstance a seized article should be kept at the police station/Nazarat for a period of more than 15 days. In support of his submission and placed reliance upon the decision in *Sunderbhai Ambala Desai Vs, State of Guirat* AIR 2003 SC 638 where it has been held in para-21.

> "However, those powers are to be exercised by the concerned Magistrate. We hope and trust that the concerned Magistrate would take immediate action for seeing that powers under Section 451, Cr.P.C., are properly and promptly exercised and articles are not kept for a long time at the police station, in any case, for not more than fifteen days to one month. This object can also be achieved if there is proper supervision by the Registry of the concerned High Court in seeing that the rules framed by the High Court with regard to such articles are implemented properly."

In view of aforesaid decision of the Apex Court article should not be kept for a long time at a Police Station/Nazarat.

7. In the present case as mentioned earlier learned Magistrate rejected the petition filed under Section 451 of the Cr.P.C. on the ground that seized gun will be required at the time of evidence, in the same manner learned Sessions Judge has acted in a very casual manner, while dismissing the revision and giving liberty .to applicant to file afresh application under Section 451 of Cr.P.C., if advised so, when revision was filed before him it was his pious duty to pass an appropriate order. Normally every seized article in a case under Section 392 or 379 of IPC etc., is required at the time of evidence. and on such grounds application should never be disallowed. Where stolen or looted articles are seized by police it should

be released on supuradnama to the person who prima facie establish his possession over the articles if the gun in question kept in police station or Nazarat during pendency of trial is likely to deteriorate its condition and may virtually be reduced to scrap.

8. I am sorry to say that both the Courts below have passed the impugned orders in a very irresponsible manner, without going through the spirit of Section 451 of Cr.P.C. and applicant is unnecessary roaming from this Court to that Court from 4.2.2009. Apex Court has held again and again that normally question of ownership is not to be decided while disposing an application under Section 451 of the Cr.P.C.

9. It seems, that both the Courts below are not aware of aforesaid law laid down by Apex Court in *Sunderbhai Ambala Desai* (Supra). It will be proper to re-produce Section 451 of Cr.P.C.

> **S. 451. Order for custody and disposal of property pending trial in certain cases:-**When any property is produced before any Criminal Court during an inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.
>
> Explanation:- For the purposes of this section, "property" includes-
>
> (a) property of any kind or document which is produced before the Court or which is in its custody.
>
> (b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.

10. On bare perusal of the aforesaid section, it is very clear that while releasing the property on furnishing security (Supuradnama) title or proof of ownership is not to be inquired at all. Both the Courts were not justified in disallowing the application. The Court could have granted the gun to applicant on interim custody with a condition that whenever gun will be required it will be produce by the applicant before Court. .

11. On the facts and aforesaid reasons, I am of the view that this petition under Section 482 of Cr.P.C. deserves to be allowed. Let the seized licensed gun No. 16285/04 to be delivered on supuradnama of Rs. 10,000/- to the applicant, on condition that it shall be produce in the Court as and when required before the trial Court.

12. In the result, this petition under Section 482 of Cr.P.C., is allowed, accordingly.

Petition allowed.

I.L.R. [2010] M. P., 2001
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice R.C. Mishra
19 June, 2009*

KAMLA RUSIYA (SMT.) ... Applicant
Vs.
STATE OF M.P. & anr. ... Non-applicants

Negotiable Instruments Act (26 of 1881), Section 138 - *Non-applicant issued a cheque on behalf of M/s Vaibhav Enterprises which was not arraigned as an accused - Held - The only fact that the non-applicant had issued the cheque, by itself, was not sufficient to attract penal liability for the offence u/s 138 as he was able to establish that his authority as the drawer had ceased to continue till the date it was presented for encashment - In other words, the applicant had failed to prove that the non-applicant had played some role at the time when the cheque was dishonoured - Acquittal upheld.* (Para 6)

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – अनावेदक ने मेसर्स वैभव एंटरप्राईजेज की ओर से चैक जारी किया जिसे अभियुक्त के तौर पर आरोपित नहीं किया गया – अभिनिर्धारित – केवल यह तथ्य कि अनावेदक ने चैक जारी किया था अपने आप में धारा 138 के अंतर्गत शास्तिक दायित्व को आकृष्ट करने के लिये पर्याप्त नहीं था क्योंकि वह यह साबित करने में सक्षम था कि लेखीवाल के तौर पर उसका प्राधिकार उस दिनांक तक समाप्त हो गया था जब उसे भुनाने के लिये प्रस्तुत किया गया था – अन्य शब्दों में आवेदक यह साबित करने में विफल रहा कि जब चैक का अनादरण हुआ था, उस समय अनावेदक ने कोई भूमिका निभाई थी – दोषमुक्ति की पुष्टि की गयी।

Cases referred :
AIR 2000 SC 145, AIR 2008 SC 2255.

Vivek Rusia, for the applicant.

O R D E R

R.C. Mishra, J. :–Heard on admission.

2. This is an application under Section 378(4) of the Code of Criminal Procedure for grant of leave to appeal against the order of acquittal in respect of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881. The corresponding judgment was passed on 24/8/2006 by Shri A.K.Pandey, JMFC Satna in Criminal Case No.1101/2005. In that case, cognizance of the offence was taken upon a complaint made by the applicant. It contained the following averments -

> The respondent is the Proprietor of a Firm that carries business in the name of M/s Vaibhav Enterprises. On behalf of the Firm, the respondent borrowed an amount of Rs.1 lakh from

*M.Cr.C. No.9408/2006 (Jabalpur)

the applicant and for repayment thereof issued a post dated cheque for an amount of Rs.1 lakh. However, the cheque was dishonoured by the Bank. He sent a notice of demand by registered post, but it was returned with the remark that the addressee had refused to accept it. Thereafter, the respondent failed to pay the amount covered by the cheque within the stipulated period.

3. Asserting that he was not the Proprietor of the Firm, the respondent took the defence that the cheque in question was dishonoured by the Bank for want of authority despite the fact that sufficient amount was available in the corresponding account. According to him, the power of attorney executed in his favour by Smt. Nirmala Devi, the Proprietor, authorizing him to withdraw the amount was cancelled much before the dishonour of cheque. To substantiate the plea S.G.Tripathi (DW1), the then Accountant and Ramautar Pathak (DW2), Munim of the Firm were examined."

4. A bare perusal of the judgment would reveal that the finding of not guilty was recorded in view of the following facts:

(i)The demand notice was not issued within the prescribed period of fifteen days of receipt of information from the Bank regarding dishonour of cheque.

(ii)The post-dated cheque was given by way of guarantee in respect of agreement dated 1/4/1999 (Ex.P/1).

5. There is yet another aspect of the matter justifying the acquittal that though not dealt with by learned trial Magistrate also deserves consideration as under –

6. Although the cheque was issued on behalf of M/s Vaibhav Enterprises yet, it was not arraigned as an accused. It is true that a Proprietary concern is neither a Company incorporated under the Companies Act, 1956 nor a Firm within the meaning of S.4 of the Partnership Act, 1932, but in absence of averments as to whether the Firm was a registered Partnership Firm, its Proprietor namely Nirmala Devi ought to have been prosecuted for the dishonour of cheque. However, as explained by the Apex Court in *Anil Hada v. Indian Acrylic Ltd.* AIR 2000 SC 145, the complaint could not be dismissed simply because the Firm or its Proprietor was not impleaded as an accused. But the only fact that the respondent had issued the cheque, by itself, was not sufficient to attract penal liability for the offence under Section 138 as he was able to establish that his authority as the drawer had ceased to continue till the date it was presented for encashment. In other words, the applicant had failed to prove that the respondent had played some role at the time when the cheque was dishonoured (See *DCM Financial Services Ltd. v. J. N. Sareen* AIR 2008 SC 2255).

7. Moreover, Section 138 of the Act covers only those cases wherein the cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the

bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank.

8. It is well settled that an order of acquittal should not disturbed unless the conclusions drawn on the evidence on record, are found to be grossly unreasonable, perverse and palpably unsustainable.

9. In this view of the matter, no interference is called for. The application, therefore, stands dismissed in limine.

Application dismissed.

I.L.R. [2010] M. P., 2003
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice N.K. Gupta
6 August, 2010*

KAPIL DURGWANI ... Applicant
Vs.
STATE OF M.P. ... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 438, Juvenile Justice (Care and Protection of Children) Act, 2000, Section 12, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Section 18 - *Provisions of S. 12 of the Act, 2000 can not be held to have any overriding effect over the provision of S. 18 of the Act, 1989, as the scope of the application of both the provisions is different.* (Para 11)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438, किशोर न्याय (बालकों की देख–रेख और संरक्षण) अधिनियम, 2000, धारा 12, अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम, 1989, धारा 18 – अधिनियम, 2000 की धारा 12 के उपबंध अधिनियम, 1989 की धारा 18 के उपबंध पर कोई अध्यारोही प्रभाव रखने वाले नहीं ठहराये जा सकते क्योंकि दोनों उपबंधों के लागू होने का विषयक्षेत्र भिन्न–भिन्न है।

Case distinguished :

2008(2) RCR (Cr.) 764 (Raj.)

S.K. Tiwari, for the applicant.
B.P. Pandey, P.P., for the respondent/State.

ORDER

N.K. Gupta, J. :–This application under Section 438, Cr.P.C. is filed by the present applicant for grant of anticipatory bail in connection with Crime No.87/2010 registered at Police Station (AJK) Pali District Umariya for the offence punishable under Sections 294, 323, 506, 326 of IPC and Section 3 (1) (x) & 3 (2) (v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (herein after referred as the 'SC/ST Act').

*M.Cr.C. No.3888/2010 (Jabalpur)

2. The prosecution story in short is that the applicant assaulted the complainant Guddu Sonkar by knife causing grievous hurt to him. It is also alleged that the applicant abused the complainant Guddu Sonkar mentioning his caste. The complainant also stated in F.I.R. that the Applicant has committed the aforesaid crime to insult the complainant on the basis of caste.

3. The learned counsel for the applicant submits that the applicants' date of birth was 10/8/1993 and, therefore, he was below 18 years of age at the time of incident, in such circumstances he comes under the category of 'juvenile' and therefore he is entitled for anticipatory bail. It has been urged on his behalf that no offence under Section 3 (1) (x) and 3 (2) (v) of the 'SC/ST Act' is made out. And therefore bar of section 18 of the 'SC/ST Act' is not attracted in present case.

4. On the other hand learned Govt. Advocate urges that due to bar of sec. 18 of 'SC/ST Act' bail of anticipatory nature can not be accepted in favour of the Applicant.

5. At present the subject matter of examination is the extent upto which the merits of the case can be touched in terms of provision of Section 18 of the 'SC/ ST Act'. The provision of Section 18 of the 'SC/ST Act' reads as under:-

> **"18. Section 438 of the Code not to apply to persons committing an offence under the Act.**—Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act."

6. On perusal of the aforesaid provision, it is clear that the Court which is granting bail under Section 438 of Cr.P.C. has to pass an order either expressly or impliedly that the offence under the 'SC/ST Act' is not made out, though it may be written in the order that it will not cause any prejudice to the trial Court on merits. Language of Section 18 of the 'SC/ST Act' is specific and, therefore, if either special Court or any superior Court passes an order that provisions of Section 18 of the 'SC/ST Act' are not attracted then it means that, the Court has given a negative indication about commission of that crime and that would be binding on the trial Court.

7. The scope of Section 18 of the 'SC/ST Act' read with Section 438 of the Code,is such that it creates a specific bar in the grant of anticipatory bail. When an offence is registered against a person under the provisions of the 'SC/ST Act', no Court shall entertain application for anticipatory bail, unless it prima facie finds that such offence is not made out.

8. It is settled position of law that at the time of framing charges, Court is expected to appreciate the evidence, but the material which is available on record should be considered as it is. While considering the bail application scope for appreciation of evidence and other material on record is limited. Court is not expected to indulge in critical analysis of the evidence on record. When a provision has been enacted in the Special Act to protect the persons who belong to Scheduled Caste and Scheduled Tribe and a bar has been imposed in granting bail under

Section 438 Cr.P.C., the provision in the Special Act cannot be easily brushed aside by elaborate discussion of the evidence.

9. In support of his contention, the learned counsel for the applicant has placed reliance on the following case law:-

(i) *"R.K.Singh and another Vs. State of Chhattishgarh,"*(2007 (2) Crimes 44 (Chhattisgarh))

(ii) *"Narendra Singh Yadav & another Vs. State of Chhattishgarh,"*(2007 (2) Crimes 46 (Chhattisgarh))

(iii) *"Praveen Kumar Sahu Vs. State of Chhattisgarh"*(2007(1) Crimes 452).

In the aforesaid cases, the Single Bench of the Chhattisgarh High Court has granted anticipatory bail to the concerned applicants after considering the facts of the cases. No fresh legal interpretation appears in the aforsaid cases. Facts of each case differ from other case and, therefore, consideration made on the basis of facts cannot be taken as a precedent in another case.

10. Learned counsel for the applicant further submits that the present applicant is a juvenile and, therefore, provisions of Section 12 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short the "Juv. Act ") have overriding effect on the provisions of Section 18 of the SC/ST Act. In support of his contention, he has placed reliance on the case law *"Tara Chand Vs. State of Rajasthan*, 2008 (2) RCR (Cr.) 764 (Raj.)" as published in a book "Digest on Bails" written by Shri Chander Kanta Dateer, Advocate in 2009 Edition at Page No.197,wherein it has been held:-

> "In the light of above, I am of the view that the provisions of Section 12 of the Act of 2000 shall have an overriding effect over the provisions of Section 18 of the Act of 1989 and a juvenile who is brought before the Board or "appears" even by means of an application for being granting anticipatory bail, then notwithstanding the provisions of Section 18 of the Act of 1989 could be dealt with by the Board/Court (in the light of Section 6 (2) of the Act of 2000) as Section 12 is a special provision meant exclusively for Juveniles as such the exclusion of Section 438, Cr.P.C. under Section 18 of the Act of 1989 shall not apply in the case of a juvenile who is to be governed by the Act of 2000 and dealt as such.

11. It is here relevant to consider the provisions of Section 12 (1) of the 'Juv. Act', which are as under:-

> **"12. Bail to Juvenile :-** (1) When any person accused of a bailable or non-bailable offence, and apparently a juvenile, is arrested or detained or appears or is brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure,1973 (2 of 1974) or in any other law for the

time being in force, be released on bail with or without surety but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice."

It is true that the 'Juv. Act' has been enacted for the benefit of juvenile delinquents and, therefore,it has an overriding effect over the 'SC/ST Act', but when the words used in Section 12 of the 'Juv. Act', are considered in juxtaposition with the wordings of Section 18 of 'SC/ST Act', it would be clear that the scope of the application of both the provisions is different, therefore, provisions of Section 12 of the 'Juv. Act' can not be held to have any overriding effect over the provision of Section 18 of the 'SC/ST Act'. The interpretation given by learned single judge of Rajasthan High Court, if accepted as it is, it will give a rise to an inference that the Board constituted under 'Juv. Act' would have powers of Section 438 of Cr.P.C., meaning thereby that the accused would be entitled to appear before the Board by filing an application under Section 438 of Cr.P.C. instead of appearing in person. But the legal position is otherwise. Provisions of Section 12 of the 'Juv. Act' do not provide such power to the Board which is equivalent to Sec. 438 of Cr.P.C.. The Board has no jurisdiction to entertain an application under Sec. 438 of Cr.P.C. Therefore, I respectfully disagree with the interpretation advanced by the learned single judge of Rajasthan High Court in case of *Tarachand* (supra).

12. As per the provisions of Section 6 of the 'Juv. Act', the powers of the Board can be exercised by the Court of Sessions as well as by the High Court in an appeal, revision or otherwise. Apart from it if a Board constituted under the 'Juv. Act' rejects a bail application of the Juvenile, an appeal shall lie to the Sessions Court and against the order of the Sessions Court, revision may be preferred to High Court. Therefore, if the bail application is decided by the High Court for the first time and it is rejected, then the opportunity of appeal and revision will be lost by the juvenile. Thus, directly approaching to High Court under the provisions of Section 438 of Cr.P.C., shall result in a loss of the opportunity to prefer appeal and revision to a Juvenile, therefore such practice should be discouraged.

13. I have already discussed that in deciding bail application scope of appreciation of evidence is much limited. In the present circumstances and in view of the facts of the case, as mentioned in F.I.R., it can not be held that the offence alleged against the applicant does not fall within the purview of 'SC/ST Act'.

14. In view of the aforesaid discussion, this application is disposed off with a observation that the applicant if so advised may appear before the appropriate Board constituted under the Juvenile Justice (Care and Protection of Children) Act, 2000 as per provisions of Section 12 of the 'Juv. Act' and apply for bail according to law.

Application disposed of.
