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Jabalpur M. P.



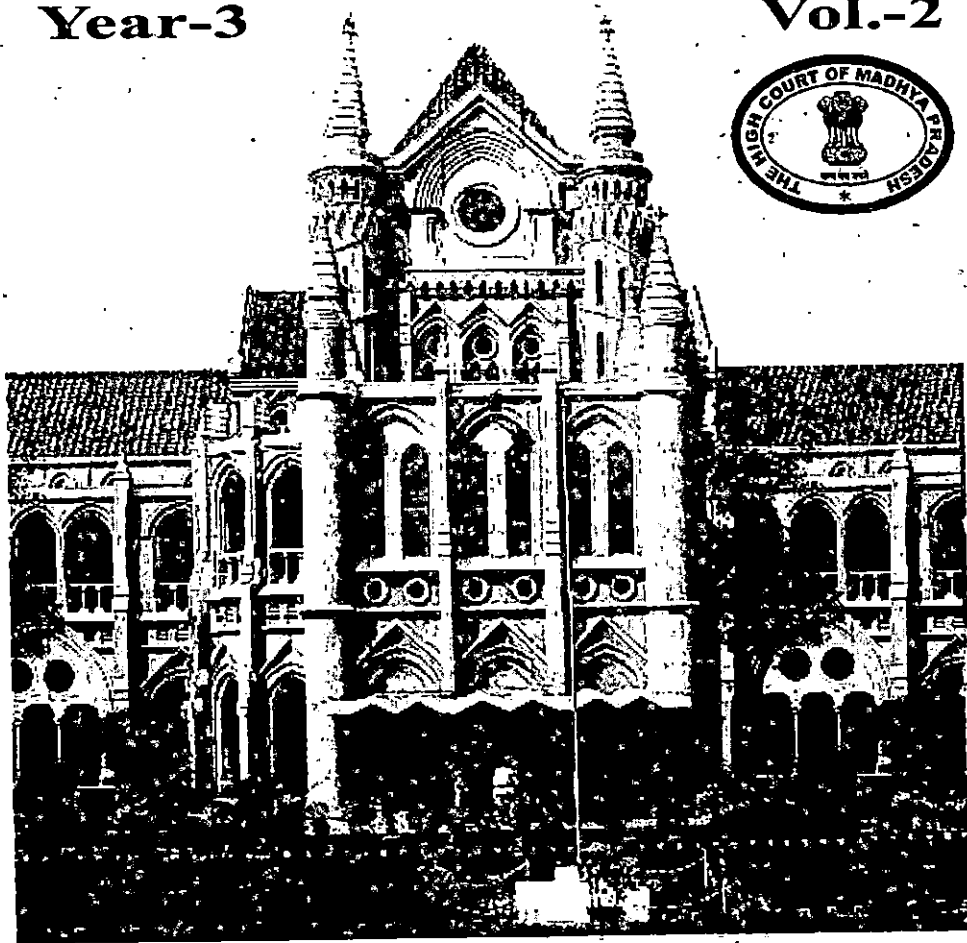
THE INDIAN LAW REPORTS

M. P. SERIES

CONTAINING
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THE HIGH COURT OF MADHYA PRADESH

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2011

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2011

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Short Note (DB)

***(52)**

Before Mrs. Justice S.R. Waghmare & Mr. Justice I.S. Shrivastava

Cr.A. No.437/2001 (Indore) decided on 14 December, 2010

GARADA & anr.

... Appellants

Vs.

STATE OF M.P.

... Respondent

Penal Code (45 of 1860), Section 302 - Murder - Injuries on accused persons - Appellants and deceased are real brothers - Quarrel took place on the question of possession over a Kotha - Appellants also received injuries - Appellants also lodged F.I.R. against complainant mentioning injuries sustained by them - Witnesses expressed their ignorance about injuries sustained by appellants - Fact of sustaining injuries by accused not mentioned in F.I.R. lodged by complainant - Place of incident also changed by witnesses - Appellants acquitted.

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – अभियुक्त व्यक्तियों को क्षतियाँ – अपीलार्थी और मृतक सगे भाई – कोठे पर कब्जे के प्रश्न पर झगड़ा उत्पन्न हुआ – अपीलार्थियों को भी क्षतियाँ आयीं – अपीलार्थियों ने भी उन्हें पहुँची क्षतियों का उल्लेख करते हुए परिवादी के विरुद्ध एफ.आई.आर. दर्ज कराई – साक्षियों ने अपीलार्थियों को पहुँची क्षतियों के बारे में अपनी अज्ञानता व्यक्त की – परिवादी द्वारा दर्ज कराई गयी एफ.आई.आर. में अभियुक्त को पहुँची क्षतियों का तथ्य का उल्लेख नहीं – साक्षियों द्वारा घटना का स्थान भी परिवर्तित कर दिया गया – अपीलार्थी दोषमुक्त।

**The Judgment of the Court was delivered by :
S.R. WAGHMARE, J. :-**

Cases referred :

**1994 JLJ 183, AIR 1976 SC 2263, 1999(1) JLJ 69, 1991 JLJ 6,
AIR 1976 SC 1156.**

Z.A. Khan with Ramesh Gangare, for the appellants.

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

NOTES OF CASES SECTION

Short Note

***(53)**

Before Mr. Justice I.S. Shrivastava

Cr.A. No.254/2007 (Indore) decided on 19 January, 2010

JAIBUN NISHA

... Appellant

Vs.

STATE OF M.P.

... Respondent

A. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 50(4) - Search of female - Whenever a lady is to be searched, her search can only be carried out by lady - Name of female carrying search is also to be noted - Name of lady constable not mentioned in Panchnama - Search not in accordance with Section 50(4).

क. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 50(4) – स्त्री की तलाशी – जब कभी किसी स्त्री की तलाशी ली जानी हो, उसकी तलाशी केवल किसी स्त्री द्वारा ही ली जा सकती है – तलाशी लेने वाली स्त्री का नाम भी लिखा जाना चाहिए – पंचनामा में महिला आरक्षक के नाम का उल्लेख नहीं – तलाशी धारा 50(4) के अनुसार नहीं।

B. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8/21 - Sample - I.O. admitted that the chit pasted on sample does not contain the thumb impression and name of accused - It cannot be prima facie seen that samples are related to the accused.

ख. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8/21 – नमूना – अन्वेषण अधिकारी ने स्वीकार किया कि नमूने पर चिपकी पर्ची में अभियुक्त का अंगुष्ठ चिह्न और नाम अन्तर्विष्ट नहीं है – प्रथम दृष्टया यह नहीं देखा जा सकता कि नमूने अभियुक्त से संबंधित है।

C. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8/21 - Seizure - Smack was sealed in empty packet of cigarette - However, when the article was opened in Court smack was not found in packet of cigarette but in polythene packet - It can be very well said article was not in original and it was tampered.

ग. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा

NOTES OF CASES SECTION

8/21 – अभिग्रहण – स्मैक को सिगरेट के खाली पैकेट में मुहरबंद किया गया – परन्तु जब वस्तु को न्यायालय में खोला गया, सिगरेट के पैकेट में स्मैक नहीं पायी गई, किन्तु पॉलीथीन पैकेट में पायी गयी – यह बहुत उचित रूप से कहा जा सकता है कि वस्तु मूल वस्तु नहीं थी और वह छोड़ी हुई थी।

Cases referred :

(1999) 6 SCC 172, (2008) 1 SCC 450, 2002(1) EFR 460, (2006) 12 SCC 321.

Sanjay Sharma, for the appellant.

Dipak Rawal, G.A., for the respondent/State.

Short Note (DB)

***(54)**

Before Mr. Justice Ajit Singh & Mr. Justice Sanjay Yadav

W.P. No.6192/2009 (Jabalpur) decided on 28 October, 2010

JAWAHAR LAL SAHU

...Petitioner

Vs.

UNION OF INDIA & ors.

...Respondents

Central Civil Services (Pension) Rules 1972, Rule 69(1)(c) - Payment of Gratuity - Preferment of a criminal revision or an appeal against an acquittal cannot be regarded as a continuance of the trial and cannot be treated to be pendency of judicial proceeding as the initial presumption of innocence gets re-enforced by the orders of acquittal.

केन्द्रीय सिविल सेवा (पेंशन) नियम 1972, नियम 69(1)(सी) – उपदान का भुगतान – दोषमुक्ति के विरुद्ध दाण्डिक पुनरीक्षण या अपील करना विचारण के निरंतर रहने के रूप में नहीं माना जा सकता और न्यायिक कार्यवाही लंबित रहना नहीं माना जा सकता, क्योंकि निर्दोष मानने की प्रारंभिक उपधारणा को दोषमुक्ति के आदेशों द्वारा शक्ति प्रदान होती है।

The order of the Court was delivered by :
SANJAY YADAV, J.:-

Pradeep Sahu, for the petitioner.

Vikram Singh and Abhay Pandey, for the respondents.

NOTES OF CASES SECTION

Short Note (DB)

***(55)**

Before Mr. Justice Shantanu Kemkar &

Mr. Justice Prakash Shrivastava

W.P. No.9749/2003 (Indore) decided on 3 December, 2010

MANEESH ENTERPRISES

... Petitioner

Vs.

COMMISSIONER OF COMMERCIAL TAX, M.P. & ors. ... Respondents

A. Commercial Tax Act, M.P. 1994 (5 of 1995), Section 15, Entry 4, Central Sales Tax Act, 1956, Section 8(2)A - Hessian Cloth - Hessian Cloth is a variety of cloth covered under Entry 4 and amended entry 4-(1) of Schedule 1 and is exempted from payment of tax.

क. वाणिज्यिक कर अधिनियम, म.प्र. 1994 (1995 का 5), धारा 15, प्रविष्टि 4, केन्द्रीय विक्रय कर अधिनियम, 1956 धारा 8(2)ए - हेसीयन कपड़ा - हेसीयन कपड़ा, कपड़े की वह किस्म है जो प्रविष्टि 4 और संशोधित प्रविष्टि 4(1) की अनुसूची 1 के अंतर्गत समाविष्ट है और कर के भुगतान से छूट प्राप्त है।

B. Commercial Tax Act, M.P. 1994 (5 of 1995), Entry 4 Schedule I, Entry 4 of Part IV of Schedule II - Doubt or Rival Entries - In case of doubt or rival entries, the Entry which is beneficial to tax payer must be adopted - Even if Assessing Authority had found that Hessian cloth was covered under two entries, then Assessing Authority should have assessed it in the entry covering all variety of cloth because it is specific entry covering Hessian cloth and is the entry beneficial to Assessee.

ख. वाणिज्यिक कर अधिनियम, म.प्र. 1994 (1995 का 5), प्रविष्टि 4 अनुसूची I अनुसूची II के भाग IV की प्रविष्टि 4 - संदेह या विरोधी प्रविष्टियाँ - संदेह या विरोधी प्रविष्टियों के मामले में, जो प्रविष्टि कर दाता के लिए लाभकारी हो उसका अंगीकरण करना चाहिए - तब भी यदि निर्धारण प्राधिकारी ने पाया कि हेसीयन कपड़ा दो प्रविष्टियों के अंतर्गत समाविष्ट था, तब निर्धारण प्राधिकारी को चाहिए था कि उसका निर्धारण उस प्रविष्टि में करे, जिसमें कपड़े की सभी किस्में समाविष्ट हैं, क्योंकि वह विनिर्दिष्ट प्रविष्टि है, जिसमें हेसीयन कपड़ा समाविष्ट है और निर्विरोधता के लिए लाभकारी प्रविष्टि है।

4)

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C. Commercial Tax Act, M.P. 1994 (5 of 1995), Section 17(1) - Notification - Notification dated 22.06.1998 reducing rate of tax on Hessian cloth stood impliedly repealed by amendment in Entry 4 of Schedule I w.e.f. 01.04.1999.

ग. वाणिज्यिक कर अधिनियम, म.प्र. 1994 (1995 का 5), धारा 17(1) - अधिसूचना - हेसीयन कपड़े पर कर की दरें कम करने वाली अधिसूचना दिनांक 22.06.1998, 01.04.1999 से प्रभावशील अनुसूची I की प्रविष्टि 4 में संशोधन द्वारा विवक्षित रूप से निरसित हो जाती है।

The Order of the Court was delivered by :
Prakash Shrivastava, J.:-

Cases referred :

(1970) 26 STC 306, (1964) 15 STC 498 (Guj), (1986) 61 STC 318 (SC), 1982 VKN (15) 56, AIR 1961 (12) STC 122, (1961) SCC 609, 2010 30 VST 587 (All), (1993) 91 STC 37, (1987) 66 STC 1, (1999) 114 STC 460.

G.M. Chaphekar with *C.R. Pancholiya*, for the petitioner.
Vivek Patwa, Dy.G.A., for the respondent/State.

Short Note (DB)

***(56)**

Before Mr. Justice Ajit Singh & Mr. Justice Sanjay Yadav

W.P. No.738/2006 (Jabalpur) decided on 08 October, 2010

NAND KISHORE

...Petitioner

Vs.

M.P.R.T.C. & anr.

...Respondents

Industrial Relations Act, M.P. (27 of 1960), Sections 62 & 64-A - Limitation & condonation of delay - Petitioner was removed from service by order dated 28.02.1994 - He filed an application u/s 31(3) r/w Sections 61 & 107 of the Act on 05.03.1994, seeking quashment of a departmental proceedings - Subsequently, challenge was put forth by way of an amendment in 1996 - An application u/s 64-A of the Act was filed by the petitioner - The same was rejected by Labour Court and affirmed by Industrial Court on the ground that it does not contain sufficient ground for condonation of delay - ***Held*** - Courts

NOTES OF CASES SECTION

below were not justified in rejecting the application on the ground of delay and fell into patent error by not condoning the same.

औद्योगिक संबंध अधिनियम, म.प्र. (1980 का 27), धाराएँ 62 व 64-ए — परिसीमा एवं विलम्ब की माफी — याची को आदेश दिनांक 28.02.1994 के द्वारा सेवा से हटाया गया — उसने विभागीय कार्यवाहियों के अभिखण्डन हेतु दिनांक 05.03.1994 को अधिनियम की धारा 31(3) सहपठित धाराएँ 61 व 107 के अंतर्गत एक आवेदन प्रस्तुत किया — तत्पश्चात् 1996 में संशोधन के रूप में चुनौती दी गई — याची के द्वारा अधिनियम की धारा 64-ए के अंतर्गत आवेदन प्रस्तुत किया गया — जिसे इस आधार पर कि इसमें विलम्ब माफी के लिये पर्याप्त आधार अन्तर्विष्ट नहीं है, श्रम न्यायालय द्वारा नामंजूर किया गया और औद्योगिक न्यायालय द्वारा पुष्टि की गई — अभिनिर्धारित — अधीनस्थ न्यायालयों द्वारा विलम्ब के आधार पर आवेदन नामंजूर करना न्यायसंगत नहीं था और उन्होंने उसे माफ न कर प्रत्यक्ष त्रुटि की।

The Order of the Court was delivered by :
AJIT SINGH, J.:-

Ashok Shrivastava, for the petitioner.

P.K. Mishra, for the respondents.

Short Note

*(57)

Before Mr. Justice R.S. Jha

W.P. No.16354/2006 (Jabalpur) decided on 10 December, 2010

RAJKUMARI YADAV

... Petitioner

Vs.

INDIAN OIL CORPORATION LTD. & ors.

... Respondents

Policy guidelines for allotment of dealership under Kisan Seva Kendra by Indian Oil Corporation - Criteria for evaluation - Minimum qualifying marks for female candidates - Minimum qualifying marks for Open Category Applicant is 60% and for reserved category candidate is 50% -- Minimum qualifying marks for female of OP category would be 60% - Held - Treating woman of open category as separate reserved category and reducing minimum eligibility criteria for allotment of dealership to 50% misconceived and erroneous - Matter remitted back.

किसान सेवा केन्द्र के अंतर्गत डीलरशिप के आवंटन हेतु इंडियन ऑयल

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कॉर्पोरेशन द्वारा नीति निर्देश - मूल्यांकन हेतु मानदंड - महिला अभ्यर्थियों के लिए न्यूनतम अर्हक अंक - खुले वर्ग के आवेदक के लिए न्यूनतम अर्हक अंक 60 प्रतिशत और आरक्षित वर्ग के लिए 50 प्रतिशत है - ओपी वर्ग की महिला के लिए न्यूनतम अर्हक अंक 60 प्रतिशत रहेंगे - अभिनिर्धारित - खुले वर्ग की महिला को पृथक आरक्षित वर्ग के रूप में मानना, डीलरशिप के आवंटन हेतु न्यूनतम अर्हता मानदंड घटाकर 50 प्रतिशत करना भ्रामक एवं त्रुटिपूर्ण है - मामला प्रतिप्रेषित।

Cases referred :

1992 Supp. (3) SCC 217, (1995) 2 SCC 560.

Sheel Nagu, for the petitioner.

Avinash Zargar, for the respondent.

LL.R. [2011] M. P., 823

WRIT APPEAL

Before Mr. Justice Shantanu Kemkar & Mr. Justice Prakash Shrivastava

W.A. No.559/2007 (Indore) decided on 27 August, 2010

STATE OF M.P. & anr.

... Appellants

Vs.

SURESH KHANDELWAL

... Respondent

Stamp Act (2 of 1899), Section 47A - Opportunity of hearing - Sub-Registrar on being satisfied that sale-deed produced before him does not reflect the market value - He referred the instrument to Collector after conducting spot inspection and assessing market value - No fault can be found in the action of Sub-Registrar - However, Collector before passing order u/s 47-A should afford opportunity to respondent to rebut the market value assessed by the Sub-Registrar - Matter remitted back to Collector. (Paras 10 & 11)

स्टाम्प अधिनियम (1899 का 2), धारा 47ए - सुनवाई का अवसर - उप पंजीयक ने संतुष्ट हो जाने पर कि उसके समक्ष प्रस्तुत विक्रय पत्र, बाजार मूल्य नहीं दर्शाता - उसने मौके का निरीक्षण कर एवं बाजार मूल्य निर्धारित करने के पश्चात लिखत कलेक्टर को निर्दिष्ट किया - उप पंजीयक की कार्यवाही में कोई दोष नहीं पाया जाता - अपितु, कलेक्टर द्वारा धारा 47-ए के अंतर्गत आदेश पारित करने से पूर्व, उप पंजीयक द्वारा निर्धारित बाजार मूल्य का खंडन करने का प्रत्यर्थी को अवसर देना चाहिए - मामला कलेक्टर को विप्रेषित।

L.N. Soni, Addl. A.G. with Kshitij Vyas, for the appellants.

Lokesh Mehta, for the respondent.

ORDER

The Order of the Court was delivered by SHANTANU KEMKAR, J. :-Feeling aggrieved by the order dated 2.07.2007 passed by learned Single Judge of this Court in W.P. No.7130 of 2006, the appellants have filed this intra court appeal under section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005.

2. Brief facts necessary for disposal of this writ appeal are that the respondent purchased a plot situated at 8, Siyaganj, Indore admeasuring 457.42 sq.ft. alongwith the Tin Shed house built upon the same. He presented the sale deed of the said property for its registration before the Sub Registrar, Indore on 15.01.2002. The sale consideration shown in the said sale deed was Rs.5,25,000/-.

3. The said property being situated in a prime commercial location, the Sub Registrar, prima facie was of the view that the market value of the property has not been truly set forth in the sale deed. He, therefore, conducted a spot inspection and made assessment of the value of the property to the extent of Rs.24,81,200/-.
4. The Sub Registrar, thereafter referred the instrument to the Collector of Stamps, Indore invoking his powers under section 47-A of the Indian Stamp Act 1899. On receipt of the reference the Collector issued notice to the respondent and determined the market value of the property to be Rs.24,81,200/-.
5. The said order passed by the Collector of Stamps Indore was challenged by the respondent in an appeal under section 47-A(4) of the Indian Stamp Act before the Commissioner, Indore Division. The Commissioner vide order dated 16.07.2003 dismissed the respondent's appeal. The said order was further challenged by the respondent before the Board of Revenue in appeal No.55-1/04. The learned Board of Revenue vide order dated 18.01.2006 set aside the order passed by the Collector Stamps, Indore as also the order passed by the Commissioner. Aggrieved, the State had filed a writ petition No.7130 of 2006 before this Court. The learned Single Judge of this Court vide order dated 2.01.2007 dismissed the said writ petition. Aggrieved the appellant/State has filed this writ appeal.
6. It has been argued by Shri L.N.Soni, learned Additional Advocate General that while invoking the powers under section 47-A of the Indian Stamp Act the Sub Registrar has rightly referred the matter to the Collector Stamps, Indore, who in turn, after following due procedure of law has passed the order determined the market value of the respondent's property to be Rs.24,81,200/- which order was rightly affirmed by the Commissioner in appeal.
7. He further argued that the Board of Revenue and the learned Single Judge have committed error in holding that the orders passed by the Collector Stamps and Commissioner can not be sustained in view of the fact that once the sale deed has been registered by the Sub Registrar, then the value could not be enhanced. He pointed out that the Sub-Registrar at the stage of and during the course of registration, had noticed that the market value of the property in question has not been truly set forth and therefore, he in exercise of his powers under Section 47-A of the Indian Stamps Act referred the sale deed to the Collector Stamps, after getting the market value assessed by conducting spot inspection. Thus, according to him, there was no illegality in

the orders passed by the Sub Registrar, the Collector Stamps and the Commissioner, Indore Division.

8. Shri Lokesh Mehta, learned counsel for the respondent on the other hand supported the impugned order passed by the Board of Revenue and the learned Single Judge.

9. Having heard learned counsel for the parties and after going through the provisions contained in section 47-A of the Indian Stamp Act, we are of the view that the learned Single Judge was not correct in affirming the order passed by the Board of Revenue setting aside the orders passed by the Collector Stamps and Commissioner, Indore.

10. The Sub-Registrar on being prima facie satisfied that the market value of sale-deed produced before him for registration does not reflect true market value, conducted the spot inspection and after assessment of the market value referred the instrument to the Collector. In the circumstances in our considered opinion no fault can be found in the action of Sub-Registrar. On the other hand, the action of the Sub Registrar is in consonance with the provision of section 47-A of the Indian Stamp Act.

11. However it has not been disputed before us that on receipt of the reference before passing the order, the Collector of Stamps did not serve upon the respondent a show cause notice and passed exparte order after lapse of one year without affording opportunity to the respondent to rebut the market value assessed by the Sub Registrar.

12. In the circumstances, we set aside the orders passed by the Board of Revenue and by the learned Single Judge, as also the orders passed by the Collector Stamps and the Commissioner, Indore Division and remit the matter to the Collector Stamps, Indore for taking fresh decision in the matter in accordance with law after giving due opportunity of hearing to the respondent.

13. Let the matter be decided afresh by the Collector Stamps, Indore within a period of four months from the date of receipt of copy of this order.

14. The writ appeal is allowed to the extent indicated above. No orders as to costs.

C.c. within three days.

Appeal allowed.

I.L.R. [2011] M. P., 826

WRIT APPEAL

Before Mr. Justice Shantanu Kemkar & Mr. Justice Prakash Shrivastava
W.A. No.302/2010 (Indore) decided on 21 September, 2010

DHAR TEXTILE MILLS LTD.

... Appellant

Vs.

CANARA BANK & ors.

... Respondents

A. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M.P. 2005 (14 of 2006), Section 2 - Appeal - Suppression of material fact - Material fact not disclosed by appellant in writ appeal - No explanation as to why material fact has not been disclosed in writ appeal - Writ appeal liable to be dismissed on the ground of suppression of material fact.
(Para 10)

क. उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, म.प्र., 2005 (2006 का 14), धारा 2 - अपील - तात्त्विक तथ्यों का छिपाव - अपीलार्थी द्वारा रिट अपील में तात्त्विक तथ्यों को प्रकट नहीं किया - कोई स्पष्टीकरण नहीं कि रिट अपील में तात्त्विक तथ्यों को प्रकट क्यों नहीं किया गया - तात्त्विक तथ्य छिपाने के आधार पर रिट अपील खारिज की जाने योग्य।

B. Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (54 of 2002), Sections 13(2), 13(4) & 17, Constitution, Article 226 - Alternative remedy - Petitioner challenged the notice issued u/s 13(2) of Act - Petition dismissed because of alternative remedy of appeal - Held - No error committed by learned Single Judge in not entertaining the petition in view of alternative remedy - Moreover measure has also been taken u/s 13(4) of Act after the dismissal of writ petition - Petitioner has to seek alternative and efficacious remedy provided u/s 17 of Act - Writ Appeal dismissed.
(Para 13)

ख. वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन अधिनियम (2002 का 54), धाराएँ 13(2), 13(4) व 17, संविधान, अनुच्छेद 226 - वैकल्पिक उपचार - अधिनियम की धारा 13(2) के अंतर्गत जारी नोटिस को याची ने चुनौती दी - अपील का वैकल्पिक उपचार होने के कारण याचिका खारिज - अभिनिर्धारित - वैकल्पिक उपचार को दृष्टिगत रखते हुए याचिका ग्रहण न करने में विद्वान एकल न्यायमूर्ति द्वारा कोई त्रुटि नहीं की गई - इसके अलावा रिट याचिका खारिज होने के पश्चात, अधिनियम की धारा 13(4) के अंतर्गत उपाय भी

किया गया — याची को अधिनियम की धारा 17 के अंतर्गत उपबंधित वैकल्पिक एवं प्रभावकारी उपचार चाहना होगा — रिट याचिका खारिज।

C. Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (54 of 2002), Section 13(1), (4), (9) & 17 - Objections - D.R.T. is empowered to consider whether any of the measures referred to in Section 13(4) taken by secured creditor for enforcement of security are in accordance with provisions of Act and Rules framed thereunder - Non-fulfillment of requirement of Section 13(1)(9) can be very well considered by Tribunal. (Para 15)

ग. वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन अधिनियम (2002 का 54), धाराएँ 13(1), (4), (9) व 17 — आक्षेप — डी.आर.टी. विचार करने में सशक्त है कि क्या प्रतिभूति के प्रवर्तन के लिए प्रतिभूत लेनदार द्वारा धारा 13(4) में निर्दिष्ट उपायों में से लिया गया कोई उपाय, उसके अंतर्गत विरचित किसी अधिनियम और नियम के उपबंधों के अनुसरण में है — धारा 13(1)(9) की अपेक्षाओं के अपालन पर अधिकरण द्वारा उचित रूप से विचार किया जा सकता है।

D. Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (54 of 2002), Section 13(2), (4), Sick Industrial Companies (Special Provisions) Act, 1985, Sections 15 & 22 - Maintainability of proceedings u/s 13 of Act, 2002 - Appellant Company already declared sick under Act, 1985 - In view of provisions of Section 15 of Act, 1985, proposed action through notice u/s 13(2) of Act, 2002 is not barred. (Para 16)

घ. वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन अधिनियम (2002 का 54), धारा 13(2), (4), रुग्ण औद्योगिक कम्पनी (विशेष उपबंध) अधिनियम, 1985, धाराएँ 15 व 22 — अधिनियम, 2002 की धारा 13 के अन्तर्गत कार्यवाहियों की पोषणीयता — अपीलार्थी कंपनी पहले ही अधिनियम, 1985 के अंतर्गत रुग्ण घोषित की गई — अधिनियम 1985 की धारा 15 के उपबंधों को दृष्टिगत रखते हुए अधिनियम, 2002 की धारा 13(2) के अंतर्गत नोटिस द्वारा प्रस्तावित कार्यवाही वर्जित नहीं है।

Cases referred :

(1998) 8 SCC 1, AIR 2008 Orissa 103, (2010) 154 Company Cases 646 (P&H), W.P. No.2079/2010 (Bombay H.C.), 2004(120) Company Cases 373 (SC), 2010 1 NSC 550.

G.M. Chaphekar with Vishal Baheti, for the appellant.
Manoj Munshi, for the respondent No.3.

ORDER

The Order of the Court was delivered by SHANTANU KEMKAR, J. :-This intra Court appeal under Section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005 has been directed against the order dated 29.07.2010 passed by Single Bench of this Court in W.P. No.7986 of 2009.

2. In the aforesaid writ petition, the petitioner had prayed for following reliefs :-

(A) that the proceedings initiated by the respondents under the provisions of SARFAESI Act, 2002 be quashed.

(B) that the notice dated 24.08.2009 issued by respondent no.2 u/s 13(2) of SARFAESI Act be set aside.

(C) that the respondent be directed to obey the mandate of section 22 of SICA Act, 1985."

3. Briefly stated, a reference under Section 15(1) of the Sick Industrial Companies (Special Provision) Act, 1985 (for brevity the SICA) was filed on 31.3.2004 by the appellant company before the 'Board', constituted under the SICA, stating therein that it has become a 'sick industrial company'. In the said reference a prayer was made by the appellant for determination of the measures which shall be adopted with respect to the appellant company. On 25.08.2006, the Board declared the appellant company as a sick company under section 3(1)(o) of the SICA. The Board in exercise of its powers under section 17(3) of the SICA appointed the Standard Chartered Bank as operating agency for appellant company. Thereafter on 9.10.2009 the appellant company had filed a draft rehabilitation scheme before the Board, which according to the appellant, is pending for consideration.

4. In the meanwhile, as the appellant company failed to repay the credit facility availed by it and having committed default in repayment of debt, the first respondent Canara Bank issued a notice dated 24.08.2009 to the appellant company in exercise of its powers under Section 13(2) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity Act of 2002) claiming to be the authorised officer of Consortium of Banks comprising of Standard Chartered Bank Mumbai and Canara Bank, Siyaganj Branch, Indore and R.N.T. Marg Branch, Indore. In the said notice it was also stated by the first respondent Bank that the Standard

Chartered Bank is assignee of debts due and payable by the appellant to State Bank of India, State Bank of Indore and State Bank of Saurashtra. It was also averred in the said notice that the first respondent – Canara Bank and the third respondent – Standard Chartered Bank are secured creditors to the extent of 81% in respect of the assets / securities of the appellant company. It was stated that from March 2004 the operation and conduct of the financial assets / credit facilities made available to the appellant, become irregular and the appellant had failed to keep up the terms of the agreement in clearing the dues of the Consortium of Canara Bank & Standard Chartered Bank within the time given. Thus having been evasive in settling the dues, the debts of the appellant company has to be classified as 'Non Performing Asset'. Accordingly, by the said notice, the appellant company was informed that the consortium of the Banks will exercise all or any of the rights against the appellant as provided under section 13 (4) of the Act of 2002.

5. The appellant company submitted its representation/objection to the said notice stating therein that the noticee consortium does not represent more than three-fourth value of the amount outstanding against it and as such the noticee is not entitled to exercise the rights under Section 13 (4) of the Act of 2002. It was also alleged that third respondent – Standard Chartered Bank, Mumbai is not empowered to trade in debts as it is not having registration in terms of section 3(1) of the Act of 2002. A plea was taken by the appellant company that it is a sick company and in the circumstances, the proposed action through the notice under Section 13(2) of the Act of 2002 is barred by Section 22 of the SICA.

6. The first respondent vide reply dated 29.10.2009 rejected the objections raised by the appellant company and once again requested the appellant to repay the outstanding dues as per the notice issued to it under section 13(2) of the Act of 2002. Aggrieved the appellant had filed the aforesaid W.P. No.7986 of 2009 before this Court. The learned Single Judge vide order dated 29.07.2010 dismissed the writ petition on the ground that the appellant has got an alternative remedy available under the Act of 2002 before the Debts Recovery Tribunal under section 17 of the Act of 2002 in case an order is passed against it under Section 13 (4) of the Act of 2002. Aggrieved the appellant has filed this appeal.

7. Shri GM Chaphekar, learned Senior Counsel appearing for the appellant company argued that the impugned order passed by the learned Single Judge

dismissing the appellant's writ petition on the ground of availability of alternative remedy, is not sustainable. According to him, in view of the law laid down by the Supreme Court in the case of *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai* (1998) 8 SCC 1, availability of alternative remedy is no bar for invoking jurisdiction by this Court under Article 226 of the Constitution of India. He further argued that the very assignment of debt by the State Bank of India, State Bank of Indore and State Bank of Saurashtra in favour of the Standard Chartered Bank, which is not registered under Section 3 of the Act of 2002 being illegal, the issuance of notice under Section 13 (2) by the first respondent as a consortium of the financial institutions, was without jurisdiction. He argued that in the absence of fulfillment of requirement of Section 13 (9) of the Act of 2002 the first respondent is not entitled to take measures under Section 13 (4). He further argued that the learned Single Judge has misconstrued the law laid down by the Division Bench of Orissa High Court in the case of *Noble Aqua Pvt. Ltd. & ors. v. State Bank of India & Ors.* (AIR 2008 Orissa 103). He pointed out that the finding recorded by the learned Single Judge in paragraph 7 of the impugned order that the Division Bench of Orissa High Court has upheld the action of the Bank in taking action against the petitioner company therein under the provisions of the Act of 2002, is contrary to what has been laid down by the Division Bench of Orissa High Court. Placing reliance on the judgment of Orissa High Court in the case of *Noble Acqua Pvt. Limited* (supra), learned Senior Counsel argued that in view of the pendency of the reference under of SICA, the bar contained in Section 22 of the SICA is attracted in matter. He urged that the question with regard to the validity of transfer of security interest by the State Bank of Indore, State Bank of India and State Bank of Saurashtra in favour of the third respondent Standard Chartered Bank, who is not authorised to trade in securities, is a question which cannot be gone into by the Debts Recovery Tribunal in an appeal under Section 17 of the Act of 2002.

8. Shri Manoj Munshi, learned counsel appearing for the third respondent – Standard Chartered Bank, on the other hand supported the impugned judgment passed by the learned Single Judge. He argued that the appellant has not approached this Court with clean hands as it has concealed the material subsequent event which has taken place after passing of the impugned order by the learned Single Judge. He stated that before filing of the writ appeal, the first respondent – Canara Bank had already taken possession of the secured

assets of the appellant company by taking measures under section 13(4) of the Act of 2002. Thus according to him, this writ appeal deserves to be dismissed for non-disclosure of this material fact. Even otherwise, he submitted that since the measures under section 13(4) of the SARFAESI Act, 2002 have been taken before filing of the writ appeal this writ appeal has rendered infructuous and as such it be dismissed. Supporting the impugned order passed by learned Single Judge, Shri Manoj Munshi learned counsel for the third respondent argued that in view of pronouncements of the various Courts, including the judgment passed in the case of *Nabha Industries Limited vs. Punjab State Industrial Development Corporation and another* [2010] 154 Company Cases 646 (P & H), the order dated 19.05.2010 passed in W.P. No.2079 of 2010 by a Division Bench of Bombay High Court in the case of *Nouveaw Exports Private limited vs. Appellate Authority for Industrial and Financial Reconstruction Co. and others*, the law laid down by the Supreme Court in the case of *Mardia Chemicals Ltd and others vs. Union of India and others* - 2004 (120) Company Cases 373 (SC) = (2004) 4 SCC 311 = AIR 2004 SC 2371 and a judgment delivered by the Supreme Court on 26.07.2010 in the case of *United Bank of India vs. Satyawati Tondon and other* - 2010 1 NSC 550, this writ appeal deserves dismissal.

9. Shri Manoj Munshi, learned counsel also submitted that though in paragraph 7 the learned Single Judge may have recorded an incorrect finding that the Division Bench of Orissa High Court has upheld the action of the Bank in proceeding against the petitioner company under the Act of 2002, but the judgment delivered by Division Bench of Orissa High Court has been considered by various High Courts, as would be clear from the judgment delivered by the Division Bench of the Punjab and Haryana High Court in the case of *Nabha Industries Limited vs. Punjab State Industrial Development Corporation and another* (supra) and the judgment of Division Bench of Bombay High Court in the case of *Nouveaw Exports Private limited vs. Appellate Authority for Industrial and Financial Reconstruction Co. and others*, and according to these judgments the reference shall stand abate, if the secured creditors, representing not less than three-fourth in value of the amount outstanding against financial assistance disbursed to the borrower of such creditors, have taken any of the measures to recover their security debt under sub Section (4) of Section 13 of the Act of 2002 in view of the proviso contained in section 15 of the SICA. He further argued that the Standard Chartered Bank has not violated the provisions of Act of 2002 and has not

committed any illegality in becoming assignee of debts due to the other Banks. It is also his case that in case the appellant company seeks to challenge the assignment made in favour of the third respondent – Standard Chartered Bank, the appellant company has got remedy of taking appropriate steps including filing of a civil suit. He also stated the question as to whether the consortium represents three-fourth value of the amount outstanding or not as per the requirements of Section 13 (9) of the Act of 2002 can be very well gone into in an appeal under Section 17 of the Act of 2002. However, according to him, the notice under section 13(2) of the Act of 2002 cannot be challenged in a writ petition in view of the law laid down by the Supreme Court.

10. Having heard learned counsel for the parties and after going through the impugned order and the annexures, we find that against the impugned order dated 29.07.2010 passed by learned Single Judge, this writ appeal was filed on 16.08.2010 i.e. much after the measure under section 13(4) was taken by the first respondent – Canara Bank. Thus, though the measure under Section 13 (4) was already taken still the same was not disclosed by the appellant in the writ appeal. No explanation on the part of the appellant company has been offered even during the course of the arguments as to why this material fact has not been disclosed in the writ appeal. In the circumstances, on the ground of suppression of material fact, this writ appeal deserves to be dismissed. However, we deem it proper to consider and decide the other submissions made by the learned counsel for the parties in regard to the validity of the impugned order passed by the learned Single Judge.

11. So far as to the appellant's challenge to the notice under Section 13(2) of the Act of 2002 the Supreme Court in the case of *United Bank of India vs. Satyawati Tondon and others*, after considering the scheme of the Act of 2002 and the law laid down by it in the case of *M/s Mardia Chemicals Limited vs. Union of India* as also in the case of *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai* (supra) has observed as under :-

“12. The Division Bench of the High Court did not even advert to the appellant's plea that the writ petition should not be entertained because an effective alternative remedy was available to the writ petitioner under Section 17 of the SARFAESI Act and passed the impugned order restraining the appellant from taking action in furtherance of notice issued under Section 13(4) of the SARFAESI Act. The reason which

prompted the High Court to pass the impugned interim order and operative portion thereof are extracted below:

“Learned counsel for the petitioner has urged that the loan was taken by respondent No.4 for opening a colour lab at 50/43, Raj Complex, K.P. Kakkar Road, Allahabad, but the loan has not been repaid by respondent No.4 and the bank is proceeding against the petitioner who is the guarantor of the loan. It is not clear from the documents produced by learned counsel for the bank as to what steps have been taken by the bank against the borrower of the loan and merely issuance of notice under section 13 (2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 against the borrower is not sufficient. The bank should have proceeded against the borrower and exhausted all the remedies against him and thereafter the bank could have proceeded against the guarantor. Until further orders of this court, the respondents are restrained from proceeding under section 13(4) of the Act 2002 with regard to petitioner's property who was the guarantor of the loan. However, if any possession has been taken by the bank then the property shall not be sold to any one else and the petitioner shall be continued in possession of the property.”

13. We have heard learned counsel for the appellant and perused the record. Normally, this Court does not interfere with the discretion exercised by the High Court to pass an interim order in a pending matter but, having carefully examined the matter, we have felt persuaded to make an exception in this case because the order under challenge has the effect of defeating the very object of the legislation enacted by the Parliament for ensuring that there are no unwarranted impediments in the recovery of the debts, etc. due to banks, other financial institutions and secured creditors.

18. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance. It must be remembered that stay of an action initiated by the State and / or its agencies / instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in *Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad* AIR 1969 SC 556, *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai* (1998) 8 SCC 1 and *Harbanslal Sahnia and another v. Indian Oil Corporation Ltd. and others* (2003) 2 SCC 107 and some other judgments, then the High Court may, after considering

- all the relevant parameters and public interest, pass appropriate interim order.

27. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.”

12. In yet another case the Supreme Court in the case of *Punjab National Bank and another Vs. M/s Imperial Gift House and others*- 2009 INSC 1074 decided on 14.5.2009 has held as under :-

“Heard learned counsel for the parties.

By the impugned order, in effect and substance, the High Court has quashed notice issued by the Bank under Section 13 (2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, [for short, “the Act”]. Upon receipt of notice, respondents filed representation under Section 13 (3)(A) of the Act, which was rejected. Thereafter, before any further action could be taken under Section 13 (4) of the Act by the Bank, the writ petition was filed before the High Court. In our view, the High Court was not justified in entertaining the writ petition against the notice issued under Section 13 (2) of the Act and quashing the proceedings initiated by the bank.

Accordingly, the appeal is allowed, impugned order passed by the High Court is set aside and the writ petition filed before it is dismissed.”

13. In view of the aforesaid pronouncements of the Supreme Court, in our considered view, the learned Single judge has committed no error in not entertaining the writ petition against the notice issued under Section 13 (2) of the Act of 2002. Moreover as observed aforesaid after the dismissal of the writ petition the measure under Section 13 (4) has also been taken by the first respondent Bank, in the circumstances, the appellant has to seek alternative and efficacious remedy provided under Section 17 of the Act of 2002.

14. The appellants contention that the question raised and involved in the matter cannot be gone into by the Debts Recovery Tribunal is also wholly misconceived, in view of the wide scope of the jurisdiction vested in the Debts Recovery Tribunal under Section 17 of the Act of 2002. Section 17 of the Act of 2002 reads as under:-

"17. Right to appeal.-(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, [may make an application along with such fee, as may be prescribed] to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

[Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.]

[Explanation.- For the removal of doubts it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section (1) of section 17.]

[(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the secured assets to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more

measures referred to in sub-section (4) of section 13 taken by the secured assets as invalid and restore the possession of the secured assets to the borrower or restore the management of the secured assets to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of application in accordance with the provisions of the Recovery of Debts

Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder.]

15. On a bare reading of the aforesaid provision of appeal it is very clear that the Debts Recovery Tribunal is empowered to consider whether any of the measures referred to in Section 13 (4) of the Act of 2002 taken by the secured creditor for enforcement of security are in accordance with the provisions of the Act of 2002 and the rules made thereunder. In the circumstances we are of the view that in the appeal the appellant's objection about nonfulfillment of requirement of Section 13 (9) of the Act of 2002 can be very well considered by the Debts Recovery Tribunal. The appellant's other objection that the third respondent is no registered under Section 3 (1) of the Act of 2002 and, therefore, the assignment made in its favour is not valid, also can be gone into in appeal in view of the powers conferred upon the Debts Recovery Tribunal under Section 17 (2) of the Act of 2002.

16. As regards the appellant's contention that in view of the provision contained in Section 22 of the SICA the proposed action through notice under Section 13 (2) of the Act of 2002 is barred is not tenable in view of the second and third proviso of Section 15 of the SICA which reads as under:-

"Provided further that no reference shall be made to the Board for Industrial and Financial Reconstruction after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where financial assets have been acquired by any securitisation company or reconstruction company under sub-section (1) of section 5 of that Act:

Provided also that on or after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where a reference is pending before the Board for Industrial and Financial Reconstruction, such reference shall abate if the secured creditors, representing not less than three-fourth in value of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under sub-section (4) of section 13 of that Act."

17. In the case of *Nabha Industries Limited* (supra) the Division Bench of Punjab and Haryana High Court and in the case of *Nouveaw Exports*

Private limited (supra) a Division Bench of Bombay High Court after considering the aforesaid proviso of Section 15 of the SICA have held that in case the secured creditors, representing not less than three – fourth in value of the amount outstanding against financial assistance disbursed to the borrower of such creditors have taken any measure to recover their security debt under Section 13 (4) of the Act of 2002 the reference shall stand abate. We find ourselves in complete agreement with this view taken in the case of *Nabha Industries Ltd.* and also in the case of *Nouveaw Exports Private Limited* (supra). In the circumstances at this stage when prima facie there is a specific averment that the assignment in favour of the third respondent was effected on 29.3.2006, the reference under Section 15 of the SICA was made on 31.3.2004 much after the 21.6.2002 the date of commencement of the Act of 2002 and also having regard to the averment that the noticee consortium are secured creditors to the extent of 81% in respect of the assets/securities of the appellant company in our view the reference under SICA stands abate and as such no interference is called for on this ground.

18. Accordingly, for the reasons stated hereinabove, keeping the questions raised to be left open to be decided by the Debts Recovery Tribunal or by the competent Court, the writ appeal fails and is hereby dismissed. It is further made clear that dismissal of this writ appeal and the observations made hereinabove would not come in the way of the Debts Recovery Tribunal for deciding the validity of the measures as to whether they are taken in accordance with the provision of the Act of 2002 and the Rules made thereunder or not, in case any appeal is filed before it. No order as to the costs.

Appeal dismissed.

I.L.R. [2011] M. P., 839

WRIT APPEAL

Before Mr. Justice Shantanu Kemkar & Mr. Justice Prakash Shrivastava

W.A. No.296/2010 (Indore) decided on 21 September, 2010

VELOCITY LTD. (M/S.)

... Appellant

Vs.

STATE BANK OF INDIA

... Respondent

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (54 of 2002), Section 13(2), 13(4) & 17, Constitution, Article 226 - Alternative remedy - No justification

to entertain writ petition against notice u/s 13(2) of Act, 2002 - Such communication is not an order/action causing harm to borrower but is a step before taking recourse to measures provided u/s 13(4) of Act, 2002 - Only on taking recourse u/s 13(4), it can be said that borrower is aggrieved and only thereafter appeal u/s 17 of Act, 2002 can be filed - Writ appeal dismissed. (Para 14)

वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन अधिनियम (2002 का 54), धारा 13(2), 13(4) व 17, संविधान, अनुच्छेद 226 - वैकल्पिक उपचार - अधिनियम, 2002 की धारा 13(2) के अन्तर्गत सूचना के विरुद्ध रिट याचिका ग्रहण करने के लिए कोई न्यायोचित्य नहीं - ऐसी संसूचना ऋणी को हानि कारित करने वाला आदेश/कार्यवाही नहीं है बल्कि अधिनियम, 2002 की धारा 13(4) के अन्तर्गत उपबंधित उपाय का अवलंब लेने के पूर्व एक कदम है - धारा 13(4) के अन्तर्गत अवलंब लेने पर ही यह कहा जा सकता है कि ऋणी व्यथित है और उसके बाद ही अधिनियम, 2002 की धारा 17 के अन्तर्गत अपील पेश की जा सकती है - रिट अपील खारिज।

Cases referred :

AIR 2004 SC 2371, 2005 CLC 978, (2007) 76 SCL 280, 2009 INSC 1074, 2010 INSC 550.

A.K. Sethi with Rahul Sethi, for the appellant.

G.M. Chaphekar with R. C. Sinhal, for the respondent.

ORDER

The Order of the Court was delivered by SHANTANU KEMKAR, J.:—This intra Court appeal under Section 2 (1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth ko Appeal) Adhiniyam, 2005 has been filed by the appellant challenging the order dated 10.08.2010 passed by the Single Bench of this Court in Writ Petition No.2099/2010.

2. Brief facts necessary for disposal of this writ appeal are that the appellant Company was extended the loan/credit facilities by the respondent Bank. Due to defaults in the re-payment, considering the difficulties stated by the appellant, the respondent Bank accepted the appellant's prayer for re-schedulement of the financial assistance extended by it. However, even after re-schedulement the appellant failed to adhere to the conditions of re-schedulement, in the circumstances the respondent Bank in exercise of its powers under Section 13 (2) of the Securitisation and Reconstruction of Financial Assets and

Enforcement of Security Interest Act, 2002 (for short 'Act of 2002') issued a notice dated 14.12.2009 requiring the appellant to discharge in full its liabilities. It was also informed to the appellant that failing to discharge its liabilities the Bank shall be entitled to exercise all or any of the rights under sub-Section (4) of the Section 13 of the Act of 2002.

3. On receipt of the said notice under Section 13 (2) of the Act of 2002 the appellant submitted a representation/objection before the respondent/Bank. The respondent Bank considered the said representation/objection and informed the appellant that his representation/objection is not acceptable/tenable vide letter dated 09.02.2010. Aggrieved by the notice dated 14.12.2009 issued under Section 13 (2) of the Act of 2002 and the reply dated 09.02.2010 sent by the respondent/Bank, the appellant filed a writ petition No.2099/2010 before this Court under Article 226 of the Constitution of India praying therein that the entire proceedings initiated by the respondent/Bank under the provisions of Act of 2002 including the notice under Section 13 (2) of the Act of 2002 as well as the reply dated 09.02.2010 be quashed. The said writ petition has been dismissed by the learned Single Judge vide impugned order dated 10.08.2010 by observing that the appellant can avail the alternative remedy available to it in case the respondent Bank wishes to proceed further under Section 13 (4) of the Act of 2002. The learned Single Judge placed reliance on the judgment passed by the Supreme Court in the case of *Mardia Chemicals Limited and others Vs. Union of India and others* AIR 2004 SC 2371 = 2004 (4) SCC 311, on a Division Bench judgment of Madras High Court in the case of *Digvision Electronics Ltd. Vs. Indian Bank* represented by its General Manager 2005 CLC 978, a Single Bench judgment of Madras High Court in the case of *Archana Spinners Ltd. Vs. Board for Industrial and Financial Reconstruction* (2007) 76 SCL 280 and on a judgment delivered by the Supreme Court on 14.05.2009 in the case of *Punjab National Bank and another Vs. M/s Imperial Gift House and others* 2009 INSC 1074.

4. Feeling aggrieved by the order passed by the learned Single Judge dismissing its writ petition the appellant/petitioner has filed this writ appeal.

5. Heard Shri A.K.Sethi, learned Senior counsel for the appellant and Shri G.M.Chaphekar, learned Senior counsel for the respondent/Bank.

6. It has been argued by learned Senior counsel for the appellant that the learned Single Judge has committed an error in dismissing the appeal on the

ground of availability of an alternative remedy to the appellant. He submitted that in view of the Scheme of the Act of 2002 there is no remedy of appeal against the rejection of the representation or objection submitted by the borrower under Section 13 (3A) of the Act of 2002. According to him the proviso to Section 13 (3A) prohibits the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or to approach the Court of District Judge under Section 17-A. He pointed out that the explanation of Section 17 also provides that the communication of the reasons to the borrower by the secured creditor for not accepting his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person including the borrower to make an application to the Debts Recovery Tribunal under Section 17 (1) of the Act of 2002. In the circumstances, according to him the only remedy available to the appellant was to approach the High Court by filing a writ petition under Article 226 of the Constitution of India. He also argued that against the rejection of the representation/objection submitted by the borrower the borrower cannot be said to be remedy less and the powers vested in this Court under Article 226 of the Constitution of India cannot be said to be closed as has been observed by the learned Single judge. He argued that the judgment of the Supreme Court in the case of *Mardia Chemicals Limited Vs. Union of India* (supra) has no application to the present case in view of the fact that Section 13 (3A) has been inserted by Act No.30 of 2004 w.e.f. 11.11.2004 after the decision of the Supreme Court in the case of *Mardia Chemicals* delivered on 18.01.2004. Distinguishing the case of *Punjab National Bank and another Vs. M/s Imperial Gift House and others* decided by the Supreme Court, he argued that in the said case, the Supreme Court had observed that the High Court was not justified in entertaining the writ petition against the notice issued under Section 13 (2) whereas in the present case apart from challenge to the notice under Section 13 (2) of the Act of 2002 the appellant had also challenged the reply of the respondent Bank by which the appellant's representation/objection has been rejected under Section 13 (3A) of the Act of 2002.

7. On the other hand, learned Senior counsel appearing for the respondent Bank argued that in the writ petition the challenge was essentially to the notice issued to the appellant by the respondent Bank under Section 13 (2) of the Act of 2002, in the circumstances, in view of the law laid down by the Supreme Court in the case of *Mardia Chemicals* and also in the case of *Punjab*

National Bank Vs. M/s Imperial Gift House and others (supra) the notice under Section 13 (2) as also to challenge the reply under Section 13 (3A) of the Act of 2002 sent by the respondent Bank to the appellant could not have been challenged as by the communication of reasons under Section 13 (3A) of the Act of 2002 no harm was effected on the appellant and as such at that stage of the proceedings the appellant was not entitled to invoke the jurisdiction of this Court under Article 226 of the Constitution of India. He also pointed out that after dismissal of the writ petition the respondent Bank has already taken action under Section 13 (4) of the Act of 2002 and as such the appellant is required to file an appeal before the Debts Recovery Tribunal under Section 17 of the Act of 2002. In support of his contention that the possession of the appellant's property was taken invoking powers under Section 13 (4) of the Act of 2002 on 17.08.2010 document Annexure R-14 has been filed.

8. In order to decide the controversy involved in this writ appeal it would be appropriate to extract the relevant provisions of the Act of 2002. Section 13 provides for enforcement of the security interest.

"13. Enforcement of security interest.-

(1) Notwithstanding, anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

[(3A) If, on receipt of the notice under sub-section (2),

the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower.

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.]

9. Section 17 which is also relevant is quoted as under :-

"17. Right to appeal.- (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, [may make an application along with such fee, as may be prescribed] to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

[Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.]

[*Explanation*.- For the removal of doubts it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section (1) of section 17.]

[(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the secured assets to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured assets as invalid and restore the possession of the secured assets to the borrower or restore the management of the secured assets to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any party to the application may make an

application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder.]

10. Section 18 which provides for appeal to Appellate Tribunal is also extracted which reads as under :-

"18. Appeal to Appellate Tribunal.-

(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal [under Section 17, may prefer an appeal along with such fee, as may be prescribed] to an Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal.

[Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower:]

[Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent. of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:

Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent. of debt referred to in the second proviso.]

(2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder."

11. In the case of *Mardia Chemicals Limited Vs. Union of India and others* the Supreme Court was considering the question about validity of the Act of 2002. In paragraph 77 and 80 the Supreme Court has observed thus :-

"77. It is also true that till the stage of making of the demand and notice under Section 13(2) of the Act, no hearing can be claimed for by the borrower. But looking to the stringent nature of measures to be taken without intervention of Court with a bar to approach the Court or any other forum at that stage, it becomes only reasonable that the secured creditor must bear in mind the say of the borrower before such a process of recovery is initiated. So as to demonstrate that the reply of the borrower to the notice under Section 13(2) of the Act has been considered applying mind to it. The reasons howsoever brief that may be for not accepting the objections, if raised in the reply, must be communicated to the borrower. True, presumption is in favour of validity of an enactment and a legislation may not be declared unconstitutional lightly more so, in the matters relating to fiscal and economic policies resorted to in the public interest; but while resorting to such legislation it would be necessary to see that the persons aggrieved get a fair deal at the hands of those who have been vested with the powers to enforce drastic steps to make recovery.

80. Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures under Section 13(4) of the Act have been taken, a mechanism has been provided under Section 17 of the Act to approach the Debt Recovery Tribunal. The above noted provisions are for the purposes of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges from different provisions of the Act, is as follows :-

1. Under sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days notice before proceeding to take any of the measures as provided under sub-section (4) of Section 13 of the Act. After service of notice, if

the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion we have already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be for the purposes of the information /knowledge of the borrower without giving rise to any right to approach the Debt Recovery Tribunal under Section 17 of the Act, at that stage.

2. As already discussed earlier, on measures having been taken under sub-section (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under Section 17 of the Act before the Debt Recovery Tribunal.

3. That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/ interim order subject to the condition at it may deem fit and proper to impose.

4. In view of the discussion already held on this behalf, we find that the requirement of deposit of 75% of amount claimed before entertaining an appeal (petition) under Section 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it is liable to be struck down.

5. As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in civil court, within the narrow scope and on the limited grounds on which they are permissible, in the matters relating to an English mortgage enforceable without intervention of the Court."

12. On going through the law laid down by the Supreme Court in the case of *Mardia Chemicals* (supra) it is clear that the amendment in the Act of 2002 by insertion of Section 13 (3A) was made on account of the observation made by the Supreme Court, in the circumstances even though the amendment has been introduced after the judgment of the Supreme Court in the case of *Mardia Chemicals* but in view of the observations made by the Supreme Court that the reasons communicated to the borrower against any objection to the notice under Section 13 (2) shall be only for the purposes of information/knowledge of the borrower without giving rise to any right to approach the Debts Recovery Tribunal under Section 17 of the Act at that stage, the challenge to the communication of reasons to reject the objection/representation being only for the purposes of information and knowledge of the borrower the same cannot be assailed at that stage. In the case of *Punjab National Bank and another Vs. M/s Imperial Gift House and others* (supra) the challenge was not only to the notice under Section 13 (2) but was also to the rejection of the representation under Section 13 (3A) of the Act of 2002. In the said case before any further action could be taken under Section 13 (4) by the Bank the writ petition was filed before the High Court. In that situation, the Supreme Court observed that the High Court was not justified in entertaining the writ petition against the notice issued under Section 13 (2) of the Act and quashing the proceedings initiated by the Bank.

13. In the case of *United Bank of India Vs. Satyawati Tondon and others* decided on 26.07.2010 [2010] INSC 550 in paragraphs 4, 5, 6, 17, 18, 19, 21, 22, 27 and 28 the Supreme Court has observed thus :-

"4. Section 17 speaks of the remedies available to any person including borrower who may have grievance against the action taken by the secured creditor under sub-section (4) of Section 13. Such an aggrieved person can make an application to the Tribunal within 45 days from the date on which action is taken under that sub-section. By way of abundant caution, an Explanation has been added to Section 17(1) and it has been clarified that the communication of reasons to the borrower in terms of Section 13(3-A) shall not constitute a ground for filing application under Section 17(1). Sub-section (2) of Section 17 casts a duty on the Tribunal to consider whether the measures taken by the secured creditor for enforcement of security interest are in accordance with the

provisions of the Act and the Rules made thereunder. If the Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that the measures taken by the secured creditor are not in consonance with sub-section (4) of Section 13, then it can direct the secured creditor to restore management of the business or possession of the secured assets to the borrower. On the other hand, if the Tribunal finds that the recourse taken by the secured creditor under sub-section (4) of Section 13 is in accordance with the provisions of the Act and the Rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor can take recourse to one or more of the measures specified in Section 13(4) for recovery of its secured debt. Sub-section (5) of Section 17 prescribes the time-limit of sixty days within which an application made under Section 17 is required to be disposed of. The proviso to this sub-section envisages extension of time, but the outer limit for adjudication of an application is four months. If the Tribunal fails to decide the application within a maximum period of four months, then either party can move the Appellate Tribunal for issue of a direction to the Tribunal to dispose of the application expeditiously. Section 18 provides for an appeal to the Appellate Tribunal.

5. Section 34 lays down that no Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Tribunal or Appellate Tribunal is empowered to determine. It further lays down that no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken under the SARFAESI Act or the DRT Act. Section 35 of the SARFAESI Act is substantially similar to Section 34(1) of the DRT Act. It declares that the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

6. However, effective implementation of the SARFAESI

Act was delayed by more than two years because several writ petitions were filed in the High Courts and this Court questioning its vires. The matter was finally decided by this Court in *Mardia Chemicals v. Union of India* (2004) 4 SCC 311 and the validity of the SARFAESI Act was upheld except the condition of deposit of 75% amount enshrined in Section 17(2). The Court referred to the recommendations of the Narasimham and Andhyarujina Committees on the issue of constitution of special tribunals to deal with cases relating to recovery of the dues of banks etc. and observed:"

"One of the measures recommended in the circumstances was to vest the financial institutions through special statutes, the power of sale of the assets without intervention of the court and for reconstruction of assets. It is thus to be seen that the question of non-recoverable or delayed recovery of debts advanced by the banks or financial institutions has been attracting attention and the matter was considered in depth by the Committees specially constituted consisting of the experts in the field. In the prevalent situation where the amounts of dues are huge and hope of early recovery is less, it cannot be said that a more effective legislation for the purpose was uncalled for or that it could not be resorted to. It is again to be noted that after the Report of the Narasimham Committee, yet another Committee was constituted headed by Mr. Andhyarujina for bringing about the needed steps within the legal framework. We are, therefore, unable to find much substance in the submission made on behalf of the petitioners that while the Recovery of Debts Due to Banks and Financial Institutions Act was in operation it was uncalled for to have yet another legislation for the recovery of the mounting dues. Considering the totality of circumstances and the financial climate world over, if it was thought as a matter of policy to

have yet speedier legal method to recover the dues, such a policy decision cannot be faulted with nor is it a matter to be gone into by the courts to test the legitimacy of such a measure relating to financial policy." (emphasis supplied)

This Court then held that the borrower can challenge the action taken under Section 13(4) by filing an application under Section 17 of the SARFAESI Act and a civil suit can be filed within the narrow scope and on the limited grounds on which they are permissible in the matters relating to an English mortgage enforceable without intervention of the Court. In paragraph 31 of the judgment, the Court observed as under:

"In view of the discussion held in the judgment and the findings and directions contained in the preceding paragraphs, we hold that the borrowers would get a reasonably fair deal and opportunity to get the matter adjudicated upon before the Debts Recovery Tribunal. The effect of some of the provisions may be a bit harsh for some of the borrowers but on that ground the impugned provisions of the Act cannot be said to be unconstitutional in view of the fact that the object of the Act is to achieve speedier recovery of the dues declared as NPAs and better availability of capital liquidity and resources to help in growth of the economy of the country and welfare of the people in general which would subserve the public interest."

(emphasis supplied)

17. There is another reason why the impugned order should be set aside. If respondent No.1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression 'any person' used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the

Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

18. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution

and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in *Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad* AIR 1969 SC 556, *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai* (1998) 8 SCC 1 and *Harbanslal Sahnia and another v. Indian Oil Corporation Ltd. and others* (2003) 2 SCC 107 and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass appropriate interim order.

19. In *Thansingh Nathmal v. Superintendent of Taxes* (1964) 6 SCR 654, the Constitution Bench considered the question whether the High Court of Assam should have entertained the writ petition filed by the appellant under Article 226 of the Constitution questioning the order passed by the Commissioner of Taxes under the Assam Sales Tax Act, 1947. While dismissing the appeal, the Court observed as under :

"The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the

exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self imposed limitations. Resort that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.

21. The views expressed in *Titaghur Paper Mills Co. Ltd. v. State of Orissa* (supra) were echoed in *Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd. and others* (1985) 1 SCC 260 in the following words:

"Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or

where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged."

22. In *Punjab National Bank v. O.C. Krishnan and others* (2001) 6 SCC 569, this Court considered the question whether a petition under Article 227 of the Constitution was maintainable against an order passed by the Tribunal under Section 19 of the DRT Act and observed:

"5. In our opinion, the order which was passed by the Tribunal directing sale of mortgaged property was appealable under Section 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short "the Act"). The High Court ought not to have exercised its jurisdiction under Article 227 in view of the provision for alternative remedy contained in the Act. We do not propose to go into the correctness of the decision of the High Court and whether the order passed by the Tribunal was correct or not has to be decided before an appropriate forum.

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."

27. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.

28. Insofar as this case is concerned, we are convinced that the High Court was not at all justified in injuncting the appellant from taking action in furtherance of notice issued under Section 13(4) of the Act."

14. On a close scrutiny of the provisions of the Act of 2002 and the law laid down by the Supreme Court in the case of *Mardia Chemicals*, in the case of *Punjab National Bank* and in the case of *United Bank of India Vs. Satyawati Tondon and others*, we find that it is not justifiable to entertain a writ petition against the notice under Section 13 (2) of the Act of 2002 and also against the communication of reason by the secured creditor to the borrower about non-acceptability or untenability of the representation or objection. Such communication is not an order/action causing harm to the

borrower but is a step before taking recourse to one or more of the measures provided under Section 13 (4). It is only when such measure under Section 13 (4) is taken it can be said that the borrower is aggrieved and only on taking of such measure the borrower can take recourse to the provision of appeal provided under Section 17 of the Act of 2002. Keeping in view the scheme of the Act of 2002 the object behind making amendment by way of introducing Section 13 (3A) and the observations made by the Supreme Court in the case of *Mardia Chemicals Limited* in our considered view the communication of reasons is only for the purpose of information/knowledge of the borrower, and the same being not an action to cause harm to the borrower, at that stage it cannot be assailed. Having regard to the scope of provisions of Section 17 of the Act of 2002, the reasons so communicated can be well assailed in case measures referred to in sub-Section (4) of Section 13 are taken by the secured creditor. This being the scheme of the Act of 2002, any interference by this Court in a writ petition under Article 226 of the Constitution of India at the stage of notice under Section 13 (2) and at the stage of communication of rejection of representation/objection under Section 13 (3A) of the Act of 2002 would hamper the process of recovery, defeating the very purpose of enactment of the Act of 2002 and the purpose of introducing Section 13 (3A) in the Act of 2002.

15. It is also pertinent to mention that after dismissal of the writ petition the respondent Bank on 17.08.2010 has taken the recourse under Section 13 (4) of the Act of 2002, in the circumstances if the appellant feels aggrieved by taking of such measure it is open for it to approach the Debts Recovery Tribunal under Section 17 of the Act.

16. Accordingly, no case for interference in the order passed by learned Single Judge is made out. The appeal fails and is hereby dismissed. No orders as to the costs.

Appeal dismissed.

I.L.R. [2011] M. P., 859

WRIT APPEAL

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

W.A. No.1315/2006 (Jabalpur) decided on 19 November, 2010

MUNICIPAL CORPORATION, KATNI

...Appellant

Vs.

MADHU PASREEJA & ors.

...Respondents

A. Madhyamik Shiksha Adhiniyam, M.P. (23 of 1965), Sections 3, 28(4), Regulations of Board of Secondary Education, Regulations 2(6), 2(12), 2(13) & 2(14) - Bal Mandirs - Regulations applies to High School, Higher Secondary School, Multi-purpose Higher Secondary School which have been recognized by Board - Bal Mandir runs and maintains the institutions imparting pre-primary education and thus by no stretch of imagination it could be equated or compared with the schools which are called High Schools, Higher Secondary Schools or multipurpose schools which impart education of higher classes. (Paras 15 & 18)

क. माध्यमिक शिक्षा अधिनियम, म.प्र. (1965 का 23), धाराएँ 3, 28(4), माध्यमिक शिक्षा बोर्ड का विनियमन, विनियम 2(6), 2(12), 2(13) व 2(14) - बाल मंदिर - विनियमन हाईस्कूल, उच्चतर माध्यमिक विद्यालय, बहुउद्देशीय उच्चतर माध्यमिक विद्यालय, जिन्हें बोर्ड द्वारा मान्यता प्रदान की गई है, को लागू होते हैं - बाल मंदिर, पूर्व प्राथमिक शिक्षा प्रदान करने वाली संस्थाओं को चलाता एवं विकसित करता है और इसलिए, कल्पना से परे उसे उन विद्यालयों के साथ समानुपातिक अथवा बराबरी नहीं की जा सकती, जिन्हें हाई स्कूल, उच्चतर माध्यमिक विद्यालय या बहुउद्देशीय विद्यालय कहा जाता है, जो उच्चतर कक्षाओं की शिक्षा प्रदान करते हैं।

B. Municipal Service (Scale of Pay & Allowance) Rules, M.P. 1967, Municipal Corporations (Appointment and Conditions of Services of Officers and Servants) Rules, M.P. 2000, Rule 13(1), Schedule I - Bal Mandir Shikshikas - Post of Bal Mandir Shikshikas is not mentioned in the set up as provided in Scheduled I of the Rules, 2000 - Rules, 2000 do not apply - Service Conditions of Bal Mandir Shikshikas not governed by Rules of 2000. (Para 19)

ख. नगर पालिका सेवा (वेतनमान एवं भत्ते) नियम, म.प्र. 1967, नगरपालिक निगम (अधिकारियों एवं कर्मचारियों की नियुक्ति और सेवा शर्तें) नियम, म.प्र. 2000, नियम 13(1), अनुसूची I - बाल मंदिर शिक्षिकायें - नियम, 2000 की अनुसूची I में

यथा उपबंधित व्यवस्था में बाल मंदिर शिक्षिकाओं का पद उल्लेखित नहीं है - नियम 2000 लागू नहीं होते - बाल मंदिर शिक्षिकाओं की सेवा शर्तें 2000 के नियमों द्वारा शासित नहीं।

C. Equal Pay for Equal Work - Bal Mandir Shikshikas initially appointed by Gram Panchayat which subsequently became part in Municipal Corporation are employees of Municipal Corporation - However, they failed to establish that their nature of duty is similar to that of L.D.T. - The claim of respondents No. 1 and 2 for grant of pay-scale of L.D.T. can not be accepted. (Paras 20 & 21)

ग. समान कार्य के लिये समान वेतन - ग्राम पंचायत जो तत्पश्चात् नगरपालिक निगम की भाग बन गयी द्वारा आरम्भ में नियुक्त बाल मंदिर शिक्षिकायें नगरपालिक निगम के कर्मचारी हैं - तथापि वे यह स्थापित करने में असफल रही कि उनके कर्तव्य की प्रकृति एल.डी.टी. के कर्तव्यों के समान है - एल.डी.टी. का वेतनमान प्रदान किये जाने के लिए प्रत्यर्थी क्र. 1 व 2 का दावा स्वीकार नहीं किया जा सकता।

Cases referred :

(1993) 1 SCC 539, (2007) 8 SCC 279.

Arpan J. Pawar, for the appellant.

H.K. Upadhyay, for the respondents No. 1 & 2.

Ashish Shroti, G.A. for the respondent No. 3.

J U D G M E N T

The Judgment of the Court was delivered by :
S.R. ALAM, CHIEF JUSTICE. :-This intra-court appeal is preferred under Section 2 of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005 against the order of learned Single Judge dated 14.3.2006 in Writ Petition No. 2 095/2002.

2. The relevant admitted facts briefly stated are that respondents No. 1 and 2 were initially appointed as 'Bal Mandir Shikshikas' by Gram Panchayat, Tikuri. Respondent No. 1 was appointed on 1.1.1982 on fixed pay of Rs.150/-per month whereas respondent No.2 was appointed vide order dated 1.12.1983 on a salary of Rs.6/- per day. However, with the passage of time, Gram Panchayat, Tikuri became part of the Municipal Corporation, Katni, appellant before us. After inclusion of the Gram Panchayat, Tikuri in Municipal Corporation, Katni (in short 'Corporation'), respondents No. 1 and 2 became employee of the appellant-corporation. However, when the services

of respondents No. 1 and 2 were not regularized, they filed W.P. No.5055/1996 before this Court. In the said writ petition, the learned Single Judge in view of the fact that respondents No. 1 and 2 have rendered their services for considerable period and also by taking into account the fact that the appellant has already sent a requisition to the State Government to grant necessary sanction for creation of six extra posts, directed the State Government to pass an order within 30 days from the date of the order, on the requisition sent by the Corporation and; accordingly, disposed of the writ petition. It appears that the State Government thereafter sanctioned the posts and consequently the appellant vide order dated 29.4.1998 regularized the services of respondents No. 1 and 2 on the post of 'Bal Mandir Shikshika' in the pay-scale of Rs.950-25-1000-30-1210-40-1530/-. However, respondents No.1 and 2 being dissatisfied with the pay-scale given to them made representations claiming pay-scale of Rs. 1200-2040/- which is being paid to the Lower Division Teacher of the Government School. However, when no action was taken, respondents No. 1 and 2 again approached this Court by filing W.P. No.2095/2002 for issuance of direction commanding the appellant to grant aforesaid pay-scale from the date of their regularization and to grant the corresponding pay-scale of Rs.4000-6000/- from the date when it was made applicable including arrears of salary after proper fixation of their pay-scale with interest @ 18% per annum. In the said writ petition, the appellant appeared and contested the same by filing return. The stand of the appellant in the writ petition was that pursuant to the order of the State Government the services of the respondents were regularized in the pay-scale of Rs.950-1530/- vide order dated 29.4.1998, the corresponding pay-scale of which at present is Rs.3050-4590/-. It was further stated by the appellant in the return that no post of Teacher in the pay-scale of Rs.1200-2040/- has been sanctioned by the State Government in the school where respondents No. 1 and 2 are employed and, as such, they cannot claim higher pay-scale. It has further been averred in the return of the appellant that the pay-scale of Rs.1200-2040/- has been sanctioned by the State Government only in respect of those schools which are receiving grant-in-aid from the State Government; since the school where respondents No. 1 and 2 are employed does not receive any grant-in-aid from the State Government and hence they cannot be given the pay-scale of Rs.1200-2040/-.

3. The learned Single Judge vide order dated 14.3.2006 allowed the writ petition preferred by respondent No. 1 and 2. It was, inter alia, held

862 Municipal Corpn., Katni Vs. Madhu Pasreeja (DB) I.L.R.[2011] M.P., that admittedly two posts were sanctioned by the State Government in terms of Section 58 of M.P. Municipal Corporation Act, 1956 (in short 'Act of 1956') pursuant to which services of respondents No. 1 and 2 were regularized; and since the appellant has sanctioned pay-scale of Rs.1200-2040/- which has been revised to Rs.4000-6000/-, to the teachers employed in the school run by the appellant and since no pay-scale has been prescribed in respect of the post held by respondents No. 1 and 2 in Madhya Pradesh Municipal Corporations (Appointment and Conditions of Services of Officers and Servants) Rules, 2000 (in short 'Rules of 2000') and the pay-scale of Rs.950-1530/- is not provided in the Rules of 2000; the post held by respondents No. 1 and 2 since have been sanctioned by the State Government in terms of Section 58 of the Act of 1956, they are entitled for the pay-scale of Rs.1200-2040/- which has been revised to Rs.4000-6000/- and; accordingly, the appellant was directed to grant the said pay-scale to the respondents from the date of their regularization.

4. The aggrieved appellant therefore preferred an intra-court appeal which was earlier decided by another Division Bench of this Court vide order dated 9th August, 2007. The Division Bench held that singular issue which arises for consideration is whether respondents No. 1 and 2 are entitled to pay-scale as has been directed by the learned Single Judge in Regulation 73 of the Regulations framed by the Board of Secondary Education. The Division Bench while taking into account Regulation 73 of the Regulations framed by the Board of Secondary Education held that in case of educational institutions which are non-aided, there shall be one scale of pay, the minimum of which shall not be less than that in Government educational institutions. It was further held that there is no material on record to hold that the post on which respondents No. 1 and 2 are working are not available in the schools run by the State Government. Accordingly, the Division Bench came to the conclusion that Part II of Regulation 73 would be applicable to the case of respondents No. 1 and 2 and salary has to be paid to them accordingly. However, the direction for grant of interest on the amount of arrears of salary was set aside by the Division Bench. Accordingly, writ appeal preferred by the appellant-corporation was partly allowed.

5. Being aggrieved by the aforesaid order; appellant-corporation preferred Special Leave Petition before the Supreme Court namely SLP(C No.21231/2009 which was decided by the Supreme Court vide order dated 17.11.2009. The Supreme Court held that Division Bench of this Court has

passed the direction only on the basis of Regulation 73 of the Regulations framed by the Board of Secondary Education. It was further observed that this Court ought to have considered the provisions of M.P. Municipal Service (Scale of Pay & Allowance) Rules, 1967 (in short '**Rules of 1967**') which clearly prescribes the pay-scale of teachers of Municipal Corporation and particularly the Bal Mandir Shikshikas. Accordingly, the matter was remitted back to this Court for a fresh decision.

6. We have heard learned counsel for the parties.

7. Learned counsel for the appellant submitted that Rules of 2000 do not provide for the post of Bal Mandir Shikshikas and, therefore, the pay-scale cannot be fixed under the said Rules. It was further contended that under the 1967 Rules, the post of Bal Mandir Shikshikas and Lower Division Teachers have been categorized distinctly and separate pay-scales have been prescribed. It was further submitted that Regulation 73 of the Regulations framed by the Board of Secondary Education does not apply to the case of respondents, as it applies to teachers who are employed in primary, middle and higher secondary schools. It was further contended that the burden was on the respondents to prove that they are performing similar work which is being performed by assistant teachers in order to claim the benefit of principle of 'equal pay for equal work'. In support of his submissions, learned counsel has placed reliance on the decisions of the Supreme Court in the case of *State of Madhya Pradesh and another vs. Pramod Bhartiya and others*, (1993) 1 SCC 539 and *S.C. Chandra and others vs. State of Jharkhand and others*, (2007) 8 SCC 279. Learned counsel for the appellant further contended that respondents cannot claim parity in the matter of pay-scale with the teachers of Municipal Corporation, Jabalpur.

8. On the other hand, learned counsel for respondents No. 1 and 2 while opposing the submissions made on behalf of the appellant-corporation submitted that pursuant to the direction of this Court passed in W.P No.5055/1996 dated 6.11.1997, the services of respondents No. 1 and 2 were regularized. Respondents No. 1 and 2 are employees of appellant-corporation and their service condition are governed by the provisions of Madhya Pradesh Municipal Corporation (Appointment and Conditions of Service of Officers & Servants) Rules, 2000. Learned counsel for the respondents No. 1 and 2 further contended that if provisions of Section 58 of the Act of 1956 are

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read conjointly with Rule 13 of the 2000 Rules, it would be apparent that the
service conditions of respondents No.1 and 2 are governed by 2000 Rules.

9. We have considered the submissions made on both sides. As per
order of the Apex Court dated 17.11.2009, the issue which requires to be
adjudicated in this appeal is as to whether the pay-scale of the respondents
are to be fixed in accordance with Regulation 73 of the Regulations framed by
the State Government or under the provisions of Rules 1967 which clearly
prescribes the pay-scale of teachers of the Corporation particularly Bal
Mandir Shikshikas with which we are concerned and was not considered in
the earlier judgment of the Division Bench in this appeal.

10. Let us have look of the relevant provisions of the Act and the
Rules. The Madhya Pradesh Madhyamik Shiksha Adhiniyam, 1965 (Act
No.23 of 1965) (in short '**Act of 1965**') was enacted with a view to
provide for the establishment of a Board to regulate Secondary Education in
Madhya Pradesh and other matters ancillary thereto. Under Section 3 of the
Act of 1965, the Board of Secondary Education, Madhya Pradesh (in short
'**Board**') was established. The Board in exercise of powers under Section
28(4) of the Act of 1965 framed the Regulations of Board of Secondary
Education, Madhya Pradesh ('**Board's Regulations**').

11. Regulation 2(6) of the Board's Regulations defines the expression
"College" to mean an educational institution preparing candidates for the
Higher Secondary 'B' courses. Teachers Training Certification Examination,
Physical Training Teachers Examination or such other examination of the Board
are recognized by the Board for such a purpose.

12. Regulation 2(12) of the Board's Regulations defines the expression
"High School" to mean an educational institution which is not a college preparing
candidates for the High School Examination of the Board and recognized by
the board for such a purpose.

13. Regulation 2(13) of the Board's Regulations defines 'Higher
Secondary School' means an educational institution preparing candidate
for a Higher Secondary School Certificate Examination of the Board
and recognized by the Board for such a purpose.

14. Regulation 2(14) of the Board's Regulations defines "Multiple-
purpose Higher Secondary School" means an educational institution
preparing candidate for the Higher Secondary School Certificate Examination

of the Board and recognized by the Board as a Multi-purpose Higher Secondary School under its bye-laws.

15. Thus, from perusal of Regulation 2 of the Board's Regulations, it is apparent that it applies to High School, Higher Secondary School, Multi-purpose Higher Secondary School which have been recognized by the Board. Chapter XII of the Board's Regulations deals with staff with private Educational Institutions. Regulation 70 of the Board's Regulations provides that regulation in Chapter XII shall apply to all non-Government educational institutions.

16. Regulation 73 of the Board's Regulations which is relevant for the purposes of controversy involved in the writ petition is extracted below:

"The scales of pay of the staff, in educational institutions which are in receipt of Government grant, shall not be less than those sanctioned for the corresponding staff in Government institution.

In the case of educational institutions which are not aided, there shall be a scale of pay, the minimum of which shall not be less than that in Government educational institutions."

17. Clause 32 of Chapter III of Madhya Pradesh Education Code provides recognition is required to be taken in respect of schools where education in primary, middle and higher classes is imparted. Thus, from conjoint reading of the Regulations and M.P. Education Code, it is apparent that no permission or recognition is required either by the Board of Secondary Education or by the State Government to run Pre-Primary School/Classes.

18. It appears that Bal Mandir runs and maintains the institutions imparting pre-primary education and thus by no stretch of imagination it could be equated or compared with the schools which are called high schools, higher secondary schools or multipurpose schools which impart education of higher classes. Admittedly, the respondents are employed as teachers to teach students of pre-primary classes in the institutions run by the Corporation. These pre-primary classes are known as Bal Mandirs. From a careful scrutiny of the regulation referred above, would reveal that it does not apply to the institutions imparting education in higher classes which are maintained or controlled by the Board and are squarely under the management and control

866 Municipal Corpn., Katni Vs. Madhu Pasreeja (DB) I.L.R.[2011] M.P., of the Municipal Corporations. Admittedly, the respondents No. 1 and 2 are working in Bal Mandir as Shikshikas and teaching students of pre-primary level.

19. Admittedly, vide notification dated 27.12.1980 in respect of the area comprised in Katni Township, Municipal Corporation was constituted with effect from 1.1.1981. Section 2(1) of the Act of 1956 provides that on the application of this Act to any city, the municipality of that city shall, save as hereinafter provided, be deemed to have been withdrawn from the operation of the Municipal Law. Section 2(1) of the Act of 1956 reads asunder:

"2. Repeal of Enactment.-(1) On the application of this Act to any city, the municipality of that city shall, save as hereinafter provided, be deemed to have been withdrawn from the operation of the Municipal Laws.

Provided that on the application of this Act to any city under sub-section (3) of Section 1, the authority or any institution if performing the Municipal functions shall cease to perform such functions and all, assets and liabilities of such authority or institution shall vest in the Municipal Corporation constituted under this Act."

Thus, the Rules of 1967 which framed in exercise of powers under Section 355 read with Section 95 of the Madhya Pradesh Municipal Corporation Act, 1961, do not apply in the case of respondents No.1 and 2 as they became employees of the Corporation with effect from 1.1.1981. However, the aforesaid aspect was not brought to the notice of the Supreme Court and on the other hand, it was contended before the Supreme Court that service conditions of respondents No.1 and 2 would be governed by the Rules of 1967. However, in view of Section 2(1) of the Act of 1956, the aforesaid rules do not apply in the case of respondents No.1 and 2. In exercise of powers conferred under Section 58 read with Section 433 of the Act of 1956, the State Government has framed the Rules of 2000 (Supra). The post of Bal Mandir Shikshikas is not mentioned in the set up as provided in Schedule-1 of the Rules of 2000. Rule 13(1) of the Rules of 2000 provides that Corporation shall be competent to prescribe the method/procedure under which decision is to be taken in respect of medical treatment, General Provident Fund and pension. The other conditions of service which have not been provided in these Rules or any other Rules made under Madhya Pradesh

Municipal Corporation Act shall be dealt to be the same which are applicable to Government servants on the same post from time to time. Rule 13(1) of the Rules of 2000 reads as under:

"13. Other conditions of service.-(1) The Corporation shall be competent to prescribe the method/procedure under which decision is to be taken in respect of medical treatment, General Provident Fund and Pension. The other conditions of service which have not been provided in these rules or any other rules made under the Act shall be deemed to be the same which are applicable to Government servants on the same post from time to time"

Thus, from perusal of Rules 13(1) of the Rules of 2000, it is clear that the conditions of service of the officers and servants in respect of which no provision has been made in the Rules, provisions applicable to Government servants shall apply. However, as referred above, since the post of Bal Mandir Shikshika is not mentioned in the set up, as provided in Schedule I of the Rules of 2000, therefore, the aforesaid Rules do not apply in the case of respondents No. 1 and 2. For the aforementioned reasons, the contention of the learned counsel for the respondents No. 1 and 2 that in view of Rule 13 of the Rules of 2000, service conditions of respondents No. 1 and 2 are governed by the Rules of 2000 cannot be accepted.

20. Thus the inevitable conclusion is that though respondents No. 1 and 2 are employees of the Corporation, however, there are no statutory rules governing their service conditions. In the writ petition, the respondents have sought a direction that they be granted the pay-scale of Rs.1200-2040/- which is payable to Lower Division Teachers. However, respondents No. 1 and 2 even in the writ petition have failed to establish that their nature of duty is similar to that of Lower Division Teachers and, therefore, they are entitled to similar benefit in the matter of pay-scale. The averments that the respondents are working on the post of Assistant Teacher have been denied by the appellant-corporation in the return in para 30. Perusal of paragraph 5.4 reveals that respondents' case is that they are working on regular post of Assistant Teachers in the pay-scale of Rs.950-1530/-, whereas from perusal of Annexure P/2, it is clear that services of respondents No. 1 and 2 were regularized against the vacant and sanctioned post of 'Bal Mandir Shikshikas' pursuant to the order passed by the State Government.

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21. Thus, there is no material on record to hold that the nature of duties and functions of Bal Mandir Shikshikas and Lower Division Teachers are similar. Therefore, the claim of respondents No. 1 and 2 for grant of pay-scale of Rs.1200-2040/- which has been revised to Rs.4000-6000/- cannot be accepted as respondents No. 1 and 2 have failed to discharge the burden to show that they perform the same duties and functions which are performed by the Lower Division Teachers.

22. From perusal of affidavit filed on behalf of the Corporation, we find that Bal Mandirs which are being run by the appellant-corporation do not receive any grant-in-aid. Respondents No. 1 and 2 were initially appointed in the pay-scale of Rs.950-25-1000-30-1210-40-1530/- and are currently being paid the pay as per the pay scale of Rs.3050-4590/- which is corresponding revised pay-scale of Rs.950-1530/-.

23. In view of the discussion made above, we have no hesitation in holding that respondents No. 1 and 2 who are employed as 'Bal Mandir Shikshikas' are entitled to get the monthly salary in the pay-scale of Rs.3050-4590/- which is corresponding pay-scale of Rs.950-1530/-. Accordingly, the direction of the learned Single Judge to fix the pay-scale of respondents No. 1 and 2 in the pay-scale of Rs.4000-6000/- which is corresponding pay-scale of Rs.1200-2040/- is set aside. In the result, the appeal is partly allowed. However, there shall be no order as to costs.

Appeal partly allowed.

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WRIT APPEAL

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

W.A. No. 93/2010 (Jabalpur) decided on 9 December, 2010

M.I. KHAN (Dr.) & ors.

...Appellants

Vs.

M.P. STATE ELECTRICITY BOARD & anr.

...Respondents

A. Interpretation of Statutes - Retrospective Operation - It is cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation.

(Para 15)

क. कानूनों का निर्वचन - मूलतः प्रवर्तन - यह अर्थान्वयन का प्रमुख

सिद्धांत है कि प्रत्येक कानून प्रथम दृष्टया भविष्यलक्षी होता है, जब तक कि उसका अभिव्यक्त रूप से अथवा आवश्यक विवक्षा द्वारा भूतलक्षी प्रवर्तन होना नहीं बताया जाता।

B. Public Services (Promotion) Rules, M.P. 2002 - Prospective in Operation - Rules 2002 do not have any retrospective operation and shall apply to the employees of Board from 5.1.2006 i.e., when the same were adopted - Rule 7(5) of Rules do not apply to vacancies which have already arisen before 5.1.2006 - It applies only to vacancies which have arisen after 5.1.2006 - Direction given by Single Judge to convene a review D.P.C strictly in accordance with provisions of Rule 7 cannot be approved - In respect of vacancies which have already arisen prior to 5.1.2006, the D.P.C. shall consider the suitability of candidates to fill up the vacancies in accordance with the Rules which were in vogue prior to 5.1.2006. (Paras 15 to 17)

ख. लोक सेवा (पदोन्नति) नियम, म.प्र. 2002 - प्रवर्तन में भविष्यलक्षी - नियम 2002 का भूतलक्षी प्रवर्तन नहीं है और बोर्ड के कर्मचारियों को दिनांक 05.01.2006 से लागू होंगे, जब उन्हें अंगीकृत किया गया - नियमों का नियम 7(5) उन रिक्तियों को लागू नहीं होता जो पहले से ही दिनांक 05.01.2006 से पूर्व उत्पन्न हुई हैं - वह केवल उन रिक्तियों को लागू होता है जो दिनांक 15.01.2006 के पश्चात उत्पन्न हुई हैं - एकल न्यायाधीश द्वारा नियम 7 के उपबंधों के सम्यक् पालन में पुनर्विलोकन डी.पी.सी. बुलाने का निदेश अनुमोदित नहीं किया जा सकता - उन रिक्तियों के संबंध में, जो 5.01.2006 से पूर्व उत्पन्न हुई हैं, डी.पी.सी. उन नियमों के अनुसार रिक्तियों को भरने के लिए अभ्यर्थियों की उपयुक्तता पर विचार करेगी, जो 05.01.2006 के पूर्व प्रभावी थे।

Cases referred:

(2007) 15 SCC 406, (2007) 1 SCC 683, (1998) 4 SCC 456, (1992) 4 SCC 689, (1990) 3 SCC 42, (1983) 3 SCC 284, AIR 1983 SC 852, (1997) 10 SCC 419, (2008) 3 SCC 641, AIR 2004 SC 5100, (2007) 7 SCC 171, AIR 1974 SC 2271.

Rajneesh Gupta, for the appellant No. 1.

Sanjay Agrawal, for the respondents.

ORDER

The Order of the Court was delivered by **S.R. ALAM, CHIEF JUSTICE.** :—Both these appeals arise from the order dated 28.1.2010 passed by learned single Judge in Writ Petition No.2626/2008

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(S). As agreed to by learned counsel for the parties, the appeals were heard together and are being decided by this common order. W.A. No.137/2010 has been preferred by the employer, namely, M.P. State Electricity Board and its functionaries (in short 'the Board') whereas WA No.93/2010 has been preferred by the employee (hereinafter referred to as 'the petitioner').

2. The short question that falls for our consideration in these appeals is whether the vacancies occurring prior to adoption of new Rules by the Board are also to be filled up as per the then Rules in vogue or as per new Rules.

3. The short facts which are relevant to appreciate the aforesaid question involved in these appeals are that the petitioner entered in the services of the Board in the medical wing as Medical Officer in the year 1977. Vide order dated 1.5.1991 he was promoted as Senior Medical Officer. Aforesaid post was subsequently redesignated as Deputy Chief Medical Officer. The petitioner was awarded higher pay-scale of Assistant Chief Medical Officer vide order dated 7.11.1996. The Board vide circular dated 5.1.2006 adopted the provisions of the M.P. Public Services (Promotion) Rules, 2002 (hereinafter referred to as 'the 2002 Rules'). Rule 7 (5) of the said Rules provides that meeting of the departmental promotion committee shall be held every year and it shall consider the suitability of the public servant for promotion separately with reference to the vacancies of each previous year starting with the earliest year onwards and shall prepare a select list for the relevant year accordingly. However, in contravention of the provisions of the 2002 Rules the meeting of the departmental promotion committee was held and respondents 4 to 6 who are junior to the petitioner were promoted to the post of Assistant Chief Medical Officer.

4. In the circumstances aforesaid, the petitioner filed the writ petition inter alia, seeking relief of quashing the order of promotion of respondents 4 to 6 dated 8.1.2008 and to command the respondents to promote the petitioner to the post of Assistant Chief Medical Officer with all consequential benefits. The petitioner also sought the relief of quashing of the order dated 25.5.2007 by which the petitioner was communicated the adverse remarks and quashing of orders dated 5.1.2008 and 11.2.2008 by which his representation and the appeal against the adverse ACRs respectively, were rejected.

5. A return was filed on behalf of respondents 1 and 2 in which inter alia, it was stated that in the medical wing of the Board initially the hierarchy of the posts was as follows:

- (i) Medical Officer,
- (ii) Senior Medical Officer,
- (iii) Chief Medical Officer.

On account of stagnation in the services of the Board, a time bound promotion scheme was introduced by medical wing of the Board. By order dated 28.1.1995 post of Chief Medical Officer was upgraded and made equivalent to that of Additional Chief Engineer. On account of upgradation of the post of Chief Medical Officer there was no post in medical wing of the Board equivalent to that of Superintendent Engineer and, therefore in order to meet the existing situation, the Board redesignated four posts of Senior Medical Officers as Assistant Chief Medical Officer in the Time Scale of pay of Rs.8,300/- which was the pay-scale of Superintendent Engineer. The Board adopted the 2002 Rules by circular dated 5.1.2006. Only two posts of Assistant Chief Medical Officer were vacant for unreserved category. Rule 7(3) of the 2002 Rules provides that number of vacancies for promotion during the course of the year i.e. 1st January to 31st December are required to be worked out after taking into account the existing and anticipated vacancies on account of retirement and promotion to the higher posts or higher pay-scale of post. One post of unreserved category was likely to fall vacant in the year 2008. Thus for filling up three posts of Assistant Chief Medical Officers a panel was prepared. The departmental promotion committee considered the ACRs for the period of five years commencing from the year ending March, 2003 to 2007 of all the eligible candidates including the petitioner. However, the petitioner was not found fit for empanelment to the post of Assistant Chief Medical Officer as he could not secure the minimum benchmark grade. Thereafter in the year 2009 a meeting of the departmental promotion committee was held in which the case of the petitioner was considered and as he was found suitable to be promoted to the post of Assistant Chief Medical Officer, accordingly, vide order dated 2.3.2009 he was promoted to the said post. The claim of the petitioner that he is entitled to promotion since 1998 was denied.

6. Learned single Judge vide order dated 28.1.2010 held that in view of Rule 7 (5) of the 2002 Rules, the departmental promotion committee is required to consider suitability of public servants for promotion separately with reference to vacancies of each previous year starting with the earlier year onwards and has to prepare a select list for the relevant year. From perusal of the meeting

of the departmental promotion committee held on 5.1.2008 learned single Judge found that the consolidated vacancy of all the years as on 5.1.2008 was determined and after taking note of ACRs of five years prior to March, 2008 the exercise for ascertaining the suitability of candidates for promotion was conducted which is not in accordance with Rule 7 (5) of the 2002 Rules. It was further held by learned single Judge that since the petitioner and respondents 4 to 6 have already been promoted during pendency of the petition therefore, learned single Judge did not deem it appropriate to quash the promotion and without disturbing the promotions already made learned single Judge directed respondents 1 and 2 to convene review DPC and to take steps for filling up the vacancies year-wise, strictly in accordance to the requirement of Sub-rules (5) and (6) of Rule 7 and thereafter make the promotions already granted to the petitioner and the respondents in accordance to the particular year in which they are found eligible for promotion after such reconsideration. It was further held that it is not necessary to go into the question of adverse confidential reports communicated to the petitioner. However, it was observed that after the exercise for ascertaining the suitability of candidates for promotion is completed, in case the petitioner has any further grievance in the matter, he may agitate the same afresh. Accordingly, the writ petition was disposed of.

7. Being aggrieved by the aforesaid order, the petitioner has filed the writ appeal, namely, WA No.93/2010 in which the grievance has been made that claim of the petitioner should have been allowed in entirety by the learned single Judge. WA No.137/2010 has been filed by Board inter alia, on the ground that Rule 7 (5) cannot be given retrospective operation. Rule 7 (5) does not mandate that promotion is to be given to a candidate who is found suitable for promotion to higher post from the year in which the vacancy has arisen. It has further been averred that the order of learned single Judge in so far as it directs the promotion in accordance to the particular year in which candidates are found eligible, is liable to be set aside.

8. Shri Sanjay Agrawal, learned counsel for the Board submitted that M.P. Public Services (Promotion) Rules, 2002 were adopted by the Board vide circular dated 5.1.2006. Rule 7 (5) of the 2002 Rules do not have retrospective application therefore, learned single Judge erred in issuing a direction to respondents 1 and 2 to take steps for filling up the vacancies year-wise strictly in accordance to the requirement of Sub-rules (5) and (6) of Rule 7 and thereafter make the promotions already granted to the petitioner and the

respondents in accordance to the particular year in which they are found eligible for promotion after such reconsideration. It was further submitted by learned counsel for the Board that in the year 2008 the meeting of the departmental promotion committee was held in which the case of the petitioner was considered however, he was not found fit. Subsequently, the case of the petitioner was again considered for promotion and since he was found fit for promotion he has already been promoted. The claim of the petitioner for promotion to the post of Assistant Chief Medical Officer since 1998 suffers from delay and laches. In support of his submissions, learned counsel for the Board has placed reliance on the decisions of the Supreme Court in *Nani Sha and Others v. State of Arunachal Pradesh and Others*, (2007) 15 SCC 406, *State of Uttaranchal and Another v. Dinesh Kumar Sharma*, (2007) 1 SCC 683, *Jagdish Ch. Patnaik and Others v. State of Orissa and Others*, (1998) 4 SCC 456, *State of Madhya Pradesh v. Srikanth Chapekhar*, (1992) 4 SCC 689, *N. Nagaraja v. Vasant K. Gudodagi and Others*, (1990) 3 SCC 42 and *Y.V. Rangaiah v. J. Sreenivasa Rao*, (1983) 3 SCC 284.

9. On the other hand, Shri Rajneesh Gupta, learned counsel for the petitioner while opposing the submissions made on behalf of the Board, submitted that Rule 7 (5) applies to preparation of select list i.e. a stage prior to issue of order of promotion. He has drawn attention of this Court to a chart and stated that vacancies were available in the year 1998 however, they were not filled up by the Board. It is contended by learned counsel for the petitioner that for inaction on the part of the Board in not filling up the vacancies timely, the petitioner cannot be permitted to suffer. Learned counsel for the petitioner submitted that learned single Judge erred in not deciding the issue with regard to adverse ACR of the year 2007, as the ACR of the year 2007 has affected the case of the petitioner. It is further submitted by learned counsel for the petitioner that the case of the petitioner ought to have been allowed in entirety.

10. We have considered the submissions made by learned counsel for the parties. Admittedly, the provisions of the Madhya Pradesh Public Services (Promotion) Rules, 2002 which were framed by the State Government in exercise of power conferred by the proviso to Article 309 read with Article 16 and 335 of the Constitution of India, were adopted by the Board vide circular dated 5.1.2006. Rule 2 (n) defines 'select list' to mean a list of such public servants who are adjudged suitable to the next pay scale or the higher grade of the post as provided in the respective Recruitment Rules. Sub-rule (5) of Rule 7 of the 2002 Rules reads as under:

"7. Promotion on the basis of merit-cum-seniority: -

(5) The meeting of the Departmental Promotion/Screening Committee shall be held every year. It shall consider the suitability of the public servant for promotion separately with reference to the vacancies of each previous year starting with the earliest year onwards. The Departmental Promotion Committee/Screening Committee shall consider, the suitability of the public servants for promotion to fill up the unfilled vacancies of the earlier year or years separately and prepare the select list for the relevant year accordingly. Thereafter the Departmental Promotion Committee/Screening Committee shall consider the suitability of the public servants for promotion to fill up the existing and anticipated vacancies of the current year."

11. In *V.Y. Rangaiah and Others v. J. Sreenivasa Rao and Others*, AIR 1983 SC 852 the Supreme Court while dealing with the provisions of the Andhra Pradesh Registration and Subordinate Service Rules in paragraph 9 of the judgment held as follows:

"The vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules."

12. The Apex Court again reiterated the similar view in *State of Rajasthan v. R. Dayal and Others*, (1997) 10 SCC 419 and by placing reliance on the decision in *Y.V. Rangaiah* (supra) has held that the posts which fell vacant prior to the amendment of the rules would be governed by the original rules and not by the amended rules. As a necessary corollary, the vacancies that arose subsequent to the amendment of the rules are required to be filled up in accordance with the law existing as on the date when the vacancies arose. Even a carried-forward vacancy is required to be considered in accordance with the law existing unless suitable relaxation is made by the Government.

13. In *A. Manoharan and Others v. Union of India and Others*, (2008) 3 SCC 641 the Apex Court held as under:

"25. Furthermore, the Regulations have been amended only with effect from 11.8.2004. It would have a prospective effect. It cannot be applied retrospectively. Any vacancy which has arisen prior to coming into force

of the said amended Regulations must be filled up in terms of the law as was existing prior thereto."

14. Thus, in view of the exposition of law made by the Apex Court the vacancy has to be filled up in accordance with the law which exists at the time when the vacancy has occurred.

15. It is cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. [See: *Zile Singh v. State of Haryana*, AIR 2004 SC 5100 and *C. Gupta v. Smithkline Pharmaceuticals Ltd.*, (2007) 7 SCC 171] Thus, in the backdrop of aforesaid well settled legal position, we have no hesitation in holding that the 2002 Rules do not have any retrospective operation and shall apply to the employees of the Board from 5.1.2006, i.e. the date when the same were adopted. Rule 7 (5) of the 2002 Rules provides that the meeting of the Departmental Promotion shall be held every year and it shall consider the suitability of the public servant for promotion separately with reference to the vacancies of each previous year starting with the earliest year onwards and shall prepare a select list for the relevant year accordingly. Rule 7 (5) does not apply to vacancies which have arisen before 5.1.2006 i.e. prior to its adoption. It applies only to those vacancies which have arisen after 5.1.2006. That apart Rule 7 (5) in no way, provides that promotion is required to be given with effect from the date of occurrence of the vacancies. The said rule only provides the Departmental Promotion Committee shall prepare a select list to consider the suitability of the public servants for promotion to fill up the existing and anticipating vacancies of the current year. Therefore, in the absence of any stipulation in Rule 7 (5) of the 2002 Rules that promotion has to be given with reference to the year in which the vacancy has arisen, an employee has no right to claim promotion from the date when the vacancy has arisen in the cadre. Our conclusion is also fortified by well settled legal proposition that mere inclusion in the select list does not confer any indefeasible right on the employee to claim promotion.

16. The 2002 Rules were adopted by the Board in the year 2006 and the meeting of the Departmental Promotion Committee was held in the year 2008, but the petitioner was not found fit. Subsequently, in the year 2009, the petitioner was found fit and promotion has already been granted to him. Since, the petitioner has already been promoted in the year 2009 and it has already been held that an employee has no right to claim promotion from the date

when the vacancy has arisen in the cadre therefore, the claim of the petitioner for promotion since 1998 cannot be entertained. Even otherwise, the claim of the petitioner for promotion to the post of Assistant Chief Medical Officer suffers from delay and laches as the writ petition was filed before learned single Judge in the year 2008 after a period of ten years. Therefore, the relief of promotion with effect from 1998 cannot be granted as it suffers from delay and laches. Our view is supported by the judgments of the Apex Court rendered in *P.S. Sadasivaswamy v. State of Tamil Nadu*, AIR 1974 SC 2271 and *State of Madhya Pradesh v. Srikant Chaphekar*, (1992) 4 SCC 689.

17. In view of the discussions made above, the direction given by learned single Judge to the Board to convene a review DPC and take steps for filling up the vacancies year-wise strictly in accordance with the provisions contained in sub-rules (5) and (6) of Rule 7, cannot be approved. As noticed above, promotion against the vacancies is to be given as per existing Rules at the time of occurrence of the vacancies. Therefore, the W.A. No.137/2010 preferred by the Board deserves to be allowed. However, the Board shall convene a review DPC to consider the suitability of the eligible candidates falling within the zone of consideration including petitioner as well as respondents 4 to 6 for filling up the vacancies which have arisen after 5.1.2006 separately and prepare a fresh select list year-wise strictly in accordance with the provisions of sub-rules (5) and (6) of Rule 7 of the Rules and thereafter make promotion already granted to the petitioner as well as respondents 4 to 6 in accordance with the particular year in which they are found eligible to promotion after such consideration. However, in respect of the vacancies which occurred prior to 5.1.2006 the D.P.C. shall consider the suitability of the candidates to fill up the vacancies in accordance with the Rules which were in vogue prior to 5.1.2006.

18. In the result, the W.A. No.93/2010 preferred by the petitioner fails and is hereby dismissed. However, W.A. No.137/2010 is partly allowed and accordingly disposed of with the aforesaid direction. There shall be no order as to costs.

W.A. No.93/2010 is dismissed.

WRIT APPEAL

Before Mr. Justice Shantanu Kemkar & Mr. Justice Abhay M. Naik

W.A. No.782/2006 (Indore) decided on 28 January, 2011

COMMISSIONER OF CENTRAL EXCISE,

INDORE & ors.

...Appellants

Vs.

RAM KUMAR AGGRAWAL

...Respondent

Customs Act (52 of 1962), Sections 110(2) & 124 - Issuance of notice by registered post within six months is a sufficient compliance in the eye of law.

On 03.04.1989, a search was conducted at the shop of the petitioner-respondent and a seizure was made of 129.720 kilograms of silver and currency notes etc. A panchnama was prepared in the absence of the petitioner, copy whereof was annexed to the writ petition as Annexure-1. He was served with a show cause notice on 07.10.1989 in registered AD manner.

Neither Section 110(2) nor clause (a) of Section 124 of the Act contemplates service of notice in strict sense within a period of six months from the date of giving/issuing the same by registered post which mode has been prescribed under the Act. It merely speaks about giving of the notice. Keeping in view the object and purpose of the two provisions, it can not be said that the legislature intended to achieve service of notice within six months from the date of seizure. (Paras 2 & 15)

सीमा-शुल्क अधिनियम (1962 का 52), धाराएँ 110(2) व 124 - छः माह के भीतर रजिस्ट्रीकृत डाक द्वारा सूचना पत्र जारी करना विधि की दृष्टि में पर्याप्त अनुपालन है।

Cases referred :

AIR 1966 SC 330, 1997 (91) ELT 51 (Cal.), 2010(255) ELT 321(P&H).

Abhisheikh Tugnawat, for the appellants.

G.M. Chaphekar with *Subodh Abhyankar*, for the respondent.

ORDER

The Order of the Court was delivered by
ABHAY M. NAIK, J. :- This writ appeal is directed against the order dated 15th November, 2000 passed by the learned Single Judge of this Court in

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Miscellaneous Petition No.44/1990, quashing thereby show cause notice dated
29.09.1989 (Annexure 10) issued by the Collector, Customs & Central
Excise, Indore.

2. Short facts, leading to the present writ appeal, are that the petitioner-respondent was engaged in the business of Silver Refinery, being proprietor of Shri Ganesh Bullion Refinery. On 03.04.1989, a search was conducted at the shop of the petitioner-respondent and a seizure was made of 129.720 kilograms of silver and currency notes etc. A panchnama was prepared in the absence of the petitioner, copy whereof was annexed to the writ petition as Annexure-1. He was served with a show cause notice on 07.10.1989 in registered AD manner, copy whereof is placed on record as Annexure-10. Miscellaneous Petition No.44/1990 was submitted with allegations that the said show cause notice was given to the petitioner beyond the statutory period of six months, as prescribed in Section 110 of the Customs Act, 1962. Accordingly, a prayer was made for issuance of writ of certiorari for quashing of the said show cause notice. Additionally, a direction was sought against the respondents for return of the seized articles / goods.

In the return, it was stated that the seizure was duly made and the show cause notice was duly given to the petitioner. It was served on 28.09.1989, by way of affixture at the residential premises of the petitioner and a panchnama was duly prepared to this effect, as revealed in Annexure R/1. Additionally, show cause notice was also issued by the Office of the Collector, Customs & Central Excise, Indore on 29.09.1989 by registered post. A show cause notice was also affixed on the Notice Board of respondent's Office on 29.09.1989 vide Annexure R/2. Accordingly, the seizure having been duly made and the show cause notice having been duly given, the writ petition is liable to be dismissed.

3. Learned Single Judge vide impugned order dated 15th November, 2000 held that the respondents-appellants have failed to establish that the show cause notice was sent in conformity with the statutory requirement contained in Section 153 (a) read with Section 110(2) of the Customs Act, 1962. Accordingly, the impugned show cause notice was found to have been vitiated and the writ petition was resultantly allowed.

4. Aggrieved by the aforesaid order, the present writ appeal has been preferred. Shri Abhisheikh Tugnawat, learned counsel for the appellants and

Shri G.M. Chaphekar, learned senior counsel for the respondent made their respective submissions, which have been considered in the light of the material on record as well as provisions of law governing the situation.

5. It is contended on behalf of the appellants that the notice under Clause (a) of Section 124 of the Customs Act, 1962 was duly given within six months of the seizure of the goods. The same was equally good within the ambit of Section 110 (2) of the Customs Act. According to the learned counsel, learned Single Judge has committed an error in holding contrary by mis-construing the provisions.

6. Aforesaid contention has been countered by Shri Chaphekar, learned senior counsel appearing for the respondent, relying on the Supreme Court decision in the case of *K. Narasimhiah v. H.C. Singri Gowda and others* (AIR-1966 Supreme Court 330). Strong reliance has been placed on para 11 of it, which reads as follows:

"11. "Giving" of anything as ordinarily understood in the English language is not complete unless it has reached the hands of the person to whom it has to be given. In the eye of law however "giving" is complete in many matters where it has been offered to a person but not accepted by him. Tendering of a notice is in law therefore giving of a notice even though the person to whom it is tendered refuses to accept it. We can find however no authority or principle for the proposition that as soon as the person with a legal duty to give the notice despatches the notice to the address of the person to whom it has to be given, the giving is complete. We are therefore of opinion that the High Court was wrong in thinking that the notices were given to all the Councillors on the 10th October. In our opinion, the notice given to five of the Councillors was of less than three clear days."

According to him, notice under Clause (a) of Section 124 of the Customs Act, 1962 referred to in sub-section (2) of Section 110 thereof, can be said to be given only on service on the addressee.

7. In order to appreciate the rival contentions, we feel it necessary to reproduce the relevant portions of the following provision of law:-

"Section 110. Seizure of goods, documents and things.-

“(2) Where any goods are seized under sub-section (1) and no notice in respect of the goods, the goods shall be returned to the person from whose possession they were seized:

Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the Commissioner of Customs for a period not exceeding six months.

Section 124. Issue of show cause notice before confiscation of goods, etc.- No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person -

(a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty"

8. Perusal of the aforesaid provisions makes it clear that sub-section (2) of Section 110 conferred a right on the respondent to seek the return of the goods in question, if no notice to him, in respect thereof, is given under Clause (a) of Section 124 within six months of the seizure of the goods. Section 124 empowers the department to confiscate any goods or impose any penalty on any person if he is given notice in writing informing him of the grounds on which it is proposed to confiscate the good or to impose a penalty. Section 110 deals with the seizure of goods, documents and things, whereas Section 124 requires issuance of a show cause notice before confiscation of goods etc. It is important to note that the central legislature has made it obligatory on the part of the department to give a notice by employing the words "notice in respect thereof is given" in Section 110 (2) which is required to be given in writing by virtue of Clause (a) of Section 124. The words "notice is given" cannot be construed as "notice is served" else the legislature itself could have used the word 'served' in place of 'given'. The word 'given' cannot be treated as a synonym to word 'served', unless it is so indicated by the legislature in express manner or by necessary implication.

9. Sub-section (1) of Section 110 of the Customs Act empowers the proper officer to seize the goods, if he has reason to believe that the goods are liable to be confiscated under the said Act. After such seizure, he is further obliged to give a notice within six months of the seizure of the goods, failing which, the goods shall be liable to be returned to the person from whose possession they were seized. The object of this provision is to apprise such person of the

grounds on which confiscation of the goods or imposition of penalty is proposed. In view of the object and purpose of this provision, the legislature in its wisdom has used the words "notice is given", which would obviously mean that notice must be issued within six months of the date of seizure. The purpose of this provision is to relieve such person, if the department sleeps over the matter for a period exceeding six months from the date of seizure, without issuing notice of intended confiscation of the goods or imposition of penalty. Its purpose will not be frustrated, if the notice, though is given within six months of the seizure of the goods, is not served on such person within six months. On the contrary, if the same is construed so as to mean service within six months from the date of seizure, such person may avoid the service of notice for a period up to six months and may further take undue advantage by invoking sub-section (2) of Section 110. Needless to say that notice may be given by invoking the mode of registered post, which seems to have been prescribed by virtue of Section 153 of the said Act.

10. In the case of *Narsimhiah* (supra), it has been further observed: -

"15. A consideration of the object of these provisions and the manner in which the object is sought to be achieved indicates that while the legislature did intend that ordinarily notice as mentioned should be given it could not have intended that the fact that the notice is of less than the period mentioned in the section and thus the Councillors had less time than is ordinarily considered reasonable to arrange his other business to be free to attend the meeting, should have the serious result of making the proceedings of the meeting invalid.

20. We are, therefore, of opinion that the fact that some of the Councillors received less than three clear days' notice of the meeting did not by itself make the proceedings of the meeting or the resolution passed there invalid. These would be invalid only if the proceedings were prejudicially affected by such irregularity. As already stated, nineteen of the twenty Councillors attended the meeting. Of these 19, 15 voted in favour of the resolution of no-confidence against the appellant. There is thus absolutely no reason for thinking that the proceedings of the meeting were prejudicially affected by the "irregularity in the service of notice."

11. Reliance on the decision in the case of *K. Narasimhiah* (supra) does

not render assistance to the respondent, in view of the object sought to be achieved by Section 110 (2) of the Customs Act.

12. Thus, we are now required to consider the word 'given' in the context of notice for the purpose of achieving the object of sub-section (2) of Section 110 of the Customs Act, 1962. The object of the said provision read with Clause (a) of Section 124 of the Act, is to apprise of the proposed ground of confiscation or imposition of penalty. If the notice is issued by registered post within six months of the seizure of the goods and it reaches the person concerned after six months, the proceedings undertaken by the department are not prejudicially affected. On the contrary, if the notice is dispatched well before the expiry of six months and its service is avoided by the person concerned until such expiry in collusion with postman or otherwise, undue advantage/ shelter of sub-section (2) of Section 110 may be obtained. This perhaps may be the reason that the legislature did not use the words "no notice in respect thereof is served" in place of "no notice in respect thereof is given". It may further be seen that the petitioner himself in paragraph 13 of the writ petition has clearly mentioned that he is in receipt of the said notice. Thus, the object of the notice for the purpose of Section 110 (2) of the Act stands achieved.

13. We may successfully refer to the Division Bench decision of the High Court of Calcutta in the case of *Union of India v. Kanti Tarafdar* [1997 (91) ELT 51 (Cal.)]. While dealing with Section 110 (2), 124 and 153 of Customs Act, 1962, it has been observed: -

“28. Therefore, the real object of the notice under Section 110 (2), which is required to be issued in writing as provided in Section 124 and which is required to be given within six months, is to give the authority concerned a time-limit of six months to make out a case for confiscation of the goods seized.

29. Once the authority concerned makes out a case for confiscation within the time-limit, it cannot be sit idle. It has to make the concerned person aware of such case by giving the written notice. The question therefore is how to give such notice.

30. The only mode or manner of serving of notices issued under the Act has been provided in Section 153. The legislature in Section 153 of the Act gave a clear mandate that any notice issued under the Act should be served in the manner provided in the section.

31. The legislature, while providing that a notice under Section 110 (2) must be given within the time as specified in the said section did not provide in the section itself as to how such notice should be given, but at the same time provided that a notice under Section 110 (2) should be a notice "issued" under Section 124 of the Act and "any notice", issued under the Act, which obviously includes a notice under Section 124 of the Act, should be "served" in the manner provided in Section 153 of the Act. If the legislature intended that the manner and method of giving notice under Section 110 (2) should be different, then it would not have provided in the said section the words "notice in respect thereof if given under Clause (a) of Section 124" and the words "Issue of show cause notice" in Section 124 of the Act and the words "Any notice issued" in Section 153 of the Act.

32. It is also our duty to harmonise the provisions of the Act to find out the real legislative intent. If we fail in doing so and do not harmonise these three sections then we have to read in Section 153 "any notice", "except notice contemplated under Section 110 (2), issued under the Act" shall be served in the manner provided for in Section 153, which unfortunately, we cannot do as that will mean supplying of words in Section 153 even though there is no ambiguity in the section itself.

33. If that be so the notice as contemplated in Section 110 (2) of the Act must be a notice to be issued under Section 124 of the Act and must be given in the manner as provided for in Section 153 of the Act and not in a manner or method not thought of by the legislature at the time of enacting the Act concerned.

34. Further, Section 110 (2), though a mandatory provision, contemplates giving of a notice under Section 124, which is a general provision, while Section 153 provides the mode of giving of such notice, which is a special provision. Applying the maxim "*Generalia specialibus non-derogant*", which means special provision will prevail upon general provision, we are of the view that special procedure for service of notice as provided for in the Act should prevail over the general enactment of giving of notice.

35. We, therefore, conclude that Section 153 of the Act controls Section 110 (2) of the Act and a notice which is

required to be given under Section 110 (2) should be given in a manner provided in Section 153 and by no other means.

36. The word "serve" in legal connotation means to make legal delivery (a process or writ) on or upon (a person) or to present (a person) with a writ. (See the Shorter Oxford English Dictionary, re-print of 1988 at Page 1949). Therefore, is legal parlance serving is giving.

37. Under Section 153 of the Act, service is either by personal delivery (tender) or by putting it into transmission by registered post in case both are possible.

38. Thus, the logical conclusion would be that service of a notice will be complete either by tendering or by sending the same by registered post, since the legislature has equated both the situations by using the word "or"

39. In the event of the notice is tendered, the date on which the same was tendered should be taken as the date of giving of notice, but if the other option is exercised and the notice is sent by registered post the date of sending the notice should be the date of giving of notice as contemplated by Section 110 (2) of the Act. Any other construction will render the legislative intent of equating tender with sending by registered post otiose."

14. We may also successfully refer to the Division Bench decision of the Court of Punjab & Haryana High Court in the case of *Commissioner of Central Excise, Ludhiana v Mohan Bottling Co. (P) Limited* reported as 2010 (255) Excise Law Times 321 (P & H), which is to the effect that sending of notice through registered post at the correct address of the assessee is sufficient compliance. In the case in hand, we are not concerned with the presumption of service, because the petitioner himself has already admitted receipt of notice in paragraph 13 of the writ petition.

15. Now, coming to the material on record, it is an admitted position that the seizure of the goods was made on 03.04.1989. Show cause notice under Clause (a) of Section 124 of the Act was served on 29.09.1989 by way of affixture at the residential premises of the petitioner, as revealed in the panchnama marked as Annexure R/1. It has been pointed out that it bears the signatures dated 27.09.1989, which makes the panchnama a forged and concocted document. Without entering into this controversy, we hereby

observe that the show cause notice within the meaning of Clause (a) of Section 124 of the Act was issued by registered post on 29.09.1989, as revealed in the postal receipt. It is admitted to have been received by the petitioner in paragraph 13 of the writ petition. No prejudice is shown to have been caused to the petitioner on account of the receipt of the notice after expiry of six months, which according to Section 110 (2) ought to have been given within six months of the date of seizure. Thus, we do not find non-compliance or contravention of the aforesaid provisions. In our considered opinion, learned Single Judge has committed an error firstly in ignoring the significance of the word 'given' employed in Section 110 (2) as well as Clause (a) of Section 124 of the Customs Act, 1962. Learned Single Judge has further committed a mistake in straightway invoking Section 153 of the Customs Act, 1962, without taking into consideration that the word 'served' occurring in it is missing in Section 110 (2) as well as Section 124 of the Act. Instead, the word 'given' is there in these two provisions which goes to show that the show cause notice must be given before expiry of six months and issuance of notice by registered post within six months is a sufficient compliance in the eye of law, more so, when the same has been received by the respondent as has been admitted in paragraph 13 of the writ petition. Neither Section 110 (2) nor Clause (a) of Section 124 of the Act contemplates service of notice in strict sense within a period of six months from the date of giving/issuing the same by registered post which mode has been prescribed under the Act. It merely speaks about giving of the notice. Keeping in view the object and purpose of the two provisions, it cannot be said that the legislature intended to achieve service of notice within six months from the date of seizure. Thus, the impugned order is also found to have been passed, without considering the object and purpose of the said provisions. Consequently, the impugned order is not found sustainable in law.

Resultantly, the appeal succeeds and is hereby allowed. The impugned order is hereby set aside with no order as to costs."

C. c. as per rules.

Appeal allowed.

I.L.R. [2011] M. P., 886

WRIT PETITION

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

W.P. No. 7452/2007 (Jabalpur) decided on 18 March, 2010

AHSAN-UR-REHMAN

...Petitioner

Vs.

THE M.P. STATE CO-OPERATIVE

TRIBUNAL & anr.

...Respondents

A. Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 19-C(1-A) & Section 64 - Resolution passed by the committee can be challenged in appeal - A dispute u/s 64 or an appeal under sub-section (1-A) of Section 19-C shall be maintainable before the Deputy Registrar.

(Para 7)

क. सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 19-सी(1-ए) व धारा 64 - समिति द्वारा पारित प्रस्ताव को अपील में चुनौती दी जा सकती है - धारा 64 के अंतर्गत कोई विवाद अथवा धारा 19-सी की उपधारा (1-ए) के अंतर्गत कोई अपील उप पंजीयक के समक्ष पोषणीय होगी।

B. Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 78(1) & 78(2) - First appellate order passed by the Deputy Registrar - Second appeal would lie to the Tribunal u/s 78(2) of the Act - Appeal before the Joint Registrar was not maintainable. (Paras 11 & 12)

ख. सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 78(1) व 78(2) - प्रथम अपीलीय आदेश उप पंजीयक द्वारा पारित - द्वितीय अपील अधिनियम की धारा 78(2) के अंतर्गत न्यायाधिकरण में होगी - संयुक्त पंजीयक के समक्ष अपील पोषणीय नहीं।

Pushpendra Yadav, for the petitioner.

Rahul Rawat, for the respondent No. 2.

ORDER

The Order of the Court was delivered by R.S. GARG, J. :- The petitioner who was member of respondent No.2 Shaskiya Mudran Karmchari Grah Nirman Sehkari Sanstha Maryadit Bhopal, has filed this writ petition before this Court being aggrieved by the order dated 18.5.2007 .

2. The facts giving rise to this petition are that the petitioner being member,

had obtained certain allotments in his favour vide resolution dated 26.3.2000. The respondent-Society, in its general meeting resolved to enhance the development charges from Rs.16 per square feet to Rs.28 per square feet. The petitioner, despite appropriate information, did not deposit the enhanced amount, therefore, in the Board meeting dated 3.1.2003, he was expelled from the membership of the Society under Section 19-C of the Act. The order of expulsion was challenged by the petitioner before the Deputy Registrar, who vide his order dated 21.10.04 dismissed the said matter treating that to be an appeal under Section 19-C (1-A) of the Co-operative Societies Act. The petitioner being aggrieved by the order dated 21.10.2004 filed an appeal before the Joint Registrar, who vide his order on 29.1.2006 set aside the order of the Deputy Registrar and also set aside the order of expulsion. The respondent Housing Society being aggrieved by the order passed by the Joint Registrar filed the second appeal before the M.P. State Co-operative Tribunal, Bhopal. The Tribunal vide its order dated 18.5.2007 allowed the appeal holding inter-alia that the appeal before the Joint Registrar was not maintainable in view of juxtapose reading of Section 19-C (1-A) and Section 78 (2) of the Co-operative Societies Act. The Tribunal accordingly set aside the order dated 29.1.2006 passed by the Joint Registrar but, however, reserved liberty in favour of the petitioner to file second appeal before the Tribunal against the order dated 21.10.2004. The petitioner being aggrieved by the said order passed by the learned Tribunal has filed this petition under Article 227 of the Constitution of India.

3. Shri Pushpendra Yadav, learned counsel for the petitioner after taking us through the provisions contained under Section 19-C and Section 78 (1) (2) of the Act submitted that the resolution passed by the Co-operative Society Act though is treated to be an order, but, in fact, it is not an order and, under section 19-C (1-A), the matter placed before the Deputy Registrar is in form of a dispute. His submission is that if the Deputy Registrar was the first authority to entertain the dispute then, the regular first appeal could lie to the Joint Registrar and second appeal could lie to the Tribunal. His submission that the learned Tribunal without appreciating the distinction between a resolution and an order passed by the Deputy Registrar, Joint Registrar, Additional Registrar/Registrar erred in holding that the order passed by the Deputy Registrar under Section 19-C (1-A) would be treated to be an appellate order. In the alternative, it is submitted that if the second appeal before the Joint Registrar was not maintainable then against the said order passed by the

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Joint Registrar a further second appeal to the Tribunal would also not lie. His submission is that the Tribunal could not have exercised its jurisdiction under Section 78(2) of the Act.

4. Learned counsel for the respondents Shri Rahul Rawat submitted that if the law provides that a resolution is to be treated as an order and an appeal is provided against such a resolution then the authority who is hearing a matter against the resolution would be deemed to be an appellate authority and, in the present matter, if the Deputy Registrar is treated to be an appellate authority rather than original authority then under the law second appeal would lie to the Tribunal. His submission is that in case where an authority which does not have jurisdiction initiates the proceedings and grants a relief which it is not entitled to grant then any aggrieved party would be entitled to challenge the said order before the higher forum and the said higher forum would be entitled to correct the wrong.

5. We have heard the parties at length and have gone through the provisions of law and the reasonings adopted by the learned Court below. Section 19-C read as under -

"19-C. Expulsion of members.-(1) The committee may, by a resolution passed by three-fourth majority of the members present and voting at a meeting held for the purposes, expel a member if he -

- (a) intentionally does any act likely to injure the credit of the society or bring it to disrepute ; or
- (b) wilfully deceives the society by false statements;
or
- (c) carries on any business which comes or is likely to come into conflict with the business carried on by the society; or
- (d) persistently makes default in payment of his dues or fails to comply with any provisions of the bye-laws:

Provided that no such resolution shall be valid unless the member concerned has been given seven days' notice, either personally or by registered post, of the proposal to expel him and has been given an opportunity to represent his case to the Committee].

[(1-A) Any person aggrieved by the resolution shall be valid unless the member concerned has been given seven days' notice, either personally or by registered post, of the proposal to expel him and has been given an opportunity to represent his case to the committee].

[(2) Notwithstanding anything contained in this Act or rules or bye-laws made thereunder, where it appears to the Registrar that it is necessary and desirable in the interest of the society to expel a member from the society for his indulging in any of the activities specified in sub-section (1), he may call upon such member and the society, to explain within a period to be specified by him, why such member should not be expelled from the society. If the member or society fails to furnish his or its explanation, within the specified period or after considering the explanation, if received, the Registrar may pass an order expelling a member from the society.

(3) No person who has been expelled shall be eligible for re-admission as a member of the co-operative for a period of one year from the date of such expulsion.

(4) Expulsion of a member from a society may involve forfeiture of shares held by the member in such society.]"

6. A perusal of sub-Section 1 of Section 19-C of the Co-operative Societies Act would clearly shows that a Committee may by resolution passed by three-fourth majority of the members present and voting at a meeting held for the purposes, expel a member. Sub-Section (1-A) of Section 19-C provides that any person feeling aggrieved by the resolution of the Committee may appeal before the Registrar within 30 days of the communication of such resolution.

7. Under Section 19-C(1-A), the resolution passed by the Committee can be challenged in appeal. Once law says that for a particular purpose a resolution can be challenged in an appeal then the resolution itself would par take character of an order. Whatever we may term the resolution but undisputedly, the said resolution can be challenged in an appeal under sub-Section (1-A) of Section 19-C. When a statutory right is conferred upon a party then such statutory right is to be exercised in accordance with the provisions contained in the Act. At this stage, it would be necessary to note

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that the powers which can be exercised by the Registrar for the purpose of deciding the disputes or exercising the powers under Sub-rule 1 of Section 19-C, have been conferred upon and vested into the Deputy Registrar. A dispute under Section 64 or an appeal under sub-Section (1-A) of Section 19-C shall be maintainable before the Deputy Registrar. It is also to be seen that Section 3 (2) of the Co-operative Societies Act provides that no Officer other than the Additional Registrar or the Joint Registrar shall be directed to exercise the powers to hear appeals under Section 78. If the Additional Registrar or the Joint Registrar in accordance with Section 3 are to hear the appeals then such power is conferred upon them under Section 78 only.

8. At this stage, we have to carve a distinction between the appellate powers conferred upon an authority under Section 78 and/or under Section 19-C (1-A) of the Act. If there are different powers conferred upon different authorities under the different provision of statute then, such powers are to be exercised by such authorities under the said provisions of law. If Section 19-C (1-A) provides that any person aggrieved by the resolution of the Committee under sub-Section (1) may file an appeal before the Registrar within 30 days of the communication of such resolution then obviously, there would be some difficulty for the Deputy Registrar to exercise the power under Section 78 read with Section 3 of the Act but in the present matter, sub-Section (1-A) of Section 19-C in itself provides for statutory appellate power in favour of Deputy Registrar and a right to prefer an appeal in favour of the person aggrieved then one cannot be allowed to say that the appeal before the Deputy Registrar would be treated as a dispute or representation. If the statute treats such proceedings to be an appeal then the Court would not allow anybody to say that such proceedings would not be treated to be an appeal.

9. Section 78 of the Act provides for the appeals. According to Section 78 save where it has been otherwise provided (Emphasis supplied) an appeal shall lie from every original order under this Act or the rules made thereunder to a particular authority. Sub-Section 2 of Section 78 says that a second appeal shall lie against any order passed in the first appeal by the Registrar, to the Tribunal on any of the grounds as mentioned in sub-Section 2 of Section 78. A bare perusal and reading of Section 78 (1) would make it clear that if a particular appellate order is passed by a particular authority under the proceedings of the Act then, the first appeal would lie to a particular authority. However, Section 78 (1) clearly provides that 'Save where it has been otherwise provided' such an appeal shall lie. It would thus be clear that

whatever is saved in the other provisions of the Act, is not adversely effected by Section 78 (1) of the Act. Section 19-C (1-A) is a provision which otherwise provides for an appeal. If there is a provision for an appeal under the Act itself then the authority which is passing the order in its appellate jurisdiction cannot be treated to be an original authority for purpose of Section 78 (1) of the Act even if such authority is ranking as Deputy Registrar only. Once Section 78 (1) is understood to be applicable to such orders which are passed under other provision of the Act, and are otherwise saved, then Section 78(1) cannot include in its compass an order passed under Section 19-C and then an order passed under Section 19-C (1-A) by the said Deputy Registrar, would be taken to be an appellate order then it cannot be challenged in a second appeal or any regular appeal before the Joint Registrar, Additional Registrar or Registrar. Such an appellate order has to be challenged before the Tribunal under Section 78 (2) of the Act.

10. It was sought to be contended that second appeal shall lie against any order passed in the first appeal by the Registrar and as in the present matter the appellate order was passed by the Deputy Registrar, a second appeal cannot lie to the Tribunal. In our opinion, the argument is misconceived. Section 78 (2) looking to the wisdom of the legislation is to be read along with Section 78 (1) of the Act. When an order is passed by the first appellate authority under Section 78 (1) then, second appeal shall lie to the Tribunal against the order passed by the Registrar, Additional Registrar or Joint Registrar. But if an order is not passed by the first appellate authority provided under Section 78 (1) of the Act, but it is passed by any other appellate authority then for the purpose of harmonious construction we have to read the word 'Registrar' employed in Section 78 (2) to mean that order passed by 'any authority as first appellate authority' and if we read the word 'Registrar' as an authority then Section 78 (2) would become purposeful and would become applicable to such a situation.

11. In the present matter, the first appellate order was passed by the Deputy Registrar and, therefore, that could not be treated to be an original order for the purpose of Section 78 (1) of the Act. If such order was an appellate order even though, it was not passed by the Registrar then too, the second appeal would lie to the Tribunal under section 78 (2) of the Act.

12. Taking into consideration the scheme of the Act and the different provisions of law, we hold that the order passed by the Tribunal is not bad.

The Tribunal was justified in holding that the appeal before the Joint Registrar was not maintainable. We uphold the order and dismiss the petition on merits.

13. However, taking into consideration the totality of the circumstances and that such fine question is raised for the first time before the Tribunal and this Court, we grant liberty to the petitioner to approach to the Tribunal under Section 78 (2) of the Act to challenge the order dated 21.10.2004 passed by the Deputy Registrar. If within 30 days from today the appellant files a second appeal before the Tribunal then question of limitation would not be allowed to be raised by anybody and the Tribunal shall be obliged to decide the appeal on merits. There shall be no order as to costs.

Order accordingly.

I.L.R. [2011] M. P., 892

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No.12733/2009(S) (Jabalpur) decided on 22 September, 2010

PRATIBHA RAJGOPAL (Dr.)

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Shaskiya Sevak (Adhivarshiki Ayu) Adhiniyam, M.P. (29 of 1967), Fundamental Rule 56, Academy of Administration Services (Gazetted) Recruitment Rules, M.P. 1997, Rule 15 - Age of Superannuation - Rules 1997 have been framed under Article 309 of Constitution of India - Under Article 309 of Constitution of India, Rules can be framed regulating the recruitment and service conditions until provision is made in that behalf by or under an Act of appropriate legislature - Since, Rules 1967 have been framed therefore, they will have overriding effect on Rule 15 of Rules 1997 - Petitioner, a teacher, cannot be made to superannuate at the age of 60 years - Petition allowed. (Paras 19-24)

शासकीय सेवक (अधिवार्षिकी आयु) अधिनियम, म.प्र. (1967 का 29), मूलभूत नियम 56, प्रशासनिक सेवा (राजपत्रित) अकादमी भर्ती नियम म.प्र. 1997, नियम 15 - सेवा निवृत्ति की आयु - नियम 1997 भारत के संविधान के अनुच्छेद 309 के अंतर्गत निर्मित किये गये हैं - भारत के संविधान के अनुच्छेद 309 के अंतर्गत भर्ती तथा सेवा शर्तों को विनियमित करने के लिए नियम विरचित किये जा सकते हैं, जब तक कि समुचित विधान मंडल के अधिनियम के द्वारा अथवा अंतर्गत उस संबंध में उपबंध नहीं किया जाता है - चूंकि नियम 1967 विरचित किये गये हैं, इसलिए वे

नियम 1997 के नियम 15 पर अध्यारोही प्रभाव रखेंगे – याची, एक शिक्षक को 60 वर्ष की आयु पर सेवानिवृत्त नहीं किया जा सकता – याचिका मंजूर।

Cases referred:

AIR 1965 SC 1567, AIR 1994 SC 1474, (1989) 1 SCC 175.

Kishore Shrivastava with S.R. Tamrakar, for the petitioner.

B.N. Misra, G.A., for the respondents.

ORDER

SANJAY YADAV, J. :-Being a teacher having an entitlement to serve till she attains 62 years of age, the petitioner by way of present writ petition under Article 226 of the Constitution of India calls in question the legality of the action of respondents in retiring her on superannuation at the age of 60 years.

2. Relevant facts briefly are that the petitioner was initially appointed as Lecturer, Political Science, on ad-hoc basis in Home Science College, Jabalpur, by order dated 04-07-1981. Later on vide order dated 31-05-1987 the services of the petitioner were regularized as Assistant Professor in accordance with the M. P. Regularization of Ad-hoc Appointment Rules, 1986.

3. The petitioner while she was working with the Higher Education Department, her services were borrowed by the General Administration Department, pursuant whereof vide order dated 05-03-1994, she was sent on deputation to Academy of Administration i.e. R. S. B. P. Naronha Academy of Administration in the capacity as Professor. By order dated 17-07-2003, the petitioner was directed to discharge her duties as Director in Madhya Pradesh Mahila Sansadhan Kendra, established within the Academy, in addition to Reader. The petitioner's services were thereafter absorbed with the Academy vide order dated 01-03-2004 with effect from 01-07-2003. Consequent whereof the services of the petitioner came to be governed by Madhya Pradesh Academy of Administration Service (Gazetted) Recruitment Rules, 1997, the set of rules framed in pursuance to the proviso to Article 309 of the Constitution of India.

4. The case of the petitioner is that, though governed by the Rules of 1997, whereunder Rule 15, the age of superannuation being 60 years; however, in pursuance to the Madhya Pradesh Fundamental Rule 56 which incorporated the age of superannuation of member belonging to State Civil Service vide Madhya Pradesh Adhivarsiki Ayu Adhiniyam, 1967 and as amended from

time to time, whereby, the age of superannuation of teacher being 62 years, the petitioner has a right to continue till the age of 62 years and cannot be retired at the age of 60 years.

5. Thus the short controversy involved in the present petition is as to whether petitioner, a teacher, can be deprived of an enhanced age of retirement because of her being absorbed in Academy of Administration under General Administration Department.

6. The respondents have vehemently opposed the contention put forth on behalf of the petitioner, contending inter-alia that though initially appointed as a teacher, the petitioner was later on sent to the Academy of Administration on deputation wherein she was absorbed. It is urged that on her absorption in the Academy the services were governed by the Rules of 1997; Rule 15 whereof provides, the age of superannuation being 60 years. It is contended that the petitioner being governed by specific rules, the same would prevail over the stipulation in Fundamental Rules which as per respondents are general in nature. It is further contended that even in the Academy, the petitioner was not engaged in teaching as could have been benefited from 'explanation' appended to Fundamental Rule 56 requiring that a person initially appointed as a teacher but posted or otherwise appointed to the administrative post must have to his credit teaching experience of 20 years, i.e. must be engaged in teaching for 20 years (active years). It is contended that the petitioner since did not qualify the relevant provision has no right to insist for an extended age of superannuation. Learned Govt. Advocate led this Court through documents and record pertaining to the distribution of work to bring home the submission that the nature of work which the petitioner was required to do in the Academy was not teaching but administrative in nature.

7. Controversy as raised can be appreciated in the backdrop of relevant Rules.

8. After the absorption in the Academy of Administration (Gazetted) Services, the petitioner is governed by Rules framed as per proviso to Article 309 of the Constitution of India. These rules are Madhya Pradesh Academy of Administration Services (Gazetted) Recruitment Rules, 1997. Rule 15 of the Rules stipulates the age for retirement for the faculty members. It provides for:

“15. Retirement : Age for retirement for the officers on

deputation in the Academy will be same as applied in their parent departments but for faculty members appointed/ absorbed in the Academy, the age for retirement will be 60 years.”

9. There could have been no difficulty in accepting the contention put forth by learned Govt. Advocate, that, the petitioner having been absorbed in service of Academy of Administration and as per Rule 15 of the Rule of 1997, the petitioner stand superannuated on attaining the age of 60 years.

10. But, it would not be so if Fundamental Rule 56 is taken into consideration which is on the basis of a State legislation, viz., Madhya Pradesh Shaskiya Sevak (Adhivarsiki Ayu) Adhiniyam, 1967, which is an Act to provide for the age of superannuation of government servants in the State of Madhya Pradesh and for certain matters connected therewith.

11. That vide M. P. Act No. 21 of 1998 with effect from 31-05-1998 and M. P. Act No. 13 of 1999 with effect from 18-09-1998, for Rule 56 of the Fundamental Rules applicable to the State of Madhya Pradesh was substituted as follows :

“56. Age of superannuation. - (1) Subject to the provisions of sub-rule (2) every Government Servant other than a Government Teacher and a Class IV Government Servant shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years:

Provided that a Government Servant whose date of birth is the first of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty years.

(1-a) Subject to the provisions of sub-rule (2), every Government Teacher shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty two years: (Emphasis supplied)

Provided that a Government teacher whose date of birth is the first of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty two years.

Explanation.- For the purpose of this sub-rule “Teacher”

means a Government servant by whatever designation called, appointed for the purpose of teaching in Government Educational Institution including technical or medical educational institutions, in accordance with the recruitment rules applicable to such appointment and shall also include the teacher who is appointed to an administrative post by promotion or otherwise and who has been engaged in teaching for not less than twenty years provided he holds a lien on a post in the concerned School/Collegiate/Technical/Medical education service.

(Emphasis supplied)

(1-b) Subject to the provisions of sub-rule (2), every Class IV Government Servant shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty two years:

Provided that a Class IV Government Servant whose date of birth is the first of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty two years.

(2) (a) A Government Servant may, in the public interest, be retired at any time after he has completed 20 years qualifying service, or he attains the age of fifty years whichever is earlier, without assigning any reason by giving him a notice in writing.

(b) the period of such notice shall be three months:

Provided that such Government servant may be retired forthwith and on such retirement the Government Servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of notice at the same rates at which he was drawing them immediately before his retirement or, as the case may be, for the period by which such notice falls short of three months.”

12. With the aforementioned amendment by virtue of an Adhiniyam, the retirement age of every government teacher got enhanced to 62 years.

13. Contention of the learned Govt. Advocate that the specific Rules which govern the service condition over the Fundamental Rules, is being mentioned to be negatived.

14. The reasons are not far fetched. Article 309 of the Constitution of India stipulates :

“309. Recruitment and conditions of service of persons serving the Union or a State.- Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.”

15. Thus, it is the appropriate legislature which is empowered to enact to regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with affairs of Union or the State as the case may be. That fixation of age of superannuation is a condition of service needs no elucidation. For reference please see *Bishun Narain v. State of U. P.* : AIR 1965 SC 1567 (paragraphs 4, 6 & 7), and *State of A. P. v. S. K. Mohinuddin* : AIR 1994 SC 1474 (paragraph 6).

16. Proviso to Article 309 empowers the President or the Governor of State, as the case may be, to make rules regulating the recruitment, and the conditions of service of persons appointed to such services and posts until provision in that behalf is made by or under an Act of the appropriate legislature.

17. In the case at hand there exists an enactment providing the age of superannuation of Govt. Servants in the State of Madhya Pradesh in the Madhya Pradesh Shaskiya Sevak (Adhivarshiki Ayu) Adhiniyam, 1967. And the Rules of 1997 also exist to govern the service condition of the petitioner including the age of superannuation. However, since there exists an enactment by the State Legislature governing the age of superannuation, the same shall have an overriding effect on Rule 15 of the Rules of 1997.

18. In this context regard can be had of the judgment by Supreme Court in *Union of India v. Soma Sundaram Vishvanath* : (1989) 1 SCC 175; wherein their Lordships were please to observe :

“6. It is well settled that the norms regarding recruitment and promotion of officers belonging to the Civil Services can be laid down either by a law made by the appropriate legislature or by rules made under the proviso to Article 309 of the Constitution of India or by means of executive instructions issued under Article 73 of the Constitution of India in the case of Civil Services under the Union of India and under Article 162 of the Constitution of India in the case of Civil Services under the State Governments. If there is a conflict between the executive instructions and the rules made under the proviso to Article 309 of the Constitution of India, the rules made under proviso to Article 309 of the Constitution of India prevail, and if there is a conflict between the rules made under the proviso to Article 309 of the Constitution of India and the law made by the appropriate legislature the law made by the appropriate legislature prevails.”

19. It therefore leaves no iota of doubt that the provisions contained in the Adhiniyam 1967 and the amendment effected thereunder from time to time will have an overriding effect on the Rule 15 of the Rules of 1997 framed by virtue of powers conferred by the proviso to Article 309 of the Constitution of India.

20. The next question which emanates from the submission of learned Govt. Advocate that even if the provisions contained under the Adhiniyam of 1967 governing the age of superannuation of an employee of State Government is applicable in case of the petitioner; however, unless the petitioner fulfills the conditions stipulated in “Explanation” of sub-rule (1-a) of Fundamental Rules 1956, she is not entitled for enhanced age of superannuation.

21. The “Explanation” stipulates that for the purpose of this sub-rule “Teacher” means a Government servant by whatever designation called, appointed for the purpose of teaching in Government Educational Institution including technical or medical educational institutions, in accordance with the recruitment rules applicable to such appointment and shall also include the teacher who is appointed to an administrative post by promotion or otherwise

and who has been engaged in teaching for not less than twenty years provided he holds a lien on a post in the concerned School/Collegiate/Technical/Medical education service.

22. A close reading of the explanation would make it clear that the same is attracted where in case a government servant, irrespective of the designation, is appointed for the purpose of teaching and shall also include a teacher who is appointed to an administrative post by promotion or otherwise and who has been engaged in teaching for not less than twenty years.

23. Though the aforesaid explanation is of no consequence in the present case because the petitioner is a government teacher initially appointed with Higher Education Department and later absorbed in the same capacity in Academy of Administration as a Member of Academy of Administration (Gazetted) Service. However, for the sake of completeness when the facts of the present case are adjudged on the touchstone of the 'explanation' pressed in service by the learned Government Advocate, it is observed that the petitioner qualifies the same. That is to say having been initially appointed as teacher, Political Science (on ad-hoc basis) on 04-07-1981, she was regularized as Assistant Professor by order dated 31-03-1987 and continued to service in the Higher Education Department till she is absorbed in the same capacity in the Academy of Administration with effect from 01-07-2003. Even after her absorption she continues as a teacher, engaged in teaching. The contention on behalf of the State that she was given the additional charge to Chair on administrative post, will not, in the considered opinion of this Court, bereft her of the experience she gains when engaged in teaching. In this context regard can be had of the judgment of Supreme Court in *Asim Kumar Bose v. Union of India* : AIR 1983 SC 509, wherein in the context as to whether a Specialist Grade-III in a teaching hospital belonging to the Central Health Service is eligible for appointment or promotion as a Professor or Associate Professor of the concerned speciality their Lordships were please to observe :

“29. It is necessary to emphasize that the recruitment rules nowhere provide that the teaching experience gained by a Specialist in a teaching hospital in the capacity of an Associate Professor (ex-officio) shall not count towards the requisite teaching experience. There is no provision made in the Rules that the teaching experience must be gained on a regular appointment. There is hardly any difference so far as teaching

experience is concerned whether it is acquired on regular appointment or as Specialist in a teaching hospital with the ex-officio designation. As the statutory rules do not provide that the teaching experience gained in an ex-officio capacity shall not count towards the requisite teaching experience, the teaching experience gained by the appellant while holding the post of Radiologist-cum-Associate Professor of Radiology (ex-officio) in the Irwin Hospital cannot be ignored in determining his eligibility for appointment as Professor of Radiology in Maulana Azad Medical College.”

24. In view of above analysis it is held that the petitioner, a teacher, cannot be made to superannuate at the age of 60 years and is entitled to serve till 62 years of age.

25. In the result petition is allowed to the extent above. However, no costs.
Petition allowed.

I.L.R. [2011] M. P., 900

WRIT PETITION

Before Mr. Justice S.C. Sharma

W.P. No. 1280/2009(S) (Indore) decided on 14 October, 2010

M.P. PUBLIC SERVICE COMMISSION

...Petitioner

Vs.

KU. PURNIMA JAIN

...Respondent

Service Recruitment - Reservation of handicapped persons - Posts of Commercial Tax Inspector - Advertisement does not reflect that the posts were exclusively reserved for orthopadically handicapped persons - P.S.C. has certainly committed an error in not permitting the respondent No. 1 (who is a visually handicapped person) to participate in the process of interview - Commissioner for Persons with Disabilities has rightly directed P.S.C. to permit the respondent No. 1 to appear in process of interview.
(Paras 10 to 12)

सेवा भर्ती - विकलांग व्यक्तियों का आरक्षण - वाणिज्य कर निरीक्षक के पद - विज्ञापन यह नहीं दर्शाता कि पद अनन्यतः शारीरिक विकलांग व्यक्तियों के लिए आरक्षित थे - प्रत्यर्थी क्र. 1 (जो नेत्रिय विकलांग व्यक्ति है) को साक्षात्कार की प्रक्रिया में सहभागी होने की अनुमति प्रदान न करते हुए पी.एस.सी. ने निश्चित रूप

से त्रुटि कारित की है – विकलांगता से ग्रसित व्यक्तियों के लिए कमिश्नर ने प्रत्यर्थी क्र. 1 को साक्षात्कार की प्रक्रिया में सम्मिलित करने के लिए पी.एस.सी. को उचित रूप से निर्देश दिया।

Case referred :

2010 (3) MPLJ 99.

V.P. Khare, for the petitioner.

M.S. Dwivedi, for the respondent No. 1.

Seema Sharma, Dy. G.A., for the respondents No. 2 to 4.

ORDER

S.C. SHARMA, J. :-Regard being had to the similarity in the controversy involved in both the present writ petitions, they were heard analogously together and by a common order both the writ petitions are being disposed of by this Court.

2. The petitioner before this Court has filed this present petition being aggrieved by order dated 17.9.08, passed by Commissioner for Persons with Disabilities by which the learned Commissioner has directed the MP Public Service Commission to permit the respondent no.1 to participate in the process of interview in respect of MP Civil Services Examination, 2005.

3. Contention of petitioner MP.Public Service Commission is that an advertisement was issued in *Rojgar Aur Nirman*, a new paper published by State Government on 26.12.05 in respect of MP Civil Services Examination, 2005, inviting applications from eligible candidates for various vacancies in respect of the posts of Dy. Collector; Dy. Superintendent of Police; District Excise Officer; District Registrar, Publicity; District Commandant Homeguard; Superintendent of Jail; Asstt. Labour Officer; Commercial Tax Inspector; and Sub Registrar, (Stamps and Registration). The Public Service Commission, while issuing the aforesaid advertisement published on the basis of requisition of the State Government has also reflected the reservation provided for various posts in respect of disabled persons. The contention of Public Service Commission is that for the post of Dy. Collector, two vacancies (posts) were reserved for disabled persons and for the post of Commercial Tax Inspector, 8 vacancies (posts) were reserved for disabled persons and for Sub-Registrar (Stamps and Registration) 1 post was reserved for disabled person. It has been further stated by the Public Service Commission that respondent no.1, who is disabled person suffering from 100%

disability, as she is a blind girl did submit an application in response to the aforesaid advertisement and she was declared successful in Preliminary Examination as well as in the main examination conducted by the Public Service Commission. The PSC has further stated that a clarification was sought from the State Government in the matter and the State Government has clarified that only orthopadically handicapped persons can be permitted to appear in the process of interview, as reservation was provided only for orthopadically handicapped persons.

4. Contention of learned petitioner's counsel is that a complaint was lodged by the respondent no.1 before the Commissioner appointed under the provisions of Persons with Disabilities (Equal Opportunities Protection of Right & Full Participation) Act, 1995 and on 24.2.08, notices were issued by the Commissioner. A reply was filed by the petitioner PSC before the Commissioner on 28.5.08 and an order was passed by the Commissioner on 17.9.08. Contention of the learned counsel is that learned Commissioner has failed to consider the provisions of the Act of 1995 and the Rules made thereunder and has erroneously directed the PSC to conduct an interview in respect of the petitioner. It has also been argued before this Court that the post in question was exclusively reserved for orthopadically handicapped person and, therefore, the question of permitting the petitioner to appear in the process of interview does not arise. It has also been argued that the process of selection has been concluded and the select list has not been challenged and post reserved under the handicapped category has already been filled up and, therefore, the question of holding the interview and appointing the respondent no.1 in case she succeeds, does not arise. Learned petitioner's counsel has prayed for quashing of the order dated 17.9.08, passed by the Commissioner in case no.418.

5. A reply has been filed by respondents no. 2 & 3 and their contention is that 8 seats were reserved for physically handicapped persons belonging to orthopadically handicapped category only and the respondent no.1 who is blind cannot be included under the orthopadically handicapped persons category. The reply of the State Government is concluded in two paragraphs out of which para-1 deals with description of the subject matter of writ petition and para-2 contains prayer for quashing of the order passed by the Commissioner for disabled persons dated 17.9.08. It is really unfortunate that the State Government has not filed a detailed reply in the matter and an empty formality has been done by the State Government in the matter by filing a two paragraphs' reply.

6. Learned counsel appearing for respondent no.1 has argued before this Court that the respondent enjoys brilliant academic record, however, as the destiny was cruel with her, she is visually impaired girl and has been assessed as 75% disabled.. He has also argued that inspite of her being a handicapped girl, she faught with all difficulties and has obtained a Post Graduate Degree as well as Bachelor Degree in Law and is competing with other persons in respect of the posts advertised by the PSC. It has also been argued that the respondent no.1 in response to an advertisement published by PSC was permitted to appear in the preliminary examination and thereafter she was permitted to appear in the main examination and has secured a very high percentage of marks, however, no interview call letter was issued to her and, therefore, the respondent no.1 was left with no other choice except to prefer a complaint on 22.4.08 and took shelter of the provisions of Persons with Disabilities (Equal (Equal Opportunities Protection of Right & Full Participation) Act,1995.

7. Learned counsel for respondent no.1 has also brought to the notice of this Court, the notification issued by the State Government dated 31.3.05 by which the State Government has reserved 6% of the posts for handicapped persons keeping in view the provisions of the Act, 1995 and he has also drawn the attention of this Court in the matter of reservation in respect of visually handicapped persons. The aforesaid notification dated 31.3.95 reveals that 2% of the posts are to be exclusively reserved for visually handicapped persons. He has drawn attention of this Court towards the requisition dated 1.7.05 sent by the State Government to the PSC and the aforesaid requisition also provides for reservation in respect of handicapped persons and total 8 vacancies have been reserved for handicapped persons. The requisition does not reflect that the vacancies are reserved exclusively for orthopatically handicapped persons. Learned counsel has also argued before this Court that the respondents State should have also provided reservation for visually handicapped persons for the post of Dy. Collector which is a class II post, as the notification of the State Government dated 31.3.05 does provide for reservation of 2% posts for visually handicapped persons. Learned counsel has placed reliance upon a judgment delivered by the Apex Court in the matter of *Govt. of India through Secretary and anr. Vs Ravi Kumar* (2010. (7) SCC 626), wherein the Hon'ble Apex Court has directed appointments of a visually handicapped person in the Indian Administrative Service.

8. Learned appearing for respondent no.1 has also informed this Court

that the petitioner has also preferred a writ petition for implementation of the order passed by the Commissioner and the same is registered as WP No.3312 of 09 and has also prayed before this Court for issuance of an appropriate writ, order or direction, directing the respondents State to provide reservation to visually handicapped persons in respect of class II posts also.

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

10. In the present case, the respondent no.1 is a visually handicapped girl and she enjoys a brilliant academic record and holds a Master Degree in Arts as well as a Bachelor Degree in law. The advertisement published by PSC dated 26.12.05 does provide reservation for handicapped persons in respect of the post of Dy. Collector and in respect of Commercial Tax Inspector as well as for the post of Sub Registrar also. The post of Dy. Collector was reserved for orthopadically handicapped person, however, in respect of Commercial Tax Inspector, the advertisement does not reflect that the posts were exclusively reserved for orthopadically handicapped persons.

11. This Court has carefully gone through the requisition forwarded by the State Government to the PSC in respect of Commercial Tax Inspector as contained in Annexure P-29 dated 1.7.05 and again the requisition does not reflect that the posts are exclusively meant for orthopadically handicapped persons. The requisition only reflects that the posts reserved for handicapped persons shall be filled in as per the notification of the State Government and the notification dated 31.3.05 provides for 2% reservation in respect of visually handicapped persons and, therefore, the PSC has certainly committed an error in not permitting the petitioner to participate in the process of interview. The relevant portion of the notification of the State Government dated 31.3.05 reads as under:-

मध्य प्रदेश शासन
सामान्य प्रशासन विभाग
मंत्रालय

कमांक एफ 8-5/2004/आ. प्र./एक भोपाल, दिनांक 31 मार्च 2005
प्रति,

शासन के समस्त विभाग,
अध्यक्ष, राजस्व मंडल, म. प्र. ग्वालियर,
समस्त विभागाध्यक्ष,

समस्त संभायुक्त,

समस्त जिलाध्यक्ष,

समस्त मुख्य कार्यपालन अधिकारी, जिला पंचायत,

विषय:- लोक सेवाओं एवं पदों में निःशक्तजनों के लिए आरक्षण/छूट तथा निःशक्तजनों के लिए आरक्षित पदों को विशेष भरती अभियान के तहत भरनेबाबत।

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राज्य शासन द्वारा लोक सेवाओं एवं पदों में निःशक्तजनों के लिए आरक्षण तथा अन्य छूटों के विषय में समय-समय पर जारी किए गए महत्वपूर्ण निर्देश राज्य शासन के समस्त विभागों की सुविधा के लिए निम्नानुसार है:-

(एक)- निःशक्तजनों के लिए लोक सेवाओं एवं पदों में आरक्षण

1. सामान्य प्रशासन विभाग के ज्ञापन क्रमांक एफ, 8-4/2001/आ. प्र. /एक, दिनांक 31 जून 2001 द्वारा सीधी भर्ती से भरे जाने वाले द्वितीय श्रेणी, तृतीय श्रेणी एवं चतुर्थ श्रेणी संबंधित सेवाओं एवं पदों में निःशक्तजनों के लिए 6 प्रतिशत आरक्षण निम्नानुसार दिया गया है:-

1-दृष्टिबाधित - 2 प्रतिशत

2-श्रवणबाधित - 2 प्रतिशत

3-अस्थिबाधित - 2 प्रतिशत

2. उपरोक्त आरक्षण 'होरीजेन्टल' रहेगा तथा नियुक्ति किये गये निःशक्तजन को आरक्षण रॉस्टर में उसके प्रवर्ग के अनुसार कमशः अनुसूचित जाति, अनुसूचित जनजाति,

अन्य पिछड़ा वर्ग अथवा अनारक्षित के लिए चिन्हांकित बिन्दू के विरुद्ध दर्शाया जायेगा।

(दो) सेवाओं एवं पदों में आरक्षण के लिए निःशक्तजनों की श्रेणियों की परिभाषा भारत सरकार, कार्मिक एवं प्रशिक्षण विभाग के ज्ञान क्रमांक 36035/14..... अस्पष्ट.....

(आ) दिनांक 27/02/96 सहपठित ज्ञान क्रमांक 36035/14/95/स्था.

(आ)2 दिनांक अस्पष्ट द्वारा सेवाओं एवं पदों में आरक्षण के लिए निःशक्तजनों की श्रेणियों की परिभाषा निम्नानुसार निर्धारित की है:-

12. Keeping in view the aforesaid notification, this Court is of the considered opinion that the Commissioner for Persons With Disabilities, has rightly arrived at a conclusion that the respondent no.1 was entitled to participate in the process of interview, and has rightly directed the PSC to permit the respondent no.1 to appear in the process of interview.

13. Sec.33 of the Persons with Disabilities (Equal (Equal Opportunities Protection of Right & Full Participation) Act,1995 reads as under:-

"33. Reservation of posts:- Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent, each shall be reserved for persons suffering from:-

- (i) blindness or low vision;
- (ii) hearing impairment;
- (iii) locomotor disability or cerebral palsy; in the posts identified for each disability;

Provided that the appropriate Government may, having regard to the type of work, carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

14. The aforesaid statutory provisions of law provides for appointment of disabled persons in the Government establishments and also provides for issuance of notification reserving the posts for disabled persons and the State Government has issued a notification dated 31.3.05 reserving 2% posts for visually handicapped persons. Secs. 61 and 62 of the Act, 1995 deals with the powers of the Commissioner for Persons with Disabilities and the aforesaid statutory provisions of law empowers the Commissioner to take appropriate steps to safeguard the rights and the facilities made available to the persons with disabilities and, therefore, the Commissioner was well within his domain in passing the impugned order by which the PSC has been directed to hold an interview in respect of respondent no.1. Learned counsel appearing for the petitioner nor the learned Government Advocate appearing for respondents State have pointed out violation of any of the statutory provisions as contained under the Persons with Disabilities (Equal Opportunities Protection of Right & Full Participation) Act, 1995 in the matter. The stand of petitioner MP PSC that they were informed by a letter dated 12.10.06 that the State Government has only permitted the MP PSC to consider the orthopadically handicapped persons only in respect of the posts of Commercial Tax Inspector, also does not help the MP PSC or the State Government in any manner. At the time of forwarding the requisition, 8 posts were reserved exclusively for handicapped persons and, therefore, the posts were required to be filled up, keeping in view the notification dated 31.3.05. Even if it is assumed for the

sake of arguments that some clarification was received by the MP PSC, it would amounts to no reservation in respect of visually handicapped persons as advertisement does not provide for any reservation in respect of visually handicapped persons apart from the post of Commercial Tax Inspectors.

15. Hon'ble the Apex Court in the case of *Ravi Prakash Gupta* (supra) in the matter of appointment of a visually handicapped person to the Indian Administrative Service, has dismissed the Special Leave Petition preferred by the Government of India and has directed the Government of India to consider the appointment of Ravi Prakash Gupta respondent no.1 therein. The Hon'ble Apex Court in the aforesaid case in paragraphs 22, 27, 29 and 31 has held as under :-

“22. We have examined the matter with great care having regard to the nature of the issues involved in relation to the intention of the legislature to provide for integration of persons with disabilities into the social mainstream and to lay down a strategy for comprehensive development and programmes and services and equalisation of opportunities for persons with disabilities and for their education, training, employment and rehabilitation amongst other responsibilities. We have considered the matter from the said angle to ensure that the object of the Disabilities Act, 1995, which is to give effect to the proclamation on the full participation and equality of the people with disabilities in the Asian and Pacific regions, is fulfilled.

27. It is only logical that as provided in Section 32 of the aforesaid Act posts have to be identified for reservation for the purposes of Section 33, but such identification was meant to be simultaneously undertaken with the coming into operation of the Act, to give effect to the provisions of Section 33. The legislature never intended the provisions of Section 32 of the Act to be used as a tool to deny the benefits of Section 33 to these categories of disabled persons indicated therein. Such a submission strikes at the foundation of the provisions relating to the duty cast upon the appropriate Government to make appointments in *every establishment* (emphasis added).

29. While it cannot be denied that unless posts are identified

for the purposes of Section 33 of the aforesaid Act, no appointments from the reserved categories contained therein can be made, and that to such extent the provisions of Section 33 are dependent on Section 32 of the Act, as submitted by the learned ASG, but the extent of such dependence would be for the purposes of making appointments and not for the purpose of making reservation. In other words, reservation under Section 33 of the Act is not dependent on identification, as urged on behalf of the Union of India, though a duty has been cast upon the appropriate Government to make appointments in the number of posts reserved for the three categories mentioned in Section 33 of the Act in respect of persons suffering from the disabilities spelt out therein. In fact, a situation has also been noticed where on account of non availability of candidates some of the reserved posts could remain vacant in a given year. For meeting such eventualities, provision was made to carry forward such vacancies for two years after which they would lapse. Since in the instant case such a situation did not arise and posts were not reserved under Section 33 of the Disabilities Act, 1995, the question of carrying forward of vacancies or lapse thereof, does not arise.

31. We, therefore, see no reason to interfere with the judgment of the High Court impugned in the special leave petition which is, accordingly, dismissed with costs. All interim orders are vacated. The petitioners are given eight weeks' time from today to give effect to the directions of the High Court. The petitioners shall pay the costs of these proceedings to Respondent no.1 assessed at Rs.20,000/-, within four weeks from date."

16. As already stated earlier, the Hon'ble Apex Court was dealing with a case relating to appointment in the Indian Administrative Service and in the present case, the respondent no.1 has successfully qualified the MP Public Service Commission examination,05. It is really unfortunate that the State Government has not provided any reservation in respect of class II posts for visually handicapped persons. If a visually handicapped person is fit for appointment to IAS, this Court does not find any reason for not providing reservation for a visually handicapped person in respect of MP Administrative Service. Not only this, in respect of other class II posts also, there is no reservation

for visually handicapped persons and the respondents/State have provided reservation only in respect of the post of Commercial Tax Inspector and the respondent no.1, who has successfully qualified the written examination, is now being deprived of her legitimate right to appear in the process of interview without any justification. This Court is of the considered opinion that the learned Commissioner appointed under the Act of 1995, has rightly passed the impugned order keeping in view the intention of legislature and keeping in view the provisions of the Act, 1995 as well as notification dated 31.3.05 and also keeping in view the requisition sent by the State Government initially on 1.7.05.

17. Learned counsel for the Petitioner has also argued that all the eight posts advertised under the handicapped category have been filled up and in case respondent no.1 succeeds, the State Government will have to discontinue another handicapped person.

18. Learned counsel appearing for respondent no.1 as well as learned Govt. Advocate appearing for the State Government have informed this Court that one Mr. VK Jain, Commercial Tax Inspector who was selected in the same process of selection under the handicapped category, has resigned from the post of Commercial Tax Inspector and his resignation has also been accepted by the State Government on 16.9.09, meaning thereby that a post advertised in the year, 2005, under the handicapped category is lying vacant and, therefore, in case the respondent no.1 is found fit, she can be very well adjusted against the post available with the State Government under the reserved category (handicapped category).

19. This Court in the case of *Amardas Bairagi vs State of MP and others* (2010 (3) MPLJ 99), while dealing with the similar controversy instead of throwing out an handicapped person for accommodating another handicapped person, has directed the petitioner therein to be appointed against the post in question, as the posts are available in the department and the petitioner therein has already been appointed by the State Government, as directed by this Court and, therefore, keeping in view the judgment delivered in the matter of *Amar Das Bairagi* (supra), the petitioner, if found fit, deserves to be appointed under the handicapped category.

20. Resultantly, this Court does not find any reason to interfere with the order passed by Commissioner. The present writ petition stands dismissed. Consequently the writ petition filed by Purnima Jain as petitioner stands allowed with the following directions:-

(a) The State Government shall undertake an exercise of identifying the posts in respect of class II posts for disabled persons and keeping in view the provisions of Persons with Disabilities Act, 1995 read with notification dated 31.3.05 shall pass an appropriate order for reserving the posts for visually handicapped persons also;

(b) The aforesaid exercise shall be concluded by the State Government within a period of three months from the date of receipt of certified copy of this order;

(c) The petitioner MP Public Service Commission shall hold an interview of the respondent no.1 within a period of 30 days from today for the post in question and in case the petitioner receives more marks than the marks obtained by a candidate selected under the handicapped category or in case finds a place in the merit list in respect of the 8 reserved posts under the handicapped category, then the petitioner PSC shall forward the case of the respondent no.1 to the State Government for appointment on the post of Commercial Tax Inspector.

(d) The State Government on receiving such recommendation shall issue an appointment order within a period of 30 days thereafter; appointing the respondent no.1 on the post of Commercial Tax Inspector;

(e) In case the petitioner is appointed on the post of Commercial Tax Inspector, she will be entitled for notional seniority; notional pay fixation and other consequential benefits excluding arrears of salary;

(f) As this Court has already dismissed the present writ petition, the other writ petition filed by respondent no.1 namely Ku. Purnima Jain stands allowed with the aforesaid observations.

A copy of this order be retained in connected WP No.2312 of 09 (s).

Order accordingly.

I.L.R. [2011] M. P., 911

WRIT PETITION

Before Mr. Justice S. C. Sharma

W.P. No.10550/2010 (Indore) decided on 22 November, 2010

SAJID KHAN

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Service Recruitment - Public Health and Family Welfare Department, Class III, Nurse Service Recruitment Rules, M.P. 1989 - Reservation of female/woman candidates - Against statutory provisions, there can not be 100% reservation in favour of woman candidates - An order or executive instruction can not supersede the statutory recruitment rules - Impugned advertisement quashed. (Paras 10 & 12)

सेवा भर्ती - लोक स्वास्थ्य एवं परिवार कल्याण विभाग, वर्ग-III नर्स सेवा भर्ती नियम, म.प्र. 1989 - स्त्री/महिला अभ्यर्थियों का आरक्षण - कानूनी उपबंधों के विरुद्ध, महिला अभ्यर्थियों के पक्ष में 100 प्रतिशत आरक्षण नहीं हो सकता - कोई आदेश अथवा कार्यपालिक निर्देश, कानूनी भर्ती नियमों का अधिक्रमण नहीं कर सकता - प्रतिवादित विज्ञापन अभिखंडित।

Case referred :

(2002) 5 SCC 195.

Jitendra Verma, for the petitioner.

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

O R D E R

S.C. SHARMA, J. :-Regard being had to the similar controversy involved in these bunch of cases, they have heard analogously together with the consent of the parties and a common order is being passed in the matter: Facts of writ petition No.10550/10 are narrated as under:

2. The petitioners before this Court, who are qualified "General Nurse Midwife" holding a valid diploma and who are registered with Mahakaushal Nurse Registration Council, have filed this present petition being aggrieved by an advertisement dated 26.07.2010 by which applications have been invited for the post of Staff Nurse, governed under the Recruitment Rules known as M.P. Public Health and Family Welfare Department, Class-III, Nurse Service Recruitment Rules 1989 and schedule 8 appended to the aforesaid rules

provides for qualifications for the post of Staff Nurses/Warden/Public Health Nurse. The petitioners have further stated that the aforesaid rules do not provide that the posts of Staff Nurses/Warden/Public Health Nurse are exclusively reserved for women candidates only. The petitioners' contention is that all the petitioners are holding qualifications as per the recruitment Rules, 1989 and therefore, the advertisement issued by the respondents dated 26.07.2010 (Annexure P-10) is bad in law.

3. This Court while issuing notices on 28.03.2010 has permitted the petitioners to participate in the process of recruitment and inspite of there being an order dated 28.03.2010, the petitioners were not permitted to participate in the process of selection. A contempt petition was filed and the same was registered as Contempt Petition No.651/10. The contemnners therein, in reply filed by Dr. S.K. Meena, Joint Director, Nursing have justified their action in not permitting the petitioners to participate in the process of recruitment inspite of there being an order dated 23.08.2010 passed by this Court. This Court has again thereafter directed the contemnners to file an affidavit and the petitioners were permitted to participate in the process of selection.

4. Learned counsel appearing for the respondents/State has informed this Court that those candidates, who are having Higher Secondary certificate with Science subject, have been found eligible for the post of Staff Nurse. The grievance of the petitioners is that the aforesaid qualification of Higher Secondary with Science is not in existence under the Schedule appended to the Rules 1989 and the recruitment, if any, for the post of Staff Nurse has to be done keeping in view the qualifications prescribed under the Recruitment Rules of 1989.

5. A reply has been filed in the matter and the stand of the respondents/State is that the petitioners cannot be appointed on the post of Staff Nurse as a policy decision has been taken by the State Government on 18.06.2010 to appoint the women alone exclusively on the post of Staff Nurse. The respondents have also stated that as per the recruitment rules, only Female Staff Nurses can be appointed and the petitioners as they are males, cannot be appointed on the post of Staff Nurse. It has also been stated that as per the policy decision as contained Annexure R-2 dated 18.06.2010, the candidates, who possess a 10+2 certificate to their credit with science subject are entitled to be considered and, therefore, those candidates, who are otherwise qualified as per the provisions of the Recruitments of 1989 and

who are not having 10+2 qualification to their credit with science, are not entitled for appointment. The respondents have prayed for dismissal of the writ petition.

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

7. In the present case, the petitioners are holding a diploma in General Nursing Midwifery from recognized institutions and they are registered with Mahakoshal Nurses Registration Council under the register maintained as per the provisions of the C.P. & Berar Nurses Registration Act, 1936. The recruitment in question as per the advertisement (Annexure P-1) is being done on the posts of Staff Nurse in the Public Health Department of the State of M.P.. The Governor of Madhya Pradesh has framed the rules for regulating the recruitments of Nurses known as (Directorate of Health Service) Class-III, Nurse Service Recruitment Rules 1989 and Rule 8 of the aforesaid Rules deals with the direct appointment to the post mentioned in the schedule 3 appended to the aforesaid rules and the same reads as under:-

S.No.	Name of service	Minimum age limit	Maximum age limit	Required educational qualifications and training	Remarks
(4)	Staff Nurse/ Warden/ Public Health Nurse/ Operation Theatre-Nurse/ Nursing Supervisor/ Nursing Orderly	18 years	30 years	1: Graduate (B.Sc. Nursing) General Nursing and Senior Midwifery trained along with Registered Nurse Registered Midwife with MK Nursing Council	Training prescribed for appointment to the post of Staff Nurse/Warden/ Public Health Nurse/ Operation Theatre Nurse/Nursing Supervisor/ Nursing Orderly.

8. The aforesaid statutory provision of law makes it very clear that the posts in question is not exclusively reserved for women only. Not only this, the qualification prescribed for the post does not reveal that the candidates must possess Higher Secondary (10+2) with Physics, Chemistry and Biology. Not only this, as per the provisions of M.P. Civil Services (Special Provision for Appointment of Women) Rules 1997, 30% of all the posts in the services in the State are required to be reserved for women candidates. Rule 3 of the aforesaid Rules, 1997 reads as under:

"3. Reservation of posts for women. - (1) Notwithstanding anything contained in any service Rules, there shall be reserved thirty percent of all posts in the service under the State in favour of women at the stage of direct recruitment and the said reservation shall be horizontal and compartmentwise.

Explanation.-For the purposes of this rule "horizontal and compartmentwise reservation" means reservation in each category, namely, Scheduled Castes, Scheduled Tribes, Other Backward Classes and General.

(2) Subject to the provisions of sub-rule (1) in the said appointments preference shall be given to the widow or divorced Women."

9. From perusal of the aforesaid statutory provisions, it is crystal clear that the State Government can reserve 30% of the posts in service for women candidates. It does not provide 100% reservation as has been done in the present case. Not only this, so called Cabinet decision enclosed along with the return also reflects that after taking a cabinet decision, it was resolved to make suitable amendment in the recruitment rules, however, the respondents before amending the rules have started the process of recruitments contrary to the statutory provisions vide order dated 18.06.2010 passed by the State Government and the same reads as under:-

"मध्यप्रदेश शासन

लोक स्वास्थ्य एवं परिवार कल्याण विभाग

मंत्रालय

:-आदेश:-

भोपाल, दिनांक-18/06/2010

क्रमांक एफ 3-12/2010/17/मेडि-1 :: राज्य शासन द्वारा निर्णय लिया गया है कि लोक स्वास्थ्य एवं परिवार कल्याण विभाग के अधीन शासकीय नर्सिंग प्रशिक्षण केन्द्रों में महिला उम्मीदवार न मिलने की स्थिति में मान्यता प्राप्त अशासकीय नर्सिंग स्कूलों/कालेजों से नर्सिंग प्रशिक्षण उत्तीर्ण महिला अभ्यर्थियों को नियुक्ति हेतु लिया जाए। यदि उक्त शासकीय/अशासकीय नर्सिंग स्कूलों/कालेजों से भी नर्सिंग प्रशिक्षित उम्मीदवार उपलब्ध न हों तो ऐसी स्थिति में एक बार के लिए अन्य राज्यों से बी. एस. सी. नर्सिंग कोर्स व जनरल नर्सिंग डिप्लोमा उत्तीर्ण उम्मीदवार को नियुक्ति हेतु आमंत्रित किया जाये। इस हेतु भौतिक रसायन एवं जीव विज्ञान से 102 परीक्षा उत्तीर्ण होने

के साथ ही बी एस सी नर्सिंग अथवा डिप्लोमा नर्सिंग परीक्षा उत्तीर्ण हो तथा मध्यप्रदेश नर्सस रजिस्ट्रेशन काउन्सिल में आरएनआरएम् (रजिस्टर्ड नर्सस रजिस्टर्ड मिडवाइफरी) का पंजीयन होना चाहिए। अतः विभाग के तृतीय श्रेणी परिचारिका सेवा के भरती-नियमों में तदनुसार संशोधन किया जाये।

2. विभाग के तृतीय श्रेणी परिचारिका सेवा के भरती नियमों में सामान्य प्रशासन विभाग के परिपत्र क्रमांक सी-3-11/84/3/1, दिनांक 24/04/1984 तथा क्रमांक सी 3-25/88/3/49, दिनांक 29/03/1989 के अनुसार महिला उम्मीदवारों की आयु सीमा 18 से 45 वर्ष तथा आरक्षित वर्ग की विधवा, तलाकशुदा एवं परित्यक्ता के लिए 5 वर्ष की छूट अनुसार आयु सीमा निर्धारित की जाती है।

मध्यप्रदेश के राज्यपाल के नाम से

तथा आदेशानुसार

sd/-

(आर आर चौधरी)

अवर सचिव

मध्य प्रदेश शासन

लोक स्वास्थ्य एवं परिवार कल्याण विभाग"

10. It is a well settled principle of law that an order or executive instructions cannot supersede the statutory recruitments rules governed the field and, therefore, the order dated 18.06.2010 cannot certainly supersede the provisions of Public Health Recruitment Rules, 1989 as well as the provisions of M.P. Civil Services (Special Provision for Appointment of Women) Rules 1997, therefore, the action of respondents in reserving the 100% posts for women is bad in law. The petitioners in the present case have been permitted to participate in the process of selection that too only when a contempt petition was filed and an order was issued in the contempt petition and the respondents have rejected certain candidates on the ground that they are not holding 10+2 certificate to their credit with Physics, Chemistry and Biology. The aforesaid qualification does not find place under the Rules of 1989 and the respondents have applied the same for the petitioners and have found them illegible, hence the action of the respondents in rejecting the candidature of the petitioners is bad in law.

11. This Court while granting an interim order on 28.03.2010 has directed the respondents not to issue any appointment without leave of this Court and subsequently, another advertisement was issued by the respondents/State on 14.10.2010 once again reserving all the posts for women candidates and this

Court vide order dated 29.10.2010 passed in W.P. No.11030/10 in the case of *Sanjay Mandloi Vs. State of M.P. and others*, stayed the process of recruitments. Today, it has been brought to the notice of this Court by learned government advocate that the respondents/State on 08.11.2010 has withdrawn the aforesaid advertisement, which is impugned in W.P. No.11030/10 and other writ petitions are also pending on the same subject. Not only the petitioners, but a large number of identically placed persons, who are not before this Court, have been deprived of their legitimate right to participate in the process of selection only because an advertisement was issued by the State Government contrary to the provisions of the Recruitment Rules, 1989 as well as contrary to the reservation Rules, 1997 and therefore, the advertisement is bad in law and the same deserves to be quashed.

12. The Apex Court in the case of *S. Renuka and Others Vs. State of A.P. and another* reported in (2002) 5 SCC 195 in paragraph No.8 has held as under:-

"8. It is settled law that no right accrues to a person merely because a person is selected and his or her name is put on a panel. The petitioners have no right to claim an appointment. Even otherwise, the selection was contrary to the Rules in force at that time. There could not be 100% reservation for women. Also the reservation policy had not been adhered to. The posts which are created are posts of District and Sessions Judges, Grade II. There are no separate posts for Judges of Family Courts and Mahila Courts. Thus the petitioners could not be appointed as Judges of Family Courts and Mahila Courts in ex-cadre posts even provisionally. This would amount to creation of ex-cadre posts not sanctioned by the Government. No fault can be found with the High Court being in favour of not appointing the petitioners."

13. Keeping in view the aforesaid judgment delivered by the Apex Court, there is no manner of doubt that there cannot be 100% reservation in favour of the women candidates as the same is against the statutory provisions, resultantly, the impugned advertisement is hereby quashed. The respondents are permitted to issue a fresh advertisement strictly keeping in view the provisions of the Recruitment Rules of 1989. It is needless to mention that the

respondents while issuing a fresh advertisement shall reflect the qualification prescribed under the Schedule 3 of the Rules of 1989 and shall also be free to reserve the posts upto extent of 30% as provided under the provisions of M.P. Civil Services (Special Provision for Appointment of Women) Rules 1997.

14. As this Court has allowed the present writ petition, the contempt petition No.651/10 arising out of the interim order passed in the present case also deserves to be disposed of. The contempt petition was filed for non-compliance of the order dated 28.03.2010 and notices were issued by this Court on 23.09.2010. A reply has been filed in the contempt petition by one Dr. S.K. Meena and the reply reveals that the respondents have not complied the interim order passed by this Court as the advertisement was issued exclusively for appointment of the women candidates. This Court was aware of the advertisement issued by the respondents/State and has passed an interim order on 23.08.2010 to permit the petitioners to participate in the process of selection and with a defiant attitude a reply was filed in the contempt petition, justifying the disobedience.

15. It is really unfortunate that in spite of there being an order passed by this Court on 23.08.2010, the respondents have not permitted the petitioners to participate in the process of selection and on the contrary, has offered a justification.

16. This Court as has allowed the main writ petition and, therefore, no further orders are required to be passed in the contempt petition. The same is disposed of. With the aforesaid, the writ petition is allowed. No order as to costs.

17. The other identical writ petitions are also allowed and the other contempt petitions are also disposed of.

Petition allowed.

I.L.R. [2011] M. P., 918

WRIT PETITION

Before Mr. Justice S.K. Gangele

W.P. No. 2861/2009(S) (Gwalior) decided on 2 December, 2010

ARVIND SINGH

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Service Law - Panchayat Karmi - Qualification of - Certificate of Prathma issued by the Hindi Sahitya Sammelan, Allahabad could not be said to be equivalent to class 10 under 10+2 system, which is a necessary qualification for the purpose of appointment to the post of Panchayat Karmi.

(Para 5)

सेवा विधि - पंचायत कर्मी - की अर्हता - हिन्दी साहित्य सम्मेलन, इलाहाबाद द्वारा जारी प्रथमा का प्रमाणपत्र, 102 प्रणाली के अंतर्गत कक्षा 10वीं के समतुल्य नहीं कहा जा सकता, जो कि पंचायत कर्मी के पद पर नियुक्ति हेतु आवश्यक अर्हता है।

Cases referred :

AIR 2010 SC 2221, (2003) 4 AWC 3016 : (2003 All. L. J. 2579).

Vivek Jain, for the petitioner.*Smt. Nidhi Patankar, G.A.*, for the respondents No. 1 & 2.*Anil Sharma*, for respondent No. 3.**ORDER**

S.K. GANGELE, J. :- Petitioner has filed this petition against the order dated 30.05.2009, Annexure P-1.

2. There was a post of Panchayat Karmi vacant in Gram Panchayat, Sirmiti, district Morena. Gram Panchayat failed to appoint the Panchayat Karmi. The Collector vide order dated 10.01.2008 directed the Chief Executive Officer, Janpad Panchayat, Morena, to appoint a Panchayat Karmi at Gram Panchayat, Sirmiti. Thereafter, the Chief Executive Officer, Janpad Panchayat, Morena selected respondent No.3, Mr. Dharmendra Kumar, to the post of Panchayat Karmi and appointed him on the aforesaid post. One Kumari Priyanka Chandela challenged the order of appointment of respondent No. 3 as Panchayat Karmi before the Commissioner by way of filing an appeal. The Commissioner remanded the matter back to the Collector with a direction to record a finding that whether the qualification of Prathama examination of Hindi Sahitya Sammelan, Allahabad is equivalent to Class 10 examination or

not? The Collector vide impugned order held that the qualification of Prathma obtained by respondent No. 3 from Hindi Sahitya Sammelan, Allahabad is equivalent to Class – 10 and on the basis of aforesaid qualification the appointment of respondent No. 3 to the post of Panchayat Karmi is as per law.

3. It is an admitted fact that respondent No. 3 has been held meritorious on the basis of his qualification of Prathma, which has been obtained by him from Hindi Sahitya Sammelan, Allahabad and the Authority has held that it is equivalent to matriculation examination.

4. The State Government issued circular in regard to appointment of Panchayat Karmi. As per the aforesaid circular, the necessary qualification for a candidate is to have passed High School or 10th Class examination under the 10 + 2 system. The respondent No. 3 has passed Prathma examination from Hindi Sahitya Sammelan, Allahabad. The General Administration Department vide circular dated 18th September 1973, copy of which has been filed as Annexure R-3, informed all the departments that examination of Prathma from Hindi Sahitya Sammelan, Allahabad is recognised up to the level of S.L.C. and that too for Hindi level only. It has been specially stated in the circular that the aforesaid qualification is restricted to Hindi level only. It is clear from the aforesaid notification that the examination of Prathma of Hindi Sahitya Sammelan, Allahabad has not been equated with the examination of Class 10 under 10 + 2 system. Apart from this, the Hon'ble Supreme Court in the case of *Rajasthan Pradesh V. S. Sardarshahar & Another Vs. Union of India and others*, reported in AIR 2010 SC 2221, has quoted the judgment of the Allahabad High Court in the case of *Umakant Tiwari & others Vs. State of U.P & others*, (2003) 4 AWC 3016 : (2003 All L.J. 2579), wherein the Allahabad High Court has held that the Hindi Sahitya Sammelan, Allahabad, is a fake institution. Subsequently, the Hon'ble Supreme Court set aside the judgment of the Allahabad High Court passed in the case of *Umakant Tiwari* (supra) and remanded the matter back to the Allahabad High Court and after remand the Allahabad High Court again held the same and dismissed the writ petition. Relevant observations of the Hon'ble Supreme Court reported in *Rajasthan Pradesh V. S. Sardarshahar & Another Vs. Union of India and others* (supra) are as under :-

"23. In *Umakant Tiwari & others v. State of U.P. & others*, (2003) 4 AWC 3016 : (2003 All. L.J. 2579), a Division Bench

of the Allahabad High Court has considered the issue at length and came to the conclusion that the Hindi Sahitya Sammelan Allahabad / Prayag were only registered societies and not educational institutions. The said societies had no business to impart education in medical sciences. Hindi Sahitya Sammelan, Allahabad was a fake institution whereas Hindi Sahitya Sammelan, Prayag was recognised only from 1931 to 1967.

24. In *Dr. Vijay Kumar Gupta & Others v. State of U.P. & Others* (1999) AWC 1783 : (1999 All L.J. 1756), a Division Bench of the Allahabad High Court has held that a degree / certificate / diploma from Hindi Sahitya Sammelan, Prayag acquired after 1967 was not recognised and those who obtained the same subsequent to 1967 were not entitled to practice medicines.

25. In *Dr. Vijay Kumar Gupta & Others v. State of U.P. & Others* (1999) AWC 1783 : (1999 All L.J. 1756), a Division Bench of the Allahabad High Court considered the matter at length along with statutory provisions of the Act, 1970 and came to the conclusion that Hindi Sahitya Sammelan, Allahabad had never been empowered to issue such certificates/ degrees. However, certificates issued by the Hindi Sahitya Sammelan, Prayag were recognised during the period of 1931 to 1967. Thus, any such certificate subsequent thereto could not entitle a person to practice medicine.

26. In *Virender Lal Vaishya v. Union of India & others*, 2003 (2) Mah. L.J. 64 : (2003 Lab I.C. 2820), a Division Bench of the Bombay High Court held that Hindi Sahitya Sammelan, Prayag was not a recognised University / Board and thus could not award degree, diploma or certificate.

27. In *Charan Singh & others v. State of U.P. & Others*, AIR 2004 All. 373, the Allahabad High Court considered the issue of validity of certificates issued by Hindi Sahitya Sammelan, Prayag and came to the conclusion that the said institution had absolutely no authority to confer any degree or diploma of "Vaidya Visharad" and "Ayurved-Ratna" after 1967 and any person who has acquired such certificate after 1967 was not entitled to practice at all.

28. The judgment of the *Allahabad High Court in Umakant Tiwari*, (2003 All LJ 2579) (supra) was set aside by this Court and the matter was remanded to the High Court to decide afresh in Civil Appeal No. 1453/2004 vide judgment and order dated 25th May, 2007, for the reason that matter had initially been decided by the High Court in 2003 without giving opportunity of hearing to Hindi Sahitya Sammelan Allahabad / Prayad.

29. After remand, Hindi Sahitya Sammelan Allahabad / Prayag were given notices and were directed to file the counter affidavits. The Court, after hearing all the parties concerned, including Hindi Sahitya Sammelan Prayag, vide judgment and order dated 23.10.2009, dismissed the writ petition."

5. From the aforesaid, it is clear that the Hindi Sahitya Sammelan, Allahabad is not a recognized institution. Apart from this, the certificate of Prathma issued by the Hindi Sahitya Sammelan, Allahabad could not be said to be equivalent to Class – 10 under 10 + 2 system, which is a necessary qualification for the purpose of appointment to the post of Panchayat Karmi.

6. Consequently, the petition of the petitioner is allowed. The impugned order dated 30.05.2009, Annexure P-1, passed by the Collector is hereby quashed. The matter is remanded back to the Chief Executive Officer, Janpad Panchayat, Morena, to appoint a Panchayat Karmi as per the merits list of the candidates excluding respondent No. 3. Necessary orders in this regard be passed within a period of six weeks from the date of receipt of a copy of this order. No order as to costs.

Petition allowed.

I.L.R. [2011] M. P., 921

MISCELLANEOUS PETITION

Before Mr. Justice A.K. Shrivastava

M.P. No.597/1993 (Jabalpur) decided on 4 January, 2011

KAMLA BAI (SMT.)

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

Nagariya Kshetron Ke Bhumihin Vyakti (Pattadhruti Adhikaron Ka Pradan Kiya Jana) Adhiniyam, M.P. (15 of 1984), Section 3 - Grant of Patta - Petitioner possessing the property in question (even as a

tenant of trespasser) and there is no material to hold that she is not a landless person - Patta granted in petitioner's favour by Sub-Divisional Officer is a valid Patta. (Paras 13 & 14)

नगरीय क्षेत्रों के भूमिहीन व्यक्ति (पट्टाधृति अधिकारों का प्रदान किया जाना) अधिनियम, म.प्र. (1984 का 15), धारा 3 - पट्टा प्रदान किया जाना - प्रश्नगत सम्पत्ति याची के कब्जे में (अतिचारी का किराएदार के रूप में भी) तथा यह मानने के लिए कोई सामग्री नहीं है, कि वह भूमिहीन व्यक्ति नहीं है - याची के पक्ष में उपखंड अधिकारी द्वारा प्रदान किया गया पट्टा, विधिमान्य पट्टा है।

Ashok Lalwani, for the petitioner.

Harish Agnihotri, G.A., for the respondents.

ORDER

A.K. SHRIVASTAVA, J. :-By filing this petition under Article 226 and 227 of the Constitution of India, the petitioner has challenged the validity of the order dated 30.12.86 (annexure P/11) passed by Additional Collector, Katni (Sihora) whereby the land in question has been settled in the name of deceased respondent no.6, Rahman Bi.

2. No exhaustive statement of facts are required to be narrated for the purpose of disposal of this petition. Suffice it to say that an application under Section 3 of M.P. Nagriya Shetron Ke Bhumiheen Vyakti (Pattadharati Adhikaro Ka Pradhan Kiya Jana) Adhiniyam, 1984 (hereinafter referred to as the Act) was submitted by petitioner-Kamla Bai widow of Tahalram and it was prayed that the said land be settled in her name since she is a landless person. On the said application, deceased respondent no.6 opposed the prayer of the petitioner for settling the land in question in her favour under the said Act. The Sub Divisional Officer settled the land in question in favour of the petitioner by granting a patta, Annexure P/2 in her favour. Against the grant of said patta, deceased respondent no.6 Rahman Bi filed a revision application before Additional Collector, Katni (Sihora). The learned Additional Collector by the impugned order dated 30.12.1986 (annexure P/11) has allowed the revision application of deceased respondent no.6 and set aside the patta (annexure P/2) which was granted by the Sub Divisional Officer in favour of the petitioner.

3. In this manner, this petition has been filed by the petitioner assailing the said order.

4. During the pendency of this petition, deceased respondent no.6 died

and an application was filed on behalf of the petitioner to delete her name as she had died leaving behind no heir. Accordingly, this Court on 6.8.97 directed to delete her name from the cause title of the petition and her name has been deleted.

5. During the pendency of this petition, on 7.4.2005, this Court directed respondents to hold an enquiry whether Rahman Bi had any successor in accordance with law or not. Accordingly, the Sub Divisional Officer, Katni, after holding an enquiry submitted a report to this Court dated 11.8.08 stating therein that after adopting all efforts it could not be ascertained that Rahman Bi who was a widow was having any successor or not.

6. The contention of learned counsel for the petitioner is that there is overwhelming material to hold that petitioner was a tenant of Rahman Bi and was residing in the same premises which is being claimed by her. According to petitioner, she is a landless person. In this context, learned counsel has invited my attention to Annexure P/4 which is an application submitted by Rahman Bi in the revision proceedings before Additional Collector, Katni mentioning that in the disputed property, the husband of the petitioner, Tahalram is residing as her tenant and although she is making demand to pay arrears of rent and is also asking Tahalram to vacate the premises, but neither he is giving vacant possession nor paying any rent. Alternatively, she also submitted that she is possessing the said property in question for the last 15-16 years and is also paying the property tax. Thus, it has been contended by learned counsel that since it is borne out from the record that petitioner is residing in the same premises, may be as a tenant but, she is a landless person and is also possessing the property in question and further because Rahman Bi had died without any heir, the property in dispute be settled in the name of petitioner.

7. Learned counsel further submits that property in dispute is owned by the State Government & Rahman Bi was only a trespasser although she inducted petitioner's husband Tahalram as her tenant in it. It has been further been contended by learned counsel for the petitioner that the Authorized Officer under the Adhiniyam is the Collector and, therefore, the order impugned (annexure P/11) passed by Additional Collector is without jurisdiction and further it has been contended that in flagrant violation of law, the said authority enquired the matter in detail although it was not permissible under Section 4-A of the said Act while hearing the revision application. On these premised submissions, it has been argued that this petition be allowed and the patta

(annxure P/2) granted by Sub Divisional Officer in favour of the petitioner be restored.

8. On the other hand, Shri Harish Agnihotri, learned Government Advocate argued in support of the impugned order.

9. Having heard learned counsel for the parties, I am of the view that this petition deserves to be allowed.

10. I do not find any merit in the contention raised by learned counsel for the petitioner that since the impugned order is passed by the Additional Collector, the same is without jurisdiction, because, under Section 4-A of the said Act, only Collector is empowered to hear the revision application. On bare perusal of Section 2(e) of the said Act, it is luminously clear like a noon day that words and expression used but not defined in the said Act and defined in M.P. Land Revenue Code, 1959 (hereinafter referred to as the Code) shall have the meanings respectively assigned to them in that Code and therefore, according to me, the word "Collector" used in Section 4-A of the Act would mean to include the Additional Collector also and in this regard, it will be profitable to place reliance on Section 11 as well as Section 17 of the Code. According to Section 11, the Collector would include Additional Collector also and a bare perusal of Section 17 of the Code, this Court finds that the Additional Collector can discharge any duties under sub-section 2 of Section 17 if he had been the Collector of the District and, therefore, the contention of learned counsel for the petitioner that the impugned order (annexure P/11) passed by Additional Collector is without jurisdiction cannot be accepted and it is hereby held that Additional Collector was empowered to hear the revision application filed under the Act.

11. Now coming to the merit of the case, this Court finds that deceased respondent no.6 died as widow and in the report which has been submitted by the respondents in compliance to the order passed by this Court, it has been mentioned that after full efforts, it could not be ascertained that she was having any successor or not. In this petition also, none has appeared after the death of deceased respondent no.6 claiming himself or herself to be the heir or legal representative of Rahman Bi and, therefore, for the purposes of this petition, it is hereby held that said Rahman Bi died as widow leaving behind no heir or any legal representative.

12. On bare perusal of the impugned order, this Court finds that learned

Additional Collector did not pay any heed to the application/objections (annexure P/4) submitted by Rahman Bi before it stating in para 2 that in the property in dispute, the petitioner's husband Tahalram is residing as her tenant and it has also been stated by her that neither the Tahalram is paying the rent nor he is vacating the property in question and, therefore, according to me, she has admitted that Tahalram was her tenant and was residing in the property in question and he did not vacate the said property. Needless to say that petitioner is the widow of Tahalram. It is also not disputed that the property in question is owned by the State of M.P. and hence according to me, deceased respondent no.6 was a trespasser in the government property and petitioner was the tenant of a trespasser.

13. There is no material on record in order to indicate that petitioner is not a landless person. On the contrary, a bare perusal of the patta (annexure P/2) granted in her favour by the Sub Divisional Officer, it is gathered that she is a landless person as envisaged under Section 2(d) of the Act. There is no finding of the learned Additional Collector holding otherwise that petitioner is not a landless person as envisaged under Section 2(d) of the said Act and according to learned Additional Collector, Rahman Bi was holding the property. On bare perusal of the application/objections (annexure P/4) which were filed by Rahman Bi in revision proceedings, this Court finds that there is a clear admission of her that petitioner's husband Tahalram is residing in the property in question as her tenant and, therefore, since the petitioner is possessing the property in question and patta has been granted under the said Act to her by the Sub Divisional Officer and there is no other material to hold that she is not a landless person, therefore, according to me, the impugned order (annexure P/11) dated 30.12.86 passed by the Additional Collector (respondent no.2) is illegal and contrary to the provisions of the said Act and, therefore, I have no option except to set aside the said order of Additional Collector and I do it accordingly.

14. Resultantly, this petition succeeds and is hereby allowed. The impugned order dated 30.12.86 (annexure P/11) passed by Additional Collector is hereby set aside and patta (annexure P/2) appears to have been granted vide order dated 17.6.84 by Sub Divisional Officer in favour of petitioner is held to be a valid patta. No order as to costs.

Petition allowed.

I.L.R. [2011] M. P., 926

WRIT PETITION

Before Mr. Justice A.K. Shrivastava

W.P. No.1313/2009 (Jabalpur) decided on 5 January, 2011

RAMESH CHANDRA SHRIVASTAVA (DR.) & anr. ...Petitioners

Vs.

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

Education - Exemption of tuition fee - Petitioner No. 1 already undergone sterilization operation prior to cut off date which is 13.5.2003 - He is entitled for the exemption of the tuition fee - Petition allowed.

(Paras 7 to 9)

शिक्षा — शिक्षण शुल्क की छूट — प्रत्यर्थी क्र. 1 निर्दिष्ट तारीख 13.5.2003 के पूर्व ही नसबंदी ऑपरेशन करा चुका था — वह शिक्षण शुल्क की छूट के लिये हकदार है — याचिका मंजूर।

Avinash Zargar, for the petitioners.

Harish Agnihotri, G.A., for the respondents.

ORDER

A.K. SHRIVASTAVA, J. :-The petitioner by this petition under Article 226 of the Constitution of India has prayed for following reliefs:

1. That, this Hon'ble Court may kindly be pleased to direct the respondents nos.3 & 4 to refund the tuition fees of Rs. 35,000/- deposited by the petitioners under protest on petitioner no.2's admission to Master of Surgery (Obsterics & Gynecology) Course along with interest @ 18% per annum.
2. That this Hon'ble Court may kindly be pleased restrain the respondents from demanding tuition fees from the petitioners in future while prosecution of Master of Surgery (Obsterics & Gynecology) Course by the petitioner no.2.
2. Petitioner no.2 has obtained admission in Post Graduate MS (Obsterics & Gynecology) Course and petitioner no.1 is her father. The contention of the learned counsel is that petitioner no.1 has under gone sterilization operation on 11/05/1989 and in this regard he has filed two documents Annexures-P-2 & P-3, hence, he is entitled to obtain back the tuition fee of his daughter (petitioner no.2) which he deposited in the light of the circular of the State Government dated 06/07/1990 (Annexure-P-4).

3. Learned counsel further submits that when all these facts were demonstrated to the Dean Medical College, Jabalpur (respondent no.4), he did not agree and in these adverse facts and circumstances the petitioner has deposited tuition fee, so that, the admission of petitioner no.2 may not be cancelled. However, looking to the mandate as well as assurance given by the State Government, the petitioners are entitled for the benefit in terms of said circular (Annexure-P-4). Hence, it has been prayed by the learned counsel that the tuition fee which was deposited be refunded to the petitioners.

4. Per Contra, Shri Harish Agnihotri, learned Government Advocate by placing reliance on a later circular of the State Government dated 17/10/2007 has submitted that the said benefit can be extended only once and not for the second time and therefore, even though no specific order has been passed by the Dean Medical College to return the tuition fee, since the circular dated 17/10/2007 (Annexure-P-9) has superseded the earlier circular (Annexure-P-4) dated 06/07/2010 it should be given effect to and hence the petitioners are not entitled for any relief.

5. Considered the rival contentions of the learned counsels for the parties and after having heard them, I am of the view that this petition deserves to be allowed.

6. On bare perusal of circular of State Government dated 6th July 1990 (Annexure-P-4) it is gathered that the State Government in order to promote the scheme of sterilization so as to check the population of the country, exempted the tuition fee to the children of the parents of green card holders. True, this circular has been superseded by later circular dated 17/10/2007 which has been annexed as Annexure-P-9, but according to me this circular would not debar the petitioners from the exemption of tuition fee for the simple reason that in clause 2 of the said circular it has been clarified by the State Government that this circular will not be applicable to the persons who had already undergone the said sterilization operation prior to 13/05/2003.

7. In this context, I would like to refer sub para (3) of clause 1 of the said circular which reads thus:-

3. शासकीय स्वशासी शासकीय चिकित्सा महाविद्यालय/अभियांत्रिकी महाविद्यालय/पॉलीटेक्निक महाविद्यालय औद्योगिक/प्रशिक्षण संस्थानों में शिक्षण शुल्क का लाभ केवल एक बार एक ही डिग्री/पाठ्यक्रम के लिये प्राप्त होगा ।

I would also like to quote clause 2 which reads thus :-

2. ऐसे ग्रीन कार्ड धारकों को जिनके द्वारा दिनांक 13/05/2003 से पूर्व नसबंदी कराई गई है को इस आदेश से पूर्व प्रचलित प्रावधानों के अनुरूप सुविधायें प्राप्त होती रहेंगी दिनांक 13/05/2003 के पश्चात नसबंदी करने वाले उन्हीं व्यक्तियों को उक्त सुविधायें प्राप्त होंगी जो गरीबी रेखा के नीचे जीवन यापन करने वालों की श्रेणी में आते हैं ।

I have no scintilla doubt in holding that this circular would not debar the petitioner from the benefit, since the petitioner no.1 had already undergone sterilization operation prior to cut of date which is 13/05/2003.

8. I do not find any merit in the contention of the learned Government Advocate Shri Agnihotri that for the second time the said benefit would be given only to the persons who are below to the poverty line. If the aforesaid circular is taken into consideration to its true spirit, this court finds that in the first part of clause which is referred hereinabove, the State Government has directed that the green card holders who had undergone operation prior to 13/05/2003 will be benefited in the same manner as they were enjoying earlier, however, in second part after the cut of the date viz 13/05/2003 the State Government has provided benefit for second time to those green card holders who are below the poverty line and therefore, according to me since the petitioner no.1 had already undergone sterilization operation prior to the cut of date, he is entitled for the exemption of the tuition fee which he had already deposited to get his daughter (petitioner no.2) admitted in the medical college at Jabalpur. The action of Dean Medical College, Jabalpur not refunding the tuition fee of petitioner no.2 is arbitrary in nature.

9. Resultantly, this petition succeeds and is hereby allowed. The respondent no.4 is hereby directed to return back the tuition fee to the petitioners on or before 28/02/2011, failing which they will be entitled for the interest @ 6% per annum w.e.f 01/03/2011. The petitioner shall be entitled for the costs also. Counsel fee Rs. 2,000/-. Let the amount of costs be also paid to the petitioner by adding and including it in the refund amount of the tuition fee.

Petition allowed.

I.L.R. [2011] M. P., 929

WRIT PETITION

Before Mr. Justice Ajit Singh & Mr. Justice Sanjay Yadav

W.P. No.89/2011 (Jabalpur) decided on 12 January, 2011

RAKESH JAIN

... Petitioner

Vs:

CHHAKKILAL KUSHWAHA & ors.

... Respondents

Municipalities Act, M.P. (37 of 1961), Section 20 - Election Petition
- Inspection of invalid votes - Respondent No. 1 materially affected -
The Trial Court/Tribunal by impugned order called for inspection of
355 ballot papers which were declared invalid during the counting -
Held - The issue can be decided only after ballot papers, which were
declared invalid, are inspected in the Court as trial Court has jurisdiction
for calling the ballot papers for inspection. (Para 7)

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 20 — चुनाव याचिका — अवैध मतपत्रों का निरीक्षण — प्रत्यर्थी क्रं. 1 तत्त्वतः प्रभावित — आक्षेपित आदेश द्वारा विचारण न्यायालय/अधिकरण ने, 355 मत पत्र जिन्हें गिनती के दौरान अवैध घोषित किया गया था, उन्हें निरीक्षण हेतु बुलाया — अभिनिर्धारित — विवाद्यक का निर्णय केवल तभी हो सकता है, जब अवैध घोषित मतपत्रों, का निरीक्षण न्यायालय में हो, जैसा कि निरीक्षण के लिए मतपत्रों को बुलाने की विचारण न्यायालय की अधिकारिता है।

Cases referred :

1999(1) J.L.J. 200, 1999(1) J.L.J. 342, (1984) 2 SCC 36, AIR 1964 SC 1249.

Hitendra Singh, for the petitioner.*S.P. Khare*, for the caveator/respondent No.1.**ORDER**

The Order of the Court was delivered by
AJIT SINGH, J. :- Heard on admission.

This petition, under Article 227 of the Constitution, is directed against the order dated 13.12.2010, Annexure P1, passed in MJC No. 06/2010 by the First Additional District Judge, Tikamgarh, whereby he has requisitioned the ballot papers in a sealed cover from the office of District Election Officer for inspection.

2. The petitioner and respondents contested the election for the office of President, Nagar Panchayat, Kari, District Tikamgarh. The counting of votes

was held on 15.12.2009 and on the same date petitioner was declared elected. The result showed that petitioner secured 1780 votes and respondent no.1, 1647 votes. Aggrieved with the result declared, respondent no.1 has filed an election petition against the petitioner and remaining respondents. In the election petition he has alleged that 200 votes cast in his favour were illegally declared invalid on a flimsy ground of there being some small ink marks or spots on the ballot papers. Respondent no.1 has inter-alia prayed that he be declared elected in place of petitioner. The petitioner in his reply, while defending the election result, has denied the allegation of respondent no.1.

3. On the pleadings made, the trial court has framed as many as eight issues out of which issue nos.2 and 3 read as under:

“2. क्या मतगणना अधिकारियों ने आवेदक छककीलाल के पक्ष में डाले गये 200 मतपत्रों को केवल इस आधार पर अवैध घोषित कर दिया कि उनमें कहीं-कहीं स्याही के छोटे-छोटे निशान थे ?

3. क्या उक्त मतपत्रों को अवैध रूप से अस्वीकृत किया गया ?”

4. Respondent no.1 and petitioner have examined seven witnesses each in support of their averments. The trial of the election petition is also at the fag end. It is at this stage the trial court, by the impugned order, has called for inspection 355 ballot papers which were declared invalid during the counting. These ballot papers also include 200 ballot papers which, according to respondent no.1, were cast in his favour but were illegally declared invalid.

5. The learned counsel for petitioner has argued that the trial court gravely erred in calling the ballot papers for inspection without there being any foundation. In support of his submission the learned counsel cited two decisions of this court in *Uday Singh vs. Himmat Singh* 1999 (1) J.L.J. 200 and *Kailash Singh vs. Narayan Singh* 1999 (1) J.L.J. 342. He has also placed reliance on *Hari Ram vs. Hira Singh* reported in (1984) 2 SCC 36. The learned counsel appearing for respondent no.1, on the other hand, submitted that truth should not only be revealed but must also prevail. He strongly defended passing of the impugned order by the trial court.

6. It is not in dispute that the trial court has the jurisdiction for calling the ballot papers for inspection. The only question therefore which calls for consideration is whether, in the fact situation of case, it is justified in doing so.

7. Respondent no.1 in his evidence has testified that 200 votes cast in his

favour were illegally declared invalid at the time of counting, and his objections in this regard were not responded by the officers concerned. If these votes are found by the trial court to be illegally declared invalid, the result of election will be materially affected. The above quoted issues can best be decided only after ballot papers, which were declared invalid, are inspected in the court. In *Ram Sewak Yadav vs. Hussain Kamil Kidwai* AIR 1964 SC 1249 the Supreme Court, while examining Rule 93 of the Conduct of Election Rules 1961, has categorically held that in a proper case where the interest of justice demanded, the Tribunal can call upon the Returning Officer to produce the ballot papers and may permit inspection by the parties before it of the ballot papers. We find this is what the trial court has done in the present case.

8. There cannot be any denial to the law laid down by this court in the cases of *Uday Singh and Kailash Singh* that order of recount cannot be passed merely for asking only on pleadings without framing of issues and evidence to support order of recount. But in the case at hand, not only the issues have been framed, respondent no.1 has also adduced evidence to the effect that 200 votes cast in his favour were illegally declared invalid on a flimsy ground of there being some small ink marks or spots on the ballot papers. It is also to be noted that the trial court has not ordered recounting of votes. It has only called the ballot papers for inspection to properly decide the issues framed.

9. In the case of *Hari Ram*, relied upon by the petitioner, it is not clear as at what stage the High Court had, by an interlocutory order, directed for the production and inspection of electoral rolls and counter files warranting interference by the Supreme Court. This case also, therefore, does not help the petitioner.

10. For these reasons, we find no merit in the petition. It fails and is accordingly dismissed summarily.

Petition dismissed.

I.L.R. [2011] M. P., 932

WRIT PETITION

Before Mr. Justice A.K. Shrivastava

W.P. No.2742/2000 (Jabalpur) decided on 13 January, 2011

AKHIL BHARTIYA ADHINAST BANK

KARMACHARI SANGH

...Petitioner

Vs.

UNION OF INDIA & anr.

...Respondents

Industrial Disputes Act (14 of 1947), Section 2(k) - Dispute - Workman not called for interview for selection on the post of messenger boy - Petitioner-union submitted the application, but the employer, respondent No. 2 did not agree with the submission put forth by Union before Conciliation Officer - Action amounts to an industrial dispute as envisaged u/s 2(k) of the Act - The respondent No. 1 (appropriate Government) ought to have referred the matter to CGIT - Petition allowed.

(Paras 5 & 6)

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 2(के) - विवाद - संदेशवाहक के पद पर चयन हेतु साक्षात्कार के लिए कर्मकार को नहीं बुलाया गया - याची संघ ने आवेदन प्रस्तुत किया परन्तु नियोक्ता, प्रत्यर्थी क्र. 2, संघ द्वारा सुलह अधिकारी के समक्ष प्रस्तुत निवेदन से सहमत नहीं था - कार्यवाही औद्योगिक विवाद की कोटि में आती है, जैसा कि अधिनियम की धारा 2(के) के अंतर्गत परिकल्पित है - प्रत्यर्थी क्र. 1 (समुचित सरकार) को चाहिए था कि मामला सीजीआईटी को निर्देशित करें - याचिका मंजूर।

Cases referred :

AIR 1989 SC 1565, 2002 AIR SCW 1670.

Arvind Shrivastava, for the petitioner.*Sujoy Paul with Piyush Jain*, for the respondent No. 2.**ORDER**

A.K. SHRIVASTAVA, J. :- By this petition under Article 226/227 of the Constitution of India the petitioner is challenging the action of respondent No.1 in not referring the matter to the Central Government Industrial Tribunal-cum-Labour Court (Annexure P-1) dated 24.9.1999.

2. Learned counsel for the petitioner submits that de-hors to the service rules and conditions the candidature of the workman Suresh Chand Rajak who is the member of the Union of the petitioner-Union to recruit him on the

post of messenger boy on regular pay scale has not been taken into account and therefore, an application was submitted under Section 2(k) of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act"). The averments made in the application were denied by respondent No.2 and since the conciliation failed, therefore, according to the learned counsel, the matter should have been referred to the Central Government Industrial Tribunal (for short "the CGIT"). Learned counsel has invited my attention to the Second Schedule Item No.6 of the Act and by placing reliance on the two decisions of the Supreme Court, *Telco Convoy Drivers Mazdoor Sangh v. State of Bihar*, AIR 1989 SC 1565 and *Sharad Kumar v. Govt. of NCT of Delhi and others*, 2002 AIR SCW 1670 it has been prayed by learned counsel that this petition be allowed and the matter may be referred to the CGIT.

3. On the other hand, Shri Sujoy Paul, learned counsel appearing for the respondent No.2 argued in support of the impugned order.

4. Having heard learned counsel for the parties I am of the view that this petition deserves to be allowed.

5. On bare perusal of the application submitted by the petitioner-Union it is gathered that Suresh Rajak was not called for interview for the selection on the post of messenger boy. Admittedly, said workman is under the employment of the respondent-Bank and therefore, according to me, there was an industrial dispute as envisaged under Section 2(k) of the Act which reads, thus:

"(k) "industrial dispute" means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, or any person."

6. Since the respondent No.2 did not agree with the submission put forth by the Union before the Conciliation Officer, therefore, its action amounts to an industrial dispute as envisaged under Section 2(k) of the Act. In this context, I may also place reliance on the Second Schedule Item No.6 of the Act and, therefore, the respondent No.1 (appropriate Government) ought to have referred the matter to the CGIT.

7. The Supreme Court in *Telco Convoy Driver Mazdoor Sangh* (supra) has categorically held that appropriate government is not having any jurisdiction to entertain into the merits of the case and only function which it discharges is

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to see whether there is an industrial dispute or not and if there is an industrial dispute and the conciliation fails, it had no option except to refer the matter to the Labour Court. Similar view has been taken in the later decision by the Supreme Court in *Sharad Kumar* (supra).

8. For the reasons stated hereinabove, I am of the view that respondent No.1 has acted in flagrant violation of law by not referring the matter to the CGIT. Eventually, I have no option except to set aside the impugned order dated 24.9.1999 (Annexure P-1) passed by the respondent No.1.

9. This petition is accordingly allowed and the matter is referred to the CGIT. The respondent No.1 is hereby directed to frame necessary question and refer the matter to the CGIT on or before 28.02.2011. Since the matter is quite old, the CGIT is directed to decide the matter as early as possible preferably within a period of three months from the date of receipt of the reference. Shri Sujoy Paul, learned counsel for respondent No.2 is hereby directed to furnish certified copy of this order to the respondent No.1.

Petition allowed.

I.L.R. [2011] M. P., 934

WRIT PETITION

Before Mr. Justice Ajit Singh & Mr. Justice Sanjay Yadav

W.P. No.17222/2010 (Jabalpur) decided on 13 January, 2011

BACHCHA SHANKAR MISHRA

...Petitioner

Vs.

SHRI KRISHNA PANDEY & anr.

...Respondents

Guardians and Wards Act (8 of 1890), Sections 7 & 39 - Removal of Guardian - Application for amendment - Removal of guardian sought under Section 39 - It will not be open for such person to seek a conversion of the same into that of an application u/s 7 - Trial Court was justified in rejecting the application for amendment - Petition dismissed.
(Paras 14 & 15)

संरक्षक और प्रतिपाल्य अधिनियम (1890 का 8), धाराएँ 7 व 39 - संरक्षक को हटाया जाना - संशोधन के लिए आवेदन - धारा 39 के अंतर्गत संरक्षक को हटाया जाना चाहा गया - उसका परिवर्तन धारा 7 के अंतर्गत के रूप में चाहने के लिए ऐसा व्यक्ति उन्मुक्त नहीं - विचारण न्यायालय द्वारा संशोधन के लिए आवेदन नामंजूर करना न्यायानुमत - याचिका खारिज।

A.K. Jain, for the petitioner.

S.N. Tiwari, for the respondents.

ORDER

The Order of the Court was delivered by
SANJAY YADAV, J. :—Heard on admission.

Challenge put-forth in this petition under Article 227 of Constitution of India is to an order dated 18.10.2010 passed by the Family Court in case No. 2/2010, which is an application under Section 39 of the Guardians and Wards Act, 1890 (for short the Act of 1890); whereby, the petitioner has sought the relief to remove respondent Nos. 1 and 2 as guardian of baby Gauri.

2. During the pendency of said case petitioner herein filed an application seeking amendment and proposed to amend the cause-title, pleadings as well as the prayer clause. The Trial Court after considering the application and the reply filed by respondents herein, rejected the application on the ground that the same would lead to change the nature of application under Section 39 of the Act of 1890. Aggrieved whereof, the petitioner has filed this petition on the ground that the trial court was not justified in dismissing the application for amendment.

3. In the proposed amendment the petitioner intended to delete the cause-title by converting it into a petition under Section 7 of the Act of 1890. Furthermore, the petitioner proposed to add new paragraph after existing paragraph 15; whereby, he intended to challenge the order dated 30.3.2009 passed by Family Court in Guardians and Wards Act Case No. 3/2009.

4. The petitioner further intended to delete the entire prayer clause and substitute the same with the following:-

“It is, therefore, prayed that the order dated 30/3/2009, passed by the Learned Second Additional Judge of the Family Court, Jabalpur, passed in Guardian & Wards Act, Case No. 3/09 be set aside with cost on the ground that same was passed without jurisdiction and is a nullity for all purposes. For deciding this question, summary enquiry for recording the evidence of the parties may be allowed.”

5. The application wherein proposed amendment is being sought is under Section 39 of the Act of 1890 filed by the petitioner with a specific relief that

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respondent Nos. 1 and 2 be removed as guardian of baby Gouri Pandey. They
were appointed as guardian by order dated 30.3.2009 passed by II Additional
Judge of the Family Court, Jabalpur in Guardians and Wards Case No. 3/2009.

6. As evident from the pleadings and documents on record respondent
Nos. 1 and 2 were appointed as guardian of Ku. Gouri Pandey. They are the
paternal grand parent of the ward Ku. Gouri Pandey. The petitioner herein is
the maternal grand father of Ku. Gouri Pandey.

7. The question is whether the petitioner can be allowed to convert a
proceeding initiated under Section 39 into a proceedings under Section 7 of
the Guardians and Wards Act, 1890 and whether the order passed by the
trial court suffers from any jurisdictional error.

8. The controversy can be appreciated on the anvil of the scope of Section
7 and Section 39 of the Act of 1890.

9. Section 7 provides for :

7. Power of the Court to make orders as to guardianship.-

(1) Where the Court is satisfied that it is for the welfare of a
minor that an order should be made-

(a) Appointing a guardian of his person or property or both,
or

(b) declaring a person to be such a guardian the Court may
make an order accordingly.

(2) An order under this section shall imply the removal of any
guardian who has not been appointed by will or other
instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instru-
ment or appointed or declare by the Court, an order under
this section appointing or declaring another person to be
guardian in his stand shall not be made until the powers of
the guardian appointed or declare as aforesaid have ceased
under the provision of this Act.

Section 39 stipulates:

39. Removal of guardian.- The court may, on the application
of any person interested, or of its own motion, remove a
guardian appointed or declared by the Court, or a guardian

appointed by will or other instrument, for any of the following causes, namely :-

- (a) for abuse of his trust;
- (b) for continued failure to perform the duties of his trust;
- (c) for incapacity to perform the duties of his trust;
- (d) for ill-treatment, or neglect to take proper care, of his ward;
- (e) for contumacious disregard of any provision of this Act or of any order of the Court;
- (f) for conviction of an offence implying, in the opinion of the Court, a defect of character which unfits him to be the guardian of his ward;
- (g) for having an interest adverse to the faithful performance of his duties
- (h) for ceasing to reside within the local limits of the jurisdiction of the Court
- (i) in the case of a guardian of the property, for bankruptcy or insolvency;
- (j) by reason of the guardianship of the guardian ceasing, or being liable to cease, under the law to which the minor is subject.

Provided that a guardian appoint by will or other instrument, whether he has been declared under this Act, or not, shall not be removed-

- (a) for the cause mentioned in clause (g) unless the adverse interest accrued after the death of the person who appointed him, or it is shown that person made and maintained the appointment In ignorance of the existence of the adverse interest, or
- (b) for the cause mentioned in clause (h) unless such guardian has taken up such a residence as, in the opinion of the Court, renders it impracticable for him to discharge the functions of guardian."

10. Section 7 thus empowers the Court on being satisfied that it is for the welfare of a minor, to (a) appoint a guardian of his person or property or both, or (b) declaring a person to be such a guardian. The consequence of such an order has been spelt out in sub-section (2) of Section 7 that it shall

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imply the removal of any guardian who has not been appointed by will or
other instrument or appointed or declared by the Court.

11. Placing emphasis on sub-section (2) of Section 7 it is the contention of
learned counsel for the petitioner that even when an application is filed under
Section 39, first proviso thereunder empowers the applicant to seek a relief
as is available under Section 7. The submission though at first blush sounds
attractive but when probed on the anvil of provisions as contained under
Sections 7 and 39 and the respective field in which they operate, the attractive
submissions fall apart.

12. Section 7, as apparent, empowers the Court to appoint a guardian and
when such order is passed, the same would lead to removal of any guardian
who is not appointed by a will or other instrument or declared by the Court.
The expression “appointed” or “declared” which appear under sub-section
(2) of Section 7 reflects the nature of order passed by the Court under sub-
section (1) of Section 7 which could be either under clause (a) or (b) or sub-
section (1) of Section 7 as the case may be.

13. To elaborate further when there is a ‘declaration’ the same recognizes a
pre-existing right of such a person as a guardian, whereas in case of
‘appointment’ there is no such pre-existing right and the same is on the basis
of an application. The field of operation of Section 39, in our considered
opinion is totally different than that of Section 7. It enumerates the grounds
on the basis whereof a guardian appointed or declared by the Court, or a
guardian appointed by will or other instrument is to be removed. The proviso
to Section 39 carves out an exception to the main clause to the extent that a
guardian who is appointed by will or other instrument whether he has been
declared under the Act or not shall not be removed:

- (a) for the cause mentioned in clause (g) unless the adverse
interest accrued after the death of the person who
appointed him, or it is shown that person made and
maintained the appointment in ignorance of the existence
of the adverse interest,
or
- (b) for the cause mentioned in clause (h) unless such guardian
has taken up such a residence as, in the opinion of the Court,
renders it impracticable for him to discharge the functions of
guardian.

14. Thus, in a case as present one, removal of guardian as sought under Section 39, it will not be open for such person to seek a conversion of the same into that of an application under Section 7. As the Court has already exercised its power under Section 7 by appointing respondent No. 1 and 2 as guardian of Ku. Gouri Pandey. Because if the same is allowed, it will tantamount to review the order passed under Section 7 of the Act of 1890; whereas, the scheme of Act of 1890 does not support such a course of action.

15. Therefore, in our considered opinion trial court was well justified in its approach in rejecting the application for amendment on the ground that the same would change the nature of the case.

In the result petition fails and is hereby dismissed.

Petition dismissed.

I.L.R. [2011] M. P., 939

WRIT PETITION

Before Mr. Justice Ajit Singh & Mr. Justice Sanjay Yadav

W.P. No.18749/2010 (Jabalpur) decided on 31 January, 2011

MAYTAS INFRA LTD.

...Petitioner

Vs.

M.P.S.E.B. & ors.

...Respondents

Contract - Suspension of commercial relations - Decision to suspend future business relation, without affording any opportunity of hearing is not sustainable, being void ab initio - Petition allowed. (Para 31)

संविदा - व्यावसायिक संबंधों का निलम्बन - सुने जाने का अवसर दिये बिना भावी व्यापार संबंधों को निलम्बित करने का निर्णय, आरंभतः शून्य होने से समर्थन योग्य नहीं - याचिका मंजूर।

Manoj Sharma, for the petitioner.

A.P. Shroti, for the respondents.

ORDER

The Order of the Court was delivered by SANJAY YADAV, J. :-Issue, though a singular one, but of a contextual magnitude, which crops up for consideration is whether the respondents though employer in a contract matter, are justified in their action of suspending commercial relations with the petitioner for the period of five years without affording an opportunity of hearing.

Undisputed Facts:

2. Petitioner, a Public limited company, registered under the relevant provisions of the Companies Act, 1956 was awarded a turnkey contract under Rajiv Gandhi Gramin Vidyutikaran Yojna, for construction of high tension/low tension lines, installation of distribution transformers and providing service connections to below poverty line consumers in different package, viz. SN1-04 for Seoni District and CHD-01 to CHD-05 for Chhindwara District, as per approval accorded by the respondents' Board of Directors vide their decision dated 8.9.06 taken in its 20th meeting. Total cost of award, supply+erection was for Rs .89.63 crores.
3. Agreements between the petitioner and respondent No. 2 was entered into. The works awarded as per the agreement were to be completed upto May 2008 in phased manner.
4. Work as per stipulation could not be accomplished whereon, the Board of Directors in its 36th meeting dated 1.4.09 resolved to terminate the contract by invoking Clause 42 of the agreement. The validity whereof is being questioned and is a subject matter of writ petition: W.P. No. 7808/09, *MAYTAS Infra Ltd. v. M.P. Poorva Kshetra Vidyut Vitran Co. Ltd. and others*. While terminating the contract it was also decided to suspend commercial relations with the petitioner for a period of five years. It was also resolved, as evident from Annexure R/6, that the decision dated 1.4.2009 regarding suspension of commercial relations be not disclosed to the firm. It is this decision which is being questioned herein in this writ petition.

DISOUISTION-

5. Contentions of the petitioner is that the termination of the contract being under Clause 42 "Contractors Default" of General Terms and conditions of the Contracts (Annexure-P/2) and the said clause since does not provide that if contract is being rescinded/cancelled the same would automatically lead to black listing of the contractor, the action of respondents in suspending the commercial relations for a period of 5 years without affording any opportunity of hearing is an arbitrary exercise of power.
6. It is contended that the decision regarding suspension of commercial relations for five years came to its knowledge only after when in response to NIT floated by respondent No.2 on 8.12.2010, the petitioner went to obtain the tender/bidding documents and the same was declined.

7. It is urged that on an inquiry being made in the office of respondent No.2, the petitioner was asked to check the list of vendors with whom the commercial relations are suspended, whereon, the petitioner came across the fact that by order No.EX/WS/RE/RGGVY/2232 dated 9.4.09, the commercial relations with the petitioner have been suspended for five years.

8. It is submitted that, the decision of suspension of commercial relation for a period of five years is in violation of principles of natural justice as no opportunity of hearing has been afforded. It is contended that petitioner was entitled for an opportunity of hearing as the decision has not only affected the commercial activities with the respondent No. 2 but also with other respondents who are in the process of issuing NITs.

9. It is urged that, the impugned action violates the fundamental rights of the petitioner, its promoters, shareholders, employees and officials as guaranteed under Articles 14 and 19 (1)(g) of the Constitution of India.

10. The petitioner accordingly seeks quashment of the order dated 9.4.09 and direction to the respondents not to deprive the petitioner from participation in any of its tender process or from having any commercial relations.

CONTRARIETY-

11. The respondent on its turn jettisons the contentions raised.

12. It is urged that Board of directors in its 36th meeting dated 1.4.09 besides terminating the contracts awarded to the petitioner in Seoni and Chhindwara Districts also resolved to debar the petitioner firm from future business with the answering respondent for a period of five years. This decision, it is urged, is a consequential action based on the non-performance of contract which led to its termination under Clause 42 thereof.

13. It is contended that even if any specific notice had been given to the petitioner for debarring it would have proved to be a useless formality in as much as the petitioner was given opportunity against non-performance of Contract which led to its termination and the consequential action of suspension of commercial relations for five years.

14. It is urged that the Suspension of Commercial relations for five years does not tantamount to blacklisting the petitioner. In support of this contention the respondent has placed reliance on a "SECRET" communique bearing No.

511/145-A-66/1468 dated 4th October 1967 (Annexure R/7), which lays down standardized code for blacklisting suppliers. Drawing distinction between blacklisting (paragraph 3) and suspension of business (paragraph 4), it is contended that, whereas an order of blacklisting implies that all departments of State Government are forbidden from the dealing with the firm; an order for suspension of business may be passed where pending full enquiry into the allegations, the competent authority is of the view that it is not desirable that business with the firm should continue.

15. Pertinent it is to note that paragraph 3 and 4 of Annexure R/7 lays down respective conditions in the event whereof the order in respect of blacklisting or suspension of business is passed. Be that as it may. For the present, the contention of the respondent is that, since the decision is for suspension of business, the fact and the reasons thereof are not communicated as per stipulation contained in the letter dated 4.10.67.

16. In nutshell, it is urged on behalf of the respondent that because the petitioner was a non-performer of a contract which led to the termination thereof as per Clause 42 therein, no further notice is warranted before taking decision for suspension of future commercial relations. The decision, it is contended is just and proper and does not suffer from vice of arbitrariness. It is accordingly urged that, petition deserves to be dismissed.

THE SYNTHESIS-

17. Before dwelling upon the rival contentions opportune it would be to first deal with the aspect of whether in a case as the present one where in a commercial transaction, between the parties where one of it is a State functionary the failure on the part of the Contractor, in absence of the specific terms and conditions in the Contract, would automatically debar such contractor from having future business transactions or suspension of business interest, without affording any opportunity of hearing, for a term suo-motu decided by such functionaries.

18. The issue leads us to dwell into various aspect and the facets of the Doctrine of Natural Justice which envelope within its fold the facets of procedural justice which creeps in when an administrative action as the present one is being scanned. Code of fair administrative procedure is being evolved over the years in the field of administrative law with growing governmental powers, the importance whereof has been noted in the following terms by the

authors of Administrative Law: Seventh Edition: H.W.R. Wade and C.F. Forsyth : Chapter 13: Page 463 : Quoting Jackson J., an American Judge [as he stated in *Shaughnessy v. United States* : 345 US 206 (1953)] that, procedural fairness and regularity are of the indispensable essence of liberty. Authors observe that "Procedure is not a matter of secondary importance. As governmental powers continually grow more drastic, it is only by procedural fairness that they are rendered tolerable." As said Frankfurter J. in *Mc Nabb v. United States* : 318 US 332(1943) : "The history of liberty has largely been the history of the observance of procedural safeguards.

19. Trite it is that the concept of Natural Justice comprises two fundamental rules of fair procedure: (i) that a man may not be a judge in his own cause and (ii) that a man's defence must always be fairly heard [Please see *S. L. Kappor v. Jagmohan and others*: (1980) 4 SCC 379, (paragraph 9). *Baldev Singh and others v. Himachal Pradesh and others*: AIR 1987 SC 1239, (paragraph 5)].

20. The application of these fundamental rules to the administrative action is also settled [Please see *State of Haryana v. Ram Kishan and others*: AIR 1988 SC 1301, (paragraph 10) and *Cantonment Board, Dinapore and others v. Taramani Devi*: AIR 1992 SC 61, (paragraph 5)]. In *M/s Southern Painters v. Fertilizers & Chemicals Travancore Ltd. and another*: AIR 1994 SC 1277, (paragraph 9)].

21. In Principle of Statutory Interpretations; By G. P. Singh, 12th Edition, learned Author has succinctly observed the importance of principle of natural justice in the Indian Context in the following terms-

"In India a liberal interpretation of Articles 14 and 21 of the Constitution readily brings in the requirements of natural justice to administrative actions against a person. It has become an implied principle of the rule of law that any order having civil consequences should be passed only after following the principles of natural justice."

But whether the same would apply also in respect of powers being exercised under a contract is what is to be seen in the present context and more particularly in the context of present case where because of the contractual relations there is an exercise of administrative powers in suspending future commercial relations under the pretext that the same is the fall out of the breach of contract.

22. True it may be that, because of the non-performance of the contract, the same may result in cost escalation and the delay in the work. But in absence of specific term or a condition in the contract, whether the employer have the liberty to suspend future commercial relationship? Such a clause in a contract may not be unexceptional, in which case, the termination of contract and the suspension of future commercial relations may go hand in hand. But in absence of such term, in our considered opinion incumbent it would be upon the employer, the State functionary as the present one, to adhere to procedural fairness and, before imposing, to say, an economic sanction, should give an opportunity of hearing. Because the instrumentality of State like the respondent cannot afford to penalize without affording an opportunity of hearing. And as observed in *A. L. Kaira v. The Project and Equipment Corporation of India Ltd.*; AIR 1984 SC 1361, that an action per se arbitrary is a denial of equal protection of law as guaranteed under Article 14 of the Constitution of India.

23. The respondents during course of hearing attempted to press in service the aspect of sufficient compliance, submitting that since the action taken against the petitioner is under clause 42 of the agreement and before terminating the contract, the petitioner contractor was given the opportunity of hearing; such a hearing it is urged is sufficient to meet out the principle of natural justice and a further notice would be an exercise in futility, a useless formality.

24. We are not impressed with the submission of learned counsel for respondents for the simple reason that the consequences of two orders are different. An order terminating a contract may result in abatement of existing contract. The suspension of commercial relation on the other hand, however, results in ceasing of future business, which leads to drastic consequence, as the same may result in an economic death of a commercial institution. The basic fallacy in the approach of the respondent thus is that dual consequences have been visioned as arising out of one decision. Whereas, such an action is not supported by any of the terms of contract wherefrom the action of termination of contract emanates.

25. Much emphasis is also laid upon by the respondent on paragraph 4 of the letter dated 4.10.1967 (Annexure R/7) to substantiate that, the decision of suspension of business can be taken by competent authority and the fact of and the reasons need not be communicated to the firm concerned.

26. Paragraph 4 of the communication dated 4.10.1967 is in the following terms:

“4. Suspension of business:

(I) Suspension of business may be ordered where pending full enquiry into the allegations, the competent authority is of the view that it is not desirable that business with the firm should continue. Such an order may be passed:-

(i)- If the firm is suspected to be of doubtful loyalty to India.

(ii)- If the police recommend such a course in respect of in case under investigation; and

(iii)- If the competent authority is prima facie of the view that the firm is guilty of an offence involving moral turpitude in relation to business dealing which if established would result in its blacklisting.

(iv) If the competent authority is of the view that the firm is a confirmed evader of Central/State Sales Tax over a period of years and that all reasonable efforts to recover the amount of tax from them have failed.

(II) Orders regarding (i) and (ii) above shall be passed to the recommendation of the General Administration Department ('X' section) and will be given effect to by all other departments. Orders regarding (iii) above may be issued by the administrative department concerned. Orders regarding (iv) above may be issued by the Administrative Department. Concerned. Orders regarding (iv) above may be issued by the administrative department concerned who should send copies thereof to all other departments for giving effect thereto and endorse a copy to General Administrative Department ('X' section) for communicating the same to the Government of India.

(III) The fact of and the reasons for suspension of business shall not be communicated to the firm concerned.

27. Fair reading of the clause reveals that it is only on happening of events mentioned therein that leads to suspension of business. The allegation whereunder such an action can be taken would be in the event of : (i) doubtful loyalty to India, (ii) police recommendation in respect of in case under

investigation, (iii) prima.facie guilty of an offence involving moral turpitude, (iv) firm is a confirmed evader of Central/State Sales Tax and efforts to recover the amount have failed.

28. In the case at hand no material is brought on record by respondent as would fulfill the conditions stipulated in paragraph 4 of the letter dated 4.10.1967. The same, therefore, does not render any help to the respondent to cover up their action, nor does it lend any legal colour to it.

29. Letter debarring the petitioner from future business is in following terms:

Confidential

M.P. POORV KSHETRA VIDYUT VITRAN CO. LTD.,

BLOCK-73rd Floor, ShaktiBhawan, Jabalpur

No.EZ/WS/RE/RGGVY/2232

Jabalpur Dated 09.04.09

Subject: Debarring of M/s Maytas Infra Pvt. Ltd., Hyderabad.

"It has been decided to debar M/s Maytas Infra Pvt. Ltd. Hyderabad from future business with the EZ Company for a period of 5 years for all the items/contracts due to default by contractor in execution of the RDDVY works awarded to them for construction of New II KV line, LT line, 25 & 16 KVA, 11/0.4 KV. Distribution substations and Extension of Service Lines including house wiring for BPL house holds in package SNI-04 of Seoni District and packages CHD-01 to CHD-05 of Chhindwara District against this office award nos. as shown below:

Rs. In Crores

Sl. No.	LOA details	Name of Block cover under RGGVY	Cost of Award supply+Erection
1.	EZ/WS/RGGVY/SNI-04/ORD/4657 Dt. 19.10.06	Dhanora & Ghansor	16.66
2.	EZ/WS/RGGVY/CHD-01/ORD/4852 Dt. 27.10.06	Tamiya & Jamai	11.87
3.	EZ/WS/RGGVY/CHD-02/ORD/4853 Dt. 27.10.06	Amarwara, Harrai & Chourai	23.58

Sl. No.	LOA details	Name of Block cover under RGGVY	Cost of Award supply+Erection
4.	EZ/WS/RGGVY/CHD-03/ORD/4854 Dt. 27.10.06	Parasiya & Pandhurna	13.23
5.	EZ/WS/RGGVY/CHD-04/ORD/4855 Dt. 27.10.06	Chhindwara & Mohkhed	13.43
6.	EZ/WS/RGGVY/CHD-05/ORD/4856 Dt. 27.10.06	Sausar and Bichhua	10.86

The facts of debarring should not be disclosed to the firm, whose full address is given below:

M/s Maytas Infra Pvt. Limited,
6-3-1186/5/A. 3rd Floor,
Amongh Plaza, Begumpet
Hyderabad- 500016 (AP)

Chief Engineer (W&P EZ)
M.P.P.K.V.V. Co. Ltd., Jabalpur

30. Admittedly, the decision to debar the petitioner from future business has been taken without affording any opportunity of hearing, nor the same was communicated to the petitioner.

31. During course of hearing it was proposed to the respondent to cancel such an order and they would be at liberty to take fresh decision after affording an opportunity of hearing. However, after seeking instructions, learned counsel for the respondent submits that the respondent is not inclined to withdraw the same. Therefore, since we are of the considered opinion that the decision to suspend future business relation is without affording any opportunity, of hearing the same is not sustainable being void ab initio and is hereby quashed.

32. The respondent would be liable to bear the cost of this petition which we quantify to Rs.2000/-. Though a fervent plea was put-forth by learned counsel for the respondent against the imposition of cost; however, in a given facts of present case we are not inclined to exonerate the respondent from bearing the cost. It is ordered accordingly.

The petition is allowed to the extent above.

Petition allowed.

I.L.R. [2011] M. P., 948

ELECTION PETITION

Before Mr. Justice I.S. Shrivastava

E.P. No.6/2009 (Indore) decided on 29 September, 2010

HIMMAT KOTHARI

... Petitioner

- Vs.

PARASMAL SAKLECHA

... Respondent

Representation of the People Act (43 of 1951), Section 87, Civil Procedure Code, 1908, Order 18 Rule 4(2) - Mode of examination of witnesses - Election Petition filed on charges of corrupt practices - Charge of Corrupt Practice has to be proved like a criminal charge not based on preponderance and probabilities - Held - Looking to importance and stake, evidence should be recorded by Court and not through Commissioner and not by affidavits. (Para 10)

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 87, सिविल प्रक्रिया संहिता, 1908, आदेश 18 नियम 4(2) - साक्षियों की परीक्षा का ढंग - अष्ट आचरण के आरोपों पर निर्वाचन याचिका प्रस्तुत - अष्ट आचरण के आरोप, दाण्डिक आरोप के समान साबित करने होते हैं जो अधिसंभाव्यताओं की प्रबलता पर आधारित नहीं होता - अभिनिर्धारित - महत्वपूर्णता एवं लगे दांव को देखते हुए, साक्ष्य न्यायालय द्वारा अभिलिखित की जानी चाहिए और न कि कमिशनर द्वारा या शपथपत्रों द्वारा।

Cases referred :

AIR 1981 SC 8, AIR 1984 SC 1161, AIR 1985 SC 89, AIR 2005 SC 2441, (2009) 1 SCC 633, (1999) 9 SCC 386, (2003) 1 SCC 49.

V.K. Jain with Subodh Abhyankar, for the petitioner.

C.L. Yadav with M. Yadav, for the respondent No.1.

Suraj Sharma, Dy.G.A., for the respondent No.2.

ORDER

I.S. SHRIVASTAVA, J. :- This order is for the the mode of evidence and 'examination of the witnesses in this Election Petition.

2. It has been argued on behalf of the Respondent that since the charges against the respondents are of corrupt practice under the Representation of People Act (for short the Act) hence they have to be proved like criminal

charges, therefore, the trial of this petition should be like a criminal case and charges should be actually proved and should not be based on preponderance and probabilities as in civil cases. The evidence should not be recorded through affidavits.

3. It has been argued on behalf of the petitioner that according to S. 87 of the Act, election petition has to be tried in accordance with the procedure applicable under the Code of Civil Procedure to the trial of the suits. Hence evidence may be recorded by affidavits. The charges of corrupt practices has to be proved by the petitioner but the respondent is not going to be punished under the criminal law; hence no question arises that this petition should be decided in accordance with the Criminal Procedure Code. Only charges of corrupt practices has to be proved with the other grounds on the basis of evidence and not to be decided on preponderance and probabilities.

4. Considered arguments.

5. According to S. 87(1) of the Act, the election petition has to be tried as may be in accordance with procedure applicable under the Code of Civil Procedure Code, 1908 to the trial of suits. Hence for the trial of the election petition, Criminal Procedure Code 1973 does not apply. There may be charges of corrupt practice on the basis of which election of respondent may be challenged. By the evidence the charges have to be proved like a criminal charge not based on preponderance and probabilities.

6. In the cases of *N.C. Zeliang Vs. Aju Newmai and ors.* - AIR 1981 SC 8, *Manmohan Kalia Vs. Shri Yash. and ors.* - AIR 1984 SC 1161, *Surindar Singh Vs. Hardial Singh & ors.* - AIR 1985 SC 89, *Kailash Vs. Nanku & ors.* - AIR 2005 SC 2441 and *Baldev Singh Mann Vs. Surjit Singh Dhiman* - (2009) 1 SCC 633, the nature of proof for the charges of corrupt practice has been discussed. In the case of *Jeet Mohinder Singh Vs. Harinder Singh Jassi* (1999) 9 SCC 386 it has been held that "the charges of corrupt practices are quasi criminal in nature. If substantiated it leads not only to the setting aside of the election of such candidate but also on his being disqualified to contest an election for certain period. It may entail extinction of a person's public life and political career. Trial of election petition though within the realm of civil law is akin to trial of a criminal charge. Two consequences follow: firstly the allegation relating to a commission of corrupt practice should be sufficiently clear and stated precisely so as to afford the person charged a full opportunity of meeting the same. Secondly the charge

when put to issue, should be proved by the clear, cogent and cr  dible evidence. To prove charges of corrupt practice a mere preponderance and probabilities would not be enough. There would be a presumption of innocence available to the person charged. The charge shall have to be proved to the hilt, the standard of proof being same as in criminal trial.”

7. Therefore, the trial of election petition has to be conducted as per Civil Procedure Code but the standard of proof of the charges of corrupt practice shall not be based on mere preponderance or probabilities. Therefore, argument that there should be criminal trial of election petition, if there are charges of corrupt practice is baseless.

8. So far as the mode of recording evidence is concerned, according to S. 87 of the Act, trial of election petition shall be as nearly as may be in accordance with the procedure applicable under the Civil Procedure Code. In case of *Kailash Vs. Nanku & ors.* (supra) it has been held that “*in election petition under the provisions of the Act, Civil Procedure Code do not apply in its entirety with all its rigidity and technicality. The applicability of Civil Procedure Code is circumscribed on two riders; firstly it is applicable as nearly as may be, and secondly C.P.C. would give way to any provisions of the Act and of any rules made thereunder. C.P.C. applies to trial of election petition with flexibility and only as guidelines. Therefore, in view of the law laid down in above case, the applicability of C.P.C. in the trial of election petition, is with flexibility and only as guidelines.*” In *Salem Advocate Bar Association T.N. Vs. Union of India* - (2003) 1 SC 49 it has been held that “about the procedure prescribed in Order 18 R. 4(1) (as substituted by Act 22 of 2002) and Order 16 Rule 1 and 1-A that Examination-in-chief of witness produced without summons, must be in form of an affidavit; However, in case of summoned witnesses, principle incorporated in Order 18 Rule 4(1) can be waived. Whether a witness shall be directed to file affidavit or be required to be present in the court for recording of evidence, is a matter to be decided by the Court in its discretion having regard to the facts of each case.

9. Order 18 R.4(2) empowers to decide as to whether evidence of a witness shall be taken either by the court or by the Commissioner.” Therefore, after amendment of C.P.C. the Court still has discretion to decide whether the evidence of a witness shall be taken either by the court or by the commissioner.

10. On the basis of above discussion I am of the view that in the election

petition the procedure of trial of civil suits in civil case, should be followed as may be applicable as nearly as may be but it **does not apply in its entirety with all its rigidity and technicality**. Therefore, the evidence, in view of the importance and stake in election petition should be recorded by the court and not through the commissioner and not by affidavits and the evidence of the election petition has to be recorded by the Court following the procedure of C.P.C. as nearly as may be keeping in view the provisions of the The Representation of People Act.

11. Hence ordered accordingly. C.C.as per rules.

Order accordingly.

I.L.R. [2011] M. P., 951
ARBITRATION APPEAL

Before Mr. Justice Abhay M. Naik

Arbitration Appeal No.5/2008 (Gwalior) decided on 14 December, 2010

UNION OF INDIA

...Appellant

Vs.

HARIRAM GUPTA & anr.

...Respondents

A. Arbitration Act (10 of 1940), Sections 30 & 39, Arbitration and Conciliation Act (26 of 1996) - Award passed under the Arbitration Act, 1940 can not be legally set-aside by invoking sub-section (3) of Section 31 of the Arbitration & Conciliation Act, 1996. (Para 4)

क. माध्यस्थम् अधिनियम (1940 का 10), धाराएँ 30 व 39, माध्यस्थम् और सुलह अधिनियम (1996 का 26) - माध्यस्थम् अधिनियम 1940 के अंतर्गत पारित किये गये पंचाट को माध्यस्थम् और सुलह अधिनियम 1996 की धारा 31 की उप धारा (3) के अवलम्ब द्वारा वैध रूप में अपास्त नहीं किया जा सकता।

B. Item-wise Award - Arbitrator not obliged under the conditions contained in general conditions of contract to pass item-wise award, he could validly pass/give lump-sum award. (Para 12)

ख. पदशः पंचाट - संविदा की सामान्य शर्तों में अंतर्विष्ट शर्तों के अंतर्गत माध्यस्थ पदशः पंचाट पारित करने के लिए बाध्य नहीं, वह विधिमान्यतः एक मुश्त पंचाट पारित/दे सकता है।

Cases referred :

(2005) 6 SCC 678, 1989 JLJ 511, 1997 (I) MPLJ 7, AIR 1967 SC 1030.

H.D. Gupta with Santosh Agrawal, for the appellant.

Prashant Sharma, for the respondent No.1.

J U D G M E N T

ABHAY M. NAIK, J. :- This appeal has been preferred under Section 39 of the Arbitration Act, 1940 against the order dated 15.1.2002 passed by the Court of 6th A.D.J. Gwalior in MJC No.24/1999 and for confirmation of the award of the Arbitrator dated 26.8.1999 passed by the respondent No.2.

2. Briefly stated facts are that an agreement was executed between the respondent No.1 and the appellant on 18.11.1986. Work pursuant thereto could not be completed within time and a dispute arose between the parties with regard to it. Respondent No.1 submitted an application for appointment of General Manager Central Railway as Arbitrator. Since no such appointment was made, respondent No.1 submitted an application before the court for appointment of arbitrator. Court of District Judge Gwalior vide its order dated 9.12.1994 directed that General Manager Central Railway himself or any gazetted officer nominated by him in this regard would decide the dispute under G.C.C. (General Conditions of Contract) as an arbitrator. Respondent No.2 was nominated as arbitrator, who passed an award dated 26.8.1999. On service of award on respondent No.1 on 6.9.1999, he submitted an application under Section 30 of the Arbitration Act 1940 for setting it aside mainly with the allegations that he had claimed in all Rs.4,10,091/- against item Nos.1 to 8, whereas, merely, a sum of Rs.25,204/- has been awarded by the Arbitrator against item No.1 as against Rs.44,191/- as claimed. No award has been passed in respect of remaining other items. Main objection of respondent No.1 is that while declining the claim in respect of other items, no reason has been assigned by the Arbitrator. This application has been allowed by the impugned order dated 15.1.2002 on the ground that the Arbitrator was obliged to assign reasons by virtue of sub section (3) of Section 31 of the Arbitration and Conciliation Act 1996. Since the arbitrator was directed to decide the dispute under G.C.C. and the arbitrator by virtue of clause 64 (3)(b)(i) of it was obliged to make the itemwise award with reasons, Accordingly, the arbitration award dated 26.8.1999 has been set aside and the arbitrator was directed to pass a fresh award after keeping in mind Section 31 (3) of the Arbitration and Conciliation Act 1996 and the provisions of G.C.C. Aggrieved by it, present appeal has been preferred.

3. Shri H.D.Gupta, learned Senior Advocate for the appellant and Shri

Prashant Sharma, learned counsel for the respondent No.1 made their respective submissions, which have been duly considered in the light of the material on record.

4. Admittedly, the contract agreement No. GWL/STLI/ Cont./4 in respect of the construction of boundary wall at Sithauli Railway Station was executed between respondent No.1 – the contractor and the appellant on 10.3.1987 when the Arbitration Act 1940 was in force. Arbitration and Conciliation Act 1996 was brought into force on 22.8.1996. Prior to its enforcement, an application was submitted by the respondent No.1 for appointment of arbitrator and an order for such appointment was made by the Court of District Judge Gwalior on 9.12.1994 that General Manager Central Railway or any gazetted officer nominated by him in this respect would decide the dispute as arbitrator under G.C.C. Pursuant thereto, respondent No.2 was nominated as Arbitrator on 19.5.1995. Thus, obviously the arbitration proceeding had commenced before the Arbitration and Conciliation Act 1996 and the award passed under the Arbitration Act 1940 can not be legally set aside by invoking sub section (3) of Section 31 of the Arbitration and Conciliation Act 1996.

5. As regards furnishing reasons for the award, it may be seen that neither in the arbitration agreement nor in the order dated 9.12.1994 it was so directed that reasons are to be assigned by the arbitrator. Learned District Judge Gwalior vide its order dated 9.12.1994 observed that the General Manager in case of claim not exceeding Rs.5 lac may nominate any gazetted officer as arbitrator. Accordingly, it was ordered vide order dated 9.12.1994 that the General Manager Central Railway may nominate any gazetted officer as arbitrator, who was directed to decide the dispute of arbitration under G.C.C. There is no material on record that an arbitrator was obliged to assign reason either under the statutory provisions or under the contract or even otherwise.

6. Hon'ble Supreme Court of India in the case of 2005 (6) SCC 678 (*Rajendra Construction Co. v. Maharashtra Housing & Area Development Authority*) has observed :

"17. In the opinion of this Court, it could not be disputed that in India, it has been "firmly established" that it was not obligatory on the arbitrator or umpire to record reasons in support of the award when "neither any arbitration agreement nor any deed of submission" required reasons to be recorded. In that case also, it was urged, as has been done in the instant

case, that if no reasons are disclosed by the arbitrator, it would not be possible for the court to find out whether the award passed is in accordance with law. The Court, however, negated the contention observing that if the parties wanted reasons to be recorded in support of the award to be passed by the arbitrator or umpire it was open to them to make a provision in the agreement/contract itself to that effect. But in the absence of any stipulation in the contract, the court could not say that arbitrator was duty-bound to record reasons and if reasons are not recorded in support of the award, the award was vulnerable and liable to be set aside or should be remitted to the arbitrator. According to this Court, such an order would amount to virtually introducing by judicial verdict an amendment to the Act. No doubt, if the reasons are recorded by the arbitrator or umpire in support of the award, they can be ~~considered by the court and if those reasons disclose an error~~ apparent on the face of the record, the award can be set aside by a competent court of law. But in the absence of such requirement under the agreement itself, the party could not insist for reasons in support of the award nor a court of law can interfere with non-speaking award.

18. It was, however, urged that recording of reasons in support of the order is part and parcel of "natural justice" and on that count also, unreasoned award should be treated as null and void and ineffective. We are unable to uphold the argument. A similar contention was raised in Chokhamal and negated by this Court observing that the said doctrine applies to administrative law field. In the decisions pertaining to administrative law, this Court has always insisted for recording of reasons in support of the order or decision. The Court observed that it would apply to "public law" field and not to "private law" field like arbitration agreement.

23. The present awards are not under the new Act but under the old Act. It is, therefore, obvious that they could not have been set aside by the High Court on the ground that they were not supported by reasons and were not speaking awards."

7. Constitutional Bench of the Hon'ble Supreme Court of India in the case

of *Raipur Development Authority and others v. Mrs. Chokhamal Contractors and others* (1989 JLJ 511) has observed :-

"19. It is now well settled that an award can neither be remitted nor set aside merely on the ground that it does not contain reasons in support of the conclusion or decisions reached in it except where the arbitration agreement or the deed of submission requires him to give reasons. The arbitrator or umpire is under no obligation to give reasons in support of the decision reached by him unless under the arbitration agreement or in the deed of submission he is required to give such reasons and if the arbitrator or umpire chooses to give reasons in support of his decision it is open to the Court to set aside the award if it finds that an error of law has been committed by the arbitrator or umpire on the face of the record on going through such reasons. The arbitrator or umpire shall have to give reasons also where the Court has directed in any order such as the one made under section 20 or section 21 or section 34 of the Act that reasons should be given or where the statute which governs an arbitration requires him to do so.

The Constitutional Bench has further observed in para 36 :-

36. The arbitrators or umpire have passed the awards which are involved in the cases before us relying on the law declared by this Court that the awards could not be questioned merely on the ground that they have not given reasons. At the same time it cannot also be said that all the awards are contrary to law and justice. In this situation it would be wholly unjust to pass an order either remitting or setting aside the awards, merely on the ground that no reasons are given in them, except where the arbitration agreement or the deed of submission or an order made by the Court such as the one under section 20 or section 21 or section 34 of the Act or the statute governing the arbitration required that the arbitrator or the umpire should give reasons for the award.

8. Placing reliance on the decision of the Hon'ble Apex Court in the case of *M.M.T.C. Limited v. Sterlite industries (India) Ltd.* [1997 (1) MPLJ 7], it has been contended on behalf of the respondent No.1 that the provisions of

Arbitration and Conciliation Act 1996 could be invoked and were rightly invoked.

In the case of *MMTC Ltd.* (supra), the arbitration proceedings commenced after the new Act came into force. This being so, *MMTC Ltd.*'s decision has no applicability in the present case.

9. It has been further contended on behalf of the respondent No.1 that the learned subordinate Judge has rightly set aside the award since there was no itemwise adjudication in the arbitration award as required by clause 64 (3) (b)(i) of the General Conditions of Contract, which according to him was that the arbitral award shall state itemwise, the sum and reasons upon which it is based.

10. However, Dy.Chief Engineer, Construction, Gwalior of North Central Railway has submitted his affidavit in support of his application under Order XLI Rule 27 CPC (I.A.No.17094/10) accompanied by the copy of G.C.C., which was in force at the relevant time. According to him, said clause was revised vide letter issued by the Chief Engineer Works Headquarters Office Mumbai CST dt.27.8.1997. Thus, at the relevant time, clause 64 (3) was as under :-

"Clause 64 (3)

(a) Matters in question, dispute or difference to be arbitrated upon shall be referred for decision to :-

As per Railway Board letter No.82/WJ/CT/9 (P) dated 21.12.83, circulated vide CE(C) letter No.EW 187 R.465.11dt 6.2.84.

(3)(i)

A Sole Arbitrator who shall be the General Manager or a Gazetted Railway Officer nominated by him in that behalf in cases where the claim in question is below Rs.5,00,000/- (Rs. 5 lakhs) and in cases where the issues involved are not of a complicated nature. The General Manager shall be the sole Judge to decide whether or not the issues involved are of a complicated nature.

(ii) – Two Arbitrators, who shall be Gazetted Railway Officers of equal status to be appointed in the manner laid down in clause (3) (b) for all claims of Rs.3,00,000 and above, and

for all claims irrespective of the amount or value of such claim if the issues involved are of a complicated nature. The General shall be the sole judge to decide whether the issues are of a complicated nature or not. In the event of the two Arbitrators being divided in their opinions the matter under dispute will be referred to an Umpire to be appointed in the matter laid down in clause (3)(b) for his decision.

(iii) The Arbitrators(s)/Umpire so appointed as the case may be, shall give the award on all matters referred to arbitration indicating therein break-up of the sums awarded separately on each individual item of disputes."

In the absence of rebuttal, there is no reason to disbelieve the affidavit and the copy of the GCC accompanying the application under Order XLVII Rule 27 CPC. Consequently, I.A.No.17094/10 is hereby allowed. Document G.C.C. accompanying application is taken on record.

11. Claim of the respondent No.1 is contained in Annexure P/3 of the record of the trial court, which is as follows :-

Sr. No.	Claim No.	Particulars of Claims	Amount claimed in Rs.
1.	1.	Refund of Security Deposit	44,191/-
2.	2.	Cost of T & P and Z pumps and other materials left at site.	40,000/-
3.	3.	Cost incurred against re-excavation of trenches.	10,000/-
4.	4.	Payment of Final Bill	25,000/-
5.	5.	Cost incurred for idle labour due to failure on part of Railway Dept.	50,000/-
6.	6.	Profit @ 10% on unexecuted work worth Rs.4.09 lakhs due to illegal rescission of contract.	40,900/-
7.	7.	Damages for prolongation of contract under Section 73 of Indian Contract Act 1918.	1,00,000/-

8. 8. Compensation for mental injury 1,00,000/-
caused due to harassment by
the Railway authorities.

Total : 4,10,091/-

The relevant portion of the award is as follows :-

"NOW KNOW YE, that I, Smt.Shobhna Jain having taken upon myself the burden of said reference and having considered the evidence produced before me by both the parties and having heard the arguments of both the parties and having satisfied myself concerning the matters which were referred to me for arbitration as aforesaid and having considered the claims made by the Claimant and the defence of the Respondent, I hereby make and publish this award of and concerning the same in the manner following, that is, I award and determine.

Claimant	Amount Claimed	Amount Awarded
1.	44,191/-	25204*
2.	40,000/-	Nil
3.	10,000/-	Nil
4.	25,000/-	Nil
5.	50,000/-	Nil
6.	40,900/-	Nil
7.	1,00,000/-	Nil
8.	1,00,000/-	Nil
Total	4,10,091	25,204

*Being the refund of Security Deposit after adjusting the dues as per Final Bill since the notice for termination of contract was not received by he claimant.

Award in the aforesaid manner can not be said to be in contravention of clause 64 (3)(a) (iv) as it existed at the relevant time.

12. From the aforesaid, it is clear that at the relevant time arbitrator was not under obligation under the conditions contained in GCC to pass itemwise award. In the absence of any such requirement, the arbitrator could validly

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give lump sum award, as he was not bound to give separate award for each claim, as observed by the Hon'ble Apex Court in para 2 of the decision in the case of *Firm Madanlal Roshanlal v. Hukumchand Mills* (AIR 1967 SC 1030).

13. In view of the aforesaid discussion, the impugned order dated 15.1.2010 is not sustainable in law and the same is hereby set aside. Award of the arbitrator dated 26.8.1999 is hereby confirmed in the light of the foregoing reasons. Appeal stands allowed accordingly with no order as to costs.

Appeal allowed.

I.L.R. [2011] M. P., 959

CENTRAL EXCISE APPEAL

Before Mr. Justice Shantanu Kemkar & Mr. Justice Prakash Shrivastava
C.E.A. No.20/2009 (Indore) decided on 19 November, 2010

UNION OF INDIA

... Appellant

Vs.

M/S. M.S.S. FOODS PRODUCTS LTD., INDORE

... Respondent

Central Excise Act (1 of 1944), Section 11A(1), Central Excise Rules, 2002, Rule 25 - Levy of Excise Duty - Revenue has to establish that excisable goods were produced or manufactured by assessee concerned and it is necessary to establish that excisable goods was clandestinely removed - Respondents alleged that seized Gutkha was never manufactured by them and is duplicate - Held - Revenue failed to establish that seized Gutkha was manufactured by respondent - Excise duty cannot be levied merely on basis of assumption or presumption - Petition dismissed. (Para 12)

केंद्रीय उत्पाद शुल्क अधिनियम (1944 का 1), धारा 11ए(1), केंद्रीय उत्पाद शुल्क नियम, 2002, नियम 25 - उत्पाद-शुल्क का उद्ग्रहण - राजस्व को स्थापित करना होगा कि उत्पाद शुल्क लगने योग्य माल का सम्बन्धित निर्धारिती द्वारा उत्पादन या विनिर्माण किया गया और यह स्थापित करना आवश्यक है कि उत्पाद शुल्क लगने योग्य माल को छिपाकर हटाया गया - प्रत्यर्थियों ने अभिकथित किया कि जब्तशुदा गुटखा उनके द्वारा कभी विनिर्मित नहीं किया गया और वह नकल है - अभिनिर्धारित - राजस्व यह स्थापित करने में असफल रहा कि जब्तशुदा गुटखा प्रत्यर्थी द्वारा विनिर्मित किया गया - उत्पाद शुल्क मात्र धारणा अथवा उपधारणा के आधार उद्ग्रहित नहीं किया जा सकता - याचिका खारिज।

Cases referred :

1978 ELT (J 172), 2010(255) ELT 234 (P&H), (2000) 4 SCC 594.

Vinay Zelawat with Abhishek Tugnawat, for the appellant.

P.K. Saxena with Vivek Gautam, for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by :
PRAKASH. SHRIVASTAVA, J. :-THIS appeal under section 35 G (2) of the Central Excise Act, 1944, filed against the final order No.1482/2008-SM [BR] dated 04.11.2008 passed by the Customs Excise and Service Tax Appellate Tribunal, New Delhi was admitted by this Court by order dated 04.11.2009 on the following substantial questions of law:-

(1) Whether, the Tribunal was justified in holding that in absence of any evidence, no liability in respect of the transaction in question can be fastened upon the respondent (assessee), under the provisions of the Central Excise Act, so far as the goods in question is concerned?.

(2) When, in the statement of Nitesh Wadhwani, (Proprietor of the respondent company), it is clearly admitted that the company is engaged in manufacture of Gutkha and selling products under the Brand "Shimla" and further when dispute in this case also related to same goods or brand name "Shimla", whether Tribunal was justified in ignoring this material piece of evidence for not implicating the respondent-company in respect of the transaction in question?.

(3) Whether, the statement of Nitesh Wadhwani is sufficient to initiate action against the respondent in respect of the goods in question under the Act and pass appropriate penal orders?.

2. In brief the respondent is manufacturer of Gutka Pan Masala, Mouth-Freshner, Sweet Supari etc under the Brand name of "Shimla", "Malikchand" and "Vansh" having its Industrial Unit at Indore. In the search conducted on 21.05.2004 against M/s. Kuber Group of Companies, the Excise Department had detained a Container at Chennai, containing 40 bags of "Shimla" Brand Gutkha valued at Rs.8,73,600/- (MRP). The consignments was booked by

M/s. Vaishali Cargo Carriers, New Delhi consigned to "Self" at Chennai, through M/s. Balaji Cargo Forwarders, Delhi also having their office at Chennai. The Vaishali Cargo Carriers failed to produce any document covering payment of Central Excise, Transportation etc. Statement of Shailendra Singh, Manager, M/s. Balaji Cargo Forwarders was recorded on the spot on 26.05.2004 where, he stated that they were generally receiving the LR's with description of the goods as Hardware Goods instead of Gutkha and later on used to destroy the LR's. Shri P.S. Vijay Kumar, Delivery Assistant of M/s. Vaishali Cargo Carrier, Chennai, in his statement recorded on 01.06.2004, stated that they had been receiving Gutkha consignment by declaring the same as Hardware goods on LR's from Delhi and they were handing over said Gutkha consignment to the persons; who brought copy of the LR's and delivery memo/cash receipts. The summons were also issued to the respondent and statement of Nitesh Wadhvani, the Proprietor of the respondent was recorded and thereafter, the show cause notice dated 24.11.2004 was issued to the respondent for confiscation of goods under Rule 25 of the Central Excise Rules, 2002 and for payment of Central Excise duty on these goods under Section 11A(1) of the Central Excise Act, 1944, by mentioning that the respondent appeared to have clandestinely cleared 40 bags of Gutkha seized from the premises of Vaishali Cargo Carrier, Chennai without payment of excise duty. The levy of penalty under Rule 25 was also proposed. The respondent filed reply to the show cause notice and the Deputy Commissioner of Custom and Central Excise Division, Indore passed the Order dated 30/31 August, 2005, dropping the proceedings initiated against the respondent by holding that there was no evidence to establish that the said 40 bags of Gutkha was manufactured and clandestinely cleared by the respondent without payment of excise duty. The Commissioner (Appeals) – I by order dated 28th November, 2006, affirmed the order of the Deputy Commissioner with only clarification that the order relating to release of goods passed by the authority cannot be presumed to be an order holding that he had directed release of goods to the respondent. The CESTAT by order dated 04.11.2008 has affirmed the order passed by the Deputy Commissioner as well as the Commissioner Appeals by dismissing the appeal of the department. Aggrieved with the same, present appeal has been filed, which has been admitted on the above mentioned questions of law, which are decided as under :-

3. The First substantial question of law:-

Learned counsel appearing for the appellant submitted that the Tribunal

as well as the authorities have committed an error in dropping the proceedings against the respondent and in not fastening the liability of payment of excise duty and penalty.

Learned counsel for the respondent submitted that there is no evidence that the respondent had manufactured and cleared the goods in question without payment of excise duty, therefore, the Tribunal as well as the Commissioner has not committed any error in dropping the proceedings against the respondent. He further submitted that since the appeal does not involve any question of law, therefore, no interference of this court is required.

4. So far as the objection of the respondent that no question of law is involved in appeal is concerned, though the authorities as well as the Tribunal have concurrently found in favour of the respondent, but a perusal of the three questions formulated by this Court indicates that these are the substantial questions of law, which arise for consideration in this appeal.

5. Though the respondent is the manufacturer of "Shimla" brand of Gutkha, but the consignment has not been seized at the time of its transportation from the factory of the respondent. The consignment was seized from the possession of M/s. Kuber Group of Companies at Chennai, which was booked by M/s. Vaishali Cargo Carriers, New Delhi, consigned to "Self" at Chennai, through M/s. Balaji Cargo Forwarders, Delhi. No evidence has been collected from the M/s. Kuber Group of Companies, M/s. Vaishali Cargo Carriers, New Delhi or M/s. Balaji Cargo Forwarders, Delhi, which could connect the respondent with the seized goods. The statement of Shailendra Singh, Manager of M/s. Balaji Cargo Forwarders and Shri P.S. Vijay Kumar, Delivery Assistant of M/s. Vaishali Cargo Carrier, Chennai, were recorded, but they have not stated that the seized goods were manufactured by the respondent or received from the respondent or transported at the instance of the respondent. The clear stand of the respondent before the authorities was that the seized goods were not manufactured and were not cleared by the respondent without payment of excise duty. The respondent in his reply to the show cause notice had stated that the seized 40 bags of Shimla Gutkha did not belong to him and the seized Gutkha was probably a duplicate product using his brand name. In the reply he had disclosed the reasons which support his suspicion about the seized goods being a duplicate product. He had also stated that he had never sold his product in Delhi market and that the manner the product was packed was different from his mode of packing the product. He also took the further

plea that he had never transported any consignment through carriers in question. Before the excise authorities, the respondent had expressed inability to produce the relevant excise record since on 24.06.2004, his factory was searched by Central Excise Headquarters Preventive Indore and all the record pertained to the year 2003-2004 and 2004-2005, was seized. The respondent had produced a copy of Punchnama dated 24.06.2004 and a copy of the letter to concern excise authorities, requesting for release of the books of account. A clear assertion was also made that the seized goods were not removed from his factory. Learned counsel appearing for the appellant has not disputed the fact that the record for the relevant period was seized by the excise department and he has also failed to point out as to what had prevented the excise authorities from verifying their allegation from the record, which was seized from the respondent.

6. The Deputy Commissioner Customs and Central Excise Division Indore by the order dated 30/31 August, 2005, found that :-

"3. In the instant case, I find that no Grs & Challans were recovered from the premises of M/s. Vaishali Cargo Carrier, Chennai premises at which the seized goods container was detained. And from the statement of Shri Singh, Manager and of Shri P.S. Vijay Kumar, Delivery Assistant, both of M/s. Balaji Cargo Forwarders, Chennai what transpire is that as the product Gutka which is banned in the State of Tamil Nadu, is transported and unloaded in the State in the guise of Hardware goods with fake LRs. While the impugned goods have been placed under seizure of the allegations that the said goods appeared have been cleared without payment of appropriate Central Excise Duty from the factory premises of the Notice. To this, I find that no record, whether oral or documentary has been brought on record or has been adduced before me, to establish that the said goods were manufactured and cleared by the Noticee without payment of appropriate Central Excise Duty on it. As both, Shri Singh, Manager and Shri P.S. Vijay Kumar, Delivery Assistant, both of M/s. Balaji Cargo Forwarders in their statement dated 26.05.04 and 01.06.04 respectively, have nowhere stated the seized goods were delivered and manufactured by the noticee.

4. As regards to the allegation that Shri Nitesh Wadhwani,

Proprietor Noticee had admitted that the seized goods had been manufactured by them and has expressed his willingness to pay the Central Excise Duty. I find that Shri Nitesh Wadhwani nowhere in his statement has admitted that the said goods were manufactured by them. And as regards to duty payment he has stated that in case of provisional release of the seized goods to them which if they claim to protect their Brand name they will clear it on payment of duty. On the contrary, he has categorically stated that they have neither sold any goods Delhi based dealers nor have booked any consignment through M/s. Vaishali Goods Carrier, Delhi and I find that nothing has been brought on record to disprove it. Whereas, the Show Cause Notice is silent as to who had actually booked the consignment at M/s. Vaishali Goods Carrier, Delhi. Further, follow up action at end of M/s. Vaishali Goods Carrier, Delhi or at the end of M/s. Kuber Group of Companies, against whom the original follow up of searches was conducted seems to be was not carried out.

5. Further, no evidence is brought on record to establish that the 40 bags of "Shimla" Brand Gutkha in total valued at Rs.8,73,600/- (MRP) seized under Mahazar dated 26.05.04 drawn at the premises of M/s. Vaishali Cargo Carriers. No.96/181, Broadway Chennai - 600 - 108, were manufactured and Clandestinely cleared by the Noticee. Further, the said goods seized on 26.05.04 are not established to have been removed without payment of Central Excise Duty on it, the same are not liable for confiscation and deserves to be released unconditionally.

6. In view of above, I am of the view that in the absence of any evidence to establish or prove that the said goods were manufactured and cleared without payment of appropriate Central Excise Duty on it by the Noticee the demand of Central Excise Duty of Rs.2,62,080/- does not arise, hence, the demand raised in the instant show cause notice is not sustainable. I also find that as the Noticee have not violated any of the provisions of Central Excise Rules in the instant case, hence are not liable to any penalty under Rule 25 of the Central Excise Rules, 2002".

7. The said reasoning and finding of Deputy Commissioner has been maintained by the Commissioner Appeal and CESTAT. The CESTAT also found that :-

"5. I have carefully considered the submission from both the sides. The factory of the respondent is at Indore, in which they manufacture among other item, "Shimla" brand Gutkha. The container from which the 40 bags of "Shimla" brand Gutkha were recovered had been intercepted at Chennai and the same had been booked by M/s. Vaishali Cargo Carrier through a freight forwarder M/s. Balaji Cargo Forwarders, Delhi but it could not be ascertained as to who had booked this consignment. I find that as such there is no evidence indicating that the goods in question, had been booked by the respondent through Balaji Cargo Forwarders and the same had been clandestinely cleared by the respondent without payment of duty. In absence of such an evidence, the proceedings for confiscation of goods, demand of duty in respect of the same and imposition of penalty on the respondent has been rightly dropped by the Deputy Commissioner and the Deputy Commissioner's order has been rightly upheld by the CCE (Appeals). The learned departmental representatives has relied upon the Tribunal judgment in case of *Ashok Kumar Gupta Vs. CCE, Ghaziabad* (Supra) but in that case, the non-duty paid nature goods was clear but this is not so in the present case. In view of this, I find no infirmity in the impugned order. The revenue appeal is dismissed."

8. Before this Court also learned counsel appearing for the appellant has failed to point out from the record any material, which could establish that the seized goods were manufactured by the respondent or they were being transported at the instance of the respondent or they were cleared from the factory premises of the respondent clandestinely without payment of the excise duty. He has failed to point out any evidence, which could attract the levy of excise duty or penalty under the provision of Acts and Rules as against the respondent, in the given facts of this case.

9. The Supreme Court in the matter of *Oudh Sugar Mills Ltd V/s. Union of India* reported in 1978 E.L.T. (J 172) had set aside the levy of additional

excise duty and fine since the excise duty was levied on assumption and presumption without there being any evidence of removal of goods without payment of excise duty. The Supreme Court in that case held that:-

"B..... In the circumstances therefore, we must hold that the finding that 11,606 mauls of sugar was not accounted for by the appellant has been arrived at without any tangible evidence and is based only on inferences involving unwarranted assumptions. The finding is thus vitiated by error of law."

10. In the matter of *Commissioner of C. Ex., Ludhiana V/s. Rakesh Nayyar* reported in 2010 (255) E.L.T. 234 (P & H) in a case, where no material was brought on record to show as to whom imported goods were sold and how goods were clandestinely removed from factory and no evidence was produced to establish that goods after manufacture were cleared domestically without payment of excise, the Division Bench of the Punjab and Haryana High Court following the judgment of the Supreme Court in the matter of *Oudh Sugar Mill* (supra) set aside the demand under Section 11-A of Excise Act by holding that:-

"18..... The Revenue has also not placed any material on record which could show as to whom the imported yarn has been sold and how the same was removed clandestinely from the factory premises of the appellant. In the absence of any such material, the findings of the adjudicating authority and the Commissioner (Appeals) that the entire yarn has been cleared clandestinely without payment of duty cannot be sustained. Not even a single document has been produced in order to establish that the yarn after manufacture was cleared without payment of duty in the home market. A perusal of the export documents clearly shows that the yarn after manufacture was used in knitted garments which were subsequently exported by the respondent in order to discharge their export obligations under the advanced licence scheme. The Hon'ble Apex Court in *Oudh Sugar Mills's case* (Supra) had clearly held that duty cannot be confirmed on the basis of mere suspicion, howsoever, strong it may be."

11. In the matter of *State of West Bengal and Others V/s. MD. Khalil* reported in (2000) Vol 4 SCC 594, the Supreme Court while examining the

issue of levy of entry tax when the taxable goods were found in possession of the assessee, but there was no evidence that the assessee had brought the goods into the concerned Metropolitan area from outside, held that :-

"20 It must be borne in mind that before the tax could be imposed under Sub-Section (3) of Section 14 of the Entry Tax Act, the authority will have to be satisfied of the requirements noted above. Without there being any material to show that the specified goods in the possession of the respondent have been brought into the Calcutta Metropolitan Area and that they were brought without payment of any tax leviable thereon, no tax can be levied under sub-section (3) of Section 14 even on a dealer. It cannot be lost sight of that the tax under the Entry Tax Act is a tax on the entry of the specified goods into the Calcutta Metropolitan Area and not on possession of the specified goods within the Calcutta metropolitan Area..

21. However, the contention of Mr. Chakravarty is that when specified goods are found in possession of a person and when he, on being required to produce before the authority any accounts, register or document under sub-section (6) of Section 14, has failed to do so, a presumption arises that the specified goods have been brought by him into the Calcutta Metropolitan Area without payment of tax. We are afraid, we cannot accede to this contention. A presumption is a rule of law which requires the court to draw a given conclusion on proof or existence of certain facts and leaves it to the party disputing the conclusion to rebut the same. Presumptions may be of fact or of law. A presumption is an inference sanctioned by law which does not logically or necessarily follow from the proved facts. For raising a presumption, as submitted by Mr. Chakravarty, there must be a specific provision in the Entry Tax Act. No provision in the said Act is brought to our notice which may enable the authority to raise the presumption that a possessor of the specified goods, who fails to produce before the authority his accounts, register or document on being required to do so, has imported the goods into the Calcutta Metropolitan Area without payment of tax. On the facts and circumstances of the

case, it is impossible for a court to infer that the respondent has imported the goods into the Calcutta Metropolitan Area without payment of tax."

12. Under the Excise Act, the excise duty is leviable on manufactured or production of excisable goods, therefore, for levying the excise duty, it is necessary to establish that the excisable goods was produced or manufactured by the assessee concerned and for attracting Section 11-A, it is necessary to establish that the excisable goods was clandestinely removed without payment of excise duty, which the revenue in the present case has failed to establish. The excise duty cannot be levied merely on the basis of assumption or presumption.

13. In the present case, it is clear that the revenue has failed to produce even a single piece of evidence that the seized goods were manufactured by the respondent or they were clandestinely removed without payment of excise duty from the factory premises of the respondent. The revenue has sought to levy excise duty and penalty on the respondent merely on the basis of assumptions and presumptions and such a course is not permissible in law. Thus, first question is answered by holding that for want of evidence, the Tribunal was justified in not fastening the liability on the respondent and dropping the proceedings against him.

Substantial Questions of law No.2 and 3.

14. These two questions of law are based upon the statement of Nitesh Wadhvani, proprietor of the respondent company recorded by the excise authority, therefore, they are decided together.

15. The statement of Nitesh Wadhvani was recorded on 11.10.2004 wherein, he stated that he was engaged in manufacture of Gutkha and other items under the brand name of "Shimla", "Malikchand" and "Vansh" and that there was no authorized dealers or distributors of the product and the product was popular only in four states namely Madhya Pradesh, Maharashtra, Karnataka and Gujrat. He clearly stated that he did not know how the seized goods were sent to Chennai, who booked this consignment and that he had not sold any Gutkha to Delhi based traders. Merely, because the seized item was Gutkha bearing brand name "Shimla" and there is admission of Nitesh Wadhvani that he was also manufacturing Gutkha by brand-name "Shimla", only on that basis it cannot be conclusively held that the seized item was

manufactured and cleared by the respondent. The written explanation of the respondent that the seized item was not manufactured by it, but was a duplicate product and the reasons given by him indicating that it was a duplicate product cannot be ignored. There is no admission in the statement of Nitesh Wadhvani that the seized product was manufactured by him or it was cleared from his factory premises without payment of excise duty, therefore, the statement of Nitesh Wadhvani, is not sufficient to initiate the action against the respondent and fasten the liability of excise duty as well as the penalty on respondent without there being any cogent evidence on record establishing the necessary ingredients for levy of excise duty and penalty as against the respondent.

16. The statement of Nitesh Wadhvani, was duly taken note of and considered by the Deputy Commissioner Customs and Central Excise in its order dated 30/31 August, 2005. The Tribunal has also noted the statement of Nitesh Wadhvani, in paragraph one of the order and it cannot be held that the Tribunal had ignored the statement of Nitesh Wadhvani, while affirming the finding recorded by Deputy Commissioner as well as Commissioner Appeal.

17. In view of the above analysis, all the three questions are answered against the revenue and in favour of the respondent and the appeal is accordingly, dismissed.

Appeal dismissed.

I.L.R. [2011] M. P., 969

COMPANY APPEAL

Before Mr. Justice S.N. Aggarwal & Mrs. Justice Indrani Datta

Company Appeal No.3/2010 (Gwalior) decided on 7 February, 2011

**KORBA METALS & CONDUCTORS PVT. LTD. (M/S.) ... Appellant
Vs.**

B.I.F.R. & amr.

... Respondents

***Company Court Rules, 1959, Rules 272 & 273 - Auction purchaser^o
is entitled for execution of sale deed of property in favour of its nominee.***

Appellant Company, an auction purchaser of the property, after the sale was confirmed in its favour, wanted sale deed to be executed in favour of its nominee for which application was filed. The application was dismissed by the Company Judge - **Held** - Impugned order passed by the Company Judge cannot be sustained in law and needs to be set aside. (Paras 5 & 6)

970 Korba M. & Cond.Pvt. Ltd. (M/s.) Vs. B.I.F.R.(DB) I.L.R.[2011] M.P.,

कम्पनी न्यायालय नियम, 1959, नियम 272 व 273 — नीलाम-क्रेता अपने नामनिर्देशिती के पक्ष में सम्पत्ति का विक्रय विलेख निष्पादित कराने का हकदार है।

Cases referred :

Company Appeal No.3/2004 (M/s Raj Enterprises vs. M/s. Sul India Ltd. decided on 21.07.2006, AIR 1935 Bom 340, AIR 1936 Bom 137.

Kishore Shrivastava with R. V. Sharma, for the appellant.

J.D. Suryavanshi, for the official liquidator/respondent.

ORDER (ORAL)

The Order of the Court was delivered by
S.N. AGGARWAL, J. :- Heard on admission.

With the consent of counsel for both the parties, this company appeal has been taken up for final disposal at motion hearing stage itself.

2. This company appeal under Section 483 of the Companies Act, 1956 filed by the appellant-M/s. Korba Metals & Conductors Private Limited arises out of an order of the learned Company Judge of this Bench dated 29.10.2010 passed in I.A. No. 12545/2010, rejecting its application for directions to official liquidator to execute the sale-deed of the property in question being Lot No.01 in favour of its nominee-M/s. Sagar Dwellings Private Limited. The appellant admittedly was an auction purchaser of the property in question being Lot No.01 and the sale in its favour was confirmed by the Hon'ble Company Judge. After the sale was confirmed in favour of the appellant (auction purchaser), the appellant wanted sale-deed of the property in question to be executed in favour of its nominee- M/s. Sagar Dwellings Private Limited for which he filed an application being I.A. No. 12545/2010 and the same has been dismissed by the Company Judge vide order impugned in the present appeal.

3. Mr. Kishore Shrivastava, learned senior counsel appearing on behalf of the appellant has relied upon provisions contained in Rules 272 & 273 of the Company Court Rules, 1959, which are extracted below :-

"Rule 272:- Sale to be subject to sanction and to confirmation by Court unless the Court otherwise orders, no property belonging to a Company which is being wound up by the Court shall be sold by the Official Liquidator without the previous sanction of Court, and every sale shall be subject to confirmation by the Court.

Rule 273: Procedure at Sale :- Every sale shall be held by the Official Liquidator, or, if the Judge shall so direct, by an agent or an auctioneer approved by the Court, and subject to such terms and conditions, if any, as may be approved by the Court. All sales shall be made by public auction or by inviting sealed tenders or in such manner as the judge may direct."

4. The learned senior counsel for the appellant has also drawn attention of this Court to a Division Bench judgment of Indore Bench passed in Company Appeal No.03/2004 decided on 21.07.2006 (*M/s. Raj Enterprises Vs. M/s. Sul India Limited*), wherein the Division Bench relying upon two judgments of the Bombay High Court, one of the Division Bench and another of the Single Bench in cases namely (i) *Rahimullah Vs. Official Assignee*, reported as AIR 1935 Bombay 340 and (ii) *Ganpati Manja Hegade Vs. Subrya Rayappa Shetti and Others*, reported as AIR 1936 Bombay 137 has held that the sale-deed of the property of the company in liquidation can be executed at the behest of the auction purchaser in favour of its nominee and the Company Judge cannot deny execution of the sale-deed in favour of the nominee, if a request for the same is made. In fact, the official liquidator had filed a reply before the Company Judge to I.A.No. 12545/2010. The reply of the official liquidator is Annexure A/7, at page 43 of the paper book. The official liquidator in his reply has also referred to and relied upon the same judgment of the Division Bench of the Indore Bench in *Raj Enterprises Vs. M/s. Sul India Limited* referred above. The relevant portion of the reply of the official liquidator contained in paragraph 5 is extracted below :-

"5. That, Hon'ble High Court of Madhya Pradesh, Indore Bench vide its order dated 21/07/2008 passed in I.A.No. 4860/2008 in Company Petition No. 02/2001 filed by the successful auction purchaser M/s. Shri Sumati Agro & Refinery Pvt.Limited for execution of sale deed in favour of its nominee M/s. Urban Development Traders Limited has allowed application, considering an order passed by the Division Bench of Indore High Court in Company Appeal No. 03/2004 dated 21.07.2006, which has held that such a direction can be given. The said application was allowed with direction to the Official Liquidator to execute the sale deed of the property in favour of the successful bidder's nominee. Copy of the order dated 21/07/2008 is enclosed and marked as Annexure "A".

5. Having regard to the fact that there was no clause in the tender document pursuant to which the appellant had participated in the auction bid prohibiting execution of the sale-deed in favour of the auction purchaser's nominee and also having regard to the reply of the official liquidator and the law laid down by the Division Bench in *M/s. Raj Enterprises* (supra), we are of the opinion that the impugned order passed by the Company Judge cannot be sustained in law and needs to be set aside. The appellant being the auction purchaser is held entitled for execution of sale-deed of the property in question in favour of its nominee-M/s. Sagar Dwellings Private Limited in accordance with law.

6. In view of the foregoing, we allow this Appeal, set aside the impugned order dated 29.10.2010 passed in I.A. No. 12545/2010 by the Company Judge. ~~The official liquidator is directed to execute the sale deed of the property in question being Lot No. 01 in favour of appellant's nominee M/s. Sagar Dwellings Private Limited in accordance with rules. This appeal stands disposed of.~~

Appeal disposed of.

I.L.R. [2011] M. P., 972

APPELLATE CIVIL

Before Mr. Justice N.K. Mody

M.A. No.1935/2005 (Indore) decided on 9 August, 2010

KISHORE

Vs.

SHAHID SHAH & anr.

... Appellant

... Respondents

A. Motor Vehicles Act (59 of 1988), Section 147 - Liability of Insurer - Thresher attached with tractor (insured) was in operation and because of mechanical fault, right leg of appellant crushed and ultimately it was amputated - Held - Since the accident occurred when the offending tractor was being used for agricultural purpose, insurance company can not be exonerated.

(Paras 2 & 7)

क. मोटर यान अधिनियम (1988 का 59), धारा 147 - बीमाकर्ता का दायित्व - ट्रैक्टर के साथ जुड़ा हुआ (बीमाकृत) थ्रेशर काम कर रहा था और यांत्रिक दोष के कारण अपीलार्थी का दायाँ पैर कुचल गया और अंततः उसका अंगविच्छेद किया गया - अभिनिर्धारित - चूंकि दुर्घटना उस समय घटित हुई, जब दोषी ट्रैक्टर, कृषि प्रयोजन हेतु होने से, उसका उपयोग किया जा रहा था, बीमा कम्पनी को विमुक्त नहीं किया जा सकता।

B.Motor Vehicles Act (59 of 1988), Section 166 - Quantum - Leg of appellant amputated from joint - Appellant is entitled for compensation on basis of 100% permanent disability - Compensation enhanced from Rs. 2,90,000/- to Rs. 5,05,000/-. (Para 7)

ख. मोटर यान अधिनियम (1988 का 59), धारा 166 – मात्रा – अपीलार्थी का पैर जोड़ से अंगविच्छेद किया गया – अपीलार्थी, 100 प्रतिशत स्थायी निःशक्तता के आधार पर प्रतिकर के लिए हकदार – प्रतिकर रुपये 2,90,000/- से बढ़ाकर 5,05,000/- किया गया।

Cases referred :

2009(3) ACCD 1753, 2006 ACJ 943, 2008 ACJ 2486, 2004 ACJ 1306, 2010(1) ACCD 444, 2007 ACJ 1909, 2007 ACC 188, 2007(I) DMP 279, 1991 ACJ 777, 2000 ACJ 1323, 2003(1) ACJ 12.

Sameer Athawale, for the appellant.

C.P.Singh, for the respondent No. 2.

ORDER

N.K. Mondy, J. :-Being aggrieved by the award dated 27.1.2005 passed by M.A.C.T., Neemuch in Claim Case No.51/2002, whereby claim petition filed by the appellant was allowed and compensation of Rs.2,90,000/- was awarded and respondent No.2 was exonerated, present appeal has been filed.

2. Short facts of the case are that appellant filed a claim petition alleging that respondent No.1 owned a tractor bearing registration No.MPN-7627, which is insured with respondent No.2. It was alleged that on 17.10.99 respondent No.1 brought his tractor to the field of appellant, which was attached with thresher for the purpose of cutting Soyabean crop lying in the field of appellant. It was alleged that while the thresher was in operation because of mechanical fault right leg of the appellant was crushed from the joint of thigh and ultimately it was amputated. It was alleged that the accident occurred due to negligence on the part of respondent No.1. It was prayed that petition be allowed and compensation be awarded. The claim petition was contested by the respondents by filing separate written statement. In the written statement filed by respondent No.1 it was denied that the accident occurred in which appellant sustained injuries. Liability of respondent No.1 was denied. In the written statement filed by respondent No.2 it was alleged that thresher is not a part of the motor vehicle. It was alleged that respondent No.1 was not possessing valid driving licence and also offending thresher was not insured with respondent No.2, hence respondent No.2 was not liable for the alleged

accident. It was prayed that claim petition be dismissed. After framing of issues and recording of evidence learned Tribunal allowed the claim petition and awarded compensation of Rs.2,90,000/- and exonerated the respondent No.2, break-up of amount awarded is as under :-

Rs. 6,000/-	Towards medical expenses.
Rs. 50,000/-	Towards hospital expenses.
Rs.2,34,000/-	Towards permanent disability.
<u>Rs.2,90,000/-</u>	<u>Total</u>

3. Learned counsel for the appellant argued at length and submits that impugned award passed by the learned Tribunal is illegal, incorrect and deserves to be set aside. It is submitted that since the offending tractor was insured and the thresher was being operated with the help of tractor, which was insured with respondent No.2, therefore, respondents are liable to pay compensation. For this contention reliance is placed on a decision in the matter of *United India Insurance Company Ltd. Vs. Smt. Anandi Devi*, reported in 2009(3) ACCD 1753, wherein deceased sustained injuries in working on thresher machine and the thresher machine was operated by tractor, which was insured for agricultural purpose, this Court held that deceased being a third party in the accident, therefore, liability of Insurance Company covered with regard to payment of compensation. Further reliance is placed on a decision in the matter of *United India Insurance Company Ltd. Vs. Sardari Lal*, 2006 ACJ 943, wherein tractor used for propelling wheat thresher and the labourer woman was collecting wheat grain under the thresher when the driver started the tractor, thresher came in motion and the woman got wrapped with the belt resulting in her death, Himachal Pradesh High Court held that accident arose out of use of tractor. It was also observed that tractor is not being plied on the road does not necessarily mean that an accident had not occurred arising out of the use of motor vehicle. Reliance is also placed on a decision in the matter of *Oriental Insurance Company Ltd. Vs. Savthanji Khodaji Thakor*, 2008 ACJ 2486, wherein Insurance Company sought to avoid liability on the ground that tractor was insured but not the thresher a Division Bench of Gujrat High Court held that Insurance Company is liable for payment of compensation. Reliance was also placed on a decision in the matter of *P. Muse Khan Vs. M. Gopala Krishnaiah*, 2004 ACJ 1306, wherein accident caused by a lorry during the course of drilling in agricultural fields resulting in death of the deceased, Andhra Pradesh High Court held that the Insurance Company is

liable for payment of compensation. On the strength of aforesaid decisions, learned counsel for the appellant submits that learned Tribunal committed error in exonerating respondent No.2. So far as amount of compensation is concerned, learned counsel submits that in a case where leg was amputated from the joint, it is a case of 100% permanent disability. In the matter of *United India Insurance Co.Ltd. Vs. Rajendra*, 2010(1) ACCD 444, wherein claimant was aged 21 years and right hand was amputated the compensation awarded by the Tribunal Rs.2,06,000/- was enhanced by this Court to Rs.2,75,000/-. In this case accident occurred when claimant while operating thresher fitted with tractor was insured, in the circumstances this Court further held that Insurance Company cannot avoid the liability to pay compensation. It is submitted that appeal filed by the appellant be allowed and the findings relating to exoneration be set aside and the amount be enhanced.

4. Learned counsel for respondent No.2 submits that since the tractor, which was belonging to respondent No.1 was taken by the appellant to his field and the operation was being made by the appellant himself, therefore, appellant is not entitled to claim any amount of compensation from respondent No.2. It is submitted that in the facts and circumstances of the case learned Tribunal has rightly exonerated respondent No.2. Learned counsel for respondent No.2 placed reliance on a decision in the matter of *Oriental Insurance Co.Ltd. Vs. Brij Mohan*, 2007 ACJ 1909, wherein labourer engaged to dig earth was sitting on earth loaded trolley attached to tractor and due to rash and negligent driving of tractor-trolley the labourer slipped and came under its wheels and sustained injuries, the Insurance Company sought to avoid its liability on the ground that trolley was not insured and tractor alone was insured and the vehicle was not being used for agricultural purpose for which it was insured, Apex Court held that since the tractor was being used for brining earth from site of digging to brick-kiln for manufacturing bricks which is not agricultural work, therefore, Insurance Company is not liable. However, Hon'ble Apex Court in exercise of its extraordinary jurisdiction under Article 142 of the Constitution of India directed the Insurance Company to satisfy the award. Further reliance is placed on a decision in the matter of *Thawri Vs. Harji*, 2007 ACC 188, wherein death occurred while deceased was repairing vehicle, which was not in motion as tractor was standing and trolley put on jack and jack slipped out and trolley fell upon, Rajasthan High Court dismissed the claim petition. Reliance is also placed on a decision of this Court in the matter of *Ashok Varma Vs. Shivnath Singh*, 2007(I) DMP

279, wherein tractor was not being used as a motor vehicle, as neither passengers nor goods were being carried on and thresher was merely operated by the motor of tractor, which was in a stationary position, this Court held that accident caused is not covered under the Act. It is submitted that in the facts and circumstances of the case appeal be dismissed.

5. From perusal of the record it is evident that to prove the case appellant has filed documents Ex.A/1 to A/27. Ex.A/1 to A/25 are the documents relating to criminal case, while rest of the documents are relating to treatment of the appellant. Appellant has examined himself as AW-1 and Radheshyam as AW-2. While respondent No.2 produced the documents and has proved the policy and has also examined Shahid Shah and Ravindra Mundra. From the evidence on record it is amply proved that the thresher was being used by the appellant in his field with the aid of the tractor, which was being owned by respondent No.1 and insured with respondent No.2.

6. In the matter of *Shivaji Dayanu Patil Vs. Vatschala Uttam More*, 1991 ACJ 777 wherein collision between a truck and petrol tanker and the tanker turned turtle and thereafter after 4½ hours of the accident the tanker exploded and caught fire resulting in injuries to and death of several persons assembled near it. In this case contention was that at the time when explosion and fire took place the petrol tanker which was lying turtle was not suitable or fit for use on the road and hence was not a 'motor vehicle' as defined in Section 2(18) of the M.V. Act. Hon'ble Apex Court held that petrol tanker though lying turtle was in 'use' at the time of explosion and fire and the claimant is entitled to compensation under Section 92-A of M.V. Act. It was further held that the word 'use' in the expression 'use of a motor vehicle' has a wider connotation and covers accidents which occur both when the vehicle is in motion and when it is stationary. It was further held that use of vehicle does not cease when it has been rendered immobile on account of breakdown or mechanical defect or accident. In the matter of *Gayatri Bai Vs. Ahmadi*, 2000 ACJ 1323 wherein in a case where bus was stationary and driver and cleaner had raised the chassis over a jack for changing spring and jack slipped and conductor who was sitting by the side of the bus got pressed between mudguard and wheels sustaining fatal injuries and the tribunal held that vehicle was parked and it was not in use and dismissed the claim application, Divisional Bench of this Court held that the accident arose out of use of vehicle giving the expression 'use' an extended meaning and the claimants are entitled to compensation.

7. Since the accident occurred when the offending tractor was being used for being agricultural purpose, therefore, this Court is of the view that learned Tribunal committed error in exonerating respondent No.2. So far as amount of compensation is concerned, it appears that on number of heads no amount has been awarded by the learned Tribunal and on number of heads amount awarded is on lower side. In a case of amputation where leg of the appellant was amputated from joint, in the opinion of this Court amount awarded to the appellant is on lower side. In the opinion of this Court income of the appellant ought to have been @ Rs.3,000/- per month and keeping in view the injuries sustained by the appellant and the fact that the appellant is an agriculturist, appellant is entitled for compensation on the basis of 100% permanent disability after applying the multiplier of 15. Appellant is entitled for the following amount :-

Rs.4,70,000/-	Towards permanent disability:
Rs. 10,000/-	Towards medical expenses.
Rs. 10,000/-	Towards hospital expenses..
Rs. 5,000/-	Towards special diet.
Rs. 5,000/-	Towards transport.
Rs. 5,000/-	Towards attenders.

Rs.5,05,000/-	

8. It is true that in the memo of appeal the prayer is for compensation of Rs.4,00,000/-, while in the claim petition filed before the learned Tribunal long back in the year 2001 prayer was for compensation of Rs.6,94,000/-, therefore, this Court has not to misguide with what amount has been claimed but the Court has to examine what is the just compensation and while assessing the just compensation this Court can award more amount than it is claimed as laid down by the Hon'ble Apex Court in the matter of *Nagappa Vs. Gurudayal Singh*, 2003(1) ACJ 12.

9. In view of this appeal filed by the appellant is allowed and the amount awarded by the Tribunal Rs.2,90,000/- is enhanced to Rs.5,05,000/- holding that respondents are liable to pay the compensation jointly and severally. Thus, the amount of award is enhanced by Rs.2,10,000/-, which shall carry interest @ 8% per annum from the date of application. The amount awarded shall be deposited by the Insurance Company with the learned Tribunal and the learned

Tribunal is directed to invest 80% of the said amount on long term fixed deposit in the name of appellant in the nearest Nationalized Bank, in the area where the appellant is residing, with the condition that the bank will not permit any loan or advance. Interest on the said amount shall be credited on monthly basis in S.B. Account of appellant, which shall be opened by the appellant No.1 from where appellant can withdraw the amount as per her needs. However, on an application by the appellant this condition could be modified by the learned Tribunal in exceptional circumstances, if made out by the appellant.

10. With the aforesaid observations appeal stands disposed of.

Appeal disposed of.

I.L.R. [2011] M. P., 978

APPELLATE CIVIL

Before Mr. Justice U.C. Maheshwari

S.A. No.116/2007 (Jabalpur) decided on 8 December, 2010

AZIZUDDIN QURESHI

...Appellant

Vs.

STATE OF M.P.

...Respondent

Treasure-trove Act, (6 of 1878), Sections 7 & 8 - Maintainability of Civil Suit - Collector while deciding objection did not adjourn the case with a direction of filing civil suit for declaration of title - Collector after inquiry declared the treasure to be ownerless property - Held - Act, 1878 is a complete code - Unless and until specific direction or observation is given by Collector u/s 8 to approach the Civil Court for getting the title decided, Civil Court has no jurisdiction to entertain the suit - Appeal dismissed. (Paras 9 to 11)

निखात निधि अधिनियम, (1878 का 6), धाराएँ 7 व 8 - सिविल वाद की पोषणीयता - कलेक्टर ने आक्षेप निर्णीत करते समय, स्वत्व की घोषणा के लिए सिविल वाद प्रस्तुत करने के निदेश के साथ मामला स्थगित नहीं किया - जाँच के पश्चात् कलेक्टर ने खजाने को स्वामीहीन सम्पत्ति घोषित किया - अभिनिर्धारित - अधिनियम, 1878 एक पूर्ण संहिता है - जब तक कि कलेक्टर द्वारा धारा 8 के अन्तर्गत स्वत्व विनिश्चित कराने के लिए सिविल न्यायालय जाने के विनिर्दिष्ट निदेश एवं संप्रेक्षण नहीं दिये जाते, तब तक सिविल न्यायालय को वाद ग्रहण करने की कोई अधिकारिता नहीं है - अपील खारिज।

Cases referred:

AIR (36) 1949 East Punjab 33, AIR 1995 SC 1955, 2005(4) MPLJ 146.

Ahdulla Usmani, for the appellant.

ORDER

U. C. MAHESHWARI J.:—This appeal is directed on behalf of the appellant/plaintiff under Section 100 of CPC being aggrieved by the judgment and decree dated 31.7.2006 passed by 4th Additional District Judge, Jabalpur, in Civil Regular Appeal No.35-A/2005, modifying the judgment and decree dated 6.8.2005 passed by the 18th Civil Judge, Class-II, Jabalpur in COS No.152-A/05 dismissing his suit for declaration to declare him the owner of the suit property seized by the official of the respondent No.1 under the provisions of The Indian Treasure Trove Act, 1878 (in short the Act), with a further prayer to declare the order dated 16.3.2004 passed by the respondent No.2/Collector, with respect of such property, under the Act, being illegal is not binding on him. While modifying the judgment and decree of the trial court the appellate court instead to decree the suit directed the appellant to file the appeal against the aforesaid Order of the Collector dated 16.3.2004 under the provision of Section 9 of the Act before the Chief Controlling Revenue Authority.

2. The facts giving rise to this appeal in short are that the appellant herein filed the aforesaid suit against the respondents contending that in the year 1975-76, he was residing in a house of one Shri Ansari situated at Gurandi Bazar, Jabalpur, during such period such house was subjected to burn, on which to save the lives, the appellant and his family member by leaving their goods and belonging in such premises had left the same and subsequently after extinguishing such fire he came back to such house on 13.5.1976 then only he came to know that some unsocial elements by committing the theft had taken away his aforesaid domestic goods and belongings, on which he lodged a report of theft with the Police Station, Belbagh on the same day i. e. 13.5.1976. In such report besides the other stolen articles one sealed "Gund" (A Metallic utensil) was also stated. As per further averments, in such "Gund" his old coins and other valuable were kept. Subsequent to incident after removing said coins and belongings such blank Gund was thrown in his house. Out of the alleged stolen articles some of them after recovery had been returned to him by the Collector, Jabalpur vide order dated 2.1.1977, while

some of the articles on recovery were returned to him by the Collector, Dindori vide order dated 22.4.2004. As per further averments of the plaint some of the stolen articles were recovered by the Police Station Omti and Madan Mahal in the year 1997, on which on behalf of respondent No.2 by publishing a news in this regard in the bulletin of Dainik Bhaskar of 2.1.2003, the claims with respect of such seized property were invited within six months under the provision of the Act. On such publication the plaintiff herein filed his claim in the office of the respondent No.2/ Collector, Jabalpur. Besides the appellant one Santosh Kumar has also filed his claim on 20.6.2003 with respect of the same seized property. After receiving such claims the respondent No.2 has registered the cases under the Act, in which the statement of the present appellant and said Santosh Kumar were recorded. On subsequent occasion said Santosh Kumar had relinquished his right with respect of the seized property. Thereafter the appellant was the only claimant to receive such seized valuable articles. But on adjudication of such matter the respondent No.2 vide order dated 16.3.2004 stating that the seized articles were not specifically mentioned by the appellant in his first information report dated 13.5.1976 and pursuant to that by holding that appellant has failed to prove his title over such seized property/ articles dismissed his claim. It was also held by the respondent No.2 that aforesaid articles were recovered in the territorial jurisdiction of the Police Station Omti and Madan Mahal, which are very far away from the alleged place of the appellant, the Gurandi Bazar from where his articles were stolen, thus it could not be deemed to be the property of the appellant. According to further pleadings of the appellant such order was passed by the respondent No.2 without having any territorial jurisdiction over the matter and also contrary to the provisions of Section 6, 7 and 8 of Act. It is also stated that inspite the availability of sufficient evidence showing the right and title of the appellant over the seized property his claim was dismissed contrary to such record by the respondent No.2. With these averments besides the above mentioned prayer of declaration a prayer of mandatory injunction directing the respondent No.2 to deliver the disputed seized articles to him is also made.

3. In spite service of notice on the respondents no one was appeared before the trial court, on which the case was proceeded ex-parte against them.

4. After recording the evidence on appreciation of the same the trial court by holding the plaintiff has failed to prove his case or title over the disputed

property dismissed his suit. While dismissing such suit trial court also observed that the aforesaid order dated 16.3.2004 being passed under the provision of the Act, was appealable under Section 9 of the Act before the prescribed appellate authority and, the suit being filed without exhausting such remedy, the same could not be deemed to be entertainable in the Civil Court. Being dissatisfied with such judgment and decree of the trial court the appellant filed an appeal under Section 96 of CPC before the subordinate appellate court. After hearing the parties, on consideration the appellate court by allowing such appeal in part and held that the trial court has committed grave error in deciding the question of title of the property, specially when the order of the respondent No.2/ Collector was appealable under Section 9 of the Act, therefore, unless such remedy of appeal is exhausted by the appellant, the Civil Court did not have the jurisdiction over the matter to decide the question of title of such disputed property and pursuant to that by setting aside the judgment and decree of the trial court extended the liberty to the appellant to approach the appellate authority, The Chief Controlling Revenue Authority under Section 9 of the Act against the order of respondent No.2/ Collector dated 16.3.2004 (Ex.P.14), on which the appellant has come forward to this court with this appeal.

5. Shri Ahadullah Usmani, learned counsel for the appellant after taking me through pleadings of the plaint, evidence available on the record and the exhibited documents, said that his un rebutted evidence has not been properly considered by the courts below, on proper appreciation of the same the courts below ought to have decreed the suit as prayed for declaration and appropriate direction to the respondent No.2 for delivery of the seized articles to the appellant. In continuation, by referring the provision of Section 9 of CPC he said that the Collector has not conducted the proceeding in accordance with the prescribed procedure and invoking the power vested in him under the Act then certainly in such circumstance the Civil Court had jurisdiction to examine such position. In continuation, he said that although the trial court dismissed the suit holding that in view of provision of appeal the same is not maintainable but the appellate court by setting aside such judgment of the trial court has held that civil suit was maintainable but in view of the provision of appeal the trial court did not have any authority to decide the title of the disputed property and in such premises, the judgment and decree of the trial court was set aside. According to his submission after holding the suit is maintainable, there was no occasion with the appellate court except to pass the decree as prayed by

the appellant but contrary to that without taking into consideration the appellate court has directed the appellant to file the regular appeal against the aforesaid order of the Collector before the appellate authority under Section 9 of the Act. Such debatable inconsistency of the impugned judgments being substantial question of law requires consideration under Section 100 of CPC at this stage and prayed for admission of this appeal on the substantial question of law mentioned in the appeal memo.

6. Having heard the counsel, keeping in view the arguments of the appellant, after perusing the record of the courts below and the impugned judgments along with the case law in the matter of *Munawar Ali Khan Vs. The Punjab Province* reported in AIR (36) 1949 East Punjab 33 cited by the appellant's counsel, I am of the considered view that the appellate court has not committed any error in setting aside the judgment and decree of the trial court, dismissing the suit, by allowing the appeal in part and directing the appellant to approach the Appellate Authority under Section 9 of the Act against the order of the Respondent No.2/ Collector Jabalpur dated 16.3.2004.

7. As per provisions of the Indian Treasure Trove Act, 1878, on receiving the Treasure property exceeding the amount of Rs.10/- under Section 4 of the Act, the Collector is bound to publish the notification under Section 5 of the Act by mentioning the information as per requirement of such Section, for inviting the objection and the claim of the interested persons with respect of such property within the prescribed limitation. In response of such publication on receiving the claims/ objections the Collector is bound to deal with the same in accordance with the provision of Section 7 and onwards sections of the Act. According to Section 6 on account of non-appearance of the persons having any right to such treasure or in any part thereof in compliance of the notification under Section 5 of the Act, such right of the concerning persons shall be forfeited by the authority. If some objection(s) comes then the Collector is directed to deal with the same in accordance with the provision of Section 7 and 8 of the Act and during the course of inquiry under Section 7 of the Act, if the Collector sees the reasons to believe that treasure was hidden within one hundred years before the date of finding by a person as required by the said notification and claiming such treasure or by some other person, under whom such person claims, the Collector shall make an order adjourning the hearing of the case for such period as he deems sufficient, to allow of a suit being instituted by the claimant, to establish his right. Such order would be passed under Section 8 of the Act, and after holding inquiry

in accordance with the provision of Section 7 and 8 of the Act the Collector may declare the treasure to be an owner less property in the circumstance enumerated under Section 9 of the Act and such order is further made appealable under the same Section of the Act.

8. In the available circumstance, after going through the record, it is revealed that in the present matter without directing the appellant to get decided his title over the property or without extending any opportunity to him to file the Civil Suit, on appreciation, the respondent No.2/ Collector had passed the order dated 16.3.2004 (Ex.P.14) holding and declaring the treasure to be owner less property and accordingly the appellant was not held to be the owner or title holder of such treasure.

9. It is undisputed fact in the case that before filing the instant suit for declaration and other prayers made in it, in the course of the inquiry either under Section 7 or 8 of the Act no such direction to file Civil Suit by adjourning the case was given by the Collector to the appellant. On the other hand after holding the inquiry by virtue of earlier part of Section 9 of the Act such treasure was declared to be the owner less property and by virtue of later part of Section 9, such order is made appealable under the Act.

10. On going through the entire provision and the scheme of the aforesaid Act, 1878, it appears to be a complete Code to resolve all the question relating to the treasure trove property and in such premises unless specific direction or observation is given by the Collector under Section 8 of the Act to the party to approach the Civil Court to get decided the title by adjourning the case, the Civil Court did not have any jurisdiction to entertain the civil suit in the matter. On passing the order by the respondent No.2 under earlier part of Section 9 of the Act, if the appellant was aggrieved by such order then could have exhausted the remedy of appeal under the aforesaid provision and subject to order of such appellate court on arising the occasion the appellant could have proceeded further. But contrary to such provision without exhausting the remedy of the appeal under Section 9 of the Act the impugned suit of the appellant could not be entertained directly by the Civil Court and in such premises the appellate court has not committed any error in setting aside the judgment of the trial court dismissing such suit and directing the appellant to approach the appellate authority under Section 9 of the Act against the order dated 16.3.2004 (Ex.P.14) passed by the respondent No.2. It is settled law that where there is a self contained complete Code is available under the

specific Act or enactment then in such circumstance no Civil Suit could be entertained by the Civil Court by virtue of Section 9 of CPC. Such principle laid down by the Apex Court in the matter of "*State of Bihar v. Dhirendra Kumar*" reported in AIR 1995 S. C. 1955, in which it was held that the Act being a complete Code in itself, jurisdiction of Civil Court is excluded by necessary implication and jurisdiction under Article 226 of the Constitution of India can be invoked. Although such case was decided taking into consideration the provision of Land Acquisition Act, but the principle, analogy and ratio of the same is applicable in the available circumstance to the case at hand.

11. On arising the occasion such principle was further followed by the Division Bench of this Court in the matter of *Dev Kunwar Ben Shah Vs. State of Madhya Pradesh* reported in 2005 (4) MPLJ 146, in which it was held as under :

12. in this case, proceedings under Section 4 of the Act have not been challenged. What is under challenge is the fresh notification under Section 6 of the Act dated 13.8.1998. therefore, in such a situation, whether such suit will be maintainable. Apex Court in the case of *State of Bihar Vs. Dhirendra Kumar* (Supra) has held that the Act being a complete Code in itself, jurisdiction of Civil Court is excluded by necessary implication and jurisdiction under Article 226 of the Constitution of India can be invoked. Thus, in view of the judgment of the Apex Court in the aforesaid case which has been following by the Division Bench of this Court in the case of *Pashu Chikitsa* (Supra), covering the question of law has been delivered in the matter of the Act, therefore, judgment referred in the case of *Dhulabhai* (Supra) will not be applicable to the present case. Therefore, the suit as filed itself is not maintainable. Even otherwise, since the proceedings are under Section 17 of the Act and emergency clause was invoked, therefore in the light of the judgment in the case of *Satendra Prasad Jain* (Supra), provisions of Section 11-A of the Act will not be applicable. Therefore, the suit has rightly been dismissed by the trial Court."

12. In view of the aforesaid discussion the case law cited on behalf of the

appellant in the matter of *Munawar Ali Khan Vs. The Punjab Province* (Supra), is not helping to the appellant.

13. Under the aforesaid circumstance, I have not found any perversity, infirmity, irregularity or any circumstance in the judgment impugned giving rise to any question of law rather than substantial question of law requiring any consideration at this stage under Section 100 of CPC. Consequently, this appeal being devoid of any such question, the same is hereby dismissed at the stage of motion hearing. However, it is made clear that any observation made by this court in this order or in the impugned judgments by the courts below shall not come in the way of the appellant on filing the appeal under Section 9 of the Act and the appellant shall also be entitled to get the exclusion of the period of limitation which have been spent by him in prosecuting the present litigation from civil suit up to second appeal on filing the appeal provided under Section 9 of the Act. It is further directed that appellate authority shall be at liberty to decide the appeal without influencing any observation either made in this order or in the judgments impugned.

14. The appeal is dismissed as indicated above. There shall be no order as to costs.

Appeal dismissed.

I.L.R. [2011] M. P., 985

APPELLATE CIVIL

Before Mr. Justice N.K. Mody

F.A. No.515/2008 (Indore) decided on 15 December, 2010

MANGU & ors.

....Appellants

Vs.

STATE OF M.P. & anr.

...Respondents

A. Land Acquisition Act (1 of 1894), Sections 4 & 11 - Award - Subsequent notification issued on 26.04.2002 - There was no justification in awarding the compensation on the basis of first notification dated 06.02.1998. (Para 9)

क. भूमि अधिग्रहण अधिनियम (1894 का 1), धाराएँ 4 व 11 - अधिनिर्णय - पश्चात्पूर्ति अधिसूचना 26.04.2002 को जारी की गई - प्रथम अधिसूचना दिनांक 06.02.1998 के आधार पर प्रतिकर अधिनिर्णित करने का कोई न्यायोचित्य नहीं था।

B. Land Acquisition Act (1 of 1894), Sections 12 & 18 -

Limitation for reference - At the time of passing of award, appellants were not present before the Collector - No evidence that appellant was intimated about the award or the contents of award were known to the appellant - **Held** - Only on the basis of amount of compensation paid by cheque, it cannot be inferred that the award was communicated to the appellant and the contents of the award were known to the appellant - It cannot be said that the objections filed by the appellant were not in time.

(Para 8)

ख. भूमि अधिग्रहण अधिनियम (1894 का 1), धाराएँ 12 व 18 - निर्देश के लिए परिसीमा - अधिनिर्णय पारित करते समय, अपीलार्थी कलेक्टर के समक्ष उपस्थित नहीं थे - कोई साक्ष्य नहीं कि अपीलार्थी को अधिनिर्णय के बारे में सूचित किया गया या अधिनिर्णय की अंतर्वस्तु अपीलार्थी को ज्ञात थी - अभिनिर्धारित - केवल प्रतिकर की राशि का चेक द्वारा भुगतान किये जाने के आधार पर यह निष्कर्ष नहीं निकाला जा सकता कि अधिनिर्णय की अपीलार्थी को सूचना दी गई थी और अधिनिर्णय की अंतर्वस्तु अपीलार्थी को ज्ञात थी - यह नहीं कहा जा सकता कि अपीलार्थी द्वारा लिये गये आक्षेप समय पर नहीं लिए गये।

Cases referred :

2003(5) MPHT 570, 2009(III) MPWN 95, 1992 Suppl. LAC 32, (1994) 4 SCC 595, AIR 2004 SC 2895, AIR 1963 SC 1604, AIR 1985 GUJRAT 170, (2010) 3 SCC 545, AIR 1988 SC 1615.

Pankaj Shrivastava, for the appellants.

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

J U D G M E N T

N.K. Mody, J. :- This judgment shall also govern disposal of F.A.Nos. of which numbers are mentioned in the chart hereinbelow as in all the appeals the appellants are the land owners and the respondent is the State and in all the appeals the question involved is one and the same. In all the appeals the applications filed by the appellant under Section 18 of the Land Acquisition Act (which shall be referred as the L.A. Act) for enhancement of the amount of compensation were dismissed by the Land Acquisition Officer.

Full particulars of all the cases are as under :-

Sr.No.	F.A.No.	Area of land acquired	Compensation determined by L.A.O.	Claim in Appeal
1	515/08	0.84	Rs.96,896/-	Rs.1,36,920/-
2	499/08	1.67	Rs.77,284/-	Rs.2,72,210/-
3	500/09	2.43	Rs.2,80,306/-	Rs.1,63,000/-
4	501/08	1.21	Rs.63,444/-	Rs.3,96,096/-
5	502/08	1.67	Rs.80,374/-	Rs.1,97,230/-
6	503/08	0.67	Rs.77,286/-	Rs.2,72,210/-
7	504/08	1.30	Rs.62,567/-	Rs.1,09,210/-
8	506/08	1.21	Rs.1,39,576/-	Rs.2,39,610/-
9	507/08	2.00	Rs.2,30,705/-	Rs.1,97,230/-
10	508/08	1.67	Rs.1,92,638/-	Rs.3,26,000/-
11	509/08	1.46	Rs.1,68,414/-	Rs.2,37,980/-
12	510/08	1.04	Rs.1,19,967/-	Rs.1,69,520/-
13	511/08	1.67	Rs.1,92,638/-	Rs.2,72,210/-
14	512/08	1.67	Rs.1,92,368/-	Rs.2,72,210/-
15	513/08	0.84	Rs.96,896/-	Rs.1,36,920/-
16	514/08	1.46	Rs.70,268/-	Rs.1,18,990/-
17	516/08	2.30	Rs.2,65,309/-	Rs.3,74,900/-
18	517/08	1.46	Rs.1,68,413/-	Rs.1,63,000/-
19	518/08	2.00	Rs.1,84,564/-	Rs.3,26,000/-
20	519/08	1.67	Rs.1,92,638/-	Rs.2,72,210/-
21	520/08	1.67	Rs.1,92,638/-	Rs.2,72,210/-
22	521/08	0.65	Rs.74,980/-	Rs.1,05,950/-
23	522/08	0.65	Rs.31,282	Rs.52,957/-

2. Short facts of the case are that in all the appeals appellant are the land owners of the land situated at village Khajuri, Tehsil Susner, District Shajapur. In all the cases the land was acquired by the State Govt. for the purpose of construction of Ganeshpura Dam. In all the cases applications were filed by the appellant under Section 18 of the Land Acquisition Act on 19.5.2004, wherein it was alleged that appellants are the land owners, whose land has been acquired for the aforesaid purpose and the compensation has been assessed by the Land Acquisition Officer vide award dated 9.5.2003 @ Rs.81,521/- for irrigated land, Rs.43,185/- for unirrigated land and Rs.34,013/- for barren land. It was alleged that initially the land was acquired by the State Govt. vide Notification dated 6.2.98 under Section 4(1) of the Land Acquisition Act and the compensation was assessed on the same rate as stated above but at the time of disbursement of compensation the claim of the appellant in all the appeals was rejected on the ground that the status of the appellant is of Govt. lessee, therefore, appellant is not entitled for any amount of compensation, hence claim of the appellant was rejected vide order dated 31.7.2000 and the possession was taken. In the application it was alleged that after dismissing of the claim and also after taking the possession in view of the law laid down by the Hon'ble Apex Court it was found that even if the appellant is lessee, then too, appellant is entitled for compensation, therefore, again Notification was issued under Section 4 of the Land Acquisition Act on 26.4.2002. It was alleged that since fresh Notification was issued on 26.4.2002 under Section 4 of the Land Acquisition Act, therefore, the compensation could not have been assessed on the basis of the earlier Notification dated 6.2.98. It was alleged that compensation can be assessed only on the basis of subsequent Notification dated 26.4.2002. It was prayed that in the facts and circumstances of the case application filed by the appellant be allowed and the impugned order, whereby compensation was assessed by the Land Acquisition Officer be set aside and the amount of compensation be enhanced.

3. This application was opposed by the respondents by filing reply, wherein all the facts stated by the appellant were denied. It was alleged that Notification under Section 4 of the Act was issued on 6.2.98 and possession has been taken on 31.7.2000. It is submitted that since it was the Govt. land, therefore, the compensation was not paid by the respondents to the appellant and later on fresh Notification was issued on 26.4.2002. It was alleged that the application filed by the appellant is barred by time. It was submitted that application be dismissed. After framing of issues and also after recording of evidence copy

application filed by the appellant was dismissed against which present appeal has been filed.

4. Learned counsel for the appellant argued at length and submits that the impugned award passed by learned Court below is illegal, incorrect and deserves to be set aside. Learned counsel submits that there was no justification on the part of learned Court below in holding that appellant is entitled for compensation on the basis of earlier Notification. It is submitted that in the facts and circumstances of the case learned Court below committed error in dismissing the application filed by the appellant. For this contention reliance is placed on a decision in the matter of *State of M.P. Vs. Ku.Rajiya Vano*, 2003(5) MPHT 570, wherein Division Bench of this Court has held that compensation has to be determined on the date of publication of Notification published under Section 4(1) of the Act. It is submitted that since the fresh Notification was issued on 26.4.2002, therefore, impliedly the Notification dated 6.2.98 came to an end and since Notification is of the year 2002, therefore, compensation has to be determined on the market value, which was prevailing on the date when Notification was issued. So far as the market value of the land is concerned, learned counsel submits that appellant has submitted documents Ex.P/1 to P/11, which goes to show the existing value of the land in question at the time of publication of Notification. It is submitted that since the Collector is fixing the areawise guideline for determination of value of the land and on that basis only the stamp duty is being charged and registration fee is being paid, therefore, for the purpose of payment of compensation also the same guideline is required to be taken into consideration. For this contention reliance is placed on a decision in the matter of *State of M.P. Vs. Surya Kumar*, 2009(III) MPWN 95, wherein Division Bench of this Court has held that compensation of land acquired claimed as per rate fixed under the guidelines framed cannot be denied. Learned counsel submits that though the evidence aduced by the appellant in shape of Ex.P/1 to P/10, which goes to show that the value of the land was on higher side than the guideline. However, there was no reason for denying the compensation on the basis of Collector's guideline.

5. So far as limitation is concerned, learned counsel submits that learned Court below committed error in dismissing the petition filed by the appellant for enhancement of compensation on the ground of limitation. It is submitted that applications were filed on 19.5.2004 while the award was passed on 9.5.2003 but neither the award was communicated to the appellant nor the

was provided. It is submitted that appellant was not also present in the office of Land Acquisition Officer at the time when the award was passed. It is submitted that in the facts and circumstances of the case for the purpose of computation of limitation under Section 18 of Land Acquisition Act the starting point of limitation is the date 18.5.2004 when the contents of the award came to the notice of the appellant through their counsel. For this contention reliance is placed on a decision of Madras High Court in the matter of *S. Chalammal Vs. Special Tahsildar*, 1992 Suppl.LAC 32, wherein Division Bench of Madras High Court has held that since service of notice was not in conformity with the provisions of the statute, therefore, it was found that appellant came to know of the award immediately prior to issuance of the notice by her counsel in February, deserves acceptance. It was further held that it is well settled that where there is a failure to serve the notice under Section 12(2) of the Act, the date from which the time limit could run is only the date when the party actually or constructively came to know about the essential contents of the award. On the strength of aforesaid position of law learned counsel submits that appeal be allowed and impugned award passed by the trial Court, whereby application for enhancement of the amount was dismissed, be set aside.

6. Shri Vivek Phadke, Govt. Advocate, submits that since the award is dated 9.5.2003 and the objections were admittedly filed on 19.5.2004, therefore, on the face of it is barred by time. It is submitted that neither there was any prayer nor there is any provision for condonation of delay, therefore, the learned Court below rightly dismissed the application filed by appellant holding that the same is barred by time. Learned counsel submits that undisputedly the award is dated 9.5.2003 and all the appellants, who are the claimants have admitted in cross-examination that they have received the amount through cheque and ample evidence is on record to demonstrate that cheque is of June, 2003, therefore, learned Court below has rightly held that appellant is having knowledge of the award right from the date when the compensation was paid. Learned counsel for respondent submits that for the purposes of value of land on the date of Notification the Collector's guideline cannot be the basis. For this contention reliance is placed on a decision in the matter of *Jawajee Nagnatham Vs. Revenue Divisional Officer*, (1994) 4 SCC 595, wherein Hon'ble Apex Court has held that Section 47-A of the Stamps Act does not confer power to determine market value of an entire area, region or block and to maintain Basic Valuation Register for levy of stamp duty. Further reliance is placed on a decision in the matter of *Krishi*

Utpadan Mandi Samiti Vs. Bipin Kumar, AIR 2004 SC 2895, wherein the Hon'ble Apex Court held that value fixed in basis valuation Register for stamp duty purposes cannot be the basis for determination of value of the land. It is submitted that in the facts and circumstances of the case appeal has no merits and the same be dismissed.

7. There are some important dates, which are having bearing for just disposal of these appeals.

Sr.No.	Date	Particulars
1	6.2.98	Notification under Section 4(1) of Act
2	31.7.2000	Possession of land was taken.
3	26.4.2002	Second Notification under Section 4(1) of L.A.Act.
4	3.5.2003	Award passed by L.A.O.
5	9.6.2003	Compensation paid by cheque.
6	19.5.2004	Objections filed.
7	14.1.2008	Impugned order.

8. Clause (a) of Proviso of sub-Section(2) of Section 18 lays down that the objections can be filed within six weeks from the date of Collector's award if person make the objection is present before the Collector at the time when the award was passed. As per proviso of sub clause (b) of sub-Section (2) of Section 18 of the Act within six weeks of the receipt of the notice from the Collector under Section 12 sub-Section (2) or within six months from the date of Collector's award. In the matter of *State of Punjab Vs. Mst. Qaisar Jehan Begum*, AIR 1963 SC 1604, wherein Apex Court held that limitation of six months under proviso to Section 18 runs from knowledge of the contents of award. In the matter of *Rajat Hirabhai Motibhai Vs. Dy. Collector*, AIR 1985 Gujrat 170, it was held that Collector has not merely to intimate parties about passing of award, but he has to communicate essential contents of award. In the matter of *Bhagwandas Vs. State of U.P.*, (2010)3 SCC 545, while interpreting "within six weeks from the date of Collector's award" mentioned in sub clause (b) of the proviso of Section 18 of the L.A.Act, Hon'ble Apex Court held that the said expression has to be read to mean six months from the date of actual or constructive knowledge of essential contents of the award. It was further held that the expression be not interpreted literally because such an interpretation leads to absurd results inasmuch as person not having knowledge of award would be deprived of opportunity to seek reference to Court. In the present case at the time of passing of award appellants were not

present before the Collector. There is absolutely no evidence that contents of the award were known to the appellant. There is no evidence that at any point of time appellant was intimated about the award passed by the Collector. Only on the basis of amount of compensation paid by cheque, it cannot be inferred that the award was communicated to the appellant and the contents of the award were known to the appellant. In the facts and circumstances of the case, this Court is of the view that findings recorded by the learned Court below that objections filed by the appellant is not within time cannot allowed to sustain. Since neither the appellants were present before the Collector at the time of passing of award nor notice was served on the appellant, therefore, it cannot be said that the objections filed by the appellant were not in time.

9. So far the question of awarding compensation on the basis of Notification dated 6.2.98 is concerned, since subsequent Notification was issued on 26.4.2002, therefore, there was no justification in awarding the compensation on the basis of the first Notification. In the matter of *Raghunath Vs. State of Maharashtra*, AIR 1988 SC 1615, Hon'ble Apex Court held that proceedings initiated under earlier notification should be deemed to have been superseded. In the facts and circumstances of the case appeal filed by the appellant stands allowed and the impugned order passed by the reference Court is set aside and the case is remanded back to the learned Court below with a direction to decide the objections filed by the appellant on the basis of evidence on record and on merits and keeping in view the law laid down by Division Bench of this Court in the matter of *State of M.P. Vs. Surya Kumar, Jawajee Nagnatham and Krishi Utpadan Mandi Samiti* (supra).

10. With the aforesaid observations appeal stands disposed of. Let copy of this judgment shall be kept in the record of all connected cases.

Appeal disposed of.

I.L.R. [2011] M. P., 992

APPELLATE CIVIL

Before Mr. Justice Alok Aradhe

S.A. No. 141/2000 (Jabalpur) decided on 24 January, 2011

MOHAMMAD ISMAIL

...Appellant

Vs.

SIKHANDAR AZAD

...Respondent

A. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f)

- Ground for eviction - A landlord can not be non-suited on the ground that he has failed to disclose a ground for eviction in notice. (Para 6)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41) धारा 12(1)(एफ) — बेदखली का आधार — किसी भूस्वामी को इस आधार पर कि वह सूचना पत्र में बेदखली का आधार प्रकट करने में असफल रहा, वाद लाने से वर्जित नहीं किया जा सकता।

B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) - Alternative accommodation - Burden of proof - Plaintiff and his father stating that they do not have any alternative accommodation - The defendant has failed to prove that the plaintiff has any alternative accommodation - Held - The burden of proof shall be on the person who asserts the positive - Courts below erred in placing the burden of proof on the plaintiff and holding that he has no suitable alternative accommodation. (Para 6)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41) धारा 12(1)(एफ) — वैकल्पिक स्थान — सबूत का भार — वादी तथा उसके पिता ने कथन किया कि उनके पास कोई वैकल्पिक स्थान नहीं है — प्रतिवादी यह साबित करने में असफल रहा कि वादी के पास कोई वैकल्पिक स्थान है — अभिनिर्धारित — सबूत का भार उस व्यक्ति पर होगा है जो सकारात्मक प्राख्यान करता है — अधीनस्थ न्यायालयों ने वादी पर सबूत का भार रखने और यह अभिनिर्धारित करने में कि उसके पास कोई उपयुक्त वैकल्पिक स्थान नहीं है, त्रुटि की।

C. Civil Procedure Code (5 of 1908), Order 41 - Judgment in appeal - First appellate Court being the final Court of facts, must record its finding only after deciding the issues of law and facts - The appellate Court is under an obligation to give its reason in support of its conclusion. (Para 6)

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 — अपील में निर्णय — प्रथम अपीलीय न्यायालय को तथ्य का अंतिम न्यायालय होने के नाते विधि और तथ्य के विवाद्यक विनिश्चित करने के बाद ही अपने निष्कर्ष अभिलिखित करना चाहिए — अपीलीय न्यायालय अपने निष्कर्ष के समर्थन में कारण देने के लिए दायित्वाधीन है।

Cases referred :

AIR 1994 SC 2129, AIR 2000 SC 534, AIR 1989 SC 162, (2001) 7 SCC 189, (2001) 5 SCC 705, (2001) 4 SCC 262, (2010) 11 SCC 483, (2001) 4 SCC 756.

P.N. Pathak, for the appellant.

Suyash Tripathi, for the respondent.

J U D G M E N T

ALOK ARADHE, J. :- This appeal has been preferred by the plaintiff landlord whose suit for eviction has been dismissed. This Court vide order dated 11.5.2007 had admitted the appeal on the following substantial question of law:

"Whether the courts below have committed illegality in negating the genuine requirement of the plaintiff without applying the objective test?"

2. The relevant facts necessary to answer the question of law framed by this Court are that the appellant/plaintiff instituted a suit on 11.11.1987 seeking the decree for eviction on the ground enumerated under Section 12 (1) (a), (c), (f), (g) and (h) of the M.P. Accommodation Control Act, 1961 (in short 'the Act'). The plaintiff sought the decree under Section 12 (1) (f) on the ground that the plaintiff is unemployed and needs the suit accommodation bona fide for opening a general store and he has no alternative accommodation. The defendant filed the written statement in which inter alia, the bona fide need of the plaintiff was denied on the ground that the plaintiff is engaged in the business of selling the cattle feed and is running a shop in which bicycles are let out on rent and is not unemployed.

3. The trial Court vide judgment and decree dated 29.12.1992 inter alia, held that the plaintiff is running shop in which bicycles are let out on rent and he is not unemployed. It was also held that in notices Ex.s D-1 and D-2, dated 1.2.1985 and 27.7.1987, the bona fide need of the plaintiff's brother was set up. It was further held that the plaintiff has failed to prove that he has no alternative accommodation. Accordingly, the suit was dismissed. The plaintiff preferred an appeal against the decree of the trial Court only in so far as it related to his claim for eviction under Section 12 (1) (f) of the Act. The appellate Court vide judgment and decree dated 1.11.1999 inter alia, held that if the plaintiff would have needed the suit shop bona fide, he would not have set up the need of his brother in notices Ex.s D-1 and D-2. Without discussing the statements of Sikhandar, the defendant and Naresh Kumar defendant Witness No.-2 and merely by referring to their statements in paragraph 11 Appellate Court recorded a finding that the plaintiff is carrying on the business of sewing of mattress and quilts, letting out the bicycles on

rent and selling of cattle feed. Accordingly, the bona fide need of the plaintiff was not found to be proved. It was further held that though the plaintiff's father is carrying on the business in the shop situate in front of the house of the plaintiff and has stated that it is rented accommodation yet neither the rent receipts have been filed nor the landlord has been examined to prove that the accommodation where the business is carrying on by the plaintiff's father is rented accommodation. The plaintiff in paragraph 6 of his deposition has admitted that the shop situate in front of his house belongs to him therefore, the plaintiff has alternative accommodation. Accordingly, the decree passed by the trial Court was affirmed.

4. Shri P.N. Pathak, learned counsel for the appellant submitted that from the evidence on record it is established that the plaintiff is assisting his father in his business which is seasonal in nature. The findings recorded by the courts below that the plaintiff is carrying on the business is perverse and is based on misappreciation of evidence on record. Learned counsel for the appellant further submitted that he has filed an application under Order 41 Rule 27 of the CPC with which copy of the judgment and decree passed in the suit for eviction instituted against the plaintiff's father has been filed which shows that plaintiff's father was carrying on the business in the rented accommodation. In support of his submissions learned counsel has placed reliance in *K.S. Sundararaju Chettiar v. M.R. Ramachandra Naidu*, AIR 1994 SC 2129 and AIR 2000 SC 534. On the other hand, learned counsel for the respondent submitted that both the courts below on appreciation of the evidence on record have rightly held that bona fide need of the plaintiff is not genuine and no interference in exercise of power under Section 100 of the Code of Civil Procedure is called for.

5. I have considered the submissions made on both side. Vide order dated 20.1.2011 this Court has struck out the defence of the respondent defendant against eviction. However, still the plaintiff has to satisfy the court that he has fulfilled the statutory conditions which enable him to seek a decree for eviction. [See: *Modula India v. Kamakshya Singh Deo*, AIR 1989 SC 162] The jurisdiction of this Court to interfere with concurrent findings of fact is well defined by catena of decisions. If the courts have misread the material on record and have misdirected himself in the matter of legal principle and have wrongly cast burden on the plaintiff, this Court would be justified in interfering with the finding of the fact. [See: *Hafazat Hussain v. Abdul Majeed*, (2001) 7 SCC 189]. It is well settled in law that if while recording a finding the court

does not bear in mind the statutory mandate such finding would not be a mere finding of fact. [See: *Deenanath v. Pooranlal*, (2001) 5 SCC 705] Under Section 100 of the CPC interference with the finding of fact can be made if the finding is perverse. [See: *Kulwant Kaur and Others v. Gurdial Singh Mann (Dead) By Lrs.*, (2001) 4 SCC 262 and *Bharath Matha v. R. Vijaya Renganathan*, (2010) 11 SCC 483].

6. In the backdrop of well settled legal position facts of the case may be seen. The plaintiff who has been examined as plaintiff witness No.1 in paragraph 1 in his deposition has said that he is unemployed. In paragraph 11 of his deposition he has stated that cycle shop is run by his brother. He has further stated that he assists his father in his business of sewing of mattress and quilts which is seasonal in nature. Similarly plaintiff witness No.2, Ramprasad in paragraph 4 of his statement stated that the plaintiff assists his father in his business of sewing of mattress and quilts. Similarly plaintiff witness No.3- Mohd. Ibrahim, father of the plaintiff has stated that he is carrying on the business of sewing of mattress and quilts which is seasonal in nature and the plaintiff is unemployed. He has no alternative accommodation for business of his son. In paragraph 3 of the cross examination a suggestion has been given to Mohd. Ibrahim that the plaintiff assists him in his business of sewing mattress and quilts. However, by misreading the evidence on record the trial Court has recorded a finding that plaintiff is running a shop in which bicycles are let out. The first appellate Court which is the final court of facts must record its finding only after deciding the issues of law and facts. The appellate court is under an obligation to give its reason in support of its conclusion. The first appeal is a valuable right and the parties have right to be heard on question of law as well as question of fact. [See: *Madhukar and others v. Sangram and Others*, (2001) 4 SCC 756]. However, in the instant case the appellate Court without discussing the material evidence on record, merely by making a statement of DW-1 and DW-2 and even without assigning any reasonings, have recorded a conclusion that the plaintiff is engaged in business of sewing mattress and quilts. Merely, because in the notices Ex.D-1 and Ex.D-2 1.2.1985 and 26.6.1986 need of the brother was mentioned, no inference can be drawn that need of the plaintiff is not bona fide. The plaintiff has stated in his deposition that his brother is now running the shop in which bicycles are let out on rent. The suit has been filed on 11.11.1987. A landlord cannot be non-suited on the ground that he has failed to disclose a ground for eviction in notice even though in the suit he has proved the same. The plaintiff as well as his father has

stated that they do not have any alternative accommodation. The burden of proof is on the person who asserts the positive. The defendant has failed to prove that the plaintiff has any alternative accommodation. Therefore, the courts below have clearly erred in placing the burden of proof on the plaintiff and holding that he has no suitable alternative accommodation. No orders are necessary to be passed on the application under Order 41 Rule 27 as this Court has held that plaintiff has no alternative accommodation. Thus, the finding recorded by the courts below that need of the plaintiff is not bona fide is perverse.

7. Thus, it is apparent that the plaintiff has fulfilled the statutory mandate and has proved that he bona fide needs the suit accommodation and he has no other suitable alternative accommodation. Thus, the courts below have negatived the bona fide need of the plaintiff without applying the objective test. Thus, the substantial question of law framed by this Court has to be answered in the affirmative.

8. In the result, the appeal succeeds. The judgment and decree of the courts below are set aside and the plaintiff's suit for eviction under Section 12 (1) (f) of the Act is decreed with costs.

Appeal succeeds.

I.L.R. [2011] M. P., 997

APPELLATE CIVIL

Before Mr. Justice Alok Aradhe

S.A. No.319/1992 (Jabalpur) decided on 28 January, 2011

PRITHVIVALLABH & ors.

... Appellants

Vs.

CHANDRAKISHORE VYAS & ors.

... Respondents

A. Land Revenue Code, M.P. (20 of 1959), Section 158(1)(c), Bhopal State Land Revenue Act, 1932, Section 2(15) - Bhoomiswami - Nawab granted a Sanad (05.08.1945) in favour of original plaintiff subject to terms & conditions mentioned therein and was placed in possession - Original plaintiff was an 'occupant' under the Act of 1932 and became Bhoomiswami by operation of law on commencement of the Code, 1959. (Para 8)

क. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 158(1)(सी), भोपाल राज्य

भू राजस्व अधिनियम, 1932, धारा 2(15) - भूमिस्वामी - नवाब ने मूल वादी के पक्ष में सनद (05.08.1945) उसमें उल्लेखित निबंधनों और शर्तों के आधीन प्रदान की और कब्जा दे दिया गया - अधिनियम 1932 के अंतर्गत मूल वादी 'अधिभोगी' था और संहिता 1959 के क्रियान्वित होने पर विधि के प्रवर्तन द्वारा भूमिस्वामी बन गया।

B. Public Trusts Act, M.P. (30 of 1951), Sections 2(4) & 4 - Public Trust - Plaintiff claimed title in respect of temple in question and adjoining land on basis of 'Sanad' - Defendants pleaded their right to perform Pooja in the temple and right to manage the lands on basis of 'Hibanama' - Held - It is nobody's case that property in dispute belongs to a Trust - The property in dispute is not a trust property - Therefore, the Courts below committed an error in directing plaintiffs to make an application u/s 4. (Para 9)

ख. लोक न्यास अधिनियम, म.प्र. (1951 का 30), धाराएँ 2(4) व 4 - लोक न्यास - सनद के आधार पर वादी ने प्रश्नगत मंदिर एवं लगी हुई भूमि के संबंध में हक का दावा किया - प्रतिवादियों का हिवानामा के आधार पर मंदिर में पूजा करने और भूमियों के प्रबंध के अधिकार का अभिवाक् - अभिनिर्धारित - यह किसी का मामला नहीं कि विवादि सम्पत्ति न्यास की है - विवादित सम्पत्ति न्यास सम्पत्ति नहीं है - इसलिए, वादी को धारा 4 के अंतर्गत आवेदन करने का निर्देश देकर निचले न्यायालय ने त्रुटि की।

C. Civil Procedure Code (5 of 1908), Section 11 - Res judicata - Question involved in the instant appeal were neither raised nor decided while deciding the S.A. No.567/1992 on 23.06.1993 - Therefore, the order dated 23.06.1993 does not have the effect of res judicata. (Para 11)

ग. सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 - पूर्व न्याय - प्रस्तुत अपील में अंतर्गत प्रश्न को 23.06.1993 को एस.ए. नं. 567/1992 निर्णित करते समय ना तो उठाया गया और न ही निर्णित किया - इसलिए, दिनांक 23.06.1993 का आदेश पूर्व न्याय का प्रभाव नहीं रखता।

Cases referred :

AIR 2003 SC 649, AIR 2005 SC 2499, AIR 2005 SC 446, AIR 2006 SC 861, AIR 2006 Bom 50, AIR 2001 Madras 151, 2004 RN 22, AIR 2000 SC 2301.

Ravish Agrawal with K. Jha, for the appellants.

Atulanand Awasthy, for the respondent Nos.1 to 3.

Ashok Chourasiya, G.A., for the respondent No.4.

J U D G M E N T

ALOK ARADHE, J. :- This appeal has been preferred by the plaintiffs which arises out of suit for permanent injunction. This Court vide order dated 23.6.1993 had formulated the following substantial questions of law:-

"(1) Whether the grant/sanad (Ex.P/1) conferred exclusive title in favour of Niti Vallabh together with exclusive right of worship?

(2) Whether the plaintiffs became Bhumiswami of the property in dispute after coming into force of M.P. Land Revenue Code, 1959?

(3) Whether the finding that the property in dispute is a trust property is not based on any pleadings or evidence on record?

(4) Whether the courts below acted within their jurisdiction to direct the plaintiffs to make an application under section 4 of the M.P. Public Trusts Act?

(5) Whether the prior agreement of worship created any right in the property in dispute in favour of the defendants/respondents and against the plaintiffs?"

2. Facts giving rise to filing of the appeal are that on land admeasuring. 2.29 acres a Ganesh Temple is situate in city of Sehore. In respect of the land on which the temple is situate and the adjoining lands, erstwhile Nawab had granted a Sanad (Exhibit-P-1) dated 05.8.1945 in favour of the original plaintiff so that he can perform pooja in the temple and can maintain himself as well as manage the affairs of the temple from the income of the adjoining lands. Pursuant to the aforesaid grant, name of original plaintiff was entered in the revenue records as 'Maufidar'. However, defendants started interfering with the possession of the plaintiffs. Accordingly, in the suit relief of permanent injunction was sought.

3. Defendant No.1(b) i.e. daughter of Gopal Das, admitted the claim of the plaintiff. However, defendants No. 1 (a) & defendant No.2 contested the claim of the plaintiffs. In the written statement filed by them it was, inter alia, pleaded that one Chhoteram was pujari of temple in question which was built 300-400 years ago. After his death, one Hemraj and Krishnanand used to perform pooja in the temple. Hemraj had no son, therefore, during his

lifetime he handedover the management of the temple to Kanhaiyalal and original defendant No. 1 (Gopal Prasad) alternatively for one year each. Hemraj executed a registered gift deed in favour of original defendant No.1 by which management of the temple and possession of the adjoining land was handed over to defendant No.1. Thereafter, Kanhaiyalal and Gopal Prasad perform pooja every alternate year. Kanhaiyalal as well as Gopal Prasad had no son. Gopal Prasad, therefore, adopted defendant No.2, namely, his daughter's son vide adoption deed 13.9.1968. The original plaintiff and defendant no. 2 are entitled to perform pooja every alternate year.

4. The trial Court vide judgment and decree dated 16.1.1986 decreed the suit of the plaintiffs. It was held that in view of Exhibit-P-1 i.e. the 'Sanad', the plaintiff alone has the authority to manage the affairs of the temple and to manage the adjoining lands. Original plaintiff had handedover the work of performing pooja to defendant No. 1 on account of his illness. Thus, no right accrued in his favour. The land belongs to the temple and the temple is a public trust. The trial Court further directed the plaintiffs to file an application under section 4 of the M.P. Public Trust Act for getting the Trust registered as public trust. Accordingly, the suit was decreed.

5. Being aggrieved by the judgment and decree of the trial Court the plaintiffs as well as defendants preferred appeals, which were registered as Civil Appeal No.4-A/86 and 3-A/86 respectively. The aforesaid appeals were decided by the appellate court by a common judgment dated 13.7.1992. It was held that admittedly Nawab of Bhopal had issued a 'Sanad' (Ex.P-1) in favour of original plaintiff. Since 1945 the original plaintiff's name was recorded in the revenue records. On the basis of Ex.D-1 i.e. registered 'Hibanama' dated 14.11.1911 & D-2, it was held that prior to 1911, the affairs of the temple were managed by the two branches of the family, namely, Kanhaiyalal and Gopal Prasad. In 1911 the work of performance of pooja was handed over to Gopal Prasad, original defendant No. 1, which has been admitted by plaintiff in para 12 of his deposition. It was further held that the deceased defendant vide Ex.D-7 dated 13.9.1968 i.e. the registered gift deed conveyed his right to defendant No.2. Thus, after the death of Gopal Prasad also the plaintiffs as well as defendant No.2 had the right to perform pooja every alternate year. It was further held that temple in question is a public temple and trial Court has rightly directed the plaintiffs to move an application for its registration under M.P. Public.Trusts Act, 1951.

6. Against decree passed in Civil Appeal No.4A of 1986 the plaintiff preferred second appeal namely S.A. No.567/1992, in which the direction issued by the trial Court to the plaintiffs to make an application under Section 4 of the M.P. Public Trust Act, 1951, was assailed. The said appeal was dismissed by vide order dated 23.6.1993 which reads as under:

"Since the question of holding Pooja in the temple is purely a finding of fact which is not open to challenge in this second appeal and no substantial question of law is involved in the matter, the appeal does not merit admission. It is dismissed summarily."

Against the decree passed in Civil Appeal No.3A/1986, the instant appeal has been preferred, which was admitted on 23.6.1993, i.e. the same day on which other second appeal, namely. Second Appeal No.567/1992 was dismissed.

7. Learned senior counsel for the appellant contended that from perusal of Ex.P/1, it is graphically clear that lands were granted by erstwhile Nawab to original plaintiff Neti Vallabh. Since, Neti Vallabh was an occupant as defined under Section 2(15) of Bhopal State Land Revenue Act, 1932, on commencement of M. P. Land Revenue Code, 1959 by operation of Section 158(c), the original plaintiff become the Bhumiswami of suit lands. It was also submitted that all prior agreements with regard to worship stood superseded on execution of ExP/1 dated 5.8.1945. It was further submitted that it was no body's case that temple in question is a public trust, therefore, the Courts below erred in issuing the direction to the plaintiffs under Section 4 of the M.P. Public Trust Act, 1951. On the other hand, learned counsel for respondents submitted that vide Ex.P/1 lands were dedicated to the temple and earlier arrangements made in 1911 and 1933 were neither cancelled nor superseded. It was pointed that plaintiff namely P.W.1 has admitted in para 1 of his deposition that lands were allotted to Ganesh Temple and original plaintiff only had the right to perform pooja. The order dated 23.6.1993 passed in Second Appeal No.567/1992 would have the effect of res judicata. However, it is submitted that Courts below erred in issuing the direction to the plaintiffs to move an application under Section 4 of M.P. Public Trust Act 1951, as it was no body's case that temple in question is a public trust. In support of his submissions, learned counsel has placed reliance on decisions in *C. V. Rajendran and another Vs. N. M. Muhammed Kunhi*, AIR 2003

SC 649, *M/s. Makhija Construction & Enggr. Pvt. Ltd., Vs. Indore Development Authority and others*, AIR 2005 SC 2499, *U.P. State Road Transport Corporation Vs. State of U.P. and another*, AIR 2005 SC 446, *Sarat Chandra Mishra and others Vs. State of Orissa and others*, AIR 2006 SC 861, *Nariman Point Association and another Vs. Union of India and others*, AIR 2006 Bombay 50, *Alwar Chettiar etc., Vs. Natrajan Pillai and others* AIR 2001 Madras 151 and *Jamana Prasad Vs. State of M.P.*, 2004 RN 22.

8. I have considered the submissions made by learned counsel for parties. To ascertain the question whether the grant vide Ex.P/1 dated 5.8.1945 was made in favour of the temple or in favour of original plaintiff Netivallabh close scrutiny of Ex.P/1 is required. The contents of Ex.P/1 reveal that land ad-measuring 4.31 acres was granted to Kanhaiyalal who was the Pujari of the temple on 3.11.1993. He expired on 28.12.1943. Therefore, the land was settled in favour of original plaintiff Netivallabh subject to terms and conditions mentioned therein and he was placed in possession thereof. Section 2(15) of the Bhopal State Land Revenue Act, 1932 defines the expression 'occupant' to mean a person who holds land direct from Government or would do so but for the right of collecting land revenue having been assigned or relinquished. Thus, the original plaintiff was an occupant under the Bhopal State Land Revenue Act, 1932. Section 158(1)(c) of the M. P. Land Revenue Code, 1959 provides that every person who holds the land in Bhopal region as an occupant as defined in Bhopal State Land Revenue Act, 1932 shall become Bhoomiswami. Thus, by operation of law on commencement of M.P. Land Revenue Code, 1959, the original plaintiff became Bhoomiswami of the suit land. This conclusion finds support from the khasra entries, namely, Ex. P/6 to P/11 in which the name of Netivallabh is recorded as owner and he is shown to be in possession. Thus, for aforementioned reasons, the first and second substantial questions of law have to be answered in the affirmative and in favour of the plaintiffs.

9. From perusal of averments made in paragraph 2 of the plaint it is graphically clear that the plaintiffs have claimed title in respect of temple in question and adjoining lands on the basis of 'Sanad' Exhibit-P-1 dated 05.8.1945. On the other hand the defendant No.1 (a)(1) & 2 have pleaded in their written statement that by registered 'Hibanama' dated 14.11.1911 (Ex.D-1), right to perform pooja in the temple and right to manage the lands were conveyed to deceased defendant No. 1. It is also averred that defendants have right to perform the

'pooja' alternate years along with plaintiffs. From perusal of the pleading of the parties, it is clear that it is nobody's case that property in dispute belongs to a Trust. For the aforementioned reasons it is held that property in dispute is not a trust property. Accordingly, the third substantial question of law is answered. Since, the temple in question as well as the adjoining land does not belong to the trust, therefore, the Courts below committed an error in directing the plaintiffs to make an application under section 4 of M.P. Public Trusts Act, 1951. The fourth substantial question of law is answered accordingly.

10. In preceding paragraph it has already been held that in view of 'Sanad' Exhibit-P-1 dated 05.8.1945, on commencement of M.P. Land Revenue Code, 1959, the original plaintiff had become the owner of the lands in question and his right to perform Pooja in the temple was acknowledged vide Ex.P/1 dated 5.8.1945. Therefore, any right created under prior agreement of worship stood extinguished. Therefore, the prior agreement of worship did not create any right in favour of defendants in respect of the property in dispute. Accordingly, the fifth substantial question of law is answered.

11. Before parting with the case, it is apposite to deal with the submissions made by learned counsel for the respondents with regard to the effect of the order dated 23.6.1993 passed in Second Appeal No.567/1992. Both the second appeals as stated supra were heard on the same date i.e. 23.6.1993. From perusal of memo of appeal of Civil Appeal No.4A/1986, it is apparent that the plaintiff had only challenged the decree passed in Civil Appeal No.4A/1986 on the ground that the trial Court erred in law in issuing a direction to the plaintiff to move an application under Section 4 of the M.P. Public Trust Act, 1951. The appeal was dismissed summarily on the ground that the question of performing the Pooja in the temple is purely a finding of fact which is not open to challenge in the second appeal. Thus, the appeal was dismissed. The issues which were involved in the instant appeal were neither raised nor decided in the aforesaid second appeal vide order dated 23.6.1993. It is well settled in law that decision on an issue would operate as res judicata only if the same is raised and decided. [See: *Madhvi Amma Bhawani Amma Bhawani Amma and others Vs. Kunjikutty Pillai Meenakshi Pillai and others*, AIR 2000 SC 2301]. From perusal of the order dated 23.6.1993, it is apparent that the question involved in the instant appeal were neither raised nor decided while deciding the Second Appeal No.567/1992. Therefore, the order dated 23.6.1993 does not have the effect of res judicata in the instant appeal.

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12. For the aforementioned reasons, the judgment and decree passed by the lower appellate court is set aside and that of the trial court is restored with the modification that the direction contained in the decree of the trial Court to the plaintiffs to make an application under Section 4 of the M. P. Public Trust Act, 1951 is set aside. In the result, the appeal succeeds and is allowed with costs.

Appeal allowed.

I.L.R. [2011] M. P., 1004

APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saxena & Mr. Justice G.S. Solanki

Cr.A. No.81/2001 (Jabalpur) decided on 19 August, 2010

JAGDISH CHANDRA RAIKWAR

... Appellant

Vs.

STATE OF M.P.

... Respondent

A. Prevention of Corruption Act (49 of 1988), Sections 7 & 13(1)(d) - Motive - Appellant/accused, though not competent to grant Patta but was an important person in survey party and therefore complainant and other members of Mohalla had impression that appellant will be helpful person in process of granting the Patta - It can not be said that there was no opportunity or motive to receive the bribe by appellant/accused. (Para 20)

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7 व 13(1)(डी) - हेतु - यद्यपि अपीलार्थी/अभियुक्त पट्टा प्रदान करने के लिए सक्षम नहीं, परन्तु सर्वेक्षण पक्ष में महत्वपूर्ण व्यक्ति था और इसलिए मोहल्ले के अन्य सदस्य इस धारणा में थे कि पट्टा प्रदान करने की प्रक्रिया में अपीलार्थी मददगार व्यक्ति होगा - यह नहीं कहा जा सकता कि अपीलार्थी/अभियुक्त द्वारा रिश्वत प्राप्त करने का कोई अवसर अथवा हेतु नहीं था।

B. Evidence Act (1 of 1872), Section 3 - Proof - Conversation recorded in cassette not audible before Court - Held - Despite non-audibility of cassette, the fact of demanding bribe can be established by oral evidence of complainant and Panch witnesses. (Para 26)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 3 - सबूत - कैसेट में रिकार्ड की गई बातचीत, न्यायालय के समक्ष कर्णगोचर नहीं - अभिनिर्धारित - कैसेट के कर्णगोचर न होते हुए भी, रिश्वत की मांग का तथ्य, शिकायतकर्ता एवं पंच साक्षियों के मौखिक साक्ष्य से स्थापित किया जा सकता है।

C. Prevention of Corruption Act (49 of 1988), Sections 7 & 13(1)(d) r/w Section 13(2) - Demand & acceptance of bribe money - Complainant and other witnesses deposing about the demand and acceptance of money by appellant - Bribe money also recovered from drawer of seat of appellant - Presence of phenolphthalein powder was found in fingers of appellant during the trap process - Held - No further burden is cast on the prosecution to prove the demand or motive by direct evidence - Prosecution succeeded in proving the demand and acceptance of bribe money by appellant/accused - Conviction affirmed. (Paras 41 & 44)

ग. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7 व 13(1)(डी) सहपठित धारा 13(2) - रिश्वत के पैसों की मांग व स्वीकृति - अपीलार्थी द्वारा पैसों की मांग एवं स्वीकृति के बारे में शिकायतकर्ता और अन्य साक्षियों के कथन - रिश्वत के पैसे अपीलार्थी की सीट की दराज में से बरामद भी हुए - ट्रेप प्रक्रिया के दौरान अपीलार्थी की अंगुलियों पर फिनाल्फथलीन पाउडर की उपस्थिति भी पाई गई - अभिनिर्धारित - प्रत्यक्ष साक्ष्य द्वारा मांग अथवा हेतु साबित करने का अभियोजन पर कोई और भार नहीं बनता - अभियोजन, अपीलार्थी/अभियुक्त द्वारा रिश्वत के पैसों की मांग एवं स्वीकृति साबित करने में सफल - दोषसिद्धि की पुष्टि की गई।

Cases referred :

AIR 1968 Kerala 60, AIR 1994 SC 1538, (2005) 6 SCC 211, 2003 SCC (Criminal) 1008, AIR 2000 SC 3377, (2007) 8 SCC 309, (2006) 12 SCC 277, AIR 1991 SC 1853, AIR 1992 SC 644, AIR 1974 SC 218, (2009) 9 SCC 752.

H.S. Dubey, for the appellant.

Aditya Adhikari, for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by :
G.S. SOLANKI, J. :- The appellant has filed this appeal against the judgment dated 9.1.2001 passed by the Spécial Judge (Prevention of Corruption Act), Jabalpur in Special Case No. 3/1999, convicting him under Sections 7 and 13(1)(d) read with Section 13(2) of Prevention of Corruption Act and sentencing him to rigorous imprisonment for two years with fine of Rs. 3,000/-, in default, rigorous imprisonment for six months; and rigorous imprisonment for two years with fine of Rs. 3,000/-, in default, rigorous imprisonment for six months respectively. Substantive sentences directed to run concurrently.

2. It is not disputed that appellant Jagdish Chandra Raikwar was posted as Revenue Inspector (Nazul) on 26.12.1976. It is also undisputed that he was a member of survey party constituted under Scheme called Rajeev Gandhi Ashray Yojana, to grant Patta to Urban Homeless Poor Persons, who were living before 31.5.1998.

3. In short, the prosecution case is that complainant Shiv Balak Patel (PW4) was living in the hut which was situated, on Nazul Land, at Bagdadafai, Polipathar, Jabalpur. His hut was damaged in earth quake, in the year of 1997. He was constructing a house at the same place, where his hut was situated earlier. In the month of May 1998, appellant Jagdish Chandra Raikwar surveyed this area and threatened complainant to demolish his under construction house.

4. On 24.8.98, complainant Shiv Balak (PW4) requested the appellant to grant him Patta but appellant/accused demanded bribe of rupees five thousand for this purpose. Complainant was not interested to give bribe, therefore, on 25.8.98 he lodged a written report Ex.P/20 to the Superintendent of Police, Special Police Establishment (Lokayukt), Jabalpur. A tape recorder and cassette were provided to complainant Shiv Balak for recording the conversation regarding demand of bribe. On same day complainant Shiv Balak again met appellant in his Office at Room No. 20 of Collectorate and recorded the conversation about demand of bribe. Appellant demanded rupees five thousandf, which first installment was to be paid on 26.8.98. Complainant Shiv Balak deposited the above mentioned tape recorder and cassette on 26.8.1998 in the office of Superintendent of Police, Special Police Establishment, Lokayukt, Jabalpur.

5. M.B.S.Jaggi (PW12), DSP, Special Police Establishment (Lokayukt) called panch witnesses Ramesh Singh Jain (PW3) and G.R. Chandoriya (PW1), who verified the complaint Ex. P/20, and a transcript Ex.P/1 was prepared, from recorded cassette. Then crime was registered vide Ex.P/27. Complainant gave two currency notes of denomination of Rs. 500/- and ten currency notes of denomination of Rs. 100/-. Panchnama Ex.P/4 was prepared in this regard. Initial of Panch witness Ramesh Chandra was taken on the currency notes, and notes were treated with phenolphthalein powder. Preliminary Panchnama EX.P/ 7 was prepared. Complainant was instructed to give signal after acceptance of bribe by appellant.

6. On 26.8.98 at about 1.10 trap was arranged. On the signal of complainant

Shiv Balak (PW4) trap party alongwith Panch witnesses entered in the room of appellant, then complainant Shiv Balak told that he gave currency notes to co-accused Kanhaiyalal Burman (acquitted) on the instruction of appellant Jagdish Chandra Raikwar. Appellant took currency notes from co-accused Kanhaiyalal and concealed them underneath his seat. He further informed that appellant Jagdish Chandra Raikwar got his three signatures on Patta and in concerning register. Trap party caught hold appellant and prepared the solution of Sodium Carbonate, in which hands of appellant Jagdish Raikwar and co-accused Kanhaiyalal were washed, color of solution turned light pink. Same was filled in bottles. Bottles were sealed in presence of Panch witnesses. Panch witness Ramesh Chandra Jain (PW3) took currency notes out from underneath the seat of appellant which bore the initials of panch witnesses and tallied with numbers of preliminary panchnama. Thereafter same were seized vide memo Ex.P/9.

7. M.B.S.Jaggi (PW12), Investigating Officer, seized an application of complainant Shiv Balak (PW4) regarding grant of Patta, two photographs of complainant and one photograph of complainant's wife Shakuntala, Survey Book regarding Rajeev Gandhi Scheme 1998, from the possession of appellant and prepared the seizure memo Ex.P/14. A diary from possession of the appellant was also seized vide Ex.P/15. Appellant was arrested vide Ex.P/17. Panchnama of whole proceedings was prepared vide Ex.P/18. Bottles of solution seized during trap proceeding were sent to Forensic Science Laboratory, Sagar vide memo EX.P/13. Assistant Chemical Examiner of FSL, Sagar opined vide report EX.P/34, presence of phenolphthalein and sodium carbonate, in the solution, said to be of washed hands of the appellant and co-accused Kanhaiyalal. After getting prosecution sanctioned vide EX.P/19, appellant and co-accused were charge-sheeted.

8. Learned Special Judge framed charges under Sections 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act against appellant. He abjured his guilt and pleaded that he was not competent to issue Patta in favour of complainant. He never demanded bribe and stated that trap money was never recovered from his possession. He further stated that house of complainant was constructed after 31.5.98 and it was encroachment on the Nazul land. He reported the matter to Collector, Jabalpur in July 1998 thereby Revenue Case No. 58/A-68/97-98 was registered under Section 148 M.P. Land Revenue Code against complainant. He was convicted and sentenced to pay fine of Rs. 500/-. An order of dispossession was passed against him.

Due to this fact complainant had grouse/ malice against him. According to him, complainant Shiv Balak (PW4) was not entitled to get Patta and he never filled form in this regard. He further stated that an unknown person inquired about S.D.M. Office and shook hands with him. Just after this incident, he was trapped and falsely implicated.

9. After appraisal of the evidence on record, learned Special Judge acquitted the co-accused Kanhaiyalal Burman of the charge levelled against him and convicted and sentenced appellant/accused as mentioned above.

10. Learned counsel for the appellant submitted that appellant was not competent to grant Patta as well as complainant Shiv Balak (PW4) was not entitled to get Patta, therefore, there was no opportunity to receive bribe and prosecution failed to prove motive. He further contended that bribe money was not seized from possession of the appellant. Since complainant Shiv Balak was convicted on the encroachment report of appellant, therefore due to enmity complainant concocted false story of trap.

11. On the other hand, learned counsel for the State justified and supported the impugned judgment and the finding of the trial Court.

12. We have perused the impugned judgment, evidence and the other materials on record.

13. We consider the submission's made by learned counsel for appellant one by one. (First submission was that appellant was not competent to grant Patta as well as complainant Shiv Balak (PW4) was not entitled to get the Patta).

14. Santosh Kumar Sharma (PW8) stated that in 1998 Collector, Jabalpur vide order Ex.P/24, appointed him as incharge of survey party regarding grant of Patta in Polipathar area. Appellant/accused Jagdish Chandra Raikwar was a member of survey party. During survey they found that house of complainant Shiv Balak (PW4) was under construction. They measured the plot area of his house and prepared the map. According to him, appellant/accused was doing the work of filling up the form. Santosh Kumar admitted that since house of Shiv Balak was under Construction, therefore, Shiv Balak (PW4) did not fill up the form. He admitted that as per rule Shiv Balak was not entitled to get Patta. He further admitted that they have to submit survey report to Collector, who may grant Patta after verification of survey report.

15. Sharda Pillai (PW5) stated that house of Shiv Balak was damaged due to earth quake on 22.5.1997. During survey appellant/accused had come-in his Mohalla. Photograph of Shiv Balak was prepared and a form regarding grant Patta was also filled up by Shiv Balak. He admitted that Shiv Balak was a tenant of Laxman Kol.

16. Hanuman Prasad Patel (PW6) deposed that appellant/accused surveyed his Mohalla, in connection of grant of Patta. He also deposed that house of Shiv Balak was damaged in earth quake. He admitted that Shiv Balak was trying to construct new house on Government land.

17. Hanuman Prasad Patel (PW6) and Sharda Pillai (PW5) are the witnesses of Mohalla committee which was constituted during survey of Polipathar area. Therefore, this fact is established from their statements that appellant/accused was a member of survey party and he was the only person who filled up the forms in connection with grant of Patta. It also established by the evidence of Santosh Kumar Sharma (PW8) that plot of Shiv Balak was measured and a map was prepared in this regard. This fact further finds support from the field book which was seized from the office of appellant. At item no. 28 of field book, an entry of measurement of complainant's house was made with the remark that house was found under construction.

18. As Santosh Kumar Sharma (PW8), admitted that complainant Shiv Balak was not entitled to get Patta, and process of Patta was to be started after submission of the survey report, it shows that at the time of survey, appellant/accused was not competent to grant Patta. But from the evidence of Mohalla Samiti Members Sharda Pillai (PW5) and Hanuman Prasad Patel (PW6), it is proved that appellant/accused was an important member of survey party who filled up the forms regarding Patta and his field book showed that he measured the disputed house and a map was also prepared.

19. In these circumstances, members of Mohalla Samiti and the complainant were under impression that appellant is an important person, whose report is helpful in getting Patta. In same facts situation, in AIR 1968 Kerala 60, *Cherian Lukose Vs. State of Kerala*, the Kerala High Court observed that though nurse was not competent to allot the bed but her role for allotment of bed was important and general public had an impression that she was important person who could help in allotment so to offer bribe to her.

20. Same position is in the instant case. Though appellant/accused was

not competent to grant Patta but he was an important person in survey party, who filled up the forms, therefore, complainant and other members of Mohalla, had an impression that appellant will be the helpful person in the process of granting the Patta. This fact further finds Support from the register and the blank form of Patta on which appellant took the signature of complainant, which was seized from the possession of appellant/accused vide Ex.P/14. In these circumstances, it cannot be said that there was no opportunity or motive to receive the bribe by appellant/accused.

21. Learned counsel for the appellant argued that signatures of complainant on register and blank form were taken by investigating officer to cook up the case against appellant, but investigating officer, M.B.S. Jaggi (PW12) specifically Stated that he seized the said documents from the possession of appellant/accused in presence of Panch witnesses. Panch witnesses G.R. Chandoria (PW1) and Ramesh Chandra Jain (PW3) also supported his version. This fact substantially corroborated by panchnama which was prepared during course of trap. In these circumstances, argument of learned counsel has no force.

22. On the contrary, learned counsel for the State argued that despite knowing the fact that complainant was not entitled to get Patta, by getting signatures and photographs of complainant, appellant/accused tried to mislead him for squeezing out the money.

23. Learned counsel for the appellant argued that prosecution has utterly failed to prove demand and acceptance of bribe. He relied on following pronouncements of Apex Court AIR 1994 SC 1538, Babulal Bajpai Vs. State of U.P., 2005 (6) SCC 211, *Ganga Kumar Shrivastava Vs. State of Bihar*, 2003 SCC (Criminal) 1008, *State of U.P. Vs. Jagdish Singh Malhotra*, AIR 2000 SC 3377, *Smt. Meena Balwant Hemke Vs. State of Maharashtra* and 2007 (8) SCC 309, *G.S. Naik Vs. State of Karnataka*.

24. On the other hand, learned counsel for the respondent/State submitted that when it is proved that there was voluntarily and conscious acceptance of money by the accused, there is no further burden cast on prosecution to prove by direct evidence, the demand or motive. It has only to be deduced from the facts and circumstances of particular case. He relied on 2006 (12) SCC 277, *B. Noha Vs. State of Kerala and another*.

25. It is true that in the present case conversation regarding demand

of bribe, recorded in cassette was not audible before the Court. However complainant Shiv Balak (PW4) deposed that after measuring his disputed house appellant/accused called him in his office. When he met him he demanded Rs. 5,000/- in lieu of granting the Patta. He further deposed that despite his request appellant did not agree to reduce the amount, he gave Rs.2,000/- to him and for remaining amount of Rs. 3,000/-he agreed to be given after making the Patta. He made a complaint to Lokayukt Police vide complaint Ex. P/20 for the said purpose. After deposing above mentioned facts in chief examination, his cross-examination was deferred on the request of appellant/accused and after three months he resiled from his statement and deposed that appellant did not demand money from him but some other person demanded money, but he admitted his signature on report Ex.P/20, as well as on re-examination by prosecutor, he admitted that report Ex.P/20 was lodged by him and a cassette for recording the conversation regarding demand of bribe was provided him by Lokayukt Police. After recording the conversation he filed the application Ex.P/2 before the Lokayukt Police.

26. Ramesh Chandra Jain (PW3) corroborated the version of complainant and deposed that application Ex.P/2 was read over by him to complainant. He had made an endorsement with his signature on the same. Another panch witness G.R. Chandoriya (PW1) deposed that complainant told him that appellant Jagdish Chandra Raikwar demanded money for granting the Patta therefore, he wanted to get him trapped red handed. First report lodged by complainant is Ex.P/20 and Ex.P/2 is the second application filed by complainant after recording of the cassette. They substantially corroborate the demand of bribe by appellant/accused. This fact stands further corroborated by M.B.S. Jaggi, Investigating Officer (PW12), who registered the offence vide Ex.P/27 on the basis of Ex.P/2, application filed by complainant Shiv Balak (PW4). In these circumstances, despite non-audibility of cassette, the fact of demanding bribe is established by the oral evidence of complainant and panch witnesses.

27. Now we have to examine that whether prosecution succeeded in proving the fact of acceptance? Complainant Shiv Balak (PW4) stated in his examination-in-chief that when trap was arranged he gave the currency notes to trap party, notes were smeared with phenolphthalein powder and preliminary pañchnama vide Ex. P/7 was prepared before panch witnesses. This fact was corroborated by investigating officer, M.B.S. Jaggi (PW12) and panch witnesses G.R. Chandoria (PW1) and Ramesh Chandra Jain (PW3).

Further complainant deposed that when he reached to the room of appellant, he was not on his seat so he waited; after five minutes appellant Jagdish returned to his seat, then he gave him bribe notes of Rs.2,000/-. Appellant directed co-accused Kanhaiyalal to count them, who after counting returned same to the appellant. According to complainant Shiv Balak (PW4), on his signal the trap party came and caught him. He further stated that bribe notes were seized from drawer of seat of appellant.

28. Investigating Officer, M.B.S. Jaggi (PW12), Panch witness Ramesh Chandra Jain (PW3) and other panch witness G.R.Chandoriya (PW1), categorically stated that on signal of complainant, they entered into room and caught hold of the appellant and co-accused Kanhaiyalal and after inquiry trap party seized the bribe money kept underneath of the seat of appellant and prepared the seizure memo Ex.P/9. Investigating Officer, M.B.S. Jaggi further stated that fingers of appellant Jagdish were washed in the solution of Sodium Carbonate which turned to light pink which was filled in bottle, same was sealed and seized vide seizure memo Ex.P/8. This fact was corroborated by panch witnesses G.R. Chandoria(PW1) and Ramesh Chandra Jain (PW3). Despite turning hostile complainant also supported this fact in his statement in para-13.

29. Regarding seizure of money from the seat of appellant, there are some variations in the statements of panch witnesses and investigating officer. Panch witnesses G.R. Chandoriya (PW1) and Ramesh Chandra Jain (PW3) admitted that they did not know about the fact that seat belonged to the appellant from where the notes were seized, but investigating officer, M.B.S. Jaggi (PW12) specifically stated that bribe money was seized from the seat of appellant, complainant Shiv Balak (PW4) stated that money was seized from drawer of the seat of appellant. Presence of phenolphthalein powder was found in fingers of appellant during the trap process which was substantially proved by investigating officer M.B.S. Jaggi (PW12) and panch witnesses G.R. Chandoriya (PW1) and Ramesh Chandra Jain (PW3) and by FSL report of Chemical Examiner Ex.P/34 and further corroborated by final panchnama which was prepared at the time of trap. In these circumstances, the question that seat belonged to whom became immaterial.

30. Learned counsel for the appellant argued that complainant was declared hostile by prosecution, hence his testimony had no value. It is true that complainant was declared hostile by prosecution but after completing his

examination-in-chief, cross examination was deferred on the request of appellant/ accused. His examination-in-chief was completed on 2.11.1999 and he was cross examined on 7.8.2000; approximately after three month's. Trial Court held that complainant was won over by appellant, following the principle laid down by Hon'ble Apex Court in AIR 1991 SC 1853, *Khujji @ Alias Surendra Triwari Vs. State of Madhya Pradesh*. We are also of the view that complainant was won over by appellant and he tried his level best to escape from criminal liability.

31. Moreover despite being hostile, complainant Shiv Balak admitted in his cross-examination (para-13) that when hands of appellant were washed in colorless solution, same turned to light pink. This admission lends assurance that fingers of appellant were washed in Sodium Carbonate and color of solution was turned to pink at the time of trap proceeding. He thus supported the factum of acceptance of bribe by the appellant.

32. Learned counsel for the appellant argued that complainant Shiv Balak (PW4) admitted hand shaking with appellant and there is a possibility that accused could have also come into contact with the particles of phenolphthalein. He place reliance on *Meena Balwant Hemke's Case* (supra). The facts of that case were different. In that case accused pushed away the phenolphthalein treated currency notes by his hands during process of seizure, but such facts are not in instant case. Firstly complainant Shiv Balak (PW4) admitted the fact of hand shaking, after he turned hostile, secondly preliminary plea of appellant was that an unknown person shook hands with him just before trap proceeding. It is to be noted that complainant was not unknown to appellant because appellant knew him since survey and encroachment proceeding. In these circumstances, plea of shaking hands with complainant is clearly an after thought.

33. In *Babulal Bajpai's Case* (supra) complainant tried to thrust money in pocket of accused, who resisted and threw the same on floor. This version of accused was supported by independent witnesses. Clubbed with the facts that no bill of complainant/contractor was pending with accused, in above said fact situation; Hon'ble Apex Court allowed the appellant's appeal. Facts of the instant case are not identical to above case as we discussed hereinabove. that in this case appellant obtained money from complainant by giving impression that he is helpful in granting the Patta.

34. In *Ganga Kumar Shrivastava's case* (supra) phenolphthalein powder

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was not used during trap, therefore, oral evidence which was dubious in character, was not found reliable, but in instant case phenolphthalein powder was not only used but presence of phenolphthalein was found in the solution of hand was of appellant.

35. In *State of U.P. Vs. Jagdish Singh Malhotra's case* (supra) plea of accused was that he shook hands with the officers of trap party and phenolphthalein crystals could have come on his hands during that time, but such facts are not in instant case. As well as we have discussed hereinabove that appellant himself took a different plea that he shook hands with unknown person. In these circumstances, ratio of this case is not applicable to the facts of instant case.

36. In *G. S. Naik's Case* (supra) currency notes smeared with phenolphthalein powder had not been touched by appellant. Moreover, Hon'ble Apex Court observed that finding of facts arrived at by trial court on appreciation of evidence was a possible view and, therefore, High Court in appeal, against acquittal was not justified in interfering therewith on the ground that a different view was possible. In this case, presence of phenolphthalein was found in wash of hand of appellant. We are not differing with the view taken by trial Court, therefore, ratio of this case is not applicable to instant case.

37. Last contention of learned counsel for the appellant was that since complainant Shiv Balak (PW4) was convicted on the encroachment report of appellant, therefore, due to enmity he falsely implicated the appellant.

38. K.K. Tripathi (DW2) deposed that complainant Shiv Balak (PW4) was convicted in encroachment case and fine of Rs. 500/- was imposed on him under Section 148 of M.P. Land Revenue Code. He further stated that encroachment was reported by appellant Jagdish Chandra Raikwar on 1.7.1998 vide report Ex.D/2 but he admitted that final judgment of Tehsildar was passed on 5.6.2000, it means after two years of incident, therefore, it cannot be said that complainant was convicted before the incident. However, it is proved that appellant reported encroachment of complainant on Nazul land, but, as we have discussed hereinabove that despite encroachment appellant measured disputed under-constructed house of complainant and gave an impression that he may be helpful in granting the Patta. In these circumstances, it cannot be said that appellant was falsely implicated due to enmity.

39. Learned counsel for the appellant also argued that Panch witnesses Ramesh Chandra Jain (PW3) and G.R. Chandoria (PW1) admitted that they were the panch witnesses in two three cases, therefore they were not, independent witnesses and their testimony could not be accepted. He relied on AIR1992 SC 644, *Ayyasami Vs. State of Tamil Nadu* and AIR 1974 SC 218, *Darshan Lal Vs. The Delhi Administration*. In *Darshanlal's case* (supra), panch witness was a partisan witness and a complaint against him was being investigated by the appellant/accused but such situation is not in the instant case.

40. In *Ayyasami's case* (supra), the chemical solution was not turned pink and there was no independent witness of recovery, but in instant case chemical solution turned light pink and this fact stood duly corroborated by the version of complainant, panch witnesses and investigating officer. Being panch witnesses in two three cases, is itself not a ground to discard the testimony of independent witnesses.

41. On careful scanning of evidence on record, we find that there was voluntarily acceptance of money by the appellant/accused, hence there is no further burden cast on the prosecution to prove by direct evidence, the demand or motive. From the facts and circumstances of the case, it can be safely deduced that appellant/accused by giving impression that he is an important person during process of granting Patta, obtained bribe money from complainant.

42. Further there is no case of appellant/accused that said amount was received by him as the amount which he was legally entitled to receive or collect from complainant Shiv Balak (PW4).

43. As it was held by Apex Court in *State of A.P. Vs. Kommaraju Gopala Krishna Murthy*, 2009 (9) SCC 752 that when an amount is found to have been passed to the public servant, the burden is on public servant to establish that it was not by way of illegal gratification. Such burden was not discharged by the appellant/accused in this case.

44. In these circumstances, in our opinion, the prosecution succeeded in proving, the demand and acceptance of bribe money by appellant/accused and trial Court did not commit any error, in recording the finding of conviction against the appellant/accused, therefore, we affirm the finding of conviction recorded by the trial Court.

45. Regarding sentence, considering, the nature of the accusations, it would be appropriate to reduce the sentence of appellant to the minimum prescribed under the statute. In other words it shall be six months rigorous imprisonment for Section 7 and one year rigorous imprisonment for Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act. Sentence of fine is affirmed. Both the sentences of imprisonment shall run concurrent.

46. The appeal is dismissed, except to the extent of modification of sentence as noted above.

Appeal dismissed.

I.L.R. [2011] M. P., 1016

APPELLATE CRIMINAL

Before Mr. Justice A.K. Shrivastava & Mr. Justice Brij Kishore Dube

Cr.A. No.235/2001 (Gwalior) decided on 9 November, 2010

SIDDAR KHAN & ors.

... Appellants

Vs.

STATE OF M.P.

... Respondent

A. Penal Code (45 of 1860), Section 34 - Common intention - Appellant No.4 came on the spot along with Dharja but neither assaulted the deceased nor provoked or exhorted other appellants to kill deceased - Role assigned to A-4 would not come within purview of Section 34. (Para 24)

क. दण्ड संहिता (1860 का 45), धारा 34 - सामान्य आशय - अपीलार्थी क्र. 4 धारिया के साथ घटनास्थल पर आया किन्तु न तो मृतक पर हमला किया और न ही मृतक की हत्या करने के लिए अन्य अपीलार्थियों को उत्तेजित या प्रेरित किया - ए-4 को समनुदेशित कार्य धारा 34 की परिधि में नहीं आयेगा।

B. Penal Code (45 of 1860), Section 302, Evidence Act, 1872, Section 8 - Murder - Motive - Motive is insignificant where the case of prosecution rests on direct evidence. (Para 27)

ख. दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम, 1872, धारा 8 - हत्या - हेतु - जहाँ अभियोजन का मामला प्रत्यक्ष साक्ष्य पर आधारित हो वहाँ हेतु निरर्थक है।

C. Penal Code (45 of 1860), Sections 34 & 324 - Common intention to cause injury - A-4 caused injury to injured witness by means

of Dharia - No evidence that other appellants shared common intention to cause injury to injured witness - A-1 to A-3 wrongly convicted u/s 324/34 IPC - A-4 convicted u/s 324 IPC. (Para 28)

ग. दण्ड संहिता (1860 का 45), धाराएँ 34 व 324 — क्षति कारित करने का सामान्य आशय — ए-4 ने क्षतिग्रस्त साक्षी को धारिया के साधन द्वारा क्षति कारित की — कोई साक्ष्य नहीं कि अन्य अपीलार्थियों ने क्षतिग्रस्त साक्षी को क्षति कारित करने के सामान्य आशय में भाग लिया — ए-1 से ए-3 भा.द.सं. की धारा 324/34 के अन्तर्गत गलत ढंग से दोषसिद्ध — ए-4 भा.द.सं. की धारा 324 के अन्तर्गत दोषसिद्ध।

Case referred :

AIR 2004 SC 1264.

Sanjay Gupta & Atul Gupta, for the appellants.

C.S. Dixit, P.P., for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by :
A.K. SHRIVASTAVA, J. :- Feeling aggrieved by the judgment of conviction and order of sentence dated 17.4.2001 passed by learned Sessions Judge, Bhind, in Sessions Trial No.142/1999 convicting appellants under Section 302/34 as well as under Section 324/34 of IPC and thereby sentencing them to suffer imprisonment as mentioned in the impugned judgment, the appellants have knocked the doors of this Court by preferring this appeal under Section 374(2) of the Code of Criminal Procedure, 1973.

2. In brief, the case of prosecution is that there is enmity between Siddar Khan and Ashraf Khan (appellants 1 and 2) on one side and Ismail Khan (complainant) on the other side earlier to the incident and making it a point to cause death of the deceased, all the appellants on 29.3.1999 at about 8.30 p.m. sharing the common intention to cause death, came to the house of Nathe Khan (hereinafter referred to as the deceased) carrying Dhariya (sharp edged weapon) in their hands. On seeing the deceased, all the appellants assaulted him. It is the further case of prosecution that appellant Ashraf Khan, Siddar Khan and Nanhe Khan caused blows by Dhariyas, which they were carrying to the deceased. One blow landed on the left side of head and other injuries were caused on the temporal region as well as on the hands. On hearing the shriek of the deceased, his son complainant Ismail Khan came to the spot and when he tried to rescue his father (deceased), it is said that appellant No.4-Allah Khan caused Dhariya blow to him. The entire episode has been

witnessed by Sukhe Khan and Siddar Khan. After causing injuries to the deceased, all the accused persons fled from the place of occurrence.

3. After the incident took place, the deceased was brought in injured condition by complainant Ismail Khan to police Station Gormi where he lodged FIR. On lodging of the FIR, criminal law was triggered and set in motion.

4. The investigating agency arrived at the spot; prepared the spot map; seized ordinary and blood stained earth from the place of occurrence; sent deceased Natthe Khan, who was seriously injured at that time, to hospital for obtaining his MLC report as well as for his treatment and also sent injured complainant Ismail Khan for obtaining his MLC report as well as to provide treatment to him; recorded the statements of the witnesses; accused persons were arrested and from their possession Dhariyas, which were used as weapons in the commission of the offence, were also seized.

5. After the investigation was over, a charge-sheet was submitted in the committal Court which committed the case to the Court of Session where all the appellants were tried.

6. The learned Trial Judge framed charges which are mentioned in para 1 of the impugned judgment. Needless to say, all the appellants abjured their guilt and pleaded complete innocence.

7. In order to bring home the charges, the prosecution examined its witnesses and also proved certain documents. The defence of appellants is of alibi as they were busy in the marriage affairs of Allahddin, who is the nephew of appellant Siddar Khan and all other appellants since they are closely related to each other, were also present in the marriage ceremony. The other defence of appellants is that there was no motive on their part to kill the deceased although it has been borne out from the evidence that they were having some motive against the complainant and if that would be the position, why appellants would kill the deceased. Some whisper has also come in the evidence of Sukhe Khan (PW-8) that the deceased caused murder of one Guddi Bai earlier to the date of incident [see para 5 of the statement of (PW8) Sukhe Khan] and in these state of affairs, this possibility cannot be ruled out that some unknown persons have killed the deceased and in order to implicate the appellants, since there is enmity, they have been falsely implicated. In support of their defence, the appellants examined five witnesses, they are Hussain Khan (DW-1), Kamruddin (DW-2), Kazi Sirajuddin (DW-3), Angad (DW-4)

and Imamkhan (DW-5) and out of these witnesses, Sirajuddin (DW-3) is the Kazi who solemnized the Nikah of Allahddin and Parveen Bano and prepared the Nikahnama, in which the name of appellant No.1-Siddar Khan has been mentioned in the column of Vakeel.

8. The learned Trial Judge on the basis of evidence placed on record, came to hold that charges are proved against the appellants, as a result of which, convicted them and passed the sentence which is mentioned in the impugned judgment.

9. In this manner, this appeal has been filed by the appellants assailing their judgment of conviction and order of sentence.

10. Vehemently, it has been contended by Shri Sanjay Gupta and Shri Atul Gupta, learned counsel for the appellants, that there was no motive for the appellants to kill the deceased, although it is borne out from the evidence that they were having some enmity with the complainant and if that would be the position, why they will kill the deceased. It has been then contended by them that earlier to the incident, deceased caused a murder of one Guddi Bai and on the report of Ashraf Khan and Nanhe Khan several cases were registered against complainant Ismail Khan, and therefore, there is possibility that deceased might have been killed by some unknown persons and in order to implicate the appellants falsely, they have been roped in this case. It has been then contended by learned counsel that from the evidence of prosecution witnesses as well as from the evidence of defence witnesses, it is emphatically proved that appellant No.1-Siddar Khan was the Vakeel in the marriage of Allahddin and Parveen Bano which took place on the same date and time when the alleged incident took place. In this context, learned counsel has invited our attention to the testimony of Kazi Sirajuddin (DW-3) as well as the document Ex.D-5 which has been proved by this witness. So far as other appellants are concerned, it has been contended that since all of them are thickly related to each other as well as to the family of groom, therefore, all of them were present in the marriage of Allahddin.

11. It has been then contended by learned counsel that the FIR (Ex.P-1) is ante-time and ante-dated and in support of their argument, learned counsel has invited our attention to the testimony of complainant/injured Ismail Khan (PW-1) as well as the testimony of Hoshiyar Khan (PW-6). Learned counsel further submitted that injury No.1, which is said to have been caused by

appellant Ashraf Khan, was fatal in nature and other injuries may be grievous, but they were not fatal, and therefore, all the appellants cannot be convicted under Section 302/34 of IPC. Learned counsel has also argued that looking to the evidence of prosecution witness, it is difficult to hold that which of the appellant caused which particular injury and on which part of the body, and therefore, since other injuries except injury No.1 were not on vital part and they were not fatal, the benefit would go to the appellants. Learned counsel has also invited our attention to the evidence of investigating officer as well as other witnesses that weapons which were seized were not the same weapons which were said to have been used in the commission of the offence, and therefore, the defence which they have taken that some unknown persons have caused injuries has been strengthened.

12. It has also been put forth by learned counsel that looking to the role assigned to appellant Allah Khan, although as per the case of prosecution he came along with other appellants, but he did not cause any injury to the deceased, but caused injury to injured only, and therefore, he cannot be convicted under Section 302/34 of IPC. On these premised submissions, it has been contended by learned counsel that by allowing this appeal, the judgment of conviction and order of sentence be set aside.

13. On the other hand, Shri C.S.Dixit, learned Public Prosecutor, argued in support of impugned judgment and submitted that there is ample evidence of the eye-witnesses that all the appellants armed with weapons came and caused injuries to the deceased, as a result of which, he had died and appellant Allah Khan also caused injuries to injured/complainant Ismail Khan by Dhariya when he tried to rescue his father (deceased), and therefore, all of them have been rightly convicted for the charges which were framed by learned Trial Court and this appeal sans substance and the same be dismissed.

14. Having heard learned counsel for the parties, we are of the considered view that this appeal deserves to be allowed in part.

15. In the present case, the prosecution has examined as many as four eye-witnesses, they are Ismail Khan (PW-1), Siddar Khan (PW-2), Hoshiyar Khan (PW-6) and Sukhe Khan (PW-8). Needless to say, Ismail Khan is the son of the deceased and is also an injured witness. The other witnesses Siddar Khan, Hoshiyar Khan and Sukhe Khan are the cousins of the deceased. Similarly, appellant No.2-Ashraf Khan is the brother of appellant No.1-Siddar Khan and other two appellants are cousins of Siddar Khan.

16. The FIR (Ex.P-1) was lodged by injured witness Ismail Khan (PW-1) and he accompanied his injured father (who later on died) to the police Station. The MLC report of deceased is Ex.P-18 and Dr. V.C.Jain (PW-4) proved the MLC report of the deceased. The MLC report of complainant is Ex.P-19 and he was also examined by the same Dr. V.C.Jain. After the death of the deceased, postmortem of his dead-body was conducted by Dr. Ajit Mishra (PW-9) and his postmortem report is Ex.P-20. On bare perusal of the testimony of autopsy surgeon Dr. Ajit Mishra (PW-9) and his postmortem report (Ex.P-20), we find following injuries on the person of the deceased :-

"(i) One incised wound 10 cm x 2 cm x 2 cm (bone deep) situated over left side at the temporo parietal region. Bone cut and fracture of bone due to injury seen. Wound is obliquely placed.

"(ii) Incised wound 12 cm x 2 cm x 2 cm situated on right cheek extending from nose to frontal region of forehead. Maxillary bone cut and fractured. Wound is obliquely placed.

(iii) Incised wound 10 cm x 4 cm x 3 cm situated on right chin. Margin regular, blood clot, placed transversely.

(iv) Incised wound 10 cm x 2 cm x 3 cm situated on right hand dorsally to index finger, vertically placed, bone cut and fracture of bone seen.

(v) Incised wound 8 cm x 3 cm x 2 cm situated on lower 1/3 of left side forearm, bone cut, transversely placed. "

According to the autopsy surgeon, injury No.1 was fatal in nature and other injuries were grievous and the cause of death was haemorrhage from all the wounds.

17. On bare perusal of the evidence of complainant Ismail Khan (PW-1), who is also an injured witness, we find that on the date of incident at 8.30 p.m. the deceased was standing at the door and this witness was inside the house. At that time, he heard the shriek of his father who was scolding that Ashraf Khan and Siddar Khan are killing. On hearing hue and cry, this witness came out and saw that all the appellants carrying Dhariya were standing there. This witness further says that appellant Ashraf Khan dealt Dhariya blow on the left side of the deceased, appellant Siddar Khan dealt Dhariya blow which landed on the temporal and eye region of the deceased and after falling of the deceased, appellant Nanhe Khan caused blow by Dhariya which landed on his hands because the deceased raised his hands in order to save him.

Specifically this witness is saying that when he rushed to rescue his father, appellant Allah Khan caused Dhariya blow on the left side of his forehead. On hearing hue and cry, Sukhe Khan and Siddar Khan (name of one witness is also Siddar Khan) arrived there.

18. Specifically this witness is saying that after the incident had occurred, he went to lodge the report (Ex.P-1) which was proved by him. In very specific words, he is saying that from the police Station deceased and this witness were sent to the hospital.

19. This witness was cross-examined at length, but he remained embedded to his version despite there being a roving cross-examination over him. From every angle we have examined the testimony of this witness and we find that his testimony to be clear, cogent and trustworthy and learned Trial Court did not commit any error in placing reliance on the testimony of this witness.

20. We do not find any merit in the contention of learned counsel for the appellants that FIR (Ex.P-1) is ante-time and ante-dated and the original FIR has been suppressed. On going through the FIR (Ex.P-1), we find that specifically it has been mentioned in it that the complainant brought his injured father to the police Station. If in para 3 of his examination-in-chief complainant Ismail Khan (PW-1) has stated that he went to lodge the report, it would not mean that he was not accompanied by his father who was seriously injured and who later on died. Further, this witness has clarified in the same para that from the police Station he and his father were sent to Primary Health Center, Gormi, and from where his father was referred to District Hospital, Bind, and by that time he could reach District Hospital, he had died.

21. We are not at all impressed by the submission of learned counsel for the appellant that looking to the testimony of Hoshiyar Khan (PW-6) para 9, first of all the deceased was brought to the hospital and the complainant Ismail Khan went to police Station and brought the police persons, and therefore, it can be inferred that FIR (Ex.P-1) is ante-time and ante-dated, for two reasons. Firstly, this type of suggestion was not put to the author of the FIR Ismail Khan (PW-1). We cannot read part of the statement of complainant Ismail Khan para 3 and part of the statement of Hoshiyar Khan (PW-6) para 9 in order to infer that FIR is ante-time and ante-dated. Secondly, firmly in para 3 complainant is saying that he went to police Station to lodge the report which is Ex.P-1 and from the police Station he and the deceased were sent to Primary Health Center, Gormi, and therefore, it can be inferred that the deceased,

who was seriously injured at that time, was carried by the complainant to the police Station, and therefore, we have no scintilla of doubt in holding that FIR is not ante-time and ante-dated.

22. The testimony of complainant has been corroborated by the evidence of Siddar Khan (PW-2), Hoshiyar Khan (PW-6) and Sukhe Khan (PW-8). However, on bare perusal of the testimony of complainant Ismail Khan (PW-1), we find that this witness was throughout present when the incident took place. But, he is not at all saying about any of the role of appellant Allah Khan in causing injuries to the deceased, although his evidence is that when he came to intervene and to rescue his father, this appellant caused injuries by Dhariya to him. This statement was made by this witness in examination-in-chief that appellant No.4-Allah Khan did not cause any injury to the deceased and this witness was not declared hostile and if that would be the position, according to us, the prosecution is bound to accept the evidence of this witness which would mean that appellant-Allah Khan did not take part in the commission of the offence so far as causing injuries to the deceased is concerned. In this context, we may profitably place reliance on two decisions of Supreme Court they are; *Raja Ram v. State of Rajasthan*, 2005 SCC (Cri) 1050 and *Mukhtiar Ahmed Ansari v. State* (NCT of Delhi), 2005 SCC (Cri.) 1037. In *Raja Ram* (supra), in para 9 the Supreme Court has held as under:-

"9. But the testimony of PW 8 Dr. Sukhdev Singh, who is another neighbour, cannot easily be surmounted by the prosecution. He has testified in very clear terms that he saw PW 5 making the deceased believe that unless she puts the blame on the appellant and his parents she would have to face the consequences like prosecution proceedings. It did not occur to the Public Prosecutor in the trial court to seek permission of the court to heard (sic declare) PW 8 as a hostile witness for reasons only known to him. Now, as it is, the evidence of PW 8 is binding on the prosecution. Absolutely no reason, much less any good reason, has been stated by the Division Bench of the High Court as to how PW 8's testimony can be sidelined."

23. Looking to the evidence placed on record, we are of the view that although this appellant No.4-Allah Khan came to the spot carrying Dhariya with him, but there is no evidence that he shared any common intention with other appellants to cause death of the deceased. There is no iota of evidence

that this witness even provoked or exhorted other appellants to kill the deceased, and therefore, according to us, the role assigned to this appellant would not come within the purview of Section 34 of IPC, and hence we extend our benefit of doubt to him for the charge under Section 302/34 of IPC.

24. However, looking to the role assigned to the other appellants, namely Siddar Khan, Ashraf Khan and Nanhe Khan, we find that they have caused brutal Dhariya blows to the deceased, as a result of which, he had died. The injuries sustained by the deceased we have already quoted hereinabove. The deceased had died not only on account of head injury, but also on account of excessive haemorrhage from all the wounds. We do not find any substance in the submission of learned counsel for the appellants that since the evidence of prosecution witnesses is contrary to each other that which of the appellant caused injury on which particular part of the body of the deceased, they are entitled for the benefit of doubt, because it was not possible for the witnesses to state about the incident in the same manner as "action reply" of a cricket match. It has come in the testimony of all the eye-witnesses that these three appellants, namely Siddar Khan, Ashraf Khan and Nanhe Khan, caused injuries by Dhariya to the deceased, and therefore, according to us, they have been rightly convicted under Section 302/34 of IPC.

25. So far as the plea of alibi is concerned, we also do not find any substance in it for the simple reason that on bare perusal of the testimony of Kazi Sirajuddin (DW-3), we find that Nikah register, which was brought by him, was having several several pages in the form of carbon copies. It is also borne out from the testimony of this witness that original copy is given to the family of bride and groom and a carbon copy is kept in the register. But, the relevant entry, which is Ex.D-5, we find that it has been made by a pen and is not a carbon copy, and therefore, it raises a heavy doubt about the authenticity and the hallmark of this document (Ex.D-5) in which the name of appellant No.1 Siddar Khan has been mentioned as Vakeel. The matter would have been different if the original Nikahnama would have been summoned from the family of bride and the groom and it would have been filed alongwith the copy of the document Ex.D-5, but this has not been done so. Hence, according to us, learned Trial Court rightly did not place reliance on the plea of alibi.

26. So far as the weapon part is concerned, according to us, on bare perusal of the testimony of autopsy surgeon (PW-9) para 8, 9 and 10, it is as clear like a noon day that weapon which was seized could cause the injuries sustained

by the deceased. In the decision of *State of Rajasthan v. Dhool Singh*, AIR 2004 SC 1264 the sword was not seized, but the Apex Court convicted the accused under Section 302 of IPC.

27. Similarly, we do not find any merit in the contention of learned counsel for the appellants that there was no motive on the part of the appellants to cause death of the deceased because earlier the enmity was with complainant Ismail Khan only. It is well settled in law that motive part is totally insignificant if the case of prosecution rests on direct evidence. Since there is overwhelming direct evidence on record, according to us, this argument cannot be accepted. True there is some enmity between the complainant Ismail Khan (PW-1) and the appellants, but looking to his unimpeachable evidence which is corroborated by the evidence of other eye-witnesses and also medical evidence, it cannot be said that they have been falsely roped and merely because as per the defence the deceased has caused murder of one Guddi Bai, the appellants have been falsely implicated.

28. Now coming to the role assigned to appellant Allah Khan, we find that since this appellant caused single injury of Dhariya to the complainant, which has also been proved by the testimony of MLC Dr. V.C.Jain (PW-4) and his MLC report (Ex.P-19), according to us, he has committed the offence under Section 324 of IPC. However, there is no iota of evidence that all other appellants shared common intention with this appellant Allah Khan to cause injury to complainant, and therefore, according to us learned Trial Court has wrongly convicted appellants Siddar Khan, Ashraf Khan and Nanhe Khan under Section 324/34 of IPC. Their conviction under this Section is hereby set aside and the conviction of appellant No.4-Allah Khan is altered from Section 324/34 to 324 of IPC. The learned Trial Court has awarded one year R.I. to appellant No.4-Allah Khan which he has already suffered.

29. In the result, the appeal succeeds in part. The judgment of conviction and order of sentence convicting appellants Siddar Khan, Ashraf Khan and Nanhe Khan under Section 302/34 of IPC is hereby affirmed and they are hereby directed to serve the sentence as directed by learned Trial Court. However, their conviction under Section 324/34 of IPC is hereby set aside and they are acquitted from this offence. Appellant No.4-Allah Khan is acquitted from the offence punishable under Section 302/34 of IPC and his conviction under Section 324/34 is altered to Section 324 of IPC. Appellant-Allah Khan is on bail, his bail bonds are discharged.

30. Appellant No.1-Siddar Khan is on bail, his bail bonds shall stand cancelled after he offers his surrender before learned Trial Court on or before 27th December, 2010, failing which learned Trial Court shall issue perpetual arrest warrant against this appellant and also take action against his surety. After the surrender of appellant No.1, he shall be sent to jail to serve out remaining part of his jail sentence and his bail bonds thereafter shall stand cancelled. Learned Trial Court is further directed to intimate the Registry of this Court about the factum of sending appellant No.1 to jail. The Registry is hereby directed to send the record posthaste so as to reach learned Trial Court on or before 1st December, 2010 and the original bail bonds of appellant No.1 be also sent to learned Trial Court and a photocopy thereof be retained in this file.

Order accordingly.

I.L.R. [2011] M. P., 1026

APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saxena & Mr. Justice T.K. Kaushal

Cr.A. No.326/2006 (Jabalpur) decided on 21 January, 2011

BABULAL & anr.

... Appellants

Vs.

STATE OF M.P.

... Respondent

A. Evidence Act (1 of 1872), Section 113-B, Penal Code, 1860, Section 304B - Deceased married with appellant about 2-3 years before her death, died of burn injuries in her nuptial home - Appellants subjected deceased to cruelty and harassment in connection with demand of dowry - It can be presumed that they caused the dowry death of deceased.
(Para 24)

क. साक्ष्य अधिनियम (1872 का 1), धारा 113-बी, दण्ड संहिता, 1860, धारा 304बी - मृतक की अपीलार्थी के साथ शादी उसकी मृत्यु के 2-3 वर्ष पूर्व हुई, उसकी ससुराल में जलने की क्षतियों के कारण मृत्यु हो गयी - अपीलार्थियों ने मृतक के साथ दहेज की मांग से संबंधित क्रूरता तथा उत्पीड़न का व्यवहार किया - यह उपधारणा की जा सकती है कि उन्होंने मृतक की दहेज हत्या कारित की।

B. Evidence Act (1 of 1872), Section 32 - Dying declaration - Dying declaration of deceased recorded by Executive Magistrate - Doctor found her fit to give statement and made certification and endorsement on the dying declaration - Mere fact that the condition of Sessions Trial No.1/

the deceased was found to be serious and critical by the doctors at the time of her admission in hospital, cannot lead to an assumption in absence of any such evidence that the deceased was not able to speak or give statement. (Para 13)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 32 - मृत्युकालिक कथन - कार्यपालिक मजिस्ट्रेट द्वारा मृतक का मृत्युकालिक कथन अभिलिखित किया गया - चिकित्सक ने उसे बयान देने के लिए समर्थ पाया और मृत्युकालिक कथन पर प्रमाणन तथा पृष्ठांकन किया - केवल तथ्य कि अस्पताल में भर्ती करते समय मृतक की स्थिति चिकित्सकों द्वारा गंभीर एवं अंत्यस्थ पाया जाना, किसी ऐसी साक्ष्य के अभाव में कि मृतक बोलने अथवा बयान देने में असमर्थ थी, किसी धारणा की ओर अग्रसर नहीं होता।

C. Evidence Act (1 of 1872), Sections 32, 59, 61 & 62 - Dying declaration - Proof of - The contents of a document (dying declaration) can be proved by the production and proof of the said document before the Court.

It is not expected of a Magistrate, doctor or any other person to have remembered the statement given by the deceased to him. Therefore, if such statement has been put into writing, proof of the document of dying declaration before the Court in accordance with law would be sufficient to make it admissible under law. By no stretch of imagination it can be held that the document of recorded dying declaration would not be treated as evidence under law. (Para 15)

ग. साक्ष्य अधिनियम (1872 का 1), धाराएँ 32, 59, 61 व 62 - मृत्युकालिक कथन - का सबूत - दस्तावेज (मृत्युकालिक कथन) की अंतर्वस्तु, न्यायालय के समक्ष उक्त दस्तावेज के सबूत एवं प्रस्तुति द्वारा साबित की जा सकती है।

Cases referred :

AIR 1978 SC 1530, AIR 2002 SC 2973, (1999) 7 SCC 695, AIR 2003 SC 2859, (2008) 16 SCC 705.

Ajay Kumar Jain, for the appellants.

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

J U D G M E N T

The Judgment of the Court was delivered by :
RAKESH SAKSENA, J. :-Appellants have filed this appeal against the judgment dated 20.1.2006, passed by Second Additional Sessions Judge, Damoh, in

2001, convicting them under Sections 302 and 304-B of the Indian Penal Code and sentencing them to imprisonment for life with fine of Rs.1000/- and rigorous imprisonment for 10 years with fine of Rs.500/- on each count respectively with default stipulation.

2. The prosecution case in nutshell is that Jyotibai, the deceased, was the wife of appellant Babulal and daughter-in-law of appellant Kallibai. About one and half years before the date of incident, which occurred on 1.10.2000, deceased was married to Babulal. Though no dowry was settled at the time of marriage, but the parents of deceased had given dowry in the marriage according to their capacity. After marriage, second time, when deceased came back to her parents' house, she informed that her husband, mother-in-law, father-in-law and Jethani used to demand Rs.10,000/- in dowry. They also used to pass comments on her for not bringing sufficient dowry. On later occasions also deceased told to her family members that for not giving Rs.10,000/- in dowry, appellants, Gangaram and Anita used to manhandle her. For about two months, deceased stayed at her parents house. When her uncle died, her father-in-law came there and asked her to go back with him. Despite opposition of her family members, he took her with him. On 13th day ceremony also she was not sent to her parents' house and instead her husband Babulal attended the ceremony. After about two days, Nanna (PW-2), the father of deceased, received information that deceased got burnt and was admitted in Government Hospital, Damoh. Family members of deceased viz. Harishanker, Laxmirani, Parwatibai, Pujarani, Leeladhar and Janki Prasad went to see her at hospital. It is said that in the hospital deceased disclosed to them that in the morning at about 5.00 a.m. when she was in the courtyard, her mother-in-law poured kerosene on her and her husband set fire to her. Though Jethani Anitarani and father-in-law Gangaram were also present there, but they did not make any attempt to rescue her. On her crying, people of the neighbourhood reached there, extinguished fire and carried her to Damoh Hospital. In the hospital, Additional Tahsildar/Executive Magistrate recorded the dying declaration (Ex.P/8) of the deceased. She was then referred to Jabalpur Hospital where on 8.10.2000 she breathed her last. Murg intimation report was recorded at Jabalpur and was transferred to Damoh. After Murg enquiry, police registered first information report (Ex.P/9) under Section 304-B of the Indian Penal Code. After investigation, charge sheet was filed under Section 304-B of the Indian Penal Code.

3. After committal, though trial court framed charges under Section 304-B of the Indian Penal Code against all the four accused persons, but, in addition to it charged appellants under Section 302 of the Indian Penal Code also.
4. Appellants abjured their guilt and pleaded false implication. According to them, deceased did not want to live with her husband, therefore, she used to elope from the house. Since her parents compelled her to live at her nuptial home, she committed suicide. In the trial, it was also suggested that deceased caught fire accidentally by a stove.
5. Learned Additional Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, though acquitted the other two accused persons, however, found the appellants guilty of intentionally causing death of Jyotibai by pouring kerosene and setting her ablaze and convicted and sentenced them under Section 302 of the Indian Penal Code and at the same time found appellants guilty of the offence under Section 304-B of the Indian Penal Code also by the impugned judgment, which has been challenged in this appeal.
6. We have heard the learned counsel for the parties.
7. It was no longer disputed that deceased Jyotibai died of burn injuries. It was also reflected from the evidence of Dr. S.Nikhar (PW-16), who examined the injuries of the deceased and also by the evidence of Dr. A.K. Yadu (PW-20), who conducted the postmortem examination of her body after death on 8.10.2000. According to Dr. S.Nikhar (PW-16), on 1.10.2000, when he was posted in District Hospital, Damoh, Jyotibai was brought to hospital in burnt condition by her husband Babulal. Smell of kerosene was emanating from her body. There were blisters over her body. She was conscious and was giving answers to the question put to her. He admitted her and wrote for getting her dying declaration recorded. According to him, she had 100% burn injuries. She was sent in the female surgical ward. He proved his Medico Legal Report (Ex.P/10). Dr. A.K. Yadu (PW-20) deposed that on 8.10.2000 when he was posted as CMO in Medical College, Jabalpur, the dead body of deceased was brought by constable Rajesh Mishra for postmortem examination. The body was identified by Nanna, the father, and Kallibai, mother-in-law of the deceased. The body of deceased was covered by bandages. There were 3rd and 4th degree ante mortem featured flame burn injuries on sides of her lower part of face, neck, abdomen, chest, external

genitalia, thighs, legs, dorsum of feet, upper extremities, back and hips. Deceased died due to toxæmia from burn injuries. He proved the postmortem report (Ex.P/14), which was written and signed by him and Dr. Smt. K.B.Mishra. It was thus clearly evident that the deceased Jyotibai died of burn injuries.

8. Learned counsel for the appellants, however, submitted that the trial court gravely erred in placing implicit reliance on the dying declaration (Ex.P/8) of the deceased recorded by the Executive Magistrate Ashok Shukla (PW-13) and the evidence of other witnesses especially Parvatibai (PW-5) and Harishanker (PW-12) about the oral dying declaration allegedly given by the deceased to them. According to learned counsel, the dying declarations were inconsistent and doubtful. Appellants were falsely implicated. Learned counsel for the State, on the other hand, justified and supported the conviction of the appellants.

9. We have gone through the entire evidence on record.

10. The dying declaration (Ex.P/8) of the deceased was recorded by Additional Tahsildar/Executive Magistrate Ashok Kumar Shukla (PW-13). He stated that on 1.10.2000 he was posted as Additional Tahsildar and Executive Magistrate in Damoh. He recorded the dying declaration of Jyotibai at 12.40 p.m., who was admitted in District Hospital, Damoh. The doctor, who was posted in the hospital, examined the deceased and found her fit to give the statement. Thereafter, he recorded her statement. At 1.00 p.m., after completion of recording, the doctor again examined Jyotibai. He certified that she was fully conscious and responded to all the questions put to her. He deposed that he recorded the dying declaration in question and answer form. He recorded the statement as was given by Jyotibai. He also obtained the thumb impression of Jyotibai and put his signature on Ex.P/8.

11. Dr. S.Nikhar (PW-16) also corroborated the fact of recording of dying declaration of the deceased before him. He deposed that the dying declaration was recorded by Additional Tahsildar, Damoh, at 12.40 p.m.. He had certified that the patient was fit for making dying declaration. Similar endorsements were also made by him at the end of the dying declaration (Ex.P/8).

12. Learned counsel for the appellants urged that since deceased was found to suffer hundred percent burn injuries, it was not possible for her to have made the dying declaration. Apart from it, the dying declaration was recorded

on 1.10.2000, but no evidence was produced by the prosecution to show as to where it was kept until 24.10.2000 when the FIR (Ex.P/9) was recorded. Apart from it, learned counsel submitted that Executive Magistrate Ashok Kumar Shukla (PW-13) did not reproduce the contents of the dying declaration before the Court and merely proved the document (Ex.P/8). Therefore, the dying declaration could not be held to be proved according to law.

13. After bestowing our anxious consideration to the submissions made by learned counsel for the appellants and having gone through the record, we find that there is nothing on record to indicate that Dr. S.Nikhar (PW-16), who made certification and endorsements on the dying declaration (Ex.P/8) to the effect that deceased was fit to give statement and Executive Magistrate Ashok Kumar Shukla (PW-13), who recorded the dying declaration (Ex.P/8) of the deceased had any animus or ill will against the appellants. There appear no reasons to suspect that these government officials would fabricate or manipulate the dying declaration (Ex.P/8) with false certification so as to falsely implicate the appellants. Mere fact that the condition of the deceased was found to be serious and critical by the doctors at the time of her admission in the hospital cannot lead to an assumption in absence of any such evidence that the deceased was not able to speak or give statement, particularly when Dr. S.Nikhar (PW-16) himself testified that he had examined her before recording her statement and found her fit to give statement. Apart from it, Dr. A.K. Yadu (PW-20), who conducted the postmortem of the body of deceased on 8.10.2000, categorically stated that a hundred percent burnt person can also speak and it will not effect his mental status. Even if the deceased remained alive for 4 days, she could be in the mental condition of thinking and speaking. It is also significant to note that in the instant case deceased suffered burn injuries on 1.10.2000 and died on 8.10.2000. She thus remained alive for about seven days. The Apex Court in case of *State of Haryana vs. Harpal Singh and others*-AIR 1978 SC 1530 held that even when the pulse was not palpable and blood pressure was unrecordable, dying declaration could be recorded.

14. The Constitutional Bench of the Apex Court in case of *Laxman vs. State of Maharashtra*-AIR 2002 SC 2973 overruling its earlier decision rendered in the case of *Paparam Baka Rosamma & Ors vs. State of AP*-(1999) 7 SCC 695 held that if the person recording the dying declaration is satisfied that the deceased is in a fit state of mind, dying declaration can be acted upon even without examination of the doctor. In the instant case,

Dr.S.Nikhar (PW-16) has categorically deposed that deceased was in fit state of mind to make a dying declaration.

15. We are unable to accept the arguments advanced by the learned counsel for the appellants that in the absence of oral reproduction of the dying declaration by the Executive Magistrate before the court, the dying declaration cannot be held proved. The dying declaration made by deceased is admissible under Section 32 of the Evidence Act. Section 32 provides as under:

“32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.- Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-

- (1) **when it relates to cause of death.-**When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.”

The dying declaration even recorded by police officer can be proved before the Court. It is not expected of a Magistrate, doctor or any other person to have remembered the statement given by the deceased to him. Therefore, if such statement has been put into writing, proof of the document of dying declaration before the Court in accordance with law would be sufficient to make it admissible under law. By no stretch of imagination it can be held that the document of recorded dying declaration would not be treated as evidence under law. In Section 3 of the Evidence Act, the word “Evidence” has been interpreted as under:

““Evidence”.- “Evidence” means and includes-

- (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry,

Such statements are called oral evidence;

- (2) [all documents including electronic records produced for the inspection of the Court],
such documents are called documentary evidence.”

Apart from it, the contents of a document can be proved by the production and proof of the said document before the Court. It is relevant to refer to the provisions of Sections 59, 61 and 62 of the Evidence Act. It will be apposite to quote the aforesaid provisions:

“59. Proof of facts by oral evidence.-All facts, except the [contents of documents or electronic records], may be proved by oral evidence.

61. Proof of contents of documents.- The contents of documents may be proved either by primary or by secondary evidence.

.....

62. Primary evidence-Primary evidence means the document itself produced for the inspection of the Court.

.....”

In view of the above, we hold that the document of dying declaration (Ex.P/8) proved by Executive Magistrate Ashok Kumar Shukla (PW-13) was admissible in evidence.

16. It is true that despite the fact that the dying declaration (Ex.P/8) was recorded by the Executive Magistrate, yet the offence was not registered and the said document was not obtained by the police until the Murg enquiry was initiated by police Damoh. The death of deceased occurred in the Victoria Hospital, Jabalpur, on 8.10.2000. On receiving the intimation about the death of deceased, ASI of Police Station, Omti, Jabalpur, registered the Murg as 0/2000 and sent the body for postmortem examination to Medical College, Jabalpur. M.R. Ahire, SDO (P), Jabalpur, conducted the inquest proceedings in Victoria Hospital on 8.10.2000. On receiving the Murg intimation and the inquest proceedings on 24.10.2000, Murg No.51/2000 under Section 174 of the Code of Criminal Procedure was registered by Police Station, Indoria, district Damoh, vide Ex.P/9. Murg No.51/2000 (Ex.P/9) was proved by Station Officer R.S. Parmar (PW-15). According to R.S. Parmar, Murg enquiry was conducted by Additional Supdt. of Police, Damoh, Sudhir Lad

(PW-18) and after recording statements of witnesses, Crime No.257/2000 was registered on 25.11.2000. From the evidence of Harishanker (PW-12), brother of deceased, it appears that he went to inform the police about the occurrence at Damoh, but his report was not recorded. It can be presumed that he being the brother of deceased would have got involved in the treatment of deceased. He deposed that though he lodged the report at police station after cremation of deceased, but for 2-3 months no action was taken and thereafter he approached to Collector. Thereafter his statements were recorded. In view of the aforesaid circumstances, it appears to us that conduct of the police in investigating the case remained indifferent. Though the Executive Magistrate was requisitioned for recording the dying declaration on the date of occurrence itself, but police did not take care to act upon the dying declaration.

17. After appreciating all the above circumstances, we are of the view that the dying declaration (Ex.P/8) recorded by the Executive Magistrate Ashok Kumar Shukla (PW-13) was a genuine document. Ashok Kumar Shukla had recorded the said dying declaration correctly as was made by the deceased.

18. The next submission of the learned counsel for the appellants was that the account of incident given by deceased in the dying declaration (Ex.P/8) was not truthful. From the other evidence on record, it was doubtful that she was set on fire by appellants.

19. Nanna (PW-2), the father of deceased, stated that when he went to hospital, deceased told to him that she caught fire by stove and nobody set fire to her. This witness was declared hostile. Hari Shanker (PW-12), the brother of deceased, though deposed that when he asked the deceased in the hospital, she told to him that her mother-in-law poured kerosene on her and her husband set fire to her, but when he was confronted with his police statement (Ex.D/4), this fact was found missing. Apart from it, he was further confronted with A to A part of Ex.D/4 wherein he disclosed that on his asking his sister told to him that in the morning at about 5.00 a.m. when she was preparing tea, she caught fire. Another brother of deceased Janki Prasad (PW-3), though in chief examination stated that appellants set fire to deceased, yet in the cross-examination he admitted that a few days back his sister had run away from the house of appellants and stayed at the house of Munna Kachi, but Munna Kachi sent her back. Because of this incident, a Panchayat was convened. Accused persons had told that they would not keep the deceased, but the

Panchas made deceased to understand that she should live in her nuptial home properly. If she repeated such act, it would result in breaking of marriage. She was then taken by the accused persons. After about 15-20 days, uncle of deceased died, but accused persons did not permit deceased to attend 13th day ceremony and on the same evening deceased set herself on fire. Leeladhar (PW-4), yet another brother of deceased, though stated that appellants set fire to deceased, but this fact was found omission in his police statement (Ex.D/1). Similar was the position with Parvatibai (PW-5). She was also confronted with her police statement (Ex. D/2).

20. Learned counsel for the appellants drew our attention to the evidence of Munna (PW-11), a neighbour of appellants, who disclosed that deceased caught fire accidentally. Munna (PW-11) was cited as a witness of spot map (Ex.P/7). However, in the cross-examination he deposed that his house was situated in front of the house of accused persons. At the time of incident, when he was milking his cow, he saw deceased igniting stove. Suddenly flames erupted from the stove and the deceased caught fire. Hearing her shrieks, accused persons and other people from the neighbourhood reached at the spot. This witness was not declared hostile. Counsel submitted that his evidence had to be treated as part of the prosecution case. His presence was established by the spot map (Ex.P/7) wherein it was mentioned that he and other village people saw the deceased burning.

21. Learned counsel for the appellants further submitted that the dying declaration (Ex.P/8) was not truthful because it was inconsistent with the evidence of Dr. S.Nikhar (PW-16) on the point as to who carried the deceased to hospital. In dying declaration (Ex.P/8) deceased stated that no one of her house saved her and outside people brought her to hospital, whereas Dr. S.Nikhar (PW-16) categorically stated that deceased was brought to hospital by her husband Babulal. This fact was corroborated by the MLC report (Ex.P/10) wherein Dr. Nikhar recorded the above fact.

22. It is significant to note that after the deceased suffered burn injuries, she was taken to hospital by her husband. It has also come in the evidence of Dr. A.K. Yadu (PW-20), who conducted autopsy, that on 8.10.2000 when the dead body of deceased was brought to Medical College, Jabalpur, it was identified by Kallibai, mother-in-law of the deceased. Thus, the presence of appellants, who are husband and mother-in-law of the deceased, during the treatment of deceased, is established. This gives some indications about the

culpability of the appellants with respect to accusation of commission of murder by them. Had they set fire to deceased, naturally they would not have remained present with the deceased throughout.

23. After scanning and critically scrutinizing the evidence of dying declaration (Ex.P/8) recorded by the Executive Magistrate Ashok Kumar Shukla (PW-13), we find that although it was a truly recorded document, yet we feel not fully satisfied about the truthfulness of the account of incident given by deceased in the said dying declaration. The Apex Court in the case of *P.V. Radhakrishna vs. State of Karnataka-AIR 2003 SC 2859* held that though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. Once the court is satisfied that the declaration was true and voluntary, undoubtedly it can base its conviction without any further corroboration. In *Samadhan Dhudaka Koli vs. State of Maharashtra*-(2008) 16 SCC 705 the Apex Court held that judgment of conviction can be recorded on the basis of the dying declaration alone, but the court must have satisfied that the same was true and voluntary. Indisputably for ascertaining the truth as regards the voluntariness of making such a dying declaration, the court is entitled to look into the other circumstances, but the converse may not be true. Since the evidence of dying declaration recorded in Ex.P/8 does not appear consistent with the version given by the evidence of Hari Shanker (PW-12), Parvatibai (PW-5) and Nanne (PW-2), who happened to be the family members of the deceased, we feel compelled to not to place implicit reliance on the dying declaration. In our opinion, the conviction of the appellants under Section 302 of the Indian Penal Code deserves to be set aside.

24. As far as the offence under Section 304-B of the Indian Penal Code is concerned, from the evidence of Janki Prasad (PW-3), Leeladhar (PW-4), Parvatibai (PW-5) and Hari Shanker (PW-12), it is established that the deceased was married to appellant Babulal about 2-3 years before her death. It is undisputed that deceased died of burn injuries in her nuptial home. Leeladhar (PW-4), the brother of deceased, Parvatibai (PW-5) and Laxmi (PW-10), Bhabhi of deceased, categorically stated that accused persons demanded Rs.10,000/- from them in dowry. Accused persons intimidated

that if the said amount of Rs.10,000/- was not given, they would have to face consequences. Parvatibai deposed that Jyoti used to tell her that whatever her father could give, he gave to accused persons, still they demanded Rs.10,000/-. Appellant Babulal told that if Rs.10,000/- were not paid, they would not keep her. Laxmi (PW-10) also deposed about the demand of Rs.10,000/- by the accused persons from Jyoti. We find no reason to disbelieve the evidence of aforesaid witnesses. Thus, it has been clearly established that appellants subjected deceased to cruelty and harassment in connection with demand of dowry. In view of the above evidence, a presumption under Section 113B of the Evidence Act can also be raised. Since it has been established that the appellants subjected deceased to cruelty and harassment in connection with demand of dowry, it can be presumed that they caused the dowry death of deceased.

25. In view of the foregoing discussion, we are of the considered opinion that the trial court was not justified in holding the appellants guilty and convicting them under Section 302 of the Indian Penal Code for intentionally causing death of Jyotibai. Accordingly, the conviction of appellants under Section 302 of the Indian Penal Code is set aside and they are acquitted of that charge. However, their conviction and sentence, as awarded by the trial court under Section 304-B of the Indian Penal Code, is affirmed. Appellants are said to have been in custody for about ten years. If that be so, they be released forthwith, if not required in any other case.

26. Appeal partly allowed.

Appeal partly allowed.

I.L.R. [2011] M. P.; 1037
APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saxena & Mr. Justice T.K. Kaushal

Cr.A. No.1044/2001 (Jabalpur) decided on 21 January, 2011

PREM NARAYAN MEENA

...Appellant

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Sections 302, 304 Part-I - Murder or Culpable Homicide - Upon demanding of borrowed money, there suddenly ensued a hot altercation and appellant inflicted injuries to deceased by taking out chhuri from his pocket - Held - Assault was not premeditated

and it sparked off suddenly - The offence committed by the appellant was culpable homicide not amounting to murder. (Para 15)

दण्ड संहिता (1860 का 45), धाराएँ 302, 304 भाग-I - हत्या या आपराधिक मानव वध - उधार दिये गये पैसों की मांग करने पर, एकाएक वाद-विवाद उत्पन्न हुआ और अपीलार्थी ने अपनी जेब से छुरी निकालकर मृतक को क्षतियाँ पहुँचाई - अभिनिर्धारित - हमला पूर्वचिंतन से नहीं किया गया था और वह अचानक घटित हुआ - अपीलार्थी द्वारा कारित अपराध, हत्या की कोटि में न आने वाला आपराधिक मानव वध था।

Y.K. Gupta, for the appellant.

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

J U D G M E N T

The Judgment of the Court was delivered by :
RAKESH SAKSENA, J. :-Appellant has filed this appeal against the judgment dated 14th June, 2001 passed by Sessions Judge, Bhopal in Sessions Trial No.404/2000 convicting the appellant under sections 302 and 326 of the Indian Penal Code and sentencing him to imprisonment for life with fine of Rs.500/- and rigorous imprisonment for 6 months with fine of Rs.100/- on each count, respectively.

2. In short, prosecution case is that on 3.9.2000, Dilip Sahu, the deceased was staying in Swadeshi Lodge situated in Hanumanganj, Bhopal. Lachhu Sindhi and Dinesh Sahu had gone to meet him. At about 10:00 p.m. appellant along with his wife Rajkali and Dinesh Yadav went there and met Dilip Sahu. They made demand of their money which was borrowed by him. Talking to them Dilip Sahu came down on the road. Dilip Sahu assured them that he would return the money, but they insisted that he should return it on that very day. An altercation ensued between them during which accused Dinesh Yadav caught hold of Dilip, appellant's wife Rajkali dealt a blow on the forehead of Dilip by broken glass bottle and appellant took out a Chhuri from his waist and dealt blows with it on the chest and waist of Dilip. Dilip fell down. When Dinesh Sahu (PW-5) tried to save him, appellant dealt a blow with Chhuri to him also whereby he suffered injury on his right hand thumb. In the meanwhile, constable Naresh Lakda (PW-6) who was present in the vicinity and ASI R.P.Pandey (PW-12) caught the appellant and took him to police station. Naresh Lakda took injured persons to hospital where Dilip Sahu was declared dead. On the information given by Dinesh Sahu (PW-5), first information report Ex.P/14 was recorded at police station Hanumanganj and a case under section

307/34 I.P.C. was registered against all the three accused persons. At about 11:00 p.m. on receiving the report from Dr. Shailendra Shrivastava, C.M.O. Hamidya Hospital, Bhopal about the death of Dilip, marg intimation report Ex.P/17 was recorded at police station, Maharana Pratap Nagar, Bhopal. Dead body of Dilip Sahu was sent for postmortem examination. Dr. C.S.Jain (PW-13) conducted the postmortem examination of the dead body and found seven injuries on it. Four injuries were stab wounds. Postmortem examination report is Ex.P/23. Dr. Shailendra Shrivastava (PW-1) examined the injuries of Dinesh Sahu and found one incised wound on his right hand index finger. His report is Ex.P/1. Dr. Manoj Mehra (PW-11) also performed the medico legal examination of Dinesh and vide his report Ex.P/22 confirmed the said injury. Spot map was prepared and a Chhuri was seized from the possession of appellant. After further investigation, charge sheet was filed and the case was then committed for trial. Accused Dinesh Yadav remained absconding.

3. During trial, appellant abjured his guilt and pleaded false implication. According to him, Dinesh Sahu (PW-5) falsely implicated him because Rajkali married him instead of marrying to Dinesh Sahu. In defence, appellant examined Mangiram (DW-1).

4. Prosecution examined fourteen witnesses. Dinesh Sahu (PW-5), Naresh Lakda (PW-6), Lachhu @ Laxman (PW-2) and Omprakash (PW-4) were examined as eyewitnesses of the incident. Lachhu and Omprakash, however, did not support the prosecution case. Dr. Shailendra Shrivastava (PW-1), Dr. Jyoti (PW-10), Dr. Manoj Mehra (PW-11) and Dr. C.S.Jain (PW-13) were examined to prove the injuries found on the body of injured Dinesh Sahu and deceased Dilip Sahu.

5. Learned Sessions Judge, after trial and upon appreciation of evidence adduced in the case, convicted and sentenced to appellant under sections 302 and 326 of the Indian Penal Code, however, finding the evidence insufficient against accused Rajkali, acquitted her. Aggrieved by his conviction, appellant filed this appeal.

6. We have heard the learned counsel for the parties and perused the record.

7. It was no longer disputed that deceased Dilip Sahu died of homicidal injuries. It is reflected from the evidence of Dr. Shailendra Sahu (PW-1) that when Dilip Sahu was brought to Hamidya Hospital, he was found dead. He

had sent report in this regard to police. Dr. C.S.Jain (PW-13), Forensic Expert, Medico Legal Institute, Bhopal conducted the postmortem examination of the body of deceased and vide his report Ex.P/23, found following injuries on his body:-

- (i) Lacerated wound just above right eyebrow 4 x 0.6 cm, skin deep.
- (ii) Lacerated wound on right maxillary region 3 x 2 cm, skin deep.
- (iii) Lacerated wound on anterior aspect of chin below lower lip 1 x 0.5 cm muscle deep.
- (iv) Stab wound on epigastric region 3.5 x 0.5 cm. One end pointed and other blunt. It perforated diaphragm, left ventricle wall with pericardium. Depth 8 cm.
- (v) Stab wound on left hypochondrial region 4 x 1cm. It stabbed stomach. Depth minimum 12 cm. Direction left to right below upward.
- (vi) Stab wound on left inguinal region 1 x 0.4 x 6cm. Direction above downwards.
- (vii) Stab wound on left upper thigh 3.5 x 0.5cm, skin deep.

In the opinion of Dr. Jain, death was caused due to shock and haemorrhage as a result of multiple stab injuries caused by hard sharp penetrating object. Injuries were sufficient to cause death in ordinary course of nature. Death was homicidal.

8. Apart from above evidence, from the evidence of Dinesh Sahu (PW-5) and Naresh Lakda (PW-6), it is amply established that deceased had suffered injuries as a result of assault by Chhuri. After death, the intimation in that regard was sent by Dr. Shailendra Shrivastava to police and marg intimation was recorded. Sub Inspector Vijay Bahadur Singh Chouhan (PW-9) conducted the inquest proceedings vide memorandum Ex.P/19 indicating the death of deceased by injuries. It was thus clearly established that deceased Dilip Sahu died of homicidal injuries.

9. Learned counsel for the appellant did not dispute that appellant inflicted injuries to deceased by Chhuri as a result of which he died, but he submitted that the trial Court erred in convicting the appellant under section 302 of the

Indian Penal Code. According to him, since the incident occurred suddenly after a hot altercation on refusal of deceased to return money of appellant, at the most appellant could have been held liable for committing the offence of culpable homicide not amounting to murder. Learned counsel pointed out that appellant is continuously in custody since 4.9.2000. Learned counsel for the State, on the other hand, justified and supported the conviction and sentence of the appellant:

10. Dinesh Sahu (PW-5) deposed that he had gone to meet deceased who was staying in Swadeshi Lodge. After sometime, he along with deceased and Lachhu came down on the road. Appellant, Rajkali and absconding accused Dinesh Yadav reached there and demanded Rs.15,000/- from deceased. Since Dilip had no money, he asked accused persons not to quarrel and that he will make the payment. However, while they were on the road, hot altercation ensued between deceased and the accused persons. Dinesh Yadav caught hold of the hand of deceased and appellant inflicted injuries to deceased by Chhuri. He dealt blows on his chest and abdomen. When he tried to defend the deceased, he also suffered injuries on his right hand thumb. He deposed that Dinesh Yadav ran away on the motorcycle. However, appellant and Rajkali were nabbed by the people and some policemen. When he and Dilip Sahu were taken by police to hospital, Dilip was declared dead. He then went to police station and lodged the report Ex.P/14. Though this witness was subjected to a lengthy cross-examination, but nothing material could be elicited out to render his testimony unreliable. His evidence stood corroborated by the fact that he suffered injury in the occurrence. Dr. Shailendra Shrivastava (PW-1) and Dr. Manoj Mehra (PW-11) examined his injury and found an incised injury on his right hand thumb. His presence at the spot, therefore, stood established. Apart from it, his evidence finds further support from the first information report Ex.P/14 lodged by him immediately after the occurrence at 11:10 p.m. It is also significant to note that there is no suggestion by the accused that PW-5 had any animus against the appellant. It was deposed by him that for the first time he had seen the appellant and Rajkali at the time of occurrence.

11. Evidence of Dinesh Kumar Sahu stood further corroborated from the evidence of constable Naresh Lakda (PW-6), who was posted on duty at nearby 'Gallamandi'. According to Naresh Lakda, when deceased and some persons came out of Swadeshi Lodge, appellant assaulted the deceased by Chhuri. Hearing the noise, he rushed to the spot and caught the appellant. He

also stated that one more person had cut injury on his finger. Sub Inspector R.P.Pandey had also reached at the spot and took accused persons to police station. Naresh Lakda had seen the appellant for the first time. Though there was some variation between the evidence of Naresh Lakda (PW-6) and Sub Inspector R.P.Pandey (PW-12) but it was not material since the appellant was caught by them at or near about the place of incident. R.P.Pandey (PW-12), in the presence of Israr Hasan (PW-3) also seized the blood stained Chhuri from the spot.

12. After scanning and appreciating the evidence of aforesaid witnesses, we are satisfied that the trial Court committed no error in holding that prosecution successfully established that appellant inflicted stab injuries to deceased, as a result of which he died. It was also established that appellant caused grievous injury by Chhuri to Dinesh Sahu (PW-5). Dr.Jyoti (PW-10), R.M.O. in Radiology Department of Hamidya Hospital deposed that from the X-ray Ex.P/20 taken by her, she found that bone of the index finger of Dinesh Sahu was cut and, therefore, the injury was grievous in nature. X-ray report Ex.P/21 was written and signed by her. Conviction of appellant under section 326 of the Indian Penal Code is, therefore, fully justified.

13. Now the question before us is whether in the facts and circumstances of the case, the conviction of appellant under section 302 of the Indian Penal Code was justified or his act would fall in the category of the offence of culpable homicide not amounting to murder.

14. On perusal of the evidence on record, we find that there is absolutely no iota of evidence to indicate that there had been enmity between appellant and the deceased or that appellant had motive to commit murder of deceased.

15. From the evidence of Dinesh Kumar Sahu (PW-5), it is revealed that appellant and his wife Rajkali approached to deceased and demanded Rs.15,000/- from the deceased, but deceased had no money, then he (PW-5) told to them to take money from him. While talking, when they reached the road, suddenly there ensued a hot altercation between appellant and the deceased in the course of which appellant inflicted injuries by Chhuri to deceased. Report of the incident (Ex.P/14) was lodged by Dinesh Sahu wherein he had mentioned that deceased told to him that he owed Rs.15,000/- to accused persons which they were demanding. In these circumstances, it seems probable that suddenly, on spur of the moment appellant took out Chhuri from his pocket and inflicted injuries to deceased. Thus, the facts of the case

and the evidence on record indicate that assault was not premeditated. It sparked off suddenly when deceased failed to return the money of appellant. We, therefore, find substance in the submission made by learned counsel for the appellant that the appellant is entitled to the benefit of Exception 4 of section 300 of the Indian Penal Code and the offence committed by the appellant was culpable homicide not amounting to murder. However, there can be no doubt that appellant used Chhuri and dealt its blow on vital parts of the body of deceased, therefore, it has to be held that he intended to cause death or such bodily injuries to deceased which were likely to cause his death. We are, therefore, of the view that appellant is liable to be punished under Part-I of section 304 of the Indian Penal Code.

16. For the reasons aforesaid, the finding of learned Sessions Judge holding the appellant guilty of the offence of murder punishable under section 302 of the Indian Penal Code is set aside and he is held guilty of commission of offence of culpable homicide not amounting to murder punishable under section 304 (Part-I) of the Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years with fine of Rs.1000/-. In default of payment of fine, he shall further undergo rigorous imprisonment for three months. Conviction and sentence of appellant under section 326 of the Indian Penal Code as awarded by the trial Court is affirmed.

17. Appeal partly allowed.

Appeal partly allowed.

I.L.R. [2011] M. P., 1043

APPELLATE CRIMINAL

Before Mr. Justice S.N. Aggarwal

Cr.A. No.666/2004 (Gwalior) decided on 2 February, 2011

STATE OF M.P.

... Appellant

Vs.

VIRENDRA & anr.

... Respondents

Penal Code (45 of 1860), Section 306 - Suicide note left by the deceased is an important document and cannot be brushed aside.

Deceased committed suicide in her matrimonial home within one and a half year of her marriage. In case there was any abetment to her for committing suicide on the part of the respondents, then while she was dying she would

suicide note why she committed suicide and the reason for suicide given by her was that her husband being respondent No.1 herein was not happy with her because of her low height and that she did not want to see her husband miserable on that count. The said reason given by the deceased in her suicide note, by no means, amounts to abetment within the meaning of Section 306 IPC. (Para 5A)

दण्ड संहिता (1860 का 45), धारा 306 — मृतक द्वारा छोड़ा गया आत्महत्या लेख एक महत्वपूर्ण दस्तावेज है और उसे नज़रअंदाज नहीं किया जा सकता।

Jai Prakash Sharma, P.P., for the appellant/State.

Madhukar Kulshreshtha, for the respondents.

J U D G M E N T

S. N. AGGARWAL, J.:— This criminal appeal by special leave under section 378 Cr.P.C. granted by this Court vide its order dated 11/10/2004, is preferred by the State aggrieved by the impugned judgment of the Trial Court dated 18/11/2003 in Sessions Trial Case No.400/02 whereby respondents have been acquitted of charge under section 306/34 IPC.

2. I have heard the arguments of Mr. Jai Prakash Sharma, learned Public Prosecutor appearing on behalf of appellant/State and Mr. Madhukar Kulshreshtha, learned counsel appearing on behalf of the respondents. I have also perused the entire record of the Trial Court and have given my anxious consideration to the arguments advanced by the learned counsel for the parties.

3. Briefly stated, the facts of the case relevant for disposal of this appeal are as follows :

The respondents being the son and mother were tried for offence under section 306/34 IPC in relation to suicide committed by the deceased Shrimati Rani, married to respondent No.1 on 25/2/2001. The deceased had died an unnatural death by hanging in her matrimonial home on 10/8/2002 and this death took place within seven years of her marriage. There was no complaint against the respondents by any of the family members of deceased's parental house regarding cruelty meted out to her or demand of dowry from her till the date she committed suicide by hanging on 10/8/2002. The information of suicide by the deceased was given to the Police by none else but brother of respondent No.1 and son of respondent No. 2. Panchayatnama of dead body of the deceased was

prepared which is Ex.P/3 and bears the signatures of the mother and brother of the deceased, besides signatures of other persons. This Panchayatnama (Ex.P/3) on its back contains an opinion of S.H.O. regarding cause of death of the deceased and a perusal of the same would show that the deceased had committed suicide of her own without any instigation or abetment to her from anybody. No member of the parental family of the deceased made any murmur or complaint either to the Police or to any other authority about the deceased being treated with cruelty, much less, in connection with demand of dowry, even after they came to know about the death of the deceased by hanging in her matrimonial home on 10/8/2002. A suicide note in the hand writing of the deceased, found tied with a corner of her saree which the deceased was wearing at the time of her death, was recovered by the Police and the said suicide note is Ex.P/14 which is extracted below :

“मैं श्रीमती रानी झा मेरी शादी वीरेन्द्र झा से तारीख 25.2.2001 को हुई मगर मेरे पती इस शादी से खुस नहीं हैं वो मुझे पसन्द नहीं करते और मेरी सास भी मुझे पसंद नहीं करती इसका कारण है कि मेरी हाईट लम्बाई कम है इसलिए वो मुझे पसन्द नहीं करते और वो मुझे लेकर बहुत दुखी रहते हैं पर मैं उन्हें दुखी नहीं देख सकती मैं नहीं चाहती की वो मेरे कारण दुखी रहें मे अपने परिवार में अपने कारण किसी को दुखी नहीं देखना चाहती मे नहीं चाहती की मेरे कारण कोई दुखी हो इस लिए मेने यह फेसला किया है कि मैं आत्महत्ता करने जा रही हू यह आत्महत्ता सिर्फ मुझे अपनी लम्बाई कम होने के कारण करनी पड रही है । मैं भगवान से यह प्रार्थना करूंगी की भगवान किसी भी लडकी को कुरूप ना बनाए नहीं तो उसका जीवन नरक के समान हा जाता है । उसको सभी मैं अपनी आत्महत्ता अपनी मरजी से कर रही हूँ इसका कारण है की मेरे कारण मेरे पती और मेरी सास दुखी है मे और वो मुझे पसन्द नहीं करते पर मे अपने पति को बहुत प्यार करती हू पर मे उनसे कह नहीं सकती वीरेन्द्र में इस दुनिया को छोड कर जा रही हू । मेरे कारण तुम्हारी जिन्दगी बरबाद हुई है न इस लिए मे नहीं चाहती की मेरे कारण तुम्हारी जिन्दगी बरबाद हो और तुम दुखी रहो इस लिए मैं तुम्हे छोड कर जा रही हू तुम खुस रहना मैं भगवान से प्रार्थना करूंगी की वो तुम्हे खुस रखे मे तुम्हे बहुत प्यार करती हू मैं जा रही हू

तुम्हारी रानी जिसे तुम नफरत

करते हो

नाम रानी झा

दस्तखत

9.8.2002"

4. It is after more than twenty days of the suicide committed by the deceased, an FIR under section 306/34 IPC was registered against the husband and mother-in-law of the deceased in which vague allegations of demand of dowry and harassment meted out to the deceased were made by her parents. The learned Trial Court in the impugned judgment has considered the entire testimony produced by the prosecution and by its well reasoned order has arrived at a conclusion that the respondents cannot be accused of abetting the suicide by the deceased. The suicide note (Ex.P/14) left by the deceased speaks for itself and proves that the respondents are not guilty of abetment within the meaning of section 306/34 IPC.

5. Para 58 of the impugned judgment is relevant and is extracted below :

“इस प्रकरण में यद्यपि रानी को उसके माता-पिता के घर जाने से इनकार नहीं किया गया बल्कि उसका कद छोटा होने के कारण अभियुक्त वीरेन्द्र के दुखी रहने का उल्लेख प्रदर्श पी-14 के पत्र में किया गया है। मृत्तिका रानी का कद छोटा होने के कारण अभियुक्त वीरेन्द्र द्वारा कूरता से पेश आने बाबत कोई साक्ष्य मौजूद नहीं है बल्कि मृत्तिका के भावुक एवं संवेदनशील होने के कारण मन में हीन भावना पा लिये जाने का समर्थन उपरोक्त साक्षी लच्छीराम तथा राधेश्याम द्वारा किया गया है। ऐसी स्थिति में यदि अभियुक्त वीरेन्द्र तथा सावित्री बाई रानी के ठिगने कद के कारण दुखी रहते भी हों तो उन्हें उसकी आत्महत्या के दुष्प्रेरण का अपराधी नहीं ठहराया जा सकता।”

5. This Court is in complete agreement with the above reasoning given by the Trial Court for not acquitting the respondents of charges against them under section 306/34 IPC. The learned Public Prosecutor appearing on behalf of the appellant/State could not point out any reason much less a cogent reason to take a view different than the view on the testimony taken by the Trial Court for acquitting the respondents of charges under section 306/34 IPC. This Court is of the view that the suicide note (Ex.P/14) left by the deceased is an important document and cannot be brushed aside. It is a matter of record that the deceased has committed suicide in her matrimonial home within one and a half year of her marriage. In case there was any abetment to her for committing suicide on the part of the respondents, then while she was dying she would not have spared them. She has given a reason in the suicide

note why she committed suicide and the reason for suicide given by her was that her husband being respondent No.1 herein was not happy with her because of her low height and that she did not want to see her husband miserable on that count. The said reason given by the deceased in her suicide note, by no means, amounts to abetment within the meaning of section 306 IPC.

6. For the foregoing reasons, I do not find any merit in this appeal which fails and is hereby dismissed.

Appal dismissed.

**I.L.R. [2011] M. P., 1047
APPELLATE CRIMINAL**

Before Mr. Justice S.N. Aggarwal

Cr.A. No.3/2005 (Gwalior) decided on 3 February, 2011

RAMDAYAL & anr.

... Appellants

Vs.

STATE OF M.P.

... Respondent

Penal Code (45 of 1860), Section 307 - Attempt to murder - Appellants poured petrol over the body of the injured and on account of which he suffered 42% burn injuries in the incident - Held - Intention on part of appellants to kill the injured by their act of pouring petrol and then setting him (injured) ablaze is clearly borne out - No infirmity or illegality in judgment of conviction passed by the trial Court. (Para 5)

दण्ड संहिता (1860 का 45), धारा 307 - हत्या का प्रयत्न - अपीलार्थियों ने चोटग्रस्त व्यक्ति के शरीर पर पेट्रोल डाला जिसके कारण घटना में उसे 42% जलने से क्षतियाँ आयीं - अभिनिर्धारित - अपीलार्थियों का चोटग्रस्त व्यक्ति पर पेट्रोल डालने तथा उसे (चोटग्रस्त) आग लगा देने के उनके कृत्य द्वारा चोटग्रस्त व्यक्ति को मारने का आशय साबित होता है - विचारण न्यायालय द्वारा पारित दोषसिद्धि के निर्णय में कोई अशक्तता या अवैधता नहीं।

MadhukarKulshrestha, for the appellants.

J.P. Sharma, P.P., for the respondent/State.

J U D G M E N T

S.N. AGGARWAL, J. :-This Criminal Appeal under Section 374 Cr.P.C. filed by the appellants, who are two in number, is directed against their conviction under Section 307/34 IPC. Vide judgment of the court below dt. 8th December 2004 in Sessions Trial Case No.107/04, they have been

sentenced to undergo rigorous imprisonment for four years each and to pay fine of Rs.10,000/-each and in default to further undergo rigorous imprisonment for six months.

2. I have heard the arguments of Mr.Madhukar Kulshrestha, learned counsel appearing for the appellants and of Mr.J.P.Sharma, learned Public Prosecutor appearing for the respondent/State. I have also perused the entire record of the trial court and have given my anxious consideration to the rival arguments advanced by learned counsel for both the parties.

3. Briefly stated facts of the case giving rise to this appeal are as follows :

(i) The appellants were tried in the court below for the offence under Section 307/34 IPC on accusation against them that they in furtherance of their common intention had set P.W.4. Gajan Lal ablaze by pouring petrol on him in the incident that took place at National Auto Center Sawarkar Market, A.B.Road around 8 a.m. on 25.2.2004. The injured P.W.4 had suffered 42% burn injuries and had remained in hospital as an indoor patient for about a month. The defence set up by the appellants during trial was that the injured P.W.4 Gajan Lal had problem with his wife, who was not staying with him and for that reason he got himself burnt by sprinkling kerosene oil over his body. According to the appellants, they were falsely implicated by injured P.W.4 Gajan Lal and his father-in-law P.W.5 Mangal Singh, as they were suspecting him of taking away wife of P.W.4 Gajan Lal from his custody.

(ii) The injured P.W.4 Gajan Lal was got medically examined from P.W.3 Dr.C.M.Gupta and he has proved the M.L.C. of the injured in his statement as document Ex.P/4. As per testimony of P.W.3 Dr.C.M.Gupta, the burn injuries suffered by the injured were by petrol and not by kerosene oil. No suggestion was given to P.W.3 Dr.C.M. Gupta that the injured had suffered burn injuries by kerosene oil, rather Dr.C.M.Gupta in his cross-examination has amplified that he has opined the burn injuries to have been suffered by the injured by petrol as he himself had been using petrol for his vehicle. From the

testimony of P.W.3 Dr.C.M.Gupta, no manner of doubt is left to conclude that the injured had suffered injuries in the incident by pouring of petrol over his body. The question that now arises is whether the appellants were responsible for the burn injuries suffered by the injured in the incident.

- (iii) The FIR of the incident was lodged by P.W.5 Mangal Singh, father-in-law of the injured P.W.4 Gajan Lal. He in his testimony has testified that on the date of incident he had received an information around 8.00-8-30 a.m. while he was busy in his business of selling vegetables that his son-in-law P.W.4 Gajan Lal had been burnt by the appellants. He in his cross-examination has denied the suggestion of the defence that the appellants have been falsely implicated because he had withheld an amount of Rs.5000/- due from him to appellant No.2 and further on account of the fact that his daughter was not residing with his injured son-in-law P.W.4 Gajan Lal.
- (iv) P.W.4 Gajan Lal was the star witness of the prosecution and he in his testimony has categorically deposed that appellant No.2 had caught of his hands and appellant No.1 had poured petrol over his body and then set him ablazed. He has denied the suggestion of the defence that he himself had poured kerosene oil over his body and set himself ablazed because his wife was not staying with him. He further denied the suggestion of the defence that he used to suspect appellant No. 1 of enticing away his wife. There is absolutely nothing in the cross-examination either of P.W.4 or P.W.5, which may create a doubt on their version regarding the manner and the role attributed to the appellants in the incident as stated by them in their respective testimony.

4. Mr.Madhukar Kulshrestha, learned counsel appearing on behalf of the appellants has argued that the appellants, who are real brothers, were falsely implicated by P.W.5 Mangal Singh because they were on inimical terms since the injured P.W.4 Gajan Lal used to suspect them of taking away his wife from his custody. Learned counsel has further argued that P.W.4 and P.W.5,

who are related to each others as son-in-law and father-in-law are interested witnesses and the court should not give much credence to their testimony, as according to him the independent public witnesses of the incident namely P.W.1 and P.W.2 have turned hostile and did not support the prosecution case. This argument in my opinion has no force. Merely because public witnesses P.W.1 and P.W.2 were hostile to the prosecution case can not be a ground to disbelieve the testimony of P.W.4 and P.W.5, who both were the star witnesses of the prosecution. In fact, the testimony of P.W.4 and P.W.5 find ample corroboration from the testimony of P.W.3 Dr.C.M.Gupta. The alleged previous animosity between the parties is a double edged weapon and in the peculiar facts and circumstances of this case, the alleged animosity between them can not be said to be a ground for false implication of the appellants.

5. From the facts of the prosecution on record, it stands proved that the appellants were the real culprits responsible for pouring petrol over the body of the injured P.W.4 Gajan Lal, on account of which he suffered 42% burn injuries in the incident. The intention on their part to kill the injured by their act of pouring petrol and then setting him ablazed is clearly -borne out. It can not be believed for a moment that the appellants would not know the consequences of their act of setting a person ablazed by pouring petrol over him.

6. In view of the facts and circumstances of the case stated, I do not find any infirmity or illegality in the impugned judgment of conviction passed by the trial court against the appellants. The said judgment of the court below is therefore affirmed.

7. Mr.Madhukar Kulshrestha, learned counsel appearing on behalf of the appellants submits that the impugned sentence of appellant No.1 was not suspended and according to him he might have been released from jail after completing his term of imprisonment of four years awarded to him by the court below. In view of the same, the Jail Superintendent, Gwalior is directed to release appellant No.1 immediately, if not already released, in case he has already completed the sentence awarded to him by the court below.

8. As far as appellant No.2 is concerned, he had remained in custody as under trial prisoner from 27th February 2004 to qfh March 2004 and thereafter from the date of impugned judgment dt. 8.12.2004 till his sentence was suspended by this court vide order dt. 2nd February 2005. Appellant No.2 is directed to surrender to custody forthwith to serve the remaining sentence of imprisonment awarded to him by the court below. In case he fails

to surrender of his own, then the court of Chief Judicial Magistrate Shivpuri is directed to initiate necessary process for ensuring arrest of appellant No.2 and send him to jail for serving the remaining sentence of imprisonment.

In view of the above, this appeal stands dismissed.

Appeal dismissed.

I.L.R. [2011] M. P., 1051

CIVIL REVISION

Before Mr. Justice U.C. Maheshwari

C. R.No. 311/2010 (Jabalpur) decided on 11 October, 2010

AKASH JAIN

...Applicant

Vs.

JAMA MASJID COMMITTEE

...Non-applicant

Wakf Act (43 of 1995), Section 55, Transfer of Property Act, 1882, Section 114 - Jurisdiction of Tribunal - Direction to deposit arrears of rent - Suit for eviction filed against applicant after serving quit notice under Transfer of Property Act - Tribunal directed applicant to deposit entire arrears of rent - Held - If some direction to deposit arrears of rent/mesne profit without mentioning any consequence of it has been given by Tribunal, then it could not be said that such order has been passed under any error of jurisdiction - Question regarding forfeiture of lease and pursuant to that the question of his eviction from disputed property can be adjudicated at the time of final hearing of the matter - Revision dismissed. (Paras 8 & 9)

वक्फ अधिनियम (1995 का 43), धारा 55, सम्पत्ति अंतरण अधिनियम, 1882, धारा 114 - अधिकरण की अधिकारिता - भाड़े का बकाया जमा करने का निदेश - सम्पत्ति अंतरण अधिनियम के अंतर्गत खाली करने का सूचना पत्र तामील करने के पश्चात आवेदक के विरुद्ध बेदखली का वाद प्रस्तुत - अधिकरण ने भाड़े का संपूर्ण बकाया जमा करने का आवेदक को निदेश दिया - अभिनिर्धारित - यदि अधिकरण द्वारा भाड़े का बकाया/मध्यवर्ती लाम जमा करने का कोई निदेश, बिना कोई परिणाम उल्लेखित करते हुए दिया गया, तब यह नहीं कहा जा सकता कि ऐसा आदेश अधिकारिता की किसी भूल के अंतर्गत पारित किया गया - पट्टे के समपहरण संबंधी प्रश्न और उसके अनुसरण में, वाद सम्पत्ति से उसकी बेदखली का प्रश्न, मामले की अंतिम सुनवाई के समय न्यायनिर्णित किया जा सकता है - पुनरीक्षण खारिज।

Cases referred:

AIR 2000 SC 540, AIR 1973 SC 76.

M.L. Choubey with S.K. Choubey, for the applicant.

ORDER

U.C. MAHESHWARI, J. :-The applicant/defendant has directed this revision under section 83(9) of the Wakf Act, 1995 being aggrieved by the order dated 26.6.2010 passed by the M.P. State Wakf Tribunal, Bhopal in Case No. Nil/2010 directing the applicant to deposit the entire arrears of the rent of the disputed premises within one month in the suit for eviction filed by the respondent.

2. The facts giving rise to this revision in short are that the respondent herein filed the suit against the applicant for eviction with respect of the premises situated at Sagar. Undisputedly, the respondent being constituted under the provision of Wakf Act, its property is governed with such enactment. By virtue of the notification No.F-24-(4)-83-XXXII-I dated 7.9.89 the provision of M.P. Accommodation Control Act, 1961 is not applicable to any property of the respondent.

3. In the aforesaid premises, on behalf of the respondent, after giving a quit notice of terminating the tenancy with respect of the disputed premises, the impugned suit for eviction has been filed in the above mentioned tribunal under the provisions of the Transfer of Property Act as under the Wakf Act no such procedure has been provided and applicability of any provision of Transfer of Property Act has neither been excluded nor barred. A copy of the plaint is also placed on the record according to which the applicant, being defaulter in payment of the regular monthly rent of the disputed premises inspite sending the demand notice had not paid the dues of months together, on which, the suit for eviction as well as for recovery of arrears of the rent and mesne profit, is filed.

4. In pendency of the suit, on behalf of the respondent, an application to close the right of the applicant to defend the case on account of non-payment and non depositing the arrears of rent was filed. As per averments of such IA, the same was filed under section 13(6) of the M.P. Accommodation Control Act, 1961. On behalf of the applicant, the averments of such IA are disputed in his reply on dated 3.5.2010. On consideration in view of the alleged rent note (Kirayanama) and the other available circumstances, the applicant was

directed by the tribunal to deposit the entire arrears of rent in one month vide impugned order dated 26.6.2010. Being aggrieved by the same, the applicant has come forward with this revision to this court.

5. Shri M.L.Choubey, learned counsel after taking me through the averments of the revision memo as well as the pleadings and the papers placed on the record argued that undisputedly the present case is not governed by the provision of M.P. Accommodation Control Act, 1961 so the application filed on behalf of the respondent under section 13(6) of such Act for closing the right of the applicant to defend the case was not entertainable and on that basis the applicant could not be directed to deposit the outstanding sum of the rent. He also argued that under the provision of Rent Control Act there is certain provision empowering the court to struck out the defence on account of non-payment of the outstanding rent or regular rent of the premises but there is no such provision under the Transfer of Property Act and, in such premises, the impugned order being passed in the lack of any statutory provision, is not sustainable under the law. In continuation he also argued that courts should not pass such an order for which the procedure for it's compliance or execution is not provided under the law. In this respect he said that if in compliance of such order the step is not taken by the applicant then there is no provision under the law to take any recourse or action against the applicant regarding violation of such order. He also argued that the High Court, being superior court and the court of record, is duty bound to keep all record in accordance with the law and if any apparent error is noticed then this court has to determine the scope of the jurisdiction. In such premises, this court is having the jurisdiction to rectify such order which has been passed by the inferior court or the subordinate court without having such vested jurisdiction in that regard. By placing his reliance on a case law in the matter of *M.M.Thomas Vs. State of Kerela and another*-AIR 2000 SC 540, he prayed for setting aside the impugned order by admitting and allowing this revision.

6. Having heard the counsel, keeping in view his arguments, I have carefully gone through the pleadings and other papers along with the impugned order placed on the record but because of following reasons, I am of the view that the trial court has not committed any error or perversity in passing the impugned order.

7. It is not in dispute that the respondent/plaintiff being Wakf institution,

by virtue of the above mentioned notification, is exempted from the provision of M.P. Accommodation Control Act. It is also undisputed circumstance that under the Wakf Act no provision either for creating the lease or determining the same or to determine the rights and liabilities of the Lessor and Lessee are enacted so, in such circumstance, the alleged lease transaction of the disputed premises between the respondent and the applicant shall be governed with the provision of section 105 to 117 enacted to govern the lease of immovable property in Chapter V of the Transfer of property Act. Out of them, section 114 is read as under :-

114. Relief against forfeiture for non-payment of rent

Where a lease of immovable property has been determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the court thinks sufficient for making such payment within fifteen days, the court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

The above mentioned provision of Transfer of Property Act provides that where the alleged lease of immovable property has been determined by forfeiture for non-payment of rent and the lessor sues to eject the lessee and on hearing of suit the lessee pays or tenders to the lessor, the rent in arrears together with interest thereon and its full cost of the suit or gives such security as the court thinks sufficient for making such payment within 15 days then the court in lieu of decree of ejectment, pass an order relieving the lessee against forfeiture and, in such circumstance, the lessee shall hold the property leased as if the forfeiture had not occurred.

8. Keeping in view the aforesaid provision and the circumstances on examining the impugned order it is apparent that in such order by allowing some application of the respondent, the applicant is directed to deposit the rent within one month. At present, in such order, on non-compliance the direction to deposit the rent according to spirit of said provision, no consequence has been mentioned. But in any case, at the request of the respondent, after taking into consideration the factual matrix of the case and the basic spirit of the aforesaid section 114 of the Act, if some directions to

deposit the arrears of rent or mesne profit without mentioning any consequence of it has been given by the tribunal then it could not be said that such order has been passed by the tribunal under any error of jurisdiction or contrary to law.

9. In any case, the impugned order could be deemed to be passed with the spirit of the aforesaid provision of section 114 of the Transfer of Property Act. If such direction is not complied with then certainly, subject to appreciation of the evidence, under the aforesaid provision, on final hearing of the matter, in view of impugned order, the question regarding forfeiture of the lease of the applicant and pursuant to that the question of his eviction from the disputed premises could be adjudicated.

10. In the aforesaid premises, I have not found any perversity, infirmity or irregularity or any thing against the propriety of the law in the order impugned. On the contrary, it appears to be passed by the tribunal under the vested jurisdiction of it.

11. So far the case law *M.M.Thomas* (supra) cited on behalf of the applicant is concerned, in view of the aforesaid discussion, such case law being distinguishable on facts with the case at hand, is not helping to the applicant. So far the principle laid down in such case is concerned, this court did not have any dispute but in the available circumstances the same is not giving any benefit to the applicant.

12. Long before in the matter of *Managing Director (MIG) Hindustan Aeronautics Ltd. Balanagar, Hyderabad and another v. Ajit Prasad Tarway, Manager (Purchase and Stores) Hindustan Aeronautics Ltd. Balanagar, Hyderabad*, -AIR 1973 SC 76, the Apex Court has held that if the impugned order is passed by the subordinate, court under its vested jurisdiction then even if erroneous on facts, the same could not be interfered under the revisional jurisdiction of the superior court.

13. In the aforesaid premises, I have not found any merits in this revision for admission, resultantly, the same is hereby dismissed at the motion stage. Pursuant to it, IA No.8572/10 the stay application is also dismissed.

Revision dismissed.

I.L.R. [2011] M. P., 1056

CIVIL REVISION

Before Mr. Justice N.K. Mody

C.R. No.223/2010 (Indore) decided on 23 November, 2010

RAJESH KUMAR

....Applicant

Vs.

PREMCHAND & anr.

...Non-applicants

Municipalities Act, M.P. (37 of 1961), Section 20 - Election Petition - Recounting of votes - Court is not powerless in ordering of recounting of ballot papers - However, justification for an order of recounting of votes should be by placing material by the petitioner, before an order for recount is actually made. (Para 13)

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 20 - चुनाव याचिका - मत की पुनर्गणना - मतपत्रों की पुनर्गणना का आदेश करने हेतु न्यायालय शक्तिहीन नहीं है - फिर भी, मत की पुनर्गणना के आदेश का समर्थन पुनर्गणना हेतु वास्तव में किये आदेश के पूर्व याचिकाकर्ता द्वारा सामग्री प्रस्तुत कर होना चाहिये।

Cases referred :

1972 JIJ 658, AIR 2010 SC 24.

*C.L. Yadav, with Manish Yadav, for the applicant.**Vivek Sharan with Aakash Sharma, for the non-applicant No. 1.**Vivek Phadke, G.A., for the respondent No. 2.***ORDER**

N.K. Mody, J. :-Being aggrieved by order dated 18.9.2010 passed by learned Additional District Judge, Susner in Election Petition No. 2/2010, whereby petition filed by respondent No.1 under Section 20 of the Madhya Pradesh Nagar Palika Adhiniyam, 1961 (herein after referred to as "the Act") was allowed and the election of the petitioner for the post of Vice President was set aside, present petition has been filed.

2. Short facts of the case are that Respondent No.1 filed an election petition on 15.2.2010 under Section 20 of the Act wherein it was alleged that election of Nagar Panchayat, Soyatkala for the post of Vice President took place on 16.1.2010 wherein 16 voters casted their votes . It was alleged that said election was contested by the petitioner and respondent No.1. It was alleged that in the said election all the voters casted their votes out of which two ballots were rejected as invalid. After counting it was found that petitioner

and respondent No.1 both has got 7 votes. It was alleged that since both the candidates got equal number of votes, therefore the Presiding Officer followed the procedure to decide the election by lot in which the petitioner was declared elected. It was alleged that the entire process which was followed was illegal. It was prayed that election of the petitioner for the post of Vice President be declared as invalid. The election petition was contested by the petitioner by filing reply wherein the allegations made in the petition were denied. It was prayed that petition be dismissed. After framing of issues and recording of evidence and also after examining the rejected ballot papers the petition filed by the respondent No.1 was allowed and election of the petitioner for the post of Vice President was declared illegal against which present petition has been filed.

3. Mr. C.L. Yadav, Senior advocate appearing for the petitioner submits that the impugned order passed by the trial Court is illegal, incorrect and deserves to be set aside. Learned counsel submits that election of the petitioner for the post of Vice President took place on 16.1.2010 and the election petition was filed on 15.2.2010. Learned counsel submits that the election petition is required to be file under Section 20(3) of the Act within a period of 30 days which was also filed in time but after expiry of the period of limitation an application for amendment was filed on 18.8.2010 wherein for the first time validity of the meeting itself wherein the election took place was challenged. Learned counsel submits the election petition cannot be allowed to amend after expiry of limitation prescribed for filing the election petition. Learned counsel submits that since the prescribed period of limitation is 30 days, therefore, after expiry of limitation respondent No.1 cannot be allowed to amend the election petition. For this contention reliance is placed on a decision in the matter of *Ganpat Lal Sharma Vs. Surya Prasad and ors*, 1972 J LJ 658 wherein this Court has held that

"Objection which has been raised in the election petition after expiry of limitation by amendment objection cannot be considered even if amendment allowed."

4. In view of the aforesaid position of law, learned counsel submits that learned court below committed error in holding that the meeting itself which was held for conducting the election, was illegal. Learned counsel further submits that the procedure followed by the Presiding Officers for the election for the post of Vice President can be challenged on the grounds mentioned

under Section 22 of the Act. It is submitted that the meeting itself, held for conduction of the election, was illegal, cannot be a ground for declaring the election to be void. Learned counsel submits that even if it is assumed that the ground validity of the meeting can be taken into consideration as ground, then too, since there was no pleadings which are necessary as per law, therefore, election should not have been set aside on that ground. Learned counsel further submits that learned Court below has held that the meeting was not valid as there was no notice of clear 7 days. It is submitted that since notice was dated 8.1.2010 and the meeting was held on 16.1.2010, therefore, observation made by the Court below is not correct. Learned counsel submits that learned Court below committed error in recounting of ballots without passing any order. Learned counsel placed reliance on a decision in the matter of *Kattinokkula. Murali Krishna Vs. Veeramalla Koteswara Rao*, AIR 2010 SC 24 wherein Hon'ble Apex Court held that an order for inspection and re-count of the ballot papers affects the secrecy of ballot, such an order cannot be made as a matter of course. Undoubtedly, in the entire election process, the secrecy of ballot is sacrosanct and inviolable except where strong prima facie circumstances to suspect the purity, propriety and legality in the counting of votes are made out. Before an Election Tribunal can permit scrutiny of ballot papers and order re-count, two basic requirements viz. (i) the election petition seeking re-count of the ballot papers must contain an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded, and (ii) on the basis of evidence adduced in support of the allegations, the Tribunal must be prima facie satisfied that in order to decide the dispute and to do complete and effectual justice between the parties, making of such an order is imperatively necessary, are satisfied. Hon'ble Apex Court has further held that similarly the fact that there was a narrow margin of votes between the returned candidate and the election petition would not per se give rise to a presumption that there had been an irregularity or illegality in the counting of votes. Even the fact that Election Officer has failed to explain the corrections and over writings in Form No.26 were irrelevant. On the strength of aforesaid position of law and in the facts and circumstances of the case, learned counsel submits that the petition filed by the petitioner be allowed and the impugned order passed by the learned Court below whereby election of the petitioner as Vice-president is declared void, be set aside.

5. Mr. Vivek Sharan, learned counsel for respondent No.1 submits that no

illegality has been committed by the learned Court below in passing the impugned order, which can be corrected by this Court while exercising revisional jurisdiction. It is submitted that the learned Court below has allowed the petition filed by respondent No.1 and declared the election petition illegal on the ground that because of not following the statutory rules and also one vote was wrongly rejected by the Election Officer. It is submitted that since the meeting in which the election took place was not called in accordance with law, therefore, election petition was amended by moving an amendment application, which was duly allowed. It is submitted that otherwise also sufficient pleadings are in the election petition itself, which goes to show that the calling of the meeting was not in accordance with law, as seven days clear notice was not given. Learned counsel further submits that since Section 56(3) of M.P. Municipalities Act, 1961 was not followed for convening of meeting, therefore, the meeting itself was illegal, which is one of the ground for declaring the election invalid. It is submitted that so far as recounting of votes is concerned, interim order dated 07/04/10 and 29/04/10 were not challenged by the petitioner and also there is no findings of the learned trial Court and the election was not declared illegal on the basis of recounting of votes, therefore, validity of that part of the order is not required to be seen. It is submitted that the petition filed by the petitioner is without any merits and the same be dismissed.

6. Before dealing with the facts of the case, it is necessary to deal with some important provisions of law. Section 56 of M.P. Municipalities Act, 1961 deals with convening of meeting. Sub-section (3) of Section 56 of M.P. Municipalities Act lays down that notice of every meeting specifying the time and place thereof and the business to be transacted there at shall be despatched to every Councillors and exhibited at the Municipal office seven clear days before an ordinary meeting and three clear days before a special meeting. In exercise of powers conferred by Section 355 read with Section 43 of M.P. Municipalities Act State Government framed the rules for the purpose of election of Vice-president which are known as M.P. Municipality (Election of Vice-president) Rules, 1998. Rule 11 of Rules deals with the procedure upon opening each ballot box and counting of votes, according to which the presiding authority shall open the ballot box and proceed to scrutinise the ballot papers. If on any ballot paper there is "X" mark against more than one name or there is any mark or sign on a ballot paper by which the voter can be identified, such ballot papers shall be considered invalid and shall not be counted. The decision of the presiding authority shall be final in that respect. The valid votes

shall then be counted by the presiding authority and the ballot paper arranged in respect of each candidate. Rule 14 of the Rules deals with maintenance of secrecy of voting, according to which every person who performs any duty in connection with the recording or counting of votes at any election shall maintain and aid in maintaining the secrecy of voting and shall not (except for some purpose authorised by or under any Law) communicate to any person any information calculated to violate such secrecy.

7. From plain reading of Rule 11 of the Rules it is evident that a ballot paper can be declared as invalid by which the voter can be identified and on the ballot paper there is "X" mark against more than one name.

8. Election petition is being filed under Section 20 of Municipalities Act, according to which petition can be filed on one or more of the grounds specified in Section 22 of the Act. Section 22 (d)(iii) of Municipalities Act empowers the Court to declare the election to be void if because of non-compliance with the provisions of this Act or of any rules or orders made thereunder. In the light of aforesaid provisions of law the facts of the case has to be examined.

9. In the election petition which was filed on 15/02/10 it is nowhere stated that any provision of law or the rules was violated. On the contrary in Para-1 of the petition it is alleged that the meeting was convened for election of which intimation was given to all the councillors. Vide order dated 18/08/10 additional ground was added which was to the effect that the notice issued to the councillors were not served in time and also were not issued in time. This ground was not taken by the respondent within 30 days from the date of election of the petitioner. In view of law laid down by this Court in the matter of *Ganpat Lal Sharma* (Supra) objection can be considered even though the amendment was allowed. Apart from this in the present case notices were issued on 08/01/10, while election took place on 16/01/10, therefore, on the face of it there was seven days clear notice which is necessary for calling of ordinary meeting. It was not the case of respondent NO.1 that any of the councillor was unserved with the notice. Moreover there is nothing on record on the basis of which it can be said that the notice was not pasted on the notice board. As per Section 56(3) of the Act notices are required to be dispatched to the councillors and exhibited before any ordinary meeting. Since it was not the case of respondent No.1 that the notice was not exhibited, therefore, findings of the learned trial Court that pasting of the notice on the notice board is doubtful, is without any basis.

10. Apart from this it has to be presumed that notice must have been accepted as per Section 56(3) of the Act unless it is rebutted, for which no case was made out by the respondent. So far as finding of the learned Court below that the notice was not served before seven days to the councillors is concerned, as per Section 56(3) of the Act requirement of law is that the notices are required to be dispatched before seven days. Moreover, in the present case since all the voters were present and also casted their votes, therefore, there was no justification on the part of learned Court below in holding that the meeting itself was invalid as the voters were not served in time.

11. In view of this, the findings recorded by the learned trial Court for declaring the election invalid on the ground that the notice was not exhibited and was not served in time to the councillors can not be allowed to sustain because the ground was not raised by the respondent No.1 in time and also the ground was not taken in the amendment petition that the notices were not exhibited and also on the ground that all any of the voters was not served as the persons were required to cast their votes were present.

12. So far as other ground is concerned, whereby the learned Court below allowed the recounting of votes is concerned, Hon'ble Apex Court in the matter of *Kattinokkula Murali Krishna* (Supra) in para-12 has observed as under:-

The Court would be justified in ordering a recount of the ballot papers only where:

(1) the election-petition contains an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded;

(2) on the basis of evidence adduced such allegations are prima facie established, affording a good ground for believing that there has been a mistake in counting; and

(3) the Court trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties.

13. From the aforesaid position of law it is clear that the Court is not powerless in ordering of recounting of ballot papers. However the justification for an order of recounting of votes should be by placing material by an election

petitioner on the threshold before an order for re-count of votes is actually made. The reason is that the preservation of the secrecy of the ballot is a sacrosanct principle which cannot be lightly or hastily broken unless there is prima facie genuine need for it. The right of a defeated candidate to assail the validity of an election result and seek recounting of votes has to be subject to the basic principle that the secrecy of the ballot is sacrosanct in a democracy and hence unless the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a prima facie case of a high degree of probability existed for the recount of votes being ordered by the Election Tribunal in the interests of justice, a Tribunal or Court should not order the recount of votes.

14. In view of the aforesaid position of law, this Court has to examine the facts stated in the petition. In para-5 of Election Petition the facts stated by the respondent No.1 are as under:-

यह कि याचिका का मुख्य आधार यह है कि पीठासीन अधिकारी द्वारा जो मत अविधि मान्य घोषित किया गया वह अविधि मान्य नहीं था एवं स्पष्ट रूप से याचिकाकर्ता के पक्ष में था। उक्त मत में याचिकाकर्ता के नाम पर ही कास के निशान लगे हुए थे नियम के मुताबिक अगर कास लगने वाली लाईन में कहीं भी कास का निशान है तो वह मत स्वीकार योग्य होता है।

15. Vide order dated 07/04/10 upon the application filed by respondent No.1 record was called alongwith the ballot papers. On 29/04/10 Smt. Usha Singh, Tehsildar who was Election Officer was examined. During course of examination in chief counsel for the respondent prayed that he be permitted to open the envelop in which ballots were kept to prove that the ballot paper is not on the form-B as per Rule (iii) of Rule 10 of the Rules, therefore, entire procedure is illegal. This prayer was opposed by the counsel for the petitioner. The prayer was rejected and witness was directed to open the envelop wherein ballot papers were kept.

16. From the aforesaid fact it is evident that the prayer was made for opening the envelop wherein the ballot papers were kept, to verify whether the ballot papers were on Form-B as Per Rule 10(iii) or not. This was not the case of respondent No.1 in the petition. The case of the respondent was that two ballot papers have wrongly been rejected. Since it was not the case of respondent No.1 in the election petition that the ballot paper is not on Form-B as prescribed in Sub-Rule (iii) of Rule 10 of the Rules and also it was not materially affecting the election, therefore, there was no justification on the

part of learned Trial Court to allow the witness to open the sealed cover in which ballot papers were kept. However, the election petition filed by respondent No.1 has not been allowed on that count. In the facts and circumstances of the case, petition filed by the petitioner is allowed and the impugned order whereby election of respondent no.1 is declared as void, is set aside and also the order which was passed on 29/04/10 in the order-sheet and also in the deposition of Smt. Usha Singh is set aside and the case is remanded to the learned trial Court to redecide the petition on the ground stated in para-5 of Election Petition, which has been quoted hereinabove. Learned trial Court is directed to pass the order regarding necessity of opening of sealed cover to examine the validity of two invalid votes. Parties are directed to remain present before the learned Court below on 03/12/2010. Learned trial Court is directed to redecide the petition within a period of three weeks.

17. With the aforesaid observations, petition stands disposed of. No order as to costs.

Petition disposed of.

I.L.R. [2011] M. P., 1063
CIVIL REVISION

Before Mr. Justice U.C. Maheshwari

C.R. No. 474/2010 (Jabalpur) decided on 6 December, 2010

SHRI PRATAP RAGHAVJI BHAGWAN

VIRAJMAN MANDIR

... Applicant

Vs.

SMT. KRISHNA & ors.

... Non-applicants

Accommodation Control Act, M.P. (41 of 1961), Section 18(3) - Right of Re-entry - Decree under Section 12(1)(h) of the Act, 1961 passed with condition of re-entry - Tenant vacated the premises in terms of decree and building was constructed by applicant - Tenant filed application under Section 18(3) of the Act, 1961 as he was not placed in possession - Application allowed by Executing Court - Held - Executing Court can not go behind the terms of the decree - Tenant entitled to get possession of premises in reconstructed house from applicant - Revision dismissed. (Paras 6 to 9)

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 18(3) - पुनः प्रवेश का अधिकार - पुनः प्रवेश की शर्त के साथ अधिनियम 1961 की धारा 12(1)(एच) के

अंतर्गत डिक्री पारित — डिक्री की शर्तों के अनुसार किरायेदार ने स्थान खाली किया और आवेदक द्वारा भवन का निर्माण किया गया — किरायेदार ने अधिनियम 1961 की धारा 18(3) के अंतर्गत आवेदन प्रस्तुत किया, क्योंकि उसे कब्जा नहीं दिया गया — निष्पादन न्यायालय द्वारा आवेदन मंजूर किया गया — अभिनिर्धारित — निष्पादन न्यायालय डिक्री की शर्तों से मुक्त नहीं सकता — किरायेदार, आवेदक से पुनः निर्मित मकान में स्थान का कब्जा लेने का हकदार — पुनरीक्षण खारिज।

Cases referred:

AIR (38) 1951 SC 189, 1982 MPWN 225, AIR 1973 SC 76.

Pranay Verma, for the applicant.

ORDER

U.C. MAHESHWARI, J. :- This revision is directed on behalf of the applicant/plaintiff/deeree holder against respondent/judgment debtor/defendant under section 115 of the CPC being aggrieved by the order dated 27.9.2010 passed by Civil Judge Class-I Tikamgarh in MJC No.4/2010. The same also appears to be filed against the order dated 21.10.2010 as stated in para-8 and 9 of the revision memo whereby the application filed on behalf of the respondents under section 18(3) of the M.P. Accommodation Control Act, 1961 (for short 'the Act') for their re-entry in the newly constructed premises in compliance of the judgment and decree dated 31.7.07 passed by the District Judge Tikamgarh in Civil Regular Appeal No.37-A/06 arising out of judgment and decree dated 31.7.06 passed by the Addl. Civil Judge to the Court of Civil Judge Class-I Tikamgarh in Civil Original Suit No.29-A/06 has been allowed and pursuant to that to deliver the possession of the newly constructed premises to the respondents, a warrant of possession has been directed against the applicant herein.

2. The facts giving rise to this revision in short are that the applicant herein on or about 20.9.1999 instituted a civil suit against the respondents for their eviction from the premises comprising two rooms of House No.40 situated at Ward No.80, Khasra No.226/1, Rajmahal Road, Tikamgarh also described and marked in the map annexed with the plaint on the grounds enumerated under section 12(1)(a) and (h) of the Act. The same was contested on behalf of the respondents. After holding the trial on appreciation, the same was decreed by the trial court in Civil Original Suit No.29-A/06 vide judgment dated 31.7.06 for eviction on aforesaid both the grounds i.e. section 12(1)(a) and (h) of the Act. On challenging such decree by the respondents herein in the above-mentioned appeal, the same was allowed in part and by setting

aside such decree in part till the extent of section 12(1)(a) of the Act, the same was affirmed on the ground under section 12(1)(h) of the Act with some terms and conditions in which the right of re-entry to the respondents after making out the new construction of the premises was also included. It is noted that at the instance of the applicant herein, a second appeal against the aforesaid judgment and decree of the appellate court is pending in this court as S.A.No. 1669/07 in which against the execution of said decree no stay has been granted as such stay application was withdrawn on behalf of the applicant herein vide dated 12.3.2010 in such appeal.

3. As per further case of the parties, subsequent to decision of the aforesaid first appellate court, in compliance of the terms of the decree, the vacant possession of the disputed premises was handed over by the respondents to the applicant for making the new construction within the prescribed period, thereafter the respondents had carried-out the same. As per case of the respondents they have complied with all the terms of the decree passed on the ground under section 12(1)(h) and, therefore, in such premises, they are entitled to re-enter in the premises after its re-construction. But the possession of the same was not being given to them by the applicant herein, on, which, they filed the impugned application under section 18(3) of the Act with a prayer to make available them the vacant possession of the newly constructed shop from the applicant in compliance of the decree. The averment of such IA was disputed on behalf of the applicant/Trust by filing its reply, on which, after holding the preliminary inquiry, the aforesaid application of the respondents were allowed by the executing court vide dated 21.10.2010. I would like to mention here that initially according to the reply of the applicant the requisite rent of the agreed period was not deposited by the respondents, therefore, they are not entitled for re-entry in the premises. But the executing court vide order dated 21.10.10, by holding that such entire rent has been deposited by the respondents and in such premises, the warrant of possession to make available the alleged shop to the respondents, has also been directed, on which, the applicant has come forward to this court with this revision.

4. Shri Pranay Verma, learned counsel for the applicant, after taking me through the averments of the revision memo as well as the papers placed on the record said that undisputedly the decree has been passed in favour of the present applicant and against the respondents under section 12(1)(h) of the Act by extending the right of re-entry in favour of the respondents but subsequent to such decree its terms and conditions were not complied with

by the respondents by depositing the rent of the disputed accommodation regularly and, therefore, the respondents have lost their right to re-enter in the premises but the executing court without taking into consideration such aspect with proper approach has passed the impugned order and, in such premises, prayed for admission of this revision. He also argued that subsequent to vacating the possession, the respondents had got some alternate accommodation in the same locality, therefore, in such premises also they do not deserve to get re-entry in the disputed premises and prayed for setting aside the impugned order and rejecting the application of the respondents filed under section 18(3) of the Act by allowing this revision.

5. In response of some query, he fairly conceded that in the aforesaid pending S.A.No. 1669/07, no stay order has been passed against execution of the impugned decree. The same is also stated in para-5 of the revision memo.

6. Having heard the counsel, in order to consider his submission, I have carefully gone through the averments of the revision memo as well as the papers placed on the record. Undisputedly, the eviction suit of the applicant herein was decreed by the trial court on the grounds enumerated under section 12(1)(a) and (h) of the Act. On filing the appeal at the instance of the respondents, the same was allowed in part and the decree passed under section 12(1)(a) of the Act was set aside while the decree passed under section 12(1)(h) of the Act, subject to provision of section 18 of the Act, with some direction, has been affirmed by the appellate court vide judgment dated 31.7.07 in Civil Appeal No.38-A/06 as evident from Annexure A-3. It also appears from the papers placed on the record that in compliance of such decree, the premises was vacated by the respondents herein thereafter, the same has been constructed by the applicant. But in compliance of the decree, in accordance with provision of section 18 of the Act when the possession of newly constructed premises was not handed-over to the respondents then they filed the impugned application under section-18(3) of the Act and after holding the inquiry, the executing court has come to this conclusion that the respondent herein complied with the terms of the decree and, in such premises, they are entitled to get the possession of the premises in the reconstructed house from the applicant and in such premises, the warrant of possession has been directed to be issued against the applicant with respect of the alleged premises.

7. In the aforesaid premises, it is apparent that the respondents herein filed

an application under section 18(3) of the Act in compliance of the decree and as per findings of the executing court, in the impugned order, the requisite sum of the rent has also been deposited by the respondents and, in such premises, I am of the considered view that the executing court has not committed any error in allowing the aforesaid application of the respondents and in directing the warrant of possession to make available the alleged premises to the respondents from the applicant.

8. Besides the above, I am of the considered view that in any case after passing the decree at the stage of its execution, the executing court cannot go behind the terms of the decree as laid down by the Apex Court in the matter of *V.Ramaswami Aiyengar and others Vs. T.N. V.Kailasa Thevar*- AIR (38) 1951 SC-189 and *Onkar Vs. Heeralal*- 1982 MPWN-225. In such premises also the applicant did not have any authority or right to deprive the respondents from getting the fruits of the impugned decree whereby the right of re-entry in the premises has been extended in their favour.

9. In the aforesaid premises, I have not found any perversity, infirmity or irregularity in the order impugned requiring any interference under the revisional Jurisdiction of this court. On the contrary, such order appears to be passed by the executing court in its vested jurisdiction and, therefore, in view of the law laid down by the Apex court in the matter of *Managing Director (MIG) Hindustan Aeronautics Ltd. Balanagar, Hyderabad and another v.Ajit Prasad Tarway, Manager (Purchase and Stores) Hindustan Aeronautics Ltd. Balanagar, Hyderabad*-AIR 1973 SC 76, the impugned order does not require any interference at this stage. Resultantly, this revision being devoid of any merit, is hereby dismissed at the stage of motion hearing.

Revision dismissed.

I.L.R. [2011] M. P., 1068

CIVIL REVISION

Before Mr. Justice Shantanu Kemkar & Mr. Justice Abhay M. Naik

C.R. No. 806/2001 (Indore) decided on 28 January, 2011

LEELAWATIBAI (DECEASED)

THROUGH L.RS. MAHENDRA KUMAR & ors.

...Applicants

Vs.

RADHAKISHAN (DECEASED)

THROUGH L.RS. SMT. SAJJANBAI & ors.

...Non-applicants

A. Accommodation Control Act, M.P. (41 of 1961), Sections 23-A & 23-J- Application based on the bona fide requirement of landlord himself and any other person permitted under Clause (a) or (b) of Section 23-A - Death of landlord will not result into abatement of the proceedings and legal heirs substituted in place of the landlord may continue the proceedings before the Rent Controlling Authority - However, application for eviction on the ground of bona fide requirement of the landlord alone would come to an end on death of the landlord and substitution of the legal heirs may not be permitted. (Para 29)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धाराएँ 23-ए व 23-जे - स्वयं मू-स्वामी और धारा 23-ए के खण्ड (ए) या (बी) के अंतर्गत अनुज्ञात किसी अन्य व्यक्ति की वास्तविक आवश्यकता के आधार पर आवेदन - मू-स्वामी की मृत्यु के परिणामस्वरूप कार्यवाहियाँ समाप्त नहीं होंगी और मू-स्वामी के स्थान पर प्रतिस्थापित विधिक वारिस माड़ा नियंत्रक प्राधिकारी के समक्ष कार्यवाहियों को जारी रख सकते हैं - तथापि सिर्फ मू-स्वामी की वास्तविक आवश्यकता के आधार पर बेदखली का आवेदन मू-स्वामी की मृत्यु के साथ समाप्त हो जायेगा और विधिक वारिसों का प्रतिस्थापन अनुज्ञात नहीं किया जा सकता।

B. Accommodation Control Act, M.P. (41 of 1961), Section 23-E - If the death of the landlord takes place after the eviction order is passed in his favour, the legal representatives of the landlord nevertheless may continue the revisional proceedings to defend the order of eviction. (Para 29)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23-ई - यदि मू-स्वामी की मृत्यु उसके पक्ष में बेदखली का आदेश पारित होने के बाद होती है, तो मू-स्वामी के विधिक प्रतिनिधि ऐसा होने पर भी बेदखली के आदेश का प्रतिवाद करने के लिए पुनरीक्षण कार्यवाहियों को जारी रख सकते हैं।

Cases referred :

2008 (I) MPWN 71, 2001(II) MPACJ 169, 1995 MPACJ 273, 1989 MPRCJ 482, 1991(I) MPWN 166, 1997 (2) MPLJ 671, 1999 (II) MPJR SN 11, (1976) 4 SCC 417, AIR 1956 SC 213, 1994 JLJ 408, 1990 MPJR 517, AIR 1973 SC 2110, 2004 (2) MPLJ 314, 1999 (II) MPLJR 19, (1999) 8 SCC 1, (2004) 5 SCC 772.

G. M. Chaphekar with D.S. Kale, for the applicants.

A.S. Kutumbale with Amit Purohit, for the respondents.

ORDER

The Order of the Court was delivered by **ABHAY M. NAIK, J.:-** This reference has been received by us by virtue of order of Brother Shri S.K. Seth, J. dated 1.3.2007, who noticed various conflicting decisions of Single Bench of this Court on the point that whether an application for eviction submitted under Section 23-A of the M.P. Accommodation Control Act, 1961 (hereinafter referred to as 'Act') would continue to be maintainable after the death of landlord of the specified category described under Section 23-J of the said Act.

2. Short facts leading to the reference are that Leelawatibai, widow of Ghanshyamdas alongwith her sons submitted an application for eviction under Section 23-A of the Act with allegations that the suit premises is owned by herself and her sons, which is in occupation of the defendant-non-applicant as tenant on rent @Rs.40/-p.m. The house comprising the suit premises belonged to Ghanshyamdas. After his death, it devolved upon the applicants including Leelawatibai. Various other portions of the said house are occupied by four other tenants. It is stated in the application that the suit premises was let out for residential purpose to the non-applicant, which is required bonafide by the applicant for the residence of herself and other members of her family which include sons, daughter-in-laws and grand children. Applications for eviction of other tenants have also been submitted for bonafide residential need.

3. Non-applicant submitted his reply admitting therein his status as tenant in the suit premises. However, it was contended that the suit premises was owned by Jethalal, who happened to be father of Ghanshyamdas and Devidas. Legal heirs of Devidas and Ghanshyamdas are co-owners and the eviction proceedings at the instance of Leelawatibai, widow of Ghanshyamdas and

her sons alone is not maintainable. Alleged bonafide need was also refuted with an allegation that the same is not genuine and the applicants have other suitable accommodations for their residence.

4. The eviction application was submitted on 28.3.1994. On 16.3.1998, applicants no.2 to 7-revisionists submitted an application under Order 22 Rule 3 of C.P.C. informing thereby that Leelawatibai had died on 27.1.1998. Her legal representatives were already on record as applicants no.2 to 7. This being so, a prayer was made for deleting the name of Leelawatibai from the cause title of the application for eviction. On 7.4.1998, learned Rent Controlling Authority allowed the said application and granted permission to delete the name of Leelawatibai from the cause title of the application for eviction. Thereafter, the application for eviction proceeded on merits. Ultimately, a final order was passed on 29.6.2001 by the Court of Rent Controlling Authority, Ujjain dismissing thereby the application for eviction with finding that the applicants failed to establish their case. Aggrieved by the same, applicants-revisionists submitted the present civil revision before this Court under Section 23-E of the Act.

5. It came up for hearing before the learned Single Judge, brother S.K.Seth, J., who noticed that learned Single Judges of this Court in the case of *Mahesh Chand and others Vs. Nishar Khan* 2008 (I) MPWN 71, *Smt.Jarina Vs. Smt.Hazzani and another* 2001 (II) MPACJ 169 and *Santosh Kumar Jaiswal Vs. Joseph and another* 1995 MPACJ 273 have held that after the death of landlord of the specified category under Section 23-J, application for eviction does not survive and is liable to be dismissed. Learned Single Judge further noticed that other learned Single Judges of this Court in the cases reported as 1989 MPRCJ 482 *Nabi Ahmed Vs. Ramprakash Rastogi and others*, 1991 (1) MPWN 166 *Narain Vs. Basant Rao*, 1997 (2) MPLJ 671 *Hemant Kumar Vs. Shankarlal and others*, 1999 (II) MPJR SN 11 *Girish Chandra Chaturvedi and another Vs. Smt. Pushpa Bhopatkhar and others* have held that despite the death of landlord of the specified category under Section 23-J of the Act, the application for eviction may be pursued by the legal representatives.

6. Thus, there being apparently a clear conflict, a request was made for placement of the papers before Hon'ble the Chief Justice for constitution of an appropriate Bench for resolving the conflict. Consequently, the case is listed before this Division Bench on reference.

7. Shri G.M.Chaphekar and Shri A.S.Kutumbale, learned senior Advocates made their respective submissions:

8. It has been contended by Shri G.M.Chaphekar, learned senior counsel that Leelawatibai was admittedly falling in the specified category of landlords under Section 23-J of the Act and was entitled to submit an application under Section 23-A of the Act for eviction. She was covered under the definition of landlord within the meaning of Section 23-J of the Act, which reads as follows:-

"23-J. Definition of landlord for the purposes of Chapter III-A.- For the purposes of this Chapter 'landlord' means a landlord who is-

- (i) a retired servant of any Government including a retired member of defence Services; or
- (ii) a retired servant of a company owned or controlled either by the Central or State Government; or
- (iii) a widow or a divorced wife; or
- (iv) physically handicapped person; or
- (v) a servant of any Government including a member of defence services who, according to his service conditions, is not entitled to Government accommodation on his posting to a place where he owns a house or is entitled to such accommodation only on payment of a penal rent on his posting to such a place.

9. Section 23-A enables the landlord as defined hereinabove to submit an application for eviction on the grounds enumerated thereunder. Application in question was based on Clause (a) of Section 23-A which reads as follows:-

"23-A (a) that the accommodation let for residential purposes is required "bona fide" by the landlord for occupation as residence for himself or for any member of his family, or for any person for whose benefit, the accommodation is held and that the landlord or such persons has no other reasonably suitable residential accommodation of his own in his occupation in the city or town concerned.

Explanation. For the purposes of this clause, "accommodation let for residential purposes" includes-

- (i) any accommodation which having been let for use as a residence is without the express consent of the landlord, used wholly or partly for any non-residential purpose;
- (ii) any accommodation which has not been let under an express provision of contract for non-residential purpose;"

10. The aforesaid provisions clearly enabled Leelawatibai to submit an application for eviction for occupation of the suit premises as residence for herself and for members of her family. Accordingly, the application was submitted by the applicants before the Court of Rent Controlling Authority on the ground of bonafide requirement for herself and other members of her family. Thus, the application at the time of presentation before the Court of Rent Controlling Authority was unquestioningly competent. The application for eviction was submitted on 28.3.1994, whereas Leelawatibai died on 27.1.1998. Since the requirement as alleged in the application for eviction was also of the members of the family covered under the said Act, it is contended that the same could not have been dismissed on the ground of death of Leelawatibai.

11. Shri A.S.Kutumbale, learned senior counsel appearing for the respondents contended that provisions contained in Order 22 of the C.P.C. have no application to the application for eviction submitted under Section 23-A of the Act because it does not amount to plaint. It is further contended by Shri A.S.Kutumbale, learned senior counsel for the respondents that no specific procedure has been provided for Rent Controlling Authority in the event of death of landlord in an application for eviction pending before him.

12. We are not inclined to accept this contention because Rule 16 of the M.P. Accommodation Control Rules, 1966 postulates that Rent Controlling Authority may be guided by the provisions of Code of Civil Procedure. For convenience Rule 16 is reproduced below:-

"16. Code of Civil Procedure to be generally followed.- In deciding any question relating to procedure not specifically provided by the Act and these rules, the Rent Controlling Authority shall as far as possible, be guided by the provisions contained in the Code of Civil procedure, 1908."

13. This being so, we hold that Rent Controlling Authority will not be unjustified in applying the provisions of Order 22 of C.P.C. It may be further

seen that non-applicants did not make any opposition in writing to the application under Order 22 Rule 3 C.P.C., which was allowed on 7.4.1998 by the Rent Controlling Authority, who permitted the remaining applicants, who happened to be legal heirs of Leelawatibai to pursue the application for eviction. The order dated 7.4.1998 directing thereby the remaining applicants to delete the name of Leelawatibai and, thus, to pursue the application for eviction implicitly, was not challenged by the respondent at the right juncture. Instead, the non-applicant, continued to contest the application for eviction by participating in the proceedings for eviction before the Rent Controlling Authority.

14. We may successfully refer to the following passage from the decision of the Supreme Court in the case of *Shantilal Thakordas and others Vs. Chimanlal Maganlal Telwala* (1976) 4 SCC 417.

"If the law permitted the eviction of the tenant for the requirement of the landlord "for occupation as a residence for himself and members of his family", then the requirement was both of the landlord and the members of his family. On his death the right to sue did survive to the members of the family of the deceased landlord. We are unable to take the view that the requirement of the occupation of the members of the family of the original landlord was his requirement and ceased to be the requirement of the members of his family on his death. After the death of the original landlord the senior member of his family takes his place and is well competent to continue the suit for eviction for his occupation and the occupation of the other members of the family."

15. It is further contended on behalf of the respondents that Leelawatibai was the only landlord of specified category, whereas the other applicants did not fall in the said category. This being so, after the death of Leelawatibai, the Rent Controlling Authority ceased to have jurisdiction to entertain the application for eviction under Chapter III-A of the said Act.

This has been countered by Shri G.M.Chaphekar, learned senior counsel that once the application for eviction was competent at the time of presentation, jurisdiction of the Rent Controlling Authority to deal with it is not affected by subsequent death of the landlord falling under the specified category.

16. It is true that Leelawatibai alone was landlord falling under the specified

category. This being so, she was well competent to submit an application for eviction on the ground under Section 23-A (a) of the Act. It has not been disputed by the learned senior counsel for the respondents that the application for eviction during the life time of Leelawatibai could not have been legally dismissed merely on account of inclusion of her sons as applicants no.2 to 7. The question before us would be that whether the death of landlord falling under the specified category would make the application for eviction incompetent.

17. Shri G.M.Chaphekar, learned senior counsel placed reliance on the following passage of the Apex Court decision in the case of *Rajahmundry Electric Supply Corporation Ltd Vs. Nageshwara Rao* AIR 1956 SC 213.

"The validity of a petition must be judged on the facts as they were at the time of its presentation, and a petition which was valid when presented cannot, in the absence of a provision to that effect in the statute, cease to be maintainable by reason of events subsequent to its presentation."

18. Shri A.S.Kutumbale, learned senior counsel appearing for the respondents has been unable to point out any specific provision which would make the application for eviction of present nature (projecting need of landlord of the specified category as well as members of his family) non-maintainable by reason of death of such landlord.

19. In view of this we hold that the application for eviction filed by the landlord of specified category for the bonafide residential need of himself or his family members will not abate on his death during the pendency of application for eviction before the Court of Rent Controlling Authority and his legal representatives shall have right to pursue the proceedings for eviction under Chapter III-A of the Act.

20. Now, we may deal with the status of various single bench authorities cited at bar and other relevant authorities.

Case of *Mahesh Chand* [2008 (1) MPWN 71] though reproduced in toto does not make it clear that whether the eviction was sought by the landlord of specified category for the need of herself alone or also for the members of her family. In former kind of requirement, decision may be held good. However, in later kind of requirement, we hold that it would not be a good law.

21. In case of *Smt. Jarina* [2001 (II) MPACJ 169], an application for eviction was submitted for the bona fide requirement of the deceased landlady Hazzanibai herself alone. This being so, it has been rightly held by the learned Single Judge that the cause of action for eviction under Chapter III-A of the Act based on the alleged need did not survive, after the death of the landlady.

22. In case of *Gangadhar v. Shantaram Lokre* reported as 1994 JLJ 408, the landlady had filed an application for eviction under Section 23-A of the Act with the assertion that she is widow and she bona fide requires house for the residence of her sons and grandsons. Clause (a) of Section 23-A enables a landlord to submit an application for eviction before the Rent Controlling Authority on the ground that the premises is required bona fide by the landlord for occupation as residence for himself or by any member of his family. In the case of *Gangadhar* (supra), Smt. Radhabai, being widow, at the time of filing of the application for eviction, was a landlady falling in the specified category under Section 23-J of the Act and the application for eviction was, thus, well competent. This being so, the learned Single Judge had rightly found the same to be maintainable.

23. In case of *Narain v. Basant Rao* (1990 MPJR 517), it was held that the landlady Smt. Ansuyiyabai was alive on the date of passing of the order for eviction by the Rent Controlling Authority. This Court placing reliance on the Supreme Court decision in the case of *Smt. Phool Rani and other v. Naubat Rai Ahluwalia* (AIR 1973 SC 2110) reiterated the following observation of the Supreme Court: -

"..... the estate is entitled to the benefit which, under a decree, has accrued in favour of the plaintiff and therefore the legal representatives are entitled to defend further proceedings, like an appeal, which constitute a challenge to that benefit."

This being not a situation herein, we are not concerned with it, at present.

24. In case of *Indarmal v. Dropadabai* (2004 (2) MPLJ 314) an application for eviction was submitted by the widow Smt. Surajbai for bona fide requirement of her son, which is permissible in view of language of Clause (b) of Section 23-A of the Act. Thus, application for eviction was well competent and son of the deceased applicant, on his substitution, during pendency of the application itself could have continued with the proceedings for eviction before the Rent Controlling Authority. This, too, has been, thus, decided in consonance with the opinion of the present Division Bench.

25. In case of *Hemant Kumar v. Shankarlal* reported as 1997 (2) MPLJ 671, an application for eviction under Chapter III-A of the Act was submitted by the landlady on the ground of her own bona fide need for business. Learned Single Judge held that the son of the landlady can pursue the matter for the need of his son. The son of the landlady was handicapped person and was permitted to pursue the proceedings for eviction under Chapter III-A. Thus, the situation in case of Hemant Kumar was all together different.

26. In the case of *Girish Chandra Chaturvedi & another v. Smt. Pushpa Bhopatkar & others* (1999 (II) MPJR SN 11), legal heirs of widow landlady are allowed to continue the proceedings after the death of landlady.

27. In the case of *Santosh Kumar Jaiswal v. Joseph and other* (1999 (II) MLJR 19); the death of the landlady falling in specified category occurred after the order of eviction was passed by the Rent Controlling Authority. This being not the situation in the instant case, we are not concerned with it. However, by way of caution, we hasten to add that the earlier contrary view expressed by the Hon'ble Judge Shri R.C. Lahoti (as he then was, later on became Hon'ble the Chief Justice of India) in the case of *Narain* (Supra), was not taken into consideration by the learned Single Judge, which derived strength from Supreme Court's decision in *Phool Rani's case* which has been reiterated in following cases.

In case of *Shantilal Thakordas and others v. Chimanlal Manganalal Telwala* reported as (1976) 4 Supreme Court Cases 417, it has been observed:

"If the law permitted the eviction of the tenant for the requirement of the landlord "for occupation as a residence for himself and members of his family", then the requirement was both of the landlord and the members of the family. On his death the right to sue did survive to the members of the family of the deceased landlord. We are unable to take the view that the requirement of the occupation of the members of the family of the original landlord was his requirement and ceased to be the requirement of the members of his family on his death."

In case of *Raghunath G. Panhale (dead) by L.Rs. v. Chaganlal Sundarji and Co.* reported as (1999) 8 Supreme Court Cases 1, it has again been observed: -

"12. Learned counsel for the respondent, however, raised another point regarding abatement and relied upon *Phool Rani v. Naubat Rai Ahluwalia* to contend that while the matter was in the trial Court, the original plaintiff died, that the cause of action based on his bona fide requirement ceased to exist and the suit could not have been continued by his heirs. This was because the original plaintiff's requirement would not be same as that of his heirs. It is true, the above judgment does support the above contention. On the main point, the above decision was overruled in *Shantilal Thakordas v. Chimanlal Maganlal Telwala* where it was held that if the original plaintiff pleaded that it was his own need and that of the family members, the cause of action would survive on his death to his heirs. In *Shantilal case* it was pointed out that if the landlord claimed possession on the ground of bona fide requirement for himself and his family members, his family members could continue the same eviction case, after the landlord's death, without amendment since the cause of action would survive to them."

28. In case of *Shakuntala Bai and others v. Narayan Das and others* reported as (2004) 5 Supreme Court Cases 772, it has been observed: -

"15. As the preamble shows, the Madhya Pradesh Control Act, 1961 has been enacted for expeditious trial of eviction cases on the ground of bona fide requirement of landlords and generally to regulate and control eviction of tenants. If the subsequent event like the death of the landlord is to be taken note of at every stage till the decree attains finality, there will be no end to litigation. By the time a second appeal gets decided by the High Court, generally a long period elapses and on such a principle if during this period the landlord who instituted the proceedings dies, the suit will have to be dismissed without going into merits. The same thing may happen in a fresh suit filed by the heirs and it may become an unending process. Taking into consideration the subsequent events may, at times, lead to rendering the whole proceedings taken infructuous and colossal waste of public time. There is no warrant for interpreting a rent control legislation in such a

manner, the basic object of which is to save harassment of tenants from unscrupulous landlords. The object is not to deprive the owners of their properties for all times to come."

29. In the result, we answer the reference in the following manner:

(1) In an application for eviction by landlord of specified category under Section 23-J of the Madhya Pradesh Accommodation Control Act based on the bona fide requirement of the landlord himself and any other person permitted under Clause (a) or (b) of Section 23-A of the Act, the death of landlord will not result into abatement of the proceedings and legal heirs substituted in place of the landlord may continue the proceedings before the Rent Controlling Authority;

(2) In case of death of landlord during the pendency of the application for eviction under Chapter III-A based on the ground of bona fide requirement of the landlord alone, it would come to an end on death of the landlord and substitution of the legal heirs may not be permitted, because the cause of action, as pleaded in the application would come to an end with the death of the landlord.

(3) If the death of the landlord takes place after the eviction order is passed in his favour, the legal representatives of the landlord nevertheless may continue the revisional proceedings to defend the order of eviction.

30. We may further observe here that the single bench decisions of this Court contrary to the aforesaid are not good law and are not binding.

The order of reference may be placed before the learned Single Judge for deciding the civil revision against the order of Rent Controlling Authority, on merits in accordance with law. It is made clear that we have merely decided the question of reference and learned Single Judge while deciding the civil revision is well empowered to appreciate the findings with regard to the existence of ground for eviction under Clause (a) of Section 23-A of the Act.

No order as to costs.

C.C. as per rules.

Order accordingly.

I.L.R. [2011] M. P., 1079

CRIMINAL REVISION

Before Mr. Justice S.S. Dwivedi

Cr.R. No.179/2003(Gwalior) decided on 30 November, 2009

RAFIQUE

... Applicant

Vs.

STATE OF M. P.

... Non-applicant

Arms Act (54 of 1959), Section 25(1-B)(a) - Independent witness not confirming the prosecution story as described by police - Armorer not confirming that the firearm was sealed and signed by seizing officer - Prosecution also failed to prove that the firearm examined by armorer is the same which was seized from the applicant - Benefit of doubt would go to the applicant - Applicant acquitted - Revision petition allowed. (Paras 7 to 9)

आयुध अधिनियम (1959 का 54), धारा 25(1-बी)(ए) - स्वतंत्र साक्षी ने पुलिस द्वारा बताये गये अनुसार अभियोजन की कहानी की पुष्टि नहीं की - आयुधकार ने यह पुष्टि नहीं की कि आग्नेयास्त्र जब्तकर्ता अधिकारी द्वारा मुहरबंद एवं हस्ताक्षरित किया गया था - अभियोजन यह भी सिद्ध करने में असफल रहा कि आयुधकार द्वारा जाँच किया आग्नेयास्त्र वही था, जिसे आवेदक से जब्त किया गया था - संदेह का लाभ आवेदक को जायेगा - आवेदक दोषमुक्त - पुनरीक्षण याचिका स्वीकृत।

Brijesh Sharma, for the applicant.

Mukund Bharadwaj, P.P., for the non-applicant/State.

ORDER

S.S. DWIVEDI, J. :- The applicant has preferred this revision under Section 397 of the Code of Criminal Procedure, feeling aggrieved by the appellate judgment dated 1.5.2003 passed by Third Additional Sessions Judge, Morena, in Cri. Appeal No.93/03, whereby allowed the appeal to the extent of sentence and affirmed the judgment of conviction of the applicant, passed by Chief Judicial Magistrate, Morena, in Criminal Case No. 1767/99 wherein the applicant has been found guilty for the offence under Section 25(1-b)(a) of the Arms Act but reduced the sentence from one year to six months'RI with a fine of Rs.200/-.

2. Briefly stated the facts of the case are, on 17.9.1999 the Sub-Inspector R.S.Solanki posted at Police Kotwali, Morena received a secret information that near Central Warehouse a person is there having some illegal firearm with

him. On this information, the concerning police Sub-Inspector reached on the spot, caught hold the applicant/accused in suspicious condition and on search before the independent Panch witness found a countrymade pistol with a cartridge with him. The pistol as well as cartridge had been seized; necessary panchnama had been prepared, returned back to the police station, registered a case under Section 25 of the Arms Act, sent the seized article for its mechanical examination to the D.R.P.Line, Morena where Akhilesh Kumar Dubey . (PW3) examined the article and found it to be a firearm. After obtaining requisite sanction for prosecution under the Arms Act the charge sheet has been filed.

3. The applicant/accused abjured the guilt and his defence is of false implication in this case. The learned trial Court by impugned judgment dated 27.2.2003 held the applicant/accused guilty for the offence punishable under Section 25 (1-b) (a) of the Arms Act and sentenced him to one year RI with a fine of Rs.200/-; aggrieved by which the applicant has preferred a criminal appeal no.93/2003, which has been decided by Third Additional Sessions Judge, Morena by the judgment dated 1.5.2003 whereby partly allowed; the appeal, affirmed the conviction of the applicant for the offence, under Section 25 (1 -b) (a) of the Arms Act.but reduced the sentence of one year to six months RI with a fine of Rs.200/-. Aggrieved by which, the applicant came up before this Court by this revision petition.

4. Having heard the learned counsel for the applicant as well as the learned Public Prosecutor appearing for the State and perused the record.

5. It is submitted by the counsel for the applicant that the independent panch witness Naresh Kumar (PW1) had not supported the seizure of firearm concerned from the possession of the applicant. Similarly, it is nowhere stated by the seizing officer R.S.Solanki (PW5) that after seizure the concerning firearm and cartridge had been properly sealed and on the outer cover the necessary signature of panch witness had been obtained. The concerning Head Armorer Akhilesh Kumar Dubey (PW3) has also not stated that at the time of examination of the concerning firearm the same firearm had been sent to him in a sealed cover having properly sealed and signature on the outer cover of the original concerned and, in such circumstances, the prosecution has failed to prove that whatever firearm had been examined by the Head Armorer Akhilesh Kumar Dubey (PW3) is the same firearm, which had been seized from the conspicuous possession of the applicant/accused and, in such

circumstances, both the courts below have committed error in holding, the applicant guilty for the offence punishable under Section 25 (1-b) (a) of the Arms Act and, hence prayed for setting aside of the impugned judgment of conviction and sentence passed by the courts below.

6. In reply, learned Public Prosecutor for the State supported the impugned judgment and prayed for dismissal of the revision petition.

7. To bring home the charge as leveled against the applicant, the prosecution had examined the seizing officer R.S.Solanki (PW5), the Sub-Inspector of Police, who had actually seized the concerning firearm and the cartridge from the possession of the applicant and a seizure memo Ex.P/1 had been prepared. As per the statement of this witness, the seizure had been made in presence of the independent panch witness Naresh Kumar (PW1) but unfortunately the independent panch witness Naresh Kumar had not supported the aforesaid statement of the seizing officer, and he had not stated that any firearm or any cartridge had been seized from the possession of the applicant. Though this witness is declared hostile by the prosecution but nothing substantial came on which basis his statement can be disbelieved,

8. Similarly, it is also pertinent to note that the seized firearm had been sent for its mechanical examination to the Armorer Section of D.R.P.Line, Morena where Akhilesh Kumar Dubey (PW3) had examined the concerning firearm but in his statement he had also not stated that whatever firearm received from Kotwali Morena, he received in a sealed cover packet duly signed by the seizing officer and independent panch witness. If that being so, then the prosecution has failed to establish that whatever firearm had been seized from the possession of the applicant is the same firearm that has been examined by the Head Armorer Akhilesh Kumar Dubey (PW3) and in such circumstances also, whatever article had been seized from the possession of the applicant as per the statement of R.S.Solanki (PW5) is examined by the aforesaid witness is not-proved beyond reasonable doubt and the benefit will go in favour of the applicant.

9. In such circumstances, the prosecution has failed to prove beyond reasonable doubt that any firearm and cartridge had been seized from the possession of the applicant, therefore, the finding of conviction and sentence recorded by both the courts below appears to be erroneous and liable to be set aside.

10. Resultantly, the revision petition is hereby allowed. The impugned judgment is set aside and the applicant is acquitted from the charge under Section 25 (1-b) (a) of the Arms Act. The fine amount if any deposited by the applicant be refunded to him. The applicant is on bail, his bail bonds stand discharged forthwith.

Revision allowed.

I.L.R. [2011] M. P., 1082

CRIMINAL REVISION

Before Mr. Justice R.C. Mishra & Mrs. Justice Vimla Jain

Cr.R. No.2013/2010 (Jabalpur) decided on 6 January, 2011

DILIP TAKHTANI

... Applicant

Vs.

STATE OF M.P.

... Non-applicant

Evidence Act (1 of 1872), Section 145 - Previous statement recorded on a Compact Disk during an interview, can be used for the purpose, if the C.D. to be used for the purpose must fulfil the necessary requirements of being a primary evidence. (Para 8)

साक्ष्य अधिनियम (1872 का 1), धारा 145 - साक्षात्कार के दौरान कॉम्पैक्ट डिस्क (सीडी) पर अभिलिखित किया गया पूर्वतन कथन प्रयोजन हेतु उपयोग किया जा सकता है, यदि वह सीडी जिसका उपयोग प्रयोजन हेतु किया जाना है, प्राथमिक साक्ष्य होने की अनिवार्यताओं की पूर्ति करती है।

Cases referred:

AIR 1982 SC 839, AIR 1971 SC 1162, AIR 1975 SC 1788, AIR 1968 SC 147, AIR 1986 SC 3, (1965) 2 All ER 464.

R.K. Nanhorya, for the applicant.

Vikram Singh, Standing Counsel, for the non-applicant/CBI.

ORDER

The Order of the Court was delivered by **R.C. MISHRA, J.** :-Arguments heard.

2. This revision is directed against the order-dated 25.11.2010 passed by Special Judge under the Prevention of Corruption Act (for CBI cases) at Jabalpur, in Special Case No.12/2009, rejecting petitioner's prayer for grant of permission to contradict the evidence given by complainant Sanjay

Tekchandani in the Court with reference to his previous statement recorded on a Compact Disk during an interview taken by a local correspondent of Raj News immediately after the trap proceedings.

3. The petitioner and the co-accused namely Brijendra Nath Bala alias B.N. Bala have been facing trial upon the charges of the offences punishable under Sections 7 and 13(1)(d) read with S.13(2) of the Prevention of Corruption Act, 1988 (for short the 'Act'). Allegations, in substance, are that they had demanded an amount of Rs.1,000/- as illegal gratification for not registering income tax case against the complainant and, thereafter, had also received the bribe money.

4. A bare perusal of the impugned order would reveal that learned trial Judge refused to allow the petitioner to confront the complainant with his video recorded statement primarily on the ground that the statement could not be treated as previous statement for the purpose of cross-examination under Section 145 of the Indian Evidence Act, 1872 (for brevity the 'Evidence Act'). To fortify this view, he also quoted the following observations without disclosing the source -

"Section 145 applies only to cases where the same person makes two contradictory statements either in different proceedings or in two different stages of a proceeding. If the maker of a statement is sought to be contradicted, his attention should be drawn to his previous statement under S. 145."

5. However, these observations were made by the Apex Court in *Mohanlal Gangaram Gehani v. State of Maharashtra* AIR 1982 SC 839 while laying down the proposition that Section 145 of the Evidence Act is not attracted where statement made by a person or witness is sought to be contradicted not by his own statement but by the statement of another witness. Thus, the reliance on *Mohanlal's case* was apparently misplaced.

6. The tape, itself, is primary and direct evidence admissible as to what has been said and picked up by the recorder (*N. Sri Rama Reddy v. V. V. Giri* AIR 1971 SC 1162). It is a document as defined in Section 3 of the Evidence Act and stands on no different footing than photograph (*Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra* AIR 1975 SC 1788). However, such evidence must be received with caution (*Yusufalli Esmail*

Nagree v. State of Maharashtra AIR 1968 SC 147). The conditions for admissibility of a tape recorded statement are -

"(1) The voice of the speaker must be duly identified by the maker of the record or by others who recognise his voice. In other words, it manifestly follows as a logical corollary that the first condition for the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.

(2) The accuracy of the tape recorded statement has to be proved by the maker of the record by satisfactory evidence direct or circumstantial.

(3) Every possibility of tampering with or erasure of a part of tape recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.

(4) The statement must be relevant according to the rules of Evidence Act.

(5) The recorded cassette must be carefully sealed and kept in safe or official custody.

(6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances."

(Ram Singh v. Col. Ram Singh AIR 1986 SC 3)

7. It is relevant to note that in *N. Sri Rama Reddy's case* (supra), the following observations made by the House of Lords in *R. v. Maqsud Ali* (1965) 2 All ER 464 were quoted with approval -

"It would be wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded are properly identified. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case."

8. Accordingly, we are of the view that learned trial Judge committed a

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serious error of jurisdiction in declining the permission to confront the complainant, under Section 145 of the Evidence Act, with his tape-recorded statement. However, it is needless to emphasize that the C.D. to be used for the purpose must fulfill the necessary requirements of being a primary evidence.

9. Consequently, the revision stands allowed and the impugned order-dated 25.11.2010 is hereby set aside. Instead, the permission is granted to impeach credit of the complainant with reference to his tape-recorded statement subject to the provisions of the Evidence Act, particularly those contained in Chapter V thereof.

C.C. as per rules.

Revision allowed.

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CRIMINAL REVISION

Before Mrs. Justice Indrani Datta

Cr.R. No.944/2010 (Gwalior) decided on 17 January, 2011

DHARMVEER SINGH TOMAR

... Applicant

Vs.

RAMRAJ SINGH TOMAR

... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 372, 378(4)
- Appeal against acquittal - Complaint case - The only remedy available to the applicant/complainant of complaint case is to prefer appeal against the judgment of acquittal before High Court u/s 378(4) of the Code, as the Section 372 nowhere specifies that victim also includes complainant of complaint case - Revision dismissed. (Paras 7 & 8)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 372, 378(4) — दोषमुक्ति के विरुद्ध अपील — परिवाद मामला — परिवाद मामले में आवेदक/परिवादी को केवल यह उपचार उपलब्ध है कि वह संहिता की धारा 378(4) के अंतर्गत उच्च न्यायालय के समक्ष दोषमुक्ति के निर्णय के विरुद्ध अपील प्रस्तुत करे, क्योंकि धारा 372 कहीं भी विनिर्दिष्ट नहीं करती कि पीड़ित में परिवाद मामले का परिवादी भी सम्मिलित है — पुनरीक्षण खारिज।

Case referred :

2010 CrLJ 2860.

Prashant Sharma, for the applicant.

Respondent not served.

ORDER

INDRANI DATTA, J. :- This revision has been preferred by applicant/complainant against order dated 31.8.2010 passed by Fourth Additional Judge to First Additional Sessions Judge, Gwalior, in Criminal Appeal No.266/2010, whereby appeal preferred against judgment dated 28.1.2010 passed in Criminal Case No.2302/2008 acquitting respondent from the charge under Section 138 of the Negotiable Instruments Act, (for brevity the Act) is dismissed.

2. Facts stated in brief are that applicant/complainant filed a complaint under Section 138 of the Act before JMFC, Gwalior, which was registered as Criminal Case No.2302/2008. In that case, respondent/accused was acquitted by judgment dated 28.1.2010 from the charge under Section 138 of the Act. Against that judgment of acquittal, applicant/complainant preferred Criminal Appeal No.266/2010 which was dismissed by learned Appellate Court vide order dated 31.8.2010 on two grounds; firstly that appeal is time barred and secondly appeal is not maintainable. Against this order of Appellate Court dismissing the appeal, applicant/complainant has preferred this revision.

3. It is contended by learned counsel on behalf of the applicant that order of learned Appellate Court is illegal, arbitrary and contrary to law and deserves to be set aside. It is further contended that as per the provisions of Section 372 of Cr.P.C., victim can prefer an appeal against any judgment or order passed by the criminal Court acquitting the accused before Session Court. Hence, applicant has rightly preferred appeal in Sessions Court and learned Court below has erred in holding that appeal is not maintainable under Section 372 of Cr.P.C. It is further submitted that Section 378(4) of Cr.P.C. prescribes that complainant can only prefer an application for leave to appeal and if such leave is granted, then such appeal lies before High Court. Under the provisions of Section 378(4) of Cr.P.C. right to file appeal depends upon the discretion of the Court, while Section 372 of Cr.P.C. gives an absolute right to the victim to prefer an appeal against the judgment of acquittal in Session Court.

4. It is further submitted by learned counsel that judgment was passed on 28.1.2010 and applicant could not receive information about the judgment as he went to Shivpuri. When he came back from Shivpuri and was intimated on 10.5.2010 about the result of the case, he applied for getting certified copy of the judgment and got it on 29.5.2010. Thereafter, he preferred appeal on 2.6.2010. In such circumstances, there are sufficient reasons for condoning

the delay, and hence, learned Trial Court has erred in holding that applicant failed to show sufficient cause for condoning the delay. It is further submitted that order of learned court below is not sustainable and is to be set aside and matter be remanded back to learned Trial Court for deciding afresh on its merit.

5. Heard learned counsel for the applicant and perused the record of learned Trial Court.

6. In the present case, the points that arise for consideration are that (i) Whether in case of acquittal by Judicial Magistrate First Class, complainant can prefer appeal to Sessions Court under Section 372 of Cr.P.C. ? and (ii) Whether in case of acquittal by Judicial Magistrate First Class complainant can only prefer appeal before High Court under Section 378(4) of Cr.P.C. and cannot prefer appeal under Section 372 of Cr.P.C. ?

7. In order to examine the scope of Sections 372 and 378(4) of Cr.P.C. and to specify the meaning of word "victim", which is explained in Section 2 (wa), these Sections need to be quoted, which reads as under :-

"372.No appeal to lie unless otherwise provided.-No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force:

Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court."

"2. Definitions.- In this Code, unless the context otherwise requires.-

(a) to (w)

(wa)"victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir."

(x) to (y)"

"378. Appeal in case of acquittal.- (1) to (3).....

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) to (6) ..."

On a bare reading of Section 372 of Cr.P.C., it is crystal clear that this Section nowhere specifies that victim also includes complainant of complaint case. In Section 372 of Cr.P.C. the word used is victim and in Section 378(4) of Cr.P.C. the word used is complainant and this Section applies to complaint case.

8. In the case of *Damodar S. Prabhu v. Sayed Babalal H.*, 2010 Cri. L.J. 2860, Hon'ble Apex Court has held in para 14 as under :-

"14. It may be noted here that Section 143 of the Act makes an offence under Section 138 triable by a Judicial Magistrate First Class (JMFC). After trial, the progression of further legal proceedings would depend on whether there has been a conviction or an acquittal.

* In the case of conviction, an appeal would lie to the Court of Session under Section 374(3)(a) of the Cr.P.C.; thereafter a Revision to the High Court under Section 397/401 of the Cr.P.C. and finally a petition before the Supreme Court, seeking special leave to appeal under 136 of the Constitution of India. Thus, in case of conviction there will be four levels of litigation.

* In the case of acquittal by the JMFC, the complainant could appeal to the High Court under Section 378(4) of the Cr.P.C., and thereafter for special leave to appeal to the Supreme Court under Article 136. In such an instance, therefore, there will be three levels of proceedings."

Considering this legal aspect and in the light of amended provision and decision

of Hon'ble Apex Court, in my considered opinion, the only remedy available to the applicant/complainant of complaint case is to prefer appeal against the judgment of acquittal before High Court under Section 378(4) of Cr.P.C.

9. In view of the above observation, there is no necessity to discuss anything on the point of limitation, as the appeal has rightly been rejected by learned Appellate Court on the ground of non-maintainability.

10. This revision sans merit and is dismissed accordingly.

Revision dismissed.

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CRIMINAL REVISION

Before Mrs. Justice Indrani Datta

Cr.R. No.267/2006 (Gwalior) decided on 18 January, 2011

HUKUM SINGH YADAV & anr.

...Applicants

Vs.

STATE OF M.P.

...Non-applicant

Penal Code (45 of 1860), Section 306 - Suicide - Deceased and his father when going to farm, were restrained, abused, slapped and threatened to kill by applicants - Later on the deceased went to field and committed suicide by consuming poisonous substance - Held - There is no evidence that applicants provoked, incited or encouraged to commit suicide - Not alleged that the applicants were armed with some weapons - It cannot be presumed that deceased was so frightened that he had no option left except committing suicide and was compelled to do so - Order of framing of charge against applicants for committing offence u/s 306 cannot be sustained - Revision allowed.

(Paras 2, 10 & 12)

दण्ड संहिता (1860 का 45), धारा 306 - आत्महत्या - मृतक और उसके पिता जब खेत पर जा रहे थे, उन्हें आवेदकों द्वारा रोका गया, गाली गलौज की गई, थप्पड़ मारा गया और जान से मारने की धमकी दी गई - बाद में मृतक खेत पर गया और विषैले पदार्थ का सेवन कर आत्महत्या कारित की - अभिनिर्धारित - कोई साक्ष्य नहीं कि आवेदकों ने आत्महत्या कारित करने का प्रकोपन; उद्दीपन अथवा प्रोत्साहित किया - आरोपण नहीं कि आवेदक किसी शस्त्र से सुसज्जित थे - यह उपधारणा नहीं की जा सकती कि मृतक इतना भयभीत था कि उसके पास आत्महत्या करने के अतिरिक्त कोई पर्याय नहीं बचा और ऐसा करने के लिए वह बाध्य हुआ

— धारा 306 के अंतर्गत अपराध कारित करने के लिए आवेदकों के विरुद्ध आरोप विरचित करने का आदेश स्थिर नहीं रखा जा सकता — पुनरीक्षण मंजूर।

Cases referred :

2004(5) MPHT 39 (NOC), 2004(4) MPHT 7 (NOC), AIR 2002 SC 1998.

Pratip Visoriya, for the applicants.

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

S.K. Tiwari, for the complainant.

ORDER

INDRANI DATTA, J. :—With the consent of parties, matter is finally heard.

Applicants have preferred this revision under Section 397/401 of CrPC against the order dated 17.02.2006 passed by the learned Sessions Judge Datia in S.T. No.14/2006 by which charges have been framed against the applicants under Section 306 IPC.

2. Facts in brief are that on 07.06.2005 deceased and his father Jagdish were going to their farm. Applicants restrained them and abused deceased and his father and applicant Prakash also slapped the deceased and thereafter they threatened them to kill. Manku bai also reached there and asked applicants that why they are quarrelling with deceased and his father, then applicants then went away from the spot. Thereafter, the deceased and his father Jagdish went to their field and then Jagdish returned to his house. Meanwhile, the deceased committed suicide by consuming poisonous substance. Deceased was admitted in Jhansi hospital where he breathed his last. After marg investigation, FIR is lodged and Crime No.35/2005 is registered against the applicants. After due investigation, charge-sheet has been filed before the JMFC and case is committed to Sessions Court, Datia. The learned Sessions Judge framed the charges against the applicants under Section 306 IPC, against which this revision has been preferred.

3. It is contended by the learned counsel for the applicants that there is no material on record for making out a charge under Section 306 IPC. It is further submitted that no ingredients of offence under Section.306 IPC are made out as there is no evidence or allegation that applicants in any manner abetted or incited the deceased to commit suicide, hence order of framing charges against them for offence under Section 306 IPC is illegal and deserves to be set aside. It is further submitted that as per suicidal note of deceased,

applicants are liable for his commitment of suicide but even if that suicide note is entirely taken to be true even then on the basis of that applicants cannot be held guilty for instigating the deceased to commit suicide as neither of the ingredients of abetment are attracted by the suicidal note or on perusing the material collected during investigation.

4. Learned counsel for the applicants placed reliance on *Ramesh and another vs. State of Madhya Pradesh* 2004(5) MPHT 39 (NOC). In that case also, charges were framed against applicants/accused under section 306 IPC and Section 3(1)(x) of SC STAct and it was observed that there is no material on record to hold that applicants and co-accused instigated or abetted deceased to commit suicide within the meaning of Section 306 IPC and revision was allowed. Further reliance is placed on *Rajesh Shivhare vs. State of Madhya Pradesh* 2004(4) MPHT 7 (NOC) in that case charges were framed by the trial court against accused under Section 306 IPC and impugned order of framing of charge was set aside on the ground that there is nothing to show that applicants had an intention that deceased should commit suicide.

5. Placing reliance on these citations, it is submitted that in this case also ingredients of instigation are lacking. No ground is made out for framing of charge under Section 306 IPC.

6. Learned Public Prosecutor opposed the petition and submitted that suicide is result of quarrel that had taken place between the deceased and applicants. Hence *prima facie* case is made out against the applicant under Section 306 IPC and no ground for setting aside the order of framing of charge is made out.

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

8. In order to *prima facie* consider the that whether applicants have abetted deceased for suicide, it is necessary to go-through Section 107 and 108 of IPC.

Section 107. A person, abets the doing of a thing, who-

(1) Instigates any person to do that thing, or

(2) Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal commission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

(3) Intentionally aids, by act or illegal omission, the doing of that thing.

Section 108. A person abets an offence, who abets either the commission of an offence, or the commission of an act, which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

9. From perusal of Section 108 of IPC, it is clear that this section defines the word abettor. As per said section, a person abets an offence by commission of an act, which would be an offence, if committed by person capable by law of committing an offence with the same intention or knowledge as that of the abettor. From perusal of Section 108, IPC, it is clear that the abettor must have same intention or knowledge as that of the abettor in committing an offence.

10. Considering these legal aspect this is to be observed that whether applicants have had same knowledge that deceased would commit suicide. As per the prosecution case when deceased was going with his father. Applicants restrained deceased and his father Jagdish and abused and threatened both of them, hence it cannot be assumed that applicants had knowledge that one of them particularly deceased will commit suicide. When act of abusing and threatening was alleged to be done with deceased as well as his father, so it cannot be said that applicants had knowledge or intention that deceased should commit suicide. There is no evidence that they provoked, incited or encouraged deceased to commit suicide. It is also not alleged that when applicants threatened to kill deceased and his father Jagdish they were armed with some weapons. So it cannot be presumed that deceased was so frightened that he had no option left except committing suicide and was compelled to do so.

11. In the case *Sanju alias Sanjay Singh Sengar vs. State of Madhya Pradesh* AIR 2002 SC 1998 there was quarrel between accused and deceased and accused told deceased to go and die then it is held that these words itself would not constitute the ingredients of instigation. Even if prosecution story is accepted to be true that applicants did tell deceased to go and die then also these words would not constitute ingredients of instigation. The word 'instigate' denotes incitement or urging to do some drastic or unadvisable action or to stimulate or incite. Presence of mens rea, therefore,

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is the necessary, concomitant of instigation. It is a common knowledge that the words uttered in a quarrel or in a spur of the moment cannot be taken to be uttered with mens rea. The Hon'ble Apex Court considered various decisions and held that a charge of an offence under Section 306 is not sustainable merely on the allegation of harassment to the deceased particularly when ingredients of abetment are not attracted on the statement of deceased or witnesses.

12. Considering the facts and circumstances of the case and for the foregoing reasons, I am of the opinion that the impugned order of framing of charge against applicants for committing offence under section 306 IPC cannot be sustained, therefore, charge framed against applicants under Section 306 IPC is set aside.

Accordingly, revision succeeds and is allowed.

Revision allowed.

I.L.R. [2011] M. P., 1093
MISCELLANEOUS CIVIL CASE
Before Mr. Justice Rajendra Menon

M.C.C.No.40/2011 (Jabalpur) decided on 11 February, 2011

PROJECT DIRECTOR, DISTRICT LITERACY

SAMITI, TALA HOUSE

...Applicant

Vs.

MS. MAMTA SHRIVASTAVA & anr.

...Non-applicants

Industrial Disputes Act (14 of 1947), Section 17-B - Amount paid as the 'last wages drawn' is not recoverable nor can it be refunded in the event the employer loses the case in the Higher Court. (Para 7)

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 17-बी - 'अंतिम आहरित वेतन' के रूप में प्रदत्त रकम वसूली योग्य नहीं है और न ही इसे नियोक्ता के उच्चतर न्यायालय में मामला हार जाने की दशा में वापस किया जा सकता है।

Cases referred :

(1992) 2 SCC 106, 1987 Lab IC 1468, (2001) 5 SCC 169.

J.K. Jain, Dy.A.G., for the applicant.

ORDER

RAJENDRA MENON, J. :-This application has been filed inter alia contending that in view of the setting aside of the award passed by the Labour Court and the order passed by this Court in Writ Petition No.3252/2000, on

4.4.2005, the amount deposited by virtue of the provisions of Section 17-B, of the Industrial Disputes Act, 1947 (hereinafter referred to as the 'Act'), be refunded back to the applicant.

2. Non-applicant No.1 Ms. Mamta Shrivastava was working in the applicant's establishment. Her services were terminated and, therefore, an industrial dispute was raised before the competent authority. Conciliation having failed matter was referred to the Labour Court, Rewa wherein it was registered as Case No.3/ID Act (Ref)/99 and by an award dated 20.10.1999, respondent/non-applicant No.1 Ms. Mamta Shrivastava was directed to be reinstated with full back wages and other consequential benefits. Challenging the aforesaid order passed by the Labour Court on 20.10.1999, Writ Petition No.3252/2000 was filed by the applicant before this Court. The writ petition was admitted and when a prayer for stay of the award was made, the stay granted was to effect that petitioner/applicant should comply with the mandate of Section 17-B of the Act. In compliance to the stay order, 'last wages drawn' in accordance to the requirement of Section 17-B was granted to Ms. Mamta Shrivastava. Ultimately, the writ petition was heard and by holding that the applicant's establishment is not an 'industry' and, therefore, the Industrial Disputes Act is not applicable, award was set aside and the petition allowed. Now, applicant wants this Court to direct for refund of the amount deposited, by virtue of the payment made in compliance to Section 17-B, of the Act.

3. Having heard the contentions advanced by Shri Jain, learned Dy. Advocate General, I find the application to be wholly misconceived.

4. Section 17-B of the Act has been incorporated for payment of 'last wages drawn' to the workman pending a proceeding in the higher court. Whenever an award is passed by the Labour Court or the Tribunal, the employer is required to comply with the award and if the award is of reinstatement, the employee or the workman is entitled to be reinstated in service, in lieu of reinstatement as a matter of advantage to workman the legislature thought it appropriate to give them some subsistence allowance and it was for this reason that Section 17-B was incorporated in the Act, vide amending act No.46 of 1982.

5. Section 17-B was incorporated into the Industrial Disputes Act, 1947 by virtue of Amending Act 46 of 1982. The purpose for incorporating Section 17-B is to relieve to certain extent the hardship that is caused to a workman due to delay caused in implementation of an award during the pendency of the

proceeding when the award is challenged before the High Court or the Supreme Court. The payment which is made to the workman during the pendency of the proceedings before the High Court or the Supreme Court is in the nature of 'subsistence allowance' and this is not refundable or recoverable from the workman even if the award is set aside by the High Court or the Supreme Court. In this regard, reference may be made to a judgment of the Supreme Court in the case of *Dena Bank Vs. Kiriti Kumar T. Patel*, (1992) 2 SCC 106. In the said judgment the object and reasons for enacting the provision of Section 17-B was considered and thereafter in paragraph 7, the Supreme Court has indicated as under:

"7. It would thus appear that the object underlying the enacting of the provisions contained in Section 17-B is to give relief to the workman in whose favour an award of reinstatement has been passed by the Labour Court and the said is under challenge in the High Court or this Court. The said relief has been given with a view to relieve the hardship that would be caused to the workman on account of delay in implementation of the award as a result of the pendency of the proceedings in the High Court or this Court. The question for consideration is: what is the extent to which such relief has been granted to a workman under this provision? The objects and Reasons do not indicate any answer to this question and its answer has to be found in the provisions of the enactment. Since the expression 'full wages last drawn' in Section 17-B has been construed by the various High Courts in the decisions referred to above we would briefly refer to the same."

Subsequently, judgments of the Karnataka High Court, Bombay High Court are considered and finally it has been held by the Supreme Court in the aforesaid case that what is paid to the workman by virtue of Section 17-B is in the nature of 'subsistence allowance' that is payable under section 10-A of the Industrial Employment (Standing Orders) Act, 1946 and this allowance is neither refundable nor recoverable irrespective of the result of the enquiry. After adopting the analogy contained in Section 10-A of the Industrial Employment (Standing Orders) Act, 1946, it has been held that the provisions of Section 17-B does not encroach upon the powers of the High Court or the Supreme Court under Article 226 and 136 of the Constitution and finally in paragraph 17, the principle has been crystallized and in paragraph 23, the

final verdict of the Supreme Court is that the amount payable under section 17-B is not refundable or recoverable even in the event of an award being set aside. It has been held that the amount cannot be recovered. A perusal of the judgment of the Supreme Court, in the case of *Kiriti Kumar T. Patel* (supra) would indicate that the judgment apart from taking note of various other judgments of the Supreme Court, has considered the judgment of the Division Bench of the Bombay High Court, in the case of *Elpro International Limited Vs. K.B. Joshi*, 1987 Lab IC 1468, wherein constitutional validity of section 17-B was challenged on the ground that the section is vague, it is arbitrary in as much as no provision is made as to what would happen to the amount paid, if ultimately the employer succeeds and the award is set aside by the Higher Court. It was argued before the Bombay High Court in the case of *K.B. Joshi* (supra) that in view of the above the provisions of section 17-B is violative of Article 14 of the Constitution. The High Court rejected the aforesaid contention and it was held by the High Court that in the absence of a provision indicating as to what would happen to the amount paid under section 17-B if the employer succeeds in the litigation does not make a section either vague or arbitrary because the amount is paid as a 'subsistence allowance' and is not recoverable.

6. The judgment in the case of *Kiriti Kumar T. Patel* (supra) was again considered by the Supreme Court in the case of *Dena Bank Vs. Ghanshyam*, (2001) 5 SCC 169. In the said case, apart from granting the benefit applicable under section 17-B, the High Court directed for payment of certain amount in excess of the amount payable under section 17-B after taking note of the meaning of the word 'full wages last drawn' as appearing in the provisions of section 17-B, and after evaluating the principles laid down as indicated hereinabove in paragraph 13, the Supreme Court has dealt with the matter in the following manner:

"13. It must, however, be pointed out that while passing an interlocutory order the interests of the employer should not be lost sight of. Even though the amount paid by the employer under section 17-B to the workman cannot be directed to be refunded in the event he loses the case in the writ petition [see- *Dena Bank Case* (supra)] any amount over and above the sum payable under the said provision, has to be refunded by him. It will, therefore, be in the interest of justice to ensure, if the facts of the case so justify, that payment of any amount over and above the amount payable under Section 17-B to

him, is ordered to be paid on such terms and conditions as would enable the employer to recover the same."

(Emphasis supplied)

7. Keeping in view the aforesaid enunciation of law, it is clear that an amount paid, which is the 'last wages drawn' in accordance to the provisions of Section 17-B, is not recoverable nor can it be refunded in the event the employer loses the case in the Higher Court. In that view of the matter, the application filed by the applicant hereinabove is wholly misconceived, contrary to the provisions of law and, therefore, cannot be accepted.

8. Accordingly, the application is dismissed.

Application dismissed.

I.L.R. [2011] M. P., 1097

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice R. C. Mishra & Mrs. Justice Vimla Jain

M.Cr.C. No.7892/2009 (Jabalpur) decided on 29 November, 2010

RAJESH DUBEY

...Applicant

Vs.

STATE OF M.P. & anr.

...Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 200 - Complaint - Delay in lodging of - Delay in filing the complaint throws a great deal of doubt on the prosecution story - Delay would be insignificant only when there is no motive for false implication or where the complainant has been able to offer a plausible explanation for it - Mere statement that police did not take action can hardly be taken to have explained the delay in making complaint. (Para 11)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 200 - शिकायत - दर्ज करने में विलम्ब - शिकायत दर्ज करने में विलम्ब अभियोजन कहानी पर भारी संदेह उत्पन्न करता है - विलम्ब केवल तब निरर्थक होगा, जब मिथ्या आलिप्त करने का कोई हेतु न होने अथवा जहाँ शिकायतकर्ता उसके लिये सत्यमापी स्पष्टीकरण देने में समर्थ हो गया हो - मात्र कथन कि पुलिस ने कार्यवाही नहीं की, मुश्किल से शिकायत दर्ज करने में हुये विलम्ब को स्पष्ट करने के लिए लिया जा सकता है।

B. Prevention of Corruption Act, (49 of 1988), Section 7 - Demand of illegal gratification - Clerk posted in the office of Tahsildar lodged police report that on his disinclination to process the application

of respondent No.2 for issuance of domicile certificate, a quarrel ensued and certain documents were torn by respondent No. 2 - Respondent No.2 thereafter filed complaint alleging that Rs. 500 were demanded by clerk and applicant impliedly encouraged the clerk for the same - *Held* - Under the facts of the case, it can easily be concluded that complaint was made with malafide motive as a counter blast to registration of criminal case against respondent No.2 - Applications allowed - Criminal proceedings pending against both applicants quashed. (Para 12)

ख. स्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 7 - अवैध परितोषण की माँग - तहसीलदार के कार्यालय में पदस्थ लिपिक ने पुलिस रिपोर्ट दर्ज कराई कि प्रत्यर्थी क्र. 2 के मूलनिवासी प्रमाण पत्र जारी करने के आवेदन की कार्यवाही करने से उसके इंकार करने पर झगड़ा उत्पन्न हुआ और प्रत्यर्थी क्र. 2 द्वारा कतिपय दस्तावेज फाड़ दिये गये - तत्पश्चात् प्रत्यर्थी क्र. 2 ने यह अभिकथन करते हुये परिवाद पेश किया कि लिपिक द्वारा 500/- रुपये की माँग की गई थी और इसके लिए आवेदक ने विवक्षित रूप से लिपिक को प्रोत्साहित किया था - अभिनिर्धारित - मामले के तथ्यों के अंतर्गत आसानी से यह निष्कर्ष निकाला जा सकता है कि परिवाद प्रत्यर्थी क्र. 2 के विरुद्ध दाण्डिक प्रकरण दर्ज होने की प्रतिक्रिया के रूप में असदमावी हेतु से किया गया था - आवेदन मंजूर - दोनों आवेदकों के विरुद्ध लम्बित दाण्डिक कार्यवाहियाँ अभिखण्डित।

Cases referred:

(2005) 13 SCC 540, AIR 1971 SC 66, AIR 2007SC 3234, AIR 2010 SC 201, AIR 1992 SC 604.

Surendra Singh with Manish Mishra, for the applicant.

Aditya Adhikari, S.P.P. for the Non-applicant No.1.

None, for the Non-applicant No. 2, though served.

ORDER

The Order of the Court was delivered by **R.C. MISHRA, J.** :- These petitions, under Section 482 of the Code of Criminal Procedure (for short 'the Code'), are interlinked as preferred for the same relief viz. quashing of the criminal proceedings pending before the Court of Special Judge (under the Prevention of Corruption Act, 1988 [for brevity 'the Act']) at Seoni as Special Case No.2/2009. In that case, cognizance of the offence punishable under Section 7 of the Act has been taken against petitioners namely Rajesh Dubey and Govind Prasad Shrivastava upon the charge-sheet submitted by Inspector-SPE (Lokayukta), Jabalpur on 13/7/2009, after due in-

investigation into the complaint made by A.K. Tripathi, the respondent no.2, in both the MCrCs and forwarded by Special Judge, under Section 156(3) of the Code, to Superintendent of Police, SPE (Lokayukta), Jabalpur for investigation.

2. For the sake of convenience, the petitioners shall be referred to by their respective names whereas respondent no.2 namely Ashwini Kumar Tripathi shall be referred to as the complainant.

3. At the relevant point of time, Rajesh Dubey, the petitioner in MCrC No.7892/2009 was posted as Tahsildar at Lakhnadaun whereas Govind Prasad Shrivastava, the petitioner in MCrC No.11903/2009 was working as his Reader. The complainant, though a bona fide resident of Uttar Pradesh, had been practicing as an Advocate at Lakhnadaun after his removal from the post of Civil Judge Class-II in the Lower Judicial Service of Madhya Pradesh.

4. The complaint in respect of the offences punishable under Sections 7, 12 and 13 of the Act was presented before the Special Judge on 25.09.2008. It contained the following allegations -

"High Court of Madhya Pradesh had invited applications from practicing lawyers for direct recruitment to the Higher Judicial Services of M.P. and last date for receipt of applications was fixed as 12.09.2008. Being interested in applying for the same, the complainant had moved an application for issuance of a domicile certificate in the office of Tahsildar at Lakhnadaun nearly 7 days prior to the incident in question. Although, as per the standing guidelines issued by the Collector of the District, the certificate ought to have been issued on the date of filing of the application yet, Govind, the Reader, continued to avoid acceptance of the application on the pretext that the Tahsildar was busy in election work. Ultimately, it was on 10.09.2008 that Govind received the application and asked the complainant to come on the following day at 4 p.m. However, when the complainant reached the office to collect the certificate, Govind returned the application saying that it was not possible to issue the same for two reasons, - firstly, he was not born in the State of M.P. and secondly, the application was not otherwise complete. The complainant still asserted that the application was complete in all respects and

the requisite fee of Rs.20/- had already been deposited by him but at this juncture, Govind reminded him that like any other applicant desirous of getting the domicile certificate issued on the same day, the complainant was also required to pay a sum of Rs.500/- as illegal gratification. In turn, he refused to pay any amount as bribe. This led to an altercation that attracted attention of persons present in and around the office. Rajesh also arrived there but, on being apprised of the root cause of quarrel, insisted for fulfillment of the requirement as pointed out by Govind. Gathering support and activation from Rajesh, his controlling officer, Govind turned violent and while hurling abuses, not only tore the application and the documents annexed thereto but also threw the same at the complainant's face saying that "see that the certificate has been prepared".

5. Thus, according to the complainant, the domicile certificate was not issued solely because the demand for a sum of Rs.500/- as an illegal gratification was not satisfied.

6. Shri Surendra Singh, learned Senior Counsel appearing on behalf of petitioner Rajesh Dubey has strenuously contended that his prosecution is an abuse of the process of the Court in view of the following facts -

(i) The complainant, who has not only served as Civil Judge for a considerable period of 9 years but has also practiced at the Bar, was expected to know that (a) under the relevant rules, he was not entitled to get Domicile Certificate and (b) in the wake of his removal from the post of Civil Judge, he was disqualified for appointment to the Higher Judicial Services.

(ii) There was not even an iota of evidence to indicate that Rajesh had ever demanded any illegal gratification from the complainant for the purpose.

(iii) The complaint was made with a view to wreaking vengeance by the complainant, who stands prosecuted for the offences punishable under Sections 186, 353, 294 and 506 of the IPC upon the FIR lodged by Govind at P.S. Lakhnadaun on 11.09.2008 at 5.30 p.m.

(iv) Allegations levelled against the petitioners are patently

absurd as it is inconceivable that any demand for bribe would be made at a public place in presence of the crowd.

(v) A considerable delay of 14 days was sufficient to conclusively establish falsity of the complaint particularly in view of the fact that being well versed with law; the complainant was expected to understand significance of a prompt complaint.

7. Adopting the same line of arguments, Shri G.S. Alhuwalia, Advocate appearing for Govind, has highlighted the misconduct for which the services of the complainant as Civil Judge were terminated. According to him, apparently, the complaint was made as a counterblast to the registration of criminal case against the complainant upon a promptly lodged FIR reflecting that -

On 11.09.2008 at about 4:40 p.m., in the wake of the objection that his application was not entertainable as he was not a bona fide resident of State of Madhya Pradesh by birth, the complainant, being infuriated, caught hold of collar of Govind's shirt and as his fellow officials came forward to intervene, tore the documents lying on his table and gave a fist-blow resulting into injuries on lips and neck.

He is further of the view that absence of any plausible explanation as to why the complainant had not reported the matter directly to the S.P. (Lokayukta) for a considerable period of time, was sufficient to doubt veracity of the complaint. Our attention has also been invited to the fact that Investigating Officer had not been able to seize any receipt evidencing deposit of Rs.20/- as the requisite fee or carbon copy thereof.

8. In response, learned Special Public Prosecutor has submitted that the defences raised by the petitioners would require inquiry into the facts and can not be considered at the preliminary stage for the purpose of quashing the proceedings initiated on the basis of the complaint. Placing reliance on the decision of the Apex Court in *State of Orissa v. Saroj Kumar Sahoo* (2005) 13 SCC 540, he has further contended that the allegations of mala fides against the petitioners are inconsequential and cannot, by themselves, be the basis to stifle a legitimate prosecution.

9. At the outset, it may be observed that particulars of misconduct forming

foundation of the termination of complainant's services have hardly any relevance to the issues involved in these petitions. Moreover, we do not propose to go into the question as to whether on the date of the alleged occurrence, the complainant was entitled to grant of domicile certificate.

10. A brief perusal of the chronology of events leading to lodging of complaint, allegations made therein and counter allegations as contained in the FIR lodged by Govind, would reveal that on 11.09.2008 around 4.30 p.m., a quarrel had ensued in the office of Tahsildar at Lakhnadaun upon Govind's disinclination to process the application of the complainant for issuance of domicile certificate and in the course of the quarrel, certain documents were torn and pieces thereof were seized in criminal case registered as Crime No.202/2008 against the complainant in respect of the offences punishable under Section 186, 353, 294 and 506 of the IPC. However, as indicated by the Deputy Collector, Seoni in the letter-dated 23.01.2009 addressed to Officer-In-Charge of Finance Section (that has been annexed to the charge sheet submitted against the petitioners), no complaint as to the alleged misconduct of Govind and connivance of Rajesh was made to the Collector of the District. This apart, the complaint is completely silent on the point as to whether the complainant had laid the information about the occurrence before the SHO of P.S. Lakhnadaun or any officer of SPE (Lokayutka) at any earlier point of time.

11. The complainant, being a former Judge and a practicing Advocate, was certainly expected to be well versed with the legal position, as explained in *Khedu Mohton v State of Bihar* AIR 1971 SC 66, that delay in filing the complaint throws a great deal of doubt on the prosecution story. A delay would be insignificant only when there is no motive for false implication or where the complainant has been able to offer a plausible explanation for it. However, mere statement that police did not take action can hardly be taken to have explained the delay in making complaint (See. *Dilawar Singh v. State of Delhi* AIR 2007 SC 3234).

12. Adverting to the facts of the case, it can easily be concluded that the complaint was made with mala fide motive as a counter blast to registration of the criminal case against the complainant, after a considerable delay of 14 days. Allegations made in the complaint suggesting that Govind was impliedly encouraged by Rajesh to openly demand bribe in a public office were so patently absurd and inherently improbable that no prudent person can ever

reach a conclusion that there is sufficient ground for proceeding against the accused persons. As pointed out already, the complainant had not preferred to inform legally competent authority viz. Special Police Establishment (Lokayukta) about the misdemeanour of the petitioners as public servants. It is well settled that -

"the criminal law is not to be used as an instrument of wreaking private vengeance by an aggrieved party against the person who, according to that party, had caused injury to it. Barring a few exceptions, in criminal matters the party who is treated as the aggrieved party is the State which is the custodian of the social interests of the community at large and so it is for the State to take all the steps necessary for bringing the person who has acted against the social interests of the community to book"

[*Thakur Ram v. State of Bihar* AIR 1966 SC 911 referred to]

13. In a recent decision rendered in *M. N. Ojha v. Alok Kumar Srivastav* AIR 2010 SC 201, while quashing the criminal proceedings against Bank Manager and Officers initiated upon a complaint made by one of the guarantors against whom action had already been taken by the Bank Officers for cheating and misappropriation of hypothecated goods in the wake of default in re-payment of Bank loan by borrower, the Supreme Court has reiterated the following guidelines -

".... the High Court cannot refuse to exercise its jurisdiction if the interest of justice so required where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no fair-minded and informed observer can ever reach a just and proper conclusion as to the existence of sufficient grounds for proceeding. In such cases refusal to exercise the jurisdiction may equally result in injustice more particularly in cases where the complainant sets the criminal law in motion with a view to exert pressure and harass the persons arrayed as accused in the complaint. It is well settled and needs no restatement that the saving of inherent power of the High Court in criminal-matters is intended to achieve a salutary public purpose "which is that a court proceeding ought not to be permitted to degenerate into a

weapon of harassment or persecution. If such power is not conceded, it may even lead to injustice".

14. In *Saroj Kumar Sahoo's case* (supra) also, while explaining nature, scope and purpose of Section 482 of the Code, the Apex Court has only sounded a note of caution that inherent power is to be exercised sparingly, *ex debito justitiae* to do real and substantial justice and that too in the rarest of rare cases.

15. Applying these principles to the factual scenario highlighted above, we are of the considered opinion that the present case is one of the rarest of rare cases that requires our interference to secure the ends of justice as the continuance of prosecution would amount to abuse of the process of the Court. Needless to say that case of the petitioners falls within category nos.(5) and (7) of the cases as enumerated in *State of Haryana v. Bhajan Lal* AIR 1992 SC 604.

16. In the result, both the petitions stand allowed. The criminal proceedings pending as Special Case No.2/2009 before the Court of Special Judge (under the Act) at Seoni are hereby quashed.

17. A copy of this order be retained in the connected MCrC.

Petitions allowed.

I.L.R. [2011] M. P., 1104

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Abhay M. Naik

M.Cr.C. No.8856/2009 (Gwalior) decided on 3 December, 2010

TEJNARAYAN SHUKLA

... Applicant

Vs.

STATE OF M.P.

... Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 439 - Grant of bail - Factors to be taken into consideration - Law discussed. (Para 11)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 - जमानत का दिया जाना - विचार में लिये जाने वाले कारक - विधि की विवेचना की गयी।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 439 - Arrest by C.B.I. - Applicant arrested by police for offence u/s 302 and

filed charge sheet - Further investigation by C.B.I. pending - On considering the material available in the case diary, applicant granted bail - However, the bail order shall remain in abeyance for two weeks - C.B.I. at liberty to make arrest of applicant although he is in police custody, in case if C.B.I. is in possession of incriminating material against applicant. (Para 18)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 - सी.बी.आई. द्वारा गिरफ्तारी - आवेदक को पुलिस द्वारा धारा 302 के अपराध के लिए गिरफ्तार किया गया तथा आरोप पत्र प्रस्तुत किया गया - सी.बी.आई. द्वारा अतिरिक्त अन्वेषण लम्बित - केस डायरी में उपलब्ध सामग्री पर विचार कर आवेदक को जमानत प्रदान की गयी - तथापि, जमानत आदेश दो सप्ताह तक स्थगित रहेगा - यदि सी.बी.आई. के पास आवेदक के विरुद्ध अपराध में फँसाने वाली सामग्री उपलब्ध हो तो सी.बी.आई. आवेदक की गिरफ्तारी हेतु स्वतंत्र है यद्यपि वह पुलिस अभिरक्षा में है।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 46 - Arrest by C.B.I. - Applicant already in police custody - C.B.I. has power of arrest, if upon investigation incriminating material has been found by it against applicant - In case of arrest and/or filing of supplementary charge sheet against applicant, bail granted to applicant on the basis of the charge sheet filed by police would cease to operate and applicant would be required to file fresh application. (Para 18)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 46 - सी.बी.आई. द्वारा गिरफ्तारी - आवेदक पूर्व से ही पुलिस अभिरक्षा में - सी.बी.आई. के पास गिरफ्तार करने की शक्ति है, यदि अन्वेषण के उपरान्त उसके द्वारा आवेदक के विरुद्ध अपराध में फँसाने वाली सामग्री पायी गयी हो - गिरफ्तारी होने और/अथवा आवेदक के विरुद्ध पूरक आरोप पत्र दाखिल किये जाने की दशा में पुलिस द्वारा पेश आरोप पत्र के आधार पर आवेदक को प्रदान की गयी जमानत प्रवृत्त नहीं रह जायेगी और आवेदक को पुनः आवेदन प्रस्तुत करना होगा।

Cases referred :

AIR 1978 SC 527, (2008) 1 SCC 667, (2002) 3 SCC 598, 2007 AIR SCW 5598, (2005) 1 SCC 568, (2007) 8 SCC 770, (2004) 5 SCC 347, (2006) 6 SCC 277, (2009) 1 SCC 441.

Sanjay Gupta, Pradeep Katore & Rajesh Shukla, for the applicant.

R.P. Rathi, P.P., for the non-applicant/State.

Ankur Mody, A.S.G., for C.B.I.

Deeksha Mishra, for the complainant/objector.

ORDER

ABHAY M. NAIK, J. :- This is the third application for bail under Section 439 of Cr.P.C. in the matter of arrest of the applicant in connection with Crime No.30/09 for commission of offence under Sections 302/34, 120(B) of IPC, 25, 27 of the Arms Act read with Section 3(2)(v) of The Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities) Act, 1989.

2. Shri Makhanlal Jatav, the then sitting MLA from Gohad was shot dead on 13.04.09 at about 20.00 hours. FIR was lodged by Shivraj in the intervening night of 13th and 14th April, 2009 at 0025 hours who was the security guard of Makhanlal Jatav. It was to the effect that the informant alongwith Balkrishna Dogra [Head Constable No.524] was accompanying Makhanlal Jatav on white coloured Bolero vehicle bearing registration no.HR04-N0261. They reached at village Tharet at about 19.15 hours. Their own vehicle and that of the candidate Bhagirath Prasad reached to the place of election meeting at village Tharet for addressing. In addition to them, driver Devendra and maternal uncle of Makhanlal Jatav, namely, Banwarilal Jatav were also sitting inside the vehicle. Vehicle moved slowly. When it reached at the door of Ramesh Kushwah, the MLA was busy in conversation with the persons following the vehicle on feet. Suddenly, he heard a noise of two bullet fires. The MLA fell down on the right towards driver's side inside the vehicle. MLA was shifted to middle seat by them. Upper portion of right ear was bleeding and the MLA had become unconscious. Passersby fled away from the seen. A towel was wrapped on the injury and the MLA was brought by the same vehicle to Sahara Hospital where he was declared dead. The incident was seen by the said person and many other villagers. On the basis of this FIR, Crime No. 30/09 was registered against the unknown.

3. On 19.04.09, the applicant was arrested for the alleged offence and was chargesheeted on 06.07.09 by submission of challan. He is in custody since 19.04.09.

4. First application for bail [M.Cr.C No.5014/09] was submitted by the applicant. During hearing, it was disclosed that CBI was further investigating in the matter and statements of number of witnesses were to be recorded. In this background, application for bail was dismissed as withdrawn with liberty to file afresh at appropriate stage. It was directed by this Court vide order dated 14.10.09 while allowing the withdrawal that the CBI shall conclude the investigation within a period of two months. Second application [M.Cr.C 8406/

09] for bail was submitted which, too, was dismissed as withdrawn on 10.12.09.

5. It has been submitted on behalf of the applicant that the applicant was not named in the FIR. Statements of Shivraj, Balkrishna Dogra, driver Devendra and Banwarilal were recorded by the Police under Section 161 of Cr.P.C. on various dates. None of them has made allegations against the applicant for committing or causing murder of Makhanlal Jatav. Copy of application dated 14.04.09, submitted by Arvind Kumar S/o Makhanlal Jatav is in the Court file which, too, does not contain any allegation against the applicant.

6. It is further submitted that Challan has already been filed. No incriminating material is submitted alongwith the Challan papers.

In view of the aforesaid, it is submitted that the applicant is a practising law abiding advocate. He has no criminal background. He has not committed any offence and is in custody since 19.04.09 after his arrest. A prayer for his release on bail has been, therefore, made.

7. Case of the opposite party is that it is a case of contract killing. Call records of mobile phones do reveal that the applicant was constantly and continuously in touch with another accused, Mewaram who murdered Makhanlal Jatav. It is stated that the murder was committed at the instance of the applicant who on account of his behaviour was shifted from Gohad jail to Bhind jail. Since his two applications for bail were already dismissed, this being third successive application is liable to be dismissed. This apart, it has been informed that the case has already been transferred to Central Bureau of Investigation (CBI).

8. Learned counsel for CBI informed this Court that after taking over the investigation of the case by CBI on 16.07.09 considerable progress has already been made. It has examined number of witnesses and has seized some important documents.

9. This Court has gone seriously through the Challan papers & the case diary. Statements of Arvind Kumar S/o deceased Makhanlal Jatav and Smt. Sheela Devi W/o deceased Makhanlal Jatav were recorded by the Police [copies thereof are contained in Challan papers]. They, too, have not made allegations against the applicant for committing or causing murder of Makhanlal Jatav. They have not levelled aspersions on the applicant for causing murder

of Makhanlal Jatav by contract killing. It is not understandable from Challan papers that what did prevent the prosecution from making inclusion of cogent evidence (if any) in the Challan papers which could have ex facie proved the nexus between the applicant and Mewalal, the accused for committing the murder.

10. It is true that it is the third application for bail but the earlier two applications were not decided on merits and therefore there was no consideration of the factors relevant for grant or refusal of bail application.

Hon'ble Apex Court of India in the case of *Babu Singh and others Vs. The State of Uttar Pradesh* [AIR 1978 SC 527] has observed:

"2. But an order refusing an application for bail does not necessarily preclude another, on a later occasion, giving more materials, further developments and different considerations. While we surely must set store by this circumstance, we cannot accede to the faint plea that we are barred from second consideration at a later stage. An interim direction is not a conclusive adjudication, and updated reconsideration is not overturning an earlier negation. In this view, we entertain the application and evaluate the merits pro and con.:

Repeated bail applications are also found permissible in the facts and circumstances of the case in a recent judgment of the Hon'ble Supreme Court of India in the case of *Rajesh Ranjan Yadav alias Pappu Yadav Vs. CBI through its Director* [(2008) 1 SCC 667]

In view of the aforesaid, this Court does not feel to be precluded from consideration of the third application on merits.

11. Exercise of Court's discretion with regard to grant of bail is to be exercised in a judicious manner by cogent reasons and not as a matter of course. Factors to be taken into consideration in this regard cannot be laid down exhaustively, however, the illustrative considerations have been enumerated by Hon. Supreme Court of India in the case of *Ram Govind Upadhyay Vs. Sudarshan Singh and others* [(2002) 3 SCC 598]. Mode of exercise of such powers and the illustrative relevant considerations have been described by the Hon. Apex Court in the case of *Ram Govind Upadhyay* (Supra) in the following paragraphs:

"3. Grant of bail though being a discretionary order – but, however, calls for exercise of such a discretion in a judicious manner and not as a matter of course. Order for bail bereft of any cogent reason cannot be sustained. Needless to record, however, that the grant of bail is dependent upon the contextual facts of the matter being dealt with by the court and facts, however, do always vary from case to case. While placement of the accused in the society, though may be considered but that by itself cannot be a guiding factor in the matter of grant of bail and the same should and ought always to be coupled with other circumstances warranting the grant of bail. The nature of the offence is one of the basic considerations for the grant of bail – more heinous is the crime, the greater is the chance of rejection of the bail, though, however, dependent on the factual matrix of the matter.

4. Apart from the above, certain other which may be attributed to be relevant considerations may also be noticed at this juncture, though however, the same are only illustrative and not exhaustive, neither there can be any. The considerations being:

(a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.

(b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.

(c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the court in support of the charge.

(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the genuineness of the

prosecution, in the normal course of events, the accused is entitled to an order of bail."

Hon. Apex Court in the case of *Sudha Verma Vs. State of U.P. & Another* [2007 AIR SCW 5598] has observed:

"12. There is a need to indicate in the order, reasons for prima facie concluding why bail was being granted particularly where an accused was charged of having committed a serious offence. It is necessary for the courts dealing with application for bail to consider among other circumstances, the following factors also before granting bail, they are:

1. The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence;
2. Reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;
3. Prima facie satisfaction of the Court in support of the charge."

12. Application for bail is now being considered in the light of Challan papers keeping in mind the aforesaid considerations.

Undisputably, murder is a heinous crime and an accused of such a crime is not to be released lightly provided there is incriminating material against such an accused in the eyes of law.

Similarly, freedom of an innocent person is also equally important since his right to liberty is guaranteed under the Constitution of India. Hon. Supreme Court of India in the case of *Babu Singh and others Vs. The State of Uttar Pradesh* [AIR 1978 SC 527] has clearly observed:

"8. Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Art.21 that the crucial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorise impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental,

suffering lawful eclipse only in terms of procedure established by 'law'. The last four words of Art.21 are the life of that human right."

Coming to the Challan papers, it may be seen that the deceased Makhanlal Jatav was accompanied by his security guard Shivraj, Balkrishna Dogra [Head Constable No.524], driver Devendra and Banwarilal Jatav, maternal uncle of the deceased. Statements of all these persons were recorded by the Police under Section 161 Cr.P.C. on various dates. This Court does not find any allegation in these statements against the applicant for causing murder of Makhanlal Jatav. Application dated 14.04.09 submitted by Arvind Kumar S/o deceased Makhanlal Jatav does not contain any allegation against the applicant for causing murder by contract killing. Statements of Arvind Kumar as well as of Smt. Sheela Devi were recorded by the Police wherein no allegation is found to have been made against the applicant for causing murder of Makhanlal Jatav. There are details of phone calls which have been highly relied on by the prosecution to contend that the murderer, namely, Mewaram was constantly and continuously in touch with the applicant on mobile.

Admittedly, the applicant is a practising lawyer. This being so, it cannot be treated as a strange event if a criminal contacts him on phone which may be for seeking protection from court of law.

13. At this stage, it is informed by Shri Ankur Mody, learned Assistant Solicitor General of India appearing on behalf of Central Bureau of Investigation (CBI) that its investigation is almost complete and a supplementary chargesheet is likely to be submitted by CBI. He has further stated at bar that certain incriminating material has been discovered/traced out by the CBI during investigation against the applicant which would be produced with the supplementary chargesheet.

Since material produced by the prosecution alone is to be considered for charge as per the decision of the Hon'ble Supreme Court of India in the case of *State of Orissa Vs. Debendra Nath Padhi* [(2005) 1 SCC 568], this Court at the present juncture does not feel it proper to take into

'consideration the material available with the CBI which is not the part and parcel of the Challan papers submitted against the applicant.

Since the investigation as per the statement of CBI is almost complete, there is least likelihood of tampering with the evidence.

14. It is true that the applicant was shifted from Gohad Jail to Bhind Jail but there is no material on record as well as with the prosecution to prima facie establish that such shifting was on account of apprehension of threat to the complainant or witnesses of the prosecution.

15. It cannot be lost sight of that the applicant was not present at the place of occurrence. He was not named in the FIR. None of the persons present at the place of occurrence has referred to the name of the applicant as a person involved in the commission of murder of Makhanlal Jatav. Arvind Kumar [S/o deceased Makhanlal Jatav] as well as Smt. Sheela Devi [Wd/o deceased Makhanlal Jatav] have also not made any allegation against the accused for causing the murder in question. Deceased Makhanlal Jatav was a sitting MLA whereas the applicant was not in the fray of the seat for ML Aship. No criminal history of the applicant has been established by the prosecution. Applicant is a practising lawyer and might have received phone calls even from the accused Mewaram for seeking protection from the Court of Law. Particulars of conversation between the applicant and Mewaram are not on record. Applicant is in custody from 19.04.09. Shivraj, Balkrishna Dogra [Head Constable No.524], driver Devendra and Banwarilal Jatav, maternal uncle of the deceased stated that it was Lal Singh Arya who shouted "Kill Makhan" "Let him not escape".

Aforesaid evidence available in the prosecution's record does not support prima facie the involvement of the applicant in the offence of murder directly or as a contract killer.

16. In the facts and circumstances of the case revealed in the Challan papers and the case diary but without expressing any opinion on the merits of the case, this Court feels it proper to grant bail to the applicant in the following manner:

It is directed that the applicant be released on bail on his furnishing a personal bond in the sum of Rs.1,00,000/- (**Rs. One Lac Only**) with two solvent sureties of Rs.50,000/- each in the like amount to the satisfaction

of the Trial Court for his regular appearance in the trial court during trial subject to following conditions:

- (i) that he will not leave the municipal limits of Gohad without obtaining leave from the court of Special Judge, Bhind (M.P.), however, it is made clear that he would be permitted to attend the dates of hearing before the court of Special Judge, Bhind (M.P.);
- (ii) that he will give appearance before the Police Station Endori, District Bhind (M.P.) at 11 am on every Sunday;
- (iii) that he will make himself available for investigation of the case, if required, and will co-operate the CBI;
- (iv) that he shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected; and
- (v) that he shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence.

17. It is an admitted position that the investigation by CBI was already ordered which took over the investigation of the case on 06.07.09. According to Shri Ankur Mody, learned Assistant Solicitor General of India appearing on behalf of Central Bureau of Investigation (CBI), CBI's investigation is almost complete.

18. Section 173(8) of Cr.P.C. makes a provision for further investigation. Hon. Supreme Court of India in *Dinesh Dalmia Vs. CBI* [(2007) 8 SCC 770] has observed:

"20. Indisputably, the power of the investigating officer to make a prayer for making further investigation in terms of sub-section (8) of Section 173 is not taken away only because a charge-sheet under sub-section (2) thereof has been filed. A further investigation is permissible even if order of cognizance of offence has been taken by the Magistrate.

Similarly, in case of defective Challan, permission for further investigation

may be obtained as observed by the Apex Court in *Hasanbhai Valibhai Qureshi Vs. State of Gujarat and others* [(2004) 5 SCC 347] and *Bhupinder Singh and others Vs. Jarnail Singh and others* [(2006) 6 SCC 277].

Similarly, second FIR and further investigation by CBI is also permissible as observed by the Hon. Apex Court in *Nirmal Singh Kahlon Vs. State of Punjab and others* [(2009) 1 SCC 441].

It is further submitted that the supplementary charge sheet is likely to be submitted by CBI. In view of the aforesaid, it is hereby further observed that the order of this Court shall become operative after two weeks from the date of order. In the meantime, CBI is at liberty to make arrest of the applicant although he is in police custody in the crime registered by the CBI against him, in case if CBI is in possession of incriminating material against the applicant.

CBI has undoubtedly powers of arrest, if upon investigation incriminating material has been found by it against the applicant. In case of such an arrest and/or filing of supplementary chargesheet against the applicant, this order would cease to operate and the applicant would be required to move a fresh application for seeking bail in accordance with law.

It is made clear that any observation made herein is meant for providing reasons for order and will not amount to appreciation of evidence on record. The same shall not affect the merits of the case, which are to be established before the Court trying the case in accordance with law.

19. M.Cr.C., thus, stands disposed of.

Petition disposed of.

I.L.R. [2011] M. P., 1115

MISCELLANEOUS CRIMINAL CASE*Before Mr. Justice R. C. Mishra*

M.Cr.C. No. 5752/2010 (Jabalpur) decided on 25 January, 2011

SHAMSHER BAHADUR SINGH @ NIRMAL SINGH ...Applicant

Vs.

STATE OF M.P.

...Non-applicant

Contempt of Courts Act (70 of 1971), Section 12(1) - Contempt of Court - False statement in affidavit given in course of justice - Father of noticee (applicant) obtained temporary bail by submitting applications containing false declaration that no bail application was decided by the Supreme Court - Noticee in respect of two such applications submitted supporting affidavits - Noticee came forward with an explanation that the affidavits were submitted under a bona fide belief - Held - False statement in affidavits was made deliberately and consciously and it certainly amounted to Contempt of Court - Noticee is held guilty of contempt and directed to pay Rs. 20,000/- as penalty and exemplary costs. (Para 10 & 12)

न्यायालय अवमान अधिनियम (1971 का 70), धारा 12(1) - न्यायालय अवमान - न्याय के दौरान शपथपत्र में झूठा कथन दिया गया - नोटिसी (आवेदक) के पिता ने झूठी घोषणा युक्त आवेदनों द्वारा, कि उच्चतम न्यायालय द्वारा कोई जमानत का आवेदन विनिश्चित नहीं किया गया है, अस्थायी जमानत अभिप्राप्त की - नोटिसी ने ऐसे दो आवेदनों के संबंध में समर्थक शपथपत्रों को प्रस्तुत किया - नोटिसी इस स्पष्टीकरण के साथ आगे आया कि शपथ पत्र, सद्भाविक विश्वास के अंतर्गत प्रस्तुत किये गये - अमिनिर्धारित - शपथपत्रों में जानबूझकर एवं मानपूर्वक झूठा कथन किया गया और वह निश्चित रूप से न्यायालय का अवमान की कोटि में आता है - नोटिसी अवमान का दोषी पाया गया और शस्ति एवं अनुकरणीय व्यय के रूप में रु. 20,000/- का भुगतान करने के लिए निर्देशित।

Cases referred :

AIR 2000 SC 168, AIR 1995 SC 1795, AIR 1929 CAL 283, (2000) 2 SCC 367, (2009) 7 SCC 460, (1994) 2 SCC 8.

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

Anil Khare with Namrata Kesharwani, for the noticee.

ORDER**R.C. MISHRA, J. :-**Arguments heard.

In the light of the order dated 16.12.2009 passed by the Apex Court in SLP (Cri) Nos.10165-10166/2009, the office was directed vide order dated 27.4.2010, passed on the administrative side, to register this M.Cr.C. for cancellation of temporary bail granted to Shamsher Bahadur Singh by virtue of order dated 29.3.2010 passed in M.Cr.C. No.2492/2010. The obvious reason was that the facility was obtained by suppressing the fact that aforesaid petitions moved against the order dated 24.4.2009 and order dated 8.10.2009 passed by this Court respectively in M.Cr.C. No.666/2009 and 10084/2009 rejecting the applications for grant of regular bail on merits as well as on medical grounds, had already been dismissed by the Apex Court on 16.12.2009.

2. However, the direction could not be complied with by the Registry till 15.6.2010 and in the meanwhile, the term of temporary bail expired on 18.5.2010. It is relevant to note that even after dismissal of the SLPs, Shamsher Bahadur was able to obtain temporary bail on medical grounds for the periods from 19.1.2010 to 25.3.2010 and again from 29.3.2010 to 17.5.2010. Particulars of the corresponding bail applications and the orders may be tabulated as under -

Date of presentation of bail application	Registered as M.Cr.C. No.	Decided on	Result
19.12.2009	13211/2009	19.1.2010	The applicant Shamsher Bahadur was released on temporary bail on medical grounds till 23.2.2010
18.2.2010	1710/2010	22.2.2010	Period of temporary bail was extended upto 25.3.2010.
15.3.2010	2492/2010	29.3.2010	Applicant was again released on temporary bail till 17.5.2010.

3. Each one of these applications contained a declaration that no bail application was decided by the Supreme Court. However, supporting affidavits

were submitted in respect of the last two applications only by noticee Bhanu Pratap Singh, the son of applicant Shamsher Bahadur Singh.

4. In such a situation, notice was issued to Bhanu Pratap Singh, to show cause as to why he should not be prosecuted for submitting false affidavits before this Court in M.Cr.C. No.1710/2010 as well as in M.Cr.C. No.2492/2010.

5. In reply, the noticee has not disputed the authorship of the affidavits in question. However, he has come forward with an explanation that the affidavits were submitted under a bonafide belief that no SLP was filed on behalf of his father Shamsher Singh before the Supreme Court. According to him, he did engage Shri Deepak Kumar Singh, an Advocate practicing in the Supreme Court, for the purpose through Shri Suresh Kumar Sharma, Advocate, who happens to be a resident of Rewa; but, in view of the deteriorating physical condition of his father, he had asked Shri Suresh Sharma to communicate his instructions to Shri Deepak Kumar Singh forbearing him not to prefer any SLP. He has further asserted that Shri Deepak Kumar Singh had only made him to sign on two blank papers and thus, he had not sworn any affidavit before any Notary or Oath Commissioner at Delhi.

6. However, the explanation is far from being satisfactory as it was expected from the noticee to verify the state of affairs with regard to filing of the SLPs before swearing in affidavit on more than one occasion. As such, the noticee is apparently guilty of swearing false affidavits in judicial proceedings.

7. Now the question that arises for consideration is as to what should be the course of action to be adopted?

8. As rightly pointed by learned counsel, only two options are available to the Court. The first one is to direct the Registrar of this Court to conduct a summary enquiry contemplated under Section 340(1) of the Code of Criminal Procedure to ascertain as to whether a complaint should be filed against the noticee in respect of the offence punishable Section 193 of the IPC (*M.S. Ahlawat vs. State of Haryana and another* AIR 2000 SC 168 referred to). The second course is to deal the matter under the provisions of the Contempt of Courts Act, 1971 (for short 'the Act') as filing of false affidavit in Court constitutes criminal contempt as defined under Section 2(c) of the Act (*Dhananjay Sharma vs. State of Haryana and others* AIR 1995 SC 1795 relied on).

9. As indicated already, noticee was required to show cause as to why he should not be prosecuted for furnishing false affidavits and prosecution means process by way of indictment or information, and is not necessarily confined to prosecution for an offence (See *Daulat Ram vs. Corporation of Calcutta* AIR 1929 Calcutta 283). In this view of the matter, there is no legal hurdle in dealing the case under the Act.

10. As concluded already, the explanation tendered by the noticee is not reasonably acceptable. Swearing of false affidavit not only obstructs but also perverts course of justice. Since the false statement in the affidavits was made deliberately and consciously, it certainly amounted to Contempt of Court. This apart, his omission to inform this Court about dismissal of the SLPs at any point of time during hearing of the bail applications, which were otherwise not entertainable, also renders him liable to penalty.

11. Taking into consideration all the relevant aspects, as highlighted by the Apex Court in *Murray & Co. vs. Ashok Kr. Newatia and another* (2000) 2 SCC 367, including that the noticee has been able to secure release of his father on the ground of serious illness for a period of more than 3½ months despite rejection of his Special Leave Petitions by the Supreme Court, an amount of Rs.2,000/- is imposed as fine under Section 12(1) of the Act in respect of each affidavit containing the false assertion and in the light of decision in *Sunkara Lakshminarasamma and another vs. Sagi Subba Raju and others* (2009) 7 SCC 460, Rs.16,000/- is imposed as exemplary costs in view of the fact that the false statement on oath has, in effect, resulted in violation of judicial discipline and propriety by this Court (*Bimla Devi (Smt) vs. State of Bihar* (1994) 2 SCC 8 referred to).

12. Consequently, noticee Bhanu Pratap Singh is held guilty of Contempt of this Court and is directed to pay a total sum of Rs.20,000/-. The amount shall be deposited with the Registry of this Court within a period of 2 months from today and if the amount is not paid, the noticee shall suffer imprisonment for 3 months.

Order accordingly.
