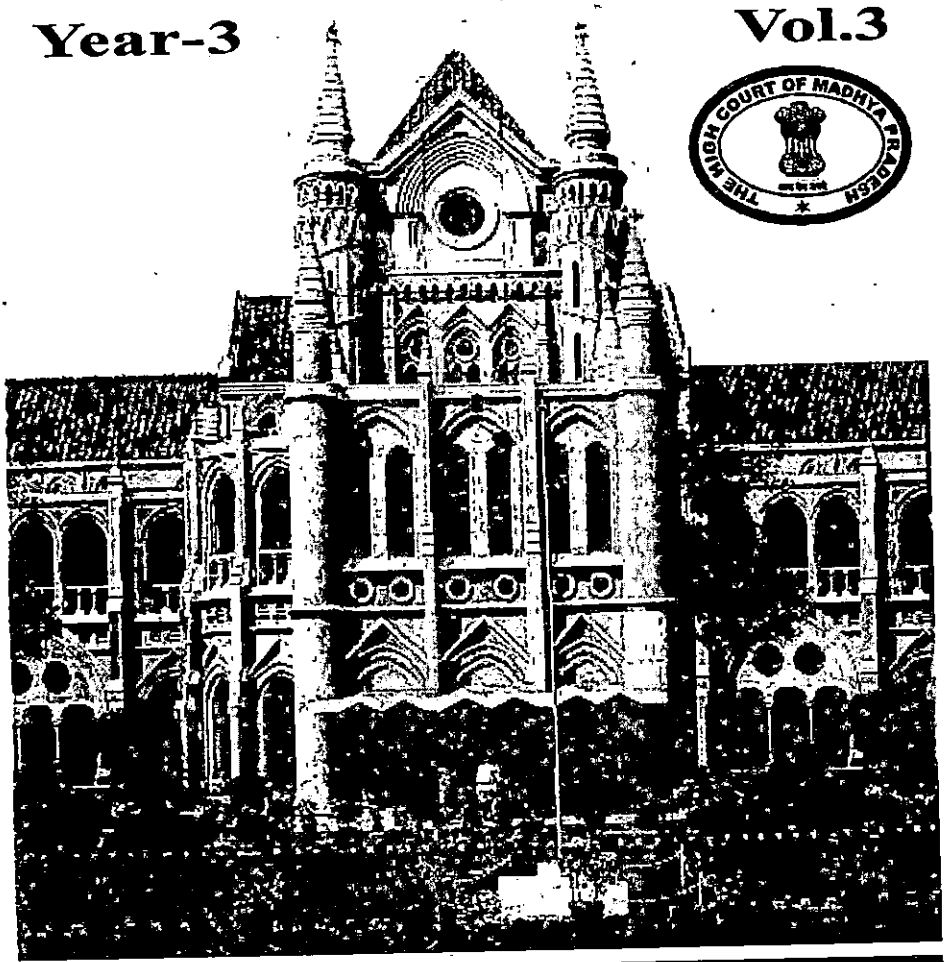
I. L. R. (2011) M.P.

RNI. Regn. No. MPBIL/2009/32366
Postal Regn. No. L4/N.P./2010-12
Jabalpur M. P.

# THE INDIAN LAW REPORTS
## M.P. SERIES

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

**Year-3** **Vol.3**



**August** **(Single copy ₹40)** **2011**

(pp. 1797 to 2090) 

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# HIGH COURT MADHYA PRADESH

## CORRIGENDUM

IN SECOND APPEAL NO. 332 OF 2001 (GWALIOR)

(Judgment dated May 12, 2011)

Published in ILR [2011] M. P. 1731

KAMAL SINGH & anr. ...Appellants

Vs.

ROOP SINGH (SINCE DEAD)
THROUGH L.RS. & anr. Respondents

| Page No. | Line No. | For | Read |
|---|---|---|---|
| 1731 | 2 of Head Note | of receiver– | of commissioner– |
| 1731 | 1 of Head Note in Hindi | रिसीवर | कमिश्नर |

(Awdhesh Kumar Shrivastava)
Principal Registrar (ILR)

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## TABLE OF CASES REPORTED

*(Note : An asterisk (*) denotes Note number)*

## TABLE OF CASES REPORTED



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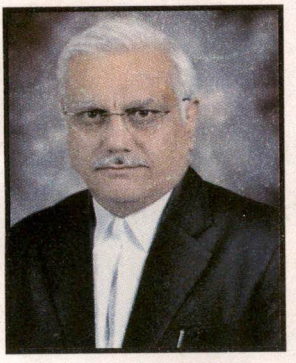
## APPOINTMENT TO THE MADHYA PRADESH HIGH COURT



We congratulate Shri Keshav Kumar Trivedi on his appointment as Judge of the High Court of Madhya Pradesh. Shri Keshav Kumar Trivedi took oath of the High Office on 27th of May, 2011.

**Justice Keshav Kumar Trivedi**

Born on January 10, 1954. Started practising in the High Court of Jabalpur from 1979, being enrolled as an advocate on 11-08-1979 in the rolls of the State Bar Council of Madhya Pradesh. Father was Class-I gazetted officer of the State Civil Services. Grandfather was District & Sessions Judge in British India and retired in 1936. Maternal uncles late Justice S. Awasthy and late Justice R. P. Awasthy were Judges of the Madhya Pradesh High Court. Was part time lecturer in University Teaching Department in the year 1986-87. Was Deputy Govt. Advocate for sometime and Additional Government Advocate with effect from 1988 to 30-09-1991. Was standing counsel for M.P.Audyogik Vikas Nigam Ltd., till 1994. Was also counsel for Election Commission of India w.e.f. 2003 till elevation. Represented various Corporations, Municipal Councils etc. Was a practicing lawyer in Civil, Constitutional, Service matters, Arbitration matters etc.

Elevated as Additional Judge of the High Court of Madhya Pradesh on May 27,2011.

**We wish Hon'ble Shri Justice Keshav Kumar Trivedi, a successful tenure on the Bench.**

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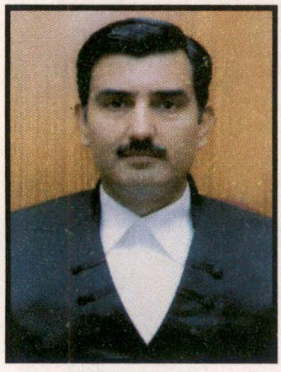
## APPOINTMENT TO THE MADHYA PRADESH HIGH COURT



**Justice Sheel Nagu**

We congratulate Shri Sheel Nagu on his appointment as Judge of the High Court of Madhya Pradesh. Shri Sheel Nagu took oath of the High Office on 27th of May, 2011.

Born on January 1, 1965. Started practising in the High Court of Jabalpur from 1987, being enrolled as an Advocate on 05-10-1987 in the rolls of the State Bar Council of Madhya Pradesh. Was Government Advocate from September, 1995 to February, 1998. Was standing Counsel for Indian Railways, Hindustan Petroleum Corporation Ltd., Bharat Petroleum Corporation Ltd., State Bank of India, Hitkarini Sabha (a premier education society) and Bharat Oman Refineries Ltd. (largest upcoming refinery in central India). Also appeared on behalf of Associated Cement Companies, R.P.G. Life Sciences Ltd., United Bank of India, Jabalpur Development Authority, Income Tax Department, Employees Provident Fund Organization, Kendriya Vidyalaya Sangathan, Tata Iron & Steel Co. Ltd. etc.. Also participated as Advocate Member of Lok Adalat at the High Court level on four occasions.

Elevated as Additional Judge of the High Court of Madhya Pradesh on May 27, 2011.

**We wish Hon'ble Shri Justice Sheel Nagu, a successful tenure on the Bench.**

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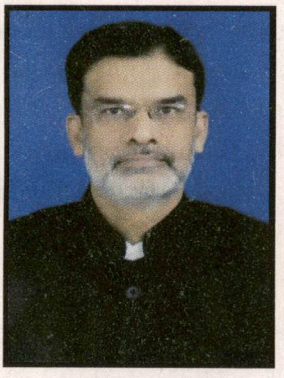
## APPOINTMENT TO THE MADHYA PRADESH HIGH COURT



We congratulate Shri Sujoy Paul on his appointment as Judge of the High Court of Madhya Pradesh. Shri Sujoy Paul took oath of the High Office on 27th of May, 2011.

**Justice Sujoy Paul**

Born on June 21, 1964. Started practising in the High Court of Jabalpur from 1990, being enrolled as an advocate in the rolls of the State Bar Council of Madhya Pradesh, enrollment number being 1948/90. Represented State Bank of India, Bank Note Press, Dewas, Jabalpur Development Authority, M.P. State Legal Services Authority, M.P. Urja Vikas Nigam and M.P. Human Rights Commission. Also appeared on behalf of Sports Authority of India, National Institute of Teachers' Technical Training & Research, M.P. Administrative Service Association. Was also member of M.P. State Legal Services Authority.

Elevated as Additional Judge of the High Court of Madhya Pradesh on May 27,2011.

**We wish Hon'ble Shri Justice Sujoy Paul, a successful tenure on the Bench.**

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**Shri Naman Nagrath, Addl. Advocate General of M. P., while felicitating the New Judges, said :–**

Today is a memorable and inspiring day for all of us as three of our practicing colleagues are being elevated as Hon'ble Judges of this court. I consider it to be my great privilege today to welcome your lordships as Addl. Judges of this Court. Till yesterday, all of them were amongst us in the Bar, but from now on a great responsibility is on their shoulders, which we are confident that each one of the Hon'ble Judges shall fulfill to the best of their ability.

My Lord Shri K.K. Trivedi was born on 10th of Jan 1954 has been practicing in the High Court since 1979 when he was enrolled as an Advocate. Shri Trivedi hails from a family of judges and senior civil servants. While his father was a senior gazetted officer in the State Civil services, his Grand father was a District & Sessions Judge in the Pre-Independence era under the British rule. Not only this, his maternal uncle late Justice S. Awasthy and Justice R.P. Awasthy also adorned the high office of Hon'ble Judges of this Court. With this background we are sure that Shri Trivedi would also prove to be an excellent judge who would be liked by one and all.

Your Lordship Shri Trivedi has also been a teacher in the University Teaching Department and has also represented the State Government, while he was associated with the office of the Advocate General. Shri Trivedi has been an active all-round practitioner, who has been a standing counsel for government bodies like MPAKVN, Election Commission of India, and has represented various Corporations and local bodies. Shri Trivedi has actively practiced mainly in civil, constitution, service and other matters.

With the elevation of Shri K.K. Trivedi as an Hon'ble Judge of this Court, we all have very high hopes and expectations from him as a Judge and we are sure that with his experience, legal acumen, integrity, composed temperament and sincerity, his Lordship shall prove everyone of us right.

Socrates in 470 BC had said -

Four things belong to a judge :

- to hear courteously
- to answer wisely
- to consider soberly
- and to decide impartially

Hon'ble Shri Trivedi is bestowed with all the above traits, and we all hope and believe that his Lordship shall endeavor to follow each one of them.

I, on behalf of State Government, Law Officers of the State, on behalf of the Advocate General, and my own behalf congratulate Justice K.K. Trivedi on his elevation, and wish him a very excellent and satisfying tenure as a judge.

Today, I also have the privilege and honour today to welcome and honour Shri Justice Sheel Nagu as a Judge of this Court.

Shri Sheel Nagu was born on lst day of the year 1965. Enrolled as an Advocate on 5.10.1987, Shri Nagu has been practicing since then. Initially Shri Nagu has been associated with Shri Vivek Tankha, Senior Advocate for a considerably long period, but thereafter developed his own practice.

His Lordship has also been associated with the Office of the Advocate General and also represented the State Government for almost three years. Shri Nagu has been representing many Corporates, Government bodies and Corporations. To name a few Shri Nagu has represented Indian Railways, Hindustan Petroleum Corporation, Bharat Petroleum Corporation, State Bank, Jabalpur Development Authority, Income Tax department, Provident Fund Organization. He has also represented major companies like Bharat Oman Refinery, Tata Iron Steel etc. Shri Nagu has also been involved with Lok Adalat and has been an Advocate Member during several Lok Adalat proceedings.

Your Lordship is soft spoken, cool headed and well versed in various branches of law. We are certain that his lordship shall display a formidable combination of intellect and open-mindedness, courtesy and humility, integrity and fairness, thereby making him an excellent judge. My Lord, the Bar of the State has produced many lawyers, many of whom have become Judges. The quality of Judges reflect the quality of Bar.

I feel privileged in offering this ovation to Justice Sheel Nagu and hope he will prove worthy of the assignment and will be a great asset to the institution.

I, on behalf of State Government, Law Officers of the State, on behalf of the Advocate General, and my own behalf, congratulate Justice Sheel Nagu on his elevation, and wish him a very healthy future life with a successful tenure as a judge.

Lastly, I consider it to be my proud privilege and honour today to welcome Justice Sujoy Paul as a Judge of M.P. High Court.

Shri Sujoy Paul was born on 21st of June 1964. Shri Paul has been practicing as an Advocate since his enrolment as an advocate in the year

1990. Initially, Shri Paul started his career and was a junior to Shri R.K.Gupta, who later on himself was elevated as judge of this court. However, subsequently Shri Paul started his own practice and has developed a name for himself in the legal field. Shri Paul is known for his fairness, honesty, excellent temperament and legal acumen. Although Shri Paul initially worked mainly in the field of labour and service matters, but subsequently developed practice in other fields of law, including civil and constitutional. While practicing Shri Paul has represented various important organizations and government bodies. As a lawyer, Shri Paul represented State Bank of India, Bank Note Press, JDA, MP State Legal Service Authority, MP Madhyam, MP Human Rights Commission, Sports Authority of India, National Institute of Teachers Training & Research, etc. Shri Paul is also a member of MP State Legal Service Authority.

With the elevation of Shri Paul as Hon'ble Judge of this Court we are confident that he shall be an asset to the judiciary. With his cool temperament and excellent nature, Shri Paul shall prove to be an excellent judge of this court.

In Justice Paul, we are sure to have a Judge who will be quick in his perception, broad in his vision and fresh in his approach. We are sure that no case will be lost of won before him before the last word is spoken. It is said that good lawyers make good judges, and good judges make good judgments, and we are sure that Justice Paul shall prove that right.

It is often said that the foremost quality to become a Judge is that one should be a good human being, because rest everything can follow. His Lordship has that great quality of being a good human being, besides having an excellent legal acumen. Your Lordship is compassionate and humble, which shall undoubtedly make him a great Judge.

I, on behalf of State Government, Law Officers of the State, on behalf of the Advocate General, and my own behalf wish Hon'ble Shri Sujoy Paul a very healthy future life and an excellent and satisfying career as a judge.

**********

**Shri Sunil Choubey, Vice-President, M. P. High Court Bar Association, while felicitating the New Judges, said :–**

I consider it to be my greatest privilege today to extend a hearty welcome to Hon'ble Justice Shri Keshav Kumar Trivedi, Hon'ble Justice Shri. Sheel Nagu and Hon'ble Justice Shri Sujoy Paul on their elevation as Additional Judges of this Hon'ble High Court. Your Lordships legal acumen and the unique qualities of head and heart need hardly any description from my side. However, in view of these extra ordinary qualities inevitably the expectation of the members of this Bar has become very high. We also look toward to Your Lordships that with your rich experience in the Bar, the relationship of Bar and Bench will prove to scale new heights and would also strengthen foundation of the institution as a whole. Paradoxically, the Bar looses three eminent advocates members but the Bench is recipient of these luminaries which we hope will surely add to the glory of the entire judicial system. This Bar Association feels proud on this solemn occasion to receive this honour. I also take this opportunity to convey the feelings of young junior lawyers who were ably guided by Your Lordships in the corridors wouldn't be forgotten so that they shape well and in future become asset to the institution.

My Lord Justice Keshav Kumar Trivedi was Born on 10.01.54 . My Lord was enrolled as an Advocate on 11.08.1979 with State Bar Council of M.P.. My Lord took initial lessons under the able guidance of his maternal uncle Hon'ble Justice Shri S. Awasthy. Your Lordship's father was Class-1 Gazetted officer and grand father was Distt. & Session Judge in British India. Your maternal uncles late Justice S. Awasthy and late Justice R.P. Awasthy were judges of this prestigious High Court. My Lord was also a part-time lecturer in University Teaching Deptt. My Lord was also a law officer in the Advocate General office and was Standing Counsel for various institutions like M.P. Audyogik Vikas Nigam, Election Commission of India as also for several corporations and Municipal councils.

It is my privilege to welcome Hon'ble Justice Shri Sheel Nagu. My Lord Justice Shri Sheel Nagu was born on 01.01.1965. My Lord was enrolled as an Advocate on 05.10.87 with State Bar Council of M.P. My Lord was Govt. Advocate in Advocate General office from September 1995 to February 1998. My Lord was Standing Counsel for various prestigious institutions. To name a few Indian Railways, Hindustan Petroleum Corporation Ltd., Bharat Petroleum, State Bank of India, Hitkarni Sabha, Bharat Oman Refineries. Your Lordship also appeared on behalf of Associated Cement Companies, R.P.G. life Insurance and several other institutions.

I had the privilege to get associated with Your Lordship when under orders of this Hon'ble High Court we went to inspect Sagar Jail regarding condition of prisoners detained there. I could easily remember saying of sant Kabir das ji :-

"शीलवन्त सबसे बड़ा सब रत्नन की खान ।
तीन लोको की सम्पदा रही शील मे आन ।।"

Hon'ble Justice Shri Sujoy Paul was born on 21.06.1964. My Lord was enrolled as an advocate in the year 1990 with State Bar Council of M.P. My Lord had represented several prestigious institutions like State Bank of India, Bank Note press Dewas, JDA, M.P. State Legal Service Authority, M.P. Urja Vikas Nigam, M.P. Human Rights Commission, Sports Authority of India, National Institute of Teachers Technical Training & Research, M.P. Administrative Service Association. My Lord is also a member of M.P. State Legal Service Authority.

I on my own behalf and on behalf of M.P. High Court Bar Association wish Your Lordships a very happy and successful tenure as a judge of this Hon'ble High Court.

I promise on my own behalf and on behalf of each and every member of M.P. High Court Bar Association in maintaining dignity of the institution and the effectiveness of the Justice delivery system.

**********

**Shri. T.S. Ruprah, President, M. P. High Court Advocates' Bar Association, while felicitating the New Judges, said :–**

It is after a long wait that the dream of the Bar has been fulfilled. We are reminded of the saying ***"Sahaj pake so meetha hoi".***

We the members of the legal fraternity, experience immense pleasure and nostalgia and are extremely happy on Your Lordships elevation as Judges of this great institution. I deem it to be my proud privilege to offer felicitations to your Lordships and welcome Hon'ble Shri Justice Keshav Kumar Trivedi. Hon'ble Shri Justice Sheel Nagu and Hon'ble Shri Justice Sujoy Paul. My Lords you are the best choice of the Hon'ble Chief Justice and the Bar.

My Lords occupy a very special place in our hearts as great human beings with adorable qualities of gentlemanliness, extreme courtesy towards all, and affable manners. With geniality of temper, humanity, patience, capacity to put in hard work, ability to form sound judgment and willingness to understand the other man's point of view, we have no doubt that you shall

soon evolve into hard working and dutiful illustrious Judges of this Hon'ble High Court. We are confident My Lords bring a wealth of experience, vast knowledge of law, inexhaustible fund of patience, tolerance and compassion in dispensation of justice.

My Lords have a very vast experience at the Bar nd thus aware of the difficulties and problems of the lawyers and litigants. My Lords, judging is no longer easy. It is not what it used to be. Expectations from the judiciary of the public have increased many folds. Judicial responsibility, accountability and independence are in every sense inseparable. They are, and must be, embodied in the institution of the judiciary. In the memorable words of Lord Devlin "the prestige of the judiciary and their reputation for stark impartiality is not at the disposal of any government: it is an asset that belongs to the whole nation."

My Lords, it is imperative for a sound judicial functioning, that a counsel must be allowed to say what according to him, would be in the best interests of his client, in an atmosphere of mutual respect. We are very hopeful that your amiable personalities will help the new lawyers of this Court in developing confidence and fearlessness.

My Lords with your elevation your responsibilities become greater and increase manifold and such responsibilities can only be discharged efficiently and properly with the co-operation of all. Today with firm conviction we assure your Lordships of our fullest co-operation in discharging your functions.

Your Lordships possess an unruffled temper, a benign smile, courteous behavior, and a deep sense of justice. I am sure with these illustrious qualities Your Lordships shall endear to one and all.

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

**********

**Shri. Adarsh Muni Trivedi, Vice Chairman, M.P.State Bar Council, while felicitating the New Judges, said :–**

For me it is a proud privilege to extend a hearty and cordial welcome to My Lord Shri Justice Keshav Kumar Trivedi., My Lord Shri Justice Sheel Nagu and My Lord Shri Justice Sujoy Paul at this auspicious occasion of beginning of your odyssey on the Golden chariot of Justice as a trio representing three supreme Gods of the Nature Brimha, Vishnu and Mahesh. I congratulate Your Lordships on my own behalf and on behalf of Madhya Pradesh State Bar Council. All 80,000 Advocates of the state join me in the felicitations.

Your Lordships are joining today the High Judicial fraternity of robed brethrens, which is like a cool breeze in this hot month of May, like welcome-drops of rains of pre-monsoon. We welcome these pre-monsoon clouds at the threshold of impending winsome rainy-season and elevation of Your Lordships has touched us deep with a pertinently blowing solo of soothing cool breeze through the portals of this High Court. The Almighty have conferred upon you the greatest honour to wipe off tears from every eye and changing the colours of faces by adjudging the fates and fortunes. Your Lordships have been successful lawyers but now you the trio have to play a different role that of master-functionaries of Constitutional powers, with sublime humanism and to assure excellence and freedom from prejudice. Humanity, not legality is Social Justice. Your Lordships now have a vision and a promise to keep.

**Kathopanishad exhorts as follows :-**

"उत्तिष्ठत् जाग्रत प्राप्य वरान्निबोधत ।
क्षुरस्य धारा निश्चिता दुरत्यया
दुर्ग पथस्तत्कदयो वदन्ति ।। [Kathopanishad-I (iii) 14]

[Arise, awake and approaching great souls, receive instructions from them. The wise says that the road is difficult to tread;it is like treading on the sharp edge of a razor.]

**My Lord Shri Justice Keshav Kumar Trivedi :-**

We, at Jabalpur, have had quantity of occasions and privilege to acknowledge your ability as an upright, intelligent and experienced lawyer since last three decades. Your Lordship born on 10th January 1954 and started practise in the High Court from year 1979, being enrolled with State Bar Council of M.P. as an advocate on 11.08.1979. Your grand-father was District and Sessions Judge in British period and retired in year 1936. Your father was a Class-1 Gazetted Officer of State Civil Services. Your maternal

uncles late Justice Shri Sachchidanand Awasthy and late Shri Justice R.P. Awasthy were renowned Judges of Madhya Pradesh High Court and retired respectively in year 1990 and 1995. Your Lordship were part-time Lecturer in University Teaching Department of Jabalpur University in the year 1986-87, and still have skill to teach the others. Your Lordship worked as Deputy and Additional Government Advocate in office of Advocate General from 1988 to 1992. You had been standing Counsel for Election Commission Of India, M.P. Industrial Development Corporation Ltd. and other various Corporations, Municipal Councils in the High Court of M.P. You have commanded a very lucrative practice in Civil, Constitutional, Arbitration and service matters. I personally had occasion to share the advantage of your learning and experience in law. You have always been soft- spoken, cool-headed and well versed in various branches of law. So also being a "Trivedi', you are supposed to be "Master of three Vedas" by birth. Your appearance with snow-white hairs is like a great sage. Your varied experience as a prominent lawyer with legal heritage in your veins would be tested now as an Hon'ble Judge of this Court. I again congratulate you and wish you a very successful and happy tenure as a Judge of this Court.

**My Lord Shri Justice Sheel Nagu :–**

We, at Jabalpur, have privilege to acknowledge Your Lordship's great virtues and excellence as a successful lawyer. Your Lordship born on 1st January 1965, the opening day of new year and started practice in the High Court of Madhya Pradesh at Jabalpur since year 1987, being enrolled with State Bar Council of M.P. on 05.10.1987. For the first time when I met Your Lordship I was very much impressed by your heroic charming personality and I thought you were a Film Star. Then you had come to Bar with your Film Star cousin Vivek Mushran, who was hero of a very successful film 'Saudagar' with leading roles of Manish Koirala, Dilipkumar and Rajkumar. Thank God, you have not joined Film Industry, otherwise we would have been deprived of a very good Judge of future. Your Lordship were Government Advocate in office of Advocate General from September 1995 to February 1998. You had been standing Counsel for Indian Railways, Hindustan Petroleum Corporation Ltd., Bharat Petroleum Corporation Ltd., State Bank of India, a premier educational society Hitkarini Sabha, Bharat Oman Refineries Ltd. etc. You have also appeared on behalf of Associated Cement Companies, R.P.G. Life Sciences Ltd., United Bank of India, Jabalpur Development Authority, Income Tax Department, Employees Provident Fund Organization, Kendriya Vidyalaya Sangthan, Tata Iron & steel Co. Ltd. etc. thus having great experience of Civil, Constitutional, Commercial, Banking,

Company laws as well as service law. You have also participated in Lok-Adalats of M.P. High Court as an Advocate Member and thus contributed for cause of Social Justice. We hope that your varied experience and concern to social Justice would bring you eminence as a Judge of this Court. I again congratulate you.

**My Lord Shri Justice Sujoy Paul :-**

We, at Jabalpur, have privilege to acknowledge Your Lordship's excellence, great revolutionary thoughts and deep concern with the cause of poors and underprivileged sections of the people. Your appearance is like a revolutionary with your charming beard. I bet if Your Lordship have had not joined the practice, must have been a revolutionary working for vital changes in the system. Your Lordship born on 21st June, 1964 and started practice in High court of Madhya Pradesh Jabalpur since 1990, being enrolled with State Bar Council of M.P. vide Enrolment No. 1948/1990. Your Lordship earned reputation as an Advocate having vast knowledge and experience in different disciplines of law. You represented State Bank of India, Bank Note Press Dewas, Jabalpur Development Authority, M.P. State legal Services Authority, M.P. Urja Vikas Nigam and M.P. Human Rights Commission. You also appeared on behalf of Sports Authority of India, National Institute of Teachers Technical Training & Research, M.P. Administrative Service Association. You have also been a member of M.P. State Legal Services Authority. Your presentations before the Benches was always courteous, gracious and dignified. I congratulate you and hope that your commitments to impart Social and Economic Justice would bring you eminence as a Judge of this Court.

The elevation of Your Lordships is always a loss to the Bar you all being capable and intelligent Advocates, but we accept and welcome it with a sense of pride as ultimately it is a gain to our Institution- Robert Callier has said-

"Success is the sum of small efforts repeated day in day out."

I must say on behalf of Bar at this occasion that a Judge in this country like India, should not only be excellent in the field of law but he should also be prone to the ground-realities facing by the common man day to day. Even after 64 years of independence, according to much-talked about report of late Arjun Sen Gupta, the per day income of 80 crores people of India is less than Rs. 20/-. The 'de-rigueur' sense of colonialism and feudalism in the minds of Administrators in Executive still to treat the citizens as 'subjects' as well as mechanism of depriving common men from their fundamental, human and legal rights is stand-still in vogue. "Justice is always tampered with mercy" as said by Shakespeare in 'Merchant of Venice', but the character as Shylock scarely

deserves mercy. As the State actions have lost sensitiveness, the Judicial system have even to burn its fingers to administer Justice to common men.

"कुछ लोग जिनके पास चिरागों के ढेर हैं । वे लोग चाहते हैं बड़ी लंबी रात हो ।
ये लहू उबल उबल के कहीं सूख न जाये । अपनी तरफ से भी तो कोई शुरुआत हो ।।

This macro-challenge demands now radical humanitarian changes in the exotic Pre-Independence Bench- Bar theory and elitist system of Britishers which still exists in Bar. There must be a departure from the 'status-quo'. India's twinkling tryst with destiny inaugurated a new dawn with vibrant values wiping out colonial denial of human rights for the masses. The Justice delivery system ought not to be untouchable and unapproachable. Imperial injustice became obsolete with independence of India long ago and getting substantial Justice has become the birth-right of the least and the lost. In a changing society such as in India, law must be dynamic. The questions before we all are why not to obliterate procedural anfractuosities, why not to broaden the old anglo-saxon idea of 'locus-standai', why not to enable the penurious many to exercise their right of access to the door-steps of Judiciary ? Our constitution in its basic structure stresses Justice Social, Economic and Political as a supreme value. Then why to insist on pachydermic chaos of interpretation which has its roots in British Indian lawyering practices ? An all over transformation is needed. This transformation still has to be translated and reflected in Judicial system, to attain liberty in the words of Rabindranath Tagore :-

"Where the mind is without fear and head is held high."

At this juncture I must- pay respect on behalf of the entire Bar of the State to Your Lordship, the Chief Justice as a magnanimous man for your obeiable prolixity and at times, logomachic pronouncements which are departures from orthodox judgment writing methodologies having a heterodox approach and people- oriented social philosophy free from personal ego. Your Lordship are a titan morally and jurally, open minded and willing to listen, adjust and learn and decide without Victorian vintage legalisms, the Judgments being weighty without being heavy. Your Lordship are a light-house for entire Bar and Bench.

We are proud that as a class our Judiciary maintains a higher standard of ethics and impartiality than their counter-parts in the Executive domain. I again wish and expect that Your Lordships, elevated today will leave an indelible stamp of scholarship, learning, impartiality. Judiciousness, morality and pleasing Court manners on the pages of the platinum history of the Court.

**********

**Shri. O.P. Namdeo, Central Government Standing Counsel, while felicitating the New Judges, said :–**

My Lords it is my great: privilege and pleasure to felicitate and welcome on behalf of Union of India, Assistant Solicitor Ceneral,my colleague Central Govcrnmet Counsels and my own behalf, on your Lordships elevation as Judge of this High Court of repute.

My Lords all judges decide cases to the best of their ability But the nobility of Judge springs from the manner he hears the cases impartially and with an open mind. The best Judge is one who can keep at arms length his own predilections and prejudices and then approach the matter and try the case before him with stern judicial frame of mind and without bias of any kind. To this he is compelled by his oath, upbringing and training. In this sense your Lordships will, we hope, make mark as disinguished Judges of this Court.

You're Lordships rich and varied experiences at the BAR and the depth of insight and breadth possessed by you all have fully qualified you all to grace this high office.Your Lordships have achieved this distinction by shear dint of your merit which has brought you to this high office.

Your Lordships achievements virtues and values have been elaborately mentioned by my previous speakers to which I entirely agree by saying in two words "I agree" and I need not repeat the same. With this I once again welcome and cogratulate your Lordships on your elevation to the Bench and wish you all a very successful and illustrious tenure coupled with good health.

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**Shri Rajendra Tiwari, Senior Advocate, on behalf of Senior Advocates Council, while felicitating the New Judges, said :–**

It is a matter of great happiness to the fraternity of lawyers to participate in this oath-taking ceremony of the three newly inducted Hon'ble Judges who have been chosen from amongst the lawyers practising in the High Court. Each of the newly appointed Judges has a distinguished career as a lawyer, which had actually attracted the attention of the Hon'ble Chief Justice and Members of the Collegium to recommend them for the said assignment. On behalf of the Senior Council and on my own behalf, I felicitate your Appointments to this August High Court.

My Lord Shri Justice K.K. Trivedi is a little over 57 years of age and has very rich experience as an Advocate of this Court. He has to his credit 32 years of legal practice which sufficiently justifies his elevation to this high office.

He comes from a family wherein his grandfather was a District and Sessions Judge in the British India and has retired in 1936. On his maternal side, his two uncles the late Justice S.Awasthi and the late Justice R.P.Awasthi were the judges of this Court who retired in the year 1990 and 1995 respectively. Justice Trivedi had his lesson in law practice in the Chamber of the late Justice S.Awasthi where he was well groomed into a lawyer of immense ability. He has had his association with the office of the Advocate General and with many organizations of repute and importance like the Election Commission of India. He is well-versed in civil matters including service, arbitration and constitutional matters.

My Lord Justice Nagu is considerably young, being 46 years old. This is the right age when he has entered the portals of this great institution - the M.P. High Court as its Judge. He has to his credit nearly a quarter century of practice as a lawyer. He has been associated with many organizations of this Country having represented them in the Court as their Counsel. He has a very amiable nature and an endearing and charming personality.

My Lord Justice Sujoy Paul is about 47 years old and has to his credit about 21 years of practice as an Advocate of this Court. He was a busy lawyer mostly dealing with service matters and has represented many Organisations as their Standing Counsel.

My Lords, all the three Judges who have just taken oath of the office today have had scintillating career as Advocates. Now, they are being transformed from lawyers into sequestered judicial personages who had hithertofore free lance personalities.

It is generally said and Brandeis had observed :

"No Judge really performs his functions adequately unless the case before him is adequately presented".

This indicates profusely the inevitable and absolute coordination between the Bench and the Bar. A Lawyer pleads for the right and the just cause against the threatening injustice and a Judge has to remain engaged in the quest of truth to deliver justice. Thus the twain together perform a duet of divine assignment without fear or favour.

My Lord, a Judge is oath bound to defend the Constitution. Though the Lawyer does not take oath in the same way but his allegiance to the Constitution is the super-most from where he draws inspiration time and again to stand for protection of rights of the people and as guardian of their legal privileges.

My Lord it was observed by Willian Scroggs"as anger does not become

a Judge so neither doth pity, for one is the mark of a foolish woman as the other is of a passionate man". The above observation evidently suggests that a Judge should not allow anger to grip over him for whatever reason and so also the administration of law be not always done only with pity to the party presenting its case. What is required is that a Judge should hear patiently, consider it carefully, ponder over intimately and decide impartially. These are the attributes a Judge is expected to possess of course not in the beginning but must develop these attributes demonstrably in abundance as he gathers experience day by day, month by month and year by year.

The modern trend of justice delivery system, embellished with judicial activism is more aimed at making it available to the common man - particularly the have-nots. They look at the Judges for relief from this thraldom of pain and misery to which they are destined in the present day social milieu. Judges has to redeem their malaise by judicial activism.

My Lords there is no accurate apparatus or fool-proof technology for dispensation of justice 'amongst its consumers that is the litigating parties. It is in this background the Judges have to rise to the occasion every time while deciding a particular case. While engaging themselves in this cause they may make themselves subject to criticism which no Judge should ever mind. Bhartihari has said :

"निन्दन्तु नीति निपुणाः यदि वा स्तुवन्तु"

which means that a Judge should not be bothered about the criticism of the persons well-versed with knowledge and should also not be elated at the praises from the wise people. They must always take them as a part of their duty in a routine manner.

Frank Furter observed : "Judges as persons, or Courts as Institutions, are entitled to no greater immunity from criticism than other persons or Institutions. Just because the holders of judicial office are identified with the interests of justice they may forget their common human frailties and fallibilities. There have sometimes been martinets upon the Bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore, Judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt".

In the present days the occasions are frequent where criticism are galore but may I have the privilege to tell your Lordships, i.e. the newly inducted

Judges, that your Lordships should not be perturbed because of criticism. Criticism should be constructive and should always be taken in that light. If that is done, I am sure that your Lordships who have great potentials in yourselves will certainly elevate the grace of the Chair, you occupy rather than get elevated by the grace of the Chair.

I wish your Lordships all the best for a very successful tenure of office. I pray to the Almighty with an extract from Vedic literature :

सुगास्ते सन्तु पन्थानः

Let your paths be easy to tread upon.

Thank you.

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**Reply to Ovation by Hon'ble Shri Justice K.K. Trivedi.**

I am overwhelmed by the words of praise the wishes and blessings showered on me by all of you. At the same time, I am surprised to know about certain good qualities in me, which I have not recognized earlier. I assure you that if, I have any such good qualities in me, they will be fully utilized to serve this great institution to the best of my abilities.

To me getting appointed to the high post of Judge of this Court is a dream come true. The day I entered this institution, I made a promise to myself that one day I will get myself on the seat which has been adorned by great Judges of this Court. I was fortunate to get the guidance in right manner apart from my senior Shri Sachchidanandji Awasthy Senior members of the Bar, to name few, Shri A.R. Choubey, Shri V.S. Dabir, Shri Rajendra Singh Ji, Shri R.P. Verma, Shri S.C. Datt, Shri Rajendra Tiwari and many others. Equally, I was fortunate enough to get guidance from the great Judges like Mr. Justice G.P. Singh Saheb, Justice Shri G.L. Ojha, Justice Shri J.S. Verma, Justice Shri B.C. Verma, Justice Shri D.M. Dharmadhikari, Justice Shri K.N. Shukla, Justice Shri Faijanuddin, Justice Shri P.C. Pathak and many more. I have the feeling if one is trained in such manner, he or she will be of great use to the system of Judiciary. Today, the need is more because of the raising graph of the expectations of people at large.

Since I have come from a family known for services, I am aware of the difficulties which the persons involved in this system are facing. However, I feel that the same can be overcome if moves are made in rightful manner. I extend my gratitudes to those who have supported me in the days of my struggle. Specially I am thankful to my wife Smt. Sunita Trivedi who was

always there to support me. But for her support and cooperation, I would not have reached this height.

I am conscious about the great responsibility which I have accepted as a challenge. I am confident that I will be able to discharge my duties to the satisfaction, with the cooperation of members of the Bar and guidance of my Senior brother and sister Judges.

Though, I have come for a very short tenure, but I will try my best to fulfill the expectations of the Bar. I extend my gratitude to the collegiums for reposing confidence on me and I shall not let them down.

I once again thank you all for the greeting and wishes.

Thanking you,

JAI HIND.

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**Reply to Ovation, by Hon'ble Shri Justice Sheel Nagu :-**

I am grateful for the words of appreciation spoken about me. At the very outset I bow in reverence to the almighty for bestowing upon me the pious responsibility of rendering Justice.

I am deeply indebted to my parents for inculcating high moral standards and the sense to differentiate between right and wrong.

I owe my existence in legal fraternity to Shri V.K. Tankha under whose able guidance, I began my carrier as a lawyer at Jabalpur.

I extend my gratitude to Shri P.D. Gupta and Shri Chhatar Singh Kaurav for extending their valuable guidance during the formative years of my practice at Civil Courts NRP.

The members of the Bar have been a great source of inspiration. I thank the senior members of the Bar for setting examples to be looked up to and the jr. members for their affection and assistance.

My two years tenure as Govt. Advocate in the office of Advocate General at Jabalpur provided me with great exposure and experience in field of Law, which I am sure will go a long way in assisting me to discharge my duties as a judge. I am thus thankful to all the Advocate Generals under whom I worked.

I am grateful to my in laws for introducing me to the spiritual world and in the process making me a better person.

I take this opportunity to request every member of the Bar to continue sharing with me, their vast reservoir of knowledge and experience.

I assure you that I will try my best to render fair, equitable & speedy justice. Before concluding I extend my heartiest felicitations to Hon'ble Shri K.K.Trivedi & Hon'ble Shri Sujoy Paul for having been appointed as Judges of this Court.

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## Reply to Ovation, by Hon'ble Shri Justice Sujoy Paul

I am extremely thankful for the kind words showered on me. I express my gratitude to my mother, for the values and principles she has instilled in me. She was my mother and teacher at home and in my primary school respectively. I lost my father at the age of only 15 months and my mother took extreme pains in my upbringing. On account of the blessings of elders, I stand here today. This would not have been possible without the cooperation and sacrifice of my family during my struggling days.

I also express my gratitude towards my Senior, Justice R. K. Gupta, a Former Judge of this Court who guided me in the profession in my initial days of practice.

I am also thankful to the members of the Bar both senior and juniors who always gave me affection, cooperation and love during my practice as an Advocate in this Court. I hope that the members of the Bar will continue to extend cooperation to me to enable me to perform the duty of dispensation of justice. I also appreciate the assistance provided to me by my associate Advocates and office staff.

I once again thank you all.

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*NOTES OF CASES SECTION*

***Short Note***

****(92)***

***Before Mr. Justice Sanjay Yadav***

W.P.No. 7970/2011 (Jabalpur) decided on 21 June, 2011

BHARAT SANCHAR NIGAM LTD. ...Petitioner

Vs.

COMMISSIONER, MUNICIPAL CORPORATION & ors....Respondents

*A.* ***Government Company - Ownership of property*** **- Govt. company is a separate legal entity and does not hold property on behalf of government.**

क. सरकारी कम्पनी – सम्पत्ति का स्वामित्व – सरकारी कम्पनी पृथक विधिक अस्तित्व रखती है और सरकार की ओर से सम्पत्ति धारण नहीं करती।

*B.* ***Municipal Corporation Act, M.P. (23 of 1956), Section 305 - Property Vested in Corporation*** **- Conditions precedent for exercise of power - (i) regular line of public street, either as existing or as determined for the future - (ii) beyond the front of immediately adjoining buildings.**

ख. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 305 – निगम में निहित सम्पत्ति – शक्ति का प्रयोग करने हेतु पूर्ववर्ती शर्तें – (1) सार्वजनिक सड़क की नियमित लाईन या तो जैसे कि अस्तित्वमान है या जैसे कि भविष्य के लिए निर्धारित है (2) निकट संलग्न भवनों के सामने तरफ।

*C.* ***Municipal Corporation Act, M.P. (23 of 1956), Section 305 - Colorable Exercise of Power*** **- Power to demarcate regular line of public street vests with Corporation - Vesting is automatic once the requisite conditions are satisfied - Ultimate result may be widening of public street - Exercise of power of determining the regular line of public street cannot be said to be exceeding the powers so conferred - Exercise of power cannot be said to be a colorable exercise of power.**

ग. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 305 – शक्ति का आभासी प्रयोग – सार्वजनिक सड़क की नियमित लाईन का सीमाकंन करने की शक्ति निगम में निहित है – अपेक्षित शर्तों की संतुष्टि होने पर अपने आप निहित होती है – अंतिम परिणाम स्वरुप सार्वजनिक सड़क का चौड़ीकरण हो सकता है – सार्वजनिक सड़क की नियमित लाईन को निर्धारित करने की शक्ति का प्रयोग, प्रदत्त शक्तियों से अधिक होना नहीं माना जा सकता – शक्ति के प्रयोग को शक्ति का आभासी प्रयोग नहीं कहा जा सकता।

**Cases Referred:**

(1995) 5 SCC 251, (1999) 3 SCC 290, AIR 1957 SC 344, AIR 1961 SC 1170, (1973) 411 US 365, 36 Law Ed. 2n 318, (1898) 2 QB 91,99, AIR 1990 SC 1277.

*Ashok Kumar Jain,* for the petitioner.

*R.N. Singh* with *Anshuman Singh,* for the respondents.

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***Short Note***

****(93)***

***Before Mr. Justice A.K. Shrivastava***

S.A. No. 371/2001 (Gwalior) decided on 22 March, 2011

DAULAT SINGH ...Appellant

Vs.

DEVI SINGH (DEAD) & ors. ... Respondents

*A. Evidence Act (1 of 1872), Section 76 - Certified Copy* - **Copies of Khasra merely signed by Patwari and are not certified copies as per the requirement of Section 76 - Khasra signed by Patwari are merely certificate issued by Patwari which can be proved by examining the Patwari.**

क. साक्ष्य अधिनियम (1872 का 1), धारा 76 – प्रमाणित प्रति – खसरे की प्रतियां मात्र पटवारी द्वारा हस्ताक्षरित और धारा 76 की अपेक्षा अनुसार प्रमाणित प्रतियां नहीं हैं – पटवारी द्वारा हस्ताक्षरित खसरा, पटवारी द्वारा जारी किया गया प्रमाण पत्र मात्र है जिसे पटवारी का परीक्षण कर साबित किया जा सकता है।

*B. Adverse Possession* - **Plaintiff claimed that he is in open and hostile possession of land in dispute from the year 1972 but filed Khasra only of the year 1993-94 to 1997-98 - Bald statement of plaintiff and his witnesses cannot be stretched to the extent of strict proof of adverse possession - Defendant has filed certified copies of Khasra of the years 1970-71 to 1998-99 to show that the name of original plaintiff is nowhere mentioned - Plaintiff failed to prove his adverse possession - Appeal allowed.**

ख. प्रतिकूल कब्जा – वादी ने दावा किया कि सन् 1972 से विवादित सम्पत्ति उसके खुले एवं प्रतिकूल कब्जे में है, परन्तु केवल वर्ष 1993–94 से 1997–98 के लिए खसरा प्रस्तुत किया – वादी और उसके साक्षियों के एक से कथन, प्रतिकूल कब्जे का कड़ा सबूत नहीं माना जा सकता – प्रतिवादी ने वर्ष 1970–71 से 1998–99 के खसरों की प्रमाणित प्रतियां प्रस्तुत की हैं यह दर्शाने के लिए कि मूल वादी का नाम कहीं भी उल्लेखित नहीं है – वादी अपना प्रतिकूल कब्जा साबित करने में असफल रहा – अपील मंजूर।

*C. Adverse Possession - Burden of Proof* - **Plaintiff has to prove his case on the basis of his own pleadings and cannot take advantage of weakness of defendant - Person pleading adverse possession has no equities in his favour - It is for him to clearly plead and prove all facts necessary to establish his adverse possession - Further plaintiff has not rebutted the certified copies of Khasra filed by defendant by filing relevant documents - Appeal allowed.**

ग. प्रतिकूल कब्जा – सबूत का भार – वादी को अपने स्वयं के अभिवचनों के आधार पर अपना मामला साबित करना होगा और प्रतिवादी की कमजोरी का लाभ नहीं ले सकता – प्रतिकूल कब्जे का अभिवाक् करने वाले व्यक्ति के पक्ष में कोई साम्य नहीं है – यह उसके लिए है कि वह अपना प्रतिकूल कब्जा स्थापित करने हेतु स्पष्ट अभिवाक् करे और सभी आवश्यक तथ्यों को साबित करे – आगे और, प्रतिवादी द्वारा प्रस्तुत खसरे की प्रमाणित प्रतियों का सुसंगत दस्तावेजों की प्रस्तुती द्वारा वादी ने खंडन नहीं किया है – अपील मंजूर।

**Cases referred:**

AIR 1959 SC 960, AIR 1954 SC 526, AIR 1946 PC 59, AIR 2009 SC 103, 2008(II) MPJR (SC) 300, 2010 (1) MPJR 32.

*Sanjay Kumar Mishra & Ashok Kaushik* for the appellant.
*R.D. Agrawal,* for the respondent No.1.
*P.N.Gupta,* G.A. for the respondent No.2.

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***Short Note***

****(94)***

***Before Mr. Justice R.C.Mishra***

Cr.A. No. 86//2008 (Jabalpur) decided on 15 April, 2011

MADAN & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

*A. Evidence Act (1 of 1872), Section 3 - Witnesses - Related* - **Merely because witnesses are related is not sufficient to discredit their evidence - Further more, their relationship with deceased was not a factor to affect their credibility as they were more interested in bringing the real assailants to book.**

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्षी – संबंधित – मात्र इसलिए कि साक्षीगण संबंधित हैं, उनकी साक्ष्य पर अविश्वास करने के लिए पर्याप्त नहीं है – और आगे, मृतक के साथ उनका संबंध उनकी विश्वसनीयता को प्रभावित करने का कारक नहीं था क्योंकि वे वास्तविक हमलावरों को दंड दिलवाने में अधिक हितबद्ध थे।

*B.* ***Penal Code (45 of 1860), Section 304 Part I*** **- Culpable Homicide not amounting to murder - Circumstantial Evidence - False plea of alibi - Appellants failed to prove their plea of alibi - Presumption could be raised that they were present at the place of occurrence.**

ख. दण्ड संहिता (1860 का 45), धारा 304 भाग *I*– हत्या की कोटि में ना आने वाला आपराधिक मानववध – परिस्थितिजन्य साक्ष्य – अन्यत्र उपस्थित होने का मिथ्या अभिवाक – अपीलार्थीगण उनके अन्यत्र उपस्थित होने के अभिवाक् को साबित करने में असफल रहे – यह उपधारणा उठाई जा सकती है कि वे घटनास्थल पर मौजूद थे।

*C.* ***Penal Code (45 of 1860), Section 304 Part I*** **- Culpable Homicide not amounting to murder - Sentence - Considering the social impact of crime, nature and situs of injuries sentence is reduced to 7 years from 11 years.**

ग. दण्ड संहिता (1860 का 45), धारा 304 भाग *I* – हत्या की कोटि में ना आने वाला आपराधिक मानववध – दण्डादेश – अपराध का सामाजिक प्रभाव, क्षतियों के स्वरुप एवं अवस्थान को विचार में लेते हुए दण्ड 11 वर्ष से कम करके 7 वर्ष किया गया।

**Cases referred:**

(1990) 3 SCC 190, AIR 1934 Cal 719, (1974) 4 SCC 300, (1987) 1 SCC 679, (2003) 10 SCC 700, (2006) 11 SCC 239, (2003) 6 SCC 380, AIR 1978 SC 1399.

*Madan Singh,* for the appellants No. 1, 2 & 4.
*Anil Khare*, for the appellant No. 3.
*Umesh Pandey,* G.A. for the respondent/State.

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***Short Note (DB)***

****(95)***

***Before Mr. Justice S.K. Gangele & Mr. Justice Brij Kishore Dube***

W.P. No. 1759/2008(PIL) (Gwalior) decided on 20 May, 2011

MAHESH BHARADWAJ ...Petitioner

Vs.

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

*A.* ***Constitution, Article 226 - Public Interest Litigation*** **- Petition filed by the petitioner against the notification issued u/s 48(1) of the Land Acquisition Act, 1894, releasing the land from acquisition with malafide intention and on wrong assumption of the fact - Petitioner**

**is a public spirited person and a conspiracy created by the land owner's with the connivance of the authorties in order to grab the Government land - The petition is to be treated as Public Interest Litigation and it is a genuine Public Interest Litigation.**

क. संविधान, अनुच्छेद 226 – लोक हित वाद – असद्भावपूर्ण उद्देश्य और तथ्यों की गलत धारणा के साथ भूमि को अर्जन से मुक्त करने की भूमि अर्जन अधिनियम 1894 की धारा 48(1) के अंतर्गत जारी की गई अधिसूचना के विरुद्ध याची द्वारा यह याचिका प्रस्तुत की गई – याची एक लोक भावना रखने वाला व्यक्ति है और सरकारी भूमि छीनने के लिए भूमिस्वामियों द्वारा प्राधिकारियों की मौनानुमति के साथ षडयंत्र रचा गया – याचिका को जन हित वाद के तौर पर मानना होगा और यह वास्तविक लोक हित वाद है।

*B. Land Acquisition Act (1 of 1894), Section 48(1)*- **Power under the aforesaid provision can be exercised by the State only, if the possession of the land has not been taken over.**

In the present case, from the record it is clear that possession of the land in question had been taken over - Apart from this, the award passed by the Competent Authority has become final because the revisions and writ petitions filed against the said award were dismissed - In this view of the matter, in our opinion, the impugned notification issued by the Revenue Department is malafide, arbitrary and without any power and authority and against the provisions of Section 48(1) of the Act of 1894.

ख. भूमि अर्जन अधिनियम (1894 का 1), धारा 48(1) – उपरोक्त उपबंधों के अंतर्गत शक्ति का प्रयोग केवल राज्य द्वारा किया जा सकता है, यदि भूमि का कब्जा नहीं लिया गया है।

*C. Constitution, Article 226* -**Public Interest Litigation - Costs- Petitioner espoused a good cause - The State is directed to pay a cost of Rs. 20,000/- to the petitioner.**

ग. संविधान, अनुच्छेद 226 – लोक हित वाद – व्यय – याची ने उचित मामले का समर्थन किया है –याची को 20,000/–रुपये का व्यय अदा करने के लिए राज्य को निर्देशित किया गया।

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

**Cases referred :**

(2004) 13 SCC 660, (2005) 1 SCC 590, (2007) 10 SCC 614, (2010) 3 SCC 402, (2010) 4 SCC 192.

*S.K. Sharma,* for the petitioner.
*M.P.S. Raghuvanshi,* Addl. A.G. for the respondents No. 1 to 5.
*H.K. Shukla*, for the intervenor, Shantilal.
*Yogesh Chaturvedi*, for the intervenors *Kaptan Singh & Vijay Pal Singh.*
*N.K. Jain* with *A.K. Jain,* for intervenors *Prem Narayan & others.*

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***Short Note***

****(96)***

***Before Mr. Justice K.K. Trivedi***

W.P. No. 10908/2010(S) (Jabalpur) decided on 8 July, 2011

MUKESH RANA (SUBEDAR MAJOR) ...Petitioner
Vs.
UNION OF INDIA & ors. ...Respondents

***Service Law - Constitution, Article 226 - Transfer order - Judicially*** review **- Any order of transfer is to be examined only on three counts, namely the competence of the authority issuing order of transfer, the malafide of authority in actuating the order of transfer and the violation of the statutory rules while issuing the order of transfer.**

The petitioner has utterly failed to show any malafide of the authority in issuing order of transfer - He has not pointed out any statutory rules on the basis of which it could be said that the order of transfer is bad in law- The competence of the authority issuing the order of transfer has not been challenged - Thus, in considered opinion of this Court, none of the condition is available to interfere in an order of transfer issued by the competent authority with intention to maintain discipline within the armed forces.

सेवा विधि – संविधान, अनुच्छेद 226 – स्थानातंरण आदेश – न्यायिक पुनर्विलोकन – स्थानातंरण के किसी आदेश का परीक्षण केवल तीन बिन्दुओं पर करना होता है, अर्थात, स्थानातंरण आदेश जारी करने वाले प्राधिकारी की सक्षमता, स्थानातंरण आदेश पारित करने में प्राधिकारी की असद्भावना और स्थानांतरण आदेश जारी करते समय कानूनी नियमों का उल्लंघन।

**Cases referred :**

(2010) 1 SCC (L & S) 503, 1992 SCC (L & S) 127.

*Surendra Verma*, for the petitioner.
*K.K. Singh*, for the respondents.

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## *NOTES OF CASES SECTION*

### *Short Note*

**(97)*

***Before Mr. Justice U.C. Maheshwari***

M.A.No. 761/2008 (Gwalior) decided on 6 May, 2011

MUKESH ...Appellant

Vs.

SMT. PRITI & ors. ...Respondents

*A. Motor Vehicles Act (59 of 1988), Section 163-A- Compensation-* **Appellant did not examine any doctor to prove the medical documents - However, such documents and other aspects of the claim petition were proved by the appellant himself in his deposition - Tribunal did not commit any mistake in holding that appellant had suffered permanent disability.**

क. मोटर यान अधिनियम (1988 का 59), धारा 163–ए– प्रतिकर – चिकित्सीय दस्तावेजों को साबित करने हेतु अपीलार्थी ने किसी चिकित्सक का परीक्षण नहीं कराया – किन्तु ऐसे दस्तावेज और दावा याचिका के अन्य पहलुओं को स्वयं अपीलार्थी ने अपने कथन में साबित किया – अधिकरण ने यह धारणा करने में कोई त्रुटि नहीं की कि अपीलार्थी स्थायी निःशक्तता से ग्रसित हुआ।

*B. Evidence Act (1 of 1872), Section 146 - Cross Examination* **- Cross examination of witnesses of other side is a material implements in the hand of adverse party - He can place his case by putting the suggestions or the questions in such cross examination of witnesses - If the case is not suggested in such a manner in the cross examination of the witness, then at later stage on appreciation, the party who left such lacuna could not be permitted to challenge the unrebutted and uncrossed in chief of such witness.**

ख. साक्ष्य अधिनियम (1872 का 1), धारा 146 – प्रतिपरीक्षण– अन्य पक्ष के साक्षियों का प्रतिपरीक्षण, प्रतिपक्षी के हाथों में तात्विक साधन है – साक्षियों के ऐसे प्रतिपरीक्षण में सुझाव एवं प्रश्न पूछकर वह अपना मामला प्रस्तुत कर सकता है – यदि साक्षियों के प्रति परीक्षण में इस प्रकार से सुझाव नहीं दिये गये तब बाद के प्रक्रम पर मूल्यांकन करने पर, पक्षकार जिसने ऐसी कमी छोड़ी है उसे ऐसे साक्षी के मुख्य परीक्षण में अखंडित और अप्रतिपरीक्षित को चुनौती देने की अनुज्ञा नहीं दी जा सकती।

*C. Motor Vehicles Act (59 of 1988). Section 163-A - Compensation* **- Appellant suffered 30% disability - Income is assessed at Rs. 15,000/- as he was non-earning member - After adding 50% of**

**such existing deemed notional income, his annual income comes to Rs. 22,500/- - 30% comes to Rs. 6,750/- p.a. - Applying the multiplier of 15 it comes to Rs. 1,01,250/- apart from Rs. 52,522/- towards medical treatment as awarded by Tribunal - Appeal allowed.**

ग. मोटर यान अधिनियम (1988 का 59), धारा 163–ए– प्रतिकर – अपीलार्थी 30 प्रतिशत निःशक्तता से ग्रसित हुआ – चूंकि वह कमाने वाला सदस्य नहीं था, अतः उसकी आय रुपये 15000/–निर्धारित की गई – ऐसी विद्यमान समझी गई काल्पनिक आय में 50 प्रतिशत जोड़े जाने के पश्चात उसकी वार्षिक आय रुपये 22,500/– बनती है – 30 प्रतिशत से 6,750/– वार्षिक होती है – 15 का गुणक लागू करने पर वह रुपये 1,01,250/– होती है, अधिकरण द्वारा चिकित्सीय उपचार के रुप में अवार्ड किये गये रुपये 52,522/– के अतिरिक्त – अपील मंजूर।

**Case referred:**

AIR 1961 Cal 359.

*Sameer Shrivastava*, for the appellant.
*Shrinewasgajendragadkar*, for the respondents.

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***Short Note (DB)***

****(98)***

***Before Mr. Justice R.C. Mishra & Mrs. Justice Vimla Jain***

Cr.A. No. 1276/2010 (Jabalpur) decided on 22 February, 2011

MURLIDHAR AGARWAL ...Appellant

Vs.

STATE OF M.P. ...Respondent

*A. Vinirdishta Bhrashta Acharan Nivaran Adhiniyam, M.P. (36 of 1982), Section 6 - Sanction* - **Appellants tried for offences punishable under different provisions of Penal Law and Prevention of Corruption Act but convicted under Section 6 of Adhiniyam, 1982 - Sanction was granted by competent authority under Section 197 of the Code and Section 19 of P.C. Act - No sanction under Section 6 of Adhiniyam, 1982 was sought and granted - Held - State Govt. really intended to launch prosecution for the offence of preparation of false and fictitious muster rolls, absence of specific direction for investigation or mention of offence under Section 6 of Adhiniyam, 1982 would not assume any significance, provided that the other mandatory pre-conditions for taking cognizance of the offence are satisfied.**

क. विनिर्दिष्ट भ्रष्ट आचरण निवारण अधिनियम, म.प्र. (1982 का 36), धारा

6 – मंजूरी – दण्ड विधि और भ्रष्टाचार निवारण अधिनियम के विभिन्न प्रावधानों के अंतर्गत दण्डनीय अपराधों के लिए अपीलार्थीगण का विचारण किया गया परन्तु अधिनियम, 1982 की धारा 6 के अंतर्गत दोषसिद्ध किया गया – सक्षम प्राधिकारी द्वारा संहिता की धारा 197 एवं भ्र.नि. अधिनियम की धारा 19 के अंतर्गत मंजूरी प्रदान की गई – अधिनियम 1982 की धारा 6 के अंतर्गत कोई मंजूरी नहीं चाही गई और न प्रदान की गई – अभिनिर्धारित – राज्य सरकार का वास्तविक आशय मिथ्या एवं बनावटी मस्टर रोल बनाये जाने के अपराध के लिए अभियोजन शुरु करने का था, अन्वेषण के लिए विनिर्दिष्ट निदेश का अभाव या अधिनियम 1982 की धारा 6 के अंतर्गत अपराध उल्लेखित करना कोई महत्व नहीं रखता परन्तु यह तब जबकि अपराध का संज्ञान लेने के लिए अन्य आज्ञापक पूर्व शर्तों की संतुष्टि की गई हो।

***B.*** ***Criminal Procedure Code, 1973 (2 of 1974), Section 173 - Charge Sheet* - Defect or illegality in investigation, however serious, has no direct bearing on the jurisdiction of the Court to take cognizance.**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 173 – आरोप पत्र – अन्वेषण में चाहे कितनी भी गंभीर त्रुटि या अवैधता हो, संज्ञान लेने की न्यायालय की आधिकारिता को प्रत्यक्ष रुप से प्रभावित नहीं करती।

***C.*** ***Vinirdishta Bhrashta Acharan Nivaran Adhiniyam, M.P. (36 of 1982), Sections 41,42 & 43 - Committal of case* - Charge sheet was filed in the Sessions Court for offences punishable under Section 13(1)(d) of P.C. Act and under Sections 409,420,468,471,477-A,120-B of I.P.C. - Appellants acquitted for the said offences but convicted under Section 6 of Adhiniyam, 1982 - As the case was not committed to the Court of Special Judge, therefore, he had no jurisdiction to take cognizance of offence under the Adhiniyam, 1982 - Convictions are not sustainable and set aside.**

ग. विनिर्दिष्ट भ्रष्ट आचरण निवारण अधिनियम, म.प्र. (1982 का 36), धाराएँ 41, 42, व 43– मामले की सुपुर्दगी – पी.सी अधिनियम की धारा 13(1)(डी) और आई.पी.सी. की धाराएँ 409,420,468,471,477–ए,120–बी, के अंतर्गत दण्डनीय अपराधों के लिए सेशन न्यायालय में आरोप पत्र प्रस्तुत किया गया – अपीलार्थी उपरोक्त आरोपों से दोषमुक्त किये गये परन्तु अधिनियम, 1982 की धारा 6 के अंतर्गत दोषसिद्ध किया गया – चूंकि मामले को विशेष न्यायाधीश के न्यायालय को सुपुर्द नहीं किया गया इसलिए उसे अधिनियम 1982 के अंतर्गत अपराध का संज्ञान लेने की आधिकारिता नहीं है – दोषसिद्धियां कायम रखने योग्य नहीं और अपास्त की गई।

***D.*** ***Criminal Procedure Code, 1973 (2 of 1974), Section 293* - Reports of certain Government scientific experts - Report authored**

**by another person and only forwarded by Director of Finger Print Bureau - Report could not be used in evidence as there was nothing on record to show that notice was given to the appellants under Section 294 to admit document or they had admitted the correctness of the report.**

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 293 – कतिपय सरकारी वैज्ञानिक विशेषज्ञ की रिपोर्ट – रिपोर्ट अन्य व्यक्ति द्वारा लिखी गई और अंगुली छाप ब्यूरो के निदेशक द्वारा केवल अग्रेषित की गई – साक्ष्य में रिपोर्ट का उपयोग नहीं किया जा सकता क्योंकि अभिलेख पर यह दर्शाने के लिए कुछ नहीं है कि दस्तावेज को स्वीकार करने के लिए अपीलार्थीगण को धारा 294 के अंतर्गत नोटिस दिया गया या उन्होंने रिपोर्ट की सत्यता को स्वीकार किया।

The judgment of the Court was delivered by : **R.C. Mishra, J.**

**Cases referred:**

1996 MPLJ 283, 1996(2) MPJR 324, 2001(2) MPLJ 702, Cr.R. 8/98 decided at Indore on 22-9-88, 1984 MPLJ 234, AIR 2007 SC 2618, AIR 2004 SC 730, AIR 1955 SC 196, (1875) 1 Ch D 426, AIR 1936 PC 253, AIR 1975 SC 915, (1984) 2 SCC 500, AIR 2004 SC 536.

*R.K. Nanhorya & Kunal Dubey* for the appellant.
*Umesh Pandey,* G.A. for the respondent/State.

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***Short Note***
****(99)***
***Before Mr. Justice U.C. Maheshwari***
M.A.No. 2512/2006 (Jabalpur) decided on 28 April, 2011

NATIONAL INSURANCE COMPANY LTD. ...Appellant
Vs.
SUNITA & ors. ...Respondents

***Motor Vehicles Act (59 of 1988), Section 163-A - Maintainability*** **- Owner of the vehicle was driving the vehicle when it collided against wall of a canal - Driver/owner of the vehicle died in the accident - Legal representatives of Driver/owner did not have any authority to file claim petition - However, claim petition returned to claimants to file the claim before appropriate forum.**

मोटर यान अधिनियम (1988 का 59), धारा 163–ए – पोषणीयता – वाहन का

स्वामी वाहन चला रहा था जब वह नहर की दीवार से टकराया – वाहन चालक/वाहन के स्वामी की दुर्घटना में मृत्यु हो गई – वाहन चालक/वाहन के स्वामी के विधिक प्रतिनिधियों को दावा याचिका प्रस्तुत करने का कोई प्राधिकार नहीं है – अपितु समुचित न्यायालय के समक्ष दावा प्रस्तुत करने के लिए दावा याचिका दावाकर्ताओं को वापिस की गई।

**Cases referred :**

(2008) 5 SCC 736, (2009) 13 SCC 710, (2004) 8 SCC 553, 2007(2) MPHT 52 (CG).

*Rakesh Jain*, for the appellant.
*Akshay Sapre*, for the respondents.

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***Short Note***
****(100)***
***Before Mr. Justice G.D. Saxena***
Cr.A. No. 601/2006 (Gwalior) decided on 21 June, 2011

PUSHPENDRA ...Appellant
Vs.
STATE OF M.P. ...Respondent

***A. Evidence Act (1 of 1872), Section 3 - Independent & Interested witnesses*** **- A witness is normally to be considered 'independent' unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused to wish to implicate him falsely -The term 'interested witness' postulates that the person concerned must have some direct interest in seeing that the accused person is somehow or the other convicted either because he had some animus with the accused or for some other reason.**

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – स्वतंत्र व हितबद्ध साक्षी – साक्षी को सामान्यतः 'स्वतंत्र' माना जाएगा जब तक कि वह ऐसे स्त्रोतों से नहीं आता है जिनके दोषमुक्त होने की संभावना है और प्रायः इसका अर्थ है कि जब तक कि साक्षी के पास कारण नहीं है जैसे कि अभियुक्त के विरुद्ध वैमनस्यता जिससे कि वह उसे मिथ्या आलिप्त करना चाहेगा – शब्द 'हितबद्ध साक्षी' परिकल्पित करता है कि संबंद्ध व्यक्ति का यह देखने मे कोई प्रत्यक्ष हित होना चाहिए कि किसी भी प्रकार अभियुक्त दोषसिद्ध हो जाए या तो इसलिए कि उसकी अभियुक्त के साथ कोई वैमनस्यता थी या किसी अन्य कारण से।

***B. Evidence Act (1 of 1872), Sections 3 & 27 - Testimony of***

***Police Officer*** **- Appreciation of - Where the Court is satisfied that the evidence of the police can be independently relied upon, then there is no prohibition in law that the same cannot be accepted without independent corroboration -Court is expected to seek corroboration in such cases as a matter of caution and not as a matter of rule.**

ख. साक्ष्य अधिनियम (1872 का 1), धाराएँ 3 व 27 – पुलिस अधिकारी की परिसाक्ष्य – का अधिमूल्यन – जहां न्यायालय संतुष्ट है कि पुलिस की साक्ष्य पर स्वतंत्र रुप से विश्वास किया जा सकता है तब विधि में कोई प्रतिबंध नहीं कि उसे बिना स्वतंत्र संपुष्टिकरण के स्वीकार नहीं किया जा सकता – न्यायालय से अपेक्षित है कि वह ऐसे मामलों में सतर्कता के रुप में संपुष्टि चाहे और न कि नियम के रुप में।

***C Evidence Act (1 of 1872), Section 114 Illustration (a) - Presumption under*** **- Recovery of articles belonging to the complainant from the possession of appellant-accused immediately after the commission of offence - Possession remained unexplained by the appellant - Prima facie attracts the presumption - It needs no discussion *to conclude that the robbery of the articles were found to be part of the same transaction.***

ग. साक्ष्य अधिनियम (1872 का 1), धारा 114 दृष्टांत (ए) – के अंतर्गत उपधारणा – अपराध कारित होने के तुरन्त पश्चात अपीलार्थी–अभियुक्त के कब्जे से शिकायतकर्ता की वस्तुओं की बरामदगी – कब्जे का अपीलार्थी द्वारा कोई स्पष्टीकरण नहीं – प्रथम दृष्ट्या उपधारणा को आकर्षित करता है –इस निष्कर्ष के लिए चर्चा की कोई आवश्यकता नहीं कि लूट की वस्तुएं उसी गतिविधि का हिस्सा पायी गयी।

***D. Penal Code (45 of 1860), Sections 392, 397 & 412, Dakaiti Aur Vyapharan Prabhavit Ksheshtra Adhiniyam, M.P. (36 of 1981), Section 11/13*** **-- Disclosure statement of accused and huge recoveries from him at his instance on that very day - Itself is a sufficient circumstance to show that the accused-appellant has committed the offence of robbery.**

**Recent and unexplained possession of stolen properties will be taken to be presumptive evidence of the alleged offence against the appellant - The irresistible conclusion would, therefore, be that the appellant and no one else had committed that offence.**

घ. दण्ड संहिता (1860 का 45), धाराएँ 392, 397 व 412, डकैती और व्यपहरण प्रभावित क्षेत्र अधिनियम, म.प्र. (1981 का 36), धारा 11/13 – अभियुक्त का प्रकटीकरण कथन और उसी दिनांक को उसकी निशानदेही पर विशाल बरामदगी

– अपने आप में पर्याप्त परिस्थिति है यह दर्शाने के लिए कि अभियुक्त – अपीलार्थी ने लूट का अपराध कारित किया है।

**Case referred :**

AIR 1977 SC 472.

*Sunil Soni*, for the appellant.

*R.K. Shrivastava*, PL for the respondent.

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***Short Note***

****(101)***

***Before Mr. Justice Rakesh Saksena***

Cr. A. No. 626/2002 (Gwalior) decided on 11 May, 2011

RAJU @ RAJESH AVLANI & anr. ...Appellants

Vs.

STATE OF M.P. ...Respondent

*A. Penal Code (45 of 1860), Section 304B - Dowry Death* - **Soon before death - Appellants were demanding dowry after marriage - Demand of Rs. 50,000 was made in August 1999 when appellant No. 2 left the deceased in her parent's house - Deceased was brought back by appellant No.2 and his father after five months after extending assurance that they would not make any demand - Deceased died on 6-5-2000 - No evidence to indicate that after patch up of dispute, appellants subjected deceased to cruelty for or in connection with demand of dowry - As prosecution has failed to prove that deceased was subjected to cruelty soon before her death, no presumption under Section 113B of Evidence Act can be drawn - Appellants acquitted under Section 304B of I.P.C.**

क. दण्ड संहिता (1860 का 45), धारा 304बी – दहेज मृत्यु – मृत्यु के तुरंत पहले – विवाह के पश्चात अपीलार्थी दहेज की मांग कर रहे थे – अगस्त 1999 में 50,000/– रुपये की मांग की गई जब अपीलार्थी क्रं. 2 ने मृतिका को उसके माता–पिता के घर छोड़ा – पांच महिनों पश्चात अपीलार्थी क्रं. 2 और उसके पिता द्वारा यह आश्वासन देने के बाद कि वह कोई मांग नहीं करेंगे मृतिका को वापिस ले आये– 06.05.2000 को मृतिका की मृत्यु हुई – यह दर्शाने के लिए कोई साक्ष्य नहीं कि विवाद के सुलझ जाने के पश्चात अपीलार्थीगण ने दहेज की मांग के लिए या उसके संबंध में मृतिका के साथ क्रूरता का व्यवहार किया – चूंकि अभियोजन यह साबित करने में असफल रहा कि उसकी मृत्यु के तुरंत पूर्व मृतिका के साथ क्रूरता का व्यवहार किया गया, साक्ष्य अधिनियम की धारा 113बी के अंतर्गत कोई उपधारणा नहीं की जा सकती – अपीलार्थीगण आई.पी.सी. की धारा 304बी के अंतर्गत दोषमुक्त।

***B. Penal Code (45 of 1860), Section 498A - Cruelty* - Even if accused cannot be convicted under Section 304B of I.P.C. but this would not rescue them from offences under Section 498A of I.P.C.**

ख. दण्ड संहिता (1860 का 45), धारा 498ए – क्रूरता – यद्यपि अभियुक्त आई.पी.सी. की धारा 304बी के अंतर्गत दोषसिद्ध नहीं किये जा सकते अपितु यह उन्हें आई.पी.सी. की धारा 498ए के अंतर्गत अपराधों से नहीं बचा सकता।

***C. Penal Code (45 of 1860), Section 498A - Sentence* - Appellant No. 3, a lady aged about 61 years and also a heart patient - She had already remained in jail for 6-7 days - Her sentence is reduced to period already undergone with fine of Rs. 10,000 - However, sentence of appellant No.2 of two years maintained.**

ग. दण्ड संहिता (1860 का 45), धारा 498ए – दंडादेश – अपीलार्थी क्रं. 3 लगभग 61 वर्षीय महिला है और दिल की मरीज है – वह पहले ही 6–7 दिनों के लिए जेल में रही है – रुपये 10,000/– के अर्थदण्ड के साथ भुगतायी जा चुकी अवधि के लिए उसका दण्ड कम कर दिया गया – परन्तु अपीलार्थी क्रं. 2 का 2 वर्ष का दण्ड बनाए रखा गया।

*Sanjay Gupta,* for the appellants.
*J.M. Sahni,* P.L. for the respondent.
*Lokesh Achhra,* for the complainant.

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***Short Note (DB)***
****(102)***
***Before Mr. Justice S.K. Gangele & Mr. Justice Brij Kishore Dube***
W.A. No.186/2011 (Gwalior) decided on 6 April, 2011

SANJAY ...Appellant
Vs.
SHRI LAL & ors. ...Respondents

***Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995 - Rule 3* - Election petition not presented before Specified Officer by respondent himself and the counsel was also not authorized by respondent to submit the election petition - No signature of respondent on the copy of the election petition, which was served on the appellant - Held - There is non compliance of the mandatory provision of Rule 3 of the rules of 1995 - Election petition liable to be rejected.**

The provision of Rule 3(2) of the Rules of 1995 is similar to Section 81(3) of the Representation of the People Act 1951 - The Constitution Bench of the Hon'ble Supreme Court has clearly held that the copy of the election petition has to be attested by the petitioner under his own signatures and this is a mandatory compliance.

पंचायत (निर्वाचन अर्जियाँ, भ्रष्टाचार और सदस्यता के लिए निरहर्ता) नियम, म.प्र. 1995 – नियम 3 – विनिर्दिष्ट अधिकारी के समक्ष स्वयं प्रत्यर्थी द्वारा निर्वाचन अर्जी प्रस्तुत नहीं की गई और अधिवक्ता भी निर्वाचन अर्जी प्रस्तुत करने हेतु प्रत्यर्थी द्वारा प्राधिकृत नहीं किया गया था – निर्वाचन अर्जी पर प्रत्यर्थी के कोई हस्ताक्षर नहीं जिसे अपीलार्थी पर तामील किया गया था – अभिनिर्धारित – नियम 1995 के नियम 3 के बाध्यकारी उपबंध का अनुपालन नहीं किया गया – निर्वाचन अर्जी अस्वीकार किये जाने योग्य।

The judgment of the Court was delivered by : **S.K. GANGELE, J.**

**Cases referred :**

1999 (I) MPLJ 88, 2002 (3) MPLJ 591, 2004(2) JLJ 263, 2008 (4) MPHT 410, (2009) 8 SCC 736, ILR (2010) MP 129, (2005) 12 SCC 187, AIR 2008 SC 1577, (2011) 2 SCC 654, (2005) 2 SCC 188, 2008 (III) MPWN 92, 1999 (I) MPLJ 291, AIR 1964 SC 1027.

*R.B.S. Tomar,* for the appellant.
*N.S. Kirar,* for the respondents No. 1 to 5.
*Vivek Khedkar,* G.A. for the respondents No. 6 & 7.

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***Short Note***
****(103)***
***Before Mr. Justice G.D. Saxena***
Cr. Rev. No. 868/2010 (Gwalior) decided on 13 May, 2011

SANTOSH JAIN (SMT.) & ors. ...Applicant
Vs.
SALIM KHAN & ors. ...Non-applicants

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 146(1) - Relief of possession* - Where attachment has been made under Section 146(1), it is not necessary for unsuccessful party to seek relief of possession from Court - Mere adjudication of rights would suffice in as much as attached property is held custodia legis.**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 146 (1) – कब्जे का

अनुतोष – जब धारा 146(1) के अंतर्गत कुर्की की गई है तब असफल पक्षकार के लिए आवश्यक नहीं कि न्यायालय से कब्जे का अनुतोष चाहे – मात्र अधिकारों का न्यायनिर्णयन पर्याप्त होगा क्योंकि, कुर्क समपत्ति विधि अभिरक्षा में धारित है।

***B. Criminal Procedure Code, 1973 (2 of 1974), Sections 146(1), 397 - Nature of order* - Order of attachment is not interlocutory in nature - Revision is maintainable.**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 146(1), 397 – आदेश की प्रकृति – कुर्की का आदेश अंतवर्ती प्रकृति का नहीं है – पुनरीक्षण पोषणीय है।

***C. Criminal Procedure Code, 1973 (2 of 1974), Sections 145, 146(1) - Order of attachment* - Order of attachment passed on the ground of emergency without drawing order under Section 145(1) not sustainable - Magistrate is required to apply his mind separately with regard to existence of emergency and should pass an order with great circumspection under Section 146(1) of Cr.P.C. - Order of attachment passed without passing a preliminary order bad.**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 145, 146(1) –कुर्की का आदेश – धारा 145(1) के आधीन आदेश किये बिना आपात् के आधार पर पारित किया गया कुर्की का आदेश कायम रखने योग्य नहीं है – आपात् के अस्तित्वमान होने के संबंध में मजिस्ट्रेट को मस्तिष्क का प्रयोग करना अपेक्षित है और द.प्र.सं. की धारा 146(1) के अंतर्गत बड़ी सावधानी के साथ आदेश करना चाहिए – प्रारंभिक आदेश पारित किये बिना कुर्की का आदेश दोषपूर्ण।

**Cases referred :**

AIR 2004 SC 115, AIR 1959 SC 960, 1990 CRI.L.J. 1541, (1988) 4 SCC 452, 2006 MPLJ 342.

*Prashant Sharma*, for the applicant.
*S.K. Sharma*, for the non-applicants.

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***Short Note (DB)***
****(104)***

***Before Mr. Justice S.K. Gangele & Mr. Justice Brij Kishore Dube***
W.P. No.1891/2011 (Gwalior) decided on 24 March, 2011

SURYA ROSHNI LTD. ...Petitioner
Vs.
EMPLOYEES' PROVIDENT FUND & anr. ...Respondents

***Employees' Provident Funds and Miscellaneous Provisions Act, (19 of 1952), Sections 2 & 6 - Basic wages* - Transport/conveyance**

**allowance, attendent incentive and special allowance, being paid to all employees are liable to be included under the 'basic wages' - However, the lunch/canteen allowance, being paid to Operators and those employees who are required to remain on machines during lunch period could not be included in 'basic wages' - The Company is not liable to deduct provident fund for this amount.**

कर्मचारी भविष्य–निधि और प्रकीर्ण उपबंध अधिनियम(1952 का 19), धाराएँ 2 व 6 – मूल वेतन – परिवहन/प्रवहण भत्ता, परिचर अतिरिक्त भत्ता और विशेष भत्ता सभी कर्मचारियों को दिये जाने से 'मूल वेतन' के अंतर्गत सम्मिलित किये जाने योग्य है – किन्तु आपरेटरों और उन कर्मचारियों को जिन्हे भोजन अवकाश में मशीनों पर उपस्थित रहना अपेक्षित है, को दिया जाने वाला भोजन/जलपानगृह भत्ता 'मूल वेतन' में सम्मिलित नहीं किया जा सकता इस रकम से भविष्य निधि की कटौती करने हेतु कम्पनी दायी नहीं।

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

**Cases referred :**

(2008) 5 SCC 428, AIR 1963 SC 1474, AIR 1963 SC 1480, (2001) 7 SCC 204.

*Prashant Sharma*, for the petitioner.

*S.L. Gupta* and *R. K. Goyal*, for the respondents.

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***Short Note (DB)***

****(105)***

***Before Mr. Justice R.C.Mishra & Mrs. Justice Vimla Jain***

M.Cr.C. No. 5913/2010 (Jabalpur) decided on 29 April, 2011

U.K. SAMAL ...Applicant

Vs.

STATE OF M.P. ...Non-applicant

*A. Criminal Procedure Code, 1973 (2 of 1974), Section 197* - **Petitioner at the time of commission of the alleged offence of criminal conspiracy, was employed in connection with the affairs of the Corporation, that was a juridical person having a distinct legal entity. In such a situation, sanction of the State Government for prosecution of the petitioner for the offence was not at all necessary.**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 197 – आपराधिक षडयंत्र का अभिकथित अपराध कारित करते समय याची निगम के कार्यकलापों के संबंध में नियुक्त था, जो कि सुभिन्न विधिक अस्तित्व रखते हुए विधिक व्यक्ति था – ऐसी स्थिति में, अपराध के लिए याची के अभियोजन हेतु राज्य सरकार की मंजूरी की कोई आवश्यकता नहीं थी।

*B. All India Services (Death-cum-Retirement Benefits), Rules 1958 - Rule 6 (c)* - **Cognizance of offence u/s 120B of the IPC and 13(1)(d) read with 13(2) of the PC Act taken against the petitioner, a superannuated I.A.S. officer - Petitioner challenged the prosecution as barred by limitation of four years, already expired before filing the charge-sheet -Held - The objection is already overruled in the light of decision of Apex Court and no period of limiation is specified under the Code or the PC Act for taking cognizance of any offence falling under the Act - Rejection of application based on Rules 6 was well-merited.**

ख. अखिल भारतीय सेवा (मृत्यु–सह–निवृत्ति लाभ), नियम 1958 – नियम 6(सी) – याची एक सेवा निवृत्त आई.एस.एस अधिकारी के विरुद्ध आई.पी.सी. की धारा 120बी और पी.सी. अधिनियम की धारा 13(1)(डी) सहपठित धारा 13(2) के अंतर्गत अपराधों का संज्ञान लिया गया – याची ने अभियोजन को चार वर्षों की परिसीमा द्वारा वर्जित होने के कारण चुनौती दी, आरोप पत्र प्रस्तुत किये जाने से पूर्व ही उसकी मृत्यु हो गयी थी – अभिनिर्धारित – उच्चतम न्यायालय के निर्णय के आलोक में आक्षेप को पहले ही अस्वीकार किया गया है और पी.सी. अधिनियम के अंतर्गत आने वाले किसी अपराध का संज्ञान लेने हेतु संहिता अथवा पी.सी. अधिनियम के अंतर्गत परिसीमा की कोई अवधि विनिर्दिष्ट नहीं है – नियम 6 पर आधारित आवेदन की अस्वीकृति सुयोग्य है।

The order of the Court was delivered by : **R.C. MISHRA, J.**

**Cases referred :**

AIR 1989 SC 558, 2000 CR.L.J. 1767, (2004) 8 SCC 40, (1972) 3 SCC 89, (2004) 13 SCC 767, AIR 1998 SC 1945, (2004) 13 SCC 767, AIR 1981 SC 1395, (2005) 13 SCC 213, (2007) 1 SCC 1.

*Ajay Mishra,* with G. *Tiwari* for the applicant.

*Aditya Adhikari,* Special Public Prosecutor, for the Non-applicant/SPE.

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***Short Note***

****(106)***

***Before Mr. Justice Alok Aradhe***

W.P. No. 18712/2010 (Jabalpur) decided on 16 May, 2011

UMARAON SINGH ...Petitioner

Vs.

DISTRICT COLLECTOR ...Respondent

*A. Land Acquisition Act (1 of 1894) ,Section 3(f) - Public Purpose* - **Right of citizen to hold property is subject to right of sovereign to acquire it subject to payment of reasonable compensation**

**- Public purpose defined in Section 3(f) is merely illustrative and not exhaustive - Inclusive definition of Section 3(f) does not restrict its ambit and scope - Expression 'Public Purpose' is incapable of precise and comprehensive definition and it is neither desirable nor advisable to attempt to define it.**

क. भूमि अर्जन अधिनियम (1894 का 1), धारा 3(एफ) – लोक प्रयोजन – नागरिक का सम्पत्ति धारण करने का अधिकार, युक्तियुक्त मुआवजे के भुगतान के आधीन उसे अधिग्रहित करने के प्रभुत्वसम्पन्न अधिकार के अधीन है – धारा 3(एफ) में परिभाषित लोक प्रयोजन मात्र दृष्टांत स्वरुप का है और विस्तृत नहीं है – धारा 3(एफ) की संयुक्त परिभाषा उसकी परिधि एवं व्याप्ति को निर्बंधित नहीं करती – शब्द 'लोक प्रयोजन' की यथावत एवं व्यापक परिभाषा नहीं दी जा सकती तथा उसे परिभाषित करने का प्रयत्न करना ना तो वांछनीय है और न ही उचित है।

***B. Land Acquisition Act (1 of 1894), Sections 4, 6 - Public Purpose - Land acquired for Hydel Power Project* - M.P.E.B. entered into purchase agreement with respondent no.3 company, providing that entire power generated from project is required to be supplied to M.P.S.E.B and the tariff of electricity generated from Project shall be decided by M.P.S.E.Regulatory Commission - Project cost includes expenditure and investment made by State Govt. to the extent of Rs. 21.25 crores - Project also involves the funds spent by M.P.S.E.B. and Narmada Valley Development Authority and funding of the project has been obtained from various Govt. financial institutions - Compensation has been paid from public exchequer - Project is going to benefit the people of State and will also enable augmented supply of drinking water to Indore city and adjoining areas - Land has been acquired for public purpose.**

ख. भूमि अर्जन अधिनियम (1894 का 1), धाराएँ 4, 6 – लोक प्रयोजन – जल विद्युत परियोजना हेतु भूमि अधिग्रहित की गई – प्रत्यर्थी क्र. 3 कम्पनी के साथ एम.पी.एस.ई.बी ने क्रय करार किया इस उपबंध के साथ कि परियोजना से उत्पन्न होने वाली संपूर्ण विद्युत शक्ति एम.पी.एस.ई.बी. को प्रदाय होगी और परियोजना से उत्पन्न बिजली की दरें एम.पी.एस.ई. विनियामक आयोग द्वारा निर्धारित की जाएगी – राज्य सरकार द्वारा रुपये 21.25 करोड़ की सीमा तक किये गये व्यय एवं निवेश परियोजना लागत में सम्मिलित है – एम.पी.एस.ई.बी तथा नर्मदा घाटी विकास प्राधिकरण द्वारा खर्च की गई निधि भी परियोजना में अंतर्विष्ट है और विभिन्न सरकारी वित्तीय संस्थाओं से परियोजना के लिए निधि अभिप्राप्त की गई है – लोक राजकोष से प्रतिकर का भुगतान किया गया है – परियोजना से राज्य की जनता को लाभ होगा और इंदौर शहर एवं लगे हुए क्षेत्रों को पेयजल की संवर्धक आपूर्ति की क्षमता प्रदान करेगी – भूमि लोक प्रयोजन हेतु अधिग्रहित की गई।

C. ***Land Acquisition Act (1 of 1894), Section 17 - Urgency Clause*** **- Invocation of urgency clause is a matter which is in realm of subjective satisfaction of competent court - Court would interfere only when the reasons are wholly irrelevant and same exhibit lack of application of mind - Mere pre-notification delay would not render invocation of urgency provisions void.**

ग. भूमि अर्जन अधिनियम (1894 का 1), धारा 17 – अत्यावश्यकता खंड – अत्यावश्यकता खंड का अवलंब लेना ऐसा मामला है जो सक्षम न्यायालय के व्यक्तिपरक समाधान के परिमण्डल में है – न्यायालय केवल तब हस्तक्षेप करेगा जब कारण पूर्णतः असंगत है और वह मस्तिष्क के प्रयोग का अभाव प्रदर्शित करते हैं – मात्र पूर्व अधिसूचना का विलम्ब, अत्यावश्यकता उपबंधों का अवलंब लेने को शून्य नहीं बना देगा।

**Cases referred:**

Civil Apeal No. 3261/2011, AIR 1963 SC 151, AIR 1971 SC 1033, AIR 1975 SC 629, AIR 1984 SC 1721, (1996) 2 SCC 285, (2004) 8 SCC 453, AIR 1961 SC 343, (2000) 10 SCC 664, AIR 2003 SC 3140, (2008) 1 SCC 728, (2009) 10 SCC 689, (2010) 13 SCC 98, (2008) 9 SCC 552, (1996) 1 SCC 9, (1998) 6 SC 1, (2002) 4 SCC 160, (2004) 8 SCC 144, (2010) 10 SCC 282, (2010) 11 SCC 242, AIR 1984 SC 1721.

*Brian D'Silva* with *V. Bhide,* for the petitioner.

*Naman Nagrath,* Addl. A.G. for the respondent/State.

*Shekhar Bhargava* with *Alok Sharma & Amit Singh,* for the respondent/company.

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State Government respectively for reconsideration. In this view of the matter, his explanation that he had no other option but to sign the agreement was not reasonably acceptable. As indicated already, his predecessor-in-office namely Laxmikant Dwivedi has also been impleaded as an accused in the charge-sheet.

20. In *Vineet Narain* v. *Union of India* AIR 1998 SC 889, the Apex Court quoted with approval seven principles on Public Life as stated in the report of the Committee headed by Lord Nolan on 'Standards in Public Life'. The principle relating to accountability reads thus -

> *" Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office".*

21. The fact that he had taken over charge of the office only a day before, did not assume any significance as being the Chief Executive Officer, the petitioner Ramesh Singh was responsible and accountable for each and every action taken by him. Furthermore, as propounded in *State of Bihar* v. *P.P. Sharma* 1992 Supp (1) SCC 222 and re-affirmed in *Superintendent of Police (C.B.I)* v.*Deepak Chowdhary* AIR 1996 SC 186, according of sanction is an executive act and validity thereof cannot be tested in the light of principles applicable to quasi-judicial orders. For these reasons, Ramesh Singh is not entitled to the relief sought for in the writ petition.

22. In the result, both the petitions are dismissed. However, nothing contained herein shall be construed as any expression of opinion on the merits of the case. It shall still be open to the petitioners to raise all such pleas as are available under law. There shall be no order as to costs.

23. A copy of this order be retained in the connected petition.

*Petitions dismissed.*

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**I.L.R. [2011] M. P., 1798**

**SUPREME COURT OF INDIA**

***Before Mr. S.H. Kapadia, Chief Justice of India, Mr. Justice Altamas Kabir, Mr. Justice R.V. Raveendran, Mr. Justice B. Sudershan Reddy & Mr. Justice Aftab Alam***

Curative Petition (Crl.) Nos. 39-42/2010, decided on 11 May, 2011

C.B.I. & ors. ...Appellants

Vs.

KESHUB MAHINDRA ETC. ...Respondents

***Constitution, Article 136 - Criminal Procedure Code, 1973 (2 of 1974), Sections 216, 227 & 228 - Alteration of Charges during trial -*** **Supreme Court discharged the accused persons for offences punishable under Section 304(PartII), 324,326,429 of I.P.C. on the basis of material produced by prosecution at the stage of framing of charges -** ***Held*** **- Order was passed at the stage of framing of charges - It did not remove from the Code Sections 323,216,386,397,399 or 401 etc. or denuded a competent Court of the powers under these provisions - It is wrong to assume that the order of Apex Court is a fetter against the proper exercise of powers by a Court of competent jurisdiction under relevant provisions of Code - Mistake committed by Magistrate can be corrected by Revisional court - Curative petition dismissed.** (Para 4)

संविधान, अनुच्छेद 136 – दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 216, 227 व 228 – विचारण के दौरान आरोपों का परिवर्तन – आरोपों को विरचित करने के प्रक्रम पर अभियोजन द्वारा प्रस्तुत की गई सामग्री के आधार पर उच्चतम न्यायालय ने अभियुक्तगण को आई.पी.सी. की धारा 304 (भाग –दो), 324, 326, 429 के अंतर्गत दण्डनीय अपराधों के लिए उन्मोचित किया – अभिनिर्धारित – आरोपों को विरचित करने के प्रक्रम पर आदेश पारित किया गया था – यह संहिता से धाराएँ 323,216,386,397,399 या 401 इत्यादि नहीं हटाती अथवा इन उपबंधों के अंतर्गत सक्षम न्यायालय की शक्तियों को निवारित नहीं करती – यह धारणा अनुचित है कि उच्चतम न्यायालय का आदेश, संहिता के सुसंगत उपबंधों के अंतर्गत सक्षम आधिकारिता के न्यायालय द्वारा शक्तियों का समुचित प्रयोग किये जाने के विरुद्ध रोक है – मजिस्ट्रेट द्वारा कारित गलती को पुनरीक्षण न्यायालय द्वारा सुधारा जा सकता है – क्यूरेटिव पिटीशन खारिज।

**Case Referred:**

(2002) 4 SCC 388.

**ORDER**

The Order of the Court was delivered by **S. H. KAPADIA, CJI.** :– These curative petitions are filed by Central Bureau of Investigation for recalling the judgment and order dated 13.9.1996 of this Court in Keshub Mahindra vs. State of M.P. (Criminal Appeal Nos. 1672-1675 of 1996 decided on 13.9.1996 reported in 1996 (6) SCC 129), on the following premises :

(i) When this Court, by the said judgment dated 13.9.1996 quashed the charges framed against accused Nos. 2 to 5, 7 to 9 and 12 under Sections 304 (Part II), 324, 326 and 429 IPC and directed the trial court to frame charges under Section 304A IPC, this Court had before it adequate material to make out prima facie, an offence chargeable under Section 304 (Part II) IPC. Therefore, this Court committed a serious error in ignoring such material and quashing the charge under Section 304 (Part II) IPC.

(ii) The evidence placed in support of the charge under Section 304A IPC during the trial of the said accused before the learned Chief Judicial Magistrate, Bhopal showed prima facie that the said accused had committed offences punishable under Section 304 (Part II) IPC. But for the said judgment of this Court dated 13.9.1996, the learned Magistrate would have, by taking note of the said material, committed the case to the Court of Sessions under Section 323 of the Code of Criminal Procedure (for short 'the Code'). However, in view of categorical finding recorded by this Court, in its binding judgment dated 13.9.1996 that there was no material for a charge under Section 304 (Part II) IPC and consequential quashing of the said charge, with a direction to frame the charge under Section 304A IPC, the learned Magistrate was barred from exercising his judicial power under Section 323 of the Code, even though the Code vested the jurisdiction in him to alter the charge or commit the case to the Court of Sessions as the case may be, on the basis of evidence that came on record during the trial.

(iii) The judgment dated 13.9.1996 therefore resulted in perpetuation of irremediable injustice necessitating filing of the curative petitions seeking recall of the judgment dated 13.9.1996.

2. On the night of December 02, 1984 there was a massive escape of lethal gas from the MIC storage tank at Bhopal plant of the Union Carbide (I) Ltd. (UCIL) into the atmosphere causing the death of 5,295 people leaving 5,68,292 people suffering from different kinds of injuries ranging from permanent total disablement to less serious injuries. On the day following the incident, the SHO, Hanuman Ganj Police Station, suo moto, registered a Crime Case No. 1104 of 1984 under Section 304A IPC. On December 06, 1984 investigation was handed over to the CBI, which investigation stood completed, resulting in filing of charge sheets by the CBI in the Court of C.J.M., Bhopal on December 01, 1987. Since the charge sheets inter alia alleged commission of offence under Sections 304, 324, 326, 429 read with Section 35 of IPC, the case was committed by the C.J.M. to the Sessions Court as Sessions Case No. 237 of 1992 (See : Order dated 30th April, 1992). On 8th April, 1993, the 9th Additional Sessions Judge, Bhopal passed an order framing charges against the accused Nos. 5 to 9 under Sections 304 (Part II), 324, 326 and 429 of IPC and against accused Nos. 2, 3, 4 and 12 under the very same Sections but with the aid of Section 35 of IPC. It may be mentioned that at the time of framing of charge, the Court had before it, accused Nos. 2 to 9 and accused No. 12 (UCIL) whereas accused No. 1 (Warren Anderson) was absconding and the Court was also unable to bring before it the other two companies, UCC and Union Carbide Eastern Inc., accused Nos. 10 and 11.

3. The accused after having unsuccessfully challenged the order framing charge by the Court of Sessions before the Madhya Pradesh High Court, brought the matter to this Court in four separate appeals in which the leading case was Appeal (Cri.) No. 1672 of 1996 filed at the instance of accused No. 2 which stood ultimately disposed of by the judgment of the Division Bench of this Court dated September 13, 1996 in the case of *Keshub Mahindra* (supra). This Court held that on the material produced by the prosecution before the Trial Court at the stage of framing of charges, no charges could have been framed against the accused under Section 304 (Part II) or under Sections 324, 326, 429 with or without the aid of Section 35 IPC and it accordingly quashed the charges framed by the Sessions Court and directed that on the material led by the prosecution the charge under Section 304A IPC could be made out against accused Nos. 5, 6, 7, 8 and 9 and under the same sections with the aid of Section 35 against accused Nos. 2, 3, 4 and 12. Applications seeking leave to file a review petition being Criminal Misc. Petition Nos. 1713-16 of 1997 in a proposed review petition stood dismissed on

March 10, 1997. These applications were filed jointly by Bhopal Gas Peedith Sangharsh Sahyog Samiti (BGPSSS), Bhopal Gas Peedith Mahila Udyog Sangathan (BGPMUS) and Bhopal Group for Information and Action (BGIA). The CBI/State of M.P. did not question the said 1996 judgment or filed any review petition under Article 137 of the Constitution and instead proceeded for the next 14 years to prosecute the accused under Sections 304A, 336, 337, 338 read with Section 35 IPC. It is only on 26th April, 2010, after the defence evidence stood concluded and after conclusion of the oral arguments by the Senior Public Prosecutor, that, a petition was filed jointly by BGPSSS and BGPMUS under Section 216 Cr.P.C. for enhancement of the charge to Section 304 (Part II) IPC. This application was not supported by CBI. The said application was rejected by the C.J.M. on the same day. However, this order of the C.J.M. was also never challenged under Section 397/399 or under Section 482 Cr.P.C. Ultimately on June 7, 2010 Criminal Case No. 1104 of 1984 stood disposed of by the C.J.M. vide his judgment convicting accused Nos. 2 to 5, 7 to 9 and 12 under Sections 304A, 336, 337, 338 read with Section 35 IPC and sentencing them to two years' imprisonment. On June 29, 2010 Criminal Appeal No. 369 of 2010 was filed by State of M.P. before the Court of Sessions with a prayer for enhancement of sentences under the existing charges. On the same day the State of M.P. also filed Criminal Revision Application No. 330 of 2010 before the Court of Sessions under Section 397 Cr.P.C., challenging the alleged failure of the C.J.M. to enhance the charges to Section 304 (Part II) in exercise of his jurisdiction under Section 216 Cr.P.C., and to commit the trial of the case to Sessions under Section 323 Cr.P.C. and inter alia praying for a direction to enhance charges and commit. On July 29, 2010 Criminal Appeal No. 487 of 2010 was filed by the CBI before the Court of Sessions for enhancement of sentences under the existing charges. On 23rd August, 2010, CBI filed the criminal revision only after the present curative petitions were filed before this Court on August 2, 2010. All the appeals and revisions remain pending before the Court of Sessions.

4. It is clear to us that in the criminal revisions filed by the CBI and the State of M.P. the legal position is correctly stated. But the curative petitions are based on a plea that is wrong and fallacious. As noted above, one of the main planks of the curative petitions is that even though in course of trial before the Magistrate, additional evidences have come on record that fully warrant the framing of the higher charge (s) and the trial of the accused on those higher charges, as long as the 1996 judgment stands the Sessions Court

would feel helpless in framing any higher charges against the accused in the same way as the trial court observed that in view of the judgment of the Supreme Court no court had the power to try the accused for an offence higher than the one under Section 304A of IPC. The assumption is wrong and without any basis. It stems from a complete misapprehension in regard to the binding nature of the 1996 judgment. **No decision by any court, this Court not excluded, can be read in a manner as to nullify the express provisions of an Act or the Code** and the 1996 judgment never intended to do so. In the 1996 judgment, this Court was at pains to make it absolutely clear that its findings were based on materials gathered in investigation and brought before the Court **till that stage.** At every place in the judgment where the Court records the finding or makes an observation in regard to the appropriate charge against the accused, it qualifies the finding or the observation by saying "on the materials produced by the prosecution **for framing charge".** "At this stage", is a kind of a constant refrain in that judgment. The 1996 judgment was rendered at the stage of sections 209/228/240 of the Code and we are completely unable to see how the judgment can be read to say that it removed from the Code sections 323, 216, 386, 397, 399, 401 etc. or denuded a competent court of the powers under those provisions. In our view, on the basis of the material on record, it is wrong to assume that the 1996 judgment is a fetter against the proper exercise of powers by a court of competent jurisdiction under the relevant provisions of the Code. If according to the curative petitioner, the learned Magistrate failed to appreciate the correct legal position and misread the decision dated 13.9.1996 as tying his hands from exercising the power under Section 323 or under Section 216 of the Code, it can certainly be corrected by the appellate/revisional court. In fact, the revision petitions though belatedly filed by the State of M.P. and the CBI (which are still pending) have asserted this position in the grounds of revision. Moreover, no ground falling within the parameters of *Rupa Ashok Hurra vs. Ashok Hurra* 2002 (4) SCC 388 is made out in the curative petitions. Also, no satisfactory explanation is given to file such curative petitions after about 14 years from 1996 judgment of the Supreme Court. The curative petitions are therefore dismissed.

5. Nothing stated above shall be construed as expression of any view or opinion on the merits of the matters pending before the learned Sessions Judge, Bhopal.

*Petition dismissed.*

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**I.L.R. [2011] M. P., 1803**

**SUPREME COURT OF INDIA**

***Before Mr. Justice Dr. Mukundakam Sharma & Mr. Justice Anil R. Dave***

Civil Appeal No. 4921/2011 decided on 4 July, 2011

NATIONAL INSURANCE CO. LTD. ...Appellant

Vs.

SHYAM SINGH & ors. ...Respondents

***Motor Vehicles Act (59 of 1988), Section 166 - Just compensation -Multiply* - Deceased (19) the son of Respondents No. 3 & 4, who were 55 & 56 of age met with accident and died - Held - The multiplier of 8 by taking average of the age of parents of the deceased would be applied.** (Para 10)

मोटर यान अधिनियम (1988 का 59), धारा 166 – उचित प्रतिकर – गुणक – 55 व 56 वर्ष की आयु के प्रत्यर्थी क्रं. 3 व 4 के पुत्र, मृतक (19) की दुर्घटना में मृत्यु हो गई – अभिनिर्धारित – मृतक के पालकों की आयु की औसत को लेकर 8 का गुणक लागू होगा।

**Cases referred :**

(2009) 6 SCC 121, AIR 1994 SC 1631, (2008) 2 SCC 670.

**JUDGMENT**

The Judgment of the Court was delivered by **DR. MUKUNDAKAM SHARMA, J. :–** Leave granted.

2. This appeal is directed against the judgment and order dated 15.03.2010 passed by the High Court of Madhya Pradesh at Jabalpur in Miscellaneous Appeal No. 4867 of 2009, whereby the High Court had partially allowed the appeal filed by the Respondent No. 3 and 4 herein, against the award dated 28.08.2009 passed by the Second Additional Motor Accident Claims Tribunal, Satna, Madhya Pradesh and enhanced the compensation awarded by the Tribunal.

3. The factual matrix of the case is that Respondent No. 3 and 4 are parents of one Yogendra Kumar Pathak, who was 19 years of age and on 01.11.2007 while on his way to his village Kor Gaon. he alongwith his sister were travelling in jeep No. MP 19-A 930. The said jeep wasbeing driven by Respondent No. 1 and met with an accident near Dhal Factory General Road due to rash and negligent driving by the Respondent No. 1 which resulted in his death on

the spot. FIR was lodged at Police Station, Civil Lines, Satna against the driver under Sections 229 and 304-A of the Indian Penal Code. His dead body was taken to his village from the hospital on payment of Rs. 800/- and amount of Rs. 25000/- was spent on cremation.

4. It was stated in the claim petition that before his death, the deceased was a young man of robust health and was working as mechanical fitter in Priya Engineering Prism Cement Factory on the salary of Rs. 4500/- per month and in total was getting Rs. 6000/- a month inclusive of salary and over time allowance and was supporting his parents financially. "After his death, Respondents No. 3 and 4 have been rendered without any financial support and have been deprived of the association and pleasure of having a family and grand children in future.

5. The M.A.C.T., Satna, came to a finding that the deceased was earning Rs. 3000 /- per month and deducted 50 % therefrom towards personal expenses, as he was a bachelor. Considering the age of the parents which was 56 and 55 years, applied the Multiplier of 9, and awarded a total compensation of Rs. 1.72.000/- (Rs. 1,62,000/- towards the loss of dependency + Rs. 10,000/- towards conventional heads) along with 6 % interest per annum from the date of claim petition. Being aggrieved, the Respondent No. 3 and 4 preferred miscellaneous appeal No. 4867 of 2009 before the High Court for enhancement of amount of compensation stating that the income of the deceased was Rs. 4500/- and not Rs. 3000/- as determined by the Tribunal, and a multiplier of 16 instead of 9 was supposed to be applied. The High Court relying on the judgment of this Court in the case of *Sarla Verma (Smt.) and Others v. Delhi Transport Corporation and Another* (2009) 6 SCC 121, enhanced the multiplier to 18 instead of 9 and granted expenses to the tune of Rs. 15000/- under conventional heads. Accordingly, the High Court enhanced the amount of compensation from Rs. 1,72,000/- to Rs. 3,39,000/-

6. The learned counsel appearing for the appellant submitted that the High Court had failed to correctly apply the ratio laid in the case of *Sarla Verma case* (supra.). It was further contended that this Court has repeatedly held that in case where an unmarried young man dies, the average age of the parents will be taken for determining the multiplier and not the age of the deceased. In the aforesaid case, it has been clearly stated that for the age group of 56-60 years the multiplier should be 8, as has been correctly applied by the Tribunal by taking the average age of the Respondents 3 and 4 who are 55 and 56

years of age. It was further submitted that assuming, though not admitting, even if the age of the deceased is to be considered for determining the multiplier, the correct multiplier should have been 16 instead of 18, which is applicable to the age group between 15 to 20 years.

7. On the other hand, the learned counsel appearing for the Respondents No. 3 and 4 supported the impugned judgment and submitted that the High Court correctly enhanced the multiplier keeping in view the age of the deceased which was 19 years.

8. The assessment of damages and compensation takes into account a number of imponderables. This has been held by this court in the case of *General Manager, Kerala State Road Transport Corporation, Trivandrum v. Mrs. Susamma Thomas and Ors.* (AIR 1994 SC 1631) as: -

> *"The assessment of damages to compensate the dependents is beset with difficulties because from the nature of things, it has to take into account many imponderables, e.g. the life expectancy of the deceased and the dependents, the amount that the deceased would have earned during the remainder of his life, the amount that he would have contributed to the dependents during that period, the chances that the deceased may not have lived or the dependents may not live up to the estimated remaining period of their life expectancy, the chances that the deceased might have got better employment or income or might have lost his employment or income together etc. "*

9. This Court in the case of *Vijay Shankar.Shinde and Ors. v. State of Maharashtra* (2008) 2 SCC 670, after referring to the earlier judgments of this Court, in detail, dealt with the law with regard to determination of the multiplier in a similar situation as in the present case. The said findings of this Court are as under:

> *"6. We have given anxious consideration to these contentions and are of the opinion that the same are devoid of any merits. Considering the law laid down in New India Assurance Co. Ltd. v. Charlie AIR 2005 SC 2157, it is clear that the choice of multiplier is determined by the age of the deceased or claimants whichever is higher. Admittedly, the age of the father was 55 years. The question of mother's age never cropped up because*

*that was not the contention raised even before the Trial Court or before us. Taking the age to be 55 years, in our opinion, the courts below have not committed any illegality in applying the multiplier of 8 since the father was running 56th year of his life.*

*7. The learned Counsel relying on the 2nd Schedule of the Act contended that the deceased being about 16 or 17 years of age, a multiplier of 16 or 17 should have been granted. It is undoubtedly true that Section 163A was brought on the Statute book to shorten the period of litigation. The burden to prove the negligence or fault on the part of driver and other allied burdens u/s 140 or 166 were really cumbersome and time consuming. Therefore as a part of social justice, a system was introduced via Section 163A wherein such burden was avoided and thereby a speedy remedy was provided. The relief u/s 163-A has been held not to be additional but alternate. The Schedule provided has been threadbare discussed in various pronouncements including Deepal Girishbhai Soni v. United India Insurance Co. Ltd. AIR 2004 SC 2107. 2nd Schedule is to be used not only referring to age of victim but also other factors relevant therefore. Complicated questions of facts and law arising in accident cases cannot be answered all times by relying on mathematical equations. In fact in U.P. State Road Transport Corporation v. Trilok Chandra (1996) 4 SCC 362, Ahmedi, J. (As the Chief Justice then was) has pointed out the shortcomings in the said Schedule and has held that the Schedule can only be used as a guide. It was also held that the selection of multiplier cannot in all cases be solely dependent on the age of the deceased. If a young man is killed in the accident leaving behind aged parents who may not survive long enough to match with a high multiplier provided by the 2nd Schedule, then the Court has to offset such high multiplier and balance the same with the short life expectancy of the claimants. That precisely has happened in this case. Age of the parents was held as a relevant factor in case of minor's death in recent decision in Oriental Insurance Co. Ltd. v. Syed Ibrahim and Ors. AIR 2008 SC 103. In our considered opinion, the Courts below rightly struck the said balance."*

10. In our view, the dictum laid down in *Vijay Shankar Shinde* (supra) is applicable to the present case on all fours. Accordingly, we hold that the Tribunal had rightfully applied the multiplier of 8 by taking the average of the parents of the deceased who were 55 and 56 years.

11. Thus, the present appeal is allowed to the aforesaid extent and the award passed by the Tribunal is restored. No costs.

*Appeal allowed.*

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**I.L.R. [2011] M. P., 1807**
**FULL BENCH**
***Before Mr. Justice Rajendra Menon, Mr. Justice S.K. Gangele & Mr. Justice Anil Sharma***
W.P. No.2902/2009(S) (Gwalior) decided on 19 April, 2011

MAMTA SHUKLA (SMT.) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***A. Interpretation of Statute - Harmonious Construction - Conflict between two enactments*** **- Harmonious construction has to be applied in resolving the conflict between two enactments or rules.**

**In resolving the apparent conflict between two Rules i.e. Recruitment Rules of 1977 and the Pension Rules of 1979, it would be just and proper to hold that in accordance with Rule 3 of Pension Rules of 1979, the rules shall apply to a permanent member of work-charged and contingency paid employees service, who is appointed in accordance with the provisions of Recruitment Rules of 1977.** **(Para 13)**

क. कानून का निर्वचन – समन्वयपूर्ण अर्थान्वयन – दो अधिनियमितियों में विरोध – दो अधिनियमितियों या नियमों के मध्य विरोध को विनिश्चित करने में समन्वयपूर्ण अर्थान्वयन को लागू करना होगा।

***B. Industrial Relations Act, M.P. (27 of 1960), Section 2 (13)*** **- Appointment is not made in terms of statutory rules or against a clear vacancy or on any permanent post - The employee could not be declared or granted a permanent status in accordance with the provisions of the Act.** (Para 19)

ख. औद्योगिक संबंध अधिनियम, म.प्र. (1960 का 27), धारा 2(13) – नियुक्ति, कानूनी नियमों की शर्तों के अनुसार या स्पष्ट रिक्ति के विरुद्ध या किसी स्थायी पद पर नहीं की गई – अधिनियम के उपबंधों के अनुसार कर्मचारी को स्थायी प्रास्थिति घोषित या प्रदान नहीं की जा सकती।

*C. Service Law - Pension* - **Pension is a payment for the past services rendered by an employee.** (Para 22)

ग. सेवा विधि – पेंशन – कर्मचारी द्वारा पूर्व में दी गई सेवाओं के लिए भुगतान पेंशन है।

*D. Work Charged and Contingency Paid Employees Pension Rules, M.P., 1979 - Scope and application* - **Rules would be applicable to the work-charged and contingency paid employee, who comes within the definition of 'service' of the Recruitment Rules of 1977.**

For the purpose of rendering service, the employee has to attain the status, which means, an employee has to be appointed in accordance with the provisions of Recruitment Rules.

An employee is eligible to count his past service as qualifying service in accordance with Rules 6 of the Pension Rules, 1979, if he was appointed in accordance with the provisions of Recruitment Rules of 1977 - An employee, who was not appointed in accordance with the provisions of Recruitment Rules framed by the concerned department i.e. the Recruitment Rules of 1977, would not be eligible to count his past service as qualifying service for the purpose of grant of pension.

The decision of the Division Bench in the case of *Rahisha Begum Vs. State of MP. and others,* 2010 (4) MPLJ 332 is not per incuriam. (Paras 20, 24 & 25)

घ. निर्धारित कर्म और आकस्मिकता वेतन वाले कर्मचारी पेंशन नियम, म.प्र., 1979– परिधि और उपयोज्यता – नियम निर्धारित कर्म और आकस्मिकता वेतन पाने वाले कर्मचारी को लागू होगें जो भर्ती नियम 1977 के 'सेवा' की परिभाषा के अंतर्गत आते हैं।

**Cases referred :**

2010(4) MPLJ 332, 2003(4) MPLJ 376, 2006(4) MPLJ112, 2005(3) MPLJ 85, 2002(2) MPLJ 278, (1981) 1 SCC 449, (1995) SUPPL. 3 SCC 67, ILR (2003) MP 1127, (2000) 8 SCC 4, 2008 SCW 619, 2010 (4) SCC 317, 2007 SCW 70, (2002)1 SCC 405, AIR 1959 SC 422, AIR 1964 SC 160, AIR

2002 SC 1432, AIR 2009 SC 869, AIR 1971 SC 1409, 2007 AIR SCW 70, (2006) 4 SCC 01, (1983) 1 SCC 305, (2003)12 SCC 293, 2003(4) MPLJ 282, 2010(4) MPLJ 332.

*M.K. Sharma,* for the petitioner.

*M.P.S. Raghuvanshi, Addl. A.G. & Vivek Khedkar, G.A.* for the respondents/State.

**ORDER**

The Order of the Court was delivered by **S. K. GANGELE, J.** :–On a reference by the learned Single Judge, Hon'ble the Chief Justice has constituted this Full Bench to answer the following reference:

"(i) Whether the decision of the Division Bench in W.A.No.725/2007 *(Smt. Rahisha Begum Vs. State of M.P. & Others)* is not a good law in view of the decision of the earlier Division Bench of this Court vide order dated 18-7-2005, passed in W.P.No. 1273/2000 *(State of M.P. and Others Vs. Ram Singh and another)* ?

(ii) Whether an employee is eligible for the benefit of family pension in accordance with the provisions of Madhya Pradesh (Work Charged and Contingency Paid Employees) Pension Rules, 1979 after completing qualifying service in accordance with the provisions of Recruitment Rules framed by the concerned Department for work charged and contingency paid employees or in accordance with the definition of Rule 2 of Madhya Pradesh (Work Charged and Contingency Paid Employees) Pension Rules, 1979 in regard to "contingency paid employee", "work-charged employee" and "permanent employee" ?

(iii) Whether for counting qualifying service of an employee for the purpose of grant of benefit of pension it is necessary that the employee has to be appointed in accordance with the provisions of contingency paid employees recruitment rules framed by the concerned department in regard to work charged and contingency paid employees ?"

2. Before answering the reference, it would be appropriate to consider the facts which have resulted in making the present reference. Petitioner Mamta Shukla filed a petition before this Court in regard to grant of family pension on the basis of 19 years' qualifying service rendered by her husband late Rajkumar Shukla. The husband of the petitioner was engaged in the year 1981 on daily wages basis. He was regularized vide order dated 31/12/1996 on the post of Helper in work charged and contingency paid establishment in the pay-scale of Rs. 870-15-945. He was missing, hence a report of Gumsudgi was lodged at police station Kotwali on 02/04/2000. Thereafter, the petitioner instituted a suit for declaration that the husband of the petitioner be declared dead as 'civil death' with effect from 02/04/2000. The trial Court vide order dated 01st February, 2008 decreed the suit and declared the civil death of husband of the petitioner with effect from 02/04/2000.

3. The petitioner submitted an application for grant of family pension, that was turned down by the department. Hence, she filed a petition before the High Court claiming family pension on account of civil death of her husband in accordance with the provisions of Madhya Pradesh (Work-Charged Contingency Paid Employees) Pension Rules, 1979 (hereinafter referred to as 'the Pension Rules of 1979'). She further claimed that she is entitled to receive pension after counting the total years of service of her husband i.e. 19 years from the date of his initial engagement upto the date of declaration of his civil death i.e. 02/04/2000.

4. The respondents/State controverted the facts in regard to entitlement of the petitioner to receive pension in accordance with the Pension Rules, 1979 on the ground that husband of the petitioner was engaged initially in the year 1981 on daily wages basis and subsequently he was regularized on the post of un-skilled Helper in work-charged and contingency paid establishment with effect from 31/12/1996, hence, he had not completed six years of qualifying service for the purpose of grant of family pension in accordance with the Pension Rules, 1979. The respondents further pleaded that earlier period of the husband of the petitioner from the date of initial engagement as daily wager upto the date of his regularization i.e. 31/12/1996, could not be counted as qualifying service for the purpose of grant of pension, because the husband of the petitioner was a daily wager employee.

5. The learned counsel appearing for the petitioner at the time of argument contended that in accordance with the definition of Rule 2 of the Pension

Rules 1979, the husband of the petitioner was a contingency and work-charged employee from the date of initial appointment, hence the entire service rendered by him upto the period of his civil death has to be treated as qualifying service for the purpose of grant of pension in accordance with Pension Rules 1979. In support of his contentions, the learned counsel relied on Division Bench's judgment of this Court in the case of *Rahisha Begum vs. State of M.P. and others,* reported in 2010 (4) M.P.L.J. 332. Contrary to this, learned Additional Advocate General appearing for the respondents/State contended that the husband of the petitioner was engaged initially as daily wager and he was regularized in work-charged establishment on the post of un-skilled Helper vide order dated 31/12/1996. Hence, his service prior to 31/12/1996 rendered as daily wager employee could not be counted for the purpose of qualifyinq service in accordance with the Rule 6 of the Pension Rules, 1979. The leaned Additional Advocate General further submitted that in order to get benefit of pension in accordance with. the provisions of Pension Rules, 1979, the work-charged or contingency paid employee has to be appointed in accordance with the provisions of Work Charged and Contingency Paid Employees Recruitment and Conditions Service Rules, 1977 (hereinafter called as 'Recruitment Rules of 1977'). In support of his contention, the learned counsel relied on un-reported judgment of Division Bench of this Court passed in W.P.No.1273/02 *(State of M.P. vs. Ramsingh and another).*

6. Looking to the general importance of the law involved in the case and some conflict in the decisions between two Division Benches of this Court, learned Single Judge referred the matter after formulation of substantial questions of law to the Hon'ble Chief Justice under the provisions of Madhya Pradesh High Court Rules, 2008 and consequently, the Hon'ble the Chief Justice has constituted this Full Bench to answer the reference.

7, The learned counsel appearing on behalf of the petitioner have contended that the law laid down by the Division Bench of this Court in the case of *Rahisha Begum* (supra) is in accordance with law. The Pension Rules, 1979 are independent in nature and the contingency paid employees and work-charged employees have been defined under Rule 2 of the Pension Rules of 1979 and looking to the object of the 'pension', a liberal interpretation has to be accorded to the Pension Rules of 1979 and if an employee comes within the definition of contingency paid employee or work-charged employee, then he is entitled to receive pension counting his entire length of service as

qualifying service. In support of contentions, the learned counsel relied on the following judgments:

(i) ***Shrikrishna Shrivastava vs. State of M.P. and others,*** **2003 (4) MPLJ 376.**

(ii) ***Samim Begum vs. State of M.P. and others,*** **2006(4) MPLJ 112;**

(iii) ***Surendra Kumar Chaturvedi vs. State of M.P. and others,*** **2005(3) MPLJ 85;**

(iv) ***Gopi Pillai vs. M.P.E.B.,*** **2002 (2) MPLJ 278;**

(v) ***Som Prakash Rekhi vs. Union of India and another*** **(1981) I SCC 449.**

(vi) ***Ram Kumar Agrawal vs. State of M.P.*** **(1995) Suppl. 3 SCC 67.**

(vii) ***Jagbandhan Prasad vs. State of M.P.,*** **W.P.No. 10628/ 2009; and**

(viii)***Jabalpur Bus Operator Association vs. State of M.P.,*** **I.L.R. (2003) MP 1127.**

8. Contrary to this, learned Additional Advocate General appearing for the respondents/State has contended that the Pension Rules of 1979 have to be read in consonance with the Recruitment Rules of 1977 and for the purpose of counting the qualifying service of an employee, he has to fulfill the conditions of Recruitment Rules of 1977, meaning thereby, his appointment must be in accordance with the Recruitment Rules of 1977. The adhoc and daily wages period of an employee de hors the Recruitment Rules could not be counted as qualifying service for the purpose of granting pension in accordance with the Pension Rules of 1979. The learned Additional Advocate General further submitted that the Pension Rules of 1979 have to be read in consonance with the Recruitment Rules of 1977. The Recruitment Rules of 1977 would prevail in the matter of recruitment and conditions of service and also for the purpose of determining the qualifying service of work-charged and contingency paid employee. The learned counsel further submitted that the subsequent Division Bench of this Court in the case of *Rahisha Begum* (supra) has not considered the earlier Division Bench judgment of this Court, hence, it is per incuriam. In support of his contentions, the learned Additional Advocate General relied on the following judgments:-

(i) ***State of Haryana vs. Haryana Veterinary ande Ahts Association and another,*** **(2000) 8 SCC 4;**

(ii) ***Chandra Mohan Pandurang Kajbaje vs. State of Maharashtra and others,*** **2008 SCW 619;**

(iii) ***Punjab State Electricity Board vs. Narate Singh and another,*** **2010 (4) SCC 317;**

(iv) ***State of M.P. ,and others vs. Lalit Kumar Verma,*** **2007 SCW 70; and**

(v) ***Union of India and another vs. P.D. Yadav,*** **2002 (1) SCC 405.**

9. For the sake of convenience, in our opinion, it would be just and appropriate to consider the substantial questions of law No. 2 and 3, first.

10. The Governor of State of Madhya Pradesh in exercise of powers conferred under Article 309 of the Constitution of India has made Rules regulating the recruitment and conditions of service of work charge and contingency paid employees in Irrigation Department named as Madhya Pradesh Irrigation Department Work Charged and Contingency Paid Employees Recruitment and Conditions of Service Rules, 1977 (hereinafter called as 'Recruitment Rules of 1977'). These rules came into force with effect from 01st January, 1974. Rule 2 (b) defines contingency paid employee and Rule 2(h) defines work charged employee, which are as under:

> "(b) "Contingency paid employee" means a person employed for full time in an office or establishment and who is paid on monthly basis and whose pay is charged to office contingencies excluding the employees who are employed for certain period only in a year.
>
> (h) "Work-charged employee" means a person employed upon the actual execution, as distinct from general supervision of a specified work or upon subordinate supervision of the departmental labour, store, running and repairs of electrical equipment and machinery in connection with such work, excluding the daily paid labour and muster-roll employee employed on the work.

" Rule 2 (f) defines service which is as under:

"(f) 'Service' means the Madhya Pradesh workcharged contingency paid employees service."

Rule 7 prescribes 'recruitment and promotion'. Rule 8 prescribes physical fitness, age of superannuation, Rule 9 prescribes maintenance of seniority list, Rule 12 prescribes conduct and Rule 13 prescribes penalties. Rule 14 prescribes procedure for imposing penalty and Rule 15 prescribes appeals.

11. The Governor of Madhya Pradesh in exercise of power conferred by the proviso to Article 309 of the Constitution of India made the Rules named as Madhya Pradesh (Work-charged and Contingency Paid Employees) Pension Rules, 1979 (hereinafter called as 'Pension Rules, 1979'). These Rules came into force with effect from 01" January, 1974.

Rule 2 defines definitions, which is as under:

"(a) "Contingency paid employee" means a person employed for full time in an office or establishment and who is paid on monthly basis and whose pay is charged to office contingencies excluding the employees who are employed for certain period only in a year.

(b) "Work -charged employee" means a person employed upon the actual execution, as distinct from general supervision of a specified work or upon subordinate supervision of the departmental labour, store, running and repairs of electrical equipment and machinery in connection with such work, excluding the daily paid labour and muster-roll employee employed on the work.

(c) "Permanent employee" means a contingency paid employee or a work-charged employee who has completed fifteen years of service or more on or after the lst January, 1974:

Provided that in respect of a contingency paid employee or a workcharged employee who has attained the age of superannuation on or after the First April 1981, permanent employee means an employee, who has completed 10 years of service on or after the lst January, 1974."

Rule 3 defines 'Scope and application', which is as under:

"These rules shall apply to every permanent member of the work-charged and contingency paid employees."

Rule 4 defines 'Regulation of amount of pension', which is as under:

"Regulation of amount of pension: Notwithstanding anything contained in rules 5 and 6 the payment of pension and gratuity of permanent employee shall be regulated as under, namely:-

(1) The Madhya Pradesh New Pension Rules, 1951, except rule 5 thereof, shall apply to all permanent employees who have retired on or after the 1St January, 1974 but before the 1st June, 1976.

(2) The Madhya Pradesh Civil Services (Pension) Rules, 1976, except rules 47 and 48 thereof, as amended from time to time, shall apply to all permanent employees who have retired on or after the 1st June, 1976.'

[4A. Notwithstanding anything contained in rule 4 the family of a permanent employee who dies while in service or after retirement on pension on or after the 1St April, 1981 shall be entitled to family pension at the rate of 30% of his/her pay drawn and maximum of RS.100/- per month subject to other conditions of rule 47 of the Madhya Pradesh Civil Services (Pension) Rules, 1976 except sub-rule (3) of the said rule.]"

Rule 6 defines Commencement of qualifying service, which is as under:

"(1) Subject to the provisions of chapter III of the Madhya Pradesh Civil Services ( Pension) Rules, 1976 of section IV of Madhya Pradesh New' Pension Rules, 1951 as the case may be, for calculating qualifying service of a permanent employee who retires as such, the service rendered with effect from the 1st January, 1959 onwards shall be counted.

(2) On absorption of a permanent employee without interruption against any regular pensionable post, the service rendered with effect from lst January, 1959 onwards shall be counted for pension as if such service was render in a regular post.

(3) On absorption of temporary employee without interruption against any regular pensionable post, the service rendered with effect from 1St January, 1974 onwards, if such service is not of less than six years shall be counted for pension as if such service was rendered in a regular post."

In accordance with Rule 3 of Pension Rules, 1979, the rules shall apply to every permanent member of the work- charged and contingency paid employees' service. Rule 2 (c) defines a permanent employee, which is as under:

> "Permanent employee" means a contingency paid employee or a work-charged employee who has completed fifteen years of service or more on or after the 1st January, 1974.
>
> Provided that in respect of a contingency paid employee who has attained the age of superannuation on or after 1-4-1981 permanent employee means an employee who has completed ten years of service on or after the 1st January, 1974."

In accordance with Rule 2(f) of the Recruitment Rules of 1977, 'service' means Madhya Pradesh Work-charged and Contingency Paid employee's service and in Rule 6 of Rules of 1977 under the head of categorization, the permanent and temporary categories of employees have been defined, which is as under:

> "6. Categorization :-(1) Workcharged contingency paid employees shall for the purpose of these rules be divided into the following two categories namely:
>
> (i) Permanent; and
>
> (ii) Temporary.
>
> (2) The employee -
>
> (a) who had completed not less than ten years of service on the 1st January, 1974;
>
> (b) appointed prior to the said date but had not completed ten years of service on the 1st January, 1974.
>
> (c) appointed after the said date shall be in case of (a) above on the 1st January, 1974 and in case of (b) and (c) on the completion of ten years of continuous service, be eligible for the status of permanent workcharged contingency paid employees."

12. The Pension Rules of 1979 are not independent Rules in regard to

regulating the condition of service of work- charged and contingency paid employees. There are specific rules i.e. Recruitment Rules of 1977 in regard to condition of service including appointment, qualification, procedure for recruitment and promotion, seniority list, conduct and procedure for imposing penalty. Hence, the Pension Rules of 1979 be read in consonance with the Recruitment Rules of 1977, because the object of Pension Rules, 1979 is to provide benefit of pension to certain class of employees and that has to be construed to employees who have been recruited in accordance with the provisions of Recruitment Rules of 1977, because if the Pension Rules of 1979 be read in isolation or independently then the Recruitment Rules of 1977 would become redundant.

13. It is well settled principle of law that if there is a conflict between two enactments, then the harmonious construction has to be applied in resolving the conflict between two enactments or rules. The Hon'ble Supreme Court in the case of *N. T. Veluswami Thevar vs. G. Raja Nainar and others,* AIR 1959 SC 422 has held as under in regard to harmonious construction of statute :

> "It is no doubt true that if on its true construction, a statute leads to anomalous results, the Courts have no option but to give effect to it and leave it to the Legislature to amend and alter the law. But when on a construction of a statute, two views are possible, one which results in an anomaly and the other not, it is the duty of a Court to adopt the latter and not the former, seeking consolation in thought that the law bristles with anomalies."

14. The Hon'ble Supreme Court in *Sirsilk Ltd. v. Govt. of Andhra Pradesh,* AIR 1964 SC 160 has resolved the conflict between mandatory provisions of Section 17 (1) and Section 18(1) of the Industrial Dispute Act, 1947. The learned author Hon'ble Justice Shri G. P. Singh, in Principles of Statutory Interpretation has referred the decision as under :

> "An interesting question relating to a conflict between two equally mandatory provisions, viz. sections 17(1) and 18(1) of the Industrial Disputes Act, 1947, is a good illustration of the importance of the principle that every effort should be made to give effect to all the provisions of an Act by harmonising any apparent conflict between two or more of its provisions. Section 17(1) of the Act requires the Government to publish every award of a Labour Tribunal

within thirty days of its receipt and by sub-section (2) of Section 17 of the award on its publication becomes final. Section 18(1) of the Act provides that a settlement between employer and workmen shall be binding on the parties to the agreement. In a case where a settlement was arrived at after receipt of the award of a Labour Tribunal by the Government but before its publication, the question was whether the Government was still required by section 17(1) to publish the award. In construing these two equally mandatory provisions, the Supreme Court held that the only way to resolve the conflict was to hold that by the settlement, which becomes effective from the date of signing, the industrial dispute comes to an end and the award becomes infructuous and the Government cannot publish it."

15. The Hon'ble Supreme Court in the case of *Bhatia International vs. Bulk Trading S.A. and another.* AIR 2002 SC 1432 has held as under in regard to interpretation of statute:

"15. The conventional way of interpreting a statute is to seek the intention of its makers. If a statutory provision is open to more than one interpretation then the Court has to choose that interpretation which represents the true intention of the legislature. If a language used is capable of bearing more than one construction, in selecting the true meaning, regard must be had to the consequences, resulting from adopting the alternative constructions. A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results."

Hence, in our opinion, in resolving the apparent conflict between two Rules i.e. Recruitment Rules of 1977 and the Pension Rules of 1979, it would be just and proper to hold that in accordance with Rule 3 of Pension Rules of 1979, the rules shall apply to a permanent member of work-charged and contingency paid employees service, who is appointed in accordance with the provisions of Recruitment Rules of 1977.

16. The question has to be considered from another angle also. If, it is held that the Pension Rules of 1979 would be applicable independently to the

employees, as per the definition of work-charged and contingency paid employees as defined in the Pension Rules of 1979 then, the employees who were not eligible or who were appointed on muster-roll basis or daily wager without following the procedure of Recruitment Rules of 1977, would also be eligible to get pension from the date of their initial engagement.

17. The Hon'ble Supreme Court in *State of Haryana and others vs. Shakuntla Devi,* AIR 2009 SC 869 has held as under in regard to status of an employee:

> "21. The primary question, therefore, is who would be a Government employee within the meaning of the said Scheme.
>
> We will advert to this a little later. The second question would be, can the Scheme be read independent of the Rules.
>
> Answer thereto must be rendered in the negative. We say so because in terms of the Rules, the following conditions precedent must be fulfilled before the benefit of family pension can be extended:
>
> 1. The employee must be a Government employee.
>
> 2. He must be employed in a pensionable establishment.
>
> 3. He must have become eligible to derive the benefit thereof.
>
> 22. Chapter II of Volume II of the Rules provides for different provisions relating to grant of pension. The distinction between a pensionable establishment and a provident fund establishment must, therefore, be borne in mind. Pension although is not a bounty, the entitlement thereto is only under a statute. Only when the conditions precedent provided for in the statute are fulfilled, an employee would be entitled thereto.
>
> 23. We would begin our discussions with the status of an employee. A Government employee enjoying a status indisputably must be recruited in accordance with Rules. The offers of appointment made in favour of the employees in no uncertain terms show that they were appointed on an ad hoc basis. The appointment was not regular, although in relation to the case of Balwant Singh, the names were said to have been called for from the Employment Exchange. Nothing has been placed on record to

show as to what was the cadre strength in the posts to which they were appointed.

No material has been brought on records to show that the equality clause contained in Articles 14 and 16 had been complied with. Any recruitment made in violation of the constitutional scheme, as adumbrated therein as also the Recruitment Rules framed by the State would render the same illegal and invalid.

24. The very fact that a regularization scheme was framed by the State is a clear pointer to show that the concerned employees were not regularly employed. They had sought for regularization of their service and at least in one case, as noticed hereinbefore, for one reason or the other, the said request was turned down.. The validity thereof was not questioned. It attained finality.

In the case of *Rama Devi,* a contention was raised in the writ petition that the offer of appointment in law was not for a period of six months but for an indefinite period. Such a contention cannot be upheld. If the initial appointment was for a fixed period and the appointment could be terminated without any notice and without assigning any reason, such appointment cannot be said to be an appointment on a permanent post or a temporary sanctioned post. Unless and until the post itself is a permanent or a temporary one, the same would not answer the description of a substantive and permanent employment, in this case, it had been shown that the services of Karan Singh was being renewed for a period of six months on the expiry of the original or extended tenure."

18. The Hon'ble Supreme Court further in *Deokinandan Prasad vs. The State of Bihar and others,* AIR 1971 SC 1409 has held that right to receive pension flows by virtue of the rules The relevant findings of the Hon'ble Supreme Court are as under:

"We are not inclined to accept the contention of the learned counsel for the respondents. By a reference to the material provisions in the Pension Rules, we have already indicated that the grant of pension does not depend upon an order being passed by the authorities to that effect. It may be that for the purposes of quantifying the amount having regard to the period of service and other allied matters, it may be

necessary for the authorities to pass an order to that effect, but the right to receive pension flows to an officer not because of the said order but by virtue of the Rules. The Rules, we have already pointed out, clearly recognise the right of persons like the petitioner to receive pension under the circumstances mentioned therein."

19. The Hon'ble Supreme Court further in *State of M.P. and others vs. Lalit Kumar Verma.* 2007 AIR SCW 70 has held as under in regard to illegal appointment:

"13. The question which, thus, arises for consideration, would be: Is there any distinction between ' irregular appointment' and 'illegal appointment'? The distinction between the two terms is apparent. In the event of appointment is made made in total disregard of the constitutional scheme as also the recruitment rules framed by the employer, which is State within the meaning of Article 21 of the Constitution of India, the recruitment would be an illegal one; whereas there my be cases where, although, substantial compliance of the constitutional scheme as also the rules have been made, the appointment may be irregular in the sense that some provisions of some rules might not have been strictly adhered to."

From the aforesaid decision of the Hon'ble Supreme Court, it is clear that if an appointment is not made in terms of statutory rules or against a clear vacancy or on any permanent post, the employee could not be declared or granted a permanent status in accordance with the provisions of Madhya Pradesh Industrial Relations Act, 1960.

20. A constitutional Bench of Hon'ble Supreme Court in *Secretary, State of Karnataka and others vs. Umadevi and others.* (2006) 4 SCC 01 has held as under in regard to regularization and absorption of the daily wage employees.

"47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognised by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post

could be made only by following a proper procedure for selection and in cases .concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

48. It was then contended that the rights of the employees thus appointed, under Articles 14 and 16 of the Constitution, are violated. It is stated that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries for doing similar work. The employees before us were engaged on daily wages in the department concerned on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never

been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled.

49. It is contended that the State action in not regularising the employees was not fair within the framework of the rule of law. The rule of law compels the State to make appointments as envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in tribunals and courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages. When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution.

50. It is argued that in a country like India where there is so much poverty and unemployment and there is no equality of bargaining power, the action of the State in not making the employees permanent, would be violative of Article 21 of the Constitution. But the very argument indicates that there are so many waiting for employment and an equal opportunity for competing for employment and it is in that context that the Constitution as one of its basic features, has included Articles 14, 16 and 309 so as to ensure that public employment is given only in a fair and equitable manner by giving all those who are qualified, an opportunity to seek employment. In the guise of upholding rights under Article 21 of the Constitution, a set of persons cannot be preferred over a vast majority of people waiting for an opportunity to compete for State employment. The acceptance of the argument on behalf of the

respondents would really negate the rights of the others conferred by Article 21 of the Constitution, assuming that we are in a position to hold that the right to employment is also a right coming within the purview of Article 21 of the Constitution. The argument that Article 23 of the Constitution is breached because the employment on daily wages amounts to forced labour, cannot be accepted. After all, the employees accepted the employment at their own volition and with eyes open as to the nature of their employment. The Governments also revised the minimum wages payable from time to time in the light of all relevant circumstances. It also appears to us that importing of these theories to defeat the basic requirement of public employment would defeat the constitutional scheme and the constitutional goal of equality.

51. The argument that the right to life protected by Article 21 of the Constitution would include the right to employment cannot also be accepted at this juncture. The law is dynamic and our Constitution is a living document. May be at some future point of time, the right to employment can also be brought in under the concept of right to life or even included as a fundamental right. The new statute is perhaps a beginning. As. things now stand, the acceptance of such a plea at the instance of the employees before us would lead to the consequence of depriving a large number of other aspirants of an opportunity to compete for the post or employment. Their right to employment, if it is a part of right to life, would stand denuded by the preferring of those who have got in casually or those who have come through the backdoor. The obligation cast on the State under Article 39(a) of the Constitution is to ensure that all citizens equally have the right to adequate means of livelihood. It will be more consistent with that policy if the courts recognise that an appointment to a post in government service or in the service of its instrumentalities, can only be by way of a proper selection in the manner recognised by the relevant legislation in the context of the relevant provisions of the Constitution. In the name of individualising justice, it is also not possible to shut our eyes to the constitutional scheme and the right of the numerous as against the few who are before the court. The directive principles of State policy have also to be reconciled with the rights available to the citizen under

Part III of the Constitution and the obligation of the State to one and all and not to a particular group of citizens. We, therefore, overrule the argument based on Article 21 of the Constitution.

52. Normally, what is sought for by such temporary employees when they approach the court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities, to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favour of such persons. At this juncture, it will be proper to refer to the decision of the Constitution Bench of this Court in *Rai Shivendra Bahadur (Dr.) v. Governing Body of the Nalanda College*. That case arose out of a refusal to promote the writ petitioner therein as the Principal of a college. This Court held that in order that a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employees directing the Government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent."

From the aforesaid decision of the Hon'ble Supreme Court, it is clear that an employee who was appointed or engaged without following the procedure as enumerated in relevant Recruitment Rules and on adhoc basis against any sanction post, could not get a status and hence on the basis of the aforesaid principle of law, it has to be held that Rule 3 of the Pension Rules of 1979, which prescribes scope and application of the Pension Rules of 1979, would be applicable to the 'work-charged and contingency paid employee', who comes within the definition of 'service' of the Recruitment Rules of 1977.

21. The concept of 'pension' has also been considered in various judgments by the Hon'ble Supreme Court. It is elaborately considered by the Constitutional Bench of Hon'ble Supreme Court in *D.S. Nakara and others vs. Union of India*. (1983) 1 SCC 305. The Hon'ble Supreme Court has also traced the history of concept of pension and held as under:

"19. What is a pension? What are the goals of pension? What public interest or purpose, if any, it seeks to serve? If it does seek to serve

some public purpose, is it thwarted by such artificial division of retirement pre and post a certain date? We need seek answer to these and incidental questions so as to render just justice between parties to this petition.

20. The antequated notion of pension being a bounty, a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in *Deokinandan Prasad v. State of Bihar* wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon anyone's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied matters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in *State of Punjab v. Iqbal Singh.*

21. There are various kinds of pensions and there are equally various methods of funding pension programmes. The present enquiry is limited to non-contributory superannuation or retirement pension paid by Government to its erstwhile employee and the purpose and object underlying it. Initially this class of pension appears to have been introduced as a reward for loyal service. Probably the alien rulers who recruited employees in lower echelons of service from the colony and exported higher level employees from the seat of Empire, wanted to ensure in the case of former continued loyalty till death to the alien rulers and in the case of latter, an assured decent living standard in old age ensuring economic security at the cost of the colony.

22. In the course of transformation of society from feudal to welfare and as socialistic thinking acquired respectability. State obligation to provide security in old age, an escape from undeserved want was recognised and as a first step pension was treated not only as a reward for past service but with a view to helping the employee to avoid destitution in old age. The quid pro quo was that when the

employee was physically and. mentally alert, he rendered unto master the best, expecting him to look after him in the fall of life. A retirement system therefore exists solely for the purpose of providing benefits. In most of the plans of retirement benefits, everyone who qualifies for normal retirement receives the same amount (see Retirement Systems for Public Employees by Bleakney, p. 33).

23. As the present case is concerned with superannuation pension,. a brief history of its initial introduction in early stages and continued existence till today may be illuminating. Superannuation is the most descriptive word of all but has become obsolescent because it seems ponderous. Its genesis can be traced to the first Act of Parliament (in U.K.) to be concerned with the provision of pensions generally in the public offices. It was passed in 1810. The Act which substantively devoted itself exclusively to the problem of superannuation pension was Superannuation Act of 1834. These are landmarks in pension history because they attempted for the first time to establish a comprehensive and uniform scheme for all whom we may now call civil servants. Even before the 19th century, the problem of providing for public servants who are unable, through old age or incapacity, to continue working, has been recognised, but methods of dealing with the problem varied from society to society and even occasionally from department to department.

24. A political society which has a goal of setting up of a welfare State, would introduce and has in fact introduced as a welfare measure wherein the retiral benefit is grounded on "considerations of State obligation to its citizens who having rendered service during the useful span of life must not be left to penury in their old age, but the evolving concept of social security is a later day development". And this journey was over a rough terrain. To note only one stage in 1856 a Royal Commission was set up to consider whether any changes were necessary in the system established by the 1834 Act. The Report of the Commission is known as "Northcote-Trevelyan Report". The Report was pungent in its criticism when it says that:

"[I] in civil services comparable to lightness of work and the certainty of provision in case of retirement owing to bodily incapacity, furnish strong inducements to the parents and friends of sickly youths to

endeavour to obtain for them employment in the service of the Government, and the extent to which the public are consequently burdened, first with the salaries of officers who are obliged to absent themselves from their duties on account of ill health, and afterwards with their pensions when they retire on the same plea, would hardly be credited by those who have not had opportunities of observing the operation of the system."

25. This approach is utterly unfair because in modern times public services are manned by those who enter at a comparatively very young age, with selection through national competitive examination and ordinarily the best talent gets the opportunity.

26. Let us therefore examine what .are the goals that pension scheme seeks to subserve? A pension scheme consistent with available resources must provide that the pensioner would be able to live:

(i) free from want, with decency, independence and self-respect, and (ii) at a standard equivalent at the pre-retirement level. This approach may merit the criticism that if a developing country like India cannot provide an employee while rendering service a living wage, how can one be assured of it in retirement? This can be aptly illustrated by a small illustration. A man with a broken arm asked his doctor whether he will be able to play the piano after the cast is removed. When assured that he will, the patient replied, "that. is funny, I could not before". It appears that determining the minimum amount required for living decently is difficult, selecting the percentage representing the proper ratio between earnings and the retirement income is harder. But it is imperative to note that as self-sufficiency declines the need for his attendance or institutional care grows. Many are literally surviving now than in the past. We owe it to them and ourselves that they live, not merely exist. The philosophy prevailing in a given society at various stages of its development profoundly influences its social objectives. These objectives are in turn a determinant of a social policy. The law is one of the chief instruments where by the social policies are implemented and ·

"pension is paid according to rules which can be said to provide social security law by which it is meant those legal mechanisms

primarily concerned to ensure the provision for the individual of a cash income adequate, when taken along with the benefits in kind provided by other social services (such as free medical aid) to ensure for him a culturally acceptable minimum standard of living when the normal means of doing so failed".

27. Viewed in the light of the present day notions pension is a term applied to periodic money payments to a person who retires at a certain age considered age of disability; payments usually continue for the rest of the natural life of the recipient. The reasons underlying the grant of pension vary from country to country and from scheme to scheme. But broadly stated they are (1) as compensation to former members of the Armed Forces or their dependents from old age, disability or death (usually from service causes), (ii) as old age retirement or disability benefits for civilian employees, and (iii) as social security payments for the aged, disabled or deceased citizens made in accordance with the rules governing social service programmes of the country. Pensions under the first head are of great antiquity. Under the second head they have been in formed in one form or another countries for over a century but those coming under the third head are relatively of recent origin, though they are of the greatest magnitude. There are other views about pensions such as charity. paternalism, deferred pay, rewards for service rendered, or as a means of promoting general welfare. But these views have become otiose.

28. Pensions to civil employees of the Government and the defence personnel as administered in India appear to be a compensation for service rendered in the past. However, as held in *Douge vs. Board of Education*, a pension is closely akin to wages in that it consists of payment provided by an employer, is paid in consideration of past service and serves the purpose of helping the recipient meet the expenses of living. This appears to be the nearest to our approach to pension with the added qualification that it should ordinarily ensure freedom from undeserved want.

29. Summing up it can be said with confidence that pension is not only compensation for loyal service rendered in the past, but pension also has a broader significance, in that it is a measure of socio-

economic justice which inheres economic security in the fall of life when physical and mental prowess is ebbing corresponding to aging process and, therefore, one is required to fall back on savings. One such saving in kind is when you give your best in the hey-day of life to your employer, in days of invalidity, economic security by way of periodical payment is assured. The term has been judicially defined as a stated allowance or stipend made in consideration of past service or a surrender of rights or emoluments of one retired from service. Thus the pension payable to a government employee is earned by rendering long and efficient service and therefore can be said to be a deferred portion of the compensation or for service rendered. In one sentence one can say that the most practical raison d'etre for pension is the inability to provide for oneself due to old age. One may live and avoid unemployment but not senility and penury if there is nothing to fall back upon."

22. The Hon'ble Supreme Court further in *Kerala State Road Transport Corporation vs. K.O. Varghese and others.* (2003) 12 SCC 293 has considered the concept and object of pension and held as under:

"12. Before we deal with their respective contentions, it is necessary to appreciate the concept of pension. There are different classes of pensions and different conditions govern their grant. It is almost in the nature of deferred compensation for services rendered. There is a definition of pension in Article 366(17) of the Constitution of India, 1950 (in short "the Constitution"), but the definition is not all-pervasive. It is essentially a payment to a person in consideration of past services rendered by him. It is a payment to a person who had rendered services for the employer, when he is almost in the twilight zone of his life.

13. A political society which has a goal to set up a welfare State, would introduce and has, in fact, introduced as a welfare measure wherein ' the retiral benefit is grounded on consideration of State obligation ' to its citizens who having rendered service during the useful span of life must not be left to penury in their old age. But, the evolving concept of social security is a later-day development, and this journey was over a rough terrain. To note only one stage in 1856 a Royal Commission was set up to consider whether changes

were necessary in the system established by the operative 1834 Act. The report of the Commission is known as "Northoote-Trevelyan Report". The report was pungent in its criticism when it says that:

"in civil services comparable to lightness of work and the certainty of provision in case of retirement owing to bodily incapacity, furnish strong inducement to the parents and friends of sickly youth to endeavour to obtain for them employment in the service of the Government, and the extent to which the public are consequently burdened, first with the salaries of officers who are obliged to absent themselves from their duties on account of ill health, and afterwards with their pensions when they retire on the same plea, would hardly be credited by those who have not had opportunities of observing the operation of the system". (See Gerald Rhodes: Public Sector Pensions, pp. 18-19.)

14. This approach is utterly unfair because in modern times public services are manned by those who enter at a comparatively young age, with selection through stiff competitive examinations and ordinarily the best talent gets the opportunity.

15. Let us, therefore, examine; as was done by this Court in *D.S. Nakara v. Union of India* as to what are the goals that any pension scheme seeks to subserve. A pension scheme consistent with available resources must provide that the pensioner would be able to live: (i) free from want with decency, independence and self-respect, and (ii) at a standard equivalent at the preretirement level. This approach may merit the criticism that if a developing country like India cannot provide an employee while rendering service a living wage, how can one be assured of it in retirement? This can be aptly illustrated by a small illustration. A man with a broken arm asked his doctor whether he will be able to play the piano after the cast is removed. When assured that he will, the patient replied, "that is funny, I could not before". It appears that in determining the minimum amount required for living decently is difficult, selecting the percentage representing the proper ratio between earnings and the retirement income is harder. But it is imperative to note that as self-sufficiency declines the need for his

attendance or institutional care grows. Many are literally surviving now than the past. We owe it to them and ourselves that they live, not merely exist. The philosophy prevailing in a given society at various stages of its development profoundly influences its social objectives. The law is one of the chief instruments whereby the social policies are implemented and pension is paid according to rules which can be said to provide social security law by which it is meant those legal mechanisms primarily concerned to ensure the provision for the individual or a cash income adequate, when taken along with the benefit in kind provided by other social services (such as free medical aid) to ensure for him a culturally acceptable minimum standard of living when the normal means of doing so failed. (See Social Security Lawby Prof. Hany Calvert, p. 1.)

16. Viewed in the light of the present-day notions, pension is a term applied to periodic money payments to a person who retires at a certain age considered age of disability; payments usually continue for the rest of the natural life of the recipient. The reasons underlying the grant of pension vary from country to country and from scheme to scheme. But broadly stated they are: (i) as compensation to former members of the armed forces or their dependants for old age, disability, or death (usually from service causes), (ii) as old age retirement or disability benefits for civilian employees, and (iii) as social security payments for the aged, disabled or deceased citizens made in accordance with the rules governing social service programmes of the country. Pensions under the first head are of great antiquity. Under the second head they have been in force in one form or another in some countries for over a century but those coming under the third head are relatively of a recent origin, though they are of the greatest magnitude. , There are other views about pensions ,such as charity, paternalism, deferred pay, reward for service rendered, or as a means of promoting general welfare (see Encyclopaedia Britannica, Vol. 17, p. 575). But these views have become otiose.

17. Pension to civil employees of the Government and the defence personnel as administered in India appear to be a compensation for service rendered in the past. However, as held in *Dodge v.*

*Board of Education* a pension is closely akin to wages in that it consists of payment provided by an employer, is paid in consideration of past service and the purpose of helping the recipient meet the expenses of living. This appears to be the nearest to our approach to pension with the added qualification that it should ordinarily ensure freedom from undeserved want.

18. Summing up, it can be said with confidence that pension is not only compensation for loyal service rendered in the past, but pension also has a broader significance, in that it is. a measure of socio-economic justice which inheres economic security in the foil of life when physical and mental powers start ebbing corresponding to the aging .progress and therefore, one is required to fallback on savings. One such saving in kind is when you gave your best in the heyday of life to your.employer, in days of invalidity, economic security by way of periodical payment is assured. The term has been judicially defined as a stated allowance or stipend made in consideration of past service or a surrender of rights or emoluments to one retired from service. Thus the pension payable to an employee is earned by rendering long and sufficient service and therefore can be said to be a deferred portion of the compensation for service rendered. In one sentence one can say that the most practical raison d'etre for pension is the inability to provide for oneself due to old age. One may live and avoid unemployment but not senility and penury if there is nothing to fall back upon.

19. The discernible purpose thus underlying pension scheme or a statute introducing the pension scheme must inform interpretative process and accordingly it should receive a liberal construction and the courts may not so interpret such statute as to render them obscure (see American Jurisprudence 24.881).

20. From the aforesaid analysis three things emerge: (i) that pension is neither bounty nor a matter of grace depending upon the sweet will of the employer and that it creates a vested right subject to the statute, if any, holding the field, (ii) that the pension is not an ex gratia payment but it is a payment for 'the past service rendered; and (iii) it is a social-welfare measure rendering socio-economic

justice to those who in the heyday of their life ceaselessly toiled for employers on an assurance that in their ripe old age they would not be left in the lurch. It must also be noticed that the quantum of pension is a certain percentage correlated to the emoluments earlier drawn. Its payment is dependent upon an additional condition of impeccable behaviour even subsequent to retirement. That is, since the cessation of the contract of service and that it can be reduced or withdrawn as a disciplinary measure.

21. in Corpus Juris Secundum, Vol. 70, at p. 423, it is stated that the title "pension" includes pecuniary allowances paid periodically by the Government to persons who have rendered services to the public or suffered loss or injury in the public service, or to their representatives; who are entitled to such allowances and rate and amount thereof; and proceedings to obtain and payment of such pensions.

22. In its strict sense a pension is not a matter of contract, and is not founded on any legal liability, it is a mere bounty or gratuity "springing from the appreciation and consciousness of the sovereign", and it may be given or withheld at the discretion of the sovereign. It may be bestowed on such persons and on such terms as the law- making body of the Government prescribes, and it is, at the most, an expectancy granted by the law. The term "pension" has been compared and distinguished from "bonus", "compensation", "profits" and "retirement payment". A pension fund is to be distinguished from an annuity fund derived in part from voluntary contributions under a statutory option to contribute or refrain from contributing.

In *State of Kerala v. M. Padmanabhan Nair* it was observed that pension and gratuity are no longer any bounty to be distributed by the Government to its employees on their retirement but are valuable rights and property in their hands and any culpable delay in settlement and disbursement thereof must be visited with the penalty of payment of interest at the current market rate till actual payment. The view was reiterated in *Uma Agrawal (Dr.) v. State of U.P.*

24.It is to be noted that in certain countries wrongful withholding of pension money has been made a criminal offence and it has been observed in some of the Western countries that the federal statute

making the wrongful withholding of pension money a criminal offence must be strictly construed. The purpose of the statute, it was held, is to protect the pensioner against fraud until the unconditional payment of the money to him.

25. In Halsbury's Law of England, 4th Edn., Reissue, Vol. 16, it has been observed on the subject as follows:

"Pension means, a periodical payment or lump sum by way of pension, gratuity or superannuation allowance as respects which the Secretary of State is satisfied that it is to be paid in accordance with any scheme of arrangement having for its object or one of its objects to make provision in respect of persons serving in particular employments for providing them with retirement, benefits and, except in the case of such a lump sum which had been paid to the employee, that:

(1) the scheme or arrangements is established by. Act of Parliament or of Parliament of Northern Ireland, or other instrument having the force of law, or

(2) the benefits under the scheme or arrangement are secured by an irrecoverable trust which is subject to the laws of any part of the Great Britain; or

(3) the benefits under the scheme or arrangements are secured by a contract of assurance or an annuity contract which is made with:

(a) an insurance company to which the Insurance Companies Act, 1982 applies; or

(b) a registered friendly society; or

(c) an industrial and provident society registered under the Industrial and Provident Societies Act, 1965; or

(4) the benefits under the scheme or arrangement are secured by any regulation or other instrument, not being a regulation or instrument having the force of law, made with the authority of a Minister of the Crown or with the consent of the Treasury for the purpose of authorizing the payment to persons not employed in the

civil service of the State of such pensions, gratuities or other like benefits, as might-have been granted to person so employed; or

(5) the scheme or arrangement is established by an enactment or other instrument having the force of law in any part of the Commonwealth outside the United Kingdom;

and that the provision made to enable benefits to be paid, taking into account any additional resources which could and would be provided by the employer, or any person connected with the employer to meet any deficiency, is adequate to ensure payment in full of such benefits.

'Pension' includes any part of the pension, 'Pension' does not include:

(i) a payment of an employee which consists of solely of a return of his own contributions, with or without interest;

(ii) that part of a payment to an addition which is attributable solely to additional voluntary contributions by that employee made in accordance with the scheme or arrangement;

(iii) a periodical payment or lump sum, insofar as that payment or lump sum represents compensation under statutory compensation scheme and is payable under a statutory provision whether made or passed before, on or after 31-7-1978.

If in any case the Secretary of State is satisfied that benefits under the scheme or arrangement are wholly or mainly provided for the benefit of persons not resident in Great Britain, he may, if he thinks fit and subject to such conditions, if any, as he thinks proper, waive the requirement contained in head (2) above in respect of a scheme or arrangement the benefits under which are secured by an irrecoverable trust or the requirements of heads 3(a), 3(b) or 3(c) above in the case of a scheme or arrangement the benefits under which are secured by a contract of assurance or an annuity contract."

26. In *Union of India v. P.N. Menon* this Court observed that not only in the matters of revising the pensionary benefits, but also in respect of revision of scales of pay a cut-off date on some rational

or reasonable basis has to be and can be fixed for extending the benefits. The cut-off date may be justified on the ground that additional financial outlay is involved or the fact that under the terms of appointment the employee was not entitled to the benefit of the pension on retirement. (See *Union of India v. Lieut.E. lacats.*) Depending upon financial conditions a cut-off date can be fixed when a new pension scheme is being introduced. (See *State of Rajasthan v. Amrit Lal Gandhi.*)"

From the aforesaid judgments of the Hon'ble Supreme Court, it is clear that the pension is a payment for the past services rendered by an employee and for the purpose of rendering service, the employee has to attain the status, which means, an employee has to be appointed in accordance with the provisions of Recruitment Rules.

23. The Division Bench of this Court in *Madhukar Talmale vs. State of M.P. and others.* 2003 (4) MPLJ 282 has held that if the appointment of a work-charged employee is de hors the rules, then his service has to be counted from the date of regularization and not from the date of his initial appointment. The relevant findings of the Division Bench are as under:

"Annexure-II has been apapended to the Schedule to the M.P. Workcharged and Contingency Employees Pay Revision Rules, 1984 as it has been under Rule 3. Under S. No. 3 (B) the post of Time Keeper is mentioned. It stipulates that there would be 100% direct recruitment. It stipulates that incumbent must have passed Higher Secondary, mathematics being one of the subject. As the petitioner was appointed in the year 1983, 1984 Rules would be applicable that governed the field then. The relaxation has been made in exercise of power under Rule 11. A general circular was issued on 13-11-1988 when the petitioner's services had been regularized by taking recourse to Rule 11. If the said Rule is conjointly read with the circular in question, he cannot claim seniority from the date of his initial service in as much as he was appointed de hors to the Rules and therefore, his seniority has to be computed from the date of regularisation. No fallacy or infirmity in the order passed by the Tribunal."

24. On the basis of above discussion, we hold in regard to the substantial questions of law No. 2 and 3 that an employee is eligible to count his past service as qualifying service in accordance with Rule 6 of the Pension Rules,

1979, if he was appointed in accordance with the provisions of Recruitment Rules of 1977. We further hold that an employee, who was not appointed in accordance with the provisions of Recruitment Rules framed by the concerned department i.e. the Recruitment Rules of 1977, would not be eligible to count his past service as qualifying service for the purpose of grant of pension in accordance with the Pension Rules of 1979 and we answer the substantial questions of lawNo. 2 and 3 accordingly.

25. In regard to substantial question of law No.1. Earlier Division Bench of this Court in W.P.No. 1273/2000 *(State of Madhya Pradesh vs. Ramsingh and another)* has held that a daily wager employee would not fall within the definition of work-charged and contingency paid employee, hence his case would not be covered by Madhya Pradesh Work-charged and Contingency Paid Employees Pension Rules, 1979, has not been noticed by the subsequent Division Bench of this Court in *Rahisha Begum vs. State of M.P. and others.* 2010 (4) MPLJ 332. However, in the subsequent case, the Division Bench has held that if an employee comes within the definition of work-charged and contingency paid employee as defined in the Pension Rules of 1979, then he is eligible to count his past service for the purpose of qualifying service in accordance with the Rules of 1979. In our opinion, there is no conflict between the Division Bench judgments, because the findings of the Division Benches are based, on different factual aspects. Accordingly, we answer the substantial question of law No, 1 that there is no conflict of opinion between the two Division Bench judgments. Hence, the decision of the Division Bench in the case of *Rahisha Begum vs. State of M.P. and others,* 2010 (4) MPLJ 332. is not per incuriam. We answer substantial question of law No.1 accordingly.

*Order accordingly.*

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**I.L.R. [2011] M. P., 1838**

**WRIT APPEAL**

***Before Mr. Justice S.N. Aggarwal & Mr. Justice Brij Kishore Dube***

W.A. No. 14/2011 (Gwalior) decided on 30 June, 2011

C.M. VYAS & ors. ...Appellants

Vs.

M.P. HOUSING BOARD & ors. ...Respondents

***A. Constitution, Article 226 - Escalation of price of flat -***

**Additional demand over and above the cost of flat declared in broucher made by Housing Board from allottees - Part of additional demand struck down by Writ Court in writ petition without any reason in the order - Order of Writ Court challenged by Housing Board as well as allottees - Writ Court did not give any reason in support of its conclusion - Matter remanded back to Writ Court.** (Para 3)

क. संविधान, अनुच्छेद 226 – फ्लैट की कीमत की वृद्धि – आंवटितियों से हाउसिंग बोर्ड द्वारा विवरण पुस्तिका में घोषित की गई फ्लैट की कीमत के अलावा अतिरिक्त मांग की गई – रिट न्यायालय द्वारा रिट याचिका में आदेश में बिना कोई कारण दिये अतिरिक्त मांग के भाग को खंडित किया गया – रिट न्यायालय के आदेश को हाउसिंग बोर्ड तथा आवंटितियों द्वारा भी चुनौती दी गई – रिट न्यायालय ने अपने निष्कर्षों के समर्थन में कोई कारण नहीं दिया – रिट न्यायालय को मामला प्रतिप्रेषित।

***B. Constitution, Article 226 - Handing over of possession of flats to allottees* - Additional demand raised by Housing Board - Matter sub-judice before High Court - Allottees ready to give undertaking to meet the additional demand if any, subject to final order of Court - Housing Board is legally obliged to handover possession of flats to the allottees.** (Para 4)

ख. संविधान, अनुच्छेद 226 – आंवटितियों को फ्लैटस् का कब्जा हस्तांतरित किया जाना – हाउसिंग बोर्ड द्वारा अतिरिक्त मांग उठाई गयी – मामला उच्च न्यायालय के समक्ष विचाराधीन – न्यायालय के अंतिम आदेश के आधीन अतिरिक्त मांग, यदि कोई हो तो आवंटिति उसकी पूर्ती करने का परिवचन देने के लिए तैयार है – आंवटितियों को फ्लैटस् का कब्जा हस्तांतरित करने के लिए हाउसिंग बोर्ड विधिक रुप से आबद्ध है।

**Case referred:**

AIR 2010 SC 3607.

*T.C. Singhal, Yogesh Singhal, D.S. Chauhan & R.K. Goyal,* for the appellants.

*K.N. Gupta* with *Sweta Bothra,* for the respondents.

**ORDER**

The Order of the Court was delivered by **S.N. AGGARWAL, J.** :–These are 13 appeals. All these 13 appeals are directed against common order of the writ court dated 24th November 2010 in a bunch of writ petitions filed by the allottees of HIG and MIG flats allotted by

the Madhya Pradesh Housing Board in "Shrimant Madhavrao Scindia Enclave" Darpan Colony, Gwalior Impugned order of the writ court has been assailed both by the M.P.Housing Board as well as by the allottees.

2. Madhya Pradesh Housing Board had constructed 32 HIG and 32 MIG flats in second phase in "Shrimant Madhavrao Scindia Enclave" Darpan Colony, Gwalior. An advertisement was issued by the Housing Board in 2005 for inviting applications from the intended buyers of the flats for their registration for HIG/MIG flats. The tentative cost of HIG flat declared in the broucher was Rs.10.50 lacs and the tentative cost of the MIG flat declared in the broucher was Rs.8.50 lacs. It was mentioned in the broucher that the price of the flats declared therein could be enhanced subsequently on the basis of actual cost. M.P.Housing Board vide its letter dt. 11th July 2007 addressed to the allottees informed them that the cost of the flat, for which they were registered was likely to be enhanced by 15-20% and they were asked to give their consent whether they were willing to pay the enhanced cost by 15-20% over and above what was declared in the broucher. The allottees consented to the said enhancement and this is not disputed by the learned counsel appearing on behalf of the allottees. When the construction of the flats was at advanced state, M.P.Housing Board on 12th August 2008 made a demand of increased cost by increasing the cost of the flats by 20% over and above the price declared in the broucher and this increased demand made from allottees stood paid and this is not disputed by Shri K.N.Gupta, learned senior counsel appearing on behalf of the Housing Board. However, when the construction of the flats in question was completed, the Housing Board made a final demand vide their letter dated 17th July 2009/26th July 2009 from the allottees of HIG and MIG flats and called upon them to make an additional payment of Rs.3,39,175/- and Rs.2,13,219/- respectively by the allottees of the flats. The allottees were aggrieved by the said additional demand made from them by the Housing Board for which they lodged their protest with the Housing Board and thereafter filed several writ petitions to dispute the additional demand made from them by the Housing Board. It is on these writ petitions of the allottees, the impugned order has been passed by the learned Writ Court. Vide its impugned order, learned Writ Court has struck down the demand made by the Housing Board from the allottees on account of parking fee and land premium. However, the other miscellaneous payments like lease rent, maintenance charges, etc. demanded by the Housing Board from the allottees is kept intact.

3. We have gone through the impugned order and have also heard the learned counsel for the parties. Upon going through the impugned order of the writ court, we find that no reasoning has been given by the writ court except referring to a judgment of the Hon'ble Supreme Court in *Nihalchand Lallochand Pvt. Ltd. v. Panchali Co-operative Housing Society Ltd.* AIR 2010 SC 3607 in support of its conclusion justifying demand on account of miscellaneous charges like lease rent, maintenance charges etc. and in holding demand on account of parking fee and land premium to be illegal. We as appellate court can not scrutinize the correctness of the view taken by the writ court in the impugned judgment unless we know the mind of the writ court as to for what reasons a particular demand was held legal and the other demand was held illegal. Though broad reasons were not required to be given but at least some reasons should have been given in the impugned order as to how the judgment of apex court referred therein applies to the facts of the case in hand. We have also gone through the judgment of the Hon'ble Apex Court in *Nihalchand's case* (supra) referred by the writ court in the impugned order and we find that the said judgment of the Hon'ble apex court in *Nihalchand's case* (supra) is based upon review of the previous precedents on the subject regarding justifiability of the allotting authority to make an additional demand over and above what was declared in the broucher. The court while dealing with the facts of a particular case has to see which particular judgment referred as a precedent in the judgment of the apex court in *Nihalchand's case* (supra) will apply to the facts of the case in hand. Since the writ court has not given any reason in support of its conclusion in the impugned order, we deem it appropriate and expedient to remand the case back to the writ court for passing a fresh order on the basis of law applicable to the facts of the case in hand.

4. At this stage, Shri T.C.Singhal, learned counsel appearing on behalf of the allottees has brought to our notice that the Housing Board has not handed over the possession of the flats in question to the allottees despite they have made entire payment as per first increase i.e. the cost of the flat declared in the broucher including 20% increase on the said cost demanded by the Housing Board vide its letter dated 12th August 2008. The learned counsel appearing on behalf of the allottees submits that the Housing Board may be directed to hand over the possession of the flats in question to the allottees as they are suffering a great prejudice in not enjoying the fruits of the flats, for which they have already paid. The learned counsel appearing on behalf of the allottees further submits that the allottees are ready and willing to

give an undertaking to the court that in the event of their loosing court case in regard to additional demand under challenge, they shall indemnify the Housing Board by making such payment as may be directed by the court at the time of final disposal without any protest or demur. Shri K.N.Gupta, learned senior counsel appearing on behalf of the Housing Board says that in case such an undertaking is given by the allottees, the Housing Board has no objection in handing over of possession of flats to the allottees. De-hors this concession given by the learned senior counsel for the Housing Board, we are otherwise of the view that since the allottees have already made payment of the cost of the flats to the Housing Board in terms of their demand letter dated 12th August 2008, the Housing Board can not withheld the handing over of possession of the flats to the allottees only on the ground that there exists a dispute between the allottees and the Housing Board regarding additional demand made under challenge vide letter dated 17th July 2009/26th July 2009.

5. The counsel on both the sides i.e. counsel for the allottees and the learned senior counsel for the Housing Board have at this stage agreed for passing of a consent order and therefore we dispose of all these appeals by a consent order in terms of consent given by the learned counsel for the parties in the following manner:

(i) The orders of the writ court impugned in these appeals are hereby set aside. The cases are remanded back to the writ court for fresh decision in accordance with law. The parties shall appear before the writ court for directions on 20th July 2011.

(ii) The allottees of HIG and MIG flats shall file an undertaking in the court by way of their affidavits within four weeks from today that in the event of dismissal of their challenge to the additional demand they shall indemnify the Housing Board by making such additional payment as may be finally directed by the court within such time as may be given to them at the time of final decision of the case. The allottees shall also mention in their undertaking that they shall make additional payment in terms of the court order without any protest or demur. A copy of the said undertaking shall also be supplied by the allottees to the Housing Board or its counsel.

(iii) Upon an undertaking in terms of Clause ii herein is filed

by the allottees, the Housing Board shall hand over possession of the flats in question to the allottees within four weeks of receipt of copy of undertaking by it.

(iv) In case any payment is found outstanding against any of the allottee in terms of demand letter of the Housing Board dated 12th August 2008, such an allottee shall not be entitled to possession of the flat unless the payment in terms of said demand is first made by him.

All these appeals stand disposed of in terms referred above. A copy of this order be kept in the files of all the appeals which have been disposed of by this common order.

*Appeal disposed of.*

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**I.L.R. [2011] M. P., 1843**
**WRIT PETITION**
***Before Mr. S.R. Alam, Chief Justice***
W.P. No.11208/2003 (Jabalpur) decided on 31 January, 2011

MAHENDRA KUMAR MISHRA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

*A.* ***Service Law - Promotion - Merit cum Seniority*** **- Principle of Merit cum Seniority lays greater emphasis on merit and ability and seniority plays a less significant role - Seniority is to be given weight only when merit and ability are approximately equal.** (Para 11)

क. सेवा विधि – पदोन्नति – योग्यता सह ज्येष्ठता – योग्यता सह ज्येष्ठता का सिद्धांत योग्यता एवं सामर्थ्य पर अधिक बल देता है और ज्येष्ठता कम महत्व की भूमिका अदा करती है – ज्येष्ठता को केवल तभी महत्व देना होता है जब योग्यता एवं सामर्थ्य लगभग एक समान होते हैं।

*B.* ***Service Law - Promotion - Right*** **- An employee cannot claim promotion as a matter of right - At the most he is entitled only to be considered for such promotion.** (Para 12)

ख. सेवा विधि – पदोन्नति – अधिकार – कर्मचारी अधिकार के रुप में पदोन्नति का दावा नहीं कर सकता – ऐसी पदोन्नति हेतु केवल विचार किये जाने के लिए वह हकदार है।

*C. Service Law - Promotion* - **Petitioner was considered by duly constituted D.P.C. but was not recommended due to his service record - When subsequently his service record was improved, he was recommended by D.P.C. and was consequently promoted - Petition *dismissed.*** (Para 13)

ग. सेवा विधि – पदोन्नति – सम्यक् रुप से गठित डी.पी.सी. द्वारा याची का विचार किया गया परन्तु उसके सेवा अभिलेख के कारण अभिशंसा नहीं की गई – तत्पश्चात जब उसका सेवा अभिलेख सुधर गया, उसकी डी.पी.सी. द्वारा अभिशंसा की गई और परिणामस्वरुप पदोन्नत किया गया – याचिका खारिज।

**Cases referred:**

AIR 1988 SC 2565, AIR 1986 SC 1035, (1991) 2 SCC 295.

*None,* for the petitioner.

*Sanjay Dwivedi,* G.A. for the respondents/State.

**ORDER**

**S.R. ALAM, CHIEF JUSTICE,** :– The writ petition is called out, however, none responded on behalf of the petitioner, despite the name of the learned counsel for the petitioner being reflected in the daily cause list.

2. However, Shri Sanjay Dwivedi, learned Govt. Advocate on behalf of the State-respondents is present.

3. I have perused the record.

4. The present petition was filed before the State Administrative Tribunal Jabalpur Bench and was registered as O.A. No.544/1997, however, after abolition of the Administrative Tribunal the same was registered in this Court as W.P.No.11208/2003.

5. The sole petitioner has sought for quashing of the order of the respondent No.2 dated 12-2-1997 whereby his representation for giving seniority as Office Superintendent with effect from 1-6-1989 and to place him above the respondents No.3 and 4 has been rejected. A further prayer is made to command the respondents No.1 and 2 to consider his case for promotion to the post of Joint Registrar in view of the Tribunal's order dated 2-12-1996 passed in O.A. No.2835/1995. Besides, to give him all benefits including differences of salary treating him as Office Superintendent with effect from 1-6-1989 and as Joint Registrar with effect from 1-6-1992.

6. It appears that the petitioner was appointed as Lower Division Clerk (LDC) on 3-5-1966 in the Agricultural Department, however, his service was transferred to the Excise Department on 20-3-1970, thereafter to the Labour Department on 30th November, 1970.

7. The petitioner, accordingly joined on Budhar Labour Court on 1-12-1970. He was thereafter promoted as Head Clerk on 17-01-1978 and was confirmed on 8-5-1980. Whereas the respondents No.3 and 4 on whom the petitioner is claiming seniority was promoted as Head Clerk in the years 1983 and 1984 respectively. The petitioner, therefore, has claimed that since both the respondents No.3 and 4 are juniors to him as Upper Division Clerk (UDC) which is also reflected in the gradation list of 1985, he should have been placed above them and further ought to have been given promotion to the post of Office Superintendent which fell vacant in the year 1989. But, the Department ignoring his claim and seniority promoted one Smt. Nalini Desai as Office Superintendent, however, Smt. Nalini Desai has not been impleaded as respondent in this petition. It has further been alleged that the petitioner protested before the Chairman, State Industrial Court against the promotion of Smt. Nalini Desai. It appears that thereafter in the year 1991 the respondents No.3 and 4 were given officiating promotion as Accountant and Office Superintendent, who were junior to the petitioner. In the gradation list published in the year 1992, the name of the respondent No.4 was shown in the cadre of Office Superintendent whereas the respondent No.3 was in the cadre of Accountant, but the name of the petitioner was shown in the cadre of Head Clerk at Sr. No.3. The petitioner being aggrieved represented his case by making a representation on 30-10-1996. Thereafter, he again sent reminder on 24-01-1997 which has been rejected by the impugned order dated 12-2-1997. It has been alleged in the petition that the Department promoted the respondents No.3 and 4, who are junior to the petitioner without holding a proper DPC and the entire action of the respondents No.1 and 2 promoting the respondents No.3 and 4 is arbitrary, discriminatory and hence, liable to be set aside.

8. On the other hand, respondents No.1 and 2 have filed return stating therein that the criteria for promotion is merit-cum-seniority and not seniority-cum-merit as has been alleged by the petitioner. A copy of the rules have been enclosed as Annexure-R/1. A perusal thereof indicates that the promotion to the post of Office Superintendent is to be given on the basis of merit-cum-seniority. It has further been averred in the return that the petitioner's case along with others was considered for promotion in the year 1989 and again in

the years 1990 and 1991 along with all other eligible candidates. However, since he was not found fit he was not promoted. It has further been stated that in the year 1996 when he was found fit for promotion by the DPC, he was given promotion from that date. The contention that the promotion is to be given on seniority has been denied and it has been asserted that all eligible persons including the petitioner were considered by the DPC and only those employees whose records were found better in comparison to others were considered and given promotion. It has further been stated that service record of the petitioner was not as good as that of the respondents No.3 and 4 and, therefore, his grievance that they have been promoted without considering his claim is misconceived and deserves to be rejected.

9. The aforesaid averments in the return have not been controverted or denied by the petitioner by giving rejoinder and thus, the fact that his claim for promotion was also considered along with other eligible candidates in the year 1989 and thereafter in 1990 and 1991 goes uncontroverted. The assertion in the return that the record of the respondents No.3 and 4 are better than the petitioner also goes uncontroverted in the absence of rejoinder.

10. The respondents in the return have stated that criteria for promotion to the post of Superintendent is merit-cum-seniority and not seniority-cum-merit as has been claimed by the petitioner. A copy of the Schedule II of Rule 6 of the Madhya Pradesh Labour Service (Class III Non-Gazetted) Recruitment Rules, 1966 is enclosed as Annexure-R-I which lays down the criteria for promotion to the post of Superintendent. It provides that 100% posts are to be filled-up by promotion on the basis of merit-cum-seniority. Therefore, the criteria for promotion being merit-cum-seniority the respondents No.3 and 4 having been found more meritorious in comparison to the petitioner there can be no exception to the order promoting them. When the rule provides that promotion is to be given on the basis of merit-cum-seniority then merit plays dominant role and if a person though is senior but he is found less meritorious cannot insist that promotion should be give only on the basis of his seniority.

11. The apex Court in *B.V. Sivaiah and others etc. vs. K. Addanki Babu and others, etc.*, AIR 1998 SC 2565 while considering the principle principle of `merit-cum-seniority' in paragraph 9 of the judgment observed that the principle of `merit-cum-seniority' lays greater emphasis on merit and ability and seniority plays a less significant role. Seniority is to be given weight only when merit and ability are approximately equal.

12. However, there is another aspect of the matter; promotion is not a matter of right. It is well settled legal proposition that an employee cannot claim promotion as a matter of right and at the most he is entitled only to be considered for such promotion. Reference may be made to *Indravadan H. Shah Vs. State of Gujrat & another,* AIR 1986 SC 1035 and *Director, Lift Irrigation Corporation Ltd. and others vs. Pravat Kiran Mohanty and others,* (1991) 2 SCC 295.

13. In the case in hand, it is an admitted position that the claim of promotion of the petitioner was considered by the duly constituted DPC, however, because of his service record he was not recommended. However, when subsequently his service record was improved the DPC recommended his promotion and consequently he was promoted with effect from 1996.

14. Thus, in my view the petitioner has failed to make out a case for grant of relief sought in this petition. Consequently, the writ petition being devoid of merit, is dismissed but without costs.

*Petition dismissed.*

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**I.L.R. [2011] M. P., 1847**
**WRIT PETITION**
***Before Mr. Justice Ajit Singh & Mr. Justice Sanjay Yadav***
W.P. No.1925/2010(S) (Jabalpur) decided on 14 February, 2011

RAKESH YADAV ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

*A. **Service Law - Appointment - Higher Education in Computer*** - **Means such a degree in which Computer is the exclusive or the main subject and not a graduate degree of Commerce, Arts or Science where Computer Science is one of the subjects.** (Para 9)

क. सेवा विधि –नियुक्ति – कम्प्यूटर में उच्चतर शिक्षा – का अर्थ ऐसी उपाधि/डिग्री जिसमें कम्प्यूटर अनन्य अथवा प्रमुख विषय है और वाणिज्य, कला अथवा विज्ञान की स्नातक उपाधि नहीं है जिसमें कम्प्यूटर विज्ञान एक विषय है।

*B. **Service Law -Appointment - Refusal by Government to appoint selected candidates*** - **Petitioners graduate in Commerce (B.Com.), Arts (B.A.) or Science (B.Sc.) with Computer as one of the subjects - They appeared in the examination and were declared selected -**

**But the State Government has declined to appoint them on the ground that they did not possess the minimum educational qualification - Held - The petitioners who do not satisfy the educational qualification as laid in the advertisement, are not elgibile for appointment - Petition dismissed.** (Paras 3 & 13)

ख. सेवा विधि –नियुक्ति – सरकार द्वारा चयनित अभ्यर्थियों को नियुक्त करने से इंकार – याचीगण वाणिज्य (बी.काम.), कला (बी.ए.), या विज्ञान (बी.एससी.) जिसमें कम्प्यूटर विषयों में से एक विषय के रुप में स्नातक हैं – वे परीक्षा में सम्मिलित हुए तथा चयनित घोषित किये गये – परन्तु राज्य सरकार ने उन्हें नियुक्त करने से इंकार कर दिया इस आधार पर कि वे न्यूनतम शैक्षणिक अर्हता नहीं रखते – अभिनिर्धारित – जो याचीगण विज्ञापन में निर्धारित की गई शैक्षणिक अर्हता को पूरा नहीं करते वे नियुक्ति के लिए हकदार नहीं है – याचिका खारिज।

**Case referred :**

(2007) 5 SCC 519.

**ORDER**

The Order of the Court was delivered by

AJIT SINGH, J. :– All these writ petitions are being disposed of by this common order as they are similar in nature and were heard together.

2. The Madhya Pradesh Professional Examination Board issued an advertisement inviting applications for appointment of Patwaris. The appointment was to be made after passing of candidates in a written examination. The advertisement mentioned the requisite qualifications meant for eligibility for examination. Clause 1.8 of Chapter I of the advertisement stated the educational qualifications. According to this clause the candidate appearing for the post of Patwari must have passed Higher Secondary or High School (10+2) examination and must also possess '0' Level Certification from DOEACC/IETE or one year Diploma in Computer Application (DCA) from an institute run by a registered/recognized/affiliated with the University recognized by the UGC or higher education in computer.

3. The petitioners in all the petitions are graduate in Commerce (B.Com.), Arts (B.A.) or Science (B.Sc.) with Computer as one of the subjects. They had appeared in the examination and were declared selected. But the State Government has declined to appoint them on the ground that they did not possess the minimum educational qualification. The submission of petitioners is that since they have passed higher education in Computer while doing the

graduate course, the action of the State Government in not appointing them on the post of Patwari is illegal and arbitrary.

4. The stand of the State Government on the other hand is that the petitioners are merely graduate in Commerce, Arts and Science with Computer Science as one of the subjects and, therefore, they are not eligible. Reason and justification for the same are also given in the return filed by the State Government.

5. During the course of hearing of Writ Petition No.1925/2010(s) before Hon'ble Rajendra Menon,J.: at Jabalpur an order dated 22.11.2010 passed in Writ Petition No.1622/2010(s) by a learned Single Judge of the Indore Bench was produced where a petitioner who had passed B.Sc. degree with Computer Science as one of the subjects has been held eligible. Menon, J. found that there was no discussion in that order as to how the qualification prescribed in the advertisement and the qualification acquired by the candidate i.e. B.Sc. with Computer Science as one of the subjects is equivalent or permissible to be in conformity with the advertisement. He also took note of the fact that the order did not deal with the stand taken by the State Government in the return regarding ineligibility of the candidates having graduated in Commerce, Arts or Science with Computer Science as one of the subjects. The learned Judge felt the question as to whether the qualification prescribed in the advertisement can be said to be fulfilled by a candidate who is graduate in Commerce, Arts or Science with Computer Science as one of the subjects, an important one, and directed the matter to be placed before Honourable the Chief justice for its decision by a Division Bench. This is how Writ Petition No. 1925/2010 along with above mentioned connected writ petitions have been referred to us.

6. The educational qualification for appointment to the post of Patwari provided in Clause 1.8 of the advertisement is as follows:

> 1.8. शैक्षणिक योग्यता :
>
> हायर सेकंड्री या हाईस्कूल (10+2) उत्तीर्ण होना अनिवार्य है साथ ही 'O' Level certification from/DOEACC/IETE या UGC से मान्यता प्राप्त विश्वविद्यालय द्वारा संचालित/पंजीकृत/मान्यता प्राप्त/ सम्बद्ध संस्था से 1 वर्षीय कम्प्यूटर डिप्लोमा (DCA) या कम्प्यूटर में उच्च शिक्षा प्राप्त होना चाहिये ।

A Division Bench of this Court has translated it in Writ Petition No.8802/2009 as under:

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

7. There is no difficulty in understanding the educational qualification that candidate must have passed Higher Secondary or High School (10+2) examination and also must possess '0' Level Certification from DOEACC/ IETE or one year Diploma in computer application from an institution run by a registered/recognized/affitiated with the University recognized by the UGC. The difficulty arises in the alternative for '0' level certification or diploma in computer application provided by the words "or higher education in Computer".

8. The argument of the petitioners which has found favour with the Indore Bench is that where a person has passed B.Sc. degree with Computer Science as one of the subjects it also satisfies the required alternative qualification of higher education in Computer. The submission on behalf of the State Government is that higher education in Computer means one has to have a Computer degree in the field of Computer. It is also submitted that where merely one of the subjects has been Computer Application in a graduate course, the candidate cannot be said to possess higher education in the field of Computer.

9. It is a matter of common knowledge that knowledge of Computer has become so important that even in schools Computer is one of the subjects. But higher education in Computer above '0' Level Certification from DOEACC/ IETE or Diploma course in our opinion must mean as the State Government submits, a higher degree in Computer exclusively and not a degree in some other subjects in which Computer is one of the subjects taught. The intention in prescribing higher education in Computer in the context of '0' Level Certification from DOEACC/IETE or Diploma as the minimum qualification shows that the object is to appoint persons who are well versed in Computer technology. Higher education in Computer, therefore, means such a degree in which Computer is the exclusive or the main subject and not a graduate degree of Commerce, Arts or Science where Computer Science is one of the subjects.

10. Our this view also finds support from the decision of the Supreme Court in *Bihar Public Service Commission v. Kamini,* (2007) 5 SCC 519. In that case, respondent Kamini had passed her B.Sc. (Hons.) in the year 1989 in Chemistry with Zoology. Her main subject in B.Sc. degree was Chemistry along with Zoology and Botany as subsidiary subjects. An advertisement was issued on 21.12.1999 by the Public Service Commission inviting applications from eligible candidates for appointment to the post of District Fisheries Officer. It was stated therein that the candidate must have qualifications of B.Sc., Zoology with a two years' diploma in Fisheries Science from Central Institute of Fisheries Education, Mumbai, or a graduate degree in Fisheries Science (BFSC) from a recognised university or M.Sc. (Inland Fisheries Administration and Management) with Zoology from the Central Institute of Fisheries Education, Mumbai. The respondent was called for interview and at that time on closer scrutiny of the mark sheet, it was found that she was not having Honours degree in Zoology. The Commission, therefore, rejected her candidature. Aggrieved, she filed a petition in the High Court which was dismissed by the Single Bench. Her Letters Patent Appeal was, however, allowed by the Division Bench. The Commission challenged the order of Division Bench in the Supreme Court which set aside the order on the ground that respondent had passed B.Sc. with Chemistry as principal subject and Zoology as subsidiary subject and, therefore, she cannot be held qualified for the post advertised.

11. Even otherwise, the question of equivalence of qualifications is a technical matter and it should be presumed that the State Government in not accepting a particular qualification as equivalent to the prescribed has acted on expert advise and, therefore, the State Government's opinion cannot be lightly interfered with.

12. The case decided by the Indore Bench does not refer to the submission made by the State Government as rightly pointed out by the learned Single Judge referring the matter to the Division Bench for decision. After analyzing the order dated 22.11.2010 passed in Writ Petition No.1622/2010(s) at Indore Bench and submission made by the State Government we accept the meaning of higher education in Computer as submitted by the State Government.

13. We, therefore, do not agree with the submissions made by the petitioners. In our opinion the petitioners who do not hold '0' level certification from

DOEACC/IETE or one year diploma in Computer application or higher education in Computer as explained by us above do not satisfy the educational qualification as laid in the advertisement. They are, therefore, not eligible for appointment as Patwari.

14. The petitioners of Writ Petition No. 1925/2010 by referring to Annexure RJ-1 have averred that at least three candidates Sangeeta, Sirdha Mangal and Asha Rajendra Kumar named therein who had passed B.Sc. with Computer as one of the subjects have been appointed on the post of Patwari and, therefore, they should also be treated equally. In reply, the learned Government Advocate submitted that although he is not aware of any such appointments and even if some appointments have wrongly been made, the State Government shall review them. On examining Annexure RJ-1 we find that it is only a list of selected candidates from which no inference can be drawn that the names of candidates occurring therein, particularly Sangeeta, Sirdha Mangal and Asha Rajendra Kumar have, in fact, been issued appointment orders. Moreover, it is well settled that misconstruction of a provision of law in one case does not give rise to a similar misconstruction in other cases on the basis of doctrine of equality and an illegality cannot be allowed to be perpetuated under the so-called "equality doctrine".

15. For these reasons, the petitions fail and are accordingly dismissed.

*Petition dismissed.*

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**I.L.R. [2011] M. P., 1852**
**WRIT PETITION**
***Before Mr. S.R. Alam, Chief Justice & Mr. Justice R.S. Jha***
W.P. No. 2227/2011 (Jabalpur) decided on 17 February, 2011

VIKASH SHUKLA ...Petitioner
Vs.
HIGH COURT OF MADHYA PRADESH ...Respondent

***A. Lower Judicial Service (Recruitment and Conditions of Service) Rules, M.P. 1994 - Rule 4 and 6* - Unfilled posts reserved for S.T. category - Petitioner appeared in examination for selection and appointment on the post of Civil Judge Class II as general candidate - He was placed at serial No. 3 of waiting list - 9 posts reserved for S.T. category remained unfilled - Petitioner cannot be given appointment against the post reserved for S.T. Category - Petition dismissed.** (Para 8)

क. निम्नतर न्यायिक सेवा (सेवा भर्ती एवं शर्तें) नियम म.प्र. 1994 – नियम 4 व 6 – एस.टी. श्रेणी के लिए आरक्षित पदों का न भरा जाना – याची सामान्य वर्ग के अभ्यर्थी के रुप में सिविल जज वर्ग–II के पद पर चयन एवं नियुक्ति हेतु परीक्षा में सम्मिलित हुआ – उसे प्रतिक्षा सूची में अनुक्रमांक 3 पर रखा गया – एस. टी. वर्ग के लिए आरक्षित 9 पद नहीं भरे गये – एस.टी. वर्ग के लिए आरक्षित पद पर याची को नियुक्ति नहीं दी जा सकती – याचिका खारिज।

***B. Lower Judicial Service (Recruitment and Conditions of Service) Rules, M.P. 1994 -Rule 4, 6 -*** **Uchchtar Nyayik Seva (Bharti Tatha Seva Sharten) Niyam, M.P., 1994, Rule 6, Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Aur Anya Pichhade Vargon Ke liye Arakshan) Adhiniyam, M.P., 1994, Section 3 - Rule 6 of Niyam 1994 provides that the post meant for reserved category if not filled up on account of non-availability of eligible candidate, the same shall be treated as unreserved and the same would be filled up from amongst the general category candidates - Petitioner cannot claim parity in view of the clear provisions of Niyam, 1994 and clear exclusion under Section 3 of Act, 1994.** (Para 12)

ख. निम्नतर न्यायिक सेवा (सेवा भर्ती एवं शर्तें) नियम म.प्र. 1994 – नियम 4 व 6 – उच्चतर न्यायिक सेवा (भर्ती तथा सेवा शर्तें) नियम, म.प्र., 1994, नियम 6, लोक सेवा (अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्गों के लिए आरक्षण) अधिनियम, म.प्र., 1994, धारा 3 – नियम 1994 का नियम 6 उपबंधित करता है कि योग्य अभ्यर्थी की अनुपलब्धता के कारण यदि आरक्षित श्रेणी के पद को नहीं भरा जाता है, तो उसे अनारक्षित समझा जाएगा और उसे सामान्य श्रेणी के अभ्यर्थियों में से भरा जाएगा – नियम 1994 के उपबंधों को और अधिनियम 1994 की धारा 3 के अंतर्गत स्पष्ट अपवर्जन को दृष्टिगत रखते हुए याची समतुल्यता का दावा नहीं कर सकता।

*Aditya Sanghi,* for the petitioner.

*Ashish Shroti,* for the respondent.

## ORDER

The Order of the Court was delivered by **S.R. ALAM, CHIEF JUSTICE.** :–Heard on the question of admission.

2. In the instant writ petition filed under Article 226 of the Constitution of India, the petitioner come up for issuance of a writ of mandamus commanding the respondent to appoint the petitioner on the post of Civil Judge Class-II as per his merit against the post reserved for the Scheduled Tribe category as 9 posts reserved for the Scheduled Tribe category candidates are lying vacant on account of non-availability of candidates belonging to that category.

3. Facts giving rise to filing of the instant writ petition briefly stated are that the petitioner is an advocate of this Court and practicing since 2007. He appeared in the examination for selection and appointment on the post of Civil Judge Class-II in the year 2010. The petitioner was placed at Serial No. 3 of the waiting list, therefore, not being in the main list, he was not given appointment. It. appears that 9 posts, which were reserved for Scheduled Tribe category candidates could not be filled up on account of non-availability of Scheduled Tribe candidates. It is submitted by the petitioner that these 9 posts reserved for Scheduled Tribe candidates which are lying vacant may be directed to be filled up from amongst the selected and wait-listed candidates belonging to the general category. Learned counsel for the petitioner, vehemently, contended that since the petitioner is at Serial No. 3 of the waiting list, he may be considered and given appointment against the aforesaid 9 posts which are lying vacant.

4. On the other hand, the learned counsel appearing on behalf of the respondent opposed the prayer and submitted that the appointment and selection of Civil Judge Class-II is governed by the provisions of the M.P. Lower Judicial Service (Recruitment and Conditions of Service) Rules, 1994 (hereinafter referred to as the Rules of 1994 for brevity) and as there is no provision in the rules to de-reserve or fill up vacant seats of the reserved categories by general category candidates in the event a qualified candidate of the reserved category is not available, no writ can be issued.

5. We have considered the submissions of the learned counsel for the parties.

6. The selection to the post of Civil Judge Class-II is made in accordance with the provision of Rule 6 of the Rules of 1994. Rule 6 of the aforesaid Rules of 1994 provides for reservation as per Madhya Pradesh Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Aur Anya Pichhade Vargon Ke Liye Arakshan) Adhiniyam, 1994 (hereinafter referred to as the Act of 1994 for short). For ready reference Rule 6 is extracted hereinafter :-

> ***"6. Reservation of Posts for Scheduled Castes, Scheduled Tribes and Other Backward Classes.-*** *Posts for direct recruitment shall be reserved for the candidates belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes in accordance with the provisions of the Madhya Pradesh Lok Seva (Anusuchit*

*Jatiyon, Anusuchit Jan jatiyon Aur Anya Pichhade Vargaon Ke Liye Arakshan) Adhiniyam, 1994 (No .21 of 1994)."*

7. Thus, reservation in respect of appointment to the post of Civil Judge Class-II is to be governed by the Act of 1994. Section 4 of the Act of 1994 provides as under :.-

***"4. Fixation of percentage for reservation of posts and standard of evaluation.-****(1) Unless otherwise provided by or under this act, the posts reserved for the members of Scheduled Castes or Scheduled Tribes or other Backward Classes shall not be filled by the members who do not belong to such castes or tribes or classes as the case may be.*

*(2) Subject to other provisions of this Act there shall be reserved for the persons belonging to the Scheduled Castes, Scheduled Tribes and other Backward Classes, at the stage of direct recruitment in public service and posts.*

(i) *at the State level, the following percentage of vacancies arising in a recruitment year, in class I, II, III and IV posts -*

*(a) in class I and II posts-*

| | |
|---|---|
| *Scheduled Castes* | *16 percent* |
| *Scheduled Tribes* | *20 percent* |
| *Other Backward Classes* | *14 percent* |

*(b) Class III and Class IV posts-*

| | |
|---|---|
| *Scheduled Castes* | *16 percent* |
| *Scheduled Tribes* | *20 percent* |
| *Other Backward Classes* | *14 percent* |

*(ii) in an establishment at the Divisional or District level the percentage of vacancies arising in a Recruitment year in such categories of Class III and Class IV posts as may be notified by the State Government in this behalf.*

*(iii) the appointments to vacancies as aforesaid in (1) and (ii), shall be made in accordance with a roster as may be prescribed:*

*Provided that the aforesaid reservation shall not apply*

*to such categories of persons belonging to the other Backward Classes as are notified by the State Government as belonging to the creamy layer from time to time.*

*(3) (a) If in respect of any recruitment year any vacancy reserved for any category of persons under sub-section (2) remains unfilled, such vacancy shall be carried forward to be filled up in the next or a subsequent recruitment year.*

*(b) When a vacancy is carried forward in the manner aforesaid it shall not be counted against the quota of the vacancies reserved for the concerned category of persons for the recruitment year to which it is carried forward:*

*Provided that the appointing authority may at any time undertake a special recruitment to fill up such unfilled vacancy and if such vacancy remains unfilled even after such special recruitment it shall be filled up in the manner as the State Government may prescribe.*

*(c ) Wherever the reserved vacancies for Scheduled Castes and Scheduled Tribes in all cases of direct recruitment or promotion have remained unfilled in the earlier year or years, the backlog and/or carried forward vacancies would be treated as a separate distinct group and will not be considered together with the reserved vacancies of the year in which they are being filled up for determining the ceiling of fifty percent reservation on total number of vacancies of that year. In other words, the ceiling of fifty percent on filling up of reserved vacancies would apply only on the reserved vacancies which arise in the current year and the backlog/carried forward reserved vacancies for Scheduled Castes or Scheduled Tribes of earlier year or years would be treated as a separate and distinct group and would not be subject to ceiling of fifty percent:*

*Provided that the appointing authority may at any time undertake a special recruitment to fill up such unfilled vacancies and if such vacancies remain unfilled, it shall not be de-reserved in any manner for filling up by the person not belonging to the category for whom the post or posts are reserved.*

*(4) If a person belonging to any of the categories mentioned in sub-section (2) gets selected on the basis of merit in an open competition with general candidates, he shall not be adjusted against the vacancies reserved for such category under sub-section (2).*

*(4-A) The State Government may by general or special order make any provisions in favour of the members of the Scheduled Castes and the Scheduled Tribes, for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of recruitment and promotion to any class or classes or services or posts in connection with the affairs of the State.*

*(5) If, on the date of commencement of this Act, reservation was in force under Government orders for appointment to post to be filled by promotion, such Government orders shall continue to be applicable till they are modified or revoked.*

*(5-A)The State Government may make rules or issue any instructions in the matters of promotion with consequential seniority to any class or classes of posts in the Civil Services of the State in favour of the Scheduled Castes and the Scheduled Tribes."*

8. A perusal of the aforesaid provision specifically Section 4(3) (a), 4(3) (b) and the proviso thereto clearly reveals that if the post meant for reserved category in respect of any recruitment year remains unfilled, it shall be carried forward to be filled up in the next or subsequent recruitment year and shall not be counted against the quota reserved for the reserved category of the recruitment year to which it is carried forward, provided that the authority may take up special recruitment to fill up such unfilled posts and only in case they still remain unfilled can they be filled up in the manner prescribed by the State Government. A perusal of the section makes it further clear that the vacancies cannot be filled up by the candidates who do not belong to such castes or tribes or classes except in the manner prescribed by the State in the eventualities mentioned in the proviso to Section 3(b) of Section 4.

9. Thus, in view of the clear bar as provided in Section 4 of the Act of 1994, we are afraid that the relief sought for in the instant writ petition cannot be granted in the facts and circumstances of this case.

10. At this stage, the learned counsel for the petitioner further submitted that in respect of Higher Judicial Services, the posts belonging to the reserved category, that remained vacant in the past were allowed to be filled up from amongst the candidates belonging to the general category. We do not find any force in the submission of the learned counsel for the petitioner in view of the distinct and different provisions of law governing the two services.

11. A perusal of the provision of Section 3 of the Act makes it clear that it does not apply to appointments made to the Madhya Pradesh Higher Judicial Services. Further, Rule 6 of Madhya Pradesh Uchchtar Nyayik Seva (Bharti Tatha Seva Sharten) Niyam, 1994 provides that in the event the posts belonging to reserved category remain unfilled, they can be filled up from amongst general category candidates. Rule 6 of the aforesaid Rules of 1994 reads as under :-

> *"6. **Reservation of posts for Schedule Castes/Scheduled Tribes, and Other Backward Classes** .-15%, 18% and 14% of posts for direct recruitment shall respectively be reserved for the candidates who are members of the Schedule Castes, Scheduled Tribes and Other Backward Classes respectively :*
>
> *Provided that if sufficient number of candidates belonging to Schedule Castes/Scheduled Tribes & Other Backward Classes are not available, such posts shall be treated as "unreserved".*

12. Thus, it is clear that the proviso of the aforesaid Rule 6 of the Higher Judicial Service Rules, provides that the post meant for the reserved category candidate if not filled up on account of non-availability of eligible candidate, the same shall be treated as unreserved and, thus, the same would be filled up from amongst the general category candidates. Therefore, in view of the clear provisions of the Higher Judicial Services Rules and also in view of the clear exclusion under Section 3 of the Act of 1994, the parity claimed by the petitioner is misconceived and misplaced and no relief on that ground can be granted.

13. In view of the aforesaid, the petition being devoid of merit stands dismissed.

*Petition dismissed.*

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**I.L.R. [2011] M. P., 1859**
**WRIT PETITION**
***Before Mr. Justice A.K. Shrivastava***
W.P. No. 1354/2010 (Jabalpur) decided on 28 February, 2011

SANJAY GOLHANI ...Petitioner
Vs.
STATE GOVT. OF M.P. & ors. ...Respondents

*A. **Police Regulations, M.P. - Rule 855 - Surveillance** -* **No material disclosed in the order of Surveillance - Action of putting petitioner under surveillance not in consonance to the provision.** (Para 8)

क. पुलिस विनियम, म.प्र. – नियम 855 – निगरानी – निगरानी के आदेश में कोई तत्व प्रकट नहीं किया गया – याची को निगरानी के अधीन रखने की कार्यवाही उपबंध के अनुरुप नहीं।

*B. **Police Regulations, M.P. - Rule 857 - Surveillance - Duration*** **-Surveillance should be for a shorter duration - However, period not mentioned in the order - Order cannot be allowed to stand.** (Para 9)

ख. पुलिस विनियम, म.प्र. – नियम 857 – निगरानी – कालावधि – निगरानी अल्प कालावधि के लिए होनी चाहिए – किन्तु, आदेश में अवधि उल्लिखित नहीं – आदेश को कायम नहीं रखा जा सकता।

**Cases referred:**

1995 (II) MPWN 138, AIR 1981 SC 613.

*Wakeel Khan,* for the petitioner.
*Puneet Shroti,* PL for the respondents.

**ORDER**

**A.K. SHRIVASTAVA, J. :**–By filing this petition under Article 226 of the Constitution of India, the petitioner is challenging the validity and pregnability of the impugned order Annexure P/1 dated 2.8.09 whereby by taking aid of Rule 855 of the M.P. Police Regulations, the petitioner has been made pivot of surveillance.

2. The contention of learned counsel for the petitioner is that before passing such order by the Superintendent of Police by taking aid of this provision, it was incumbent upon him to bring the facts on record and material for its satisfaction that the petitioner has become hazardous on account of

public tranquility. Learned counsel submits that in the order impugned, no such material has been disclosed and in a mechanical manner, the said order has been passed. In support of his contention, learned counsel has placed heavy reliance on the judgment passed by the Division Bench of this Court in 1995(II) MPWN 138 *Shyam Sunder Vs. State of M.P.* By inviting my attention to Rule 857 of Police Regulations, further it has been submitted that the duration of surveillance should be short but that period is not disclosed.

3. On the other hand, Shri Puneet Shroti, learned Panel Lawyer 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 impugned order, it is gathered that although it has been mentioned in it that the history sheet of the petitioner was opened and the recommendation of the SDO(P), Lakhnadon was also taken into account, but, on opening of the history sheet, what was found and in what manner the activities of the petitioner involved in public peace and security, his presence in the said District has became dangerous, the order is silent. In Rule 855 itself, it has been mentioned that mere conviction in criminal cases where nothing gravely imperils safety of society shall not warrant surveillance under this Regulation. For better understanding, it would be fruitful to quote entire Rule 855 which reads thus:-

> "855. Surveillance- persons fit for.-Surveillance proper, as district from general supervision, should be restricted to those persons, whether previously convicted or not, against whom reasonable material exists to induce the opinion that they show a determination to lead a life of crime, being confined to such criminal activities as involve public peace and security and are dangerous security risks. Mere conviction in criminal cases where nothing gravely imperils safety of society shall not warrant surveillance under this regulation. When the entries in a history sheet or any other information at his disposal, lead the Superintendent of Police to believe that a particular individual is leading a life of crime, as aforesaid, he may order that his name be entered in the Surveillance Register. The Circle Inspector will thereupon open a history sheet, if one is not already in existence and the man will be placed under regular surveillance."

6. For deciding the aforesaid provision on the touchstone and anvil of the present factual scenario, it is gathered that without any material, the impugned order has been passed, hence it is clear that the Division Bench's decision squarely applicable in the present case.

7. I may also profitably place reliance on a decision of the Supreme Court in AIR 1981 SC 613 *Prem Chand Vs. Union of India and others* wherein it has been held in a similar provision in the Delhi Police Act that any apprehension would not be enough to pass an order of extemment. The Apex Court further held that there must be a clear and present danger based upon credible material which makes the movements and acts of the person in question alarming or dangerous or fraught with violence.

8. On bare perusal of para 5 of the return, this Court finds that although it has been mentioned that satisfaction was accorded by the Superintendent of Police in passing the order (Annexure P/1) but that material has not been disclosed in the order itself and, therefore, according to me, the action of the respondent no.3 cannot be said to be in consonance to the aforesaid provision. In this para of the return, it has been admitted by the respondents that later on, no criminal case has been registered against the petitioner.

9. Apart from this, on bare perusal of Rule 857, it is gathered that the order of surveillance should be for a shorter duration only but what should be that period, it is not mentioned in the order (Annexure P/1). For this additional reason also, the said order cannot be allowed to remain stand.

10. For the reasons stated hereinabove, this petition succeeds and is hereby allowed. The order impugned dated 2.8.2008 (Annexure P/1) is set aside and quashed. No order as to costs.

*Petition allowed.*

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**I.L.R. [2011] M. P., 1862**
**WRIT PETITION**
***Before Mr. S.R. Alam, Chief Justice & Mr. Justice R.S. Jha***
W.P. No. 3274/2011 (Jabalpur) decided on 8 March, 2011

SANJAY PATEL ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

*A. State Backward Class Commission Act, M.P. 1995 - Sections 9, 10 - Jurisdiction of Commission* - **Commission has only been entrusted with the task of recommending inclusion or exclusion of communities in the list of backward class and to tender advise regarding reservation for O.B.C. in public service and admission in educational institutions - It has no judicial or adjudicatory powers nor can it hold the rules framed by State as illegal and direct the State to change the same.** (Paras 11, 12 & 13)

क. राज्य पिछड़ा वर्ग आयोग अधिनियम, 1995 – धाराएँ 9, 10 – आयोग की अधिकारिता – आयोग को केवल पिछड़े वर्गों की सूची में समुदायों को सम्मिलित करने या अपवर्जित करने की सिफारिश करने का और ओ.बी.सी. के लिए लोक सेवा में आरक्षण एवं शैक्षणिक संस्थाओं में प्रवेश संबंधी सलाह देने का कार्य सौंपा गया है – उसे कोई न्यायिक अथवा न्यायनिर्णयन की शक्तियां नहीं है और न ही वह राज्य द्वारा बनाए गये नियमों को अवैध ठहरा सकता और उसे बदलने के लिए राज्य को निदेश दे सकता है।

*B. Medical and Dental Post Graduate Course Entrance Examination Rules M.P. 2010 - Rule 20(9),20(11) - Sequence of Councelling* - **Rule 15.10 has been introduced in the light of the judgment of the High Court - Rules are in compliance of the decision of the High Court - Rules are not unconstitutional - Petition dismissed.** (Para 14)

ख. चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम 2010 –नियम 20(9), 20(11) – परामर्श का क्रम – नियम 15.10, उच्च न्यायालय के निर्णय के आलोक में समाविष्ट किया गया है – नियम उच्च न्यायालय के निर्णय के अनुपालन में है – नियम असंवैधानिक नहीं है – याचिका खारिज।

**Cases referred :**

2004(3) MPLJ 82, 2003 (4) MPLJ 497, AIR 1993 SC 477, ILR (2008) MP 1892.

*K.K. Patel,* for the petitioner.
*Sanjay Dwivedi,* G.A. for the respondents No. 1 to 4.

**ORDER**

The Order of the Court was delivered by **S.R. ALAM, CHIEF JUSTICE.** :–The petitioner has filed this petition by way of a Public Interest Litigation praying for quashing of Rules 20(9) and 20(11) of the M.P. Medical and Dental Post Graduate Course Entrance Examination Rules, 2010 (hereinafter referred to as the Rules of 2010) which provides for the sequence of category-wise councelling for allotment of seats in Post Graduate medical courses.

2. It is submitted by the learned counsel for the petitioner that in accordance with the constitutional mandate reservations have been made for selection and allotment of seats in the post graduate courses by the State of M.P. wherein till the year 2003 it was provided that councelling for allotting seats on the basis of the categories would be done in the following sequence :-

(A) Unreserved Category.

(B) ST Category.

(C) SC Category.

(D) OBC Category.

However, subsequently in the M.P. Medical and Dental Post Graduate Entrance Examination Rules, 2004 by way of introducing Rule 15.10 the sequence of councelling for various categories has been changed and it has now been provided that the councelling shall be done in the following sequence :-

(A) ST Category.

(B) SC Category.

(C) OBC Category.

(D) Unreserved Category.

3. It is submitted by the learned counsel for the petitioner that the sequence of councelling as changed in the Rules of 2004 is detrimental to the interest of the reserved categories and in spite of repeated representations the impugned sequence has been continued by the respondent/State even in the Rules of 2010 under Rules 20(9) and 20(11) on the pretext that the said sequence has been changed in the year 2004 in view of the orders passed by this Court. The petitioner has also stated that the aforesaid issue was taken up by the M.P State Backward Class Commission and by order dated 9-8-2010 in exercise of powers under Section 10 of the M.P. State Backward Class

Commission Act, 1995 the entire councelling proceedings held in the year 2010 were declared illegal and the State was directed to amend the rule accordingly. However, in spite of the aforesaid orders of the Commission no change has been brought about by the respondent/State.

4. The learned counsel appearing for the respondents/State on a perusal of Annexure P-8, the order passed by the M.P State Backward Class Commission dated 9-8-2010 has stated that the authorities of the State have pointed out that the sequence of councelling was changed on account of the decision of this court rendered in W.P.No. 27382/2003 *(Mayank Jain v. State of M.P. & others)*. It is further pointed out that the issue also stands concluded against the petitioner in view of the judgment of this Court rendered in the case of *Amit Kumar Aritwal (Dr.) v. State of M.P. & others,* reported in 2004 (3) MPLJ 82.

5. We have heard the learned counsel appearing for the parties at length and gone through the record of the case.

6. From a perusal of Rules 15.9 and 15.11 of the M.P. Medical and Dental Post Graduate Entrance Examination Rules, 2003, a copy of which has been filed along with the petition as Annexure P-4, it is clear that initially the sequence of councelling of the reserved category prescribed in the Rules was as follows :-

(A) Unreserved category.
(B) ST category.
(C) SC category.
(D) OBC Category.

7. The aforesaid rules were challenged before this Court in the case of *Amit Kumar Aritwal (Dr.) v. State of M.P. and others* reported in 2004 (3) MPLJ 82 and this Court after taking into consideration the law in the field as well as the judgment of this Court in the case of *Mayank Jain v. State of M.P. & others* (W.P.No. 27382/2003) reported in 2003 (4) MPLJ 497, held that the sequence of councelling prescribed in the Rules of 2003 as stated above was unconstitutional as it sought to adopt a novel method of increasing the percentage of reservation beyond the limits prescribed and laid down by the Supreme Court in the case of *Indira Sawhney etc. v. Union of India and others,* AIR 1993 SC 477 and held that the councelling in respect of the reserved categories should be held first. It is further clear that pursuant to the judgment of this Court the State subsequently amended the rules in 2004 and changed the sequence of councelling for the categories by providing the following sequence :-

(A) ST Category.
(B) SC Category.
(C) OBC Category.
(D) General Category.

which has now been challenged in the present petition

8. It is, therefore, clear from a perusal of the aforesaid two judgments rendered by this Court; namely, in *Amit Kumar's case* (supra) and *Mayank Jain's case* (supra) that the change in the sequence of category-wise councelling brought about from the year 2004 onwards which we fully endorse and affirm is in conformity with and in compliance of the order passed by this Court in the aforesaid judgments as submitted by the learned counsel for the State.

9. From a perusal of the record and the submissions made before us it is uncontroverted and undisputed that the reservation prescribed for the reserved category in Rule 8 of the Rules of 2010 is strictly being followed and that reserved candidates who have obtained more marks than general category candidates are also made eligible for councelling in either their own category or in the unreserved category in accordance with the prior option given by them under Rule 20(13) and, therefore, there is no violation of the rules of reservation or the rules prescribing the extent of the reservation for the reserved category. In other words there is no allegation in the petition or otherwise that reservation to the extent prescribed is not being made available or that the impugned rule reduces the extent of reservation prescribed in any manner.

10. At this stage, it is submitted by the learned counsel appearing for the petitioner that the authorities of the State are also not complying with the order passed by the M.P. State Backward Class Commission, dated 9-8-2010, Annexure P-8.

11. We are unable to find any substance in the aforesaid submission for the simple reason that the M.P. State Backward Class Commission Act, 1995 was enacted in view of the directions issued by the Supreme Court in the case of *Indira Sawhney* (supra) in paragraph 243(17) whereof the State Government has been directed to create a permanent machinery for examining the cases of requests for inclusion or exclusion of any caste, community of persons or in the other backward class. A perusal of Sections 9 and 10 of the M.P. State Backward Class Commission Act, 1995 further indicates that the Commission has only been entrusted with the task of recommending inclusion or exclusion of communities in the list of backward class and to tender advise

regarding reservation for Other Backward Classes in public services and admission in educational institutions and for that limited purpose have been given limited powers of the Civil Court under Section 10. The aforesaid Act of 1995 does not constitute the Commission as an adjudicatory body with judicial powers to declare provisions of the Rules or bye laws made pursuant thereto to be illegal or to direct the State to frame rules in a particular manner. The Commission can only recommend and advise the State Government in certain matters which recommendation or advise may be accepted or may not be accepted by the State.

12. This Court in the case of *S.K. Verma v. State of M.P. and others,* reported in ILR (2008) MP 1892, while considering the provisions of Sections 9 and 10 of the M.P. State Scheduled Caste Commission Act, 1995 which are in pari materia with the provisions of Sections 9 and 10 of the M.P. State Other Backward Class Commission Act, 1995 has categorically held that the Commission constituted under the Act has no power to enquire into the individual complaints like a Civil Court, a disciplinary authority or a Trial Court and cannot direct the Government to take a particular action nor does it have any power to enforce its orders and call for compliance there of.

13. In view of the decision of this court in the case of *S.K. Verma* (supra), the submissions of the learned counsel for the petitioner and the reliance placed by him on the order of the M.P. State Backward Class Commission, dated 9-8-2010 is also held to be misconceived as the Commission has no judicial or adjudicatory powers nor can it hold rules framed by the State to be illegal and direct the State to change the sequence of councelling for the reserved category specifically when it has been changed and is in accordance with the decisions rendered by this court holding the previous sequence of councelling prescribed in the 1993 Rules to be unconstitutional and illegal. It is hereby clarified that in such circumstances the Commission cannot direct the State to quash the selection proceedings and implement the sequence of councelling in the reserved category which has been declared unconstitutional by this Court. Therefore, the order of the Commission dated 9-8-2010 has rightly not been complied with by the State as it is misconceived and has been passed in ignorance of the decision rendered by this Court in the cases of *Amit Kumar Aritwal* (supra) and *Mayank Jain* (supra).

14. In the instant case as we have already held that the sequence of councelling for the categories prescribed under Rules 20(9) and 20(11) of the 2010 Rules is in compliance of the decision of this Court rendered in the *Amit*

*Kumar's case* (supra) and *Mayank Jain's case* (supra), therefore, in view of the decision of this Court rendered in the case of *S.K. Verma* (supra) wherein it has been held that the Commission constituted under the Act of 1995, has no judicial or adjudicatory powers, we do not find any illegality or unconstitutionality in the sequence of councelling provided in Rules 20(9) and 20(11) of the Rules of 2010 and the challenge by the petitioner to the same is accordingly rejected.

15. In view of the aforesaid, the petition filed by the petitioner being without merit is dismissed. A copy of the order pass today be transmitted to the concerned authority for information and compliance. Petition is accordingly, dismissed.

*Petition dismissed.*

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**I.L.R. [2011] M. P., 1867**
**WRIT PETITION**
***Before Mr. Justice A.K. Shrivastava***
W.P. No.1289/2011(S) (Gwalior) decided on 24 March, 2011

JAI PRAKASH BATHAM ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

*A. Constitution - Article 14, 16 - Policy Decision* - **Policy decision has to pass the test of Articles 14 and 16 of Constitution - If decision is deviating from normal and salutary rule of selection based on merit and is subversive of doctrine of equality, it cannot be allowed to remain stand and it should be free from vice of arbitrariness.** (Para 16)

क. संविधान – अनुच्छेद 14, 16 – नीति निर्णय – नीति निर्णय को संविधान के अनुच्छेद 14 व 16 की परीक्षा से गुजरना होगा – यदि निर्णय योग्यता पर आधारित चयन के सामान्य एवं हितकर नियम से विचलित होता है और समता के सिद्धांत का उच्छेदक है, तब उसे कायम नहीं रखा जा सकता और वह मनमानेपन के दोष से मुक्त होना चाहिये।

*B. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 69 and 70 - Appointment of Panchayat Karmi - Local resident* - **Merit is the sole criteria for appointment and cannot be superseded only on the basis that meritorious candidate is not the resident of that locality.** (Para 17)

ख. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 69 व 70 – पंचायतकर्मी की नियुक्ति – स्थानीय निवासी – योग्यता ही नियुक्ति के लिए एकमात्र मानदंड है और केवल इस आधार पर अधिक्रांत नहीं किया जा सकता कि योग्य अभ्यर्थी उस स्थान का निवासी नहीं है।

**Cases referred:**

AIR 2002 SC 2877, AIR 1988 SC 94, AIR 1966 SC 828, (1999) 8 SCC 16.

*D.P. Singh*, for the petitioner.

*Nidhi Patankar*, Dy. G.A. for the respondents No. 1 & 2.

None for respondent No.3.

*K.K. Sharma,* for the respondent No. 4.

*Gaurav Samadhiya,* for the respondent No. 5.

**ORDER**

**A.K. Shrivastava, J:–** By this petition under Article 226/227 of the Constitution of India, the petitioner has challenged the order dated 02.02.2011 passed by the Commissioner, Chambal Division Morena, whereby the appeal of respondent No. 5 - Balram Sharma has been allowed by directing to appoint him on the post of Panchayat Karmi of Gram Panchayat Bargawan by further directing to confer secretarial powers of Gram Panchayat to him.

2. According to the petitioner, he is the local resident of village Bargawan, Tehsil Karahal, District Sheopur, where he is having immovable/ancestral property. He has also filed a domicile certificate (Annexure P/2). Further it has been pleaded that the petitioner is the member of Other Backward Class community and had secured 56.14% marks in the High School Examination and is also having qualification of Master Degree in Arts. The certificates have been filed and they are collectively marked as Annexure P/3.

3. The State Government, in exercise of power under Sections 69 & 70 of Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (here after referred to as'Adhiniyam') has framed a policy for appointment of Panchayat Karmi on 12.9.1995. A copy of the policy is marked as Annexure P/4. Thereafter, another policy has been framed on 27.1.2006 (Annexure P/5), whereby power of appointment of Panchayat Karmi has been delegated to Collector on account of failure of Gram Panchayat to make requisite appointment. In exercise of power under Section 86 of the Adhiniyam, the State Government has directed the Chief Executive Officer to appoint the

Panchayat Karmi. According to the policy, the appointment of Panchayat Karmi should be made on merit and preferential right to appoint members of Scheduled Caste, Scheduled Tribes, Other Backward Classes and Women candidates, should be given. Under the policy, the procedure of appointment has been specified to the effect that appointment on vacant post of Panchayat Karmi shall be made by inviting applications or preparation of merit list. It also provides that on the basis of merit a list shall be prepared and it will be sent to the Collector for approval and after obtaining the approval, appointment order shall be issued to the meritorious candidates.

4. In pursuance to the said policy of the State Government, the Gram Panchayat i.e. respondent. No.4 initiated the proceeding for filling up the post of Panchayat Karmi by issuing the advertisement on 20.7.2007 (Annexure P/6) In pursuance to the said advertisement, total 18 applications were received by the Gram Panchayat including the applications of petitioner and respondent No. 5. A meeting of Gram Panchayat was convened on 30.8.2007 and the applications were considered in respect of appointment of Panchayat Karmi, wherein the case of the petitioner was turned down on the objection of some Panchas, who also disputed the domicile certificate of the petitioner and found respondent No. 5 to be resident of local place of village Kemari, Tehsil Sabalgarh, District Morena. A copy of the proceedings of the Gram Panchayat have been filed as Annexure P/7.

5. The petitioner having aggrieved by the decision of Gram Panchayat, approached this Court by filing a writ petition bearing W.P.No.5212/07 (S) and ultimately it was decided on 6.11.2009 (Annexure P/8).

6. According to the learned counsel for the petitioner, when Braj Bihari Sharma, who was respondent No. 5 in that petition, did not succeed in the said Writ Petition, he hand in gloves with respondent No.5 and got the writ petition filed bearing number W.P.No.5857/08(S). This Court vide order dated 06.11.2009 (Annexure P/8) decided both the writ petitions viz W.P.No.5212/07(S) and W.P.No.5857/08(S) by a common order and quashed the resolution of Gram Panchayat dt. 30.08.2007 (Annexure P/l) and also quashed the consequential order of appointment dt. 31.08.2007 as well as the order passed by the Collector dated 16.10.2007 and inter alia directed to hold fresh meeting and further directed that all the applications received by the Gram Panchayat for the purpose of appointment of the post of Panchayat Karmi shall be considered and also directed to prepare a merit list which shall be based upon

the merits and thereafter proper appointment order shall be issued. Eventually, the Gram Panchayat in compliance to the order passed by this Court, resolved to appoint Braj Bihari Sharma and the name of Daulat Singh was kept in the waiting list. Thereafter, the Collector while exercising the power conferred under Section 86 (2) of the Adhiniyam, directed respondent No.3 Jila Panchyayat Karahal to make appointment of Panchayat Karmi. In pursuance to the order of the Collector, Janpad Panchayat had appointed the petitioner as Panchayat Karmi on 18.8.2010 and also notified the petitioner as Panchayat Secretary vide order dated 25.8.2010.

7. Against the order of the appointment of the petitioner, respondent No.5-Balram Sharma preferred an appeal before the Commissioner Chambal Division Morena, who allowed the appeal and by setting aside all the adverse orders and resolution, directed to appointment respondent No.5-Balram Sharma on the post of Panchayat Karmi and also to notify him as Panchayat Secretary.

8. In this manner, this petition has been filed by the petitioner.

9. The contention of Shri D.P.Singh, learned counsel for the petitioner is that the Commissioner has failed to consider the document of domicile certificate of respondent No.5-Balram Sharma and without considering the same, on the basis of bogus document, has given the finding in paras 4 and 5 of the impugned order, which is totally perverse and hence committed patent error of law. Further it has been contended that the appeal was proceeded ex parte against the present petitioner and by recording the presence of his counsel, who was not at all engaged by the petitioner, nor any Vakalatnama was filed on his behalf, allowed the appeal of respondent No. 5- Balram Sharma and therefore, the impugned order is bad in law. Certain allegations are also made that the Reader of the Commissioner was very much interested in respondent No.5-Balram Sharma and he noted down the presence of the counsel and the Commissioner by affirming the illegal act of his Reader has marked the presence of counsel of petitioner and therefore, entire proceeding before the Commissioner is vitiated.

10. Vehemently, it has been put forth by Shri D.P.Singh, learned counsel for the petitioner that respondent No. 5 is not the local resident of area and is a resident of district Sheopur and therefore, for no rhyme or reason he is entitled for appointment on the post of Panchayat Karmi and therefore, the order of Commissioner runs de hors the policy of the State Government.

11. Combating the aforesaid submissions of learned counsel for the petitioner, Shri Gaurav Samadhiya, learned counsel appearing for respondent No-5-Balram Sharma has submitted that the action of Gram Panchayat and the order of Collector was assailed by respondent No.5 - Balram Sharma by filing a writ petition before this Court, which was registered as W.P.No.5857/08 (S) and learned Writ Court vide it's order dated 6.11.2009 quashed the resolution as contained in Annexure P/l dated 30.8.2007; quashed the consequential order of appointment dated 31.8.2007 and order of Collector dated 16.10.2007 was also quashed and directed the Gram Panchayat to consider all the applications afresh and prepare a merit list and on the basis of merits, proper appointment order may be issued and further directed that the policy of the State Government relating to the appointment of Panchayat Karmi dated 12.9.1995 should be taken into consideration alongwith provisions of the Adhiniyam.

12. By putting a deep dent on the case of the petitioner, it has been put forth by Shri Gaurav Samadhiya, learned counsel for the respondent No. 5 that the name of respondent No.5-Balram Sharma is on the top of the merit list since he had secured highest percentage of marks 61.4% while the petitioner-Jai Prakash Batham stood at S.No.3 in the merit list as he secured 58% only. Hence, it has been put forth by the learned counsel that the only eligible candidate for the appointment is respondent No.5 and none else. It has also been put forth by him that although the petitioner is resident of local area of the Gram Panchayat, but even if for the sake of argument it is held that he is resident of Sheopur, since it is adjoining to the Gram Panchayat, his candidature can not be sidelined looking to his meritorious career since he secured the top position in the merit list and hence it has been prayed that this petition, which is devoid of any substance be dismissed.

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

14. So far as the contention of learned counsel for the petitioner that the Commissioner Chambal Division, Morena, acted in flagrant violation of law by deciding the appeal in the absence of petitioner by incorrectly marking his presence through his counsel is concerned, this is a disputed question of fact and can not be decided in this petition. In the absence of any material available on record, it is difficult to hold that the Revenue Commissioner, who is a very senior officer, would act on the insistence of his Reader and will mark the presence of counsel for petitioner even if he was not present. Even if

for the sake of argument, it is held that the Reader of the Commissioner was hand in gloves with respondent No. 5 - Balram Sharma and marked the presence of petitioner through his counsel deliberately, an application should have been filed by the petitioner before the Commissioner because the said authority is the best person to check his own record in order to take out the grain from chaff, but this has not been done so far and therefore, in this petition under Article 226 and 227 of the Constitution of India, no roving enquiry in the absence of any cogent material on record can be made to examine the hallmark of the contention of the learned counsel for the petitioner.

15. Even otherwise, looking to the directions given by this Court in earlier dated 6.11.2009, this court finds that specifically this Court directed the Gram Panchayat to consider all the applications and further directed to prepare a merit list and based upon the said merit list, proper appointment order shall be issued in the matter. Although, it was also directed that the policy dated 12.9.1995 to appoint a Panchayat Karmi shall also be kept in mind alongwith other provisions of the Adhiniyam, but according to me, the supreme consideration, which was adjudicated, was the merit list to appoint a candidate, who had topped the merit list. For better understanding, it would be apposite to quote relevant portion of the order of learned Writ Court dated 6.11.2009, which reads thus :

> "Resultantly, the resolution as contained in Annexure P/1 dated 30/8/2007 is hereby quashed and the consequential order of appointment dated 31/08/2007 and the order passed by the Collector dated 16/10/2007 are also hereby quashed. The writ petition is allowed with the following directions :-
>
> (a) The respondent/Gram Panchayat shall hold a fresh meeting and shall consider all 17 applications received by the Gram Panchayat for the purpose of appointment to the post of Panchayat Karmi afresh.
>
> (b) The respondent/Gram Panchayat shall prepare a merit list and based upon the merits, proper appointment order shall be issued in the matter.
>
> (c) The respondent/Gram Panchayat shall also kept in mind the policy issued by the State Government relating to appointment of Panchayat Karmi dated 12th September, 1995 read with statutory provisions of Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 while issuing such an appointment order.

(d) The aforesaid exercise of passing a fresh resolution and issuing consequential appointment order and order conferring secretarial powers, shall be concluded within a period of three months from the date of receipt of a certified copy of this order.

With the aforesaid, the writ petitions stand allowed. No order as to costs."

(Emphasis supplied)

This order was never challenged by the petitioner by filing Writ Appeal and thus the findings and the writ, which was issued by the learned Writ Court in earlier round of litigation deciding the writ petitions of petitioner as well as respondent No.5-Balram Sharma, had attained finality and it can not be molded to take out any other meaning.

16. Rightly the decision of Supreme Court in *Kailash Chand Sharma etc. v. State of Rajasthan and others* AIR 2002 SC 2877 has been placed reliance by Shri Gaurav Samadhiya, learned counsel for the respondent No.5 that the policy decision of the State Government has to pass the test of Articles 14 and 16 of the Constitution and if the decision is deviating from the normal and salutary rule of selection based on merit and is subversive of the doctrine of equality, it can not be allowed to remain stand and it should be free from vice of arbitrariness. The authenticity and the hallmark of the merit list Annexure P/9 has not been challenged and it is also a naked truth that respondent No.5-Balram Sharma is on the top of the merit list as he secured highest percentage of marks 61.4 % while the petitioner had obtained 58% marks and his position is at S.No.3 in the said list.

17. Shri D.P.Singh, learned counsel for the petitioner tried to somersault the argument put forth by Shri Gaurav Samadhiya, learned counsel for the respondent No.5 and submitted that since respondent No.5 is not the resident of local area his candidature can not at all be considered and to bolster his submission, learned counsel has placed reliance on a Division Bench decision of this Court dated 11.7.2007 passed in Writ Appeal No.421/2007 *(Smt.Sadhana Vs. State of M.P. and others)*. But, rightly it has also been placed reliance by Shri Gaurav Samadhiya, learned counsel for the respondent No.5 by placing reliance on the said decision and by inviting my attention that the said decision is also not against him because in the said decision, Hon'ble the Chief Justice Shri A.K.Patnaik, as his Lordship then was, spoke for the Bench and held that merit is the sole criteria for the appointment and it can not

be superseded only on the basis that the meritorious candidate is not the resident of that locality, because it will be in contravention of the Article 16 (2) of the Constitution of India. It would be condign to quote that portion of the order, which reads thus:

> "The appointment of the appellant has been set aside by the Collector not because she was not a resident of Village or Ward but because her name did not find place in the voter list. Hence the basis for appointment as Anganwadi Worker because of the bar under Article 16 (2) of the Constitution does not arise for decision in this case."

In this decision also, the judgment of Supreme Court in *Kailashchand Sharma* (supra), which has been placed reliance by learned counsel for the respondent No. 5, was taken into consideration.

18. For the reasons stated hereinabove, I am of the view that even if it is held (although it is a disputed question of fact) that respondent No.5-Balram Sharma is not the resident of local area where the Gram Panchayat exists and is a resident of adjoining vicinity, as well as by taking into consideration that behind the back of the petitioner, de hors the procedure of hearing of appeal, the Commissioner has allowed the appeal of respondent No.5 - Balram Sharma and directed him to be appointed on the post of Panchayat Secretary, it can not be set aside because if it is set aside, it would allow to restore an illegal resolution and an illegal order of the Collector, which is contrary to the order passed by this Court on 6.11.2009 (Annexure P/8) and therefore, I am declining to exercise the writ jurisdiction as well as the power of superintendence under Article 227 of the Constitution of India. In this contest, I may profitably place reliance on the decision of the Supreme Court in the case of *Mohammad Swalleh and others v. IIIrd Addl. District Judge* (AIR 1988 SC 94) wherein in para 7 the apex court has held:

> "7. It was contended before the High Court that no appeal lay from the decision of the Prescribed Authority to the District Judge. The High Court accepted this contention. The High Court finally held that though the appeal laid before the District Judge, the order of the Prescribed Authority was invalid and was rightly set aside by the District Judge. On that ground the High Court declined to interfere with the order of the learned District Judge. It is true that there has been some technical breach because if there is no appeal maintainable before the learned District Judge, in the appeal before the learned District

> Judge, the same could not be set aside. But the High Court was exercising its jurisdiction under Art. 226 of the Constitution. The High Court had come to the conclusion that the order of the Prescribed Authority was invalid and improper. The High Court itself could have set it aside. Therefore, in the facts and circumstances of the case justice has been done though, as mentioned hereinbefore, technically the appellant had a point that the order of the District Judge was illegal and improper. If we reiterate the order of the High Court as it is setting aside the order of the Prescribed Authority in exercise of the jurisdiction under Art. 226 of the Constitution then no exception can be taken. As mentioned hereinbefore, justice has been done and as the improper order of the Prescribed Authority has been set aside, no objection can be taken."

In the present case no injustice has been done and the Commissioner has set aside the improper order of Collector and illegal resolution, which was de hors the order of this Court dated 6.11.2009. I may also profitably place reliance on another decision of Supreme Court in the case of *Venkateswara Rao v. Govt. of Andhra Pradesh* (AIR 1966 SC 828), wherein in para 17 it has been held by Supreme Court:

> "17.....In those circumstances, was it a case for the High Court to interfere in its discretion and quash the order of the Government dated April 18, 1963 ? If the High court had quashed the said order, it would have resorted an illegal order - it would have given the Health Centre to a village contrary to the valid, resolution passed by the Panchayat Samithi. The High Court, therefore, in our view, rightly refused to exercise its extraordinary discretionary power in the circumtances of the case."

19. In *Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar* (1999) 8 SCC 16, the Supreme Court has held that the order of learned Member Board of Revenue directing action to be taken for refund of the excess, payment was valid and proper, though he had no jurisdiction to pass the order. Supreme Court further held that in the event it is set aside it would amount to reviving an invalid order of payment of excess compensation to the appellant. It would be fruitful to quote para 38 of the said decision, which reads thus:

> "For what has been stated above we hold that the order of the learned Member of Board of Revenue directing action to be taken for refund of the excess compensation was valid and proper

though he had no jurisdiction to pass the order. In the event it is set aside it would amount to reviving an invalid order of payment of excess compensation to the appellant."

20. For the reasons stated herein above, this petition is dismissed with cost. Counsel fee Rs.2500/- if pre certified.

*Petition dismissed.*

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**I.L.R. [2011] M. P., 1876**
**WRIT PETITION**
***Before Mr. Justice J.K. Maheshwari***
W.P. No. 434/2011 (S) (Jabalpur) decided on 24 March, 2011

KAMNA BALKE (KU.) ...Petitioner
Vs.
THE REGISTRAR GENERAL & ors. ...Respondents

***Service Law - Selection Process - Examination* - On the date of submission of the application form petitioner was not possessing the requisite qualification (Certificate of Computer application and Diploma Course was not passed out), which was a condition precedent in the advertisement - Held - Rejection of candidature of the petitioner on this ground is justifiable and not liable to be interfered - Petition dismissed.** (Paras 4 &5)

सेवा विधि – चयन प्रक्रिया – परीक्षा – आवेदन पत्र जमा करने की दिनांक को याची के पास आवश्यक अर्हता नहीं थी (कम्प्यूटर एप्लीकेशन का प्रमाण पत्र और डिप्लोमा कोर्स उत्तीर्ण नहीं था) जो कि विज्ञापन की पुरोभाव्य शर्त थी –अभिनिर्धारित – इस आधार पर याची की उम्मीदवारी का निरस्त होना न्यायोचित है और हस्तक्षेप करने के योग्य नहीं – याचिका खारिज।

*Sanjay Patel,* for the petitioner.

**ORDER**

**J.K. Maheshwari, J.** –This petition is directed against the order Annexure P-5 dated 16.11.2010 whereby the candidature of the petitioner on the post of Assistant Grade-III in the office of District & Sessions Judge, Burhanpur has been rejected.

2. It is the contention of the petitioner that she has passed out diploma in computer application course on 21.04.2010. Prior to the same she has filled

up the application form in furtherance to the advertisement Annexure P-1 for the post of Assistant Grade-III and appeared in the examination. The result of the said examination has been declared and the petitioner found place in the list of the selected candidate at serial no.2 of S.T. category but subsequently the candidature itself has been rejected in terms of the note appended to the clarification prescribed in the advertisement. In view of the foregoing, it is urged that after selection cancellation of the candidature is not permissible.

3. After having heard Shri Patel, learned counsel appearing on behalf of the petitioner and on perusal of the eligibility qualification as specified in the advertisement for the post of Assistant Grade-III. It is reproduced as under:

| | | |
|---|---|---|
| सहायक ग्रेड–3 प्रवर्ग | 5200–20200+ ग्रेड पे 1900 | 1. मध्य प्रदेश शासन द्वारा मान्यता प्राप्त बोर्ड/संस्था में हायर सेकेण्डी स्कूल प्रमाण पत्र अथवा 10 + 2 पद्धति से हायर सेकेण्डी परीक्षा उत्तीर्ण! 2. मध्य प्रदेश शासन द्वारा मान्यता प्राप्त बोर्ड/संस्था से हिन्दी मुद्रलेखन परीक्षा उत्तीर्ण 3. मध्य प्रदेश शासन द्वारा मान्यता प्राप्त बोर्ड/संस्था से कम्प्यूटर एप्लीकेशन में डिप्लोमा कोर्स उत्तीर्ण ! |

The note appended further reproduced as under:

"टीप : उपरोक्तानुसार दर्शित न्यूनतम शैक्षणिक एवं तकनीकी अहर्तायें आवेदन पत्र प्रस्तुत करते समय उत्तीर्ण होना आवश्यक है !

4. The candidature of the petitioner has been rejected on the ground that the certificate of computer application and diploma course was not the passed out, on the date of submission of the application form, which is required as per the conditions stipulated in the advertisement. A perusal of the aforesaid, it is apparent that on the date of submission of the application form petitioner was not possessing the requisite qualification, which was a condition precedent in the advertisement. If the eligibility was not acquired by the petitioner on the date of submission of the application form as pre-requisite by advertisement the reasons as assigned in Annexure P-4 is justifiable and not liable to be interfered with in exercise of jurisdiction under Article 226 of the Constitution of India.

5. Accordingly, I do not find any substance in this petition, hence it is dismissed in limine.

*Petition dismissed.*

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**I.L.R. [2011] M. P., 1878**
**WRIT PETITION**
***Before Mr. Justice Rajendra Menon***
W.P. No. 11174/2010 (Jabalpur) decided on 27 April, 2011

VEER SINGH GOSH ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Sections 69 & 86(1) - Panchayat Karmi and Panchayat Secretary - Different posts*** **- Respondent No. 5 was appointed by Collector on the post of Panchayat Karmi and subsequently Panchayat Secretary - Appointment of Respondent No. 5 as Panchayat Secretary was subsequently terminated on the ground of pendency of criminal cases - Held - Merely because appointment of respondent No. 5 on the post of Panchayat Secretary was terminated, it cannot be assumed that his appointment on the post of Panchayat Karmi is also terminated - Both are different posts - Petition dismissed.** (Para 14)

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धाराएँ 69 व 86(1) पंचायत कर्मी और पंचायत सचिव – भिन्न पद – कलेक्टर द्वारा प्रत्यर्थी क्रं. 5 को पंचायत कर्मी के पद पर नियुक्त किया गया और तत्पश्चात पंचायत सचिव के पद पर – तत्पश्चात् प्रत्यर्थी क्रं. 5 की पंचायत सचिव के रुप में नियुक्ति दाण्डिक मामलों के लंबित रहने के आधार पर समाप्त कर दी गई – अभिनिर्धारित – मात्र इसलिए कि प्रत्यर्थी क्रं. 5 की पंचायत सचिव के पद की नियुक्ति समाप्त कर दी गई यह धारणा नहीं की जा सकती कि पंचायत कर्मी के पद पर उसकी नियुक्ति भी समाप्त हो गई – दोनों भिन्न पद हैं – याचिका खारिज।

**Cases referred:**
2008 (4) MPHT 470,1992(2) MPLJ 729.

*R.K. Samaiya,* for the petitioner.
*J.K. Jain,* Dy. A.G. for the respondents No. 1 to 3.
*Upma Tiwari,* for the respondent No. 4.
*Shobhana Koshta & Sarita Chourasia,* for the respondent No. 5.

**ORDER**

RAJENDRA MENON, J. :–Challenging the order-dated 31.7.2010 - Annexure P/1, passed by the Commissioner, Sagar Division, Sagar and the order passed by the Collector, Tikamgarh as contained in Annexure P/9 dated

22.4.2010, in the matter of appointment of respondent No.5 on the post of Panchayat Karmi in Gram Panchayat Barmatal, Janpad Panchayat Jatara, District Tikamgarh, this writ petition has been filed.

2. Facts that have come on record indicates that Collector, Tikamgarh vide Annexure P/2 dated 6.11.2007 appointed respondent No.5 Shri Rohit Singh Parmar on the post of Panchayat Karmi so also on the post of Panchayat Secretary. In the order - Annexure P/2 a condition was stipulated that if any criminal case is registered against the employee Shri Rohit Singh Parmar, his services would be terminated. However, after his appointment when it was found that respondent No.5 is implicated in certain criminal cases, the Collector passed the order - Annexure P/3 on 26.11.2007 and cancelled the appointment of respondent No.5 on the post of Panchayat Secretary ordered under section 69(1) of the M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (hereinafter referred to as 'Adhiniyam of 1993'). This order-dated 26.11.2007 - Annexure P/3 was challenged by respondent No.5 by filing a revision before the Additional Commissioner, and the Additional Commissioner vide order-dated 5.7.2008 - Annexure P/4 found that due to involvement of respondent No.5 Shri Rohit Singh Parmar in certain criminal cases, he cannot continue as a Panchayat Secretary and as his termination from the post of Panchayat Secretary was a result of condition Clause (iv) stipulated in the appointment order - Annexure P/2, dismissed the same. Challenging the said order passed by the Additional Commissioner, petitioner preferred a second revision before the Minister of the Department concerned and the Minister also dismissed the same vide Annexure P/5 dated 23.5.2009. Finally, respondent No.5 Shri Rohit Singh Parmar challenged the orders passed by the Commissioner and the Minister before this Court in W.P.No.5844/2009 and the writ petition was also dismissed by this Court vide Annexure P/6 on 22.6.2009.

3. In the meanwhile, the Sarpanch of the Gram Panchayat on the basis of a resolution passed on 19.9.2009 vide Annexure P/7, appointed the petitioner on the post of Panchayat Karmi and the Collector vide order-dated 17.11.2009 - Annexure P/8 exercising powers conferred upon him under section 69(1) of the Adhiniyam of 1993 appointed the petitioner as Panchayat Secretary. As the appointment of petitioner was made on the post of Panchayat Karmi, interalia contending that the post of Panchayat Karmi is not vacant, respondent No.5 is still holding the post of Panchayat Karmi, his appointment on the post of Panchayat Karmi has not been terminated, the Collector vide order-dated 26.11.2007 - Annexure P/3 has only terminated the appointment of respondent

No.5 on the post of Panchayat Secretary, appeal was filed by respondent No.5 before the Collector, Tikamgarh assailing the appointment of the petitioner on the post of Panchayat Karmi. The Collector heard all concerned and vide order-dated 22.4.2010 - Annexure P/9 found that the post of Panchayat Karmi in the Gram Panchayat was not vacant, respondent No.5 was appointed to the post of Panchayat Karmi, his appointment on the post of Panchayat Karmi is not cancelled and, therefore, finding petitioner to have been appointed on the post of Panchayat Karmi by the Gram Panchayat in an illegal manner without post being available, the Collector quashed the appointment of the petitioner on the post of Panchayat Karmi vide order - Annexure P/9. Challenge to this order having failed before the Commissioner also vide Annexure P/1 dated 31.7.2010, this writ petition has been filed assailing these orders.

4. Shri R.K. Samaiya, learned counsel for the petitioner, argued that respondent No.5 was appointed on the post of Panchayat Karmi and Panchayat Secretary by the Collector vide order-dated 6.11.2007 - Annexure P/2 and as per the condition stipulated in this order due to pendency of the criminal cases against him, his appointment was cancelled vide Annexure P/3 dated 26.11.2007 and this order - Annexure P/3 having been upheld by the Commissioner, by the Minister of the Department and also by this Court vide orders - Annexures P/5, P/6 and P/7, it is stated that the interference now made by the Collector and the Commissioner is unsustainable. Shri Samaiya argued that once after termination of the service of respondent No.5 by the Collector from the post of Panchayat Karmi and Panchayat Secretary, petitioner is appointed by the Gram Panchayat vide Annexure P/7 and when he is also notified as a Panchayat Secretary by the Collector vide Annexure P/8, further interference by the Collector and the Commissioner in the matter is wholly unsustainable. It was argued by him that the Collector having exercised the powers by terminating the services of respondent No.5 vide order - Annexure P/3 and thereafter appointing the petitioner as Panchayat Secretary vide Annexure P/8 could not review or recall both these orders vide Annexure P/9 dated 22.4.2010. Accordingly contending that the Collector has no authority to review or recall his own order and stating that the action of the Collector and the Commissioner in interfering with the matter is wholly unsustainable, learned counsel for the petitioner seeks for interference into the matter.

5. By inviting my attention to a judgment rendered by a Division Bench of this Court, in the case of *Leelawati and another Vs. State of MP and others,*

2008 (4) MPHT 470, Shri R.K. Samaiya argued that the Collector has no power for reviewing his own action once he had cancelled the appointment of respondent No.5 on the post of Panchayat Karmi and Panchayat Secretary. Accordingly, Shri Samaiya on the aforesaid premises prays for interference into the matter and took me through the orders impugned in detail to emphasize his contention.

6. Smt. Shobhana Koshta, learned counsel for respondent No.5, refuted the aforesaid contention and argued that appointment of respondent No.5 was made by the Collector vide order - Annexure P/2 not only to the post of Panchayat Karmi, but also to the post of Panchayat Secretary and vide order - Annexure P/3 it was only the appointment of respondent No.5 on the post of Panchayat Secretary that was cancelled by the Collector. That being so, when the appointment of respondent No.5 on the post of Panchayat Karmi was not terminated, there was no vacant post of Panchayat Karmi and when the Gram Panchayat illegally, even without vacancy being available, appointed the petitioner as Panchayat Karmi and the Collector without appreciating these factors notified the petitioner as Panchayat Secretary, an appeal was filed by the petitioner and in the appeal the Collector has interfered in the matter rightly because the appointment of respondent No.5 on the post of Panchayat Secretary was only terminated and even after his termination from the post of Panchayat Secretary, he continued to hold the post of Panchayat Karmi and, therefore, the Collector and the Commissioner have not committed any error in interfering with the order of appointment of the petitioner on the post of Panchayat Karmi. Taking me through the findings in this regard recorded by the Collector and the Commissioner and the reasons given by them indicating that appointment of respondent No.5 on the post of Panchayat Karmi is not terminated, Smt. Shobhana Koshta sought for dismissal of this writ petition.

7. Learned counsel appearing for the remaining respondents also submitted on similar lines.

8. I have heard learned counsel for the parties and perused the records.

9. If the orders of appointment of respondent No.5 is taken note of, it would be seen that in the order-dated 6.11.2007 - Annexure P/2, the Collector has ordered for appointment of Shri Rohit Singh Parmar not only on the post of Panchayat Karmi, but also on the post of Panchayat Secretary. The order - Annexure P/2 indicates that it is a dual appointment of respondent No.5 on the post of Panchayat Karmi so also on the post of Panchayat Secretary. At

this stage it would be appropriate to take note of certain provisions of the Adhiniyam of 1993. Section 69 of the Adhiniyam of 1993 contemplates a provision for appointment of Secretary and CEOs to the Gram Panchayat. The power to appoint a Secretary to the Gram Panchayat under this section is conferred on the State Government or the authorized officer i.e.... Collector. Section 70 contemplates a provision for appointment of various officers and servants of the Panchayat and the power to make appointment under section 70 is conferred on the Panchayat subject to approval of the prescribed authority. It is, therefore, clear that for the purpose of appointing a Panchayat Karmi, the Panchayat is empowered to proceed and take action on the basis of the powers conferred under section 70 and in the matter of appointment of Panchayat Secretary, the procedure is contemplated under section 69 and the power conferred on the Collector has to be exercised. In this regard, certain principles laid down by a Bench of this Court in the case of *Ashok Kumar Kaurav Vs. State of MP and others,* 1992 (2) MPLJ 729, may be taken note of.

10. After taking note of the provisions of sections 69 and 70 of the Adhiniyam of 1993, the learned Judge in the aforesaid case has held that both sections 69 and 70 operate on different spheres. Section 69 is in relation to appointment of Panchayat Secretary whereas section 70 is in relation to appointment of various officers and servants of the Panchayat. The learned Judge has considered the effect and it is found that the Panchayat Secretary is appointed by the Collector by virtue of the powers conferred upon him being the prescribed authority under section 69(1) and the power to appoint a Panchayat Karmi is conferred on the Gram Panchayat by virtue of a Scheme formulated for appointment of Panchayat Karmi under section 70. It is held by learned Judge that a Panchayat Karmi appointed under the Scheme formulated under section 70 does not acquire the status of a Secretary of the Panchayat under section 69(1) unless specifically appointed by the competent authority under this provision. In this regard the following observations made by the learned Judge may be taken note of:

> "From the provisions in sections 69 and 70 of the MP Panchayat Raj Adhiniyam it is noticed that both sections act in distinct spheres; first in relation to the appointment of Panchayat Secretary while the second in relation to the appointment of other officers and servants of the Panchayat. Section 69 of the Adhiniyam provides for appointment of a Secretary only by State Government or the

Prescribed Authority. Section 69(1) does not grant any power to leave the matter of appointment as Secretary in the hands of any authority other than the prescribed authority or State Government. The Panchayat Karmi Yojna virtually transfers this power to the Gram Panchayat as appointment of Panchayat Karmi is made by Gram Panchayat and by deeming provision introduced in the scheme. Panchayat Karmi is appointed as Secretary. The Panchayat Karmi Yojna has not been notified in the Gazette and, therefore, the Gram Panchayat cannot act as a prescribed authority and by such general executive instructions, the requirement of making appointment by the State Government or the prescribed authority under section 69 cannot be circumvented. A Panchayat Karmi appointed under the scheme does not acquire the status of Secretary of the Panchayat under section 69(1) unless specifically appointed by a competent authority under the provision."

*(Emphasis supplied)*

11. From the aforesaid principle, it is clear that both the post of Panchayat Karmi and Panchayat Secretary are different. A Panchayat Secretary is appointed by the Collector by virtue of the powers conferred upon him under section 69 and a Panchayat Karmi is appointed by the Panchayat as per the scheme notified by the State Government. However, a further provision is contemplated under section 86, where power is given to the Collector to take action, if the Panchayat fails to perform any duties imposed upon it or under the Adhiniyam of 1993. It is, therefore, clear that if the Panchayat does not appointment on the post of Panchayat Karmi in accordance to the scheme or the provisions of the Act, the prescribed authority namely, the Collector, is entitled to exercise powers under section 86(1) and appoint a Panchayat Karmi.

12. If the order of appointment of respondent No.5 in this regard issued by the Collector is taken note of, it would be seen that the Gram Panchayat was instructed to make appointment on the post of Panchayat Karmi and when the Gram Panchayat did not make appointment of Panchayat Karmi within the stipulated period then on the basis of the applications received by the Panchayat and on merit Shri Rohit Singh Parmar - respondent No.5 was appointed as a Panchayat Karmi by the Collector and this appointment of respondent No.5 as a Panchayat Karmi by the Collector is made in exercise of the powers conferred by the Collector under section 86(1). After appointing

respondent No.5 as a Panchayat Karmi in this manner, the Collector further exercised the powers under section 69(1) and appointed respondent No.5 as a Panchayat Secretary.

13. It is, therefore, clear from a perusal of the order-dated 6.11.2007 - Annexure P/2 that this appointment is infact appointment of respondent No.5 on two different posts: one to the post of Panchayat Karmi and another to the post of Panchayat Secretary. Both these appointments are different. Thereafter, when the subsequent order was passed by the Collector on 26.11.2007 - Annexure P/3, the order in verbatim reads as under:

> 'इस कार्यालय के आदेश क्रमांक/स्था./07/2118 दिनांक 06.11.07 द्वारा श्री रोहित सिंह आत्मज श्री नरेन्द्र सिंह परमार को शर्तों के अधीन सचिवीय अधिकार ग्राम पंचायत वर्माताल जनपद पंचायत जतारा के लिये दिये गये थे।
>
> आवेदक के विरूद्ध थाना प्रभारी दिगोड़ा का प्रतिवेदन प्राप्त हुआ है। जिसके अनुसार आवेदन के विरूद्ध आपराधिक प्रकरण न्यायालय में विचाराधीन है।
>
> उक्त प्रतिवेदन के आधार पर श्री रोहित सिंह आत्मज श्री नरेन्द्र सिंह परमार को सशर्त प्रदान किये गये सचिवीय अधिकार धारा 69 (1) के अन्तर्गत निरस्त करता हूँ।' (Emphasis supplied)

A perusal of this order indicates that in this order the Collector has not terminated the appointment of respondent No.5 on the post of Panchayat Karmi, the termination is only with regard to his appointment as a Panchayat Secretary ordered by the Collector under section 69(1). That being so, when Shri Rohit Singh Parmar - respondent No.5 challenged this order - Annexure P/3 in the proceedings before the Collector, the Minister of the Department concerned and also before this Court in W.P.No.5844/2009, the question considered in these proceedings were only with regard to termination of respondent No.5's appointment on the post of Panchayat Secretary. If the orders in this regard - Annexures P/4, P/5 and P/6 are taken note of and if the facts as are narrated by this Court on 22.6.2009, in W.P.No.5844/2009, are taken note of, it is clear that the challenge made by respondent No.5 in these proceedings was to the order passed by the Collector terminating his appointment as a Panchayat Secretary under section 69(1). What was terminated by the Collector vide order - Annexure P/3 was only the appointment of respondent No.5 on the post of Panchayat Secretary and not on the post of Panchayat Karmi. That being so, the Collector and the

Commissioner are correct in contending that the appointment of respondent No.5 on the post of Panchayat Karmi was never terminated and, therefore, in appointing petitioner as a Panchayat Karmi vide Annexure P/7, the Panchayat has committed an error because the post of Panchayat Karmi was not vacant and the Collector having notified and appointed petitioner as Panchayat Secretary vide Annexure P/8 dated 17.11.2009 has committed a mistake in as much as the Panchayat and the CEO of the Janpad Panchayat did not bring these facts to the notice of the Collector. Accordingly, if the orders passed impugned in this writ petition - Annexure P/9 and P/11 are taken note of, it would be seen that both the Collector and the Commissioner have recorded concurrent findings to the effect that the appointment of respondent No.5 on the post of Panchayat Karmi was never terminated and without terminating this appointment petitioner could not be appointed as a Panchayat Karmi. This finding in the considered view of this Court is a reasonable and proper finding, which is passed in accordance to law and the same does not warrant any consideration.

14. Merely because the appointment of respondent No.5 on the post of Panchayat Secretary is terminated by the Collector vide Annexure P/3, it cannot be assumed that his appointment on the post of Panchayat Karmi is also terminated. Appointment to the post of Panchayat Secretary and Panchayat Karmi as indicated hereinabove are made by different authorities and as these are different posts, there has to be separate orders terminating the services from both the posts differently. In this case, there is no order passed by the competent authority terminating the services of respondent No.5 from the post of Panchayat Karmi and, therefore, in interfering in the matter the Commissioner and the Collector have not committed any error, which warrants interference now by this Court.

15. Accordingly, the submission made in this regard by Shri R.K. Samaiya, learned counsel for the petitioner, cannot be accepted.

16. As far as the objection raised by Shri R.K. Samaiya with regard to jurisdiction of the Collector to review his own order is concerned, it is clear that the Collector has not reviewed any of his orders in the matter of appointment or otherwise of respondent No.5 on the post of Panchayat Karmi. The order - Annexure P/3 as already indicated hereinabove is not an order terminating the services of respondent No.5 from the post of Panchayat Karmi and, therefore, there is no question of the Collector reviewing the order. The order - Annexure P/3 only terminates the appointment of respondent No.5

from the post of Panchayat Secretary and this order has not been reviewed by the Collector. Accordingly, it is not a case where the Collector has interfered in the matter by reviewing his earlier order. As far as Annexure P/8 dated 17.11.2009 passed by the Collector conferring the powers of Panchayat Secretary on the petitioner is concerned, once appointment of the petitioner on the post of Panchayat Karmi itself is by the Gram Panchayat is found to be unsustainable, the appointment of the petitioner on the post of Panchayat Secretary by virtue of his appointment as a Panchayat Karmi would also be adversely affected and if the Collector in ignorance of the facts had notified the petitioner as a Panchayat Secretary, it cannot be said that the Collector has acted in an illegal manner or without jurisdiction. It is case where the authorities concerned have proceeded in accordance with law and in doing so, this Court does not find any error warranting interference.

17. Accordingly, finding no merit in the claim made by the petitioner, this writ petition is dismissed.

*Petition dismissed.*

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**I.L.R. [2011] M. P., 1886**
**WRIT PETITION**
***Before Mr. Justice Sanjay Yadav***
W.P. No. 8015/2011 (Jabalpur) decided on 10 May, 2011

MINAL BUILDERS (M/S) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

*A. Rule of Law* - **Petitioner claimours for abiding of rule of law by others, owes its duty to abide by same rule of law.** (Para 12)

क. विधि का नियम – याची जो अन्य व्यक्तियों द्वारा विधि के नियम का पालन किये जाने की मांग करता है, उसी विधि के नियम का पालन करने के लिए वह कर्तव्य बाध्य है।

*B. Land Revenue Code, M.P. (20 of 1959), Section 248 - Removal of Encroachment* - **Petitioner raised unauthorized construction over a piece of Government Land - Petitioner failed to demonstrate that any portion of construction raised over as per sanctioned map has been breached - Action of respondents in demolishing such construction doesnot require interference - Petition dismissed.** (Paras 12 & 13)

ख. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 248 – अतिक्रमण का हटाया जाना – सरकारी भूमि के हिस्से पर याची ने अनाधिकृत निर्माण खड़ा किया – याची यह दर्शाने में असफल रहा कि मंजूरी प्राप्त नक्शे के अनुसार निर्माण के किसी हिस्से को भंग कर दिया गया – ऐसे निर्माण को नष्ट करने की प्रत्यर्थीगण की कार्यवाही में हस्तक्षेप अपेक्षित नहीं – याचिका खारिज।

*C. Bonafide purchasers* - **Petitioner constructed a mall and sold several shops - Shopkeepers have no right over such piece of land if the shops have been constructed over Govt. land - If the shopkeepers feel that they are cheated by the builder then they are at liberty to take recourse to law.** (Para 14)

ग. सद्भावपूर्ण क्रेता – याची ने मॉल का निर्माण किया और कई दुकानें विक्रय की – दुकानदारों का ऐसी भूमि के हिस्से पर कोई अधिकार नहीं यदि दुकानें सरकारी भूमि पर निर्मित की गई हैं – यदि दुकानदारों को लगता है कि बिल्डर द्वारा उनके साथ छल किया है तो वे विधि की सहायता लेने के लिए स्वतंत्र हैं।

**Case referred :**

(2009) 15 SCC 705.

*Rajendra Tiwari* with *R.L. Gupta,* for the petitioner.

*R.D. Jain,* A.G. with *Purushendra Kourav,* Dy. A.G., for the respondent/ State.

*Mohd. Adli,* for the interveners.

**ORDER**

SANJAY YADAV, J. :–TO BEGIN WITH

> "The core of existing principle is, I sugest, that all persons and authorities within the State, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the Courts. I doubt if anyone would suggest that this statement even if accurate as one of general principle, could be applied without exception or qualification. There are, for instance, some proceedings in which justice can only be done if they are not in public. But it seems to me that any derogation calls for close consideration and clear justification. And I think that this formulation, of course owning much to Diccy, expresses truth propounded by John Locke in 1690 that wherever law ends, tyranny begins', and also that famously stated by Thomas Paine in 1776, 'that in America the law is King. For as in absolute

governments the King is law, so in free countries the law ought to be King; and there ought to be no other." (The Rt. Hon. Lord. Bigham of Cornhill KG, House of Lords : TheRule of Law :The Sixth Sir David Williams Lecture, Cambridge 16 November 2006).

2. The-Epilogue as a Prelude is because, the action of State Government, Keeper of the law is being called in question in this petition under Article 226 of the Constitution of India, complaining the high-handedness by the functionaries of the State Govt. which are on a drive to demolish the portion of Minal Mall on allegation that the same is an unauthorized construction. It is this action of respondent which the petitioner is aggrieved of.

3. Facts are as clear as day. Petitioner a private limited company along with its sister concern Raj Homes, claims to be the pioneer in raising colonies, building apartments and commercial complex, purchased a piece of land comprising of an area 2.01 acres (87741.45 sq. ft.) being part of Survey No. 42/ I to 42/ 18 and 23/1 situated at village Narela Shankuri, Tahsil Huzur, District Bhopal vide sale-deed dated 25.1.2003 and amendment deed dated 30.3.2003. Petitioner with an object to construct a shopping mall sought permission from the competent Authorities including the Municipal Corporation, Bhopal and in 4 years period got constructed a shopping mall, styled as Minal Mall. It is stated that about 239 shops have been sold to private shop keepers who have established their business.

4. Attributing malice, it is urged that; Collector, Bhopal for no rhyme or reasons has subjected the petitioner to a proceeding under Section 248 of the M.P. Land Revenue Code, 1959 on the allegation that the petitioner has raised unauthorized constructions over the Nazul Land. It is contended that to meet out the constant threat of demolition, petitioner brought a suit for permanent injunction in the Court of Eleventh Additional District /Judge, Bhopal registered as C.S. No. 336-A/06. The same was decreed on 2.3.2007 in favour of petitioner with a direction that no interference be caused in construction without taking recourse to law. The suit, admittedly, confined to land bearing Survey No. 42/1 to 42/18 admeasuring 2.01 acres (87741.45 sq. ft.). The judgment and decree in Civil Suit 336 A/06 is under challenge in FA 721/2007 wherein notice on 1.A. 12562/2007 for condonation of delay has been issued.

5. It is contended that to the utter surprise and in derogation of decree dated 2.3.2007 the petitioner is again subjected to eviction proceedings under

Section 248 of Code of 1959 and though the petitioner participated in the proceedings on 15.3.2011, no order was passed. It is urged that without there being any order of demolition the petitioner's Minal Mall has been subjected to demolition. It is alleged that the action taken against the petitioner is without affording any opportunity of hearing. And even the Shop Keepers who are in occupation of respective shops are not heard. It is contended that the action of respondents is insignia of blatant highhandedness, outraging the rule of law. Petitioner accordingly seeks the relief that, the respondents be directed not to demolish the building/shopping complex of the petitioner under the name of M/s Minal Builders Pvt. Ltd. and not to make any interference in any way in the running of the shops which are situated in the shopping complex as well as call centre situated in two floor building and other business activities in the shopping mall.

6. Learned Advocate General on his turn at the outset has to submit that the objectionable portion of the Mall in question, i.e., the portion which was unauthorizedly constructed over the Government land not forming part of 87741.45 sq. ft. has been demolished. Taking cue from the documents filed along with Writ Petition No. 5998/2011, a Public Interest Litigation, and the report dated 28.3.2011 (which is placed on record during course of hearing, after serving copy on the petitioner), it is contended that, there were five instance whereon the complaints were made regarding encroachment and unauthorized constructions being raised in village Kolua Kalan and Narella Shankari over 108.47acres of land by the Sister Concern of the petitioner, i.e., Raj Homes. It is urged that demarcation was carried out between the period from 10.3.2011 to 16.3.2011 whereon it was found that, the portion of shopping mall in question over 0.80 acres were found to be unauthorizedly raised. It is contended that it was the said portion constructed over 0.80 acres of Govt. land which has been demolished and the land is freed from unauthorized construction. It is further contended that the action which has been taken by the State is only in respect of the land belonging to the State Govt. which was found to be encroached upon having unauthorized construction thereover of the Shopping Mall. It is urged that the action is taken in accordance with law and after carrying out the demarcation in presence of the personnels of the said Raj Homes, who happens to be the same as the owner of petitioner company. It is further contended that though the demarcation was carried out in respect of the unauthorized construction raised by Raj Homes, however, in the process of demarcation it was found that 0.80 acre of Govt. land has

been encroached for raising the construction of shopping mall in question. It is contended that since there was no cogent proof that the petitioner has the ownership over the land except Survey No. 42/1 to 42/18 and 23/1, the construction beyond 87741.45 sq. ft., has been demolished. It is further contended that there is no highhandedness and it is the rule of law which has been restored. It is contended that there being no cause of grievance for the petitioner, the petition is misconceived, therefore, it be dismissed.

7. Heard the counsel for the parties at length. Considered the rival submission and perused the entire material brought on record.

8. At the outset it is made clear that the complaint regarding highhandedness by the functionaries of the State in demolishing the portion of Mall said to be constructed over the government land (admeasuring 0.80 acres) is being examined in this matter and not the encroachment by Raj Homes which is a Sister Concern of the petitioner which is the subject matter ofW.P. 5998/ 2011 (PIL).

9. Learned Advocate General has been explicit in his submissions that construction over 0.80 acres of Govt. land has been presently cleared by demolishing unauthorized construction and not the portion constructed over 87741.41 sq. ft. which is said to be in accordance with the sanctioned map, (this aspect is also sub-judice in FA 721/2007).

10. To have a better picture the report dated 28.3.2011 can be taken note of. This report has been prepared on the basis of the demarcation carried out between 10.3.2011 to 16.3.2011 of the land belong to the Industries Department. The entire report for its better appreciation is reproduced as under:

> " ग्राम नरेला शंकरी एवं कोलुआ कला में उद्योग विभाग की भूमि खसरा क्रमांक 20/2 रकवा 1.00 एकड़, 21/2 रकवा 8.00 एकड़, 22/1 रकवा 3.17 एकड़, 22/2 रकवा 3.16 एकड़, 23/2 रकवा 0.05 एकड़, 45/1/2 रकवा 2.00 एकड़, 46 रकवा 6.17 एकड़ कुल रकवा 23.55 एकड़ नरेला शंकरी एवं खसरा क्रमांक 133 रकवा 0.64 एकड़, 134 रकवा 1.25 एकड़, 129/1/2 रकवा 3.05 एकड़, 129/2/2-224/24/1 रकवा 7.04 एकड़, 128-222/106/1/1/3, 129/1/1, 129/2/1 रकवा 5.94 एकड़, 127 रकवा 6.43 एकड़, 109/3 रकवा 4.10 एकड़, 109/1/2 रकवा 0.66, 130-131 रकवा 5.00 एकड़, 120 रकवा 15.04 एकड़, 123/2 रकवा 0.50 एकड़, 123/1 रकवा 4.83 एकड़, 223/105/1 रकवा 1.00 एकड़, 119 रकवा 17.12 एकड़ 124/1/1 रकवा 0.99 एकड़ 126 रकवा 14.26 एकड़, 223/105/2 रकवा 1.00 एकड़, 129/3 रकवा 5.00 एकड़ कुल रकवा 117.67 एकड़ भूमि का सीमांकन।

उपरोक्तानुसार ग्राम नरेला शंकरी एवं कोलुआ कंला तहसील हुजूर स्थित उद्योग विभाग की भूमि खसरा क्रमांक 20/2 रकवा 1.00 एकड़, 21/2 रकवा 8.00 एकड़, 22/1 रकवा 3.17 एकड़, 22/ रकवा 3.16 एकड़, 23/2 रकवा 0.05 एकड़, 45/1/2 रकवा 2.00 एकड़, 46 रकवा 6.17 एकड़ कुल रकवा 23.55 एकड़ नरेला शंकरी एवं खसरा क्रमांक 133 रकवा 0.6 4 एकड़, 134 रकवा 1.25 एकड़, 129/1/2 रकवा 3.05 एकड़, 129/2/2–224/24/1 रकवा 7.04 एकड़, 128–222/106/1/1/3, 129/1/1, 129/2/1 रकवा 5.94 एकड़, 127 रकवा 6.43 एकड़, 109/3 रकवा 4.10 एकड़, 109/1/2 रकवा 0.66, 130–131 रकवा 13.93 एकड़, 132 रकवा 0.68 एकड़, 224/124/2 रकवा 1.00 एकड़, 129/4/1 रकवा 5.00 एकड़, 120 रकवा 15.04 एकड़, 123/2 रकवा 0.59 एकड़, 123/1 रकवा 4.83 एकड़, 223/105/1 रकवा, 1.00 एकड़, 119 रकवा 17.12 एकड़, 124/1/1 रकवा 0.99 एकड़, 126 रकवा 14.26 एकड़ 223/105/2 रकवा 1.00 एकड़, 129/3 रकवा 5.00 एकड़ कुल रकवा 117.67 एकड़ भूमि का सीमांकन कलेक्टर महोदय के आदेश क्रमांक 152/अ.क./2011 भोपाल दिनांक 10.3.2011 से गठित दल द्वारा उक्त दिनांक से 16.3.2011 तक सीमांकन कार्य किया गया।

2. सीमांकन की सूचना उद्योग विभाग भोपाल एवं पड़ोसी कृषक राज होम्स द्वारा संचालक श्री संजय मेहता को सूचना -- पत्र जारीकर दी गई। उद्योग विभाग की ओर से प्रबंधक श्री कैलाश मानेकर, श्री सत्येन्द्र कुमार, श्री पी.के. चटर्जी, श्री राकेश सोनकिया तथा राज होम्स की और से श्री श्रेयांस जैन, श्री हाशिम स्थल पर उपस्थित रहे।

3. सीमांकन खसरा क्रमांक 35 ग्राम नरेला शंकरी में स्थित कुंआ एवं ग्राम नरेला शंकरी व कोलुआ कला की सीमा पर स्थित ट्रावर्स प्वाइन्ट को आधार मानते हुये अन्य बिन्दु कायम कर दिया गया।

4. सीमांकन कार्य के समय पाया गया कि उद्योग विभाग के नाम से दर्ज कुल भूमि रकवा 141.22 एकड़ (ग्राम नरेला शंकरी एवं ग्राम कोलुआ कंला) के खसरा नम्बरवार निम्न भूमि पर पड़ोसी कृषक राज होम्स द्वारा अवैध कब्जा कर तार फेंसिंग द्वारा घेरा जाकर एवं मौके पर भूमि को समतल कर रोड निर्माण का कार्य किया जा रहा है। अतिक्रमण किये जाने वाले क्षेत्र को पृथक–पृथक खसरा नम्बरवार संलग्न सूची (परिशिष्ट–1) व नक्शे में दर्शाया गया है।

5. ग्राम कोलुआ कंला की उद्योग विभाग की भूमि खसरा क्रमांक 120 का भाग रकवा 1.05 एकड़ राज होम्स की बाऊन्ड्री के अन्दर घिरा है, जिसमें मकान निर्मित है तथा 0.65 एकड़ पर रोड व 1.15 एकड़ पर फिल्म सिटी (शूटिंग हेतु) निर्मिल है एवं 12.19 एकड़ क्षेत्र बाऊन्ड्री से घिरा है।

ग्राम नरेला शंकरी स्थित उद्योग विभाग की कुल भूमि 23.55 एकड़ एवं ग्राम कोलुआ कंला स्थित उद्योग विभाग की कुल भूमि 89.94 एकड़ इस प्रकार सीमांकन के दौरान दोनों ग्रामों की कुल भूमि 113.49 एकड़ में निम्नानुसार राजहोम्स संस्था का अवैध कब्जा पाया गया :–

| क्रमांक | नोईयत | रकवा एकड़ में |
|---|---|---|
| 1 | मकान निर्मित क्षेत्र | 6.85 |
| 2 | रोड निर्मित क्षेत्र | 5.24 |

| | | |
|---|---|---|
| 3 | फूड जोन | 1.06 |
| 4 | शॉपिंग माल | 0.80 |
| 5 | पावर हाऊस | 0.20 |
| 6 | फिल्म सिटी | 1.15 |
| 7 | रिक्त बाऊन्ड्री के अन्दर का क्षेत्र | 93.17 |
| 8 | झुग्गी बस्ती | 4.25 + (0.77 उद्योग विभाग के कब्जे में) |

इस प्रकार राजहोम्स द्वारा अवैध कब्जे का क्षेत्रफल 108.47 एकड है।

अतः उपरोक्तानुसार प्रतिवेदन मय पंचनामा, नक्शा व खसरा नम्बरवार सूची कलेक्टर महोदय की ओर अवलोकनार्थ एवं आवश्यक कार्यवाही हेतु सादर प्रस्तुत है।

संलग्न :- उपरोक्तानुसार

राजस्व निरीक्षक सहा.अधीक्षक अधीक्षक
भू-अभिलेख, भोपाल भू-अभिलेख, भोपाल

ग्राम-कोलुआ कंला

| क्र. | खसरा नं. | रकवा | मकान | रोड | अन्य | रिक्त बाऊन्ड्री से घिरा | विवरण |
|---|---|---|---|---|---|---|---|
| 1 | 133 | 0.64 | | | | 0.64 | तार फेन्सिंग से घिरा |
| 2 | 134 | 1.25 | | | | 0.48 | 0.77 उद्योग विभाग के कब्जे में |
| 3 | 129/1/2 | 3.05 | | | | 3.05 | तार फेन्सिंग के अन्दर घिरा |
| 4 | 129/2/2 224/124/1 | 7.04 | | 0.40 | | 6.64 | तार फेन्सिंग के अन्दर घिरा |
| 5 | 128 129/1/1, 129/2/1 | 5.94 | | | | 5.94 | तार फेन्सिंग के अन्दर घिरा |
| 6 | 127 | 6.43 | | | | 6.43 | तार फेन्सिंग के अन्दर घिरा |
| 7 | 130-131 | 13.93 | 1.05 | 1.38 | 0.26 | 11.24 | तार फेन्सिंग के अन्दर घिरा |
| 8 | 132 | 0.68 | | | | 0.68 | तार फेन्सिंग के अन्दर घिरा |
| 9 | 224/124/2 | 1.00 | | | | 1.00 | तार फेन्सिंग के अन्दर घिरा |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 10 | 129/4/1 | 5.00 | | | | 5.00 | तार फेन्सिंग के अन्दर घिरा |
| 11 | 120 | 15.04 | 1.05 | 0.65 | 1.15 | 12.19 | तार फेन्सिंग के अन्दर घिरा |
| 12 | 123/1 | 4.83 | | | | 4.83 | तार फेन्सिंग के अन्दर घिरा |
| 13 | 223/105/1 | 1.00 | | | | 1.00 | तार फेन्सिंग के अन्दर घिरा |
| 14 | 119 | 17.12 | | 0.64 | | 16.48 | तार फेन्सिंग के अन्दर घिरा |
| 15 | 124/1/1 | 0.99 | | | | 0.99 | तार फेन्सिंग के अन्दर घिरा |
| 16 | 223/105/2 | 1.00 | | | | 1.00 | तार फेन्सिंग के अन्दर घिरा |
| 17 | 129/3 | 5.00 | | | | 0.75 | 4.25 झुग्गी गायत्री नगर |
| | कुल | 89.94 | 2.10 | 3.07 | 1.41 | 78.34 | 5.02 |

ग्राम – नरेला शंकरी

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 1 | 20/2 | 1.00 | 1.00 | | | | मकान बने है |
| 2 | 21/2 | 8.00 | | 0.40 | 0.20 | 7.40 | टिक्न घिरा |
| 3 | 22/1, 22/2 | 6.33 | 3.50 | 0.33 | 2.50 | 2.50 | टिक्न घिरा |
| 4 | 23/2 | 0.05 | 0.05 | | | | मकान बने है। |
| 5 | 45/1/2 | 2.00 | 0.20 | 0.64 | 0.36 | 0.36 | 0.36..... ..... |
| 6 | 46 | 6.17 | | 0.80 | 4.57 | 4.57 | 0.80 फूडजोन, पार्किंग .....: ..... |
| | | 23.55 | 4.75 | 2.17 | 14. 83 | 14.83 | |
| | | 113. 49 | 6.85 | 5.24 | 93. 17 | 93.17 | |

11. Apparent it is from the report that 0.80 acres of the land beloging to Government (industries department) was found to be encroached and the shopping mall constructed there over. The said piece of land as apparent from the details of survey number is a part of Survey No. 46 in village Narela Shankari. The details noted during demarcation records existence of food zone, parking. This Survey No. 46, as per Annexure P/2, the sale deed, bounds

the petitioner's land on south. The petitioner has failed to demonstrate that there are no construction over Survey No., 46. Similarly during demarcation of land construction over land bearing survey no. 45/1, which is east bound to petitioner's land, has been noted. There is no explanation/justification by the petitioner about these constructions. Whereas it is emphatically submitted by learned Advocate General that it is the unauthorized construction raised over government land which, has been razed. The petitioner fails to demonstrate that any part of construction over part of 87741.45 sq. ft. has been demolished.

12. The petitioner who claimours for abiding of rule of law by others, owes its duty to abide by same rule of law. In the entire petition, the petitioner has failed to demonstrate that any portion of construction raised over as per sanctioned map has been breached. In that case the petitioner has no cause for adjudication. On the contrary it is established from documents on record that unauthorized construction is raised over 0.80 acres of government land. Activities of raising unauthorized construction invited following observations by the Supreme Court in *Shanti Sports Club and Another v. Union of India and others* ((2009) 15 SCC 705] that:

> 75. Unfortunately, despite repeated judgments by the this Court and High Courts, the builders and other affluent people engaged in the construction activities, who have, over the years shown scant respect for regulatory mechanism envisaged in the municipal and other similar laws, as also the master plans, zonal development plans, sanctioned plans etc., have received encouragement and support from the State apparatus. As and when the courts have passed orders or the officers of local and other bodies have taken action for ensuring rigorous compliance of laws relating to planned development of the cities and urban areas and issued directions for demolition of the illegal/ unauthorized constructions, those in power have come forward to protect the wrong doers either by issuing administrative orders or enacting laws for regularization of illegal and unauthorized constructions in the name of compassion and hardship. Such actions have done irreparable harm to the concept of planned development of the cities and urban areas. It is high time that the executive and political apparatus of the State take serious view of the menace of illegal and unauthorized constructions and stop their support to the lobbies of affluent class of builders and others, else even the rural areas of the country will soon witness similar chaotic conditions."

13. It is expected of the State and its functionaries that in time to come they will rise to the occasion and would see that the rule of law is held high.

14. In view whereof no interference is warranted.

15. This order will not be complete if the grievance of the interveners are not addressed. They say that they are bona fide purchasers and cannot be put to loss when they have already invested huge amount in establishing their business and source of livelihood. In the considered opinion of this Court, if shops owned by these interveners are part of the land belonging to the government (industries department) then they have no right over said piece of land, even if they have purchased the same on due consideration; because as per petitioner he has a sanction only over 87741.45 sq. ft. forming part of Survey No. 42/1 to 42/18 and 23/1. In case if these interveners feel that they are cheated by the builder then they are liberty to take recourse to law. However, for the present in the given facts of this case no relief can be granted in this petition which is found to be devoid of substance.

16. In the result petition fails and is hereby dismissed with cost of Rs.10,000/-.

*Petition dismissed.*

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**I.L.R. [2011] M. P., 1895**
**WRIT PETITION**
***Before Mr. Justice S.N. Aggarwal***
W.P. No. 1498/2009(S) (Gwalior) decided on 11 May, 2011

MAHESH PRASAD BAJPAI ...Petitioner
Vs.
STATE OF M.P. & anr. ...Respondents

*A. Service Law - Promotion* - **In the event of an employee being found fit for promotion to a higher post, he is entitled to such promotion from the date his immediate junior was promoted in the said higher position.** (Para 10)

क. सेवा विधि – पदोन्नति – कर्मचारी को उच्चतर पद पर पदोन्नति के लिए उपयुक्त पाये जाने की दशा में वह उस दिनांक से ऐसी पदोन्नति का हकदार होगा जिस दिनांक से उसके निकटतम कनिष्ठ को कथित उच्चतर स्थिति में पदोन्नत किया गया था।

*B. Service Law - No work no pay* - **It shall not apply to deny benefit of salary in cases of notional promotion, if the incumbent has actually worked during the relevant period on a higher post in officiating capacity.** (Para 13)

ख. सेवा विधि – काम नहीं तो वेतन नहीं – काल्पनिक पदोन्नति के मामले में वेतन के लाभ से वंचित करने के लिए यह लागू नहीं होगा यदि पदधारी ने सुसंगत अवधि के दौरान स्थानापन्न क्षमता में उच्चतर पद पर वास्तविक रुप से कार्य किया है।

*D.P. Singh,* for the petitioner.
*Nidhi Patankar,* Dy. G.A. for the respondent/State.

**ORDER**

**S.N. AGGARWAL J.:**– The petitioner was appointed to the post of Agricultural Demonstrator in the year 1958. In due course, he was promoted to the post of Agricultural Development Officer w.e.f. 27.09.1985. He was aggrieved by him being ignored by the D.P.C. that met on 13.05.1991 for his second promotion to the post of Senior Horticulture Development Officer. He challenged the action of respondents for ignoring him of his second promotion to the post of Senior Horticulture Development Officer by filing an original application before the State Administrative Tribunal. The said application of the petitioner remained pending before the State Administrative Tribunal till the Tribunal was abolished in the year 2002 and further the case of the petitioner was transferred from the Tribunal to this Court for decision. The original application filed by the petitioner before the State Administrative Tribunal upon its transfer to this Court was registered as W.P. No. 2612/2003 and the same was disposed of by this Court vide order dated 01.12.2004 with the following directions to the respondents :

*"Accordingly, considering the totality of the facts and circumstances of the case as is reflected from the records this is a fit case where the claim of the petitioner for promotion has to be reconsidered. Accordingly, this petition is allowed. Respondents are directed to take action for considering the claim of the petitioner for promotion afresh by convening a review DPC and the review DPC shall consider the case of the petitioner as was existing on 13.05.1991 in the C.R. folder of the petitioner. Claim of the petitioner for promotion on the basis of C.R. for the preceeding five years as was available on*

*13.05.1991 ignoring all entries made thereafter shall be considered and action be taken within a period of two months from the date of receipt of certified copy of this order.*

*11. As petitioner has already retired on 31.06.1992 in case benefit is granted to the petitioner, the same shall be granted to him retrospectively and consequential relief in pension and post retiral benefit shall also be granted to the petitioner."*

2. Since the above directions of this Court were not complied with by the respondents, the petitioner had to file a contempt petition against the respondents being Contempt Petition No. 520/2005. During pendency of the contempt proceedings, the respondents have held a review D.P.C. on 05.03.2009 in terms of the judgment of this Court dated 01.12.2004 in W.P.No. 2612/2003 and took a decision to promote the petitioner to the post of Senior Horticulture Development Officer. The minutes of meeting of the D.P.C. are annexed as Annexure P-4 at page 36 of the paper book. A perusal of the minutes of meeting of review D.P.C. dated 05.03.2009 reveals that the D.P.C. did not decide the effective date from which the petitioner shall be entitled for his promotion to the post of Senior Horticulture Development Officer. However, the Director, Horticulture vide communication dated 07.03.2009 (Annexure P-1) informed the petitioner that he has been promoted to the post of Senior Horticulture Development Officer w.e.f. 04.09.1991. The petitioner was further informed by the Director, Horticulture that he shall not be entitled to pay of the promoted post of Senior Horticulture Development Officer for the period intervening between the date of his promotion and the date of his superannuation i.e. 30.06.1992.

3. In view of the review D.P.C. held by the respondents on 05.03.2009 and the communication dated 07.03.2009 received by the petitioner from the Director, Horticulture, the contempt petition being C.P. No. 520/2005 was disposed of by this Court vide order dated 17.03.2009 granting liberty to the petitioner to file a substantive writ petition against the communication of the respondents.

4. Pursuant to the above liberty granted by this Court to the petitioner, he has filed this writ petition seeking following reliefs :

*"(1) That the part of the order dated 07.03.2009 passed by the respondent No. 2 ( Annexure P-1) with respect to the date of promotion w.e.f. 04.09.1991 may kindly be quashed with a*

*direction that the petitioner has been ordered to be promoted w.e.f. 23.05.1991 when the incumbent juniors have been promoted by virtue of the DPC dated 13.05.1991.*

*(2) That, the part of the order (Annexure P/1) with regard to treating the intervening period applying the principle of 'no work no pay' may kindly be quashed and the respondents be further directed to extend all consequential benefits of the intervening period including salary of arrears.*

*(3) That, the respondents be further directed to pay the interest over the payment of arrears at the rate of 10% keeping in view the conduct of the respondents or delay caused in the case of the petitioner.*

*(4) Any other relief which is suitable in the facts and circumstances of the case in favour of the petitioner including the costs throughout may also be granted."*

5. In response to the petition filed by the petitioner return has been filed by the respondents, which has been perused by this Court. I have also heard the counsels for the parties and have perused the relevant record.

6. Mr. D.P.Singh, learned counsel appearing on behalf of the petitioner has argued that the petitioner was entitled for his promotion to the post of Senior Horticulture Development Officer w.e.f. 23.05.1991, the date when his immediate junior Mr. Omprakash Saraswat was promoted by the first D.P.C. on 13.5.1991.

7. Ms. Nidhi Patankar, learned Deputy Government Advocate appearing on behalf of the respondents submitted that the Director, Horticulture has communicated to the petitioner that he was entitled to promotion to the post of Senior Horticulture Development Officer w.e.f. 04.09.1991 and according to her there is no reason for this Court to interfere in the said communication of the Director, Horticulture.

8. In order to appreciate the above rival arguments advanced by the counsels for the parties regarding the date from which the petitioner was entitled for his promotion to the post of Senior Horticulture Development Officer, the pleadings of the parties needs to be mentioned. Para 5.6 of the petition in this context is relevant and is extracted below :

*"Pursuant to the recommendation of review D.P.C., the petitioner has been ordered to be promoted as Senior Horticulture Development Officer vide order dated 07.03.2009, copy of the order is annexed as Annexure P-1, whereby the petitioner has been ordered to be promoted as Senior Horticulture Development Officer w.e.f. 04.09.1991 instead of 23.05.1991 when the immediate juniors of the petitioner have been promoted."*

9. Return of the respondents to para 5.6 of the petition read as under:

*"5.6. That, contents of para 5.6 of this petition are misconceived, hence not admitted. However, filing of the contempt petition No. 520/2005 is not denied. However same was disposed of vide order dated 17.03.2009."*

10. It may be seen from the above pleadings of the parties that the respondents have not denied that the persons junior to the petitioner were promoted to the post of Senior Horticulture Development Officer on 23.05.1991. The minutes of meeting of review D.P.C. held on 05.03.2009, copy of which is annexed as Annexure P-1 at page 36 of the paper book would reveal that the D.P.C. has not taken any decision regarding the date from which the petitioner was entitled for his promotion to the higher post of Senior Horticulture Development Officer. In fact the petitioner was earlier ignored for his promotion to the higher post of Senior Horticulture Development Officer and he had to get review D.P.C. constituted through litigation that culminated in judgment of this Court dated 01.12.2004 in W.P.No. 2612/2003. The review D.P.C. was constituted by the respondents in compliance of the directions of this Court contained in its judgment dated 01.12.2004 in W.P.No. 2612/2003 and the review D.P.C. that met on 05.03.2009 has now found that the petitioner was fit for his promotion to a higher post of Senior Horticulture Development Officer on the date of first D.P.C. held on 13.05.1991. This clearly shows that the petitioner on the date of first D.P.C. dated 13.05.1991 was entitled for his promotion to the post of Senior Horticulture Development Officer and he got the same with retrospective effect in terms of the decision of the review D.P.C. that met on 05.03.2009. Since there is no denial by the respondents to the plea of the petitioner that his immediate junior got promotion to a higher post of Senior Horticulture Development Officer w.e.f. 23.05.1991, the petitioner is also held entitled to

get promotion to the said higher post w.e.f. the same date i.e. 23.05.1991, the date when his junior was promoted to the said post.

11. Regarding claim of the petitioner for pay of higher post of Senior Horticulture Development Officer for the period intervening between the date of his promotion and the date of his superannuation i.e. 30.06.1992, the pleadings of the petitioner contained in para 5.4 of the petition needs to be noticed and the same are extracted below :

> *" 5.4. That is is not out of place to mention here that since 1990, the petitioner is in current charge and holding the post of Senior Horticulture Development Officer and implementing vegetable schemes till attaining the age of superannuation on 31.06.1992. A copy of the documents with respect to performing the work as Senior Horticulture Development Officer in charge till the age of superannuation are enclosed herewith and marked as Annexure P-2. Therefore, it is apparent that the petitioner has attained the age of superannuation as in-charge Senior Horticulture Development Officer and therefore, the principle of 'no work no pay' is not having its application as applied vide order Annexure P/1,"*

12. Return of the respondents to para 5.4 of the petition read as under:

> *"5.4. That, as per para 5.4 of this petition it is not denied that petitioner was incharge Senior Horticulture Development Officer upto the age of his superannuation i.e. 31.06.1992. The petitioner who was incharge Senior Horticulture Development Officer, is not entitled for salary and other benefits of a regular Senior Horticulture Development Officer. At the relevant time petitioner had received acting allowance."*

13. The pleadings of the parties referred herein above tend to imply an admission by the respondents that the petitioner was working in officiating capacity in a higher post of Senior Horticulture Development Officer since 1990 and that he continued to work in that position till he superannuated on 30.06.1992. On the face of this admission of the respondents, the petitioner cannot be denied salary for the period intervening the date of his promotion and the date of his superannuation by invoking the principle of 'no work no pay'. This principle of 'no work no pay' has no application to the peculiar

facts of the present case since the petitioner had actually worked in higher position on the post of Senior Horticulture Development Officer, to which he was promoted in terms of decision of the review DPC held on 5th March, 2009. The petitioner is, therefore, held entitled to pay of the higher post of Senior Horticulture Development Officer for the entire period intervening between the date of his promotion, i.e., 23rd May, 1991 and the date of his superannuation, i.e., 30th June, 1992.

14. In view of the foregoing and having regard to the facts and circumstances of the case, this petition is finally disposed of with direction to the respondents to pay him arrears of salary for the period intervening between the date of his promotion to the post of Senior Horticulture Development Officer and the date of his superannuation within six weeks of receipt of certified copy of this order. If arrears as directed are not paid by the respondents to the petitioner within the stipulated period, then the petitioner is also held entitled to interest @ 12% per annum on the amount of arrears from the date of this order till the date of actual payment. The respondents are further directed to revise the pension of the petitioner suitably taking into account his last drawn salary of the post of Senior Horticulture Development Officer. The pension of the petitioner be also revised by the respondents within the same time period of six weeks as granted to them for payment of salary.

Certified copy as per rules.

*Petition disposed of.*

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**I.L.R. [2011] M. P., 1901**
**WRIT PETITION**
***Before Mr. Justice Sanjay Yadav***
W.P. No.4826/2008 (Jabalpur) decided on 13 May, 2011

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

***A. Municipalities Act, M.P. (37 of 1961), Section 109, M.P. Municipalities (Transfer of Immovable Property) Rules, 1996, Rule 3 - Disposal of Municipal Property*** **- Unless measures mentioned in the above provisions are adhered to, no right, title or interest in municipal property is created in any individual or person.** (Para 9)

क. नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 109, म.प्र. नगरपालिका (अचल सम्पत्ति का अंतरण) नियम 1996, नियम 3 – नगर सम्पत्ति का निस्तारण – जब तक कि उपरोक्त उपबंधों में वर्णित उपायों का दृढ़ता से पालन न किया गया हो, नगर सम्पत्ति में किसी व्यष्टि या व्यक्ति का कोई अधिकार, हक या हित निर्मित नहीं होता।

***B. Municipalities Act, M.P. (37 of 1961), Sections 109, 323 - Suspension of work* - Municipal Council granted permission to raise first floor without adhering to the statutory provisions - Collector suspended the order dated 21.9.2000 - Held - Collector was well within his right to have intervened.** (Para 11)

ख. नगरपालिका अधिनियम, म.प्र. (1961 का 37), धाराएँ 109, 323 – कार्य का निलंबन – नगरपालिका ने कानूनी उपबंधों का दृढ़ता से पालन किये बिना प्रथम तल के निर्माण की अनुज्ञा प्रदान की – कलेक्टर ने आदेश दिनांक 21.09.2000 को निलंबित किया –अभिनिर्धारित – कलेक्टर का हस्तक्षेप करना पूर्णतः उसके अधिकार की सीमा के भीतर था।

***C. Constitution, Article 14 - Negative Equality* - Illegality can not be perpetuated under the garb of equal opportunity - A wrong order/decision in favour of any particular party does not entitle any other party to claim the benefits on the basis of wrong decision.** (Para 13)

ग. संविधान, अनुच्छेद 14 – नकारात्मक समानता – समान अवसर की ओढ़ में अवैधता नहीं बनाई रखी जा सकती – किसी विशिष्ट पक्षकार के पक्ष में अनुचित आदेश/निर्णय, किसी अन्य पक्षकार को अनुचित निर्णय के आधार पर लाभों का दावा करने के लिए हकदार नहीं बनाता।

**Cases referred:**

AIR 2009 SC 34, AIR 2010 SC 1937.

*G.S. Ahluwalia,* for the petitioner.

*Ashish Shroti,* G.A. for the respondent/State.

*A.D. Deoras* with *R.K. Jaiswal,* for the respondent.

**ORDER**

**Sanjay Yadav, J :** - This order shall lead to disposal of W.P. Nos. 4884/2008 - *Dhanraj v. State of M.P. and others*, 4813/2008 - *Murlidhar v. State of M.P. and others,* 4817/2008- *Ashok Kumar v. State of M.P. and others,* 4820/2008 *Sachhanand v. State of M.P. and others,* 4822/08 - *Atalram Chelani v. State of M.P. and others*, 4825/2008 -*Sunil Kumar v. State of M.P. and others*, 4830/08 - *Nandkumar v. State of M.P. and others,* 4876/2008 *Asudamal v. State of M.P. and others.* 4877/08 -

*Ramomal v. State of M.P. and others,* 4878/2008 *Arjundas v. SLate of M.P. and others,* 4879/2008'-*Dilip Kumar v. State of M.P. and others,* 4881/2008 *Kalyan Singh v. State of M.P. and others,* 4887/2008 - *Mahesh Kumar v. State of M.P. and others,* 4889/2008 *Harakchand v. State of M.P. and others,* 4890/08 *Mahesh Kumar v. State of M.P. and others,* 4910/08 *Basant Kumar v. State of M.P. and others,* 4911/2008 - *Narsomal v. State of M.P. and others,* 4912/2008 - *Kanhaiyalal Chandwani v. State of M.P. and others,* 4914/2008 *Keshav Kumar v. State of M.P. and others,* 4915/2008 - *Shyamkumar v. State of M.P. and others,* 4917/2008 - *Vijay Kumar v. State of M.P. and others,* 4919/2008 - *Alamchand v. State of M.P. and others,* 4935/2008 - *Piyush Kumar Jain v. State of M.P. and others,* 4937/2008 - *Vasudeo Guravani v. State of M.P. and others,* 4938/2008 - *Motiram v. State of M.P. and others,* 4939/08 - *Pyarclal Chelani v. State of M.P. and others,* 4940/08 - *Jai Kumar Chelani v. State of M.P. and others,* 4946/08 - *Vikas Kumar Chelani v. State of M.P. and others,* 4952/08 - *Vasudeo Gurvani v. State of M.P. and others,* 4984/08 - *Ashok Kumar Jain v. State of M.P. and others,* 4985/08 - *Manoharlal v. State of M.P. and others,* 5049/08 *Gopaldas Chhabra v. State of M.P. and others,* 5053/08 - *Tarachand Chhabra v. State of M.P. and others,* 5055/08 - *Pritpal Singh v. State of M.P. and others,* 5056/08 - *Vishal Chelani v. State of M.P. and others,* 5061/08- *Ramesh Gurvani v. State of M.P. and others,* 5062/08-*Motilal v. State of M.P. and others,* 5069/08 - *Lakhanlal Chelani v. State of M.P. and others,* 5070/08 - *Devendra Singh Gambhir v. State of M.P. and others,* 5071/08 - *Pritpal i v. State of M.P. and others,* 5072/08- *Ashok Kumar Makhija v. State of M.P. and others,* 5217/08- *Rajkumar v. State of M.P. and others,* 5218/08 *Omprakash Chelani v. State of M.P. and others,* 5219/08 - *Laxmandas v. State of M.P. and others,* 5220/08 - *Kisanchand Meghani v. State of M.P. and others,* 5259/08 - *Rajkumar Basani v. State of M.P. and others,* 5262/08 - *Sewaram v. State of M.P. and others,* 5263/08 - *Pradeep Kumar Patel v. State of M.P. and others,* 5264/08 - *Bansilal Chelani v. State of M.P. and others,* 5265/08 - *Hariram Bij'lani v. State of M.P. and others,* 5360/08 - *Davindern Singh Gambhir v. State of M.P. and others;* 5361/08 - *Sushil Kumar v. State of M.P. and others,* 5363/08 - *Smt. Dwaribai v. State of M.P. and others,* 5365/08 - *Ramesh Kumar Devani v. State of M.P. and others,* 5368/2008 - *Bansilal v. State of M.P. and others and* 5370/2008 - *Kanhaiyalal Jethwani v. State of M.P. and others,* as the issue raised in these writ petitions are same.

2. The issue is as to whether the respondent State of Madhya Pradesh is justified in its action of affirming the order of suspension passed by the Collector, Hoshangabad in exercise of its powers under Section 323(1) of the M.P. Municipalities Act, 1961; whereby, the decision of Municipality permitting the petitioners to construct first floor over existing lease hold shops was suspended.

3. Relevant facts briefly are that the Nazul Land bearing Plot Nos.ll and 69 Sheet NO. 14 at Jawahar Bazar, Itarsi was allotted to Municipal Council, Itarsi by the State Government. Municipal Council constructed 65 shops over the said land to establish members of Sindhi Community who migrated from Pakistan. These shops were leased out. Petitioners are lease holder.

4. In the year 2000, as apparent from Annexure P/3, certain Councillors represented to the President, Municipal Council Itarsi, to grant permission to the shopkeepers at Jawahar Bazar, Itarsi to raise construction at first floor over their respective shops. Tentative decision was taken by the President who by his order dated 21.7.2000, directed that the matter be placed before Council (Annexure P/5). In pursuance whereof the Chief Municipal Officer, Itarsi vide his letter dated 21.9.2000 accorded the permission (Annexure P-4). This permission was however, subject to orders passed by State Government besides other terms and conditions stipulated therein. From documents Annexure P/6 which is dated 29.6.2000, it appears that much before the President took the cognizance,i.e. 21.7.2000, shopkeepers deposited the premium amount. Be that as it may.

5. It appears from record that some complaints were made against the decision taken by the council of granting permission to construct shops over first floor which led to initiation of action under section 323- of the Act of 1961 by the Collector, Hoshangabad. The complaint was that, the permission has been granted contrary to the provisions contained in Madhya Pradesh Municipalities (Transfer of Immovable Property) Rules, 1996. The proceeding culminated into an order dated 13.10.2000, by Collector, Hoshangabad, who suspended the order dated 21.9.2000; whereby, the permission was granted to the shopkeepers to raise construction on first floor. The matter thereafter was referred to the State Government for its confirmation vide sub section (2) of Section 323 of 1961 Act. The State Government vide order dated 14.2.2003 affirmed the suspension order. The decision of the State government was put to execution by Council vide resolution passed in

meeting dated 26.2.2008. Consequent whereof an order dated 1.4.2008 was passed by the Municipal Council calling upon respective shopkeepers to dismantle the construction done in pursuance to order dated 21.9.2000.

6. Order passed by the State Government in purported exercise of its powers under Sub-section (2) of Section 323 of 1961 Act is :

मध्यप्रदेश शासन
नगरीय प्रशासन एवं विकास विभाग
मंत्रालय
बल्लभ भवन, भोपाल – 4620004

"आदेश"

भोपाल दिनांक – 14–2–03

क्रमांक–एफ–10–6/18–2/2002 : मुख्य नगर पालिका अधिकारी, नगर पालिका परिषद् इटारसी ने उनके आदेश क्रमांक – स.वि.वि. 2000 दिनांक – 21.9.2000 से नगर पालिका परिषद् इटारसी द्वारा जवाहर "बाजार" / सिंधी बाजार" में भूतलपर निर्मित दुकानों के ऊपर के तल पर दुकानदारों को गोदाम/ दुकानें बनाने संबंधी कार्य स्वीकृति आदेश जारी किया। मुख्य नगर पालिका अधिकारी द्वारा दिनांक – 21.9.00 को जारी कार्य स्वीकृति आदेश नगर पालिका परिषद् इटारसी के बिना प्रस्ताव पारित किए जारी करने इसके लिए मध्यप्रदेश नगर पालिका (अचल सम्पत्ति अंतरण नियम, 1966 के नियम–8 के अंतर्गत राज्य शासन की स्वीकृति प्राप्त न करने आदि कारणों से कलेक्टर होशंगाबाद ने मध्यप्रदेश नगर पालिका अधिनियम, 1969 की धारा 323 (1) के अंतर्गत उनके आदेश क्रमांक – 686/टी.अ. कलेक्टर 2000/ दिनांक– 13.10.2000 द्वारा मुख्य नगर पालिका अधिकारी के उल्लेखित आदेश दिनांक – 21.9.00 को निलंबित करते हुए उनके पत्र क्रमांक– 70/प्र.अ.कले./2000 दिनांक – 19.10.2000 से राज्य शासन से नगर पालिका परिषद् इटारसी को समुचित निर्देश देने का अनुरोध किया।

2. इस विभाग के समसंख्यक पत्र दिनांक – 15.7.02 द्वारा मध्यप्रदेश नगर पालिका अधिनियम, 1961 की धारा –323 (2) के अंतर्गत मुख्य नगर पालिका अधिकारी, नगर पालिका परिषद्, इटारसी को इस आशय की कारण बताओं सूचना पत्र जारी किया गया कि "क्यों" न कलेक्टर, होशंगाबाद के दिनांक– 13.10.2000 के आदेश की पुष्टि की जाए। मुख्य नगर पालिका अधिकारी को व्यक्तिगत सुनवाई का भी अवसर दिया गया।

3. नगर पालिका परिषद् द्वारा स्पष्ट करते हुए कि, परिषद् प्रस्ताव क्रमांक – 4 दिनांक – 14.8.2002 द्वारा निर्मित भुगतान की दुकानों के आर प्रथम तल पर गोदाम निर्माण के संबंध में अध्यक्ष द्वारा दिए गए निर्णय की पुष्टि बहुमत से की नहीं है, शासन से कलेक्टर के आदेश दिनांक – 13.10.2000 को निरस्त करने का अनुरोध किया गया। मुख्य नगर पालिका अधिकारी की सुनवाई की गई एवं प्रकरण से संबंधित उपलब्ध अभिलेखों का अध्ययन किया गया। इनसे मुख्य रूप से यह स्पष्ट हुआ कि कलेक्टर द्वारा उक्त आदेश जिस आधार पर पारित किया गया है, उसके संबंध में नगर पालिका परिषद् द्वारा कुछ नहीं कहा गया है। उक्त स्थिति इस बात की स्वयं परिचायक है कि कलेक्टर द्वारा दिनांक – 13.10.2000 को

आदेश पारित करने के समय तक परिषद् की स्वीकृति विद्यमान नहीं थी। अध्यक्ष को बिना परिषद् की स्वीकृति के निर्णय लेने का कोई अधिकार नहीं था, साथ ही तत्संबंध में नियमानुसार शासन से स्वीकृति प्राप्त करना भी आवश्यक थी, जो प्राप्त नहीं की गई।

4. मध्यप्रदेश नगर पालिका (अचल संपत्ति अंतरण) नियम, 1996 के नियम – 3 के अनुसार – "कोई भी अचल सम्पत्ति, जिससे आय प्राप्त होती हो या वह आय देने योग्य हो, सार्वजनिक नीलामी अथवा बन्द लिफाफे में प्रस्ताव आमंत्रित करके उच्चतम बोली लगाने वाले को छोड़कर, विक्रय द्वारा या पट्टे द्वारा या अन्यथा अंतरित नहीं की जाएगी, परंतु यदि परिषद् की यह राय है कि सार्वजनिक नीलामी करना या ऐसे अंतरण के लिए बन्द लिफाफे से प्रस्ता आमंत्रित करना वांछनीय नहीं है, तो परिषद् राज्य सरकार की पूर्व मंजूरी से सार्वजनिक नीलामी के बिना या बन्द लिफाफे में प्रस्ताव आमंत्रित किए बिना ऐसा अंतरण कर सकेगी।" यह पूर्णतः सिद्ध है कि इस प्रकरण में अध्यक्ष द्वारा उक्त नियम की स्पष्टतः अवहेलना की गई है। कलेक्टर द्वारा जिस परिस्थिति में आदेश पारित किया गया है, वह पूर्णतः उचित है।

5. उल्लेखित तथ्यों के आधार पर राज्य शासन मध्यप्रदेश नगर पालिका अधिनियम, 1961 की धारा – 323 (2) के तहत् मुख्य नगर पालिका अधिकारी, इटारसी के कार्य स्वीकृति आदेश दिनांक – 21.9.00 को निलंबित करने संबंधित कलेक्टर, होशंगाबाद के आदेश दिनांक – 13.10.2000 की पुष्टि करता है।

मध्यप्रदेश के राज्यपाल के नाम से
तथा आदेशानुसार"

The Municipal Council thereafter in its meeting held on 26.2.2008 passed the resolution by majority to demolish first floor constructed over the existing shop by the shop keepers.

7. Question is whether the decision by the State Govt. suffers from any illegality and whether the shop keepers had acquired any right over the first floor and over the construction made thereon.

8. Section 109 of the Act of 1961 stipulates provisions governing the disposal of Municipal property vesting in or under the management of Council. It provides for

> **109. Provisions governing the disposal of Municipal property vesting in or under the management of Council.-** (1) No streets, lands, public places, drains or irrigation channels shall be sold, leased or otherwise alienated, save in accordance with such rules as may be made in this behalf.
>
> (2) Subject to the provisions of sub-section (1),
>
> (a) the Chief Municipal Officer may, in his discretion, grant a lease of any immovable property belonging to the Council, including any right of fishing or of gathering and

taking fruits, flowers and the like, of which the premium or rent, or both, as the case may be, does not exceed two hundred and fifty rupees for any period not exceeding twelve months at a time:

Provided that every such lease granted by the Chief Municipal Officer, other than the lease of the class in respect of which the President-in-Council has by resolution exempted the Chief Municipal Officer from compliance with the requirements of this proviso, shall be reported by him to the Standing committee within fifteen days after the same has been granted.

(b) with the sanction of the President-in-Council, the Chief Municipal Officer may, be sale or otherwise grant a least of immovable property including any such right as aforesaid for any period not exceeding three years at a time of which the premium, or rent, or both, as the case may be, for any one year does not exceed one thousand five hundred rupees.

(c) With the sanction of the Council, the Chief Municipal Officer may lease, sell or otherwise convey any immovable property belonging to the Council.

(3) The sanction of the President-in-Council or of the Council under sub-section (2) may be given either generally for any class of cases or specially in any particular case:

Provided that

(i) no property vesting in the Council in trust shall be lease, sold or otherwise conveyed in a manner that is likely to prejudicially effect the purpose of the trust subject to which such property is held;

(ii) no land exceeding fifty thousand rupees in value shall be sold or otherwise conveyed without the previous sanction of the State Government and every sale or other conveyance of property vesting in the Council shall be deemed to be subject to the conditions and limitations imposed by this Act or by any other enactment for the time being in force."

9. Similarly, Rule 3 of Madhya Pradesh Municipalities (Transfer of Immovable Property) Rules, 1996 (these rules are framed by the State Government in exercise of its powers under Section 355 read with Section 109 of the Act of 1961) provides for :

> "3. No immovable property which yields or is capable of yielding an income shall be transferred by sale, or lease or otherwise conveyed except to the highest bidder at a public auction or offer in a sealed cover:
>
> Provided that if the Council is of the opinion that it is not desirable to hold a public auction or to invite offers in sealed covers for such transfer, the Council may, with the previous sanction of the State Government, effect such transfer without public auction or inviting offers in sealed covers;
>
> Provided further that the Council may, for reasons to be recorded in writing, transfer such immovable property to a bidder other than the highest bidder, with the previous sanction of the State Government;
>
> Provided also that in any such transfer by lease, a reasonable premium shall be payable at the time of granting lease and annual rent shall also be payable during the whole term of the lease.

Thus, unless the measures mentioned in these provisions are adhered to, no right, title or interest in municipal property is created in any individual or person.

10. There is no iota of evidence on record to substantiate the claim of the petitioner having acquired any right, title or even interest over the first floor which admittedly was never leased out to any of the shop keepers as would entitle them to have a claim over the same. The decision on the basis whereof alleged possession is claimed and the constructions were raised, i.e., an order dated 21.9.2000 does not conform with the stipulations contained under Section 109 of the Act of 1961 Act and Rules of 1996. Thus admittedly there is no accrual of right and title in favour of petitioner over first floor.

11. Since the action by Municipal Council as formulated by order dated 21.9.2000 was not in conformation with the statutory provisions it was within the right of Collector Hoshangabad to have intervened. Sub-section (1) of Section 323 of 1961 Act stipulates that:

"(1) If, in the opinion of the Divisional Commissioner, the Collector, or any other officer authorized by the State Government, in this behalf, the execution of any order of resolution of a Council, or of any of its Committee or any other authority or officer subordinate thereto, or the doing of any act which is about to be done or is being done by or on behalf of the Council, is not in conformity with law or with the rules or bye-laws made thereunder and is detrimental to the interests of the Council or the public or is causing or likely to cause injury or annoyance to the public or any class or body of persons or is likely to lead to a breach of the peace, he may, by order in writing under his signature, suspend the execution of such resolution or order or prohibit the doing of any such act."

Thus exercising his powers under Section 323 (1), Collector suspended the order dated 21.9.2000. This order was duly affirmed by the State Government on being referred under sub-Section (2) of Section 323 which provides that " (2) When any order under sub-section (1) is passed, the authority making the order, shall forthwith forward to the State Government and to the Council affected thereby a copy of the order with a statement of reasons for making it; and it shall be in the direction of the State Government to rescind the order, or to direct that it shall continue in force with or without modification, permanently or for such period as it thinks fit:

Provided that the order shall not be revised, modified or confirmed by the State Government without giving the Council reasonable opportunity of showing cause against the order."

12. Contention on behalf of the petitioner that the order dated 21.9.2000 whereby the permission was granted for raising construction over the first floor of existing shops was merely suspended and there was no decision to demolish the construction raised the demolition cannot be taken recourse of, though sounds attractive but has no substance. When the very 'authority' whereunder some act has been done, looses its existence, the superstructure built thereon automatically crumble, as, such 'authority' is not an authority in existence in present. The petitioners have failed to show any other order or resolution in favour of the decision for raising construction. Thus it cannot be said that the respondents were taking action without any authority of law,

13. Further contention of the petitioner that the shop-keepers are discriminated as during earlier years similar permission was granted, whereas the permission

granted to the petitioner have been withdrawn. Petitioner has placed reliance on the documents pertaining to year 1991 to substantiate the claim. The plea of discrimination deserves to be rejected on two counts; first, that in the year 1991 the Rules of 1996 were not available nor Section 109 as the same was substituted by MP 12 of 1995 w.e.f. 1.5.195. The petitioners are thus governed by the provisions of Section 109 and Rule 3 which were not in existence in the year 1991. Parity, therefore, does not lie. Secondly, assuming that an improper permission was granted in the year 1991 whether the same can be allowed to perpetuate, the emphatic answer is in the negative. As trite it is that an illegality cannot be perpetuated under the garb of equal opportunity. In this context reference can be had of judgment by Supreme Court in *Videsh Sanchar Nigam Ltd. and Anr. v. Ajit Kumar Kar and Ors* (AIR 2009) SC 34 (paragraph 24) wherein it is held that "a bona fide mistake does not confer any right to any party and it can be corrected." And in *Fuljit Kaur v. State of Punjab and Ors.* (AIR 2010 SC 1937) (Paragraph 13) wherein it is held that "Article 14 is not meant to perpetuate illegality or fraud. And that "A wrong order/ decision in favour of any particular party does not entitle any other party to claim the benefits on the basis of the wrong decision."

14. In view whereof the claim for disparity or discrimination is not substantiated and, therefore, discarded.

15. It is also urged that the petitioners were not given a hearing. In this context it is to borne in mind that the work undertaken by petitioners was on the basis of a decision by the Council which was under scrutiny under sub-section (1) of Section 323, which was later on subject to confirmation by the State Government as per sub-section (2) of Section 323 wherein the mechanism of hearing is inherent. The record reveals that not only the officers of Municipal Council but even the shop keepers of Jawahar Market were invited and were given hearing before High Power Committee (Annexure 3R-1 and 3R-2). In view whereof the contentions that no opportunity for hearing was afforded has no legs to stand.

16. There is another aspect of the matter. State of Madhya Pradesh in the return filed by it has dwelt upon the physical status of the entire structure. It is stated that after the order dated 14.2.2003 passed by the State Government, Municipal Council sought technical opinion regarding strength of existing building to bear load of additional story over it. It is contended that opinion has been given by Maulana Azad National Institute of Technology, Bhopal

wherein it is stated that existing building is already 50 years old and has reached to its expected life and, therefore, construction of an additional story over it is not safe for public in general. Apart therefrom it is stated that present Jawahar Bazar is densely populated area having about 500 shops approximately. The road in between two lanes of shops is about 8 to 10 feet, either side of the road is used by shop keepers to display their goods and thereafter not much space is left for public use. It is contended that in such situation construction of additional shops would increase public density in the market, which would cause public nuisance and, therefore also construction of additional shops cannot be beneficial in the interest of public in general. A report on inspection of godown and shops at Jawahar Bazar Itarsi has been brought on record by the State Government as Annexure R-1; wherein the conclusion arrived at by the experts states that "such constructions though standing since 1995 cannot be considered as technically sound. The add-on storey has made distribution of mass irregular, stressed the columns beneath thus weakened the strength and rigidity of structure. During monsoon, seepage and dampness may further weaken the structure. The structure is not maintained by specialized agency and the possibility of falling down some of the components may not be ruled out. Such a structure is prone to fall in the event of scismic activity in the area. Failure of even some portions of the structure may lead to chain effect and large damage may result. In view of above it is suggested that process for replacing the existing market be started as the construction has already served for about 45 years and have nearly reached to the expected safe life of R.C.C structure estimated as 50 years."

17. Be that as it may. It is for the Municipal Council to take recourse to law keeping in view the report furnished by Department of Civil Engineering, Maulana Azad National Institute of Technology, Bhopal.

18. For the present in respect of the decision taken by the State Government of suspending the order dated 21.9.2000 and the consequential action taken by Municipal Council cannot be faulted with.

19. Having thus considered, the petitions being devoid of merit deserve to be and are hereby dismissed. However, there shall be no costs.

*Petition dismissed.*

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**I.L.R. [2011] M. P., 1912**
**WRIT PETITION**
***Before Mr. S.R. Alam, Chief Justice & Mr. Justice Alok Aradhe***
W.P. No. 5698/2008 (Jabalpur) decided on 19 May, 2011

MANGAL AMUSEMENT(P) LTD. & anr. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

*A. **Lease and Licence - Difference - Law discussed.***

(Paras 16 &17)

क. पट्टा व अनुज्ञप्ति – भेद –विधि की विवेचना की गई।

*B. **Transfer of Property Act (4 of 1882), Section 105, Easement Act, (5 of 1882), Section 52 - Lease or Licence*** **- Real intention of parties as decipherable from complete reading of document, if any, executed between parties and surrounding circumstances have to be seen - Petitioner was only given right to use the land to run amusement center and I.D.A. retained the possession of the land - Mere right to raise construction on payment of annual rent does not create an interest in property and amounts to merely a right to do something on the land - Deed dated 6-5-1994 was only a licence and not lease.** (Paras 19 & 20)

ख. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 105, सुखाचार अधिनियम (1882 का 5), धारा 52 – पट्टा या अनुज्ञप्ति – पक्षकारों का वास्तविक आशय जो पक्षकारों के बीच निष्पादित दस्तावेज, यदि कोई हो, को पूर्णतः पढ़े जाने पर स्पष्ट होता है और संबंधित परिस्थितियों को देखना होगा – याची को केवल मनोरंजन केन्द्र चलाने हेतु भूमि के उपयोग का अधिकार दिया गया था और आई.डी.ए. ने भूमि का कब्जा बनाए रखा – वार्षिक भाड़े के भुगतान पर मात्र निर्माण खड़ा करने का अधिकार, सम्पत्ति में हित स्थापित नहीं करता और भूमि पर कुछ करने मात्र के अधिकार की कोटि में आता है –विलेख दिनांक 06.05.1994 केवल अनुज्ञप्ति थी और न कि पट्टा।

*C. **Easement Act (5 of 1882), Section 52 - Licence - Renewal Clause*** **- Clause 8 provides that licence may be renewed - It confers discretion on I.D.A. to renew the licence - As renewal clause is not couched in mandatory terms, no indefeasible right on petitioners to seek renewal as a matter of right is conferred.** (Para 21)

ग. सुखाचार अधिनियम, (1882 का 5), धारा 52 – अनुज्ञप्ति – नवीकरण खंड – खंड 8 उपबंध करता है कि अनुज्ञप्ति नवीकृत की जा सकती है – वह आई.डी.ए. को

अनुज्ञप्ति नवीकरण का विवेकाधिकार प्रदान करता है – चूंकि नवीकरण खंड आज्ञापक शर्तों में छिपा हुआ नहीं है, याची को अधिकार के रुप में नवीकरण चाहने का कोई अजेय अधिकार प्रदत्त नहीं होता।

***D. Promissory Estoppel* - Petitioners were permitted to install rides and games under licence - No promise made to petitioner creating any legal relationship or affecting legal relationship - Even otherwise petitioners have not done anything nor have altered their position except by submitting application for renewal - As the land use has already been changed therefore, principle of promissory estoppel would also not apply - Petition dismissed.** (Para 24)

घ. वचन विबंध – याची को अनुज्ञप्ति के अंतर्गत सवारी एवं क्रीड़ायें स्थापित करने की अनुमति दी गई थी – कोई विधिक संबंध बनाने का या विधिक संबंध प्रभावित करने के लिए याची को कोई वचन नहीं दिया गया – अन्यथा भी याचीगण ने नवीकरण के लिए आवेदन प्रस्तुत करने के अलावा कुछ नहीं किया है और न ही अपनी स्थिति बदली है – चूंकि भूमि का उपयोग पहले ही बदल दिया गया है, इसलिए, वचन विबंध का सिद्धांत भी लागू नहीं होगा – याचिका खारिज।

**Cases referred :**

(1969) 3 SCC 611, (2004) 3 SCC 595, AIR 1992 SC 180, AIR 1991 SC 515, AIR 1977 SC 1564, (2006) 3 SCC 581, (2006) 11 SCC 464, (2004) 13 SCC 563, (2008) 15 SCC 256, AIR 1959 SC 1262, AIR 1965 SC 610, (2002) 5 SCC 361, AIR 1968 SC 175, (2003) 11 SCC 328, AIR 1965 SC 716, AIR 1968 SC 919, (1976) 3 SCC 512, AIR 1988 SCC 184, AIR 1989 SC 1816, AIR 1952 Nagpur 325, AIR 1979 SC 621.

*A.M. Mathur,* with *Ravindra Gupta, Sanjay Agarwal & Abhinav Shanodkar,* for the petitioners.

*Kumaresh Pathak,* Dy. A.G. for the respondents No. 1 & 2.

*R.N. Singh,* with *Arpan J. Pawar for the respondents No. 3 & 4.*

**ORDER**

The Order of the Court was delivered by **ALOK ARADHE J.:–** The petitioners by way of this petition, inter alia seek quashment of the notification dated 19.11.2003 (Annexure P-28) in respect of change of land use of the land in question as well as the order dated 23.9.2003 (Annexure P-25) passed by the Principal Secretary, Housing and Environment Department by which the Indore Development Authority has been directed to invite the tenders afresh. The petitioners also seek a declaration to the effect that the notification dated 19.11.2003 retaining the

land use as it was originally designated and declared in the master plan of 1975-1991 is ab initio void. The petitioner have further prayed for a direction to the respondents to ignore the order dated 23.9.2003 (Annexure P-25) passed by the Principal Secretary while considering the application for renewal, dated 9.2.2010 submitted by the petitioners. The petitioners also seek a direction to the Indore Development Authority to issue the licence to them to run the amusement park. The petitioners have also sought a direction to the respondents to consider and decide the application dated 29.12.2000 (Annexure P-15) for construction of second phase of the amusement park.

2. In order to appreciate the controversy involved in the writ petition, it is necessary to refer to relevant facts which are stated infra. The petitioners No.1 is a company incorporated and registered under the provisions of the Companies Act, 1956 whereas the petitioners No.2, is its Managing Director. The petitioners No.1 company has been constituted and incorporated for the sole purpose of setting up an amusement park in the State of M.P. and particularly at Indore. The respondent No.3, Indore Development Authority is a body incorporated under Section 38 of the M.P. Nagar Tatha Gram Nivesh Adhiniyam. 1973 (hereinafter referred to as 'the 1973 Act'). The respondent No.3 authority by a resolution dated 6.10.1987 resolved to install a children amusement centre on an area admeasuring approximately 7 to 8 acres on commercial land comprised in Scheme No .54 of the authority which forms part of the land admeasuring 17.931 hectares, on the pattern of 'Appu Ghar' in New Delhi. The respondent No.3 authority with a view to implement the aforesaid resolution, invited tenders on 26.11.1991 vide an advertisement. Pursuant to the aforesaid advertisement the petitioners as well as four other tenderers submitted their tenders. The tenders were opened on 24.11.1992.

3. As per the facts set forth in the petition, the petitioners No.1 company was found to be only qualified, eligible and successful tenderer-fulfilling all the norms and conditions laid down by the respondent No.3 authority. However., the respondent No. 3 authority delayed the acceptance of.the petitioners' tender on flimsy grounds and for extraneous considerations. In the circumstances aforesaid, the petitioners No.1 approached this Court by filing a writ petition, namely, M.P. No.313/1992 which was allowed vide order dated 23.3.1994 (Annexure P-12) by Indore Bench of this Court and the respondent authority was directed to accept the tender of the petitioners

company. In compliance of the aforesaid direction issued by Indore Bench of this Court the petitioners No.1 company was allotted 7.66 acres of land for establishment of amusement centre: It is the case of the petitioners that a document though styled as licence deed (Annexure P-13) which in fact for all intents and purposes was a lease deed in law was executed between the parties on 6.5.1994. As per the terms and conditions of the aforesaid deed, the land was initially let out to the petitioner company for a period of fifteen years with a provision for. further-renewal of the term by fifteen years by enhancement of the licence fee by 40% and thereafter on such rate -and percentage as may be mutually agreed upon and decided by the parties as provided in clause 8 of the deed. The petitioners have stated in the writ petition that the land use of land admeasuring 7.66 acres allotted to the petitioners as per the development plan of 1975-1991 was commercial and, therefore, the same was allotted to the petitioners for amusement park. As per the petitioner's version it developed. the aforesaid .land, constructed pathways. installed the rides and games, constructed administrative building, office, kiosks, shops and food centres, etc. by spending an amount of Rs. 4 Crores and completed the construction work in the month of June, 1995 as per the terms and conditions of the document dated 6.5.1994, after obtaining permission from the respondent No.3 authority as well as Municipal Corporation, Indore.

4. Thereafter the petitioners submitted an application 29.12.2000 (Annexure P-16) for permission of construction of second phase of amusement park. However, during the pendency of the application submitted by the petitioners for construction of the second phase, the land use from regional park to commercial in respect of the land comprised in survey numbers 257, 258 part, 259, 260, 261,262, 264, 265 and 265 part, and the land use of the land allotted to the petitioners was sought to be changed from commercial to regional park by the State Government, at the instance of the respondent No.3 authority. Accordingly, a public notice dated 9.3.2001 was issued by which objections were invited with regard to proposed change in the land use. In the meantime, in response to the letter of the respondent No.3 authority, Joint Director, Town and Country Planning vide order dated 7.5.2002 (Annexure P-33) permitted the activities of the second phase of the amusement Park. Thereafter the respondent No.3 authority vide communication dated 5.8.2002 sought the.project report from the petitioners. The petitioners in response to the aforesaid query submitted the project report on 14.8.2002. The Chief Executive Officer of the Indore Development Authority by

communication dated 27.5.2003 addressed to the Principal Secretary, Housing and Environment Department, sought the approval with regard to construction of the second phase of amusement park. The aforesaid letter contained a recommendation in favour of the petitioners. However, the Principal Secretary of the Housing and Environment Department vide order dated 23.9.2003 (Annexure P-25) refused to accord the permission for construction of second phase of the amusement park on the ground that in the matter of grant of licence by the respondent No.3 authority to the petitioners, the procedure which has been adopted was not in aecordance with law and was not transparent and, therefore, the proposal of the Indore Development Authority cannot be sanctioned. Accordingly, the Indore Development Authority was directed to issue fresh tenders for grant of licence in accordance with the Rules and Procedure and by adopting the transparent procedure.

5. In compliance, of the order dated 23.9.2003. the respondent No.3 authority passed a resolution for cancellation of the licence granted to the petitioners vide Annexure P-27. Accordingly, a show cause notice dated. 8.1.2007 (Annexure P-31) was issued to the petitioners for cancellation of the licence by the respondent No.3 authority. The petitioners submitted a reply, dated 22.1.2007 (Annexure P-32). The reply submitted by the petitioners was placed before the Board of the respondent No.3 authority on 14.8.2007 which passed a resolution on 14.8.2007 that the State Government be apprised that the Indore Development Authority does not agree with the findings contained in the order of the Principal Secretary for cancellation of the licence awarded to the petitioners as well as the legal and factual scenario once again. Accordingly, the communication dated 1.9.2007 contained in Annexure P-26 was sent to the Principal Secretary, Housing and Environment Department, Government of M.P.

6. As stated supra, during the pendency of the application of the petitioners for construction of the second phase of amusement park, a notification was issued at the instance of the respondent No.3 authority by the State Government on 9.3.2001 under Section 23 A of the Act by which the land use of the land held by the petitioner was sought to be changed. The petitioners submitted an objection to the aforesaid modification in the land use. However, the Principal Secretary, recommended the change of land use vide note-sheet Annexure P-13. Thereafter the final notification dated 19.11.2003 under Section 23 A(2) of the Act was issued by which the land use of the land in question was changed.

7. In the meanwhile proposed development plan for the year 2011 was published and the objections were invited with regard to development plan by the Joint Director within a period of, thirty days. The petitioners once again submitted an objection on 18.7.2003 to the Chief Executive. Officer of the respondent No.3 authority and the Chief Town Planner of the Indore Development Authority to the proposed change in the land use. The objections were also submitted to the Joint Director. However, the proposed development plan 2011 was withdrawn in December, 2005 and a new draft development plan.2021 was published and once again the objections were invited. The petitioners in response to the notice inviting objections once again submitted an objection on 10.8.2006. The petitioners were served with a notice of hearing on objection on 3.10.2006. In the meantime the Chairman of the respondent No.3 authority also vide letter dated 17.5.2007 (Annexure, P-8) addressed to the Deputy Secretary of the Housing Environment Department. recommended that land use of the land allotted to the petitioners be kept commercial in the master plan of 2021. In response to the aforesaid letter of the Chairman, Deputy Secretary of the Housing and Environment Department vide letter dated 10.7.2007 (Annexure P-9) informed the respondent No.3 that before the final publication of the master plan objections and. suggestions of the Indore Development Authority would be considered by the State Government. However, the master plan 2021 was published on 1.1.2008 (Annexure P-10) without considering the objections of the petitioners and suggestions of the Indore Development Authority. In accordance with the terms and conditions of the licence, the petitioners submitted the application for renewal of the licence on 5.2.2010 however, no decision was taken on the application submitted by the petitioners. In the aforesaid factual background, the petitioners have approached this Court seeking the reliefs as stated supra.

8. A reply has been filed on behalf of the respondent Nos.1 & 2, in which, inter alia, it is pleaded that writ petition suffers from delay and latches as in the instant writ petition notifications dated 9.3.2001 and 19.11.2003 have been challenged and the writ petition has been filed in the month of May, 2008. It has been averred that the petitioners have failed to explain the delay in challenging the notifications dated 9.3.2001 and 19.11.2003. An objection with regard to the locus standi of the petitioners to challenge the legality and validity of the notifications dated 9.3.2001 and 19.11.2003 has also been taken on the ground that the petitioners were granted the licence of running

amusement parks for a period of 15 years only which has already been expired. The petitioners have not challenged the order dated 23.9.2003 passed by the State Government (Annexure-P/25). It has further been averred that Indore Development Plan has been published and has come into force w.e.f. 1.1.2008. The land in question on which amusement park is situate has been earmarked as city/other parks whereas the land comprised in khasra Nos.257, 258(part), 259, 260-262, 264, 265 and 265 (part) situate on A B Road, admeasuring 18.22 hectares has been earmarked as commercial area. The new development plan has been published as per the Section 19 of the Act. Only four objections including the objection preferred by the petitioners were received in response to the proposed change of land use in the development plan. The petitioners were afforded an opportunity of hearing and after considering the objections and suggestions, the final notification was issued.

9. The respondent Nos.3 & 4, in their reply, have also taken an objection to the maintainability of the writ petition on the ground that no cause of action is available to the petitioners to file the writ petition. The writ petition suffers from delay and latches. The petitioners were granted licence to operate the amusement park and changes in the land use do not, in any way, effect the petitioners or their status as a licensee. It has further been averred that the Board of Indore Development Authority by the resolution dated 8.5.2003 took a decision to grant permission for construction of amusement park and banquet hall on the terms and conditions mentioned in the resolution itself and the said permission was subject to the approval of the State Government. The resolution dated 8.5.2003 was modified by the resolution No. 149 dated 19.5.2003 (Annexure-R/5).

10. In accordance with the directions contained in the order of the State Government dated 23.9.2003, the matter was placed before the Board and the Board vide resolution dated 12.2.2005 (Annexure-R/7) took a decision to issue a detailed show-cause notice to the petitioners. It has further been averred in return that the Indore Development Authority is bound by the orders and directions of the State Government. No right has accrued in favour of the petitioners so as to enable it to challenge the land use in development plan. It has further been averred that the land use between the two chunks of land was interchanged because of certain reasons. The land use of land situate towards the south of the MR-10 i.e. in the Village of Bhamori is commercial. The proposal to develop a major city centre was accepted by the State Government vide order dated 23.8.1979 and pursuant to the said permission, the authority had developed major city center known as "Meghdoot Upvan"

and another chunk of land situate on AB Road was developed as commercial. Therefore, the land use of these lands was interchanged. The expenditure which the petitioners have allegedly incurred is the subject matter of verification. It has further been averred that process for change in land use was taken way back in the year 1979 and it was not as if the Government woke up one fine morning and decided to change the land use. The petitioners are only a tenant and not the owner of the land. It has further been pleaded that petitioners have no locus standi to file the writ petition and to seek reliefs as claimed in the petition.

11. Mr. A. M. Mathur, learned senior counsel for the petitioners submitted that the deed dated 6.5.1994 (Annexure-P/13) is, in fact, not a licence deed but is a lease deed. As per deed dated 6.5.1994, the possession of the land in question was handed over to the petitioners and the permanent structures were allowed to be constructed. Clause-8 of the deed confers right of renewal on the petitioners and makes it obligatory to renew the deed on an enhanced payment. The Indore Development Authority vide Resolution dated 14.8.2007 has already recommended for granting permission of second phase of the park and letter dated 1.9.2007 was sent to the Principal Secretary to give approval. Thus, the deed dated 6.5.1994 (Annexure-P/13) is a lease and not a licence. It has further been submitted that a clause like Clause-8 appearing in the deed dated 6.5.1994 was considered by the Supreme Court in *Sudhir Kumar Vs. Baldev,* (1969) 3 SCC 611. In support of the proposition that document dated 6.5.1994 is a lease deed, learned counsel has placed reliance on the decision of the Supreme Court in *C.M. Beena and another* Versus *P.N.Ramchandra Rao,* 2004 (3) SCC 595. The respondent authority is ready and willing to renew the lease which can be inferred from the documents Annexure- R/1 dated 13.6.2002-an application of the petitioners for construction of second phase of the amusement park, Annexure-R/ 3 reply of the petitioners dated 19.6.2002, resolution dated 8.5.2003 by which permission was granted for construction of second phase of amusement park (Annexure-R/4), modified resolution dated 19.5.2003, by which recommendation for construction of second phase of the amusement park was made to the State Government vide letter dated 27.5.2003 by respondent No.3, resolution dated 14.8.2007 of the Indore Development Authority again recommending for second phase of construction (Annexure-R/8), letter dated 1.9.2007 (Annexure-P/26) written by Indore Development Authority to the State Government showing disagreement with the order dated 23 .9.2003

passed by the State Government and the letter of the Chairman of the Indore Development Authority (Annexure-P/34) to keep the land use of the petitioners' land as commercial as per Development Plan 2021. It has further been contended that as per renewal clause, namely, clause 8 contained in the lease deed, it is mandatory and obligatory for the Indore Development Authority to renew the lease. In support of his aforesaid submission, learned senior counsel has placed reliance on the decision of the Supreme Court in *M/s. Gurcharan Singh Baldev Singh Vs. Yashwant Singh and others,* AIR 1992 SC 180, *Murarilal Jhunjhunwala Vs. State of Bihar and others,* MR 1991 SC 515 and *The Charan Transport Co. Ltd., Vs Kanan Lorry Service and another,* AIR 1977 SC 1564.

12. It has further been submitted that order dated 23.9.2003 (Annexure-R/6) issued by the State Government is illegal and is without jurisdiction as the land in respect of which the lease was granted to the petitioners belong to the Indore Development Authority and not to the State Government. The State Government, in fact, has no role to play either in grant of permission of second phase of the construction of amusement park or in the matter of renewal of lease. In support of his aforesaid submission, reliance has been placed on a decision of Supreme Court in the case of *K. K. Bhalla Vs. State of M.P. and others,* (2006) 3 SCC 581. The respondents are bound by the doctrine of promissory estoppel and are under an obligation to renew the lease deed as, well as permit the petitioners to proceed with second phase of construction of the amusement park. It has further been submitted that the objection raised by the petitioners that writ petition suffers from delay and latches is misconceived. There is no delay in filing the instant writ petition. In fact, on 29.11.2007, the Chairman of the Indore Development Authority by a communication addressed to the Principal Secretary of Housing and Environment, Government of Madhya Pradesh recommended to keep the land use of the petitioners' land as commercial in Development Plan, 2021 and the writ petition was filed in the month of May, 2008 i.e. within a period of one year. The entire facts and circumstances of the case leading to filing of the writ petition have been narrated in paragraph 4 of the writ petition which show that the writ petition does not suffer from any delay and latches. In support, of his submission, learned senior counsel has relied on the decisions of Supreme Court in *U. P. Jal Nigam and another* Vs. *Jaswant Singh and another,* (2006) 11 SCC 464 and *Suresh Chand* Vs. *Union of India and others,* (2004) 13 SCC 563. It has further been submitted that once writ

petition is admitted for hearing and the delay has been satisfactorily explained, the writ petition cannot be dismissed on the ground of delay. In support of the aforesaid proposition, reference has been made to a decision of the Apex Court in *Ravindra Nath Vs. State Bank of India and others*, (2008) 15 SCC 256.

13. On the other hand, Shri R. N. Singh, learned senior counsel for respondent Nos.3 & 4 has submitted that initially in the writ petition, the petitioners have only sought the relief of quashing of the proposed modification vide notification dated 9.3.2001 (Annexure-P/17) and notification dated 19.11.2003 (Annexure-P/26). It was only when the respondents filed their reply and raised an objection with regard to delay and latches and non-challenge to the communication dated 23.9.2003 (Annexure-P/25), the petitioners sought an amendment in the writ petition which was allowed by this Court vide order dated 7.11.2008. Subsequently, yet another amendment application was preferred by which the petitioners sought certain additional reliefs in the writ petition, which was allowed by this Court vide order dated 13.8.2010 by which the reliefs in the form of clause (g) and (h) were incorporated in the para 7 of the writ petition. It was further submitted that document dated 6.5.1994 (Annexure-P/13) is not only titled as licence, but its contents also show that it is a licence to run the amusement centre on the land in question for a period of 15 years. From perusal of clause 1 of the terms and conditions of the licence it is apparent that development of certain infrastructure like pathway, roads, boundary walls, landscaping, installation of rides and games was mandatory whereas construction of food and beverage centre, kiosks, shops, administrative building, etc.was left at the option of the licence holder. The development of the infrastructure as per the terms and conditions contained in the licence dated 6.5.1994 was to be done with the approval of the respondent Nos. 3 & 4. It was further submitted that there was no transfer of interest of premises which were let out on licence and the petitioners were only permitted to use the premises. A complete reading of the document dated 6.5.1994 clearly establishes that respondent Nos. 3 & 4 by virtue of the provisions contained therein exercised sufficient control over the licensed premises without any transfer of interest. Though, licence deed contains renewal clause, yet the same is exclusively at the discretion of the respondent Nos.3 & 4. The said clause does not guarantee the renewal. Presently the land use in question as per the development plan is city/other parks. The petitioners have no locus to challenge the change in the land in use and the petitioners are trying to step in the shoes of the owner of the land. The Indore Development

Plan has already been published and brought into force w.e.f. 1.1.2008. The period of licence has expired and the petitioners have no right to continue in the premises which was let out to them under the licence. In support of the submission that document in question, namely, deed dated 6.5.1994 is a licence, learned senior counsel for respondent Nos. 3 & 4 has placed reliance on decision of Supreme Court in *Associated Hotels of India Ltd. Vs. R. N. Kapoor,* AIR 1959 SC 1262, *Mrs.M.N. Clubwala and another Vs. Fida Hussain Saheb and others,* AIR 1965 SC 610, *Corporation of Calicut Vs. K. Sreenivasan,* (2002) 5 SCC 361, *L.B.M. Lall Vs. M/s. Dunlop Rubber Co. India Ltd. and another,* AIR 1968 SC 175 and *Chandy Varghese and others Vs. K. Abdul Khader and others.* (2003) 11 SCC 328.

14. Mr. Kumaresh Pathak, learned Dy. Advocate General has supported the submissions made on behalf of the respondent Nos.3 & 4.

15. We have considered the submissions made on both sides. The following issues arise for consideration in the facts and circumstances of the case as well as in view of the submissions made before us by learned counsel for the parties:-

(i) Whether the deed dated 6.5.1994 (Annexure-P/13) is lease or a licence.

(ii) Whether Clause 8 of the deed dated 6.5.1994 (Annexure-P/13) is mandatory in nature and casts an obligation on the Indore Development Authority to renew the lease.

(iii) Whether the order dated 23.9.2003 is illegal and without jurisdiction as the .lands in question are the lands belonging to the .Development Authority and the State Government and. therefore. State Government has. no role to play, either in grant of permission of second phase or for renewal of lease.

(iv) Whether the respondents are bound by doctrine of promissory estoppel in the facts of the case.

(v) Whether the writ petition is liable to be dismissed on the ground of delay and laches.

(vi) Whether the petitioners have the locus standi to challenge the change in land use.

(vii) Whether notification dated 19.11.2003 (Annexure-P/28) inrespect of change in land use of the land in question is ab initio void.

16. We may now address ourselves to the first issue which is a core issue involved in the case, namely, whether the deed dated 6.5.1994 (Annexure-P/13) is a lease or licence. In Halsbury's Laws of England IVth edition, the expression "lease" is defined to mean "an instrument in proper form by which the conditions .of a contract of letting are finally ascertained, and which is intended to vest the right of exclusive possession in the tenant, either at once, if the term is to commence immediately, or at a future date, if the term is to commence subsequently, is a lease which takes effect from the date fixed for the commencement of the term without the necessity of actual entry by the tenant".

The term "Licence" has been defined in Halsbury's Laws of England IVth edition in following words -

*"A licence is normally created where a person is granted the right to use premises without becoming entitled to exclusive possession of them, or where exceptional circumstances exist which negative the presumption of the grant of a. tenancy. If the agreement is merely for the use of the property in a certain way and on certain terms while the property remains in the owner's possession and control, the agreement operates as a licence, even through the agreement may employ words appropriate to a lease. "*

Section 105 of the Transfer of Property Act. 1882 defines "lease" of immovable property as under:

*"105. **Lease** defined.-A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time. express or implied, or in perpetuity, in consideration of a price paid or promised or of money, a share of crops, service or any other things of value to be rendered periodically or on specified occasion, to the transfer or by the transferee, who accepts the transfer on such term. "*

Section 52 of. the Indian easements Act, 1882 defines a "licence" to mean:-

> *"52. "Licence" defined. -Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence.*

17. Thus, a lease is essentially a transfer of an interest in immovable property entitling the lessee to the enjoyment of such immovable property which includes the right to possession thereof. Another essential feature of a lease is that the transfer must be for consideration, though it may be for a limited period or in perpetuity. A lease can be effected only by a bilateral transaction in which both lessor and lessee should be the parties. On the other hand, the characteristics of licence are that it grants the licensee right to do something on the property which otherwise would have been unlawful for him to do so. The distinction between the lease and licence has been considered by the Supreme Court in catena of decisions, namely, *Associated Hotels of India Ltd.* (supra), *Uttam Chand Vs. S. M. Lalwani* AIR 1965 SC 716, *L. B. M. Lall* (supra), *Konchada Ramamurty Subudhi (dead) Vs, Gopinath Naik and others,* AIR 1968 SC 919, *Board of Revenue Vs. A. M. Ansari* (1976)3 SCC 512, *Khalil Ahmed Bashir Ahmed Vs. Tufelhussein Samasbhai Sarangpurwala* AIR 1988 SC 184, *Capt. B.V. D'Souza Vs. Antonio Fausto Fernandes,* AIR 1989 SC 1816, *K. Sreenivasan*(supra) and *Chandy Varghese* (Supra). From a close scrutiny of the aforesaid decisions, following tests for determination whether a document creates a lease or licence can be taken as well established :-

(i) To ascertain whether a document creates licence or lease, substance of the document must be preferred to the form. The Court must refer to the object and the circumstances under which document is executed. The character of the transaction turns on the operative intent, of the parties.

(ii) The real test is the intention of the parties. The Court must apply the test of dominant intention of the parties. The Court must determine the character of the document by asking itself as to what was the dominant intention of the parties in executing the document. The question

whether a particular transaction creates a lease or licence is always the question of intention of the parties and, therefore, has to be inferred from the facts and circumstances of each case.

(iii) If a document creates an interest in the property, it is a lease but if it permits another party to make use of the property, of which the legal possession continues with the owner, it is a licence.

(iv) If under the document, a party gets exclusive possession of the property, prima facie, he is considered to be a tenant, but circumstances may be established which negative the intention to create a lease. However, the test of exclusive possession is not conclusive by itself to arrive at the conclusion that the transaction in question is a lease. Merely exclusive possession is not decisive for drawing an inference that the document in question is a lease and not licence.

(v) A lease is a transfer of right to enjoy the premises whereas the licence is a privilege to do something on the premises which otherwise would be unlawful.

(vi) Occupation of licensee is permissive by virtue of grant of licence in his favour, though he does not acquire any right in the property and the property remains in possession and control of the grantor, but by virtue of such a grant, he acquires a right to remain in occupation so long the licence is not revoked and/or he is not evicted from its occupation either in accordance with law or otherwise.

18. In the backdrop of aforesaid well settled tests, to determine the question whether a particular document is a lease or a licence, we may now examine the deed dated 6.5.1994 (Annexure-P/13). Clause 1 of the terms and conditions of the document dated 6.5.1994 which is titled as "licence", shows that land ad-measuring 7 acres is given to the petitioners No.1 -company on licence initially for a period of 15 years. The relevant part of clause 1 reads as under:-

*".....The licence will have to develop inside infrastructure*

*such as path-ways, roads. boundary walls, landscaping, installation of rides and games etc., etc. at his own cost as approved by the Authority. Construction of Food and Beverages Centres, kiosks, shops, administrative buildings, toilet....."*

Clause 2 deals with period of licence which prescribes that period of licence shall commence from the date of activation of the park or 18 months from the date of giving possession, whichever is earlier. It is not in dispute before us that the period as prescribed in Clause 2 has expired in the month of June, 2010. Clause 3 provides that period of completion of project shall be 24 months from the date of handing over of the possession of the land failing which the licence may be terminated, forfeiting the earnest money and other payments, if any, by the authority. Clause 4 provides that advance licence fee shall be payable only before first of June. In case, the licensee fails to pay the fee on or before the due date, the amount of licence shall carry interest @ 18% per month for the period of default. Clause 5 empowers the Indore Development Authority to charge an amount equivalent to 25% of the entry fee which is payable by the licensee apart from the licensee fee. Clause 6 deals with earnest money. Clause 7 provides that an authority or an officer authorized in this behalf shall have the power to examine the accounts of collection of entry fee, as and when it deems fit. Clause 7 also empowers the authority to regulate the mode of collection of entry fee. Clause 8 thereof reads as under:-

*"The licence may be renewed for further period of 15 years by enhancing the licence fee, maximum by 40% and thereafter at such a percentage as may be decided by the Authority."*

Thus, Clause 8 provides that licence may be renewed for further period of 15 years by enhancing the licence fee, maximum by 40% and thereafter as such percentage as may be decided by the authority. Clause 9 entitles the licence to redeem the bank guarantee of Rs. Five lacs after completion of three years from the date of activation of the amusement park. Clause 10 casts an obligation on the licensee to buy rides, games, etc from the supplier manufacturing the aforesaid items indigenously. Clause 11 provides that licensee shall install one roller coaster, one ferris wheel, bay train and one set of merry cups, one Columbus and one telecombat must be erected with other rides. Clause 12 provides that amusement centre shall be operated and managed by the licensee himself at his own costs and responsibilities. Clause 14 provides that in the event of violation of any of, the terms and conditions

mentioned herein above, on the part of the licensee, the decision of the Chairman of the Indore Development Authority shall be final.

19. Thus, if the deed dated 6.5.1994 (Annexure-P/13) is read as a whole, the following facts are graphically clear:-

(a) The dominant intention between the parties is to let out the land.for setting up amusement park. (b) Clause (.1) reveals, that licensee is under an obligation to develop an infrastructure which is necessary for setting up of amusement park, such as pathways, roads,; boundary walls, landscaping. installation of rides and games etc. at his own costs as .approved by the Authority, whereas the construction of food and beverages centers, kiosks, shops, administrative buildings and toilets is also permissible as per the requirement and is at the option of the petitioners.

(c) The rides and games which are to be installed by the petitioners No.1 at its own costs and has to be approved by the authority, is in the nature of fixtures.

(d) The rides and games etc. should be brought from the supplier/ manufacturer in India indigenously.

(e) Indore Development Authority is entitled to charge 25% of the entry fee and; shall have the power to examine accounts of collection of entry fee as and when deemed fit. The Authority has also the power lo regulate the mode of collection of entry fee.

(f) The amusement park has to be operated and managed by the licensee at his own cost and responsibilities.

(g) As per Clause 11, licensee has to install one roller coaster, one ferris wheel, bay train and one set of merry cups, one Columbus and one telecombat with other rides.

(h) In the event of violation of terms and conditions of the licence, the decision of the Chairman of Indore Development Authority is final.

20. Thus, if the terms and conditions contained in document dated 6.5.1994 are read as a whole it leaves no iota of doubt that the document only confers a right to use the land in a particular way i.e. to run the amusement centre

without creating any interest or a right in respect of the land on the licensee and the Indore Development Authority retains the possession of the land leased out to the petitioners No. 1. A mere right to raise construction on payment of annual rent amounts to merely a right to do something on the land leased out and it does not create an interest in the property. We are fortified in our conclusion by a Division Bench decision of Nagpur High Court in case of *Samrathlal Dhanraj and another Vs. Mst. Sunderbai W/o Nathoo Singh,* AIR 1952 Nagpur 325. So far as the reliance placed on behalf of the petitioners in the case of *C. M. Beena* (supra) is concerned, in paragraph 8 itself the Supreme Court has held that real intention of the parties as decipherable from complete reading of the document, if any, executed between the parties, and the surrounding circumstances have to be seen. The inference whether a document has to be treated as a lease or licence, has to be drawn by looking at the document as a whole. Thus, the aforesaid decision is of no assistance to the petitioners. Thus, if the contents of the deed dated 6.5.1994 are tested on the touchstone of well settled legal principle to determine whether particular deed is a lease or licence, it leaves no iota of doubt in our minds that document dated 6.5.1994 (Annexure-P/13) is a licence and not a lease, for the reasons which we have already referred to supra. Accordingly, it is held that the deed dated 6.5.1994 is a licence. The first issue is answered accordingly.

21. Now, we may come to the second issue whether under clause 8 of the deed, the Indore Development Authority is bound to renew the licence. In preceding paragraphs we have already held that the document in question is a licence and not the lease. A careful scrutiny of the language employed in Clause 8 of the deed dated 6.5.1994 shows that it confers a discretion on the development authority to renew the licence for a further period of 15 years. It also empowers the respondent No.3-Authority to enhance the licence fee at the time of renewal of licence subject to a maximum of 40%. The licence is determinable in nature and its renewal is dependant on the will of the grantor. In the instant case, admittedly, the licence has come to an end by efflux of time, in the month of June, 2010. Since the grant in question has been held to be a licence, therefore, Clause 8 which even otherwise is not couched in mandatory terms cannot be held to confer any indefeasible right on the petitioners to seek renewal as a matter of right. So far as the reliance placed by the petitioners in the case of *Sudhir Kumar* (supra) is concerned, the said case was a case of lease and was not of licence and, therefore, is of no assistance to the petitioners. Similarly, in the case of *M/s. Gurcharan Singh*

*Baldev Singh* (supra) the question which arose for consideration before the Supreme Court was whether application for renewal of carriage permit under the Motor Vehicles Act. 1939 is saved on the commencement of Motor Vehicles Act, 1988. The Supreme Court while answering the question has held that application for renewal for grant of permit made under the old Act is saved, inview of Section 217(2) and (4) of Motor Vehicles Act, 1988. Thus, the aforesaid case also does not help the case of the petitioners.

22. Similarly in the case of *Murarilal Jhunjhunwala* (supra), an application for grant of licence was made under the provisions of Bihar Trade Articles (Licences Unification) Order (1984). The authority did not pass any order on the application submitted by the dealer who was carrying on the business under the bona fide belief that he would be granted licence. The licensing authority neither rejected the application nor pointed out any defect. In the aforesaid factual background, it was held by the Supreme Court that dealer cannot be prosecuted for not obtaining the licence. The Supreme Court further found that under the provisions of aforesaid notification of 1984, the licensee was eligible for grant of licence. Accordingly, a direction was issued to grant the licence. Thus, the aforesaid case is also of no assistance to the petitioners. Similarly, in the case of *Charan Transport Co. Ltd.* (supra), the Supreme Court while dealing with the scope and ambit of Section 68-F(1D) of the Motor Vehicles Act, 1939 held that operator had the right of renewal of the permit under the Act. Thus, the aforesaid case is also of no help to the petitioners. For the aforementioned reasons, we are of the considered opinion that Clause 8 of the licence deed does not cast an obligation on the respondent authority to renew the deed.

23. We may now come to the issue of validity and legality of the order dated 23.9.2003 (Annexure-P/25) passed by Principal Secretary, Housing and Environment Department. Since, it has already been held that petitioners have no right to claim renewal of the licence and the period of licence has admittedly expired in the month of June, 2010 and besides that the land use in respect of the land in question has already been changed, therefore, the issue with regard to legality and validity of order dated 23.9.2003 has been rendered academic in the facts and circumstances of the case. Accordingly, it is not necessary for us to examine the same.

24. This brings us to the fourth issue involved in the case, namely, whether the respondents are bound by the doctrine of "promissory estoppel". In

*M/s. Motilal Padampat Sugar Mills Co. Ltd. Vs. The State of Uttar Pradesh and others*, AIR 1979 SC 621, the relevant principle underlying promissory estoppel was expounded by the Supreme Court as follows:

> ".....where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective whether there is any pre-existing relationship between the parties or not."

However, in the instant case, essential ingredients for applicability principle of promissory estoppel are miserably lacking. The petitioners have been permitted to install rides and games under the licence. The period of licence has already expired. Thereafter, no promise has been made to the petitioners which has either created a legal relationship or affects a legal relationship. Even if it is assumed that such promise was made, the petitioners have neither done anything nor have altered their position except by submitting an application for renewal. For yet another reason, doctrine of promissory estoppel will not have any applicability in the facts and circumstances of the case as the land use of the land in question has already been changed and therefore, even assuming for the sake of arguments that doctrine of promissory estoppel applies then also the respondents cannot be compelled to renew the licence for the reason that petitioners have no legally enforceable right to seek removal and the same would tantamount to permitting the use which is not permissible in the eye of law. Thus, for the aforementioned reasons the irresistible conclusion is that the doctrine of promissory estoppel has no applicability in the facts and circumstances of the case.

25. Since, we have already dealt with the merits of the case, it is not necessary for us to examine the issues of delay and latches in filing the petition and the locus standi of the petitioners.

26. The next issue is whether notification dated 19.11.2003 (Annexure-P/28) in respect of the change in land use of the petitioners is ab initio void.

The procedure with regard to land use has been prescribed under the provisions of Nagar Tatha Gram Nivesh Adhiniyam, 1973. Under Section 23 A of the Act, the State Government is required to publish a draft of the modified plan together with notice of preparation of draft modified plan and the place or places where the copies may be inspected, continuously for two days in such two daily news papers which are in the approved list of the Government for advertisement purpose having circulation in the area to which it relates and a copy thereof shall be affixed in a conspicuous place in writing in the Office of Collector inviting objections and suggestions in writing from any person with respect thereto within fifteen days from the date of publication of such notice. After considering all the objections and suggestions and after giving reasonable opportunity of being heard, the State Government shall confirm the modified plan.

27. Admittedly, in the instant case the petitioners have submitted an objection to the modification in the development plan. Thereafter, the notification dated 19.11.2003 with regard to change in the land use has been issued. Learned senior counsel for the petitioners during the course of argument could not point out, any fundamental defect in the procedure adopted by the State Government with regard to change in the land use, which renders the notification dated 19.11.2003 as ab initio void. Thus, the notification dated 19.11.2003 permitting the change in the land use of the land in question cannot be said to be ab initio void. Even if the argument of the petitioners that under the Development Plan, 2021, the activity of amusement park is permissible for recreational land use, is accepted, the same has no impact on the facts of the case as we have already held that the licence was granted to the petitioners vide licence dated 6.5.1994 (Annexure-P/13), and the period of licence has already expired. The petitioners have no right to claim renewal of the licence under Clause 8 of the licence. For the aforementioned reasons, the notification dated 19.11.2003 cannot be held to be ab initio void.

28. In the result, writ petition fails and is hereby dismissed.

*Petition dismissed.*

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**I.L.R. [2011] M. P., 1932**

**WRIT PETITION**

***Before Mr. Justice Sushil Harkauli & Mr. Justice S.C.Sinho***

W.P. No. 7626/2011 (Jabalpur) decided on 19 May, 2011

MANOHAR WADHWANI ...Petitioner

Vs.

BANK OF BARODA ...Respondent

***Recovery of Debts Due to Banks and Financial Institutions Act (51 of 1993), Section 20 - Court Fee payable*** **- Court Fee is a tax, and a law imposing tax has to be applied, by the letter of that law - There is no scope of any kind of intendment or notions of equity or sympathy or hardship while interpreting taxing statutes - When the relevant statutory Rule says that a certain amount of tax is payable, and if the case falls within four corners of such statutory Rule, the amount of tax mentioned in Statutory Rule is payable - Petition dismissed.** (Paras 5 & 9)

**बैंकों और वित्तीय संस्थाओं को शोध्य ऋण वसूली अधिनियम (1993 का 51), धारा 20 – देय न्यायालय फीस** – न्यायालय फीस कर है और कर अधिरोपित करने वाली विधि लागू की जानी होगी, उस विधि के अक्षरशः अनुसार – कर कानूनों का निर्वचन करते समय किसी प्रकार के अर्थान्वयन या साम्या की धारणाएं या सहानुभूति या कठिनाई का कोई अवसर नहीं है – जब सुसंगत कानूनी नियम कहते हैं कि कतिपय रकम का कर देय है और यदि मामला ऐसे कानूनी नियम की चारदीवारी के भीतर आता है, कानूनी नियम में उल्लेखित की गई कर की रकम देय होगी – याचिका खारिज।

**Cases referred :**

I (2006) BC 228 (DRAT/DRT), III (2004) BC 123 (DRAT/DRT).

**ORDER**

The Order of the Court was delivered by SUSHIL HARKAULI, J. :–We have heard both sides.

An application to set aside an ex-parte order of DRT was rejected by the DRT. The petitioner who had made that application filed an appeal. The appeal purports to have been filed under Section 20 of the Recovery of Debts Due Banks and Financial Institutions Act, 1993 (hereinafter referred to as the Act).

2. Even in this writ petition learned counsel for the petitioner has not been able to show that the appeal would be maintainable under any other provision of Act except under Section 20 of the Act.

3. **Rule 8 of the Debts Recovery Appellate Tribunal (Procedure) Rules 1994** is relevant for the purpose of fee payable on a memorandum of appeal preferred under section 20 of the Act. This Rule has been made under section 36 (2) (d) of the Act, which says that the Rules may provide for the fees payable in respect of an appeal to the Appellate Tribunal under section 20 of the Act.

4. For ready reference the said Rule 8 is reproduced below :-

*Rule 8 Fee : - (1) Every memorandum of appeal under Section 20 of the Act shall be accompanied with a fee provided in sub-rule (2) and such fee may be remitted either in the form of crossed demand draft drawn on a nationalized bank in favour of the Registrar and payable at the station where the Registrar's office is situated or remitted through a crossed Indian postal Order drawn in favour of the Registrar and payable in Central Post Office of the station where the Appellate Tribunal is located.*

*(2) The amount of fee payable in respect of appeal under Section 20 shall be as follows :-*

| *Amount of debt due* | *Amount of fees payable* |
|---|---|
| *1. Less than Rupees 10 lakhs* | *Rupees 12,000* |
| *2. Rupees 10 lakhs or more Rupees 30 Lakhs* | *Rupees 20,000* |
| *3. Rupees 30 lakhs or more* | *Rupees 30,000* |

5. Court Fee is a tax, and a law imposing tax has to be applied, by the letter of that law. There is no scope of any kind of intendment or notions of equity or sympathy or hardship while interpreting taxing statutes. When the relevant statutory Rule says that a certain amount of tax is payable, and if the case falls within the four corners of such statutory Rule, the amount of tax mentioned in the statutory Rule is payable.

6. On the other hand if a case does not fall within the four corners of the taxing statute, there is no question of levying any tax by any kind of intendment. Learned counsel for the petitioner has relied upon the decision of the DRAT Allahabad in the case of *S. P. Kanodia and ors Vs. I.F.C.I. Ltd. & Ors.*

reported in I (2006) BC 228 (DRAT/DRT) and a decision of DRAT Delhi in the case of *M/s Shiv Ganga Organic Chemicals Ltd. & others Vs. State Bank of Bikaner & Jaipur* reported in III (2004) BC 123 (DRAT/DRT).

7. We have examined both the decisions and we are unable to agree. It appears that the basic principles of interpretation and applying of taxing statutes have been ignored by both the DRAT Allahabad and DRAT Delhi on some kind of sympathetic or equitable considerations.

8. We do not find any error in the impugned order of DRAT, which is under challenge in this writ petition, and which has applied the above quoted Rule 8 by virtue of its express words and has demanded the fee prescribed under that Rule on the appeal preferred by the writ petitioner under section 20 of the Act.

9. There is no force in this writ petition. Accordingly the same is dismissed.

*Petition dismissed.*

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**I.L.R. [2011] M. P., 1934**

**WRIT PETITION**

***Before Mr. Justice Sanjay Yadav***

W.P. No. 11529/2004 (Jabalpur) decided on 21 June, 2011

SURESH ACHARYA (PROFESSOR) ...Petitioner

Vs.

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

***Service Law - Civil Services (Pension) Rules, M.P. 1976 -- Family Pension* - Petitioner's wife appointed as Emergency Assistant Professor continued to discharge her duties till 3.9.2001, on the date when she expired - Thereafter, the State Government by Policy decision dated 28.3.2003 regularised the services of Emergency Assistant Professors w.e.f. 24.12. 1998 - Held - Family of such Government Servant will be entitled for family pension.** (Para 2)

सेवा विधि – सिविल सेवा (पेंशन) नियम, म.प्र. 1976 – परिवार पेंशन – याची की पत्नी की नियुक्ति, आपात सहायक प्रोफेसर के रूप में की गई थी, उसने अपने कर्तव्यों का निर्वहन अपनी मृत्यु दिनांक 3.9.2001 तक जारी रखा – तत्पश्चात्, राज्य सरकार ने दिनांक 24.12.1998 से प्रभावी नीति निर्णय दिनांक 28.3.2003 द्वारा आपात सहायक प्रोफेसरों की सेवाऐं नियमित की – अभिनिर्धारित – ऐसे सरकारी कर्मचारी का परिवार, परिवार पेंशन का हकदार होगा।

**Cases referred :**

1978 MPLJ 747, AIR 1981 SC 53, AIR 1967 SC 884.

*R.B.Dubey,* for the petitioner.

*S.P. Rai,* G.A. for the respondent/State.

**ORDER**

SANJAY YADAV, J. :–With consent matter is heard finally.

2. The issue which crops up for consideration in this petition under Article 226 and 227 of the Constitution of India is as to whether family of a government servant appointed as Emergency Assistant Professor will not be entitled for family pension in the eventuality of death of such government servant before regularization of his service.

3. Facts briefly are that, wife of petitioner was initially appointed as Emergency Assistant Professor in pursuance to order dated 8.11.1989. The said appointment as Emergency Assistant Professor was in pursuance to and in accordance with Rule 15 of Madhya Pradesh Educational Service (Collegiate Branch) Recruitment Rules, 1990; which makes a provision that, in case a Public Service Commission's panel of selected candidates is not available for the post of Assistant Professor, Librarians and Sports Officer, the post may be filled by Emergency appointments. The appointment letter though indicates that, the same was on officiating basis in Grade Rs.2200-75-2800-100-4000 and subject to conditions stipulated therein, one of which was that her services would be terminated in case a regular incumbent from Public Service Commission is appointed; however, the petitioner's wife continued to discharge her duties as an Assistant Professor (Emergency appointee) till 3.9.2001, on the date when she expired. Subsequent thereafter the State Government in pursuance to the policy decision dated 28.3.2003 (as apparent from Annexure R-1 filed along with additional return indicating therein the cabinet decision of regularizing the service of emergency Asstt. Professors), the State Government by order dated 19.12.2003 regularized the service of emergency Assistant Professors w.e.f. 24.12.1998.

4. It will be pertinent to note that one Dr. Kumarratnam appointed along with the petitioner on 8.11.1989 was also regularized as Assistant Professor w.e.f. 24.12.1998. Taking cue from the said order the petitioner, husband of late Smt. Vimla Acharya, an Emergency Assistant Professor, preferred a representation with a claim for family pension on the ground that since service of Emergency

Assistant Professors who were appointed along with his wife has been regularized with retrospective effect, i.e., w.e.f. 24.12.1998, the same benefit should be extended to his wife and family pension be settled in his favour.

5. The claim put-forth by the petitioner was negatived on the ground that his wife being an Emergency appointee having not been regularized, no right accrued in favour of the petitioner for grant of family pension.

6. Reiterating the claim put-forth before the State Government, it is contended by learned counsel for the petitioner that the petitioner's wife could not be discriminated in respect of regularization when the services of a contemporary was regularized with retrospective effect. It is urged that the death on 3.9.2001 will not wash away right of her for regularization w.e.f. 24.12.1998 which accrued in her favour because of the policy decision taken by the State Government for granting benefit of regularization from retrospective date.

7. It is urged that merely because an order is passed after death of petitioner's wife will not deprive her of the status of regular Assistant Professor which was conferred on similarly situated Emergency Assistant Professors. It is urged that respondents were, therefore, not justified in not extending the said benefit posthumously. It is contended that the decision taken by the respondents suffers from vice of arbitrariness and is liable to be set aside with a direction to respondents to treat the petitioner's wife as regular Assistant Professor w.e.f. 24.12.1998 and extend all the benefits as would accrue in favour of the petitioner as also the family pension in favour of petitioner.

8. The respondents on their turn have supported their action of not extending the benefit of family pension in favour of petitioner on the ground that the petitioner's wife was merely an Emergency appointee which accrued no right in her to be treated as regular appointee. It is submitted that appointment of petitioner's wife was subject to her clearing the P.S.C at the earliest failing which her services were liable to be terminated. It is urged that the appointment of petitioner's wife was also subject to that on the appointment of regular incumbent by P.S.C her services were liable to be terminated.

9. It is contended that merely because she was allowed to continue will not ipso facto create a right in her favour for regularization nor for extending the benefit of family pension in favour of petitioner after her death. It is urged that suitable orders for regularization could have been passed only after petitioner's wife facing and clearing P.S.C.

10. Placing reliance on the judgment by Division Bench in *Dalpratap Singh and others v. State of Madhya Pradesh and others* (1978 MPLJ 747) it is contended that being an emergency appointee, petitioner's wife had no right to hold the post of Assistant Professor. It is urged that since the petitioner's wife was not regularized as Assistant Professor during her life time, a subsequent policy decision will not enure any benefit in favour of the petitioner.

11. The question is whether the respondent State in the given facts of present case are justified in their stand in not extending the benefit of a regular Assistant Professor-ship in favour of petitioner's deceased wife.

12. Rule 15 of the Rules of 1990, whereunder petitioner's wife was appointed stipulates:

> 15. Emergency Appointment-
>
> If commission's penal of selected candidate is not available for the post of Asstt. Professors, Librarians and Sports Officers, the posts may be filled by emergency appointments in the following manner :-
>
> (A) An advertisement shall be issued by the Government.
>
> (B) For emergency appointments to the post of Asstt. Professor, Librarian and Sports Officers the educational qualifications will be the same as shown in Schedule III for these posts.
>
> (C) Application for emergency appointment shall be submitted in the form prescribed in Schedule-V.
>
> (D) Application received shall be registered and tabulated according to the following norms in order of merit:-
>
> (i) Percentage of the Marks obtained at Degree level shall be the basis of allotment of marks out of 40 marks.
>
> (ii) Percentage of marks obtained at Post Graduate level shall be the basis of allotment of marks out of 50 marks.
>
> (iii) 5 marks for M.Phil Degree, and

(iv) 5 marks for Ph.D. Degree.

A merit list prepared subjectwise in the above manner shall be used for filling the available vacancies in the serial order for the emergency appointments. However, all such candidates appointed on the emergency basis shall be subject to the condition, that their services will be terminated as soon as a selection list prepared by Public Service Commission is received.

13. True it is that a Division Bench of this Court in *Dalpratap Singh and others* (supra) while answering an issue as to whether "an emergency appointee under sub rule (5) of Rule 12 (M.P. Educational Service (Collegiate Branch) Recruitment Rules, 1967 had acquired a right to their respective post held in paragraph 7 that "7..... Sub-rule (5) of Rule 12 under which emergency appointments are made, itself specifically says that emergency appointments to a post may be made only if the Commission's panel of selected candidates is not available. The proviso in sub-rule (5) further states that if and when the Commission's panel is available, the teachers so appointed on emergency basis will be liable to be removed without notice. This alone is sufficient to indicate that a person who is appointed to a post merely on emergency basis cannot have any right to that post. Some other provisions contained in Rule 12 reinforce this conclusion. Sub-rule (2) of Rule 12 lays down that the candidates on the Commission's panel shall be appointed strictly in the order in which they are placed. An illustration is thereafter given in this sub-rule which says that if a lecturer already working as an emergency measure is lower in the panel, his services will be terminated, if necessary, to appoint a candidate who ranks higher on the panel. Sub-rule (3) provides that no lecturer shall be continued in an emergency appointment if a candidate duly selected by the Commission in the subject is available for appointment. In the face of these express provisions contained in Rule 12, there is no merit in the first argument of Shri Dharmadhikari and it is accordingly rejected."

14. However, in the case at hand none of the emergency Assistant Professors appointed by virtue of order dated 8.11.1989 have been terminated from service on the ground that a selection list has been prepared by the P.S.C. On the contrary cabinet decision was taken on 28.8.2003 to regularize service of all emergency appointees w.e.f. 24.12.1998. The decision taken by the Cabinet is brought on record vide Annexure R-1 and is in following terms:-

'मंत्रि–परिषद आदेश

आयटम क्रमांक 14 दिनांक 28 अगस्त, 2003

विषय :– आपाती सहायक प्राध्यापकों का नियमितीकरण।

निर्णय लिया गया कि आपाती रूप से नियुक्त सामान्य एवं आरक्षित वर्ग के सहायक प्राध्यापकों को नियमितीकरण के लिए मध्यप्रदेश शैक्षणिक सेवा (महाविद्यालयीन शाखा) भरती नियम 1990 की तृतीय अनुसूची में सहायक प्राध्यापकों के संबंध में कॉलम 5, 6 के प्रावधानों को शिथिल (आयु एवं शैक्षणिक योग्यता में) करते हुए उन्हें दिनांक 24.12.1998 से नियमित किया जाए एवं प्रथमतः अनुसूचित क्षेत्रों में इनकी पदस्थापना की जाए।'

15. Thus, the aforesaid policy decision indicate that the State Government instead of terminating the service of emergency appointment after getting regular personnel from P.S.C decided to regularize them as Assistant Professor w.e.f. 24.12.1998, i.e. a conscious decision has been taken by the State Government to retrospectively extend the benefit of regularization in favour of emergency Assistant Professors by relaxing the Rules.

16. Question is when a conscious decision is taken by the State Government itself to confer the benefit from retrospective date whether a person who was appointed as emergency Assistant Professor could be denied the benefit which accrues in his/her favour by virtue of decision taken by State Government merely because the incumbent was expired. The answer in the considered opinion of this Court, would be in negative.

17. Admittedly, petitioner's wife was working as emergency Assistant Professor as on 24.12.1998 the date from which all the emergency Assistant Professors have been regularized. Though the decision is taken to regularize the services on a date after her death; however, a right which flows out of an appointment in accordance with Rule cannot be taken away in the manner it has been done by the respondents.

18. In view whereof the decision taken by respondents not to treat petitioner's wife as a regular Assistant Professor w.e.f. 24.12.1998 being not in consonance with the right which accrued in her favour by virtue of a policy decision is hereby set aside. It is directed that the wife of the petitioner be treated as a regular Assistant Professor w.e.f. 24.12.1998 and the benefit which flows out of the same should be extended to the petitioner.

19. There is another aspect of the matter. The claim as apparent from the petition is for grant of family pension. Family Pension is governed by M.P. Civil Services (Pension) Rules 1976.

Rule 2 (i) of Rules of 1976 stipulates that "(i) save as otherwise provided in these rules, these rules shall apply to every Government servant appointed to civil services and posts in connection with the affairs of the State of Madhya Pradesh and who are borne on establishments not declared as non-pensionable".

20. Thus, a person being a member of civil service appointed in connection with the affairs of the State would be covered by the provisions contained in Rules of 1976. Regarding expression "appointed to civil services" it is held by their Lordships of the Apex Court in *Mathuradas Mohanlal Kedia and others . S.D. Munshaw and others* (AIR 1981 SC 53) that "15. .... ....the true test for determination of the question whether a person is holding a civil post or is a member of the civil service is the existence of a relationship of master and servant between the State and the person holding a post under it and that the existence of such relationship is dependent upon the right of the State to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wage and remuneration. ....."

21. In an earlier judgment in *State of Assam v. Kanak Chandra Dutta* (AIR 1967 SC 884) IT WAS HELD THAT "9 ..... ....There is no formal definition of "post" and "civil post". The sense in which they are used in the Services Chapter of Part XIV of the Constitution is indicated by their context and setting. A civil post is distinguished in Art. 310 from a post connected with defence; it is a post on the civil as distinguished from the defence side of the administration, an employment in a civil capacity under the Union or a State, see marginal note to Art. 311. In Art. 311, a member of a civil service of the Union or all-India service or a civil service of a State is mentioned separately, and a civil post means a post not connected with defence outside the regular civil services. A post is a service or employment. A person holding a post under a State is a person serving or employed under the State, see the marginal notes to Arts. 309, 310 and 311. The heading and the sub-heading of Part XIV and Chapter I emphasise the element of service. There is a relationship of master and servant between the State and a person said to be holding a post under it. The existence of this relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages or remuneration. A relationship of master and servant may be established by the presence of all or some of these indicia, in conjunction with other circumstances

and it is a question of fact in each case whether there is such a relation between the State and the alleged holder of a post."

22. Thus, wife of the petitioner may not be a holder of a post as per judgment in *Dalpratap Singh* (supra) but she was definitely a member of civil service appointed in connection with the affairs of the State of Madhya Pradesh. The appointment was as per provisions laid down in Rules of 1990. The Pension Rules of1976 were, therefore, very much applicable to her as she was also not in the excluded category as find mention in sub rule (ii) of Rule 2, i.e., (a) persons in a work-charged establishment; (b) persons in casual and daily rated employment; (c) persons paid from contingencies; (d) persons entitled to the benefit of Contributory Provident Fund; (e) persons employed on contract except when the contract provides otherwise; (f) persons whose terms and conditions of service are regulated by any other rules for the time being in force; and (g) Government servants appointed on or after 1st January, 2005 to the services and posts in connection with the affairs of the State, either temporarily or permanently. That being so the petitioner who is a husband of deceased government servant cannot be denied the benefit as would accrue as per Rule 47 of the Rules of 1976 which lays down the provisions regarding grant of family pension.

23. In view of above the petition is allowed. Respondents are directed to extend the benefit of family pension in favour of the petitioner. Let the same be done within a period of three months from the date of communication of this order. There shall be no costs.

C.c. as per rules.

*Petition allowed.*

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**I.L.R. [2011] M. P., 1941**

**WRIT PETITION**

***Before Mr. Justice R.S. Jha***

W.P. No.4336/1997 (Jabalpur) decided on 23 June, 2011

HINDUSTAN COPPER LTD. BALAGHAT ...Petitioner

Vs.

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

***Mines and Minerals (Development and Regulation) Act (67 of 1957)* - Mineral Concession Rules 1960 - Rule 64A - Petitioner obtained a mining lease for extracting copper ore - The rate of royalty was**

**enhanced by respondent/authorities, which was challenged by petitioner in Court - An interim order was passed staying recovery of enhanced amount of royalty from the petitioner - After dismissal of petition of the petitioner, the respondents issued notice to the petitioner seeking to recover the difference of royalty which was duly deposited by the petitioner - The respondents now seek to recover the simple interest at the rate of 24% on the delayed payment of the enhanced payment of royalty - Petitioner challenged the notice to recover interest submitting that there is no provision in the Act of 1957 empowering power to recover interest and therefore the notices are without jurisdiction - Held - The provisions of the Rule 64A of the Rules, 1960 empowers the authorities to recover simple interest at the rate of 24% per annum on outstanding amount of royalty - Stay order passed by a Court does not prevent running of interest.** (Paras 2 &7)

खान और खनिज (विकास और विनियमन) अधिनियम (1957 का 67) – खनिज रियायत नियम 1960 – नियम 64ए– तांबा धातु के उत्खनन हेतु याची ने खनन पट्टा अभिप्राप्त किया – प्रत्यर्थी/प्राधिकारियों द्वारा रायल्टी की दर बढ़ा दी गई जिसे याची द्वारा न्यायालय में चुनौती दी गई – याची से बढ़ायी गई रायल्टी की राशी की वसूली पर रोक का अंतरिम आदेश पारित किया गया – याची की याचिका खारिज होने के पश्चात, याची द्वारा सम्यक रुप से जमा की गई रायल्टी के अंतर की वसूली चाहते हुए प्रत्यर्थीगण ने याची को नोटिस जारी किया – अब प्रत्यर्थीगण बढ़ायी गयी रायल्टी के देयक के विलम्ब से किये गये भुगतान पर 24 प्रतिशत की दर से साधारण ब्याज की वसूली चाहते हैं – याची ने ब्याज की वसूली के नोटिस को यह निवेदन करते हुए चुनौती दी कि ब्याज की वसूली की शक्ति के अधिकार का 1957 के अधिनियम में कोई उपबंध नहीं और इसलिए नोटिस बिना आधिकारिता के है – अभिनिर्धारित – नियम 1960 का नियम 64ए के उपबंध रायल्टी की बकाया रकम पर 24 प्रतिशत प्रति वर्ष की दर से साधारण ब्याज वसूल करने की प्राधिकारियों को शक्ति प्रदान करता है – न्यायालय द्वारा पारित की गयी रोक, ब्याज के जारी रहने को निवारित नहीं करती।

**Cases referred :**

AIR 1973 SC 2226, (1999) 7 SCC 89.

*R.K. Sanghi,* for the petitioner.

*Jaideep Singh,* G.A. for the respondents/State.

**ORDER**

**R.S. JHA, J. :**–The petitioner has filed this petition being aggrieved by the notices issued to the petitioner, Annexures P-6, P-7 and P-9, dated 20-1-1997, 14-3-1997 and 14-10-1997 respectively seeking to recover

simple interest at the rate of 24 percent from the petitioner on the arrears of difference of royalty outstanding against them.

2. It is submitted by the learned counsel for the petitioner that the petitioner has obtained a mining leases in Malajkhand, District Balaghat for extracting copper ore which is a major mineral under the provisions of the Mines & Minerals (Development and Regulation) Act, 1957 ( hereinafter referred to as the "MMDR Act"). As the rate of royalty was enhanced by the respondent/ authorities, the petitioner challenged the same before this Court and an interim order dated 3-8-1993 was passed staying recovery of enhanced amount of royalty from the petitioner, however, the petition filed by the petitioner i.e W.P.No. 3042/1993 ultimately stood dismissed by this Court by order dated 23-3-1995. Pursuant to the dismissal of the petition the respondents issued notice to the petitioner on 24-3-1995 seeking to recover the difference of royalty which was duly deposited by the petitioner. However, it is stated that by the impugned notices respondents now seek to recover simple interest on the delayed payment of the enhanced amount of royalty at the rate of 24% simple interest from the petitioner.

3. The learned counsel for the petitioner submits that the respondent/ authorities have no right to recover the said interest as there was an interim order passed by this Court on 3-8-1993 and it was on that count the enhanced amount of royalty was not deposited. It is submitted that in such circumstances the impugned notices deserve to be quashed. It is also submitted that there is no provision in the Mines & Minerals (Development and Regulation) Act, 1957 empowering power to recover interest and therefore the notices are without jurisdiction.

4. The respondents have filed a return and submitted that as the royalty was not deposited in time and as the petition filed by the petitioner subsequently suffered dismissal, the respondent/authorities have rightly issued the impugned notices seeking to recover simple interest at the rate of 24% in accordance with the provisions of the Rule 64A of the Mineral Concession Rules 1960. It is also pointed out that part VI(3) of the statutory lease also makes the petitioner liable to pay interest at the rate prescribed on outstanding amount of royalty and in such circumstances, the contention of the petitioner deserves to be rejected.

5. The respondents have also filed a copy of the order passed by this Court in similar cases assailing recovery of simple interest on dismissal of the petition wherein this Court has dismissed the similar petitions i.e. W.P.Nos.

4410/1994, 3608/1996 and 3894/1996 relying on the decision of the Supreme Court rendered in the case of *M/s. Haji Lal Mohd. Biri Works, Allahabad v. The State of U.P. and others,* AIR 1973 SC 2226. It is submitted that the issue involved in the present petition is identical and, therefore, the present petition also deserves to be dismissed.

6. Learned counsel for the petitioner, in spite of strenuous efforts, could not distinguish the case of the petitioner from the aforesaid writ petitions wherein similar issue was raised by the petitioners therein which was rejected by this Court.

7. From a perusal of the order passed by this Court in W.P.No. 4410/1996, it is clear that this Court relying on the provisions of Section 25 of Mines & Minerals (Regularation & Development) Act, 1957 [renamed as Mines & Minerals (Development and Regulation) Act, 1957] and the provisions of the Rule 64A of the Mineral Concession Rules 1960 which empowers the respondent/authorities to recover simple interest at the rate of 24% per annum on outstanding amount of royalty, dismissed the petition filed by the petitioner therein. It is also clear that this Court in the aforesaid writ petitions relying upon the decision in the case of *M/s. Haji Lal* (supra) has held that the stay order passed by a Court does not prevent running of interest and in those circumstances upheld the recovery form the petitioners. It is pertinent to note that similar view has again been taken by the Supreme Court in the case of *Style (Dress Land) .. v. ..Union Territory, Chandigarh, and another,* reported in (1999) 7 SCC 89, in paragraph 15 in the following terms :-

> "15. Regarding awarding of the interest by the High Court for the period of stay it is argued that as in *Sahib Singh* case no such direction was issued, the appellants could not be burdened with the liability of paying the interest and that at the rate of 18% per annum it was excessive and exorbitant. It is a settled principle of law that as and when a party applies and obtains a stay from the Court of law, it is always at the risk and responsibility of the party applying. Mere passing of an order of stay cannot be presumed to be the conferment of any additional right upon the litigating party. This Court in *Shree Chamundi Mopeds Ltd. v. Church of south India Trust Assn.* [(1992) 3 SCC 1] held that the said portion of order by the Court means only that such order would not be operative from the date of its passing. The order would not mean that the order stayed had been wiped out from

existence. The order of stay granted pending disposal of a case comes to an end with the dismissal of a substantive proceeding and it is the duty of the Court in such cases to put the parties in the same position they would have been but for the interim orders of the Court. Again in *Kanoria Chemicals and Industries Ltd. v. U.P. SEB* [(1997) 5 SCC 772] the Court held that the grant of stay had not the effect of relieving the litigants of their obligation to pay late payment with interest on the amount withheld by them when the writ petition was dismissed ultimately. Holding otherwise would be against public policy and the interests of justice. In *Kashyap Zip Industries v. Union of India* [1993 Supp. (3) SCC 493 : (1993) 64 ELT 161], interest was awarded to the Revenue for the duration of stay under the Court's order, since the petitioners therein were found to have the benefit of keeping back the payment of duty under orders of the Court."

8. In view of the aforesaid facts and circumstances and the law laid down by the Supreme Court and this Court referred to in the preceding paragraphs, I am of the considered opinion that the impugned notices dated 20-1-1997, 14-3-1997 and 14-10-1997 seeking to recover simple interest at the rate of 24% per annum from the petitioner in exercise of powers under Rule 64A of the Mineral Concession Rules, 1960 deserve to be and are hereby upheld.

9. In the facts and circumstances of the case there shall be no order as to costs.

*Order accordingly*

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**I.L.R. [2011] M. P., 1945**
**WRIT PETITION**

***Before Mr. Justice Sushil Harkauli & Mr. Justice U.C. Maheshwari***

W.P. No. 3840/2005 (Jabalpur) decided on 27 June, 2011

CHIEF ENGINEER & ors. ...Petitioners
Vs.
MITHILA PRASAD DWIVEDI & anr. ...Respondents

***Service Law - Gainfully Employed - Burden of proof*** **- Once the employee pleads that he was not gainfully employed during the period of termination, the burden lies upon the employer to prove when, how and where the employee was gainfully employed during the period he stood terminated.** (Para 3)

सेवा विधि – लामकारी रुप से नियुक्त – सबूत का भार – जब कर्मचारी अभिवाक् करता है कि वह सेवा समाप्ति की अवधि के दौरान लामकारी रुप से नियुक्त नहीं था, तब नियोक्ता पर यह साबित करने का भार होगा कि कब, कैसे और कहां वह कर्मचारी उसकी सेवा समाप्ति की अवधि के दौरान लामकारी रुप से नियुक्त था।

## ORDER

The Order of the Court was delivered by SUSHIL HARKAULI, J. :– This writ petition by the employer, challenges the award of back wages by the Labour Court on the ground that the workman had not proved that during the termination period he was not gainfully employed elsewhere.

2. We have heard the counsel.

3. It has not been disputed that the workman had pleaded that he was not gainfully employed during such period. The employer has filed this writ petition on the ground that the workman did not prove that he was not gainfully employed. That is not the law. Once the employee pleads that he was not gainfully employed during the period of termination, the burden lies upon the employer to prove when, how and where the employee was gainfully employed during the period he stood terminated.

4. As a general proposition also, normally, the negatives are not proved because it is almost impossible to prove the negative fact. It is only the positive assertions which can be proved. To illustrate by example, it is possible to give proof of the (positive) that one has committed theft. But it not possible for any one to give proof of the (negative) that he has not committed theft, except perhaps by taking an *alibi*.

5. There is no merit in this writ petition. It is dismissed.

*Petition dismissed*

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**I.L.R. [2011] M. P., 1947**

**WRIT PETITION**

*Before Mr. Justice Krishn Kumar Lahoti & Mrs. Justice Vimla Jain*

W.P. No.3301/1999 (Jabalpur) decided on 28 June, 2011

KRISHNA KUMAR GUPTA ...Petitioner

Vs.

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

*A. Service Law -Compulsory retirement* - **High Court evaluated the entire service record of the petitioner including the latest report of inspection without any element of unfairness, and properly examined the question of his extension in service beyond 58 years of his age - The decision making process adopted by the High Court does not indicate any fault - Plea of arbitrariness does not stand.**

Committee headed by Hon'ble The Chief Justice on its full satisfaction formed a unanimous opinion after considering entire service record of the petitioner that his further continuance would not be in public interest and he did not have the potential of continued useful service - The impugned order based on such well considered opinion does not deserve any interference.

The petitioner failed to convince that his retirement order is either arbitrary or based on no material or had any legal malice - In our opinion, the said order is bonafide and it is based on adequate material available in the service record of this petitioner. (Paras 14, 17 & 18)

क. सेवा विधि – अनिवार्य सेवानिवृत्ति – उच्च न्यायालय ने बिना किसी अऋजु तत्व के याची के संपूर्ण सेवा अभिलेख का मूल्यांकन किया जिसमें निरीक्षण का अंतिम प्रतिवेदन सम्मिलित था और उसकी आयु के 58 वर्षों से परे उसके सेवा अवधि बढ़ाये जाने के प्रश्न का समुचित परीक्षण किया – उच्च न्यायालय द्वारा अपनायी गई निर्णय करने की प्रक्रिया, कोई त्रुटि नहीं दर्शाती – मनमानेपन का अभिवाक् स्थापित नहीं होता।

*B. Higher Judicial Service (Recruitment and Conditions of Service) Rules, M.P. 1994 (Madhya Pradesh Uchchatar Nyayik Seva(Bharti Tatha Seva Shartein) Niyam, 1994) - Rule 14* - **Rule empowers the State to compulsorily retire a member of the service, not found fit and suitable on his attaining the age of 58 years.** (Para12)

ख. उच्चतर न्यायिक सेवा (भर्ती तथा सेवा शर्तें) नियम म.प्र. 1994 (मध्यप्रदेश उच्चतर न्यायिक सेवा (भर्ती तथा सेवा शर्तें) नियम, 1994–नियम 14 – नियम राज्य को ऐसे कर्मचारी को अनिवार्य सेवानिवृत्त करने की शक्ति प्रदान करता है जो 58 वर्ष की आयु प्राप्त करने पर उचित एवं उपयुक्त नहीं पाये जाते।

**Cases referred :**

AIR 1999 SC 1018, (2001) 2 SCC 305, 2006 LAB I.C. 2365.

*R.K. Jaiswal,* for the petitioner.

*Ashish Shroti,* for the respondents.

**ORDER**

The Order of the Court was delivered by **SMT. VIMLA JAIN, J.** :–The petitioner, being aggrieved by an order No.Fa.No.3(A)13/98/21-B (Ek) Bhopal dated 15th May 1998 (Annexure-20), passed by the Principal Secretary. Government of M.P, Department of Law &; Legislative Affairs Department, retiring him from service after completion of 58 years, has come to this Court by filing a writ petition under Article 226 of the Constitution of India.

2. Briefly stated the facts are that the petitioner was appointed as Civil Judge in State Judicial Service in the year 1965. He was promoted to the posts of Civil Judge Class-I, Chief Judicial Magistrate, Additional District and Sessions Judge. He was promoted to the post of District Judge in the month of February 1991. After completion of II years of service in Higher Judicial Service, the petitioner got promotion as District Judge in Super Time Scale of 5900-200-6700 with effect from 7.10.1994 vide order dated 22.2.1995. The petitioner was appointed by respondent No. 1 State as President, District Consumer Dispute Redressal (DCDR) Forum. The benefit of this posting was that the petitioner could serve till 2002 while he would have superannuated as District Judge in the year 2000. Thereafter, the High Court transferred him from the post of Member, DCDR Forum to Officer on Special Duty in the Registry at Gwalior and he was relieved by the State Government vide order dated 1.6.1998. The petitioner did not join at Gwalior and proceeded on leave. Before the petitioner could join at Gwalior, he was served with an order of compulsory retirement on 22.7.1998. In that order, it was mentioned that as the petitioner was completing 58 years of age on 1.8.1998, he is being compulsorily retired from the service as he was not found fit and suitable to remain in service after completion of 58 years.

3. The petitioner prayed that the said order of retirement under Section 14(1) and (2) of the M.P Uchchatar Nyayik Seva (Bharti Tatha Seva Sartein) Niyam, 1994 is wholly illegal, therefore, if should be quashed.

4. Now the question before us is whether the petitioner was retired arbitrarily on attaining the age of 58 years ?.

5. The learned counsel for the petitioner submitted that the petitioner was promoted in super time scale in the year 1995. Therefore, the decision of the High Court in its meeting dated 15.5.1998, finding, the petitioner not fit to continue in service beyond the age of 58 years on the basis of same service record, was bad.in law. He also contended that there was no material on the basis of which the High Court could have recommended compulsory retirement. He further submitted that the whole decision making process was conducted in an arbitrary manner.

6. In his support, the learned counsel for the petitioner, placed reliance on the decision of the Apex Court in *Madan Mohan Choudhary vs. State of Bihar and others.* AIR 1999 SC 1018. wherein the Apex Court has observed thus:-

> "Though the officers of subordinate judiciary are basically and essentially Government servants, their whole service is placed under the control of the High Court and the Governor cannot make any appointment or take any disciplinary action including action for removal or compulsory retirement unless the High Court is "Consulted". The word "consult" in its ordinary meaning means "to ask advice" or "to take counsel". The Governor is thus a "consulter" and the High Court is the "consultee" which is treated as an expert body in all matters of service including appointments, disciplinary action, compulsory retirement etc. relating to State Judicial Services. Since the Governor cannot act on his own unless he has consulted the High Court, the Constitution has conferred upon the High Court, a sacred and noble duty to give the best of advice or opinion to the Governor; an advice tendered after due deliberation and after taking into consideration all the relevant material and record relating to the problem on which consultation is made. or advice is sought by the Governor. It is, therefore, essentially a matter of trust and confidence between the Governor and the High Court. The High Court cannot act arbitrarily

in giving its opinion to the Governor or else it will be a betrayal of that trust. If the advice is not supportable by any material on record and is arbitrary in character, it may not have any binding value".

7. The learned advocate appearing for the respondent No. 2 High Court, has vehemently contended that the High Court in its full Court meeting resolved to compulsorily retire the petitioner at 58 years of his age in public interest and had taken a bona fide decision on an overall assessment of the work and conduct of the petitioner, and therefore, it should be maintained.

8. On perusal of the record, it is found that in the present petition before us, the ACRs of the petitioner were written in the relevant years and the High Court considered the adverse and average ACRs in due course of time. The relevant ACRs of the petitioner are being reproduced below:-

(a) The Annual Confidential Report for the period ending 31.3.74 contains the following remarks:-

'.....he has not periodically inspected the work of his staff.....'

(b) The Annual Confidential Report for the period ending March, 1977 contains the following remarks:-

'.....he is not always punctual..... In some cases, charges were not properly framed by him, though they were promptly framed. Judgments were delivered on due dates by Shri K.K.Gupta. He had not paid due attention to his administrative work, specially relating to Malkhana of Nazarat. He is not always punctual.....'

(c) The Annual Confidential Report for the period ending March, 1983 contains the following remarks:-

'He made false verifications which were detected by the audit party of the High Court. He reopened case in which he heard arguments on false pretexts. He made no inspection of his section on Court. He was careless not to sign at times order-sheets on charge sheets. His quarrel with his wife took the room of big scandal'.

(d) The Annual Confidential Report for the period 1983-84 also contains the following adverse remarks:-

'He cannot be called prompt. Remarks about integrity and Impartiality-Adverse i.e. not very good. General reputation-Not very good ..... He is an average with no good reputation'.

(e) The Annual Confidential Report for the period 1985-86 also contains the following adverse remarks:-

'He is below average in working as a Judge. He lacks in firmness and takes time in taking decisions. He has no control over his. subordinate staff. He-should work hard to attain the prescribed standard of disposal'.

(f) The petitioner was graded 'E' in the year 1985-86. He was graded 'E' in the year 1992-93 and 1993-94. The remarks and grading were duly communicated to the petitioner vide D.O. dated 11.5.94. The Annual Confidential Report of the petitioner for the year 1995-96 is also not good. The remarks were duly communicated to the petitioner vide D.O.dated 12.6.1996.

9. Hon'ble Shri Justice N.K.Jain was the Portfolio Judge of the petitioner. He inspected the work of the petitioner and gave the following remarks:-

".....However, he is expected to be more pragmatic and practical in dealing with the problems of the members of Bar".

**General** : On the whole, his performance on judicial and administrative side is average. He can at best be graded 'C', he can be retained after 56 years of age but should be watched further for a year or so before grant of above Super Time Scale. I would also recommend his transfer to some other district, as his relations with the local Bar are quite strained. He has himself applied for transfer". '

10. On perusal of his entire service record, we find that his service record was poor. He had been an average officer with average integrity. He did not command good reputation. He had not always been punctual. He had not paid due attention to his administrative work. These infirmities and weaknesses are also mentioned in his report by Shri Justice N.K.Jain, his Portfolio Judge. He had also advised to keep the petitioner under observation.

11. In exercise of powers conferred by Article 233 read with Proviso to Article 309 of the Constitution of India, the Governor of Madhya Pradesh, in consultation with the High Court framed the rules in respect of M. P. Higher Judicial Service. These rules are called Madhya Pradesh Uchchatar Nyayik Seva (Bharti Tatha Seva Shartein) Niyam. 1994 (hereinafter called 'Rules'). The Rule 14 ibid relates to the age of superannuation. Rule 14 reads as under:-

> "14(1) The age of superannuation of a member of the service shall ordinarily be 60 years provided he is found fit and suitable to continue after 58 years in service of the High Court.
>
> (2) Without prejudice to the provisions contained in Rule 56(3) of the Fundamental Rules and Rule 42(l)(b) of the Madhya Pradesh Civil Services (Pension) Rules, 1976, a member of the service not found fit and suitable shall be compulsorily retired on his attaining the age of 58 years."

12. It is clear that the said Rule empowers the State to compulsorily retire a member of the service not found fit and suitable on his attaining the age of 58 years.

13. In *Bishwanath Prasad Singh vs. State of Bihar and others,* (2001) 2 SCC 305. the Apex Court held thus:-

> "1. Direction with regard to the enhancement of superannuation age of judicial officers given in *All India Judges Assn. Vs. Union of India* does not result in automatic enhancement of the age of superannuation. By force of the judgment, a judicial officer does not acquire a right to continue in service upto the extended age of 60 years. It is only a benefit conferred on the judicial officers subject to an evaluation as to their continued utility to the judicial system to be carried out by the respective High Courts before attaining the age of 58 years and formation of an opinion as to their potential for their continued useful service. Else the judicial officers retire at the superannuation age appointed in the service rules governing conditions of services of the judicial officers."

14. The High Court, keeping in view the principles laid down above by the Supreme Court, evaluated the entire service record of the petitioner including the latest report of inspection made by Hon'ble Shri Justice N.K.Jain without any element of unfairness, and properly examined the question of his

extension in service beyond 58 years of his age. The decision making process adopted by the High Court does not indicate any fault. Therefore, in our considered opinion, his plea of arbitrariness does not stand.

15. The learned counsel for the petitioner also submitted that the order of compulsory retirement cast a stigma on the petitioner. We are not inclined to accept his argument, because the petitioner is entitled for all the retiral benefits including pension. Our such view is supported by the decision of the Apex Court in *K.Manipillai vs. High Court of Judicature at Madras and another.* 2006 LAB I.C. 2365. The Apex Court held thus:-

> "Law is well settled that an order of compulsory retirement in accordance with service rules is not considered as a punishment or stigma. When compulsory retirement in terms of service rules is not considered as a stigma, it is obvious that retirement of a Judicial Officer on attaining the normal age of superannuation i.e.58 years, can never be considered as a stigma so as to stand as a bar for considering such an Officer for reemployment/re-engagement in any suitable capacity. A Judicial Officer who retires at the normal age of 58 is obviously eligible for any, other suitable engagement/employment after such retirement."

16. The High Court maintained his record in proper manner and submitted it before us. We find that ACR entries were made soon after the end of the period under review with fairness and objectivity. These entries do not reflect personal whims, fancies, prejudices, likes or dislikes of any of his superior Judge. The High Court made proper assessment of quality and quantity of performance of the petitioner on the basis of such record.

17. The committee headed by Hon'ble The Chief Justice on its full satisfaction formed a unanimous opinion after considering entire service record of the petitioner that his further continuance would not be in public interest and he did not have the potential of continued useful service. The impugned order based on such well considered opinion does not deserve any interference by us.

18. The petitioner failed to convince us that his retirement order is either arbitrary or based on no material or had any legal malice. In our opinion, the said order is bonafide and it is based on adequate material available in the service record of the petitioner.

19. Consequently, we find that the High Court retired the petitioner with a great sense of responsibility. Therefore, the impugned order is maintained and the petition, which has no force, is dismissed. No order as to costs.

*Petition dismissed.*

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**I.L.R. [2011] M. P., 1954**
**WRIT PETITION**
***Before Mr. Justice R.S. Jha***
W.P. No.619/2004 (Jabalpur) decided on 28 June, 2011

B.L. NANDA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***Mineral Concession Rules 1960 - Rule 22(4) & 22(d) -Application for mining lease* - Has necessarily to be dealt with in accordance with the Rules in force on the date of disposal of the application -Petition dismissed.** (Paras 8 & 10)

खनिज रियायत नियम 1960 –नियम 22(4) व 22(डी) – खनन पट्टे के लिए आवेदन – कार्यवाही आवश्यक रुप से आवेदन के निपटारे के दिनांक को प्रवृत्त नियमों के अनुसार की जानी होगी – याचिका खारिज।

**Cases referred :**

AIR 1990 SC 1233, 1995 MPLJ 710, AIR 1981 SC 711.

*Sandeep Chatterjee,* for the petitioner.
*Sudesh Verma,* G.A. for the respondents No. 1 & 2.
*S.A. Dharmadhikari,* for the respondent No. 3.

**O R D E R**

**R.S. JHA, J. :**–The petitioner has filed this petition being aggrieved by order dated 15.1.2004 passed by the Regional Controller, Govt. of India, Ministry of Mines, Indian Bureau of Mines, refusing to accept the mining plan submitted by the petitioner alongwith his application for grant of mining lease in view of the provisions of Rule 22D(c) of the Mineral Concession Rules 1960 (hereinafter referred to as 'the Rules of 1960').

2. The brief facts, leading to the filing of the present petition, are that the petitioner filed an application for grant of mining lease on 11.3.2003 for extracting limestone in respect of Khasra No.905, Area 3.92 Hectares of

village Bhatia, Tehsil Maihar, District Satna in accordance with the Rules. The State Government, by communication dated 6.10.2003, informed the petitioner that he should submit the mining plan after due approval from the Central Government as required by Rule 22 (4) of the Rules of 1960, within six months so that further proceedings could be taken up for processing the petitioner's application for grant of mining lease. In view of the aforesaid letter of the State Government, the petitioner submitted the mining plan to the respondent no.3 for approval. However, by the impugned communication dated 15.1.2004 the respondent no.3 has refused to grant approval to the mining plan submitted by the petitioner in view of the provisions of Rule 22 D of the Rules of 1960 which was introduced in the Mineral Concession Rules, 1960 during the pendency of the petitioner's application for grant of mining lease.

3. Being aggrieved, the petitioner has filed this petition contending that he had filed the application for grant of Mining Lease on 11.3.2003 whereas Rule 22 D(c) of the Rules of 1960, which provides that the minimum area for granting mining lease shall not be less than four Hectares, has been introduced by way of amendment in the Rules with effect from 10.4.2003 and, therefore, the respondents have wrongly rejected the application filed by the petitioner.

4. It is stated that Rule 22 D of the Rules of 1960, which was introduced during the pendency of the petitioner's application, cannot be applied retrospectively and in such circumstances the refusal to grant approval by the impugned order dated 15.1.2004 deserves to be set aside. The learned counsel for the petitioner has relied upon the decision of the Supreme Court in the case of *N. T. Bevin Katti, etc. vs. Karnataka Public Service Commission and others,* AIR 1990 SC 1233 in support of his submissions.

5. The learned counsel for the respondent Government of India, per contra, submits that the issue involved in the present petition is squarely covered by the decision of this Court rendered in the case of *Brijendra Kumar Agarwal vs. Union of India and others,* 1995 MPLJ 710, wherein this Court has specifically held that an amendment in the Rules of 1960, which is brought into effect during the pendency of the application seeking mining lease, can be applied to pending applications as there is no vested right to the grant or refusal of a mining lease. It is submitted that the petitioner's application for grant of Mining Lease has to be and has rightly been decided on the basis of the law applicable on the date of disposal of the application and as on that

date ie. On 15.1.2004, Rule 22 D of the Rules of 1960 was already existing in the statute books, therefore, it has rightly been considered and the petitioner's request for grant of approval has rightly been rejected.

6. I have heard the learned counsel for the parties at length and have also perused the provisions of law. From a narration of the facts in the preceding paragraph it is clear that the petitioner applied for grant of mining lease on 11.3.2003. It is also undisputed that Rule 22 D of the Rules of 1960 was introduced in the statute books with effect from 10.4.2003 and that the petitioner's application filed under Rule 22 (4) of the Rules of 1960 seeking approval of mining plan, which also indicates the area of the mining lease, was rejected by the respondent authorities by the impugned order dated 15.1.2004. In the circumstances, it is abundantly clear that on the date the petitioner's application under Rule 22 (4) of the Rules of 1960 for approval of mining lease was considered, Rule 22 D of the Rules of 1960 was very much in existence in the statute books and, therefore, the authority was bound to consider the same.

7. As far as the contention of the petitioner to the effect that the amended provisions of Rule 22 D of the Rules of 1960 could not have been made applicable to the petitioner's case as he had applied for grant of mining lease on 11.3.2003, i.e., prior to the coming into force of Rule 22 D of the Rules of 1960, is concerned the said issue apparently stands concluded by the decision of this Court rendered in the case of *Brijendra Kumar Agarwal* (supra), decided by relying upon the decision of the Supreme Court in the case of *State of Tamil Nadu vs M/s Hind Stone,* AIR 1981 SC 711, in the following terms in paras 8 & 9:-

> "The rules under consideration in the case *State of Tamil Nadu vs M/s Hind Stone,* AIR 1981 SC 711 were Tamilnadu Minor Mineral Concession Rules 1959. Rule 8C was introduced by notification issued on 2.12.1977. It prescribed the procedure and the forum. Application of the respondent in the case was pending even before incorporation of Rule 8C. It was contended that the disposal was delayed and the application should be disposed of under the preexisting rule. The Court held as follows:
>
> "While it is true that such applications should be dealt with within a reasonable time, it cannot on that account be said that the right to have an application disposed of in a reasonable

time clothes an application for a lease with a right to have the application disposed of on the basis of the rules in force at the time of the making of the application. No one has a vested right to the grant or renewal of a lease and none can claim a vested right to have an application for the grant or renewal of a lease dealt with in a particular way, by applying particular provisions. In the absence of any vested rights in any one an application for a lease has necessarily to be dealt with according to the rules in force on the date of the disposal of the application despite the fact that there is a long delay since the making of the application." (Emphasis supplied)

9. The decision in *M/s Hind Stone* is applicable to the facts of the present case. The Act and the Rules enabled the petitioners to apply for mining licence. The Act and the Rules prescribed particular procedure for the application and the disposal. The procedure has been altered by subsequent amendment during the pendency of the applications. The petitioners certainly have a right to file applications before the appropriate authority but they cannot have a right to have the applications disposed of on the basis of the rules in force at the time of making applications; that is because they have no vested right to the grant of a mining lease. Since there is no such vested right, it must follow that all applications pending on the date on which the amendments came into force, should be disposed of under the amended provisions of the law. The amendments, no doubt, introduced certain additional conditions and restrictions which are intended for public good and due regulation of the mining activity in the light of vital concerns with regard to protection of environment and the like."

8. From a perusal of the above it is clear that the Supreme Court in the case of *M/s Hind Stone* (supra) has clearly held that no person has a vested right to the grant of or refusal of a mining lease and that in the absence of such a right, the application for mining lease has necessarily to be dealt with in accordance with the Rules in force on the date of disposal of the application. Admittedly, the petitioner's application for grant of mining lease was filed on 11.3.2003 and the same could not be processed any further as the Government of India, by the impugned order dated 15.1.2004, refused to grant approval to the mining plan submitted by the petitioner under Rule 22 (4) of the Rules of 1960 on account of the stipulation contained in Rule 22 D of the Rules of

1960 which was introduced on 10.4.2003. It is, therefore, clear that on the date of disposal of the petitioner's application under Rule 22 (4) of the Rules of 1960, i.e. 15.1.2004, Rule 22D was very much in force and, therefore, no fault can be found with the impugned order of rejection by applying Rule 22D of the Rules of 1960.

9. In view of the law laid down by the Supreme Court in the case of *M/s Hind Stone* (supra) and of this Court in *Brijendra Kumar Agarwal* (supra) I do not find any merit in the submission and contention of the learned counsel for the petitioner. The reliance placed by the learned counsel for the petitioner on the judgment of the Supreme Court rendered in the case of *N. T. Bevin Katti, etc.* (supra) is also misplaced and misconceived as in that case the Supreme Court was dealing with a case of appointment wherein the authorities had been directed to implement the circular of the State Government which itself contained a stipulation to the effect that the said circular would not apply to advertisements that had already been issued and it was in such circumstances that the Supreme Court allowed the petition. Apparently, as the facts of that case were totally different it has no applicability to the present case.

10. The petition, being meritless is, accordingly, dismissed. In the facts and circumstances of the case there shall be no order as to the costs.

*Petition dismissed.*

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**I.L.R. [2011] M. P., 1958**

**WRIT PETITION**

***Before Mr. Justice Sujoy Paul***

W.P. No. 4252/2011 (Gwalior) decided on 7 July, 2011

RAMVATI (SMT.) ...Petitioner

Vs.

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

***Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 13(2) - Election of Sarpanch by Panchas* - This is a stop gap arrangement and transitory provision, wherein the Sarpanch is elected from Panchas till a fresh election proceeding, which is required to be commenced within six months as per statutory mandate of Section 13(2).** (Para 10)

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 13(2)

– पंचों द्वारा सरपंच का चुनाव – यह जगह भरने का प्रबंध है और अस्थायी उपबंध है जिसमें पंचों में से सरपंच का चुनाव किया जाता है जब तक कि नयी निर्वाचन कार्यवाही नहीं होती, जो कि धारा 13(2) के कानूनी आदेश के अनुसार छह माह के भीतर आरंभ किया जाना अपेक्षित है।

*R.P. Singh,* for the petitioner.
*Pravin Newaskar,* Dy. G.A. for the respondents.

**ORDER**

**SUJOY PAUL, J.** :–Petitioner Smt. Ramvati has invoked the jurisdiction of this Court under Article 226 of the Constitution of India, assailing the order Annexure P/1, whereby under **Madhya Pradesh Panchayat Nirvachan Niyam, 1995** (hereinafter called **"Rules of 1995"**) the elections for the post of Sarpanch are notified and the post of Sarpanch is decided to be filled up from General Women Category. Shri Singh assailing the order, Annexure P/1, submitted that by order dated 12.3.2010 (Annexure P/2) the petitioner was elected as Sarpanch by invoking Section 13(2) of **Panchayat Raj Evam Gram Swaraj Adhimyam, 1993** (hereinafter referred to as the **"Adhiniyam"**). Since she was elected for the post of Sarpanch in accordance with the Adhiniyam, she has a valuable legal right to complete her tenure and notification issued midway, Annexure P/1, runs contrary to the mandate of the Adhiniyam and the Rules made thereunder.

2. Shri Singh further assailed Annexure P/1 on the ground that the requirement of various provisions of the Rules of 1995 were not fulfilled. The petitioner submits that Annexure P/1 is full of illegalities and infirmities and cannot sustain judicial scrutiny. It is the case of the petitioner that as per Section 17(6) of the Adhiniyam, a Sarpanch shall be elected from SC, ST and other Backward Class and if no Sarpanch is available from any of the said categories, bye-election cannot be held by District Returning Officer for the post of Sarpanch. It is further submitted that there exists no notification by the Election Commission as per rule 28 of the Rules of 1995 and, accordingly, the order Annexure P/1 is without authority, jurisdiction and competence.

3. The petitioner assailed the order Annexure P/1 on yet another ground that the petitioner belongs to SC category and was duly elected as Sarpanch and before completion of her tenure, she cannot be thrown away by the impugned notification Annexure P/1 dated 20.6.2011 and by conducting election for her post.

4. The petitioner further submitted that Rule 7 of the Rules of 1995 is not complied with and in absence thereof the notification Annexure P/1 runs contrary to the rules and liable to be quashed and set aside.

5. Shri Pravin Newaskar, learned Deputy Government Advocate on advance notice, appeared on behalf of the State and supported the notification, Annexure P/1. Shri Newaskar produced certain documents for the perusal of the Court, wherein as per his submission, the Election Commission has given authority to exercise these powers to the Collector, a Prescribed Authority under the Adhiniyam/Rules. My attention is drawn on the document dated 21.7.2006, issued by State Election Commission, which reads as under:-

''मध्य प्रदेश राज्य निर्वाचन आयोग
''निर्वाचन भवन''
88- अरेरा हिल्स, भोपाल (म.प्र.) - 462011

क्रमांक - एफ-37-4/2005/तीन/1258 भोपाल दिनांक 21/07/2006

प्रति,

समस्त कलेक्टर एवं
जिला निर्वाचन अधिकारी (स्थानीय निर्वाचन)
मध्यप्रदेश

विषयः- ग्राम पंचायतों के आरक्षित पदों को आरक्षण से अपवर्जित किये जाने की कार्यवाही।

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ग्राम पंचायतों के पंच एवं सरपंच के आरक्षित पदों के लिये अभ्यर्थी न मिलने पर इन पदों को आरक्षण से अपवर्जित किये जाने की कार्यवाही / परामर्श के संबंध में कलेक्टरों द्वारा आयोग को पत्र लिखा जा रहा है, जबकि आरक्षण एवं पदों को आरक्षण से अपवर्जित किये जाने का कार्य आयोग के क्षेत्राधिकार में नहीं है। पदों को आरक्षण से अपवर्जित किये जाने का प्रावधान मध्य प्रदेश पंचायत राज एवं ग्राम स्वराज अधिनियम 1993 की धारा 17 (4) के परन्तुक में अंकित है और इस प्रावधान के अन्तर्गत कार्यवाही करने हेतु कलेक्टर स्वयं सक्षम है। कृपया आरक्षित पदों को आरक्षण से अपवर्जित करने या इसके संबंध में कोई मार्गदर्शन के संबंध में आयोग से पत्र व्यवहार न करते हुए सचिव, म.प्र. शासन पंचायत एवं ग्रामीण विकास ''मंत्रालय'', बल्लभ भवन, भोपाल अथवा आयुक्त सह संचालक पंचायत एवं सामाजिक न्याय संचालनालय, मध्य प्रदेश, भोपाल से पत्र व्यवहार करें।

सही/-
(हीरालाल त्रिवेदी)
सचिव
म.प्र. राज्य निर्वाचन आयोग, भोपाल

Hence, it is directed that by invoking Section 17(4) of the Adhiniyam, the Collector is competent to take decision regarding de-reservation of the reserved post. My attention is also drawn on the notification dated 29.3.2011,

whereby the Collector by exercising powers under Section 17 of the Adhiniyam, read with rule 7 of the Rules of 1995, declared the position of Gram Panchayats after de-reservation. The document dated 29.3.2011 reads as under:-

"कार्यालय कलेक्टर एवं जिला निर्वाचन अधिकारी जिला शिवपुरी, म.प्र.

क्रमांक/पंचा/पंचा. निर्वाचन/ 2011/ 2797 शिवपुरी, दिनांक 29.3.11

-: अधिसूचना :-

म.प्र. पंचायत राज एवं ग्राम स्वराज अधिनियम 1993 की धारा 17 के अनुसार म.प्र. पंचायत निर्वाचन नियम 1995 के नियम 7 में विहित की गई आरक्षण प्रक्रिया चक्रानुक्रम से लॉट निकालकर दिनांक 19 एवं 20.11.2009 को संपन्न हुई थी । जिसमें निम्न ग्राम पंचायतों अनुसूचित जनजाति वर्ग महिला / मुक्त के लिए आरक्षित हुई थी। आम निर्वाचन 2010 एवं उपनिर्वाचन जून 2010 एवं दिसम्बर 2010 में उक्त ग्राम पंचायतों में अनुसूचित जनजाति के मतदाता न होनें से सरपंच के पद रिक्त रह गये।

मैं राजकुमार पाठक कलेक्टर जिला शिवपुरी निम्नलिखित ग्राम पंचायतों में अनुसूचित जनजाति वर्ग के मतदाता न होने के कारण म.प्र. पंचायत राज एवं ग्राम स्वराज अधिनियम 1993 की धारा 17 (4) के परंतुक में प्रावधान अनुसार कॉलम 3 में दर्शित अनुसूचित जनजाति वर्ग के लिए आरक्षित ग्राम पंचायतों को अनुसूचित जनजाति वर्ग से अपवर्जित करते हुये कॉलम 5 में वर्णित वर्ग के लिए अनारक्षित घोषित करता हूँ।

| क्र. | नाम जनपद पंचायत | ग्राम पंचायत का नाम | वर्तमान आरक्षण की स्थिति | अपवर्जन करने के उपरांत आरक्षण की स्थिति |
|---|---|---|---|---|
| 1 | 2 3 | 4 5 | | |
| 1 | शिवपुरी | रातिकिरार | अनुसूचित जनजाति महिला | अनारक्षित महिला |
| 2 | पोहरी | पचीपुरा | अनुसूचित जनजाति मुक्त | अनारक्षित |
| 3 | करैरा | कालीपहाड़ी | अनुसूचित जनजाति महिला | अनारक्षित महिला |
| 4 | नरवर | रावबुजुर्ग | अनुसूचित जनजाति मुक्त | अनारक्षित |
| 5 | नरवर | रोनीजा | अनुसूचित जनजाति महिला | अनारक्षित महिला |
| 6 | नरवर | बिल्हारी खुर्द | अनुसूचित जनजाति महिला | अनारक्षित महिला |

(राजकुमार पाठक)
कलेक्टर
जिला "शिवपुरी"

6. Shri Pravin Newaskar is directed to file the aforesaid documents on record during the course of the day.

7. I have considered the arguments, perused the record and relevant provisions of the Act and Rules.

8. As per petitioner's own saying, the petitioner was elected under Section 13(2) of the Adhiniyam, which is also clear from Annexure P/2. Pausing here for a moment, it will be important to notice here that the regular election of the Sarpanch is held under Section 17 of the Adhiniyam. Section 17(1) is reproduced here as under:-

> **"17. Election of Sarpanch and Up-Sarpanch.- (1) In every Gram Panchayat there shall be a Sarpanch and Up-Sarpanch. A person who—**
>
> **(i) is qualified to be elected as panch;**
>
> **(ii) is not a member of either House of Parliament or member of State Legislative Assembly; and**
>
> **(iii) is-not Chairman or Vice-Chairman of Co-operative Society;**
>
> **shall be elected as a Sarpanch, subject to provisions of sub-section (2), (3) and (4), by persons whose names are included in the list of voters of the Gram Panchayat area in such manner as may be prescribed." (emphasis added).**

A bare perusal of this sub-section (1) makes it crystal clear that a regular Sarpanch is elected by persons whose names are included in the list of voters of Gram Panchayat area in the manner it is prescribed. Thus, the election of Sarpanch is a direct election by exercising voting powers of all the voters of the Gram Panchayat.

9. It is not in dispute that the petitioner is elected by panchas by notification dated 12.3.2010 under Section 13(2) of the Adhiniyam. Section 13(2) of the Adhiniyam is reproduced here for ready reference:

> **"13. Constitution of Gram Panchayat.- (1) Every Gram Panchayat shall consist of elected Panchas and a Sarpanch.**
>
> **(2) If any village or ward fails to elect a Sarpanch or, as the case mav be, a Panch, fresh election proceedings shall be commenced to fill the seat in such village or as the case may be, such ward within six months;**
>
> **Provided that pending the election of Sarpanch under this sub-section, elected panchas shall subject to the**

**provisions of sub-sections (2), (3) and (4) of Section 17, in the first meeting under section 20 elect a Sarpanch from amongst themselves who shall discharge all the functions of Sarpanch under the Act till a Sarpanch elected under this sub-section enters upon the office."** (emphasis added).

A microscopic reading of this provision shows that it is obligatory for every Gram Panchayat to elect Panchas and Sarpanch. Sub-section (2) deals with a situation where a voter or ward fails to elect a Sarpanch or, as the case may be, a Panch, and fresh election proceedings shall be commenced to fill the seat in such village or as the case may be, such ward within six months. It is important to note here that the admitted position in the present case, which is evident from the document, Annexure P/2, is that in the Gram Panchayat the post of Sarpanch was reserved for ST Woman but in absence of voters the said post of Sarpanch remained vacant and, therefore, by invoking the provisions of Section 13(2) of the Adhiniyam it was filled up at a later point of time by petitioner, who was elected by Panchas and not by the general voters.

10. A further microscopic reading of Section 13 (2), first proviso, makes it crystal clear that the election of Sarpanch under this sub-section, elected panchas shall subject to the provisions of sub-sections (2), (3) and (4) of Section 17, in the first meeting under section 20 elect a Sarpanch from amongst themselves who shall discharge all the functions of Sarpanch under the Act. The words ***"Pending the election of Sarpanch" and "Till a Sarpanch elected under this sub-section enters upon the office"*** make it crystal clear that this is a transitory arrangement and till a fresh proceeding for filling the post of Sarpanch is undertaken, which is required to be undertaken within six months as per Section 13(2) of the Adhiniyam, a Sarpanch elected under sub-section (2) may enter and enjoy the office. Thus, first submission of the petitioner that she is regularly elected and therefore she has a right to continue and complete her tenure, cannot be accepted and is hereby rejected. As per Section 13 of the Adhiniyam it is very clear that this is a stop gap arrangement and transitory provision, wherein the Sarpanch is elected from Panchas till a fresh election proceeding is commenced, which is required to be commenced within six months as per the statutory mandate of Section 13(2) of the Adhiniyam.

11. The petitioner's contention regarding her right to continue deserves to be negated on yet another reason. The third proviso of Section 13(2) of the Adhiniyam reads as under:-

**"Provided also that if any village or ward again fails to elect a Sarpanch or as the case may be, a Panch, fresh election proceedings shall not be commenced in such village or as the case may be, in such ward unless the State Election Commission is satisfied that there is likelihood of the village or as the case may be, a ward electing a Sarpanch or a Panch; and in case the Commission decides not to hold fresh election of Sarpanch, the Sarpanch elected under the first proviso shall continue to discharge all the functions of Sarpanch under the Act."**

The aforesaid third proviso makes it absolutely clear that in the event of failure of village in again electing a Sarpanch, fresh proceedings shall not be commenced in such village unless the State Election Commission is satisfied that there is likelihood of village electing a Sarpanch and in case the Commission decides not to hold fresh election of Sarpanch, the Sarpanch elected under the first proviso shall continue to discharge all functions of Sarpanch under the Act. Admittedly, this is nobody's case. The village has not again failed to elect a Sarpanch and such an election is notified by Annexure P/1. If after Annexure P/1 also no election takes place, it is the discretion of the State Election Commission to decide not to hold fresh election and only in that event the petitioner may have some right to continue to discharge all functions of Sarpanch. Thus, in my considered opinion, the petitioner, at present, has no statutory, legal, accrued or vested right to continue and Annexure P/1 is in consonance with the mandate of Section 13(2) of the Adhiniyam.

12. The next submission of the petitioner is that the provisions of rules 28 and 7 of the Rules of 1995 are not fulfilled. The documents produced by the State dated 21.7.2006 makes it clear like noon-day that the State Election Commission made it clear that the Collector is competent to invoke Section 17(4) of the Adhiniyam to de-reserve a reserved post. In continuation of this, the Collector's office issued a notification dated 29.3.2011, whereby the post of petitioner's Gram Panchayat, i.e. "Ratikirar" is declared as Unreserved (General) Woman. The notification of Election Commission holding that the Collector is competent to take this decision is not called in question in this petition nor the notification of the Collector dated 29.3.2011, whereby the Collector has declared the Gram Panchayat as unreserved woman seat for the purpose of election. In absence of any challenge to these orders, the consequential order Annexure P/1 cannot be called in question nor can be held to be illegal. There is no material to show that Rules 7 and 28 of the Rules of

1995 are violated. The powers are exercised by the Collector as per the direction of Election Commission and orders dated 21.7.2006 and 29.3.2011. The impugned notification Annexure P/1 is issued thereafter. I do not find any violation of the aforesaid rules. The petitioner has no legal, vested or fundamental right to continue because she is a product of a transitory provision, an arrangement which has been made "pending the election of Sarpanch" and "till a Sarpanch elected under this sub-section enters upon the office". In view of unambiguous provision of the section, petitioner has no legal right at all to continue and there is no illegality in passing the order/notification (Ann.P/1).

13. Reverting back to Section 13(2) of the Adhiniyam, it is mandate of the section that within six months the election is to be conducted. Accordingly, after the order Annexure P-2, within six months the notification Annexure P-1 has been issued.

14. Considering the aforesaid, this Court is of the considered opinion that there is no violation of the provisions of the Adhiniyam or Rules of 1995 in issuance of Annexure P-1. In absence of any such flagrant violation of the Adhiniyam or the Rules of 1995, I decline interference in the impugned order Annexure P/1. No vested, constitutional or fundamental right of the petitioner is snatched or taken away. The petition being devoid of any merit and substance is hereby dismissed.

*Petition dismissed.*

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**I.L.R. [2011] M. P., 1965**
**WRIT PETITION**
***Before Mr. Justice Rajendra Menon & Mr. Justice Alok Aradhe***
W.P.No. 1344/1999 (Jabalpur) decided on 15 July, 2011

J.K. VERMA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

*A. Service Law - Departmental Enquiry* - **Assailed on the ground that the entire enquiry was conducted on a single day - Held - Once the petitioner participated in the enquiry without any complaint and without any protest, he becomes estopped from assailing the procedure followed in the enquiry.**

Petitioner was a Senior Judicial Officer, well conversant with such quasi-

judicial proceedings and, therefore, if he had any objection with regard to the procedure followed or if he wanted any further time to examine any witness or peruse the documents he should have requested the enquiry officer, this having not been done, petitioner is not entitled to contend that the enquiry was not properly conducted because it was concluded on the same day. (Para 15)

क. सेवा विधि – विभागीय जाँच – इस आधार पर प्रहार किया गया कि संपूर्ण जाँच एक ही दिन संचालित की गई – अभिनिर्धारित – एक बार जब याची ने बिना किसी शिकायत के और बिना किसी विरोध के जाँच में भाग लिया, वह जाँच में अवलंब की गई प्रक्रिया पर प्रहार करने से विवंधित हो जाता है।

*B. Service Law - Departmental Enquiry - Grant of opportunity-* **In the absence of prejudice being pleaded or demonstrated, mere allegation of non-grant of opportunity can not be a ground for interfering with the procedure of enquiry.**

Allegation on non-grant of opportunity or violation of the principles of natural justice is made, mere violation can not be a ground for hold the enquiry to be vitiated - The delinquent employee is required to show and demonstrate the prejudice caused to him due to non-grant of opportunity and it is only when the prejudice is pleaded and demonstrated and the consequential effect of the same in the final outcome is established before the Court that the enquiry can be held to be vitiated. (Paras 15 & 16)

ख. सेवा विधि – विभागीय जाँच – अवसर प्रदान किया जाना – प्रतिकूल प्रभाव को अभिव्यक्त या प्रदर्शित किये जाने के अभाव में, मात्र अवसर प्रदान नहीं किये जाने का अभिवचन, जाँच प्रक्रिया में हस्तक्षेप हेतु आधार नहीं हो सकता।

*C. Service Law - Departmental Enquiry - Misconduct* - **Act which amounts to negligence in the discharge of duties and acts which are in total disregard to the settled principles of law in the exercise of statutory powers - The same amounts to a misconduct.**

In dealing with more than 30 criminal cases, particularly relating to bail, petitioner has shown reckless attitude, has acted negligently and has omitted to take note of prescribed conditions and settled principles of law, which were essential for discharge of his statutory duties for grant of bail - Action of the petitioner in this case amounts to an act which can be termed as act reckless in nature, in the discharge of his duties. (Paras 22 & 25)

ग. सेवा विधि – विभागीय जाँच – अवचार – कृत्य जो कर्तव्यों के निर्वहन में उपेक्षा की कोटि में आता है और वे कृत्य जो कानूनी शक्तियों का प्रयोग करने में स्थापित सिद्धांत की पूर्णतः अवहेलना करते हैं – वे अवचार की कोटि में आते हैं।

***D. Service Law - Departmental Enquiry - Improper motive and extraneous consideration - Inference of* - A judicial officer having an experience of more than 20 years, shows total recklessness and disregard in the matter of deciding more than 30 cases, particularly bail applications, in a manner which can not be approved - Inference of extraneous consideration and improper motive can be imputed.** (Para 31)

घ. सेवा विधि – विभागीय जाँच – अनुचित हेतु और अप्रासंगिक प्रतिफल – का निष्कर्ष – 20 वर्ष से अधिक का अनुभव वाले न्यायिक अधिकारी ने 30 मामलों से अधिक को विनिश्चित करने के मामले में इस प्रकार की पूर्णतः असावधानी एवं अवहेलना दर्शित की, विशिष्ट रुप से जमानत अर्जियां, जिसका अनुमोदन नहीं किया जा सकता – अप्रासांगिक प्रतिफल और अनुचित हेतु का निष्कर्ष निकाला जा सकता है।

***E. Constitution - Article 226 - Judicial officer - Removal from service* - A Judicial Officer is required to maintain a very high standard of devotion to duty and if it is found that a judicial officer has time and again shown utter disregard to settled principles and norms of justice in discharging his duty, a decision taken to remove such a judicial officer can not be interfered with by this Court until and unless the material available on record shows non-application of mind and violation or breach of statutory and constitutional provisions.** (Para 32)

ङ. संविधान – अनुच्छेद 226 – न्यायिक अधिकारी – सेवा से हटाया जाना – न्यायिक अधिकारी से बहुत उंचे दर्जे की कर्तव्य निष्ठा बनाए रखना अपेक्षित है और यदि यह पाया जाता है कि न्यायिक अधिकारी ने अपने कर्तव्य निर्वहन करने में स्थापित सिद्धांतों एवं न्याय के आदर्शों की पूरी तरह से बार बार अवहेलना की है, ऐसे न्यायिक अधिकारी को हटाए जाने के निर्णय में इस न्यायालय द्वारा हस्तक्षेप नहीं लिया जा सकता जब तक कि अभिलेख पर उपलब्ध सामग्री, मस्तिष्क का प्रयोग न किया जाना और कानूनी एवं संवैधानिक उपबंधों का अतिलंघन या उल्लंघन होना नहीं दर्शाती।

**Cases referred :**

1994 SUPP (1) SCC 540, (2001) 6 SCC 491, (2007) 4 SCC 247,(2000) 1 SCC 416, (1993) 2 SCC 56, (1994) 3 SCC 357, (1992) 3 SCC 124, 2003(1) MPJR 158, 2008(2) SCC (L & S) 789, 2010 (3) SCC 550, 2010(5) SCC 349, (1866) 17 QBD 536, 542, (2011) 4 SCC 589, (2011) 4 SCC 584

*Brian D'Silva* with *M. Verma,* for the petitioner.
*J.K. Jain,* Dy. A.G., for the respondent No. 1/State.
*Kishore Shrivastava* with *S.R. Tamrakar,* for the respondents No. 2 & 3.

**ORDER**

The Order of the Court was delivered by RAJENDRA MENON, J. :– Challenging the order-dated 30.1.1999 - Annexure P/1, by which petitioner's services have been dispensed with on the basis of misconduct, proved in a departmental enquiry, petitioner has filed this writ petition. Challenge is also made to order-dated 2.1.2001, by which the appeal/ representation filed by the petitioner has been rejected.

2. Facts in brief, indicate that petitioner was appointed as a Civil Judge Class I, on 10.11.1975 in the M.P. Lower Judicial Service on the basis of a process of selection conducted by Public Service Commission (hereinafter referred to as 'PSC'). He was promoted after due selection as a Member of the M.P. Higher Judicial Service with effect from 30.9.1989 and at the relevant time, in the year 1998, he was posted as Additional District and Sessions Judge, in Bilaspur - now, in the State of Chattisgarh. While discharging his duties as an Additional District and Sessions Judge, Bilaspur it was found that petitioner had committed various irregularities in the matter of deciding more than 30 cases, particularly in the matter of granting bail to various persons. Accordingly, charge-sheet - Annexure P/3 dated 17.1.1998 was issued to the petitioner imputing certain acts which amounted to misconduct under Rule 13 of the MP Civil Services (Conduct) Rules, 1965 [hereinafter referred to as 'Conduct Rules']. Petitioner was directed to show-cause as to why he should not be proceeded and punished under Rule 10 of the M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 [hereinafter referred to as 'Discipline and Appeal Rules']. In the article of charges issued to the petitioner, three articles of imputations were made and details of the cases in which the irregularities were committed by the petitioner were indicated as Schedule A and Schedule B, to the charge-sheet. The statement of imputation of the misconduct and mis-behaviour was indicated in Annexure-11 to the charge-sheet. Petitioner submitted his reply to the charge-sheet vide Annexure P/4 and as the same was found to be unsatisfactory vide Annexure P/5 dated 10.3.1998, a disciplinary enquiry as contemplated under Rule 14 of the Discipline and Appeal Rules was initiated against the petitioner. The District Judge (Vigilance), Jabalpur Zone was appointed as enquiry authority to conduct an enquiry into the charge-sheet issued to the petitioner. The enquiry

officer conducted the enquiry on 21.5.1998, in the enquiry more than 36 documents were taken on record and exhibited as Exhibit No.P/1 to P/36. On behalf of the prosecution one Shri N.P. Gupta was examined as PW/I, his statement is Annexure P/6. Statement of the petitioner was recorded as Annexure P/7 and on the basis of evidence and material that came on record, enquiry officer submitted his report - Annexure P/8 dated 28.5.1998. Based on the findings recorded in the enquiry a show-cause notice - Annexure P/1 I dated 14.7.1998 was issued to the petitioner and he submitted his reply to the same vide Annexure P/12 and after due approval of the Full Court of the High Court vide Annexure P/1, dated 30.1.1999, petitioner was dismissed from service. Petitioner preferred an appeal and the same was also rejected vide Aimexure P/15 dated 2.1.2001 and, therefore, the petitioner is before this Court challenging the impugned action.

3. Shri Brian D'Silva, learned Senior Advocate appearing for the petitioner, argued that the entire enquiry was conducted and concluded on a single day i.e.... 21.5.98; statement of prosecution witness Shri N.P. Gupta was recorded; petitioner was asked certain questions by the presenting officer and the enquiry officer; his statement was recorded vide Annexure P/7; and, thereafter without giving any opportunity to the petitioner to submit his defence, it is stated that the entire enquiry was completed. Accordingly, the first ground canvassed is to the effect that the enquiry which was conducted in a hasty manner and concluded on the same day is illegal. The second ground canvassed was to the effect that the allegations against the petitioner are only to the effect that the petitioner has granted bail in more than 29 cases in a negligent manner without recording proper reasons, without appreciating the records, without application of mind and, therefore, it is held that the same amounts to improper conduct on the part of the petitioner. Shri Brian D'Silva, learned Senior Advocate, taking us through the statement and article of charges submitted that the allegations against the petitioner were that he granted bail and passed orders in the cases under enquiry in pursuance to his corrupt or improper motive on extraneous consideration and with total disregard to the settled principles of law for grant of bail. Learned Senior Advocate took us through the entire enquiry report, the findings of the enquiry officer in paragraph 73 of the report, and argued that from the statement of Shri N.P. Gupta - PW/I, the allegations of corrupt or improper motive or use of extraneous considerations in deciding the criminal cases as per Schedule A to the charge-sheet is not established. It was emphasized by him that in the absence of corrupt or

improper motive being established and in the absence of any material to show that extraneous considerations weighed in the mind of the petitioner for grant of bail or dealing with the cases as alleged in the charge-sheet, the action taken is said to be wholly unsustainable and illegal.

4. Shri Brian D'Silva, learned Senior Advocate, argued that the only finding recorded against the petitioner is that he was negligent or at best reckless in deciding the matters, this according to learned Senior Advocate is not a misconduct and in the absence of enough material being available on record to hold that petitioner has decided the matters with corrupt or improper motive, it is argued that the action taken is unsustainable. Referring to the following findings recorded by the enquiry officer, in paragraph 73, as detailed herein:

> "73. Now, the question is what inference can be drawn from such bail orders? Certain limitations, in all fairness to Shri Verma had been there in this inquiry:
>
> (a) These bail orders have become final. They are being acted upon by the parties. No revision is either filed or allowed. No application for cancellation of bail is either filed or allowed;
>
> (b) Respective case diaries or criminal records are not there before me. Facts as noted and disclosed by Shri Verma in impugned bail orders have to be taken to be correct and relied upon as they are;
>
> (c) Inspection Note of either District Judge (Vigilance), District Judge or Hon'ble Portfolio Judge taking exception to these bail borders has not come before me; and,
>
> (d) There has been no complaint against Shri Verma, atleast no complaint has been filed in this enquiry.

Shri Brian D'Silva, learned Senior Advocate, argued that once the enquiry officer has come to the conclusion that the allegations of corruption are not proved, the action taken against the petitioner is unsustainable. Emphasizing on the aforesaid finding recorded by the enquiry officer and further contending that if the finding of the enquiry officer are meticulously scanned, it would be seen that the finding or' corrupt motive or extraneous

consideration is not based on any evidence or material available on record, as such it is a perverse finding, learned Senior Advocate prays for interference into the matter. In sum and substance, the arguments of Shri Silva was to the extent that the allegations of improper or corrupt motive and use of extraneous consideration is not established from the material available on record, it is based on assumptions of the enquiry officer is, therefore, perverse and on such consideration the action taken is unsustainable.

5. In support of his contention, learned Senior Advocate, invites our attention to the following judgments: *K.P. Tiwari Vs. State of MP, 1994 Supp* (1) SCC 540; *P.C. Joshi Vs. State of UP and others,* (2001) 6 SCC 491; *Ramesh Chander Singh Vs. High Court of Allahabad and another,* (2007) 4 SCC 247; and, an unreported judgment of the Supreme Court in the case of *Commissioner of Police, Delhi and others Vs. Jai Bhagwan,* Civil Appeal No.4213/2001, decided by the Hon'ble Supreme Court on 10.5.2011, and submits that the action taken against the petitioner on the basis of a perverse finding based on assumptions and presumptions is unsustainable and, therefore, the petitioner should be exonerated.

6. Inviting our attention to the principles laid down and the observations made by the Supreme Court in the case of *Ramesh Chander Singh* (supra), it was argued by Shri Brian D' Silva, learned Senior Advocate, that grant of bail to an accused persons is a significant judicial function to be performed by a judicial officer and in the absence of any complaint or objection from any person or in the absence of any improper motive being established, initiating disciplinary proceedings solely on the ground that the discretion exercised by the judicial officer and the bail granted is not on strong grounds is unsustainable. It is stated that in the absence of any material or ill-will or ill-motive being established, the action taken is unsustainable. Similar observations made in the case of *K.P. Tiwari* (supra) is highlighted in support of the above contention.

8. Accordingly, the arguments advanced by Shri Brian D'Silva, learned Senior Advocate, was that the action taken is unsustainable and on the ground of grant of bail or decision on some criminal cases on insufficient ground, no disciplinary action can be taken against a judicial officer nor can he be punished on this count.

9. Rebutting the aforesaid contentions Shri Kishore Shrivastava, learned Senior Advocate appearing for respondents 2 and 3, argued that the

allegations against the petitioner were with regard to improper conduct in the matter of granting bail in more than 29 cases, so also dealing with more than 4 criminal cases as per Schedule B to the charge-sheet in a reckless and illegal manner. It was the contention of Shri Kishore Shrivastava that even if there is no direct evidence or material to show corrupt motive or extraneous consideration, but if the material available is enough to show reckless act on the part of the petitioner in the discharge of his judicial duties, act committed in a negligent manner in total disregard to and by omission to the set legal norms prescribed for grant of bail and when such conduct is repeatedly undertaken by him in more than 30 cases which came up for scrutiny, a judicial officer can be proceeded and punished as the act amounts to misconduct. Emphasizing that recklessness and negligent way of dealing with the judicial proceedings, particularly bail cases pertaining to serious offence like rape, have to be dealt with seriously and if the act of the judicial officer in more than 30 cases is found to be nothing but a reckless and negligent act contrary to well set norms and principles of law, then a Senior Judicial Officer like the petitioner, who had more than 20 years of service, can be proceeded for the action taken. Inviting our attention to the scope of judicial review in such cases as laid down by the Supreme Court, in the case of High Court of Judicature at *Bombay Vs. Shashikant S. Patil and another,* (2000) I SCC 416; the principle laid down by the Supreme Court in the case of *Union of India and others Vs. K.K. Dhawan,* (1993) 2 SCC 56; *Union of India and others Vs. Upendra Singh,* (1994) 3 SCC 357; and, *Union of India and others Vs. A.N. Saxena,* (1992) 3 SCC 124; Shri Kishore Shrivastava argued that when the conduct of the employee, who holds the post of judicial officer is such that he, consistently in more than 30 cases, commits serious acts of recklessness and negligence, the same is a conduct which would amount to misconduct in the discharge of duties and, therefore, the High Court was right in taking action in the matter for maintaining high standard of judicial discipline and propriety and for upholding the confidence of the people in the judiciary.

10. Inviting our attention to the judgment rendered by the Supreme Court, in the case of *Ramesh Chander Singh* (supra), heavily relied upon by Shri Brian D'Silva, it was argued by Shri Kishore Shrivastava that the judgment in the case of *Ramesh Chander Singh* (supra) is delivered by a Three Judge Bench of the Hon'ble Supreme Court, but earlier to that the question in this regard is considered and decided in the case of *K.K. Dhawan* (supra). This is also a judgment of a Three Judge Bench of the Supreme Court and as the

judgment in the case of *K.K. Dhawan* (supra) is not considered in the subsequent case of *Ramesh Chander Singh* (supra), it is argued that the principle laid down in the case of *K.K. Dhawan* (supra) will prevail and the same has to be given due credence in the light of the law laid down by the Full Bench of this Court in the caseof *Jabalpur Bus Operators Association and Others Vs. State of MP and another,* 2003(1) MPJR 158. It was argued by him that in case of conflict between two decisions of the Supreme Court, both by benches comprising of equal number of judges, the decision of the earlier bench is binding unless explained by a later bench of equal strength. It is argued that as the judgment rendered in the case of *K.K. Dhawan* (supra) is neither explained nor considered in the case of *Ramesh Chander Singh* (supra), the principle laid down in the case of *K.K. Dhawan* (supra), which has approved the principle earlier laid down in the case of *A.N. Saxena* (supra) will prevail and, therefore, merely on the ground that the act of negligence does not amount to misconduct, it is argued that the petitioner cannot be exonerated. Finally, Shri Kishore Shrivastava, learned Senior Advocate, took us through the findings recorded by the enquiry officer in his report - Ex.P/8, with regard to each and every charge and argued that the observations made in paragraph 73 of the report pointed out by Shri Brian D'Silva, has to be read alongwith the entire finding given by the enquiry officer in its totality, the observations made in paragraph 73 cannot be read in isolation ignoring the findings in toto. It was argued by Shri Kishore Shrivastava, learned Senior Advocate, that if the findings of the enquiry officer are meticulously analysed it would be seen that in about 30 cases, petitioner has granted bail in a manner which is contrary to the settled norms for grant of bail even in serious cases under section 376 IPC and, therefore, it is argued that the action taken by the High Court is proper.

11. Shri Kishore Shrivastava, learned Senior Advocate, submitted that the reliance placed by the petitioner to the judgment in the case of *Ramesh Chander Singh* (supra) and *K.P. Tiwari* (supra) are of no help in the present case because they are cases where action was taken against the judicial officer on the basis of a single or isolated instance and not on the basis of consistent acts undertaken in more than 30 cases. Accordingly, it was emphasized by learned counsel that the action taken by the respondents is legal and proper and the same does not warrant any consideration.

12. Shri Brian D'Silva, learned Senior Advocate, in reply submitted that in most of the cases, which were decided by the petitioner, the cases were

received by the petitioner on transfer from the District Judge and he had passed orders on the same day and, therefore, the possibility of improper motive can be safely ruled out. Accordingly, contending that for mere act of negligence, which is also not correct, the punishment imposed is not proper, Shri Brian D'Silva prays for interference into the matter.

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

14. A perusal of the charges levelled against the petitioner as contained in the charge-sheet - Annexure P/3 dated 17.1.1998 indicates that three articles of charges are levelled against the petitioner. The first article of charge indicates that in various criminal cases as per Schedule A to the charge-sheet i.e... in more than 29 cases, petitioner improperly and in total disregard to the principle for grant of bail, granted bail to accused persons in a cryptic and casual manner without taking note of the gravity of the offence, the material available and without disclosing any reasons. Even though it is stated that this act of the petitioner amounts to impropriety and makes his integrity doubtful and is, therefore, indicative of corrupt motive or extraneous consideration. Similarly, article No.2 pertains to grant of bail in criminal cases as per Schedule B, wherein particulars of three cases are given and it is stated that in this case also petitioner granted bail on improper consideration without appreciating the fact that earlier bail applications were rejected by the petitioner, but they were allowed on subsequent applications without there being any substantial change in the facts and circumstances. It is alleged that the act of the petitioner in dismissing the bail applications at the first instance and granting them without any substantial change in the second instance that also without looking to the gravity of the offence and without application of mind, is an improper action and on this count the allegation of improper motive, extraneous considerations and allegation of doubtful integrity are levelled against the petitioner. The final charge contained in article 3 is to the effect that accused Pinki @ Santosh Tiwari, who was accused for an offence under section 307 read with sections 120-B and 34 IPC, was granted anticipatory bail merely on the ground that he was a Municipal Councilor, even though there were serious charges against him with regard to offence under section 307 IPC. If the allegations against the petitioner and the statement of imputation of misconduct as contained in Annexure II, to the charge-sheet, is perused, it would be seen that the allegations are with regard to more than 32 cases and bail is granted by the petitioner to accused persons in these cases for offences

under sections 467, 468, 471, 420, 376,307, 506-B and even under section 302 of the IPC alongwith section 12 of the Passport Act. The enquiry officer conducted an enquiry and in the enquiry Shri N.P. Gupta - PW/I appeared and produced 36 documents - Exhibit P/1 to P/36, which were mainly the order on the bail application and the official record with regard to these cases. Thereafter, the petitioner's examination was undertaken and the enquiry report submitted.

15. On analysis of the grounds raised by the petitioner, which was canvassed at the time of hearing, it would be seen that mainly two grounds are raised for assailing the impugned action. The first ground raised is that the entire enquiry was conducted on a single day i.e.. 21.5.98; examination of witness and production of documents were conducted on the same day and reasonable opportunity of defence was not granted to the petitioner. However, it is seen from the records that when the proceedings were held on 21.5.98, petitioner did not object to the procedure followed. The order-sheet of the enquiry indicates that the very outset the enquiry officer read out the charge-sheet to the petitioner, the petitioner denied the charges levelled against him and Shri N.P. Gupta, who was working as Reader to the petitioner at the relevant time, was produced as witness alongwith records. This witness only exhibited the documents - Ex.P/1 to P/36, which were the records of the proceedings and after the statement of this witness was recorded as is evident from Annexure P/6, petitioner cross-examined this witness and while cross-examining this witness petitioner did not raise any objection nor sought for time, either to cross-examine the witness or to go through the 36 documents produced by this witness, without any objection in any manner whatsoever, petitioner participated in the cross-examination of this witness, who was discharged after the petitioner indicated that he has no further questions to put to this witness. Subsequently, when the petitioner's statement was recorded as is evident from Annexure P/7, petitioner answered the questions put to him by the enquiry officer and in question Nos. 28 and 29, the enquiry officer asked the petitioner as to whether he has any further statement to make, whether he wants to produce any defence witness or does he want any documents, petitioner replied in the negative and stated that he has nothing further to add in the matter. It is, therefore, clear that when the enquiry was held on 21.5.98 and when the witnesses were examined and documents were produced, petitioner participated in the enquiry without any objection whatsoever and did not make any complaint with regard to the procedure followed. Once the

petitioner participated in the enquiry without any complaint and without any protest, the petitioner is now estopped from assailing the procedure followed in the enquiry. The petitioner was a Senior Judicial Officer, well conversant with such quasi-judicial proceedings and, therefore, if he had any objection with regard to the procedure followed or if he wanted any further time to examine any witness or peruse the documents he should have requested the enquiry officer, this having not been done, petitioner is not entitled to contend that the enquiry was not properly conducted because it was concluded on the same day.

16. That apart, when an allegation of non-grant of opportunity or violation of the principles of natural justice is made, mere violation cannot be a ground for hold the enquiry to be vitiated. The delinquent employee is required to show and demonstrate the prejudice caused to him due to non-grant of opportunity and it is only when the prejudice is pleaded and demonstrated and the consequential effect of the same in the final outcome is established before the Court that the enquiry can be held to be vitiated. In the regard, the principles laid down by the Supreme Court in the following cases may be taken note of. *Haryana Financial Corporation Vs. Kailash Chandra Ahuja,* 2008(2) SCC (L&S) 789; *Sarva Uttar Pradesh Gramin Bank Vs. Manoj Kumar Sinha,* 2010 (3) SCC 550; and, *Union of India vs. Shatrughan Pal,* 2010(5) SCC 349. In all these cases, it is held by the Supreme Court that in the absence of prejudice being pleaded or demonstrated, mere allegation of non-grant of opportunity cannot be a ground for interfering with the procedure of enquiry In the present case also, apart from the fact that the petitioner participated in the enquiry which was held on 21.5.98, without any protest, the petitioner is unable to demonstrate before this Court the prejudice caused to him due to the procedure followed nor is he able to demonstrate before this Court as to how the final outcome in the enquiry would be different if his contention is accepted. In view of the aforesaid, we do not find any reason to uphold the first ground canvassed by Shri Brian D'Silva, learned Senior Advocate, to the effect that the enquiry stands vitiated as it was concluded on the same day.

17. As far as the second ground is concerned, the same is based on two parts. The first is that the finding of the enquiry officer is perverse and the second is that for the acts alleged in the charge-sheet, the petitioner - a judicial officer, cannot be punished without proof of improper motive, doubtful integrity or extraneous consideration. To appreciate these questions and before

considering the principles canvassed by the parties concerned, it would be appropriate to take note of the facts and circumstances of the present case, the nature of allegations levelled, the findings recorded by the enquiry officer and the procedure followed by the petitioner in the cases under enquiry. As indicated hereinabove, the charges levelled against the petitioner are mainly with regard to improper procedure followed by him in the matter of granting bail. The report of the enquiry officer is in detail and runs into more than 40 pages. The enquiry officer has gone through the records of each and every case as is indicated in the charge-sheet, has meticulously gone into details and has analysed the manner in which the petitioner dealt with the cases and granted bail or passed the orders. All the cases more than 32 in number, as indicated in Annexures A and B, to the charge-sheet, are criminal cases. The enquiry officer has at the very outset referred to various judgments which lay down the principle governing grant of bail in criminal cases and after evaluating the principles which are to be borne in mind, by a criminal court for grant of bail, has found that the discretion available to a court for granting or refusing bail is to be undertaken based on certain statutory guidelines, ' which emerge from the judgments available on the subject. Thereafter, the provisions of Sections 437, 438 of the Code of Criminal Procedure are taken note of and it is held by the enquiry officer that before granting bail the following factors should be taken note of by the court concerned, the nature of the offence, the probability of the accused persons absconding after grant of bail, the probability of the accused interfering with the evidence, the probability of the accused committing the offence again, the nature of injuries sustained and after analyzing all these factors, it is held by the enquiry officer that the statutory guidelines should be followed and cogent reasons given for grant of bail. After analyzing the principle, the enquiry officer in page 12 of the report, proceeded to analyse the orders passed by the petitioner in each and every case. A table of cases alongwith the offence and the particulars are given and thereafter from paragraph 20 onwards the manner in which orders are passed by the petitioner are dealt with. In paragraph 20 of the enquiry report, the enquiry officer has dealt with certain cases, wherein five criminal cases were registered under sections 467, 468, 471, 420 and 120-B of the Indian Penal Code and section 12 of the Indian Passport Act against certain prominent persons. This was a case where a gang of persons were involved in forging passports and tampering of documents for the purpose of issuing passports. It was found that the offences were cognizable and non-bailable and were triable by Magistrate First Class. In this case, it was found by the enquiry officer that only on the ground

that the case is triable by Magistrate First Class bail was granted to the accused persons without evaluating the gravity of the act/offence and various other factors. The respective part played by the accused persons was not taken note of and bail was granted without application of mind and without considering the grounds normally followed for grant of bail. The enquiry officer recorded that in such a matter involving serious offence of forging passports bail was granted only because the case is triable by Magistrate. The finding recorded is that the bail has been granted without application of mind and without giving any valid reasons. Thereafter, another case is taken note of in paragraph 25 of the enquiry report, this case pertains to rape of a widow. It is found by the enquiry officer that this crime was registered against the accused at 8.00 PM on 10.10.96 and the offences were under sections 457, 376 and 506-B IPC, the accused was arrested on 16.10.96, he applied for bail on 18.10.96, it was transferred to the petitioner's court on 24.10.96, due to death of an Advocate the case was heard on the next date, even though the prosecutrix was a widow and she had made clear statement with regard to commission of the offence, bail was granted by the petitioner on the same day i.e.. 25.10.96 without taking note of the medical report of the prosecutrix or her statement. It was found by the court below that in a serious case of rape of a widow, bail is granted to the accused person within 9 days of his arrest when the investigation is not complete, in a routine manner, without appreciating the seriousness of the offence and without referring to relevant documents. It is held that bail is granted in a very casual manner and it is also perverse in nature as relevant facts about the offence are not taken note of.

18. Similarly, various cases are taken note of by the enquiry officer meticulously and we do not propose to burden this judgment by referring to each and every case relied upon by the enquiry officer. Suffice it to say that in most of the cases it is found that the petitioner has granted bail in a liberal manner by giving orders cryptic in nature, without appreciating the nature of offence or various other factors like the accused absconding, seriousness of the offence etc. Even in cases where the complainants were assaulted with sharp edged weapons and when bombs were hurled upon them, it is found that the petitioner has granted bail in a very casual and cryptic manner, which does not show application of mind. Even though in some cases the enquiry officer found that bail is granted properly, but in more than 22 cases the finding recorded by the enquiry officer is that the bail is granted in a cryptic manner without application of mind, without considering the basic settled principles

for grant of bail. Finally, after evaluating the totality of the circumstances, the finding recorded by the enquiry officer is that charges against the petitioner are proved. In the enquiry report, the enquiry officer in paragraph 75, has recorded the following finding:

> "75. Most of the bail orders are laconic and cryptic. Merely skeletal facts are stated and Shri Verma has granted bail remarking that in the circumstances of the case, grant of bail has been proper. Shri Verma has failed to assess the prima facie evidence, lodging of FIR, nature and extent of injuries with their site and as to what punishment could be awarded on conclusion of trial. He has failed to note that the accused had been arrested after a pretty long time of the event or in other words had been fugitive from justice. He did not care to prevent the repetition of offences charged. He did not consider whether the applicant was likely to tamper evidence and to overawe the witnesses. He has allowed bail mainly on the ground that trial and disposal of the case shall take time while the charge-sheet has already been filed and there was no objective reason to suppose that more than systematic delay was possible. Such instances are neither rare nor one or two only. Many of the bail orders are perverse, particularly in: (1) M.Cr.C.No.3075/96 - *Gaya Prasad Vs. State of MP;* (2) M.Cr.C.No.2626/96 - *Rajendra Singh Vs. State of MP;* (3) M.Cr.C.No.2363/96 - *GyaneshwarVs. State of MP;* (4) M.Cr.C.No-2959/96 - *Pappu Vishwakarma Vs. State of MP;* (5) - M.Cr.C.No. 1677/96 - *Moin Ahmad Vs. State of MP;* (6) M.Cr.C.No. 1703/96 - *Vakeel Ahmad Vs. State of MP;* (7) M.Cr.C.No.2451/96 - *Rinku Vs. State of MP;* (8) M.Cr.C.No. 1633/96 - *Rajkumar Vs. State of MP;* and, (9) M.Cr.C.No.576/96 - *Pappu Sonkar Vs. State of MP.* Subsequent bail applications have been allowed despite there was no change in the facts and circumstances of the case, after, other previous applications were dismissed after due consideration on merits in (1) M.Cr.C.No.2959/96 - *Pappu Vishwakarma Vs. State of MP;* (2) M.Cr.C.No-894/96 - *Kalloo @ Bhagwan and Sardar Singh Vs. State of MP;* and, (3) M.Cr.C.No. 1863/96 - *Sudhir @ Sushil Vs. State of MP,* much against the ration of *State of Maharashtra Vs. Buddhikota Subba Rao* (AIR 1989 SC 2022). Social status of the applicant has been the sole basis of release of

the applicant on anticipatory bail. while he was the mind for murderous attack on an officer who had come for inspection of stock from Bhopal."

***(Emphasis supplied)***

It is seen by the enquiry officer that even after rejecting anticipatory bail immediately regular bail under section 439 is granted by the officer and even in some cases when the first bail application is rejected without any change in the circumstances the second bail application is granted. It is, therefore, clear that the findings of the enquiry officer is to the effect that petitioner has granted bail in a manner which is contrary to the settled norms and principles governing grant of bail in criminal jurisprudence and this is a reckless and negligent act on the part of the petitioner. It is further held by the enquiry officer that if bail is granted then it has to be concluded that it is an outcome of the improper motive of the petitioner and is a result of extraneous consideration. This is in sum and substance, the finding of the enquiry officer. The enquiry officer in paragraph 73 has indicated that he has to be fair to the delinquent employee and has given the finding which is reproduced hereinabove as submitted by Shri Brian D'Silva, learned Senior Advocate. However, this Court cannot read the said finding in paragraph 73 of the report in isolation without referring to the remaining 76 paragraphs, where the enquiry officer has dealt with the manner in which the petitioner has granted bail in various criminal cases.

19. On a close scrutiny of the enquiry report and the finding of the enquiry officer, we are of the considered view that the allegations against the petitioner to the effect that he has granted bail in a cryptic manner without proper application of mind and in total disregard to the settled norms for grant of bail, is proved. It is a case where the petitioner in an improper manner in total disregard to the settled norms for grant of bail, has granted bail to various accused persons in a cryptic and casual manner without considering the nature and gravity of the offence and without indicating the necessary -facts to show application of mind before grant of bail. In some of the orders even the nature of the injury, the objection of the prosecution are not noted and bail is granted in a cryptic way. Even though there may be no direct evidence to show corrupt or improper motive, but the question is as to whether a ludicial officer having more than 20 years of service can be let off merely because the material on record does not directly establish corrupt motive. If a judicial officer acts in the matter of granting bail or deals with a criminal case improperly in an isolated case or one or two cases, the benefit can be granted to the judicial officer, but

when within a short span of time. in more than 22 cases, consistently it is seen that the judicial officer has acted in a manner which cannot be approved of in any manner whatsoever, the inference of improper motive and extraneous consideration can always be drawn.

20. At this stage, we would now proceed to examine the principle with regard to taking disciplinary action for such acts.

21. If the judgment in the case of *K.K. Dhawan* (supra) relied upon of by Shri Kishore Shrivastava, learned Senior Advocate, is taken note of, it would be seen that the employee therein Shri K.K. Dhawan was an Income Tax Officer and the allegation against him were with regard to conducting assessment of income tax returns of various assessee in an improper manner, contrary to settled principles. It was found that in more than 9 cases assessments were made by Shri K.K. Dhawan during the financial year 1982-83 in an irregular manner with undue haste and it was inferred that this was with a view to confer undue favour on the assessee. In the case of *K.K. Dhawan* (supra) also similar grounds as were canvassed by Shri Brian D'Silva, learned Senior Advocate, were put forth and a Three Judge Bench of the Hon'ble Supreme Court took note of certain principles and observations made in *Pearce Vs. Foster,* (1866) 17 QBD 536, 542, wherein the following observations were taken note of:

> " *If a servant conducts himself in a -way inconsistent with the faithful discharge of his duty in the service, it is misconduct which justifies immediate dismissal.* That misconduct, according to my view, need not be misconduct in the carrying on of the service of the business. It is sufficient if it is conduct which is prejudicial or is likely to be prejudicial to the interests or to the reputation of the master, and the master will be justified, not only if he discovers it at the time, but also if he discovers it afterwards, in dismissing that servant., *(Emphasis supplied)*

Thereafter, in paragraph 18, certain contentions with regard to exercise of quasi judicial powers was taken note of and the charge with regard to recklessness disclosed in the discharge of duties in utter disregard to settled norms were evaluated and it was held that if an employee discharging quasi-judicial functions acts in a manner which can be termed as reckless and the act discloses utter disregard to relevant provisions of rule and regulation, the same amounts to misconduct. After taking note of all this propositions in

paragraph 19, the principle laid down is to the following effect [i.e... on the basis of the law laid down in the case of *A.N. Saxena* (supra)]:

> "19. The above case, therefore, is an authority for the proposition that disciplinary proceedings could be initiated against the Government servant even with regard to exercise of quasi-judicial powers provided:
>
> (i) The act or omission is such as to reflect on the reputation of the Government servant for his integrity or good faith or devotion to duty, or
>
> (ii) there is prima facie material manifesting recklessness or misconduct in the discharge of the official duty, or
>
> (iii) the officer had failed to act honestly or in good faith or had omitted to observe the prescribed conditions which are essential for the exercise of statutory power."

Thereafter, in paragraph 26 of the judgment reference is made to an earlier judgment of the Supreme Court in the case of *A.N. Saxena* (supra) and after taking note of the principles laid down in paragraphs 7 and 8, it is held that disciplinary action could be taken if the officer who exercises judicial and quasi-judicial function acts in a reckless or negligent manner. The conclusion in this regard drawn in paragraph 28, reads as under:

> "28. Certainly, therefore, the officer who exercises judicial or quasi-judicial powers acts negligently or recklessly or in order to confer undue favour on a person is ***not acting as a Judge.*** Accordingly, the contention of the respondent has to be rejected. It is important to bear in mind that in the present case, we are not concerned with the correctness or legality of the decision of the respondent ***but the conduct of the respondent in discharge of his duties as an officer.*** The legality of the orders with reference to the nine assessments may be questioned in appeal or revision under the Act. But we have no doubt in our mind that the Government is not precluded from taking the disciplinary action for violation of the Conduct Rules. Thus, we conclude that the disciplinary action can be taken in the following cases:
>
> (i) Where the office had acted in a manner as would reflect on his reputation for integrity or good faith or devotion to duty;

(ii) if there is prima facie material to show recklessness or misconduct in the discharge of his duty;

(iii) if he has acted in a manner which is unbecoming of a Government servant

(iv) if he had acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;

(v) if he had acted in order to unduly favour a party;

(vi) if he had been actuated by corrupt motive, however, small the bribe may be because Lord Coke said long ago 'though the bribe may be small, yet the fault is great'. "

22. If the aforesaid principle is taken note of, it would be seen that if the material available on record prima facie shows that the official concerned has shown recklessness in discharge of duties or has acted negligently and has deviated from the prescribed condition which are essential for exercise of statutory powers then he has committed misconduct and renders himself liable to be proceeded against departmentally. If the case in hand is evaluated in the backdrop of the aforesaid principle, it would be clear that in dealing with more than 30 criminal cases, particularly relating to bail, petitioner has shown reckless attitude, has acted negligently and has omitted to take note of prescribed conditions and settled principles of law, which we essential for discharge of his statutory duties for grant of bail and if the law laid down in the case of *K.K. Dhawan* (supra) is applied to the present case, there is no iota of doubt in our mind that disciplinary action could be taken against the petitioner for this act even if the contention of the petitioner is that extraneous consideration and illegal motive with regard to his integrity are not established.

23. At this stage, it would be appropriate to take note of the main ground canvassed by Shri Brian D'Silva, learned Senior Advocate, to the effect that in the light of law laid down in the case of *Ramesh Chander Singh* (supra) that petitioner cannot be proceeded with.

24. Even though Hon'ble Supreme Court, in the case of *Ramesh Chander Singh* (supra) in paragraph 11 has held that initiating disciplinary proceeding against judicial officer has to be undertaken if strong grounds are available and action should not be taken for the manner in which a case is decided by

the judicial officer, but the aforesaid principle laid down by the Supreme Court has to be evaluated in the light of the facts and circumstances of the cases and the law governing the binding effect of precedent. In the judgment rendered in the case of *Ramesh Chander Singh* (supra), the earlier judgment by a co-ordinate Bench of Three Judges of *K.K. Dhawan* (supra) is not taken note of. That being so, Shri Kishore Shrivastava, learned Senior Advocate, is right in contending that in the light of the Full Bench judgment of this Court in the case of *Jabalpar Bus Operators Association* (supra), the law laid down in the case of *K.K. Dhawan* (supra) will prevail. In the case of *Jabalpur Bus Operations Association* (supra), a Full Bench of this Court in paragraph 10 has laid down the principle that when there is conflict between two decisions of the Supreme Court, benches comprising of equal number of judges, decision of the earlier bench is binding unless explained by a later bench of equal strength, in which case the decision of the later bench would be binding. The same principle is reiterated by the Supreme Court recently in the case of *Union of India and others Vs. S.K. Kapoor,* (2011) 4 SCC 589, wherein in paragraph 9, it has been so observed by the Supreme Court:

> "9. It may be noted that the decision in *S.N. Narula case* [(2011) 4 SCC 591] was prior to the decision in *T.V. Patel case* [(2007) 4 SCC 785]. It is well settled that if a subsequent coordinate Bench of equal strength wants to take a different view, it can only refer the matter to a larger Bench, otherwise the prior decision of a coordinate Bench is binding on the subsequent Bench of equal strength. Since, the decision in *S.N. Narula case* was not noticed in *T.V. Patel case,* the latter decision is a judgment per incuriam. The decision in *S.N. Narula case* was binding on the subsequent Bench of equal strength and hence, it could not take a contrary view, as is settled by a series of judgments of this Court."

25. If the aforesaid principle is applied in the present case, it would be seen that the decision in the case of *K.K. Dhawan* (supra) is neither considered now explained in the case of *Ramesh Chander Singh* (supra) and, therefore, the decision in the case of *K.K. Dhawan* (supra) would be binding. If that be so, then the contention of Shri Brian D'Silva, learned Senior Advocate, based on the law laid down in the case of *Ramesh Chander Singh* (supra) cannot be accepted. Instead, it has to be held that the action of the petitioner in this case amounts to an act which can be termed as act reckless in nature, in the discharge of his duties; act which amounts to negligence in the discharge of

his duties; and, acts which are in total disregard to the settled principles of law in the exercise of statutory powers and, therefore, the same amounts to a misconduct.

26. That apart, the question with regard to applying the principles in the case of *Ramesh Chander Singh* (supra) and *K.K. Dhawan* (supra) in this case can be viewed from a different perspective also. If the case of *Ramesh Chander Singh* (supra) is taken note of, it would be seen that in the said case the allegations against the judicial officer was with regard to grant of bail in a single case and complaint received against him, action was taken against the judicial officer in the matter of grant of bail and the entire action was with regard to a single or an isolated case. In the case of *Ramesh Chander Singh* (supra), he was proceeded against departmentally only with regard to an act committed by him in one single instance. It was because of this reason that the question was considered by the Supreme Court and it was held that merely because in a single isolated case the delinquent judicial officer has acted in the manner alleged, then without proof of extraneous consideration or doubtful integrity being available, he should not be proceeded against. In the present case, it is not a case where the petitioner has committed the act complained of as misconduct on a single isolated occasion. It is a case where he has on and off, on more than 30 occasions, committed the same act of commission or omission. In view of the above, we are of the considered view that the law laid down in the case of *K.K. Dhawan* (supra) would apply with all force in the present case and it can be safely construed that if the petitioner has acted in a reckless and negligent manner, he can be dealt with for acts of misconduct.

27. That apart, the scope of judicial review in such matters by a High Court is considered in the case of *Shashikant S. Patil* (supra), relied upon by Shri Kishore Shrivastava, learned Senior Advocate, and it has been held by the Supreme Court that interference with the decision of departmental authorities can be permitted while exercising jurisdiction under Article 226 of the Constitution, if it is found that disciplinary proceedings are held in violation to the principles of natural justice or in violation to statutory rules and regulations prescribed for conduct of such enquiry and if the decision is vitiated by consideration of extraneous evidence or material. In the present case, none of the aforesaid eventualities exist. Therefore, we are of the considered view that a reasonable and justifiable finding recorded by the enquiry officer cannot be interfered with by this Court merely because the petitioner feels that he has granted bail by use of his discretion.

28. Recently also the Supreme Court, in the case of *State Bank of Bikaner and Jaipur Vs. Nemi Chand Nalwaya,* (2011) 4 SCC 584, has considered the scope of judicial review into findings of departmental authorities and the test for determining perversity in a finding of the enquiry officer is considered and the law is laid down in paragraph 7, in the following terms:

> "7. It is now well settled that the courts will not act as an appellate court and reassess the evidence led in the domestic enquiry, nor interfere on the ground that another view is possible on the material on record. If the enquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the evidence will not be grounds for interfering with the findings in departmental enquiries. Therefore, courts will not interfere with findings of fact recorded in departmental enquiries, except where such findings are based on no evidence or where they are clearly perverse. The test to find out perversity is to see whether a Tribunal acting reasonably could have arrived at such conclusion or finding, on the material on record. The courts will however interfere with the findings in disciplinary matters, if principles of natural justice or statutory regulations have been violated or if the order is found to be albitrary, capricious, mala fide or based on extraneous consideration. [*Vide B.C. Chaturvedi Vs. Union of India*, (1995) 6 SCC 749; *Union of India Vs. G. Ganayutham,* (1997) 7 SCC 463; *Bank of India Vs. Degala Suryanarayana,* (1999) 5 SCC 762; and. *High Court of Judicature at Bombay Vs. Shashikant S. Patil* (supra)].
>
> If the principles laid down by the Supreme Court, in the cases referred to hereinabove, are taken note of, then a reasonable finding arrived at by the enquiry officer in he present case based on material available on record can neither be interfered with by this Court nor can it termed as perverse or unreasonable to such an extent that interference can be made by this Court.

29. Even in the case relied upon by Shri Brian D'Silva, learned Senior Advocate, that is - *P.C. Joshi* (supra) wherein reliance is placed on the judgment of *A.N. Saxena* (supra), it is seen that the judgments rendered in the case of *K.K. Dhawan* (supra) and *A.N. Saxena* (supra) are relied upon and the principle laid down in both these cases are upheld by the Supreme Court, but after

scrutinizing the records of the particular cases in which there were allegations of granting bail in 19 cases, it was found by the Court that the delinquent employee had disposed of more than 3000 bail applications and in only 19 bail orders deficiencies were found, for which he was charge-sheeted. Out of these 19 cases, in 7 cases the enquiry officer found that the bail was properly granted and the charges to that extent were not proved. In the 8th case it was found that even though bail was granted, but it was recalled within one month. In the other 11 cases, the enquiry officer found that the orders rejecting or granting bail were having same pattern and the enquiry officer did not find any specific material to show malafides. The Supreme Court dealt with the matter and even though in the facts and circumstances of that case found that the questions involved were not serious in nature, they related to decision in cases pertaining to certain non-serious matters, the principle laid down in the cases of *K.K. Dhawan* (supra) and *A.N. Saxena* (supra) were approved and in paragraph 5, the observations in this regard have been made. That being so, case of *P.C.Joshi* (supra) has been decided in the light of the facts that were available in the said case and the petitioner cannot take advantage of the said case.

30. As far as the case of *K.P. Tiwari* (supra) is concerned, that was a case of compulsory retirement of a judicial officer and the allegations against him was also with regard to a single isolated criminal case and not cases consistently on various occasions, as is available in the present case.

31. Accordingly, we are of the considered view that the contentions of Shri Brian D'Silva, learned Senior Advocate, to the effect that mere negligent way of dealing with the matter is not sufficient to take action against the petitioner cannot be accepted even though there may not be any direct proof with regard to use of improper motive or extraneous consideration by the petitioner, but when a judicial officer like the petitioner, having an experience of more than 20 years, shows total recklessness and disregard in the matter of deciding more than 30 cases, particularly bail applications, in a manner which cannot be approved, inference of extraneous consideration and improper motive can be imputed and disciplinary action taken. It cannot be lost sight of that decision in the matter of taking action against the petitioner undertaken by the High Court after the allegations levelled were proved in the departmental enquiry and a Committee of Judges scrutinized the same and finally the matter was approved by a Full Court, of the High Court. Under such circumstances, this Court in exercise of its limited jurisdiction in a petition under Article 226 of the Constitution cannot sit over the said decision as if it is exercising further

appellate jurisdiction This Court can interfere only if statutory rules or regulations are found to be violated or the enquiry is found to be held in total disregard to or in contravention to settled norms of conducting the enquiry. In the present case nothing of this sort is brought to the notice of this Court. The only ground canvassed is to the effect that no corrupt motive or the allegation of doubtful integrity is proved and, therefore, the action is unsustainable. But, when the law on the subject is clear and when the law permits the competent authority to take action against the delinquent person if consistently he shows act of negligence and recklessness in the discharge of his duties, we are of the considered view that no interference in the matter is called for.

32. This Court while exercising the powers of judicial review in the matter of taking disciplinary action against a judicial officer is required to evaluate the case keeping in view the fact that a case of a judicial officer has to be dealt in a different manner and not like a normal case of disciplinary enquiry. A judicial officer is required to maintain a very high standard of devotion to duty and if it is found that a judicial officer has time and again shown utter disregard to settled principles and norms of justice in discharging his duty, a decision taken to remove such a judicial officer cannot be interfered with by this Court until and unless the material available on record shows non-application of mind and violation or breach of statutory and constitutional provisions. In the present case, no such breach or irregularity is found warranting consideration.

33. Accordingly, finding no case for interference on the grounds raised, the petition is dismissed. No order as to costs.

*Petition dismissed.*

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**I.L.R. [2011] M. P., 1988**
**WRIT PETITION**
***Before Mr. Justice Sujoy Paul***
W.P. No. 4298/2011 (Gwalior) decided on 19 July, 2011

RAMHET TYAGI ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***Service Law - Civil Services (Classification, Control and Appeal) Rules, M.P. 1966 - Rule 9 - Sub-delegation of powers*** - **Suspension order of petitioner, a Class -III employee was issued by District Education Officer and not by the Collector - Held - The Collector took**

**a decision in the note-sheet that the petitioner is to be suspended and directed for issuance of an order in this regard - The principle of sub-delegation is not attracted.**

The note-sheet produced above clearly shows that he has not transferred his authority to DEO to place the petitioner under suspension - The Collector has also not delegated the power of judgment whether the petitioner is to be placed under suspension or not, to the DEO - The judgment to place the petitioner under suspension is of the Collector. (Para 15)

सेवा विधि –सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966 – नियम 9 – शक्तियों का उप–प्रत्यायोजन – याची तृतीय श्रेणी कर्मचारी के निलंबन का आदेश जिला शिक्षा अधिकारी द्वारा जारी किया गया और न कि कलेक्टर द्वारा – अभिनिर्धारित – कलेक्टर ने याची को निलंबित करने का निर्णय नोट–शीट पर लिया और इस संबंध में आदेश जारी करने का निदेश दिया – उप प्रत्यायोजन का सिद्धांत लागू नहीं होता।

**Cases referred :**

(2010) 2 SCC 422, 1994 AIR SCW 3832, 2007(1) MPLJ 517, AIR 1996 SC 765, AIR 1969 SC 483, AIR 1968 SC 850.

*Brijesh Sharma,* for the petitioner.

*Vishal Mishra,* for the respondents.

**ORDER**

**Sujoy Paul, J. :**–Shri Brijesh Sharma, learned counsel for the petitioner submits that the order dated 23.6.2011, whereby the petitioner, Assistant Grade-2, is placed under suspension is bad in law. The singular contention of the petitioner is that admittedly the Collector of the district is delegated with the power under rule 9 of **Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966 (hereinafter called "Rules of 1966")** to place class-3 employees under suspension. However, his contention is that Annexure P/1 dated 23.6.2011 is not an order issued and passed by the Collector but it is an order issued by District Education Officer. Shri Sharma submits that admittedly the District Education Officer is not competent to place the petitioner under suspension. Further contention of learned counsel for the petitioner is that merely writing - "ordered by Collector" in Annexure P-1 will not make it an order issued and passed by the Collector.

2. Elaborating further learned counsel for the petitioner submits that under rule 9 of the Rules of 1966, which reads as under:-

"9(1) The appointing authority or any authority to which it is subordinate or the disciplinary authority or any other authority empowered in that behalf by the Governor, by general or special order, may place a Government servant under suspension :-

(a) where a disciplinary proceeding against him is contemplated or is pending; or

(b) where a case against him in respect of any criminal offence is under investigation, inquiry or trial:"

the disciplinary authority or any authority empowered in that behalf by general or special order alone can place a Government servant under suspension. Learned counsel submits that these powers are delegated by a special/general order by the Governor to the Collector and, therefore, the status of the Collector is of delegate. Thus, he may not further delegate these powers to anybody else including the District Education Officer. This kind of further delegation is impermissible in law and on this ground alone the suspension order is liable to be axed.

3. Shri Vishal Mishra, learned Government Advocate has produced the note sheet on the direction of this Court. The relevant note sheet reads as under:-

"श्रीमान कलेक्टर महोदय

केवल एक सिकायतकर्ता नहीं है । मुझे कम से कम चार पृथक–पृथक जनप्रतिनिधियों ने शिकायत की है । निलंबित कर डिटेल्ड जॉच करना सुनिश्चित करें ।

हस्ता.
20.06.11
आदेश जारी करें ।
हस्ता. (Collector)
22.06.11"

4. Shri Mishra submits that the suspension is ordered by the Collector and Annexure P/1 is only its communication by the District Education Officer. Thus, Shri Mishra submits that the singular ground on which the entire petition is founded upon has no substance and it is liable to be rejected.

5. Learned counsel for the petitioner has relied on various provisions and judgments. Shri Brijesh Sharma relied on rule 9(2) (a) of the Rules of 1966, which reads as under:-

"9(2) A Government servant shall be deemed to have been placed under suspension by an order of appointing authority -

(a) with effect from the date of his detention, if he is detained in custody whether on a criminal charge or otherwise, for a period exceeding forty-eight hours."

The contention of Shri Sharma by reading rules 9(1) and 9(2) (a) is that an order means an effective order passed with the signature of the Competent Authority. A notesheet prepared for in-house proceedings or a note in a file by no stretch of imagination can be said to be an order. Since the notesheet is not an order, the validity of impugned order is to be seen only from Annexure P/1, which shows that it is issued by the D.E.O., although there is a noting in the order that it is "ordered by Collector".

6. During the course of arguments, Shri Brijesh Sharma relied on [(2010) 2 SCC 422 *(Union of India and another vs. Kartick Chandra Mondal and another)*. Paragraphs 17 and 18, on which reliance is placed, are reproduced here as under:-

"17. The next issue that we are required to consider pertains to internal communications which are relied upon by the respondents and which were also referred to by the Tribunal as well as by the High Court. Ex facie, the aforesaid communications were exchanged between the officers at the level of board hierarchy only.

18. An order would be deemed to be a government order as and when it is issued and publicised. Internal communications while processing a- matter cannot be said to be orders issued by the competent authority unless they are issued in accordance with law. In this regard, reliance may be placed on the decision of this Court in *State of Bihar-v. Kripalu Shankar*[2] wherein this Court observed, in paras 16 and 17, as follows: (SCC pp. 44-45)

"16. Viewed in this light, can it be said that what is contained in a notes file can ever be made the basis of an action either in contempt or in defamation. *The notings in a notes file do not have behind them the sanction of law as an effective order. It is only an expression of a feeling by the officer concerned on the subject under review.* To examine whether contempt is committed or not, what has to be looked into is the ultimate order. A mere expression

of a view in notes file cannot be the sole basis for action in contempt. Business of a State is not done by a single officer. It involves a complicated process. In a democratic set-up, it is conducted through the agency of a large number of officers. That being so, the noting by one officer, will not afford a valid ground to initiate action in contempt. We have thus no hesitation to hold that the expression of opinion in notes file at different levels by officers concerned will not constitute criminal contempt. It would not, in our view, constitute civil contempt either for the same reason as above since mere expression of a view or suggestion will not bring it within the vice of clause (b) of Section 2 of the Contempt of Courts Act, 1971, which defines civil contempt. *Expression of a view is only a part of the thinking process preceding government action.*

• 17. In *Bachhittar Singh v. State of Punjab* a Constitution Bench of this Court had to consider the effect of an order passed by a Minister on a file, which order was not communicated. This Court, relying upon Article 166(1) of the Constitution, held that the order of the Revenue Minister, PEPSU could not amount to an order by the State Government unless it was expressed in the name of Rajpramukh as required by the said article and was then communicated to the party concerned. This is how this Court dealt with the effect of the noting by a Minister on the file: (AIR p. 398, para 9)

9. The question, therefore, is whether he did in fact make such an order. Merely writing something on the file does not amount to an order. Before something amounts to an order of the State Government two things are necessary. The order has to be expressed in the name of the Governor as required by clause (1) of Article 166 and then it has to be communicated. As already indicated, no formal order modifying the decision of the Revenue Secretary was ever made. Until such an order is drawn up the State Government cannot, in our opinion, be regarded as bound by what was stated in the file. As long as the matter rested with him the Revenue Minister could well score out his remarks or minutes on the file and write fresh ones."

By placing reliance on the said paragraphs, learned counsel for the petitioner submits that the notesheet is not an order issued and publicized, it is, at best, an internal communication and, therefore, has not taken shape of an order.

7. Learned counsel for the petitioner has also relied on a judgment reported in 1994 AIR SCW3832 *(M/s. Sahni Silk Pvt. Ltd. and another vs. Employees' State Insurance Corporation)*. Reliance is placed on paragraphs 5,6,7,10 and 15, which are reproduced here as under:-

> "5. The Courts are normally rigorous in requiring the power to be exercised by the persons or the bodies authorised by the statutes. It is essential that the delegated power should be exercised by the authority upon whom it is conferred and by no one else. At the same time, in the present administrative set up extreme judicial aversion to delegation cannot be carried on an extreme. A public authority is at liberty to employ agents to exercise its powers. That is why in many statutes, delegation is authorised either expressly or impliedly. Due to the enormous rise in the nature of the activities to be handled by statutory authorities the maxim delegat us non potest delegare is not being applied specially when there is question of exercise of administrative discretionary power.
>
> 6. By now it is almost settled that the legislature can permit any statutory authority to delegate its power to any other authority, of course, after the policy has been indicated in the statute itself within the framework of which such delegatee is to exercise the power. The real problem or the controversy arises when there is a sub-delegation. It is said that when Parliament has specifically appointed authority to discharge a function, it cannot be readily presumed that it had intended that its delegate should be free to empower another person or body to act in its place. In *Barium Chemicals Ltd. v. Company Law Board,* AIR 1967 SC 295 : (1966) Supp SCR 311 this Court said in respect of sub-delegation (at p. 306 of AIR):
>
> "Bearing in mind that the maxim delegatus non potest delegare sets out what is merely a rule of construction, sub-delegation can be sustained if permitted by express provision or by necessary implication."

7. Again in *Mangulal Chunilal v. Manilal Maganlal,* AIR 1968 SC 822 (1968) 2 SCR 401 while considering the scope of S. 481 (1) (a) of the Bombay Provincial Municipal Corporation Act (59 of 1949) this Court said that Commissioner of the Ahmedabad Municipal Corporation had delegated his power and function under the aforesaid section to a Municipal Officer to launch proceedings against a person charged with offences under the Act or the Rules and that officer to whom such functions were delegated could not further delegate the same to another.

10. So far as the present S. 94A is concerned, it says that the Corporation subject to any regulation made by the Corporation in that behalf, may direct that particular or any of the powers and functions which may be exercised or performed by the Corporation may, in relation to such matters and subject to such conditions, if any, as may be specified 'be also exercisable by any officer or authority subordinate to the Corporation.' S. 94A does not specifically provide that any officer or authority subordinate to the Corporation to whom the power has been delegated by the Corporation may in his turn authorise any other officer to exercise or perform that power or function. But by the resolution dated 28-2-1976 the Corporation has not only delegated its power under S. 85B(i) of the Act to the Director General, but has also empowered the Director General to authorise any other officer to exercise the said power. Unless it is held that S. 94A of the Act enables the Corporation to delegate any of its powers and functions to any officer or authority subordinate to the Corporation, and he in his turn can sub-delegate the exercise of the said power to any other officer, the last part of the resolution dated 28-2-1976 cannot be held to be within the framework of S. 94A. According to us, the Parliament while introducing S. 94A in the Act, only conceived direct delegation by the Corporation to different officers or authorities, subordinate to the Corporation, and there is no scope for such delegate to sub-delegate that power, by authorising any other officer to exercise or perform the power so delegated.

15. Hence the view taken in the case of *Rameshwar Jute Mills Ltd. v. Union of India,* AIR 1986 Pat 288 by the Full Bench of the Patna High Court as well as in the case of *Employees' State Insurance Corporation v. M/s. Dhanda Engineers Pvt. Ltd., Faridabad,* 1981 Lab IC 658 by a Division Bench of the Punjab and Haryana High Court upholding the resolution dated 28-2-1976 and office order dated 3-5-1976 cannot be sustained and the opinion expressed in the case of *Employees' State Insurance Corporation, Bangalore v. Shoba Engineers, Bangalore* (1981) 59 FJR 343, by a Division Bench of the Karnataka High Court, that the aforesaid resolution dated 28-2-1976 and office order dated 3-5-1976 was invalid has to be upheld."

By placing reliance on these paragraphs, learned counsel for the petitioner has relied on the age old legal maxim **"delegatus non potest delegare",** which means that a delegatee cannot further delegate the power.

8. The contention of the petitioner is that the status of Collector itself is of a delegatee, who could not have further delegated it to the DEO. Such sub-delegation of the power of suspension to subordinate officer is totally unknown to law and is foreign to Service Jurisprudence and Administrative Law.

9. Shri Brijesh Sharma, also relied on a judgment reported in 2007 (1) MPLJ 517 *(Govind Kumar Sen vs. State of MP and others).* The emphasis is at para 15 of the judgment, which is reproduced here as under:-

"15. After going through the provisions of section 58(1), it is apparent that the power of appointment of petitioner is vested to Mayor-in-Council or with Commissioner. In the present case, petitioner was appointed by way of promotion as per the order of Commissioner, however, Mayor-in-Council or the Commissioner is the authority competent to pass the order affecting the service condition of the employee of the Corporation. In the present case, order of suspension has been issued by the respondent No. 3 under the instructions of Mayor. Learned counsel appearing on behalf of respondent is not in a position to produce any resolution of Mayor-in-Council or the order passed by the Commissioner directing or approving the suspension order of the petitioner. In view of the above, it is apparent that respondent No. 3, cannot

exercise the power of appointing authority or disciplinary authority to place the petitioner under suspension. Thus, the order of suspension, which is passed by respondent No. 3 is without any authority under the law."

By placing reliance on this judgment, the contention is that mere on instruction of Collector if suspension order is passed, it has no sanctity of law.

10. Per Contra, Shri Vishal Mishra, learned Government Advocate has relied on a judgment of Apex Court, reported in AIR 1996 SC 765 *(State of M.P. and others vs. Dr. Yashwant Trimbak)* . The relevant paragraphs No. 17 and 21 are reproduced here as under:-

"17. The order of sanction for prosecution of a retired Government servant is undoubtedly an executive action of the Government. A Governor in exercise of his power under Article 166(3)of the Constitution may allocate all his functions to different Ministers by framing rules of business except those which the Governor is required by the Constitution to exercise his own discretion. The expression "business of the Government of the State" in Article 166(3) of the constitution, comprises of functions which the Governor is though exercise with the aid and advice of the Council of Ministers including those which he is empowered to exercise on his subjective satisfaction and including statutory functions of the state Government. The Court has held in *Shamrao v. State of Maharashtra*,(1964) 6 SCR 446 : (AIR 1964 SC 1128) that even the functions and duties which are vested in a State Government by a statute may be allocated to Ministers by the Rule of Business framed under Article 166(3) of the Constitution. In *State of Bihar v. Rani Sonabati Kumari,* (1961)1 SCR 788 : (AIR 1961 SC 221) where power of issuing notification under Section 3 (1) of the Bihar Land Reforms Act, 1950 has been conferred on the Governor of Bihar, this Court held : (Para 40 of AIR)

"Section 3 (l)of the Act confers the power of issuing notifications under it not on any officer but on the State Government as such though the exercise of that power would be governed by the rule of business framed by the Governor under Art. 166 (3)of the constitution".

21. In view of our aforesaid conclusion, the impugned order of the Tribunal is wholly unsustainable in law and we accordingly quash the same. The Transfer Application No. 3551 of 1988 filed by the respondent before Madhya Pradesh Administrative Tribunal stands dismissed. The appropriate authority may now proceed with the departmental proceeding which has been initiated against the respondent."

Shri Mishra submits that in the light of the aforesaid pronouncement of the Supreme Court, there is no illegality in Annexure P/1 and it is in accordance with law.

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

12. The sole basis on which Annexure P/1 is sought to be quashed is that it is not issued nor it is an order passed by the Collector. The contention is that effectively it is an order passed by the District Education Officer. By relying on the aforesaid legal maxim *"delegatus non potest delegare"* and the judgment of Supreme Court in *Sahni Silk Mills's* case (supra), it is submitted by the petitioner that sub-delegation is impermissible and is bad in law.

13. Blacks Law Dictionary defines **"delegation of power"** as under:-

> **"Delegation of power - transfer of authority by one branch of Government in which such authority is vested, to some other branch or administrative agency."**

The definition shows that for the purpose of determining as to whether there is any delegation of power, one has to see whether there is any transfer of authority by A to B for example.

14. While dealing with the aforesaid maxim "it means that a delegate cannot further delegate the power. It ensures that a discretionary power is exercised by the authority on whom it has been conferred by the law in question, and not by anyone else. The justification underlying this principle is that when a law confers a discretionary power on a specified authority, it is indicative of the fact that the law has placed trust in the judgment of that authority. and consequently, it is that authority itself and none else which ought to discharge the function entrusted to it by law." *(Harichand Aggarwal v. Batala Engineering Co.Ltd.)* (AIR 1969 SC 483).

15. In the present case, in the light of the aforesaid principles it is required to be carefully examined whether the Collector has delegated his power to DEO or not. The notesheet produced above clearly shows that he has not transferred his authority to DEO to place the petitioner under suspension. The Collector has also not delegated the power of judgment whether the petitioner is to be placed under suspension or not, to the DEO. The judgment to place the petitioner under suspension is of the Collector. The Collector took a decision in the notesheet that the petitioner is to be suspended and directed for issuance of an order in this regard. The question is whether such a direction after taking such a decision to place the petitioner under suspension amounts to sub-delegation of power to DEO.

16. In the considered opinion of this Court, the Collector has not delegated his power to the DEO. There is no transfer of authority or transfer of judgment by the Collector to the DEO.

17. The judgment relied by Shri Sharma in *Govind Kumar Sen's case* (supra) is of no help to him. The finding of the Single Judge in the said matter that ***"learned counsel appearing on behalf of the respondent is not in a position to produce any resolution of Mayor-in-Council or the order passed by the Commissioner directing or approving the suspension order of the petitioner....."*** shows that in the said case, the respondent therein could not produce any resolution or order of the Competent Authority whereas in the present case a notesheet admittedly written by the Collector is produced and there is no dispute that the Collector is a Competent Authority to place the petitioner under suspension. Thus, the judgment in *Govind Kumar Sen's case* (supra) is of no help to the petitioner.

18. So far the judgment in *M/s Sahni Silk Mills's case* (supra) is concerned, the said case deals with principle of sub-delegation. Needless to mention that this judgment will be applicable in cases of sub-delegation. In the present case, since in the opinion of this Court, there is no sub-delegation of power, authority or judgment by the Collector, the said principle of *"delegatus non potest delegare"* will have no application.

19. So far the judgment in *M/s Sahni Silk Mills' case* (supra) is concerned, the said judgment is passed in a different context. The issue before the Supreme Court was totally different and was with regard to an internal communication, which was relied by the respondents therein. The case of the respondent-employees before the Supreme Court was that the noting in the file was an order and, therefore, they are entitled for its benefits/enforcement. This is

nobody's case here. Admittedly, on the basis of the notesheet signed by the Collector, an order in writing *"by the order of the Collector"* is issued. Thus, the judgment in the said case has no application here.

20. This matter may be examined from yet another angle. The principle of delegation of power and assistance is not foreign to the Principles of Administrative Law. There is a distinction between an authority delegating its power to some authority and employing assistance to help it in discharging its functions. A power may not be sub-delegated but there should be no objection in an authority seeking assistance if the final judgment rests with it. Whether in a particular situation it is a case of sub-delegation or merely of employing assistants would depend upon the degree of control and supervision exercised by the delegating authority over the subordinate agency. If the administrative decision, judgment and control over the subordinate is clear with the direction as to how the subordinate authority has to deal with it, it may be a case not of delegation but of employing assistants to help the authority in discharging its statutory power. The Apex Court in the case of *Union of India vs. P.K.Roy* (AIR 1968 SC 850) held as under:-

> "If the administrative authority named in the statute has and retains in its hands general control over the activities of the person to whom it has entrusted in part the exercise of its statutory power and the control exercised by the administrative authority is of a substantial degree, there is in the eye of law no 'delegation' at all and the maxim *"delegatus non potest delegare"* does not apply... In other words, if a statutory authority empowers a delegate to undertake preparatory work and to take an initial decision in matters entrusted to it but retains in its own hands the power to approve or disapprove the decision after it has been taken, the decision will be held to have been validly made if the degree of control maintained by the authority is close enough for the decision to be regarded as the authority's own."

21. In *P.K.Roy's case* (supra), normally the order is issued by the Assistants but the ultimate power of decision was of the Competent Authority and, therefore, it was held that it was a case of employing assistants and not a case of delegation of power.

22. In the light of the aforesaid legal discussion, this Court is of the considered opinion that in the facts and circumstances of the case, the Collector has not

transferred his authority, but himself took the decision/judgment of placing the petitioner under suspension and merely directed the DEO to pass the orders. Thus, DEO, at best, is providing assistance to the Collector in discharging its statutory power. The principle of sub-delegation is not attracted in the aforesaid fact situation and, therefore, the judgments cited by Shri Brijesh Sharma have no application in the present matter.

23. Accordingly, Annexure P/1 cannot be called in question on the ground of competence/jurisdiction. So far the merits are concerned, the order Annexure P/1 is appellable under rule 23 of the Rules of 1966 and the petitioner is at liberty to avail the aforesaid remedy. The petitioner has not argued any other point. The singular question is, therefore, answered against the petitioner as per the detailed analysis made herein above. On the basis of said analysis, the petition deserves to be dismissed. However, the petitioner is at liberty to avail the statutory appellate remedy under the rules on merits.

24. With the aforesaid observation, the petition is dismissed. No costs.

*Petition dismissed.*

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**I.L.R. [2011] M. P., 2000**
**WRIT PETITION**
***Before Mr. Justice K.K. Trivedi***
W.P. No.13284/2009 (Jabalpur) decided on 27 July, 2011

BANWARI LAL ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 85 - Power of Sub-Divisional Officer*** **- Resolution passed by the Gram Panchayat and petitioner was selected for appointment as Panchayat Karmi - Upon a complaint Sub-Divisional Officer, holding that the selection of the petitioner was not in accordance to the instructions issued by the State Government on 13.08.2007, he set aside the resolution - Held - Order of Sub-Divisional Officer being contrary to the provisions of the Act and the rules, can not be sustained - In no case the resolution of the Gram Panchayat can be set aside or cancelled in exercise of power u/s 85 of the Act.** (Paras 2 & 6 )

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 85 –

उप–प्रभागीय अधिकारी की शक्ति – ग्राम पंचायत द्वारा संकल्प पारित किया गया और याची का पंचायत कर्मी के रुप में चयन किया गया – शिकायत पर, उप–प्रभागीय अधिकारी ने यह धारणा बनाते हुए कि याची का चयन राज्य सरकार द्वारा 13.08.2007 को जारी किये गये निर्देशों के अनुसरण में नहीं था, उसने संकल्प अपास्त किया – अभिनिर्धारित – उप–प्रभागीय अधिकारी का आदेश अधिनियम तथा नियमों के उपबंधों के विपरीत होते हुए कायम नहीं रखा जा सकता – किसी स्थिति में ग्राम पंचायत के संकल्प को अधिनियम की धारा 85 के अंतर्गत शक्ति का प्रयोग कर अपास्त या निरस्त नहीं किया जा सकता।

**Cases referred :**

2008(2) MPLJ 194, 2008 (4) MPLJ 647.

*Narendra Sharma,* for the petitioner.
*S.M. Lal,* PL for the respondents No. 1 & 2.
*Smita Arora,* for the respondent No. 5.

**ORDER**

**K.K. Trivedi, J.** :–By this writ petition under Article 226 of the Constitution of India, the petitioner has called in question the order dated 25.01.2008 passed by the Sub Divisional Officer, Pushprajgarh, District Anooppur and the order dated 16.11.2009 passed by the Collector, Anooppur, alleging that the Sub Divisional Officer having no jurisdiction to set aside the resolution of the Gram Panchayat has wrongly allowed the complaint and set aside resolution of Gram Panchayat and the appeal filed against such an order has been dismissed, therefore, the petitioner is required to file this writ petition. The reliefs claimed are that the petitioner, who has rightly been selected and appointed on the post of Panchayat Karmi, be permitted to continue on his post after the quashment of the impugned orders.

2. The facts giving rise in the present writ petition in brief are that on 10.08.2007 a resolution was passed by the Gram Panchayat and petitioner was selected for his appointment as Panchayat Karmi. The said resolution was passed considering the candidature of the petitioner as also the other persons, who made applications pursuant to the advertisement issued by the concerned Gram Panchayat. 'A complaint was made before the Sub Divisional Officer that such a resolution was illegally passed and, therefore, the same was not to be implemented. However, the fact remains that the petitioner was already appointed vide order dated 10.08.2007 and he joined on his post on 13.08.2007 and started working. The Sub Divisional Officer, Pushprajgarh passed an order on 25.01.2008 considering the

complaint made and holding that the selection of the petitioner was not in accordance to the instructions issued by the State Government on 13.08.2007, therefore, he set aside the resolution dated 10.08.2007 and remitted back the matter to the Gram Panchayat for making selection afresh.

3. An appeal was preferred by the petitioner against this order before the Collector. However, even after calling the records, the appeal of the petitioner was not heard on the question of grant of interim relief, therefore, he was required to file a writ petition before this Court being W.P. No.7794/2008. The said writ petition was finally disposed of vide order dated 09.07.2008 and this Court granted a direction to maintain status quo till consideration of the application of the petitioner for grant of stay. The petitioner was thus notified as Secretary of the Gram Panchayat pursuant to his order of appointment and was permitted to work on his post. Later on the appeal of the petitioner has been dismissed holding that the Sub Divisional Officer has rightly passed the order.

4. The writ petition filed before this Court was entertained and an interim protection was granted to the petitioner on 15.12.2009. The respondents have entered appearance and have filed their response. The respondents No.1 and 2 have simply said that the circular was issued by the State Government categorically directing that the selection of Panchayat Karmi was to be made only on the basis of merit obtained on the basis of marks secured in the qualifying examination. The petitioner could not have been selected in view of this instruction and, therefore, there was nothing wrong committed by the Sub Divisional Officer in setting aside illegal resolution of the Gram Panchayat. The respondent No.3 has filed similar return. The respondent No.5 has filed the return contending that illegal selection of petitioner was done de-hors instructions of the State Government and relying on various decisions of this Court it has been said that selection of petitioner as Panchayat Karmi was bad in law. Thus, it is contended that right action was taken, orders were passed and, therefore, there was no need to interfere in the orders passed by the competent authority by this Court exercising extraordinary power of judicial review under Article 226 of Constitution of India.

5. Heard the learned Counsel for the parties and perused the records.

6. The order of Sub Divisional Officer being contrary to the provisions of the Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (herein after referred to as Act) and the rules, cannot be sustained. The Act

confers powers under Section 85 on the competent authority to suspend a resolution of a Panchayat. If a resolution is passed contrary to the law, the same can be suspended. Sub-section (2) of Section 85 of the Act aforesaid prescribes that the order of suspension is required to be affirmed by the next competent authority. Once the order is affirmed, the resolution is not to be acted upon and it is to be pocketed for all time to come. In no case the resolution of the Gram Panchayat can be set aside or cancelled in exercise of power under Section 85 of the Act.

7. Similarly there is no provision made under Section 91 of the Act or the Madhya Pradesh Panchayat (Appeal & Revision) Rules, 1995 (herein after referred to as Rules) to file an appeal or revision against the resolution of the Gram Panchayat. The Division Bench of this Court has categorically held in the case of *Sagar Machhua Sahkari Samiti, Seoni vs. Chief Executive Officer, Janpad Panchayat, Seoni & another,* 2008 (2) MPLJ 194 that a resolution of the Gram Panchayat is neither appealable or revisable. This view has been further affirmed in the decision of Division Bench of this Court in the case of *Devi Dayal Raikwar vs. State of M.P. & others,* 2008 (4) MPLJ 647. The appeal against the order of appointment alone is required to be filed and while examining the said appeal, the validity of the resolution is also examined by the appellate authority. If it is found that the resolution was illegally passed, the said resolution is not to be touched but the consequential order of appointment is liable to be set aside. At any rate the Sub Divisional Officer was not competent to set aside the resolution passed by the Gram Panchayat. From the wordings of the order impugned contained in Annexure P-5, it is clear that the resolution of the Gram Panchayat has been cancelled, therefore, the order dated 25.01.2008 cannot be given stamp of approval by this Court. In the appeal filed by the petitioner, the Collector, Anooppur, has not considered this aspect. Both the authorities have traveled beyond their jurisdiction inasmuch as they considered the method of selection as was indicated by the circular dated 13.08.2007. The selection of a candidate for appointment on the post of Panchayat Karmi on the basis of merit on the basis of marks obtained in the qualifying examination was for the first time introduced by the State Government by circular dated 13.08.2007. The said circular was prospective and if any selection prior to the coming into force of said circular was held by the Gram Panchayat, it was not open to the authorities to say that such a selection was illegal in any manner. Considering the aforesaid situation and right interpretation of the circular of the

State Government, this Court in the case of W.P. N0.17319/2010, *Kalpnath Mishra vs. State of M.P. & others,* decided on 26.07.2011, has categorically held that such consideration of appeal on wrong interpretation of the circular of the State Government cannot be given stamp of approval by this Court. Thus, it is clear that while the appeal/complaint of the respondent No.5 was being considered by the Sub Divisional Officer, he also made application of a circular, which was not applicable in the matter of appointment of the petitioner as on the date when the appointment of the petitioner was made, the said circular was not in force at all and the same mistake was committed by the Collector in not examining the applicability of a particular circular on the date of selection of the petitioner. In view of aforesaid, this Court is of the considered view that such orders of the appellate authority and revisional authority are bad in law and cannot be sustained.

8. In view of the aforesaid, this writ petition deserves to be and is hereby allowed. The impugned order dated 25.01.2008 (Annexure P-5) and the order dated 16.11.2009 (Annexure P-22) are quashed. The petitioner be allowed to continue on his post of Panchayat Karmi and Secretary of the Gram Panchayat, Dharkarkala, District Anooppur.

9. The writ petition is accordingly allowed to the extent as indicated herein above but to no order as to costs.

*Petition allowed.*

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**I.L.R. [2011] M. P., 2004**

**APPELLATE CIVIL**

***Before Mr. Justice G.S. Solanki***

M.A. No. 339/2010 (Jabalpur) decided on 19 January, 2011

SHAHIDA (SMT.) & anr. ...Appellants

Vs.

MOHD. MAHMOOD & ors. ...Respondents

***Mohammedan Law - Section 41 - Succession*** **- Heirs succeed to the estate of deceased as tenants-in-common in specific shares - Without any effective partition, heirs have no right to execute the sale deed - Temporary Injunction rightly issued against purchaser however, it was wrongly issued against sellers as they are recorded bhumiswamis.** (Paras 12 &14 )

*मुस्लिम विधि –धारा 41– उत्तराधिकार* – वारिस मृतक की सम्पत्ति में सामान्यिक अभिधारी के रुप में विनिर्दिष्ट हिस्से में उत्तराधिकारी हुए – बिना प्रभावी विभाजन के

वारिसों को विक्रय पत्र निष्पादन करने का कोई अधिकार नहीं – क्रेता के विरुद्ध उचित रुप से अस्थायी व्यादेश जारी किया गया, उसे अनुचित रुप से विक्रेताओं के विरुद्ध जारी किया गया क्योंकि वे अभिलेखित भूमिस्वामी है।

Mukhtar Ahmad, for the appellants.
Ishtiyaq Hussain, for the respondents No. 1 to 3.
S.A. Wakil, for the respondents No. 4 & 5.
None for respondents No. 6 to 10.
Kamlesh Tamrakar, PL for the respondent No. 11/State.

**ORDER**

**G.S. SOLANKI, J. :**–Being aggrieved by order dated 7.1.2010 passed by District Judge, Hoshangabad in Civil Suit No. 15-A/2009, appellants have preferred this appeal under Order 43 Rule 1(r) of CPC.

2. The facts of the case in short are that plaintiffs/respondents No. 1 to 3 filed a suit for declaration and permanent injunction against defendants/ appellants. Defendants/appellants have also filed counter claim for permanent injunction. Thereafter, plaintiffs/respondents No. 1 to 3 have filed an application (IA No. 1) under Order 39, Rule 1 and 2 read with Section 151 of CPC and defendants No. 3 and 4 also filed applications (IA Nos. 2 and 3) under Order 39 Rule 1 and 2 read with Section 151 of CPC, which were disposed of by learned trial Court by common impugned order dated 7.1.2010.

3. The averments of aforementioned applications are that plaintiffs/ respondents No. 1 to 3 pleaded that they are the title holder of disputed land situated at Gram Samalwadakala, Tehsil Itarsi and they are also in possession thereof and cultivating the land continuously . They further pleaded that defendant No. 1/appellant No. 4 is uncle of the plaintiffs. According to them, he, by practicing fraud, got mutated name of defendant No. 2/appellant No. 5 Mohd. Ishtiyaq in the revenue records. They further pleaded that defendants No. 1 and 2 executed the illegal sale deed of 2.206 hactare out of Khasra Nos. 339 and 343 and 2.207 hactares out of Khasra Nos. 341, 343/2 and 381 in favour of defendant No. 4/appellant No. 2 and defendant No. 3/appellant No. 1 respectively. It has been further pleaded that on the basis of aforementioned sale deeds, defendants No. 3 and 4 with cooperation of defendants No. 1 and 2 tried to take possession of disputed land from plaintiffs/respondents No. 1 to 3, therefore, they pray for temporary injunction against them.

4. Defendant No. 2/respondent No. 5 remained absent before the trial Court and trial Court proceeded ex-parte against him.

5. Defendant No. 1/respondent No. 4 denied the facts alleged by plaintiffs/respondents No. 1 to 3 and pleaded that being a paralytic and handicapped person, he called defendant No. 2/respondent No. 5 to look after his property and provide assistance in agricultural operations. He further pleaded that since he has no issue, therefore, he got mutated the name of defendant No. 2/respondent No. 5 Mohd. Ishtiyaq in revenue records and thereafter with cooperation and consent after oral partition, he sold 10.91 acres of land out of his share of 11.33 acres of land to respondents No. 3 and 4. On the basis of this reply, he has prayed for dismissal of application filed by plaintiffs/respondents No. 1 to 3.

6. Defendants No. 3 and 4/appellants also filed applications for grant of temporary injunction against plaintiffs/respondents No. 1 to 3. According to them, they are the bonafide purchaser of disputed land from defendants No. 1 and 2/appellants No. 4 and 5, who are the title holders thereof and their names were mutated in revenue records. They have further pleaded that they also got mutated the names in revenue records and they sow Soyabeen in the disputed land and crop of Soyabeen is being looked after by their husbands. They further pleaded that plaintiffs/respondents No. 1 to 3 threatened them to dispossess and to cut the crops of Soyabeen, therefore, they pray for temporary injunction against plaintiffs/respondents No. 1 to 3.

7. Plaintiffs/respondents No. 1 to 3 denied the averments made in the application filed by defendants No. 3 and 4 and pray for dismissal of the same.

8. The learned trial Court after hearing the parties and considering the documents and affidavits filed by the parties arrived at the conclusion that prima facie case, balance of convenience and irreparable loss is more in favour of plaintiffs/respondents No. 1 to 3 as comparison to defendants No. 3 and 4/appellants, therefore, the trial Court dismissed the applications filed by defendants No. 3 and 4/appellants and allowed the application of plaintiffs/respondents No. 1 to 3 thereby restraining defendants No. 1 to 4/respondents No. 4 and 5 and appellants are restrained to interfere in the disputed land. Being aggrieved the instant misc. appeal has been preferred by the appellants along with the prayer of grant of temporary injunction in their favour.

9. Learned counsel for the appellants has submitted that appellants are the bonafide purchaser of the disputed land. Abdul Baki defendant No. 1/appellant No. 4 has 50% share in the whole property and name of defendant No. 2/respondent No. 5 Mohd. Ishtiyaq had been mutated by mutual settlement and with the consent of Abdul Mahboob and Mohd. Mahmood (plaintiffs) in the

revenue record on 3.7.1994. He has further submitted that plaintiff No. 1 Abdul Mahboob appended his signatures on mutation order along with Abdul Baki, therefore, plaintiffs are stopped to challenge the title of appellants and their vendors Mohd. Ishtiyaq and Abdul Baki. He has further submitted that plaintiffs did not challenge the validity of said mutation order dated 3.7.1994 by Civil Suit as well as they have not challenged the consent of their father in mutation order. He has further submitted that appellants have prima facie case in their favour, despite this fact learned trial Court committed error in holding the prima facie case, balance of convenience and irreparable loss in favour of plaintiffs/respondents No. 1 to 3, therefore, learned counsel has prayed for setting aside the impugned order and for grant of temporary injunction in favour of the appellants.

10. On the other hand, learned counsel for respondents has submitted that being a Mohammedans, parties are governed by Mohammedans Law and as per section 41 of Mohammedans Law, defendant No. 1/respondent No. 4 Abdul Baki has the title in disputed property as tenant in common in specific shares. He has further submitted that there was no partition between the plaintiffs and defendant No. 1, therefore, without effective partition, defendant No. 1 has no right to execute any sale deed. He has further submitted that all mutation proceedings have been challenged by plaintiffs/respondents No. 1 to 3 in revenue Courts. Name of defendant No. 2/respondent No. 5 was mutated behind the back of plaintiffs/respondents No. 1 to 3 and by mere mutation in revenue records, no right, title or interest has been accrued in favour of defendant No. 2/respondent No. 5 Mohd. Ishtiyaq. He has further submitted that defendant Nos. 1 and 2/appellants No. 4 and 5 executed the sale deed of better land in comparison to land left and in this way they caused extensive damage to plaintiffs/respondents No. 1 to 3. He has further submitted that on the basis of aforementioned facts and circumstances of the case trial Court rightly found the prima facie case, balance of convenience and irreparable loss in favour of plaintiffs/respondents No. 1 to 3 and granted temporary injunction against appellants. In this way he supported the impugned order passed by the trial Court and has prayed for dismissal of appeal.

11. I have perused impugned order dated 7.1.2010 and the documents filed by the respective parties. It is not in dispute that both the parties are governed by the Mohammedans Law. Amended land record register dated 3.7.1994 shows that on the request of deceased Abdul Mahboob and defendant No. 1 Abdul Baki, name of defendant No. 2/respondent No. 5 Mohd. Ishtiyaq has been added along with the plaintiffs No. 1 and 2/respondent No. 1 and 2, thus

the disputed property presumed to be in joint possession of plaintiffs/defendants No. 1 and 2. Amended land record dated 10.1.2009 bears only thumb impression of defendant No. 1 Abdul Baki but signatures or thumb impression of plaintiffs No. 1 and 2/respondents No. 1 and 2 are missing. In these circumstances, the trial Court rightly refused to draw inference in regard to mutual partition.

12. A bare reading of Section 41 of Mohammedans Law regarding devolution of inheritance makes it clear that heirs succeed to the estate as tenants-in-common in specific shares means plaintiffs No. 1 and 2/respondents No. 1 and 2 along with defendant No. 1/respondent No. 4 Abdul Baki succeed to a definite fraction of every part of the estate left by deceased Farid Ahmad son of pre deceased Bibi Khatun. In these circumstances without any effective partition between the plaintiffs and defendant No. 1, defendants No. 1 and 2 have no right to execute the sale deed in favour of defendants No. 3 and 4/ appellants. Thus, in my opinion trial Court did not commit any illegality in refusing to grant temporary injunction in favour of defendants No. 3 and 4/ appellants, despite filing the registered sale deed and affidavits in regard to purchase of disputed land and cultivating thereof.

13. Considering the aforementioned position in Mohammedans Law, without effective partition defendants No. 1 and 2 are not entitled to alienate the disputed property and this fact will be decided by the trial Court after recording the evidence. Thus, the plaintiffs/respondents No. 1 and 2 have all the three points in their favour viz; prima facie case, balance of convenience and irreparable loss.

14. On perusal of last paragraph of impugned order dated 7.1.2010, it reveals that trial Court restrained defendants No. 1 and 2/respondents No. 3 and 4 along with defendants No. 3 and 4/appellants to interfere into the joint possession of the plaintiffs, despite the fact that trial Court itself found that defendant No. 1 has the joint possession with the plaintiffs on disputed property. Since defendants No. 1 and 2 are the recorded Bhumiswami along with the plaintiffs as per the amended land record dated 3.7.1994, in these circumstances, injunction ought to have been granted only against defendants No. 3 and 4/appellants.

15. In view of the aforesaid, dismissal of injunction applications filed by appellants/defendants No. 3 and 4 (IA No. 2 and 3) is hereby affirmed and injunction order dated 7.1.2010 is modified to the extent that only defendants No. 3 and 4/appellants are restrained to interfere in the joint possession of plaintiffs/defendants No. 1 and 2, without following the legal procedure.

16. Resultantly, the appeal is partly allowed to the aforesaid extent. Parties to bear their own costs as incurred of this appeal. Advocates' fee as per schedule or certificate, whichever is a less.

*Appeal partly allowed.*

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**I.L.R. [2011] M. P., 2009**
**APPELLATE CIVIL**
***Before Mr. Justice G.S. Solanki***
M.A. No. 4099/2010 (Jabalpur) decided on 3 February, 2011

NEHA SINGH (KU.) ...Appellant
Vs.
SMT. ASHA SINGH & ors. ...Respondents

***Civil Procedure Code (5 of 1908), Order 39 Rule 1&2 - Temporary Injunction - Estate of husband*** **- Appellant is daughter from first wife of deceased and respondent No.1 is legally married wife of deceased - Appellant filed suit for declaration on the basis of will to get retrial benefits and payments from the office of her late father - It was pleaded that respondent No.1 had deserted her father during his life time - Held - Undisputedly, respondent No. 1 was never divorced - She has a right of maintenance and charge is always on the property of deceased - After the death of her husband, amount of retrial benefits became his estate - She has equal right and share in retrial benefits - Application for temporary injunction rightly rejected.** (Para 8)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – अस्थायी व्यादेश – पति की सम्पत्ति – अपीलार्थी मृतक की पहली पत्नी की पुत्री है और प्रत्यर्थी क्रं. 1 मृतक की विधितः विवाहित पत्नी है – अपने मृतक पिता के कार्यालय से निवृत्ति लाभ एवं भुगतान पाने के लिए अपीलार्थी ने वसीयतनामे के आधार पर घोषणा के लिए वाद प्रस्तुत किया – यह अभिवाक् किया गया कि प्रत्यर्थी क्रं. 1 ने उसके पिता का उसके जीवन काल में परित्याग किया था – अभिनिर्धारित – अविवादित रुप से प्रत्यर्थी क्रं. 1 का कभी विवाह–विच्छेद नहीं हुआ – उसे भरण पोषण का अधिकार है और दायित्व हमेशा मृतक की सम्पत्ति पर होता है – उसके पिता की मृत्यु के पश्चात् निवृत्ति लाभों की रकम उसकी सम्पत्ति बन जाते हैं – उसे निवृत्ति लाभों में सामान अधिकार एवं हिस्सा है – अस्थायी व्यादेश के लिए आवेदन उचित रुप से अस्वीकार किया गया।

*R.P. Agrawal* with *Abhijit Dave*, for the appellant.
*Arun Kumar Choubey*, for the respondents.

## ORDER

**G.S. SOLANKI, J. :**–This Misc. Appeal has been preferred by the appellant under Order 43 Rule 1(r) read with Section 151 of CPC being aggrieved by order dated 17.9.2010 passed by Second Additional District Judge, Satna in MJC No. 18/2009.

2. It is not in dispute that respondent No. 1 Smt. Asha Singh is a legally married wife of late Ashok Kumar Singh. It is also not in dispute that appellant Ku. Neha Singh is a daughter of late Ashok Kumar Singh by his first wife Smt. Anita Singh, who died in the year 1990-91.

3. The facts of the case in short are that the appellant filed a civil suit for declaration and injunction before the trial Court on the basis of Will executed by late Ashok Kumar Singh in her favour. She filed an interim application under Order 39 Rule 1 and 2 read with Section 151 of CPC for grant of temporary injunction during pendency of the suit and pleaded inter alia that her father late Ashok Kumar Singh executed a Will in her favour on 3.11.2008 that she alone is entitled to get retiral benefits and payments from the office of his father. It was further pleaded that her father died on 27.11.2008. Respondent No. 1 after dispute with her husband late Ashok Kumar Singh, left her matrimonial house in the year 2006 and living in her parental house. Respondent No. 1 lodged a report against appellant, her father and grandfather. It was also pleaded that respondent No. 3 is bent upon to disburse the retiral benefits in favour of respondent No. 1. Since as per the Will executed by father of appellant, the appellant is the only person who is entitled for retiral benefits, appellant has prima facie case in her favour. In the event of disbursement, she will be deprived from aforesaid right and she will suffer irreparable loss, therefore, temporary injunction against respondents was prayed.

4. Respondent No. 1 replied that the Will is forged and fabricated. She is a married wife of late Ashok Kumar Singh, therefore, along with the appellant, she is also entitled to get retiral benefits under M.P. Civil Services (Pension) Rules, 1976. She further pleaded that there is no prima facie case, balance of convenience and irreparable loss in favour of the appellant. On the contrary, in the event of non payment of retiral benefits to respondent No. 1, she will have to struggle for livelihood. The aforesaid three points i.e. prima facie case, balance of convenience and irreparable loss are more in favour of respondent No. 1 in comparison to the appellant.

5. The trial Court after considering the material on record, dismissed the application filed by the appellant, hence this Misc. Appeal.

6. Learned counsel for the appellant has submitted that the trial Court committed illegality, in not holding that the three factors of prima facie case, balance of convenience and irreparable loss are in favour of the appellant. He has further submitted that respondent No. 1 deserted from her husband's house, went to her parental house and lodged a report against her husband and in-laws including the appellant, therefore, late Ashok Kumar Singh, by executing the Will, excluded respondent No. 1 from the inheritance, however, the Will is subjudice, therefore, till the decision of Civil Suit, status quo should be maintained in regard to payment of post retiral dues. He has further submitted that the trial Court failed to consider the aforesaid relevant material on record and passed the impugned order which is contrary to law and facts, and is liable to be set aside. He further prays for grant of temporary injunction in favour of appellant and in alternative, he prays for direction to the trial Court for speedy trial, till then prays for maintaining the status quo.

7. Learned counsel for the respondent has submitted that the trial Court applied its mind on the golden principles for grant of injunction and rightly held that appellant/plaintiff has no prima facie case and balance of convenience in her favour as well as there is no such irreparable loss, which cannot be compensated in money, therefore, prays for dismissal of appeal.

8. After considering the rival contentions raised by parties and having perused impugned order dated 17.9.2010 and other material on record, I am of the view that this Misc. Appeal is liable to be dismissed. As mentioned above, it is not in dispute that respondent No. 1 is a legally married wife to late Ashok Kumar Singh, she was not divorced by late Ashok Kumar Singh, therefore, she is entitled to get the maintenance from Ashok Kumar Singh and charge of maintenance is always on the property of Ashok Kumar Singh. Ashok Kumar Singh died on 27.11.2008, amount of his retiral benefits became his estate after his death. Being his wife, respondent No. 1 has equal right and share in the retiral benefits along with the appellant.

9. It was submitted that there was dispute between respondent No. 1 and Ashok Kumar Singh, during his life time and respondent No. 1 lodged report against her husband, appellant and in-laws, but due to this incident she cannot be excluded or debarred from the estate of late Ashok Kumar Singh. Since respondent No. 1 is living separately from her husband since 2006 and nothing on record to show that she was being maintained by Ashok Kumar Singh, in his life time. A Hindu, however, cannot by Will so dispose of his estate (properties) as to defeat the legal right of his wife to maintenance. In these

circumstances, despite execution of Will in favour of appellant No. 1, in my opinion, appellant/plaintiff has no strong prima facie case in her favour.

10. Further in the event of non payment of amount of retiral benefits to respondent No.1, she will be in trouble for her livelihood. Therefore, point of balance of convenience and irreparable loss are also not in favour of appellant. In these circumstances order passed by trial Court is based on sound principles of law.

11. Thus, there is no illegality committed by trial Court in passing the impugned order which warranting interference of this Court.

12. Resultantly, appeal has no force and is hereby dismissed. No orders as to costs.

13. Advocates' fee as per schedule or certificate, whichever is less.

*Appeal dismissed.*

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**I.L.R. [2011] M. P., 2012**
**APPELLATE CIVIL**
***Before Mr. Justice U.C. Maheshwari***
M.A. No. 766/2003 (Jabalpur) decided on 8 February, 2011

MUNSHI ...Appellant
Vs.
THE NEW INDIA INSURANCE CO.LTD. & ors. ...Respondents

***Motor Vehicles Act (59 of 1988), Section 166 - Compensation -*** **Claimant younger brother of deceased and dependent upon him - Deceased unmarried - Annual income of deceased Rs. 21,600 - ½ deducted towards expenses of deceased - Deceased aged about 30 years therefore, multiplier of 17 would apply - Claimant also entitled to Rs. 15,000 towards funeral expenses, loss of expectancies and loss of estate - Compensation enhanced to Rs. 1,98,600/-.** (Paras 9 & 10)

मोटर यान अधिनियम (1988 का 59), धारा 166 – प्रतिकर – दावाकर्ता मृतक का छोटा भाई है और उस पर आश्रित है – मृतक अविवाहित – मृतक की वार्षिक आय रुपये 21,600/– मृतक के खर्चे के लिये 1/2 की कटौती – मृतक की आयु लगभग 30 वर्ष, इसलिये 17 का बहुगुणक लागू होगा – दावाकर्ता अंतयेष्टि, प्रत्याशा की हानि एवं संपदा की हानि के खर्चो के रूप में 15,000/–रुपये का भी हकदार – प्रतिकर बढ़ाकर 1,98,600 रूपये किया गया।

**Case referred :**
2009 ACJ 1298.

*A.K. Tiwari,* for the appellant.
*Pranay Gupta,* for the respondent No. 1.
*None,* for the respondents No. 2 & 3.

**ORDER**

**U.C. MAHESHWARI, J. :**–The appellant/claimant has preferred this appeal u/s 173 of the Motor Vehicles Act (in short "Act") for enhancement of the sum awarded by the Second Additional Motor Accident Claims Tribunal, Fast Track Court, Harda in Motor Vehicle Claim Case No. 12/2003 vide award dated 21/01/2003, whereby his claim filed with respect of death of his younger brother namely Banshi aged 30 years in the alleged vehicular accident, has been awarded only for the sum of Rs. 1,44,000/- alongwith interest @ 9% per annum from the date of filing the claim petition.

2. The findings of the tribunal holding the brother of the appellant died in the alleged road accident caused due to rash and negligent driving of the offending vehicle by the respondent no.2 and such vehicle being registered in the name of respondent no. 3 was insured with respondent no. 1 based on appreciation of the evidence are not under challenge in this appeal. So on such questions this appeal is not required any consideration at this stage.

3. This appeal is preferred by the appellant only for the enhancement of the sum awarded by the Tribunal, hence in view of aforesaid undisputed findings of the tribunal; mentioning the entire facts of the case relating to the accident in this order are not necessary. Therefore, only by mentioning the necessary facts in this order, the appeal is being decided.

4. The tribunal taking in to consideration the income of the deceased Rs. 1,500/- per month, as he was working as cleaner of some vehicle, carried out the assessment of the compensation. According to that, holding the annual income of the deceased Rs. 18,000/- out of which deducted 1/3rd on account of the expenses of the deceased which he would have spent on him had he been alive and in such premises Rs. 12,000/- per year dependency of the appellant is held. Thereafter, by applying the multiplier of 12, the total claim of the appellant is awarded for the sum of Rs. 1,44,000/- alongwith the interest @ 9% per annum as stated above.

5. Shri A.K. Tiwari, learned counsel for appellant after taking me through the pleadings, evidence and the documents said that in view of the evidence adduced on his behalf there was sufficient circumstance to draw

the inference that the deceased was earning nearly about Rs. 60/- per day and, in such premises, the incomes comes to Rs. 1,800/- per month. On taking into consideration such earning of the deceased and on adopting the same principle of deduction, as adopted by the tribunal, the annual dependency of the appellants on the deceased comes on higher side. He also said that the multiplier of 12 which has been adopted by the tribunal is apparently on lower side. In any case, either in view of the schedule of Section 163-A of the Act or in view of the principle laid down in the matter of *Sarla Devi,* the multiplier of either 17 or 18 at the place of 12 should have been adopted by the tribunal and in such premises also the claim is awarded by the Tribunal at lower side and prayed to enhance the appropriate sum accordingly by allowing this appeal.

6. On the other hand Shri Pranay Gupta, learned counsel, responding the aforesaid argument said that the sum awarded by the tribunal is just and proper, as the calculation of the same was carried out by the tribunal on proper appreciation of the available evidence. The same does not require any interference in this appeal. He also said that in the year 1999 a person who was working as a labourer or cleaner of the vehicle was not getting more than Rs. 50/- per day. In such premises the tribunal has not committed any error in assessing the compensation @ Rs. 1,500/- per month. He also said that the appellant being elder brother of the deceased was not dependent on him and therefore, in any case he is not entitled to get any claim of such brother. If, in any case, this appeal is allowed even then, in the available circumstances, the multiplier of the higher side should not be adopted because the appellant being the elder brother of the deceased and also the earning person is not entitled for the compensation on higher side, and prayed for dismissal of this appeal.

7. Having heard the counsel keeping in view their argument, I have carefully gone through the record of the tribunal and also perused the appeal memo along with impugned award.

8. True it is that the appellant is an elder brother of the deceased but I have not found any evidence in the record showing that the appellant was not the dependent on his younger brother. On the contrary in this regard un-rebutted statement of the appellant is available on record. The same is showing that till some extent he was dependent on his deceased younger brother Banshi. So in view of such evidence it could not be held that the appellant was not the dependent person on the deceased. The possibility could not be ruled out that some time the elder brother may be dependent on the younger person. In

such premises the argument advanced by the arguing counsel contrary to the aforesaid evidence is hereby failed.

9. Keeping in view the available evidence and the circumstances, the income of the deceased could be safely assumed Rs. 60/- per day. Accordingly his income comes to Rs. 1,800/- per month and in such premises the yearly income of the deceased comes to Rs. 1,800 x12 = 21,600. Out of this assessed income, keeping in view the principle laid down in the case of *Sarla Verma and others Vs. Delhi Transport Corporation and another* reported in 2009 ACJ 1298, as the claimant is younger brother of the deceased and deceased was unmarried person, firstly I deem fit to deduct 1/2 from it out of the expenses of the deceased which he would have spent on him, had he been alive, on deducting the same, (21,600-10,800), the annual dependency of the appellant comes to Rs. 10,800/-.

10. In view of the principle laid down by Apex Court in the matter of *Sarla Verma* (supra) on adopting the multiplier of 17 relating to the age of the deceased i.e 30 years, the total dependency comes to (10800 X 17) Rs. 1,83,600/. The same is awarded. Besides this, the appellant is also entitled some amount on the traditional head like funeral expenses, loss of expectancies and loss of the estate. In such account, I deem fit to award Rs. 15,000/- to the appellant. Accordingly, the total claim of the appellant is awarded for the sum of Rs. 1,98,600/-. Out of this the respondents are entitled to deduct the sum which has been awarded by the tribunal and paid by them.

11. In the aforesaid premises, by allowing this appeal in part, the sum of Rs.1,44,000/- awarded by the tribunal is enhanced from such amount to Rs. 1,98,600/- besides this the appellant shall also be entitled to get the interest on the aforesaid enhanced amount @ 6% per annum from the date of filing the claim petition. The liability to indemnify the enhanced sum is saddled against the respondents no.1 to 3 jointly and severally. The enhanced sum is to be paid by the respondents within three months from today. In the available circumstances there shall be no order as to the costs. Till this extent, the impugned award is modified while the remaining findings of the same are hereby affirmed.

*Appeal partly allowed.*

**I.L.R. [2011] M. P., 2016**

**APPELLATE CIVIL**

***Before Mr. Justice A.K. Shrivastava***

M.A. No. 271/2011 (Gwalior) decided on 22 March, 2011

PUSHPMALA (SMT.) ...Appellant

Vs.

MAHENDRA SINGH & ors. ...Respondents

***Specific Relief Act (47 of 1963), Section 12, Civil Procedure Code (5 of 1908), Order 39 Rule 1 and 2- Deed of agreement - Nature of -*** **Agreement to sale mentions that Rs. 7 lacs out of 8 lacs have been paid as advance and the plaintiff/tenant will not pay any amount of rent - Document itself contains that plaintiff/tenant would remain tenant till the execution of sale deed - Further plaintiff/tenant has averred that he had approached the defendants for execution of sale deed which means that he is not claiming himself to be the owner of the suit property - Document is an agreement of sale and not deed of conveyance - As serious disputed questions of facts are involved therefore, Trial Court rightly granted temporary injunction restraining the defendants from alienating the property.** (Paras 12 and 13)

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 12 सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – करार का विलेख – का स्वरुप – विक्रय का करार उल्लेख करता है कि रुपये 8 लाख में से 7 लाख रुपये अग्रिम के रुप में अदा किये गये और वादी/किरायेदार, भाड़े की कोई रकम अदा नहीं करेगा – दस्तावेज में ही अंतर्विष्ट है कि वादी/किरायेदार, विक्रय पत्र के निष्पादन तक किरायेदार बना रहेगा – वादी/किरायेदार ने आगे प्रकथन किया है कि विक्रय पत्र के निष्पादन हेतु वह प्रतिवादीगण के पास गया था जिसका अर्थ है कि वह स्वयं वाद सम्पत्ति का स्वामी होने का दावा नहीं कर रहा है – दस्तावेज विक्रय का करार है और न कि हस्तातंरण पत्र – चूंकि तथ्यों के गंभीर विवादित प्रश्न अंतर्ग्रस्त हैं इसलिए विचारण न्यायालय द्वारा उचित रुप से सम्पत्ति के अन्य सक्रंमण से प्रतिवादियों को रोकने का अस्थाई व्यादेश प्रदान किया गया।

**Cases referred :**

2009(I) MPJR 113, 2005 (I) MPLJ 118.

*Aniket Naik,* for the appellant.

*P.D. Agrawal,* for the respondent No.1.

## ORDER

**A.K. Shrivastava, J. :**–The order dated 22.10.2010 passed by learned First Additional Judge to the Court of Second Additional District Judge, Gwalior in Civil Suit No.61-A/2010 has been made pivot by the appellant/ defendant no.1 by filing this appeal under Order 43 Rule 1 (r) C.P.C.

2. No exhaustive statements of facts are required to be narrated for the disposal of this appeal. Suffice it to say that a suit for Specific Performance of Contract has been filed by plaintiff/respondent no.1 against present appellant and respondents no.2 to 4, who are defendants in the suit.

3. According to the plaintiff, a document of agreement of sale has been executed between the parties on 20th November, 2008 and it was agreed upon by the parties that the defendants shall alienate the suit property to plaintiff for a consideration of Rs.8,00,000/- in which the plaintiff is residing as tenant of the defendants. It is further the case of plaintiff that a sum of Rs.7,00,000/- in advance was paid by the him to defendants and this fact is also embodied in the document of agreement of sale. Further, it has been pleaded that till the sale deed is executed, the status of defendant would be that of tenant only and he would occupy the suit property as tenant. Since it came into the knowledge of the plaintiff that defendants are trying to alienate the suit property to third person, the present suit has been filed for specific performance of contract and a decree of injunction has been sought that defendants should not alienate the suit property to any third party.

4. An application for issuance of temporary injunction has also been filed by the plaintiff on the same ground and it has been prayed that till the decision of the suit, the defendants should not alienate the suit property.

5. No reply of application of issuance of temporary injunction has been filed by either of the defendant. No doubt, it is true that a written statement has been filed by them. In the written statement, the factum of the execution of the agreement of sale has been denied.

6. The learned Trial Court after hearing the counsel for the parties allowed the application of temporary injunction of plaintiff and restrained defendant from alienating the suit property.

7. In this manner, this appeal has been filed by the appellant/defendant no.1 assailing the said order of learned Trial Court.

8. It has been contended by Shri Aniket Naik, learned counsel for the appellant that looking to the face value of the document of alleged agreement of sale, it would become luminously clear that although, the document has been labelled as agreement of sale but it is outright a sale deed and if that would be the position, since the stamp duty on the conveyance has not been affixed and the document is not a registered document, therefore, the same is inadmissible in evidence. By placing reliance on a decision of Supreme Court *Avinash Kumar Chauhan Vs. Vijay Krishna Mishra* (2009 (I) MPJR 113), it has been put forth by the learned counsel that looking to the ingredients of the alleged document of agreement of sale, since it is a conveyance, therefore, it is not even admissible for collateral purpose.

9. By inviting my attention to paragraph 2 of the alleged documents of agreement of sale, it has been contended by learned counsel that although, the factum of execution of the document has been denied, but, even for the sake of arguments if it is held that the said document was executed, since it has been embodied in paragraph 2 of the said document that the plaintiff who is residing as tenant will not pay any amount of rent and, therefore, it should be deemed that his possession on the suit property is as of owner and, therefore, the relationship of the landlord and tenant has come to an end and the document is a conveyance, therefore, since necessary stamp duty is not affixed, the same is inadmissible in evidence. In support of this contention, learned counsel has placed heavy reliance on the Single Bench decision of this Court *Yogendra Verma Vs. Dharmendra and Others* (2005 (I) M.P.L.J.118). For these reasons it has been prayed that by allowing this appeal, the impugned order be set aside and the application of plaintiffs for the issuance of temporary injunction be set aside.

10. On the other hand, Shri P.D. Agrawal, learned counsel for plaintiff/ respondent no.1 argued in support of the impugned order and has submitted that the face value of the document itself shows that it is not a conveyance but a document of agreement of the sale only. In this context, learned counsel has invited my attention in paragraph 6 of the said documents as well as the plaint averments. It has also been put forth by Shri Agrawal that the alleged document is a deed of conveyance, this has not been so pleaded by the defendant and if that would be the position, learned trial Court who was having wisdom and was also enjoying the discretionary jurisdiction to issue temporary injunction order, has rightly exercised the said jurisdiction and, therefore, this appeal sans substance and it be dismissed.

11. Having heard the learned counsel for the parties, I am of the view that this appeal deserves to be dismissed.

12. So far as the first contention of the learned counsel for the appellant that the document itself is a conveyance deed and would come within the definition of sale under Section 54 of the T.P. Act is concerned, suffice it to say that on bare perusal of paragraph 6 of the said document, this Court finds that the factum of giving advance money is embodied in the document and according to this document it was agreed by the parties to get the suit property sold in favour of plaintiff for a consideration of Rs.8,00,000/- and out of this amount, Rs.7,00,000/- has been paid as advance and if that would be the position, I am of the view that the document would not come within the definition of sale but would be a document of agreement of sale only. So far as the factum of non-payment of rent of the suit premises is concerned, specifically it has been stated in the document itself that the status of plaintiff would be of tenant only till the sale deed is executed. Nowhere in the plaint the plaintiff has pleaded that he is claiming to be the owner of the suit property on account of the execution of the said document. On the contrary, on bare perusal of paragraph 4 of the plaint, this Court finds that a specific case of plaintiff is that he(plaintiff) approached the defendant repeatedly to get the sale deed executed and ultimately he sent a registered notice to them. This would mean that the plaintiff is not claiming himself to be the owner of the suit property.

13. The factum of sending the notice has been totally denied in paragraph 4 of the written statement. *Inter alia*, it has also been denied that plaintiff ever approached the defendants to get the sale deed executed. According to me, it is a disputed question of fact and it is to be decided by learned trial Court after recording the evidence. Learned counsel for the plaintiff has stated that evidence has just begun. The factum of the plea of conveyance is not pleaded in the written statement. Apart from this, I am of the view at this juncture, serious questions of fact and law or not required to be determined and these questions should be left for determination at the time of passing the final Judgment. Hence, the plaintiff is having a prima facie case in his favour. The factum of execution of the document has been specifically pleaded by the plaintiff and a copy of the notice has also been filed the document of agreement of sale is also on record and, therefore, I am of the view that learned trial Court did not err in holding that prima facie the document of agreement of sale has been executed between the parties and if that would be the position, according to me, if during the pendency of the suit, the defendant alienates

the suit property to a third party, the plaintiff may suffer irreparable loss and, therefore, balance of convenience is also is in favour of the plaintiff. On these factual back drop, the decisions placed reliance by learned counsel for the appellant are not applicable.

14. Resultantly, the appeal fails and is hereby dismissed with cost. Counsel fee Rs.1000/- if certified.

15. Record of the trial Court be sent back so as to reach the trial Court before 6th April, 2011. Needless to say that whatever the reasons this Court has assigned will not come in the way in passing the Judgment by learned trial Court.

*Appeal dismissed.*

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**I.L.R. [2011] M. P., 2020**
**APPELLATE CIVIL**
***Before Mr. Justice Krishn Kumar Lahoti &***
***Mrs. Justice Sushma Shrivastava***
F.A. No. 47/2009 (Jabalpur) decided on 26 April, 2011

FATEHCHAND ...Appellant
Vs.
THE LAND ACQUISITION & REHABILITATION OFFICER & ors. ...Respondents

***A. Civil Procedure Code (5 of 1908), Order 3 Rule 2 -Land Acquisition Act (1 of 1894) - Evidence of Parties*** **-Where all the affairs of a party are completely managed, transacted and looked after by an attorney who happens to be a close family member, it may be possible to accept the evidence of such attorney-holder even with reference to certain facts which require to be proved by the plaintiff.**

Appellant examined his power of attorney-cum-son apart from other evidence of witnesses - Reference Court though reproduced the evidence but without any marshalling - Reference Court found that the applicant/ appellant had not examinecd himself but his power of attorney son Anil Kumar was examined - Reference Court by referring two judgments arrived at a finding that it was necessary on the part of the appellant to examine himself and the power of attorney could have done all other work except

participation in the judicial proceedings and he was not competent to examine himself to prove the case in reference - The appellant ought to have examined himself and if he was old and infirm, then a commission could have been got issued under Order 26 of the Code of Civil Procedure, failing which the case was not proved and the Reference Court dismissed the reference - Held -Trial Court ought to have considered the evidence and ought not to have rejected the reference merely on the ground that Fatehchand had not appeard in the witness box and only Fatehchand was having personal knowledge of certain facts of which his son Anil Kumar was not having any knowledge - Respondents have not challenged the statement of Anil Kumar which was made by him in para 1 of his affidavit, in absence of which - Reference Court erred in not considering the case on merits and rejecting the reference on technical ground. - Order is not sustainable under the law. (Paras 5, 7 &9 )

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 3 नियम 2 भूमि अर्जन अधिनियम (1894 का 1) – पक्षकारों की साक्ष्य – जब पक्षकार के सभी कार्यकलापों का पूर्ण प्रबंधन, संव्यवहार एवं देखभाल अटार्नी द्वारा की जा रही हो, जो कि कुटुम्ब का करीबी सदस्य भी है, ऐसे अटार्नी धारक की साक्ष्य को स्वीकार किया जाना संभव हो सकता है, उन कतिपय तथ्यों के संदर्भ में भी जिन्हे याची द्वारा साबित किया जाना अपेक्षित है।

***B. Court Fees Act (7 of 1870), Section 13, Civil Procedure Code (5 of 1908), Order 41 rule 23 - Refund of Court-fee* - Where a decision is found to be erroneous and the matter is remanded back to the Reference Court for a fresh decision, the appellant become entitled for refund of the court-fee.** (Para 10)

ख. न्यायालय फीस अधिनियम (1870 का 7), धारा 13 सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 23 – न्याय शुल्क की वापिसी – जहां निर्णय त्रुटिपूर्ण पाया गया और मामला संदर्भ न्यायालय को पुनः निर्णित करने हेतु प्रतिप्रेषित किया गया, अपीलार्थी न्यायालय फीस की वापिसी के लिए हकदार होता है।

**Cases referred:**

(2010) 10 SCC 512, AIR 1980 SC 591, 2008(1) MPLJ 645, AIR 1986 MP 130, AIR 1999 SC 1441, AIR 2005 SC 439.

*Sanjay Agrawal,* for the appellant.

*Samdarshi Tiwari,* G.A. for the respondents No. 1, 2 & 3.

*Arpan J. Pawar,* for the respondent No. 4.

**ORDER**

The Order of the Court was delivered by **K. K. LAHOTI, J.** :– This appeal is directed under Section 54 of the Land Acquisition Act, 1894 (hereinafter referred to as 'the Act') assailing an order dated 21.11.2008 by the 1st Additional District Judge, Harda in Reference Case No.1/2008 by which the reference under Section 18 of the Act was dismissed only on the ground that appellant Fatehchand had not appeared in the witness box. Though his power of attorney, son Anil Kumar appeared in witness box to prove the claim. From the perusal of the impugned order also, we find that the Reference Court after considering this aspect dismissed the reference and has not appreciated the evidence to arrive at a conclusion in respect of enhancement of the compensation to the appellant, though evidence adduced in the case was referred but without any marshalling of the evidence.

2. Learned counsel for the appellant submitted that the reference was filed through the power of attorney Anil Kumar who happens to be son of Fatehchand, appellant. Fatehchand is an old and infirm person who is sick for the last 20 years and is residing at Bhopal. He had appointed Anil Kumar, his son as power of attorney by a registered power of attorney. Anil Kumar was taking care of the affairs of the appellant since 1986. He was also having personal knowledge in respect of the disputed land, trees etc. He was also taking care of agricultural work of the appellant. It is submitted by Shri Agrawal that this power of attorney himself was having personal knowledge in the matter and his evidence ought to have been taken into consideration. Apart from this, appellant is residing since last 20 years at Bhopal. He is an old and infirm person and when power of attorney holder was having personal knowledge in respect of facts, his evidence ought to have been considered and appreciated by the reference Court. He has placed reliance to a recent judgment of the Apex Court in *Man Kaur Vs. Hartar Singh Sangha* (2010) 10 SCC 512 in support of his contention.

3. Shri Agrawal further submitted that because of the aforesaid technical ground, reference application was dismissed by the reference Court. The appellant is entitled for refund of the court-fee paid in this appeal, as the matter is to be remanded to the Reference Court for a fresh decision after appreciating the evidence which was not done by the Reference Court on earlier occasion. He has also placed reliance to section 13 of the Court Fees Act, 1870 and the decision of the Apex Court in *State of Uttar Pradesh Vs.*

*Chandra Bhushan Misra* AIR 1980 SC 591, a Division Bench's judgment of this Court in *Shakuntala Devi Vs. Land Acquisition Officer* 2008(1) MPLJ 645, a Single Bench's judgment of this Court in *Suresh Kumar Chowkse Vs. State of M.P.* AIR 1986 MP 130 and submitted that substantial court-fee paid in this appeal may be directed to be refunded to the appellant under Section 13 of the Court Fees Act.

4. Shri Arpan J. Pawar, learned counsel appearing for respondent supported the order passed by the Reference Court and submitted that it was the duty on the part of the appellant to appear in the witness box as the appellant was himself having personal knowledge in the matter. For the first time, the matter was to be adjudicated judicially by the Reference Court under Section 18 of the Act, so it was necessary on the part of the appellant to examine himself in the evidence, failing which the Reference Court has rightly dismissed the reference by the impugned order. So far as refund of the court-fee is concerned, it was submitted by Shri Pawar that it was a fault on the part of the appellant who had failed to appear in the witness box, so in case of remand, the appellant is not entitled for refund of the court-fee.

5. To appreciate rival contention of the parties, it would be appropriate if factual position in the case is stated. The appellant was Bhoomiswami of certain agicultural lands situated at village Bichola, Tahsil and District Harda which were acquired by the respondents for the purpose of Indira Sagar Project. These lands were to be submerged in the Project, so these lands were acquired by the respondents. The Land Acquisition Officer awarded Rs.13,62,232/- to the appellant but for enhancement of the compensation to the tune of Rs.33,26,64,445/-, an application was filed by the appellant before the Land Acquisition Officer under Section 18 of the Act and the matter was referred by the Land Acquisition Officer on 5.1.2007 to the Civil Court. The Reference Court after receiving the pleadings of the parties framed issues and directed the parties to adduce evidence. In the evidence, the appellant examined his power of attorney-cum-son Anil Kumar apart from other evidence of G.S.Timane, Mohanlal Patel, Lakhan C.Bhai and Narayan Gujar

The respondents examined U.S.Dubey, Basantilal Babania, Patwar, and Sudhir Tare, Land Acquisition and Rehabilitation Officer. The Reference Court though reproduced the evidence in the impugned order but without any marshalling. In para 17 of the order, Reference Court found that the applicant/ appellant had not examined himself but his power of attorney son Anil Kumar

was examined. The Reference Court by referring two judgments of the Apex Court in *Vidhyadhar Vs. Manikrao* AIR 1999 SC 1441 and *Janki Vasudeo Bhojwani Vs. Indusind Bank Ltd.* AIR 2005 SC 439, arrived at a finding that it was necessary on the part of the appellant to examine himself and the power of attorney could have done all other work except participation in the judicial proceedings and he was not competent to examine himself to prove the case in reference. The appellant ought to have examined himself and if he was old and infirm, then a commission could have been got issued under Order 26 of the Code of Civil Procedure, failing which the case was not proved and the Reference Court dismissed the reference on this solitary ground. This order is under challenge in this appeal.

6. To appreciate the contention of the appellant, it would be appropriate if the recent pronouncement of the Apex Court in *Man Kaur* (supra) is referred. The Apex Court after considering earlier judgments of the Apex Court including *Vidhyadhar* (supra) and *Janki Vasudeo Bhojwani* (supra) in paras 14 and 15 of the judgment, summarised, in paras 17 and 18 of the judgment, the principles in respect of examination of power of attorney. The Apex Court has also considered the question when a deposition by power of attorney can be relied. For ready reference, para 18 of the judgment of the Apex Court may be reproduced in which all the aforesaid principles have been categorised by the Apex Court:-

> 18. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:
>
> (a) An attorney-holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.
>
> (b) If the attorney-holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney-holder alone has personal knowledge of such acts and transactions and not the principal, the attorney-holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney-holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney-holder, necessarily the attorney-holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorised managers/attorney-holders or persons residing abroad managing their affairs through their attorney-holders.

(e) Where the entire transaction has been conducted through a particular attorney-holder, the principal has to examine that attorney-holder to prove the transaction, and not a different or subsequent attorney-holder.

(f) Where different attorney-holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney-holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his "state of mind" or "conduct", normally the person concerned alone has to give evidence and not an attorney-holder. A landlord who seeks eviction of his tenant, on the ground of his "bona fide" need and a purchaser seeking specific performance who has to show his "readiness and willingness" fall under this category. There is however a recognised exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or "readiness and willingness". Examples of such attorney-holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.

7. In this case, from the perusal of statement of Anil Kumar, it is apparent that he has specifically stated that he is son of the appellant and also power of attorney holder. His father is 70 years old and he is an old and infirm person and since last 20 years, he is sick and he is residing at Bhopal. He has appointed his son Anil Kumar as power of attorney holder. Being son, he was taking care of agricultural, bank affairs and was managing properties. In the year 1986, he was appointed as general power of attorney and was having personal knowledge in respect of agriculture, agricultural land and trees standing on the land. He has also stated that he was involved in the agricultural work. In subsequent paras, he has stated in respect of the details of agricultural land, trees standing on the land, acquisition of the land, value of the land and the trees which were standing on the land. From the perusal of the cross-examination by the respondents, we find that aforesaid statement made in para 1 of the affidavit was not controverted by the respondent, in absence of which, statement made by Anil Kumar in respect of the aforesaid facts remained uncontroverted. Though he was cross-examined in respect of the value of the land, nature of the land, yield of the land, condition of the trees and profits from the land, but in respect of power of attorney, personal knowledge of Anil Kumar, sickness of his father, appellant herein, nothing was challenged, in absence of which the Reference Court ought to have evaluated the evidence of Anil Kumar in the light of the judgment of the Apex Court by which it has been held that where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his "state of mind" or "conduct", normally the person concerned alone has to give evidence and not an power of attorney-holder. But there is a recognised exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney who happens to be a close family member, it may be possible to accept the evidence of such attorney-holder even with reference to certain facts which require to be proved by the plaintiff. The Apex Court has also considered the characters of such persons like husband/wife exclusively managing the affairs of his/her spouse, son/daughter exclusively managing the affairs of an old and inform parent, father/mother exclusively managing the affairs of a son/daughter living abroad. In the present case, Anil Kumar who is power of attorney of his father Fatehchand has specifically stated that since last 20 years, he was managing the affairs of his father. He was taking care of agricultural activities and was having personal knowledge in respect of the issues involved in the case. In these circumstances, the trial Court ought to have considered the evidence

and ought not to have rejected the reference merely on the ground that Fatehchand had not appeared in the witness box and only Fatehchand was having personal knowledge of certain facts of which his son Anil Kumar was not having any knowledge. Respondents have not challenged the statement of Anil Kumar which was made by him in para 1 of his affidavit, in absence of which, Reference Court erred in not considering the case on merits and rejecting the reference on technical ground.

8. So far as judgments of the Apex Court in *Vidhyadhar and Janki Vasudeo Bhojwani* (supra) are concerned, both judgments have been considered in the recent pronouncement by the Apex Court in *Man Kaur* (supra).

9. In view of the aforesaid, the impugned order is not sustainable under the law and is hereby set aside. The matter is remanded back to the Reference Court to redecide the matter after hearing both parties and appreciating the evidence produced by the parties in respect of reference under Section 18 of the Act.

10. Now the question arises whether the appellant who has paid ad valorem court fee in this appeal is entitled for refund of the court-fee. In this case, it is not in dispute that the power of attorney appeared in the evidence who on oath had stated that his father Fatehchand was sick since last 20 years and he himself was taking care of all the agriculture, property and bank affairs of his father. In these circumstances, apparently the dismissal of reference was unjustified. Section 13 of the Court Fees Act, 1870 provides as under:-

**13. Fees paid on memorandum of appeal:-**

If an appeal or plaint, which has been rejected by the lower Court on any of the grounds mentioned in the Code of Civil Procedure, is ordered to be received, or if a suit is remanded in appeal on any of the grounds mentioned in section 351 of the same Code, for a second decision by the lower Court, the Appellate Court shall grant to the appellant a certificate, authorizing him to receive back from the Collector the full amount of fee paid on the memorandum of appeal :

Provided that, if, in the case of a remand in appeal, the order of remand shall not cover the whole of the subject-matter of the suit, the certificate so granted shall not authorize the appellant to receive back more than so much fee as would have been originally payable

on the part or parts of such subject-matter in respect whereof the suit has been remanded.

Aforesaid provision specifically provides that if a suit is remanded in appeal on any of the grounds mentioned in section 351 of the Code of Civil Procedure, for a second decision by the lower Court, the appellate Court shall grant to the appellant a certificate authorising him to receive back from the Collector the full amount of fee paid on the memorandum of appeal. Now the para-materia provision of old section to 351 is Order 41 rule 23 of the Code of Civil Procedure which provides where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, at the time of remand of the case, may further direct what issue or issues shall be tried in the case so remanded. In this case, the Reference Court rejected the reference on a technical ground that the appellant/applicant had not appeared in the witness box while the case was proved by the power of attorney. As the aforesaid decision has been found to be erroneous and the matter has been remanded back to the Reference Court for a fresh decision, the appellant is entitled for refund of the court-fee.

11. The Apex Court in *Chandra Bhushan Misra* (supra) considering the legal position held that the refund of the court-fee paid in appeal can be ordered under Section 13 of the Court Fees Act where remand is made in the interest of justice as provided in Order 41 rule 23 of CPC. A Division Bench of this Court in a case of land acquisition in *Shakuntala Devi* (supra) considering the legal position in para 9 of the judgment held that because there was error of calculation and the Reference Court had not taken into consideration the distinction between the small plots and large track of land, in such circumstances, when the case is remanded, the appellant was entitled for refund of the court-fee.

12. In *Suresh Kumar Chowkse* (supra), the learned Single Judge of this Court held that when there is an order of remand in appeal after setting aside the decree, under Order 41 rule 23 or 23A of CPC, the appellant is entitled for refund of the court-fee. In the present case, because of the aforesaid erroneous technical reason, reference application itself was rejected. The evidence was not appreciated to ascertain the claim of the appellant for compensation etc., this Court is left with no option except to remand the matter. In these circumstances, the appellant is entitled for refund of the whole

court-fee in accordance with law which has been paid by the appellant on the memorandum of appeal before this Court. In view of the aforesaid, this appeal is allowed and following order is passed:-

(i) Order passed by the Reference Court dated 21.11.2008 in Reference Case No.1/2008 is set aside. The Reference Court shall now restore the reference case and decide the matter afresh, after hearing both parties, in accordance with law,

(ii) As both parties are present herein, we direct that both parties to remain present before the Reference Court on 4.7.2011 for which no fresh notice shall be necessary to the parties. On the aforesaid date, after restoring the reference case, the Reference Court shall proceed in the matter from the stage at which the impugned order was passed.

(iii) The Registrar of this Court shall issue a certificate of refund of the Court fee as per Section 13 of the Court Fees Act authorising the appellant to receive back from the Collector the full amount of court-fee paid on the memorandum of appeal.

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

*Order accordingly.*

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**I.L.R. [2011] M. P., 2029**
**APPELLATE CRIMINAL**

***Before Mr. Justice Rakesh Saksena & Mr.Justice M.A. Siddiqui***
Cr.A. No. 720/2003 (Jabalpur) decided on 30 March, 2011

GYAN BAI (SMT.) & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

*A. **Penal Code (45 of 1860), Section 302 - Circumstantial Evidence - False Explanation - Additional Link** -* **If accused offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete - Where the murder of wife has been committed and there is evidence that husband and wife were seen together or the offence takes place in dwelling house where husband normally resided,**

**then if false explanation is given by husband then it is a strong circumstance which indicates that he is responsible for the commission of crime.** (Para 24)

*क. दण्ड संहिता (1860 का 45), धारा 302 – परिस्थितिजन्य साक्ष्य – मिथ्या स्पष्टीकरण – अतिरिक्त कड़ी* – यदि अभियुक्त कोई स्पष्टीकरण नहीं देता या ऐसा स्पष्टीकरण देता है जिसे असत्य पाया जाता है तब वह परिस्थितियों की श्रृंखला को पूर्ण करने हेतु अतिरिक्त कड़ी बन जाता है – जब पत्नी की हत्या कारित की गई हो और साक्ष्य उपस्थित है कि पति पत्नी को एक साथ देखा गया या अपराध निवास गृह में घटित हुआ जहां सामान्यतः पति निवास करता था तब यदि पति द्वारा मिथ्या स्पष्टीकरण दिया गया है तब यह प्रबल परिस्थिति है जो यह दर्शाती है कि वह अपराध के लिए उत्तरदायी है।

***B. Penal Code (45 of 1860), Section 302 - Murder - Death of wife was homicidal in nature -*** **Husband residing in the same house with his wife and was also present at the time of incident - False explanation given by him that deceased committed suicide - Only inference possible is that he and none else caused the death of deceased.** (Para 25)

*ख. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – पत्नी की मृत्यु मानव वध के स्वरुप की थी* – पति अपनी पत्नी के साथ उसी मकान में निवास करता था और घटना के समय भी वह उपस्थित था – उसके द्वारा मिथ्या स्पष्टीकरण दिया गया कि मृतिका ने आत्महत्या की – केवल यह निष्कर्ष संभव है, कि उसी ने और न कि किसी और ने मृतिका की मृत्यु कारित की।

***C. Penal Code (45 of 1860), Section 302 - Murder -*** **Evidence available on record shows that mother-in-law was in the temple at the time of commission of murder and came back after hearing the hue and cry and by that time body was already burnt - It cannot be held that she either joined in commission of death of deceased or cause the evidence of crime to disappear - Acquitted.** (Para 26)

*ग. दण्ड संहिता (1860 का 45), धारा 302 – हत्या* – अभिलेख पर उपलब्ध साक्ष्य दर्शाती है कि हत्या कारित करते समय सास मंदिर में थी और शोरगुल सुनने के पश्चात वापिस आई और तब तक शरीर पहले ही जल चुका था – यह धारणा नहीं की जा सकती कि मृतिका की मृत्यु कारित करने में या तो वह सम्मिलित हुई या अपराध की साक्ष्य को विलोपित किया – दोषमुक्त।

***D. Penal Code (45 of 1860), Section 302 - Murder -*** **No evidence against appellant/devar that he shared intention of husband to cause the death of deceased - His mere presence is not sufficient to draw such**

**inference - He cannot be held liable for commission of murder - However, he was rightly convicted under Section 201 of I.P.C.** (Para 27)

घ. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – अपीलार्थी/देवर के विरुद्ध कोई साक्ष्य नहीं कि वह पति द्वारा, मृतिका की मृत्यु कारित करने के, आशय में मागी था – मात्र उसकी उपस्थिति ऐसा निष्कर्ष निकालने हेतु पर्याप्त नहीं है – उसे हत्या कारित करने का दायी नहीं ठहराया जा सकता – अपितु उसे उचित रुप से आई.पी.सी. की धारा 201 के अंतर्गत दोषसिद्ध किया गया।

**Case referred:**

(2006) 10 SCC 681.

*V.K. Shukla,* for the appellants.

*Vijay Pandey,* Dy. A.G. for the respondent/State.

**JUDGMENT**

The Judgment of the Court was delivered by **RAKESH SAKSENA, J. :** –Appellants have filed this appeal against the judgment dated 29th April, 2003 passed by Additional Sessions Judge, Umariya in Sessions Trial No.31/2002 convicting them under sections 302/34 and 201 of the Indian Penal Code and sentencing each of them to imprisonment for life with fine of Rs.1000/- and rigorous imprisonment for 2 years with fine of Rs.1000/- on each count respectively.

2. Prosecution case in short is that Archana, the deceased was married to accused Sukhnidhan in the year 1999. Accused Smt. Gyan Bai was her mother-in-law and accused Deep Narayan @ Dippoo was her Dewar. For about one year after the marriage they kept her alright, but thereafter started harassing her by abusing and taunting that they did not like her. Whenever Archana went to her parents' house she told to them her agony. About four months before the incident, which occurred on 27.6.2001, when Gyan Bai and Sukhnidhan quarrelled with Archana, her father-in-law Ishwardin called her father Dwarika Prasad. Dwarika Prasad advised them to live peacefully. However, accused persons frequently misbehaved with her even before her brother Pradeep and sister Kalpana. It is alleged that on 27.6.2001 with the help of accused Deep Narayan and Gyan Bai, accused Sukhnidhan caused death of Archana by strangulating her, and with a view to screen the offence, after pouring kerosene on the dead body, set it on fire projecting it to be a case of suicide.

3. Ishwardin, father-in-law of deceased, gave written intimation of incident

to police Naurozabad whereupon marg Ex.P/15 was recorded. ASI Dinesh Tripathi (PW-17), on the same day, went to spot and conducted inquest proceedings. He drew inquest memo Ex.P/2. He sent the dead body of Archana for postmortem examination to Primary Health Centre, Dhuldhuli where Dr.K.L.Baghel (PW-16) conducted autopsy and found burns on whole body of deceased. In his opinion, cause of death of deceased was asphyxia due to mechanical obstruction of air passage. Burns were postmortem. He also found a foetus of about 8-10 weeks duration in the uterus of deceased.

4. On 2.7.2001, police arrested accused Sukhnidhan and on his information, seized a can of kerosene lying concealed in the bushes of the boundary of the house. After completion of investigation, police filed charge sheet. In due course the case was committed for trial.

5. Trial Court framed the charges under sections 302/34 and 201 of the Indian Penal Code. Accused persons abjured their guilt and pleaded innocence. According to them, they never misbehaved with deceased. On 27.6.2001, at about 12 hours, Gyan Bai and Sukhnidhan on hearing groaning sounds, saw that deceased was lying behind the bathroom in burnt condition. Sukhnidhan started oscillating a fan on her. By the time, people managed an ambulance she died. It was alleged that she had been suffering with frequent abdominal pains for which she was being provided treatment.

6. Learned Additional Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, held the accused persons guilty of the charges and convicted and sentenced them as mentioned above by the impugned judgment, aggrieved whereby, appellants have filed the present appeal.

7. Learned counsel for the appellants submitted that it was not established by the prosecution evidence that deceased died a homicidal death by strangulation. She had committed suicide by setting herself on fire. According to him, the evidence of Dr. K.L.Baghel (PW-16), who conducted the postmortem examination of the dead body was suspicious and unreliable. On the other hand, learned counsel for the State contended that it was amply established that death of deceased was caused by some mechanical strangulation and the dead body was thereafter burnt with a view to give colour of suicide by the deceased.

8. We have heard learned counsel for the parties and perused the evidence on record.

9. Sub Inspector S.K.Dwivedi (PW-15) on receiving information from Ishwardin Mishra on 27.6.2001 registered a marg. ASI Dinesh Tripathi (PW-17) recorded marg intimation Ex.P/14 and went at the spot. After issuing notice to witnesses, he recorded a detailed inquest memorandum Ex.P/2.

10. Kedarnath Mishra (PW-1) deposed that dead body of deceased was lying near a water tank in front of the house inside the boundary wall of the house of accused. It was burnt. Tongue of the deceased was protruding out of the mouth. Police had prepared inquest memo Ex.P/2. Similarly, Dwarika Prasad Mishra (PW-10) deposed that he saw the dead body of deceased in burnt condition. Both the hands and legs of the body were raised and her tongue was protruding out.

11. Dr. K.L.Baghel (PW-16), who conducted the postmortem examination of the body of deceased, found whole body of the deceased burnt. Charring was present over her upper and lower limbs and tongue. Blackening was present all over the body. Scalp hair, eye brows and pubic hair were burnt and sienged. Tongue was protruded and external genitalia were burnt. There was splitting of skin muscles of thigh, legs and both arms. Smell of kerosene was emanating from the body. On opening trachea, he did not find carbon particles in it. There was congestion in lungs and blood was filled in both the chambers of the heart. There was no congestion in liver, spleen and kidneys. A foetus of about 8-10 weeks duration was present in the uterus. There was no external injury or fracture in the body. In his opinion, the cause of death of deceased was asphyxia due to some mechanical obstruction and the burn injuries were postmortem in nature. He had conducted postmortem examination with Dr.V.K.Jain. Postmortem report Ex.P/12 was in the handwriting of Dr.Jain and he had also signed it.

12. Learned counsel for the appellants argued that from the evidence of Dr.K.L.Baghel (PW-16) it is not proved that deceased died of strangulation. In the Medical Jurisprudence of Jhala and Raju, it was opined that the dead body of deceased could have acquired pugilistic attitude by burning only when deceased was alive. If death occurs due to asphyxia, brain of the deceased should be congested and right chamber of the heart should be filled with blood and left chamber should be empty. It was admitted by Dr. Baghel that in case of asphyxia, as opined in Medical Jurisprudence of Mody, abdominal organs like liver, kidney and spleen should be congested. He, however, deposed that in respect of the nature of death due to asphyxia the only symptom he found was the absence of carbon particles in trachea.

13. Dr.K.L.Baghel (PW-16) was subjected to a very lengthy and gruelling cross-examination. On perusal of his statement, it is revealed that present was the first postmortem by him in a burn case, but admittedly Dr. V.K.Jain was also with him and had conducted postmortem examination. According to Dr. Baghel, the report was prepared and signed by Dr. V.K.Jain. It is true that Dr. Baghel admitted that he did not examine trachea by microscope for detecting the carbon particles, but in our opinion, this will not affect the credibility of the evidence of Dr. Baghel in view of his firm opinion that no carbon particles were found in the trachea. Citing the Medical Jurisprudence of Cox, learned counsel submitted that if saturation of carbon monoxide in the body tissues of deceased was more than 10%, it would indicate that deceased was burnt alive. No such examination was done during investigation. It is true that most scientific and technical advanced procedures should be adopted by the doctors in Medico Legal Examination, but it is common knowledge that all these facilities are not available at all the levels of villages and Primary Health Centres. Postmortem examination in the present case was conducted by doctors in primary health centre, Dhuldhuli in District Umariya where no such technically advanced equipments and doctors were present. We find no reason to doubt the opinion of doctors given in the postmortem examination report Ex.P/12 wherein it was opined that burns found on the body of deceased were postmortem in nature.

14. Apart from the medical evidence other circumstances also deserve to be considered for forming a definite opinion whether deceased died of asphyxia due to some mechanical obstruction of respiration or by committing suicide by setting herself on fire.

15. It is true that Dr.K.L.Baghel (PW-16) did not mention in his statement about an important symptom of burn case that a red line is found between the burnt portion and the healthy portion of the body of deceased, but on the perusal of postmortem report Ex.P/12, we find it clearly mentioned that line of redness was absent. According to Mody's test book of Medical Jurisprudence and Toxicology 17th Edition, page 203, if someone is burnt alive, a red line would be formed around the injured portion of the skin and that will persist even after death.

16. We are unable to accept the submission made by learned counsel for the appellants that because of omission to send the blood of deceased for test of carbon monoxide and the portion of trachea for detection of carbon particles

to Forensic Science Laboratory, evidence of Dr.K.L.Baghel (PW-16) should be discarded.

17. Learned counsel for the appellants argued that Priest Ramniwas Mishra (PW-18), Phool Singh (PW-5), Mamta (PW-6), Lila Bai (PW-7) and Sushila (PW-8), who happened to be the neighbours of accused persons, saw deceased lying in burnt condition, therefore, it could not be held that death of deceased was caused by strangulation. It is true that the aforesaid witnesses stated that they saw deceased alive in burnt condition, but trial Court noted various discrepancies and inconsistencies in their evidence. According to Phool Singh (PW-5), incident occurred at 1:00 p.m. whereas according to Mamta (PW-6), it occurred at about 12:15 p.m.. Ramniwas (PW-18) stated that the time of occurrence as 12 hours. Other witnesses did not state the time when they saw deceased. According to ASI Dinesh Tripathi (PW-17), father-in-law of deceased viz. Ishwardin who lodged report Ex.P/15 gave the time of incident 12:30 p.m. saying that when he reached his house, he saw deceased lying dead behind the toilet. Mamta (PW-6) and Lila Bai (PW-7) were declared hostile and were confronted with their respective police statements Ex.P/4 and Ex.P/5 wherein they stated that when they reached the place of occurrence they found Archana lying dead. In our opinion, trial Court was right in holding that these witnesses being neighbours of accused persons probably acted interestedly with a view to save accused by improving their versions before the trial Court in saying that they saw deceased alive.

18. Learned counsel for the appellants next submitted that deceased was suffering with acute abdominal pain, therefore, she committed suicide by igniting herself. He referred to the evidence of Dr. Avinash Tiwari (DW-1) and Dr. Niranjan Kumar Das (DW-2). Dr. Avinash Tiwari (DW-1) deposed that on 15.5.2001 deceased had complained about the inflammation in urination for which he had given prescription Ex.D/6 and Ex.D/7. Before 6.4.2001, he had prescribed her treatment for headache. Similarly Dr. N.K.Das (DW-2) deposed that on 15.9.2000 deceased had come to him for treatment for some ailment in her ears. He had seen her on 23.9.2000 and had prescribed medicine. He had also advised her to consult some specialist. Evidence of Dr. N.K.Das (DW-2), in our opinion, is of no avail since he had treated deceased for the ailment in the ear more than 1½ years before the occurrence. So far as evidence of Dr.Avinash Tiwari (DW-1) is concerned, the complaint of inflammation in urination and headache does appear such to have compelled deceased to commit suicide. It is also significant to note that on postmortem examination of the body of deceased, Dr. Baghel (PW-16)

found that deceased was carrying pregnancy of about 8-10 weeks, the complaint of inflammation and headache could not be said to be abnormal in such a situation. Thus, the defence evidence does not render any help to accused.

19. After critical analysis of the aforesaid evidence, we find that deceased died due to strangulation and her body was set on fire immediately after the death. Thus, we hold that death of deceased was homicidal in nature.

20. There is no direct evidence of the occurrence, the case rests on the circumstantial evidence. It is not disputed that Smt. Gyan Bai was the mother-in-law, Sukhnidhan Mishra was her husband and Deep Narayan @ Dippoo was Dewar of deceased. They all were living together in the same house. From the evidence adduced by the prosecution, it appears that relations between deceased and the accused persons were not cordial. They did not like deceased. According to Gangotri Bai (PW-11), mother of deceased, Archana used to come to her house and say that Gyan Bai used to abuse and quarrel with her saying that she did not like the marriage. Her husband also used to rebuke her. Evidence of Gangotri Bai was corroborated by the evidence of Dwarika Prasad Mishra (PW-10) who stated that Archana used to make complaint about conduct of her mother-in-law. Kalpana Mishra (PW-12), younger sister of deceased, stated that she stayed twice the nuptial home of Archana. She saw that mother-in-law of Archana abused and rebuked her. Similar was the evidence given by brother Pradeep Mishra (PW-13) and uncle Kedarnath (PW-1). It is true that neighbours of accused persons viz. Phool Singh (PW-5), Mamta (PW-6), Lila Bai (PW-7), Sushila (PW-8) and Ramniwas Mishra (PW-18) deposed that accused persons had cordial relations with deceased, but it seems that these neighbours did not speak true because of being neighbours of accused persons. From the evidence of parents and family members of deceased, it appears that accused Gyan Bai and Sukhnidhan were not happy with deceased and they used to maltreat and harass her.

21. Next important question before us is whether all the accused or which of accused was responsible for causing death of deceased. Admittedly death of Archana was caused in her dwelling house where she resided with her husband and other accused persons. According to Phool Singh (PW-5) when he went in the house of accused he saw husband Sukhnidhan oscillating a fan on deceased. According to Mamta (PW-6) and Ramniwas (PW-18), accused Sukhnidhan and Deep Narayan were present at the spot. According to Ramniwas (PW-18), Gyan Bai was in the temple situated in the neighbourhood.

There were some other women also. When there was hue and cry, Gyan Bai went running towards her house. When he, Gyan Bai and other people reached in the house, they saw Archana lying in burnt condition. Sukhnidhan was waving the fan. It appears that Gyan Bai was though living in the same house with deceased and Sukhnidhan, but she reached at the spot after the occurrence.

22. An important aspect noted by the trial Court is that when the dead body of deceased was found behind the toilet in the house of accused persons, no 'Mangal Sutra' or other ornaments were found on the body of deceased. It is also evident from the inquest memorandum Ex.P/2 prepared by investigating officer. It seems unnatural that if deceased committed suicide she would have removed her ornaments herself. No explanation was given by accused for the absence of the ornaments on the body of deceased.

23. Another important aspect of the case is that the dead body of deceased was found inside the house of accused persons. It was not the case of the defence that the incident occurred at some other place. In this situation, if deceased herself set fire, the marks of burning on the floor or at other place in the house would have naturally been detected during investigation. Absence of any such marks inside the house especially when the body of deceased was almost charred indicates that when the body was burnt, deceased was not alive or at least conscious to resist. It is also unnatural that deceased did not cry while burning, and nobody, including the accused persons who were in the house, heard any noise. From the spot map Ex.P/3, it is apparent that the house in which the incident occurred is not a big one. Certainly if deceased would have ignited herself, inmates of the house would have seen her burning and could have made attempt to save her, but it is surprising that accused Sukhnidhan, the husband though present in the house did not notice the incident of burning. Almost all the witnesses who reached at the spot stated that they saw Sukhnidhan waving a fan on the deceased. In our opinion, such a silent and secret burning could be possible only when the victim was unconscious or already dead. The fact that Ishwardin, father of accused Sukhnidhan, who lodged report Ex.P/14 with the police did not mention in the report that deceased committed suicide, further reinforces the fact that the death of deceased was not suicidal.

24. In *Trimukh Maroti Kirkan vs. State of Maharashtra*-(2006) 10 SCC 681, Apex Court held that "in a case based on circumstantial evidence where no eyewitness account is available, there is another principle of law which

must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling house where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime."

25. After examining the evidence adduced by the prosecution and the circumstances of the case in the light of legal position enunciated by the Apex Court in the case of *Trimukh* (Supra), we are of the view that it has been clearly established that accused Sukhnidhan Mishra who happened to be the husband, lived in the same house with deceased and that he was present in the house when deceased died on account of asphyxia due to strangulation. He furnished false explanation that deceased committed suicide by setting fire herself. Therefore, the only inference possible is that he and none else caused the death of deceased and set fire to her body with a view to cause the evidence of the commission of offence disappear with the intention of screening himself from the legal punishment.

26. So far as the involvement of accused Gyan Bai and Deep Narayan @ Dippoo is concerned, there is no direct or circumstantial evidence on record to indicate that they caused death of deceased by strangulating her. From the evidence of Ramniwas Mishra (PW-18) it seems that on hearing hue and cry from her house, Gyan Bai, who was present in the temple, rushed to the spot and saw her son accused Sukhnidhan waving fan on deceased. This indicates that when Gyan Bai reached, the body of deceased was already burnt. Therefore, in our opinion, it cannot be held that Gyan Bai either joined in commission of death of deceased or caused the evidence of crime to disappear.

27. Admittedly accused Deep Narayan was present in the house at the time of occurrence but from his mere presence no presumption can be raised that he caused or shared the intention of accused Sukhnidhan Mishra to cause the death of deceased. The legal and factual proposition enunciated by the Apex Court in the case of *Trimukh* (supra), in our opinion, cannot be extended to hold him liable for commission of murder of deceased. However, it can be

held that he knowingly or having reason to believe that an offence was committed caused the evidence of commission of the offence disappeared with the intention of screening his brother Sukhnidhan from legal punishment. Thus, he was rightly convicted by the trial Court under section 201 I.P.C.

28. In view of the foregoing discussion, we are of the considered opinion that the trial Court did not err in holding that the death of deceased was homicidal and it was accused Sukhnidhan Mishra who caused her death by strangulation and burnt her body after death. Accordingly, conviction of Sukhnidhan Mishra under sections 302 and 201 I.P.C. and the sentence awarded to him by the trial Court is affirmed.

29. Conviction and sentence of appellant Deep Narayan @ Dippoo awarded to him by trial Court under section 302 I.P.C. is set aside. He is acquitted of that charge. His conviction under section 201 I.P.C. is affirmed, however, his sentence under section 201 I.P.C. is reduced to rigorous imprisonment for one year. Sentence of fine is affirmed.

30. Conviction and sentence of appellant Gyan Bai under sections 302/34 and 201 I.P.C. is set aside. She is acquitted of both the charges.

31. Appeal partly allowed.

*Appeal partly allowed.*

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**I.L.R. [2011] M. P., 2039**
**APPELLATE CRIMINAL**
***Before Mr. Justice R.C.Mishra & Mrs. Justice Vimla Jain***
Cr.A. No. 475//2000 (Jabalpur) decided on 7 April, 2011

MAHESHWARI PRASAD (SINCE DEAD) ...Appellant
Vs.
STATE OF M.P. ...Respondent

*A. **Evidence Act (1 of 1872), Section 3 - Witness** -* **Material omissions and contradictions in the evidence of witnesses - Witnesses were also not declared hostile - Their evidence is binding on prosecution.** (Para 12)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्षी – साक्षियों की साक्ष्य में तात्विक लोप एवं विरोधाभास – साक्षियों को पक्षविरोधी भी घोषित नहीं किया गया – उनकी साक्ष्य अभियोजन पर बाध्यकारी है।

***B. Prevention of Corruption Act (49 of 1988), Section 13(1)(d) - Illegal gratification - Personal search of raiding party* - Panch witnesses admitted that they were not asked by detecting officer to give their personal search before entering into the Atari - This is significant as prosecution witness money was recovered from the pocket of the appellant hanging on a peg whereas the money was found in a black bag lying near appellant - Non-observance of this formality assumed in view of the fact that bribe money was also not recovered from the person of the appellant - Appeal allowed.** (Paras 13 to 18)

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13 (1)(डी) – अवैध परितोषण – छापामार दल की व्यक्तिगत तलाशी – पंच साक्षियों ने स्वीकार किया कि अटारी में प्रवेश करने से पूर्व जांच अधिकारी द्वारा उन्हें अपनी व्यक्तिगत तलाशी देने के लिए नहीं कहा गया था – यह महत्वपूर्ण है क्योंकि अभियोजन साक्षियों के अनुसार खूँटी पर टंगी अपीलार्थी की थैली से रुपये बरामद हुए जबकि रुपये अपीलार्थी के निकट पड़ी काली बैग में पाये गये – इस तथ्य को दृष्टिगत रखते हुए कि रिश्वत के रुपये अपीलार्थी के शरीर पर से भी बरामद नहीं हुए इस औपचारिकता के अपालन की धारणा की गई – अपील मंजूर।

**Cases referred:**

1990 MPLJ 239, AIR 2005 SC 2804, AIR 1986 SC 307, (2006) 13 SCC 305, AIR 1969 SC 53, AIR 2000 SC 3377, (2002) 9 SCC 521, (1978) 3 SCC 133, (1975) 2 SCC 227.

*Amit Verma,* for the appellant.

*Aditya Adhikari,* for the Respondent.

## JUDGMENT

The Judgment of the Court was delivered by **R. C. Mishra, J. :**–These appeals, though arise out of two different trials, are interconnected as relating to series of offending acts so connected together as to form the same transaction.

2. The first one, registered as Cri. Appeal No.475/2000, has been preferred against the judgment-dated 2/2/2000 passed by the Special Judge (under the Prevention of Corruption Act, 1988), Tikamgarh in Special Case No.2/1992 and the second one, numbered as Cri. Appeal 478/2000, is directed against judgment passed on the same day by the same Judge in Special Case No.3/1992. In each one of the cases, the appellant Maheshwari Prasad (since dead) was convicted and sentenced as under -

| Convicted under Section | Sentenced to |
|---|---|
| 7 of the Act | undergo R.I. for 3 years and to pay fine of Rs.500/- and in default to suffer S.I. for 1 month. |
| 13(2) of the Act | undergo R.I. for 3 years, and to pay fine of Rs.500/- and in default to suffer SI for 1 month. |

with the direction that the jail sentences shall run concurrently.

3. For the sake of convenience, Special Case Nos.2/1992 and 3/1992 shall be referred to as the first case and the second case respectively and the witnesses as well as the exhibited documents shall be referred to by placing '/1' or '/2' (as the case may be) after their respective numbers in each case.

4. The prosecution story, in short, may be narrated thus -

(i) At the relevant point of time, the appellant Maheshwari, posted as Patwari of Halka No.22, was residing as tenant in Atari (the room on the roof of the house) of Thakurdas Yadav's house located in Kundeshwar. Agricultural lands belonging to Rajaram (PW8/1 & PW10/2), the complainant in the first case and Mukundi Patel (PW9/2), the complainant in the second case, were situated in Village Pahari Tilwaran, that formed part of the Halka.

(ii) On 22/7/1987, Rajaram submitted an application (Ex.P10/1) in the Tahsil office at Tikamgarh for supply of certified copies of Khasra and Khatauni for the year 1985 to 1987 in respect of his lands bearing Khasra nos.549 and 550. On the same day Mukundi also filed an application (Ex.P10/2) for supply of certified copy of Khasra entries pertaining to lands standing in the name of his father Ajju and bearing survey nos. 868 and 1636 to 1642. Copyist Hazmatullah Beg (examined as PW4 in both the cases), as per the orders of the Tahsildar, forwarded the applications to the appellant, by way of two different letters (Ex.P8/1 and 5/2), containing an identical direction to prepare copies of the revenue records and to submit the same in the copying section. However, the appellant demanded a sum of Rs.100/- from Rajaram and that of Rs.50/- from Mukundi as illegal gratification for the purpose and did not prepare the copies.

(iii) On 24/7/1987 at about 8 a.m., Rajaram submitted a complaint (Ex.P-2/1) before H.R.P. Choudhari (PW9), posted as Inspector in the office of SPE-Lokayukta at Sagar, who had come to Tikamgarh in connection with a Court case, indicating his intention to get the appellant caught red handed while accepting the bribe.

(iv) On 24/7/1987 only at about 9.30 a.m., Mukundi also presented a complaint (Ex.P-9/2) before the Inspector setting out his grievance against the appellant and expressing willingness to get the appellant trapped while receiving the illegal gratification.

(v) The Inspector, however, requested Deputy Superintendent of Police, SPE (Lokayukt), Sagar, by way of letters (Ex.P-15 in both the cases), to come along with the police party for laying the trap. The DSP, in turn, directed H.R.P. Choudhari to arrange the trap and also deputed Inspectors S.P. Shukla, M.K. Gautam, Head Constable Indramani and Constables Dwarka Prasad and Purushottam for the purpose. They immediately started from Sagar in a Government Vehicle, bearing registration no.CPZ-4391, and reacned Tikamgarh on 24/7/1987 only.

(vi) On 25/7/1987, H.R.P. Choudhari completed necessary formalities for laying the trap in presence of Panch witnesses namely R.B. Prajapati (PW3 in both the cases) and Dalchand Patel (PW7/1 and PW2/2), who were posted respectively as Deputy Collector and Asstt. Director of Agriculture, at Tikamgarh only. He took into possession 7 currency notes of Rs.10/-, one currency note of Rs.20/- and two currency notes each in the denomination of Rs.5/-, brought by Rajaram. These currency notes, after being duly treated with phenolphthalein, were kept in the right pocket of Pant worn by Rajaram with the assistance of Constable Purushottam. He was further instructed to give signal after giving the tainted money to the appellant by scratching his head. The pre-trap proceedings that commenced from 6.30 a.m. were completed by 7.15 a.m.

(vii) At about 7.25 a.m., at the time when the trap party was about to start for house of the appellant, Mukundi (PW9/2) also arrived at the Circuit House and submitted an amount of Rs.50/- in the form of 2 currency notes in the denomination of Rs.20/- and one currency note in the denomination of Rs.10/-. Constable

Purushottam smeared a thin layer of phenolphthalein on the notes and put the same into the shirt pocket of Mukundi. who was further asked to give signal after handing over the currency notes to the appellant by removing towel from his head.

(viii) After observing the other pre-trap formalities, Inspector H.R.P. Choudhari along with both the complainants and the police personnel except Purushottam, started for the appellant's residence.

(ix) At about 9 a.m., the trap party reached Kundeshwar and the Jeep was parked at a distance from the house of Thakurdas. Both the complainants were deputed to ascertain presence of the appellant in the house. At about 9.30 a.m., Rajaram informed that he had been directed by the appellant to come a little later as some other persons were sitting in the Atari. At about 10.30 a.m., Mukundi came out of the room and, at this point of time only, Rajaram went inside. After a while, he came out of the room and gave the appointed signal.

(x) Immediately thereafter, the raiding party led by H.R.P. Choudhari rushed to the Atari and as per the information given by Rajaram and Mukundi, the tainted currency notes handed over by them, were respectively recovered from the shirt pocket of the appellant hanging on a peg and a black bag lying near the appellant. Hands of both the complainants, the appellant and panch witnesses R.B. Prajapati & D.C. Patel, who had taken out the currency notes from the bag and shirt pocket of the appellant respectively, were washed with the solution of sodium carbonate that turned pink. The notes were counted and their numbers were tallied with the corresponding details recorded in the trap panchnama. Samples of the solution used for conducting Phenolphthalein test were duly seized and forwarded to FSL, Sagar. The reports (Ex.P-15/1 and 16/2) also indicated presence of phenolphthalein.

(xi) After completing the investigation and obtaining sanction (Ex.P-21 in each case) from the Secretary, Department of Law and Legislative Affairs, Govt. of M.P. Bhopal, the charge-sheets were submitted before the Special Court.

5. The appellant was charged with the offences punishable under Section

161 of the IPC and Sections 5(1)(d) read with 5(2) of the Prevention of Corruption Act, 1947 and in the alternative for the offences under Sections 7 and 13(1)(d) read with 13(2) of the Prevention of Corruption Act, 1988. He abjured the guilt and pleaded false implication. According to him, he neither demanded nor accepted the bribe amount from any one of the complainants.

6. To bring home the charges, the prosecution examined as many as 11 witnesses in the first case and 13 witnesses in the second case. No evidence was led in defence. Upon consideration of the entire evidence brought on record, learned trial Judge, for the reasons recorded in the impugned judgments, proceeded to convict the appellant for the offences punishable under Sections 7 and 13(1)(d)(i) read with Section 13(2) of the 1988 Act, (which came into existence with effect from September 09, 1988, i.e. more than a year after the incident in question) and sentenced him as indicated hereinabove.

7. Legality and propriety of the convictions have been challenged on the ground of what has been termed as mis-appreciation of the evidence on record. In response, learned Public Prosecutor, while making reference to the incriminating pieces of evidence, has submitted that the convictions are well founded.

8. Before proceeding further, it may be observed that no serious dispute was raised as to the facts up to the stage of sending of the complainants' copying applications (Ex.P-10/1 and 10/2), to the appellant. Against this backdrop, the prosecution evidence may be re-appreciated, in the light of the rival contentions, under the following sub-heads.

**EVIDENCE OF THE COMPLAINANTS -**

9. Even though the complainants Rajaram (PW8/1 and PW10/2) and Mukundi (PW9/2) reiterated the allegations contained in the applications (Ex.P2/1 and Ex.P9/2) before the Inspector on 24/7/1987, yet their evidence suffered from the under-mentioned contradictions and infirmities with reference to the contents of post-trap panchnama (Exhibited in original as Ex.P/4 in the first case) -

(i) According to Rajaram, he had made the complaint nearly 5 or 6 days after the filing of copying application and as per statement of Mukundi, he had preferred the complaint 4 days after the presentation of the copying application, whereas, as indicated already in both the cases, the complaints leading to trap were made

on 24/7/1987 only 2 days after the date of presentation of the copying application.

(ii) The assertion made by both the complainants that the appellant initially demanded a sum of Rs.200/- from each one of them as illegal gratification but reduced the amount to Rs.100/- and Rs.50/- respectively did not find place in the respective complaints.

(iii) Mukundi categorically stated that the appellant had kept the currency notes given by him in pocket of Jacket whereas as per the prosecution version his notes were recovered from a black bag. In his cross-examination, he further revealed that in response to the corresponding query, the appellant had handed over the bribe amounts to the members of the trap party after taking out the same from pockets of his shirt and jacket, which were found hanging on a peg. Rajaram on being examined as PW8 in the first case on 18/10/1997 did not say a word about the black bag. As per his version, the bribe money given by Mukundi was also found in the same pocket of the appellant's shirt wherefrom the currency notes handed over by him were recovered. However, in his subsequent deposition recorded on 23/3/1998 he, as PW10 in the second case, made an improvement by stating that the appellant had kept the tainted money given by Mukundi in a black bag.

(iv) In the first case, Rajaram asserted that Mukundi had not accompanied him from Circuit House to Kundeshwar. As per his version, after getting down from the jeep at Kundeshwar, he had gone all-alone to the residence of the appellant and had not seen Mukundi there. However, in the subsequent statement recorded in the second case, he made improvements to bring his evidence in line with the prosecution version. Accordingly, he came forward to state that -

(a) the Vigilance Squad had also taken Mukundi along with him from Circuit House to Kundeshwar.

(b) in his presence only, Mukundi had passed on tainted currency notes worth Rs.50/- to the appellant who, in turn, had kept the same in a black bag.

(v) According to Mukundi, he had given money in presence of

two or three persons belonging to Yadav caste who were sitting in the Atari and not in presence of Rajaram who was found standing outside the room. He further deposed that he did not give any signal but had personally informed Inspector H.R.P. Choudhary about passing of the bribe money.

10. Moreover, as admitted by the copyist namely Hazmatullah Beg (PW4 in both the cases), none of the complainants was required to contact the appellant for preparation or supply of the copies applied for as the same were to be delivered in the Copying Section of Tahsil only. In such a situation, where the prosecution has failed to prove the circumstances necessitating the appellant to demand the bribe, statements of the complainants were not worthy of acceptance (See. *Jagdish Chandra Makhija v. State of M.P.* 1990 MPLJ 239).

**EVIDENCE OF THE PANCH WITNESSES -**

11. Statemc ts of panch witnesses namely R.B. Prajapati (PW3 in both the cases) and D.C. Patel (PW7/1 and PW2/2) were also not in conformity with the corresponding contents of post trap Panchnama. R.B. Prajapati did not corroborate the version that it was he who had taken out the bribe money given by Mukundi from the black bag kept by the appellant. As per his statement, he was not able to remember as to whether the tainted currency notes allegedly handed over by Rajaram were recovered from the pocket of appellant's shirt or from the bag. However, he categorically admitted that he had no occasion to touch the tainted money passed on by any one of the complainants to the appellant. D.C. Patel, the other Panch witness, also did not support the corresponding recital of the Panchnama suggesting that it was he who had taken out the bribe money given by Rajaram from the appellant's shirt pocket. In his statement as PW2/2 recorded on 8/10/1993, he clearly asserted that the currency notes said to have been handed over by the complainants to the appellant were taken out from the shirt and the bag by M.K. Gautam (PW10/1 and PW12/2) whereas in his subsequent deposition recorded on 8/12/1994 in the first case, he, as PW7/1, disclosed that one of the members of the trap party had taken out the bribe money from the Jacket pocket of the appellant whereas the other member had extracted the other set of currency notes from the pocket of appellant's Kurta that was found hanging on a peg. In none of these statements, he corroborated the fact that he was also made to wash his hands with the sodium carbonate solution as he also

had the occasion to touch the tainted money allegedly passed on by Rajaram to the appellant.

12. In the light of these material inconsistencies, the evidence of panch witnesses also did not inspire confidence. Further, as these witnesses were not declared hostile; their evidence was binding on the prosecution (See. *Mukhtiar Ahmed Ansari v. State (N.C.T. of Delhi)* AIR 2005 SC 2804). Thus, contradictory versions given by the panch witnesses also rendered the prosecution case doubtful.

**EVIDENCE OF THE OFFICER LEADING THE RAIDING PARTY AND OTHER MEMBERS THEREOF** -

13. The complainants as well as the panch witnesses further admitted that the detecting officer had not asked them to give their personnel search before entering into the Atari. This admission assumes significance in view of the assertion made by H.R.P. Choudhary (PW9/1 and PW11/2) that Rajaram's currency notes were recovered from pocket of his shirt hanging on a peg whereas Mukundi's money was found in a black bag lying near the appellant who, on the date of the incident, was aged about 57 years. The fact that the appellant might have lost his agility could not be lost sight of. In the peculiar circumstances indicated above, the notes could have been inserted in the shirt pocket or placed in the bag without the consent or even knowledge of the appellant (*Salimkhan Sardarkhan v. State of Gujarat* AIR 1986 SC 307 relied on).

14. Inspector H.R.P. Choudhary was not able to explain as to why both the complaints were not forwarded by way of a single letter to the D.S.P. despite the fact that they were submitted on the same day within a short interval of 1½ hours and only one police personnel viz. Constable Purushottam (PW6/1 and PW8/2) was employed for taking the same to Sagar.

15. Inspector M.K. Gautam (PW10/1 and PW12/2), Head Constable Indramani Mishra (PW2/1 and PW1/2) and Constable Purushottam (PW6/1 and PW8/2) substantiated the facts as stated by Inspector H.R.P. Choudhary that -

(i) he had sent both the complaints (Ex.P-2/1 and P-9/2) along with letters of request (Ex.P-15 in both the cases) through Purushottam to the Dy. S.P., SPE (Lokayukt), Sagar.

(ii) DSP, while authorizing him to lay the trap, had deputed raiding

party comprising of M.K. Gautam, Inspector S.P. Shukla, Indramani Mishra, Purushottam and constable Dwarka to render necessary assistance.

16. Nevertheless, DSP Jatav, who had granted the permission to conduct the trap, was not examined. Moreover, no documentary evidence either in the form of an entry in the Roznamcha of the office of SPE (Lokayukt) at Sagar or in any other register was tendered to corroborate the corresponding statements of M.K. Gautam, Indramani Mishra and Purushottam. It is relevant to note that none of the complaints bore signatures of the DSP. Above all, Mukundi, while asserting that he had stayed at the circuit house during the previous night only completely belied the statements of members of the trap party that he had arrived at the time when they were about to start for Kundeshwar after completion of usual pre-trap formalities pertaining to complaint made by Rajaram.

17. Moreover, the trap was also conducted in an unusual manner. A trap proceeding envisages secrecy and not a wide publicity (*V. Venkata Subbarao v. State* (2006) 13 SCC 305 referred to). Accordingly, involvement of two complainants in a contemporaneous raid was sufficient to make legality of the proceedings questionable.

18. Furthermore, the complainants as well as panch witnesses candidly admitted that the detecting officer had not observed the formalities of their personal search before entering the Atari. Search of the members of the search party, though not contemplated in the section, is done in practice so that there may not be suspicion as to plantation of the incriminating article (See. *State of Bihar v. Kapil Singh* AIR 1969 SC 53). Non-observance of this formality assumed significance in view of the fact that bribe money was also not recovered from the person of the appellant (*Meena Balwant Hemke v. State of Maharashtra* AIR 2000 SC 3377 followed).

19. To sum up, on one hand, the incriminating evidence of the complainants and the Panch witnesses suffered from serious infirmities and on the other, veracity of the trap proceedings was also questionable in the light of the surrounding circumstances (See. *State of T.N. v. Krishnan* (2002) 9 SCC 521). In such a situation, the appellant was entitled to benefit of doubt (*Jai Ram Lakhe v. State of Punjab* (1978) 3 SCC 133 relied on).

20. Since it could not be established beyond a reasonable doubt that the

appellant had obtained or accepted any illegal gratification pursuant to demand made by him by abusing his position as a public servant, the presumption under Section 4(1) of the Act of 1947 could not be drawn in any case (*Sita Ram v. State of Rajasthan* (1975) 2 SCC 227 followed). As such, learned trial Judge completely misdirected himself in holding the appellant guilty of the offences under the Act.

21. In the result, the appeals are allowed. The convictions and consequent sentences are hereby set aside. Instead, the appellant is acquitted of the offences. Fine amount, if deposited, be refunded to Ramkali Khare, wife of the appellant.

22. A copy of this judgment be retained in the connected appeal.

*Appeals allowed.*

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**I.L.R. [2011] M. P., 2049**
**APPELLATE CRIMINAL**
***Before Mr. Justice Rakesh Saksena***
Cr.A. No. 261/2007 (Gwalior) decided on 12 May, 2011

KISHNU ALIAS KISHANBIHARI ...Appellant
Vs.
STATE OF M.P. ...Respondent

***Penal Code (45 of 1860), Sections 212, 216, Dakaiti Aur Vyapharan Prabhavit Ksheshtra Adhiniyam, M.P. (36 of 1981), Sections 11, 13 - Owner of house* - No documentary or oral evidence produced to show that appellant was either owner or was in possession or control of house in which dacoit was given shelter - Appellant was also not found on the spot at the time of the arrest of the dacoit - Appellant cannot be convicted - Appeal allowed.** (Paras 9 to 11)

दण्ड संहिता (1860 का 45), धाराएँ 212, 216, डकैती और व्यपहरण प्रभावित क्षेत्र अधिनियम, म.प्र., (1981 का 36), धाराएँ 11, 13 – मकान का स्वामी – यह दर्शाने के लिए कोई दस्तावेजी या मौखिक साक्ष्य नहीं कि जिस मकान में डकैतों को शरण दी गई थी, अपीलार्थी उस मकान का स्वामी था या कब्जे में या नियंत्रण में था – डकैतों की गिरफ्तारी के समय अपीलार्थी घटना स्थल पर नहीं पाया गया –अपीलार्थी को दोषसिद्ध नहीं किया जा सकता – अपील मंजूर।

*Rajesh Shukla*, for the appellant.
*T.C. Bansal*, for the respondent/State.

## JUDGMENT

**RAKESH SAKSENA, J. :**–Appellant has filed this appeal against the judgment dated 21.3.2007 passed by the Special Judge (M.P. Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam) in Special Case No. 134/2001 (Dakaiti), convicting appellant under sections 212 and 216 of India Penal Code read with section 11/13 of M.P. Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981 and sentencing him to rigorous imprisonment for three years with fine of Rs.2000/- on each count respectively.

2. According to the prosecution, on 29.8.2001 Additional Superintendent of Police Manoj Kumar Singh received an information from Informer at Bhind that appellant is harbouring a proclaimed dacoit Ramsiya in his house at Village Dulhagan. On receiving such information along with Special Task Force and with Police Officers of Police Station Phoop he went to Village Dulhagan. After dividing the force into parties, he searched the house of appellant and found dacoit Ramsiya hiding in Atari. Some guns were also seized from the house. Appellant was not found at the spot. In execution of the perpetual warrants appellant was arrested on 10.10.2003.

3. During investigation it was found that the arms seized from the house were licensed weapons, however, in view of the fact that appellant had harboured proclaimed dacoit Ramsiya an offence under sections 212 and 216 of I PC was registered against him.

4. After investigation charge-sheet was filed and appellant was put up for trial.

5. It is significant to note that other co-accused persons were also arrested in the same offence and were put up for trial, however, by judgment dated 9th July, 2004 they were acquitted.

6. For substantiating the charges, prosecution examined Vidhyacharan (PW.1), Bashir Khan (PW.3), Karun Kumar Shukla (PW.4), Sunil Kumar Shukla (PW.6), Murarilal Sharma (PW.7), K.K Mishra (PW.8) and Manoj Kumar Singh (PW.9). Learned Special Judge relying on the evidence adduced in the case held appellant guilty and convicted him of charges under sections 212 and 216 of IPC.

7. Learned counsel for appellant submitted that the learned Special Judge committed error in convicting appellant in the absence of proof that the

house from which proclaimed dacoit was apprehended belonged to appellant and or the same was in control or possession of appellant. In absence of reliable evidence for proof of the control and possession of appellant on the house from where dacoit was arrested, appellant could not have been convicted under sections 212 and 216 of IPC.

8. On the other hand learned Govt. Advocate for respondent/ State. submitted that from the evidence adduced by the prosecution it was established that dacoit Ramsiya was arrested from the house of appellant He submitted that learned Special Judge in paragraph 51 of the impugned judgment held that it was already held in previous trial against other accused persons that the house belonged to appellant.

9. I have perused the impugned judgment and the entire evidence on record. Manoj Kumar Singh (PW.9) C.S.P. Bhind stated that he received information on 29.8.2001 from some Informer that proclaimed dacoit Ramsiya was hiding in the house of appellant in Village Dulhagan. He along with Special Task Force and other police officers went to Village Dulhagan and surrounded the house. On search, he caught Ramsiya in the house with fire- arms. Similar statements were made by A.S.I. Phoop K.K. Mishra (PW.8), Head Constable Sunil Kumar Shukla (PW.6) and Head Constable Murarilal Sharma (PW.7). Learned counsel for appellant pointed out that the evidence of these witnesses was inconsistent and contradictory. Though, C.S.P. Manoj Kumar Singh (PW.9) stated that at the time of raiding the house, women and children were not present, but K.K. Mishra (PW.8) stated that the children were present in the house, however. Head Constable Sunil Kumar Shukla (PW.6) stated that women were present in the house, but they were asked to leave.

10. Apart from above, no documentary record about receiving information from Mukhbir, requisitioning of force, Rojnamcha entries about departure and arrival from the police station were produced in the Court by the prosecution.

11. It is also significant to note that no witness was produced from the locality to establish that the house in which proclaimed dacoit was found taking shelter belonged to appellant. This fact could have been proved even by some documentary evidence. No doubt it is not necessary that the appellant should have been the owner of the house for being liable for the offence, but at least the fact of his control or possession on the premises or the house, in

which the offender was given shelter should have been proved. It appears from the evidence of Sunil Kumar Sharma (PW.6) that three police parties along with Mukhbir proceeded from Police Station Phoop for Village Dulhagan. From some distance Mukhbir pointed out the house saying it was the house of Kishan Master. Except the evidence of aforesaid witness no witness had personal knowledge about the ownership or possession of the house in which the offender was apprehended. There is no evidence on record that the house from which dacoit was arrested belonged to appellant. Since the charge against appellant is also under the provisions of M.P. Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981 which are stringent by nature and provide minimum sentence of three years, proof of essential facts and ingredients of charge must be stricter. Though it was established from the evidence of Karun Kumar Shukla (PW.4) that Inspector General of Police, Chambal Range had declared reward for the arrest of dacoit Ramsiya, but in the absence of reliable evidence that he was harboured by appellant, appellant cannot be convicted for the offence under sections 212 and 216 of IPC, especially when appellant was not found at the spot. Merely by the fact that appellant remained absconding and was arrested in the year 2003, no inference about his guilt can be drawn.

12. Learned Special Judge in para 51 of the impugned judgment borrowed the findings recorded by his predecessor in a previous judgment passed against other, accused persons. In my opinion he committed error in relying upon the evidence adduced in the case which proceeded against other accused persons. The evidence of two cases were different. The finding of one judgment cannot be borrowed and used in another judgment.

13. After a close scanning and appraisal of the evidence adduced in the case, I am of the view that prosecution has failed to establish beyond the doubt that the house in which proclaimed dacoit Ramsiya was apprehended belonged to appellant or that appellant harboured or concealed him with a view to screen him from legal punishment.

14. In view of the above discussion the conviction and sentence of appellant under section 212 and 216 of I PC read with sections 11/13 of M.P. Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981 is set aside. He is acquitted. Bail bond and surety bond of appellant are discharged.

13. Appeal allowed.

*Appeal allowed.*

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**I.L.R. [2011] M. P., 2053**

**CRIMINAL REVISION**

***Before Mr. Justice S.L. Kochar & Mrs. Justice S.R. Waghmare***

Cr. Rev. No.1/2004 (Indore) decided on 22 September, 2010

GURUDEV SINGH @ GOGA ...Applicant

Vs.

STATE OF M.P. ...Non-applicant

***Arms Act (54 of 1959), Section 39 - Sanction for prosecution - Production of arms*** - **Sanctioning authority is required to see that accused was found to be in possession of firearm, the date(s) on which he was found in possession without having valid license - Physical production of firearm/object before sanctioning authority does not appear to be necessary and authority was also not required to look into it - For grant of sanction under Section 39 of the Act, production of seized instrument/ firearm/arm/arms is/are not mandatory.** (Paras 13 and 20)

आयुध अधिनियम (1959 का 54), धारा 39 – अभियोजन के लिए मंजूरी – आयुधों का प्रस्तुतीकरण – मंजूरी प्राधिकारी से यह देखा जाना अपेक्षित है कि अभियुक्त के कब्जे में बिना वैध लाईसेंस का आग्नेय अस्त्र किन दिनांकों को पाया गया – मंजूरी प्राधिकारी के समक्ष आग्नेय अस्त्र/वस्तु का वस्तुगत प्रस्तुतिकरण आवश्यक प्रतीत नहीं होता और प्राधिकारी द्वारा उसका परीक्षण भी अपेक्षित नहीं था – अधिनियम की धारा 39 के अंतर्गत मंजूरी प्रदान करने हेतु जब्तशुदा उपकरण/आग्नेयास्त्र/ आयुध/आयुधों को प्रस्तुत करना आवश्यक नहीं है।

**Cases referred:**

1998(1) JLJ 236 (Overruled), 1999 Cr.LR (MP) 80(Overruled), 2002 Cr.L.R. (MP) 192(Overruled), 1987 MPLJ 81, 1986 C.Cr.J. (MP) 115, AIR 1971 SC 1910, AIR 1972 SC 1756, 1984 (1) Crimes 838, AIR 1948 PC 82.

*Rajesh Chouhan,* for the applicant.

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

**ORDER**

The Order of the Court was delivered by **S.L. Kochar, J. :–** ON 4/4/2008, both the Criminal Revisions were listed before the learned Single Judge for final arguments. Learned counsel for applicants argued before the learned Single Judge that for conviction of the applicants U/S.25(l)(b) of the Indian Arms Act (for short **"the Act"**), sanction

for prosecution of the applicants as per provision U/S.39 of the Act was necessary and at the time of according sanction by the sanctioning authority, arm in question was not produced by the Investigating Officer before the sanctioning authority, and sanctioning authority must satisfy itself that the instrument is such which is covered within the definition given in the Act. Learned counsel for applicants placed reliance on the following judgments :-

1. *Raju Dubey Vs. State of MP* [1998(1) JLJ 236]
2. *Smt Jaswant Kaur and Anr. Vs. State of UP State of MP* [1999 Cr.LR (MP) 80].
3. *Prabhu Dayal and another Vs. State of MP* [2002 Cr.L.R (MP) 192].

2. On the contrary, learned counsel for State relying on the wording of Section 39 of the Act, submitted before the learned Single Judge that Section does not require the prosecuting agency to produce the instrument/offending arm before the sanctioning authority and observations made by learned Single Judge in the above referred cases are contrary to the provisions of law and in fact are putting unnecessary fetters on the power and authority of the sanctioning authority. Learned counsel for State submitted before the learned Single Judge for referring the matter to the larger bench so that an authoritative pronouncement by larger bench occupy the field and leaves no scope for doubt or ambiguity on the point in question.

The learned single Judge made the following reference:-

**"After going through the judgments and language employed in Section 39 of the Indian Arms Act, I am of the considered opinion that the three judgments referred to above need re-consideration by larger bench".**

3. The matter was placed before the Hon'ble Chief Justice and that is how this reference was listed before this Division Bench for decision.

4. We have heard the learned counsel for parties and also perused the record.

5. For deciding the controversy, it would be appropriate to extract Sec.39 of the Act herein.

**39. Previous sanction of the District Magistrate necessary in certain cases.—No prosecution shall be instituted against**

**any person in respect of any offence under Section 3, without the previous sanction of the District Magistrate.**

6. Brief history of the Act No. XXI of 1869:-

This Act was brought into existence by British Government. It was made because of Mutiny in Army in the year 1857 because of which British Rulers stood horrified with it and decided to disarm the whole nation. The possession and carrying of arms was, except by licence, totally banned. The Rulers feared and distrusted the people as a whole lest history repeats itself. Mahatma Gandhi characterized it as the blackest act of the British Rule. With this Act, definition of **"Arms"** and **"Ammunition"** was widened covering practically every weapon of defence and offence. Act II of 1878 was also framed and possession without licence of all the weapons were banned. After independence, the instant Act of 1959 was brought into existence with aims and objects to possess .firearm and other arms for self defence by law abiding citizens especially when terrorists, dacoit gangs and other anti social or anti national elements were using not only civilian weapons but also dangerous firearms for erpetrating heinous crimes against society and the State.

7. The Act of 1959 was amended by the Arms (amendment) Act 1985 (Act 39 of 1985) with Statement of Objects and Reasons as under:-

**"The Arms Act, 1959 regulates the acquisition, possession or carrying of and fire-arms ammunition and provides punishment for contravention of the provisions of the Act. There has been increased use of fire-arms, mostly unauthorised, by terrorists and others in committing violent acts. Such activities have been particularly noticed in 'disturbed areas' like Punjab and Chandigarh. The punishments provided for at present do not have a strong deterrent effect. There is, therefore, an increased need to provide for more stringent to curb unauthorised access to arms and ammunition and combat the growing menace of terrorism. It is accordingly proposed to provide for very stringent punishment for illegal possession or carrying for arms in disturbed areas and for contraventions of sub-section (I-B) of Section 25 of the Act in disturbed areas. It is also proposed to make the punishments for other contraventions of the said sub-section (I-B) more stringent".**

8. To achieve the Statement of Objects and Reasons, the law makers have thought it fit to provide Sec.39 (ibid) to safe guard the innocent from the false and frivolous prosecution and not to leavel for the guilty. There are other statutes also; for illustration; Prevention of Corruption Act, Food Adulteration Act, Section 197 of the Cr.P.C providing provisions of sanction for prosecution by the competent authority and aims and objects of such provision is to safeguard the life and liberty of the citizens from false, frivolous and baseless prosecution due to inimical terms and on other so many reasons.

9. Right from the beginning, it is a matter of debate as to what would be the requirement for granting sanction and how sanctioning authority should consider the matter while granting sanction. It is a question of fact which differs from case to case as well as wording of the particular statute. While interpreting provisions of sanction, the Apex Court and almost all High Courts of the country have decided this issue.

10. In *Gulabsingh Vs. State ofMP* [1987 MPLJ 81], this High Court while taking into consideration the judgment rendered in *Mohd. Rustam Oureshi's case* [1986 Current Criminal Journal (MP) 115], observed as under in para 18:-

> **"In the decision in *Mohammad Rustam Qureshi's case* 1986 C.Cr.J. (M.P.) 115 several other decisions on the subject of sanction have been referred to. It relates to sanction under section 6 of the Prevention of Corruption Act 1947. Observing that the intention behind the provision is to safeguard the innocent and not to provide a shield for the guilty it has been pointed out that the substance of the matter is that it has to be proved that the sanction was the result of application of mind to the evidence and the circumstances of the case. Therefore, unless the matter can be proved by other evidence, in the sanction itself reference must be made to facts. In order to indicate that the basic requirement of the application of mind by the sanctioning authority in the matter was met. Without a valid sanction the prosecution would be nullity and the trial without jurisdiction was liable to be quashed".**

11. In case of *Major Som Nath Vs. Union of India and another* [AIR 1971 SC 1910], the Supreme Court has held that the prosecution is required

to prove, the sanction to be valid that it was given in respect of facts constituting the offence with which the accused is proposed to be charged. It is also held that it is desirable that the facts should be referred to in the sanction itself, nonetheless if they do not appear on the face of it, the prosecution must establish aliunde by evidence that those facts were placed before the sanctioning authority.

12. The Supreme Court in case of *Gunwantlal Vs. State of MP* [AIR 1972 SC 1756] has held as under while considering Sec.39 of the Act in para 6 (placitinun C):-

> "All that is required for sanction under Section 39 is, that the person to be prosecuted was found to be in possession of the firearm, the date or dates on which he was so found in possession and that the possession of the firearm was without a valid licence. Where all the elements were contained in the sanction it was not an illegal sanction nor could it be said that the charge travelled beyond that sanction".

13. It is clear from the above mentioned observations by the Supreme Court that sanctioning authority is required to see that accused was found to be in possession of the firearm, the date or dates on which he was found in possession without having valid license. For these facts, the physical production of the firearm/object before the sanctioning authority does not appears to be necessary and authority was also not required to look into it.

14. In case of *Md. Rosen & Others Vs. The State* [1984 (1) Crimes 838, learned Single Judge has held that for prosecution of the accused U/S.25(a), if it was not mentioned in the sanction order that the materials gathered in the course of investigation against accused had been placed before the sanctioning authority and sanctioning authority had considered the materials before according sanction, the sanction had not duly been accorded after proper application of mind for prosecution in respect of the offence punishable under Arms Act. In this judgment, nowhere it is held that production or placing seized firearm or prohibited article was necessary before the sanctioning authority and sanctioning authority is under obligation to look into it. Placing of materials before the sanctioning authority and considering the same does not mean the seized article must be produced before the sanctioning authority. The sanctioning authority can apply its mind after going through the FIR, seizure memo, statements of the witnesses, expert report etc. On this basis, the authority can satisfy itself and would be able to accord sanction. In Sec.39

(ibid) also nowhere it is mentioned that production of the seized firearm is necessary for granting sanction or as to how sanction should be granted by the authority. The authority while granting sanction should satisfy itself from the facts of each case whether prima-facie case for constituting an offence is made out or not. In case of *Gokulchand Dwarkadas Morarka Vs. The King* [AIR 1948 PC 82], it is held that charge must be with respect to commission of an offence with reference to the facts of the case whether a prima facie case is made out against the accused. A sanction for prosecution should have substance to justify as to what provision had been contravened.

15. Sanction is a wholesome safeguard against false, frivolous and inexpedient prosecution and as such sanction should be accorded if prosecution is reasonable and in public interest. The sanction should disclose that the authority had applied its mind to the prima facie case of contravention of provisions of law, although minute details of the evidence is not obligatory to be gone into. While interpreting the provisions of Sec.39, unnecessary embargo should not be put before authority who is required to grant sanction,

16. In case of *Raju Dubey* (supra), for the first time learned Single Judge of Gwalior Bench has held that unless the sanctioning authority looks itself the instrument in respect of which sanction is sought, he cannot be said to have any idea as to whether possession of the instrument was illegal or the instrument was actually recovered within the definition given in Sec.2 and held that production of the instrument is mandatory.

17. We do not agree with this preposition. The authority can satisfy itself on the basis of seizure memo, expert report, statements of witnesses and other material. If production of instrument is made mandatory, then it can be said that sanctioning authority must operate it and see whether it is in working condition or not, therefore, in our view this is an unnecessary embargo for the authority to grant sanction.

18. If such view is correct, then in a case of disproportionate asset, at the time of granting sanction for prosecution punishable under the provisions of Prevention of Corruption Act, all the seized movable property is required to be produced before the sanctioning authority and for immovable property, authority must go on spot and verify the same with seizure memos and inventory available in the case diary. If production of articles for granting sanction before the authority is made mandatory for prosecution of a public servant for taking bribe, the currency notes and sealed bottles of sodium carbonate solution

turning into pink colour when on notes phenolphthalein powder is used, must be required to be produced before the authority. Same can be the situation in case of granting sanction for prosecution under the provisions of Prevention of Food Adulteration Act as also granting sanction- for prosecution as per provision U/S.197 of the Cr.P.C. It is clear from these illustrations that production of instrument, article or property is not practically possible, before the sanctioning authority. In the light of these facts, in our considered view, there is absolutely no logic for production of instrument/seized firearm before the sanctioning authority for grant of sanction. In sum and substance, sanction order must disclose reasonable application of mind by the sanctioning authority on the basis of the material facts available in the case to make out a prima facie case.

19. In view of the above, we answer the reference as under:-

> **"that for grant of sanction U/S.39 of the Indian Arms Act before the sanctioning authority, for prosecution, production of seized instrument/firearm/arm/arms is/are not mandatory".**

20. In the result, judgments rendered in case of *Raju Dubey Vs. State of MP* (1998(1) JLJ 236], *Smt. Jaswant Kaur and Anr. Vs. State of MP* [1999 Cr.LR (MP) 80] and *Prabhudayal and another Vs. State of MP* [2002 Cr.L.R(MP)192] are hereby overruled. Let these Revisions be placed before the learned Single Judge according to Roster for final decision.

21. Original order is placed in the record of Cr. Revision No. 1/2004 and a Copy whereof be placed in the record of connected Cr. Revision No-56/2004.

*Order accordingly.*

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**I.L.R. [2011] M. P., 2059**
**CRIMINAL REVISION**
***Before Mr. Justice G.D. Saxena***
Cr. Rev. No. 85/2009 (Gwalior) decided on 9 May, 2011

RAVINDRA SINGH & ors. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Section 178 - Jurisdiction of Court*** **- Charge sheet filed before C.J.M., Gwalior returned back for**

**producing the same before C.J.M. Indore - Held - Offences initially began at Indore and were continued in Bhind - Courts in Gwalior would also have the jurisdiction - Return of charge sheet by Magistrate was wrong - Trial Court directed to proceed in the matter.** (Para 9)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 178 – न्यायालय की क्षेत्राधिकारिता – सी.जे.एम. ग्वालियर के समक्ष प्रस्तुत आरोप पत्र, उसे सी.जे.एम. इंदौर के समक्ष प्रस्तुत करने हेतु वापिस किया गया – अभिनिर्धारित – प्रारंभ में अपराध इंदौर में कारित किया गया और भिंड में जारी रहा – ग्वालियर के न्यायालय को भी आधिकारिता रहेगी – मजिस्ट्रेट द्वारा आरोप पत्र की वापसी अनुचित थी – मामले में कार्यवाही करने के लिए विचारण न्यायालय को निर्देशित किया गया।

**Case referred:**

AIR 1997 SC2465.

*Pradeep Katare*, for the applicants.

*R.K. Shrivastava*, PL for the non-applicant/State.

**ORDER**

**G.D. Saxena J.** :–This Revision petition under Section 397/401 of the Code of Criminal Procedure 1973 is directed against an order dated 22nd November 08, passed in Criminal Case No. 6817/2006, by the Additional Chief Judicial Magistrate Gwalior, returning thereby the charge-sheet for filling before the court of Chief Judicial Magistrate, Indore on the ground that the main incident of the offence was not committed within the territorial jurisdiction of the court at Gwalior.

2. As per prosecution case, the complainant Nand Kishore was working as security guard in Balaji Security Services, Navnit Plaza in Silver Sachora building situated on RNT Road at Indore. There being differences in the salary of the security guard and gunman, the complainant wished to occupy the post of gunman but on account of non-possessing the requisite gun-licence, he was unable to avail that opportunity. Hence, he came into contact of the accused-petitioners Sukhendra Singh and Babu Singh Tomar, who assured him that on payment of Rs. Seven Thousand, they will manage the arms license for him within 15 days. After that, the accused informed him to arrange the sum as settled and pay to the person concerned at Sakti Gass Agency Near Village Nenora on Sanver Road Ujjain. On second day the accused Babu Singh Tomar informed that he will also manage for him the fire Arms Gun from Bhind (M.P.) on payment of Rs. Eight thousand. The complainant somehow managed the loan from Jai Bharat Parspar Co-operative Institution Sikh

Mohalla Indore. Then, he contacted accused Babu Singh Tomar with money. The accused delivered the arms licence issued from the State of J & K. On doubts about the genuineness of the licence, the complainant made a contact to his friend Dr. Kundan Singh Bundela, at Indore, who also expressed doubt about the genuineness of the licence delivered by the accused, but on the advice of his friend Dr. Kundan Singh Bundela, he made the full payment for the driving licence to Babu Singh Tomar, accused. Thereafter, he on the belief of Babu Singh accused accompanied with one Ashok Mishra came to Bhind to purchase the fire arm. Ashok Mishra managed the fire arm gun for him from one old person unknown to him. Thereafter, he showed the arms licence to his Director M/s. Balaji Security at Indore, who opined that the arms licence given to him was fake. Subsequently, he also got knowledge from Daily News Paper "Nai Dunia" dated 27th February, 08 that near-about 2000 arms licences recovered from Bhind and issued from J & K State are fake. So, on the advice of Shri Panidar, the Director of M/s. Balaji Security Indore, he send the written complaint to CID Bhopal. On the basis of his complaint, the FIR was lodged by the Economic Offences Bureau, Bhopal.

3. After investigation the charge-sheet was filed by the Economic Offences Cell, at Gwalior before the Court of Additional Chief Judicial Magistrate having jurisdiction of the Economic Offences registered by EOW, Gwalior. The trial was commenced against the accused-petitioners. At later stage, the trial Judge reached on a conclusion that the most part of the incident happened at Indore, therefore for want of having jurisdiction to try the case, he returned the charge-sheet for production before the court of CJM at Indore, vide the impugned order, hence, this revision before this court.

4. The learned counsel for petitioners contended that as per provisions under Section 178 of the Code of Criminal Procedure 1973, where offence is committed partly in one local area and partly in another, the offence may be inquired into or tried by a court having jurisdiction over any of such local area. Therefore, the order passed by the trial Magistrate is perverse and liable to be set aside.

5. Learned Public Prosecutor for the respondent/State opposed the prayer of the petitioners and submitted that no illegality has been committed by the trial court in passing the impugned order.

6. Heard the learned counsel for the parties and perused the impugned order as well as the documents on record.

7.. Section 178 of the Code of Criminal Procedure 1973 is as follows :-

> **"Section 178 Place of inquiry or trial:-** (a) when it is uncertain in which of several local areas an offence was committed ;or (b) where an offence is committed partly in one local area and partly in another, or (c) where an offence is a continuing one and continues to be committed in more local areas than one, or (d) where it consists of several acts done in different local areas it may be inquired into or tried by a court having jurisdiction over any of such local areas.

8. In the case of *Sujata Mukherjee Vs. Prashant Kumar Mukherjee* (AIR 1997 SC 2465), the Hon. Apex Court held that :-

> "4. In this connection, Mr. Gambhir has drawn our attention to Section 178 of the Code of Criminal Procedure in particular clauses (b) and (c) of Section 178. Clause (b) envisages that "where an offence is committed partly in one local area and partly in another" such offence can be tried by a Court having jurisdiction over any such local areas. Clause (c) contemplates that "where an offence is a continuing one, and continues to be committed in more local areas" then such offence can be tried by a Court having jurisdiction over any of such local areas.
>
> 5. Mr. Gambhir has submitted that complaint made by the appellant Sujata Mukherjee discloses offence committed partly in one local area and partly in another local area. The complaint also discloses that the offence was continuing one having been committed in more local areas and one of the local areas being Raipur, the learned Magistrate at Raipur had jurisdiction to proceed with the criminal case instituted in such Court.
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> 7.----------We have taken into consideration the complaint filed by the appellant and it appears to us that the complaint reveals a continuing offence of mal treatment and humiliation meted out to the appellant in the hands of all the accused-respondents and in such continuing offence, on some occasions all the respondents had taken part and on other occasion, one of the respondents had taken part. Therefore, clause (c) of Section 178 of the Code of Criminal procedure is clearly attracted. We, therefore, set aside the impugned order of the High Court and direct the learned Chief Judicial

Magistrate, Raipur to proceed with the criminal case. Since the matter is pending for long, steps should be taken to expedite the hearing.

The appeals are accordingly allowed.".

9. A bare perusal of the impugned order and the FIR clearly reveals that the offences initially began in Indore-Ujjain which were continued in Bhind. According to Section 177 of Cr.P.C., ordinary the place of inquiry and trial is before the court within whose local jurisdiction the offence has been committed. However, according to Section 178 of Cr.P.C., if the offence has been committed within several local areas, even area where it was partly committed, the court of that particular area would also have the jurisdiction to try the case. In the present case also, the offences were initially committed in Indore and were continued in Bhind. Therefore, clearly under Section 178 of Cr.P.C. the courts in Gwalior would also have the jurisdiction to try the case. The learned Magistrate despite noticing the said fact that part of the offence was committed in Indore which continued in Bhind, was not justified in returning the charge-sheet papers to be submitted to the court at Indore, for want of having jurisdiction to try the case. Hence, the learned Magistrate was absolutely wrong in doing so and hence by setting aside the impugned order, this petition is hereby allowed. The trial court is directed to proceed in the matter in the light of the guidelines issued by the Apex Court in the case of *Sujata Mukherjee Vs. Prashant Kumar Mukherjee* (AIR 1997 SC 2465).

*Petition allowed.*

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**I.L.R. [2011] M. P., 2063**

**MISCELLANEOUS CRIMINAL CASE**

***Before Mr. Justice I.S.Shrivastava***

M.Cr.C No. 615/2011 (Indore) decided on 31 January, 2011

SUKESH & anr. ...Applicants

Vs.

STATE OF M.P. :..Non-applicant

***Constitution, Article 21 - Medical Treatment to Prisoners - Availability of police force - Guidelines*** **- Prisoners are sent to jail under the orders of the Court - Whenever any prisoner requires medical aid outside the jail, and force is demanded, a copy of the requisition**

**should also be sent to Sessions Judge - If R.I. fails to provide force within 24 hours of requisition, he shall report to the Sessions Judge as to why he is unable to provide force - Sessions Judge shall supervise such cases and shall ensure that force is provided by R.I. - Jail authorities shall also prepare and send a statement every month to Sessions Judge that in how many cases force was not provided and could not send the prisoners to proper hospital.** (Para 12)

संविधान, अनुच्छेद 21 – बंदियों को चिकित्सा उपचार – पुलिस बल की उपलब्धता – मार्गदर्शक रुपरेखा – बंदियों को न्यायालय के आदेशों के अधीन जेल भेजा जाता है – जब कभी किसी बंदी को जेल के बाहर चिकित्सीय सहायता की आवश्यकता होती है और बल की मांग होती है, मांग पत्र की प्रति सेशन न्यायाधीश को भी भेजी जानी चाहिये – यदि आर.आई. मांग पत्र के 24 घंटों के भीतर बल उपलब्ध कराने में असफल रहता है, तो वह सेशन न्यायाधीश को रिपोर्ट करेगा कि क्यों वह बल उपलब्ध कराने में असमर्थ रहा – सेशन न्यायाधीश ऐसे मामलों का पर्यवेक्षण करेंगे और सुनिश्चित करेंगे कि आर.आई. द्वारा बल उपलब्ध कराया जाए – जेल प्राधिकारी विवरण पत्र भी तैयार करेंगे और प्रत्येक माह सेशन न्यायाधीश को भेजेंगे कि कितने मामलों में बल उपलब्ध नहीं कराया गया और बंदियों को उचित चिकित्सालय नहीं भेजा जा सका।

**Case referred:**
(1997) 1 SCC 416.

*Zishan Ali,* for the applicants.
*Bhagwan Singh,* PL for the non-applicant/State.

**ORDER**

**I.S.SHRIVASTAVA, J. :**–Arguments on first bail application under S.439 of the Cr.P.C. of applicants Sukesh and Rupsingh heard. The applicants are involved in Crime No. 13/11 registered at P.S. Vijay Nagar, Indore under S. 34(2) of M.P.Excise Act.

2. According to prosecution story on 5.1.11 on the information of the informer that two persons are going on a Bajaj Pulsar motor cycle with country made liquor for sale, Police reached near Barfani Dham on M.R.9 road. On arrival of two persons on Bajaj Pulsor motor cycle, they were intercepted and on inquiry they told their names as Rupsingh and Sukesh. They were having two plastic canes. On checking they smelled like country made liquor. From their possession 62 liters country made liquor was seized. Hence applicants were arrested.

3. It has been argued on behalf of the applicants that applicant Sukesh has been tortured by the police during interrogation and he sustained injuries in his right

shoulder and forearms and both the hands fractured and he was sent to jail and he has not been medically treated there and has been referred to M.Y.hospital by jail Doctor. Thereafter on repeated demands for force by the Superintendent of jail for his medical treatment, force has not been sent by R.I. of D.R.P. Line Indore. Hence he should be released on bail so that he can get his treatment.

4. It has been further argued on behalf of applicants' -counsel that they have been falsely implicated in-this case. At the time of seizure the seized quantity has not been actually measured and by approximation 62 liters wine has been mentioned in the seizure memo and uptill now there is no report of chemical examiner. They should be released on bail so that they can get themselves treated. Trial will take time.

5. Respondent has opposed the bail application.

6. Considering the circumstance and after perusal of case diary. The application is therefore, allowed. It is ordered that applicants be released on bail on their each furnishing bail bond of Rs.25,000/- with one surety by each in the like amount to the satisfaction of the trial court for their appearance before the said Court on all dates as may be fixed.

7. As regards the treatment of Sukesh, heard Shri SR Vinchurkar, Dy. Superintendent, Central Jail, Indore and Shri Govind Rawat, R.I. Police Line Indore. They have filed their written reply. As per report of the Superintendent Jail, police force was demanded for treatment of applicant Sukesh from 7.1.11, 10.1.11, 13.1.11, 14.1.11, 15.1.11, 17.1.11, 18.1.11, 19.1.11, 20.1.11, 21.1.11, 22.1.11 and 24.1.11 i.e. twelve times but the force was not made available from the D.R.P.Line so that the injured Sukesh could not be sent to M.Y. Hospital for treatment. This Court ordered on 25.1.11 for the immediate treatment of Sukesh through jail staff and explanation was sought from Superintendent Jail and R.I. Police Line. Thereafter in compliance of this Court order, force was made available by the R.I. on 26.1.11 and applicant Sukesh was sent to M.Y. Hospital for treatment.

8. As per explanation given by R.I. Indore he is having shortage of force. Hence force could not be provided for medical treatment of applicant Sukesh and after order of this Court, he is providing force daily for treatment of applicant Sukesh and he is being sent daily to the M.Y. Hospital for examination and treatment. But no explanation has been given by R.I. that why on the previous dates on repeated demand right from 7.1.11 to 24.1.11, force was not provided to the jail authorities. It is not clear that why any heed

was not paid to the demand of jail authorities to provide the force for the treatment of prisoner. No reply was given to the Superintendent Jail by the R.I. Police line nor report was given to the higher authorities that due to shortage of force he is unable to provide force.

9. The prisoners in jail are on the mercy of the jail authorities and administration for their welfare. Jail authorities are custodians of the prisoners imprisoned in jail and it is their duty and liability to get them proper food, care and medical treatment whenever it is needed. If a prisoner needs emergency medical treatment out side jail, then jail authorities are also competent and have force to send the prisoners for treatment to M.Y. hospital or any other hospital so that health of prisoner should not be deteriorated and his human rights and fundamental rights should be protected properly. Prisoners are human beings and they should be treated properly. But in this case it seems that the Superintendent Jail completed his responsibility by sending letters to R.I. Police for demand of force and he did not care about the treatment of the applicant and R.I. Police on receipt of demand of the jail authorities about the force, did not pay any heed to the prayer of the jail authorities and he did not provide any force for treatment of the prisoner without any sufficient reason. This is highly objectionable. From the oral reply of the R.I. Police Indore, near about 450 persons are available at his force; out of which 125 persons are deputed as security guards in banks; 100 persons are drivers and busy in driving of vehicles; 65 persons are deputed in courts as court mohrirs; 40 to 50 persons remain for extra duties with him. Therefore, it was his duty to depute adequate force for the treatment of the prisoner applicant Sukesh which was urgent and necessary. There may be also some other patients in jail in need of force for their treatment out side hospital. Hence it is the duty of R.I. Police that he should not ignore the letters sent by the jail authorities for demand of force for treatment of prisoners. It is also the duty of the supervising authorities to supervise the work of R.I. and jail authorities about the treatment facilities of the prisoners injail.

10. In case of *D.K.Basu Vs. State of W.B.* - AIR (1997) I SCC 416, following guide lines have been issued to be followed in all cases of arrest or detention till legal provisions are made in this respect as preventive measures :

> ***1. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The***

*particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.*

2. *That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.*

3. *A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to haye one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.*

4. *The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organization in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.*

5. *The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.*

6. *An entry must be made in the diary at the place of de tention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and*

*the names and particulars of the police officials in whose custody the arrestee is.*

7. *The arrestee should, where he so requests, be also examined at the time of his arrest and major injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.*

8. *The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well.*

9. *Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.*

10. *The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.*

11. *A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.*

*Failure to comply with the requirements hereinabove mentioned shall apart from rendering the officer concerned liable for department action, also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the country, having territorial jurisdiction over the matter.*

***The requirements, referred to above flow from Article 21 and 22(1) of the Constitution and need to be strictly followed. These would apply with equal force to the other governmental agencies also like Directorate of Revenue Intelligence, Directorate of Enforcement, Coastal Guard, Central Reserve Police Force (CRPF), Border Security Force (BSF), the Central Industrial Security Force (CISF), the State Armed Police, Intelligence Agencies like the Intelligence Bureau, RAW, Central Bureau of Investigation (CBI), CID, Traffic Police, Mounted Police and ITBF.***

***These requirements are in addition to the constitutional and statutory safeguards and do not detract from various other directions given by the courts from time to time in connection with the safeguarding of the rights and dignity of the arrestee. "***

11. It seems that in case of applicants, the directions have not been complied with properly and despite the recommendation of jail doctor for the treatment of applicant Sukesh he has not been provided with the requisite medical aid due to lackness of R.I. Police Line, Indore and jail authorities.

12. Since the prisoners are sent to jail under the orders of the Court hence it is directed that whenever a prisoner requires medical aid out side the jail and the force is demanded by the jail authorities, a copy of the requisition letter should also be sent to the Sessions Judge of the concerned District and the R.I. of the Police Line if he fails to provide the requisite force within 24 hours of such requisition, he shall intimate to the Sessions Judge that why he is unable to provide the force. The Sessions Judge concerned shall supervise such cases and shall ensure that the force is provided by the R.I. of the Police Line for the treatment of the prisoner out side the jail or with the help of the force available in the jail, the prisoner will be sent to hospital for the proper treatment and in no case the prisoner should be deprived of proper medical treatment in the absence of force. It is the fundamental right of the prisoner to get his treatment out of jail at proper time and he should not be deprived from it. The Jail authorities shall prepare and send a statement every month to the Sessions Judge that in how many cases the prisoner was required treatment out of the jail and in how many cases the force was not provided and he could not be sent to proper hospital due to lack of police force. The Sessions Judge shall discuss this matter in meeting of monitory cell every month.

13. Now let copy of this order be sent to the higher authorities of the District and Head of the Administration, Police Deptt. and Jail Deptt. and Sessions Judge to make proper arrangement for proper supervision for treatment of the prisoners detained in jail.

14. With the above direction this bail application is disposed of accordingly. C.C. as per rules.

*Application is disposed of.*

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**I.L.R. [2011] M. P., 2070**

**MISCELLANEOUS CIVIL CASE**

***Before Mr. Justice U.C. Maheshwari***

M.C.C. No. 1676/2010 (Jabalpur) decided on 25 March, 2011

RAJNI CHILE (SMT.) ...Applicant

Vs.

SHRI AMIT CHILE ...Non-applicant

*A. Civil Procedure Code (5 of 1908), Section 24 - Transfer of Suit - Convenience and Difficulties* - **In the matter of convenience and difficulties women requires more consideration in comparison to men - Wife having small child of 6 months - Child of 6 months cannot reside without her mother - She cannot be insisted to go and attend the case at Balaghat along with her child - Case transferred from Balaghat to Jabalpur.** (Para 4)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 24 – वाद का अंतरण – सुविधा और कठिनाईयां – सुविधा और कठिनाईयों के मामले में पुरुषों की तुलना में महिलाओं को अधिक विचार में लेना अपेक्षित है – पत्नी को 6 महिने का नन्हा शिशु है – 6 महिने का शिशु माता के बिना नहीं रह सकता – उसे अपने शिशु के साथ जाने और बालाघाट में मामले में उपस्थित होने के लिए आग्रह नहीं किया जा सकता – मामला बालाघाट से जबलपुर अंतरित किया गया।

*B. Civil Procedure Code (5 of 1908), Section 24 - Transfer of Suit* - **Wife residing at Jabalpur in a house of her parents along with her brother - Merely because her parents are residing at Narsingpur it cannot be held that her prayer for transfer of case to Jabalpur is not bonafide.** (Para 5)

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 24 – वाद का अंतरण – पत्नी

जबलपुर में अपने माता पिता के घर में भाई के साथ रह रही है – मात्र इसलिए कि उसके माता पिता नरसिंहपुर में रह रहे हैं यह नहीं माना जा सकता कि मामले को जबलपुर अंतरित करने की उसकी प्रार्थना सद्भावपूर्वक नहीं है।

*Abhinav Dubey*, for the applicant.

*Arun Kumar Soni*, for the Non-applicant.

**ORDER**

**U.C. MAHESHWARI, J.:**–This petition is preferred by the applicant/wife under section 24 of the CPC for transferring the Misc. Civil Suit No.23/2010 filed by the respondent/husband undersection 7,10 read with section 25 of the Guardian And Wards Act, pending in the court of 1st Addl. District Judge, Balaghat, from such Court to some court of Jabalpur having the jurisdiction to adjudicate such matter.

2. The facts giving rise to this petition are that the applicant got married with the respondent in accordance with the customs of the Hindu community at Balaghat on 27.2.2009. Out of the aforesaid wedlock, they were blessed with a child who is aged 6 months. As per further averments, on account of some matrimonial dispute and differences, under compulsion, the applicant along with her infant child, is residing at Jabalpur. It is also stated that due to the activities and behavior of the respondent and his family members and also on making dowry demand, some report in writing was also given at the instance of the applicant to the public authority at Jabalpur. On neglecting the applicant and her infant child by the respondent, she also filed the petition under section 125 of the Cr.P.C for maintenance in the Family Court of Jabalpur which is still pending. Consequently by adopting the revengeful attitude, in order to harass the applicant, the respondent has filed the above mentioned civil suit under the provisions of Guardian And Wards Act for taking the custody of the infant boy from the applicant in the aforesaid court of Balaghat. As per further averments of the petition, in the available circumstances as stated in the petition and especially in view of the age of the infant child i.e 6 months, it is not possible for the applicant to go along with her infant child to defend the case at Balaghat. Besides this ground, the prayer is also made for transferring the aforesaid case from such Court to some court of Jabalpur taking into consideration the convenience and the difficulties of the applicant. With these averments the applicant has filed this petition.

3. It is apparent fact on record that the averments of such petition and the affidavit are not rebutted by the respondent by filing any reply but on hearing

the petition, the averments of the same are seriously disputed by the counsel saying that this petition is preferred by mentioning the wrong and incorrect facts. In continuation it was also said that the parents of the applicants are residing at Narsingpur, hence there is no occasion to make the prayer to transfer the aforesaid case from Balaghat to Jabalpur. In any case the applicant wants to harass the respondent by calling him to Jabalpur, subject to transferring the aforesaid case. In the lack of any prayer to transfer the case from Balaghat to Narsingpur the applicant's petition could not be deemed to be bonafide and prayed for dismissal of the same. However, he did not dispute the age of the infant child i.e 6 months and also the fact that such infant is residing with the applicant.

4. Having heard the parties, after perusing the averments of the petition as well as the papers placed on the record, I am of the considered view that this petition should be decided keeping in view the convenience and difficulties of the parties. It is settled principle of law that in the matter of convenience and difficulties, the women requires more consideration in comparison of men and especially in the circumstance where the woman has an infant child in her lap whom she could not leave at the assurance of any person even to a person belonging to her parental family. A judicial notice can be taken in that respect that a child aged six months could not reside without her mother and looking to the age of the child, by dismissing her petition she could not be insisted to go and attained the case at Balaghat along with her infant child. If the case is not transferred from Balaghat to Jabalpur then not only to the applicant has to face the difficulty or inconvenience but her infant child will also face such inconvenience and difficulty without any fault of him.

5. So far the objection of the respondent's counsel that the parents of the applicant, being residents of Narsingpur,her prayer to transfer the case at Jabalpur could not be deemed to be bonafide, has not appealed me because as per submission of the applicant who was present at the time of hearing of this petition, she along with her infant child, is residing at Jabalpur in some house of her parents where her real brother who is prosecuting his studies in Engineering College of Jabalpur is also residing. In view of such fact, mere on the ground that she is not residing at Narsingpur at the native place of her parents, this petition could not be thrown away holding that the prayer made by the applicant is not genuine or bonafide. In any case, Jabalpur is more convenient place for both the parties to contest the aforesaid matter as it is nearabout 225 KM from Balaghat while Narsingpur is far away near about 100 KM from Jabalpur. So even on transferring the case to Narsingpur, the

respondent has to come from Balaghat to Narsingpur and in such a situation the applicant has to go with her infant child to Narsingpur to defend the case and that would not be proper for her as she has already contested her case of maintenance at Jabalpur. In the aforesaid premises, I am of the considered view that if the aforesaid case is not transferred from Balaghat to Jabalpur for its further trial and adjudication or it is transferred to some court of Narsingpur then in that circumstance in comparison of respondent, the applicant and her infant child have to face great inconvenience and difficulty to defend the aforesaid case at Balaghat or at Narsingpur.

6. Therefore, in view of the aforesaid discussion, by allowing this petition, the aforesaid Misc. Civil Suit No.23/2010 *(Amit Chile Vs. Smt Rajni Chile)* pending in the court of Ist Addl. District Judge, Balaghat, is hereby ordered to be transferred from such Court to the court of District Judge, Jabalpur for its further trial and adjudication. It is made clear that the District Judge Jabalpur shall be at liberty to make-over such case to any other court having the jurisdiction to hold the trial and adjudicate the same under its administrative powers.

7. Let aforesaid both the courts be intimated regarding this order within seven days to comply the aforesaid directions. The applicant is also directed to submit the certified copy of this order in the aforesaid court of Balaghat enabling such court to transfer the aforesaid case in compliance of the aforesaid direction.

8. Petition is allowed as indicated above.

*Petition allowed.*

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**I.L.R. [2011] M. P., 2073**

**MISCELLANEOUS CRIMINAL CASE**

***Before Mr. Justice S.N. Aggarwal***

M.Cr.C. No. 1896/2007 (Gwalior) decided on 24 June, 2011

TULSIRAM NARWARIYA ...Applicant

Vs.

MAHESH CHANDRA ...Non-applicant

***Negotiable Instruments Act (26 of 1881), Section 142(b)*** - **A litigant is not required to explain delay of each and every day - It is sufficient for him if he gives sufficient cause for delay in filing appeal or application before Court.** (Para 2)

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 142(बी) – प्रत्येक दिवस के

विलम्ब का स्पष्टीकरण देना वादकारी से अपेक्षित नहीं – यदि वह न्यायालय के समक्ष अपील या आवेदन प्रस्तुत करने में विलम्ब के लिए पर्याप्त कारण देता है तो यह उसके लिए पर्याप्त है।

**Cases referred :**

AIR 1987 SC 1353, (2001) 9 SCC 106.

*Sarvesh Sharma*, for the applicant.

*None,* for the non-applicant.

**ORDER**

**S.N. AGGARWAL, J. :–** This petition under section 482 of Cr.P.C. filed by the petitioner is directed against the order dated 3rd of February,2007 passed by the Sessions Judge, Gwalior in Criminal Revision No.325/06 whereby the order dated 06th October, 2006 passed by the learned Judicial Magistrate First Class, Gwalior in a complaint case under section 138 of the Negotiable Instruments Act, 1881 has been affirmed.

2. A complaint under section 138 of the Negotiable Instruments Act,1881 ( herein after, referred to as the "Act") filed by the petitioner against the respondent was accompanied with an application under section 142 (b) of the Act for condonation of the delay of 28 days in filing the complaint. The delay was sought to be condoned on the ground that the petitioner being the only son of his father could not file the complaint in time as his father had suffered a fracture for which a medical certificate was also annexed with the condonation application. The delay in filing the complaint was of 28 days. The Trial Court as well as Revisional Court dismissed the complaint on the ground of limitation holding that the petitioner has failed to explain delay of each day in filing the complaint. In view of the Revisional Court, the petitioner was required to explain the delay of each and every day till the date of filing of complaint. This view of the Trial Court as well as of the Revisional Court is oppose to law. Law on this aspect is well settled that a litigant is not required to explain delay of each and every day; it is sufficient for him if he gives sufficient cause for delay in filing appeal or application before Court. Reliance in support of this view is placed on a judgment of the Hon'ble Supreme Court in the case of *Collector, Land Acquisition vs. Mst. Katiji,* AIR 1987SC 1353.

3. Section 142 (b) of the Act empowers the Court before which complaint under section 138 of the Act is filed to entertain the complaint even after expiry of limitation period of thirty days, in case the complainant shows sufficient cause for such delay.

4. In the case of *Vedabai vs. Shantaram Baburao Patil,* (2001)9 SCC 106, it was held by the Hon'ble Supreme Court that in exercising the discretion under section 5 of the Limitation Act, Courts should take a pragmatic approach. A distinction must be made between a case where the delay is inordinate and a case where the delay is of only few days; where in the former case consideration of prejudice to either side will be a relevant factor and the case calls for more cautious approach, in the later case no such consideration may arise and such case deserves a liberal approach. No hard and fast rule can be laid down and the Court should exercise discretion on the facts of each case keeping in mind and construing the expression "sufficient cause" and principle that advancing substantial justice is of prime importance.

5. However, while dealing with the application seeking condonation of delay, it is always desirable to take a liberal and not a rigid or too technical view and the Court has to keep in mind that discretion in the case has to be exercised to advance substantial justice.

6. Considering the above legal position coupled with the fact that there was delay of only 28 days, that too had occasioned on account of fracture of father of the petitioner/complainant, I am inclined to condone the delay caused in filing of the complaint by the petitioner against the respondent. Needless to mention that since nobody has appeared for the respondent despite service, this Court was deprived of the advantage of hearing the views of his counsel.

7. In view of the foregoing and having regard to the facts and circumstances of the case, this petition is allowed and the impugned order dated 03rd February,2007 passed by the Sessions Judge in Criminal Revision No.325/06 as well as order dated 06th October, 2010 passed by Judicial Magistrate First Class, Gwalior are hereby set aside. The Trial Court is directed to proceed further in the case as per law.

8. Parties are directed to appear before the concerned Trial Court for directions at 10.30 a.m. on **05th July, 2011.**

9. A copy of this order be sent to the concerned Trial Court for information and necessary compliance.

*Petition allowed.*

**I.L.R. [2011] M. P., 2076**

**MISCELLANEOUS CRIMINAL CASE**

***Before Mr. Justice Rakesh Saksena & Mr. Justice M.A. Siddiqui***

M.Cr.C. No.10428/2009 (Jabalpur) decided on 5 July, 2011

AJAY SHARMA ...Applicant

Vs.

STATE OF M.P. & anr. ...Non-applicants

*A. Prevention of Corruption Act (49 of 1988), Section 13(1)(d) - Criminal misconduct* - **Petitioner submitted his opinion into the allegations of illegal retention of amount by Sarpanch - Held - To attract the provisions of Section 13(1)(d) of the Act, it is necessary that a person must dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or as a public servant allows any other person so to do or he by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage - By giving an opinion the applicant had not committed an offence punishable under Section 13(1)(d)** (Paras 10 to 13)

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13 (1)(डी) – आपराधिक अवचार – सरपंच द्वारा रकम के अवैध प्रतिधारण के आरोपों में याची ने अपनी राय प्रस्तुत की – अभिनिर्धारित – अधिनियम की धारा 13(1)(डी) के उपबंधों को आकृष्ट करने के लिए यह आवश्यक है कि व्यक्ति ने बेईमानी से या कपटपूर्वक दुर्विनियोजन किया या अन्यथा उसे न्यस्त किसी सम्पत्ति को स्वयं के उपयोग में संपरिवर्तित किया या लोक सेवक के रुप में किसी अन्य व्यक्ति को ऐसा करने की अनुमति दी या भ्रष्ट एवं अवैध साधन द्वारा उसने स्वयं के लिए या किसी अन्य व्यक्ति के लिए कोई मूल्यवान वस्तु अथवा धन संबंधी फायदा अभिप्राप्त किया – अपनी राय देकर आवेदक ने धारा 13(1)(डी) के अंतर्गत दण्डनीय अपराध कारित नहीं किया।

*B. Penal Code (45 of 1860), Section 218* - **Framing incorrect record or writing with intent to save person from punishment - Applicant had given his opinion that act of Sarpanch was in contravention of Rules and was an administrative irregularity instead of criminal act - Held - It cannot be held that applicant prepared any record or writing with intent to save Sarpanch from legal punishment - Merely on basis of difference of opinion or error of judgment, in absence of any malafide or criminal intention, a person cannot be made liable to be punished - Application allowed.** (Paras 14 to 16)

ख. दण्ड संहिता (1860 का 45), धारा 218 – असत्य अभिलेख विरचित करना या व्यक्ति को दण्ड से बचाने के आशय से लेख करना – आवेदक ने अपनी राय दी है कि सरपंच का कृत्य नियमों के उल्लंघन में था और आपराधिक कृत्य की बजाए प्रशासनिक अनियमितता थी – अभिनिर्धारित – यह धारणा नहीं की जा सकती कि आवेदक ने सरपंच को बचाने के आशय से कोई अभिलेख या लेख तैयार किया – मात्र मत की भिन्नता या निर्णय की त्रुटि के आधार पर, किसी असद्भाव या आपराधिक आशय के अभाव में व्यक्ति दण्डित किये जाने योग्य नहीं बनाया जा सकता – आवेदन मंजूर।

*C. Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Inherent Powers* - **Law discussed.** (Paras 18 to 22)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अन्तर्निहित शक्तियाँ – विधि की समीक्षा की गई।

**Cases referred :**

(2009) 8 SCC 617, 1992 SUPP.(1) SCC 335, AIR 1960 SC 866.

*Shanshak Shekhar,* for the applicant.

*Aditya Adhikari,* Spl. PP for the non-applicant No. 1.

*None,* though served, for the non-applicant No. 2.

**ORDER**

The Order of the Court was delivered by **RAKESH SAKSENA, J. :**– Petitioner, the Chief Executive Officer of District Panchayat, Rajgarh has moved this petition for quashing the First Information Report dated 12.1.2009 registered at Crime No. 3/2009, by Special Police Establishment Lokayukta, Bhopal against him and another accused Under Section 13(1) (c)(d) read with Section 13(2) and Section 15 of the Prevention of Corruption Act, 1988 (for short 'the Act') and Sections 409, 218 and 120- B of the Indian Penal Code.

2. According to complaint submitted by Urmila Singh to Lokayukta she was Sarpanch of Gram Panchayat Dhatrawada, Janpad Panchayat, Jeerapur. During her tenure, she got constructed a Panchayat Bhawan, in which she spent Rs. 8200/- from her pocket. After evaluation of her work, the aforesaid amount was deposited in the bank account of Panchayat for being paid to her. After her tenure, accused Raghuveer Singh was elected as Sarpanch. The said amount of Rs. 8200/-was to be paid to Urmila Singh by Raghuveer Singh after withdrawing the same from the bank. The amount was deposited in the bank on 8.2.2001. On 9.2.2001, Raghuveer Singh withdrew Rs.8000/- from the bank, but did not pay the same to Urmila Singh. After about 8 months, on

22.11.2001, Raghuveer Singh redeposited the said amount in the bank. On 3-4 occasions, he withdrew the amount from the bank and after using the same redeposited it. Thus, Raghuveer Singh retained and converted the said amount to his personal use for a period of two years and nine months.

3. It is alleged that in the year 2001, a question was raised in the Assembly about misappropriation of the said amount by the then Sarpanch Raghuveer Singh and non payment of the said amount to Urmila Singh. According to Urmila Singh the then Collector submitted false reports in the Assembly that she did not furnish bills and vouchers about the expenses incurred by her, in the Panchayat and that Sarpanch Raghuveer Singh committed no error. According to complaint, Sarpanch Raghuveer Singh committed misappropriation of Rs. 8200/- for about 2 years and nine months and Collector J.N. Kansotiya gave a false report to Government with a view to save Raghuveer Singh from punishment. As such, J.N.Kansotiya committed offences under Sections 193, 420 and 297 of the Indian Penal Code and Section 13(l)(d) read with Section 13(2) of the Act. Raghuveer Singh committed offence under Section 406/409 of the Indian Penal Code.

4. The said complaint was made by UrmilaSingh,to Lokayukta on 21.11.2005. Legal Advisor, of Lokayukta, Bhopal sent the copy of the report to the then Collector, Rajgarh seeking a factual report about the allegations made against Sarpanch and Collector. Chief Executive Officer of District Panchayat, Rajgarh was directed to hold an enquiry and submit a report in this regard.

5. On a complaint sent by Chief Executive Officer, Janpad Panchayat, Sub Divisional Officer Khilchipur District Rajgarh passed an order on 22.12.2004 (Annexure A/6) rejecting the complaint on the ground that it was not established that Sarpanch Dhatrawada took Rs. 8200/- in his personal use and that Urmila Singh deliberately avoided receiving of money due to which Raghuveer Singh redeposited the money in the bank. However, Urmila Singh had received the payment.

6. Another enquiry report (Annexure A/12) dated 3.2.2007 was submitted by Panchayat Avam Samaj Shiksha Sanghatak, Janpad Panchayat, Jeerapur, wherein the Enquiry Officer found that Sarpanch Raghuveer Singh sent information to Urmila Singh to deposit voucher etc. after about 8-9 months of the withdrawal from-the bank. On 7.6.2007 petitioner submitted his opinion (Annexure A/13) to Collector, Rajgarh indicating that Sarpanch Raghuveer Singh had withdrawn Rs. 8000/- from the account of Janpad Panchayat on

9.2.2001, but since Urmila Singh did not make the concerned bills and vouchers available, the said amount was not paid to her and was redeposited in the bank on 22.11.2001. Thus, Raghuveer Singh retained the said amount with him for a period of 8 months and 12 days. He opined that the conclusion reached by Chief Executive Officer/Janpad Panchayat Inspector that Sarpanch Raghuveer Singh converted the money for his personal use, had no basis. According to Panchayat sub Rule 18 of M.P.Gram Panchayat (Accounts) Rules, 1999 (for short 'the Rules'), Sarpanch/Secretary was not entitled to retain cash in excess of Rs. 2500/-. The retention of more cash was an irregularity, but not necessarily a criminal act. In view of the above, he opined that the complaint against Sarpanch was devoid of any substance. However, petitioner mentioned in Annexure A/13 that on this subject, the opinion of Deputy Director Prosecution can be obtained.

7. On the basis of the complaint made by Smt. Urmila Singh and other material, Special Police Establishment, Bhopal registered First Information Report on 12.1.2009 against the then Sarpanch Raghuveer Singh and the petitioner Chief Executive Officer/Additional Collector, Rajgarh under Section 13(1)(c)(d) read with Section 13(2) and Section 15 of the Act and Sections 409, 218 and 120-B of the Indian Penal Code.

8. Learned counsel for the petitioner submitted that the complaint filed by Urmila Singh on the basis of which, first information report was registered does not disclose commission of any offence by the petitioner. The then Collector J.N.Kansotiya, against whom the complaint was made was not made accused in the first information report. Petitioner was not posted in District Rajgarh at the relevant time. The alleged incident took place between 9.2.2001 and 2.1.2004. Petitioner joined on the post of Chief Executive Officer Zila Panchayat Rajgarh in the month of January, 2007. He was unaware of any proceedings against Sarpanch Raghuveer Singh. Just on the letter issued by the then Collector and the memorandum/enquiry report dated 3.2.2007, being forwarded to him on 7.2.2007, he gave his opinion on 7.6. 2007 indicating that the act/conduct of Sarpanch Raghuweer Singh was contravention of provisions of Sub Rule 18 of the Rules, 1999. Since the petitioner was not a party to the original occurrence and he appeared in the scene only on 7.6.2007 by giving his opinion, he was not liable to be prosecuted. There were absolutely no allegations against the petitioner to make out ingredients of offences under Section 13(1)(c)(d) read with Section 13(2) and Section 15 of the Act as well as under Sections 409, 218 and 120-B of the Indian Penal Code. He placed

reliance on the Apex Court decision in the case of *State of M.P. Vs. Sheetla Sahai and others*-(2009) 8 SCC 617 and *State of Haryana Vs. Bhajan Lal*-1992 Supp.(1) SCC 335.

9. On the other hand learned Special Public Prosecutor submitted that there was specific allegation against the petitioner that he deliberately conspired with accused Raghuveer Singh and tried to save him from legal punishment by giving his opinion/report dated 7.6.2007 knowing it to be incorrect. He deliberately ignored the report of the Panchayat Inspector dated 5.2.2007, wherein Raghuveer Singh was found guilty.

10. Undisputedly, petitioner was made accused in the first information report on the basis of report/opinion which he tendered on 7.6.2007. Apart from it, no act connected with the alleged activity of Sarpanch Raghuveer Singh was alleged against him. The incident of alleged misappropriation had occurred between the years 2001-2004. It is true that an enquiry report by Panchayat Inspector was sent to him which indicated commission of criminal act by Raghuveer Singh, but petitioner formed his opinion that the act of Raghuveer Singh was an administrative irregularity which deserved to be dealt with under the provision of the Rules.

11. Before adverting to the accusation against; the petitioner under Section 13(l)(c) and 13(l)(d) read with Section 13(2) and Section 15 of the Act, is concerned, the reproduction of the said provisions are necessary:

> **Section 13. Criminal misconduct by a public servant-** (1) A public servant is said to commit the offence of criminal misconduct,-
>
> (a).....
>
> (b).....
>
> (c) if he dishonestly or fradulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do; or
>
> (d) if he,-
>
> (i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or
>
> (ii) by abusing his position as a public servant, obtains for himself or for any person any valuable thing or pecuniary advantage; or

(iii)while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or

(e).....

**Section 15: Punishment for attempt.**-Whoever attempts to commit an offence referred to in clause (c) or clause (d) of sub-section (1) of section 13 shall be punishable with imprisonment for a term which may extend to three years and with fine.

12. A bare perusal of the aforesaid provisions indicate that for a public servant being liable under the aforesaid provisions, it is necessary that he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or as a public servant allows any other person so to do or he by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage. Section 15 provides punishment for attempt to commit the offence referred to in clause (c) or clause (d) of sub-section (1) section 13.

13. On perusal of the accusation made against the petitioner in the First information report, it is not revealed that the petitioner committed any such act himself or conspired with Sarpanch Raghuveer Singh in the acts committed by him. On the same reasoning, commission of offence under Section 409 of the Indian Penal Code by him is not revealed.

14. Section 218 of the Indian Penal Code reads as under:

**Section 218. Public servant framing incorrect record or writing with intent to save person from punishment or property from forfeiture.**

"Whoever, being a public servant, and being as such public servant, charged with the preparation of any record or other writing, frames that record or writing in a manner which he knows to be incorrect, with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public or to any person, or with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or other charge to which it is liable by law, shall be punished

with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

15. Perusal of the above provision indicates that if public servant prepares or frames any record or writing in a manner which he knows to be incorrect, with intent to save, or knowing it to be likely that he will thereby save. any person .from legal punishment, he shall liable to be punished. In the instant case, it seems that petitioner gave his opinion that the act of Sarpanch Raghuveer Singh was contravention of the Rules and was an administrative irregularity instead of a criminal act. He further stated that the opinion of Deputy Director Prosecution could be obtained in this matter. From the said opinion, it cannot be held that petitioner prepared any record or writing with intent to save Raghuveer Singh from legal punishment.

16. Apart from it, opinion of one may differ from the opinion of any other person. Merely on the basis of difference of opinion or error in an opinion or the error of judgment, in the absence of- any malafide or criminal intention, a person cannot be made liable to be .punished. In the case of *Sheetla Sahai* (supra), the Apex Court affirmed the acquittal of respondent of the charge under Section 13(l)(d) read with Section 13(2) of the Act and Section 120-B of the Indian Penal Code on the ground that there might be an error of judgment, but no material was brought on record to show that respondent did so for causing any wrongful gain to themselves or to a third party or for causing wrongful loss to the State.

17. There might be divergent opinions of different Officers, but the decision to prosecute the offender was to be taken by the State/Prosecuting Agency. The opinion of petitioner could not have saved the offender if on investigation incriminating material was found against him. Admittedly petitioner was not concerned with the act of Sarpanch, Raghuveer Singh committed by him in the past when petitioner was no where in the picture.

18. In *R.P.Kapur Vs. State of Punjab*-AIR 1960 SC 866, Apex Court summarized some categories of cases where inherent power can and should be exercised to quash the proceedings:

(i) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;

(ii) where the allegations in the first information report or complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

19. When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained.

20. The scope of exercise of power under Section 482 of the Code of Criminal Procedure for quashing the First Information Report, complaint or a criminal proceeding was considered by the Apex Court in the decision *State of Haryana Vs. Bhajan Lal*- 1992 Supp (1) SCC 335. The illustrative categories indicated by the Court are as follows:

"102. (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code..

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the

provisions of the Code or the Act concerned (under .which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with malafides and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

21. It is true that the aforesaid power should be exercised sparingly in rarest of rare cases, but it has to be seen that judicial process should not be an instrument of oppression, or needless harassment.

22. Taking into consideration all the relevant facts and circumstances into consideration in the light of proposition laid down by the Apex Court, we find that the allegations made in the FIR against the petitioner, even they are taken at their face value and accepted in entirety do not prima facie constitute any offence or make out a case against him. Even the complaint made by Urmila Singh to Lokayukta did not disclose any criminal act on the part of petitioner. He came into picture only when an opinion was sought by the Collector from him in respect of the conduct of Sarpanch, Raghuveer Singh. Thus, from the First Information Report dated 12.1.2009 registered at Crime No. 3/2009 by Special Police Establishment Lokayukta, Bhopal, no commission of the offence by the petitioner is disclosed. As such, the said FIR so far as it relates to petitioner only deserves to be and is hereby quashed. It is, however, made clear that in case, during investigation if any other incriminating evidence or material appears against the petitioner, concerned police shall be at liberty to join the petitioner as accused again

23. Subject to liberty aforesaid, petition is allowed.

*Petition allowed.*

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**I.L.R. [2011] M. P., 2085**

**MISCELLANEOUS CRIMINAL CASE**

***Before Mr. Justice S.N. Aggarwal***

M.Cr.C. No.7937/2008 (Gwalior) decided on 7 July, 2011

DILIP ...Applicant

Vs.

STATE OF M.P. ...Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Sections 451 & 457 -*** **A Magistrate is competent to grant interim release of the vehicle seized by the authorities in a criminal case booked under the M.P. Excise Act or Wild Life (Protection) Act, 1972.** (Para 10)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 451 व 457 – म.प्र. उत्पाद शुल्क अधिनियम या वन्य जीव (संरक्षण) अधिनियम, 1972 के अंतर्गत दर्ज किये गये दाण्डिक मामले में मजिस्ट्रेट, प्राधिकारियों द्वारा जब्त वाहन की अंतरिम निर्मुक्ति प्रदान करने हेतु सक्षम है।

**Cases referred :**

2000(I) MPLJ 289, 2008(I) JT 364.

*Rajeev Upadhyay, G.S. Sharma, M.L. Yadav, Mukesh Sharma, R.V.S. Ghuraiya, Vijay Datt Sharma, Ashok Rathore, Yogesh Singhal, Praveen Mishra, S.S. Rahul, Tajuddin Khan, S.K. Tiwari, R.K.* Shrivastava for the applicant.

*T.C. Bansal, Vivek Khedkar,* P.P. for the non-applicant.

**ORDER**

**S.N. AGGARWAL, J. :**–A batch of these forty-three petitions is proposed to be disposed of by this common order because they all raise the same legal question for consideration and answer by the Court and that question is whether the Magistrate has power under sections 451 or 457 of the Code of Criminal Procedure, 1973, to grant interim release of the vehicle seized by the authorities either under the M.P. Excise Act, 1915 or under the Wild Life ( Protection ) Act, 1972 or under the Forest Act.

2. I would like to note that some of these petitions have been filed by the owners of the offending vehicles aggrieved by refusal of interim release of their vehicles by the Magistrate on the ground that he has no power or jurisdiction to grant interim release and some petitions have been filed by the State of Madhya Pradesh aggrieved by the orders of the Magistrate/

Revisional Court granting interim release of the offending vehicle to its owners on supurdari subject to certain conditions mentioned in the orders.

3. Whether the petitions have been filed by the vehicle owners or by the State raise only one question regarding competence of the Magistrate to grant interim release of vehicle to its owner during the pendency of trial against the claimant. The question that arises for consideration in these petitions has already been considered and answered by Full Bench of this Court in the case of *Madhukar Rao vs. State of Madhya Pradesh,* 2000 (1) MPLJ 289 wherein it was held as under :

> In order that the seized property may be treated as property of the State, there should be a finding by the competent court that vehicle seized has been used for committing an offence. The property seized under section 50 of the Wild Life (Protection) Act from an alleged offender cannot become property of the State under Clause (d) of section 39(1) unless there is a trial and a finding reached by the competent Court that the Property was used for committing an offence under the Act. Properties including vessel can be seized on accusation of commission of an offence under the Act and if the offender is available and is arrested, on proof of his guilt, the property seized from him and used in commission of the offence is liable to forfeiture to the State under section 51 (2) of the Act. Similarly every property seized and is held to have been used for committing an offence by competent Court, whether the offender is available or not for punishment, would be declared to be the property of the State by virtue of the provisions contained under section 39 (l)(d) of the Act. Section 39 contained in Chapter-V is sort of a residuary provision to make all properties seized and found to be used in commission of an offence as properties of the State Government irrespective of the fact whether they are liable to forfeiture at the conclusion of the trial under sub-section (2) of section 51 of the Act. A situation can be envisaged where the offence is proved to have been committed but the owner of the property or the offender himself is not available for prosecution. In that situation by virtue of Clause (d) of section 39 of the Act the property would become the property of the State without any requirement of passing an order of forfeiture in a trial by the Criminal Court in accordance with sub-section (2) of section 51 of the Act. Any property including vehicle

seized, on accusation or suspicion of commission of an offence under the Act can, on relevant grounds and circumstances, be released by the Magistrate pending trial in accordance with section 50(4) read with section 451 of the Code of Criminal Procedure, 1973. Mere seizure of any property including vehicle on the charge of commission of an offence would not make the property to be of the State Government under section 39(1) (d) of Act.

4. The above view on the point in issue taken by the Full Bench of this Court in the aforementioned case has been affirmed by the Hon'ble Supreme Court in an appeal preferred by the State against the judgment of the Full Bench vide its decision dated 09th January, 2008 in Civil Appeal No.5196/01. While affirming the view on the point in issue taken by the Full Bench of this Court, Hon'ble the Supreme Court has held that the Magistrate is fully competent to grant interim release of the offending vehicle to its owner during the pendency of criminal case in which the vehicle was seized against him. Said judgment of the Hon'ble Supreme Court dated 09th January, 2008 in Civil Appeal No.5196/01 is reported as case titled *State of M.P. and others vs. Madhukar Rao* in 2008(1) JT 364.

5. The question whether the Magistrate is competent to grant interim release of the vehicle seized under the Wild Life ( Protection ) Act, 1972( hereinafter, referred to as the "Act" for brevity), also came up for consideration before the Hon'ble Supreme Court yet in another case titled *State of U.P. And another vs. Lalloo Singh,* (2007)7 SCC 334 and in that case also it was held by the Hon'ble Supreme Court that the Magistrate is competent to grant interim release of the offending vehicle to its true owner during the pendency of criminal case in which the vehicle was seized.

6. Since, decision on the question that has been raised in these petitions stands already concluded by decision of the Full Bench in *Madhukar Rao's* case( supra ) and affirmed by the Hon'ble Supreme Court, as stated above, in the opinion of this Court, no further consideration of the said question is required by this Court.

7. However, at this stage, Shri Vivek Khedkar, learned Public Prosecutor appearing on behalf of the State contends that the provisions contained in M.P.Excise Act, 1915 are not pari materia with the provisions contained in the Wild Life Act and, therefore, he submits that as far as vehicles seized by the authorities under the M.P. Excise Act are concerned, they cannot be

released by the Magistrate in exercise of his power under sections 451 and 457 of Cr.P.C. This argument is of no consequence because it is not in dispute before this Court that the person apprehended for any violation under the M.P.Excise Act has to be tried by the Magistrate. Section 58 of the M.P. Excise Act, 1915 is relevant and is extracted below :

> **"58. Arrests, searches etc., how to be made.** - Save as in this Act otherwise expressly provided the provisions of the Code of Criminal Procedure, 1973 (No.2 of 1974) relating to arrest, detentions in custody, searches, summons, warrants of arrests, search warrants, the production of persons arrested, and the disposal of things seized, shall apply, as far as may be, to all action taken in these respects under this Act."

8. It is apparent on a plain reading of the above statutory provision contained in section 58 of the M.P.Excise Act,1915 that the provisions of Code of Criminal Procedure, 1973 are applicable to matters relating to arrest, detention, search and seizure, summons, warrants etc for cases under the M.P.Excise Act,1915 in the same manner as they are applicable under the Wild Life Act.

9. A similar argument in regard to applicability of the provisions of the Code of Criminal Procedure, 1973 to cases under the Wild Life Act was also raised before the Hon'ble Supreme Court in *Madhukar Rao's case* ( supra ) and the Hon'ble Supreme Court after consideration of the said argument has held as under :

> " The scheme of Section 50 of the Wild Life Act makes it abundantly clear that a police officer is also empowered to investigate the offences and search and seize the offending articles. For trial of offences, the Code of Criminal Procedure is required to be followed and for that there is no other specific provision to the contrary. The special procedure prescribed is limited for taking cognizance of the offence as well as powers are given to other officers mentioned in Section 50 for inspection, arrest, search and seizure as well as of recording statement. The power to compound offences is also conferred under section 54. Section 51 provides for penalties which would indicate that certain offences are cognizable offences meaning thereby a police officer can arrest without warrant. Sub-section (5) of Section 51 provides that nothing contained in Section

360 of the Code of Crimial Procedure or in the Probation of Offenders Act, 1958 shall apply to a person convicted of an offence with respect to hunting in a sanctuary or a national park or of an offence against any provision of Chapter 5-A unless such person is under 18 years of age. The aforesaid specific provisions are contrary to the provisions contained in the Code of Criminal Procedure and that would prevail during the trial. However, from this, it cannot be said that operation of rest of the provisions of the Code of Criminal Procedure are excluded."

10. Since the provisions of the Code of Criminal Procedure, 1973 are held applicable to cases tried under the Wild Life Act, by no stretch of imagination, it may be said that the Magistrate who is competent to try a criminal case under the M.P.Excise Act will be incompetent to grant interim release of the offending vehicle even if the merits of the case so warrant. Hence, this Court holds that the Magistrate is competent to grant interim release of the vehicle even in Excise cases during the pendency of the trial of such cases, as per merits of each case.

11. In view of the foregoing and having regard to the judgment of the Full Bench of this Court in *Madhukar Rao's case* (supra) as affirmed by the Hon'ble Supreme Court, the view taken by the Trial Court/Revisional Court that the Magistrate is not competent to grant interim release of the vehicle on supurdari to its owner in cases under the M.P. Excise Act or Wild Life Act is unsustainable and needs to be set aside. Petitions filed by the State against orders of Trial Court/Revisional Court granting interim release of the vehicle to its owners on supurdari subject to certain conditions need to be dismissed because the orders in those cases, impugned by the State, are in accordance with law as per judgment of the Full Bench in *Madhukar Rao's case* (supra) affirmed by the Hon'ble Supreme Court.

12. In the facts and circumstances of the case and for the reasons given hereinabove, all these petitions are disposed of with the following directions :

(1) The petitions filed by the owners of the vehicles against orders declining them interim release of the vehicles by the Magistrate/Revisional Court are allowed. Impugned orders in all such cases are set aside.

(2) The petitions filed by the State against the orders of the Magistrate/Revisional Court granting interim release of the offending vehicle to its owner on supurdari are dismissed.

(3) The cases of the vehicle owners in those petitions, who vide orders impugned in these petitions were declined interim custody of their vehicles, are remanded back to the concerned Trial Court for passing fresh orders on their applications for interim release of their vehicles filed either under section 451 or section 457 Cr.P.c. on merits of each case without being influenced by the observations of this Court regarding his competence to grant interim release of the vehicles. It shall be open to the concerned Magistrate either to grant or not to grant interim custody of the vehicle, but that shall be on objective assessment of the relative merits of each case. The Magistrate shall pass a speaking order spelling out the reasons for grant or non-grant of interim custody of vehicle, as expeditiously as possible, but not later than three months of receipt of certified copy of this order. Needless to mention that the Magistrate shall give a hearing on application under section 451/457 Cr.P.C. to both the parties before passing his reasoned order.

(4)In case, it is found by the Magistrate at fresh hearing of the application under section 451/457 that the finding of guilt has already been recorded against the owner of the vehicle/ accused person in the main case and the said conviction has attained finality, then the Magistrate shall not grant custody of the vehicle, what to speak of interim custody.

(5)The Magistrate shall be entitled to put such conditions as he may consider necessary for interim release of the vehicle on supurdari and may also take an undertaking from the vehicle owners that they shall abide by those conditions till final disposal of main criminal case.

13. All these petitions stand disposed of in terms referred hereinabove.

14. A copy of this order be kept in the files of all the cases which have been disposed of by this common order.

*Petition disposed of.*

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