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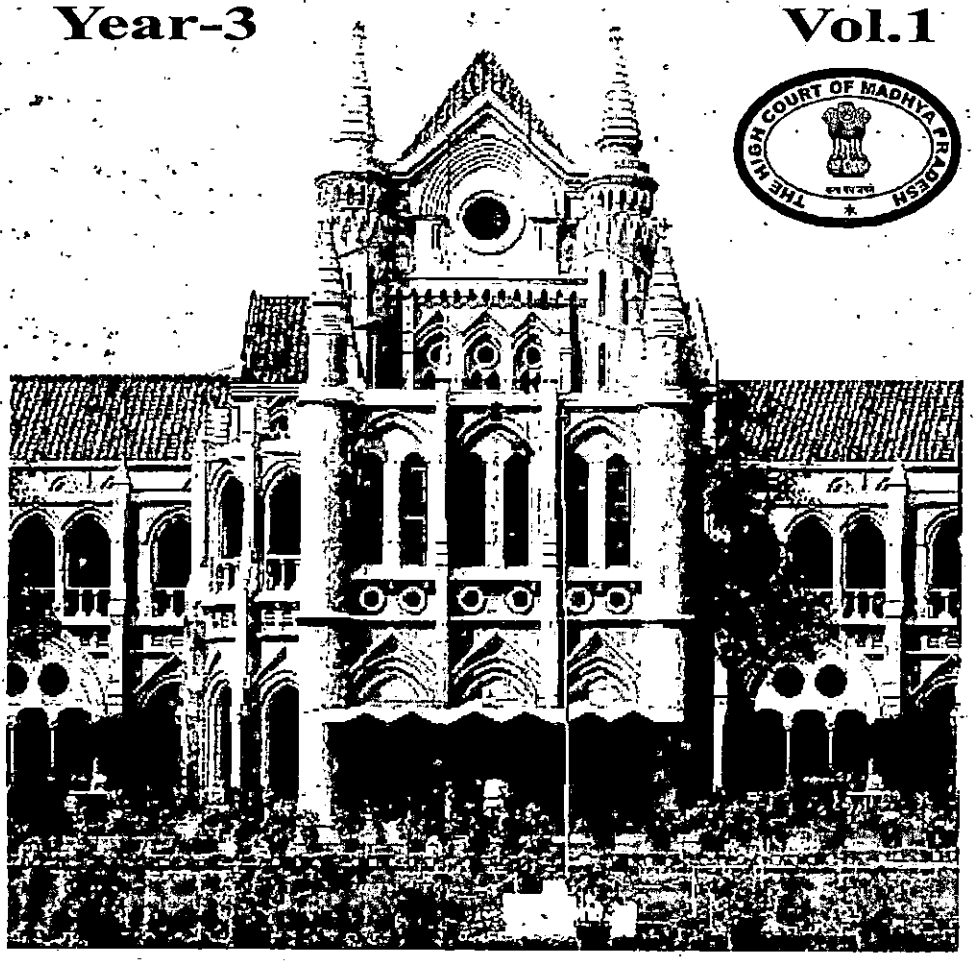
THE HIGH COURT OF MADHYA PRADESH

Year-3 Vol.1



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2011

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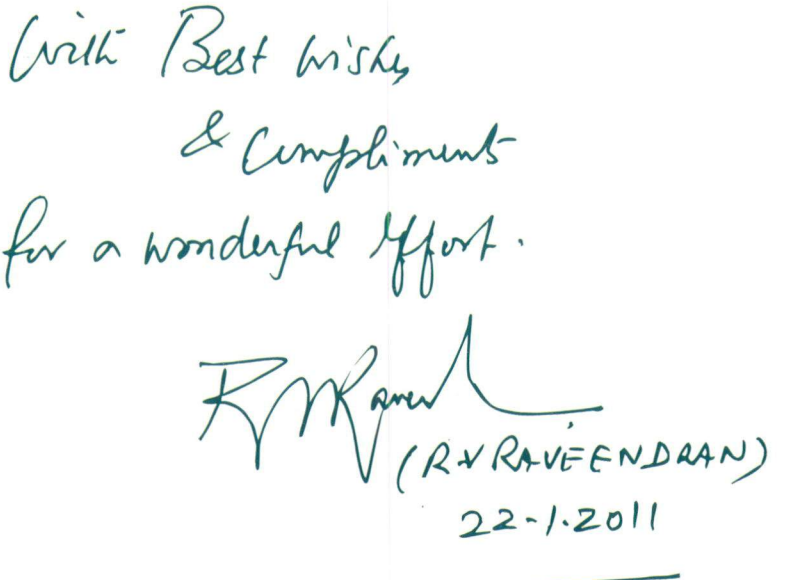
Hon'ble Shri Justice R.V. Raveendran, Judge, Supreme Court of India, releases First Volume of 50 years' Digest of ILR M.P. Series in the august gathering of Hon'ble Judges of M.P. High Court on 22-01-2011, at *Jaal Sabhagar*, Indore.

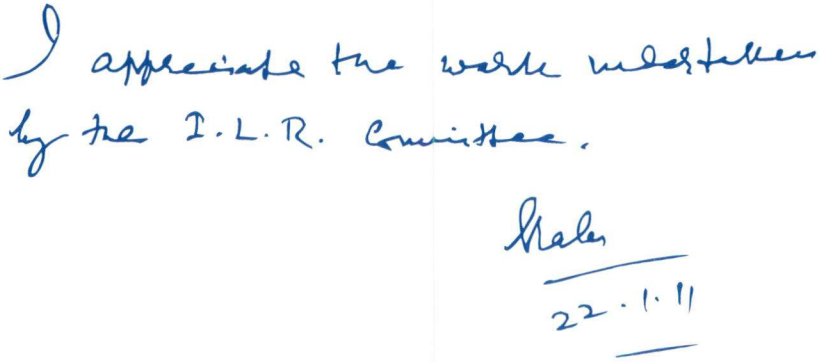
Hon'ble Shri Justice S.R. Alam, Chief Justice of Madhya Pradesh High Court, Hon,ble Shri Justice K.K. Lahoti, Administrative Judge of Madhya Pradesh High Court, Jabalpur and Hon'ble Shri Justice S.S. Kemkar, Administrative Judge of Indore Bench also graced the occasion. Shri Awdhesh Kumar Shrivastava, Principal Registrar (ILR) and Shri D.K. Mishra, Assistant Editor (ILR) are also seen present on this auspicious occasion.

His Lordship Hon'ble Shri Justice R.V. Raveendran, expressed his views as under:-



"With Best wishes & Compliments for a wonderful effort."

Hon'ble Shri Justice S.R. Alam, Chief Justice of Madhya Pradesh High Court, expressed his views as under :-



"I appreciate the work undertaken by the ILR Committee"

APPOINTMENT TO THE MADHYA PRADESH HIGH COURT

We congratulate Shri Giriraj Das Saxena on his appointment as Judge of the High Court of Madhya Pradesh. Shri Giriraj Das Saxena took oath of the High Office on 03-01-2011.

Justice Giriraj Das Saxena

Born on April 02, 1952 at Mandsaur in Advocate Family of Shri. Babu Bachchan Lalji Saxena, renowned Advocate of his time. Completed schooling and collegiate education at Mandsaur. Passed B.A. Degree in the year1970 from Government Post Graduate College, Mandsaur. Obtained LLB Degree from Jawahar Lal Nehru Law College, Mandsaur. Joined Bar on November 19, 1973 and started practice on Civil side at Mandsaur. Joined Judicial Service as Civil Judge Class-II on 18-08-1979 and worked at Ratlam. Promoted as Civil Judge Class-I on April 13, 1987 and worked as Chief Judicial Magistrate Jhabua & Indore. Was promoted to Higher Judicial Service on March 03, 1992 and worked as ADJ at Alirajpur, Gwalior, & Bhopal. Was granted Selection grade on May 08, 1999 and as Special Judge S.C./S.T. (Prevention of Atrocities) Act was posted at Bhopal, Shahdol, and Sehore. Was granted Super Time Scale on February 26, 2006. Worked as District Judge Narsinghpur, Dewas and as District Judge (Inspection & Vigilance) Indore. Was working as District & Sessions Judge, Dhar, before elevation.

Elevated as Additional Judge of the High Court of Madhya Pradesh on 03.01.2011.

We wish Shri Justice Giriraj Das Saxena, a successful tenure on the Bench.

APPOINTMENT TO THE MADHYA PRADESH HIGH COURT

We congratulate Shri Tarun Kumar Kaushal on his appointment as Judge of the High Court of Madhya Pradesh. Shri Tarun Kumar Kaushal took oath of the High Office on 03.01.2011.

Justice Tarun Kumar Kaushal

Born on Sept. 08, 1953 in Bombay. Son of Late Shri Uddhav Kumar Kaushal, Gwalior based poet and Freedom Fighter. Completed High School in the year 1968 from DAV Gwalior, B.Sc. in the year 1974 from Govt. Science College, Gwalior and LLB in the year 1977 from Madhav College, Gwalior. Won awards in debate and Moot Court competitions. Started practice in criminal side in High Court, in the year 1978. Joined Judical Service on 20.08.1979. Worked as Civil Judge Class II at Bhind, Morena, Sardarpur and Sanwer and was confirmed as Civil Judge in the year 1983. Was posted as Civil Judge Class-I at Ujjain in the year 1987 and as ACJM at Indore in the year 1990. Worked as ADJ at Dhar, Mandleshwar and Khargone from the year 1992 to 1999. Confirmed as District Judge in Higher Judicial Services on 04-10-1997. Granted Selection Grade Scale on 08-05-1999. Worked as President, Distt. Consumer Forum, Guna, in the year 1999, and as Addl. Welfare Commissioner, Bhopal Gas victims, Bhopal from the year 2000 to 2005. Was posted as Distt. & Sessions Judge Khandwa in the year 2005. Was granted Super Time Scale on 26-02-2006.

Worked in the Madhya Pradesh High Court Registry at main seat Jabalpur, from the year 2007 in various capacities, as O.S.D., as Principal Registrar (Inspection & Vigilance) and was working as Registrar General of the High Court of M.P. before elevation.

Elevated as Additional Judge of the High Court of Madhya Pradesh on 03.01.2011.

We wish Shri Justice Tarun Kumar Kaushal, a successful tenure on the Bench.

OVATION TO NEW JUDGES

Shri Kumaresh Pathak, Dy. Advocate General of M. P., while felicitating the new Judges, said :–

While extending Your Lordships a very hearty welcome it gives me immense pleasure that today we are getting two new judges, Hon'ble Shri Justice Giriraj Das Saxena and Hon'ble Shri Justice Tarun Kumar Kaushal.

Both the new judges Hon'ble Shri Justice Giriraj Das Saxena and Hon'ble Shri Justice Tarun Kumar Kaushal who are adorning the office today hail from the lower judiciary and they have deep sense of administration and delivery of justice.

My Lord Hon'ble Shri Justice Giriraj Das Saxena was born on 2/4/1952 and after his schooling he acquired Bachelor Degree in Arts and thereafter Law. He joined as Civil Judge Class II in the year 1979 and was confirmed as such w.e.f. 29/4/1983. My Lord Hon'ble Shri Justice Giriraj Das Saxena was promoted as Distt. And Sessions Judge w.e.f. 9/4/1997 and now today he is adorning the office as a Judge of this Hon'ble High Court. During his tenure as a Judge in the Lower Judiciary he had been appointed as Special Judge of Special Courts established under various enactments.

My Lord Hon'ble Shri Justice Tarun Kumar Kaushal was born on 8/9/1953 and after acquiring Bachelor Degree in Science he acquired the degree of LLB and then joined as Civil Judge Class II in the year 1979 and was confirmed as Civil Judge w.e.f. 29/4/1983. My Lord Hon'ble Shri Justice Tarun Kumar Kaushal was promoted as Distt. And Sessions Judge w.e.f. 4/10/1997 and thus he is serving the judiciary since beginning. During his tenure as a Judge in the Lower Judiciary he was also appointed as Special Judge of Special Courts established under various enactments.

Both the new judges who are adoring the office of a Judge in this Hon'ble Court have a long experience of administration of justice. Particularly, Justice Tarun Kumar Kaushal is acquainted with the administration of this High Court who prior to his being elevated as Judge of this Hon'ble Court had been holding the office of Registrar General of this Hon'ble High Court

Now, both these new judges are holding the responsibilities of deciding the fate and fortunes of litigants, and I feel that they will be successful in their onerous task of dispensation of justice. With their deep

sense and commitment towards the judiciary as also with the sense of realization of problems and sufferings of common man they will certainly give due justice to the needy persons without any fear and favour.

My Lord, I being the Dy. Advocate General, representing the State of MP, assure that the Law Officers of the State will extend their full assistance in the discharge of your arduous duties.

I, on behalf of the Advocate General, State of Madhya Pradesh, Law Officers and my own behalf welcome your Lordships and wish successful tenure as Judges of this Hon'ble Court.

****

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

I feel it to be my proud privilege when I stand here on behalf of the prestigious M.P. High Court Bar Association to welcome My Lord Justice Shri Giriraj Das Saxena and Hon'ble Justice Shri Tarun Kumar Kaushal on their appointment as Additional Judges of this glorious High Court.

This is a time where a feeling of jubilation is surrounding My Lords. Amidst this moment of joy and happiness, a conscious feeling of responsibility and duty is also surrounding within the mind of My Lords. The experience of My Lords with the judiciary is a long one but the new assignment puts a challenge before My Lords to preserve and protect the Constitution of India and the rule of law. It was 26th of November, 1949 that the Constituent Assembly deriving its power from the people of independent India in their aggregate capacity of its sovereign unfolded and delivered our Constitution. The Constitution reflects the will and aspiration of-'We the People of India'.

I am conscious that the occasion I am addressing is the ovation of My Lords which literary means enthusiastic display of appreciation from an audience, but I feel it to be my duty that the expectation of the Bar should also be put forth at this juncture. We feel that it is only the independent judiciary which can protect our Constitution given by 'We the People'. To preserve the rule of law is also the domain of judiciary. Such a hope was expressed by Justice Sri Kania at the inaugural ceremony of the Supreme Court of India on 28.01.1950 who said:- "We hope and trust that the Courts will maintain the high traditions of the judiciary and perform its duties without fear and favour. If we succeed in doing so, we shall contribute our share to the progress of our republic and render service

to this country which none else can render". The hope so expressed in 1950 is still to be achieved.

The reason why I say so is that never before was there a criticism of the judicial system in the manner as it is being done today. We see that the judiciary has become more innovative on the one hand while on the other hand it is under the clouts which is shaking the confidence of We the People who gave this Constitution. The concept of the judicial accountability is indicative of the fear and distrust prevailing in the minds of 'We the People.'

It is the expectation of the Bar that the judicial Institution is required to wipe out the fear and distrust prevailing in the minds of the People.

I feel that it is not only the duty of the Bench alone to repose the shattered confidence of the public in the judicial institution, but it is also the pious duty of the Bar to stand together in restoring the faith and belief in the judicial institution. It is the time when the Bench and the Bar are required to understand the duties without exercising the Right of Might.

My Lord Justice Shri Giriraj Das Saxena and My Lord Justice Tarun Kumar Kaushal have adorned the high office as Judge of this court and the Bar believes that My Lord fulfill the expectations in respect to the appointment of Judges, as was expressed by the then Chief Justice of India Shri R.C. Lahoti in his speech on the occasion of Law Day in 2004. He expressed that, "the criteria for appointment of a Judge whether from the Bar or from the service should be character, merit and integrity". He also observed that, "the procedure for screening the Judges for appointment must ensure that no wrong person passes through the filter". The Bar is hopeful that My Lords during their tenure as Judges of this court would display their excellence, merit, character and integrity.

It is said that -"Bar is the Judge of Judges" I may put it in a way that the Bar is the best critique of the Bench .In order to be apprised of the critical evaluation ,it is necessary that the relation between the Bench and the Bar should be very healthy and strong. It is the duty of the members of the Bar to be prepared with their cases and vice-versa, it is expected that the Judge would give a patient hearing and would be humble towards the Bar. I think that the cordial relation between the Bench and Bar would act as a catalyst in strengthening this institution. The outside forces will be afraid of lowering down the prestige and glory of the Indian Judicial System. I believe that the Bar is a shield and a protector for the Bench against unscrupulous forces.

On this occasion I expect that the junior lawyers would be encouraged by My Lords so as to make them at ease when they appear to argue their cases.

I assure My Lords the Bar would extend all its cooperation in making you discharge your duties. I also assure, My Lords that the Bar would always stand as a live link between the expectations of the people and the Bench.

With these words I on behalf of Madhya Pradesh High Court Bar Association and also on my behalf once again warmly welcome My Lord Justice Shri Giriraj Das Saxena and My Lord Justice Shri Tarun Kumar Kaushal and hope for a bright and a successful tenure with all the goodness of the almighty to be showered upon them.

****

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

I seem it to be my proud privilege to offer felicitatings to your Lordships on your appointment as Judges of this High Court. We welcome Hon'ble Shri Justice GIRIRAJ DAS SAXENA and Hon'ble Shri Justice TARUN KUMAR KAUSHAL.

Perhaps it is for the first time that elevation to the Bench is being made on the first working day of the New Year. It is indeed a good omen to start the New Year 2011 with utmost enthusiasm, joy and happiness.

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

My Lords, this Bar is known for its high traditions. It is full of illustrious seniors and energetic bright young members who are extremely respectful and courteous. We the members of the Bar, have great expectations from your Lordships. My Lords will bring to your task a wealth of experience, the vast knowledge of law, an almost inexhaustible fund of patience, tolerance and compassion and above all what lawyers always appreciate in a Judge, unfailing courtesy, affection and regard to the Bar.

My Lords, the people of India are standing on a very critical point. Every Government in India is involved in one or the other scam; the public is being cheated; corruption has become the order of the day; Image of the Judiciary has also been eclipsed. It appears as if the very system of administration has been shaken. My Lords, it is the right time when we all who are concerned with the administration of justice should seriously introspect rise to the occasion and help the system to function and maintain the age old prestigious and impeccable status of the judiciary and strengthen the faith of the public on the system.

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

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

****

Shri Rameshwar Neekhra, Chairman, M. P. State Bar Council, while felicitating the new Judges, said :–

आज के इस विशिष्ट अवसर पर मध्य प्रदेश उच्च न्यायालय में नवनियुक्त न्यायाधिपति माननीय श्री जस्टिस जी. डी. सक्सेना एवं माननीय श्री जस्टिस टी. के. कौशल जी का मैं मध्य प्रदेश राज्य अधिवक्ता परिषद की ओर से हार्दिक स्वागत करता हूँ एवं उनके पदभार ग्रहण करने के इन क्षणों में उनके सफल कार्यकाल की मंगलकामना करता हूं।

माननीय श्री जस्टिस जी. डी. सक्सेना–

आपने प्रदेश की न्यायिक सेवाओं में वर्ष 1979 में पदार्पण किया और तब से निरंतर न्यायिक सेवाओं के विभिन्न पदों पर आपने सफलतापूर्वक अपने दायित्वों का निर्वाह किया। इस दीर्घ अवधि में आपने रतलाम, डबरा, महू, धार, मनावर, झाबुआ, इंदौर, अलीराजपुर, ग्वालियर, भोपाल, शहडोल, सीहोर, नरसिंहपुर, देवास और धार में सिविल जज वर्ग–2 सिविल जज, एडीजे एवं सत्र न्यायाधीश के रुप में अपनी सेवाएं दी। आपने इंदौर में डी. जे. विजिलेंस एवं डी. जे. (इंस्पेक्शन एंड विजिलेंस) के दायित्वों का भी सफलतापूर्वक निर्वाह किया एवं उच्च न्यायालय में नियुक्ति के पूर्व आप जिला धार में जिला एवं सत्र न्यायाधीश के रुप में पदस्थ थे।

आपका दीर्घ अनुभव, विधि का गहन ज्ञान निश्चित ही प्रदेश के पक्षकारों के लिये लाभकारी प्रमाणित होगा तथा शीघ्र और सुलभ न्याय का मार्ग भी आप प्रशस्त करेंगे, इस हेतु मैं आशांवित हूं।

माननीय श्री जस्टिस टी. के. कौशल–

आपने वर्ष 1979 में प्रदेश की न्यायिक सेवाओं में सिविल जज वर्ग–2 के रुप में पदार्पण किया और तब से निरंतर आप भिंड, मुरैना, सरदारपुर, सांवेर में सिविल जज वर्ग–2

के रुप में उज्जैन में सिविल जज वर्ग-1 के रुप में इंदौर में ए.सी.जे.एम के रुप में धार, मंडलेश्वर, खरगौन में ए.डी.जे. के रुप में, गुना में डिस्ट्रिक्ट कंज्यूमर फोरम के अध्यक्ष के रुप में, भोपाल में एडीशनल वेलफेयर कमिश्नर भोपाल (गैस विक्टिमस्) के पद पर, खंडवा में जिला एवं सत्र न्यायाधीश के रुप में अपनी सेवाएं दी हैं।

यह जबलपुर का सौभाग्य रहा है कि वर्ष 2007 से आप मध्य प्रदेश उच्च न्यायालय की रजिस्ट्री में आफिसर्स ऑन स्पेशल ड्यूटी तथा बाद में अतिरिक्त रजिस्ट्रार, (विजिलेंस), रजिस्ट्रार (विजिलेंस-2), रजिस्ट्रार, (इंस्पेक्शन एवं विजिलेंस) प्रिंसिपल रजिस्ट्रार, (इंस्पेक्शन एवं विजिलेंस) तथा दिनांक 1 मार्च 2010 से अब तक रजिस्ट्रार जनरल जैसे महत्वपूर्ण पद को गरिमा प्रदान कर रहे थे।

आपके दीर्घ अनुभव, विलक्षण प्रतिभा, मृदुल व्यवहार से प्रदेश के पक्षकारगण तो लाभांवित होंगे ही साथ ही अभिभाषक संघों एवं अधिवक्ताओं की समस्याओं के निदान में भी आपका महत्वपूर्ण योगदान होगा, इस हेतु मैं आशांवित हूं।

निश्चित ही न्यायिक सेवाओं में गहरा अनुभव रखने वाले आप द्वय न्याय मनीषियों को अधीनस्थ न्यायालयों में होने वाली व्यवहारिक कठिनाईयों, वहां व्याप्त समस्याओं और उनके निदान के लिये क्या किया जाना आवश्यक है इसका गहरा अनुभव है और आपके इस प्रदेश के उच्च न्यायालय के न्यायाधिपति के रुप में कार्य करने के इस अवसर से अनेक समस्याओं का निदान सफलतापूर्वक होगा, इस हेतु मैं आशांवित हूं।

न्यायदान की प्रक्रिया अपने मौलिक स्वरुप से आगे बढ़कर लोक अदालतों, मीडियेशन, कंशीलियेशन जैसे मार्गों में भी नई ऊंचाईयों को स्पर्श कर रही है तथा आमजन की अपेक्षाओं के अनुरुप न्याय शीघ्र, सस्ता, सुलभ एवं सभी पक्षों को संतोष देने वाला हो, इस हेतु भी हमारे प्रदेश का माननीय उच्च न्यायालय पूरी तरह गंभीर और गतिशील है। आपका अनुभव एवं आपकी मेधा इस क्षेत्र में भी महत्वपूर्ण योगदान प्रदान करेगा, इस हेतु भी हम सभी आशांवित हैं।

मैं इन्ही भावनाओं के साथ आपके सफल कार्यकाल की मंगलकामना करता हूँ।

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Shri Radhelal Gupta, Assistant Solicitor General of India, while felicitating the new Judges, said :–

Hon'ble Chief Justice in this New Year 2011 has given us the two legal luminaries who are gracing the High Office of High Court as the greeting of the New Year. These legal luminaries are Hon'ble Shri Justice Giriraj Das Saxena and Hon'ble Shri Justice Tarun Kumar Kaushal. So let me take the advantage of this occasion to extend the greetings of New Year to entire Bench and Bar. May "I wish you all Happy New Year."

Before introducing Your Lordship, I offer my heartiest welcome and congratulate Your Lordship for adorning the High Office of Hon'ble Judge, of High Court of MP.

I am thankful to Hon'ble Shri Justice S.Rafat Alam the Chief Justice of High Court of MP and Hon'ble Judges of Collegium for recommending such a worthy appointments.

This galaxy of judicial stall wards has entered in this province of Justice Delivery in the year 1987 and 1979. These two legal luminaries were successful in selection process and they never looked behind and continued to proceed successfully to the present stage of elevation to the highest peak of state judiciary.

My Lord Shri Giriraj Das Saxena

My Lord joined the judicial services as Civil Judge Class I in the year 1987 and since then in his service journey has graced various important Offices in the Judiciary of Madhya Pradesh. Apart from this My Lord has been Special Judge for cases under SC/ ST at various district places of the State. My Lord before gracing the high office of Hon'ble High Court of MP has graced the Office of District and Session Judge. I am very much hopeful that with the help of Your Lordships great experience and wisdom; Your Lordship shall set mile stones in the history of judicial administration of this great temple of Justice.

My Lord Tarun Kumar Kaushal

My Lord has joined the Judicial Services in the year 1979. With your Lordships great knowledge, experience and deep knowledge of law your Lordship has been promoted to various important Office of the Judiciary of High Court like District Consumer Forum and Additional Welfare Commissioner, Bhopal Gas victims and has also graced many important Office of Judiciary of the State. Today, in the history of this Hon'ble High Court once again a new chapter is about to begin, when two highly experienced judges have adorned the oath of Hon'ble Judge.

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

At last but not the least, I once again on behalf of Government of India, law officers of the Central Government and my own behalf, I sincerely offer my whole hearted welcome to the noble temple of justice and best wishes to My Lord Shri Giriraj Das Saxena and My Lord Shri Tarun Kumar Kaushal.

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

On behalf of the Senior Advocates' Council and on my own behalf I welcome both of your lordships Shri Giriraj Das Saxena and Shri, Tarun Kumar on your appointment as Judges of Madhya Pradesh High Court.

The legal work that you have done while being in the Subordinate Judicial Services is completely different.

As High Court Judges your Lordships ought to have a larger & wider vision.

Your Lordship's court should not remain as court of law but it ought to be court of justice also.

We wish both of your lordship's a happy, successful carrier.

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Reply to Ovation by Hon'ble Mr. Justice Giriraj Das Saxena :–

I congratulate for new year commenced the day before yesterday & I wish a happy, prosperous, joyful, New Year to you all.

I bow down before the lotus feet of the almighty Lord Krishna for His divine blessings by conferring this august pious responsibility on me.

For a judicial officer ,elevation to the Bench of this Honourable Court is perhaps the incarnation of his highest dream . This is an honour not to me alone but to the services from which I have arisen.

I am grateful for kind words spoken about me , I am aware that I do not well deserve the words of praise spoken about me , but I shall endeavour to come up to them and justify the all sentiments expressed about me.

I must express heartiest gratitude to My Lord Mr. Sayed Rafat Alam Sb. Chief Justice of this court., and Honourable members of the Collegium Honorable Shri. Justice Arun Kumarji Mishra Former Administrative Judge, now Chief Justice High Court of Rajasthan and Honourable Shri. Justice S. L .Kochar Sb. Former Judge of this court ,for considering me for appointment to this august chair. I express my heartiest gratitude to my lord and all Honourable Judges of this court for their blessings and good wishes and having full confidence in me. I am especially grateful to Honourable Shri. Justice H.S. Kapadia Sahib Chief Justice of India and Honourable Members of the Collegium and Judges of Supreme Court. I am thankfull to all Honourable Judges of Supreme Court and Judges of

this Honourable court and all my District Judges under whom I worked for their able guidance and I could develop my legal acumen .

I am thankful to my senior Shri.U.N. Bhachawat who was elevated to this Honourable Court, and Shri. M. L. Bhachawat Sahib of Mandsaur. I also thanks to all Senior Members of District Bar Association Mandsaur to set up my earlier carrier.

I must pay homage to my Grand father Late Shri. Babu Bachchan Lalji Vakil of Mandsaur who was a very renowned and respected Advocate of his time . He was a man of principles of truth, simplicity and hard work. I was brought up by my Grand Father. It is my pious duty to pay the homage to my respected father Shri. Vallabh Das Saxena who left me in my infant age. In my early age I was brought up by mother ,an idol of simplicity and principles of religious ethics. She was my first teacher of my life. I must hearty pay respect to her. The values nurtured by my grand Parents, my mother and my teachers have throughout remained the strength of my life and I pray the Almighty to give me courage to fulfill the dreams of my Grand father and mother.

I must pay humble tribute to my ancestors. I also pay my respect to my maternal uncle Shri. N. B. S. Moriya my father-in Law Shri A. P. Muwar. I remember all my teachers who developed quality of high human values and hard working in me. I also thanks for good wished to my all brothers, sisters, brother-in laws. I extend my thanks to my wife Smt. Sangeeta Saxena , by her luck and cooperation, help, wishes and prayers for me that I could achieve this position. I am also thankfull to my daughters Smt. Padmaja & Smt Tarnija ,my sons in-law, Shri. Umang & Shri. Sudhir Nigam and my son Padmnabh and Mrs. Reena .

I express my humble gratitude to my learned colleagues brother judges and members of Registry who are my well wishers and worked with me and extended their fullest co-operation in discharging judicial duties. I am also thankful to all subordinate staff those co-operated me a lot in discharging my judicial capacity.

What I have achieved from my service career might be a matter of satisfaction for me at this moment, but now I feel that Your Lordship had administered the pious oath under Constitution , within the limits there is something more to be achieved . With the co-operation of the Honorable members of Bar, and having good learning with the association of all my

senior Brothers, I would fully justify the confidence reposed in me by My Lord the Chief Justice.

I extremely thanks to all those personalities and persons who extended their blessings and well wishes to me. I am again thankful to all those well wishers who have came here to bless me by attending this graceful function .

"JAI HIND"

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Reply to Ovation by Hon'ble Mr. Justice T. K. Kaushal :–

First of all I take this opportunity to express my deep and sincere gratitude and thanks to respected Speakers, who blessed and enriched me with their nice thoughts and kind words. I will try my level best to live upto the expressions and expectations of the House.

Almighty God has showered his blessings and grace on me so this day has come in my life. I pray to Almighty God to continue to have your such support and co-operation in future also.

Let me say something more about me. My father late Shri Uddhav Kumar Kaushal, a Poet and Freedom Fighter, who was symbol of smile and simplicity personified. His lyrics have always been source of inspiration for me to go ahead straight forward like his song from film "HUMLOG"- "Gaye Chala ja ek din thera bhi jamana aayega" and "Satyameva Jayate aage badho Kahte" sung by Lata Mangeshkar in 1971 in Ramleela Maidaan on Bangladesh Victory occasion. My mother late Smt. Tara Kaushal was strong supporter of my father in freedom movement. My father left me in 1984 and my mother left me alone for heavenly abode in 2007. I salute their divine presence here today.

It was a conspiracy of events which placed me leaving film direction course in Pune Film Institute mid-way to join LL.B. Classes at Gwalior and simultaneously join the office of prestigious and famous Advocate Shri J.P. Gupta in the year 1974. I worked and: practiced in the High Court under the able guidance and company of, Hon. Shri Justice Rajeev Gupta in 1978-1979. I learnt there what a lawyer should be.

On 20th August, 1979, I joined the services as Civil Judge, Class-II in Bhind. Hon. Shri Justice W.A. Shah imparted the training, there I learnt

what a Judicial Officer should be. I remember my posting of Morena, Sardarpur, Sanwer, Ujjain, Indore, Dhar, Mandleshwar, Khargone, Guna, Bhopal, Khandwa and Jabalpur. I enjoyed posting at Ujjain from 1987 to 1990 for disposal of Food Adulteration cases and for kind support and guidance of Hon'ble Shri Justice V.K. Agrawal the then District Judge, Ujjain and posting of Indore from 1990 to 1992 for disposal of cases of Income Tax, Central Excise and cases relating to Economic Offences. These gave me great job satisfaction,

In the year 2000-2005, I worked as Additional Registrar, Bhopal Gas Victim particularly for disbursement of pro-rata compensation of Rs.1500 crores amongst six lacs Gas victims within a time frame. The action plan was approved and monitored by the Apex Court. Whole work was completed under the control and guidance of Hon. Shri Justice Deepak Verma, Judge, Supreme Court of India the then Welfare Commissioner, Bhopal Gas Victims.

Before completing my two years' tenure as District Judge, Khandwa, I found an opportunity to work in the Registry at Main Seat Jabalpur March 2007 onwards in various capacities as O.S.D., Registrar (Vigilance) and also enjoyed the working of Examination Cell. The then Hon'ble the Chief Justice, Hon. Shri A.K. Patnaik, Judge, Supreme Court of India, had provided me lot of opportunity to work in various capacities with His Lordship.

Hon'ble the Chief Justice Shri Syed Rafat Alam Saheb is the main Architect of this historical moment of my life. His Lordship has appointed me as Registrar General of this High Court on 1.3.2010.Today i.e on 3.1.2010, His Lordship has administered Oath of Judgeship. I am fortunate to have such guidance, support and protection on me. It is equally important to mention the contribution of Hon'ble Shri Justice Arun Mishra, Chief Justice of Rajasthan High Court and Hon'ble Shri Justice S.L.Kochar as their assessment of me has proved fruitful today.

Collegium of Hon'ble the Supreme Court has found me worth, it is a matter of great satisfaction and pride.

I am obliged and happy seeing the presence of my respected and dear friends and relatives, father-in-law, brother, sister-in-law, parents-in-laws of my daughters, who have come all the way from long distances like Dubai, Delhi, Gwalior, Indore, Bangalore and so many various places.

Without their presence, this occasion would not have such shine and importance for me.

I availed different positions in the Registry, but one thing always remained common that is constant love, support and co-operation of my Registry Officers and Court officials. They all deserve a share in thoughts that has been expressed by the audience appreciating my work and personality.

To become successful father of daughters TARANG and TRIPTI, son VISHWAS and father-in-law of SIDDHARTH and SUDHANSHU, I consider it a result of extreme hard work and dedication of my wife Lata. She indeed has a clear dream, great vision and strong intuition power in her. My wife and children have always supported me to shape each other's career and even they afforded to live ten/eleven years separate from me. This is indeed a great sacrifice.

I am aware of my limitations, but I know my priorities and attitude also. My motto would be as usual, punctuality and: transparency in my life, speed and accuracy in work satisfying the criteria of quality and quantity both. Profession and the society has given me everything irrespective of my potential and capacity but this is the time for me to give it back to the Society and Mera samay suru hota hai ab.

"Jai Hind"

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NOTES OF CASES SECTION

Short Note (DB)

**(21)*

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

W.P. No.1574/2008 (Jabalpur) decided on 29 September, 2010

AJAY DUBEY ... Petitioner

Vs.

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

A. Environment (Protection) Rules, 1986, Rule 5(3), Minor Mineral Rules, M.P. 1996, Rule 49 - **The notification u/R 5(3) of Environment (Protection) Rules, 1986 is not an enactment within the meaning of S. 24(1) of the Environment (Protection) Act, 1986 and, therefore, it cannot have overriding effect on Rule 49 of the M.P. Minor Mineral Rules, 1996.**

क. पर्यावरण (संरक्षण) नियम, 1986, नियम 5(3), गौण खनिज नियम, म.प्र. 1996, नियम 49 – पर्यावरण (संरक्षण) नियम, 1986 के नियम 5(3) के अन्तर्गत अधिसूचना, पर्यावरण (संरक्षण) अधिनियम, 1986 की धारा 24(1) के अर्थान्तर्गत अधिनियमिति नहीं है और इसलिए यह म.प्र. गौण खनिज नियम, 1996 के नियम 49 पर अध्यारोही प्रभाव नहीं रख सकती।

B. Environment (Protection) Rules, 1986, Rule 5(3), Minor Mineral Rules, M.P. 1996, Rule 49 - **Provisions of Environmental Impact Assessment (EIA) notification dated 14.09.2006 issued by Central Government in exercise of powers u/R 5(3)(a) of the Environment (Protection) Rules, 1986 do not apply to quarrying operations of sand and 'Bajri' in view of Rule 49(1) of M.P. Minor Mineral Rules, 1996 - Consequently, no prior environmental clearance is required to be obtained in respect of quarrying of sand and 'Bajri'.**

ख. पर्यावरण (संरक्षण) नियम, 1986, नियम 5(3), गौण खनिज नियम, म.प्र. 1996, नियम 49 – केन्द्रीय सरकार द्वारा पर्यावरण (संरक्षण) नियम, 1986 के नियम 5(3)(ए) के अन्तर्गत शक्तियों के प्रयोग में जारी पर्यावरण समाघात मूल्यांकन (ईआईए) अधिसूचना दिनांक 14.09.2006 के उपबंध, म.प्र. गौण खनिज नियम, 1996 के नियम 49(1) को दृष्टिगत रखते हुए रेत एवं बजरी की खदान क्रियाओं को लागू नहीं होता – परिणामस्वरूप, रेत एवं बजरी की खदान क्रिया के संबंध में कोई पूर्व पर्यावरण अनापत्ति अभिप्राप्त करना आवश्यक नहीं है।

The Order of the Court was delivered by : S.R. ALAM, CHIEF JUSTICE.

NOTES OF CASES SECTION

Cases referred :

AIR 1997 SC 811, (2004) 12 SCC 118, AIR 1966 SC 1676, (2004) 13 SCC 83, (2009) 6 SCC 142, (2008) 9 SCC 763, AIR 1966 SC 828, AIR 1982 SC 882, (1984) 4 SCC 27.

Siddharth Gupta, for the petitioner.
Naman Nagrath, Addl.A.G., for the respondent Nos.1, 2, 3, 6, 8 & 9.
Ashish Shroti, for the respondent No.4.
Sushrut Dharmadhikari, for the respondent Nos.5 & 10.

Short Note (DB)

**(22)*

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

W.P. No.10789/2009 (Jabalpur) decided on 14 October, 2010

ALL INDIA BANK OFFICERS' ASSOCIATION & ors. ... Petitioners
Vs.
STATE BANK OF INDIA & ors. ... Respondents

A. Public Interest Litigation - **Neither any fact has been pleaded nor any material has been brought in support thereof to show that any legal rights of public in general are being affected or any pecuniary loss or any loss is going to be caused to the public at large - Writ petition cannot be treated as Public Interest Litigation.**

क. लोकहित वाद – यह दर्शाने के लिये कि सामान्य जनता का कोई विधिक अधिकार प्रभावित हो रहा है अथवा जन समुदाय को कोई आर्थिक हानि या कोई हानि कारित होने वाली है, न तो किसी तथ्य का अभिवचन किया गया और न ही उसके समर्थन में कोई सामग्री प्रस्तुत की गयी – रिट याचिका को लोकहित वाद नहीं माना जा सकता।

B. Constitution, Article 226 - Vires - **Challenged as to a provision - Held - In absence of any foundation in the pleadings with regard to the provision, vires of the provision cannot be examined.**

ख. संविधान, अनुच्छेद 226 – शक्तिमत्ता – किसी उपबंध के बारे में चुनौती – *अभिनिर्धारित* – उपबंध के संबंध में अभिवचनों में किसी आधार के अभाव में उपबंध की शक्तिमत्ता का परीक्षण नहीं किया जा सकता।

C. State Bank of India Act (23 of 1955), Section 35(13) - **State Bank of Indore is a banking institution within the meaning of S. 35(13).**

ग. *भारतीय स्टेट बैंक अधिनियम (19: का 23), धारा 35(13)* – धारा 35(13) के अर्थों में स्टेट बैंक ऑफ इन्दौर एक बैंकिंग संस्था है।

D. Constitution, Article 226, State Bank of India Act, 1955, Sections 35(1) & 35(2) **- Petition challenging acquisition of State Bank of Indore by State Bank of India -** ***Held*** **- Procedure u/s 35(1) & 35(2) of State Bank of India Act, 1955 has been followed - Acquisition order u/s 35(2) of the Act, 1955 has been issued by Central Government and majority of share holders, officers, employees of State Bank of Indore have not agitated any grievance before Grievance Redressal Forum - Petition dismissed.**

घ. *संविधान, अनुच्छेद 226, भारतीय स्टेट बैंक अधिनियम, 1955, धाराएँ 35(1) व 35(2)* – भारतीय स्टेट बैंक द्वारा स्टेट बैंक ऑफ इन्दौर के अर्जन को चुनौती देने वाली याचिका – *अभिनिर्धारित* – भारतीय स्टेट बैंक अधिनियम की धारा 35(1) व 35(2) के अन्तर्गत प्रक्रिया का पालन किया गया है – अधिनियम, 1955 की धारा 35(2) के अन्तर्गत अर्जन आदेश केन्द्र सरकार द्वारा जारी किया गया है तथा स्टेट बैंक ऑफ इन्दौर के अधिकांश अंशधारियों, अधिकारियों, कर्मचारियों ने शिकायत निवारण मंच के समक्ष कोई शिकायत प्रस्तुत नहीं की है – याचिका खारिज।

The Order of the Court was delivered by : **S.R. ALAM, CHIEF JUSTICE.**

Cases referred :

AIR 1982 SC 149, (2007) 7 SCC 552, AIR 1991 SC 1040, AIR 1968 SC 1413, (2009) 5 SCC 342, (2008) 13 SCC 15, (2004) 4 SCC 311, 1980 Suppl. SCC 574, AIR 1995 SC 470, (2006) 12 SCC 360, (2002) 2 SCC 333, (2009) 5 SCC 515, (2007) 10 SCC 684, AIR 1999 SC 393, (2002) 4 SCC 34, (2010) 3 SCC 402.

Ashok Lalwani, for the petitioners.

R.N. Singh with *Ashish Shroti,* for the respondent No.1.

Rohit Arya & S.K. Rao with *Sanjay Lal & Sanjeev Chaturvedi,* for the respondent No.2.

NOTES OF CASES SECTION

Short Note (DB)

**(23)*

Before Mr. Justice Rakesh Saksena & Mr. Justice M.A. Siddiqui

W.P. No.2431/2010 (Jabalpur) decided on 4 October, 2010

DEV VRAT MISHRA ... Petitioner

Vs.

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

A. Criminal Procedure Code, 1973 (2 of 1974), Sections 91 & 482 - Additional documents - **High Court in exercise of power u/s 482 can consider material produced on behalf of accused to arrive at a decision whether the charge as framed could be maintained or not.**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 91 व 482 – अतिरिक्त दस्तावेज – उच्च न्यायालय, इस निर्णय पर पहुँचने के लिए कि क्या विरचित आरोप कायम रखे जा सकते हैं अथवा नहीं, धारा 482 के अन्तर्गत शक्तियों के प्रयोग में अभियुक्त की ओर से प्रस्तुत सामग्री पर विचार कर सकता है।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Additional documents - Quashing of FIR and investigation - **Charge sheet yet to be filed - Documents filed by accused cannot be considered.**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अतिरिक्त दस्तावेज – एफ.आई.आर. और अन्वेषण का अभिखंडन – आरोप पत्र अभी प्रस्तुत किया जाना है – अभियुक्त द्वारा प्रस्तुत किये गये दस्तावेजों पर विचार नहीं किया जा सकता।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 154, Lokayukt Evam Up-Lokayukt Adhiniyam, M.P. 1981 - Limitation - **FIR registered after expiry of 5 years from the date of offence - S.P.E. is not powerless to register the FIR and proceed with investigation - Lokayukt or Up-Lokayukt are not debarred to refer the matter to S.P.E. for verification merely because of the lapse of 5 years from the date of offence.**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154, लोकायुक्त एवं उप–लोकायुक्त अधिनियम, म.प्र. 1981 – परिसीमा – एफ.आई.आर. अपराध की तारीख से 5 वर्ष बीत जाने के बाद दर्ज की गयी – विशेष पुलिस स्थापना एफ.आई. आर. दर्ज करने और अन्वेषण करने के लिए अग्रसर होने के लिए अशक्त नही हैं –

आपराध की तारीख से 5 वर्ष बीत जाने मात्र से ही लोकायुक्त या उप–लोकायुक्त सत्यापन के लिए मामला विशेष पुलिस स्थापना को निर्दिष्ट करने के लिए विवर्जित नहीं हो जाते।

***D. Prevention of Corruption Act (49 of 1988), Section 13(1)(d) - Misuse of office by public servant* - Allegation that applicant by misusing his position as Dy.S.P., S.P.E., undervalued the house and constructed area of the house was not correctly shown in map and sale deed - The sale deed was undervalued causing loss of Rs. 29,434/ - by paying less stamp duty - Held - Applicant was not posted as Dy.S.P., S.P.E. at the time of registration of sale deed - Merely because the property is undervalued and vendor or vendee is public servant, he cannot be prosecuted u/s 13(1)(d) of Act - It cannot be concluded that applicants abused their positions as public servants to obtain the pecuniary advantage.**

घ. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – लोक सेवक द्वारा पद का दुरुपयोग – आरोप कि आवेदक ने उप पुलिस अधीक्षक, विशेष पुलिस स्थापना के रूप में अपने पद का दुरुपयोग करके मकान का न्यून मूल्यांकन किया और नक्शे एवं विक्रय विलेख में मकान का निर्मित क्षेत्र सही रूप से नहीं दर्शाया गया – विक्रय विलेख का न्यून मूल्यांकन किया गया जिससे कम स्टाम्प शुल्क भुगतान होने से 29,434/– रुपये की हानि कारित हुई – अभिनिर्धारित – आवेदक विक्रय विलेख के रजिस्ट्रीकरण के समय उप पुलिस अधीक्षक, विशेष पुलिस स्थापना के रूप में पदस्थ नहीं था – मात्र इसलिए कि सम्पत्ति का न्यून मूल्यांकन किया गया तथा विक्रेता अथवा क्रेता लोक सेवक है, उसे अधिनियम की धारा 13(1)(डी) के अन्तर्गत अभियोजित नहीं किया जा सकता – यह निष्कर्ष नहीं निकाला जा सकता कि आवेदकगण ने आर्थिक लाभ प्राप्त करने के लिए लोक सेवक के रूप में अपने पद का दुरुपयोग किया।

The Order of the Court was delivered by : **RAKESH SAKSENA, J.**

Cases referred :

(2004) 1 SCC 691, (1992) 3 SCC 317, AIR 2005 SC 359, (2008) 14 SCC 1, (1997) 9 SCC 477, (2003) 9 SCC 700, AIR 1992 SC 604.

Anil Khare with *Namrata Kesharwani,* for the petitioner.
Aditya Adhikari, for the respondent.
Kishore Shrivastava with *Kapil Jain,* for the intervenor.

NOTES OF CASES SECTION

Short Note (DB)

**(24)*

Before Mr. Justice Abhay M. Naik & Mr. Justice Anil Sharma

W.P. No.464/2010 (Gwalior) decided on 24 September, 2010

GULZARILAL JAIN ... Petitioner

Vs.

RAVIKANT SHIRKE ... Respondent

A. Civil Procedure Code (5 of 1908), Order 8 Rule 1 - Written statement - **Case fixed for filing of written statement - Defendant absent upto 4 p.m. when ex parte proceedings were drawn - Later on defendant filing written statement and counter claim on the same day - Trial Court was justified in taking the same on record - Insertion of a sentence in order sheet about closure of defendant's right to submit written statement without initials of presiding judge is inconsequential.**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 8 नियम 1 – लिखित कथन – मामला लिखित कथन प्रस्तुत करने के लिए नियत – प्रतिवादी सायं 4 बजे तक अनुपस्थित रहा जब एकपक्षीय कार्यवाही लेखबद्ध की गयी – बाद में प्रतिवादी ने उसी दिन लिखित कथन तथा प्रतिदावा प्रस्तुत किया – विचारण न्यायालय द्वारा उसे अभिलेख पर लिया जाना न्यायसंगत – आदेश पत्रिका में पीठासीन न्यायाधीश के हस्ताक्षर बिना प्रतिवादी के लिखित कथन प्रस्तुत करने के अधिकार की समाप्ति के सम्बन्ध में वाक्य जोड़ना महत्वहीन है।

B. Civil Procedure Code (5 of 1908), Order 8 Rule 6A - Counter claim - **Defendant filing counter claim for eviction against plaintiff as well as against co-defendant - Such counter claim is maintainable - Counter claim solely against co-defendant is not maintainable.**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 8 नियम 6ए – प्रतिदावा – प्रतिवादी द्वारा वादी तथा सह–प्रतिवादी के विरुद्ध बेदखली का प्रतिदावा प्रस्तुत – ऐसा प्रतिदावा पोषणीय है – केवल सह–प्रतिवादी के विरुद्ध प्रतिदावा पोषणीय नहीं है।

The Order of the Court was delivered by : **ABHAY M. NAIK, J.**

Cases referred :

(2003) 7 SC 350, 1982 MPWN SN 62, 1981(II) MPWN 231, 2009(3) MPLJ 239, AIR 2007 SC 10.

Mohan Babu Mangal, for the petitioner.

Deepak Khot, for the respondent.

NOTES OF CASES SECTION

Short Note

**(25)*

Before Mr. Justice Abhay M. Naik

C.R. No.147/2009 (Gwalior) decided on 6 September, 2010

HARISHANKAR ARORA & anr. ... Applicant

Vs.

SMT. VEDBATI & ors. ... Non-applicant

A. ***Civil Procedure Code (5 of 1908), Order 32 Rule 3 - Next friend*** **- Court is guardian of minor and is obliged to take care of minor's interest - Next friend remaining persistently absent - Court not to dismiss the suit in default, but may appoint another next friend to protect minor's interest.**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 32 नियम 3 – वाद मित्र – न्यायालय अवयस्क का संरक्षक है तथा अवयस्क के हित का ध्यान रखने हेतु बाध्य है – वाद मित्र बार–बार अनुपस्थित रहा – न्यायालय को व्यतिक्रम में वाद खारिज नहीं करना चाहिए, बल्कि अवयस्क के हित के संरक्षण के लिए दूसरा वाद मित्र नियुक्त कर सकता है।

B. ***Civil Procedure Code (5 of 1908), Order 9 Rule 9 - Restoration of suit*** **- Suit dismissed due to gross-negligence of next friend of minor - Suit liable to be restored.**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 9 – वाद का पुनःस्थापन – अवयस्क के वाद मित्र की घोर उपेक्षा के कारण वाद खारिज – वाद पुनःस्थापन किये जाने योग्य है।

Cases referred :

AIR 1957 AP 293, 1961 MPLJ SN (6), AIR 1954 Bombay 214, AIR 1971 P&H 462, AIR 1960 Kerala 367.

N.K. Gupta, for the applicant.

V.K. Bhardwaj with *Anand Bhardwaj,* for the Non-applicant Nos.1 & 2.

NOTES OF CASES SECTION

Short Note (DB)

**(26)*

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

Cr.A. No.1539/1995 (Jabalpur) decided on 13 October, 2010

JIYALAL ... Appellant

Vs.

STATE OF M.P. ... Respondent

A. Prevention of Corruption Act (49 of 1988), Section 13(1)(d) & 20 - Presumption - **Appellant not made any demand of illegal gratification - Money found in possession of appellant - Premise to be established for arriving at presumption is that public servant had obtained or accepted any illegal gratification - No scientific test process was adopted to prove that appellant handled the currency notes in question - Defence that currency notes were kept in the pocket of his shirt hanging on a peg without his knowledge more probable - Appellant liable to be acquitted.**

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 13(1)(डी) व 20 – उपधारणा – अपीलार्थी ने अवैध परितोषण की कोई माँग नहीं की – अपीलार्थी के कब्जे में धन पाया गया – उपधारणा पर पहुँचने के लिए यह आधार स्थापित किया जाना है कि लोक सेवक ने कोई अवैध परितोषण अभिप्राप्त अथवा स्वीकार किया था – यह साबित करने के लिए कोई वैज्ञानिक परीक्षण प्रक्रिया नहीं अपनायी गयी कि अपीलार्थी ने प्रश्नगत नोटों को हाथ से पकड़ा था – यह बचाव कि नोट खूंटी पर लटकी उसकी शर्ट की जेब में उसकी जानकारी के बिना रखे गये, अधिक संभाव्य है – अपीलार्थी दोषमुक्त किये जाने योग्य।

B. Prevention of Corruption Act (49 of 1988), Section 19 - Sanction - Competent Authority - **Executive Magistrate who accorded sanction was not competent to remove the appellant from service - Such defective sanction had certainly resulted in failure of justice.**

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 19 – मंजूरी – सक्षम प्राधिकारी – कार्यपालक मजिस्ट्रेट जिसने मंजूरी प्रदान की अपीलार्थी को सेवा से पृथक करने के लिए सक्षम नहीं था – ऐसी दोषपूर्ण मंजूरी के परिणामस्वरूप निश्चित ही न्याय की विफलता हुई थी।

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

NOTES OF CASES SECTION

Cases referred :

AIR 2010 SC 1451, (1976) 1 SCC 145, (2007) 11 SC 273.

Amit Dubey, for the appellant.

Ashok Chourasiya, G.A., for the respondent/State.

Short Note

**(27)*

Before Mr. Justice U.C. Maheshwari

S.A. No.350/2010 (Jabalpur) decided on 15 September, 2010

LAKHANLAL GUPTA ... Appellant

Vs.

NEMCHAND JAIN ... Respondent

A. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) - Bona fide requirement - Experience - **Even in absence of any experience, the landlord and his family members may be entitled to get the decree on the ground of bona fide requirement for opening new business.**

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ) – वास्तविक आवश्यकता – अनुभव – किसी अनुभव के अभाव में भी भूस्वामी तथा उसके परिवार के सदस्य नया कारोबार खोलने के लिए वास्तविक आवश्यकता के आधार पर डिक्री प्राप्त करने के हकदार हो सकते हैं।

B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) - Inconsistency in legal notice and plaint - **Prior notice of alleged necessity of accommodation is not requirement of law - Merely on account of some inconsistencies in notice and pleadings of plaint, the alleged need of landlord could not be discarded.**

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ) – विधिक सूचना पत्र और वादपत्र में असंगति – स्थान की कथित आवश्यकता का पूर्व सूचना पत्र विधि की अपेक्षा नहीं है – सूचना पत्र और वादपत्र के अभिवचनों में मात्र कुछ असंगतियों के कारण भूस्वामी की कथित आवश्यकता को अमान्य नहीं किया जा सकता।

C. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f), Civil Procedure Code, 1908, Section 100 - Second Appeal - Substantial question of law - Bona fide requirement - **Bona fide requirement based on appreciation of evidence being findings of fact, does not give rise to any substantial question of law.**

ग. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ), सिविल प्रक्रिया संहिता, 1908, धारा 100 – द्वितीय अपील – विधि के सारवान प्रश्न – वास्तविक आवश्यकता – साक्ष्य के मूल्यांकन पर आधारित वास्तविक आवश्यकता तथ्य के निष्कर्ष होने से विधि का कोई सारवान प्रश्न उत्पन्न नहीं करते।

Cases referred :

AIR 1983 MP 144, 1983 MPRCJ (Note) 84, (1995) 6 SCC 580, 2006(II) MPLJ 484, AIR 1999 SC 2213.

R.P. Agrawal with *Abhijeet Dave,* for the appellant.

P.S. Das with *Sonal Das,* for the respondent.

Short Note (DB)

****(28)***

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

W.P. No.8670/2007 (Jabalpur) decided on 20 August, 2010

LILASONS BREWERIES LTD. (M/S.) & ors. ... Petitioners

Vs.

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

A. Value Added Tax Act, M.P. (20 of 2002), Sections 2(z) & 5 - Turnover and incidence of tax **- Turnover u/s 5 has to be work out as per Section 2(z) of Act.**

क. मूल्य वर्धित कर अधिनियम, म.प्र. (2002 का 20), धाराएँ 2(जेड) व 5 – कुल बिक्री एवं कर का भार – धारा 5 के अन्तर्गत कुल बिक्री की गणना अधिनियम की धारा 2(जेड) के अनुसार करनी होगी।

B. Entry Tax Act, M.P. (52 of 1976), Sections 3, 3-B & 14 - Incidence of taxation **- Section 3 of Act is charging provision - Words used in later part of Section 3(1) that such tax shall be paid by every dealer who is liable to pay tax under VAT Act, is only for identifying the person who is liable to pay entry tax - Ss. 3-B & 14 are machinery provisions.**

ख. प्रवेश कर अधिनियम, म.प्र. (1976 का 52), धाराएँ 3, 3–बी व 14 – कर का भार – अधिनियम की धारा 3 एक भारण उपबंध है – धारा 3(1) के दूसरे भाग में प्रयुक्त शब्द कि ऐसे कर का भुगतान प्रत्येक व्यापारी जो कि वेट अधिनियम के अन्तर्गत कर भुगतान हेतु दायी है, के द्वारा किया जायेगा, केवल उस व्यक्ति का अभिज्ञान करने के लिये है जो प्रवेश कर का भुगतान करने के लिए दायी है – धारा 3–बी एवं 14 तंत्र–उपबंध हैं।

C. Interpretation of Statutes - Taxing statute - Tax - Four ingredients **- (1) Nature which prescribes the taxable event attracting**

the levy, (2) Person on whom the levy is imposed and who is obliged to pay the tax, (3) Rate at which the tax is imposed, (4) Measure or value to which rate will be applied for computing the tax liability.

ग. कानूनों का निर्वचन – कर कानून – कर – चार संघटक – (1) प्रकृति, जो आरोपण आकर्षित करने वाली कर योग्य स्थिति विहित करती है (2) व्यक्ति, जिस पर आरोपण करना है तथा जो कर भुगतान करने के लिए दायी है (3) दर, जिससे करारोपण किया जाना है, (4) मात्रा अथवा मूल्य, जिस पर कर दायित्व की गणना करने के लिये दर लागू होगी।

***D. Entry Tax Act, M.P. (52 of 1976), Sections 3, 3-B & 14 - Notification u/s 3-B - Absence of* - Absence of notification u/s 3-B cannot come in the way of validity of charging S. 3 of the Act and render it inoperative - Absence of notification prescribing special procedure for collection of entry tax upon foreign liquor and beer - General machinery provision of S. 14 is clearly attracted.**

घ. प्रवेश कर अधिनियम, म.प्र. (1976 का 52), धाराएँ 3, 3–बी व 14 – धारा 3–बी के अन्तर्गत अधिसूचना – का अभाव – धारा 3–बी के अन्तर्गत अधिसूचना का अभाव अधिनियम की धारा 3 की विधिमान्यता के आड़े नहीं आ सकता तथा इसे अप्रभावी नहीं कर सकता – विदेशी मदिरा तथा बीयर पर प्रवेश कर के संग्रहण के लिए विशेष प्रक्रिया विहित करने वाली अधिसूचना का अभाव – धारा 14 का सामान्य तंत्र उपबंध स्पष्ट रूप से आकर्षित होता है।

***E. Interpretation of Statutes - Non-obstante clause* - It is a potent clause intended to exclude every consideration arising from other provisions of the same statute or other statute - When the section does not refer to any particular provisions which it intends to override but refers to the provisions of the statute generally, it is not permissible to hold that it excludes the whole Act and stands all alone by itself.**

ङ. कानूनों का निर्वचन – सर्वोपरि खण्ड – यह उसी कानून अथवा अन्य कानून के उपबंधों से उद्भूत प्रत्येक विचार का अपवर्जन करने के लिए आशयित एक प्रभावकारी खण्ड है – जब धारा किसी विशिष्ट उपबंध, जिस पर यह अध्यारोही होना चाहती है, को निर्दिष्ट नहीं करती किन्तु कानून के उपबंधों को साधारणतया निर्दिष्ट करती है, तब यह अभिनिर्धारित करना अनुज्ञेय नहीं है कि यह पूरे अधिनियम को अपवर्जित करती है तथा स्वयं ही प्रभावी होती है।

***F. Interpretation of Statutes - Taxing statute - Levy of tax* - For want of machinery provision, levy cannot become invalid - Even if rules have not been framed under the Act, levy can still hold good.**

च. कानूनों का निर्वचन – कर कानून – कर का उद्ग्रहण – तंत्र उपबंध के अभाव में, उद्ग्रहण अविधिमान्य नहीं हो सकता – भले ही अधिनियम के अन्तर्गत नियम विरचित नहीं किये गये हों, उद्ग्रहण तब भी उचित रहता है।

The Order of the Court was delivered by : ARUN MISHRA, J.

Cases referred :

(1995) 96 STC 654(SC), (1994) 27 VKN 76, (1985) 165 ITR 144, (1999) 8 SCC 667, (2004) 10 SCC 201, (1965) 55 ITR 741, (1957) 32 ITR 190, AIR 1981 SC 972, AIR 1957 SC 637, 1953 SCR 1, AIR 1984 SC 1022, AIR 1998 SC 1388, AIR 1971 SC 530, (2004) 3 SCC 466, (2003) 3 SCC 393, AIR 2003 SC 269.

Sumit Nema with *S.D. Mishra,* for the petitioners.

R.D. Jain, A.G. with *Purushendra Kaurav, Dy.A.G.,* for the State.

Short Note

****(29)***

Before Mr. Justice N.K. Mody

S.A. No.60/2006 (Indore) decided on 26 August, 2010

MADAN ... Appellant

Vs.

SHANTILAL ... Respondent

***A. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(a) - Arrears of rent* - Tenant already tendered arrears of rent to the landlord which was accepted by him prior to the date of filing of the suit - Tenant not in arrears of rent on the date of filing of the suit - No decree u/s 12(1)(a) of the Act can be granted.**

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ए) – भाड़े का बकाया – किरायेदार ने पहले ही भूस्वामी को भाड़े का बकाया निविदत्त किया जिसे वाद प्रस्तुत करने के दिनांक से पूर्व उसके द्वारा स्वीकार किया गया – वाद प्रस्तुत करने के दिनांक को किरायेदार पर भाड़े का बकाया नहीं था – अधिनियम की धारा 12(1)(ए) के अन्तर्गत कोई डिक्री प्रदान नहीं की जा सकती है।

***B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(e) - Bona fide requirement for residential purposes* - Landlord claimed that he requires accommodation for tying 16 animals and for residence of servants - Held - Landlord has not mentioned number of members in the family, nor it is pleaded that how much milk is**

required by him on daily basis - Landlord already having 16 animals but it is not the case of landlord that animals are kept in a rented premises - If the landlord requires the accommodation for running dairy, then requirement is for commercial purposes and is not entitled for decree u/s 12(1)(e) as nature of suit accommodation is residential.

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ई) – निवासीय प्रयोजनों के लिए वास्तविक आवश्यकता – भूस्वामी ने दावा किया कि उसे 16 पशुओं को बांधने के लिए और नौकरों के आवास के लिए स्थान की आवश्यकता है – *अभिनिर्धारित* – भूस्वामी ने कुटुम्ब के सदस्यों की संख्या उल्लिखित नहीं की और न ही यह अभिवचन किया गया कि उसे प्रतिदिन कितने दूध की आवश्यकता होती है – भूस्वामी के पास पहले से ही 16 पशु हैं परन्तु भूस्वामी का यह मामला नहीं है कि पशुओं को भाड़े के परिसर में रखा है – यदि भूस्वामी को स्थान की आवश्यकता डेयरी चलाने के लिए है, तब आवश्यकता वाणिज्यिक प्रयोजनों के लिए है और धारा 12(1)(ई) के अन्तर्गत डिक्री के लिए हकदार नहीं है क्योंकि वाद स्थान की प्रकृति आवासिक है।

C. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(e) - Bona fide requirement - Findings **- Findings regarding bona fide requirement are concurrent findings of facts, which cannot be disturbed unless the findings recorded are perverse and based on no evidence.**

ग. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ई) – वास्तविक आवश्यकता – निष्कर्ष – वास्तविक आवश्यकता सम्बन्धी निष्कर्ष तथ्यों के समवर्ती निष्कर्ष हैं, जिसमें विघ्न नहीं डाला जा सकता जब तक कि अभिलिखित निष्कर्ष विपर्यस्त और साक्ष्य पर आधारित न हों।

D. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(m) - Alteration of suit property **- No evidence that construction raised by appellant/tenant has materially altered the accommodation to the detriment of the landlord's interest and is likely to diminish the value substantially - Landlord not entitled for decree u/s 12(1)(m).**

घ. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एम) – वाद सम्पत्ति में परिवर्तन – कोई साक्ष्य नहीं कि अपीलार्थी / किरायेदार द्वारा खड़े किये गये निर्माण से स्थान में भूस्वामी के हित के लिए हानिकर तात्विक रूप से परिवर्तन हुआ है और सारतः मूल्य कम होने की संभावना है – भूस्वामी धारा 12(1)(एम) के अन्तर्गत डिक्री के लिए हकदार नहीं।

E. Accommodation Control Act, M.P. (41 of 1961), Section

12(10) **- No time given to tenant to restore the accommodation to its original condition or pay landlord such amount of compensation - No decree u/s 12(1)(m) can be passed.**

ङ. *स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(10)* – स्थान को मूल स्थिति में पुनःस्थापित करने या भूस्वामी को क्षतिपूर्ति की ऐसी राशि का भुगतान करने के लिए किरायेदार को कोई समय नहीं दिया गया – धारा 12(1)(एम) के अन्तर्गत कोई डिक्री पारित नहीं की जा सकती।

F. Accommodation Control Act, M.P. (41 of 1961), Section 12 - Suit for eviction - Maintainability **- Father of appellants was owner of the suit premises which was purchased by respondent in auction through Court - Earlier a suit for eviction was filed against father of appellants who died during the pendency of the earlier suit - All eight legal heirs were substituted in earlier suit - In subsequent suit all the legal heirs were not made party, although they are living separately in the suit accommodation in different different portions - Suit was suffering from the defect of non-joinder of necessary party.**

च. *स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12 – बेदखली के लिए वाद – पोषणीयता* – अपीलार्थी के पिता वाद परिसर के स्वामी थे जिसे प्रत्यर्थी द्वारा न्यायालय के माध्यम से की गई नीलामी में क्रय किया गया – पूर्व में अपीलार्थियों के पिता के विरुद्ध बेदखली का वाद प्रस्तुत किया गया था, जिनकी पूर्ववर्ती वाद के लम्बित रहने के दौरान मृत्यु हो गयी – सभी आठ विधिक वारिसों को पूर्ववर्ती वाद में प्रतिस्थापित किया गया – पश्चात्वर्ती वाद में सभी विधिक वारिसों को पक्षकार नहीं बनाया गया, यद्यपि वे वाद स्थान में अलग–अलग हिस्सों में पृथक–पृथक रह रहे हैं – वाद आवश्यक पक्षकार के असंयोजन के दोष से ग्रसित था।

Cases referred :

AIR 1990 SC 2053, 1985 WN 95, 2008(I) MPWN 39, 2008(I) MPACJ 288, 1992(I) MPWN 14, 1999 MPACJ 424, 1970 RCJ 566, 1986 MPRCJ 199, 1994 MPACJ 274, 2004(II) MPACJ 223, AIR 1963 SC 468, AIR 1989 SC 1470.

B.J. Mehta, for the appellant.

Dilip Choudhary, for the respondent.

NOTES OF CASES SECTION

Short Note

****(30)***

Before Mr. Justice Sanjay Yadav

W.P. No.787/2002 (Jabalpur) decided on 13 October, 2010

MUNICIPAL COUNCIL, BALAGHAT ... Petitioner

Vs.

M/S RISHUBH DEVELOPERS & BUILDERS & ors. ... Respondents

A. Land Revenue Code, M.P. (20 of 1959), Section 242 - Wazib-ul-urz **- Land settled with ex-proprietor in occupancy rights by High Court in Second Appeal - Land/water body was entered as Wazib-ul-urz -** ***Held*** **- Board of Revenue was well within its right to set aside the entries in Wazib-ul-urz.**

क. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 242 – वाजिब–उल–अर्ज – उच्च न्यायालय द्वारा द्वितीय अपील में पूर्व–स्वामी के अधिभोग अधिकार में भूमि व्यवस्थापित – भूमि/जलाशय वाजिब–उल–अर्ज के रूप में प्रविष्ट – *अभिनिर्धारित* – वाजिब–उल–अर्ज की प्रविष्टि को अपास्त करना राजस्व मण्डल के अधिकार में था।

B. Land Revenue Code, M.P. (20 of 1959), Section 50 - Revision - Powers **- Revisional Court has not limited jurisdiction as it can satisfy itself as to legality or proprietary of any order passed by or as to the regularity of the proceedings of any revenue officer subordinate to it.**

ख. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 50 – पुनरीक्षण – शक्तियाँ – पुनरीक्षण न्यायालय को सीमित अधिकारिता नहीं है क्योंकि यह अपने अधीनस्थ किसी राजस्व अधिकारी द्वारा पारित किसी आदेश की वैधता अथवा औचित्यता के संबंध में अथवा उसकी कार्यवाहियों की नियमितता के संबंध में अपना समाधान कर सकता है।

Case referred :

1986 MPLJ 362.

Sawpnil Ganguly, for the petitioner.

Rajendra Tiwari with *Sankalp Kochar,* for the respondents.

Short Note (DB)

**(31)*

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

W.P. No.3321/2007 (Jabalpur) decided on 27 April, 2010

NORTHERN COAL FIELDS LTD. ... Petitioner

Vs.

ADDL. COMMISSIONER,
COMMERCIAL TAX, JABALPUR & ors. ... Respondents

Commercial Tax Act, M.P. 1994 (5 of 1995), Section 2(u) - Sale price - Transit fee - **Transit fee for transit of forest produce is in the form of regulatory measure and same is required to be paid along with royalty in advance - Transit fee forms part of sale price - It has been rightly included in the turnover by assessing officer - Petition dismissed.**

वाणिज्यिक कर अधिनियम, म.प्र., 1994 (1995 का 5), धारा 2(यू) – विक्रय मूल्य – परिवहन शुल्क – वनोपज के परिवहन हेतु परिवहन शुल्क विनियामक उपाय के रूप में है तथा रॉयल्टी के साथ उसका अग्रिम भुगतान किया जाना आवश्यक है – परिवहन शुल्क विक्रय मूल्य का भाग होता है – निर्धारण अधिकारी द्वारा उसे विक्रय राशि में उचित रूप से सम्मिलित किया गया है – याचिका खारिज।

The Order of the Court was delivered by : **ARUN MISHRA, J.**

Cases referred :

(1994) 95 STC 571; (2003) 2 STJ 127, 2002 STC 412, W.P. No.2309/2002, W.P. No.3545/1994, (1961) 12 STC 476, (1996) 102 STC 144, (1980) 46 STC 477 (SC), (1984) 56 STC 70, (1985) 59 STC 147, (1984) 55 STC 65.

H.S. Shrivastava with *Sandesh Jain,* for the petitioner.

Deepak Awasthy, G.A., for the respondents.

NOTES OF CASES SECTION

Short Note

****(32)***

Before Mr. Justice N.K. Gupta

Cr.A. No.923/2007 (Jabalpur) decided on 11 October, 2010

RAMADHAR @ PAPPAN KHAMPARIA ...: Appellant

Vs.

STATE OF M.P. ... Respondent.

A. Penal Code (45 of 1860), Sections 307 & 324 - Attempt to murder or causing simple hurt - Complainant alone in the street - Appellant fired from the back from a distance of 8 fts. - Did not repeat his fire - Appellant did not approach near the complainant - Appellant ran away immediately although there was no body at the time of incident to prevent him to make another gun shot - Held - Intention of appellant was to cause simple injuries - His intention cannot be presumed of causing death of complainant - Overt act of appellant constitute offence u/s 324 of IPC.

क. दण्ड संहिता (1860 का 45), धाराएँ 307 व 324 – हत्या करने का प्रयत्न या साधारण उपहति कारित करना – परिवादी गली में अकेला – अपीलार्थी ने पीछे से 8 फीट की दूरी से फायर किया – उसने पुनः फायर नहीं किया – अपीलार्थी परिवादी के पास नहीं गया – अपीलार्थी तुरंत भाग गया यद्यपि घटना के समय उसे दूसरी गोली चलाने से रोकने के लिए वहाँ कोई नहीं था – *अभिनिर्धारित* – अपीलार्थी का आशय साधारण क्षतियाँ कारित करना था – परिवादी की मृत्यु कारित करने का उसका आशय होने की उपधारणा नहीं की जा सकती – अपीलार्थी का प्रत्यक्ष कृत्य भा.द.सं. की धारा 324 के अंतर्गत अपराध गठित करता है।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 154 - Dehati Nalishi **- Dehati Nalishi is FIR but to maintain its authenticity it is required to be proved that (i) there should be no manipulation of time, and (ii) it should not be registered after any enquiry.**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – देहाती नालिशी – देहाती नालिशी प्रथम सूचना रिपोर्ट है परंतु उसकी प्रमाणिकता बनाये रखने के लिए यह साबित करना अपेक्षित है कि (i) समय का कोई हेरफेर नही हुआ हो, और (ii) उसे किसी जाँच के बाद अभिलिखित नहीं किया गया हो।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 154 - Ante-timed FIR **- Evidence shows that police reached at 10:30 p.m. whereas Dehati Nalishi was written at 9:30 p.m. - FIR was registered at 7:00 a.m. - No reason of delay in lodging the FIR explained -** ***Held***

- Dehati Nalishi appears to be ante- timed - Possibility of concoction arises - Corroboration cannot be expected from Dehati Nalishi.

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – समय पूर्व प्रथम सूचना रिपोर्ट – साक्ष्य दर्शाती है कि पुलिस रात 10:30 बजे पहुँची जबकि देहाती नालिशी रात 9:30 बजे लिखी गई – प्रथम सूचना रिपोर्ट प्रातः 7 बजे दर्ज की गयी – प्रथम सूचना रिपोर्ट दायर करने में हुए विलम्ब का कोई कारण स्पष्ट नहीं किया गया – *अभिनिर्धारित* – देहाती नालिशी पूर्व समयी प्रतीत होती है – कूटरचना की संभावना उत्पन्न होती है – देहाती नालिशी से सम्पुष्टि की अपेक्षा नहीं।

D. Evidence Act (1 of 1872), Sections 3 & 8 - False implication - Motive - **Complainant is a political person and his wife had fought the election for member of Panchayat - Appellant was Up-Sarpanch at the time of incident -** ***Held*** **- Political rivalry between appellant and complainant cannot be ruled out.**

घ. साक्ष्य अधिनियम (1872 का 1), धाराएँ 3 व 8 – मिथ्या आलिप्त करना – हेतु – परिवादी एक राजनीतिक व्यक्ति है और उसकी पत्नी ने पंचायत सदस्य का चुनाव लड़ा था – घटना के समय अपीलार्थी उप–सरपंच था – *अभिनिर्धारित* – अपीलार्थी और परिवादी के बीच राजनीतिक प्रतिद्वन्द्विता की संभावना नकारी नहीं जा सकती।

E. Evidence Act (1 of 1872), Section 3 - Witness - **Persons named in FIR as witnesses not examined by prosecution - Son and nephew claiming themselves to be eye witnesses not named in FIR as witnesses -** ***Held*** **- Witnesses are concocted witnesses.**

ङ. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्षी – प्रथम सूचना रिपोर्ट में साक्षियों के रूप में नामित व्यक्तियों की अभियोजन द्वारा परीक्षा नहीं की गयी – स्वयं के प्रत्यक्षदर्शी साक्षी होने का दावा करने वाले पुत्र और भतीजे का नाम प्रथम सूचना रिपोर्ट में साक्षियों के रूप में नही दिया गया – *अभिनिर्धारित* – साक्षी मनगढ़ंत साक्षी हैं।

F. Penal Code (45 of 1860), Section 307 - Source of light on the spot - **Incident took place at 8:30 in the night and no arrangement of light shown in investigation - Not possible for complainant to see the actual assailant - Testimony of complainant doubtful.**

च. दण्ड संहिता (1860 का 45), धारा 307 – घटनास्थल पर प्रकाश का स्रोत – घटना रात 8:30 बजे घटित हुई और अन्वेषण में प्रकाश की कोई व्यवस्था नही दर्शाई गई – परिवादी के लिए वास्तविक आक्रमणकर्ता को देख सकना संभव नही – परिवादी की परिसाक्ष्य संदेहास्पद।

Cases referred :

1980 SCC (Cri) 968, AIR 1982 SC 62, AIR 1983 SC 305, AIR 1975 SC 1962.

Ranjan Banerjee, for the appellant.

P.C. Jain, Panel Lawyer, for the respondent/State.

Short Note (DB)

****(33)***

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

Cr.A. No.1838/2005 (Jabalpur) decided on 25 October, 2010

RAM PRASAD ... Appellant

Vs.

STATE OF M.P. ... Respondent

Prevention of Corruption Act (49 of 1988), Sections 13(1)(d) & 20 - Presumption **- Neither demand of bribe nor acceptance or payment thereof established from evidence on record - Serious infirmities in prosecution version sufficient to establish probability of defence that notes were put into pocket of Pyjama presuming to that of co-accused (already dead) without his knowledge or connivance -** ***Held*** **- Burden which rests on accused to displace presumption is not a onerous as that cast on prosecution to prove its case - Appeal allowed.**

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 13(1)(डी) व 20 – उपधारणा – अभिलेख पर उपलब्ध साक्ष्य से न तो रिश्वत की माँग और न ही उसकी स्वीकृति अथवा भुगतान स्थापित हुआ – अभियोजन कथन में गम्भीर अशक्तताएँ बचाव की इस संभाव्यता को स्थापित करने के लिए पर्याप्त हैं कि पजामे की जेब में नोट उसे सह–अभियुक्त (जिसकी पूर्व में ही मृत्यु हो चुकी है) का मानकर उसकी जानकारी अथवा मौन सहमति के बिना डाले गये थे – *अभिनिर्धारित* – अभियुक्त पर उपधारणा को विस्थापित करने का भार दुर्भर नहीं है क्योंकि अपना मामला साबित करने का भार अभियोजन पर डाला गया है – अपील मंजूर।

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

Cases referred :

(1980) 2 SCC 390, AIR 1990 SC 287, AIR 1997 SC 551, (2000) 8 SC 571, (2006) 12 SCC 277.

P.R. Bhave with *B.P. Yadav,* for the appellant.

Aditya Adhikari, Special Public Prosecutor, for the respondent/ S.P.E. (Lokayukt).

Short Note

****(34)***

Before Mr. Justice Sanjay Yadav

W.P. No.264/1996 (Jabalpur) decided on 6 October, 2010

RUKMANI BAI & ors ... Petitioners

Vs.

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

A. Civil Procedure Code (5 of 1908), Section 9 - Decree without jurisdiction - Nullity - **A decree passed by a Court without jurisdiction is a nullity - Its invalidity can be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral purposes.**

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 9 – बिना अधिकारिता की डिक्री – अकृतता – किसी न्यायालय द्वारा बिना अधिकारिता के पारित की गयी डिक्री अकृतता की डिक्री है – इसकी अविधिमान्यता जब और जहाँ इसको प्रवृत्त करने अथवा उस पर अवलम्ब करने की प्रार्थना की जाती है, यहाँ तक कि निष्पादन के प्रक्रम पर एवं सांपार्श्विक प्रयोजन में भी स्थापित की जा सकती है।

B. Urban Land (Ceiling and Regulation) Act (33 of 1976), Section 8(3) - Service of notice - **When holder acknowledge the service, then mode of service gets diluted - Even if notice is not published in the manner contemplated by law, it will be best a case of irregularity but certainly not a fact striking at the very jurisdiction of the authority passing order.**

ख. नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम (1976 का 33), धारा 8(3) – सूचना पत्र की तामील – जब धारक तामील को अभिस्वीकृत करता है, तब तामीली का ढंग महत्वहीन हो जाता है – भले ही, विधि द्वारा अनुध्यात ढंग से सूचना प्रकाशित नहीं की गयी हो, यह अनियमितता का एक उत्तम प्रकरण होगा किन्तु आदेश पारित करने वाले प्राधिकारी की अधिकारिता पर आघात करने वाला तथ्य बिल्कुल नहीं।

Cases referred :

AIR 2002 SC 5, AIR 2002 SC 1801, (1997) 11 SCC 754, AIR 1954 SC 340, AIR 1953 Orissa 111, (1999) 4 SCC 396.

Ravish Agrawal with *Abhishek Singh,* for the petitioners.
B.N. Mishra, G.A., for the respondents.

Short Note (DB)

****(35)***

Before Mr. Justice A.K. Shrivastava & Mr. Justice Brij Kishore Dube

W.P. No.3276/2010(I) (Gwalior) decided on 4 October, 2010

SHABBAR HUSSAIN & ors. ... Petitioners

Vs.

RAM DAYAL & ors. ... Respondents

Civil Procedure Code (5 of 1908), Order 41 Rule 5 **- First appellate Court while allowing the application, directed the appellant to deposit mesne profit at the rate of Rs.7000/- p.m. -** ***Held*** **- While exercising power under Order 41 Rule 5, the appellate Court did not err in imposing the condition as there is overwhelming material placed on record that the suit shop would fetch more than the rent of Rs.7000/- p.m. if it is let out today - Petition dismissed.**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 5 – प्रथम अपीली न्यायालय ने आवेदन मंजूर करते समय अपीलार्थी को निदेशित किया कि 7000/– रुपये मासिक की दर से अन्तःकालीन लाभ जमा करे – *अभिनिर्धारित* – आदेश 41 नियम 5 के अन्तर्गत शक्ति का प्रयोग करते समय अपीलीय न्यायालय ने शर्त अधिरोपित करने में त्रुटि नहीं की क्योंकि अभिलेख पर दुर्दमनीय सामग्री उपलब्ध है कि यदि वाद दुकान को आज किराये पर दिया जाता है तो उसका 7000/– रुपये मासिक से अधिक किराया प्राप्त होगा – याचिका खारिज।

The Order of the Court was delivered by : **A.K. SHRIVASTAVA, J.**

Cases referred :

(2009) 8 SCC 483, (2008) 7 SCC 539, (2005) 1 SCC 705, (1999) 2 SCC 325, 2003(1) JLJ 105.

V.K. Bhardwaj with *Raja Sharma,* for the petitioners/defendants.
A.S. Rathore, for the respondent No.1/plaintiff.

NOTES OF CASES SECTION

Short Note (DB)

**(36)*

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

W.A. No.353/2007 (Jabalpur) decided on 20 July, 2010

SHYAM NARAYAN SHARMA & ors. ... Appellants

Vs.

STATE OF M.P. ...: Respondent

A. Constitution, Article 311 - Executive policy - **When executive power of Union of India is not trammeled by any statute or rule is wide, and pursuant to its power, it can make executive policy.**

क. संविधान, अनुच्छेद 311 – कार्यपालक नीति – जब भारत संघ की कार्यपालिका शक्ति किसी कानून द्वारा बाधित न हो अथवा नियम व्यापक हों, तथा अपनी शक्तियों के अनुसरण में यह कार्यपालक नीति बना सकती है।

B. Constitution, Article 311 - **Merger of two departments - Merger is essentially a policy decision.**

ख. संविधान, अनुच्छेद 311 – दो विभागों का विलयन – विलयन आवश्यक रूप में एक नीति निर्णय है।

C. Constitution, Article 311 - Policy decision - **Questions relating to constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria for promotion pertain to the field of policy which is exclusive discretion and jurisdiction of State Government.**

ग. संविधान, अनुच्छेद 311 – नीति निर्णय – पदों के निर्माण, स्वरूप, नामावली, संवर्ग, श्रेणी, उनका सृजन/समाप्ति, योग्यता का निर्धारण तथा सेवा की अन्य शर्तें, जिसमें पदोन्नति पथ, तथा पदोन्नति मानदण्ड सम्मिलित हैं, से सम्बन्धित प्रश्न नीति क्षेत्र से सम्बन्धित होते हैं, जो कि राज्य सरकार का अनन्य विवेकाधिकार एवं क्षेत्राधिकार है।

D. Constitution, Article 311 - Equivalency of two posts - **Not to be judged by sole fact of equal pay but many factors other than pay will have to be taken into consideration like (i) nature and duties of a post, (ii) responsibilities and powers exercised by officer holding post, (iii) extent of territorial or other charge held or responsibilities discharged, (iv) minimum qualification prescribed for recruitment, (v) Salary.**

घ. संविधान, अनुच्छेद 311 – दो पदों की समानता – सिर्फ समान वेतन के तथ्य को ही नहीं आंकी जाती बल्कि वेतन के अलावा अन्य कारकों जैसे (i) पद का स्वरूप एवं कर्तव्य, (ii) पद धारण करने वाले अधिकारी द्वारा प्रयोग किये जाने वाले उत्तरदायित्व एवं शक्तियाँ, (iii) धारित किये गये क्षेत्रीय अथवा अन्य पदभार का अथवा निर्वहन किये गये दायित्वों का विस्तार, (iv) भर्ती के लिए विहित न्यूनतम योग्यता, (v) वेतन, को भी विचार में लेना होगा।

E. Education Service (School Branch) Recruitment and Promotion Rules, M.P. 1982, Constitution, Article 311 - Merger of two departments and posts **- Directorate of Adult Education was merged with Directorate of Public Instructions - Post of District Adult Education Officer absorbed with Assistant Director, Public Instructions granting them seniority - Responsibilities of the post of Asstt. Director, Adult Education and that of Public Instructions were more or less same - Although there was slight difference of pay scale but later on was brought at par - No educational qualification as such was provided for the post of Asstt. Director, Public Instructions - Absorption of the post of D.A.E.O. who were holding the qualification of graduation and were sufficiently experience with Asstt. Director, Public Instructions could not be said to be impermissible - Petition dismissed.**

ङ. शिक्षा सेवा (शाला शाखा) भर्ती तथा पदोन्नति नियम, म.प्र. 1982, संविधान, अनुच्छेद 311 – दो विभागों और पदों का विलयन – प्रौढ़ शिक्षा संचालनालय का लोक शिक्षण संचालनालय में विलय – जिला प्रौढ़ शिक्षा अधिकारी के पद का सहायक संचालक, लोक शिक्षण में उनको वरिष्ठता प्रदान करते हुए आमेलन किया गया – सहायक संचालक, प्रौढ़ शिक्षा तथा लोक शिक्षण के पदों का उत्तदायित्व लगभग समान था – यद्यपि वेतनमान में कुछ भिन्नता थी, किन्तु बाद में दोनों को समान कर दिया गया – सहायक संचालक, लोक शिक्षण के पद हेतु इस रूप में कोई शैक्षणिक योग्यता का उपबंध नहीं था – जिला प्रौढ़ शिक्षा अधिकारी, जो स्नातक योग्यता धारित किये हुए थे तथा जिन्हें सहायक संचालक, लोक शिक्षण का पर्याप्त अनुभव था, के पद का आमेलन अननुज्ञेय नहीं कहा जा सकता – याचिका खारिज।

F. Interpretation of Statutes - 'May' or 'Shall' **- Use of word 'May' at one place and 'Shall' at another place in the same section may strengthen the inference that these words have been used in their primary and that 'Shall' be construed as mandatory.**

च. कानूनों का निर्वचन – 'सकेगा' या 'होगा' – एक ही धारा में एक स्थान पर 'सकेगा' शब्द तथा दूसरे स्थान पर 'होगा' शब्द का उपयोग इस अनुमान

को पुष्ट कर सकता है कि इन शब्दों का उपयोग उनके मूल रूप में किया गया है और यह कि 'होगा' का आज्ञापक अर्थ लगाया जावे।

G. Constitution, Article 226 - Writ Petition - Return filed by State - **State cannot take whatever stand they want to take on the same set of rules and on same facts at different points of time.**

छ. संविधान, अनुच्छेद 226 – रिट याचिका – राज्य द्वारा रिटर्न प्रस्तुत – राज्य भिन्न समय बिन्दुओं पर एक समान नियमों तथा समान तथ्यों पर जो कुछ आधार वह लेना चाहता है, नहीं ले सकता।

The Order of the Court was delivered by : ARUN MISHRA, J.

Cases referred :

(1991) 1 SCC 505, 2004(3) MPLJ 489, (1998) 4 SCC 590, (2003) 2 SCC 632, AIR 2000 SC 594, AIR 1961 SC 751, AIR 1992 SC 1341, (1998) 6 SCC 590, JT 2009(14) SC 298.

K.K. Trivedi, for the appellants.

P.K. Kaurav, Dy.A.G., for the respondent Nos.1 to 4.

S. Paul, for the intervenor.

Rajendra Tiwari with *Udyan Tiwari & T.K. Khadka*, for the respondent Nos.5 to 7.

Short Note (DB)

**(37)*

Before Mr. Justice S.L. Kochar & Mrs. Justice S.R. Waghmare

Cr.A. No.113/2005 (Indore) decided on 16 September, 2010

SOMU ... Appellant

Vs.

STATE OF M.P. ... Respondent

A. Penal Code (45 of 1860), Section 302, Evidence Act, 1872, Section 3 - Medical and ocular evidence - **Autopsy surgeon found stab wounds and impact abrasions and laceration of mastoid region because of pieces of skull bone - Accused alleged to have caused injuries by hard and blunt object are entitled to be acquitted as oral evidence is not corroborated by medical evidence.**

क. दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम, 1872, धारा 3 – चिकित्सीय एवं चक्षुदर्शी साक्ष्य – शव परीक्षक ने खोपडी की हड्डी के टुकड़े होने के कारण बेधन घाव तथा संघात खरोंच और कर्णमूल भाग का कटा–फटा

होना पाया – अभियुक्त जिसने कथित रूप से सख्त तथा भोथरे हथियार से क्षतियाँ कारित कीं, दोषमुक्त किये जाने का हकदार है, क्योंकि मौखिक साक्ष्य की चिकित्सीय साक्ष्य से सम्पुष्टि नहीं होती है।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 161 - Delay in recording of **- Statement of witness recorded after more than a month - Witness failed to account for - No reliance can be placed.**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 161 – अभिलिखित करने में विलम्ब – साक्षी का कथन एक माह से अधिक समय बाद अभिलिखित – साक्षी इसका कारण बताने में असफल – कोई विश्वास नहीं किया जा सकता।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 161 - Delay in recording of - Explanation thereof **- Plausible explanation has been given by I.O. with regard to delay in recording of evidence of P.W. 8 and P.W. 11 - Names of P.W. 8 and P.W. 11 mentioned in FIR which was lodged immediately after incident - Evidence of P.W. 8 and P.W. 11 are reliable.**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 161 – अभिलिखित करने में विलम्ब – उसका स्पष्टीकरण – अ.सा. 8 एवं अ.सा. 11 की साक्ष्य अभिलिखित करने में विलम्ब के संबंध में अन्वेषण अधिकारी द्वारा युक्तिसंगत स्पष्टीकरण दिया गया – प्रथम सूचना रिपोर्ट, जो कि घटना के तत्काल बाद दर्ज करायी गयी, में अ.सा. 8 एवं अ.सा. 11 के नामों का उल्लेख – अ.सा. 8 एवं अ.सा. 11 की साक्ष्य विश्वसनीय है।

D. Evidence Act (1 of 1872), Section 3 - Eye witness - Appreciation **- P.W. 5 supported the prosecution case in examination in chief - He was cross examined after 10 months of his examination in chief - Witness resiled from his statement made in examination in chief - No re-examination done by Public Prosecutor - Trial Court has also not exercised its power u/s 165 of Cr.P.C. - Bald statement of witness that first informant reached on the spot after the incident was over, cannot be acted upon.**

घ. साक्ष्य अधिनियम (1872 का 1), धारा 3 – प्रत्यक्षदर्शी साक्षी – मूल्यांकन – अ.सा. 5 ने मुख्य परीक्षा में अभियोजन मामले का समर्थन किया – उसकी प्रतिपरीक्षा उसकी मुख्य परीक्षा के 10 माह बाद की गयी – साक्षी अपनी मुख्य परीक्षा में किये गये कथन से मुकर गया – लोक अभियोजक द्वारा कोई पुनः परीक्षा नहीं की गयी – विचारण न्यायालय ने भी दं.प्र.सं. की धारा 165 के अंतर्गत अपनी शक्ति का प्रयोग नहीं किया – साक्षी के सरल कथन कि प्रथम सूचनादाता घटनास्थल पर घटना के समाप्त होने के पश्चात् पहुँचा था, पर कार्यवाही नहीं की जा सकती।

E. Criminal Procedure Code, 1973 (2 of 1974), Section 165 - Duty of Court - **It is duty of Court to find out the truth from falsehood.**

ङ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 165 – न्यायालय का कर्तव्य – असत्य में से सत्य को ढूंढना न्यायालय का कर्तव्य है।

The Judgment of the Court was delivered by : **S.L. KOCHAR, J.**

Cases referred :

(2007) 10 SCC 496, (2006) 12 SCC 64, (2006) 3 SCC 643, (2007) 9 SCC 796, (2007) 10 SCC 274, AIR 1958 SC 672.

A.K. Chatterjee, for the appellant.

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

Short Note (DB)

****(38)***

Before Mr. Justice Rakesh Saksena & Mr. Justice S.C. Sinho

Cr.A. No.1956/2002 (Jabalpur) decided on 30 April, 2010

VIJAY KUMAR PALIWAL ... Appellant

Vs.

STATE OF M.P. ... Respondent

A. Prevention of Corruption Act (49 of 1988), Section 13(1)(d) - Conspiracy - **It might be difficult to produce any direct or positive evidence to prove conspiracy, but then the prosecution is required to establish the circumstances on the basis of which it can be inferred with certainity that appellants hatched conspiracy with main accused.**

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – षड्यंत्र – षड्यंत्र साबित करने के लिए कोई प्रत्यक्ष या सकारात्मक साक्ष्य प्रस्तुत करना कठिन हो सकता है, परन्तु तब अभियोजन से यह अपेक्षित है कि वह परिस्थितियाँ स्थापित करे जिनके आधार पर यह निष्कर्ष निकाला जा सके कि अपीलार्थियों ने मुख्य अभियुक्त के साथ षड्यंत्र रचा।

B. Prevention of Corruption Act (49 of 1988), Section 13(1)(d) - Circumstantial evidence - **There is always a danger that conjecture or suspicion may take place of legal proof - Circumstances should be fully established and all the facts so established should be consistent only with the hypothesis of guilt of accused - Circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.**

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – परिस्थितिजन्य साक्ष्य – इसका सदैव खतरा रहता है कि विधिक सबूत का स्थान अनुमान या संदेह ले सकता है – परिस्थितियाँ पूर्णतः स्थापित होनी चाहिए और ऐसे स्थापित सभी तथ्य, केवल अभियुक्त के दोषी होने की परिकल्पना से संगत होने चाहिए – परिस्थितियाँ निश्चायक प्रकृति और प्रवृत्ति की होनी चाहिए और वे ऐसी होनी चाहिए जिससे साबित किये जाने के लिये प्रस्तावित एकमात्र परिकल्पना के सिवाय सभी परिकल्पनाएँ अपवर्जित करती हों।

***C. Prevention of Corruption Act (49 of 1988), Section 13(1)(d) - Mens rea* - Prosecution must prove affirmatively that appellant by corrupt or illegal means or by abusing his position obtained any pecuniary advantage for some other person - Even if there appeared some amount of carelessness or negligence on the part of appellant, it does not appear plausible to doubt his bona fides - Possibility cannot be ruled out that in routine manner while acting quickly or hurriedly, mistake is committed.**

ग. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – आपराधिक मनःस्थिति – अभियोजन को सकारात्मक रूप से साबित करना चाहिए कि अपीलार्थी ने भ्रष्ट या अवैध साधनों द्वारा या अपनी स्थिति के दुरुपयोग द्वारा किसी अन्य व्यक्ति के लिए कोई आर्थिक लाभ अभिप्राप्त किया – यद्यपि अपीलार्थी की ओर से कुछ मात्रा में असावधानी या उपेक्षा प्रतीत हुई है, तथापि उसकी सद्भाविकता पर संदेह करना युक्तिसंगत प्रतीत नहीं होता – इस बात की संभावना से इन्कार नहीं किया जा सकता कि नैत्यिक रूप से जल्दबाजी में या शीघ्रता से कार्य करते समय भूल हुई हो।

The Judgment of the Court was delivered by : RAKESH SAKSENA, J.

Cases referred :

AIR 1957 SC 466, AIR 1977 SC 822, AIR 1952 SC 343.

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

Aditya Adhikari, for the respondent.

Short Note

**(39)*

Before Mr. Justice I.S. Shrivastava

Cr.A. No.911/2001 (Indore) decided on 2 August, 2010

VINAY KUMAR JAIN & anr. ... Appellants

Vs.

STATE OF M.P. ... Respondent

A. Narcotic Drugs and Psychotropic Substances Act (61 of

1985), Section 52 - Disposal of articles seized **- Court permitted to destroy 1447 Kg of poppy straw - Property not forwarded to High Level Drug Disposal Committee for destruction - Certificate of destruction was to be issued by High Level Drug Disposal Committee - No such certificate produced before the Court - Property was not destroyed as per procedure - Provisions of Section 52 not complied with.**

क. स्वापक औषधि और मन:प्रभावी पदार्थ अधिनियम (1985 का 61), धारा 52 – अभिग्रहित वस्तुओं का व्ययन – न्यायालय ने 1447 किग्रा पोस्त पुआल (पॉपी स्ट्रा) का व्ययन करने की अनुज्ञा दी – सम्पत्ति विनष्ट किये जाने के लिए उच्च स्तरीय औषधि व्ययन समिति को नहीं भेजी गयी – विनष्ट किये जाने का प्रमाण पत्र उच्च स्तरीय औषधि व्ययन समिति द्वारा जारी किया जाना था – ऐसा कोई प्रमाण पत्र न्यायालय के समक्ष प्रस्तुत नहीं किया गया – सम्पत्ति को प्रक्रिया के अनुसार नष्ट नहीं किया गया – धारा 52 के उपबंधों का अनुपालन नहीं।

B. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 42 - Seizure **- Independent witness of seizure memo not supported fact of seizure - Seizure Panchnama not proved.**

ख. स्वापक औषधि और मन:प्रभावी पदार्थ अधिनियम (1985 का 61), धारा 42 – अभिग्रहण – अभिग्रहण ज्ञापन के स्वतंत्र साक्षी ने अभिग्रहण के तथ्य का समर्थन नहीं किया – अभिग्रहण पंचनामा साबित नहीं।

C. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8, 21(c) - Samples **- Bulk quantity of seized poppy straw not produced before the Court - It cannot be said that samples were prepared from the bulk quantity.**

ग. स्वापक औषधि और मन:प्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8, 21(सी) – नमूने – अभिग्रहीत पोस्त पुआल (पॉपी स्ट्रा) की वृहद मात्रा न्यायालय के समक्ष प्रस्तुत नहीं – यह नहीं कहा जा सकता कि नमूने वृहद मात्रा से तैयार किये गये थे।

Cases referred :

2007(1) EFT 127, 2001(1) EFR 160, 2004(1) EFR 229, 2008(IV) AD-Cri (SC) 337, 2009(2) JLJ 148, AIR 1996 SC 3033, 2001(1) EFR 6, 2003(1) EFR 220.

D.D. Vyas with *Ashish Sharma,* for the appellants.
Deepak Rawal, G.A., for the State.

I.L.R. [2011] M. P., 321
SUPREME COURT OF INDIA

Before Mr. Justice G.S. Singhvi & Mr. Justice Asok Kumar Ganguly

Cr.A. No.2263-2264/2010, decided on 1 December, 2010

INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA ... Appellant
Vs.
VIMAL KUMAR SURANA & anr. ... Respondents

A. Chartered Accountants Act (38 of 1949), Section 28 - Sanction to prosecute - **Prohibition is attracted when such person is sought to be prosecuted for contravention of provisions contained in Ss. 24, 24A, 25 or 26 - Prohibition is not attracted for any act or omission which constitutes offence under IPC.** (Para 13)

क. चार्टर्ड अकाउंटेंट अधिनियम (1949 का 38), धारा 28 – अभियोजन करने की मंजूरी – प्रतिषेध आकर्षित होता है जब धारा 24, 24ए, 25 या 26 में अन्तर्विष्ट उपबंधों के उल्लंघन के लिए ऐसे व्यक्ति को अभियोजित किया जाना चाहा गया है – भा.द.सं. के अन्तर्गत अपराध गठित करने वाले किसी कार्य या लोप के लिए प्रतिषेध आकर्षित नहीं होता।

B. Interpretation of Statutes - Construction - **If there are two possible constructions of statute, then the one which leads to anomaly or absurdity and makes the statute vulnerable to attack of unconstitutionality should be avoided in preference to other which makes it rational and immune from charge of unconstitutionality.** (Para 14)

ख. कानूनों का निर्वचन – अर्थान्वयन – यदि कानून के दो अर्थान्वयन संभव हैं, तब वह जो विषमता या अर्थहीनता की ओर ले जाता है एवं कानून को असंवैधानिकता के आक्रमण से भेद्य बनाता है उससे बचना चाहिए, दूसरे की तुलना में जो उसे युक्तिसंगत बनाता है तथा असंवैधानिकता के आरोप से उन्मुक्त करता है।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 300, Constitution, Article 20(2) - Double jeopardy - **Person who is said to have contravened provisions of Ss. 24, 24A, 25, 26 of Chartered Accountants Act, 1949 can also be prosecuted for an offence defined under IPC.** (Para 21)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 300, संविधान, अनुच्छेद 20(2) – दोहरा संकट – व्यक्ति जिसने कथित रूप से चार्टर्ड अकाउंटेंट अधिनियम, 1949 की धाराएँ 24, 24ए, 25, 26 के उपबंधों का उल्लंघन किया है,

उसे भा.द.सं. के अन्तर्गत परिभाषित अपराध के लिए भी अभियोजित किया जा सकता है।

***D. Criminal Procedure Code, 1973 (2 of 1974), Section 195(3) - Court* - Officers of the Income Tax Department and authorities constituted under M.P. Trade Tax Act, 1995 do not fall within the ambit of term Court.** (Para 25)

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 195(3) – न्यायालय – आयकर विभाग के अधिकारी एवं म.प्र. व्यवसाय कर अधिनियम, 1995 के अन्तर्गत गठित प्राधिकारी, न्यायालय शब्द की परिधि के भीतर नहीं आते।

Cases referred :

(2009) 6 SCC 316, (1953) 4 SCR 730, (1969) 3 SCR 65, (1961) 3 SCR 107, (1988) 3 SCC 467, (1988) 4 SCC 655, (2003) 2 SCC 152, (2005) 4 SCC 370, AIR 1931 All 443.

JUDGMENT

The Judgment of the Court was delivered by :

G.S. SINGHVI, J. :–Leave granted.

2. The question which arises for consideration in these appeals is whether the provisions contained in Sections 24, 24A and 26 of the Chartered Accountants Act, 1949 (for short, 'the Act') operate as a bar against the prosecution of a person who is charged with the allegations which constitute an offence or offences under other laws including the Indian Penal Code (IPC).

3. Respondent, Vimal Kumar Surana, who is a graduate in Commerce and has passed the examination of Chartered Accountant but is not a member of the appellant-institute is alleged to have represented himself before the Income Tax Department and the authorities constituted under the MadhyaPradesh Trade Tax Act on the basis of power of attorney or as legal representative and submitted documents such as audit reports and certificates required to be issued by the Chartered Accountants by preparing forged seals. He is also said to have impersonated himself as Chartered Accountant and prepared audit reports for monetary consideration.

4. Shri Brij Kishor Saxena, who was authorised by the appellant-institute to do so, submitted complaint dated 18.3.2001 to the Station House Officer, Police Station, Betul with following allegations:

"1) That the said Shri Vimal Kumar Surana is not registered

with the Institute of Chartered Accountants of India as Chartered Accountants, but he being not a Chartered Accountant impersonated in the public as such, and performed such functions which are being performed by a Chartered Accountant. Whereas without being registered as Chartered Accountant, he is not legally authorized to perform the said functions before the. Income Tax Department, under the provisions of Income Tax Act,. 1961, he represented himself as legal representative. Similarly under Section 31 of the M.P. Trade Tax Act, 1995 he worked on the basis of Power of Attorney or as legal representative. In this manner he has worked contrary to the provision of Section 24 of the Chartered Accountants Act, 1949, which is punishable offence under section 24 of the Act.

2) That in the manner above mentioned, the said Shri Vimal Kumar Surana not being a Chartered Accountant, personated to the public as Chartered Accountant and in the same manner unauthorisedly worked, which is an offence under Section 419 of the Indian Penal Code.

3) That the said Shri Vimal Kumar Surana impersonated" himself as the Chartered Accountant, prepared the audit reports; which are required to be issued under different provisions of law and obtained monitory consideration which is an offence under Section 420 of the Indian Penal Code.

4) That the said Shri Vimal Kumar Surana with the intention of cheating with a view to extract money by playing fraud upon the general public, prepared valuable documents such as audit reports, certificates required to be issued by Chartered Accountants for being Used, which is punishable offence under Section 468 of the Indian Penal Code.

5) The said Shri Vimal Kumar Surana with a view to perform aforesaid acts prepared forged seals and used the same, which is an offence punishable under Section 472 of the Indian Penal Code. He is in possession of the seal which he uses as Chartered Accountant. Therefore, this act is punishable offence under section 473 of the Indian Penal code."

5. After conducting investigation, the police filed challan in the Court of

Chief Judicial Magistrate, Betul (hereinafter referred to as 'the trial Court'), who passed order dated 10.3.2003 for framing charges against the respondent under Sections 419, 468, 471 and 472 IPC. The respondent challenged that order by filing revision under Section 397 of the Code of Criminal Procedure (Cr.P.C.). 1st Additional Sessions Judge, Betul allowed the revision, set aside order dated 10.3.2003 and.remitted the case to the trial Court with the direction to decide whether there are sufficient grounds for framing charges under Sections 419, 420, 465, 467 and 473 IPC read with Sections 24 and 26 of the Act. After remand, the trial Court passed order dated 8.12.2003 and held that there was no basis for framing any charge against respondent under the IPC. It further held that cognizance of offences under Sections 24 and 26 of the Act cannot be taken because no complaint had been filed by or under the order of the Council before the Magistrate.

6. The appellant questioned the correctness of orders dated 29.10.2003 and 8.12.2003 passed by 1st Additional Sessions Judge, Betul and the trial Court respectively by filing two separate revisions. The learned Single Judge of the High Court dismissed both the revisions. He held that even though prima facie case was made out against the respondent under Sections 24, 24A and 26 of the Act, the Magistrate could not have taken cognizance because no complaint was filed under Section 28 and the report submitted by the police could not be made basis for punishing him on the allegation of contravention of any of those provisions. The learned Single Judge also referred to Sections 2(d), 4, 5 and Section: 195(l)(b)(ii) Cr.P.C. and held that in the absence of a complaint filed by the concerned Court, the Magistrate was not competent to frame charges against the respondent. The learned Single Judge also held that in view of the special mechanism contained in the Act for prosecution of a person violating Sections 24, 24A and 26 of the Act, he cannot be prosecuted under the IPC.

7. Shri U.U. Lalit, learned senior counsel appearing for the appellant argued that even though the provisions contained in Chapter VII of the Act specify penalties for certain acts committed by a member of the Institute or a non member or a company, there is no bar against prosecution of such member, non member or company .if he/it commits an offence under the IPC. Learned senior counsel invited our attention to the expression 'without prejudice to any other proceedings, which may be taken against him' used in sub-section (2) of Sections 24A, 25 and 26 of the Act and argued that any person who contravenes these provisions can be punished by levy of fine and/or

imprisonment and 'also prosecuted for offence(s) under the IPC. Learned senior counsel emphasized that while enacting Chapter VII of the Act, the legislature has designedly not excluded the applicability of the provisions contained in the IPC and argued that the learned Single Judge committed serious error by approving the orders of the trial Court and Ist Additional Sessions Judge, Betul.

8. Shri R.P. Gupta, learned senior counsel appearing for the respondent argued that the Act is a special legislation and as specific penalties have been provided for contravention of Section 24 and sub-section (1) of Sections 24A, 25 and 26, the provisions contained in the IPC and Cr.P.C. cannot be invoked for prosecuting and punishing such person. Learned senior counsel further argued that the respondent could not have been prosecuted for the alleged contravention of sub-section (1) of Sections 24A and 26 of the Act because no complaint was filed against him under Section 28 of the Act. In support of this argument, the learned seniot counsel relied upon the judgments of this Court in *Jeewan Kumar Raut v. CBI* (2009) 7 SCC 526 and *Jamiruddin Ansari v. CBI* (2009) 6 SCC 316. Learned counsel then submitted that this Court may not interfere with the impugned order because the allegations levelled against the respondent do not constitute any offence under the IPC.

9. Ms. Vibha Datta Makhija, learned counsel for the State ofMadhya Pradesh relied upon the judgment of this Court in *Maqbool Hussain v. The State of Bombay* (1953) 4 SCR 730 and *T.S. Baliah v. T.S. Rangachari* (1969) 3 SCR 65 and argued that the offences specified in Sections 24 to 26 are distinct from the offences defined under Sections 419, 420, 465, 467, 468, 472 and 473 IPC and even if the complaint submitted by Brij Kishor Saxena cannot be treated as a complaint filed under Section 28 of the Act, his prosecution for offences defined under the IPC cannot be treated as barred.

10. The Chartered Accountants Act was enacted by Parliament to make provision for regulation of the profession of Chartered Accountants. Chapter I of the Act contains definitions of various terms. Chapter II contains provisions relating to incorporation of the Institute, entry of names in the Register, categorisation of the members of the Institute and certificate of practice. Section 7 which also finds place in this Chapter declares that every member of the Institute in practice shall, and any other member may, use the designation of a chartered accountant and no member using such designation shall use any

other description, whether in addition thereto or in substitution therefor. Section 8 enumerates the disabilities which disentitles a person to have his name entered in the Register. Section 9(1) which finds place in Chapter III postulates that there shall be a Council of the Institute for the management of the affairs of the Institute and for discharging the functions assigned to it. The other provisions contained in Chapter III regulate constitution of the Council of the Institute, establishment of Tribunal and their functions, etc. The provisions contained in Chapter IV mandates the Council to maintain a Register of the members of the Institute, inclusion of the particulars of the members and removal of the name of any member of the Institute from the Register. Chapter V consists of thirteen sections i.e. Sections 21 to 22G. Section 21(1) postulates establishment of a Disciplinary Directorate by the Council headed by an officer of the Institute designated as Director (Discipline). The main function of the Director (Discipline) is to scrutinize any information or complaint received against any member and place the same before the Disciplinary Committee. Sections 21A, 21Band 22A provide for constitution of a Board of Discipline, a Disciplinary Committee and an Appellate Authority. The main function of these bodies is to ensure that expeditions action is taken against the members against whom allegations of misconduct are levelled and he gets fair opportunity to contest those allegations. An order passed by the Disciplinary Committee can be appealed against under Section 22G. Section 23 which finds place in Chapter VI provides for constitution' and functions of Regional Councils. Chapter VII specifies the penalties, which can be imposed on a member, a non member and a company. Chapter VIIA contains provisions for establishment of Quality Review Board, functions of the Board, etc. and Chapter VIII contains miscellaneous provisions. Schedules I and II appended to the Act specify various acts of misconduct of a chartered accountant in practice. These Schedules obviously do not enumerate the wrong doings of a person who is not a member of the Institute.

11. Sections 2(1) (b), 24, 24A, 25, 26 and 28 of the Act, which have bearing on this case, read as under:

> **"2. Interpretation**
>
> (1) In this Act, unless there is anything repugnant in the subject or context,-
>
> (b) "chartered accountant" means a person who is a member of the Institute.

24. Penalty for falsely claiming to be a member, etc.

Any person who-

(i) not being a member of the Institute -

(a) represents that he is a member of the Institute; or

(b) uses the designation Chartered Accountant; or

(ii) being a member of the Institute, but not having a certificate of practice, represents that he is in practice or practises as a chartered accountant, shall be punishable on first conviction with fine which may extend to one thousand rupees, and on any subsequent conviction with imprisonment which. may extend to six months or with fine which may extend to five thousand rupees, or with both.

24A. Penalty for using name of the Council, awarding degree of chartered accountancy, etc.

(1) Save as otherwise provided in this Act, no person shall-

(i) use a name or the common seal which is identical with the name or the..common seal of the Institute or so nearly resembles it as to deceive or as is likely to deceive the public;

(ii) award any degree, diploma or certificate or bestow any designation which indicates or purports to indicate the position or attainmentnt of any qualification or competence similar to that of a member of the Institute; or

(iii) seek to regulate in any manner whatsoever the profession of chartered accountants.

(2) Any person contravening the provisions of subsection (1) shall, without prejudice to any other proceedings Which may be taken against him, be punishable with fine which may extend on first conviction to one thousand rupees, and on any subsequent conviction with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees, or with both.

25. Companies not to engage in accountancy

(1) No company, whether incorporated in India or elsewhere, shall practise as chartered accountants.

(2) If any company contravenes the provisions of sub-section (i), then, without prejudice to any other proceedings which may be taken against the company, every director, manager, secretary and any other officer thereof who is knowingly a party to such contravention shall be punishable with fine which may extend on first conviction to one thousand rupees, and on any subsequent conviction to five thousand rupees.

26. Unqualified persons not to sign documents

(1). No person other than a member of the Institute shall sign any document on behalf of a chartered accountant in practice or a firm of such chartered accountants in his or its professional capacity.

(2) Any person who contravenes the provisions of sub-section (1) shall, without prejudice to any other proceedings, which may be taken against him, be punishable on first conviction with a fine not less than five thousand rupees but which may extend to one lakh rupees, and in the event of a second or subsequent conviction with imprisonment for a term which may extend to one year or with fine not less ten thousand rupees but which may extend to two lakh rupees or with both.

28. Sanction to prosecute

No person shall be prosecuted under this Act except on a complaint made by or under the order of the Council or of the Central Government."

Sections 2(d), 4., 5 and 195 Cr.P.C. on which reliance has been placed by learned senior counsel for the respondent read as under:

"2(d). "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation. -A report made by a police officer in acase which discloses, after investigation, the commission of a non-

cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;

4. Trial of offences under the Indian Penal Code and other laws. - (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into tried, and otherwise dealt with according to the provision hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences,

5. Saving. - Nothing contained in this Code shall in the absence of a specific provision to the contrary, affect any special or local law any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence-(1) No Court shall take cognizance-

(a) (i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

(ii) of any abetment of, attempt to commit, such offence, or

(iii) of any criminal conspiracy to commit, such offence, except on the complaint in writing- of the public servant concerned or of some other public servant to whom he is administratively subordinate;

(b) (i) of any offence punishable under any of the following section of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199,200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) of any offence described in section 463, or punishable

under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) of any. criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub-clause (ii),

except on the complaint in writing of that Court or by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate.

(2) Where a complaint has been made by a 'public servant under clause (a) of subsection (1) any authority to which he is administratively subordinate may order the withdrawal of the complaint and send a copy of such order to the Court; and upon its receipt by the Court, no further proceedings shall be taken on the complaint:

Provided that no such withdrawal shall be ordered if the trial in the Court of first instance has been concluded.

(3) In clause (b) of sub-section (1), the term "Court" means a Civil, Revenue or Criminal Court, and includes a tribunal constituted by or under a Central, provincial or State Act if declared by that Act to be a Court for the purposes of this section.

(4) For the purposes of clause (b) of sub-section (1), a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from appealable decrees or sentences of such former Court, or in the case of a civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within whose local jurisdiction such Civil Court is situate:

Provided that-

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate;

(b) where appeals lie to a civil and also to a Revenue Court,

such Court shall be deemed to be subordinate to the civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed."

12. An analysis of Section 24 shows that if a person who is not a member of the Institute represents himself as a member of the Institute or uses the designation of chartered accountant then he is liable to be punished on first conviction with fine which may extend to Rs.1,000/-. On any subsequent conviction, he can be punished with imprisonment up to 6 months or fine which may extend to Rs.5,000/- or with both. Similar punishment can be imposed on a member of the Institute who does not have a certificate of practice but represents that he is in practice or practises as a chartered accountant. Sub-section (2) of Sections 24A, 25 and .26 provide for imposition of different kinds of punishment for violation of the provisions contained in sub-section (1) of those sections. The punishment prescribed under Section 24A can be imposed if a person uses a name or the common seal which is identical with the name or the common seal of the Institute or is almost similar to such seal and the use of such seal has the effect of deceiving or is likely to deceive the public, A person can also be punished if he awards any degree, diploma or certificate or bestow any designation which indicates or purports to indicate position or attainment of any qualification or competence at par with a member of the Institute or if he seeks to regulate the profession of chartered accountants. Section 26 provides for imposition of punishment if a person other than a member of the Institute signs any document on behalf of a chartered accountant in practice or a firm of such chartered accountants in his or its professional capacity. Section 28 which is couched in negative form declares that no person shall be prosecuted under the Act except on a complaint made by or under the order of the Council or of the Central Government.

13. What is most significant to note is that prohibition contained in Section 28 against prosecution of a person except on a complaint made by or under the order of the Council or of the Central Governiment is attracted only when such person is sought to be prosecuted for contravention of the provisions contained in Section 24 or sub-section (1) of Sections 24A, 25 or 26 and not for any act or omission which constitutes an offence under the IPC. The use of expression without prejudice to any other proceedings which may be taken against him in sub-section (2) of Sections 24A and 26 and somewhat similar expression in sub-section (2) of Section 25 show that contravention of the

provisions contained in sub-section (1) of those sections can lead. to filing of complaint under Section 28 of the Act and if the particular .act also amounts an offence under the IPC or any other law, then a complaint can also be filed under Section 200 Cr.P.C. or a first information report lodged with the police under Section 156 Cr.P.C. The said expression cannot be given a restricted meaning in the context of professional and other misconducts which may be committed by a member of the Institute and for which he may be punished under Section 21B(3) because the violation of Sections 24 to 26 can be committed by a person who may or may not be a chartered accountant as defined in Section 2(b). In other words, if the particular act of a member of the Institute or a non member or a company results in contravention of the provisions contained in Section 24 or sub-section (1) of Sections 24A, 25 or 26 and such act also amounts criminal misconduct which is defined as an offence under the IPC, then a complaint can be filed by or under the order of the Council or of the Central Government under Section 28, which may ultimately result in imposition of the punishment prescribed under Section 24 or sub-section (2) of Sections 24A, 25 or 26 and such member or non member or company can also be prosecuted for any identified offence under the IPC. The object underlying the prohibition contained in Section 28 is to protect the persons engaged in profession of chartered accountants against false and untenable complaints from dissatisfied litigants and others. However, there is nothing in the language of the provisions contained in Chapter VII from which it can be inferred that Parliament wanted to confer immunity upon the members and non members from prosecution and punishment if the action of such member or non member amounts to an offence under the IPC or any other law.

14. The issue deserves to be considered from another angle. If a person cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is (Section 416 IPC), then he can be charged with the allegation of cheating by personation and punished under Section 419 for a term which may extend to 3 years or with fine or both. If a person makes any false document with the intent to cause damage or injury to the public or to any person, or to support any claim or title, then he can be prosecuted for an offence of forgery (Section 463) and can be punished under Section 465 with imprisonment which may extend to 2 years or with fine or with both. If a person commits forgery for the purpose of intending that the

document forged by him shall be used for the purpose of cheating then he can be punished with imprisonment for a term which may extend to 7 years and fine (Section 468). If a person makes or counterfeits any seal, plate, or other instrument for making an impression, intending that the same shall be used for committing any forgery which would be punishable under Section 467 or with such intent, in his possession any such seal, plate or other instrument, knowing the same to be counterfeit then he is liable to be punished with imprisonment for life or with imprisonment which may extend to 7 years. He shall also be liable to fine. The provisions contained in Chapter VII of the .Act neither define cheating by personation or forgery or counterfeiting of seal, etc. nor provide for punishment for such offences. If it is held that a person acting in violation of Section 24 or contravening sub-section (1) of Sections 24A and 26oftheAct can be punished only under the Act even though his act also amounts to one or more offence(s) defined under the IPC and that too on a complaint made in accordance with Section 28, then the provisions of Chapter VII will become discriminatory and may have to be struck down on the ground of violation of Article 14. Such an unintended consequence can be and deserves to be avoided in interpreting Sections 24A, 25 and 26 keeping in view the settled law that if there are two possible constructions of a statute, then the one which leads to anomaly or absurdity and makes the statute vulnerable to the attack of unconstitutionality should be avoided in preference to the other which makes it rational and immune-from the charge of unconstitutionality. That apart, the Court cannot interpret the provisions of the Act in a manner which will deprive the victim of the offences defined in Sections 416, 463, 464, 468 and 471 of his right to prosecute the wrong doer by filing the first information report or complaint under the relevant provisions of Cr.P.C.

15. We. may add that the respondent could have been simultaneously prosecuted for contravention of Sections 24, 24A and 26 of the Act and for the offences defined under the IPC but in view of the bar contained in Article 20(2) of the Constitution read with Section 26 of the General Clauses Act, 1897 and Section 300 Cr.P.C., he could not have been punished twice for the same offence. In *Maqbool Hussain v. The State of Bombay* (supra), the Court considered the question whether the appellant who had brought gold from Jeddah in contravention of notification dated 25.8.1948 could have been prosecuted under Section 8 of the Foreign Exchange Regulation Act, 1947 after the gold had been confiscated by the authorities of the Customs Department.under Section 167(8) of the Sea Customs Act, 1878. The

appellant challenged his prosecution by contending that this amounted to infringement of his fundamental right under Article 20(2) of the Constitution. The Bombay High Court negatived his challenge. This Court upheld the order of the High Court and observed:

> "There is no doubt that the act which constitutes an offence under the Sea Customs Act as .also an offence under the Foreign Exchange Regulation Act was one and the same viz. importing the gold in contravention of the notification of the Government of India dated 25th August, 1948. The appellant could be proceeded against under Section 167(8) of the Sea Customs Act as also under Section 23 of the Foreign Exchange Regulation Act in respect of the said act.
>
> The fundamental right which is guaranteed in Article 20(2) enunciates the principle of "autrefois convict" or "double jeopardy". The roots of that principle are to be found in the well established rule of the common law of England "that where a person has been convicted of an offence by a court of competent jurisdiction the conviction is a bar to all further criminal proceedings for the same offence". (Per Charles, J. in *Reg v. Miles*'). To the same effect is the ancient maxim *"Nemo bis debet puniri.pro uno delicto"*, that is to say that no one ought to be twice punished for one offence or as it is sometimes written "pro eadem causa", that is, for the same cause.
>
> This is the principle on which the .party pursued has available to him the plea of "autrefois convict", or "autrefois acquit". "The plea of 'autrefois convict' or 'autrefois acquit' avers that the defendant has been previously convicted or acquitted on a charge for the same offence as that in respect of which he is arraigned.... The question for the jury on the issue is whether. the defendant has previously been in jeopardy in respect of the charge on which he is arraigned, for the rule of law is that a person must not be put in peril twice for the same offence. The test is whether the former offence and the offence now charged have the same ingredients in the sense that the facts constituting the one are sufficient to justify a conviction of the other, not that the facts relied on by the Crown are the same in the two trials. A plea of 'autrefois acquit' is not proved unless

it is shown that the verdict of acquittal of the previous charge necessarily involves an acquittal of the latter." (Vide Halsbury's Laws of England, Hailsham Edition, Vol. 9, pp. 152 and 153, para 212).

This principle found recognition in Section 26 of the General Clauses Act, 1897,–

> 'Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence,'

and also in Section 403(1) of the Criminal Procedure Code, 1898,–

> 'A person who has been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236, or for which he might have been convicted under Section 237'."

The Court then referred to the provisions of the Sea Customs Act, 1878 and held:

> "We are of the opinion that the Sea Customs authorities are not a judicial tribunal and the adjudging of confiscation, increased rate of duty or penalty under the provisions of the Sea Customs Act do not constitute a judgment or order of a court or judicial tribunal necessary for the purpose of supporting a plea of double jeopardy.
>
> It therefore follows that when the Customs authorities confiscated the gold in question neither the proceedings taken before the Sea Customs authorities constituted a prosecution of the appellant nor did the order of confiscation constitute a punishment inflicted by a court or judicial tribunal on the appellant. The appellant could not be said by reason of these proceedings before the Sea Customs authorities to have been

> "prosecuted and punished" for the same offence with which he was charged before the Chief Presidency Magistrate, Bombay, in the complaint which was filed against him under Section 23 of the Foreign Exchange Regulation Act."

16. In T.S. Baliah's case, the Court considered the question whether the appellant could be simultaneously prosecuted under Section 177 IPC and for violation of Section 52 of the Income Tax Act, 1922. After noticing Section 26 of the General Clauses Act, the Court held:

> "A plain reading of the section shows that there is no bar to the trial or conviction of the offender under both enactments but there is only a bar to the punishment of the offender twice for the same offence. In other words, the section provides that where an act or omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or both the enactments but shall not be liable to be punished twice for the same offence. We accordingly reject the argument of the appellant on this aspect of the case."

17. In *State of Bombay v. S.L. Apte* (1961) 3 SCR 107, the question that fell for consideration was whether in view of an earlier conviction and sentence under Section 409 IPC, a subsequent prosecution for an offence under Section 105 of Insurance Act, 1935, was barred by Section 26 of the General Clauses Act and Article 20(2) of the Constitution. This Court answered the question in following words:

> "To operate as a bar the second prosecution and the consequential punishment thereunder, must be for 'the same offence'. The crucial requirement therefore for attracting the article is that the offences are the same, i.e., they should be identical. If, however, the two offences are distinct, then notwithstanding that the allegations of facts in the two complaints might be substantially similar, the benefit of the ban cannot be invoked. It is, therefore, necessary to analyse and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identity is made out. .
>
> ... Though Section 26 in its opening words refers to 'the act or omission constituting an offence under two or more

enactments', the emphasis is not on the facts alleged in the two complaints but rather on the ingredients which constitute the two offences with which a person is charged. This is made clear by the concluding portion of the section which refers to 'shall not be liable to be punished twice for the *same offence*". If the offences are not the same but are distinct, the ban imposed by this provision also cannot be invoked."

18. In *V.K. Agarwal v. Vasantraj B. Bhatia* (1988) 3 SCC 467, this Court considered the question whether the acquittal of an accused charged with having committed an offence punishable under Section 111 read with Section 135 of the Customs Act, 1962 create a legal bar to the subsequent prosecution of the said accused under Section 85 of the Gold (Control) Act, 1968. The Gujarat High Court answered the question in affirmative. This Court reversed the order of the High Court and observed:

"It is therefore evident that the ingredients required to be established in respect of the offence under the Customs Act are altogether different from the ones required to be established for an offence under the Gold (Control) Act. In respect of the former, the prosecution has to establish that *there was a prohibition against the import* into Indian sea waters of goods which were found to be in the possession of the offender. On the other hand in respect of the offence under the Gold (Control) Act, it is required to be established that the offender was in possession of primary gold meaning thereby gold of a purity of not less than 9 carats in any unfinished or semi-finished form. In regard to the latter offence it is not necessary to establish that there is any prohibition against the import of gold into Indian sea waters. Mere possession of gold of purity not less than 9 carats in any unfinished or semi-finished form would be an offence under the Gold Control Act. It is therefore stating the obvious to say that the ingredients of the two offences are altogether different. Such being the case the question arises whether the acquittal for the offences under the Customs Act which requires the prosecution to establish altogether different ingredients operates as a bar to the prosecution of the same person in connection with the charge of having committed the offence under the Gold (Control) Act.

.....In the present case the concerned Respondents could be found guilty of both the offences in the context of the possession of gold. If it was established that there was a prohibition against the import of gold and that he was found in possession of gold which he knew or had reason to believe was liable to confiscation he would be guilty of that offence. He would also be guilty of an offence under the Gold (Control) Act provided the gold is of a purity of at least 9 carats. He would have violated the provisions of "*both*" the Customs Act and the Gold (Control) Act if the aforesaid ingredients were established. It is not as if in case he was found guilty of an offence under the Customs Act, he could not have been found guilty under the Gold (Control) Act or vice versa. Upon being found guilty of both the offences the court may perhaps, impose a concurrent sentence inrespect of both the offences but the court has also the power to direct that the sentence, shall run consecutively. There is therefore no question of framing of an alternative charge one, under the Customs Act, and the other, under the Gold (Control) Act. If the ingredients of both the offences are satisfied the same act of possession of the gold would constitute, an offence both under the Customs Act as also under the .Gold (Control) Act. Such being the position it cannot be said that they could have been tried on the .same facts for an alternative charge in the context of Section 236Cr.P.C. at the time of the former proceedings. The submission urged .in the context of Section 403(1) cannot therefore succeed for it cannot be said that the persons who are sought to be tried in the subsequent proceedings could have been tried on the same facts at the former trial under Section 236."

19. In *State of Bihar v. Murad Ali Khan* (1988) 4 SCC 655, the question considered by the Court, was whether, the complaint lodged by the competent officer alleging commission of offence under Section 9(1) read with Section 51 for killing elephants and removing its husk was maintainable notwithstanding the pendency of police investigation for an offence under Sections 447, 429 and 479 read with Sections 54 and 39 of the Act. After adverting to the relevant provisions, this Court held:

"What emerges from a perusal of these provisions is that cognizance of an offence under the "Act" can be taken by a court only on the complaint of the officer mentioned in Section 55. The person who lodged complaint dated June 23, 1986 claimed to be such an officer. In these circumstances even if the jurisdictional police purported to register a case for an alleged offence against the Act, Section 210(1) would not be attracted having regard to the position that cognizance of such an offence can only be taken on the complaint of the officer mentioned in that section. Even where a Magistrate takes cognizance of an offence instituted otherwise than on a police report and an investigation by the police is in progress in relation to same offence, the two cases do not lose their separate identity. The section seeks to obviate the anomalies that might arise from taking cognizance of the same offence more than once. But, where, as here, cognizance can be taken only in one way and that on the complaint of a particular statutory functionary, there is no scope or occasion for taking cognizance more than once and, accordingly, Section 210 has no role to play. The view taken by the High Court on the footing of Section 210 is unsupportable.

We are unable to accept the contention of Shri R.F. Nariman that the specific allegation in the present case concerns the specific act of killing of an elephant, and that such an offence, at all events, falls within the overlapping areas between of Section 429 IPC on the one hand and Section 9(1) read with Section 50(1) of the Act on the other and therefore constitutes the same offence. Apart from the fact that this argument does not serve to support the order of the High Court in the present case, this .argument is, even on its theoretical possibilities, more attractive than sound. The expression "any act or omission which constitutes any offence under this Act" in Section 56 of the Act, merely imports the idea that the same act or omission might constitute an offence under another law and could be tried under such other law or laws also.

'The proviso to Section 56 has also a familiar ring and is a facet of the fundamental and salutary principles that permeate

penology and reflected in analogous provisions of Section 26 of General Clauses Act, 1897; Section 71 IPC; Section 300 CrPC 1973, and constitutionally guaranteed under Article 20(2) of the Constitution. Section 26 of the General Clauses Act, 1897 provides:

> "26. *Provision as to offences punishable under two or more enactments*–Where an. act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

Broadly speaking, a protection against a second or multiple punishment for the same offence, technical complexities aside, includes a protection against re-prosecution after acquittal, a protection against re-prosecution after conviction and a protection against double or multiple punishment for the same offence. These protections have since received constitutional guarantee under Article 20(2). But difficulties arise in the application of the principle in the context of what is meant by "same offence". The principle in American law is stated thus:

> "The proliferation of technically different offences encompassed in a single instance of crime behaviour has increased the importance of defining the scope of the offence that controls for purposes of the double jeopardy guarantee.
>
> Distinct statutory provisions will be treated as involving separate offences for double jeopardy purposes only if 'each provision requires proof of an additional fact which the other does not' (*Blockburger v. United States*). Where the same evidence suffices to prove both crimes, they are the same for double jeopardy purposes, and the clause forbids successive trials and cumulative punishments for the two crimes. The .offences must be joined in

> one indictment and tried together unless the defendant requests that they be tried separately. *{Jeffers v. United States)"*

The expression "the same offence", "substantially the same offence" "in effect the same offence" or "practically the same", have not done much to lessen the difficulty in applying the tests to identify the legal common denominators of "same offence". Friedland in *Double Jeopardy* (Oxford 1969) says at p. 108:

> "The trouble with this approach is that it is vague and hazy and conceals the thought processes of the court. Such an inexact test must depend upon the individual impressions of the judges and can give littlle guidance for future decisions. A more serious consequence is the fact that a decision in one case that two offences are 'substantially the same' may compel the same result in another case involving the same two offences where the circumstances may be such that a. second prosecution should be permissible...,"

In order that the prohibition is attracted the same act must constitute an offence under more than one Act. If there are two distinct and separate offences with. different ingredients under two different enactments. a double punishment is not barred. In *Leo Roy Frey v. Superintendent, District Jail,* the question arose whether a. crime and the offence of conspiracy to commit it are different offences. This Court said: (SCR p. 827)

> "The offence of' conspiracy to commit a crime is a different offence from the crime that is the object of the conspiracy because the conspiracy precedes the commission of the crime and is complete before the. crime is attempted or completed, equally the crime attempted or completed does not require the element of conspiracy as one of its ingredients. They are, therefore, quite separate offences."

20. In *State of Rajasthan v. Hat Singh* (2003) 2 SCC 152, the Court

considered the question whether the High Court was right in taking the view that the respondent could have been prosecuted either under Section 5 or Section 6(3) of the Rajasthan Sati (Prevention) Act, 1987 and not under both the sections. The High Court, had ruled in favour of the respondent. This Court reversed the judgment of the High Court, referred to Article 20(2) of the Constitution, the judgments in *Maqbool Hussain v. The State of Bombay* (supra), *State of Bombay v. S.L. Apte* (supra) and observed:

> "The rule against double jeopardy is stated in the maxim *nemo debet bis vexari pro una et eadem causa.* It is a significant basic rule of criminal law that no man shall be put in jeopardy twice for one and the same offence. The rule provides foundation for the pleas of *autrefois acquit* and *autrefois convict.* The manifestation of this rule is to be found contained in Section 26 of the General Clauses Act, 1897, Section 300. of the Code of Criminal Procedure, 1973 and Section 71 of the Indian Penal Code. Section 26 of the General Clauses Act provides:
>
> > "26. Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the *same offence.*"

Section 300 CrPC provides, *inter alia,*–

> "300. (1) A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of, such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the *same offence,* nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of Section 221, or for which he might have been convicted under sub-section (2) thereof."

Both the provisions employ the expression "*same offence*".

The Court then proceeded to analyze the relevant sections of the Act

and held that the offences under Sections 5 and 6(3) of the Act were distinct and there was no bar against prosecution of the respondent under Section 5 even though his prosecution under Section 6(3) had failed.

21. In view of the above discussion, the argument of the learned senior counsel appearing for the respondent that the Act is a special legislation vis-a-vis IPC and a person who is said to have contravened the provisions of sub-section (1) of Sections 24, 24A, 25 and 26 cannot be prosecuted for an offence defined under the IPC, which found favour with the High Court does not commend acceptance.

22. The judgments on which the learned senior counsel appearing for the respondent has placed reliance are clearly distinguishable. In *Jamiruddin Ansari v. C.B.I,* (supra), this Court was called upon to consider Whether an order for investigation could be passed under Section 156(3) Cr.P.C. in a case involving violation of the provisions contained in the Maharashtra Control of Organised Crime Act, 1999. This Court referred to the provisions of Sections 9 and 23 of the Maharashtra Act and held that the Special Judge cannot take cognizance of any offence under that Act unless sanction has been given by a police officer not below the rank of Additional Director General of Police. The Court further held that the provisions contained in the Maharashtra Act have overriding effect and Section 156(3) cannot be invoked for ordering special inquiry on a private complaint. Paragraphs 65 (part), 67 and 68 of the judgment, which contain this conclusion, reads as under:

> "The wording of sub-section (2) of Section 23 leaves no room for doubt that the learned Special Judge cannot take cognizance of any offence under MCOCA unless sanction has been previously given by the police officer mentioned hereinabove. In such a situation, even as far as a private complaint is concerned, sanction has to be obtained from the police officer not below the rank of Additional Director General of Police, before the Special Judge can take cognizance of such complaint.
>
> We are also inclined to hold that in view of the provisions of Section 25 of MCOCA, the provisions of the said Act would have an overriding effect over the provisions of the Criminal Procedure Code and the learned Special Judge would not, therefore, be entitled to invoke the provisions of Section 156(3) CrPC for ordering a special inquiry on a private complaint

and taking cognizance thereupon, without traversing the route indicated in Section 23 of MCOCA. In other words, even on a private complaint about the commission of an offence of organised crime under MCOCA cognizance cannot be taken by the Special Judge without due compliance with sub-section (1) of Section 23, which starts with a non obstante clause.

As indicated hereinabove, the provisions of Section 23 are the safeguards provided against the invocation of the provisions of the Act which are extremely stringent and far removed from the provisions of the general criminal law. If, as submitted on behalf of some of the respondents, it is accepted that a private complaint under Section 9(1) is not subject to the rigours of Section 23, then the very purpose of introducing such safeguards lose their very raison d'etre. At the same time, since the filing of a private complaint is also contemplated under Section 9(1) of MCOCA, for it to be entertained it has also to be subject to the rigours of Section 23. Accordingly, in view of the bar imposed under sub-section (2) of Section 23 of the Act, the learned Special Judge is precluded from taking cognizance on a private complaint upon a separate inquiry under Section 156(3) CrPC. The bar of Section 23(2) continues to remain in respect of complaints, either of a private nature or on a police report."

The question which fell for consideration in *Jeewan Kumar Raut v. C.B.I.* (supra) was whether the Transplantation of Human Organs Act, 1994 (for short, 'the 1994 Act') is a special law and has overriding effect qua the provisions of the IPC. This Court referred to Sections 18, 19 and 22 of the 1994 Act and observed:

"TOHO being a special statute. Section 4 of the Code, which ordinarily would be applicable for investigation into a cognizable offence or the other provisions, may not be applicable. Section 4 provides for investigation, inquiry, trial, etc. according to the provisions of the Code. Sub-section (2) of Section 4, however, specifically provides that offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating

the manner or place of investigating, inquiring into, tried or otherwise dealing with such offences.

TOHO being a special Act and the matter relating to dealing with offences thereunder having been regulated by reason of the provisions thereof, there cannot be any manner of doubt whatsoever that the same shall prevail over the provisions of the Code. The investigation in terms of Section 13(3)(iv) of TOHO, thus, must be conducted by an authorised officer. Nobody else could do it. For the aforementioned reasons, the officer in charge of Gurgaon Police Station had no other option. but to hand over the investigation to the appropriate authority.

Section 22 of TOHO prohibits taking of cognizance except on a complaint made by an appropriate authority or the person who had made a complaint earlier to it as laid down therein. The respondent, although, has all the powers of an investigating agency, it expressly has been statutorily prohibited from filing a police report. It could file a complaint petition only as an appropriate authority so as to comply with the requirements contained in Section 22 of TOHO. If by reason of the provisions of TOHO, filing of a police report by necessary implication is necessarily forbidden, the question of its submitting a report in terms of sub-section (2) of Section 173 of the Code did not and could not arise. In other words, if no police report could be filed, sub-section (2) of Section 167 of the Code was not attracted.

It is a well-settled principle of law that if a special statute lays down procedures, the ones laid down under the general statutes shall not be followed. In a situation of this nature, the respondent could carry out investigations in exercise of its authorisation under Section 13(3)(iv) of TOHO. While doing so, it could exercise such powers which are otherwise vested in it. But, as it could not file a police report but a complaint petition only; sub-section (2) of Section 167 of the Code may not be applicable."

23. The language of the provisions, which were interpreted in the above noted two judgments was not similar to sub-section (2) of Sections 24A, 25 and 26 of the Act which, as mentioned above, contain the expression 'without

prejudice to any other proceedings, which maybe taken'. Therefore, the ratio of those judgments cannot be relied upon for sustaining the impugned order.

24. It is also apposite to mention that except the provision contained in Section 28 against the prosecution of a person, who is alleged to have acted in contravention of sub-section (1) of Sections 24, 24A, 25 or 26 otherwise then on a complaint made by or under the order of the Council or the Central Government, the Act does not specify the procedure to be followed for punishing such person. In the absence of any such provision, the procedure prescribed in Cr.P.C. has to be followed for inquiry, investigation and trial of the complaint which may be filed for contravention of any of the provisions contained in Chapter VII of the Act - Section 4 Cr.P.C.

25. The submission of Shri Gupta that the respondent cannot be prosecuted for offences defined under the IPC because no complaint had been filed against him by the concerned Court or authority as per the requirement of Section 195(l)(b)(ii) Cr.P.C. sounds attractive but lacks merit. The prohibition contained in Section 195 Cr.P.C. against taking of cognizance by the Court except on a complaint in writing made by the concerned Court before which the document is produced or given in a proceeding is not attracted in the case like the present one because the officers of the Income Tax Department and the authorities constituted under the Madhya Pradesh Trade Tax Act, 1995 before whom the respondent is alleged to have acted on the basis of power of attorney or as legal representative or produced audit report do not fall within the ambit of the term 'Court' as defined in Section 195(3) Cr.P.C. Such officer/authorities were neither discharging the functions of a Civil, Revenue or Criminal Court nor they could be treated as tribunal constituted by or under the Central or State Act, which is declared to be a Court for the purpose of Section 195. This provision was analysed and interpreted by the Constitution Bench in *Iqbal Singh Marwah v. Meenakshi Marwah* (2005) 4 SCC 370. The Constitution Bench referred to other provisions of Cr.P.C. and considered earlier judgments and observed:

> "The scheme of the statutory provision may now be examined. Broadly, Section 195 CrPC deals with three distinct categories, of offences which have been described in clauses (a), (b)(i) and (b)(ii) and they relate to (1) contempt of lawful authority of public servants, (2) offences against public justice, and (3) offences relating to documents given in evidence. Clause (a) deals with offences punishable under Sections 172 to 188 IPC

which occur in Chapter X IPC and the heading of the Chapter is –"Of Contempts of the Lawful Authority of Public Servants". These are offences which directly affect the functioning of or discharge of lawful duties of a public servant. Clause (b)(i) refers to offences in Chapter XI IPC which is headed as –"*Of False Evidence and Offences Against Public Justice*". The offences mentioned in this clause clearly relate to giving or fabricating false evidence or making a false declaration in any judicial proceeding or before a court of justice or before a public servant who is bound or authorised by law to receive such declaration, and also to some other offences which have a direct correlation with the proceedings in a court of justice (Sections 205 and 211 IPC). This being the scheme of two provisions or clauses of Section 195 viz. that the offence should be such which has direct bearing or affects the functioning or discharge of lawful duties of a public servant or has a direct correlation with the proceedings in a court of justice, the expression "when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any court" occurring in clause (b)(ii) should normally mean commission of such an offence after the document has actually been produced or given in evidence in the court. The situation or contingency where an offence as enumerated in this clause has already been committed earlier and later on the document is produced or is given in evidence in court, does not appear to be in tune with clauses (a)(i) and (b)(i) and consequently with the scheme of Section 195 CrPC. This indicates that clause (b)(ii) contemplates a situation where the offences enumerated therein are committed with respect to a document subsequent to its production or giving in evidence in a proceeding in any court.

Section 195(1) mandates a complaint in writing to the court for taking cognizance of the offences enumerated in clauses (b)(i) and (b)(ii) thereof. Sections 340 and 341 CrPC which occur in Chapter XXVI give the procedure for filing of the complaint and other matters connected therewith. The heading of this Chapter is– "Provisions as to Offences Affecting the Administration of Justice". Though, as a general rule, the

language employed in a heading cannot be used to give a different effect to clear words of the section where there cannot be any doubt as to their ordinary-meaning, but they are not to be treated as if. they were marginal notes or were introduced into the Act merely for the purpose of classifying the enactments. They constitute an important part of the Act itself, and may be read not only as explaining the sections which immediately follow them, as a preamble to a statute may be looked to explain its enactments, but as affording a better key to the constructions of the sections which follow them than might be afforded by a mere preamble. (See *Craies on Statute Law,* 7th Edn., pp.207, 209.) The fact that the procedure for filing a complaint by court has been provided in Chapter XXVI dealing with offences affecting administration of justice, is a clear pointer to the legislative intent that the offence committed should be of such type which directly affects the administration of justice viz. which is committed after the document is produced or given in evidence in court. Any offence committed with respect to a document at a time prior to its production or giving in evidence in court cannot, strictly speaking, be said to be an offence affecting the administration of justice."

The Court then referred to Section 195 of the Code of Criminal Procedure, 1898, the Full Bench judgment of the Allahabad High Court in *Emperor v. Kushal Pal Singh* AIR 1931 Allahabad 443 and observed:

"The Court clearly rejected any construction being placed on the provision by which a document forged before the commencement of the proceeding in which it may happen to be used in evidence later on, to come within the purview of Section 195, as that would unreasonably restrict the right to initiate prosecution possessed by a person and recognised by Section 190 CrPC.

The aforesaid decision was considered in *Raghunath v. State of U.P. Here,* the accused had obtained sale deed of the property of a widow by setting up of an impostor and thereafter filed a mutation application before the Tahsildar. The widow contested the mutation application on the ground that she had

never executed the sale deed and thereafter filed a criminal-complaint under Sections 465, 468 and 471 IPC in which the accused were convicted. In appeal, it was contended that the private complaint was barred by virtue of Section 195(l)(c) CrPC and the Revenue Court alone could have filed the complaint. The Court repelled the aforesaid contention after relying upon the ratio of *Patel Laljibhai v. State of Gujarat* and the private complaint was held to be maintainable. In *Mohan Lal v. State of Rajasthan*-the abovenoted two decisions were relied upon for holding that provisions of Section 195(l)(c) (old Code) would not be applicable where mutation proceedings were commenced after a Will had been forged. In *Legal Remembrancer, Govt. of W.B. v. Haridas Mundra,* Bhagwati, J. (as His Lordship then was), speaking for a three-Judge Bench observed that earlier there was divergence of opinion in various High Courts, but the same was set at rest by this Court in *Patel Laljibhai Somabhai* and approved the view taken therein that the words of Section 195(l)(c) clearly meant the offence alleged to have been committed by a party to the proceeding in his character as such party i.e. after having become a party to the proceeding, and Sections 195(1)(c), 476 and 476-A (of the old Code) read together indicated beyond doubt that the legislature could not have intended to extend the prohibition contained in Section 195(l)(c) to the offences mentioned in the said section when committed by a party to a proceeding prior to his becoming such party. Similar view has been taken in *Mahadev Bapuji Mahajan v. State of Maharashtra* where the contention that the absence of a complaint by the Revenue Court was a bar to taking cognizance by the criminal court in respect of offences under Sections 446, 468, 471 read with Section 120-B IPC which were committed even before the start,of the proceedings before the Revenue Court, was not accepted.

An enlarged interpretation to Section 195(l)(b)(ii), whereby the bar created by the said provision would also operate where after commission of an act of forgery the document is subsequently produced in court, is capable of great misuse. As pointed out in *Sachida Nand Singh* after preparing a forged

> document or committing an act of forgery, a person may manage to get a proceeding instituted in any civil, criminal or revenue court, either by himself or through someone set up by him and simply file the document in the said proceeding. He would thus be protected from prosecution, either at the instance of a private party or the police until the court, where the document has been filed, itself chooses to file a complaint. The litigation may be a prolonged one due to which the actual trial of such a person may be delayed indefinitely. Such an interpretation would be highly detrimental to the interest of the society at large."

The attention of the High Court does not appear to have been invited to the aforesaid judgment of the Constitution Bench and this is the reason that the High Court declared that the complaint filed by Brij Kishor Saxena was not maintainable because the same was not filed in accordance with Section 195(l)(b)(ii)Cr.P.C.

26. Although, Shri Gupta argued that the allegations levelled against the respondent do not constitute any offence under Sections 419, 420, 465, 467, 468, 472 and 473 IPC, we do not consider it necessary to deal with this point because the High Court did not sustain the orders challenged before it on that ground.

27. In the result, the appeals are allowed. The impugned order is set aside and the matter is remitted to the trial Court for considering whether the allegations contained in the complaint lodged by Brij Kishor Saxena constitute any offence under the IPC. If the trial Court comes to the conclusion that the allegations do constitute one or more offence(s), then it shall proceed against the respondent in accordance with law. However, it is made clear that in the absence of a complaint having been filed under Section 28, no charges be framed against the respondent for the alleged contravention of Sections 24,24A or 26 of the Act.

Appeal allowed.

I.L.R. [2011] M. P., 351
WRIT APPEAL

Before Mr. Justice A.K. Shrivastava & Mr. Justice Brij Kishore Dube
W.A. No.329/2008 (Gwalior) decided on 22 September, 2010

RAMSWAROOP ... Appellant
Vs.
STATE OF M.P. & ors. ... Respondents

Constitution, Article 226 - Judicial review* - In a matter of punishment awarded by disciplinary authority, the scope of judicial review is limited and unless and until it is borne out that the punishment *is shockingly disproportionate, the same cannot be interfered with while exercising writ jurisdiction under Article 226 - The scope is still more narrower in intra-court appeal.

The appellant was serving on the post of Forest Guard. The charge, which was levelled against him, is that he assaulted his superior officer by Lathi and thereby has committed the misconduct. The charges were found to be proved by the enquiry officer, as a result of which, Disciplinary Authority passed the punishment of dismissal from service. The departmental appeal, which was filed by the delinquent employee, met the same result. In this manner, the employee filed the writ petition before the Court. (Paras 2 & 10)

संविधान, अनुच्छेद 226 – न्यायिक पुनर्विलोकन – अनुशासनात्मक प्राधिकारी द्वारा दिये गये दण्ड के मामले में न्यायिक पुनर्विलोकन का विस्तार सीमित है तथा यदि और जब तक यह धारित नहीं किया जाए कि दण्ड आघातीय रूप से अनुपातहीन है, तब तक अनुच्छेद 226 के अन्तर्गत रिट अधिकारिता का प्रयोग करते समय उसमें हस्तक्षेप नहीं किया जा सकता – अन्तःन्यायालयीन अपील में अब तक विस्तार अति संकीर्ण है।

Cases referred :

(2010) 2 SCC 236, 2007(3) MPHT 565, (2007) 1 SCC 437, (2006) 11 SCC 147.

K.B. Chaturvedi with *G.P. Chaurasiya,* for the appellant.

P.N. Gupta, G.A., for the respondent Nos.1 to 3/State.

JUDGMENT

The Judgment of the Court was delivered by :

A.K. SHRIVASTAVA, J. :–The order of learned Single Bench dated 15.4.2008

passed in Writ Petition No.6839/2003 has been assailed by the appellant/ writ petitioner by filing this appeal under Section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005.

2. Indeed, the appellant was serving under the employment of respondents on the post of Forest Guard. The charge, which was levelled against him, is that he assaulted his superior officer namely Badam Singh Chouhan by Lathi and thereby has committed the misconduct. The charges were found to be proved by the enquiry officer, as a result of which, Disciplinary Authority passed the punishment of dismissal from service. The departmental appeal, which was filed by the delinquent employee, met the same result. In this manner, the employee filed the writ petition before learned Single Bench of this Court.

3. The learned Single Bench by examining the material placed on record, came to hold that charge of assaulting superior officer has been found to be proved, as a result of which, looking to the limited scope of judicial review, did not interfere in the order of Appellate Authority either on the merit or on the point of quantum of sentence.

4. In this manner, this appeal has been filed by the appellant assailing the order passed by learned Writ Court as well as order passed by the Disciplinary Authority which has been affirmed by the Appellate Authority.

5. Shri K.B.Chaturvedi, learned senior counsel for the appellant, submits that there is no evidence even that of Badam Singh Chohan that Lathi blow was dealt by appellant to him and if that is the position, certainly this Court can interfere in the quantum of punishment which has been imposed by Disciplinary Authority and the said punishment of dismissal can be diluted by imposing some lesser punishment. In support of his contention, learned senior counsel has placed heavy reliance on the latest pronouncement of Supreme Court *State of Uttar Pradesh and others v. Ram Daras Yadav,* (2010) 2 SCC 236 and the decision of learned Single Bench of this Court *Surendra Prasad Pande v. State of Madhya Pradesh and three others,* 2007 (3) M.P.H.T.565. Learned senior counsel further submits that even if there is error of fact, judicial review is permissible and in that regard learned senior counsel has placed heavy reliance on the decision of Supreme Court *Mathura Prasad v. Union of India & others,* (2007) 1 SCC 437. By putting a deep dent on the order passed by Appellate Authority dismissing the appeal, it has been contended that without applying its mind, the order of dismissal awarded to the delinquent employee by Disciplinary Authority has been affirmed and if

that would be the position, certainly this Court can interfere and in this regard learned senior counsel has place reliance on the decision of Supreme Court Director (Marketing), Indian Oil Corpn. Ltd. and another v. Santosh Kumar, (2006) 11 SCC 147.

6. Combating the aforesaid submissions, Shri Gupta, learned Govt. Advocate, argued in support of the impugned order passed by learned Single Bench and submitted that there is no scope in this intra-court appeal because the matter has been dealt at length by learned Single Bench and hence it has been prayed that this appeal be dismissed.

7. Having heard learned counsel for the parties, we are of the view that this appeal deserves to be dismissed.

8. Even if for the sake of argument we accept the contention of learned senior counsel for the appellant that the blow of Lathi, which was tried to be dealt by the appellant to the officer Badam Singh Chouhan, did not hit him and merely because the Lathi struck the roof, it would not dilute the act of appellant. According to us, since it is proved that appellant tried to assault the officer and it was his good luck that the blow did not hit his body, therefore, it cannot be said that the finding is perverse, and hence, the decisions of Supreme Court *Mathura Prasad* and this Court *Surendra Prasad Pandey* (supra) are not applicable in the present case.

9. So far as the decision of Supreme Court *Director (Marketing), Indian Oil Corpn. Ltd.* (supra) is concerned, according to us, over all material was taken into consideration by the Appellate Authority and if in that situating a finding has been arrived at that there is no material to deviate from the findings of the Disciplinary Authority, it cannot be said in the peculiar facts and circumstances that the Appellate Authority has not applied its mind. The learned Writ Court has also paid its heed to the entire episode of the matter and declined to exercise the writ jurisdiction.

10. Looking to the limited scope of judicial review and unless and until it is borne out that the punishment is shockingly disproportionate, the same cannot be interfered with while exercising writ jurisdiction under Article 226 of the Constitution and the scope is still more narrower in this intra-court appeal. In this manner, the decision of Supreme Court *Ram Daras Yadav* (supra) is distinguishable on facts wherein the order of dismissal was substituted by the punishment of reinstatement with 50% back wages.

11. For the reasons stated hereinabove, we do not find any merit in this appeal. The same is hereby dismissed with no order of costs.

Appeal dismissed.

I.L.R. [2011] M. P., 354
WRIT APPEAL
Before Mr. S.R. Alam, Chief Justice & Mr. Justice Alok Aradhe
W.A. No.335/2010 (Jabalpur) decided on 20 October, 2010

MAHILA RUKHMANI PRIMARY CONSUMER CO-OPERATIVE SOCIETY ... Appellant
Vs.
STATE OF M.P. & ors. ... Respondents

A. ***Food Stuffs (Distribution) Control Order, M.P. 1960, Clause 4, (Khadya Padarath) Sarvajanik Nagrik Purti Scheme, M.P. 1991, Clause 4(1)*** **- S.D.O. has failed to assign any reason for cancellation of fair price shops run by the appellant - He also did not afford any opportunity of hearing to the appellant - Order passed by S.D.O. cannot be sustained in eye of law - Order quashed.** (Paras 8 & 9)

क. खाद्य सामग्री (वितरण) नियंत्रण आदेश, म.प्र. 1960, खण्ड 4, (खाद्य पदार्थ) सार्वजनिक नागरिक पूर्ति योजना, म.प्र. 1991, खण्ड 4(1) – अनुविभागीय अधिकारी अपीलार्थी द्वारा चलायी जा रही उचित मूल्य की दुकानें रद्द किये जाने का कोई कारण बताने में असफल – उसने अपीलार्थी को सुनवाई का कोई अवसर भी नहीं दिया – अनुविभागीय अधिकारी द्वारा पारित आदेश विधि की दृष्टि में कायम नहीं रखा जा सकता – आदेश अभिखंडित।

B. ***Food Stuffs (Distribution) Control Order, M.P. 1960, Clause 4, (Khadya Padarath) Sarvajanik Nagrik Purti Scheme, M.P. 1991, Clause 4(1)*** **- The Scheme envisages pre-decisional hearing - The post-decisional hearing cannot be a substitute for pre-decisional hearing.** (Para 9)

क. खाद्य सामग्री (वितरण) नियंत्रण आदेश, म.प्र. 1960, खण्ड 4, (खाद्य पदार्थ) सार्वजनिक नागरिक पूर्ति योजना, म.प्र. 1991, खण्ड 4(1) – योजना निर्णय–पूर्व सुनवाई परिकल्पित करती है – निर्णय–उपरांत सुनवाई निर्णय–पूर्व सुनवाई के लिए स्थानापन्न नहीं हो सकती है।

Cases referred :
(1995) 6 SCC 279, (1990) 4 SCC 594, (2010) 3 SCC 732.

R.K. Samaiya, for the appellant.
Kumaresh Pathak, Dy.A.G., for the respondent Nos.1 to 3.
Yadvendra Dwivedi, for the respondent No.4.

ORDER

The Order of the Court was delivered by : **S.R. ALAM, CHIEF JUSTICE.** :–With the consent of learned counsel for the parties, the matter is heard finally.

2. This intra-Court appeal arises from the order dated 9.4.2010 passed by learned Single Judge by which writ petition preferred by the appellant has been dismissed.

3. Facts leading to the filing of the instant writ appeal briefly stated are that complaints were lodged against the appellant regarding irregularities committed in respect of distribution of food stuff from the fair price shops allotted to appellant in Ward Nos.3, 4, 5 and 6 at Lidhora. Pursuant to the aforesaid complaints, report was sought by the Sub-Divisional Officer, Jatara, Distt. Tikamgarh from Senior Supply Officer, Jatara. Senior Supply Officer conducted an enquiry and submitted the report on 25.9.2009. On the basis of the facts found in the aforesaid enquiry, a show-cause notice dated 25.9.2009 was issued to the appellant by the Sub-Divisional Officer. Appellant submitted a reply to the aforesaid show-cause notice. Thereafter, vide order dated 9.10.2009, the allotment of fair-price shops was cancelled by the Sub-Divisional Officer. The appellant being aggrieved by the aforesaid order, preferred an appeal before the Collector. The appellate Authority after affording an opportunity of hearing to the appellant, up-held the order of the Sub-Divisional Officer and subsequently, by order dated 27.10.2009, the Sub-Divisional Officer pursuant to the direction issued by the Collector, allotted the fair price shops in favour of respondent No.4, by way of ad-hoc arrangement. Appellant challenged the validity of the aforesaid order by filing a writ petition before the learned Single Judge. Learned Single Judge vide order dated 9.4.2010 dismissed the writ petition preferred by the appellant.

4. Learned counsel for the appellant has drawn our attention to order Annexure P/7 dated 9.10.2009 passed by the Sub-Divisional Officer as well as the order sheets of the proceedings before the Sub-Divisional Officer contained in Annexure P/8 and has submitted that Sub-Divisional Officer while passing the impugned order, has not afforded any opportunity of hearing to the appellant. It has been further submitted that the Sub-Divisional Officer while passing the impugned order, has neither considered the reply submitted

by the appellant nor has assigned any reasons for passing the impugned order. While referring to clause 14 of M.P. (Khadya Padarth) Sarvajanik Nagrik Purti Scheme, 1991, it was submitted that order of allotment of fair price shops contained in Annexure P/9 dated 27.10.2009 is abinitio-void, as the competent authority under the Scheme to allot the fair price shops is the Sub-Divisional Officer whereas, the order dated 27.10.2009 has been passed pursuant to the instructions of the Collector.

5. On the other hand, Shri Kumaresh Pathak, learned Deputy Advocate General submitted that an opportunity of hearing was afforded to the appellant by the Sub-Divisional Officer. While referring to the order passed by the Collector, it was pointed out that even the Collector had afforded an opportunity of hearing to the appellant and had asked the appellant to produce the evidence. However, the appellant did not adduce any evidence and, therefore, he cannot be permitted to complain that order has been passed in violation of principles of natural justice.

6. We have considered the submissions made by learned counsel for the parties.

7. In exercise of powers conferred under clause 4 of the M.P. Food Stuffs (Distribution) Control Order, 1960, the State Government has framed a scheme which is known as M.P. (Khadya Padarth) Sarvajanik Nagrik Purti Scheme, 1991. Clause 4(1) of the aforesaid Scheme provides that a fair-price shops shall be allotted at the district level by the Food Controller/Food Officer and in rest of the places by the Sub-Divisional Officer. Clause 13 of the Scheme deals with penalty. Clause 13(4) provides that before cancelling the licence granted to a fair-price shops, the Sub-Divisional Officer shall issue a show-cause notice to the concerned person and after affording an opportunity of hearing to him, shall pass an order. Clause 14 of the Scheme provides that in case any person is aggrieved by any action with regard to allotment of shops, an appeal can be preferred before the appellate Authority.

8. In the light of the aforesaid provisions of the Scheme, facts of the case may be adverted to. From perusal of order dated 9.10.2009 (Annex.P/7), we find that Sub-Divisional Officer has failed to assign any reasons for cancellation of fair price shops run by the appellant. It is well setteled in Law that quasi-Judicial authority must assign reasons while passing the oeder. Reference in this connection can be made to the decisions of the Supreme Court reported in *State Bank of Bikaner & Jaipur Vs. Prabhu Daya Grover* (1995) 6 SCC 279, wherein, it has been held that an order passed by the authority should disclose application of

mind. Whether there was an application of mind or not can only be disclose by assigning reasons. In *S.N. Mukherjee Vs. Union of India* (1990) 4 SCC 594, the Supreme Court has held that people must have confidence in the judicial or quasi-judicial authorities. While emphasizing the need for assigning reasons, it was held that giving of reasons minimizes the chances of arbitrariness and hence, it is an essential requirement of the rule of law. Similarly, in *Secretary and Curator, Victoria Memorial Hall Vs. Howrah Ganatantrik Nagrik Samity and others,* (2010) 3 SCC 732, it has been held by the Supreme Court that reason is the heartbeat of every conclusion. Absence of reasons renders the order indefensible/ unsustainable particularly when the order is subject to further challenge before a higher forum. It has further been held that recording of reasons is a principle of natural justice. It ensures transparency and fairness in decision making.

9. Besides that from perusal of order sheet (Annex.P/8) of the proceedings before the Sub-Divisional Officer, we find that the Sub-Divisional Officer did not afford any opportunity of hearing to the appellant. The Scheme envisages pre-decisional hearing and therefore, the post-decisional hearing which was given by the Collector, as contended by learned Deputy Advocate General, cannot be a substitute for pre-decisional hearing. Therefore, the inevitable conclusion is that order Annexure P/4 dated 9.10.2009 passed by the Sub-Divisional Officer cannot be sustained in the eye of law. Accordingly, the same is quashed.

10. Since, under the Scheme, the Sub-Divisional Officer is the competent authority to allot the fair-price shops and an appeal lies against the order passed by the Sub-Divisional Officer to the Collector, therefore, the order of allotment of shops passed in favour of respondent No.4 at the instance of Collector cannot be sustained. Accordingly, the same is also quashed.

11. The matter is remitted back to the Sub-Divisional Officer. The Sub-Divisional Officer shall afford an opportunity of hearing to the appellant and shall pass a reasoned order. Needless to state that the Sub-Divisional Officer shall afford an opportunity of hearing to the appellant and to adduce the evidence and shall hear respondent No.4 as well as the complainants. The aforesaid exercise shall be completed within a period of three months.

12. In the meanwhile, the Sub-Divisional Officer shall make an alternative arrangement for running the fair-price shops in question.

13. With the aforesaid direction, the writ appeal stands finally disposed of.

Appeal disposed of.

I.L.R. [2011] M. P., 358

WRIT APPEAL

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

W.A. No.792/2010 (Jabalpur) decided on 25 October, 2010

S. GOENKA LIME & CHEMICALS ... Appellant

Vs.

NAGAR PANCHAYAT, KAYMORE & anr. ... Respondents

Municipalities Act, M.P. (37 of 1961), Sections 131, 132, 164 & 322 **- Demand notice for export tax issued to the appellant in exercise of powers u/s 164 - The Collector has absolutely no authority to quash the demand notice - Powers u/s 131 & 132 are exercisable by the State Government and have not been delegated to the Collector - Appeal dismissed.** (Para 10)

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धाराएँ 131, 132, 164 व 322 – धारा 164 के अन्तर्गत शक्तियों के प्रयोग में अपीलार्थी को निर्यात कर हेतु मांग का सूचना पत्र जारी किया गया – कलेक्टर को मांग का सूचना पत्र अभिखंडित करने का आत्यंतिकतः कोई प्राधिकार नहीं है – धारा 131 एवं 132 के अन्तर्गत शक्तियाँ राज्य सरकार द्वारा प्रयोग किये जाने योग्य हैं तथा कलेक्टर को प्रत्यायोजित नहीं की गयीं हैं – अपील खारिज।

Cases referred:

AIR 1966 SC 828, AIR 1982 SC 882, AIR 1984 SC 1543.

Archana Nagaria, for the appellant.

A.M. Trivedi with *Ashish Trivedi,* for the respondent No.1.

Samdarshi Tiwari, G.A., for the respondent No.2.

ORDER

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

This intra Court appeal has been preferred against the order dated 1.7.2010 passed by the learned Single Judge by which the writ petition preferred by the respondent No.1 has been allowed.

2. Facts giving rise to filing of the writ appeal briefly stated are that the appellant was served with a bill dated 23.1.1998 issued under Section 164 of the Madhya Pradesh Municipalities Act, 1961 (hereinafter referred to as 'the Act') by which the appellant was asked to make payment of export tax.

Thereafter, the appellant was served with another notice dated 6.6.1998 asking the appellant to pay export tax for the period from 1.10.1993 to 31.3.1998 which was quantified at Rs.2,04,083/-. The appellant being aggrieved by the aforesaid notice dated 6.6.1998, preferred an application under Section 131 read with Section 132 of the Act (Annexure-P/15) before the Collector. The Collector vide order dated 3.11.1999 Annexure-P/16, set aside the notice issued by the respondent No.1. The aforesaid order was challenged by respondent No.1 in the writ petition. Learned Single Judge vide order dated 1.7.2010 allowed the writ petition preferred by respondent No.1, inter alia, holding that the Collector, under the provisions of Section 131 of the Act, has no authority to set aside the bill/notice issued under Section 164 of the Act. Being aggrieved by the aforesaid order, the appellant preferred the instant appeal.

3. We have heard learned counsel for both the sides.

4. Learned counsel for the appellant submitted that respondent No.1-Municipal Council has no authority in law to levy the export tax. The imposition of tax is absolutely without jurisdiction. It was further submitted that under Section 323 of the Act, the Collector has power to set aside an order passed by Municipality.

5. On the other hand, Shri Trivedi, learned senior counsel for respondent No.1 has submitted that the Collector has no jurisdiction to set aside the bill for payment of tax which was issued under Section 164 of the Act. It was further pointed out that in fact, the appellant could have challenged the validity of the notice issued under Section 164 of the Act as provided under Section 172 of the Act before the Civil Judge, by filing an appeal. Therefore, learned Single Judge has rightly set aside the order passed by the Collector.

6. We have considered the submissions made by learned counsel for the parties. The Madhya Pradesh Municipalities Act, 1961 is an Act to consolidate and amend the law relating to Municipalities and to make better provision for the organization and administration of Municipalities in Madhya Pradesh. Before proceeding to decide the controversy involved in the appeal is apt to take note of relevant provisions of Madhya Pradesh Municipalities Act, 1961. Sections 131 & 132 of the Act read as under:

131. Power of State Government in regard to relief in taxes-If on a complaint made to it or otherwise, it appears

to the State Government that any tax levid by a Council is unfair in its incidence or that such levy or any part thereof is obnoxious to the interest of the inhabitants of the Municipality, it may, by an order, require the Council to remove the objections to any such tax within such time as may be specified therein and on the failure of Council to comply with the order within the time so specified, to the satisfaction of the State Government the State Government may, by notification and subject to such conditions or restrictions as may be specified therein, abolish, suspend or reduce the amount of rate of any tax.

132. Power of State Government to grant exemption from taxes.-The State Government may, on its own motion or otherwise after giving the Council an opportunity of expressing its views in the matter, by order, exempt from payment of any tax in whole or in part any person or class of persons or any property or description of properties for the purpose of granting protection to any industry or for any other purpose in public interest subject to such condition as may be specified in such order.

7. Section 164 of the Act which is relevant for the purpose of controversy involved in the appeal reads as under:

164.Presentation of bills for taxes, rent and other claims.-(1) When they amount-

(a) which, by or under any provisions of this Act, is declared to be recoverable in the manner provided by this Chapter; or

(b) which, not being leviable under sub-section (1) of Section 157 or payable on demand on account of an octroi or a toll, is claimable as an amount or instalment on account of any other tax which is being imposed or may hereafter be imposed in any Municipality; or

(c) which, on account of rent of any Municipal land, buildings, shops, gumtis, or any other property,

shall have become due, the Chief Municipal Officer shall, with the least practicable delay, cause to be presented to the person liable for the payment thereof a bill for the sums claimed as due,

(2)Evey such bill shall specify-

(a) the period for which; and

(b)the property, occupation or thing in respect of which the sum is claimed, and shall also give notice of-

(i) the liability incurred in default of payment; and

(ii) the time within which an appeal may be preferred as hereinafter provided against such claim.

(3) If the person to whom a bill has been presented as aforesaid does not, within 15 days from the presentation thereof either-

(a) pay the sum claimed as due in the bill; or

(b) show-cause to the satisfaction of the Chief Municipal Officer or of such officer as the Council may appoint in this behalf, why he should not pay the same; or

(c) prefer an appeal in accordance with the provisions of Section 172 against the claims,

the Chief Municipal officer may cause to be served upon the person liable for the payment of the said sum a notice of demand in the form prescribed by rules.

(4) The sum claimed as due in the bill shall carry interest at the rate of 6-1/4 per centum per annum till the date it is paid and shall be recoverable along with the bill.

8. Section 172 of the Act which provides for an appeal is reproduced below for the facility of ready reference:

172. Appeal to Civil Judge.-(1) Appeals, against any claim included in a bill presented in accordance with the provisions of this Act, or the rules made thereunder, be made to the Civil

Judge, Class I, having jurisdiction over the Municipal area and if there be no Civil Judge, Class I, at the headquarters of the Municipality the Civil Judge, Class II having jurisdiction at such headquarters if there be no such Civil Judge Class II at the headquarters to the Civil Judge, Class II having jurisdiction and in case of more than one such Civil Judges at the headquarters having jurisdiction, as the case may be, to such one of them as the District Judge may specify.

(2) No such appeal shall be heard and determined unless-

(a) the appeal is brought within 15 days next after presentation of the bill complained of;

(b) an application, in writing, stating the ground on which the claim of Council is disputed,has been made to the Council in the case of a rate on building or land within the time fixed in the notice given in accordance with the provisions of the Act or the rules made thereunder or of the assessment or alteration thereof, according to which the bill is prepared;

(c) the amount claimed from the appellant has been deposited by him in the Municipal office.

(3) The decision of the Civil Judge in an appeal made under sub-section (1) shall, subject to the decision in revision by the Court to which appeals against the decision of such Civil Judge ordinarily lie, be final.

Section 322 of the Act reads as under:

322. Power of inspection and supervision.-The Divisional Commissioner, Collector or any officer authorised by the State Government in this behalf by general or special order may-

(a) enter on and inspect or authorise any other person to enter on an inspect any immovable property occupied by Council or any of its committees or any institution under its control or management or any work in progress under its direction;

(b) call for or inspect any orecord or extract from the proceedings of any meeting of the Council or of any of its

ommittees and any book or document in the possession of or under the control of a Council;

(c) call for any return, statement, account or report which he may think fit to require such Council to furnish;

(d) require a Council to take into its consideration any objection which appears to him to exist to the doing of anything which is about to be done or is being done by or on behalf of such Council or any information which it is able to furnish and which appears to him to necessitate the doing of a certain thing by the Council and, to make a written reply to him within a reasonable time stating its reason for not desisting from doing, or for not doing such thing.

9. After having noticed, the relevant provisions of The Madhya Pradesh Municipalities Act, 1961, it is graphically clear that Section 164(3)(c) provides a remedy of appeal against the bill which is issued in exercise of power under Section 164 of the Act. Section 172 of the Act provides that an appeal would lie before the Civil Judge. Section 164 of the Act is a special provision which provides for specific remedy of an appeal. Section 322 of the Act is the general provision of law. It is well settled in law that if the special provision is made on a certain matter, that matter is excluded from the general provision. In this connection, reference be made to the decisions of Supreme Court in *Venkateshwar Rao Vs. Govt. of Andhra Pradesh,* AIR 1966 SC 828, *State of Bihar Vs. Yogendra Singh,* AIR 1982 SC 882 and *Maharashtra State Board of Secondary and Higher Secondary Education Vs. Paritosh Bhupesh Kumar Sheth,* AIR 1984 SC 1543. Thus, in view of well settled legal principles, Section 322 of the Madhya Pradesh Municipalities Act, 1961 has no application to the facts and circumstances of the case.

10. We may now examine whether the Collector under Section 131 of the Act has the authority to set aside the notice issued in exercise of powers under Section 164 of the Act. Section 131 deals with power of the State Government with regard to relief in taxes. Similarly, Section 132 of the Act empowers the State Government to grant exemption from taxes. The powers under Sections 131 & 132 of the Act are exercisable by the State Government and have not been delegated to the Collector. Therefore, the Collector had absolutely no authority in law to quash the demand notice issued in exercise of powers under Sections 131 & 132 of the Act. Thus, for the aforementioned

reasons, we do not find any ground to differ with the view taken by learned Single Judge.

11. At this stage, learned counsel for the appellant submitted that she may be permitted to prefer an appeal before the Civil Judge.

12. In view of the aforesaid prayer, the instant writ appeal is dismissed with liberty to the appellant to take recourse of such remedy as may be available to the appellant under the law.

Appeal dismissed.

I.L.R. [2011] M. P., 364
WRIT APPEAL

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

W.A. No.304/2009 (Jabalpur) decided on 9 November, 2010

RASHTRIYA COLLIERY MAJDOOR CONGRESS & anr.... Appellants
Vs.
SOUTH EASTERN COALFIELDS LTD. & ors. ... Respondents

A. Payment of Wages Act (4 of 1936), Section 7(2)(KKK) - Check-off facility - **Employer is not under any obligation to offer check-off facility to Union - Check-off facility is a concession granted to Union under an agreement or binding settlement and cannot be claimed as a matter of right.** (Para 13)

क. मजदूरी संदाय अधिनियम (1936 का 4), धारा 7(2)(केकेके) – चैक–ऑफ सुविधा – यूनियन को चेक–ऑफ सुविधा प्रस्तावित करने के लिये नियोक्ता किसी बाध्यता के अधीन नहीं – चैक–ऑफ सुविधा किसी करार या बाध्यकारी परिनिर्धारण के अन्तर्गत यूनियन को प्रदाय की गई रियायत है और अधिकार के रूप में दावा नहीं किया जा सकता।

B. Constitution, Article 12 - State - Judicial review - **S.E.C.L. is an instrumentality of State - Action of State and its instrumentality must conform to rule of law and must be informed by reasons - Actions are subject to judicial review on touchstone of relevance, reasonableness, fair play, natural justice, equality and non-discrimination - Unfettered discretion is a sworn enemy of Constitutional Guarantee against discrimination.** (Para 16)

ख. संविधान, अनुच्छेद 12 – राज्य – न्यायिक पुनर्विलोकन – एस.ई.सी.

एल. राज्य का एक अभिकरण है – राज्य एवं उसके अभिकरण की कार्यवाही विधि के नियमानुरूप होनी चाहिए और कारणों द्वारा सूचित होनी चाहिए – कार्यवाहियाँ सुसंगति, युक्तियुक्तता, नियमानुरूपता, नैसर्गिक न्याय, समानता और अविभेद की कसौटी पर न्यायिक पुनर्विलोकन के अधीन हैं – बंधनमुक्त विवेकाधिकार, विभेद के विरुद्ध संवैधानिक गारंटी का घोर शत्रु है।

C. Payment of Wages Act (4 of 1936), Section 7(2)(KKK) - Check-off facility - Withdrawal of - **Appellant/Union enjoying check-off facility for a period of 21 years - Facility withdrawn on extraneous consideration i.e., requirement of affiliation with Central Trade Unions which has no statutory sanction - Action of unilaterally withdrawing the facility of check-off system cannot be approved - Respondent cannot be permitted to show undue preference to any union on extraneous consideration - Withdrawal of check-off facility bad.** (Para 18)

ग. मजदूरी संदाय अधिनियम (1936 का 4), धारा 7(2)(केकेके) – चैक–ऑफ सुविधा – का वापस लेना – अपीलार्थी/यूनियन ने 21 वर्षों की अवधि तक चैक–ऑफ सुविधा का उपभोग किया – अप्रासंगिक प्रतिफल अर्थात् केन्द्रीय व्यापार संघ, जिसे कोई कानूनी मंजूरी नही है, से सम्बद्धता की अपेक्षा पर सुविधा वापस ली गई – एकपक्षीय रूप से चैक–ऑफ पद्धति की सुविधा को वापस लेने की कार्यवाही अनुमोदित नहीं की जा सकती – अप्रासंगिक प्रतिफल पर किसी यूनियन को असम्यक् अधिमान देने की प्रत्यर्थी को अनुज्ञा नहीं दी जा सकती – चैक–ऑफ सुविधा वापस लेना दोषपूर्ण।

D. Constitution, Article 226 - Territorial jurisdiction - Cause of action - **Letter issued by General Manager from Bilaspur, S.E.C.L. challenged - Check-off facility is not available only at headquarter level - It is prevalent at various unit sub areas - Collieries of respondent No.1 also situated within State of M.P. - Part of cause of action has arisen within territorial jurisdiction of Court - High Court of M.P. has territorial jurisdiction to adjudicate the controversy.** (Para 19)

घ. संविधान, अनुच्छेद 226 – क्षेत्रीय अधिकारिता – वाद हेतुक – बिलासपुर, एस.ई.सी.एल. से महाप्रबंधक द्वारा जारी पत्र को चुनौती – केवल मुख्यालय स्तर पर चैक–ऑफ सुविधा उपलब्ध नहीं है – वह अनेक उपक्षेत्रों की इकाईयों में विद्यमान – प्रत्यर्थी क्र. 1 की कोयला खानें भी म.प्र. राज्य के भीतर स्थित – वाद हेतुक का भाग न्यायालय की अधिकारिता के भीतर उत्पन्न हुआ है – म.प्र. उच्च न्यायालय को संविवाद न्यायानिर्णीत करने की क्षेत्रीय अधिकारिता है।

E. Constitution, Article 226 - Policy matter - Judicial review

- If policy is irrational, arbitrary or perverse, interference can be made by Court in exercise of powers of judicial review. (Para 20)

ङ. *संविधान, अनुच्छेद 226 – नीति संबंधी विषय – न्यायिक पुनर्विलोकन* – यदि नीति असंगत, मनमानी या विपर्यस्त है, तो न्यायालय द्वारा न्यायिक पुनर्विलोकन की शक्तियों के प्रयोग में हस्तक्षेप किया जा सकता है।

Cases referred :

AIR 1999 SC 1059, (1994) 4 SCC 711, (2008) 3 SCC 456, (1977) 1 SCC 486, (2009) 9 SCC 304, (2002) 4 SCC 34, (1998) 9 SCC 587, (2004) 9 SCC 786, AIR 2002 SC 350, (2003) 11 SCC 607, (1994) Suppl. 3 LLL 77, AIR 1999 SC 1059, (2005) 2 SCC 481.

Rohit Arya with *Amitabh Gupta,* for the appellants.

P.S. Nair with *Rajas Pohankar,* for the respondent Nos.1, 2, 3, 5 & 6.

Vivek Rusia, for the respondent No.4.

S.K. Rao with *V. Pandey,* for the respondent No.7.

ORDER

The Order of the Court was delivered by **ALOK ARADHE, J.** :–This intra-court appeal arises from the order dated 24.2.2009 passed by learned Single Judge by which writ petition preferred by the appellants has been dismissed.

2. Facts giving rise to filing of the instant appeal, briefly stated, are that the appellant claims to be the oldest union engaged in the coal industry. It was registered on 15.8.1947 with the Registrar of Trade Unions under the provisions of Trade Unions Act, 1926 (hereinafter referred to as 'the Act'). The Union was initially registered as Chhattisgarh Colliery Workers' Federation. The name of the appellant-Union has changed from time to time in accordance with the provisions of Section 23 of the Act. The appellant-union claims to have mass following of about 21000 odd workers working in the collieries situate in the States of Madhya Pradesh and Chhattisgarh. The appellant-union being the oldest Trade Union has been participating in the industrial relation meeting with the respondent-Management since long. The appellant has been enjoying the check-off facility since 1986 under the provisions of Section 7(2)(KKK) of the Payment of Wages Act, 1936. Guidelines were issued vide communication dated 20/23-6-2000 in relation to Trade Unions availing the facility of check-off system. In the aforesaid guidelines it was clarified that check-off system is applicable only in respect of Unions which are under the industrial relations system including the appellant. However, respondent no.3

in premeditated manner circulated distorted version of the decision taken in the meeting dated 13.7.2007 and permitted verification of the authorization forms submitted in favour of affiliates of Central Trade Unions.

3. The appellants being aggrieved by the said communication which had the effect of depriving the appellants of their legitimate right, submitted a representation (Annexure-P-6 annexed with the writ petition) to the Management. In the meanwhile, Management accepted the participation of respondent No.7 i.e. South Eastern Koyla Mazdoor Congress vide Annexure-P-6A annexed with the writ petition. It is averred that membership of respondent No.7 is much below the strength of membership of the appellant-union. Being aggrieved by communication dated 14.7.2007, the appellants filed the writ petition seeking writ of certiorari for quashing the impugned order dated 14.7.2007, Annexure-P-5. The appellant also prayed for writ of mandamus commanding the respondents to permit the appellant to participate in the meeting with the respondents under the industrial relations system and to restore the check-off facility under the Payment of Wages Act. The appellants also sought the relief of quashing of Annexure-P-6A by which respondent No.7 was permitted to participate in industrial relations system.

4. Respondents No.1, 2 & 3 filed the return in which, inter alia, it was contended that the appellant has neither any statutory nor any legal right for seeking writ of mandamus under Article 226 of the Constitution of India. An objection with regard to maintainability of the writ petition on the ground of availability of alternative remedy under the Industrial Disputes Act, 1947 was also raised. It was pleaded that disputed questions of fact are involved in the writ petition which cannot be adverted to in the writ petition. It was further stated that provisions of Payment of Wages Act have no application to the individual as the wages of the employees engaged in the coal industries are more than Rs.6500/- per month. It was also stated that no writ can be issued for enforcement of check-off system. Respondents No.1 to 3 also raised the objection that this Court has no territorial jurisdiction to entertain the writ petition, as the appellant is challenging the communication dated 14.7.2007 (Annexure-P-5) issued by the General Manager (IR/Legal) from Bilaspur. It was further pleaded that coal industry was nationalized 01.5.1973. In view of the instructions from Union of India, the Coal Mines Authority and subsequently Coal India Limited has decided to form a Joint Consultative Committee for coal industry. The workers were to be represented by five Central Trade Unions, namely, INTUC, AITUC, CITU, BMS and HMS. It is

further pleaded in the return that industrial relations system in SECL is governed by the Code of Conduct. As per the Code of Conduct any break away group of expelled person of any signatory union shall not be entertained/ encouraged by the signatory organization to this Code. The appellant has been expelled from INTUC and its affiliation from INTUC has been suspended. It is also averred that deduction under check-off system is only to the unions which are functioning under the industrial relations system. The functioning of industrial relations system is based on Code of Conduct and recognition of any union as affiliate of the central union is to be decided by the Apex Organization.

5. Respondent No.4 has filed return in which, inter alia, objection with regard to maintainability of the instant writ petition on the ground of territorial jurisdiction has been raised. It has further been pleaded that petition is liable to be dismissed on account of non-joinder of necessary parties. The dispute with regard to election of office bearers is pending before the State Industrial Court, Chhattisgarh and, therefore, if any direction is issued in the writ petition, it will adversely affect the decision in the case which is pending before Industrial Court.

6. Respondent No.5 has filed return, inter alia, contending that he has been impleaded without there being any justification. There is neither any allegation against the respondent No.5 nor any relief has been sought against respondent No.5. Similar stand has been taken by the respondent No.6 in his return.

7. Respondent No.7 has filed the return in which preliminary objection with regard to maintainability of the writ petition has been taken. It has been, inter alia, stated that disputed question of facts are involved in the present writ petition and, therefore, the same cannot be adjudicated in exercise of powers under Article 226 of the Constitution of India. The appellant was de-affiliated from Indian National Trade Union Congress on 24.3.2007. Respondent No.7 has been granted affiliation by NITUC. In the verification of the membership of the unions, which took place in the month of July, 2007, the appellants-union's membership was nil whereas the membership of the respondent-Union was more than 1000. It has further been stated that the appellant is affiliated with United Trade Unions Congress which has not been recognized by the Coal India Limited, since United Trade Union Congress has neither any membership in Coal India Limited nor in its subsidiary companies. It has further been averred that employer is not duty bound to deduct the union membership

fee to recognize the union which is not having any membership. Simply because Trade Union is registered, a writ cannot be issued directing employer for granting check-off facility. The appellant-Union, in fact, has become defunct. The appellant has an alternative efficacious remedy under the Industrial Disputes Act, 1947 and, therefore, appellant cannot invoke the jurisdiction of this Court.

8. The learned Single Judge vide order dated 24.2.2009 dismissed the writ petition preferred by the appellant. The learned Single Judge, however, rejected the objections raised on behalf of the respondents with regard to territorial jurisdiction and held that this Court has the territorial jurisdiction to entertain the writ petition. It was further held that since the claim of the appellants in the writ petition is based on the ground that it is a recognized Trade Union under the Trade Unions Act, 1926, therefore, the appellant has the locus standi to maintain the writ petition. However, the learned Single Judge held that the facility of check-off system is an integral part of industrial relations system which can be borne out from the Code of Conduct which has been evolved in accordance with the decision taken by the Joint Consultative Committee in the meeting held on 2.8.1994. It was further held that Code of Conduct was evolved with the purpose to ensure that disputes, demands/ grievances are settled mutually to maintain peace and tranquility. Thus, a set policy is in vogue in SECL since 1986. It was further held that scope of judicial review with regard to interference with the policy decision is extremely limited. Accordingly, it was found that no illegality was committed by the respondents in not extending the facility of check-off system to the appellant-Union.

9. Shri Rohit Arya, learned senior counsel submitted that provisions of Industrial Disputes Act, 1947 and Trade Unions Act, 1926 do not make any distinction between the self styled recognized Trade Union and the Registered Trade Unions. It was further contended that action of respondents in depriving the appellants of check-off facility amounts to unfair labour practice. The respondent-Management has no authority in law to discriminate between two Trade Unions on the ground that one Trade Union is affiliated qua the other for which there is no legal sanction. It was further contended that none of the Central Trade Unions are registered under the Trade Unions Act. Action of respondents in depriving the appellants of the check-off facility amounts to selective discrimination which does not pass the test of Article 14 and violates the fundamental rights of the appellants under Article 19(1)(f) of the Constitution

of India. It has further been contended that check-off facility has been recognized and treated as condition of service of an employee. It is also submitted that Code of Conduct has no legal sanctity in the eyes of law. In this connection learned senior counsel has placed reliance on the decision of the Supreme Court reported in *Management of Karnataka, State Road Transport Corporation vs. KSRTC Staff and Workers' Federation and another*, AIR 1999 SC 1059.

10. On the other hand Shri P.S.Nair, learned senior counsel for respondents No.1 to 3 while countering the submissions made on behalf of the appellants submitted that impugned communication neither creates any right nor does it take away any right. No cause of action arose within the territorial jurisdiction of this Court and, therefore, this Court has no territorial (jurisdiction) to entertain the writ petition. In support of aforesaid proposition learned senior counsel placed reliance on decisions of Supreme Court in *Oil and Natural Gas Commission Vs. Utpal Kumar Basu and others*,(1994) 4 SCC 711 and *Eastern Coalfields Limited and others v.Kalyan Banerjee*, (2008) 3 SCC 456. It was further contended that check-off system cannot be claimed as a matter of right. It is also submitted that Union has no locus to file the writ petition seeking the benefit of check-off system. In this connection reliance has been placed on a decision reported in (1994) Suppl. 3 Labour Law Journal 77. It was further submitted that from perusal of Section 1 of Payment of Wages Act it is clear that it has no application in the facts of this case. The decision of the government is a policy decision which has been taken for a period of 30 years. The union of the appellant has no membership. The facility of check-off system is a concession and cannot be claimed as a matter of right. In the absence of any statutory or legal right, no writ of mandamus can be issued. For this proposition the learned senior counsel has placed reliance on the decisions of Supreme Court reported in *Mani Subrat Jain and others vs. State of Haryana and others*, (1977) 1 SCC 486 and *Union of India and others Vs. Muralidhara Menon and another*, (2009) 9 SCC 304. It has further been stated that 5 Central Trade Unions, to which concession has been given have membership all over the country. Unequals cannot be treated as equals. For this proposition learned senior counsel has placed reliance on the decision of Supreme Court reported in *Ashutosh Gupta vs. State of Rajasthan and others*, (2002) 4 SCC 34. However, learned senior counsel fairly submitted that action of respondents in not extending the benefit of check-off system to the appellant-Union can be examined on the touchstone of

Article 14 of the Constitution of India. It has also been submitted that during the pendency of the instant writ appeal, appellant has moved an application before the Assistant Labour Commissioner (Central) in which a dispute has been raised. Since the appellants has resorted to the alternative remedy, therefore, writ appeal cannot be entertained. It was further submitted that since the disputed questions of fact arise for determination, therefore, the same cannot be adjudicated in exercise of powers under Article 226 of the Constitution of India. For this proposition, learned senior counsel has referred to the decisions of the Supreme Court in *Krishan Lal and others vs. Adhishashi and others,* (1998) 9 SCC 587 and *National Textile Corporation Limited and others vs. Haribox Swalram and others,* (2004) 9 SCC 786. The scope of judicial review in the matter of policy is extremely limited. For this proposition, learned senior counsel has placed reliance on the decision of Supreme Court in *Balco Employees Union (Regd.) vs. Union of India and others,* AIR 2002 SC 350. It has further been contended that Trade Unions have no right to represent its members. In this connection, reference has been made to the decision of the Supreme Court in *Chairman, State Bank of India and others vs. All Orissa State Bank Officers Association and another,* (2003) 11 SCC 607.

11. Learned counsel for respondents No.4 & 5 have adopted the submissions made by learned senior counsel appearing for respondents No.1 to 3. It has been pointed that for the first time the appellant-union was debarred on 20.6.2000 and, therefore, the contention that by the impugned communication dated 14.7.2007 the appellant-union has been debarred from participating in the industrial relations system is incorrect.

12. Shri S.K.Rao, learned senior counsel for respondent No.7 has submitted by order dated 24.3.2007, the affiliation of the appellant from INTUC has been suspended and facility of check-of has been extended to respondent No.7 in place of appellant. Respondent No.7 has been granted affiliation by INTUC. It has further been submitted that benefit of check-off facility is extended to unions having large membership. The provisions of Payment of Wages Act do not apply in the facts of the case as an employee in Coal Industries earns more than Rs.6500/- per month. It has further been submitted that appellant-union has been de-recognized and it has no membership. The appellant has neither having the locus to file the writ petition nor this Court has the territorial jurisdiction, to entertain the writ petition.

13. We have considered the submissions made by learned counsel for the parties. Under the check-off facility the employer has to deduct the subscription of the members of the union from their wages on obtaining individual authorization. While dealing with the nature of check-off facility the learned Single Judge of this Court vide order dated 12.3.2003 passed in W.P.No.160/2003 has held that no statutory duty is cast upon the management to extend the check-off facility. Similar view has been taken by the learned Single Judge of Madras High Court in the decision reported in *Hills Plantation Workers' Union vs. Anamaila Planters Association, Valparai, Coimbatore and another,* (1994) Suppl. 3 LLL 77. Supreme Court had an occasion to deal with the nature of check-off facility in case of *Management of Karnataka State Road Transport Corporation vs. State of Karnataka,* AIR 1999 SC 1059 in which it was held that pay roll/check off facility is available to a union under the binding settlement and not by way of convention or practice. It was further held that check off facility is obviously not a facility available to workmen. It is available only to the union to get an ensured method of securing membership fee from its members on regular basis. It has also been held that check-off facility is a condition of service. Thus, in view of the aforesaid enunciation of law by Supreme Court it is apparent that employer is not under any obligation to offer check-off facility to union. Check-off facility is a concession granted to the union under an agreement or binding settlement and cannot be claimed by a union as a matter of right.

14. Appellant-union was incorporated on 15.8.1947 and was registered with Registrar, Trade Unions under the provisions of Trade Unions Act, 1926. The union was initially registered as Chhattisgarh Colliery Workers' Federation. Thereafter, the name of the appellant-union was changed from time to time in accordance with Section 23 of the Trade Unions Act, 1926. The appellant-union claims to have mass following of about 21000 and odd workers working in the collieries situate in the States of Madhya Pradesh and Chhattisgarh. The benefit of check-off facility was extended to the appellant-union in 1986 as is perceptible from minutes of meeting held between the management and the representative of union dated 12/12-6-1986 (Annexure-P-3). Thereafter, revised guidelines were issued vide circular dated 20/23-6-2000 . From perusal of the aforesaid guidelines which are annexed as Annexure-P-4 with the writ petition, it is apparent that five Central Trade Unions, namely, INTUC, AITUC, CITU, BMS and HMS and the appellant-union were entitled to the benefit of check-off facility. Thus, for a period from 1986 till 2007 i.e. prior to issuance

of impugned letter dated 14.7.2007 contained in Annexure-P-5, the appellant-union was extended the facility of check-off system for almost 21 years. At this stage, it is relevant to mention here that appellant-union was affiliated with AITUC only for a period of five years i.e. 2003-2007. In other words, even when the appellant was not affiliated with AITUC the benefit of check off facility was extended to the appellant-union.

15. Vide impugned letter dated 14.7.2007 (Annexure-P-5), a decision was taken by the management to permit verification of authorization in respect of forms of membership of declaration, submitted in favour of affiliatees of Central Trade Unions only. Thus, the check-off facility which was extended to appellant-union was withdrawn on the ground that it is not affiliated to five Central Trade Unions.

16. Admittedly, the respondent No.1/SECL is an instrumentality of the State. It is well settled in law that every action of the State and its instrumentality must conform to rule of law and must be informed by reasons. It's action has to meet the test of Article 14 of the Constitution of India. The action of the State and its instrumentality are subject to judicial review on the touchstone of relevance, reasonableness, fair play, natural justice, equality and non-discrimination. It is equally well settled in law that an unfettered discretion is a sworn enemy of the constitutional guarantee against discrimination. [See: *Bharat Heavy Electricals Ltd. Vs. M.Chandrasekhar Reddy and others,* (2005) 2 SCC 481.

17. In the backdrop of well settled position, facts of the case may be adverted to. Appellant, as stated supra, is a union registered under the Trade Unions Act, 1926. No statutory provision was brought to our notice which requires that in order to avail the check-off facility, the union must be affiliated to the aforesaid five central trade unions. At the cost of repetition, we may once reiterate that check-off facility was extended to the appellant-union way back in the year 1986. From 1986 till 2002 the appellant was not affiliated to AITUC or any other central trade unions, yet benefit of check of facility was given to the appellant. The appellant-union thereafter for a period from 2003 to 2007 was affiliated with AITUC. Thereafter, the action of the management in withdrawing the facility of check-off system on the ground that it is not affiliated to any central trade union does not meet the test of reasonableness and fairness, especially in view of the fact that requirement of affiliation to central trade unions in order to avail check-off facility is not statutory

requirement. The benefit of check-off facility for a period of 21 years was extended to appellant-union and, therefore, its withdrawal, all of sudden on extraneous consideration, i.e. requirement of affiliation with central trade unions, which otherwise has no statutory sanction, cannot, but be held to be discriminatory and arbitrary.

18. Respondent No.1 being an instrumentality of State within the meaning of Article 12 of the Constitution of India is supposed to act in a fair, rational and reasonable manner while dealing with the trade unions and its action must be aimed at promoting industrial harmony. It's action in unilaterally withdrawing the facility of check-off system can not be approved. Respondent No.1 cannot be permitted to show undue preference to any union on extraneous consideration. For the aforementioned reasons, the inevitable conclusion is that the action of the management in withdrawing the check-off facility suffers from vice of unreasonableness and arbitrariness.

19. So far as objection raised on behalf of the respondents with regard to lack of territorial jurisdiction to entertain the writ petition is concerned, suffice it to say that respondents had raised such an objection before the learned Single Judge which was rejected by the learned Single Judge and it was held that this Court has the territorial jurisdiction to entertain the writ petition. Against aforesaid finding, neither any cross-objection nor any cross-appeal has been filed. Therefore, such an objection cannot be entertained at the behest of the respondents. Even otherwise, such an argument cannot be accepted as check-off facility is not available only at the headquarter level. The check-off facility is prevalent at various unit sub areas. Admittedly, the collieries of respondent No.1 are situated in the State of Madhya Pradesh and State of Chhattisgarh and, therefore, part of cause of action has arisen within the territorial jurisdiction of this Court. For the aforementioned reasons, it cannot be said that this Court has no territorial jurisdiction to adjudicate the controversy.

20. So far as the contention that Code of Conduct which has been evolved is a matter of policy under which it is decided to extend the check-off facility to only 5 central trade unions, is concerned, no interference should be made in the matter of policy. It is well settled in law that if a policy is irrational, arbitrary or perverse, interference can be made by the Court in exercise of powers of judicial review. We have already held that action of respondent-management in withdrawing check-off facility does not conform to requirement of Article 14 of the Constitution and is arbitrary and discriminatory.

21. For the aforementioned reasons, the order passed by the learned Single Judge is quashed. Consequently, the writ petition preferred by the appellant is allowed. Order dated 14.7.2007 (Annexure-P-5) is also quashed. Respondents 1 to 5 are directed to extend the benefit of check-off facility to the appellant-union. Accordingly, the writ appeal is allowed. However, there shall be no order as to costs.

Appeal allowed.

I.L.R. [2011] M. P., 375
WRIT PETITION

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

W.P. No.4155/2010 (Jabalpur) decided on 14 May, 2010

GAJENDRA ... Petitioner

Vs.

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

*A. **Contract - Mistake in bid document - Whether can be corrected** -* **Bidders were required to keep Part I of tender document containing their eligibility in one envelop and financial bid in another envelop - Petitioner kept both the documents in the envelop meant for keeping financial bid - Petitioner moved an application informing that tender form Part I is kept in tender form II - Collector, Excise rejected the application and financial bid of petitioner was not opened - *Held* - There is secrecy as to financial bid - Envelop containing financial bid cannot be opened at the stage of qualification round - It was a fatal error - Financial bid of the petitioner cannot be considered - Petition dismissed.** (Para 7)

क. संविदा – बोली दस्तावेज में त्रुटि – क्या सुधारी जा सकती है – बोली लगाने वालों से निविदा दस्तावेज का भाग–I, जिसमें उनकी पात्रता वर्णित थी, एक लिफाफे में तथा वित्तीय बोली दूसरे लिफाफे में रखा जाना अपेक्षित था – याची ने दोनों दस्तावेज वित्तीय बोली रखने के लिए अभिप्रेत लिफाफे में रख दिये – याची ने यह सूचित करते हुए आवेदन किया कि निविदा पत्र भाग–I निविदा पत्र II में रखा है – कलेक्टर, आबकारी ने आवेदन अस्वीकार कर दिया और याची की वित्तीय बोली को नहीं खोला गया – *अभिनिर्धारित* – वित्तीय बोली के सम्बन्ध में गोपनीयता होती है – योग्यता दौर के प्रक्रम पर वित्तीय बोली का लिफाफा नहीं खोला जा सकता – यह एक गंभीर त्रुटि थी – याची की वित्तीय बोली पर विचार नहीं किया जा सकता – याचिका खारिज।

B. Contract - Judicial review - Negligent mistakes - **Negligent mistakes in bid documents cannot be permitted to be corrected on basis of equity - Where facts indicate that (i) it was not beyond the control of bidder to correct the error before the submission of bid (ii) that he was not vigilant (iii) that he did not seek to make corrections at the earliest opportunity - It is not within the scope of judicial review.** (Para 8)

ख. संविदा – न्यायिक पुनर्विलोकन – नगण्य त्रुटि – बोली दस्तावेजों की नगण्य त्रुटियों को साम्य के आधार पर सुधारे जाने की अनुज्ञा नहीं दी जा सकती – जहाँ तथ्यों से यह उपदर्शित होता है कि **(i)** बोली प्रस्तुत किये जाने के पूर्व त्रुटि को सुधारना बोली लगाने वाले के वश से परे नहीं था, **(ii)** वह सजग नहीं था, **(iii)** उसने सर्वप्रथम अवसर पर सुधार करने का अनुरोध नहीं किया – यह न्यायिक पुनर्विलोकन के कार्यक्षेत्र में नहीं है।

C. Contract - Judicial review - **Parameters of judicial interference in contractual matters - Explained.** (Para 8)

ग. संविदा – न्यायिक पुनर्विलोकन – संविदात्मक मामलों में न्यायिक हस्तक्षेप के मापदण्ड – स्पष्ट किये गये।

D. Contract - Judicial review - Error in bid document and price bid - **Nature of error in bid document is also material to be considered - Merely the fact that price bid was lesser could not be a ground to accept the tender in violation of the conditions.** (Para 8)

घ. संविदा – न्यायिक पुनर्विलोकन – बोली दस्तावेज में त्रुटि और मूल्य बोली – बोली दस्तावेज में त्रुटि की प्रकृति पर विचार किया जाना भी तात्विक है – मात्र यह तथ्य कि मूल्य बोली कम थी, शर्तों का अतिक्रमण करके किसी निविदा को स्वीकार किये जाने का आधार नहीं हो सकता।

Cases referred :

(2001) 2 SCC 451, AIR 1996 SC 11, (2009) 11 SCC 9, (1991) 3 SCC 273, (1990) 2 SCC 488, AIR 2006 Ori. 156, 2002(4) MPLJ 311, AIR 1994 All 283.

Narendra Singh Kirar, for the petitioner.

Naman Nagrath, Addl.A.G., for the respondent Nos.1 to 3.

Gurleen Chhabra, for the respondent Nos.4 & 5.

ORDER

The Order of the Court was delivered by ARUN MISHRA, J. :–Petitioner submitted the tender form obtaining liquor shops. He has prayed that his financial bid be opened and it be ordered to be

accepted in case it is highest, and, to provide reasonable time to the petitioner to comply with the required formalities.

2. Petitioner has averred that petitioner submitted tender for obtaining licence of the shops in question. Due to work pressure and bona fide mistake, he submitted the tender form-I in the envelop meant for financial bid. On the ground that petitioner did not submit tender form Part I, his financial bid has not been opened and has resulted into rejection of his tender which was highest. Petitioner submitted the representation, same was without any avail. Under the Policy (P.2) for the year 2010-11, the tenders were invited in form (P.3). Petitioner submits that he submitted draft of security amount, consent agreement, self-attested documents relating to photo identity proof and resident proof, PAN Card, attested copy of bank account number, notarized affidavit, but wrongly placed the tender form Part I in the financial bid envelop no.2, both the envelops were put in a bigger envelop and the forms were deposited vide receipts (P.4 and P.5). On coming to know of the mistake, petitioner moved an application that tender form Part I has been placed in tender form Part II. The Collector Excise has passed an Order (P.6) rejecting the prayer of the petitioner to open the financial bid. As against Order (P.6) passed by the Collector, Excise, petitioner filed representation before Excise Commissioner. Representation has been rejected vide Order (P.1) dated 22.3.2010 by the Excise Commissioner. It has been held that envelop of financial bid could not have been opened as tender form Part I was not contained in envelop of eligibility,i.e., envelop no.1. Hence, instant petition has been preferred.

3. In the return filed by respondents 1 to 3, it is contended that part I of the tender is an important document to ascertain the eligibility, eligibility part was not available on opening envelop no.1, consequently, District Excise Committee has decided not to consider the financial bid. Orders passed by the Collector and Commissioner, Excise are proper. Clause 13.5 provides that tender shall be received only on tender form printed and supplied by the Excise Department. Clause 13.6 provides that tenderer has to submit his identification and proof of residence.Clause 13.8 which is relevant for the controversy in the instant case provides that tender form issued shall be in two parts. In part-I tenderer has to give details of the required security deposits, acceptance deed, proof of identification and residence along with the relevant documents, PAN Card, details of the bank account and other documents along with notarized affidavit. Tenderer is required to clearly specify

the name and number of his shop and his offer in numeral and words in Part II of the tender. There is clear direction that the financial bid (Part-II) of the tender is to be kept in separate envelop and sealed. The financial bid could be opened only when a person qualifies in the eligibility criteria while evaluating Part-I of the tender document. The procedure was duly informed to all and was required to be followed by the tenderers. Clause 13.11 provides that tender shall be opened in descending order of the reserved price. Firstly Part I of the tender shall be opened and eligibility of the tenderer would be determined. It is only after satisfaction of the Committee about the security deposit and all documents being in order, the District Committee would open Part-II of the tender, i.e., financial bid. Clause 13.13 stipulates that financial bid shall not be rejected on account of clerical or general error. The District Excise Committee is empowered to get necessary correction done on the spot. In the instant case, mandatory requirement was not fulfilled as such envelop containing financial bid could not have been opened. Thus, action taken is in accordance with law.

4. In the return filed by respondent no.5 it is contended that as the requisite details which were necessary for qualification round were not found in envelop no.1, and as per stipulation in the tender document, envelop no.2 could not have been opened, thus, rejection of tender of the petitioner was proper,agreement has been entered into with the answering respondent.

5. Shri Narendra Singh Kirar, learned counsel appearing for petitioner has submitted that it was a case of clerical mistake due to which the tender document Part I was placed into envelop no.2, instead of envelop no.1. On coming to know of the mistake, prayer was made to open the envelop 2nd containing the financial bid. Rejection of the prayer could not have been said to be legal. By opening the financial bid, State would have been benefited in case contract was granted to the petitioner as his bid was the highest for both the shops. The condition of placing the tender document and other documents in Part I could not be said to be mandatory. Thus, the respondents have acted illegally while rejecting the prayer made by the petitioner and granting the contract of the shops in question to respondents 4 and 5. Petitioner is a common man, he could not be saddled with the responsibility of knowing the technical aspects of law. The purpose of tender form-I is clerical so as to obtain information at a glance, envelop no.2 contained unsplited tender document. Submission of both parts of the tender documents was material which were filed. Disqualification of the petitioner could not be said to be a decision taken

in accordance with law. Tender of the petitioner could not have been rejected in the circumstances of the case. He has relied upon decisions to be referred later.

6. Shri Naman Nagrath, learned Addl.AG and Ms. Gurleen Chhabra, learned counsel appearing for respondents have submitted that financial bid could not have been opened. As per condition of the tender, it was necessary to qualify for opening of the 2nd envelop. Thus, rejection of the tender of the petitioner was proper. It was not possible, in the absence of document forming Part I of the tender, to ascertain for which of the shops the petitioner has submitted the tenders the other requisite documents necessary for the purpose of qualification were not found in envelop-1. Thus, petitioner was rightly disqualified.

7. In order to appreciate whether the financial bid envelop 2nd could have been opened in order to ascertain eligibility is required to be examined in view of clause 13 of the tender document. The Clause 13.8 provides that in Part-I of the tender document, the tenderer has to furnish the details of security deposit, consent agreement,documents as to his identity, PAN card, bank account no., notarized affidavit and other necessary documents. Tenderer has to mention the names of shops and of the group concerned for which the tender has been submitted. Financial offer was required to be submitted in Part II of the tender. It was clearly mentioned in clause 13.8 that financial bid Part II has to be kept in a separate envelop and in the 3rd envelop post dated cheque of 1/12th amount of the offer made had to be submitted. The tender Part-I and II were required to be kept in separate envelops and then in one common big envelop. It was clearly mentioned in Condition No. 13.11 that firstly Part I of the tender will be opened and eligibility shall be considered. Once satisfaction is reached with respect to the eligibility and submitting the security equal to the basic licence fee only thereafter Part-II containing the financial bid will be opened. In case post dated cheque of 1/12th amount is not found, the offer made i.e.financial bid will not be considered. Clause 13.13 provides that in case of clerical error or general error, financial bid will not be disallowed and such error could be corrected by the District Committee on the spot under the guidance of the Collector/Commissioner,Excise. Conditions no. 13.8, 13.11 and 13.13 are quoted below :

> 13.8 निर्गत टेण्डर प्रपत्र दो भागो में होगा। भाग–एक में टेण्डरदाता धरोहर राशि जमा का विवरण, सहमति करार, स्वयं की पहचान सुनिश्चित करने एवं निवास स्थान के पते के प्रमाणीकरण हेतु वांछित दस्तावेज की स्वप्रमाणित

छायाप्रति तथा आयकर स्थायी लेखा (PAN) कमांक, बैंक खाता कमांक तथा प्रस्तुत की जा रही जानकारी के संबंध में नोटराइज्ड शपथ पत्र एवं आवश्यक अन्य अभिलेख भरकर, एक लिफाफे में बंद कर रखेगा। टेण्डरदाता भागीदारी फर्म होने की दशा में फर्म के पंजीयन प्रमाण पत्र के साथ–साथ पार्टनरशीप–डीड एवं रजिस्ट्रार फर्म्स एण्ड सोसायटी द्वारा जारी फर्म के रजिस्टर की नकल (एब्स्ट्रेक्ट) अनिवार्यतः प्रस्तुत करेगा। यदि टेण्डरदाता कंपनी की ओर से टेण्डर देना चाहता है, तो टेण्डर देने के पूर्व उसे संबंधित कम्पनी का निगमन प्रमाण पत्र अथवा उसकी विधिवत् अभिप्रमाणित प्रतिलिपि, कंपनी के मेमोरेण्डम एण्ड आर्टीकल्स ऑफ एसोसिएशन की मूल या प्रमाणित प्रतिलिपि कम्पनी के संचालक मण्डल की सूची तथा संचालक मण्डल की ओर से आवेदक के पक्ष में निष्पादित/जारी अधिकार पत्र प्रस्तुत करना होगा। टेण्डरदाता दुकान/एकल समूह का स्पष्ट नाम लिखते हुए अपना ऑफर शब्दों तथा अंको में टेण्डर प्रपत्र के भाग–दो में प्रस्तुत करेगा। जिसे वह पृथक लिफाफे में रखकर बंद करेगा। टेण्डरदाता अपने ऑफर के 1/12 भाग की राशि का पोस्टडेटेड चैक को टेण्डर प्रपत्र के भाग दो के लिफाफे से भिन्न एक तीसरे पृथक लिफाफे में रखेगा अर्थात् टेण्डर प्रपत्र के दोनो भाग एक व दो के लिफाफे तथा तीसरा पृथक लिफाफा इन तीनों लिफाफों को एक बड़े लिफाफे में, इस तरह चिपकाकर बंद करेगा कि उसे फाड़े बिना, लिफाफे को खोला न जा सके। टेण्डरदाता द्वारा सील्ड टेण्डर कंडिका–48.1 में घोषित समयावधि में विहित प्रकिया अनुसार प्रस्तुत किया जायेगा।

13.11 टेण्डर द्वारा निष्पादित की जाने वाली सभी मदिरा दुकानो/एकल समूहों के घोषित आरक्षित मूल्य के अवरोही कम में, मदिरा दुकानवार/एकल समूहवार प्रस्तुत टेण्डरों का भाग–एक खोला जाकर टेण्डरदाता के टेण्डर में भाग लेने की पात्रता की जांच की जाएगी। साथ ही टेण्डरदाता द्वारा संबधित दुकान/एकल समूह की सम्पूर्ण बेसिक लायसेंस फीस की समतुल्य धरोहर राशि की विधिवत पुष्टि/संतुष्टि एवं जांच में समस्त अभिलेख पूर्ण होने एवं समाधानकारक पाए जाने तथा निर्धारित लिफाफे में 1/12 भाग का पोस्टडेटेड चैक पाये जाने के उपरांत ही जिला समिति द्वारा टेण्डर का ऑफर, भाग–दो फाईनेन्शियल बिड को खोला जाएगा। पोस्टडेटेड चैक के लिफाफे में 1/12 भाग के पोस्टडेटेड चैक की अनुपस्थिति में टेण्डर प्रपत्र के भाग–दो फायनेंशियल बिड के लिफाफे को नहीं खोला जायेगा। अर्थात इस स्थिति में टेण्डरदाता द्वारा दिया गया ऑफर विचारणीय नहीं होगा और फाईनेन्सियल बिड का लिफाफा जिला समिति के सदस्यों द्वारा हस्ताक्षरित कर यथास्थिति बंद ही रखा जायेगा।

13.13 टेण्डर प्रपत्र भाग–एक के अभिलेखों में धरोहर राशि के विधिवत् जमा पाये जाने पर एवं पोस्टडेटेड चैक के लिफाफे में 1/12 भाग का पोस्ट डेटेड संलग्न पाये जाने पर, अभिलेखों में लिपिकीय त्रुटि अथवा सामान्य त्रुटियों के

आधार पर प्राप्त ऑफर (फाइनेन्शियल बिड)को अमान्य नहीं किया जावेगा। इस प्रकार की त्रुटियों का सुधार जिला समिति मौके पर करवा सकेगी। लिपिकीय त्रुटि अथवा सामान्य प्रकार की त्रुटि के संबंध में शंका–समाधान के लिए, कलेक्टर सागर, आबकारी आयुक्त से निर्देश प्राप्त कर सकेंगे। इस संबंध में आबकारी आयुक्त द्वारा दिया गया निर्देश अंतिम माना जावेगा।"

In our opinion, taking into consideration clause 13.8 and 13.11, the envelop containing financial bid could not be opened in the absence of petitioner having qualified on the basis of Part I of tender document to be placed in envelop no.1. There is purpose behind keeping secret the financial bid. Question of opening the envelop 2nd containing the financial bid arises only after qualification round. There is secrecy as to financial bid. The envelop containing it could not have been opened at the stage of qualification round. It was a fatal error committed by the petitioner which was beyond periphery of being corrected. There was no scope to entertain any doubt that financial bid was not to be opened in case an incumbent fails in qualifying round in which necessary documents including the names of shops or group were required to be mentioned along with other necessary documents mentioned above. Admittedly, in envelop no.1 necessary documents were not submitted. As per
condition no.13.11 envelop 2nd could not have been opened unless a person fulfills the eligibility round. Thus, prayer made later on by the petitioner, as apparent from representation filed to the Collector,Excise that his financial bid envelop be opened, could not have been accepted. By that time qualification round was already over and the tender document Part I itself was not found in envelop no.1. The submission raised that it is a case of clerical error cannot be accepted. Such an error could not have been corrected within the purview of clause 13.13 of tender document. Thus, rejection of petitioner's tender and his disqualification while opening envelop no.1 was proper.

8. In *W.B.State Electricity Board vs. Patel Engineering Co.Ltd. and others* (2001) 2 SCC 451 relied on by State counsel , the Apex Court has laid down that negligent mistakes in bid documents cannot be permitted to be corrected on basis of equity. Where facts indicate that (i) it was not beyond the control of bidder to correct the error before submission of bid; (ii) that he was not vigilant, and (iii) that he did not seek to make corrections at the earliest opportunity, such bidder cannot be permitted to correct his bid documents afterwards. The Apex Court held in such circumstances strict adherence to instructions to bidders is essential and cannot be branded a

pedantic approach. The Apex Court laid down that High Court was not right in allowing the corrections to be made. The Apex Court laid down that relief on the ground of mistake cannot be granted. The Apex Court further laid down such corrections are not permissible under the Rules governing the process of tender, it was not within the scope of judicial review of the Court to interfere under Article 226 of the Constitution. The Rules and instructions must be complied with scrupulously in order to avoid discrimination, arbitrariness and favouritism, which are contrary to rule of law and constitutional values. Relaxation by State or its agencies of a rule or condition in favour of a particular bidder is not permissible unless expressly provided for in the rules. The Apex Court has referred to the decision in *Tata Cellular vs. Union of India* AIR 1996 SC 11 = (1994) 6 SCC 651 laying down the parameters of the judicial interference in such contractual matters. The Apex Court in para 14 has referred to the ratio of *Tata Cellular vs. Union of India* (supra) thus :

> "14. Before proceeding to ascertain answers to the above questions, it will be useful to bear in mind the principles governing the exercise of power of judicial review by the High Courts. We consider it unnecessary to refer to cases on the scope of the power of judicial review of administrative action by the High Court as a three-Judge Bench of this Court has, after exhaustive consideration of long line of authorities, succinctly summarized the position and laid down the following principles in *Tata Cellular Vs. Union of India* [1994 (6) SCC 651 (SCC pp.687 88, para 94) :
>
> (1) The modern trend points to judicial restraint in administrative action.
>
> (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
>
> (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
>
> (4)The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.Normally speaking, the decision to accept the

tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

The Apex Court has considered the exception to the general principle of seeking relief in equity on the ground of mistake in *W.B.State Electricity Board vs. Patel Engineering Co.Ltd. and others* (supra) thus :

"27. Exceptions to the above general principle of seeking relief in equity on the ground of mistake, as can be culled out from the same para, are :

(1) where the mistake might have been avoided by the exercise of ordinary care and diligence on the part of the bidder; but where the offeree of the bid has or is deemed to have knowledge of the mistake, he cannot be permitted to take advantage of such a mistake.

(2) where the bidder on discovery of the mistake fails to act promptly in informing to the concerned authority and request for rectification, withdrawal or cancellation of bid on the ground of clerical mistake is not made before opening of all the bids.

(3) where the bidder fails to follow the rules and regulations set forth in the advertisement for bids as to the time when bidders may withdraw their offer; however where the mistake is discovered after opening of bids, the bidder may be permitted to withdraw the bid."

There was error committed by Computer, the Apex Court observed that

it could have been discovered and notified by the said respondents with exercise of ordinary care and diligence. The mistakes were not pointed out till 23.12.1999. Nature of error is also material to be considered. Merely the fact that price bid was lesser could not be a ground to accept the tender in violation of the conditions. In *Sorath Builders vs. Shreejikrupa Buildcon Ltd.and another* (2009) 11 SCC 9 the Apex Court has laid down that pre-qualification document is required to be submitted within the stipulated time. Respondent 1 was negligent and insincere in not submitting his prequalification documents within the stipulated time though he had information that there was a time schedule attached to the notice inviting tenders. The terms and conditions of the tender are required to be adhered to strictly and,therefore, respondent 2 was justified in not opening the tender submitted by respondent 1 which was late by three days. No grievance could be made by respondent 1 as the lapse was due to his own fault. Decision in *W.B.State Electricity Board vs. Patel Engineering Co.Ltd. and others* (supra) has been relied upon.

9. Petitioner's counsel has referred to the decision of Apex Court in *Poddar Steel Corporation vs.Ganesh Engineering Works And Others* (1991) 3 SCC 273 in which there was deviation in the tender condition from non essential or ancillary/subsidiary requirement.The Apex Court held that minor technical irregularity can be waived.Instead of draft drawn on State Bank of India,the cheque marked and certified by Union Bank of India was sent by the tenderer.It was held by the Apex Court that the Government justified in waiving technical compliance with the tender condition. In the instant case, it could not be said that there was deviation from non-essential or ancillary/subsidiary requirement. It was essential condition here that before opening the 2nd envelop, a person must qualify in which the petitioner failed, thus, the envelop 2nd containing financial bid could not have been opened at eligibility stage and there is purpose for not opening it before the qualification round which being mandatory stipulation could not have been waived. The financial bid could not have been opened at the stage of qualification round. That would be violative of the very essential condition of tender document. Learned counsel has also relied upon decision of Apex Court in *G.J.Fernandez vs. State of Karnataka and others* (1990) 2 SCC 488 in which the Apex Court has laid down that minimum qualifying requirements for intending tenderers and informations and documents in support thereof to be furnished along with the application for issue of blank tender book prescribed in two separate paragraphs of notification inviting tenders. Both the paragraphs of NIT should be read harmoniously. Minimum

qualifying requirements for intending tenderers and information and documents to be furnished by them prescribed by notification inviting tenders should be strictly observed by the instrumentality of the State equally in cases of all the intending tenderers. Where the instrumentality of State consistently and bona fide interpreting the standards so prescribed in a particular manner and acting accordingly, the Court would not interfere and substitute an interpretation which it considers to be correct. Applying the aforesaid ratio in the instant case, the respondents have acted properly in rejecting the tender considering clause 13.8 along with 13.11, rejection is found to be proper as the interpretation made by the Collector and Commissioner, Excise is in accordance with the terms of the agreement, and it is not open to the Court to interfere in the terms of the invitation subject to which the tenders are invited as held by the Apex Court in *Tata Cellular vs. Union of India* AIR 1996 SC 11. Petitioner's counsel relied upon the observations made by the Apex Court in para 203 of the aforesaid decision in which the Apex Court has laid down that where the mistake is in relation to a non-essential matter that is in relation to peripheral or collateral matter. There has been every intention to comply with the terms of the bid, for an accidental omission it cannot be punished. The Apex Court has laid down in para 113 that terms of invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Thus, in the instant case it being essential condition that the envelop 2nd will not be opened in the absence of qualification of the tenderer by opening part-I of the envelop, it was not open to the petitioner to insist for opening of financial bid envelop for ascertaining his qualification.

10. Learned counsel has also relied upon decision of High Court of *Orissa in Akbar Mohammed vs. State of Orissa and Ors.* AIR 2006 Orissa 156 in which petitioner who was the lowest tenderer was asked to submit Sales Tax Clearance Certificate, the condition was held to be merely ancillary condition. It was held that the decision of the State Government stating that petitioner's bid cannot be accepted without Sales Tax Clearance Certificate was improper, and no other tender was rejected on that ground. The decision is totally different, here it was essential condition which has been violated. Mistake as to essential condition could not have been permitted to be corrected, the opening of the financial bid was not permissible before qualification round and petitioner was very well aware of the condition. The decision of Apex Court in *Kanhaiya Lal Agrawal vs. Union of India and others* 2002 (4) MPLJ 311 has also been relied upon by the petitioner's counsel in which the Apex Court has laid

down that when essential condition of tender is not complied with, it is open to the person inviting tender to reject the same. Whether a condition is essential or collateral could be ascertained by reference to the consequence of non compliance thereto. If non-fulfilment of the requirement results in rejection of the tender, then it would be an essential part of the tender otherwise it is only a collateral term. In the instant case, clause 13.8 read with clause 13.11 of the tender document makes it clear that essential condition of tender has not been complied with. It is apparent from the aforesaid clauses that non fulfillment of the requirements of qualification round results in rejection of the tender, it was essential condition that envelop no.2 would not be opened in the absence of qualification of incumbent on opening 1st envelop. Thus, the decision counters the submission raised by petitioner's counsel.The decision in *Gorakhnath Upadhyaya vs. State of U.P. and others* AIR 1994 Allahabad 283 has also been pressed into service by the petitioner laying down that authority inviting tender should insist on strict compliance of essential conditions. The condition that tenderer should produce certificate of experience for 3 years whereas certificate produced by petitioner stating that petitioner has full experience. The Court held that "full experience" must be taken to mean required experience of three years. In connection with the requirement of filing "no dues certificate", no exception could be taken to Certificate filed on ground that it was only executive Engg.P.W.D.who could issue correct Certificate. Similar condition of submitting non-judicial stamp and revenue stamp with tender was held to be not an essential condition of eligibility. Stamps were required for executing contract after tender was accepted. The facts of the instant case are totally different and the ratio,thus, cannot be applied.

11. Considering the aforesaid dictums of the Apex Court in *W.B.State Electricity Board vs. Patel Engineering Co.Ltd. and others* (supra) and in *Sorath Builders vs. Shreejikrupa Buildcon Ltd.and another* (supra), the decision taken by the respondents 1 to 3 cannot be faulted as there was violation of essential condition of tender subject to which they were invited.

12. Resultantly, we find no force in the submissions raised by petitioner's counsel. Petition being devoid of merits deserve dismissal and is hereby dismissed. No costs.

Petition dismissed.

I.L.R. [2011] M. P., 387
WRIT PETITION

Before Mr. Justice A.K. Shrivastava & Mr. Justice Brij Kishore Dube

W.P. No.4755/2009(I) (Gwalior) decided on 15 September, 2010

KHAMIR SINGH ... Petitioner

Vs.

RADHESHYAM BANSAL ... Respondent

A. Stamp Act (2 of 1899), Section 11, Stamp Rules, M.P. 1942, Rules 15 & 17 - **Apart from the requisite revenue stamp on the promissory note, adhesive stamp also pasted - The document itself cannot be said to be inadmissible in evidence.** (Para 9)

क. स्टाम्प अधिनियम (1899 का 2), धारा 11, स्टाम्प नियम, म.प्र. 1942, नियम 15 व 17 – वचन–पत्र (प्रॉमिसरी नोट) पर अपेक्षित राजस्व स्टाम्प के अलावा चिपकने वाले स्टाम्प भी चस्पा थे – दस्तावेज साक्ष्य में अग्राह्य होना नहीं कहा जा सकता।

B. Civil Procedure Code (5 of 1908), Order 14 Rule 5 - **Issues already framed by trial Court cover the proposed issues - Trial Court did not commit any error in rejecting the application.** (Para 15)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 14 नियम 5 – विचारण न्यायालय द्वारा पूर्व से विरचित विवाद्यक प्रस्तावित विवाद्यकों को आच्छादित करते हैं – विचारण न्यायालय ने आवेदन नामंजूर करने में कोई त्रुटि नहीं की।

Case referred :

2000(I) MPJR 51.

D.D. Bansal, for the petitioner.

Jitendra Sharma, for the respondent.

ORDER

The Order of the Court was delivered by **A.K. SHRIVASTAVA, J.** :–Feeling aggrieved by the order dated 3/9/2009 passed by the Additional Judge to the Court of Civil Judge Class I, Shivpuri in Civil Suit No.4-B/2009 dismissing two applications filed by the defendant/ petitioner – one under section 11 of the Stamps Act read with Rules 15 and 17 of the M.P.Stamp Rules and another under Order XIV Rule 5 read with section 151 of C.P.C., the petitioner has filed this writ petition under Article 227 of the Constitution of India.

2. No exhaustive statement of facts is required to be narrated for the purpose of disposal of this writ petition, suffice it to say that a suit on the basis of promissory note executed by defendant/petitioner in favour of plaintiff/ respondent has been filed for realisation of a sum of Rs.41,000/-. According to the plaint averments, the defendant/petitioner executed a promissory note on 15/3/2006 for Rs.30,000/-in favour of plaintiff/respondent and took loan amount of Rs.30,000/-. It was agreed between the parties that the said amount will be paid alongwith interest at the rate of two percent per annum whenever the demand is made by the plaintiff. Since the amount of promissory note was not paid, hence, the plaintiff after giving notice on 24/4/2008 to the defendant, filed the present suit for realisation of Rs.41,000/-.

3. In the Court below, the impugned document of promissory note was submitted. The defendant/petitioner filed an application under section 11 of the Indian Stamps Act (for brevity, the "Act") read with Rules 15 and 17 of the M.P. Stamp Rules, 1942 (for short, the "Rules") alleging that since the pronote bears adhesive stamp, therefore, the same is inadmissible in evidence and because the suit has been filed on the basis of said promissory note, the same be dismissed. An application under Order XIV Rule 5 of C.P.C. was also filed by the petitioner/defendant for framing some additional issue.

4. The learned Trial Court dismissed both these applications by the impugned order.

5. In this manner, present writ petition has been filed by the defendant/ petitioner under Article 227 of the Constitution of India.

6. The contention of the learned counsel for the defendant/petitioner is that since the document namely pronote bears the adhesive stamp, therefore, the same is inadmissible in evidence and since the suit has been filed on the basis of inadmissible document, the same be dismissed. In support of his contention, learned counsel has placed heavy reliance on single Bench decision of this Court in *Ismail Khan v. Ram Prakash Verma,* 2000 (I) MPJR 51. By putting deep dent on the impugned order of the learned Court dismissing the application under Order XIV Rule 5 of C.P.C., it has been argued by the learned counsel that the proposed issues are necessary for the real adjudication of the suit, therefore, the learned Trial Court committed grave error in dismissing the application. On these premised submissions, it has been argued by the learned counsel that this petition be allowed.

7. Per contra, Shri Jitendra Sharma, learned counsel for the plaintiff/ respondent argued in support of the impugned order and has submitted that since a revenue stamp has also been affixed on the impugned document of pronote, even if an adhesive stamp is pasted, it cannot be said that the promissory note is inadmissible in evidence. Further it has been contended that Issues No.1 and 2 are already framed and, therefore, there is no necessity of framing any additional issues. Learned counsel for the plaintiff/respondent further submitted that in order to delay the trial, these applications have been filed at the time of recording of evidence of the plaintiff and, hence, it has been prayed that this petition be dismissed.

8. Having heard learned counsel for the parties, we are of the view that this writ petition deserves to be dismissed.

9. So far as rejection of the application under section 11 of the Act read with Rules 15 and 17 of the Rules (Annexure P/6) is concerned, suffice it to say that certainly the argument of the learned counsel for the defendant/petitioner could have been accepted, if in addition to the adhesive stamp, the requisite revenue stamp would not have been affixed on the promissory note. In the present case,on bare perusal of the photo copy of the pronote (Annexure P/2), we find that on the impugned pronote, apart from the requisite stamp of revenue, an adhesive stamp of denomination of Re.1/-has also been pasted. Since apart from the requisite revenue stamp on the promissory note, adhesive stamp has also been pasted, according to us, the document itself cannot be said to be inadmissible in evidence. In this context, we would like to quote section 10 of the Act which speaks about the duty and how it is required to be paid :

> **"10. Duties how to be paid.** (1) Except as otherwise expressly provided in this Act, all duties with which any instruments are chargeable shall be paid, and such payment shall be indicated on such instruments, by means of stamps-
>
> (a) according to the provisions herein contained; or
>
> (b) when no such provision is applicable thereto as the State Government may by rule direct.
>
> (2) The Rules made under sub-section (1) may, among other matters, regulate-
>
> (a) in the case of each kind of instrument – the description of stamps which may be used;

(b) in the case of instrument stamped with impressed stamps – the number of stamps which may be used;

(c) in the case of bill of exchange or promissory notes, the size of the paper on which they are written."

10. Section 11 of the Act pertains to use of adhesive stamps and it would be condign to re-write that section-

"**11. Use of adhesive stamps** – The following instruments may be stamped with adhesive stamps, namely-

(a) instruments chargeable with a duty not exceeding ten naye paise, except parts of bills of exchange payable otherwise than on demand and drawn in sets;

(b) bills of exchange, and promissory notes drawn or made out of India;

(c) entry as an advocate, vakil or attorney on the role of a High Court;

(d) notarial acts; and

(e) Transfers by endorsement of shares in any incorporated company or other body incorporate."

11. In order to give positive effect to different provisions of the Act, aforesaid Stamp Rules have been framed. Looking to Rule 5 of the said Rules, we find that a promissory note or bill of exchange shall, except as provided by section 11 or by rules 13 and 17, be written on paper on which a stamp of the proper value with or without the word "hundi" has been engraved or embossed. Thus, promissory note can be executed on a paper having a revenue stamp of proper valuation. If we go through Rule 17 which speaks about adhesive stamp, denoting duty of ten naye paise or five naye paise, we find that such stamp may be inscribed for use for revenue only. We think it apposite to quote said Rule 17 which reads thus

"**Adhesive stamp or stamps denoting duty of ten naye paise and five naye paise.**-Except as otherwise provided by these rules, the adhesive stamps used to denote duty shall be the requisite number of stamps bearing the words "Twenty-five naye Paise" or "Fifteen naye paise" or " ten naye paise" or "Five naye paise" and such stamps may be inscribed for use for revenue."

12. On bare perusal of the impugned promissory note (Annexure P/2) we find that requisite revenue stamp has been affixed on the pronote. On bare perusal of Rule 17 of the Rules, we find that no adhesive stamp on the pronote can be used except the stamp inscribed for use of revenue, and therefore, according to us, even if, apart from requisite revenue stamp, an adhesive stamp was additionally affixed, it cannot be said that the document (promissory note) is inadmissible in evidence, and therefore, according to us, petitioner's application (Annexure P/6) has rightly been rejected by the learned Trial Court. The decision of *Ismail Khan* (supra) placed reliance by the learned counsel for the petitioner/defendant does not support the case of the petitioner, rather, it supports the case of the plaintiff/respondent because in that decision, the requisite revenue stamp was not affixed and the pronote was having only an adhesive stamp, and therefore, in that situation the learned single Bench rightly held that the document of pronote is not admissible in evidence. But in the present case, admittedly, the document of pronote is already having requisite revenue stamp and, therefore, this decision supports the case of plaintiff/ respondent.

13. Now coming to rejection of the application filed by the defendant/ petitioner under Order XIV Rule 5 of C.P.C., according to us, the same has also been rightly rejected by the learned Trial Court. On the basis of averments made in the plaint and denial in the written statement, following issues have been framed by the learned Trial Court.

> "1 क्या प्रतिवादी ने वादी से 30,000 रूपये उधार प्राप्त कर वादी के पक्ष में प्रोमेसरी नोट संपादित किया ?
>
> 2 क्या वादी साहूकारी का धंधा करता है ?
>
> 3 सहायता एवं व्यय ?"

14. The Issues which the defendant/petitioner has proposed in his application under Order XIV Rule 5 of C.P.C. (Annexure P/5) are :

> "(1) क्या वादी ने प्रतिवादी के फर्जी हस्ताक्षर बनाकर प्रोमेसर नोट एवं पावती पत्र की कूट रचना की है यदि हॉ तो प्रभाव ?
>
> (2) क्या वादी साहूकारी का व्यवसाय करता है यदि हॉ तो क्या वादी द्वारा साहूकारी विधान पालन किया गया है ?"

15. By keeping the issues already framed by the learned Trial Court and the issues proposed to be framed by the defendant/petitioner in juxtaposition to

each other and reading them conjointly, we find that the issues already framed by the learned Trial Court cover the proposed Issues. Therefore, according to us, the learned Trial Court did not commit any error in rejecting the application filed by the defendant/petitioner under Order XIV Rule 5 of C.P.C.(Annexure P/5).

16. We have gone through the reasonings assigned by the learned Trial Court rejecting these two applications and we find that the reasonings are based on correct appreciation of law.

17. Ex consequenti, we do not find any merit in this writ petition. The same is hereby dismissed. Parties are directed to bear their own costs.

Petition dismissed.

I.L.R. [2011] M. P., 392
WRIT PETITION

Before Mr. Justice A.K. Shrivastava & Mr. Justice Brij Kishore Dube

W.P. No.5311/2009 (Gwalior) decided on 4 October, 2010

INDUSTRIAL SECURITY ASSOCIATION ... Petitioner

Vs.

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

A. Constitution, Article 21 - Blacklisting a Contractor - **Is serious action as after blacklisting, he would not be able to take part in submitting tenders in future, which directly hits his right tc life including right of meaningful livelihood enshrined under Article 21.** (Para 10)

क. संविधान, अनुच्छेद 21 – ठेकेदार को वर्ज्यसूची में डालना – गंभीर कार्यवाही है क्योंकि वर्ज्यसूची में डालने के बाद वह भविष्य में निविदाएँ प्रस्तुत करने में भाग लेने योग्य नहीं होगा, जो कि प्रत्यक्ष रूप से उसके जीवन के अधिकार पर प्रहार करता है जिसमें अनुच्छेद 21 के अन्तर्गत सुरक्षित महत्वपूर्ण जीविका का अधिकार भी सम्मिलित है।

B. Constitution, Article 226 - Writ Petition - Challenging blacklisting a Contractor - **Before taking a drastic and harsh action of blacklisting a Contractor, an opportunity of hearing should have been provided, and having not done so, he is entitled to relief.** (Para 10)

ख. संविधान, अनुच्छेद 226 – रिट याचिका – ठेकेदार को वर्ज्यसूची में डालने को चुनौती – ठेकेदार को वर्ज्यसूची में डालने की कड़ी और कठोर

कार्यवाही करने से पूर्व सुनवाई का एक अवसर दिया जाना चाहिए था और ऐसा न किये जाने से, वह अनुतोष का हकदार है।

Vivek Mishra, for the petitioner.
C.S. Dixit, Dy.A.G., for the respondent No.1/State.
Devendra Choubey, for the respondent No.2.

ORDER

The Order of the Court was delivered by **A.K. SHRIVASTAVA, J.** :–Heard finally.

2. Learned Counsel for the petitioner confines his argument to relief No. 1 only, which reads thus :-

> "1. Order of the respondent to declare the petitioner as a blacklisted may kindly be quashed."

3. The only contention, which has been put forth by Shri Vivek Mishra, Learned Counsel for the petitioner, is that the action of the respondent no.2 runs dehors to the maxim *audi alteram Partem* and the University (respondent no .2) has blacklisted the writ petitioner without affording any opportunity of hearing. In this context, he has invited our attention to the copy of the Newspaper *"Dainik Bhaskar"* dated 08.11.2009 (Annexure P/14), in which a news has been published that the petitioner has been blacklisted.

4. Learned Counsel further submits that no order has been served or even if it is sent, it has not been received by the petitioner.

5. Learned Counsel further argued that before casting stigma of blacklisting, it was incumbent upon the respondent no.2, who is a 'State' and would come within the provision of the definition of 'State' enshrined under Article 12 of the Constitution of India, to provide proper opportunity of hearing to the petitioner. Hence, the relief prayed be allowed.

6. On the other hand, Shri Choubey, Learned Counsel for respondent no.2 has supported the action of respondent no.2 blacklisting the petitioner.

7. Having heard the Learned Counsel for the parties, we are of the view that this petition deserves to be allowed in part and the petitioner is entitled for the relief number 1.

8. On bare perusal of the grounds raised in the memorandum of writ petition, we find that there is pleading of writ petitioner that without giving

any notice to him, he has been blacklisted by the respondent no.2. We think it apposite to quote ground 'B', which reads thus :-

> "B. That, the petitioner was performing his duty unblemished in the office of the respondent no.2 and no any allegation has been made by the respondent no.2 in the contract period and in respect of the work of the petitioner, no complaint has been made by the respondent no.2. Inspite of this, without giving any opportunity of hearing and without giving any intimation the petitioner agency has been declared as a blacklisted. The aforesaid illegal and arbitrary action has been made by the respondent no.2, which is not permissible in the eyes of law."

In the return, the respondent no.2-Jiwaji University, Gwalior. while replying ground No.B although has pleaded that several opportunities were provided to the petitioner, but not even a single document has been filed alongwith the return in this regard. We have also gone through letter (Annexure R/1) of Dr. Keshav Singh Gurjar, Security Incharge, addressed to Registrar of the Jiwaji University, Gwalior complaining about the petitioner and there is an endorsement in the said letter Annexure R/1 that a copy of which has also been sent to the petitioner. But this complaint (Annexure R/1) is of incharge Security only and no notice has been sent by the Registrar in pursuance to the said report to the petitioner. We do not know whether the incharge Security had ever sent a copy of Annexure R/1 to the Writ Petitioner or not because no acknowledgment has been filed alongwith the return.

9. It would be relevant to quote Para 5.8 of the Return, which reads thus;

> "5.8. That, the contents of this para the tender application submitted by the petitioner was as per rules and procedure the contract for security services were followed. That inspite of regular warnings and opportunities given to the petitioner to improve the services as per the conditions there was no action taken by the petitioner therefore the action for blacklisting the petitioner was taken since the security of the university was at risk."

10. Although, it has been pleaded on behalf of University (respondent no.2) that several opportunities were provided to the petitioner to improve his services, but no action was taken by him to improve his services, therefore, he has been blacklisted. But, no document has been filed in support of the

pleadings made in Para 5.8 of the return by the University (respondent no.2). There is nothing on record in order to indicate that the Writ Petitioner was ever noticed by any warning and, therefore according to us, mere bald statement in the return would not suffice in absence of any material on record. According to us, blacklisting a Contractor, is a serious action because after blacklisting him, he would not be able to take part in submitting tenders in future etc. and the consequences are very serious in nature, which directly hits his right to life which includes right of meaningful livelihood enshrined under Article 21 of the Constitution of India. Hence, before taking a drastic and harsh action of blacklisting the petitioner, an opportunity of hearing should have been provided, and having not done so, according to us, the Writ Petitioner is entitled to Relief No.1. which we have quoted hereinabove.

11. Resultantly, this writ petition succeeds and is hereby allowed with costs. The action of University (respondent no .2) blacklisting the Writ Petitioner is hereby set aside. Counsel's fee Rs.2,000/-, if pre-certified.

Petition allowed.

I.L.R. [2011] M. P., 395
WRIT PETITION
Before Mr. Justice S.C. Sharma

W.P. No.2819/2010 (Indore) decided on 5 October, 2010

RAIS KHAN ... Petitioner
Vs.
STATE OF M.P. & anr. ... Respondents

A. Notaries Rules, 1956, Rule 2(a) - Appropriate Government **- Petitioner appointed by Central Government - Appropriate Government is Central Government to enquire into the allegations of professional or other misconduct - Action initiated by State Government bad in law.** (Para 6)

क. नोटरी नियम, 1956, नियम 2(ए) – समुचित सरकार – याची केन्द्रीय सरकार द्वारा नियुक्त – वृत्तिक या अन्य अवचार के आरोपों की जाँच करने के लिए केन्द्रीय सरकार समुचित सरकार है – राज्य सरकार द्वारा प्रारम्भ की गयी कार्यवाही विधि की दृष्टि में दोषपूर्ण।

B. Notaries Rules, 1956, Rule 13 - Expunction of remarks - **Before any castigating remarks are made by Court against any person,**

he should have been given an opportunity of being heard in respect of such proposed remarks/strictures - Petitioner was not heard at any point of time before passing any remark/stricture - Stricture deserves to be expunged - Petition allowed. (Para 6)

ख. नोटरी नियम, 1956, नियम 13 – टिप्पणी का विलोपन – न्यायालय द्वारा किसी व्यक्ति के विरुद्ध आलोचनाकारी टिप्पणी करने के पूर्व प्रस्तावित टिप्पणी/निन्दा के सम्बन्ध में उसे सुने जाने का अवसर दिया जाना चाहिये – कोई टिप्पणी/निन्दा पारित करने के पूर्व किसी भी समय प्रार्थी को सुने जाने का अवसर नहीं दिया गया – निन्दा विलोपित किये जाने योग्य है – याचिका मंजूर।

Case referred :

AIR 2001 SC 93.

J U D G M E N T

S.C. SHARMA, J. :–The petitioner before this Court has filed this present petition being aggrieved by an order dt. 22/6/09 passed by President, Grievance Redressal Authority, Sardar Sarovar Project. The contention of the petitioner is that he was appointed as a notary by Government of India on 22/1/08 and since then he is discharging his duties as a notary strictly in consonance with the provisions of the Notaries Act 1952 read with the Notaries Rules 1956. The petitioner has further stated that one Smt. Parvati Bai approached the petitioner on 26/5/09 for swearing an affidavit and the petitioner has explained the contents of the affidavit of Smt. Parvati Bai and after explaining the contents of the affidavit on 26/5/09, the same was notarised. The petitioner has further stated that Smt. Parvati Bai preferred a complaint before the Registrar, Sardar Sarovar Grievances Redressal Forum and the complaint of Smt. Parvati Bai was rejected by the Registrar, Sardar Sarovar Grievances Redressal Forum in the matter of grant of compensation. The petitioner has further stated that the President, Grievances Redressal Forum while deciding the appeal of Smt. Parvati Bai i.e., appeal No.365/07 has observed that the petitioner while notarising the affidavit of Smt. Parvati Bai has not stated in the affidavit that the contents of the affidavit were explained to her and therefore the petitioner has executed the affidavit in a most carelessness manner. The petitioners grievances is that the President has directed action against the petitioner in the matter and thereafter on the basis of the order passed in appeal, the State Government though is not the appropriate government has issued a show cause notice (Annexure P/2) dated 23/2/10. The petitioner has prayed for quashing of the show cause notice as well as the observation made against him in order dated 3/6/09 passed by the

President, Grievances Redressal Forum, Sardar Sarovar Project. Learned counsel for the petitioner has relied upon a judgment delivered by the apex court in the case of *Manish Dixit and others Vs. State of Rajasthan* reported in (AIR 2001 SC 93) and his contention is that the apex court in the aforesaid case has held that in case any adverse remarks are made against a person, he should have been given an opportunity of hearing, as such adverse remarks are strictures resulting in serious consequences on future carrier of the person concerned. A reply has been filed on behalf of respondent State and contention of the respondent State is that the action initiated by the State Government is in consonance with the statutory provisions as contained under the Notaries Rules 1956 and they have rightly issued a show cause notice under Rule 13 of the Notaries Rules 1956. The respondents have also stated that the petitioner while notarising the affidavit of one Smt. Parvati Bai has not explained the contents of the affidavit to Smt. Parvati Bai and the same finds place in the order passed by the President dated 3/6/09. The respondents have further stated that they have taken the action against the petitioner rightly keeping in view the order passed by the President and no case for interference is made out in the mater.

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

3. In the present case the petitioner before this court was appointed as a Notary by Government of India on 22nd January 2008. It is needleas to mention that the petitioner was not appointed by the State Government. The Notaries Rules 1956 defines the appropriate Government and the definition clause i.e., Sec. 2(a) defines the appropriate Government as under :

> (a) "appropriate Government" means in relation to a notary appointed by the Central Government, the Central Government, and in relation to a. notary appointed by the State Government, the State Government;

4. In the present case as the petitioner was appointed by the Central Government and therefore the appropriate Government is certainly the Government of India. Rule 13 of the Notaries Rules 1956 reads as under:

> 13. Inquiry into the allegations of professional or other misconduct or a notary.- (1) An inquiry into the misconduct of a notary may be initiated either suo motu by the appropriate Government or on a complaint received in Form XIII].
>
> (2) Every such complaint shall contain the following particulars, namely-

(a) the acts and omissions which, if proved, would under the person complained against, unfit to be a notary;

(b) the oral or documentary evidence relied upon in support of the allegations made on the complaint

5. The aforesaid statutory provisions of law makes it clear that an inquiry into the misconduct of a notary may be initiated by the appropriate Government. In the present case the appropriate Government is Central Government whereas the action has been initiated by the State Government and therefore the notice 'as contained in Annexure P/2 dated 23/2/10 as well as the notice dated 13/7/09 issued by the Officer In Charge Nazarat, Distt. Dhar is bad in law. In the present case learned counsel for the petitioner has drawn the attention of this court towards the affidavit on the basis of which strictures were passed against the petitioner by the President of the Grievances Redressal Forum. The seal affixed on the back side of the Affidavit which is in Hindi reflects that the contents of the Affidavit were explained to Smt. Parvati Bai and she has affixed her thumb impression on the reverse page of the affidavit also. Thus it is not a case where the notary has not stated on the affidavit that the contents of the Affidavit were explained to the person concerned namely Smt. Parvati Bai and she was aware of the contents of the affidavit and therefore the strictures against the petitioner in para 6 deserves to be expunged. In the present case the affidavit enclosed along with the Writ Petition as well as the seal afixed on the reverse side of the affidavit has not been taken into account by the President or by the State Government at all and therefore the strictures made against the petitioner deserves to be expunged. The Apex Court in the case of *Manish Dixit and others Vs. State of Rajasthan* reported in (AIR 2001 SC 93) in para 43 and 44 has held as under:

> 43. Even those apart, this Court has repeatedly cautioned that before any castigating remarks are made by the Court against any person, particularly when such remarks could ensue serious consequences on the future career of the person concerned he should have been given an opportunity of being heard in the matter in respect of the proposed remarks or strictures. Such an opportunity is the basic requirement, for, otherwise the offending remarks would be in violation of the principles of natural justice. In this case such an opportunity was not given to PW 30 (Devendra Kumar Sharma). *State of UP V. Mohd. Naim* (1964) 2 SCR 363:

(AIR 1964 SC 703: 1964 (1) Cri LJ 549). *Ch. Jage Ram Vs. Hans Raj Midha* (1972) I SCC 181: (AIR 1972 SC 1140: 1972 Cri LJ 768), *R. K. Lakshmanan v. A. K. Srinivasan.* (1975) 2 SCC 466: (AIR 1975 SC 1741: 1975 Cri LJ 1545): *Niranjan Patnaik V. Sashibhusan Kar.* (1986) 2 SCC 569: (AIR 1986 SC 819 : 1986 Cri LJ 911); *State of Karnataka v. Registrar General* 2000 (5) Scale 504 : (2000 AIR SCW 2794: AIR 2000 SC 2626).

44. It is apposite in this context to extract the following observations made by this court in *Dr. Dilip Kumar Deka V. State of Assam* (1996) 6 SCC 234:

"we are surprised to find that in spite of the above catena of decisions of this court, the learned Judge did not, before making the remarks, give any opportunity to the appellants, who were admittedly not parties to the revision petition to defend themselves. It cannot be gainsaid that the nature of remarks the learned Judge has made, has cast a serious aspersion on the appellants affecting 'their character and reputation and may, ultimately affect their career also. Condemnation of the appellants without giving them an opportunity of being heard was complete negation of the fundamental principle of natural justice."

6. The apex court in the aforesaid case has held that in case any castigating remarks are made by the court against any person, particularly when such remark would ensue serious consequences on future career of the person concerned, he should have been given an opportunity of being heard in the matter in respect of such proposed remarks or strictures. Keeping in view the judgment delivered by the .apex court in the aforesaid case as the petitioner was never heard at any point of time in the matter and by virtue of the strictures the impugned action has been initiated against him, the adverse remarks / strictures deserves to be expunged. Resultantly the Writ petition is allowed. The adverse remarks / strictures against the petitioner in para 6 of order dated 3/6/09 (annexure P/l) are hereby expunged. Resultantly the notice dated 13/7/09 (Annexure P/5) and the notice issued by the State Government dated 23/2/10 are also quashed as being without jurisdiction. The writ petition stands allowed. No order as to costs.

Petition allowed.

I.L.R. [2011] M. P., 400

WRIT PETITION

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

W.P. No.11325/2009(O).(Jabalpur) decided on 5 October, 2010

SATYENDRA PRATAP SINGH ... Petitioner

Vs.

STATE OF M.P. ... Respondent

A. Constitution, Articles 14 & 16 - Right of equality - **Forbids class legislation but does not forbid reasonable classification - Classification in order to be reasonable must be founded on intelligible differentia and that differentia must have rational relation to the object sought to be achieved - Object of Article 14 & 16 is to ensure equality to all those who are similarly situated.** (Para 9)

क. संविधान, अनुच्छेद 14 व 16 – समानता का अधिकार – वर्ग विधान का निषेध करता है किन्तु युक्तियुक्त वर्गीकरण का निषेध नहीं करता – वर्गीकरण, युक्तियुक्त रहने के लिये सुग्राह्य अन्तर पर आधारित होना चाहिए तथा उस अन्तर का पूर्ति किये जाने वाले उद्देश्य से युक्तिसंगत संबंध होना चाहिए – अनुच्छेद 14 एवं 16 का उद्देश्य उन सब लोगों के प्रति समानता सुनिश्चित करना है, जो समान रूप से स्थित हैं।

B. Service Law - Promotion - **Employee has no fundamental right of promotion - He only has a right to be considered for promotion - Even reduction in chances of promotion does not affect right of an employee.** (Para 11)

ख. सेवा विधि – पदोन्नति – कर्मचारी को पदोन्नति का कोई मौलिक अधिकार नहीं है – पदोन्नति के लिये विचार में लिया जाना मात्र ही उसका अधिकार – पदोन्नति के अवसर में कमी होना भी किसी कर्मचारी के अधिकार को प्रभावित नहीं करता है।

C. Constitution, Article 226 - **Vires of G.O.P. dated 07.06.2008 (new policy of promotion) challenged on ground that the same is discriminatory, arbitrary and violative of Article 14 - Held - Policy introduced with the object of betterment of the force and to promote energetic persons who can deal with in the difficult law and order situations on the field. The aforesaid classification has been made by taking into account the factor of physical efficiency, ability and nature of duties. Thus, the classification cannot be said arbitrary or unreasonable.** (Para 10)

ग. *संविधान, अनुच्छेद 226* – जी.ओ.पी. तारीख 07.06.2008 (पदोन्नति की नवीन नीति) की शक्तिमत्ता को इस आधार पर चुनौती दी गयी कि यह विभेदकारी, मनमानी तथा संविधान के अनुच्छेद 14 की उल्लंघनकारी है – *अभिनिर्धारित* – नीति बल की बेहतरी के तथा ऊर्जावान व्यक्तियों, जो क्षेत्र में कठिन कानून एवं व्यवस्था की स्थितियों से निपट सकें, को प्रोत्साहित करने के उद्देश्य से पेश की गयी। पूर्वोक्त वर्गीकरण शारीरिक क्षमता, काबलियत तथा कर्तव्य की प्रकृति के कारक का ध्यान रखकर किया गया है। इस प्रकार वर्गीकरण मनमाना अथवा अयुक्तियुक्त नहीं कहा जा सकता।

Cases referred :

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

K.K. Trivedi, for the petitioners.

Ashish Shroti, G.A., for the respondents.

ORDER

The Order of the Court was delivered by **S.R. ALAM, CHIEF JUSTICE. :**–With the consent of the parties, the matter is heard finally.

2. In the instant writ petition, the petitioners who are working as Head Constables, have challenged the vires of the GOP order dated 7.6.2008 issued in exercise of powers under Section 12 of the Police Act, 1961.

3. Brief facts necessary for adjudication of the controversy are that petitioners are Head Constables working in Special Armed Force (Home) Police Department, Government of Madhya Pradesh. According to the old policy formulated for making promotion from the post of Head Constable to the post of Assistant Platoon Commander vide GOP-75/97, 90% posts of Assistant Platoon Commander are to be filled on the basis of seniority-cum-merit by promotion and rest 10% posts are to be filled up by persons having outstanding record under Regulation 56(3) of Police Regulations. However, under the old policy, the Head Constable who had put in three years of service, could take part in the examination which was held for promotion to the post of Assistant Platoon Commander. The list of the candidates was prepared on the basis of marks obtained in the aforesaid examination. The petitioners had passed the Pre-promotional Examination. However, by another GOP dated 7.1.2008 contained in Annexure-P/3, promotion policy for the post of Constables, Company Commanders, Platoon Commanders was changed. Under the new policy it was provided that promotion from the post of Head Constable to Assistant Platoon Commander shall be made 100% by

promotion. It was provided that 90% posts shall be reserved for promotion, out of which 60% will be filled in by promotion by the candidates who have passed the Departmental Cadre Examination which will be placed in Group-A. 30% posts are to be filled in by promotion of Head Constables who have completed 45 years of age on the basis of seniority-cum-merit after evaluating their service record, who will be placed in Group-B. The petitioners, who had qualified the Pre-promotional Examination and were empanelled for being sent for Pre-promotional Training were excluded from the list because of the age factor prescribed in the new GOP dated 7.6.2008. Being aggrieved by the aforesaid new policy, the petitioners have challenged the validity of the same in the instant writ petition.

4. The respondents have filed the return inter alia contending that under the old policy for promotion to the post of Assistant Platoon Commander from the post of Head Constable, there existed only one seniority list and the criteria was seniority-cum-merit. However, more meritorious and efficient persons who could be deployed in the field work were deprived of promotion because they being juniors were placed below in the seniority list. Physical efficiency was considered to be the main issue to provide promotion to the youngsters so that their services could be utilized in a better way. Thus, in order to provide promotion to youngsters, the GOP dated 7.6.2008 was issued and the eligible candidates were splitted in two groups for the purpose of promotion. The GOP was amended with an object to promote the Head Constable below 45 years in age by taking into account the physical efficiency and ability. It was further pleaded that before incorporating the proposed amendment, a committee was constituted which invited suggestions. The suggestions were placed in the meeting of the high officials of Special Armed Forces including nine officers of Indian Police Service. The proposals were duly considered and thereafter the GOP was amended. The amendment in the GOP has been formulated on the basis of report of expert body. It has further been stated that Assistant Platoon Commander is leader of section who needs to be intelligent, efficient and full of energy as Special Armed Force personnel are deployed in Naxalite/dacoit affected areas and have to perform onerous duties.

5. We have heard learned counsel for the parties. Shri K. K. Trivedi, learned counsel for the petitioners submitted that right accrued to the petitioners under the old policy of promotion cannot be taken away by issuing the new GOP dated 7.6.2008. It has further been contended that the GOP dated

7.6.2008 has been given retrospective effect as the petitioners' names have been directed to be removed from the list of Head Constables who have qualified the cadre examination only on the basis of age factor. The new policy of promotion framed by GOP dated 7.6.2008 cannot be given retrospective operation. The petitioners would be deprived of the benefit of promotion. It was further submitted that GOP dated 7.6.2008 has no reasonable nexus with the object sought to be achieved and the same is discriminatory and arbitrary and is violative of Article 14 of the Constitution of India.

6. On the other hand, learned Government Advocate while opposing the submissions made by learned counsel for the petitioners submitted that new GOP has been issued with an object of betterment of the force and is in public interest. The Head Constables have been put in two separate groups for the purposes of promotion, only to ensure that Head Constables who are below the age of 45 years are promoted on account of their physical efficiency and ability so that maximum utilization of their services can be made. It has further been submitted that before issuing new GOP, the objections and suggestions were invited which are duly considered in the meeting of high officials of Special Armed Force including nine officers of Indian Police Services. Learned Government Advocate in support of his submissions has placed reliance on decision of Supreme Court in *Indravadan H. Shah Vs. State of Gujrat & another,* AIR 1986 SC 1035.

7. We have considered the submissions made by learned counsel for the parties. The Legislature has enacted an Act namely Madhya Pradesh Vishesh Shastra Bal Adhiniyam, 1968 (hereinafter referred to as 'the Act'). In exercise of powers under Section 27 of the Act, the State government has framed rules which are known as Madhya Pradesh Vishesh Shastra Bal Niyam, 1973. The aforesaid rules provide for the recruitment as well as manner of recruitment in Special Armed Force. Rule 23 of the said Rule specifically provides that recruitment to the rank of Company Commander, Platoon Commander, Head Constable and Constable of Special Armed Force shall be made either by direct recruitment or recruitment by personnel from the police force or promotion. Rule 23(2) of the Rules provides that method and procedure of recruitment and selection shall be specified by the State Government from time to time. Rule 56 deals with promotion and examination. A policy of promotion was formulated by issuing GOP in exercise of powers conferred under Section 12 of the Police Act, 1861 namely GOP 75/97. In view of the aforesaid policy, a Head Constable who had put in three years of service

could take part in the examination which was to be conducted by an committee on the basis of the aforesaid examination, a list of selected candidates was to be prepared and the selected candidates were required to undergo Pre-promotional Training and thereafter they were promoted to post of Assistant Platoon Commander.

8. The general order of police is issued by the Director General of Police on the basis of recommendations of the committee, it was observed that under the old policy of promotion to the post of Assistant Platoon Commander from the post of Head Constable, there existed only one seniority list and the criteria fixed for promotion was seniority-cum-merit. Therefore, more meritorious and efficient persons who could be deployed in the field work were being deprived of promotion because they were junior in the seniority list. Physical efficiency was considered to be main factor to provide promotion to youngsters whose services could be utilized in a better way in the field and, therefore, an amendment in the policy for promotion was contemplated. The committee in its meeting held on 18.3.2008 proposed certain amendments in GOP. Thereafter, the committee invited suggestions. After consideration of the suggestions, the committee prepared the draft and the same was forwarded to the Additional Dy. Director General. The draft was considered in the meeting of high officials of Special Armed force including nine officers of Indian Police Service. After due deliberation of the proposal, a new policy of promotion vide GOP dated 7.6.2008 was issued. Thus, the GOP has been formulated after due deliberations and on the basis of recommendation of an expert body.

9. Article 14 of the Constitution of India forbids class legislation but does not forbid reasonable classification. Classification in order to be reasonable must be founded on intelligible differentia and that differentia must have rational relation to the object sought to be achieved. Object of Articles 14 and 16 of the Constitution is to ensure equality to all those who are similarly situated. The State has the power to qualify persons in different groups for legitimate purposes. The classification so made should have the reasonable nexus with the object to be achieved. In the backdrop of aforesaid well settled legal proposition, challenge made by the petitioners to GOP dated 7.6.2008 may be examined.

10. The purpose for introducing the new GOP is to promote efficient and energetic persons who are normally supposed to be deployed in the field and are able to perform their duties efficiently even in the adverse situations. The

Assistant Platoon Commander is a leader of section who needs to be intelligent, efficient and full of energy as Special Armed Force personnel are always deployed in the Naxalite/dacoit affected areas and they have to perform anti Naxlite, anti dacoit and anti terrorist operations and have to deal with in difficult law and order situations. If the new policy of promotion which was introduced by GOP dated 7.6.2008 is examined, it is apparent that the aforesaid policy has been introduced with the object of betterment of the force and to promote energetic persons who can deal with in the difficult law and order situations on the field. The aforesaid classification has been made by taking into account the factor of physical efficiency, ability and the nature of duties which are required to be performed by the Assistant Platoon Commander. Thus, the aforesaid classification can neither be said to be arbitrary nor unreasonable. The classification which been made has a reasonable nexus with the object sought to be achieved i.e. to promote young and energetic Head Constables and Platoon Commanders so that they can effectively perform their duties in Naxal/dacoit affected areas and deal with in difficult law and order situations. Such a criteria for promotion which is based on age limit can be prescribed in the public interest in order to ensure that a candidate who has excellent service record and is efficient, is promoted. Reference in this connection can be made by the decision of Supreme Court in AIR 1986 SC 1035 (supra). For the aforementioned reasons, the challenge to GOP on the anvil of Article 14 of the Constitution of India, must fail.

11. So far as the contention of the petitioner that their vested right is being taken away by the amendment in the GOP is concerned, suffice to say that no employees has a fundamental right to claim promotion. It is equally well settled legal proposition that an employee has no fundamental right of promotion. He only has a right to be considered for promotion. Even reduction in chances of promotion does not affect right of an employee. Reference in this connection may be made to the decision of Supreme Court in *Director, Lift Irrigation Corporation Ltd. and others Vs. Pravat Kiran Mohanty and others,* (1991) 2 SCC 295.

12. However, since under the old policy of promotion as well as new policy of promotion which has been framed by the GOP dated 7.6.2008, the Head Constables who are not promoted on account of expiry of select list, shall have right to be placed at the top of the new selection list which is prepared. Therefore, in the facts and circumstance of the case, we deem it appropriate to direct the respondents to consider the case of the petitioners for promotion

as per the provisions of the new policy against the quota of 30% of the Head Constables, who have crossed the age bar.

13. With the aforesaid direction, the petition is disposed of.

Petition disposed of.

I.L.R. [2011] M. P., 406
WRIT PETITION

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

W.P. No.7931/2010 (Jabalpur) decided on 12 October, 2010

DILIP BHARTI ... Petitioner

Vs.

SMT. MEERABAI & anr. ... Respondents

***Civil Procedure Code (5 of 1908), Order 6 Rule 17 - Amendment of written statement* - Defendant filed application seeking replacement of entire written statement on the ground that the same was filed by his counsel without his knowledge and pleadings are contrary to fact - *Held* - There is no allegation of fraud being committed on him - Each page of written statement bear signatures of petitioner - Petitioner cannot withdraw the admission which he had tendered in written statement by substituting such written statement with a fresh one - Petition dismissed.** (Para 15)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – लिखित कथन का संशोधन – प्रतिवादी ने सम्पूर्ण लिखित कथन का प्रतिस्थापन चाहने वाला आवेदन इस आधार पर प्रस्तुत किया कि उसे उसके वकील द्वारा उसकी जानकारी के बिना प्रस्तुत किया गया और अभिवचन तथ्य के विपरीत हैं – *अभिनिर्धारित* – उसके साथ कपट किये जाने का कोई अभिकथन नहीं – लिखित कथन के प्रत्येक पृष्ठ पर याची के हस्ताक्षर हैं – याची ने जो स्वीकृति लिखित कथन में प्रस्तुत की थी, उसे वह ऐसे लिखित कथन को नये लिखित कथन से प्रतिस्थापित कर वापस नहीं ले सकता – याचिका खारिज।

Cases referred :

(2006) 6 SCC 498, (2007) 6 SCC 167, (1976) 4 SCC 320.

Janhavi Pandit, for the petitioner.

G.S. Baghel, for the respondent No.1.

O R D E R

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

Petitioner by way of present petition filed under Article 227 of the Constitution of India calls in question the legal tenability of the order dated 12.5.2010 passed by Civil Judge, Class I, Maihar, District Satna in Civil Suit No. 6A/2007; whereby application preferred by the petitioner under Order 6 Rule 17 of the Code of Civil Procedure seeking replacement of the entire written statement filed by him was rejected.

2. The petitioner is defendant No. 2 in a suit filed by respondent No. 1/ plaintiff. The suit is for declaration and for permanent injunction in respect of suit property which is a house situated in Ward No. 12, Satna Road over a land bearing number 14/4/4 admeasuring 30 x 58 = 1740 sq.ft.

3. On being noticed in the suit, petitioner/defendant No. 2 entered his appearance through one Counsel Shri Arjun Singh and filed the written statement duly verified by him. The said written statement contained signature of the petitioner on each page of it. Thereafter, the Trial Court framed issues on the basis of respective pleadings and matter proceeded further when respondent No. 1/plaintiff examined himself and closed his evidence.

4. It is at this stage that an application was filed by the petitioner defendant No. 2 under Order 6 Rule 17 seeking replacement of the entire written statement on the ground that the same was filed by his Counsel without his knowledge and the pleadings therein were contrary to fact.

5. Pertinent it is to note that in an application preferred by the petitioner/ defendant No. 2 there is no allegation of fraud being committed on him nor is there any allegation that the learned counsel who was appearing for petitioner before the Trial Court was being planted by the opposite party. The application which the petitioner/ defendant No. 2 preferred under Order 6 Rule 17 was to the extent that written statement which was filed containing certain admission on his behalf was never read over to him and his signatures were obtained without apprising of the contents therein.

6. The trial court considering the entire material on record observed:

> "प्रकरण के अवलोकन से यह स्पष्ट है कि प्रतिवादी क्र0–2 ने अपने जवाब दावा 7–12–07 को प्रस्तुत किया था पूर्व के जवाब दावा के अंत में प्रतिवादी क्र0–2 ने यह कहा था कि वादी का दावा स्वीकार या अस्वीकार किए जाने पर कोई आपत्ति नहीं है। और भविष्य में भी कोई आपत्ति नहीं होगी। पूर्व के जवाब दावे में यह भी उल्लेखनीय है कि प्रतिवादी क्र0–2 ने लगभग सभी तथ्यों को स्वीकार किया था।

परन्तु वर्तमान आवेदन के साथ जो संशोधन प्रस्तावित किया गया उसमें मनगढ़ंत तथ्यों को बताये हुए उसे निरस्त किए जाने की प्रार्थना की गई है। पूर्व के जवाब दावे के विपरीत सभी तथ्यों के इंकार किया गया है इससे यह तो सपष्ट है कि प्रतिवादी एक प्रकार से नया जवाब दावा प्रस्तुत करना चाहता है। इसीलिए वर्तमान आवेदन के साथ संशोधित जवाब दावा प्रस्तुत कर दिया है।

यदि प्रकरण को देखा जाएं तो वादी का साक्ष्य समाप्त हो चुका है तथा पिछली पेशी पर प्रतिवादी साक्ष्य के लिए अंतिम अवसर दिया गया है। ऐसी स्थिति में यह स्पष्ट है कि वर्तमान आवेदन सदभाविक नहीं है तथा उसे विलम्ब से पेश करने के लिए प्रस्तुत किया गया है। इससे दावे की प्रकृति में पूरी तरह परिवर्तन होता है।"

7. Questioning the correctness of finding arrived at by the Trial Court, it is contended by learned counsel for petitioner/defendant No. 2 that, it is within the right of defendant to even raise inconsistent plea in the written statement and the amendment which was being sought was in the category of inconsistent plea, it is urged that the trial court committed grave error in rejecting the same.

8. The petitioner has placed reliance of judgment rendered by Supreme Court in *Baldev Singh and others v. Manohar Singh and another* (2006) 6 SCC 498 and *Andhra Bank v. ABN AMRO Bank N.V. and others* (2007) 6 SCC 167 to bring home the submissions that, it is permissible to cause an amendment in the written statement even at belated stage and is also permissible to raise inconsistent plea in the written statement. It is urged that since the trial court fell into patent error in rejecting the application seeking amendment in the written statement, the same may be rectified by setting aside the said order and by allowing the petitioner/defendant No. 2 to substitute a fresh written statement.

9. Learned counsel appearing for respondent contradicts the submissions put-forth on behalf of the petitioner. It is urged that, the petitioner/defendant No. 2 had duly engaged his counsel and the written statement filed by him contained his signatures on each page of it. It is also contended that the petitioner/defendant No. 2 had personally appeared in Court along with his counsel on 4.1.2008 after filing the written statement, which was filed on 7.12.2007. It is urged that the petitioner was well aware of the stand he had taken in his written statement, as no objection was raised when the issues were settled by the trial court.

10. It is further contended that it is only when the evidence of the respondent/ plaintiff was over that the petitioner/defendant No. 2 came up with a story regarding written statement being filed by his counsel without his consent and the signatures were obtained without reading over the substance therein. It is urged that, the petitioner cannot be allowed to take a U turn by replacing the entire written statement which will cause grave prejudice to the respondent/ plaintiff. It is accordingly urged that, the petition being devoid of substance deserves to be dismissed.

11. Heard the counsel for the parties at length.

12. Indisputably, the written statement filed by the petitioner/defendant No. 2 on 7.12.2007 contained his signatures on each page of written statement. The petitioner has also verified the pleadings and has put his signatures thereon which is not denied. The petitioner after filing of written statement also personally appeared before the trial court on 4.1.2008 even then no plea was taken by him in respect of the written statement filed by him. Furthermore, no objection has been raised by the petitioner when the issues were settled. It was only after when the respondent plaintiff has examined himself, that the petitioner/defendant No. 2 came up with the plea that the written statement filed by him was not proper and wanted to replace the same by a fresh written statement with entirely new pleas therein.

13. True it is that, the amendment in a written statement can be sought even at belated stage as has been observed by their Lordships in *Andhra Bank* (supra). However, in the same very case it has been observed by their Lordships that "it is permissible in law to amend a written statement of the defendant by which only an additional ground of defence has been taken."

14. In the case at hand the petitioner/defendant No. 2 by way of application under Order 6 Rule 17 CPC 1908 intends to replace the entire written statement with new plea. Whereas, vide earlier written statement the petitioner/defendant No. 2 has expressly admitted in paragraph 12 of his written statement filed on 7.12.2007 that "अतएव वादी का दावा स्वीकार अथवा अस्वीकार किये जाने पर प्रतिवादी क्र0–2 को न तो कोई आपत्ति है और न ही भविष्य में कोई आपत्ति होगी।"

15. True it is that, the defendants are at liberty to take inconsistent plea in the written statement which can also be brought by way of an amendment as is observed in *Baldev Singh and others* (supra) wherein it is held that "inconsistent pleas can be raised by the defendants" (paragraphs 15 and 16).

However, whether the said proposition would also be true in case where the defendant intends to withdraw the admission which he had tendered in written statement by substituting such written statement with a fresh one has been answered in negative by three Judges Bench of the Supreme Court in *M/s. Modi Spinning & Weaving Mills Co. Ltd. and another v. M/s. Ladha Ram and Co.* [(1976) 4 SCC 320] wherein their Lordships were pleased to observe:

> "10. It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paragraphs 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. The High Court rightly rejected the application for amendment and agreed with the trial court."

16. In view of the law above and the facts of the present case we are of the considered opinion that the trial court did not falter in rejecting the application preferred by the petitioner/defendant No. 2 seeking replacement of written statement with entire new facts.

17. In view of above petition fails and is hereby dismissed. However, no costs.

Petition dismissed.

I.L.R. [2011] M. P., 410
WRIT PETITION

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

W.P. No.8337/2010 (Jabalpur) decided on 29 October, 2010

POOJA MATHUR (DR.) ... Petitioner

Vs.

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

A. Constitution, Article 226 - Validity of Rule - **Challenge as to validity of rule can be entertained only where it is found that it suffers from legal infirmity, being wholly beyond the scope of rule making power, or being inconsistent with any provision of Parent Act or amounts to infraction of any provision of Constitution.** (Para 17)

क. संविधान, अनुच्छेद 226 – नियम की विधिमान्यता – नियम की विधिमान्यता संबंधी चुनौती को केवल वहीं ग्रहण किया जा सकता है जहाँ यह पाया जाता है कि वह नियम बनाने की शक्ति के विषयक्षेत्र से पूर्णतः परे होकर अथवा मूल अधिनियम के किसी उपबंध से असंगत होकर किसी विधिक दोष से ग्रसित है अथवा संविधान के किसी उपबंध के उल्लंघन की कोटि में आता है।

B. Medical and Dental Post Graduate Course Entrance Examination Rules, M.P. 2010, Rule 1.19(2)(b) - Inter se merit - Age - Validity **- In case two candidates scoring equal marks, then candidate older in age will be placed higher in inter se merit of such candidate -** ***Held*** **- Rule 1.19(2)(b) cannot be held to be arbitrary or unreasonable.** (Para 17)

ख. चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र. 2010, नियम 1.19(2)(बी) – परस्पर योग्यता – आयु – विधिमान्यता – दो अभ्यर्थियों के एक समान अंक आने की दशा में अधिक आयु वाले अभ्यर्थी को ऐसे अभ्यर्थियों की परस्पर योग्यता में ऊपर रखा जायेगा – *अभिनिर्धारित* – नियम 1.19(2)(बी) को मनमाना अथवा अयुक्तियुक्त नहीं ठहराया जा सकता।

C. Medical and Dental Post Graduate Course Entrance Examination Rules, M.P. 2010, Rule 1.20(16) - Opt for waiting **- If candidate is not willing to take admission in any of the subject available at the time of his counseling it would be open for him/her to give option in writing and to opt for waiting -** ***Held*** **- In the event of any vacancy, the candidature of such candidate shall be considered on the basis of merit - Rule 1.20(16) cannot be held to be arbitrary or unreasonable.** (Para 22)

ग. चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र. 2010, नियम 1.20(16) – प्रतीक्षा का विकल्प – यदि कोई अभ्यर्थी अपनी काउंसिलिंग के समय उपलब्ध किसी विषय में प्रवेश लेने का इच्छुक नहीं है तो वह लिखित में विकल्प देने अथवा प्रतीक्षा का विकल्प चुनने के लिए स्वतंत्र होगा – *अभिनिर्धारित* – कोई रिक्ति होने की दशा में ऐसे अभ्यर्थी की अभ्यर्थिता पर योग्यता के आधार पर विचार किया जायेगा – नियम 1.20(16) को मनमाना अथवा अयुक्तियुक्त नहीं ठहराया जा सकता।

Cases referred :

AIR 1999 SC 2894, (2003) 7 SCC 83, AIR 2009 SC 323, 2007(1) MPHT 325, (1986) 2 SCC 667, (2002) 6 SCC 318, (1993) Suppl. 1 SCC 593, (1993) Suppl. 1 SCC 594, (2001) 8 SCC 355, (2002) 7 SCC 258, (2005) 2 SCC 65, (2009) 2 ILR 1263, (2002) 8 SCC 152, (1998) 6 SCC 131, AIR 1984 SC 1543, AIR 2001 SC 2800, (2002) 7 SCC 258.

R.P. Agrawal with *Abhijit Dave,* for the petitioner.
Naman Nagrath, Addl.A.G., for the respondent Nos.1 to 4.
Swapnil Ganguly, for the respondent No.5.
Indira Nair with *Rajas Pohankar,* for the respondent No.6.

ORDER

The Order of the Court was delivered by **S.R. ALAM, CHIEF JUSTICE.** :–In Writ Petition No.8337/2010 the petitioner has questioned the validity of the provisions contained in Rule 1.19(2)(b) and Rule 1.20(16) of M.P. Medical and Dental Post Graduate Course Entrance Examination Rules, 2010 (hereinafter referred to as 'the 2010 Rules') whereas in W.P. No.6321/2010 the petitioner has challenged the validity of Rule 1.20(16) of the 2010 Rules. However, in Writ Petition No.9619/2010 though the validity of the rules has not been specifically challenged but the point in issue of this petition is interlinked with the controversy involved in Writ Petition No.8337/2010 and, therefore, this Court vide order dated 17.8.2010 directed the petition to be listed along with Writ Petition No.8337/2010. This is how all the three petitions were heard together and are being disposed of by this common order.

2. In Writ Petition No.8337/2010 the petitioner, inter alia, has challenged the validity of Rule 1.19(2)(b) and Rule 1.20(16) of the 2010 Rules. The petitioner has also prayed for a direction to grant admission in M.S. Gynaecology to the petitioner against the seat which is kept vacant vide order dated 23.6.2010 passed by Indore Bench of this Court. The petitioner has also sought a direction to respondents No.1 to 4 to allow her to participate in the second round of counselling. It is, inter alia, averred in the writ petition that petitioner has obtained M.B.B.S. degree with four gold medals. She as well as respondent No.5 appeared in Pre P.G. Test, 2010, conducted by the respondent No.2 in which the petitioner and respondent No.5 got equal marks i.e. 151 out of 200. It is relevant to mention here that in Part-B of the examination also the petitioner and respondent No.5 secured equal marks. Though the petitioner as well as respondent No.5 secured equal marks, yet the respondent No.5 was placed at Sr. No.58 in the merit list, whereas the petitioner was placed at Sr.No.61 in the merit list on the sole ground that respondent No.5 is older in age. One Dr. Neha Sharma, who had also appeared in Pre P.G. test, filed a writ petition, namely, W.P.No.3565/2010. In the said writ petition Indore Bench of this Court vide interim order dated 06.4.2010 directed that one seat in M.S. Gynaecology shall be kept vacant

till next date of hearing. The respondent No.5 who had participated in Pre. P.G. counselling could not get the seat in M.S. Gynaecology, therefore, she opted for a seat in Diploma in Gynaecology and Obstetrics (for short 'DGO') in M.P. quota and obtained admission. She had also appeared in All India Entrance Examination. In All India quota seats also she could secure a seat in Diploma in Gynaecology. Thus, the respondent No.5 obtained seat in DGO in M.P. quota as well as in All India quota. The respondent No.5 after getting admission in diploma course in Gynaecology and Obstetrics submitted her resignation from the seat in DGO of M.P. quota. However, by suppressing the aforesaid fact she filed a writ petition, namely, W.P. No. 6092/2010 in which a relief was claimed that she be permitted to appear in the second round of counselling.

3. The writ petition preferred by Dr. Neha Sharma and respondent No.5 came up for hearing before Indore Bench of this Court on 20.5.2010. The writ petition preferred by Dr. Neha Sharma was dismissed whereas the writ petition preferred by respondent No.5, Dr. Ritu Agrawal, was disposed of with a direction to permit her to appear in second round of counselling for a seat in M.S. Gynaecology. It is averred that respondent No.5 was not entitled to appear in second round of counselling. In the aforesaid factual backdrop the petitioner of W.P.No.8337/2010 has challenged the validity of Rule 1.19(2)(b) of the 2010 Rules which provides that if two candidates secure equal marks even in Part B of the question paper, the candidate older in age will be placed higher in inter se merit of such candidates. She also challenged the validity of Rule 1.20(16) of the 2010 Rules which provides that any candidate who has been allotted a seat in a college/institution will not be permitted to participate in the subsequent counselling.

4. The petitioner in W.P.No.9619/2010, Dr.Ritu Agrawal, has challenged the order dated 22.6.2010 passed by a Committee headed by Director, Medical Education, by which she has been held to be ineligible to participate in second round of counselling.

5. Petitioners in W.P.No.6321/2010 have challenged the validity of Rule 1.20(16) of the 2010 Rules which prohibits a candidate from appearing in the second round of counselling once he/she is allotted a seat in first round of counselling.

6. Respondents No.1, 3 and 4 have filed a detailed return in W.P.No.8337/2010 which has been adopted in W.P.No.9619/2010 and W.P.No.6321/2010.

In the return it is, inter alia, stated that the challenge putforth by the petitioner to the rules in question is misconceived. It has been averred that Rule 9.9 of M.P. Medical and Dental Undergraduate Entrance Examination Rules, 2006, which was in para materia to Rule 1.20(16) of the 2010 Rules has been held to be intra vires by a Division Bench of this Court in the case of *Arun Singh Yadav vs. State of M.P.,* ILR [2007] M.P. 178. Thus, the challenge to the aforesaid rule is no longer res integra. It has further been averred that challenge to Rule 1.19(2)(b) of the 2010 Rules is also misconceived as the same is not in violation of Regulation 9 of the Post Graduate Medical Education Regulations, 2000 (in short 'Regulations') which has been framed by Medical Council of India. The higher age in case of other things being equal is a universally accepted criteria to give preference to selected candidate. It has further been averred that respondent No.5 was ineligible to participate in second round of counselling.

7. Respondent No.5 has filed return in W.P.No.8337/2010 in which, inter alia, it is stated that due to interim order passed by this Court in writ petition preferred by Dr. Neha Sharma by which one seat in M.S. Gynaecology was directed to be kept vacant, the respondent No.5 could not be selected. She under protest and reserving her right for the aforesaid seat opted for seat in DGO in M.P. quota. It has further been averred that contention of the petitioner that respondent No.5 after having submitted her resignation and acceptance of the same, cannot claim a seat in M.S. Gynaecology, is misconceived. It has further been averred that petitioner as well as respondent No.5 had appeared in second round of counselling for a seat of M.S. Gynaecology, however, the candidature of respondent No.5 was rejected by a Committee vide order dated 22.6.2010 which is under challenge in W.P.No.9619/2010.

8. Respondent No.6, Medical Council of India, has filed counter affidavit in which, inter alia, it has been stated that Regulations framed by the Medical Council of India, under the Indian Medical Council Act, 1956 (hereinafter referred to as 'the 1956 Act') have statutory force. It has been averred that the Regulations have been framed by Medical Council of India which prescribe minimum eligibility criteria for admission to P.G. courses as well as time schedule for making admissions to P.G. courses. It is not permissible for any University or Medical institute to depart from the norms with regard to eligibility criteria and time schedule fixed by the Regulations framed by Medical Council of India.

9. We have heard learned counsel for the parties. Shri R.P.Agrawal, learned

senior counsel for the petitioner submitted that Section 20 of the 1956 Act empowers the Medical Council of India to prescribe standards for Post Graduate Medical Education for the guidance of Universities. In exercise of powers under Section 33(l) of the 1956 Act, the Medical Council of India has framed Regulations which are known as Post Graduate Medical Education Regulations, 2000. The aforesaid Regulations have statutory force as has been held by Supreme Court in *Dr. Preeti Shrivastava vs. State of M.P. and others,* AIR 1999 SC 2894, *State of M.P. and others vs. Gopal D. Tirthani and others,* (2003) 7 SCC 83 and *Harish Verma and others vs. Ajay Srivastava and another,* (2003) 8 SCC 69. Regulation 9 of Regulations provides that students for Post Graduate Medical Courses shall be selected strictly on the basis of academic merit. It is argued that Rule 1.19(2)(b) of the 2010 Rules is ultra vires Regulation 9 of Regulations inasmuch as the same prescribes a criteria of placement in merit list on the basis of age, in case candidates secure equal marks. It is contended that aforesaid rule is contrary to Regulation 9 framed by Medical Council of India. It is further submitted that Rule 1.20(16) of the 2010 Rules in so far as it prohibits a candidate from participating in second round of counselling merely because he has been allotted a seat in first round of counselling is arbitrary and unreasonable. Learned senior counsel in this connection has placed reliance on a judgment of the Supreme Court in *State of Maharashtra and others vs. Sneha Satyanarayan Agrawal and others,* AIR 2009 SC 323. It is further submitted that on 06.4.2010 Indore Bench of this Court by interim order directed that one seat of M.S.Gyneacology shall be kept vacant. Thereafter, on 07.4.2010 the first counselling was held whereas second counselling was held on 04.6.2010. Therefore, when the petitioner appeared in the first round of counselling, seat in M.S. Gyneacology was not available and, therefore, it cannot be said that petitioner participated in second round of counselling. It was further submitted that respondent No.5 having resigned from the seat of DGO from State quota was ineligible to participate in second round of counselling. It is further contended that Division Bench of this Court in the case of *Arun Singh Yadav vs. State of M.P. and others,* 2007 (1) MPHT 325, while dealing with Rule 9.9 of M.P. Medical and Dental Undergraduate Entrance Examination Rules, 2006, did not test the validity of aforesaid Rules on the anvil of Regulation 9 of Regulations framed by Medical Council of India.

10. Shri Sandeep Singh, learned counsel for the petitioners in W.P.No.6321/

2010 while adopting the submissions made by learned senior counsel for petitioner in W.P.No.8337/2010, has submitted that in all other States the candidates who have participated in the first round of counselling are permitted to participate in the second round of counselling and, therefore, the Medical Council of India cannot be allowed to contend that the candidate who has appeared in first round of counselling and has been allotted a seat, cannot be permitted to participate in the second round of counselling.

11. Shri Naman Nagrath, learned Additional Advocate General for respondents No.1, 3 & 4 has submitted that for the purpose of determining inter se merit Pre.P.G. Entrance Test is held as students come from different universities and from different backgrounds. In order to bring the candidates at par and to determine their inter se merit, Common Entrance Test is held. It has further been submitted that in all the brochures, which have been relied upon by the petitioners, preference has been given on the basis of age. It has further been submitted that the higher age in case candidates secure equal marks is a universally accepted criteria to give preference to selected candidate and, therefore, Rule 1.19(2)(b) of 2010 Rules is not violative of Regulation 9 of Regulations. It has further been submitted that so far as validity of Rule 1.20(16) of 2010 Rules is concerned the same is no longer res integra as the Division Bench of this Court in *Arun Singh Yadav* (supra) has already upheld the validity of para materia provision of aforesaid 2006 Rules. In support of his submissions learned Additional Advocate General has placed reliance on decisions of Supreme Court in *A.P. Christians Medical Education Society vs. Government of A.P. and another,* (1986) 2 SCC 667 and *Mabel vs. State of Haryana and others,* (2002) 6 SCC 318.

12. Smt.Indira Nair, learned senior counsel for Medical Council of India has contended that after expiry of dead line fixed by the Supreme Court for admissions in medical course i.e. 30.6.2010, no admission in Post Graduate Courses can be granted. If any direction is issued by this Court at this point of time directing that the petitioners be admitted in any of the Post Graduate Courses the same would amount to midstream admission which is not permissible in law. She further submitted that merely because a vacancy in a particular course exists, the same cannot be a ground to fill up the seat. Learned senior counsel has drawn our attention to 1.20(15) of 2010 Rules and has submitted that if a candidate does not wish to be admitted to any of the subjects/ courses available at the time of her/his counselling, he/she may give "opt for waiting" option in writing and his/her name will be placed in order of merit. If

any seat falls vacant on or before 31st of May, 2010, in any Medical/Dental Colleges then the name of such candidate shall be considered on the basis of merit. It has further been submitted that if the petitioners were not satisfied with the seat offered to them in the first round of counselling, they should have submitted their option under Rule 1.20(15) of the 2010 Rules. In support of her submissions learned senior counsel has placed reliance on decisions of Supreme Court in *Subodh Nautiyal (Dr) Vs. State of U.P.,* (1993) Suppl. 1 SCC 593, *State of U.P. vs. Anupam Gupta (Dr),* (1993) Suppl. 1 SCC 594, *Arvind Kumar Kankane vs. State of U.P.,* (2001) 8 SCC 355, *Medical Council of India vs. Madhu Singh,* (2002) 7 SCC 258, *Mridul Dhar (minor) and another vs. Union of India and others,* (2005) 2 SCC 65, *Mridul Dhar Vs. Union of India,* (2009) 2 ILR 1263, *Shafali Nandwani vs. State of Haryana and others,* (2002) 8 SCC 152 and *Medical Council of India Vs. State of Karnataka and others,* (1998) 6 SCC 131.

13. We have considered the submissions made on both sides. In order to test the validity of the rules in question, it would be useful to first examine the relevant provisions of the Act, Rules and Regulations. The Parliament enacted the 1956 Act to provide for reconstitution of Medical Council of India and maintenance of Medical Register for India and for matters connected therewith. The 1956 Act came into force on 1st of November, 1958. Section 20 of 1956 Act provides that Council may prescribe standards of Post Graduate Medical Education for guidance of the Universities and may advise Universities in the matter of securing uniform standards for Post Graduate Medical Education throughout India. Section 33 of 1956 Act empowers the Council to make Regulations for conducting of professional examinations, qualifications of the examinations and the conditions of admission to such examinations. In exercise of powers under Section 33 read with Section 20 of 1956 Act, the Medical Council of India with the previous approval of the Central Government has framed Regulations called as Post Graduate Medical Education Regulations, 2000.

14. Regulation 9 of the Regulations read as under:-

"Regulation 9. ***Selection of Post Graduate Students.***

1. Students for Post Graduate Medical Courses shall be selected strictly on the basis of their academic merit

2. For determining the academic merit, the university/ institution may adopt any one of the following procedures both for degree and diploma courses:-

i. On the basis of merit as determined by the competitive test conducted by the State Government or by the competent authority appointed by the State Government or by the university/group of universities in the same state; or

ii. On the basis of merit as determined by a centralized competitive test held at the national level; or

iii On the basis of the individual cumulative performance at the first, second and their MBBS examination, if such examination have been passed from the same university; or

iv. Combination of (i) and (iii):

Provided that wherever entrance test for Postgraduate admission is held by the State Government or a university or any other authorized examining body, the minimum percentage of marks for eligibility for admission to postgraduate medical courses shall be fifty per cent for general category candidates and 40 per cent for the candidate belonging to Scheduled Castes, Scheduled Tribes and Backward classes.

Provided further that in non-Governmental institutions fifty percent of the total seats shall be filled by the competent authority and the remaining fifty percent by the management of the institution on the basis of merit."

15. Now, we may refer to rule 1.19(2)(b) of the 2010 Rules the validity of which is mainly challenged on the ground that the same is violative of Regulation 9 which prescribes a criteria for placement in merit list strictly on the basis of academic merit. The 2010 Rules are framed by the State Government for the purpose of holding entrance test of 2010 for Post Graduate Medical (MD & MS) Course, Post Graduate Diploma and Dental (MDS) Courses in Medical and Dental Colleges in the State of Madhya Pradesh. Rule 1.19 of the 2010 Rules provides about the preparation of merit list. The validity of sub-rule 2(b) of Rule 1.19 of the 2010 Rules alone has been challenged. The provisions contained in Rule 1.19 of the 2010 Rules reads as under:

Rule 1.19 Merit List:-

*(2) **Inter se merit***

In case two or more candidates obtaining equal marks in the entrance examination, the merit will be decided as per procedure indicated below:

(a) A Candidate who scores more marks in Part 'B" of the question paper will be kept higher in merit.

(b) Candidates scoring equal marks even in part "B" of the question paper, then candidate older in age will be placed higher in inter se merit of such candidates."

16. No doubt from a reading of the provisions contained in Regulation 9.1 of Regulations it would appear that it provides admission in the Post Graduate medical courses strictly on the basis of the academic merit. Regulation 9.2 of Regulations provides modes for determining the academic merit. It further provides that the university or the institution may adopt any one of the modes mentioned in Clause i to iv of the Regulation 9.2. Regulation 9.2.ii of Regulations provides that academic merit of candidates may be assessed by a centralized competitive test held at the national level. Thus, Pre. P.G. Test is held in accordance with the Regulation 9.2.ii of the Regulations. Since the candidates who appear in the Pre. P.G. Examination come from different universities and different backgrounds, therefore, the Common Entrance Test is held with the object to create a level playing field for the candidates to adjudge their inter se merit. A close scrutiny of Rule 1.19(2)(b) of the 2010 Rules reveals that in case two or more candidates obtain equal marks then the merit has to be decided firstly on the basis of marks secured by candidate in part "B" of the question paper i.e. the candidate who secured more marks in part 'B' of the question paper has to be kept higher in merit. However, if both the candidates secured equal marks even in part "B" of the question paper then the candidates older in age is placed higher in inter se merit. The age of candidate is prescribed as the last criteria for placement in merit, not the first criteria, as the first criteria is the marks obtained by a candidate in Part 'B' examination. From perusal of the rules framed by several institution/States which have been relied upon by the petitioners themselves we find that candidates have to be given preference on the basis of age if they secure equal marks. For instance, we may refer to Clause 12.2.C of the Rules framed by All India Institute of Medical Sciences which provides that if candidates obtain equal marks in the examination, the candidate older in age would get preference. Similarly, the Rules framed by PGI Chandigarh annexed as Annexure-P-14 also contain similar provision. Same provision exists in the Rules framed by State of

Karnataka as well as Banaras Hindu University. Therefore, it appears that in all the Entrance Examination Rules framed by various authorities, age has been made the basis for granting preference in case candidates secure equal marks. Therefore, the same appears to be a reasonable and acceptable criteria. That apart, we have no reason or justification to hold that the age which has been made one of the criteria where merit being equal could be held to be unreasonable or arbitrary and, therefore, it could be safely held to be valid and reasonable for determining the inter se merit where candidates secure equal marks. Thus, the challenge to the aforesaid rule is misconceived and cannot be sustained. The contention that the marks obtained in MBBS examination should have been made a criteria can also not be accepted as same would defeat the very object of holding the Common Entrance Test. Besides that, Regulation 9 of the Regulations prescribes four different modes or procedure for determining the academic merit. One of the mode or procedure to determine the academic merit is by holding Common Entrance Test. Therefore, where the Common Entrance Test is held for determining the academic merit, the marks obtained in different examinations of M.B.B.S. become irrelevant as merit of all the candidates, who appear in the examination, are adjudged by applying uniform criteria. It is matter of common knowledge that the standard of education varies from Institution to Institution, University to University and State to State. There may be a situation that both the candidates have passed the M.B.B.S. from the same college but it would be exception to the general rule and that cannot be a basis to hold the rule invalid.

17. For yet another reason challenge to the validity of rule 1.19(2)(b) of the 2010 Rules cannot be sustained as challenge to validity of the rule can be entertained only where it is found that the impugned rule suffers from any legal infirmity, being wholly beyond the scope of the rule making power or being inconsistent with any of the provision of the parent Act or amounts to infraction of any provision of the Constitution. Our view find support from the judgment of the apex court in the case of *Maharashtra State Board of Secondary and Higher Secondary Education and another Vs. Paritosh Bhupesh Kurmarsheth, etc.*, AIR 1984 SC 1543. In para 29 of the judgment the apex court has held that the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and the departments controlling them. The apex court

further observed in para 29 that it would be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one, were to be propounded. The apex court further cautioned that the court should as far as possible avoid any decision or interpretation of a statutory provision, rule or bye-law which would bring about the result of rendering the system unworkable in practice. In the case in hand learned counsel for the petitioner failed to point out such infirmity in the impugned Rules. Therefore, in view of the above exposition of law made by the apex court, rule 1.19(2)(b) of the 2010 Rules cannot be held to be arbitrary or unreasonable.

18. Now, we may advert to the challenge made to the validity of Rule 1.20(16) of 2010 Rules which provides that if a candidate has already been allotted a seat in the first round of counselling he would be prohibited for participating in the second round of counselling. The validity of similar Rule was under consideration before the Supreme Court in *Arvind Kumar Kankane vs. State of U.P. and others,* AIR 2001 SC 2800. The Supreme Court in paragraph 4 of the report while upholding the validity of rule has held as follows:

> *"4.....we are of the view that the finding recorded by the Division Bench and Delhi High Court in* ***Dr. Veena Gupta's case*** *(AIR 1994 Delhi 108 (supra) and the High Court of Punjab and Haryana in* ***Anil Jain's case*** *[1998 (3) ESC 2016] is in accordance with the reason and stands the test of rationality. It is clear that once an option is exercised by a candidate on the basis of which he is allotted the subject and thereafter that candidate is allowed to participate in subsequent counselling and his seat become vacant, the process of counselling will be endless and, as apprehended by the High Court, it may not be possible to complete the academic course within the stipulated period."*

19. Placing reliance on the aforesaid decision, Division Bench of this Court in *Arun Singh Yadav* (supra) upheld the validity of Regulation 9.9. of M.P. Medical and Dental Undergraduate Entrance Examination Rules, 2006, which is in para materia with Rule 1.20 (16) of 2010 Rules.

20. The Supreme Court in *Mabel* (supra) while considering clause (18) of Information Brochure of Kurukshetra University which provided that candidate already admitted in Medical or Dental College will not be considered eligible for admission to courses held in paragraph 5 as under:-

> *"5. A plain reading of the aforementioned clause shows that a candidate who was already admitted in a medical or dental college would be ineligible for admission in the other course. The said clause at times will operate harshly as in the case of the petitioner but it is meant to ensure that a candidate who has already secured admission should not abandon the studies after the commencement of that course to seek admission in another course which is in public interest, for otherwise it would result in the wastage of the seta in the course in which he has taken admission, and further, such a change would deprive another eligible candidate from seeking admission to the other course. Obviously, the intention of the authority concerned in framing clause 18 appears to be to ensure that a candidate who has already secured admission with his free will in any course (MBBS or BDS) should complete that course and should not change his mind in midstream. It, therefore, follows that the bar is intended to be operative during the period of the course in which a candidate has taken admission....."*

21. Reliance placed by learned counsel for the petitioners on the decision *Sneha Satyanarayan Agrawal* (supra) is of no assistance. The Supreme Court in the aforesaid case was dealing with Rule 2.2.3 of the Rules contained Information Brochure of Preference System for Admissions to Health Science Courses of Maharashtra which required the competent authority to follow the preference system for admission for allotment of seats not only in the first round of counselling of admission but also in each round of admission. While considering the said Rule the Supreme Court observed that firstly merit of the candidate is to be considered and then preference exercised by him while allotting the seat has to be considered. Thus, for the aforementioned reason the decision relied upon by the learned counsel for the petitioners is of no assistance in the facts and circumstances of this case.

22. Besides that, if a candidate is not willing to take admission to any of the

subject courses available at the time of his/her counselling, it would be open for him/her to give option in writing and to "opt for waiting", as provided under rule 1.20(15) of the 2010 Rules. Rule 1.20(15) of the 2010 Rules reads as under :

> "1.20(15) : If any candidate who does not wish to be admitted to any of the subjects/courses available at the time of her/his counselling, he/she may give "opt for waiting" option in writing and his/her name will be placed in order of merit. If any seat fall vacant on or before 31st May, 2010, in any Medical/Dental Colleges in any subject, the name of such candidate shall be considered on the basis of merit at the time of allotment of vacancies arising due to any reason for admission of the said category."

Therefore, in view of the above provision, rule 1.20(16) of the 2010 Rules cannot be said to be either arbitrary or unreasonable because if a candidate exercises option under rule 1.20(15) of the 2010 Rules and has given option "opt for waiting" in writing, his/her name will be placed in order of merit. In the event of any vacancy candidature of such candidate shall be considered on the basis of merit.

23. Thus, for the aforementioned reasons and in view of the aforesaid enunciation of law by the Supreme Court as well as by Division Bench of this Court, we upheld the validity of Rule 1.20(16) of 2010 Rules. Consequently, the challenge to validity of this rule also must fail.

24. For yet another reason, no relief can be granted to the petitioners. Regulation 10A of Regulations framed by the Medical Council of India which have statutory force provides that duration of P.G. Course shall be of three years. P.G. course has already commenced from 1st July, 2010. In *Medical Council of India vs. State of Karnataka* (supra) the Supreme Court in paragraph 29 held as follows:

> *"29. A medical student requires grueling study and that can be done only if proper facilities are available in a medical college and the hospital attached to it has to be well equipped and the teaching faculty and doctors have to be competent enough that when a medical student comes out, he is perfect in the science of treatment of human beings and is not found wanting in any way. The country*

does not want half-baked medical professionals coming out of medical colleges when they did not have full facilities of teaching and were not exposed to the patients and their aliments during the course of their study."

25. Similarly, in *Medical Council of India vs. Madhu Singh* (supra) (2002) 7 SCC 258 as well as in *Shafali Nandwani vs. State of Haryana and others* (supra) and *Mridul Dhar (Minor) and another vs. Union of India and others* (supra) the Supreme Court has emphasized the need to strictly adhere to time schedule and has observed that there should not be midstream admissions. In *Mridul Dhar* (supra) the Supreme Court has held that time schedule prescribed for grant of admission to P.G. vourses shall be strictly adhered to.

26. In view of the discussions made above, we do not find any merit in all the three petitions. We, therefore, dismiss the same but without cost.

Petition dismissed.

I.L.R. [2011] M. P., 424

WRIT PETITION

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

W.P. No.207/2002 (Jabalpur) decided on 19 November, 2010

M.S. RAZAWAT & ors. ... Petitioners

Vs.

STATE OF M.P. ... Respondent

A. Boilers Act (5 of 1923), Section 34 - Exemption - Validity of notification dated 21.12.2001 challenged - **State Government by notification exempted boilers whose heating surface area is less than 1000 Sq. meters from operation of provisions of clauses (a) & (b) of S. 6, Ss. 7 to 27 and S. 30 - Held - State Government has satisfied itself with regard to material design and construction of boilers and has also taken into account the need of rapid industrialization - Notification cannot be said to be in violation of S. 34(3) of Act - Petition dismissed.** (Para 15)

क. बॉयलर अधिनियम (1923 का 5), धारा 34 – छूट – अधिसूचना तारीख 21.12.2001 की विधिमान्यता को चुनौती – राज्य सरकार ने अधिसूचना द्वारा उन बॉयलरों को जिनकी गर्म होने वाली सतह का क्षेत्र 1000 वर्गमीटर से कम है, धारा 6 के खण्ड (ए) व (बी), धाराएँ 7 से 27 तथा धारा 30 के उपबंधों के

प्रवर्तन से छूट दी – *अभिनिर्धारित* – राज्य सरकार ने बॉयलर की रूपरेखा सामग्री एवं निर्माण के बारे में स्वयं की संतुष्टि कर ली और शीघ्र औद्योगिकीकरण की आवश्यकता को भी विचार में लिया – अधिसूचना, अधिनियम की धारा 34(3) का अतिलंघन नहीं कही जा सकती – याचिका खारिज।

***B. Boilers Act (5 of 1923), Section 14 - Inspection - Competent Authority* - Competent Authority is required to have necessary qualification - Condition providing for inspection at the instance of third party not illegal.** (Para 17)

ख. बॉयलर अधिनियम (1923 का 5), धारा 14 – निरीक्षण – सक्षम प्राधिकारी – सक्षम प्राधिकारी के पास अनिवार्य योग्यता होना अपेक्षित है – तृतीय पक्ष के अनुरोध पर निरीक्षण उपबंधित करने वाली शर्त अवैध नहीं है।

Sheel Nagu, for the petitioners.

Kumaresh Pathak, Dy.A.G., for the respondents/State.

ORDER

The Order of the Court was delivered by ALOK ARADHE, J. :–In the instant writ petition which has been filed as "Public Interest Litigation" the writ petitioners, who are Boiler Attendants and Boiler Operation Engineers, are, inter alia, seeking quashing of the notification published in Madhya Pradesh Gazette dated 21.12.2001 (Annexure-P-3) issued by the State Government in exercise of powers under Section 34(3) of the Indian Boilers Act, 1923 (hereinafter referred to as 'the Act') by which a class of boilers has been excluded from certain provisions of the Act.

2. Facts leading to filing of the present petition, briefly stated are that in the State of Madhya Pradesh there are about 750 registered boilers in operation. Out of aforesaid 750 boilers, about 90% i.e. 675 boilers belong to the category whose heating surface area is less than 1000 square meters. In order to ensure safety of large numbers of workers who work in the vicinity of boilers, the installation and periodical inspection of boilers by a qualified Inspector is mandatory. However, the State Government in purported exercise of powers under Section 34(3) of the Act has issued a notification (Annexure-P-3) by which boilers' whose heating surface area is less than 1000 square meters, which have been installed or would be installed in future, have been excluded from operation of provisions of clauses (a) & (b) of Section 6, Sections 7 to 27 and Section 30 of the Act subject to certain conditions.

3. It is averred in the writ petition that while granting the aforesaid

exemption, the very object and intent of the Act has been diluted down to a nullity by the State Government. By issuing the impugned notification, the State Government has prescribed a condition to the effect that the General Manager of the District Trade and Industries Centre of every district shall receive documents. The competent authority which has been described under the notification can be a Lecturer, Reader, or Professor from a recognized University or a Chartered Engineer who may not have the requisite technical expertise to issue the certificate for installation and registration of boilers. Another condition which has been prescribed in the notification is that the owner of the boiler is made responsible to run and maintain the boiler as per the provisions of the Act and the Rules made thereunder. Lastly, a condition which has been imposed in the notification provides that in case the owner of the boiler violates any of the provisions of the Act or the Rules made there under, a penalty of Rs.5000/- can be imposed on him and further penalty of Rs.500/- per day in case of re-occurrence. The General Manager, District Trade and Industries Centre has been empowered to impose the aforesaid penalty to prevent the use of boiler. In the aforesaid factual backdrop the petitioners have prayed that notification (Annexure-P-3) issued under Section 34(3) of the Act be declared as unconstitutional, arbitrary, unlawful and unjustified. The petitioners have also prayed for issue of a writ of mandamus directing the respondents to implement all the provisions of the Act to the entire boilers which have been registered and are operational in the State of Madhya Pradesh.

4. The respondents have filed their return in which, inter alia, it is stated that while exercising powers under Section 34(3) of the Act the State Government has exempted the specified class of boilers subject to fulfilment of stringent conditions which are stipulated in Regulation 4 of the Indian Boilers Regulation, 1950 and the safety aspect has not been compromised. The object of issuing the impugned notification is to widen the scope of availability of appropriate technically qualified persons competent to inspect as provided under Rule 15(3) of the M.P. Boiler Rules, 1969 and to certify the boilers as provided in the Act read with Regulations and Rules framed thereunder. The notification in question further provides that it shall be the responsibility of the owner to run and maintain it in accordance with the provisions of the Act and the Rules framed thereunder. Even after issuance of the notification which is sought to be impugned in the instant writ petition, the boiler can be inspected and certified for a certain period by the competent authorities specified in the notification. It has further been averred that no exemption has been granted to

the boilers from the operation of the provisions of Section 6(e) of the Act which specifies that the boilers shall be in charge of persons holding the certificate of proficiency or competency. It has further been pointed out that similar arrangement of third party inspection exists under various provisions of the Act and the Rules involving public safety, in the context of use of specified type of machinery, equipments and other devices.

5. The respondents have also pleaded that boiler industry in particular has progressed and modernized a lot during past 8 to 10 decades. Now, the boilers of high quality material, design and construction are manufactured strictly in accordance with Indian Boilers Regulations 1950 by reputed companies which are readily available in the market. Competent persons like Mechanical/ Thermal engineers are also available in major industries of the State. Therefore, considering the existence of large number of boilers which are in use in the State of Madhya Pradesh and with a view to augment the rapid industrialization, third party inspection mechanism has been introduced by way of notification which is an industry friendly measure which will cut down any possible inspection delays without sacrificing the safety and quality of boilers. It will also provide more time to regular Boiler Inspectors, who are only seven in number, to concentrate on technical advancement in the field. The Boiler Inspectors may also play an important role as a facilitator to an industry by rendering appropriate technical advice and consultancy. It has further been averred that the initiative of the Government has been widely welcomed by the industries and boiler users. The petitioners who are Boiler Attendants and Boiler Engineers have been set up by a lobby who has vested interest and the instant public interest petition is, in fact, a sponsored litigation. It has further been averred that the petitioners are placing wrong interpretation of the notification so far as the qualification of the competent authority is concerned. The competent authority is required to hold a Degree of Mechanical or Thermal Engineer from a recognized University necessarily and the aforesaid requirement is mandatory.

6. We have heard learned counsel for the parties at length. Shri Sheel Nagu, learned counsel for the petitioners has submitted that the impugned notification is violative of Section 34(3) of the Act as while issuing the notification the State Government has ignored the aspect of material, design and construction of the boilers. It has further been contended that the exclusion of boilers with a certified extent of heating surface has no nexus or relevance with the element of material design or construction or, even for that matter,

need for rapid industrialization. The impugned notification nullifies the very object and intent of the Act which has been enacted with a view to ensure safety of life of workers working in the vicinity of boilers by providing periodical checks and inspections. The impugned notification is arbitrary as it eliminates the existence of expert and qualified inspectors. The impugned notification has turned the clock back to pre 1923 era when there was no consolidated law to ensure safety of the workers. Learned counsel has also referred to the report submitted by the Joint Committee, Government of India dated 10.3.1921. With reference to the aforesaid report the learned counsel has stressed upon the need for necessity of efficient staff to inspect boilers.

7. On the other hand, Mr.Kumaresh Pathak, learned Deputy Advocate General has argued that while issuing the impugned notification the issue pertaining to safety of the workers has not been compromised. While issuing the impugned notification the State Government has imposed necessary conditions and precautions have also been taken to ensure the safety of workers. It has further been pointed out that the requirement of Section 14 of the Act which prescribes the duty of the owner at the time of examination of the boiler has been incorporated in the notification. It has further been contended that the qualification prescribed for the competent authority under the notification is being misinterpreted by the petitioners. The competent authority is required to hold a Degree of Mechanical or Thermal Engineering from a recognized University and should have experience of maintenance of boilers for two years and the other two conditions pertaining to qualification are in the alternative.

8. Before proceeding to deal with the adjudication of the controversy involved in the writ petition it would be appropriate to refer to the relevant provisions of the Act. The Act has been enacted with an object to consolidate and amend the law relating to steam boilers. The Act has been enacted mainly for the safety of life and property of persons from the danger of explosion and the achievement of uniformity of practice in regard to inspection and maintenance of the boilers. Section 2 of the Act deals with the definitions. Section 6 of the Act prohibits the use of unregistered or uncertified boiler. Section 6(e) was amended by Parliament by Act No.18 of 1960 which came into force with effect from 6.5.1960 primarily with an object to ensure the increased safety of human life. The relevant extract of Section 6(e) reads as under:-

"6(e) Where the State Government has made rules requiring that boilers shall be in charge of persons holding certificates of proficiency or competency, unless the boiler is in charge of a person holding the certificate required by such rules:

Provided that any boiler registered, or any boiler certified or licensed, under any Act hereby repealed shall be deemed to have been registered or certified, as the case may be, under this Act:"

Section 7 deals with registration of boilers whereas Section 8 provides for renewal of certificate of boilers. Section 28 of the Act empowers the Central Boilers Board to frame Regulations with regard to the matters enumerated therein. Section 28(1) of the Act reads as under:-

"28. Power to make regulations.-*(1) the Board may, by notification in the Gazette of India, make regulations consistent with this Act for all or any of the following purposes, namely:-*

(a) for laying down the standard condition in respect of material, design and construction which shall be required for the purpose of enabling the registration and certification of a boiler under this Act;

(aa)for prescribing the circumstances in which, the extent to which, and the conditions subject to which variation from the standard conditions laid down under clause (a) may be permitted;

(b) for prescribing the method of determining the maximum pressure at which a boiler may be used;

(c) for regulating the registration of boilers, prescribing the fees payable therefor, and for the inspection and examination of boilers or parts thereof the drawings, specifications, certificates and particulars to be produced by the owner, the method of preparing a boiler for examination, the form of the Inspector's report thereon the method of marking the register number and the period within which such number is to be marked on the boiler;

(d) for regulating the inspection and examination of boilers

and steam-pipes, and prescribing forms of certificates therefor;

(e) for ensuring the safety of persons working inside a boiler; and

(f) for providing for any other matter which is not, in the opinion of the Board a matter of merely local or State importance."

9. In exercise of powers under section 28(1) of the Act the Indian Boilers Regulations, 1950 have been framed by the Board. Section 29 of the Act empowers the State Government to frame the Rules in consistent with the provisions of the Act and the Regulation made thereunder in respect of matters which have been enumerated therein. Section 29(1) of the Act reads as under:-

"29. Power to make rules.- (1) The State Government may, by notification in Official Gazette, make rules consistent with this Act and the regulations made thereunder for all or any of the following purposes, namely:-

(a) for prescribing the qualifications and duties of the Chief Inspector, of Deputy Chief Inspectors and of Inspectors for prescribing or constituting authorities to which they shall respectively be subordinate, and the limits of the administrative control to be exercised by such authorities;

(b) for regulating the transfer of boilers,

(c) for providing for the registration and certification of boilers in accordance with the regulations made under this Act;

(d) for requiring boilers to be in charge of persons holding certificates of proficiency or competency, and for prescribing the conditions on which such certificates may be granted;

(e) for prescribing the times within which Inspectors shall be required to examine boilers under section 7 or section 8;

(f) for prescribing the fees payable for the issue of renewed certificates, for the inspection and examination of boilers or parts thereof or drawings for steam-pipes, for the testing of welders or for any other matter which,

in the opinion of the State Government, would involve time and labour, and for prescribing the method of determining the amount of such fees in each case;

(g) for regulating inquiries into accidents;

(h) for constituting the appellate authority referred to in section 20and for determining its powers and procedure;

(i) for determining the mode of disposal of fees, costs and penalties levied under this Act; and

(j) generally to provide for any matter which is, in the opinion of the State Government as matter of merely local importance in the State."

10. In exercise of powers under section 29(1) the State Government has framed M.P. Boilers Rules, 1969. Section 34 of the Act deals with exemption. Section 34(3) which is relevant for the purpose of the controversy in the instant writ petition reproduced below for the facility of reference. Section 34(3) of the Act reads as under:-

"34(3) If the State Government is satisfied that, having regard to the material, design or construction of boilers and to the need for the rapid industrialization of the country, it is necessary so to do, it may, by notification in the Official Gazette and subject to such conditions and restrictions as may be specified in the notification, exclude and specified class of boilers or steam-pipes in the whole or any part of the State, from the operation of all or any of the provisions of this Act."

11. After having noticed the relevant provisions of the Act, Rules and the Regulations we may now advert to the facts of the case. From perusal of the impugned notification contained in Annexure-P-3 it is clear that the State Government has issued the notification excluding a class of boilers from certain provisions of the Act on being satisfied that it is necessary to do so for the rapid industrialization of Madhya Pradesh. A close scrutiny of the impugned notification reveals that requirement of Section 6(e) of the Act has not been excluded. As stated supra, Section 6(e) was amended by Amending Act No.18 of 1960 with the object to ensure the increased safety of human life. Section 6(e) requires that the boiler shall be in charge of a person holding the certificates of proficiency or competency. Therefore, notwithstanding the fact that class

of boilers have been excluded from certain provisions of the Act, the boilers shall continue to remain in charge of persons holding the certificates of proficiency or competency as required under the M.P. Boilers Rules, 1969. Notwithstanding issuance of impugned notification, provisions of Indian Boilers Regulations 1950 and provisions of M.P. Boilers Rules, 1969 which contain measures for safety and inspection of boilers continue to apply to all the boilers.

12. From perusal of the impugned notification we also find that the requirement of registration of boiler as provided under section 14(1)(c) of the Act has also been incorporated in the notification. A person is required to submit all the necessary documents as provided in Indian Boilers Regulations, 1950 alongwith an application for registration of the boiler. A person concerned shall also annex the certificate from the competent authority with regard to boiler for the period and maximum pressure for which it can be safely used. The relevant extract of the notification which prescribes qualifications of competent authority is reproduced below for the facility of reference:-

"Competent Authority" shall be a person:-

-who has a degee of Mechanical or Thermal Engineering from a recognized university.

AND

-who has experience of maintenance of Boiler for two years.

OR

-who is a Lecturer/Reader/Professor in a recognized Engineering College.

OR

-A Chartered Engineer."

13. Thus, the competent authority has to be a person who holds a degree of Mechanical or Thermal Engineering from a recognized University and should have experience of maintenance of boilers for two years. The remaining two conditions are in the alternative. Therefore, the contention of the petitioners that even Lecturer or Reader or Professor or Chartered Engineer can be appointed as the competent authority, cannot be accepted.

14. From perusal of the report filed on behalf of the respondents this fact also cannot be lost sight of, that there has been significant improvement in the conditions prevailing in the boilers' industries and there has been remarkable growth in the industrial sector with technical advancement. The boilers with

latest designs and specifications are indigenously manufactured and are readily available in the market which are manufactured strictly in accordance with the Indian Boiler Regulations, 1950 by a reputed companies. Certificates authorizing use of boiler are renewed. Thus, we have no hesitation in coming to the conclusion that the issue of safety of the workers/employees working in the vicinity of boiler has not been compromised by the State Government.

15. A composite reading of the impugned notification as a whole would reveal that it does not travel beyond the purview of Section 34(3) of the Act. The State Government while incorporating the requirement as provided in Section 14(1)(c) of the Act as well as by ensuring applicability of Section 6(e) of the Act has satisfied itself with regard to the material design and construction of boilers and has also taken into account the need of rapid industrialization in the State of Madhya Pradesh. Therefore, the notification cannot be said to be violative of Section 34(3) of the Act, rather it is in consonance with mandate of Section 34(3) of the Act.

16. So far as the grievance with regard to inspection of boilers which has been handedover to third party is concerned, it is appropriate to state that inspection by a third party in respect of specified type of machinery, equipment and other devices involving public safety exist under various Acts and Rules. For instance, under Rule 6(a) of M.P. Factories Rules, 1962 framed under Section 31 of the Factories Act, 1948, a competent person has been authorized to conduct hydraulic test of pressure vessels. Similarly, under Rule 130 of Petroleum Rules, 1976 a competent person is authorized to issue certificate of safety for storage of petroleum in any installation or service station for the first time or whenever any addition or alteration to the enclosure valves and embankment are carried out. Similarly, under Rule 2(d) of the Statical and Mobile Pressure Vessels (Unfired) Rules, 1981 a competent person has been empowered for carrying out tests, examinations, inspection and certification for installation and transport vehicles as stipulated in such rules.

17. In view of the fact that the competent authority is required to have the necessary qualification we do not find any fault with the condition in the impugned notification which provides for inspection at the instance of third party, especially in view of the fact that the issue with regard to safety of workers has not been compromised by the State Government while issuing the impugned notification.

18. For the aforementioned reasons, we do not find any merit in the writ

petition. The instant writ petition deserves to and is hereby dismissed. However, there shall be no order as to costs.

Petition dismissed.

I.L.R. [2011] M. P., 434
WRIT PETITION
Before Mr. Justice Rajendra Menon

W.P. No.7480/2006(S) (Jabalpur) decided on 23 November, 2010

BHAGWAN DAS SWARNAKAR ... Petitioner

Vs.

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

Service Law - Departmental Enquiry - Inordinate delay in awarding punishment **- Charge sheet issued in year 1988 for an incident that took place between 1980-1983 - Enquiry officer submitted his report on 30.03.1991, however the punishment of stoppage of two increments (which finally modified to 'censure') was imposed on 31.07.2001 - Except the explanation for a period from 20.11.1998 to 22.11.2000 when matter was pending with the PSC, the delay is not explained - Held - The departmental action has resulted in grave injustice and prejudice to the petitioner, which has to be remedied - Entire departmental proceedings are quashed - Respondents are directed to convene a Review DPC to consider the case of the petitioner for promotion - Writ Petition allowed.** (Paras 9, 10 & 13)

सेवा नियम – विभागीय जाँच – दण्ड देने में असाधारण विलम्ब – वर्ष 1980–1983 के मध्य घटित घटना के सम्बन्ध में आरोप पत्र वर्ष 1988 को जारी – जाँचकर्ता अधिकारी ने अपनी रिपोर्ट 30.03.1991 को प्रस्तुत की, तथापि दो वेतन वृद्धियाँ रोके जाने का दण्ड (जो अंतिमतः परिनिंदा में परिवर्तित हो गया) दिनांक 31.07.2001 को अधिरोपित किया गया – 20.11.1998 से 22.11.2000 तक की कालावधि, जब मामला पी.एस.सी. में लंबित था, के स्पष्टीकरण के सिवाय विलम्ब का स्पष्टीकरण नहीं दिया गया – *अभिनिर्धारित* – विभागीय कार्यवाही के परिणामस्वरूप याची को गंभीर अन्याय एवं पूर्वाग्रह हुआ, जिसका उपचार दिया जाना है – सम्पूर्ण विभागीय कार्यवाही अभिखंडित – प्रत्यर्थियों को याची की पदोन्नति के प्रकरण पर विचार करने के लिए पुर्नविलोकन विभागीय पदोन्नति समिति आयोजित करने का निदेश – रिट याचिका मंजूर।

Cases referred :

1990 (Supp) SCC 738, (1998) 4 SCC 154, (2005) 6 SCC 636.

Vishal Dhagat, for the petitioner.
Rajesh Tiwari, G.A., for the respondents.

ORDER

RAJENDRA MENON, J. :–Challenging the order of punishment imposed upon the petitioner as contained in Annexure P/9 dated 10.2.2005 and further claiming consideration of his case for promotion at par with his juniors, petitioner has filed this writ petition. Challenge to the order of penalty i.e... 'censure', is made only on the ground of inordinate delay in conducting and conclusion of the departmental enquiry.

2. Facts that have come on record indicate that petitioner was working as an Assistant Engineer in the Water Resources Department. He has retired from service on attaining the age of superannuation. However, while working in the Department for certain acts of commission and omission done by the petitioner in the year 1980-1983, a charge sheet - Annexure P/1 was issued to him on 9.6.88. Petitioner submitted his explanation to the same vide Annexure P/2 and thereafter a departmental enquiry was ordered into the allegations levelled against him. The enquiry officer conducted the enquiry and submitted his report on 30.3.1991 vide Annexure P/3, holding the petitioner guilty of the charges levelled against him. The report of the enquiry officer was sent to the petitioner vide Annexure P/4 on 22.3.1994 and petitioner was directed to submit his representation. Petitioner submitted his representation immediately thereafter, but the matter was kept pending for more than six years after 1994 and it was only on 31.7.2001, vide Annexure P/5 that penalty of stoppage of two annual increments without cumulative effect was imposed upon the petitioner. In the meanwhile, between 10.5.94 when the petitioner submitted his reply to the enquiry officer and before the punishment order was imposed on 31.7.2001 vide Annexure P/5, various persons who were junior to the petitioner were promoted to the post of Executive Engineer vide order dated 17.4.98 and on various other dates subsequent thereof. Be it as it may be, after the punishment of stoppage of two increments was imposed vide Annexure P/5 on 31.7.2001, petitioner preferred an appeal on 11.12.2001 vide Annexure P/6 and when nothing was done, he filed an application before the State Administrative Tribunal under section 19 of the Administrative Tribunal's Act, 1985, the said application was registered as O.A.No.1416/2001. After the Tribunal was wound up, the case was transferred to this Court and the matter was decided on 28.6.2004 by this Court in W.P.No.17282/2003 and taking note of the delay the appellate

authority was directed to decide the appeal of the petitioner within two months. Copy of the order passed by this Court on 28.6.2004 is Annexure P/7. Inspite of this when the order was not complied with, petitioner filed Contempt Petition No.1247/2004 and it was only after the contempt application was filed and notice issued that on 17.3.2006 vide Annexure P/8 the appellate authority decided the appeal vide Annexure P/9 on 10.2.2005 and imposed the penalty of 'censure', which is now impugned in this petition.

3. Grievance of the petitioner now in this petition is that there has been an inordinate delay in conclusion of the enquiry, as a result even though the punishment imposed is only of 'censure', the petitioner had retired from service on attaining the age of superannuation and due to pendency of the departmental enquiry for such a long period, his case for promotion from the post of Assistant Engineer to that of Executive Engineer was not at all considered and many persons junior to him have been promoted to the said post. Accordingly taking me through the procedure followed in the departmental enquiry and the unexplained inordinate delay occasioned in concluding the enquiry, Shri Vishal Dhagat submitted that the impugned action is unsustainable and, therefore, liable to be quashed. In support of his contention with regard to quashing the departmental enquiry in view of the inordinate delay, learned counsel invites my attention to the principle laid down by the Supreme Court in the cases of *State of MP Vs. Bani Singh and Another,* 1990 (Supp) SCC 738; *State of AP Vs. N. Radhakishan,* (1998) 4 SCC 154; and, *P.V. Mahadevan Vs. Managing Director, T.N. Housing Board,* (2005) 6 SCC 636, sought for interference into the matter and quashing the order impugned.

4. Shri Rajesh Tiwari, learned counsel for the State, refuted the aforesaid and submitted that as the enquiry was conducted and as the delay was due to various factors with regard to seeking approval from the Public Service Commission (hereinafter referred to as 'PSC') and death of one of the co-employees, one Shri P.K. Tiwari and other administrative process, it is stated that the delay be condoned and the action of the State Government upheld.

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

6. From the records it is clear that at each and every stage there has been delay in conducting the enquiry. The charge-sheet was issued to the petitioner on 9.6.88 vide Annexure P/1 and even though petitioner submitted his reply to the charge-sheet within one month, on 25.7.88, it was only after more than one year that an enquiry officer was appointed. The report of the enquiry

officer - Annexure P/3 indicates that the enquiry officer was appointed sometime in the year 1989 only. Thereafter, the enquiry was kept pending from 1998 upto 30.3.1991 and the enquiry officer submitted his report vide Annexure P/3, on 30.3.1991. Even though the enquiry report was submitted on 30.3.91, for more than three years nothing was done. It was only on 22.3.94 that the enquiry report was forwarded to the petitioner and the petitioner directed to give his say into the enquiry report. Petitioner immediately within 60 days submitted his reply/objection to the report of the enquiry officer on 10.5.94 vide Annexure P/4 and thereafter from 10.5.94 the matter was kept pending and the punishment was imposed only on 31.7.2001 i.e.... after a period of more than 6 years. It is indicated by the respondents that after the reply to the show cause notice was submitted by the petitioner on 10.5.94, matter was forwarded to the PSC and it was only on 22.11.2000 that the PSC responded to the matter. The findings recorded in this regard by the appellate authority as is evident from Annexure P/9 indicates that the report of the enquiry officer alongwith the defence of the petitioner - Annexure P/4 dated 10.5.94, was kept pending by the department itself for more than four years and it was only on 20.11.98 that these papers were forwarded to the PSC and the PSC responded to the same on 18.2.2001. After the response was received from the PSC on 18.2.2001, the final order of penalty was passed on 31.7.2001. Thereafter, even though the petitioner had preferred an appeal immediately on 11.12.2001, nothing was done again for more than four years and it was only on 10.2.2005 vide Annexure P/9 that the appeal was decided, that also after intervention of this Court, in W.P.No.17282/2003 and after notice in Contempt Petition No.1247/2004. In the entire reply submitted by the respondents and in the order - Annexure P/9 passed by the appellate authority, the only explanation given for the delay is that the matter was pending before the PSC. However, the delay between 30.3.91 upto 22.3.94 i.e.... the period of about four years in forwarding the enquiry report to the petitioner and asking for his explanation and thereafter delay of more than four years after March 94 upto 20.11.98, for forwarding the case to the PSC, and thereafter pendency of the matter before the PSC for more than two years upto 22.11.2000 is not explained. It is clear that even though the charge-sheet was issued in the year 1988 for an incident that took place between 1980-1983, the enquiry was completed and a final decision taken after a period of more than 18 years. The delay in the matter is not at all explained and there is nothing to indicate that the delay is attributable to any act on the part of the petitioner.

7. In the case of *N. Radhakishan* (supra), it has been held by the Supreme Court that even though no straight jacket formula can be laid down for deciding departmental proceedings within a fixed period of time, but it is held by the Supreme Court that the principle with regard to concluding the departmental proceedings at an earlier date has to be accepted as a rule of law and each case has to be evaluated on its own merit and a decision taken. It is indicated by the Supreme Court that the interest of administration and various other factors have to be taken note of and the delinquent employee has a legal right to have the departmental proceedings against him concluded expeditiously. It is held by the Supreme Court that he cannot be permitted to undergo mental agony, monetary loss and further loss in his career prospects unnecessarily due to prolonging of the departmental enquiry, that also due to no fault on his part. The following observations made by the Supreme Court in the case of *N. Radhakishan* (supra), in paragraph 19, may be taken note of:

> "19. It is not possible to lay down any predetermined principles applicable to all cases and in all situations where there is delay in concluding the disciplinary proceedings. Whether on that ground the disciplinary proceedings are to be terminated each case has to be determined on the facts and circumstances in that case. The essence of the matter is that the court has to take into consideration all the relevant factors and to balance and weight them to determine if it is in the interest of clean and honest administration that the disciplinary proceedings should be allowed to terminate after delay particularly when the delay is abnormal and there is no explanation for the delay. The delinquent employee has a right that disciplinary proceedings against him are concluded expeditiously and he is not made to undergo mental agony and also monetary loss when these are unnecessarily prolonged without any fault on his part in delaying the proceedings. In considering whether the delay has vitiated the disciplinary proceedings the Court has to consider the nature of charge, its complexity and on what account the delay has occurred. If the delay is unexplained prejudice to the delinquent employee is writ large on the fact of it. It could also be seen as to how much the disciplinary authority is serious in pursuing the charges against its employee. It is the basic principle of administrative justice than an officer entrusted with a particular job has to perform his duties honestly, efficiently and in

accordance with the rules. If he deviates from this path he is to suffer a penalty prescribed. Normally, disciplinary proceedings should be allowed to take their course as per relevant rules but then delay defeats justice. Delay causes prejudice to the charged officer unless it can be shown that he is to blame for the delay or when there is proper explanation for the delay in conducting the disciplinary proceedings. Ultimately, the court is to balance these two diverse considerations."

(Emphasis supplied)

8. This principle has been followed by the Supreme Court again in the case of *P.V. Mahadevan* (supra) and an enquiry initiated after inordinate delay has been quashed. In both these cases, the earlier principle laid down by the Supreme Court in the case of *Bani Singh* (supra), wherein departmental proceedings were initiated after a period of 12 years was taken note and it is held that if inordinate delay in conclusion of a departmental enquiry remains unexplained then it is good ground to quash the entire proceedings as it acts unfair to a delinquent employee and cannot be upheld.

9. If the case in hand is analysed in the backdrop of the principle laid down in the cases, referred to hereinabove, it would be seen that the departmental enquiry commenced vide issuance of charge-sheet dated 9.6.1988 and even though the enquiry was concluded on 30.3.1991 when the enquiry officer submitted his report, nothing was done for more than ten years. It was only after a period of ten years vide Annexure P/5, on 31.7.2001, that the punishment of stoppage of two increments was imposed upon the petitioner. Even this delay of 10 years in taking action after the enquiry officer had submitted his report, is not explained and the only explanation is for a period from 20.11.98 to 22.11.2000, when it is stated that the matter was pending with the PSC. On going through the totality of the circumstances, the manner in which the proceedings were held and the delay that has occasioned, this Court is convinced that it is a case where unexplained inordinate delay has occasioned in concluding the enquiry, the same is not attributable to any act on the part of the petitioner and, therefore, it is a fit case where the entire proceedings should be quashed and the punishment imposed also set aside.

10. It is seen that in this case the delinquent employee has suffered for more than 18 years due to the unexplained delay in conclusion of the departmental proceedings. This has admittedly caused prejudice to him in as much as apart

from suffering the mental agony, he lost his chance to get promoted to the higher post when his juniors were promoted. As far as seriousness of the allegations against him and the punishment imposed is concerned, after a period of more than 18 years the ultimate punishment imposed is a minor penalty of stoppage of two increments without cumulative effect and finally modified to a punishment of 'censure'. In that view of the matter, if the law laid down by the Supreme Court as detailed hereinabove is applied to the facts and circumstances of the present case and if the totality of the circumstances is assessed, there cannot be any iota of doubt that the departmental action has resulted in grave injustice and prejudice to the petitioner, which has to be remedied and interest of justice requires that now atleast after his retirement, petitioner - a senior citizen, should be granted his legitimate dues and benefits. Accordingly, this Court is of the considered view that the action of the respondents cannot be approved or upheld.

11. It is not the case of the respondents that considering the nature of charges levelled and the manner in which the enquiry was required to be conducted the delay has occasioned, nor do they attribute any act on the part of the petitioner for the delay. Infact no explanation or justification for the delay is forthcoming from the respondents.

12. Accordingly, this petition is allowed. The charge-sheet issued to the petitioner vide Annexure P/1 dated 9.6.1988 and the consequential proceedings culminating in passing of the impugned order-dated 10.2.2005 - Annexure P/9 are quashed.

13. As the petitioner has retired from service and as the entire departmental proceedings are quashed, respondents are directed to convene a Review DPC to consider the case of the petitioner for promotion to the post of Executive Engineer with effect from the date his immediate juniors were promoted and in case petitioner is found fit for promotion, the same be granted retrospectively with all consequential benefits, including revision of pay, pension and other monetary benefits. The entire action for considering the case of the petitioner in the light of the aforesaid observations be undertaken and concluded within a period of three months.

14. Petition stands allowed and disposed of.

Petition allowed.

I.L.R. [2011] M. P., 441
WRIT PETITION
Before Mr. Justice Rajendra Menon

W.P. No.16541/2010(S) (Jabalpur) decided on 25 November, 2010

SUBHASH KUMAR DWIVEDI ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. ***Constitution, Article 226 - Jurisdiction*** **- Court exercising jurisdiction in a petition interferes with in such (service) matter only if constitutional provisions are found to be breached, rights statutory in nature taken away or action impugned is found to be in contravention of statutory rules or regulations.** (Para 6)

क. *संविधान, अनुच्छेद 226 – अधिकारिता* – किसी याचिका में अधिकारिता का प्रयोग करने वाला न्यायालय ऐसे (सेवा) मामलों में तभी हस्तक्षेप करेगा यदि संवैधानिक उपबंधों का उल्लंघन होना पाया जाता है, कानूनी प्रकृति के अधिकारों का हनन होता है अथवा आक्षेपित कार्यवाही कानूनी नियमों या विनियमों की उल्लंघनकारी होनी पायी जाती है।

B. ***Examination - Age relaxation*** **- State Government took a decision that age relaxation, that was given in previous two examination (held in year 2008-09 and 2009-10) is not continued now in the current examination - *Held* - Decision of the State Government cannot be interfered with by High Court until and unless, the statutory rules or regulations or any constitutional provisions are shown to be violated.**

Merely because the decision of the State Government causes hardship to the petitioner or it acts against his interest, that by itself is not a ground for interference by this Court. (Para 7)

ख. *परीक्षा – आयु में छूट* – राज्य सरकार ने निर्णय लिया कि आयु में छूट, जो पिछली दो परीक्षाओं (वर्ष 2008–09 एवं 2009–10 में आयोजित) में दी गयी थी, अब वर्तमान परीक्षा में जारी नहीं रहेगी – *अभिनिर्धारित* – राज्य सरकार के निर्णय में उच्च न्यायालय द्वारा तब तक हस्तक्षेप नहीं किया जा सकता जब तक कि कानूनी नियमों अथवा विनियमों अथवा किसी संवैधानिक उपबंध का उल्लंघन होना नहीं दर्शाया जाता।

Vipin Yadav, for the petitioner.
K.S. Wadhwa, for the respondent No.1.
Rajesh Tiwari, G.A., for the respondent No.2.

ORDER

RAJENDRA MENON, J. :–Petitioner is working as a Assistant Professor. He is 36 years of age and feels aggrieved by non-grant of age relaxation in the forth-coming State Civil Service Examination to be conducted for the year 2010-11.

2. It is an admitted position that the petitioner is over age and as per the criteria laid down in the advertisement Annexure-P3 dated 23.2.2008 and the rules framed for the examination, is not eligible to appear in the examination.

3. Grievance of the petitioner is that the State Cabinet had taken a decision for granting age relaxation to the extent of three years vide circular Annexure-P3 dated 23.2.2008. The aforesaid age relaxation was granted for the examination to be held in the year 2008-09 and again in the year 2009-10 because the examinations to be conducted every year was not conducted and between the year 2001 to 2008, only two examinations were conducted i.e. in the year 2005 and 2007. Accordingly, the decision was taken by the State Cabinet but now in this examination i.e. for the year 2010-11, it is stated that this decision is not being followed and persons like the petitioner are not being granted age relaxation.

4. Shri Vipin Yadav, learned counsel for the petitioner taking me through the documents filed argued that when examination was not held every year for various period between 2001 to 2008 and when examination was held only on two occasions in the year 2005 and 2007 and when the cabinet denied to give age relaxation due to non-conduct of the examinations, the decision of the respondents in not granting age relaxation to the petitioner now is wholly illegal, arbitrary and unsustainable as the Cabinet decision as contained in Annexure-P3 for the year 2010-11 is not being followed.

5. Shri K.S.Wadhwa, learned counsel for Public Service Commission and Shri Rajesh Tiwari, learned counsel for the State argues that the question as to whether the age relaxation should be granted or not and the period and the extent of which the age relaxation is to be granted is a policy decision to be taken by the State Government on evaluating the totality of the circumstances, the State Cabinet approved for grant of age relaxation to the extent of three years for the examinations to be held in the year 2008-09 and 2009-10. For the current year, no such decision is taken and, therefore, it is stated that no benefit can be extended to the petitioner. It is submitted by Shri K.S.Wadhwa that the policy decision of the State Government cannot be subject matter of judicial review in a petition under Article 226 of the Constitution in the absence

of statutory rules or regulations being violated or constitutional right of the petitioner infringed. Accordingly, learned counsels for the respondents pray for dismissal of this writ petition.

6. I have heard learned counsel for the parties and perused the record. It is well settled principle of law that laying down criteria for selection to State Service is a prerogative of the State Government. It is an executive function to be discharged by the executive authorities keeping in view the requirements of the administration and various other factors. A Court exercising jurisdiction in a petition under Article 226 of the Constitution interferes with, in such matter only if constitutional provisions are found to be breached, rights statutory in nature taken away or action impugned is found to be in contravention to statutory rules or regulations.

7. In the present case, considering the totality of the circumstances, the State Government took a decision to grant age relaxation for the examinations to be held in the year 2008-09 and again in the year 2009-10 after having granted age relaxation for two years on the ground of non-conduct of examinations prior to 2007, the State Government found that it is inappropriate to grant any further age relaxation in the examination to be held in the current session 2010-11. This decision of the State Government cannot be interfered with by this Court until and unless, the statutory rules or regulations or any constitutional provisions are shown to be violated. Merely because the decision of the State Government causes hardship to the petitioner or it acts against his interest, that by itself is not a ground for interference by this Court. The State Government having fixed the criteria of age in accordance with requirement of the service, this Court does not find any ground to interfere in the matter only because the age relaxation that was granted in the previous two examinations is not continued now in the current examination.

8. Its a matter completely within the domain and jurisdiction of the administrative authority and this Court, in the absence of constitutional and statutory provision being breached, does not find any ground to interfere in the matter.

9. Accordingly, finding no case made out for interference on the grounds raised, the writ petition is dismissed.

Petition dismissed.

I.L.R. [2011] M. P., 444

CONTEMPT PETITION

Before Mr. Justice Abhay M. Naik

Contempt Petition No.14/2004 (Gwalior) decided on 22 September, 2010

ARUN KUMAR ... Petitioner

Vs.

S.K. SHRIVASTAVA ... Respondent

A. Constitution, Article 215 - Contempt - **Further proceedings before Trial Court stayed in civil revision filed by applicant - Applicant made prayer for speedy disposal of suit in another pending civil revision - Direction for early disposal preferably within six months given - Suit decided by Trial Court accordingly - Applicant did not bring the order of stay into notice of Court - Trial Court not found to have deliberately violated the earlier stay order - No contempt is made out.** (Para 7)

क. संविधान, अनुच्छेद 215 – अवमानना – आवेदक द्वारा प्रस्तुत सिविल पुनरीक्षण में विचारण न्यायालय के समक्ष की अग्रिम कार्यवाहियाँ स्थगित – अन्य लम्बित सिविल पुनरीक्षण में आवेदक ने वाद के शीघ्र निपटारे के लिए प्रार्थना की – वरीयता से छः माह के अन्दर शीघ्र निपटारे के लिए निदेश दिये गये – तदनुसार विचारण न्यायालय द्वारा वाद का विनिश्चय किया गया – आवेदक स्थगन आदेश न्यायालय के ध्यान में नहीं लाया – विचारण न्यायालय द्वारा जानबूझकर पूर्व स्थगन आदेश का उल्लंघन किया जाना नहीं पाया गया – कोई अवमानना नहीं बनती।

B. Constitution, Article 215 - Contempt - **Applicant while making a prayer for expeditious disposal not apprising the Court of earlier order staying the proceedings - Such suppression may amount to contempt of Court - Contempt Petition dismissed with an exemplary cost of Rs.5000/-.** (Para 8)

ख. संविधान, अनुच्छेद 215 – अवमानना – आवेदक ने शीघ्र निपटारे के लिए प्रार्थना करते समय न्यायालय को कार्यवाहियों के स्थगन के पूर्ववर्ती आदेश से अवगत नहीं कराया – इस प्रकार का छिपाव न्यायालय की अवमानना की कोटि में आ सकता है – अवमानना याचिका 5000/– रुपये के उदाहरणात्मक ख़र्चे के साथ खारिज।

P.C. Chandil, for the petitioner.

None, for the respondent.

ORDER

ABHAY M. NAIK, J. :–This is a Contempt Petition against one Shri

S.K.Shrivastava, the then Civil Judge Class-2, Jaura, District Morena, on the ground that despite stay of proceedings of the trial Court vide order dated 20.8.2001 passed by this Court in Civil Revision No. 701/2001, the learned Trial Judge decided the suit vide judgment and decree dated 1.2.2003.

2. This Court vide order dated 7.1.2005 directed for issuance of notice to the respondent. Notice was made returnable within two weeks. On 4.3.2005, this Court observed that the service of notice was awaited. Office was directed to verify and list the case after the service report is received. On perusal of Part-C, it is revealed that Shri S.K.Shrivastava was in the meantime transferred to Bhopal as Civil Judge Class II under the District and Sessions Judge, Bhopal. Accordingly, notice was issued to him through District and Sessions Judge Bhopal. There is no further document in the file to ensure that on what date Shri S.K.Shrivastava was served with notice and whether he was in fact served or not. However, this petition has been heard considering the peculiar facts and circumstances of the case, which boomeranged against the applicant himself.

3. It may be seen that the Contempt Petition has been filed by Arun Kumar, who happened to be the plaintiff in Civil Suit No. 87A/2001. He submitted Civil Revision No. 7 01/2 001 against an interlocutory order dated 7.8.2001 passed in Civil Suit No.87A/2001. This Court directed on 20.8.2001 that until next date of listing, proceedings before trial Court shall remain stayed. It is stated at bar that Civil Revision No. 7 01/01 was not listed for hearing on or before 1.2.2003 and the order staying the proceedings of the trial court continued to be operative till the date of judgment and decree i.e. 1.2.2003.

4. In the meantime, on dismissal of the plaintiff's application for temporary injunction by both the Courts below, Arun Kumar had filed Civil Revision No.501/2000, which was disposed of on 17.7.2002. It is revealed in this order that the revisionist himself made a prayer for expeditious disposal of the suit as early as possible, preferably within a period of six months. This prayer was accepted and the trial Court was directed to dispose of the suit within a period of six months from the date of service of the order. It is pertinent to note that the plaintiff/applicant while making a prayer before this Court for expeditious disposal on 17.7.2002 did not bring into notice of this Court the order dated 20.8.2001, whereby proceedings before the trial Court were stayed, though he was under an obligation to inform the same. Learned trial Judge pursuant to the order dated 17.7.2002 decided the suit on 1.2.2003 and dismissed it on merits. It seems that the plaintiff/applicant aggrieved by

the dismissal has filed the Contempt Petition in order to pressurise the judicial officer, who obviously has acted in pursuance of this Court's direction dated 17.7.2002. The applicant/plaintiff cannot be permitted to blow hot and cold simultaneously. On 17.7.2002 he made a prayer before this Court for disposal of the civil suit within six months suppressing the factum of stay of proceedings in the trial Court vide order dated 20.8.2001. Now since the suit has been dismissed, it appears that the contempt petition has been filed by him on the ground that despite of stay of proceedings in the trial Court vide order dated 20.8.2001, the civil suit has been decided on merits. Perhaps, he would not have complained about it, had there been a decree in his favour. This shows the mischievous conduct on the part of the applicant/plaintiff.

5. Deliberate suppression about stay of trial Court's proceedings vide this Court's earlier order dt. 20.8.2001 passed in Civil Revision No. 701/2001 may itself amount to contempt of court on the part of the applicant, moreso while making a prayer in Civil Revision No. 5 01/2 000 to seek direction for expeditious disposal of the suit, preferably within a period of six months. It was the bounden duty of the applicant to bring into the notice of this Court that there was already a stay order in respect of the proceedings of the trial Court vide order dt.20.8.2001, so that there would not have been any occasion to issue conflicting direction to decide the suit within six months despite earlier stay order. This Court on being apprised of the earlier stay order would have definitely taken care of it. Applicant, who was well aware of the stay order dated 20.8.2001, himself prayed before this Court in Civil Revision No.501/ 2000 for speedy disposal of the suit without bringing into notice of this Court the factum of earlier stay order. Learned trial Judge was obviously bound by both the orders. In case, if he has acted in pursuance of the subsequent order dated 17.7.2002, he can not be treated to have acted deliberately in violation of the earlier order. On the contrary, the applicant himself may be treated to have procured the subsequent order dated 17.7.2002 for expeditious disposal within six months by deliberately suppressing the earlier order with regard to stay of proceedings in the trial Court. This, indeed, may amount to contempt of court.

6. Faced with the aforesaid situation, learned counsel in consultation with the applicant, who is present in person, prays for withdrawal of the contempt petition.

7. It may be observed that Contempt Petition is a serious matter, more so, when it is directed against a judicial officer, who is appointed through a process of selection. If cognizance of contempt petition is taken and notice is

issued to the judicial officer, he constantly remains under a sword until decision of the contempt petition. Tension arising from a pending contempt petition can not be easily imagined except by the person, who undergoes through it. This being so, a. contempt petition is not to be lightly submitted, that too, by a person, who himself has abused the process of law by making suppression of an important material fact. In the case in hand, it is clear that the applicant was well aware of the stay of the trial Court's proceeding due to this court's order dated 20.8.2001 passed in Civil Revision No.701/01. Despite this, he made a prayer before this court in pending Civil Revision No.501/2000 for expeditious disposal of the suit on merits, preferably, within a period of six months. While making this prayer, he did not disclose to this Court about the factum of stay of proceedings of the trial Court by virtue of the order dt. 20.8.2001. Learned trial Judge, who in compliance of this Court order dt. 17.7.2002 decided the suit on merits on 1.2.2003, is not found to have acted deliberately in violation of the order dated 20.8.2001. The applicant himself until decision of the suit did not submit any application in the trial Court to bring into its notice that the proceedings were stayed. Instead, by participating in the suit on merits, he virtually cooperated the trial Judge to decide the suit on merits within a frame of time prescribed by this Court vide order dt. 17.7.2002. In this view of the matter, respondent No. 2 Shri S.K.Shrivastava, learned Civil Judge can not be said to have acted deliberately in violation of the order dated 20.8.2001 and the judgment and decree rendered pursuant to this court's order dated 17.7.2002, by no stretch of imagination can be treated as contemptuous act, on the contrary, applicant himself is liable to be saddled with an exemplary cost.

8. In the result, prayer of the learned counsel for the applicant for withdrawal of Contempt Petition is accepted subject to exemplary cost of Rs.5000/- (Rupees Five Thousand) liable to be paid by the applicant. Since, respondent has not given appearance, it is directed that the cost shall be deposited with the Advocates Bar Association, Jaura for library purpose within a period of three months. In case of violation to deposit the amount within the prescribed period, the proceeding for contempt of this court shall be drawn against the applicant. Accordingly, contempt petition is dismissed as withdrawn with the aforesaid direction.

Copy of this order be sent to the respondent at his place of posting for information.

Petition dismissed.

I.L.R. [2011] M. P., 448
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
S.A. No.127/1991 (Indore) decided on 11 August, 2010

ARJUN SINGH ... Appellant
Vs.
VARDIBAI & ors. ... Respondents

A. Civil Procedure Code (5 of 1908), Section 96(3) - Compromise - Maintainability of appeal - **Where validity of compromise itself is under challenge, the appeal is maintainable.** (Paras 4 & 5)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 96(3) – समझौता – अपील की पोषणीयता – जहाँ समझौते की विधिमान्यता को ही चुनौती दी गयी हो, अपील पोषणीय है।

B. Civil Procedure Code (5 of 1908), Order 23 Rule 3 - Compromise - **Where it is alleged by one party and denied by other party about compromise, the Court has to decide the question, but for that no adjournment should be granted, unless the Court for reasons to be recorded, thinks fit to grant such adjournment.** (Para 17)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 23 नियम 3 – समझौता – जहाँ एक पक्षकार द्वारा समझौते के बारे में अभिकथन किया जाता है तथा अन्य पक्षकार द्वारा इंकार किया जाता है, वहाँ न्यायालय को प्रश्न का विनिश्चय करना होगा, किन्तु उसके लिये कोई स्थगन तब तक प्रदत्त नहीं किया जाना चाहिए जब तक न्यायालय अभिलिखित किये जाने वाले कारणों से ऐसा स्थगन प्रदत्त करना उचित नहीं समझता हो।

Cases referred :
JT 2005(6) SC 614, 1962 JLJ 495, 1985 JLJ 540.

P.K. Saxena with *Roshan Kashyap,* for the appellant.
Mangesh Bhachawat, for the respondent Nos.1 to 7.

J U D G M E N T

N.K. Mody, J. :–Being aggrieved by the order dated 17/12/90 passed by I Additional District Judge, Mandsaur in Civil Appeal No.45-A/87 and decree dated 21/12/90 whereby the judgment and decree dated 19/12/79 passed by Civil Judge, Class-1, Mandsaur in Civil Suit No.21-A/74 whereby the decree passed in favour of appellant and respondent Nos. 8 & 9 was set aside, the present appeal has been filed.

2. The appeal was admitted for final hearing by this Court vide order dated 06/12/91 on the following substantial question of law:-

"Whether the learned lower Appellate Court committed error of law in rejecting the application of the appellant to add the State Government as a party in view of amendment in Order I Rule 3(a) of C.P.C.?"

3. Vide order dated 30/06/10 following additional substantial questions of law were framed:-

"Whether the lower Court erred in not dismissing the appeal due to non-impleading the respondent Samandbai? Whether the alleged compromise of 15/12/1983 could he recorded after the same was rejected by the Court? Whether the lower Court acted in accordance with Order 23 Rule 3 in recording compromise despite the protest of the appellant and wrongly denying him the opportunity to lead evidence?"

4. Mr. Mangesh Bhachawat. Learned counsel for respondent Nos. 1 to 7 at the outset submits that the appeal itself is not maintainable in view of bar contemplated under Section 96(3) CPC. In reply learned counsel for the appellant submits that since the appeal was disposed of by the learned Appellate Court upon compromise application and the validity of the compromise is under challenge, therefore, the appeal is maintainable. For this contention reliance is placed on a decision in the matter of *Kishun @ Ram Kishun (Dead) th. Lrs. Vs. Behari (Dead) th. Lrs.*. JT 2005(6) SC 614 wherein one party set-up compromise and other party disputing. Hon'ble Apex Court held that the Court has to adjudicate if there was compromise or not and pass a decree and hence, it is appealable.

5. In view of the aforesaid position of law this Court is of the view that since the validity of the compromise itself is under challenge, therefore, the appeal filed by the appellant is maintainable, hence the objection raised by the counsel for the respondent Nos. 1 to 7 stands rejected.

6. Short facts of the case are that the appellant and respondent Nos. 8 to 10 are real brothers. Respondent Nos. 1 to7 are the legal representatives of deceased Kanhaiyalal. The land in dispute is an agricultural land situated at village Babdikheda, Tehsil Garoth. The suit was filed on 20/11/74 by the

appellant and respondent Nos. 8 & 9 against the respondent No. 10 and mother of appellant Nos. 8 to 10 Smt. Samandbai and also against Kanhaiyalal whose legal representatives are respondent Nos. 1 to 7 alleging that Madhavsingh was the father of appellant and respondent Nos. 8 to 10 and husband of Smt. Samandbai. It was alleged that appellant and respondent Nos. 8 to 10 and Samandbai are the legal representatives of deceased Madhavsingh. It was alleged that Madhavsingh was the owner of suit land and after his death his legal representatives became Bhumiswami of the suit land. It was alleged that Samandbai and repsondent No. 10 sold the suit property to Kanhaiyalal vide sale deed dated 03/06/72 for a consideration of Rs'.6,500/-. It was alleged that the sale deed was executed by deceased Samandbai in her personal capacity and also as natural guardian of appellant and respondent No.9 alleging that the appellant and respondent No.9 are minor. It was alleged that appellant and respondent No.9 were major on the date of execution of sale deed i.e. 03/06/72. It was alleged that since appellant and respondent No.9 and also respondent No.8 were having rights in the suit property being legal representatives of deceased Madhavsingh, therefore, respondent No. 10 and Samandbai was having no right to transfer the suit property showing themselves as owners of the suit property. It was alleged that deceased Samandbai was also having no right to transfer the suit property being natural guardian of appellant and respondent No.9 as no leave was obtained for transferring the suit property from the competent authority. It was alleged that appellant and respondent Nos. 8 & 9 are in occupation of the land. Lateron the suit was amended and it was incorporated that deceased Kanhaiyalal has taken the possession of the suit property on 01/06/76 forcibly. In the suit it was prayed that the sale deed dated 03/06/72 be cancelled as null and void and the appellant and respondent Nos. 8 & 9 be put into possession.

7. The suit was contested by the deceased Kanhaiyalal on various grounds alleging that the sale deed executed by the respondent No. 10 and also deceased Samandbai in her personal capacity and also as natural guardian of appellant and respondent No.9 was with consideration and also in the interest of minors, hence the suit be dismissed. After framing of issues and recording of evidence the suit filed by the appellant and respondent Nos. 8 & 9 was decreed, against which deceased Kanhaiyalal in his life time filed an appeal. During pendency of appeal applications were filed by the appellant and respondent Nos. 8 & 9 for compromise which were allowed and in terms of

compromise decree passed against Kanhaiyalal was set aside, against which present appeal has been filed.

8. Mr. PK. Saxena, learned senior counsel for the appellant argued at length and submits that the impugned order passed by the learned Appellate Court is illegal, incorrect and deserves to be set aside. It is submitted that earlier Mr. N.K. Gandhi was the advocate appearing on behalf of appellant and respondent Nos. 8 & 9. It is , submitted that the case was fixed for arguments somewhere in the month of November. 1983 and on the request of counsel the case was adjourned for 11/01/84 as the counsel was busy in the marriage of his son. It is submitted that after adjournment, an application was filed by the appellant and respondent No.9 on 15/12/83 which was marked as IA. No.6 wherein it was alleged that the matter has been settled between them and deceased Kanhaiyalal in compromise and according to which compensation has been received. In the compromise application it was prayed that since the matter has been settled between appellant and respondent No.9 and deceased Kanhaiyalal, therefore, decree be set aside. It is submitted that this application was filed by Mr. Arvind Joshi, advocate, while he was not arguing counsel. It was alleged that Mr. Arvind Joshi, advocate was engaged on that very day for the purpose of filing of the application. It is submitted that no permission/NOC was obtained by Mr. Arvind Joshi, advocate from Mr. N.K. Gandhi, advocate who was appearing on behalf of appellant. It is submitted that this act itself was illegal and in violation of Rule 11 of High Court Rules and Orders in M.P., which lays down that no advocate shall be permitted to file an appointment or memorandum of appearance in any proceeding in which another advocate is already on record for the same party save with the consent of the former advocate on record or the leave of the Court, unless the former advocate has ceased to practice or has by reason of infirmity of mind or body or otherwise become unable to continue to act. Learned counsel further submits that after filing of the application the case was adjourned from time to time and on 19/01/84 learned Appellate Court expressly recorded the findings that no compromise has taken place and thereafter the case proceeded for further hearing on merits and at a subsequent stage the same compromise was accepted, which is illegal and not permissible under the law. It is submitted that since at one stage learned Appellate Court declined to record the compromise and recorded in the order that no compromise has taken place, then at the subsequent stage on the basis of same application learned Appellate Court committed error in recording the

compromise as it hits by principle of res judicata. Learned counsel further submits that undisputedly after submission of the application for compromise appeal proceeded for hearing on merits, therefore, the compromise stands washed out. For this contention reliance is placed on a decision in the matter of *Firm Ramchandra Mathuralal Vs. Kalusingh.* 1962 JLJ 495 wherein this Court has held that once a compromise is arrived at during the pendency of a suit. the plaintiff should not proceed with the suit. He should ask the Court to record the compromise and satisfy it that the agreement is genuine. If he, however, changes his mind and the other party also acquiesces, the compromise is washed out, and the suit should proceed on merits. But he cannot later on, when his hopes do not materialise, come back to the compromise. His conduct amounts to a repudiation of the compromise. It is no less a repudiation because it is tacit and disentitles him at later stage to ask that the compromise should be recorded. Learned counsel further submits that the case was adjourned for enquiry on the compromise. It is submitted that the adjournment was prayed by the counsel for both the parties, but the learned Court below did not adjourn the case and allowed the application and decree passed in favour of appellant was set aside. Learned counsel further submits that before the learned Appellate Court a specific application was filed by the appellant wherein it was alleged that no compromise has taken place with the appellant. It is submitted that this application is dated 19/03/86 and marked as IA. No. 10 and the same was supported by an affidavit. It is submitted that in the said application it was specifically alleged that the appellant has not engaged Mr. Arvind Joshi, advocate and has not signed the application. It is submitted that it is this application upon which the learned Appellate Court directed to hold the enquiry about compromise. It is submitted that in the facts and circumstances of the case when a date was fixed for enquiry, prayer was made for adjournment, there was no justification on the part of learned Appellate Court in not adjourning the case. It is submitted that in the facts and circumstances of the case, appeal filed by the appellant be allowed and the impugned order passed by the learned Appellate Court be set aside and the case be remanded to the learned Appellate Court to decide the appeal on merits or in alternative for enquiry on compromise.

9. Learned counsel for respondent Nos. 1 to 7 submit that no illegality has been committed by the learned Appellate Court in allowing the compromise application. It is submitted that it is true that Mr. N.K. Gandhi, advocate was appearing on behalf of appellant and respondent Nos. 8 & 9. It is submitted

that since inspite of request made by the appellant and respondent Nos.8 & 9 counsel did not move an appropriate application for compromise, therefore, they were compelled to file the application by another advocate. It is submitted that since the power was filed on behalf of appellant and respondent No.9, therefore, the contract between the appellant, respondent No.9 and earlier advocate stands terminated. For this contention reliance is placed on a decision in the matter of *Umraji (Smt.) Vs. RC. Baipai.* 1985 .JL.J 540, wherein this Court held that upon appearing of the subsequent counsel the earlier authority if any given in general terms in the Vakalatnama stands withdrawn. Learned counsel for the respondents No. 1 to 7 submits that no illegality has been committed by the learned appellate Court in recording compromise and passing the order dated 17.7.90, whereby the compromise application was accepted. Learned counsel submits that the order dated 19.1.84 is not an order because no application was decided by the said order. It is submitted that for application of principles of res judicata matter is required to be heard and decided. It is submitted that since the application was not heard and decided, therefore, it cannot be treated as an order under Order 23 Rule 3 CPC rejecting the compromise. It is submitted that if the application would have been dismissed by the Appellate Court on 19.1.84 itself then there was not reason for the appellant to move IA No.9 on 24.1.86 and I.A.No.lO on 23.3.86 as application for compromise was already dismissed. It is submitted that appeal be dismissed.

10. From perusal of the record it is evident that the case was listed in the month of November, 1983 and upon the request of counsel for appellant Shri N.K.Gandhi the case was adjourned on 11.1.84. 1.A.No. 15 was filed on 15/03/84, whereby a prayer was made for preponement of the date. On 15.3.84 itself the statement of appellant-respondent No.9 Mohansingh was recorded and the case was adjourned again for orders on the application on 11.11.84, which was the date already fixed. Thereafter again from time-to-time the case was adjourned for one reason or the other. Since the appeal was not disposed of on 15.3.83 itself after preponing the case, therefore, it is having no bearing on the case that application for compromise was filed by preponing the case or by changing the Advocate. Shri. N.K.Gandhi, Advocate, who was the counsel in the original case was continued later on and made appearance, therefore, the contention of the appellant that the Rule 11 of the M.P.High Court Rules has not been followed, has no merits in the facts and circumstances of the case. Otherwise also Rule 11 has been framed

for the benefit of the Advocates so that unscrupulous litigant should not run away without payment of fees.

11. If the contention of the appellant would have been that respondent Nos. I to 7 won over the appellant and got the application for compromise filed by preponing the date and also by changing the advocate, then the position would have been otherwise. On the contrary in the present case inspite of preponing the date appeal was not disposed of on that date but the case was adjourned to record further evidence on compromise on the date which was already fixed. On that date again the earlier advocate Shri N.K. Gandhi continued which shows that neither the advocate was changed with an oblique motive nor any fraud was played for recording the compromise.

12. There are some important dates and events which requires consideration of this Court, which are as under:-

Sr. No.	Date	Events
1.	30/07/83	Kanhaiyalal predecessor in title of respondent Nos. 1 to 7 died.
2.	18/08/83	Application filed by respondent Nos. 1 to 7 for bringing them on record in place of deceased Kanhaiyalal.
3.	18/11/83	Adjournment was prayed on account of marriage of son of the counsel for appellant and respondent Nos. 8 & 9 Shri NK. Gandhi. Case was adjourned for arguments on 11/01/84.
4.	15/12/83	(a) Power was filed by Shri Arvind Joshi. advocate on behalf of Arjunsingh appellant and Mohansingh respondent No.9 alongwith an application for early hearing.
		(b) Another application was filed on that very day in which it was alleged that the matter has been settled between respondent Nos. 1 to 7 and appellant & respondent No.9.
		(c) Statement of Mohansingh (respondent No.9). Arjunsingh (appellant). Kachrulal (respondent No.2) and Mohanlal (respondent No.3) were recorded and the case was adjourned for 11/01/84 as already fixed in the case.
5.	11/01/84	Shri N.K. Gandhi original counsel for the appellant and respondent Nos. 8 & 9 appeared and the case was adjourned for 19/01/84.

6.	19/01/84	Learned Court observed that no compromise took place, hence the case was adjourned for final arguments on 25/02/84.
7.	16/03/84	Application was filed on behalf of respondent Nos. 1 to 7 to implead State of M.P. as party keeping in view the mandatory amended provisions of Order 1 Rule 3(b) CPC.
8.	06/04/84	Reply was filed on behalf of appellant and other respondents wherein it was prayed that application has been filed to delay the proceedings, hence the same be dismissed.
9.	31/01/86	Parties prayed for time. Case was adjourned for 19/02/86 by the learned Appellate Court reluctantly as it was a old case.
10.	06/02/86	Application was filed on behalf of respondent Nos. 1 to 7 and also on behalf of respondent No.8 Vajesingh wherein it was alleged that the matter has been settled in compromise, therefore, case be taken up by preponing the date and compromise be recorded.
11.	24/02/86	An application was filed by the appellant and Mohansingh respondent No.9 wherein it was alleged that the application for compromise has been filed by respondent No.8 Vajesingh, therefore, respondent No.8 be directed to supply copy of the application to the appellant and respondent No.9.
12.	19/03/86	An application was filed by the appellant supported with an affidavit IA. No. 10 alleging that appellant was informed by his counsel Mr. N.K. Gandhi that some compromise application has been filed on 15/12/83 on behalf of appellant through Mr. Arvind Joshi, advocate, while appellant has not moved any application.
13.	13/01/87	(a) An application IA. No. 12 was filed on behalf of respondent Nos. 1 to 7 which was in fact reply of the application dated 24/02/86 filed by appellant wherein it was alleged that so far as application for compromise filed by appellant and respondent No.8 is concerned, has already verified by the Court; therefore, appellant and

		respondent No.9 are not entitled to ask for the copy of compromise application which has taken place between respondent Nos. 1 to 7 & 8. (b) Respondent Nos. 1 to 7 filed an application IA. No. 13 which is reply of the application dated 19/03/86 filed by appellant wherein it was specifically stated that on 15/12/83 appellant and respondent No.9 were present in Court with Mr. Arvind Joshi, advocate and entered into compromise which was verified by the Court on that very day. It was alleged that contention of the appellant that the appellant came to know about the compromise through Mr. N.K. Gandhi, advocate on 19/09/86 is not correct. (c) IA. No. 14 was filed by respondent No.9 wherein it was alleged that on 15/12/83 the application for compromise was filed by appellant and respondent No.9 through Mr.Arvind Joshi, advocate, which has, been duly verified by the Court. It was also alleged that the compromise application dated 15/12/83 also bears the thumb impression of the appellant who is brother of 70/00/88 respondent No.9. It was alleged that respondent No.9 is still on the compromise for which respondent No.9 was having no objection. (d) Case was adjourned to 22/01/87.
14.	29/09/88	Case was fixed for consideration of application and objections relating to compromise and adjourned to 29/10/88.
15.	09/08/89	IA. No. 16 filed by Vajesingh respondent No.8 wherein it was prayed that since State is not impleaded as party in the suit therefore, judgment passed by the learned Court below be set aside and the case be remanded to decide afresh after impleading the State as party.
16.	21/08/89	IA. No. 17 filed by appellant and respondent No.8 Vajesingh alleging that no compromise has taken place by the appellant and respondent No.8 with respondent Nos. 1 to 7 and also they have never engaged Mr. Arvind Joshi, as advocate,

		therefore, Mr. Arvind Joshi and Mr. Sukhial Patidar. advocates be directed not to appear on behalf of appellant and respondent No.8.
17.	01/12/89	Affidavit filed by Mohansingh respondent No.9 duly notarized stating that compromise took place between the respondent Nos. 1 to 7 and appellant and respondent No.9 on the basis of which Mr. Arvind Joshi. advocate Filed the application on 15/12/83, upon which case was taken up on that very day by preponing the date 11/01/84 and the compromise was verified by the Court on that very day. It was alleged that appellant Arjunsingh has put his thumb impression on the application in his presence and his statement was also recorded by the Court on that very day.
18.	27/10/89	Application was filed by respondent No.8 Vajesingh to the effect that compromise is taking place, therefore, case be adjourned.
19.	24/04/90	(a) Application filed by respondent Nos. 1 to 7 and also by Vajesingh respondent No.8 praying that the compromise has taken place between the parties, which is enclosed and as per compromise order be passed. In the compromise application filed alongwith application it was alleged that respondent No.8 is having no objection regarding sale deed dated 03/06/72 which was executed in favour of Kanhaiyalal predecessor in title of respondent Nos. 1 to 7, which was also supported by an affidavit of respondent No.8 Vajesingh. (b) Statement of Vajesingh respondent No.8 was also recorded.
20.	14/09/90	(a) Application filed by appellant which was marked as IA. No. 18 it was again alleged that no compromise has taken place on 15/12/83. It was alleged that even if it is treated as compromise, than the appellant prays that the application be dismissed as withdrawn. (b) IA. No. 19 filed by appellant wherein it was alleged that compromise which has been filed on 22/08/90 is illegal

		and with an object to by pass the provisions of MPLRC, ceiling Act and Registration Act, therefore, the same be dismissed.
		(c) IA. No.20 filed by appellant wherein it was alleged that the application filed on 15/12/83 is not filed by the appellant and the said application is not a compromise. It was prayed that the application dated 15/12/83 be dismissed.
21.		Case was adjourned on 17/09/90, 22/10/90. 27/10/90, 01/11/90, 08/11/90 & 26/11/90.
22	26/11/90	Arguments heard. Case reserved for 17/12/90.
23	17/12/90	Impugned order passed.

13. So far as contention of the learned Counsel for the appellant that since application for compromise dated 15/12/83 was rejected by the learned Appellate Court vide order dated 19/01/84, therefore, no order could have been passed on the said application, as it hits by the principles of res judecata is concerned, the objection raised by the counsel for the appellant is untenable, as the question is required to be heard and finally decided by the Court. From perusal of the order dated 19/01/84 it is evident that it was not observed by the learned Appellate Court that since no compromise has taken place, therefore, application stands dismissed. On the contrary in the order-sheet it is mentioned that no compromise has taken place, let the case be listed for final hearing. Till this date no application was filed by the appellant to the effect that the appellant is withdrawing the application dated 15/12/83. Since no application for compromise was filed on 15/12/83 by respondent No.8 Vajesingh, therefore, so far as it relates to the rights of Vajesingh respondent No.8 is concerned, appeal was required to be heard finally, therefore, the observation made in the order dated 19/01/84 to the effect that 'compromise has not taken place' relates to respondent No.8 Vajesingh. So far as appellant is concerned, appellant did not dispute the compromise on 19/01/84, on the contrary conduct of the appellant reflects in the order dated 06/04/85 when the reply of the application filed by respondent Nos. 1 to 7 dated 16/03/84 by the appellant to implead the State as party was filed, in which it was stated that respondent Nos. 1 to 7 are unnecessarily prolonging the case. Appellant has objected the compromise dated 15/12/83 for the

First time on 24/02/86. In view of this, this Court is of the view that the impugned order is not hit by principles of res judecata, as the application dated 15/12/83 was not dismissed vide order dated 19/01/84.

14. So far as contention of the appellant that Mr. Arvind Joshi, advocate was having no authority to file the application as arguing counsel was Mr. N.K. Gandhi, who was appearing in the case right from beginning is concerned, is also not well founded, firstly because inspite of prepondering the case and moving the application for compromise through some other advocate, the case was not finally decided on that day and the case was adjourned for a day when it was originally fixed. On that day also Mr. N.K. Gandhi. original advocate remained present on behalf of appellant and thereafter continuously appeared for the appellant. Since from the record it is evident that the sale deed was executed by respondent No. 10 and Mother of appellant and respondent Nos. 7 to 10 Smt. Samandbai in her personal capacity and also as guardian of appellant and respondent No.9. Respondent No.8 who was admittedly major on the date of execution of sale deed, was not the party to the sale deed. However, respondent No.8 also entered into compromise and gave his statement in support of compromise. Respondent No.9 who is co-signatory to the application filed on 15/12/83 has lastly supported the compromise as the impugned order has not been challenged by respondent No.9. So far as appellant is concerned, in the application dated 15/12/83 it is mentioned that the sale deed took place for payment of debts and respondent Nos. 1 to 7 are in possession and also appellant has got compensation. It is also stated in the application that respondent No.8 was separated long before and he has already sold out the property which fell into his share.

15. So far as deceased Kanhaiyalal predecessor in title of respondent Nos. 1 to 7 is concerned, it was alleged that deceased Kanhaiyalal has become occupancy tenant and earlier also judgment has been passed against the appellant. In support of this application statement of appellant Arjunsingh was also recorded on that very day, in which appellant has stated before the Court that he has entered into compromise with respondent Nos. 1 to 7 and the compromise application is acceptable to the appellant. It was also stated that respondent Nos. 1 to 7 are in possession. After three years of filing of this application as the application was filed on 15/12/83 and the statement was recorded on that very day, for the first time on 24/02/86 appellant has disputed the compromise. In the subsequent application filed by appellant and respondent Nos. 8 & 9 it is evident that respondent No.9 who was co-signatory of the

application dated 15/12/83 also objected and challenged the validity, but subsequently accepted the compromise again and also alleged that the application dated 15/12/83 bears the thumb impression of the appellant and also admitted that appellant was present in Court and gave his statement. Respondent No.9 also submitted that Mr. Arvind Joshi was the counsel engaged by the appellant and respondent No.9 who filed the application.

16. Order 23 Rule 3 CPC deals with the compromise application. Proviso has been inserted in Rule 3 Order 23 vide CPC Amendment Act 1976 w.e.f. 01/02/77 which reads as under:-

> *"Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, think fit to grant such adjournment."*

17. As per aforesaid proviso it is evident that in case it is alleged by one party and denied by other party about compromise, the Court has to decide the question, but for that no adjournment should be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.

18. From the record it is evident that compromise application was filed by the appellant on 15/12/83, objection regarding validity of compromise was filed on 19/03/86 and no evidence was adduced by the appellant inspite of opportunity. Not only this inspite of objection raised by the appellant relating to compromise after more than three years, it is no where stated by the appellant that appellant did not appear on 15/12/83 before the learned Court and some body else was impersonated as appellant in the Court on that day. As against this respondent No.9 who also objected the compromise, not only took 'U' turn by admitting the compromise, but has gone one step ahead and stated that appellant also moved the compromise application jointly gave his statement in the Court, in the facts and circumstances of the case, this Court is of the view that no illegality has been committed by the learned Appellate Court in passing the impugned order.

19. Apart from this on merits also the sale deed under challenge is dated 03/06/72 which has been executed by Smt. Samandbai, who is none else but the mother of appellant in her personal capacity as well as in the capacity of

natural guardian of appellant and respondent No.9. Validity of the sale deed was challenged by the appellant, respondent No.8 & 9. Respondent No.8 was having the strongest case who was not the party to the sale deed and was major at the relevant time and also was having right in the suit property. However respondent No.8 entered into compromise and settled the claim with respondent Nos. 1 to 7. Similarly appellant and respondent No.9 both moved the application for compromise and both of them subsequently moved the application before the learned Appellate Court alleging that no compromise application was filed by them. However, later on respondent No.9 has moved the application wherein he has admitted that the application for compromise was filed by respondent No.9 alongwith appellant jointly. In the facts and circumstances of the case, subsequent conduct of the appellant appears to be doubtful and speaks in volume against him. Thus, in the opinion of this Court, the impugned order passed by the learned Appellate Court is in accordance with law, inspite of protest of the appellant, who did not appear before the Court inspite of opportunity. So far as substantial question of law No. 1 is concerned, no answer is necessary as it was not argued before this Court.

20. In view of this, appeal filed by the appellant has no force, hence stands dismissed. No order as to costs.

Appeal dismissed.

I.L.R. [2011] M. P., 461
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari

S.A. No.945/2003 (Jabalpur) decided on 11 August, 2010

SHARDA PRASAD ... Appellant
Vs.
STATE OF M.P. ... Respondent

Krishi Prayojan Ke Liye Upayog Ki Ja Rahi Dakhal Rahit Bhoomi Par Bhoomiswami Adhikaron Ka Pradan Kiya Jana (Vishesh Upabandh) Adhiniyam, M.P. (30 of 1984), Section 3, Specific Relief Act, 1963, Section 38 - Declaration and perpetual injunction - Relief when cannot be granted **- Appellant alleging to have acquired Bhoomiswami rights on the strength of possession for more than 100 years - State marking the land for a plantation project - Appellant**

declared to be an encroacher and proceedings u/s 248 M.P. Land Revenue Code initiated - *Held* - Appellant was not found in legal possession of the land and whenever the possession of the party is not lawful or legal, then the same could not be protected by issuing or granting perpetual injunction in favour of such party and against the true owner or the recorded Bhoomiswami of land. (Para 7)

कृषि प्रयोजन के लिए उपयोग की जा रही दखल रहित भूमि पर भूमि स्वामी अधिकारों का प्रदान किया जाना (विशेष उपबंध) अधिनियम, म.प्र. (1984 का 30), धारा 3, विनिर्दिष्ट अनुतोष अधिनियम, 1963, धारा 38 – घोषणा एवं शाश्वत व्यादेश – अनुतोष कब प्रदान नहीं किया जा सकता – अपीलार्थी ने 100 वर्षों से अधिक समय से कब्जे के बल पर भूमिस्वामी अधिकारों को प्राप्त किया जाना अभिकथित किया – राज्य ने बागान परियोजना के लिए भूमि को चिह्नांकित किया – अपीलार्थी को अतिक्रामक घोषित किया गया और म.प्र. भू राजस्व संहिता की धारा 248 के अन्तर्गत कार्यवाहियाँ प्रारम्भ की गईं – *अभिनिर्धारित* – अपीलार्थी भूमि के वैध कब्जे में नहीं पाया गया और जब कभी भी पक्षकार का कब्जा विधिपूर्ण या वैध नहीं होता है, तब ऐसे पक्षकार के पक्ष में और भूमि के वास्तविक स्वामी या अभिलिखित भूमिस्वामी के विरुद्ध शाश्वत व्यादेश जारी अथवा प्रदान कर उसे संरक्षित नहीं किया जा सकता।

Cases referred :

S.A. No.1330/06, 1986(I) MPWN 87, 1997 RN 195, AIR 1983 SC 742, 1986(I) MPWNH 116.

Gulzar Rajpoot, for the appellant.

ORDER

U.C. MAHESHWARI, J.:–The appellant/plaintiff has preferred this appeal under section 100 of the CPC, being aggrieved by the judgment and decree dated 2.8.03 passed by II nd Addl. District Judge, Gadarwara in Civil Regular Appeal No.4-A/03, affirming the judgment and decree dated 12.8.02 passed by Civil Judge Class-II, Gadarwara in Civil Original Suit No.60-A/2002, dismissing his suit filed for declaration and perpetual injunction with respect of the revenue land of village Ishwarpur bearing survey No.48/1 and 48/3 area 1.789 and 0.809 hectare respectively recorded in the name of respondent state of Madhya Pradesh.

2. The facts giving rise to this appeal in short are that the appellant herein filed the above mentioned suit for the above mentioned disputed land situated adjoining to his personal agricultural land bearing survey No.538 contending that he being in possession of the same from the time of his forefathers since

last 80 years, has perfected his right of Bhumi Swami on it. As per further pleading; he being the holder of small piece of his owns land less then 2.000 hectare comes under the category of "marginal farmer" defined under the provision of Krishi Prayojan ke Liye Ki Ja Rahi Dakhal Rahit Bhumi Par Bhumi Swami Adhikaron Ka Praday Kiya Jana "Vishesha Upbandh" Adhiniyam, 1984 (in short the Act) by virtue of other provisions of such Act has become the Bhumi Swami of the disputed land but the Patwari of the concerning area, namely, Laxmi Prasad, under some conspiracy with his oppositers made a complaint to Tehsildar stating that on the disputed land under Gram Smridhi Yojna (Village Develoopment Scheme) different type of plantation was carried out and in such premises the appellant's possession was shown to be unauthorized possession while no such plantation was carried out on such land. On such complaint of Patwari, the Revenue Case No.34-A/68/99-2000 was registered against him and on consideration, vide order dated 21.8.02 in such proceedings, by holding the possession of the appellant as encroacher, the order to remove the possession was passed, on which, he filed the appeal before Sub Divisional Officer, Gadarwara. The same is still pending. It is also stated that respondent, being State, the Revenue Officials and Police Officers are working under its authority, hence, at any moment, with their assistance, he may be dispossessed from the above mentioned land. The appellant, being in possession of the aforesaid land prior to 2.10.84 has perfected the right of Bhumi Swami under the provision of Krishi Prayojan ke Liye Ki Ja Rahi Dakhal Rahit Bhumi Par Bhumi Swami Adhikaron Ka Praday Kiya Jana "Vishesha Upbandh" Adhiniyam, 1984 and also by adverse possession and, in such premises, no right or title of the respondent has been remained in existence. With these pleadings, the aforesaid suit for declaration and perpetual injunction for protecting his possession, is filed.

3. The respondent/State of Madhya Pradesh remained ex-parte in the trial court. In such premises, no written statement was filed on its behalf. After recording the ex-parte evidence of the appellant, on appreciation of the same, his suit was dismissed by the trial court. On filing the appeal, against such dismissal, on consideration, the same was also dismissed by the appellate court, on which, the appellant has come forward to this court with this appeal.

4. Applicant's counsel after taking me through the pleadings, evidence and the exhibited documents argued that in view of his un-rebutted evidence proving his title over the land, the courts below ought to have decreed his suit but the same has been dismissed under the wrong premises. In addition, he said that

he being in possession and cultivation of the aforesaid land since last 100 years, has perfected his right as Bhumi Swami of it. In any case, he being marginal farmer, has perfected the right of Bhumi Swami under the provisions of the above mentioned Act. In such premises by placing reliance on unreported case of this court in the matter of *Prahlad s/o Bihari Ahirwar Vs. State of M.P* decided vide dated 27.2.2008 in S.A.No.1330/06 prayed for admission of this appeal on the proposed substantial questions of law mentioned in the appeal memo.

5. Having heard the counsel, keeping in view his argument, I have carefully examined the record and also perused the impugned judgment. As per concurrent findings of the courts below the appellant could not prove his case by producing any admissible, reliable evidence and documents that he is in legal possession of such land or perfected his right of Bhumi Swami by adverse possession or otherwise on such land. On the contrary, the courts below, taking into consideration, the order dated 21.8.02 passed in Revenue Case No.34-A/68/99-2000 initiated against the applicant under section 248 of the M.P. Land Revenue Code directing removal of his illegal possession as encroacher over the disputed land concurrently held such illegal possession of the encroacher, could not be protected declaring him to be the Bhumi swami of such land and issuing perpetual injunction as prayed. In such premises, both the courts below concurrently, on appreciation of evidence and the documents, had not found the legal and lawful possession of the appellant over the land.

6. It is settled proposition of the law that concurrent findings of the courts below based on appreciation of the evidence on the question of adverse possession, being findings of fact, could not be interfered under section 100 of the CPC at this stage of second appeal as laid down by this court in the matter of *Seeganram Vs. Magnia*-1986 (1) MPWN-87 and *Ram Singh Vs. Kashiram*-1997-Revenue Nirnaya195. In view of such legal position, this appeal does not involve any substantial question of law on the issue of adverse possession requiring any consideration under section 100 of the CPC at this stage.

7. Apart the above, in any case, the appellant was not found in legal possession of the same and whenever the possession of the parties is not lawful or legal then the same could not be protected by issuing or granting perpetual injunction in favour of such party and against the true owner or recorded Bhumi Swami of land. My such view if fully fortified by the decision of the Apex Court in the matter of *Gangubai Babiya Choudhary and others*

Vs. Sitaram Bgalchandra Sukhtankar and others-AIR 1983 SC-742 in which some observations regarding this question has been made. Such principle is further followed by this court in the matter of *Kamal Singh Vs. Jairam Singh*-1986 MPWN(1)- 116. So in such premises also this appeal does not involve any substantial question of law.

8. So far the aforesaid case law in the matter of *Prahlad* (supra) cited on behalf of the appellant is concerned, firstly, in view of the aforesaid decision of the Apex Court and the earlier decision of this court, the same is not helping to the appellant as the same was passed without taking into consideration the aforesaid view of the Apex Court as well as the earlier of this Court. Secondly, in the cited case, the concerning appellant was extended liberty to approach the authority to get decided his right from the competent authority under the provisions of above mentioned Act of 1984 and limited interest of such appellant was protected. While deciding such case, the provision of section 41(h) of the Specific Relief Act was not taken into consideration. According to such provision of the Specific Relief Act whenever the alternative forum for efficacious relief is available then the equitable relief of perpetual injunction could not be granted by the civil court under the general law and, in such premises also such citation is not helping to the appellant. At this stage, it is made clear that if the appellant has perfected his right under the aforesaid Adhiniyam of 1984 even then such right could not be conferred by the civil court under the general law. The appellant has to file appropriate proceedings under the aforesaid Adhiniyam and its Rules before the authority appointed for the same to confer such right of Bhumi Swami on him. In such premises also this appeal does not involve any substantial question of law.

9. In view of the aforesaid discussion, I have not found any substance or circumstance giving rise to any substantial question of law requiring any consideration under section 100 of the CPC at this stage, hence this appeal deserves to be and is hereby dismissed at the motion hearing stage. There shall be no order as to the cost. However, it is made clear that this order shall not come in the way of the appellant in prosecuting the application or proceeding under the aforesaid Adhiniyam of 1984 and on filing such proceedings by the appellant, the same may be considered by the authority appointed under such Adhiniyam in accordance with the prescribed procedure without influencing any observation made in this order or in the judgment and decree passed by the courts below.

10. The appeal is dismissed at the stage of motion hearing with aforesaid observation.

Appeal dismissed.

I.L.R. [2011] M. P., 466
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari

S.A. No.766/2005 (Jabalpur) decided on 30 September, 2010

DENA BANK ... Appellant
Vs.
MUNICIPAL CORPORATION, BURHANPUR ... Respondent

A. Transfer of Property Act (4 of 1882), Section 106, Civil Procedure Code, 1908, Order 29 Rule 1 - **Notice of termination of tenancy - Corporate Body - Notice of suit to the Head Office is sufficient compliance of provision - Issuance of notice to Branch of appellant was not necessary.** (Para 8)

क. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 106, सिविल प्रक्रिया संहिता, 1908, आदेश 29 नियम 1 – किरायेदारी के पर्यवसान की सूचना – निगमित निकाय – प्रधान कार्यालय को वाद की सूचना उपबंध का पर्याप्त अनुपालन है– अपीलार्थी की शाखा को सूचना पत्र जारी किया जाना आवश्यक नहीं।

B. Transfer of Property Act (4 of 1882), Section 106 - Termination of lease - Waiver - **Appellant deposited some of the money at the rate of existing rent in the account of respondent which was with the branch office of appellant - *Held* - It could not be deemed to be waiver of such right - Appellant after termination of tenancy became statutory tenant and therefore, deposit of rent in the account of respondent could not be deemed to have created either a new tenancy or the respondent has waived its right of eviction.** (Para 9)

ख. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 106 – पट्टे का पर्यवसान – अधित्यजन – अपीलार्थी ने किराये की प्रवृत दर से कुछ पैसा अपीलार्थी के शाखा कार्यालय में प्रत्यर्थी के खाते में जमा कराया – *अभिनिर्धारित* – इसे ऐसे अधिकार का अधित्यजन होना नहीं माना जा सकता – किरायेदारी के पर्यवसान के बाद अपीलार्थी कानूनी किरायेदार बन गया अतएव प्रत्यर्थी के खाते में किराया जमा करना नयी किरायेयदारी का सृजन हो जाना अथवा प्रत्यर्थी द्वारा अपने अधिकार का अधित्यजन किया जाना नहीं माना जा सकता।

C. Transfer of Property Act (4 of 1882), Section 106 - Termination of lease - **If the suit is filed under the provisions of Transfer of Property Act, then after serving the quit notice on the tenant, the landlord is entitled to get the decree of eviction only on proving the service of such notice.** (Para 11)

ग. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 106 – पट्टे का पर्यवसान – यदि सम्पत्ति अन्तरण अधिनियम के उपबंधों के अन्तर्गत वाद दाखिल किया जाता है, तब किरायेदार पर खाली करने की सूचना तामील करने के पश्चात् भूस्वामी केवल ऐसे सूचना की तामीली साबित करने पर बेदखली की डिक्री पाने का हकदार है।

Cases referred :

1996(1) MPLJ 97, AIR 1999 SC 2213.

R.N. Roy, for the appellant.

Rakesh Jain, for the respondent.

ORDER

U. C. MAHESHWARI, J.:–This appeal is directed under Section 100 of the CPC on behalf of the appellant/defendant, being aggrieved by the judgment and decree dated 18.3.2005 passed by the Additional Judge Burhanpur to the Court of District Judge, Burhanpur-Khandwa, in regular civil appeal No.4-A/04 upholding the judgment and decree dated 24.11.04 passed by the Ist Civil Judge Class-I, Burhanpur in Civil Original suit No. 14-A/2001, dismissing the suit of the respondent against the appellant for eviction under the provision of section 106 and the relevant provisions of the Transfer of Property Act as by virtue of section 3 of the M.P. Accommodation Control Act, 1961 (for short 'the Act') the respondent/landlord, being Municipal Corporation, the provisions of such Act is not applicable with respect of its property.

2. The facts giving rise to this appeal in short are that on behalf of the respondent herein, the above-mentioned suit for eviction was filed against the appellant contending that the appellant institution, being monthly tenant of the respondent since the year 1971, is in occupation of the disputed premises described in the plaint and also shown in the Schedule-A annexed with the plaint situated at some square of Ward No.7 of Burhanpur for non-residential purpose. The tenancy being monthly, begins from the first day of every month. As per the agreement of the parties, which had taken-place from time to time on every interval of five years, the existing rent was to be enhanced. Pursuant to it, on making repeated request on behalf of the respondent, instead to

consider such request, the unnecessary disputes were raised by the appellant and as per terms, the rent was not enhanced. In such premises, the appellant remained adamant to pay the rent of Rs.850/- per month and the same was stated in the reply of the letters issued to the respondent to it. As per further averments of it, the rent was also not paid regularly. As per further submission, the respondent/Municipal Corporation is under need of the aforesaid disputed accommodation to implement its activities. As per decision of the sub-committee of the respondent/Corporation, by giving a quit notice dated 10.7.2000, the aforesaid tenancy of the appellant in the disputed premises was terminated on expiry of the tenancy month vide dated 31.7.2000. In alternate, the tenancy was also terminated by giving an option to the appellant that if it deems the tenancy month of some different date then on receiving such notice, after 15 days, on expiry of the tenancy month accordingly, the tenancy stands terminated and the appellant was intimated to vacate the premises and hand-over the possession of the same to the respondent. Inspite service of such notice on 11.7.2000 on the appellant through its Head Office, the same was not complied with and the vacant possession of the accommodation was also not given to the respondent. With these pleadings, the above-mentioned suit for eviction of the appellant as well as for mesne profit @ of Rs.4000/- per month, is filed.

3. In the written statement of the appellant, by admitting the alleged monthly tenancy in the disputed premises since the year 1971, it is stated that the respondent being local authority covered under section 3(c) of the M.P. Accommodation Control Act, 1961, the provisions of such Act are not applicable in the present matter. It is further stated that initially the appellant was inducted as tenant at the rate of Rs.355/- per month. But time to time, on enhancing, the same had come upto Rs.850/- per month. The same is being paid by the appellant to the respondent. During subsisting the tenancy, it was settled between the parties that on every interval of five years, the existing monthly rent would be enhanced but no any terms in this regard was settled on which such enhancement was to be carried-out. The respondent has also not pleaded any such terms in the plaint. The appellant never created any obstruction in enhancing the sum of the monthly rent. It has also not committed any default in depositing the same.. In continuation it is stated that under consultation of the higher officials of the appellant its local official had enhanced the monthly rent from time to time and the appellant/Institution is also ready and willing to enhance the existing rent even today. The rent was

also paid by depositing the same in the account of the respondent held with the appellant as Saving Account No.1272 and Current Account No. M-33 and also the loan account. On depositing such sum, the same was withdrawn or received by the officials of the respondent. The appellant, being Corporation/Institution, its local official of the Branch did not have any authority to enhance the rent unless sanction or permission is given by the higher authorities. The alleged requirement of the disputed premises to the respondent is also denied. The alleged quit notice was not given to the local branch of the appellant and the service of the same on the Head Office, could not be termed to be the valid service on the appellant as the branch is functioning at Burhanpur. The service of the notice by the Head Office is admitted by the appellant but as per further averments by such notice, the alleged tenancy could not be deemed to be terminated. It is also stated that some sittings for compromise had also taken-place between the officials of the parties and, in such premises the appellant is ready and willing to resolve their dispute by compromise. Some averments regarding some new agreement is also stated. In view of such facts of compromise and in the lack of proper cause of action, the instant suit is not tenable. It is also stated that after giving the quit notice, the respondent's officials, have accepted the offer regarding enhancement of the rent and pursuant to that on depositing the amount of rent in their account, by receiving the same, the respondent has waived their notice of termination of such tenancy and, in such premises, the suit of the respondent, could not be decreed for the prayer as made in it. The objection with respect of improper valuation and the deficit court fees are also taken. With these averments, the prayer for dismissal of the suit is made.

4. In view of the aforesaid pleadings of the parties, after framing as many as nine issues and recording the evidence, on appreciation of the same, by holding the relationship of the parties as landlord and tenant and the provision of M.P. Accommodation Control Act, is not applicable to the respondent/ institution and the quit notice terminating the tenancy was duly served on the appellant through its Head Office, the suit of the respondent was decreed by the trial court for eviction as well as for the mesne profit of Rs.2300/- per month from 1.8.2000.

5. On challenging such decree by the appellant before the subordinate appellate court, on consideration, by affirming the judgment and decree of the trial court, the same was dismissed, on which, the appellant has come forward to this court with this appeal.

6. Shri R.N.Roy, learned appearing counsel of the appellant after taking me through the pleadings of the parties, available evidence and the exhibited documents said that the alleged quit notice Ex.P/2 for termination of the tenancy was not duly served on the appellant through its Branch Manager of Burhanpur. The service of such notice on the Head Office only, could not be deemed to be the proper service of notice. He also argued that such quit notice was not given in accordance with the provision of section 106 of the Transfer of Property Act. By referring such provision, he said that there is no such provision for terminating the tenancy by giving any alternate option to the tenant and as the notice was given with alternate option, hence, it being contrary to such provision, the same could not be deemed effective for passing the impugned decree against the appellant. He also argued that in the lack of proper evidence regarding nature of the lease, it could not be assumed that the alleged lease was determinable only by giving a notice of 15 days period. He also argued that after determination of the lease by the aforesaid notice, on depositing the rent by the appellant in the account of the respondent, the same was accepted by the authorities of the respondent, hence such circumstance is sufficient to draw an inference that the respondent has waived its right to prosecute the suit on the foundation of the aforesaid notice terminating the alleged tenancy. In support of his argument, he also referred section 112,111(g),(h), 113 and 116 of the Transfer of Property Act. In continuation he said that the factum of compromise between the parties was not taken into consideration with proper approach by the courts below while passing the impugned decree for eviction and, prayed for admission of this appeal on the proposed substantial questions of law mentioned in para-11 of the appeal memo. Although, before winding-up the arguments, appellant's counsel stated to submit some citations but the same were not supplied subsequent to his arguments till 23.9.2010.

7. Having heard the counsel, keeping in view the arguments advanced, after perusing the record of the courts below along with the impugned judgments, I am of the considered view that the courts below have not committed any error in decreeing the suit of the respondent against the appellant for eviction as well as for mesne profit.

8. So far the arguments of the appellant's counsel regard service of notice on the appellant is concerned, as per the provision of Order 29 rule 1 of the CPC, if the matter is relating to the Corporate body the notice of the suit to the Head Office is a sufficient compliance of the provision. In such premises, no separate notice to Branch of the appellant is required and according to my

opinion, such analogy could be adopted even for issuing the quit notice of termination of tenancy and, in such premises, the quit notice Ex.P/2 was duly served on the Head Office of the appellant. So, the branch of the appellant at Burhanpur or its official did not have any authority to say that the notice was not duly served on it. Even otherwise, it appears from the record that before inducting the appellant in the disputed premises, the respondent/institution with the Head Office of the appellant, entered into an agreement to create the alleged tenancy and, in such premises, if the notice of termination of tenancy Ex.P/2 was given to the Head Office then, in the lack of any notice to the branch office, it could not be said that the notice was not properly served. In such premises, the approach of the courts below in this regard does not appear to be contrary to the record or the existing legal position.

9. In the course of entire argument, I am not apprised by the appellant's counsel with any document or situation showing that after receiving the notice of termination of tenancy Ex.P/2 by the Head Office of the appellant, at any point of time, some agreement or compromise has been finalized between the parties and pursuant to that any enhanced rent was accepted by the respondent or its officials. So, in the lack of it, it could not be deemed that the respondent has waived his right to evict the appellant from the premises under the provision of section 112,113 read with section 111 (g), (h) of the Transfer of Property Act. Mere on account of depositing some of the money at the rate of existing rent on the date of termination of tenancy in the account of the respondent which was with the branch office of the appellant, it could not be deemed to be waiver of such right. In any case, the appellant, after terminating its tenancy became the statutory tenant under the law and, being statutory tenant, if any, sum of the rent was paid by the appellant or deposited by it in the account of the respondent then it could not be deemed that the same has created either a new tenancy between the parties or the respondent has waived its right of eviction. On arising the occasion, such question was answered by the Division Bench of this Court in the matter of *Nagar Palika Nigam, Gwalior Vs. Rajeshwar Dayal*-1996(Vol.XLI) MPLJ-97 in which it was held as under :-

> 20. In view of the conclusion arrived at the question of waiver of notice or its issuance by a person, who was not competent to issue the same becomes meaningless. It may, however, be observed that the question of waiver of notice would arrive only when there is express acceptance of rent by the

landlord, ie the Nigam/appellant. Deposit of some amount with an employee of the Nigam, which is later on credited in the Municipal fund, would be of no consequence. The concept of acceptance of rent and waiver was considered in case of *Kai Khushroo Vs. B. Jerbai*-AIR 1949 FC 124. It was held thus :-

"On the determination of a lease, it is the duty of the lessee to deliver up possession of the demised premises to the lessor. If the lessee or a sub lessee under him continues in possession even after the determination of the lease, the landlord obviously has the right to eject him forthwith, but if he does not, and there is neither assent or dissent on his part of the continuance of occupation of such persons, the latter becomes in the language of English law a tenant at sufferance who had no lawful title to the land but holds it merely through the laches of the landlord. If now the landlord accepts rent from such person or otherwise expresses assent to the continuance of his possession a new tenancy comes into existence as is contemplated by section 116, Transfer of Property Act, and unless there is an agreement to the contrary, such tenancy would be regarded as one from year to year or from month to month in accordance with the provisions of section 106 of the Act"

In cases of tenancies relating to dwelling house to which the Rent Restriction Act apply, it was observed by their Lordships of the Federal Court thus :-

".....in cases of tenancies relating to dwelling house to which the Rent Restriction Acts apply, the tenant may enjoy the statutory immunity from eviction even after the lease has expired. The landlord cannot eject him except on specific grounds mentioned in the Acts themselves. In such circumstances, acceptance of rent by the landlord from a statutory tenant whose lease has already expired could not be regarded as evidence of a new agreement of tenancy and it would not be open to such a tenant to urge by way of defence in a suit for ejectment brought against him under the provisions of Rent Restriction Act that by acceptance of a rent a fresh

tenancy was created which had to be determined by a fresh notice to quit."

The aforesaid decision was followed by the Apex Court in *Ganga Dutt Murarka Vs. Kartick Chandra Das and others*- AIR 1961 SC 1087 and it was held thus :-

"The High Court was in our judgment right in holding that by merely accepting rent from the appellant and by failing to take action against him, the appellant did not acquire the rights of a tenant holding over. It is true that in the notice dated October,10, 1950, the appellant is described as a `monthly tenant' but that is not indicative of conduct justifying an inference that a fresh contractual tenancy had come into existence. Within the meaning of West Bengal Premises Rent Control Act,1950, the appellant was a `tenant' and by calling the apellant a tenant the respondent did not evince an intention to treat him as a contractual tenant. The use of the adjective `monthly' also was not indicative of contractual relation. The tenancy of the appellant was determined by efflux of time subsequent occupation by him was not in pursuance of any contract express or implied, but was by virtue of the protection given by the successive statutes. This occupation did not confer any right upon the appellant and was not required to be determined by a notice prescribed by section 106 of the Transfer of Property Act."

10. In view of the aforesaid settled principle of law, on examining the case at hand, the case cited is directly applicable in the present circumstances and, in such premises, this appeal is not involving any question of law rather than substantial question of law on the above-mentioned subject requiring any consideration under section 100 of the CPC at this stage.

11. It is settled proposition of the law that in the matter of eviction if the suit is filed under the provision of Transfer of Property Act, after serving the quit notice on the tenant under section 106 of the Transfer of Property Act then only on proving the service of such notice on the tenant like appellant, the landlord like the respondent is entitled to get the decree of eviction and in the aforesaid circumstances it has been proved and established tenancy of the appellant was terminated by the respondent by serving the notice dated

10.7.2000 Ex.P/2 under section 106 of the Transfer of Property Act on the Head Office of the appellant, therefore, I have not found any circumstance giving rise to any substantial question of law on this subject.

12. Even otherwise, as per the concurrent findings of the courts below, the quit notice for termination of the tenancy has been served on the appellant under the existing legal position and such findings being based not only on the documents Ex.P/2 and P/3 but also on appreciation of the evidence, is a finding of fact and such finding of fact howsoever, the same is erroneous, could not be interfered at this stage under section 100 of the CPC as laid down by the Apex Court in the matter of *Kondiba Dagadu Kadam Vs. Savitri Bai Sopan Gurjar*-AIR 1999 SC 2213 .

13. In view of the aforesaid, it is apparent that the courts below have passed the impugned decree after taking into consideration the above-mentioned circumstances and, in such a situation, I have not found any substance or the circumstance in the appeal giving rise to any question of law rather than substantial question of law requiring any consideration under section 100 of the CPC at this stage, resultantly, it being devoid of any such question, deserves to be and is hereby dismissed at the stage of motion hearing.

14. In view of such dismissal, the interim order dated 29.4.05 has also come to end and IA No.3015/05, IA No.4776/05 appellant's application for grant of stay and IA No.3781/2010 respondent's application for vacating the stay, do not require any further consideration, hence the same are also dismissed. There shall be no order as to the cost.

Appeal dismissed.

I.L.R. [2011] M. P., 474
APPELLATE CIVIL
Before Mr. Justice Abhay M. Naik

M.A. No.273/2001 (Gwalior) decided on 12 October, 2010

ORIENTAL INSURANCE COMPANY LTD. ... Appellant
Vs.
HARI SHANKAR & ors. ... Respondents

A. Motor Vehicles Act (59 of 1988), Section 166 - Legal Representatives **- Claim petition filed on the basis of relationship with deceased by adoption - Held - In case of dispute about adoption, same**

is to be proved in due manner taking into consideration the provisions of Hindu Adoptions and Maintenance Act, 1956. (Paras 8 to 10)

क. मोटर यान अधिनियम (1988 का 59), धारा 166 – विधिक प्रतिनिधि – मृतक के साथ दत्तक ग्रहण सम्बन्ध के आधार पर दावा याचिका प्रस्तुत की गयी – *अभिनिर्धारित* – दत्तक ग्रहण के सम्बन्ध में विवाद होने की दशा में, उसे हिन्दू दत्तक एवं भरण–पोषण अधिनियम, 1956 के उपबंधों को विचार में लेकर सम्यक् ढंग से साबित करना होगा।

***B. Motor Vehicles Act (59 of 1988), Section 166 - Legal Representative - Nephew* - Nephew in the capacity of legal representative may maintain an application for compensation.** (Paras 11 to 13)

ख. मोटर यान अधिनियम (1988 का 59), धारा 166 – विधिक प्रतिनिधि – भतीजा – विधिक प्रतिनिधि की हैसियत से भतीजा क्षतिपूर्ति के लिए आवेदन चला सकता है।

Cases referred :

2007 ACJ 1033, 1987 ACJ 561, 1977 ACJ 253.

Anand Bhardwaj, for the Oriental Insurance Company Ltd.

M.P. Agarwal, for the respondent Nos.1 & 2.

JUDGMENT

ABHAY M. NAIK, J. :–This order disposes of Misc. Appeal No.273/2001 and Misc.Appeal No.288/2001.

2. Briefly stated relevant facts are that deceased Satyanarayan Sharma was employee of M.P.Electricity Board on the Post of Helper. He was going on a job on 10.9.1988 in a jeep bearing registration No. CPH-228 belonging to M.P.Electricity Board, it was hit by truck No. MBW-9903, which was being driven by respondent No.3 in a rash and negligent manner. Satyanarayan Sharma suffered serious injuries and died as a result of same on 11.9.1988. Parents of Satyanarayan Sharma and Santosh Kumar Sharma, alleged adopted son of the deceased Satyanarayan Sharma submitted a claim petition under Section 110-A of Motor Vehicles Act, 1939 claiming compensation to the tune of Rs.6,42,356/-. The offending truck was insured with the Oriental Insurance Company, which submitted the written statement refuting the claim of compensation. This apart, it was stated that Santosh Kumar Sharma is not adopted son of the deceased.

2. Claim case was registered at No. 5/1989. During its pendency parents

of the deceased Satyanarayan Sharma died and claimant/appellant No.1 was substituted in their place. Similarly Santosh Kumar Sharma, the claimant/ appellant No.2 was shown by way of amendment as the son of Late Satyanarayan Sharma. However, it is pertinent to note that in paragraph 6 of the claim petition it has been pleaded right from beginning that claimant/ appellant No.2 is son of real brother of the deceased Satyanarayan Sharma. It was further pleaded that Satyanarayan Sharma was unmarried and had taken in adoption the claimant No.2. The deceased had also declared the claimant No.2 as nominee in M.P.Electricity Board.

3. The Claims Tribunal vide impugned award dated 25.1.2001 held that the claimants/appellants are entitled to a sum of Rs.1,05,920/- as compensation. However, a sum of Rs.76,968/-received from the Commissioner under the Workmen Compensation Act is found liable to be deducted. Accordingly, a sum of Rs.28,952/-has been awarded by the Claims Tribunal under the impugned award against the non-applicants in joint and several manner.

4. Aggrieved by the aforesaid, the Oriental Insurance Company preferred Misc.Appeal No.273/2001 on the ground that adoption having not been duly proved the impugned award is not sustainable in law.

5. The claimants preferred Misc.Appeal No.288/2001 for enhancement of the amount of compensation.

6. Heard learned counsel at length.

7. It may be seen that claimant No.1 namely Hari Shankar Sharma is son of deceased Satyanarayan Sharma whereas claimant No.2 namely Santosh Kumar Sharma is stated to be adopted son of deceased Satyanarayan. As regards relationship of claimant No.1, there is no dispute. However, alleged adoption claimed by Santosh Kumar Sharma (claimant No.2) was denied in specific in the written statement by the Insurance Company. This being so, it was obligatory on the part of claimant No.2 to prove the alleged adoption.

8. Date of birth of deceased Satyanarayan Sharma is 14.2.1954. Thus, the alleged adoption by him, if at all, could have taken place after enforcement of the Hindu Adoptions and Maintenance Act, 1956. Section 5 of the said Act lays down that no adoption shall be made after the commencement of the said Act by or to a Hindu except in accordance with the provisions contained in Chapter II of the said Act, and any adoption made in contravention of the

said provisions shall be void. Requisites of a valid adoption are described in Section 6. Clause (vi) of Section 11 lays down that in every adoption the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth.

9. Claimant No.2 is son of Hari Shankar Sharma, who has not been examined to prove that claimant No.2 was actually given in adoption. Ramcharan, father of the deceased, has admitted in paragraph 3 of his statement that no giving and taking for adoption was performed. There is no other evidence on record to establish that Santosh Kumar was actually given and taken in adoption. This apart, it may be seen that Santosh Kumar has been described in the Nomination Form (Ex.P/2) as nephew of the deceased Satyanarayan.

10. High Court of Himachal Pradesh in the case of *Oriental Insurance Co. Ltd. vs. Lalita Sharma and others* (2007 ACJ 1033) has held that even in claim petition under Section 166 of Motor Vehicles Act, 1988 adoption if disputed is to be proved in due manner. It is true that the sole witness produced by the Insurance Company did not make any version against the alleged adoption, however, it is for the claimants themselves to prove their entitlement. In the facts and circumstances, it is held that claimant No.2 has failed to prove the alleged adoption of him by the deceased Satyanarayan.

11. Learned Claims Tribunal has found in paragraph 50 that parents and claimant No.2 were dependent on the income of the deceased. Parents have already died during pendency of the claim petition. Thus, the claimant No.2 alone is left as a claimant. Section 166 of the Motor Vehicles Act, 1988 enables a legal representative to claim compensation arising out of accident by a motor vehicle. The term "legal representative" is not defined under the said Act. It is defined in Section 2(11) of the Code of Civil Procedure who need not be necessarily a legal heir. This being so, the claimant No.2 is not disentitled to seek amount of compensation.

12. I may also successfully refer for this purpose to paragraph 14 of the Apex Court's decision in the case of *Gujarat State Road Transport Corpn., Ahmedabad vs. Ramanbhai Prabhatbhai and another* (1987 ACJ 561), which is as follows:-

> **"14. Before concluding we may add that although the Act was extensively modified after the receipt of the**

report of the Law Commission, Parliament did not choose to amend section 110-A of the Act by defining the expression 'legal representative' in relation to claims under Chapter VIII of the Act as the 'spouse, parent and children of the deceased' as recommended by the Law Commission. The Law Commission had observed in its 85th Report that it would be appropriate to assign to the expression 'legal representative' the same meaning as had been given to the expression 'representative' for the purposes of the Fatal Accidents Act, 1855 and that would effectively carry out the purpose of social justice underlying Chapter VIII of the Act, to which the Fatal Accidents Act, 1855 was the nearest approximation. This recommendation was made after referring to the divergent views expressed by the various High Courts on the meaning of the expression 'legal representative' in section 110-A of the Act. The fact that Parliament declined to take any action on the recommendation of the Law Commission of India suggests that Parliament intended that the expression 'legal representative' in section 110-A of the Act should be given a wider meaning and it should not be confined to the spouse, parent and children of the deceased."

13. Nephew may be a legal representative for the purpose of claim petition as held by Division Bench's decision of High Court of Gujarat in the case of *Megjibhai Khimji Vira and another vs. Chaturbhai Taijabhai and others* (1977 ACJ 253).

14. In view of the aforesaid discussion, the claimant No.2, namely, Santosh Kumar Sharma is found entitled to amount of compensation even in the absence of proof of adoption. Misc.Appeal No.273/2001 accordingly stands dismissed though for different reasons mentioned hereinabove.

15. Coming to Misc.Appeal No.288/2001, it has been contended on behalf of the claimants/appellants that the amount of compensation has been awarded on lower side since it was arrived at without taking into consideration the future prospects of the deceased Satyanarayan: secondly, multiplier of 17 ought have been applied in place of multiplier of 10 looking to the deceased's age of 34 years and 6 months at the time of accident.

16. As regards alleged future prospects, neither the claimants have made any specific pleading in the claim application nor have placed any material on record in respect of future prospects of difinite nature. The deceased was Helper in the service of M.P. Electricity Board. Channel of promotion based on seniority was not proved at all. Similarly, prospects of annual increment etc. have also not been established by placing on record the relevant material. This being so, the Claims Tribunal is not found to have committed any mistake in not taking into consideration the alleged future prospects for which no foundation has been laid before it. As regards multiplier, it may be seen that multiplier of 17 would have been applicable had there been proof about adoption. Since the adoption of claimant No.2 is not found proved, the Claims Tribunal has not committed any error in applying multiplier of 10. Accordingly, Misc.Appeal No.288/2001 is found meritless and the same is hereby dismissed.

17. At this stage, Shri Anand Bharadwaj, learned counsel appearing for the Insurance Company, submitted that a sum of Rs.15,000/- was deposited as interim award by the Insurance Company with the Claims Tribunal, which is also liable to be adjusted. Learned counsel for the claimants fairly expressed no objection to it. This being so, it is directed that the Claims Tribunal would ensure that the amount of Rs.15,000/-, which was deposited by the Insurance Company, as interim compensation, would be adjusted at the time of execution of the impugned award.

18. Both the appeals stand accordingly disposed of in the aforesaid manner with no order as to costs.

Appeal disposed of.

I.L.R. [2011] M. P., 479
APPELLATE CIVIL
Before Mr. Justice G.S. Solanki

F.A. No.243/1997 (Jabalpur) decided on 25 November, 2010

BASANT KUMAR ... Appellant
Vs.
INDRA SEN (DECEASED) THROUGH HEIRS & ors. ... Respondents

***A. Hindu Women's Right to Property Act (18 of 1937), Section 559(1) - Maintenance to widow* - Husband died in 1922 - Benefit under the Act was not available to wife - However, she had a right of maintenance out of property of her late husband.** (Para 15)

क. हिन्दू महिलाओं का सम्पत्ति का अधिकार अधिनियम (1937 का 18), धारा 559(1) – विधवा को भरण पोषण – पति की मृत्यु 1922 में हुई – अधिनियम के अन्तर्गत लाभ पत्नी को उपलब्ध नहीं था – तथापि उसे उसके मृत पति की सम्पत्ति में से भरण पोषण का अधिकार था।

B. Hindu Succession Act (30 of 1956), Section 14 - Property of female Hindu **- A Hindu widow has a pre-existing right of maintenance in property left by her husband and any instrument executed afterward in her favour in which her right shown as limited right, would be in recognizance of her pre-existing right, and not as a new right created for first time.** (Para 19)

ख. हिन्दू उत्तराधिकार अधिनियम (1956 का 30), धारा 14 – हिन्दू स्त्री की सम्पत्ति – कोई हिन्दू विधवा अपने पति द्वारा छोड़ी गयी सम्पत्ति में भरण पोषण का पूर्ववर्ती अधिकार रखती है और इसके बाद उसके पक्ष में निष्पादित कोई लिखत, जिसमें उसका अधिकार परिसीमित अधिकार के रूप में दर्शाया गया है, उसके पूर्ववर्ती अधिकार की पहचान में होगा न कि प्रथम बार सृष्ट किसी नये अधिकार के रूप में।

C. Hindu Succession Act (30 of 1956), Section 14 - Conditions required **- For applicability of Section 14 two conditions must exit (i) Concerning female Hindu must be in possession of property (ii) Such property must be possessed by her as a limited owner.** (Para 20)

ग. हिन्दू उत्तराधिकार अधिनियम (1956 का 30), धारा 14 – आवश्यक परिस्थितियाँ – धारा 14 की प्रयोज्यता के लिए दो परिस्थितियाँ अस्तित्वमान होनी चाहिए (i) सम्पत्ति संबंधित हिन्दू स्त्री के कब्जे में होनी चाहिए, (ii) उसके द्वारा ऐसी सम्पत्ति पर कब्जा परिसीमित स्वामी के तौर पर होना चाहिए।

D. Hindu Succession Act (30 of 1956), Section 14 - Possession **- Possession of a share of husband in joint family property in lieu of maintenance is sufficient to apply the provision of sub-clause (1) of Section 14.** (Para 20)

घ. हिन्दू उत्तराधिकार अधिनियम (1956 का 30), धारा 14 – कब्जा – भरण पोषण के बदले में संयुक्त परिवार की सम्पत्ति में पति के अंश का कब्जा धारा 14 के उपखण्ड (1) के उपबंध को लागू करने के लिए पर्याप्त है।

E. Land Revenue Code, M.P. (20 of 1959), Section 114 - Revenue entry **- No right, title or interest can be created by orders of Revenue Court regarding mutation.** (Para 29)

ड. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 114 – राजस्व प्रविष्टि – राजस्व न्यायालय के आदेशों द्वारा नामांतरण के संबंध में कोई अधिकार, हक या हित सृष्ट नहीं किया जा सकता।

Cases referred :

AIR 1970 SC 1643, AIR 1977 SC 1944.

Divesh Jain, for the plaintiff/appellant.

Arun Kumar Choubey, for the defendant/respondent No.2.

Other defendants/respondents were served but not present.

JUDGMENT

G.S. SOLANKI, J. :–Being aggrieved by the judgment and decree dated 5th April 1997 passed by Second Additional Judge to the Court of District Judge, Hoshangabad in Civil Suit No. 9-A/1982, plaintiff/appellant has preferred this appeal under Section 96 of the Code of Civil Procedure.

2. It is undisputed that Respondents No. 1 and 7 were died during the trial before lower Court. Their respective legal representatives were brought on record. It is also undisputed that Respondents No. 4, 5 and 6 remained absent after filing their written-statements, therefore, trial Court had proceeded exparte against them. Respondent No.8, State of Madhya Pradesh was formal party remained absent, trial Court had also proceeded exparte against it. It is also undisputed that genealogy of Moolchand, husband of Baijanti Bai (predecessor in title of plaintiff/appellant) is as follows:-

Mannulal (died on 1910)

Moolchand (died on 1922)	Balmukund (died on 1968)
Baijanti Bai	Indrasen
	Chandrasen
	Lalji Prasad
	Keshribai
	Bhagwatibai

It is also undisputed that Balmukund had executed a Gift deed Ex.D/1 in favour of Baijantibai in the year of 1960.

3. Plaintiff/appellant Basant Kumar has filed a suit against defendant/respondent for declaration and permanent injunction of disputed land as mentioned in plaint of para No.1. According to him, Baijantibai, widow of Moolchand, executed a registered gift deed of disputed land on 3.11.1980 (Ex.P/1). Since then plaintiff has possession over the disputed land. Disputed land was mutated in the name of plaintiff. According to plaintiff/appellant, defendant/respondent has no right, title or interest in the disputed land but on 2.7.1982 defendants/respondents No. 1 to 7 had interfered in the possession of plaintiff/appellant, therefore, he filed the suit before the trial Court.

4. Defendants/respondents No. 1 to 7 denied the fact regarding execution of Gift deed in favour of plaintiff/appellant on 3.11.1980. According to them, Moolchand, husband of Baijantibai, had died in the year 1922 and his right, title or interest of the property devolve into defendant/respondent by way of principle of reversion. At that time Baijantibai had not acquired any right, title or interest in the disputed land. They further pleaded that Balmukund, father of respondent, executed gift deed in favour of Baijantibai Ex.D/1 on 26.7.1960 with a condition that Baijantibai has a limited right of maintenance in the disputed land and she was restrained to alienate the disputed property, therefore, Baijantibai has no right to execute the Gift deed in favour of plaintiff/appellant.

5. It is also pleaded that on 3.11.1980, Baijantibai was aged of 80 years. She was unable to understand the recital of document and Munshilal, father of appellant, taken her in active confidence and Gift deed dated 3.11.1980 got executed by playing fraud on her. In these circumstances, Gift deed Ex.P/1 is void and effective-less, thereby no title, interest has passed, in favour of plaintiff/appellant. On the basis of aforesaid pleadings respondent prays for dismissal of suit.

6. On appraisal of evidence on record, trial Court dismissed the suit of plaintiff/appellant. Being aggrieved, this appeal has been filed by the plaintiff/appellant under Section 96 of Code of Civil Procedure.

7. Learned counsel for the plaintiff/appellant submitted that trial Court committed error in not appreciating the evidence on record, in its proper perspective. He further contended that trial Court committed error in holding that Baijantibai had no right, title or interest in the disputed land. He further contended that the case of Baijantibai will govern by Section 14(1) and explanation and not by Section 14(2) of Hindu Succession Act (hereinafter referred to 'The Act'). After coming into the force of Hindu Succession Act,

1956 she acquired an absolute right in the disputed property and that absolute right cannot be limited by any deed.

8. On the contrary, learned counsel for the respondent No.2 submitted that trial Court was right in holding that after the death of Moolchand, the entire property including disputed land was devolved by the principle of reversions and after the death of Balmukund in 1968, defendants/respondents become title holder. Baijantibai had only limited right for maintenance in the disputed land through gift deed Ex.D/1. In this way, he justified and supported the impugned judgment and decree and prays for dismissal of the appeal.

9. I have heard the learned counsel for the parties and perused the impugned judgment and the evidence and other material on recorded.

10. The main controversy between the parties hinges on the facts that Baijantibai had acquired absolute right in the disputed property or she had only limited right of maintenance. In other words case of Baijantibai is governed by Section 14(1) and explanation thereof or by Section 14(2) of the Hindu Succession Act, 1956 ?

11. It is undisputed that Moolchand, husband of Baijantibai, was died in the year 1922 before coming into force of Hindu Womens' Right to Property Act, 1937. On this fact defendant Chandra Sen (DW2) deposed that after the death of Moolchand, his father Balmukund was in possession of the whole ancestral property. He further deposed that Baijantibai had no right, interest or title in the property. She had only right to maintenance which was executed through Ex.D/1, executed by Balmukund.

12. Ramesh Chandra Sharma (DW-1) proved the registration of Ex.D/1.

13. On the strength of aforementioned evidence, learned counsel for the respondents contended that Moolchand, husband of Baijantibai , was died before the enactment of Womens' Right to Property Act, 1937 and Baijantibai got nothing because Womens' Right to Property Act, 1937 applies only to separate property left by a Hindu Male. It does not apply to co-parcenery property. He places reliance on *(Shyamlal Vs Amar Nath)* AIR 1970 SC 1643.

14. On the other hand, learned counsel for the appellant submitted that Baijantibai had pre-existing right of maintenance in the property of her husband and afterward same was recognized by his brother-in-law Balmukund by

executed Ex.D/1 Gift Deed in her favour. Therefore, she became absolute owner of the disputed property. He further contended that this absolute right cannot be restricted by any deed. He relied on *(Vaddeboyina Tulasamma & ors. Vs. Vaddeboyina Sesha Reddi)* AIR 1977 SC 1944.

15. It is true that Moolchand had died on 1922 thus, succession opened in 1922 and the benefit of Hindu Womens' Right to Property Act, 1937 was not available to Smt. Baijantibai but even then Baijantibai being a widow of late Moolchand, who had share in co-parcenery immovable property clearly had a right of maintenance out of the property of her late husband. Please see Section 559 (1) of Principles of Hindu Law by Mulla which read as follows :-

> (1) A widow, who does not succeed to the estate of her husband as his heir, is entitled to maintenance -
>
> (i) out of her husband's separate property,
>
> (ii) out of property in which he was a co-parcener at the time of his death.

Under old Hindu Law the widow had at least a right to maintenance out of her husband's estate whether such estate was in the hands of his male issue or in the hands of his co-parceners. The co-parcener in possession of such estate was liable to maintain the widow "not because he was under an obligation to maintain her but because he has in his hands her husband's estate". Thus, obviously, even if Smt. Baijantibai did not succeed as a heir to her husband, she had a right to maintenance out of the property of her husband which was in the hands of Balmukund, father of the respondents, who afterward had executed a Gift Deed Ex.D/1 in her favour.

16. Gift Deed Ex.D/1 is undisputed document. Learned counsel for the respondent contended on the basis of note written in the document as to the effect that Baijantibai has no right to sale, alienate, gift or mortgage the disputed land. In this way, Baijantibai was granted a limited right by Ex.D/1.

17. On the contrary, learned counsel for the appellant contended that an absolute right was given by Ex.D/1. He referred the first part of the document in which it is written that Baijantibai got possession of the property as owner thereof.

18. Section 14 of the Hindu Succession Act, 1956 reads as follows:

> "Property of a female Hindu to be her absolute property.-

(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation:- In this sub-section "property" includes both movable and immovable property acquired by a female Hindu by inheritance or device, or at a partition or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, an also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-sec.(1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil Court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

Analysis of this provision would show that female Hindu would become a full owner in case (1) she is in possession of property (2) whether the same is acquired before or after the commencement of the Act. The provision has a very wide scope. Under Explanation "property" includes both movable and immovable property and mode of acquisition is also very widely defined including (1) by inheritance, (2) by device, (3) at a partition, (4) in lieu of maintenance or arrears of maintenance, (5) by gift by any person whether relative or not, before at or after her marriage, (6) by her own skill or exertion, (7) by purchase, (8) by prescription and (9) by any other manner whatsoever, and also any such property held by her as 'stridhana' immediately before the commencement of the Act. Obviously, sub-section (2) is a proviso to sub-section (1) and is applicable only when any property is acquired under some instrument like gift, Will or other instrument or decree, order or award of the Court which prescribes a restriction by its own terms. However, in cases where such a female has 'any pre-existing right' to hold the property otherwise than under such an instrument, Section 14(2) is not applicable."

19. In *Vaddeboyina Tulasamma's case* (supra) Hon'ble Apex Court elaborately discussed the applicability of sub-clauses (1) and (2) of Section

14 of Hindu Succession Act that a Hindu widow has a pre-existing right of maintenance as an heir of her husband in the property left by her husband and if any instrument executed afterward in her favour in which her right shown as limited right. In that circumstances, the property given to her was in recognization of her pre-existing right, and not as a new right created for first time. Same position is in the case in hand. In this case Balmukund, father of respondent, executed gift deed Ex.D/1 and gave possession of the disputed property, in lieu of her right of maintenance. In these circumstances, although Ex.D/1 gave a restricted right to Baijantibai in the property, but due to the pre-existing right of maintenance in the property of her husband, this document only recognizes her pre-existing right in the property. In other word no new right, title or interest was created by Ex.D/1. In these circumstances sub-clause (2) of Section 14 of Hindu Succession Act will not applicable in this case.

20. As far as possession of the Baijantibai is concerned, as discussed hereinabove Baijantibai had pre-existing right in the co-parcenery property. In these circumstances, she was in joint possession with her brother-in-law Balmukund before executing of Ex.D/1 and after execution of Ex.D/1, she acquired absolute possession on the disputed property. In these circumstances possession of a share of her husband in the joint family property in lieu of maintenance is sufficient to apply the provision of sub-Clause (1) of Section 14 of the Hindu Succession Act. For the applicability of the provisions, two conditions must co-exist namely (1) the concern female Hindu must be in possession of the property and (2) such property must be possessed by her as a limited owner. In this case both the conditions are fulfilled, therefore, Baijantibai became full owner of the property possessed by her at the time of commencement of Hindu Succession Act, 1956.

21. In above circumstances, the authority cited by learned counsel for the respondent *(Shyamlal Vs Amar Nath)* AIR 1970 SC 1643 is not applicable to the present case because in this case Baijantibai had a pre-existing right of maintenance in the co-parcenery property of her husband Moolchand and ultimately this pre-existing right was recognized in sub-clause (1) of Section 14 of Hindu Succession Act, 1956.

22. Learned counsel for the appellant contended that Baijantibai being a absolute owner executed a gift deed Ex.P/1 dated 3.11.1980 in favour of appellant Basant Kumar, therefore, Basant Kumar became the owner of disputed property.

23. Learned counsel for the respondent contended that Baijantibai was an old women. She was not in fit mental condition to execute the gift deed, therefore, Ex.P/1 is doubtful document. He further contended that execution of Ex.P/1 is also not proved by the appellant.

24. Basant Kumar (PW1) deposed that Baijantibai had executed the gift deed Ex.P/1 in his favour, therefore, he is in possession of the disputed land from the date of execution of Ex.P/1.

25. Mahesh Kumar Shrivastava (PW4) is a witness of execution of Ex.P/1. He categorically stated that at the time of execution of document Baijantibai was healthy and fit to execute the document. Document was written by Munshi Gendalal, who is no more in the world.

26. Another witness of this document is Thakur Virendra Singh (DW6) appeared on behalf of respondent and deposed that at the time of execution of document Baijantibai was about 85-90 years of age. He treatment was continued in Hoshangabad Hospital and for execution of the document she was brought from the hospital. She remained unable to explain the decease of Baijantibai and time and date regarding the admission of Baijantibai in Hoshangabad Hospital. On the contrary, he clearly admitted that he signed the document Ex.P/1 which was written by Munshi Gendalal. He further admitted that Baijantibai recognized him at the time of execution of document. In these circumstances, execution of Ex.P/1 cannot be said to be doubtful though Baijantibai was old aged person but despite old age she was in sound and fit condition to execute the Ex.P/1., therefore trial Court committed error in not appreciating the evidence on record in its proper perspective.

27. Regarding possession of the disputed property witnesses Sunderlal (PW2) and Hyderbeg (PW3) supported the statement of plaintiff Basant Kumar. It is further supported by Patwari, Sudama Patel (PW5), who proved Kishtbandi Khitoni (Ex.P/11) and Khasra Panchsala Exhibits P/ 12, 13 and 14.

28. Respondent Chand Sen (DW2) filed Khasra Panchsala of 1979-80 to 1982-83 vide Ex.D/13 and 14, the orders of Revenue Courts regarding dispute of mutation Ex. P/11, 12, 15 and 16.

29. It is well settled principle of law that no right, title or interest can be created by the orders of Revenue Court regarding mutation. Oral evidence of Hyderbeg (PW3) and Sudama Patel (PW5) shows that Sunderlal was in

possession of disputed land as Bataidar on behalf of plaintiff/appellant. Defendant Chandsen raised the dispute when crops were harvested by Sunderlal. Sudama Patel, Patwari also admitted that he seen the possession of both the parties on disputed land, then he further stated that he is unable to say that who was in possession of the disputed land. In these circumstances in the year of 1981-82, there was a dispute regarding the possession of the property and it shows that defendant/respondent tried to dispossessed plaintiff/appellant from the disputed property, therefore, plaintiff/appellant is entitled to get a decree of declaration as well as injunction against the defendant/respondent.

30. Thus, from the above mentioned discussion, it is proved that Baijantibai had the absolute right in the disputed property and she had executed the gift deed in favour of appellant Basant Kumar, therefore, Basant Kumar became the owner of the disputed property/land and he is entitled to get decree of declaration and injunction against the respondent.

31. In the result, this appeal is allowed and judgment and decree passed by the trial Court is hereby set aside, and following decree is passed against the respondents:-

(i) It is declared that Plaintiff/appellant is the bhumiswami of disputed land i.e. Khasra Nos. 2, 3, 12, 13, 4, 11, 16, 18, 19, 41, 42, 43, 332, 335 and 448/14 total Rakba 12.678 Hectare of village Tamcharu, Tehsil and District Hoshangabad.

(ii) Defendants / respondents are restrained permanently to interfere in the possession of above mentioned property of plaintiff/appellant.

(iii) Respondents shall bear their own cost and cost of the appellant.

32. Counsel fees as per schedule or as per certificate (whichever is less).

33. Decree be drawn accordingly.

Appeal allowed.

I.L.R. [2011] M. P., 489
APPELLATE CRIMINAL

Before Mr. Justice S.L. Kochar & Mr. Justice Brij Kishore Dube

Cr.A. No.1128/2000 (Indore) decided on 18 May, 2010

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

A. Criminal Jurisprudence - Cardinal principles - **(i) Prosecution must prove its case beyond reasonable doubt, (ii) Prosecution cannot take advantage of weakness of defence case, (iii) Whenever two sets of evidence or two inferences are possible, evidence or inference in favour of accused has to be acted upon.** (Para 8)

क. आपराधिक विधि शास्त्र – मुख्य सिद्धान्त – (i) अभियोजन को अपना मामला युक्तियुक्त सन्देह के परे साबित करना चाहिये, (ii) अभियोजन बचाव पक्ष के मामले की कमजोरी का लाभ नहीं उठा सकता है; (iii) जहाँ दो साक्ष्य संवर्ग अथवा दो निष्कर्ष संभावित हों तो अभियुक्त के पक्ष में साक्ष्य या निष्कर्ष पर कार्यवाही की जायेगी।

B. Penal Code (45 of 1860), Section 302 - Circumstantial evidence - Burden of proof - **Deceased wife died due to consumption of sulphas - Appellant admitted having given Metacin and seridone medicine - *Held* - No evidence that appellant was all alone in the company of deceased - Trial Court was wrong in holding that burden lies on appellant to establish that no other tablet was given to deceased.** (Para 9)

ख. दण्ड संहिता (1860 का 45), धारा 302 – परिस्थितिजन्य साक्ष्य – सबूत का भार – मृतका पत्नी की सल्फास खाने से मृत्यु हुई – अपीलार्थी ने मेटासिन तथा सेरिडोन दवाइयाँ देना स्वीकार किया – *अभिनिर्धारित* – कोई साक्ष्य नहीं कि मृतक के साथ केवल अपीलार्थी ही था – विचारण न्यायालय द्वारा यह अभिनिर्धारित करना गलत था कि यह सिद्ध करने का भार अपीलार्थी पर था कि मृतका को कोई अन्य गोली नहीं दी गयी।

Vikas Yadav, for the appellant.
G. Desai, Dy.A.G., for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by : **S.L. KOCHAR, J. :**–The appellant has filed the aforesaid appeal against the judgment and order of conviction and sentence passed by the learned I

Addl. Sessions Judge Mhow, District Indore in S.T No.96/2000 judgment dated 12/9/2000 by which the appellant stands convicted U/Ss.302 of the IPC, sentenced to undergo RI for life with fine of Rs.1000/-; in default of payment of fine to undergo further RI for six months.

2. In nut shell, the prosecution case as unfolded before the trial Court is that Rekhabai was married with appellant before 5-6 years of her death on 28/10/1999. Upto two years of her marriage she was kept properly in her in-laws house, thereafter accused persons started beating and ill-treatment with Rekhabai. She was not provided proper food, cloth and other facilities. She was pressurized for bringing money to purchase KADI (silver ornament). Before three months of the incident, Rekhabai came to her parents house and disclosed about torturous behaviour by the appellant and acquitted co-accused, her sister-in-law. Inspite of this, Rekhabai was sent back by her father Kaniram to her in-laws house. On 28/10/1999 Rekhabai died because of consuming some medicine. Kaniram (PW. 1), father of deceased lodged the written report of the incident on 4/11/1999 (Ex.D.1) on the basis of which FIR (Ex.P.9) was registered by SHO B.L. Soni (PW. 12). After admission of the deceased in the hospital, she was not in a position to give dying declaration but Dr. Mahesh Mohbiya (PW.2) recorded the statement of the appellant (Ex.P.2) wherein appellant has disclosed that his wife was suffering from headache and he gave metacine and saridone tablet to her but what she had consumed he was not knowing and after her ill-health he brought her to the hospital and all these events had taken place before 45 minute. This statement was recorded in presence of Chhogalal and thumb impression of the appellant was also taken at "B to B" part by Dr.Mohbiya. Because of deterioration in condition of deceased, she was shifted to M.Y. Hospital where she died in the intervening night of 28th and 29th October, 1999. After completion of inquest enquiry, the dead body was sent for postmortem examination and the same was performed by Dr.N.M. Unda (PW.14). Postmortem report is Ex.P.10. Vomitting and viscera of the deceased were sent to FSL and its report is Ex.P.9. This report has confirmed that deceased had died because of sulfas poison. Investigating Officer, after recording the statements of the witnesses acquainted with the facts of the case and on completion of investigation, filed the charge sheet against the appellant and acquitted co-accused Smt.Ramubai, the sister-in-law of the appellant for commission of offence U/Ss.306, 304(B) and 302 of the IPC.

3. The accused persons denied the charges, therefore, put to trial. They

have not examined any witness in defence. Learned trial Court, after recording the statements of the prosecution witnesses and hearing both the parties, while acquitting co-accused Ramubai, convicted and sentenced the appellant as noted herein above.

4. We have heard the learned counsel for parties and also perused the entire record carefully.

5. It culled out from the record that conviction of the appellant is based on testimony of Dr.Mahesh Mohabiya (Ex.P.2),.the statement of appellant recorded by him in the hospital. Learned trial Court, while discussing the circumstantial evidence held in para 27, 28 and 29 that appellant had admitted giving of seridone and metacine tablet to his wife before Dr.Mohabiya, therefore, burden lies on him to prove that the tablets given by him were the same tablets but he failed to adduce any evidence to explain this circumstance especially when he was alone with his wife in the hospital. In para 32, learned trial Court has held that because of negligence and lapses on the part of Investigating Officer, prosecution has failed to establish beyond reasonable doubt the fact of tense relation between appellant and deceased, at the same time the finding has also been given that appellant was not having cordial relation with his wife.

6. The main question for us to decide is that up to what extent statement of appellant (Ex.P.2) recorded by Dr.Mohabiya can be acted upon and what would be its probative value ?

7. Dr.Mohabiya has deposed that deceased was not in a condition to speak, therefore, statement of her husband/appellant was recorded in presence of his elder brother Chhogalal (not examined by the prosecution) and appellant gave statement that deceased was suffering from headache for which he had given her metacine and seridone tablets but what she had consumed was not known to him and after felling ill, they brought her to the hospital on the basis of this statement, in our considered view it cannot be said positively that appellant instead of giving metacine and seridone tablets gave sulfas tablets to deceased.

8. There are three cardinal principles of criminal jurisprudence (1) prosecution is required to prove its case beyond reasonable doubt (2) prosecution cannot take advantage of weakness of the defence case and is required to stand on its on leg (3) whenever there are two sets of evidence or

two inferences are possible, the evidence or inference in favour of the accused has to be acted upon.

9. We have examined the evidence adduced by the prosecution in the instant case and judgment rendered by the trial Court. On an anvil of above mentioned three principles of criminal jurisprudence, in our considered view, the learned trial Court has erred in holding that since the appellant has admitted giving of metacine and seridone tablets, burden lies on him to establish that no other tablet like sulfas poison was given to the deceased. There is no evidence on record that the appellant was all alone in the company of the deceased for a particular period and did not leave the company of his wife before giving of metacine and seridone tablets or after supplying the same, therefore, the possibility of consumption of sulfas tablets prior or after supplying of metacine and seridone tablets by the appellant to his wife cannot be ruled out.

10. It is also clear from the contents of statement of appellant (Ex.P.2) that he had simply gave metacinc and seridone tablets. Nowhere it is mentioned in his statement that same tablets were consumed by the deceased before him. On the contrary, it is mentioned in the statement that what else had been consumed by the deceased he was not knowing.

11. It is admitted position that written complaint was filed by the father after lapse of seven days and on the basis of this complaint, FIR was registered. It is also highly abnormal that Doctor who attended the deceased first in point of time in the hospital would record the statement of her husband or any relative. There is no such procedure prevalent in medico legal matters. Normally either Doctor records the statement of patient or mentioning history in MLC report as disclosed by the patient or the persons who came along with the the patient. In document (Ex.P.2), date, time and place where this document was prepared or statement of appellant was recorded by Dr.Mohabiya are not mentioned. Without any basis, learned trial Court in para 21 has given finding that statement (Ex.P.2) was sent to the concerned police station by Dr.Mohabiya on the same day. We have gone through the statements of all the witnesses examined by the prosecution including police personnels but nowhere it is mentioned that Ex.P.2, the statement of appellant recorded by Dr.Mohabiya was sent to the police on the same day, therefore, possibility of preparation of this unusual document after registration of the crime cannot be ruled out. Dr.Mohabiya (PW.2) has also nowhere stated in the statement that statement (Ex.P.2) of the appellant was sent by him to police on the same day.

As a matter of fact in the entire evidence adduced by the prosecution, there is no material to show as to how investigating officer received document (Ex.P.2). The attesting witness of document Ex.P.2 Chhogalal has not been examined by the prosecution and no explanation has been given as to why he was not examined. All these circumstances are shrouded with suspicion, therefore, it would be hazardous to rely upon document (Ex.P.2) as circumstantial evidence against the appellant.

12. Resultantly, on the basis of aforesaid discussion, we arc of the opinion that prosecution has failed to prove its case beyond reasonable doubt against the appellant. **Hence this appeal is allowed.** Conviction and sentence passed by the trial Court against the appellant are hereby set aside. Appellant is in jail, the learned trial Court is directed to release him forthwith if not wanted in any other criminal case.

Appeal allowed.

I.L.R. [2011] M. P., 493
APPELLATE CRIMINAL

Before Mr. Justice S.L. Kochar & Mrs. Justice S.R. Waghmare

Cr.A. No.951/2000 (Indore) decided on 6 August, 2010

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

A. Evidence Act (1 of 1872), Section 134 - Number of witnesses **- Quality of witness is material and not quantity.** (Para 6)

क. साक्ष्य अधिनियम (1872 का 1), धारा 134 – साक्षियों की संख्या – साक्षी की गुणवत्ता तात्विक है न कि संख्या।

B. Evidence Act (1 of 1872), Section 3, Penal Code, 1860, Section 302 - Solitary child witness **- Evidence of child witness contrary to medical evidence - Child witness did not disclose the names of assailants to any other witness and report against unknown persons was lodged - Evidence of child witness not reliable.** (Paras 7 & 9)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड संहिता, 1860, धारा 302 – अकेला बालक साक्षी – बालक साक्षी की साक्ष्य, चिकित्सीय साक्ष्य के प्रतिकूल – बालक साक्षी ने हमलावरों के नाम किसी अन्य साक्षी को प्रकट नहीं किये और अज्ञात व्यक्तियों के विरुद्ध रिपोर्ट दर्ज की गई – बालक साक्षी की साक्ष्य विश्वसनीय नहीं।

C. ***Evidence Act (1 of 1872), Section 114(g) - Presumption*** - **First informant not examined by prosecution - No reasons assigned by prosecution for non-examination of this witness - Held - Adverse inference can be drawn against prosecution that if this witness would have been examined in Court, he would have not supported the prosecution case.** (Para 9)

ग. *साक्ष्य अधिनियम (1872 का 1), धारा 114(जी)* – *उपधारणा* – प्रथम सूचनादाता का अभियोजन द्वारा परीक्षण नहीं किया गया – अभियोजन द्वारा इस साक्षी का परीक्षण न कराने का कोई कारण नहीं दिया गया – *अभिनिर्धारित* – अभियोजन के विरुद्ध प्रतिकूल निष्कर्ष निकाला जा सकता है कि यदि इस साक्षी का न्यायालय में परीक्षण किया गया होता, तो वह अभियोजन के मामले का समर्थन नहीं करता।

D. ***Penal Code (45 of 1860), Section 302/148*** - **FIR delayed and first informant also not examined - The testimony of solitary child/ eye witness was found not safe to place reliance - The conviction and sentence passed by the trial Court set aside.** (Para 10)

घ. *दण्ड संहिता (1860 का 45), धारा 302/148* – प्रथम सूचना रिपोर्ट विलम्बित और प्रथम सूचनादाता का भी परीक्षण नहीं किया गया – अकेले बालक/प्रत्यक्षदर्शी साक्षी की परिसाक्ष्य विश्वास करने के लिए सुरक्षित नहीं पायी गयी – विचारण न्यायालय द्वारा पारित दोषसिद्धि और दण्डादेश अपास्त।

Case referred :

AIR 1957 SC 614.

Yogesh Purohit, for the appellants.

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

JUDGMENT

S.L. KOCHAR, J. :– The appellants have preferred this appeal challenging the impugned judgment dated 9/8/2000 passed in S.T. No.35/96 by learned Additional Sessions Judge, Biaora, district Rajgarh (M.P.), whereby convicted the appellants under Section 302/149 of the Indian Penal Code (for short "the IPC"), sentenced to RI for life with fine of Rs.1,000/- to each. The appellants have also been convicted under Section 148 of "the IPC", sentenced to RI for one year with fine of Rs.1,000/- to each. In default of payment of fine, each appellant shall suffer additional RI for three months in two counts.

2. According to the prosecution case, on 7.11.1995 at about 6-6.30 p.m. complainant Hari Singh (PW-8) had gone to his field with a tiffin for his Bhabhi

Maa from his house situated in village Amargarh. In the field his Bhabhi Maa and **Batedar** (partner) were sleeping. After reaching of Hari Singh, **Batedar** left for village Amargarh. Thus, complainant Hari Singh and his Bhabhi Maa namely Gulab Bai remained at the field. At about 7 to 8 P.M. when Gulab Bai was lying on bed and complainant Hari Singh was sitting nearby, 5-6 persons came from the side of village Amargarh having Lathis and Farsis. The deceased Gulab Bai said Hari Singh to run away and seek help. Hari Singh ran away up to some distance and by hiding himself behind the heaps of stones and dust, saw that appellants had assaulted Gulab Bai. Upon hearing cry, wife of Chhitar Singh reached on the spot. Gulab Bai succumbed to her injuries. Complainant Hari Singh lodged the report in the police station (Ex.P/32), on the basis of which police registered Crime No.152/95 for the offences under sections 147, 148 and 302/149 of "the IPC", against five persons. On preparation of inquest report (Ex.P/21), the dead body was sent for postmortem examination and the same was conducted by PW-4 Dr. B.K. Gupta. The postmortem report is Ex.P/14. Accused persons were arrested and on their disclosure statements, weapons were seized. Investigating officer recorded the statements of the witnesses, who were acquainted with the facts of the case and on completion of investigation, filed the charge sheet against appellants.

3. Appellants refuted the charges and pleaded their false implication on account of previous ill-will. They have examined two witness in their defence, whereas prosecution has examined, in all, 15 witnesses. Learned trial Court finding the appellants guilty, convicted and sentenced them, as mentioned herein-above.

4. We have heard the learned counsel for the parties and also perused the entire record carefully. It borne out from the record that conviction of the appellants is based on the solitary testimony of PW-8 Hari Singh, son of deceased, who was studying in 6th class at the time of incident. His father was inside the jail and facing prosecution for murder, and in the said case appellants had appeared as a witness against his father, as admitted by this witness in his deposition.

5. The moot question for us to decide is whether solitary testimony of child witness PW-8 Hari Singh, son of deceased, who was aged about 12 years at the time of incident, is rightly relied upon in the facts and circumstances of the instant case by the learned trial Court, or not?

6. **It is settled legal position that for proving the case quality of**

witness is material and not the quantity. Section 134 of the Evidence Act is clear on this point. Supreme Court has discussed this legal position in case of *Vadivelu Thevar Vs. State of Madras* [AIR 1957 SC 614] and held as under in paragraph 10 :-

> "The decision of this Court in the case of *Vemireddy Satyanarayan Reddy v. State of Hyderabad,* 1956 S C R 247: (S) AIR 1956 SC 379) (B) was also relied upon in support of the contention that in a murder case the court insists on corroboration of the testimony of a single witness. In the said reported decision of this Court, P.W. 14 has been described a 'a dhobi boy named Gopai.' He was the only person who had witnessed the murder and his testimony has been assailed on the ground that he was an accomplice. Though this court repelled the contention that he was an accomplice, it held that this position was analogous to that of an accomplice. This court insisted on corroboration of the testimony of the single witness not on the ground that this was the only evidence on which the conviction could be based on the ground that though he was not an accomplice, his evidence was analogous to that of an accomplice in the peculiar circumstances of that case as would be clear from the following observations at p.252 (of SCR): (at p.381 of AIR):
>
> ".....Though he was not an accomplice, we would still want corroboration on material particulars in this particular case, as he is the only witness to the crime and as it would be unsafe to hang four people on his sole testimony unless we feel convinced that he is speaking the truth. Such corroboration need not, however, on the question of the actual commission of the offence; if this was the requirement, then we would have independent testimony on which to act and there would be no need to rely on the evidence of one whose position may, in this particular case, be said to be somewhat analogous to that of an accomplice though not exactly the same."
>
> It is not necessary specifically to notice the other decisions of the different High Courts in Indian in which the court insisted on corroboration of the testimony of a single witness, not as a proposition of law, but in view of the circumstances of those

cases. On a consideration of the relevant authorities and the provisions of the Evidence Act, the following propositions may be safely stated as firmly established;

(1) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character.

(2) Unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character.

(3) Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the Judge before whom the case comes.

7. Applying the aforementioned test, the solitary eyewitness, who was 12 years old at the time of incident, and his statement regarding causing of injuries to deceased by sharp edged weapon i.e. Farsi, is contrary to the medical evidence; wherein Dr. Gupta (PW-4) did not find even a single injury caused by hard and sharp object. Therefore, testimony of this witness is not corroborated by the medical evidence on material particulars, specially when the witness has said that the accused persons were having Farsis and caused several injuries to his mother.

8. The First Information Report (Ex.P/32) was recorded on the next day at 7.10 p.m., on the basis of Dehati Nalishi (Ex.P/19), recorded on 8.11.1995 in the morning at 8.10 a.m. on the spot. No reasonable and plausible explanation has been given as to why in the night report was not lodged in the police station, specially when upon hearing the cry of this witness villagers had assembled on the place of incident.

9. PW-5 Chhitar, PW-7 Ram Singh, PW-10 Jagdish and PW-11 Jagannath had reached on the spot immediately after the incident in the night but to these witnesses, even by their asking, Hari Singh (PW-8) did not disclose the names

of assailants. Chowkidar of village Amargarh named Lakshminarayan gave a report (Ex.P/20A) in police station, wherein names of the appellants are not mentioned as perpetrator of the crime. It was the report against unknown persons and before going to police station he, villagers Ram Singh and Phool Singh had reached on the spot, thereafter went to police station at 10:00 P.M. for lodging the report. If Hari Singh (PW-8) had witnessed the incident and if he had disclosed the names of assailants to Chowkidar and other villagers, there is no reason for Chowkidar not to mention the names of the assailants in report (Ex.P/20A). The statement of Hari Singh (PW-8) that he had disclosed the names of the appellants as author of the crime, has not been supported by independent witnesses, and Chowkidar who lodged the report, has not been examined by the prosecution. For non examination of this witness, no reason has been assigned by the prosecution, therefore, adverse inference can be drawn against the prosecution as per Provision under Section 114(g) of the Evidence Act that if this witness would have been examined in Court, he would have not supported the prosecution case, because of which prosecution had withheld him. According to solitary child, interested and inimical eyewitness (PW-8) Hari Singh, six persons had assaulted his mother Gulab Bai and each had caused at least 10 blows but Dr. Gupta (PW-4) found only four injuries on the person of deceased, which were even less than number of accused persons.

10. In view of the above, in the considered opinion of this Court, it would not be safe to place reliance on solitary testimony of Hari Singh (PW-8), therefore this appeal is allowed. Conviction and sentence, as passed by learned trial Court against the appellants, are hereby set aside. Appellants are on bail; their bail and surety bonds stand discharged.

Appeal allowed.

I.L.R. [2011] M. P., 498

APPELLATE CRIMINAL

Before Mr. Justice I.S. Shrivastava

Cr.A. No.1351/2006 (Indore) decided on 8 September, 2010

KISHORILAL & anr. ... Appellants

Vs.

STATE OF M.P. ... Respondent

***A. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 20 - Possession of Charas* - Non-production of seized**

article during trial - Only samples were produced and bulk quantity seized not produced in evidence - It cannot be said that samples were prepared from the respective bulk quantity - Seizure of 2 kg. 800 gms. Charas not proved. (Para 8)

क. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 20 – चरस का कब्जा – अभिगृहीत वस्तु विचारण के दौरान प्रस्तुत नहीं की गई – साक्ष्य में केवल नमूने प्रस्तुत किये गये और अभिगृहीत की गई सामूहिक मात्रा प्रस्तुत नहीं की गई – यह नहीं कहा जा सकता कि नमूने, अपनी–अपनी सामूहिक मात्रा से तैयार किये गये थे – 2 किग्रा 800 ग्राम चरस का अभिग्रहण साबित नहीं।

***B. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 51 - Safe custody of seized article*-- Delay of 2 months and 6 days in sending seized article to Court - Not proved that seized article was properly sealed and kept in proper custody in police Malkhana - Accused entitled for acquittal.** (Para 14)

ख. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 51 – अभिगृहीत वस्तु की सुरक्षित अभिरक्षा – अभिगृहीत वस्तु न्यायालय को भेजने में 2 महीना 6 दिन का विलम्ब – साबित नहीं कि अभिगृहीत वस्तु उचित प्रकार से सीलबंद की गई और पुलिस मालखाना में उचित अभिरक्षा में रखी गयी – अभियुक्त दोषमुक्ति का हकदार।

***C. Evidence Act (1 of 1872), Section 9 - Relevant fact* - News published in newspaper about detention of appellants prior to seizure of Charas is relevant and cannot be disbelieved.** (Para 16)

ग. साक्ष्य अधिनियम (1872 का 1), धारा 9 – सुसंगत तथ्य – चरस के अभिग्रहण के पूर्व अपीलार्थियों के निरोध के बारे में समाचार पत्र में प्रकाशित समाचार सुसंगत हैं और उस पर अविश्वास नहीं किया जा सकता।

Cases referred :

ACR II (2006) 362, 2001(1) EFR 160, (2004) 1 SCC 562, 2005(2) JLJ 363, AIR 2009 SC (Suppl.) 852, 2009(2) JLJ 148, AIR 1994 SC 117, 2000 SCC (Cri) 189, AIR 1989 SC 2027.

C.R. Joshi & Sanjay Sharma, for the appellants.

Suraj Sharma, Dy.A.G., for the respondent/State.

J U D G M E N T

I.S. Shrivastava, J. :–This appeal has been preferred under S. 374 of Cr.P.C. being aggrieved by the judgment dated 4.11.2006 passed by the

Court of Shri Sanjiv Datta, Special Judge, (NDPS Act), Indore in Spl. Case No. 33/03 by which the appellants Kishorilal and Devisingh have been found guilty under S.8/20(b)(2)(c) of the N.D.P.S.Act (for short the Act) and sentenced to rigorous imprisonment of 10 years along with fine of Rs.1,00,000/- (one lakh) to each and in default of payment of fine, to undergo further imprisonment for four months to each.

2. According to prosecution story Shri SS Bhadoriya ASI , Police Station, Pandharinath, Indore in the morning of 21.10.03 at 10.30 a.m. received an information from the informer that Kishorilal and Devisingh resident of Kullu Manali are standing near Taj Building with Cannabis (hemp) (Charas) and waiting for customer. The information was entered in the Rojnamcha. He prepared a Panchnama of the information of the informer and information was sent to C.S.P. Sarafa. He alongwith constable Sanjay, independent witnesses and force reached Mohanpura Taj building. They found two persons standing there. After verification of their names as Kishorilal and Devisingh they were apprised with the information of the informer and after obtaining their due consent for the search, bag of Kishorilal was searched. In this bag in a polythene bag, 2 kg. 800 gms. of cannabis (hemp) (Charas) was found out of which 2 samples of 100 gms. each were prepared and sealed and marked as articles A1, A2. Remaining quantity was sealed in a polythene bag and marked as article A. All the packets were sealed and seized. Kishorilal was arrested. Devilal was also apprised of the information of the informer and after obtaining his consent for search, bag contained by him was searched in which in a polythene bag 2 kg. 500 gms. of cannabis (hemp) (Charas) was found out of which 2 samples of 100 gms. each were prepared and marked as articles B1,B2 and remaining quantity was sealed in a polythene bag and marked as article B. All the packets were sealed and seized. Devilal was arrested. The other Panchnamas were prepared and raid party returned to police station. The report was lodged at Crime No. 280/03. On interrogation Kishorilal informed that he has delivered one kg. Charas to Babulal Bagora. Memorandum of information was prepared and Babulal was searched. He was found standing before Raj Medical Store. After identification by Kishorilal, he was apprised with the information and after obtaining his due consent, one kg. Charas was found in a plastic bag; out of which 2 samples 100 gms. each were prepared and marked as articles C1,C2 and remaining quantity was packed and marked as article C. All the packets were sealed and seized on the spot. Babulal was arrested. Thereafter raid party returned to police

station. Samples A1, B1, C1 were sent to FSL Indore by the report of which presence of Charas was confirmed. Hence after completion of investigation, challan was filed. After trial appellants have been convicted as mentioned above.

3. It has been argued on behalf of the appellants that the independent witnesses were hostile. They did not support prosecution case. Bulk quantity packets were not produced at the time of evidence. Only samples A2,B2,C2 and remnant samplesA1,B1,C1 were produced at the time of evidence. Hence seizure of Charas was not proved by the evidence. There was non-compliance of S.55 of the Act. Property was sent after two months to Court for which no explanation was given. Proceedings under S. 52A of Act was not proved. Appellants Kishorilal and Devising were in custody of police since night of 20.10.2003 and this news was published in the news paper "Agniban" on 21.10.2003. Hence appellants have been falsely implicated in the case. Hence appeal be allowed.

4. It has been been argued on behalf of respondent that appellants have been rightly convicted on the basis of evidence produced before trial court for the heinous offence. Appeal being devoid of merits, be dismissed accordingly.

5. Considered the arguments. Record of trial court perused.

6. Shri SS Bhadoriya PW.1 seizing officer conducted the proceedings vide Panchnama Ex.P.9, P.12 to P.33 and P.43 to P.54. before independent witnesses Gordhan Soni PW.9 and Pradip Kumar Mishra PW.10. Gordhan Soni PW.9 has deposed that he does not know the accused persons. He does not know about the place. Police did not take any action before him. He never went to Mohanpura Taj building with police and Charas was not seized before him. The arrest was not taken before him. He has denied his signature on Ex.P.9 and P.12 to P.33 and arrest memo Ex.P. 43 to P.54. He has denied his police statement Ex.P.55. He has not supported step by step proceedings taken up by the seizing officer Shri SS Bhadoriya. In this way this witness has not supported prosecution case. The other independent witnesses Pradip Kumar (PW.10) after examination-in-chief of accused Babulal and after some cross examination from accused Kishorilal and Devising, after adjournment of the case, did not appear for further cross examination. Hence his statement is inadmissible in evidence. In this way seizure memo Ex.P.20 and Ex.P.31 and other Panchnamas were not proved by the independent witnesses.

7. As regards proceedings under S. 52A of the Act is concerned, no proceedings were taken up in this respect. Chhavinath Singh, head constable, PW.7 has deposed that he wrote a letter to the Executive Magistrate for the proceeding under S.52A of the Act but he did not conduct any proceeding in this respect. In this way proceedings under S. 52A of the Act was not taken up at the pre-trial stage.

8. At the time of trial in evidence only samples A2,B2,C2 and remnant samples A1,B1,C1 were produced and bulk quantity packets A,B,C were not produced in evidence. Therefore, it can not be said that samples were prepared from the respective bulk quantity packets A,B,C. Therefore, in the light of law laid down by the Apex Court in the case of *Ritesh Chakraworti Vs. State of M.P.* - ACR II (2006) 362 and *Bholaram Kushwaha vs. State of M.P.* - 2001(1) EFR 160 the seizure memo was not proved.

9. In the case of *Jitendra and another Vs. State of M.P.* reported in 2004(10) SCC 562, it has been held by the Apex Court that :

> "the evidence to prove that charas and ganja were recovered from the possession of accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak PW-7, Angad Singh PW-8 and sub-inspector D. J. Raj PW-6, there is no independent witness as to the recovery of the drugs from the possession of accused. The Charas and Ganja alleged to have been seized from the possession of the accused, were not even produced before the Trial Court, so as to connect it with the samples sent to the FSL. There is no material produced in the Trial apart from the interested testimony of police officers, to show that the Ganja and Charas were seized from the possession of the accused or that the samples sent to FSL which were taken from drugs seized from the possession of the accused.
>
> In the Trial, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of Charas and Ganja were seized from the possession of accused. The best evidence would have been the seized materials, which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce

them. Mere oral evidence as to their features and production of panchanama does not discharge the heavy burden, which lies on the prosecution particularly where the offence is punishable with stringent sentence as under the NDPS Act".

10. Same view has been adopted in the cases of *Abdul Gani Vs. State of M.P.* [2005 (2) JLJ 363], *Noor Aga Vs. State of Punjab* AIR 2009 SC (suppl) 852] and *Laxminarayan Vs. State of M.P.* - 2009 (2) JLJ -148.

11. Therefore, I conclude that seizure memo Ex.P.20 and Ex.P.31 were not proved at the time of evidence. Therefore, appellants were not liable to be convicted.

12. It has been argued that there was non compliance of S.55 of the Act and property was sent to Court after two months and there is no explanation of this delay.

13. Considered the arguments. Chhavinath Singh head constable PW.7 was Malkhana Incharge at the relevant time. He has deposed that property was deposited in the Malkhana on 21.10.03 and it was sent to the Court on 27.12.03. In this way there was delay of 2 months and 6 days in sending property to the court for which no explanation has been submitted by him. He has further admitted in cross examination that in the Malkhana register Ex.P.39, there is no entry about the deposit of impression of seal and seal. In this way impression of seal and seal were not deposited in the Malkhana. According to provisions of S.55 of the Act, at the time of deposit of property in the Malkhana, it shall be sealed with the personal seal of the Incharge of Police Station. In this respect Chhavinath Singh PW.7 head constable has deposed that he resealed the property before depositing it in Malkhana and prepared Panchnama Ex.P.36 and P.37. In this respect it has been argued that he has not deposed that it was sealed with the personal seal of the Incharge of Police Station. He himself has sealed the property while he was not a gazetted officer and Malkhana of the Police Station is not a double lock Malkhana. Therefore, proper custody of the property, was not proved.

14. Considered the arguments. Chhavinath Singh PW.7 has admitted in cross examination that in his police station there is no double lock system in the Malkhana. He has further deposed that he himself sealed the property and prepared Panchnamas Ex.P.36 and P.37 but in these Panchnamas it has been not mentioned that by which seal the property was resealed. He was

not Incharge of Malkhana. In Ex.P.36 it has been mentioned that the property was produced by Shri SS Bhadoriya and in Ex.P.37 it has been mentioned that property was presented by Shri N.S.Jaden Incharge of the Police Station. Under this circumstance in Ex.P.36 the property was to be sealed with the personal seal of the Incharge of Malkhana and at the time of resealing vide Panchanama Ex.P.37 which was to be sealed by the officer next to the Incharge of Police Station who was Incharge of the Malkhana at that time, but this procedure has not been followed. The property has been resealed two times by Chhavinath Singh (PW.7). Therefore, resealing of the property as per rules, was not proved and the property was not deposited in the double lock Malkhana and this delay of 2 months and 6 days in sending the property to the court was not explained. Therefore, in view of the law laid down by the Apex Court in the case of *Valsala Vs. State of Kerala* AIR 1994 SC 117 and in the case of *Thandiram Vs. State of Haryana* -2000 SCC (Cri) 189 appellants were not liable to be convicted.

15. It has been argued that appellants have been falsely implicated in this case. They were in custody of the police since 20.10.2003. Above property was seized from some other persons of Gujrat and the police just to save them, has falsely implicated the appellants in this case. In the news paper Agniban dated 21.10.2003 Ex.D.1, a news was published that since last night Kishorilal and Devising of Himachal Pradesh are in custody of the police. Hence they have been falsely implicated in this case. Respondent's counsel has argued in this respect that the paper news is not admissible in evidence.

16. Considered the arguments. According to prosecution case on 21.10.03 a Panchnama Ex.P.3 about the information of informer was prepared at 10.33 a.m. and raid party after intercepting the accused, prepared Panchnama Ex.P.12 at 11.35 a.m. with respect to Kishorilal and seized Charas from him at 12.40 p.m. vide seizure memo Ex.P.20. According to Panchnama Ex.P.23 Devisingh was apprised with the information of the informer at 13.10 p.m. and at 14.20 p.m. vide Ex.P.31 Charas was seized from him. FIR Ex.P.59 was lodged at 15.00 p.m. on 21.10.2003. This shows that the prosecution started the proceedings from 10.33 a.m. which was conducted till lodging of FIR at 15.00 p.m. on 21.10.03. The news paper Agniban Ex.D.1 dated 21.10.03 reveals that since last night accused Kishorilal and Devisingh residents of Himachal Pradesh have been in custody of the police. They came near Mohanpura Taj building to deliver Charas to Babulal and from all the three accused persons 5 kg. 450 gs. Charas has been seized. They were staying in

a lodge near Krishnapura. Agniban is an evening times. In this respect Mahendra Bapna DW.1, city chief reporter of Agniban has deposed that the news published at page 12 of Agniban on 21.10.2003 in A-A portion relates to accused Kishorilal and Devisingh. This news was given to him by Santosh Singh Gaur, C.S.P. on telephone before 12.30 p.m. This paper was printed till 1.00 p.m. Therefore, from the evidence of this witness it is clear that this paper was published till 1.00 p.m. on 21.10.2003 which contained a news that Kishorilal and Devisingh were in custody of police since last night i.e. from 20.10.2003 with Charas. Shri SS Bhadoriya PW.1 and Shri Narsingh Yadav PW.4 in this respect have been cross examined about the news published in Agniban Ex.D.1 but they have not accepted the fact that appellants Kishorilal and Devisingh were in custody of the police. As per legal position about the news published in the news paper, it is not reliable because it is hearsay evidence. But in the case of *N.Meera Rani Vs. Govt. of Tamil Nadu and another* – AIR 1989 SC 2027 it has been held that "news paper reports indicating that the detenu was already in custody could at best be relevant only to show the fact that he was already in detention prior to the making of the detention order." Therefore, news published in the paper about the detention of the appellants was relevant in this respect and can not be disbelieved. Why a paper will publish a news about the detention of a person baselessly when he is not in the custody of the police. After arrest or detention of a person in the custody it is always a news that such a person has been called to police station for arrest or taken into custody. Therefore, under the circumstances this news was not a such news which can be disbelieved the source of which was information from Shri Gaur C.S.P. Therefore, it creates a doubt about the genuineness of the case that when appellants were already in custody of the police since night of 20.10.2003 then how the proceedings were taken up on the information of the informer from 10.33 a.m. on 21.20.2003 to 15.00 p.m. on 21.10.2003. Under these circumstances all the proceedings taken up by the police in this respect are doubtful.

17. Therefore, on the basis of above discussion, I conclude that in this case, the seizure memo was not proved. Bulk quantity property was not produced at the time of evidence. Compliance of S. 55 of the Act was not proved. Proper custody of samples in the Malkhana of the Police Station was not proved. Proceedings taken up by the police was doubtful as appellants were in custody of police since night of 20.10.2003. Therefore, appellants were not liable to be convicted. Therefore, the appeal deserves to be allowed.

18. Hence on the basis of above discussion the appeal is allowed. Conviction of the appellants Kishorilal and Devising under S. 8/20(b)(2)(c) of the NDPS Act is hereby set aside. Appellants be released if not required in any other offence. Fine if deposited be returned to them.

Appeal allowed.

I.L.R. [2011] M. P., 506
APPELLATE CRIMINAL
Before Mr. Justice S.L. Kochar

Cr.A. No.548/2010 (Indore) decided on 24 September, 2010

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

A. Penal Code (45 of 1860), Section 376/511 - Attempt to commit rape - False implication - **It is not believable that for wrecking vengeance or compensation any father or mother put into stake chastity and career of their minor daughter.** (Para 7)

क. दण्ड संहिता (1860 का 45), धारा 376/511 – बलात्संग करने का प्रयत्न – मिथ्या आलिप्त करना – यह विश्वसनीय नहीं है कि बदले की भावना अथवा क्षतिपूर्ति के लिये कोई पिता अथवा माँ अपनी अवयस्क पुत्री की सुचिता और भविष्य को दांव पर लगा देंगे।

B. Penal Code (45 of 1860), Section 376/511 - Attempt to commit rape - **Prosecutrix did not state that appellant tried to penetrate his male organ - Merely removal of underwear and laying down on prosecutrix would not be sufficient to hold that appellant attempted to commit rape.** (Para 7)

ख. दण्ड संहिता (1860 का 45), धारा 376/511 – बलात्संग करने का प्रयत्न – अभियोक्त्री ने यह नहीं कहा कि अपीलार्थी ने अपना शिशन प्रविष्ट करने का प्रयत्न किया – अभियोक्त्री का अधोवस्त्र उतारना तथा उसके उपर लेट जाना मात्र ही यह अभिनिर्धारित करने के लिए पर्याप्त नहीं होगा कि अपीलार्थी ने बलात्संग करने का प्रयत्न किया।

C. Penal Code (45 of 1860), Sections 376/511, 354 - Attempt to commit rape or outraging modesty - **Appellant removed underwear of prosecutrix and laid down upon her after removing his underwear - Appellant liable for molesting the modesty of prosecutrix.** (Para 8)

ग. *दण्ड संहिता (1860 का 45), धाराएँ 376/511, 354 – बलात्संग करने का प्रयत्न अथवा लज्जा भंग करना* – अपीलार्थी ने अभियोक्त्री के अधोवस्त्र उतारे तथा अपने अधोवस्त्र उतारने के बाद उसके ऊपर लेट गया – अपीलार्थी अभियोक्त्री की लज्जा से छेड़खानी करने के लिए दायी है।

D. Penal Code (45 of 1860), Section 354 - Sentence - **Appellant a young boy of 22 years - Already undergone the sentence of 4 months and 19 days and fine of Rs. 1000 - Appellant sentenced to period already undergone.** (Para 11)

घ. *दण्ड संहिता (1860 का 45), धारा 354 – दण्डादेश* – अपीलार्थी एक 22 वर्ष का युवक – पूर्व में 4 माह 19 दिवस का कारावास तथा 1000 रू. जुर्माने की सजा भुगत चुका – अपीलार्थी को पूर्व में भुगती गयी कालावधि से दण्डादिष्ट किया गया।

Cases referred :

2004 SCC (Cri) 1266, AIR 2009 SC 351.

S.K. Vyas with *Chandiramani,* for the appellant.

Shri Sharma, Dy.G.A. for the respondent/State.

JUDGMENT

S.L. KOCHAR, J. :–The appellant has preferred this appeal against the impugned judgment dated 6.5.2010 passed in Special Case No.53/08 by learned Special Judge under Scheduled Caste & Scheduled Tribe (Prevention of Atrocities) Act, Ujjain (M.P.), whereby convicted the appellant under Section 376/511 of the Indian Penal Code (for short "the IPC"), sentenced to RI for 10 years with fine of Rs.10,000/-. In default of payment of fine, he shall suffer additional imprisonment for three months.

2. According to the prosecution case, prosecutrix (PW-2) aged 7 year belongs to Scheduled Caste community (Chamar), was residing with her parents in front of the house of appellant and she was going to the appellant's house for tuition. On 14.3.2008 at 9 a.m. prosecutrix had gone for taking tuition to the house of appellant; where one Rohit was also present, to whom appellant directed to go out and took the prosecutrix behind the cot and boxes. Appellant removed her as well as his underwear, thereafter laid down on the prosecutrix. Because of cry raised by prosecutrix, appellant stood up and made her to wear underwear . Prosecutrix went to her house and on inquiry reported the incident to her mother (PW-3) Rupa Bai. Incident was also disclosed to her father (PW-4) Peerulal. They called maternal uncle Mayaram,

who was residing in other locality, thereafter on the next day in the night at 10.30 p.m. lodged the report (Ex.P/2) in the police station. Prosecutrix was medically examined by PW-1 Dr. Aabha Chethaliya. Her MLC report is Ex.P/1. PW-5 Dr. Anil Bhargav, after taking x-ray, gave ossification test report (Ex.P/3). Investigating officer prepared the spot map (Ex.P/10) and seized slides of the vaginal swabs of the prosecutrix and her underwear. Seized articles were sent to Forensic Science Laboratory and its report is Ex.C1. The investigating officer recorded the statements of the prosecution witnesses, who were acquainted with the facts of the case and on completion of investigation, filed the charge sheet against the appellant for the offence under Section 376/511 of "the IPC".

3. Appellant denied the charges and his defence was of false implication on account of inimical term with the family of the prosecutrix. He has not examined any witness in defence. Learned trial Court finding the appellant guilty, convicted and sentenced him as indicated herein-above.

4. Learned counsel for the appellant has submitted that there is sufficient material to establish that the appellant has been falsely implicated, the FIR was lodged after 26 hours and for this delay no reasonable and plausible explanation has been given. Before the medical expert, only disclosure was made out for molestation and not for attempt to commit rape, which is clear from MLC report of the prosecutrix (Ex.P/1) proved by PW-1 Dr. Aabha Chethaliya, who has also deposed this fact in her statement that prosecutrix and her father PW-4 Peerulal have deposed that before lodging the report underwear was already washed off. Peerulal (PW-4) has also deposed that he has not seen the underwear and his wife PW-3 Rupa Bai has disclosed that underwear was washed off by prosecutrix. He has also admitted that on the date of incident his wife Rupa Bai did not inform him or disclose about the incident, and there is contradiction in his previous statement (Ex.D/2) about the place; where he was informed. Father Peerulal (PW-4) has denied A to A part of Ex.D/2 that he was informed by his wife in the field. Learned counsel has also pointed out from the statement of the prosecutrix in paragraph-13, wherein she has admitted that she and her family members were not allowed to enter in kitchen of the appellant and they were also not allowing them to touch their utensils, and there was quarrel between her mother and mother of the appellant on account of touching of the utensils and this quarrel took place before 10 days of lodging of the report. In the said quarrel mother of the appellant had filthily abused to the mother of the prosecutrix and appellant

had also abused her mother. Learned counsel has also pointed out that when underwear was washed off, as to how in FSL report human spermatozoa could be available. This shows that a false case has been concocted by the complainant party with the help of police. The seized underwear was not produced in the court and marked as article. It was also not got identified by the prosecutrix and her mother in the Court, therefore, according to learned counsel the evidence of seizure of underwear and presence of human spermatozoa in FSL report Ex.C1, is of no consequence. The second student, who was taking tuition named Rohit to whom appellant asked to go out, has not been examined by the prosecution, and that medical report as well as evidence of medical expert is not supporting the case of attempt to commit rape. It is also argued that because of inimical term and quarrel just before few days of the alleged incident, appellant has been falsely implicated with a view to take revenge as well as to take benefit of the provision of compensation. The mother of the prosecutrix (PW-3) Rupa Bai has admitted about receiving of Cheque amount of Rs.25,000/- from the Welfare Department on account of this case.

5. In alternative, learned counsel has also submitted that even if entire prosecution case is accepted, offence at the most under Section 354 of "the IPC" would be made out.

6. On the other hand, learned counsel for the State has supported the impugned judgment and finding arrived at by learned trial Court.

7. Having heard the learned counsel for the parties and on perusal of the entire record, this Court is of the view that it is not believable that for wrecking vengeance or compensation any father and mother put into stake chastity and career of their minor daughter, therefore, this Court does not find any substance in the argument of false implication. However, looking to the statement of the prosecutrix, it is clear that she has nowhere stated that appellant tried to penetrate or insert his male organ into her. Merely removal of underwear and laid down on the prosecutrix, would not be sufficient to hold that appellant attempted to commit rape, punishable under Section 376 read with S.511 of "the IPC". Supreme Court has discussed this issue in detail in case of *Aman Kumar and Another Vs. State of Haryana* [2004 SCC (Cri.) 1266] and *Premiya alias Prem Prakash Vs. State of Rajasthan* [AIR 2009 SC 351]. In case of Aman Kumar (supra) in paragraph 9 the Supreme Court has held as under :-

"A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reason beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence can be said to begin when the preparation are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. The word "attempt" is not itself identified, and must, therefore, be taken in its ordinary meaning. This is exactly what the provisions of Section 511 require. An attempt to commit a crime is to be distinguished from an intention to commit it; and from preparation made for its commission. Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not to be taken for the deed unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparation are made. Preparation to commit an offence is punishable only when the preparation is to commit offences under Section 122 (waging war against the Government of India) and Section 399 (preparation to commit dacoity). The dividing line between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case. There is a greater degree of determination in attempt as compared with preparation.

8. In view of the aforesaid observation of the Supreme Court, in the instant case there is no evidence that appellant attempted to penetrate or insert or put inside, partial or full, his male organ into her. Therefore, the appellant at the most would be liable for molesting the modesty of the prosecutrix, punishable under Section 354 of "the IPC".

9. Learned counsel for the appellant has submitted that appellant is a first offender and young-lad aged 22 years, therefore, he may be sentenced to the period already undergone (4 month and 19 days) with fine of Rs.10,000/-, as imposed by the trial Court.

10. Learned counsel for the State has no serious objection on the question of sentence.

11. Having heard the learned counsel for the parties on the question of sentence, this Court is of the view that ends of justice would be served to sentence the appellant, who is a young person aged 22 years and teacher by occupation, to the period already undergone (4 month and 19 days) with fine of Rs.10,000/-. It is pertinent to mention here that for the offence punishable under Section 354 of "the IPC", jail sentence is not mandatory. Out of fine amount, Rs.7,000/- be paid as compensation to the parents of the prosecutrix.

12. In the result, this appeal is allowed in part on the term indicated herein-above.

13. Learned trial Court is directed to release the appellant forthwith upon his depositing fine amount, if not wanted in any other criminal case.

14. Office is directed to send the copy of this judgment along with the record of the trial Court, to the trial Court immediately.

Appeal partly allowed.

I.L.R. [2011] M. P., 511
APPELLATE CRIMINAL
Before Mr. Justice R.C. Mishra

Cr.A. No.866/2006 (Jabalpur) decided on 28 September, 2010

BOOTE @ KANCHHEDI ... Appellant

Vs.

STATE OF M.P. ... Respondent

A. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 42 - **Dy.S.P. was immediately informed about recovery of the contraband - Copy of the FIR leading to registration of the case was also forwarded to the Magistrate having jurisdiction - Thus, there was substantial compliance with the provisions of Section 42.** (Para 9)

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

42 – विनिषिद्ध पदार्थ बरामद किये जाने के बारे में उप–पुलिस अधीक्षक को तुरंत सूचित किया गया – एफ.आई.आर., जिसके अग्रसरण में प्रकरण पंजीबद्ध किया गया, की प्रतिलिपि भी अधिकारिता रखने वाले मजिस्ट्रेट को प्रेषित की गई – इस प्रकार धारा 42 के उपबंधों का सारभूत अनुपालन किया गया।

B. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8, 20(b)(ii)(c), 35 & 54 - **162 Kgs of Ganja was recovered from the box kept in Tapariya occupied as residence by the appellant - Appellant did not discharge the onus of proof to rebut the presumption envisaged u/ss. 35 & 54 of the Act - Conviction proper.** (Para 12)

ख. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराएँ 8, 20(बी)(ii)(सी), 35 व 54 – अपीलार्थी द्वारा निवास के रूप में उपयोग की जाने वाली टपरिया में रखे बक्से से 162 किग्रा गांजा बरामद हुआ – अपीलार्थी ने अधिनियम की धारा 35 व 54 के अंतर्गत परिकल्पित उपधारणा का खंडन करने के लिए सबूत के भार का निर्वहन नहीं किया – दोषसिद्धि उचित।

C. Evidence Act (1 of 1872), Sections 101 & 106 - Onus of proof - **Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge.** (Para 13)

ग. साक्ष्य अधिनियम (1872 का 1), धाराएँ 101 व 106 – सबूत का भार – एकबार जब कब्जा साबित हो जाता है, तब वह व्यक्ति, जो यह दावा करता है कि वह एक सचेतन कब्जा नहीं था, को उसे साबित करना होगा, क्योंकि वह कब्जे में कैसे आया यह उसी के विशेष ज्ञान में है।

Cases referred :

AIR 2009 SC 369, ILR (2009) MP 2652, ILR (2009) MP 3012, AIR 2005 SC 2265, AIR 2003 SC 3642, (2009) 15 SCC 795.

Madan Singh, for the appellant.

Arvind Singh, for the respondent/State.

JUDGMENT

R.C. MISHRA, J. :–This appeal has been preferred against the judgment-dated 27.3.2006 passed by Special Judge (under the Narcotic Drugs and Psychotropic Substances Act, 1985) [for short 'the Act'), Sagar in Special Case No.06/05 whereby the appellant was convicted under Sections 8 read with 20(b)(ii)(C) of the Act and sentenced to undergo R.I. for 10 years and to pay fine of Rs.1 lac and in default, to suffer R.I. for 2 years.

2. The prosecution story, in short, may be narrated thus -

(i) Janki Bai (PW10), widow of Shobaram Patel and resident of Neha Nagar, Makronia, Sagar, owned lands bearing Revenue Survey Nos.872, 884/2, 875, 882, 812, 883/2, 222. 861, 862, 866/2 and 868 located in Village Mauja Pipariya Karkat. After death of Shobaram, she kept the appellant as her husband but their relationship did not survive for long. Ultimately, they started living separately. During subsistence of their relationship, the appellant sold five acres of land to Komal Patel whereas after their separation, Janki Bai transferred the lands bearing Survey Nos.222, 861, 862, 866/2, 868, 872 and 812 in favour of Deepak Choubey & his wife Shubra Choubey and the lands bearing Survey Nos.875, 882 and 883/2 to Purushottam Choubey (PW7). However, while residing in a Taparia (temporary hutment) situated in land bearing Survey No.875, the appellant continued to cultivate the same.

(ii) Upon an application made by Purushottam, the Tahsildar directed Revenue Inspector to demarcate boundaries of lands purchased by him. At the request of the Revenue Inspector, police force led by ASI J.P. Namdeo was also deployed for maintaining law and order during the demarcation proceedings proposed to be conducted on 10.06.2005.

(iii) On that day at about 6 p.m., noticing that a smell of Ganja was emanating from a Palang Peti (cot cum box) [hereinafter referred to as 'box' only], ASI J.P. Namdeo informed S.K. Mishra (PW2), the then SHO of P.S. Beheriya. He along with other members of the police force including Constable Jagdish (PW1) reached the spot. Upon appellant's refusal to provide the key, he broke open the lock of the box in presence of panch witnesses Gulab Singh (PW8) and Mukesh Jain (PW12). The box was found to contain a total quantity of 162 Kgs. of Ganja stored in as many as 31 polythene packets. The information relating to recovery of a huge quantity of the Ganja was communicated to DSP H.S. Dadoriya (PW3), who also arrived at the spot and duly seized the contraband. Two samples of 200 gms. each were taken out. One of the samples was forwarded to FSL, Sagar for chemical examination. The corresponding report (Ex.P-25)

indicated that the sample contained Ganja.

3. The appellant denied the charge and pleaded false implication at the instance of Janki Bai due to prevailing animosity arising from breakdown of their marital relationship. In the cross-examination of prosecution witnesses, it was suggested that several other persons were also residing in the taparia whereas in the examination, under Section 313 of the Code of Criminal Procedure (for short 'the Code'), he further asserted that the seized contraband belonged to Janki Bai only. Co-villager Ramesh Kumar was also examined to substantiate the defence that only Janki Bai (PW10) was involved in illicit trade of Ganja.

4. To bring home the charge, the prosecution produced as many as 12 witnesses including Patwari Rajkumar (PW9). Upon consideration of the entire evidence on record, learned trial Judge, for the reasons recorded in the judgment, proceeded to reject the defence and convicted & sentenced the appellant as indicated hereinabove.

5. Legality and propriety of the impugned conviction have been challenged primarily on the ground that there was no evidence to establish exclusive possession of the appellant over the taparia wherefrom the contraband was said to have been recovered. For this, attention has been invited to the statements of panch witness Gulab Singh (PW8) and Mukesh (PW12) that the other persons were also residing in the taparia. Reliance has also been placed on the following precedents -

(i) *Man Bahadur v. State of H.P.* AIR 2009 SC 369

(ii) *Laxminarayan v. State of M.P.* ILR [2009] M.P. 2652

(iii) *Aasif Malik v. State of M.P.* ILR [2009] M.P. 3012

6. However, no serious dispute was raised as to factum of recovery of the contraband from the box kept in the taparia. Even otherwise, the corresponding evidence of SHO S.K. Mishra (PW2), DSP H.S. Dadoriya (PW3), Constable Jagdish, panch witness Gulab Singh (PW8) and Purushottam (PW7) at whose instance the demarcation proceedings was initiated also did not suffer from any serious infirmity. It may be noted that another panch witness Mukesh (PW12), who was declared hostile by the prosecution, clearly admitted that smell of Ganja was coming out from the taparia. However, as per his statement, the taparia, initially owned by Janki Bai, was purchased by the appellant.

7. Thus, the controversy lies in a very narrow compass. The question which requires consideration is as to whether the appellant was found in a conscious and exclusive possession of the contraband ?

8. Rajkumar (PW9), the Patwari, is the key witness. According to him, he had gone to the spot under the orders of Naib Tahsildar to make measurements for the purpose of demarcation and make necessary entries in the field book. In the map (Ex.P-18) and the report (Ex.P-19) forwarded to the SHO along with copies of corresponding Khasra entries (Ex.P-20 and P-21), it was clearly indicated by him that taparia, though located in the land belonging to Janki, was occupied as residence by the appellant only. Purshottam (PW7), Gulab Singh (PW8), Janki Bai (PW10) and Mukesh (PW12) corroborated the fact that the Ganja was seized in the course of measurement proceedings conducted by the Revenue Inspector with the help of Patwari.

9. In the instant case, Deputy Superintendent of Police H.S. Dadoriya (PW3) was immediately informed about recovery of the contraband. As established from the evidence of constable Suresh (PW5), copy of the FIR leading to registration of the case was also forwarded to the Magistrate having jurisdiction. Thus, there was substantial compliance with the provisions of Section 42 of the Act and Section 157 of the Code. The seized packets of contraband as well as the box were also produced before the Court and were duly identified by DSP as articles of evidence. As such, the decision in *Laxminarayan's case* (supra), which is based on non-compliance with the mandatory provisions of Section 42 of the Act and non-production of the contraband before the Court, is not applicable to the facts of the case.

10. In *Aasif Malik's case* (above), the finding of not guilty was recorded while holding that the room wherefrom the Ganja was recovered was not in exclusive possession of the accused and the house also belonged to the co-accused Ashfaq Malik whereas in the present case, there was absolutely no cogent evidence to suggest that the possession of Taparia was shared by the other persons. In this regard, the admission made by panch witnesses namely Gulab and Mukesh did not assume any significance as no explanation was furnished regarding non-disclosure of the names of other occupants despite the fact that the appellant was none other the Patel of the village.

11. Decision rendered in *Man Bahadur's case* (ibid) which is based on non-compliance of S.50 of the Act, is also of no avail to the appellant as the Ganja

was allegedly recovered from a box and not from the person of the appellant that too during proceedings relating to demarcation of lands (*State of H.P. v. Pawan Kumar* AIR 2005 SC 2265 referred to). In this case, while explaining the malefic drug abuse, the Apex Court has struck a note of caution that drug traffickers should not go scot-free on technical pleas.

12. The contention that an exclusive and conscious possession of the contraband was not attributable to the appellant, also does not deserve acceptance in view of the fact that he did not discharge the onus of proof to rebut the presumption envisaged under Sections 35 and 54 of the Act. For further elucidation, the following observations made by the Apex Court in *Madan Lal v. State of H.P* AIR 2003 SC 3642 may be quoted -

The word 'possession' means the legal right to possession (See *Heath v. Drown* (1972) (2) All ER 561 (HL). In an interesting case it was observed that where a person keeps his fire-arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See *Sullivan v. Earl of Caithness* (1976 (1) All ER 844 (QBD).

13. Accordingly, once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.

14. Decision in *Madan Lal's case* (supra) has been consistently followed in all subsequent decisions on the point including the one rendered in *Balbir Kaur v. State of Punjab* (2009) 15 SCC 795.

15. In the face of overwhelming incriminating evidence on record and a well-settled position of law on the point of conscious possession, learned trial Judge did not commit any illegality in convicting the appellant for the offence charged with. Accordingly, the conviction in question deserves to be maintained. Since the minimum prescribed custodial and fine sentences have been awarded to the appellant, no interference would be called for.

16. Consequently, the appeal stands dismissed. The impugned conviction and the corresponding sentences are hereby maintained.

Appeal dismissed.

I.L.R. [2011] M. P., 517

APPELLATE CRIMINAL

Before Mr. Justice R.C. Mishra

Cr.A. No.2480/2005 (Jabalpur) decided on 30 September, 2010

RADHEY SHYAM AHIRWAR & anr. ... Appellants

Vs.

STATE OF M.P. ... Respondent

A. Penal Code (45 of 1860), Sections 366 & 376 - **A-2, the husband of prosecutrix, persuaded her upon a false pretext of illness of her father to accompany on a motor cycle driven by A-1 upto her parental home and from there to the place where she was handed over to A-1 - She was ravished by A-1 after being taken to a nearby plot of land - Conviction of accused/appellants A-1 for offence of rape and conviction of A-2 for the offence of abduction do not call for interference.** (Para 8)

क. दण्ड संहिता (1860 का 45), धाराएँ 366 व 376 – ए–2, अभियोक्त्रि के पति ने उसे उसके पिता के बीमार होने के मिथ्या बहाने से, ए–1 द्वारा चलाई गयी मोटर साईकिल पर उसके माता–पिता के घर तक और वहाँ से उस स्थान तक जहाँ उसे ए–1 को सौंपा गया, साथ जाने के लिए प्रेरित किया – ए–1 द्वारा निकट के भूखण्ड पर ले जाने के बाद उसके साथ बलात्संग किया गया – अभियुक्त/अपीलार्थी ए–1 की बलात्संग के अपराध के लिए दोषसिद्धि और ए–2 की अपहरण के अपराध के लिए दोषसिद्धि में हस्तक्षेप की आवश्यकता नहीं।

B. Penal Code (45 of 1860), Section 362 - Expression "deceitful means" - **Is wide enough to include the inducing a wife by husband on a false pretext.** (Para 17)

ख. दण्ड संहिता (1860 का 45), धारा 362 – अभिव्यक्ति "प्रवंचनापूर्ण उपाय" – पति द्वारा मिथ्या बहाने से पत्नी को उत्प्रेरित किये जाने को सम्मिलित करने के लिए पर्याप्त है।

Cases referred :

AIR 1983 SC 753, AIR 1983 SC 911, AIR 2005 SC 3570, (2005) 13 SCC 398, 1996 MPLJ 452, AIR 2003 SC 2471, AIR 2000 SC 2708, (2000) 5 SCC 30, AIR 1960 MP 24, AIR 2003 SC 4684.

Imtiyaz Hussain, for the appellants.

G.S. Thakur, P.L., for the respondent/State.

JUDGMENT

R.C. MISHRA, J. :–This appeal has been preferred against the judgment dated 19/11/2005 passed by Tenth Additional Sessions Judge, Bhopal in S.T. No.254/05 whereby the appellants were convicted and sentenced as under -

No. and name of appellant	Convicted under Section	Sentenced to
(1) Radhey Shyam	376 of IPC	undergo R.I for 10 years & to pay fine of Rs.1000/- and in default, to suffer R.I. for 1 year.
(2) Bhagwan Singh	366 of IPC	undergo RI for 5 years & to pay fine of Rs.1000/- and in default, to suffer R.I. for 1 year.

2. Prosecution case, in short, may be stated thus -

(i) The prosecutrix (PW3) is the legally wedded wife of appellant no.2 Bhagwan Singh (for short 'A2'). Their marriage was solemnized on 22nd of May 2005. Appellant no.1 Radheshyam Ahirwar (hereinafter referred to as A1) is the friend of A2.

(ii) At the relevant point of time, A1 was residing in village Dhamarra, Police Station Gunga, Distt. Bhopal whereas the prosecutrix was living with A2 in village Kolwa, Police Station Ashoka Garden, Bhopal.

(iii) On 8/7/2005 at about 5.45 p.m. on returning home, A2 told the prosecutrix that he had received telephonic information from her mother Rajkumari (PW4) regarding illness of her father Sunil (PW6). He then took her on a Motorcycle driven by A1 to her parental home located in Satlapur Road, Mandidep, Bhopal. Finding her father hale and hearty as she disclosed the purpose of her visit, she was apprised by her parents that none of them had made any telephonic call to A2 on that day.

(iv) While returning home on the same Motorcycle as they reached Indus Garden Colony. Bhopal A1 stopped the motorcycle in front of the colony where A1 informed the

prosecutrix that she had been sold to him by her husband for a consideration of Rs.5000/- and A2 also accepted A1's assertion as true. Thereafter, A2 went away on the motorcycle and A1 took the prosecutrix to a nearby open plot and subjected her to rape.

(v) In the morning, A1 extricated the prosecutrix. She boarded a mini bus to reach her matrimonial home and not finding A1 there, reported the matter to police at P.S. Ashoka Garden. Ultimately, on 11.07.2005, the prosecutrix came to her parents' house and narrated the incident to her mother Rajkumari. She, in turn, took the prosecutrix to the Police Station at Mandideep where a case under Section 376 read with 34 of the IPC was registered upon report (Ex.P-2) lodged by the victim. It was transferred to P.S. Misrod Distt. Bhopal within whose jurisdiction, the alleged rape was committed for investigation. On 12.07.2005, the prosecutrix was sent to J.P. Hospital Bhopal for medical examination. Dr. Mrs. N. Batham, not being able to give any definite opinion as to rape, prepared two slides from vaginal smear of the prosecutrix for chemical analysis.

3. After due investigation, charge-sheet was put up in the Court of Shri S.K. Shrivastava, JMFC, Bhopal, who committed the case to the Court of Session for trial.

4. The appellants were charged with the offences under Sections 376 and 366 of the IPC respectively. They abjured the guilt and pleaded false implication. However, in the examination under S.313 of the Code of Criminal Procedure, none of them assigned any cogent cause therefor. Nevertheless, in the cross-examination of the prosecutrix (PW3), it was suggested that she had concocted a case to get rid of a lawful marriage.

5. To bring home the charges, the prosecution examined as many as 7 witnesses including the prosecutrix and her parents. No evidence was led in defence. Upon consideration of the entire evidence on record, learned trial Judge, for the reasons assigned in the impugned judgment, proceeded to hold the appellants' guilty of the respective offences charged with.

6. Legality and propriety of the convictions have been challenged inter alia on the following grounds -

(i) Delay in lodging the report.

(ii) Non-production of the report said to have been lodged by the prosecutrix on 09.07.2005 at PS Ashoka Garden, Bhopal and referred to in the FIR (Ex.P-1).

(iii) Non-examination of medical expert Dr. Mrs. N. Batham whose report indicated that only an attempt to ravish the prosecutrix was made.

(iv) Material infirmities in the testimony of prosecutrix with reference to the recitals of the FIR (Ex.P-1) and the contents of her case diary statement (Ex.D-1).

(v) Non-corroborative evidence of Rajkumari, the mother of the prosecutrix.

Learned counsel for the appellants has further contended that A2, being the husband, could not be convicted for abduction of the prosecutrix. In response, learned Govt. Advocate, while making reference to the incriminating pieces of evidence, has submitted that convictions are well merited.

7. The prosecutrix (PW3) substantially reiterated the allegations as recorded in the First Information Report (Ex.P-1) by Head Constable Subhash Pandey (PW1) at her instance only. He was not cross-examined at all despite the fact that the FIR reflected existence of an earlier report regarding the same incident as made by the prosecutrix at P.S. Ashoka Garden, Bhopal. The prosecutrix was emphatic in stating that on 09.07.2005, she had gone to P.S. Ashoka Garden. According to her, she was advised to lodge a report at Mandideep Police Station wherefrom the case was transferred to Police Station Misrod.

8. As per statement of the prosecutrix, A2 had persuaded her upon a false pretext of illness of her father Sunil (PW6) to accompany on a motorcycle driven by A1 up to her parental home and from there, to the place where she was handed over to A1 apparently for the purpose of being subjected to an illicit intercourse. She vividly described as to how she was ravished by the A1 after being taken to a nearby plot of land.

9. It is true that Rajkumari (PW4), the mother of the prosecutrix, did not come forward to support the corresponding version but her husband Sunil Soni (PW6) clearly admitted that he was apprised by the prosecutrix about the sale transaction.

10. The proposition of law that the victim of rape can not be treated as an accomplice and therefore, no corroboration is necessary to act upon her evidence, is well settled. The prosecutrix, in this case, at the relevant point of time, is a newly married girl aged about 18 years. As observed by the Apex Court in *Bharwada Bhoginbhai Hirjibhai v. State of Gujrat* AIR 1983 SC 753, a married woman, ordinarily, would not come forward to make a false charge of rape as it involves risk of losing love and respect of her own husband. As explained further, discrepancies, which do not go to the root of the matter and shake the basic version of the witnesses, can not be annexed with undue importance. Injury on the body or private parts of the prosecutrix is also not sine qua non to prove a charge of rape. This apart, in a rape case, delay in lodging the FIR, if satisfactorily explained, would not be fatal to the prosecution.

11. Absence of corresponding injuries during the medical examination conducted on 12.07.07.2005 at 3.15 p.m. i.e. more than 80 hours after the sexual assault in question, was not by itself sufficient to falsify the case of alleged rape on her. As laid down by the Apex Court in *Sk. Zakir vs. State of Bihar* AIR 1983 SC 911 and reiterated in *State of M.P. vs. Dayal Sahu* AIR 2005 SC 3570, even non-examination of doctor and non-production of the doctor's report would not be fatal to the prosecution case, if the statements of the prosecutrix and other prosecution witnesses inspire confidence. This apart, location of the place of occurrence was also not sufficient to make the prosecution case improbable (*Parbata v. State of Rajasthan* (2005) 13 SCC 398 referred to).

12. The unproved and un-exhibited report as to medical examination of the prosecutrix produced by the prosecution yet favouring the defence to a certain extent could be used by the appellants to challenge veracity of prosecutrix's testimony (See. *Lallusingh v. State of M.P.* 1996 MPLJ 452). However, as observed by the Supreme Court in *Visveswaran v. State* AIR 2003 SC 2471 -

> "The approach required to be adopted by Courts in rape cases has to be different. The cases are required to be dealt with utmost sensitivity, Courts have to show greater responsibility when trying an accused on charge of rape. In such cases, the broader probabilities are required to be examined and the Courts are not to get swayed by minor contradictions or insignificant discrepancies, which are not of substantial character. The evidence is required to be appreciated having regard to the background of the entire case and not in isolation.

> The ground realities are to be kept in view. It is also required to be kept in view that every defective investigation need not necessarily result in the acquittal. In defective investigation, the only requirement is of extra caution by Courts while evaluating evidence. It would not be just to acquit the accused solely as a result of defective investigation. Any deficiency or irregularity in investigation need not necessarily lead to rejection of the case of prosecution when it is otherwise proved."

13. In this view of the matter, the history recorded in the medical report suggesting that it was a mere attempt to rape did not assume any significance.

14. Learned counsel for the appellants has contended that in view of the admitted fact that prosecutrix was above 16 years of age, the conviction for the offence of rape was not sustainable in law. The contention is apparently misconceived because it is a trite law that submission of body under fear of terror or duress would not amount to consent (See. *State of H.P. v. Mange Ram* AIR 2000 SC 2798) and her evidence that she was forcibly subjected to sexual intercourse should normally be accepted unless there is material leading to inference of her consent *(State of Rajasthan v. N.K., (2000)* 5 SCC 30 relied on).

15. The defence that the prosecutrix had lodged a false report with a view to snapping marital ties with A2 was apparently improbable as firstly, only a period of 46 days had elapsed after the marriage and secondly, in case of incompatibility for any reason whatsoever, it is easier to get divorce by mutual consent.

16. For these reasons, none of the contentions raised against legality and propriety of the order of conviction recorded against A1 deserves acceptance.

17. Adverting to the liability of A2, it may be observed that he had resorted to deceitful means in inducing the prosecutrix to go from one place to another. The expression "deceitful means" is vide enough to include the inducing of a wife by husband on a false pretext. Had it been a case of forcible carrying of the wife from her parents' house, the husband could not be convicted (See. *Pirmohammad v. State of M.P.* AIR 1960 MP 24) but, it was a case of sale of a wife and consequently, her abduction by deceitful means. Thus, facts of the instant case are clearly distinguishable.

18. Kunhi Raman, the then Chief Justice of Travencore Cochin High Court,

speaking for the Division Bench, explained the law on the subject in the following words -

> "Section 366 of the Indian Penal Code provides the punishment for abducting a woman, in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse, which is imprisonment of either description which may extend to ten years and also fine. It will be noticed that no question arises as to whether there was consent or absence of consent in the case of an offence under this section. It is not necessary according to the definition of abduction, that any force should be used. It is enough if by deceitful means a woman is induced to go from any place. If the intention of the accused is that she may be seduced to illicit intercourse by which is meant intercourse between a man and woman who are not husband and wife, that would make the accused liable for this offence under Section 366.
>
> The framers of the Code deliberately introduced this section into the Code with the object of providing for cases like the present, where there may be difficulty in asserting positively whether there was consent or no consent, and that question will have to be decided specially with reference to the evidence of the woman who complains of the offence. In such cases, where it is clear from the evidence that the person who is charged had abducted the woman in order that she may be seduced to illicit intercourse, he can be brought under Section 366 and punished."

19. Accordingly, the conviction of A2 for the offence of abduction also does not call for interference.

20. Coming to the question of sentence, it may be observed that A2 has already suffered the impugned sentences. Further, interests of justice would be met if the term of custodial sentence awarded to A1 is reduced to the minimum prescribed for the offence of rape.

21. Consequently, the appeal is allowed in part. In the result -

(i) The conviction and consequent sentences passed against A2 Bhagwan Singh are hereby affirmed.

(ii) The conviction and consequent sentence of fine awarded to A1 Radhe Shyam are maintained. However, the term of sentence of imprisonment is reduced from 10 years to 7 years.

22. Before parting with the judgment, it may be observed that learned trial Judge has violated the guideline laid down by the Apex Court in *Bhupinder Sharma v. State of H.P.* AIR 2003 SC 4684 by disclosing identity of the prosecutrix in first five paragraphs of the judgment.

23. Registrar General is directed to place the matter before Hon'ble the Chief Justice for appropriate action.

Appeal partly allowed.

I.L.R. [2011] M. P., 524
APPELLATE CRIMINAL
Before Mr. Justice N.K. Gupta

Cr.A. No.93/2009 (Jabalpur) decided on 22 October, 2010

LAL SINGH ... Appellant
Vs.
STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Section 376/511 or 354 - Attempt to commit rape or outrage the modesty of a woman - Difference - **Appellant/accused did not put his penis on vagina of prosecutrix and on denial of prosecutrix he performed ejaculation by his own hands - The overt-act of appellant does not come under purview of attempt to commit rape and at the most it comes under the purview of Section 354.** (Para 12)

दण्ड संहिता (1860 का 45), धारा 376/511 या 354 – बलात्संग करने का प्रयत्न या स्त्री की लज्जा भंग करना – भेद – अपीलार्थी/अभियुक्त ने अपना जननांग अभियोक्त्री की योनि में नहीं डाला और अभियोक्त्री के इनकार करने पर उसने अपने हाथों से स्खलन किया – अपीलार्थी का प्रत्यक्ष कार्य बलात्संग करने के प्रयत्न के सीमा क्षेत्र के अन्तर्गत नहीं आता है और यह धारा 354 के सीमा क्षेत्र में आता है।

Case referred :

(2004) 4 SCC 379.

Navneet Dubey, for the appellant.

R.N. Yadav, Panel Lawyer, for the respondent/State.

JUDGMENT

N.K. GUPTA, J. :–This criminal appeal is filed by the appellant being aggrieved by the judgment, finding and sentence dated 29/11/2008 passed by the Sessions Judge, Bhopal in ST No.453/2008 whereby the appellant was convicted for commission of offence punishable under Section 376 read with Section 511 of IPC and sentenced to rigorous imprisonment for five years with fine of Rs.5,000/-, in default of payment of fine amount, an additional RI for six months.

2. Prosecution case, in short, is that on 4/7/2008 at about 3:00 PM in the noon when prosecutrix (PW-1), who was 9 years old girl was in her house at Rajiv Nagar, Bhopal, the appellant-accused entered her house. At that time both of her brothers were playing outside with other boys. The appellant-accused asked her to provide some vicks and requested her to rub the vicks on his forehead and then the appellant-accused started sliding his hand on the person of the prosecutrix. Ultimately he removed the underwear of the prosecutrix and also removed his underwear and then he tried to penetrate, but he could not do it and ultimately he ejaculated by himself by his own hands. Due to his conduct, the underwear of the prosecutrix got with some spots of the semen etc. Thereafter the appellant-accused left the house. After sometime Pratibha Singh (PW-2), mother of the prosecutrix came to the house and prosecutrix narrated the entire story to her mother, who had washed the clothes of the prosecutrix. She tried to search the appellant-accused. The appellant-accused was found in a Dal Mill where he was working. Pratibha Singh (PW-2) assaulted him by a stick and injured him. Thereafter she took Ramkumar, owner of the Dal Mill, with her to the Police Station Bairagarh, Bhopal where she lodged an FIR Ex.P-1 against the appellant-accused. The police directed the prosecutrix for medical examination, but her mother Pratibha Singh refused to get the medical examination done on her daughter. After due investigation, a charge sheet was filed before the concerned committal Court for commission of offence under Section 376 read with Section 511 of IPC.

3. The appellant-accused denied his guilt and plea was recorded by the learned Sessions Judge. He took the defence that he was falsely implicated, but he did not adduce any defence evidence.

4. On considering the evidence adduced by the parties, the learned Sessions Judge, Bhopal found the appellant to be guilty for commission of offence punishable under Section 376 read with Section 511 of IPC and inflicted the aforesaid sentence.

5. I have heard the learned counsel for the parties.

6. In the present case, there are only two points to be considered in this appeal. Firstly as to whether the prosecutrix and her mother are reliable to convict the appellant-accused and secondly that the overt-act of the appellant-accused whether comes under the purview of Section 376 read with Section 511 of IPC or not.

7. The prosecutrix (PW-1) and Pratibha Singh (PW-2) have narrated the entire story before the trial Court. Pratibha Singh (PW-2) had lodged an FIR Ex.P-1 on the same day after few hours. The delay caused in lodging the FIR is explained in the FIR itself that first of all Pratibha Singh searched the appellant-accused and assaulted him by stick etc., then she informed Ramkumar, owner of the Dal Mill where the appellant-accused was a worker. She took Ramkumar with her and lodged an FIR at Police Station Bairagarh, Bhopal, therefore, the delay caused in lodging the FIR has been properly explained, and hence FIR did not lose its value in the present case.

8. The prosecutrix is an innocent girl, who was nine years of age at the time of incident, though she was a child witness, still her narration shows that she was not so much tutored that she could tell a cooked story. She is telling a natural story what she observed at the time of incident. Conduct of Pratibha Singh (PW-2), mother of the prosecutrix is also natural. If any neighbour does such an act with the daughter of some one, then the reaction of that person, certainly will be the same, which was done by Pratibha Singh, mother of the prosecutrix. The appellant-accused did not say that he was not assaulted by Pratibha Singh in the Dal Mill. There is no enmity or rivalry proved by the appellant-accused against Pratibha Singh. No reason is established from the side of the defence in cross examination of both the witnesses so that it could be presumed that there was a sufficient cause with Pratibha Singh, so that the appellant-accused could be falsely implicated.

9. Learned counsel for the appellant submits that Pratibha Singh refused to get medical examination of her daughter and her conduct shows that the incident was imaginary, but such an argument of the learned counsel for the appellant cannot be accepted, since no penetration was alleged, and therefore if no injury was caused to the prosecutrix in the incident, there was no need of medical examination of the prosecutrix. In the circumstances, the evidence of the prosecutrix and her mother Pratibha Singh with corroboration of the FIR is believable, and therefore it is proved that it was the appellant who committed such an act with the prosecutrix on the date of the incident.

10. The prosecutrix was the only eye-witness in the matter. She stated before the trial Court that initially the appellant-accused asked her to press his head by hands, then he caught hold the hands of the prosecutrix and removed her underwear. Thereafter he lied down over the prosecutrix and tried to insert his penis in the vagina of the prosecutrix and due to his act ejaculation took place causing some spots on the clothes of the prosecutrix. Prosecutrix was a nine years old girl at the time of incident, who could be tutored by her mother for some small portion of incident. In this context, Pratibha Singh (PW-2) was confronted with the FIR Ex.P-1, in which it was stated that after removing underwear of the prosecutrix, the appellant-accused also removed his underwear and tried to put his penis on the vagina of the prosecutrix, but on denial by the prosecutrix he got himself ejaculated by his own hands. In the FIR, it is nowhere mentioned that the appellant-accused lied down over the prosecutrix and rubbed his penis on the vagina of the prosecutrix, and therefore this portion of the evidence given by the prosecutrix should be considered to be an after thought. Thus, the overt-act of the appellant-accused which is acceptable can be that he removed the underwear of the prosecutrix and also his own underwear, then he tried to put his penis on the vagina, but on refusal of the prosecutrix he did not put his penis on the vagina.

11. Act of the rape, attempt to commit rape and outrage the modesty of a woman are three different acts, with subtle variations they are to be proved according to the act of the culprit. If penetration is done, though it may be for a moment or a second, but an offence under Section 376 of IPC will be made out, whereas in case of an attempt to rape, it should be an attempt with an intention to commit rape. Court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts to rape. The point of distinction between an offence to commit rape and to commit indecent assault is that there should be some action on the part of the accused which would show that he was merely going to have sexual connection with her. In this context, the judgment of the Hon'ble Apex Court in the case of *"Aman Kumar and another Vs. State of Haryana"*, [(2004) 4 SCC 379], may be referred, in which it is laid down by the Hon'ble Apex Court as under:-

> "11. In order to find an accused guilty of an attempt with intent to commit a rape, Court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired

to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect".

12. In the light of the aforesaid judgment, if the evidence of the present matter is considered, then it would be clear that the appellant-accused did not put his penis on the vagina of the prosecutrix. The prosecutrix was 9 years old girl at the time of incident, and therefore the appellant-accused not only could put his penis on the vagina, but could try to penetrate his penis into vagina, but on denial of the prosecutrix he did not try even to put his penis on the vagina and he performed ejaculation by his own hands, therefore the overt-act of the appellant-accused does not come under the purview of attempt to commit rape and at the most it comes under the purview of Section 354 of IPC. Accordingly, the conviction of the appellant-accused for commission of offence under Section 376 read with Section 511 of IPC deserves to be set aside, and the appellant-accused should be guilty for commission of offence punishable under Section 354 of IPC.

13. So far as sentence is concerned, learned counsel for the appellant has submitted that at present the appellant-accused is in custody since 29/11/2008, and therefore looking to the period of custody, the appellant-accused may be inflicted for jail sentence for the period which he has already undergone. Learned counsel for the appellant has further submitted that the appellant-accused is a poor worker of a Dal Mill, and therefore he could not deposit the fine amount, hence he may not be directed with fine amount as imposed by the learned Sessions Judge.

14. Looking to the facts and circumstances of the case, it appears that the appellant-accused may be inflicted with rigorous imprisonment of one and half years and since he has already undergone for more than that period, therefore no further imprisonment may be inflicted upon him. Similarly looking to the financial condition of the appellant-accused, if fine amount is maintained, then certainly he has to undergo the default sentence, whereas he has already undergone for a lengthy period in the custody.

15. In the result, the appeal of the appellant-accused succeeds and is partly

allowed. Conviction of the appellant under Section 376 read with Section 511 of IPC recorded by the Court below is hereby set aside and he is acquitted from that charge. Instead of it, he is held guilty for offence under Section 354 of IPC for which he is inflicted with the jail sentence for the period which he has already undergone in the custody. In addition to the jail sentence, no fine is imposed on the appellant-accused.

16. At present the appellant is in custody, therefore he be released forthwith by issuing an appropriate warrant without any delay.

Appeal partly allowed.

I.L.R. [2011] M. P., 529

APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saksena & Mr. Justice M.A. Siddiqui

Cr.A. No.186/2004 (Jabalpur) decided on 23 November, 2010

HALKU ... Appellant

Vs.

STATE OF M.P. ... Respondent

A. Penal Code (45 of 1860), Section 302 - Circumstantial evidence - Extra judicial confession - **P.W. 2, son of deceased stated that appellant had made extra judicial confession to him - Highly suspicious that for no rhyme or reason accused would have made confession of his guilt before son of deceased - Evidence of P.W. 2 suspicious.** (Paras 10 to 12)

क. दण्ड संहिता (1860 का 45), धारा 302 – परिस्थितिजन्य साक्ष्य – न्यायिकेतर संस्वीकृति – अ.सा. 2, मृतक के पुत्र ने कथन किया कि अपीलार्थी ने उससे न्यायिकेतर संस्वीकृति की – यह अत्यंत संदेहास्पद है कि बिना किसी तुक या कारण के अभियुक्त ने अपने अपराध की संस्वीकृति मृतक के पुत्र के समक्ष की होगी – अ.सा. 2 की साक्ष्य संदेहास्पद।

B. Penal Code (45 of 1860), Section 302 - Circumstantial evidence - Recovery of weapon - **Blood group of deceased was 'B' - However, blood group on Bakhar could not be detected - Held - It cannot be held with certainty that Bakhar recovered from the possession of appellant was used in commission of murder - Appeal allowed.** (Paras 14 & 15)

ख. दण्ड संहिता (1860 का 45), धारा 302 – परिस्थितिजन्य साक्ष्य – हथियार की बरामदगी – मृतक का रक्त समूह 'बी' था – तथापि 'बखर' पर के रक्त

का रक्त समूह मालूम नहीं किया जा सका – *अभिनिर्धारित* – निश्चिय पूर्वक यह अभिनिर्धारित नहीं किया जा सकता कि अपीलार्थी के कब्जे से बरामद 'बखर' हत्या करने में उपयोग किया गया – अपील मंजूर।

Cases referred :

AIR 1959 SC 18, AIR 1975 SC 1320, AIR 1987 SC 1507.

Pradeep Sharma, for the appellant.
Yogesh Dhande, Panel Lawyer, for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by :

RAKESH SAKSENA, J. :–Appellant has filed this appeal against the judgment dated 12.11.2003, passed by I Additional Sessions Judge, Chhatarpur, in Sessions Trial No.123/2003, convicting him under Section 302 of the Indian Penal Code and sentencing him to imprisonment for life with fine of Rs.5000/-.

2. In nutshell, the prosecution case is that in the night of 23.03.2003, at about 9.00 O'clock, deceased Shivnath, after taking meals, went to sleep in the outer verandah of his house. In the night, his son Mulchandra had gone to keep vigil on the field and his wife, daughter-in-law and children were at home. In the morning, when inmates of the house got up, they saw Shivnath lying dead on the cot. There were number of injuries on his neck and face by some sharp edged weapon. In the morning of 24.03.2003 Mulchandra went to Police Station, Loudi and lodged a report. Marg No.11/2003 was registered. During investigation, it was revealed that appellant committed murder of Shivnath by an iron Bakhar (a kind of plough having a wide share). On the information furnished by appellant, said Bakhar was recovered and seized from the garbage lying behind the house of appellant.

3. Dead body of Shivnath was sent for postmortem examination to Primary Health Centre, Loudi, where Dr. S.S. Chourasiya (PW-12) conducted the autopsy and found 5 incised injuries on the nose, mandible, chin and neck of the deceased. Postmortem report is Ex.P/14. After investigation, charge sheet was filed and the case was committed for trial.

4. Accused/appellant abjured his guilt and pleaded false implication by the sons of deceased. According to him, they, in connivance with the police, wanted to grab his land.

5. There was no direct evidence in the case. Case rested mainly on the

circumstantial evidence of extra judicial confession allegedly made by the appellant before Ram Prasad (PW-2) and Kallu (PW-5) and recovery of Bakhar, weapon of the offence, at his instance.

6. Learned Additional Sessions Judge, relying upon the aforesaid circumstances, held the appellant guilty of committing murder of deceased Shivnath and convicted and sentenced him as mentioned above.

7. Learned counsel for the appellant submitted that the trial Court gravely erred in placing implicit reliance on the evidence of extra judicial confession allegedly made by the appellant to Ram Prasad (PW-2) and Kallu (PW-5) and the evidence of recovery of Bakhar from the garbage lying behind the house of appellant. Learned counsel for the State, on the other hand, justified and supported the conviction of appellant.

8. We have gone through the entire evidence on record.

9. It was no longer disputed that deceased died of homicidal injuries. It is reflected from the evidence of Mulchandra, Ram Prasad (PW-2), Smt. Dhansi Bai (PW-3), Raja Bhaiya (PW-4) and Kallu (PW-5) that they saw number of injuries caused by some sharp edged weapon on the face, neck etc. of the deceased. When they saw him, he had already died. On getting information about the death of deceased, ASI Ramnath (PW-13) went to spot and after conducting inquest proceedings prepared memorandum (Ex.P/12) and sent the dead body of deceased for postmortem examination. From the evidence of Dr.S.S. Chourasiya (PW-12) it is established that on 24.3.2003 when he was posted as Block Medical Officer in Primary Health Centre, Loudi, he conducted postmortem examination of the dead body of Shivnath. According to him, he found following injuries on his body:

> "(1) Incised wound 4 cm x 0.5 cm. bony deep on nose. Bone was cut.
>
> (2) Incised wound 5 cm x 0.5 cm. bony deep on left side of face.
>
> (3) Incised wound 6 cm x 0.6 cm. bony deep on the left side of face. Mandible fractured.
>
> (4) Incised wound 6 cm x 0.5 cm. bony deep on chin. Mandible fractured.
>
> (5) Incised wound 10 cm x 5 cm horizontally placed on neck interiorly below the thyroid cartilage cutting whole thickness.
>
> All the wounds were spindle shaped with clear cut margins

and stained with blood. In wound No.5, both carotid arteries, veins and windpipe were cut.

In his opinion, cause of death was shock caused by excessive haemorrhage from the wound on neck. His postmortem report is Ex.P/14"

It was thus clearly evident that deceased Shivnath died of homicidal injuries.

10. As far as evidence of extra judicial confession made by the accused is concerned, Ram Prasad (PW-2), who is son of deceased did not state about the extra judicial confession in his examination-in-chief and he was declared hostile by the prosecution. In cross-examination, he admitted that he had given statement to police (Ex.P/6) that when he and Kallu Lodhi (PW-5) were standing near the school, accused came to him and told that he had killed his father, and that some day he would kill him too and went away. This witness admitted that since the day incident occurred, police remained present in the village. On next day of the incident, when police was in the village, accused was also present in the village. The day on which accused talked to him, police was at his house. After talking to him, since accused had gone out, he did not disclose to police that he was there. He further stated that when accused told to him about the incident, about 20 persons were present there. Kallu (PW-5) had heard accused saying the above fact. According to him, he disclosed about the aforesaid confession by the accused to his brother Mulchandra (PW-1) and Raja Bhaiya (PW-4). It is significant to note that Kallu (PW-5) did not support the version given by Ram Prasad (PW-2). He denied that in his presence accused told to Ram Prasad (PW-1) that he had killed his father and he would also kill him. This witness was declared hostile. As far as evidence of Mulchandra (PW-1) and Raja Bhaiya (PW-4), who happen to be the real brothers of Ram Prasad (PW-2), they did not say that Ram Prasad disclosed the fact of confession made by accused to him. Thus, the evidence of Ram Prasad on the point that he disclosed about the making of confession by accused to Mulchandra (PW-1) and Raja Bhaiya (PW-4) remains uncorroborated. Apart from it, it appears highly suspicious that for no rhyme or reason accused would have made confession of his guilt before the son of deceased and that too in presence of about 20 persons and on the day when police was present at the house of deceased.

11. In *Ratan Gond v. The State of Bihar*-AIR 1959 SC 18, the Apex Court observed:

> "It is enough to state that usually and as a matter of caution, courts require some material corroboration to such a confessional statement, corroboration which connects the accused person with the crime in question, and the real question which falls for decision in the present case is if the circumstances proved against the appellant afford sufficient corroboration to the confessional statement of the appellant, in case we hold that the confessional statement is voluntary and true."

In *Maghar Singh v. State of Punjab*-AIR 1975 SC 1320, the Apex Court further observed:

> "The evidence furnished by the extra-judicial confession made by the accused to witnesses cannot be termed to be a tainted evidence and if corroboration is required it is only by way of abundant caution. If the Court believes the witnesses before whom the confession is made and it is satisfied that the confession was voluntary, then in such a case conviction can be founded on such evidence alone."

12. Examining the evidence of extra judicial confession allegedly made by the accused to Ram Prasad (PW-2) in the light of above factual legal proposition, we find that the evidence of Ram Prasad (PW-2) was highly suspicious. It was not corroborated even by his real brothers viz. Mulchand (PW-1) and Raja Bhaiya (PW-4). In these circumstances, we hold that trial Court committed error in taking into consideration the evidence of extra judicial confession against the appellant.

13. The next submission made by the learned counsel for the appellant was that the evidence of recovery of Bakhar at the instance of appellant was not sufficient to hold the appellant guilty of the commission of murder of deceased, as it was not established that the said Bakhar was the weapon of offence.

14. From the evidence of Investigating Officer Ramnath, ASI (PW-13) it is revealed that on 29.3.2003 he interrogated the accused in the presence of witnesses Pappu (PW-6) and Halka (PW-10) and recorded memorandum (Ex. P/8) and in accordance accused took out a Bakhar from the garbage lying on the back side of his house. He seized the same vide seizure memo Ex.P/9 and sent the same for examination to FSL, Sagar. The report of FSL, Sagar was Ex.P/17. The evidence of investigating officer finds support from

the evidence of Pappu (PW-6) and Halka (PW-10). Both the witnesses deposed that accused gave information and a Bakhar was got recovered from the garbage kept behind his house. Thus, it is established that a Bakhar was recovered and seized from the possession of accused. On perusal of FSL report (Ex.P/17), it is revealed that the said Bakhar contained stains of human blood. Learned counsel for the appellant, however, placed reliance on the case of *Kansa Behera v. State of Orissa*-AIR 1987 SC 1507 and contended that where there is clear evidence about the dimensions of the stains of the blood on the weapon seized from the possession of the accused and blood group of the stains, if tallied with the blood group of deceased, only then the recovery of weapon from the accused would be incriminating against him. In case of *Kansa Behera* (supra), Apex Court held that "the evidence about the blood group is only conclusive to connect the blood stains with the deceased. That evidence is absent and in this view of the matter, in our opinion, even this is not a circumstance on the basis of which any inference can be drawn."

15. In the present case, though vide FSL report Ex.P/17, the blood of the deceased was detected to be of Group "B", but the group of the blood stains found on Bakhar could not be detected. Therefore, in our opinion, it cannot be concluded with certainty that Bakhar recovered from the possession of the accused was used in commission of murder of deceased. It is a settled rule of circumstantial evidence that each of the circumstances relied upon by the prosecution have to be established beyond doubt and all the circumstances put together must lead to the only one inference i.e. the guilt of accused. As discussed above, both the circumstances sought to be proved by the prosecution against the accused were not sufficient to hold the accused/ appellant guilty of commission of murder of the deceased. Apart from it, there was absolutely no evidence on record to indicate any motive on the part of accused to have caused death of the deceased.

16. In the light of above discussion, in our opinion, the court below was wrong in convicting the appellant on these facts. The appeal is, therefore, allowed. The conviction and sentence passed against the appellant are set aside. Appellant, who is in custody, shall be set at liberty forthwith, if not required in any other case.

17. Appeal allowed.

Appeal allowed.

I.L.R. [2011] M. P., 535
APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saksena & Mr. Justice M.A. Siddiqui

Cr.A. No.263/2002 (Jabalpur) decided on 23 November, 2010

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

A. Evidence Act (1 of 1872), Section 32 - Dying declaration - Dying declaration recorded by Doctor - **No evidence on record to indicate that anybody prompted or persuaded deceased to implicate appellant - No material to indicate that Doctor entertained any ill will or grudge against appellant - Dying declaration recorded by Doctor worth reliance - Appeal dismissed.** (Paras 18 & 19)

क. साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – चिकित्सक द्वारा अभिलिखित मृत्युकालिक कथन – अभिलेख पर यह उपदर्शित करने के लिए कोई साक्ष्य नहीं कि किसी ने अपीलार्थी को आलिप्त करने के लिये मृतक को उकसाया अथवा प्रेरित किया – यह उपदर्शित करने के लिए कोई सामग्री नहीं कि चिकित्सक अपीलार्थी के विरुद्ध कोई वैमनस्यता या द्वेष रखता था – चिकित्सक द्वारा अभिलिखित मृत्युकालिक कथन विश्वास योग्य – अपील खारिज।

B. Evidence Act (1 of 1872), Section 32 - Multiple dying declaration - **Each dying declaration has to be considered independently on its own merit as to its evidentiary value and one dying declaration cannot be rejected because of the contents of others - It is the duty of Court to consider each of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs.** (Para 20)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 32 – बहुविध मृत्युकालिक कथन – प्रत्येक मृत्युकालिक कथन पर उसके साक्ष्यिक मूल्य के बारे में उसके अपने गुणागुण पर स्वतंत्र रूप से विचार करना होगा और एक मृत्युकालिक कथन को अन्य की विषय वस्तु के कारण अस्वीकार नहीं किया जा सकता – न्यायालय का कर्तव्य है कि वह उनमें से प्रत्येक का उसके सही परिप्रेक्ष्य में विचार करे और स्वयं की संतुष्टि करे कि उनमें से कौन सा मामले की वास्तविक कार्यकलाप की स्थिति को प्रतिबिम्बित करता है।

Cases referred :

AIR 2006 SC 3221, (2009) 6 SCC 484, AIR 2004 SC 1708, AIR 2007 SC (Suppl) 398, (2004) 13 SCC 314.

B.J. Chaurasiya, for the appellant.
S.K. Rai, G.A., for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by : **RAKESH SAKSENA, J.** :–Since both the above appeals arise out of the common judgment, this judgment shall govern the disposal of both the appeals.

2. Appellant Somat of Criminal Appeal No.263/2002 and respondents Sevaram, Munna and Devi Prasad of Criminal Appeal No.759/2002 were tried by the Additional Sessions Judge, Khurai District Sagar in Sessions Trial No.430/2000 of the charge under sections 302 and 302 read with section 34 of the Indian Penal Code. After trial, by judgment dated 29.01.2002, learned Additional Sessions Judge convicted Somat under section 302 of the Indian Penal Code and sentenced him to imprisonment for life with fine of Rs.500/-, in default of payment of fine further rigorous imprisonment for 6 months and acquitted accused Sevaram, Munna and Devi Prasad of the charge under section 302/34 of the Indian Penal Code.

3. Prosecution case, in nutshell, is that all the four accused persons were neighbours of Nasso Bi, the deceased. It is said that accused Somat had an evil eye on Nasso Bi and often he used to tease her. When Nasso Bi in this regard complained to her brother Asraf Khan, Asraf admonished Somat. Being annoyed on 11.10.2000, the women of the family of Somat abused and manhandled Nasso Bi at about 9-10:00 a.m. Thereafter all the four accused persons went at the house of Nasso Bi. Somat had a can of kerosene. On the exhortation made by Sevaram, Munna and Devi Prasad, Somat entered the house of Nasso Bi and after pouring kerosene ignited her. Nasso Bi cried and rushed out of her house. Asraf, Quadir, Kastiya and some other persons reached there and saw accused persons running away from there. It is alleged that Nasso Bi narrated the incident to them. Injured Nasso Bi was taken to police station Khurai where she lodged first information report Ex.P/16 at about 10:45 a.m.

4. Nasso Bi was then sent to Civil Hospital, Khurai where Dr.D.B.S.Chauhan (PW-5) examined her injuries vide MLC report Ex.P/5. He also recorded dying declaration Ex.P/4 of Nasso Bi at about 11:48 a.m. In view of serious condition he referred Nasso Bi to District Hospital Sagar for further treatment. In the evening at about 4:30 p.m. Nasso Bi expired at Sagar. Intimation of her death was sent to police station Khurai and an

offence under section 302 of the Indian Penal Code was added to already registered case. Investigating Officer B.M.Dubey (PW-21) prepared the inquest and after going at the spot, prepared the spot map and seized a can, half burnt match stick and some other articles. Seized articles were sent for examination to Forensic Science Laboratory, Sagar. Dr. C.K. Dubey (PW-20), medical officer in district hospital, Sagar conducted autopsy of the dead body and vide postmortem report Ex.P/14 found 95% burn injuries on the body of deceased. After further requisite investigation, charge sheet was filed against all the four accused persons.

5. Learned Additional Sessions Judge framed the charge under section 302 against accused Somat and under section 302 read with section 34 of the Indian Penal Code against accused Sevaram, Munna and Devi Prasad. All the accused persons abjured their guilt and pleaded false implication.

6. Learned Additional Sessions Judge, after trial and upon appreciation of evidence adduced in the case, acquitted accused Sevaram, Munna and Devi Prasad, but held accused Somat guilty for intentionally causing death of Nasso Bi by pouring kerosene and setting her ablaze, convicted and sentenced him under section 302 of the Indian Penal Code as aforesaid. State has challenged the acquittal of accused Sevaram, Munna and Devi Prasad whereas appellant Somat has challenged his conviction in his appeal.

7. We have heard the learned counsel for the parties.

8. It was no longer disputed that deceased Nasso Bi died of burn injuries. It is also reflected from the evidence of Dr. D.B.S. Chauhan (PW-5) that on 11.10.2000 when he was posted as medical officer in Community Health Centre, Khurai, Nasso Bi was brought by constable Dhaniram. He had examined her injuries and found 98% second and third degree burn injuries on her body. There were superficial burns and blisters on her whole of the body except private parts and soles of feet. Smell of kerosene was emanating from her body and clothes. Her MLC report Ex.P/5 was written and signed by him. For further treatment and opinion Nasso Bi was referred to district hospital, Sagar.

9. Dr. C.K.Dubey (PW-20), who conducted the postmortem examination on the dead body of deceased Nasso Bi on 12.10.2000, also found smell of kerosene in her hair and body and ante mortem burns on her face, neck, chest, back, abdomen, both hands, both thighs and feet. Only private parts,

soles and palms were not burnt. There were blisters on her body. Carbon particles were found in her trachea. The cause of death of Nasso Bi was shock due to burn injuries and its complication. Her postmortem examination report Ex.P/14 was written and signed by Dr.Dubey (PW-20). In our opinion, it was thus clearly evident that deceased Nasso Bi died of burn injuries.

10. Learned counsel for appellant Somat, however, submitted that the trial Court gravely erred in placing implicit reliance on the dying declaration Ex. P/4 of the deceased allegedly recorded by Dr.D.B.S.Chauhan (PW-5) and also committed error in relying on the evidence of Quadir (PW-8) and Asraf (PW-10) who allegedly heard deceased shouting that accused Somat and others set fire to her. Learned counsel for the State, on the other hand, justified and supported the conviction of appellant Somat as well as contended that the trial Court committed error in acquitting respondents/ accused Sevaram, Munna and Devi Prasad.

11. We have gone through the entire evidence on record.

12. Dying declaration Ex.P/4 of the deceased was recorded by Dr. D.B.S. Chauhan (PW-5), medical officer of Community Health Centre, Khurai. Dr. Chauhan categorically deposed in his evidence that on 11.10.2000 at 11:48 a.m., he had recorded the dying declaration of Nasso Bi who was brought to hospital by constable Dhaniram. According to dying declaration, Nasso Bi stated that at about 9 o'clock in the morning when she was at her house, Somat came there and poured five litres of kerosene on her and set her ablaze. She shouted and ran out of the house in burning condition. At that time nobody was there. Somat wanted to ravish her, when she objected, he burnt her. Dr. Chauhan (PW-5) deposed that he recorded her statement in presence of Smt. Lalita Sahu, staff nurse and Smt. Manju Pandey, M.P.W. in Community Health Centre, Khurai. He obtained the right hand thumb impression of Nasso Bi and attested the same. According to Dr. Chauhan (PW-5), smell of kerosene was emanating from the body and clothes of Nasso Bi. He deposed that he had asked police to get dying declaration recorded by Magistrate, but looking to the condition of injured, he himself recorded the dying declaration. He did not record any separate certificate about the general condition of injured because the patient herself said that she was able to give her statement. He denied that at the time of recording the dying declaration any member of the family of Nasso Bi was present. Dr. Chauhan testified that he recorded the statement in the female ward. He first checked up the patient and gave

treatment, thereafter recorded her statement. He categorically stated that patient was capable and fit to give answers to the questions asked by him. Nasso Bi had not disclosed the name of any other person except accused Somat. On the question put by Court, Dr. Chauhan deposed that even a 100% burnt person can speak before going into coma.

13. Learned counsel for appellant Somat strenuously urged that the evidence of Dr. D.B.S.Chauhan (PW-5) was belied by the evidence of Quadir (PW-8) who stated that doctor had referred Nasso Bi to Sagar at about 11-11:30 a.m. and she was then taken to Sagar, whereas the dying declaration Ex.P/4 is said to have been recorded between 11:48 a.m. to 12:05 p.m. This inconsistency, in our opinion, cannot be treated as a material inconsistency in view of fact that witness Quadir (PW-8) happened to be a rustic labourer. He gave only the approximate time of referring of Nasso Bi. Therefore, in view of categoric evidence of Dr. Chauhan, the evidence of dying declaration Ex.P/4 recorded by him cannot be doubted.

14. Learned counsel for appellant Somat contended that there had been love affair between Nasso Bi and Somat, and her brother Asraf had rebuked Nasso for that, therefore, annoyed Nasso Bi committed suicide by setting fire to herself. There is absolutely no evidence on record to substantiate the submissions made by learned counsel. It is true that such a suggestion was put to Asraf (PW-10), but he firmly denied it. According to him, Nasso had told him that accused persons used to harass her.

15. Learned counsel for appellant Somat argued that since Quadir (PW-8) and Asraf (PW-10) deposed that when they reached the house of Nasso, she told to them that all the four accused persons viz. Somat, Sevaram, Munna and Devi Prasad set fire to her because Somat wanted to outrage her modesty, trial Court committed error in convicting accused Somat only and acquitting other accused persons on the ground that other accused persons were not named by Nasso in the dying declaration Ex.P/4. Learned counsel further argued that in the first information report Ex.P/16, which was recorded by deceased herself, all the four accused persons were named, therefore, the conviction of accused Somat only was not justified. Learned counsel for State referring to paragraph 23 of the judgment of the trial Court contended that trial Court disbelieved the first information report Ex.P/16 in view of the evidence of Quadir (PW-8) and Asraf (PW-10). Both the witnesses testified that when they carried Nasso to police station, they were advised that if they

wanted to save the life of Nasso they should first take her to hospital. They took Nasso to hospital and the police recorded the first information report in the hospital, whereas according to sub inspector B.P.Dwivedi (PW-18) he recorded the first information report Ex.P/16 at police station Khurai and then sent Nasso Bi to hospital. He also stated that since the condition of Nasso Bi was serious he asked the doctor on duty to record her dying declaration. After scrutinizing the evidence in respect of first information report Ex.P/16, which could have been treated as a dying declaration given by deceased, trial Court concluded that the same was not reliable. Thus, the first information report Ex.P/16 was excluded from consideration. In dying declaration Ex.P/4, deceased gave clear picture of the incident and spoke only against accused Somat whereas Quadir (PW-8) and Asraf (PW-10), who reached at the place of occurrence after the incident, appears to have exaggerated in saying that deceased named all the four accused persons i.e. accused Somat and his three real brothers. Trial Court did not commit error in giving benefit of doubt to accused Sevaram, Munna and Devi Prasad, who were not named by deceased in dying declaration Ex.P/4. We also find trial Court justified in not relying on the evidence of Inspector B.P.Dwivedi (PW-18). Under similar circumstance, Supreme Court, in *Balbir Singh versus State of Punjab* - AIR 2006 SC 3221, keeping in view the inconsistencies between two dying declarations, extended benefit of doubt to one of the appellants. In our opinion, on the above grounds dying declaration Ex. P/4 recorded by Dr. Chauhan also cannot be suspected.

16. According to Quadir (PW-8) and Asraf (PW-10), they saw all the four accused persons running on the road. According to Quadir, after hearing screams of Nasso he saw accused persons running on the road, whereas according to Asraf (PW-10) in the morning when he went to admonish accused persons, at the shop of accused Seva, Seva and Devi got annoyed and broke down their own glass containers with a view to make false accusation against him. Thereafter, there occurred a quarrel between Nasso and the family members of accused persons. Accused persons sent the women of their family to lodge report and themselves went to the house of Nasso and set fire. He saw accused persons running away after setting fire. When Nasso came out she shouted that accused persons set fire to her. In cross-examination, Asraf admitted that he reached at the spot after about 5 minutes of the incident after washing his clothes. By that time, the fire of Nasso was already extinguished. He did not know as to who was present at the spot before he reached. He

further admitted that accused persons did not lodge any report against him of breaking the glass containers of their shop. After examining and appreciating the evidence of aforesaid witnesses, trial Court found that there was no eyewitness of the incident and that it was not acceptable that immediately after the incident anybody saw accused persons running from the house or near the house of deceased. Therefore, the evidence of Quadir (PW-8) and Asraf (PW-10) in this regard was not reliable. However, since their evidence in respect of naming of accused Somat by deceased stood corroborated by the evidence of dying declaration Ex.P/4 made to Dr.Chauhan, it was acceptable, but it was not acceptable in respect to other accused persons in the absence of corroboration. View taken by the trial Court appears reasonable, therefore, we find no reason to take a different view.

17. Prosecution also examined Lalita Sahu (PW-6) and Manju Pandey (PW-7). Smt. Lalita Sahu (PW-6) was the staff nurse in community health centre. According to her, on 11.10.2000, a woman was brought to hospital in burnt condition. Dr.D.B.S.Chauhan had examined and treated her. Dr. Chauhan had recorded her statement and she and Manju Pandey both had signed on the said statement Ex.P/4. Lalita Sahu deposed that at that time patient was moaning and also speaking. Manju Pandey (PW-7) deposed that she was posted as M.P.W. in community health centre, Khurai. She had gone to deposit the slides of malaria in the hospital. She had also gone in the female ward to help the woman patient. Dr. Chauhan was recording the statement of patient. After recording the statement, on the request of Dr. Chauhan, she had signed on the statement Ex.P/4. According to her, she did not know as to what was recorded in the statement and that the thumb impression of patient was not taken before her but she had signed on the statement. She firmly denied that the statement Ex.P/4 was not recorded before her.

18. From the evidence of Dr.D.B.S.Chauhan (PW-5), Lalita Sahu (PW-6) and Manju Pandey (PW-7), it is clearly established that dying declaration Ex.P/4 of Nasso Bi was recorded by Dr. Chauhan. There is no evidence on record to indicate that anybody prompted or persuaded Nasso to implicate accused Somat. There is absolutely no material on record to indicate that Dr. D.B.S. Chauhan (PW-5) entertained any ill will or grudge against accused Somat. Merely because the evidence of Quadir (PW-8) and Asraf (PW-10) is not found acceptable against accused Sevaram, Munna and Devi Prasad, it cannot essentially be held unacceptable against accused Somat also in respect of whom the dying declaration Ex.P/4 appears reliable and trustworthy.

19. *Ratio of Vallabhaneni Venkateshwara Rao versus State of Andhra Pradesh* (2009) 6 SCC 484 and *Heeralal versus State of Madhya Pradesh,* cited by learned counsel for appellant Somat, in our opinion, is not attracted in the facts and circumstances of the present case. In case of *Vallabhaneni* (supra), three different stories had been projected by the prosecution. In three dying declarations, each one gave a different version of prosecution story. Apex Court found that second dying declaration was not a mere improvement of first dying declaration. The story projected in first dying declaration was entirely different from the second dying declaration. The story in first dying declaration was given up and a new case had been projected in another dying declaration introducing new set of eyewitnesses and new set of accused. Hence, it was unsafe to convict the appellant-accused. In case of *Heeralal* (supra) of bride burning, two dying declarations were recorded. In the first dying declaration recorded by Naib Tahsildar, it was stated that deceased tried to set herself ablaze by pouring kerosene on herself. However, in subsequent declaration recorded by another Naib Tahsildar a contrary statement was made. In these circumstances in view of apparent discrepancies in the two dying declarations, apex court found unsafe to convict the accused. In the present case, first information report Ex.P/16 allegedly recorded by the deceased was disbelieved by the trial Court for the reason that it was doubtful that it was recorded at the police station or at the hospital. Except the dying declaration Ex.P/4 recorded by Dr. Chauhan (PW-5) there is no other written dying declaration. Though Quadir (PW-8) and Asraf (PW-10) stated that deceased named all the four accused persons but their evidence about the oral dying declaration appears inconsistent with the evidence of dying declaration Ex.P/4 wherein deceased named only accused Somat. Therefore, their evidence in respect of accused Sevaram, Munna and Devi Prasad appears suspicious and exaggerated. It is significant to note that accused Sevaram, Munna and Devi Prasaid are real brothers of accused Somat. In our opinion, merely because Quadir (PW-8) and Asraf (PW-10) named all the four accused persons, the evidence of dying declaration Ex.P/4 recorded by Dr. Chauhan (PW-5) cannot be discarded wherein deceased named only accused Somat.

20. In *Nallam Veera Satyanandam and others versus Public Prosecutor, High Court of A.P.*- AIR 2004 SC 1708, Apex Court observed that "in case of multiple dying declarations each dying declaration will have to be considered independently on its own merit as to its evidentiary value and one cannot be

rejected because of the contents of the other. In cases where there are more than one dying declaration, it is the duty of the Court to consider each of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs. In *Sayarabano versus State of Maharashtra*-AIR 2007 SC (Suppl) 398, it has been observed by the Supreme Court that criminal cases are to be decided on the facts and on the evidence rather than on the case law and precedents. In *State of Maharashtra versus Sanjay* - (2004) 13 SCC 314, Supreme Court observed that "It is not the plurality of the dying declaration that adds weight to the prosecution case, but their qualitative worth is what matters. It has been repeatedly pointed out that the dying declaration should be of such nature as to inspire full confidence of the court in its truthfulness and correctness (vide the observations of a five-Judge Bench in *Laxman v. State of Maharashtra*). Inasmuch as the correctness of dying declaration cannot be tested by cross-examination of its maker, "great caution must be exercised in considering the weight to be given to this dying declaration genuinely recorded, they must be tested on the touchstone of consistency and probabilities. They must also be tested in the light of other evidence on record."

21. After bestowing our anxious consideration to the submissions made by learned counsel for the appellants and having examined the evidence on record, in the light of above propositions of law, we find that dying declaration Ex. P/4 recorded by Dr.D.B.S.Chauhan (PW-5) wherein only accused Somat was named is reliable. It stands corroborated by the evidence of Lalita Sahu (PW-6) and Manju Pandey (PW-7). It is also corroborated by the evidence of Quadir (PW-8) and Asraf (PW-10). It appears to us voluntary, truthful and, therefore, trustworthy. Since the statement made by deceased in the alleged first information report Ex.P/16 has been found suspicious and unreliable and the evidence of Quadir (PW-8) and Asraf (PW-10) does not appear reliable in respect of accused Sevaram, Munna and Devi Prasad, in our opinion, prosecution failed to establish their participation in the incident beyond a reasonable doubt.

22. In view of the foregoing discussion, we are of the considered opinion that the trial Court did not commit error in relying upon the dying declaration Ex.P/4 and holding accused/appellant Somat guilty of intentionally causing death of Nasso Bi by pouring kerosene over her and setting her ablaze and at the same time acquitting respondents/accused Sevaram, Munna and Devi Prasad of the charge under section 302 read with section 34 of the Indian Penal Code by giving them benefit of doubt.

23. Thus, we find no merit in both the appeals. The impugned judgment passed by the trial Court is affirmed.

24. Both the appeals fail and are dismissed.

Appeal dismissed.

I.L.R. [2011] M. P., 544

CIVIL REVISION

Before Mr. Justice Abhay M. Naik

C.R. No.66/2010 (Gwalior) decided on 6 October, 2010

MANJU TOMAR (SMT.) ... Applicant

Vs.

SMT. ANJALI JAIN & ors. ... Non-applicants

***Limitation Act (36 of 1963), Section 14 - Exclusion of time* - Plaint return by Court for want of jurisdiction - Benefit of Section 14 cannot be given by Court returning the case - Such benefit can be claimed only after presentation to the Court having competent jurisdiction.** (Para 7)

परिसीमा अधिनियम (1963 का 36), धारा 14 – समय का अपवर्जन – अधिकारिता के अभाव में न्यायालय द्वारा वादपत्र वापस – मामला वापस करने वाले न्यायालय द्वारा धारा 14 का लाभ नहीं दिया जा सकता है – ऐसे लाभ का दावा सक्षम अधिकारिता रखने वाले न्यायालय के समक्ष प्रस्तुत करने के उपरान्त ही किया जा सकता है।

Ajay Bhargava, for the applicant.

Prashant Sharma, for the non-applicant No.1.

ORDER

Abhay M. Naik, J. :–This Civil Revision is directed against the impugned order dated 12.5.2010 passed by the court of A.D.J. Ambah in Misc. Case No.3/10, returning thereby the Election Petition presented by the respondent No.1 with a direction that he would be entitled to the benefit of exclusion of time from 15.1.2010 to the date of impugned order under Section 14 of the Limitation Act.

2. Briefly stated relevant facts are that the revisionist has been elected as President of Municipal Council, Ambah on 15.12.2009. Respondent No.1 presented the Election Petition under Section 20 of M.P. Municipalities Act,

1961 to the Court of A.D.J. Ambah to challenge the said election. Revisionist submitted an application under Order 7 Rule 11 CPC that Ambah falls within the revenue district of Morena and therefore the Election Petition ought to have been presented to the Court of District Judge, Morena only. Accordingly, it was contended that the Court of A.D.J. at Ambah has no jurisdiction and Election Petition is liable to be dismissed. Application has been allowed by the impugned order. Learned A.D.J. Ambah directed for return of the Election Petition for being presented to the Court of D.J. Morena. Additionally, it is directed that the election petitioner would be entitled to the benefit of Section 14 of Limitation Act 1963 by excluding the time from 15.1.2010 to the date of the impugned order on account of having been consumed in the Court of A.D.J. having no jurisdiction.

3. Shri Ajay Bhargava, learned counsel for the revisionist and Shri Prashant Sharma, learned counsel for the respondent No.1 made their respective submissions.

4. Main contention of the revisionist is that the court of learned A.D.J. had no jurisdiction as rightly found by it to entertain the Election Petition presented to it in view of language of Section 20 of the M.P. Municipalities Act, 1961. This being so, he has no jurisdiction to grant benefit of exclusion of time under Section 14 of the Limitation Act, 1963.

Per contra, Shri Prashant Sharma, learned counsel for the respondent No.1, the impugned order is well reasoned order and does not warrant interference.

5. Undisputedly, Ambah falls within the revenue district of Morena, in which the Court of the District Judge is situated. This being so, the Election Petition ought to have been presented to the District Judge Morena only. This controversy has already been decided in the said manner by this Court today in Civil Revision No.95/10 and Civil Revision No.96/10 by separate order. For the reasons stated therein, it is held that the learned A.D.J. Ambah has not acted illegally in holding that the Election Petition ought to have been presented to the District Judge Morena only.

6. Contention of the learned counsel for the revisionist that the benefit of exclusion of time under Section 14 of Limitation Act 1963 could not have been granted by the learned A.D.J. has definitely substance for twofold reasons. Firstly, the court of A.D.J. having no jurisdiction to entertain the Election Petition

presented to it under Section 20 of the M.P. Municipalities Act, has equally no jurisdiction to grant any relief to the election petitioner. Learned A.D.J. himself has found in the impugned order that the Election Petition ought to have been presented to the Court of District Judge. In view of this finding, he ceases to have further jurisdiction to grant any relief. He obviously could have and has rightly returned it to the election petitioner for being presented to the District Judge Morena, which is having jurisdiction by virtue of Section 20 of the said Act.

7. Now I reproduce Section 14 of the Limitation Act, 1963 for ready reference :

> **"14. Exclusion of time of proceeding bona fide in court without jurisdiction.-** (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.
>
> (2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.
>
> (3) Notwithstanding anything contained in rule 2 of Order XXXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.
>
> Explanation.- For the purposes of this section,-
>
> (a) in excluding the time during which a former civil proceeding

was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction."

Perusal of the aforesaid, makes it clear that exclusion is to be claimed in the court having competent jurisdiction. Thus, Section 14 (supra), if at all available, is to be invoked when a litigant presents the suit in a court having competent jurisdiction. A court, in which the earlier proceedings were prosecuted with due diligence and good faith, which from defect of jurisdiction or other cause of a like nature, is unable to entertain it, can not legally decide the entitlement of the litigant to the benefit of exclusion of time for another Court, which is having competence to decide the suit on merits obviously after deciding the entitlement of the litigant to the exclusion of time under Section 14 of the Limitation Act, 1963. This judicial discretion is obviously to be exercised by the Court having competent jurisdiction. Object of this Section is to grant protection in the matter of limitation against a person, who was honestly doing his best to get his case tried on merits, but fails on account of want of jurisdiction or other cause of a like nature, provided the failure must have resulted despite due diligence and good faith in earlier civil proceedings.

8. In view of the aforesaid, it is held that the learned A.D.J. has exceeded his jurisdiction in granting the benefit of exclusion of time to respondent No.1 and thus obviously committed an illegality. Impugned order is not sustainable to this extent.

9. Learned counsel for the revisionist further contended that Section 14 of the Limitation Act 1963 is not applicable to the Election Petition presented under Section 20 of the M.P. Municipalities Act, 1961.

This point is not found involved in the present revision petition because learned A.D.J. is not found to have jurisdiction to grant any such relief. Applicability or inapplicability of Section 14 to the Election Petition shall have to be considered by the District Judge Morena, in case, if an application to seek exclusion of time is submitted before him by the Election Petitioner. This being so, there is no occasion for the time being to decide the said objection of the revisionist's learned counsel and the same is kept open for being decided

by the learned District Judge Morena in accordance with law, if an occasion arises.

10. In the result, Civil Revision succeeds in part and is allowed to the said extent. Impugned order granting benefit of exclusion of time from 15.1.2010 to 12.5.2010 is hereby set aside.

In view of partial success, parties are directed to bear their own costs.

Application partly allowed.

I.L.R. [2011] M. P., 548

CIVIL REVISION

Before Mr. Justice U.C. Maheshwari

C.R. No.345/2009 (Jabalpur) decided on 13 October, 2010

MANRAKHAN ... Applicant

Vs.

JAYVEER & ors. ... Non-applicants

***A. Civil Procedure Code (5 of 1908), Section 11 - Res judicata - Maintainability of second execution* - Decree holder filed application for execution of decree of possession - Warrant of possession was received back with some report of Revenue Inspector which was objected by decree holder - Court called report from Tahsildar - On the date fixed report of Tahsildar was not received and, in absence of decree holder, on the basis of disputed report Court recorded full and final satisfaction of decree - In revision, High Court granted liberty to file fresh application for execution - Second application challenged on the ground of res judicata - Held - Decree holder had objected to the report of Revenue Inspector - Executing Court could not have passed the final order on merits - If decree holder was absent, then execution could have been dismissed for want of prosecution - Further liberty to file another application for execution was granted by High Court - Subsequent application not barred by principle of res judicata.** (Para 8, 9)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – पूर्व–न्याय – द्वितीय निष्पादन की पोषणीयता – डिक्रीदार ने कब्जे की डिक्री के निष्पादन हेतु आवेदन फाइल किया – कब्जे का वारण्ट राजस्व निरीक्षक की किसी रिपोर्ट के साथ वापस प्राप्त हुआ जिस पर डिक्रीदार द्वारा आक्षेप किया गया – न्यायालय ने तहसीलदार से रिपोर्ट मँगाई – नियत तिथि को तहसीलदार की रिपोर्ट प्राप्त नहीं हुई और

डिक्रीदार की अनुपस्थिति में, विवादित रिपोर्ट के आधार पर न्यायालय ने डिक्री की पूर्ण एवं अंतिम तुष्टि अभिलिखित की – पुनरीक्षण में उच्च न्यायालय ने निष्पादन के लिए नया आवेदन प्रस्तुत करने की स्वतंत्रता प्रदान की – द्वितीय आवेदन को पूर्व–न्याय के आधार पर चुनौती दी गई – *अभिनिर्धारित* – डिक्रीदार ने राजस्व निरीक्षक की रिपोर्ट पर आक्षेप किया था – निष्पादन न्यायालय गुणदोषों पर अंतिम आदेश पारित नहीं कर सकता था – यदि डिक्रीदार अनुपस्थित था, तब निष्पादन अभियोजन के अभाव में खारिज किया जा सकता था – इसके अतिरिक्त निष्पादन के लिए दूसरा आवेदन फाइल करने की स्वतंत्रता उच्च न्यायालय द्वारा दी गयी थी – पश्चात्वर्ती आवेदन पूर्व–न्याय के सिद्धांत से वर्जित नहीं।

***B. Civil Procedure Code (5 of 1908), Section 47 - Application for execution - Limitation* - Application for execution filed within 12 years from the date of decree passed by last Appellate Court is within limitation, as appeal is continuation of suit.** (Para 10)

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 47 – निष्पादन के लिए आवेदन – परिसीमा – अंतिम अपीलीय न्यायालय द्वारा पारित डिक्री की तारीख से 12 वर्षों के भीतर फाइल किया गया निष्पादन का आवेदन परिसीमा के भीतर है क्योंकि अपील वाद का चालू रहना है।

Cases referred :

AIR 1992 Raj 3, AIR 1974 SC 1380, AIR 1990 Bom 361.

Rajesh Dubey, for the applicant.

B.K. Bais, for the non-applicants.

ORDER

U.C. MAHESHWARI, J. :–The applicant- judgment debtor has directed this revision under Section 115, being aggrieved by the order dated 1.5.2006 passed by Ist Civil Judge Class-II, Vaidhan in execution Case No. 45-A/79 (1999) dismissing his application filed for dismissal of such execution proceeding on the ground of principles of res judicata and holding the same to be barred by time.

2. The brief facts of the case necessary to consider the question of admission of this revision in short are that respondents herein filed a Civil Suit bearing 45-A/79 against the applicant for declaration and possession with respect of the land bearing Kh. No. 416/01 area 0.21 acre, situated at village, Binlagi, District Singhrouli. After holding the trial such suit was decreed by the trial court, vide judgment dated 20.8.01. On challenging such decree by the applicant herein, before the appellate court, on consideration by affirming

such decree such appeal was dismissed. Such decree of subordinate appellate court was also challenged by the applicant before this court under Section 100 of CPC which was also dismissed, vide order dated 1.10.1996. This fact has also come on record that in pendency of the aforesaid appeals subject to some conditions the execution of the impugned decree was stayed. But on account of non compliance of the conditions of such order the same did not remain operative.

3. Subsequent to dismissal of the aforesaid second appeal by this court, vide dated 1.10.1996 the respondents herein filed the execution proceeding before executing court on 6.1.1997, in which to deliver the possession of disputed land to the respondents, a warrant of possession was issued against the applicant - judgment debtor, the same was received back with some report of Revenue Inspector. On certain reasons such report of Revenue Inspector was objected on behalf of respondents, on which, vide order dated 11.5.1999 the executing court called the report of Tahsildar on certain points. When such report was not received from Tahsildar, then vide order dated 13.8.1999 again such report was requisitioned from Tahsildar with a direction to place the same on 16.8.1999. But due to non payment of process fee by the decree holder such report for want of intimation to Tahsildar could not be received till 16.8.1999, on which again such report was called and case was fixed for such report on 28.8.1999 but till such date no such report was received inspite it on 28.8.1999 in later hours of the day in the absence of the respondents only in presence of the applicant's counsel without calling the Tahsildar report in compliance of the order dated 11.5.1999 and 13.8.1999, on the basis of aforesaid disputed warrant of possession by recording the full and final satisfaction of the decree the execution proceeding was dismissed.

4. Such order of the executing court dated 28.8.1999 was assailed by the respondents before this court in Civil Revision No. 2237/99 and vide dated 2.2.2000 on hearing of such revision, the same was withdrawn by the respondents with liberty to move the appropriate application before the executing court. Pursuant to such liberty an application for executing the above mentioned decree was filed on behalf of the respondents in the executing court on dated 16.4.04. Subsequent to it, the applicant herein filed an application on 15.7.04 for dismissal of the aforesaid execution application on the ground of principle of res judicata and also by holding the same to be barred by limitation. As per averments of it, on dismissal of the earlier filed execution proceeding after recording full and final satisfaction of the decree,

vide dated 28.8.1999, such subsequent execution application being hit by principle of res judicata is not entertainable. As per further averments, subsequent to passing the decree by the trial court, the same was challenged in appeal by the applicant, in which subject to some condition the stay was granted but on account of non compliance of such conditions of the stay the decree was remained operative since the date of passing the same by the trial court and in such premises, the decree holder was never restrained to execute the same, hence limitation to file the execution proceeding of such decree had started on the very day, i.e. 20.8.1991, on which the same was passed by the trial court and after twelve years from such date by virtue of Article 136 of Limitation Act the same is not remained executable and in such premises prayer for dismissal of the execution proceeding is barred by limitation is made.

5. In reply of the respondents, by disputing the averments, of the application, it is stated that the executing proceeding filed on dated 6.1.1997 was fixed before the executing court on 28.8.1999 for receiving the report of Tahsildar in compliance of the earlier orders and unless such report is received by the court, on the basis of disputed service report of possession warrant as stated in the order sheets dated 11.5.1999 and 13.8.1999, the executing court did not have any authority to record the full and final satisfaction of the decree nor dismissed the execution proceedings on such count. Inspite of that the same was dismissed under the wrong premises, vide order dated 28.8.1999. On which such order dismissing the execution proceedings was challenged on behalf of the respondents before this court through Civil Revision no. 2237/ 99. Subsequently such revision was withdrawn on 2.2.2000 with liberty to file fresh application for execution and thereafter under such liberty the impugned application for execution of the impugned decree was filed. So, firstly in view of the order of the Revisional Court extending the liberty to file fresh application, the impugned application of execution should be deemed to be filed in continuation of the earlier execution proceeding and in such premises the same could not be dismissed on the principle of res judicata. It is also stated that in any case such subsequent application of execution was filed within twelve years from the date of judgment passed by this court on dated 1.10.1996 in second appeal filed under Section 100 of CPC. As soon as the order is passed by the appellate court, the judgment and decree of Subordinate court are merged in such order and limitation to execute the decree is deemed to be started from the date of judgment or order of the appellate court. So in such premises, the instant execution proceeding could not be

dismissed as barred by time and prayer for dismissal of the objection of the applicant is made.

6. On consideration, vide impugned order, by dismissing such objection of the applicant the execution was held to be entertainable, on which the applicant has come to this court with this revision.

7. Having heard the applicant's counsel at length on admission, keeping in view his arguments, after going through the impugned order and the papers placed on record, I am of the considered view that the executing court has not committed any jurisdictional error in holding the impugned execution proceeding maintainable by dismissing the objection of the applicant.

8. In view of the facts, stated above, it is apparent that initially the suit of the respondents was decreed by the trial court, vide order dated 20.8.1991 and in continuation of such suit second appeal was dismissed by this court, vide order dated 1.10.1996 and subsequent to that the respondents herein filed the execution proceeding firstly on dated 6.1.1997 well within limitation from the date of judgments of the trial court as well as of the second appeal. Undisputedly on issuing the warrant of possession under such execution, it's service report was received. On disputing the same by decree holder, vide order dated 11.5.1999 in that regard, on some points the report from Tahsildar was requisitioned. When it was not received on a date fixed for the same, then again some order in this regard was passed on dated 13.8.1999. Inspite that because of non payment of PF on behalf of the respondents the requisite report was not received, on which again vide order dated 16.8.1999 such report was requisitioned and case was fixed on 28.8.1999. On such date without receiving such report of the Tahsildar and also without assigning any specific reasons to rely on such disputed report of the Revenue Inspector on that basis after recording full and final satisfaction of the decree in the absence of the decree holders the execution was dismissed. In the civil proceeding if the plaintiff-applicant or the decree holders are not present, then no order could be passed on merits. In such premises, such execution would have been dismissed for want of prosecution and not on merits or in any case on the basis of disputed service report of warrant the executing court did not have any authority to record the full and final satisfaction of the decree. Subsequent to it, such order was challenged at the instance of the respondents before this court by way of revision No. 2237/99. On hearing the same on dated 2.2.2000, the respondents' counsel sought permission to

withdraw the same with liberty to move the executing court by an appropriate application and on consideration after granting such liberty the revision petition was dismissed as withdrawn, as evident from Annexure A-7 with this revision.

9. The impugned execution proceeding was filed on behalf of the respondents under the aforesaid liberty, which was given by this court in the aforesaid revision filed in continuation of the earlier execution proceeding/ application. Therefore, such application shall be deemed to be filed in continuation of the earlier execution proceeding. So same could not be dismissed either by holding to be barred by the principle of res judicate or by holding the same to be barred by limitation from the date of decree passed by the trial court. So in such premises, I have not found any perversity, infirmity or illegality or anything against the propriety of law in the order impugned rejecting the objections of the applicant.

10. Apart from the above for the sake of arguments, if it is deemed that subsequent to passing the order by this court in Civil Revision No. 2237/99, vide dated 2.2.2000 under such liberty, second execution proceeding was filed on behalf of the respondents in the executing court on dated 16.4.04, even then the same could not be thrown away holding the same to be filed after twelve years from the date of decree of the trial court as such on taking into consideration the spirit of the provision of Article 136 of the Limitation Act, it can be said safely that appeal being continuation of the suit, the judgment and decree of the subordinate courts merged in the decree of the appeal and pursuant to that the limitation to file the execution proceeding shall be deemed from the date of passing the judgment, decree by the last appellate court irrespective of the circumstance whether any interim stay order or interim injunction was passed against the judgment and decree appealed with some conditions and such conditions were not complied with by the party. So in such premises, the aforesaid execution filed on 16.4.04 being filed within twelve years from the date of judgment passed in second appeal is within limitation. My aforesaid view is fully fortified by the decision of Rajsthan High Court in the matter of *Sayed Abdul Rauf, v. Nurul Hussain and others,* AIR 1992 RAJASTHAN 3, in which it was held as under :-

> 10. As I have already observed, on the recommendation of the Law Commission, the Parliament enacted the present Art.136 which substantially re-produces the repealed S.48, C. P. C. and re-places Art. 182 of the old Limitation Act. This was done with a view to overcome the difficulty which used to

be faced by the litigants and the Courts. Enactment of Art.136 has simplified the controversy and has provided that for the execution of any decree or order of any Civil Court, the period of limitation would be twelve years. This period of limitation begins to run "when the decree or order becomes enforceable". Whether there was a stay order or not, that was not material for the purposes of calculating the period of limitation and giving effect to the phrase 'when it becomes enforceable'.

11. It is settled law that the decree of the trial Court gets merged with the decree of the appellate Court and the letter supersedes the decree of the trial Court. This merger takes place irrespective of the fact that the appellate Court affirms, modifies or reverses the lower Court's decree....."

11. Aforesaid case was decided by such High Court taking into consideration earlier decision of the Apex Court in the matter of *"Gojer Brothers (P) Ltd., M/s. v. Ratan Lal Singh"* AIR 1974 S. C. 1380.

12. Aforesaid question is also answered by the Hon'ble Bombay High Court in the matter of *Ramkrishna Bajirao Gotmare, Applicant v. Kanhaiyalal Tribhuwanlal Shah,* reported in AIR 1990 BOMBAY 361 in which it was held as under :-

An appellate decree supersedes the original decree on the basis of doctrine of merger and only appellate decree is enforceable; and the new Act has not brought about any change in the above crystalized legal position. Such result would ensue even on the effect of O.41, R. 35 of the Code which deals with the decree in appeal. Even if there is any doubt on the question its benefit must go to the decree-holder for whom obtaining a decree is generally a difficult task and realizing the fruits of the decree a distant dream. After all appeal is continuation of the suit. True, it is that the original decree is enforceable despite pendency of appeal if there is no stay, but that aspect is beside the point. Crux of the matter is, once it merges into the appellate decree, it ceases to rule. Accordingly, the limitation for execution of decree would commence from the date of appellate decree irrespective of whether original decree was stayed or not.

13. In view of aforesaid discussion, I have not found any merits in this

revision even for admission, thus, the same is hereby dismissed at the initial stage of motion hearing. However, keeping in view the impugned execution proceeding is pending since long, the executing court is directed to take an endeavour to expedite the proceeding to execute the decree and conclude the same probably within six months from the date of receipt of the copy of this order. There shall be no order as to the costs.

Revision dismissed.

I.L.R. [2011] M. P., 555
CRIMINAL REVISION

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

Cr.R. No.447/2010 (Jabalpur) decided on 18 November, 2010

O.P. SHUKLA ... Applicant

Vs.

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

***Prevention of Corruption Act (49 of 1988), Section 19 - Sanction for prosecution - Necessity - Office* - Applicant is member of State Administrative Services - He is alleged to have misused his office as General Manager, M.P. State Civil Supplies Corporation Limited - Held - Word 'office' denotes that office which the Public Servant misused or abused for corrupt motives and in respect of which sanction to prosecute him is necessary by competent authority entitled to remove him from that office - No necessity of sanction by State Government for prosecution in respect of offences committed by him as General Manager of Corporation.** (Paras 10 to 12)

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 19 – अभियोजन के लिए मंजूरी – आवश्यकता – पद – अपीलार्थी राज्य प्रशासनिक सेवा का सदस्य है – उसे महाप्रबंधक, म.प्र. राज्य सिविल आपूर्ति निगम मर्यादित के रूप में अपने पद का दुरुपयोग करने के लिए आरोपित किया गया – अभिनिर्धारित – शब्द 'पद' उस पद का द्योतक है जिसका लोक सेवक ने दुरुपयोग किया अथवा भ्रष्ट हेतुओं के लिए दुरुपयोग किया और जिसके संबंध में उसे अभियोजित करने के लिए उस पद से उसे हटाने के लिए हकदार सक्षम प्राधिकारी द्वारा मंजूरी आवश्यक है – निगम के महाप्रबंधक के रूप में उसके द्वारा किये गये अपराधों के संबंध में अभियोजन के लिए राज्य सरकार द्वारा मंजूरी की कोई आवश्यकता नहीं है।

Cases reffered :

AIR 2007 SC 1274, (1975) 1 SCC 784, (2007) 9 SCC 539, 2005(1)

MPLJ 476, (1984) 2 SCC 183, (2007) 1 SCC 59, (2007) 1 SCC 49, (1998) 6 SCC 411.

Surendra Singh with *Pratap Singh,* for the applicant.

Aditya Adhikari, Special Public Prosecutor, for the non-applicant/S.P.E. (Lokayukt).

ORDER

The Order of the Court was delivered by **R.C. MISHRA, J.** :–In this revision, subject matter of challenge is the order dated 8/3/2010 passed by the Special Judge [under the Prevention of Corruption Act, 1988 (for brevity the 'Act')], Satna, in relation to Crime No. 1/2006 registered at SPE (Lokayukta), Rewa, against the petitioner and two others namely R.K. Shrivastava and S.K. Trivedi, in respect of the offences punishable under Sections 409, 420, 468, 471, 477-A and 120-B of the IPC as well as Section 13(1)(d) read with S.13(2) of the Act.

2. Allegations as against the petitioner, in short, are that in pursuance of a conspiracy, he, while working as General Manager of M.P. State Civil Supplies Corporation Limited (for short "Corporation"), was involved in forgery and cheating the State Exchequer by claiming allowances for his lodging and boarding at Satna in connection with a meeting organized on 30.05.2003, despite the fact that entire expenditure incurred on his stay at Hotel Savera was borne by the Corporation and in this way, by abusing his position as a public servant, obtained for himself pecuniary advantage through illegal or corrupt means.

3. The petitioner is a member of State Administrative Services. He was appointed as Deputy Collector in the General Administration Department, Government of M.P. in the year 1993. At the relevant point of time, he was on deputation to the Corporation having its head quarters at Bhopal whereas on the date of filing of charge sheet also, he was holding the post of Special Assistant to Minister for Cultural Affairs, Govt. of M.P. at Bhopal.

4. Admittedly, no sanction was obtained under Section 19 of the Act for prosecution of anyone of the accused in respect of the offences under the Act and, by the time the investigation was completed, co-accused S.K. Trivedi, who made the payment of hotel expenses in his official capacity as District Manager of the Corporation at Satna, had already retired. The other two accused viz. the petitioner and R.K. Shrivastava, the then Regional Manager in the Corporation at Katni, raised preliminary objection against taking of

cognizance of the offences under the Act in absence of sanction under Section 19 of the Act thereof. However, learned trial Judge, for the reasons assigned in the impugned order, proceeded to uphold the objection so far as it related to co-accused R.K. Shrivastava who had continued to be in the services of the Corporation. However, he further took the view that the objection raised by the petitioner was not sustainable in the light of the principles laid down by the Apex Court in *Parkash Singh Badal v. State of Punjab* AIR 2007 SC 1274.

5. Learned Senior Counsel, while placing reliance on a decision of the Supreme Court in *V.K. Sharma v. State (Delhi Administration)* (1975) 1 SCC 784, has strenuously contended that no cognizance of the offences under the Act could be taken against him in absence of sanction by the Government of M.P. through G.A.D (General Administration Department) that still continues to be the dismissing authority. Reference has also been made to the following observations made in Para 3 of the judgment in *Parkash Singh Badal's case* (ibid) -

> *It is stated that though the High Court primarily relied on a Constitution Bench decision of this Court in R.S. Nayak vs. A.R. Antulay (1984 (2) SCC 183), the said decision was rendered in the context of the Prevention of Corruption Act, 1947 (in short the 'Old Act'). It is submitted that the provisions contained in Section 6 thereof are in part material to Section 19 of the Act so far as relevant for the purpose of this case; the effect of Section 6(2) of the Old Act (corresponding to Section 19(2) of the Act) was lost sight of. The decision in the said case was to the effect that if an accused is a public servant who has ceased to be a public servant and/or is a public servant of different category then no sanction in terms of Section 19(1) of the Act corresponding to Section 6(1) of the Old Act is necessary.*

In response, learned Special Public Prosecutor, has submitted that the impugned order, being well merited, does not warrant interference.

6. At the outset, it may be observed that there exists a distinction between "transfer" and "deputation". "Deputation" connotes service outside the cadre or outside the parent department in which an employee is serving. "Transfer",

however, is limited to equivalent post in the same cadre and in the same department. Whereas deputation would be a temporary phenomenon, transfer being antithesis must exhibit the opposite indications (See. *Prasar Bharati v. Amarjeet Singh* (2007) 9 SCC 539).

7. *V.K. Sharma* (above), a quasi-permanent Lower Division Clerk of the Central Secretariat Clerical Service, Grade II, who was borne on the cadre of Community Development and Co-operation, had come temporarily to the Rationing Department with his lien on his post on the Central Secretariat. The sanction was granted by Deputy Secretary of the Department, who was competent to remove V.K. Sharma from his office within the meaning of clause (c) of sub-section (1) of Section 6 of the Act. It was on these facts that the Apex Court while holding that the sanction was granted by the competent authority had rejected the contention that the sanction ought to have been granted by the Chief Controller, Rationing.

8. There cannot be any dispute with the proposition that by virtue of Rule 20 of the M.P. Civil Services (Classification, Control and Appeal), Rules, 1966, powers of termination of services of the petitioner even when he was on deputation to the Corporation continued to vest in the appointing authority viz. the State Government. For this, reference may also be made to the decision of a single Bench of this Court in *Kanchan Singh v. State of M.P.* 2005 (1) MPLJ 476.

9. However, the question germane for decision of this revision is as to whether State Government's sanction, under Section 19(1) of the Act, was necessary for prosecution of the petitioner in respect of the offences under the Act ?

10. Section 19 of the Act corresponds to Section 6 of the Prevention of Corruption Act, 1947. As pointed out by the Constitution Bench in *R.S. Nayak v. A.R. Antulay* (1984) 2 SCC 183), the expression 'office' denotes that office which the public servant misused or abused for corrupt motives for which he is to be prosecuted and in respect of which a sanction to prosecute him is necessary by the competent authority entitled to remove him from that office which he has abused and this interrelation between the office and its abuse is the key to understand the provision providing for sanction by a competent authority who would be able to judge the action of the public servant before removing the bar, by granting sanction, to the taking of the cognizance of offences by the Court against the public servant.

11. The obvious conclusion was couched in these words -

> *"It unquestionably follows that the sanction to prosecute can be given by an authority competent to remove the public servant from the office, which he has misused or abused because that authority alone would be able to know whether there has been a misuse or abuse of the office by the public servant and not some rank outsider".*

12. Further, for re-affirming the principle that sanction for prosecution in case the public servant is no longer holding the post/office during the holding of which the alleged offence was committed, the following illustration, given by the Constitution Bench in *R.S. Nayak's case* (supra), was reproduced in *Parkash Singh Badal's case* (above) -

> *"Now if the public servant holds two offices and he is accused of having abused one and from which he is removed but continues to hold the other which is neither alleged to have been used nor abused, is a sanction of the authority competent to remove him from the office which is neither alleged or shown to have been abused or misused necessary? The submission is that if the harassment of the public servant by a frivolous prosecution and criminal waste of his time in law courts keeping him away from discharging public duty, are the objects underlying Section 6, the same would be defeated if it is held that the sanction of the latter authority is not necessary. The submission does not commend to us. We fail to see how the competent authority entitled to remove the public servant from an office which is neither alleged to have been used or abused would be able to decide whether the prosecution is frivolous or tendentious. An illustration was posed to the learned Counsel that a Minister who is indisputably a public servant greased his palms by abusing his office as Minister, and then ceased to hold the office before the court was called upon to take cognizance of the offence against him and therefore, sanction as contemplated by Section 6 would not be necessary; but if after committing the offence and before the date of taking of cognizance of the offence, he was elected as a Municipal President in which capacity he*

was a public servant under the relevant Municipal law, and was holding that office on the date on which court proceeded to take cognizance of the offence committed by him as a Minister, would a sanction be necessary and that too of that authority competent to remove him from the office of the Municipal President. The answer was in affirmative. But the very illustration would show that such cannot be the law. Such an interpretation of Section 6 would render it as a shield to an unscrupulous public servant. Someone interested in protecting may shift him from one office of public servant to another and thereby defeat the process of law. One can legitimately envisage a situation wherein a person may hold a dozen different offices, each one clothing him with the status of a public servant under Section 21 IPC and even if he has abused only one office for which either there is a valid sanction to prosecute him or he has ceased to hold that office by the time court was called upon to take cognizance, yet on this assumption, sanction of 11 different competent authorities each of which was entitled to remove him from 11 different public offices would be necessary before the court can take cognizance of the offence committed by such public servant/while abusing one office which he may have ceased to hold. Such an interpretation is contrary to all canons of construction and leads to an absurd and product which of necessity must be avoided. Legislation must at all costs be interpreted in such a way that it would not operate as a rogue's charter. (See Davis and Sons Ltd. v. Atkins [1977] Imperial Court Reports, 662)" [Emphasis supplied]

Accordingly, there was no necessity of sanction by the State Government for prosecution of the petitioner in respect of the offences under the Act allegedly committed by him as General Manager of the Corporation.

13. The Apex Court in *K. Karunakaran v. State of Kerala,* (2007) 1 SCC 59 has already declined the prayer to have a fresh look at the view expressed in *R.S. Nayak's case* (ibid). Moreover, as pointed out in *Lalu Prasad v. State of Bihar* (2007) 1 SCC 49, the plea that the effect of the Law Commission's Report and that of the Committee headed by Dr. Bakshi

Tek Chand has not been considered by the legislature and therefore this is a case of "casus omissus" has also been rejected in *Kalicharan Mahapatra v. State of Orissa* (1998) 6 SCC 411 with these observations -

> *"It must be remembered that in spite of bringing such a significant change to Section 197 of the Code in 1973, Parliament was circumspect enough not to change the wording in Section 19 of the Act which deals with sanction. The reason is obvious. The sanction contemplated in Section 197 of the Code concerns a public servant who 'is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty', whereas the offences contemplated in the PC Act are those which cannot be treated as acts either directly or even purportedly done in the discharge of his official duties. Parliament must have desired to maintain the distinction and hence the wording in the corresponding provision in the former PC Act was materially imported in the new PC Act, 1988 without any change in spite of the change made in Section 197 of the Code."*

14. In the light of the factual scenario as highlighted above and the well-settled position of law holding that Section 19(1) of the Act is time and offence related, the question deserves to be answered in the negative. As such, learned trial Judge did not commit any error of jurisdiction in rejecting the objection as to want of sanction for prosecution of the petitioner for the offences under the Act.

15. Consequently, no interference with the order-dated 8/3/2010 (supra) is called for under the revisional jurisdiction.

16. The revision, therefore, stands dismissed.

Revision dismissed.

I.L.R. [2011] M. P., 562

MISCELLANEOUS CRIMINAL CASE

Before Mrs. Justice Indrani Datta

M.Cr.C. No.2853/2008 (Gwalior) decided on 22 October, 2010

MOHAN MANDELIA ... Applicant

Vs.

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

A. Criminal Procedure Code, 1973 (2 of 1974), Section 202 - Enquiry - Status of persons arrayed as accused - **Whenever Magistrate accepts the complaint and starts inquiry, it means he has considered the complaint and decided to proceed - At this stage it cannot be said that person who has been mentioned in complaint as accused acquires the status of accused.** (Para 21)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 202 – जाँच – अभियुक्त के रूप में दोषारोपित व्यक्तियों की प्रास्थिति – जब कभी मजिस्ट्रेट परिवाद स्वीकार करता हैं और जाँच आरम्भ करता है, इसका तात्पर्य हैं कि उसने परिवाद पर विचार किया है और आगे कार्यवाही करने का निर्णय लिया – इस प्रक्रम पर यह नहीं कहा जा सकता कि व्यक्ति, जो परिवाद में अभियुक्त के रूप में उल्लिखित है, ने अभियुक्त की प्रास्थिति प्राप्त कर ली है।

B. Criminal Procedure Code, 1973 (2 of 1974), Sections 200 & 202 - Statement of complainant - **Statements of witnesses recorded prior to the statement of complainant - It is mere irregularity and not illegality - Not a ground to quash or hold the proceedings void ab initio.** (Para 22)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 200 व 202 – परिवादी का कथन – परिवादी के कथन से पूर्व साक्षियों के कथन अभिलिखित किये गये – यह मात्र अनियमितता है न कि अवैधता – कार्यवाहियाँ अभिखंडित करने या आरम्भतः शून्य ठहराने का आधार नहीं।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 177, Negotiable Instruments Act, 1881, Section 138 - Jurisdiction - **Cheque handed over to complainant at Gwalior - Gwalior Court has jurisdiction.** (Para 23)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 177, परक्राम्य लिखत अधिनियम, 1881, धारा 138 – अधिकारिता – परिवादी को चैक ग्वालियर में सौंपा गया – ग्वालियर के न्यायालय को अधिकारिता है।

Cases referred :

(2009) 1 SCC 516, (2009) 4 SCC 439, I (2005) BC 167, (2009) 11 SCC 89, (2009) 14 SCC 696, (2008) 14 SCC 1, 1985 CrLJ 94, AIR 2004 SC 4674, 1998 CrLJ 906, AIR 2008 SC 251, (2009) 9 SCC 682, 1992 Supp (1) SCC 335.

R.K. Sharma, for the applicant Mohan Mandelia.

Prashant Sharma, for the applicant Sant Kumar Sharma.

T.C. Bansal, P.P., for the non-applicant/State.

A.R. Shivhare, G.M.Soni & Atul Gupta, for the non-applicant Rakesh Yadav.

ORDER

INDRANI DATTA, J. :–This common order shall govern the disposal of M.Cr.C. No.2853/2008 *(Mohan Mandelia vs. State of M.P. & Another)* and M.Cr.C.No.3234/2008 *(Sant Kumar Sharma vs. Rakesh Yadav and Another)* as they arise out of same order dated 04.02.2008 passed by the learned JMFC Gwalior; whereby, on a complaint filed by respondent No.1 Rakesh Yadav, cognizance has been taken against the petitioners under Section 138 of Negotiable Instruments Act (for brevity "Act") and under Sections 417, 418,420, 466, 468, 471, 120-B of IPC.

2. Facts in compendium are that respondent Rakesh filed a complaint against the petitioners under Section 138 of Act and Sections 417,418, 420, 465, 467, 468, 471, 120-B IPC. As per averments of complaint, petitioner Mohan Mandelia and accused Beena Mandelia are doing business of making cartons and business is run in the name of GNTV. There was cordial relationship between complainant and petitioner Mohan. Complainant used to give loan to petitioner Mohan and his wife accused Beena from time to time and they used to return the said amount to complainant. It is further averred that from the year 2005 to July 2007 on various occasions Rs.5 lac two times, Rs.10 lac and Rs.9 lac i.e. total Rs.39 lac have been given as loan by the complainant to petitioner and his wife accused No.1 and 2. That amount has not been returned by them. When the amount was demanded by the complainant, they tendered one cheque bearing No.038504 of Bank of India, Phoolbagh Branch, Gwalior dated 08.10.2007 of Rs.39 lac which was signed by accused No.1 Beena by assuring that when cheque is presented it will be honoured. After its presentation for encashment, the said cheque stood dishonoured with the endorsement of "insufficient funds". Cheque was

returned by Bank of India Phoolbagh Branch in a sealed envelope, it is alleged that when complainant opened the envelope he found that in the Cheque it was mentioned that "Cheque issued for gift, valid up to Rs.1,000/-". When cheque was given to complainant by petitioner and co-accused Beena at that time the hand written language and seal was not there. When information with regard to said cheque was sought from Branch Manager of Bank of India Phoolbagh Branch it was intimated that cheque was submitted by the Oriental Bank of Commerce for clearing which was returned by Bank of India because of insufficient fund and cheque was returned in original and Bank of India is having nothing to do with the seal and hand-written language on the cheque.

3. It is further averred in the complaint that petitioner Sant Kumar Sharma,Branch Manager of Oriental Bank of Commerce handing in glove with petitioner Mohan and accused Beena has forged, the cheque by writing on that cheque the words "Cheque Issued for gift,valid up to Rs.1,000/-". At the time when the cheque was presented in Bank of India words "Cheque issued for gift, valid up-to Rs.1,000/-"were not there and seal and hand-written language was not there which was found when cheque was returned to complainant on account of insufficiency of funds. Hence, it is apparent that this forgery was committed and seal and aforesaid hand written words were written when cheque was returned to Oriental Bank of Commerce by Bank of India. On this complaint, the learned trial court recorded the statement of complainant and witnesses under Section 200 and 202 CrPC and vide order dated 04.02.2008 has taken cognizance against the petitioners for commission of offence under Sections 420, 467. 468, 471, 120-B IPC and Section 138 of the Act, giving rise to present petitions.

4. It is contended by learned counsel for petitioner Sant Kumar that main dispute of alleged transaction is between the petitioner Mohan, accused Beena and complainant. Petitioner Sant Kumar is having no role to play. Offence under Section 138 of the Act is not made out against the petitioner Sant Kumar and the allegations levied are improper. Petitioner as Branch Manager is in no way concerned with the crime. Cheque presented by complainant in Oriental Bank of Commerce was sent to clearing house from where it was sent to concerned Branch of Bank of India for clearing, which has been returned on account of insufficiency of fund. in whatever fashion cheques are being presented in Bank those are being sent for clearing to concerned Bank. Petitioner is having no role to play. He was discharging his official duty. It is further submitted that there is no documentary evidence that petitioner Sant

Kumar has forged the Cheque and has put-up the seal and hand-written language "Cheque issued for gift, valid up to Rs.1,000/-" afterwards when cheque was returned from Bank of India to Oriental Bank of Commerce. It is further submitted that there is nothing to connect present petitioner Sant Kumar with the aforesaid transaction.

5. Learned counsel drew this court's attention to citation *R.Kalyani vs. Janak C. Mehta and others* (2009)1 SCC 516 in which, it is held by the Apex Court that vicarious liability can be fastened only by reason of a provision of a statute and not otherwise and for said purpose, a legal fiction has to be created. Relying on the aforesaid citation, it is contended that no vicarious liability can be imposed on petitioner Sant Kumar as he was acting as Branch Manager of the Bank.

6. Further reliance is placed on *Mahesh Chaudhary vs. State of Rajasthan and Another* (2009) 4 SCC 439 in which it is held by the Apex court that power under Section 482 CrPC is to be exercised to prevent abuse of process of court or to secure ends of justice and Court can quash charge-sheet if allegations in FIR or complaint petition do not disclose commission of offence even if on face value they are taken to be correct in their entirety.

7. Over and above, reliance is placed on *M. Venkateshwara Rao vs. Bollisetty Bapanaiah and Another,* 1 (2005) BC 167. In that case petitioner was Manager of Bank and it was alleged that other accused with connivance of petitioner have misappropriated the amount of alleged Cheque given by respondent to accused and it was held that since the conspiracy attributed to petitioner in his passing the cheque in connivance with the other accused and since there is no other allegation against him and since the petitioner cannot be said to have acted inviolation of provisions of Act in passing the cheque which contained signature of 1st respondent, he cannot be said to have committed any offence against 1st respondent and it was held that even if all the allegations in the complaint are taken to be true, since no offence is made out against the petitioner, therefore, complaint against him is liable to be quashed.

8. That apart, reliance is placed on *Hiralal and Others vs. State of Uttar Pradesh and Others* (2009)11 SCC 89 in which it is held that the parameters of interference with a criminal proceeding by the High Court in exercise of its jurisdiction under Section 482 CrPC are well known. One of the grounds on which such interference is permissible is that the allegations contained in the complaint petition even if given face value and taken to be correct in their

entirety, commission of an offence is not disclosed. The High Court may also interfere where the action on the part of the complainant is mala fide. Similar observations have been made by the Apex Court in a case relied upon by the learned counsel for the petitioner in *Dalip Kaur and others vs. Jagnar Singh and Another,* (2009) 14 SCC 696 and *Rukmini Narvekar vs. Vijaya Satardekar and Others,* (2008) 14 SCC 1.

9. Placing reliance on these citations it is urged that the petitioner being Branch Manager, has no specific role and he has only forwarded the cheque for clearance in the Bank and after receiving from Bank of India again sent the cheque to complainant. No specific allegation is made against him that he has acted in violation of Banking Act and hence no case is made out against him and proceedings initiated against him deserve to be quashed.

10. Many fold submissions has been urged by learned counsel for the petitioner Mohan. His first submission is that procedure adopted by the learned Magistrate is not proper. Learned counsel for the petitioner placed reliance in *Ratish Rai v. Mohesh Singh,* 1985 Cri. LJ. 94, in which it is held that examination of complainant adds to credibility of complaint at initial stage and complaint being foundation of entire proceedings should have test of credibility by examining complainant on oath as regards facts of complaint. Placing reliance on this citation, it is submitted that as the learned Magistrate has recorded the statement of witnesses of complainant first. Mahendra and Mohan were examined on 04.01.2008 thereafter complainant was examined on 20.01.2008. It is stated that complainant should have been examined first and thereafter statement of his witnesses were to be recorded. It is further submitted that J.P. Sharma Branch Manager of Bank of India, Phoolbagh Branch who has been mentioned as accused in complaint was examined on 21.01.2008 in trial Court and that is against law. The whole proceedings are void ab initio as after his examination, the learned trial court has taken cognizance against him on 04.02.2008 arbitrarily and thereafter on the application filed by complainant his name was deleted from the array of complaint on 27.06.2008, hence after passing the order of taking cognizance against accused No.4 mentioned in the complaint, that order cannot be recalled.

11. Learned counsel for the petitioner Mohan placed reliance on *Adalat Prasad v.Rooplal Jindal and others,* AIR 2004 SC 4674; wherein, it is held that once cognizance of offence is taken and summons are issued then recalling of that order by Magistrate is without jurisdiction. It is further submitted by

learned counsel that in view of the above, all the proceedings are de hors the law.

12. Second submission raised by learned counsel for the petitioner Mohan is that complainant has not mentioned that how petitioner has arranged the huge amount of Rs.39 lac and endorsement in the cheque is also not proper. The petitioner has made one application to Bank of India for stop payment on the ground that bag containing cheque N0.038503 and 038504 of Bank of India Phoolbagh have been lost and one publication was also made in newspaper concerning the fact that bag containing disputed cheque has been taken-away from factory campus by somebody, hence cheque cannot be returned with the endorsement of "insufficient funds".

13. Further reliance is placed on *A. Bhoosanrao v. Purushothamdas Pantani and another,* 1998 Cri.L.J. 906. In that case complainant failed to prove that he had sufficient capacity to lend that amount that too by cheque and he also failed to prove such amount was actually drawn by accused, hence it is held that accused is not liable to be punished for offence under Section 138.

14. Third submission is made that the factory of petitioner is situated at Morena and payment was made at Morena. Hence, Gwalior Court has no jurisdiction to deal with the case and complainant has maliciously implicated the petitioner Mohan and Sant Kumar, therefore, the entire proceedings deserve to be quashed.

15. Reliance is placed on *Inder Mohan Goswami & Anr. v. State of Uttaranchal & Ors.,* AIR 2008 SC 251; wherein, it is held that power under (Section) 482 CrPC exists for advancement of justice and injustice by abuse of process of Court can be prevented by exercising inherent powers.

16. Further, reliance is placed on *M.N. Ojha and others v. Alok Kumar Srivastav and another,* (2009)9 SCC 682. In that case complaint was filed against bank official as counter blast to action taken by them in their official capacity for realizing loan amount due and intention behind initiating criminal proceedings was to prevent public servants from discharging their duties. Averments and allegations made in complaint not disclosing any commission of offence by appellant, criminal proceedings initiated against accused persons were quashed.

17. Reiying on the aforesaid dictum, it is submitted by learned counsel for

the petitioner Mohan that this is a fit case for invoking inherent powers enshrined under Section 482 of CrPC as no prima facie case is made out against the petitioner Mohan.

18. Combating the claim of the petitioners, the learned counsel for the respondents vehemently opposed the petition and submitted that the order of the learned trial court of taking cognizance against the petitioners is legal and proper and requires no interference. It is further submitted that the petitioner Mohan and his wife Beena have joint account in Bank of India, hence they are jointly responsible for cheque given by Beena to complainant which was duly signed by Beena and eventually stood dishonoured. It is further submitted that as per statement of complainant's witness No.4 J.P. Sharma, Branch Manager of Bank of India that their bank has not issued any gift cheque book to petitioner Mohan and only general cheque book was issued to the petitioner and disputed cheque No.038504 is a general cheque. It is submitted by learned counsel on behalf of respondent that from the statement of J. P. Sharma, Branch Manager of Bank of India, it is crystal clear that when cheque was presented for encashment in Bank of India at that time words "cheque issued for gift, valid up to Rs.1,000/-" were not there and that seal and hand-written language was forged afterwards when cheque was returned and was in possession of petitioner Sant Kumar Branch Manager of Oriental Bank of Commerce, hence he is also similarly responsible with petitioner Mohan and other accused for forgery of cheque and for conspiracy also. It is further submitted that when the statement of witness No.4 J.P. Sharma Branch Manager was recorded in the trial court at that time he was only a proposed accused, hence the learned trial court has not acted beyond jurisdiction and as such the order is infallible and requires no interference .by this Court in a petition under Section 482 CrPC.

19. Heard the learned counsel for the parties at length and perused the documents on record.

20. At this juncture, it would be apposite and justifiable to go-through the provisions of Section 202 and 2(g) of Code of Criminal Procedure, 1973. Section 202 reads as follows:-

> **202. Postponement of issue of process-** (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance or which has been made over to him under Section 192, may, if he thinks fit, [and shall, in a case where

the accused is residing at a place beyond the area in which he exercises his jurisdiction,] postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made,-

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) Where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under Section 200.

(2) in an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

Section 2(g) reads as follows:-

"inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court. .

21. It is apparent on bare reading of these Sections that when Magistrate takes a cognizance of a complaint presented before him, a person mentioned in the array of accused does not assume status of "accused". Whenever he accepts the complaint and starts the inquiry, it means he has considered the complaint and decided to proceed further, that does not mean any legal parlance "taking cognizance". At this stage it cannot be said that a person who has been mentioned in the complaint as an accused acquires the status of "accused". That takes me to further inference that Magistrate is competent to

examine any person deemed fit for unfolding the issue and providing him sufficient information to conclude whether really that person or proposed accused need to be proceeded against by issuing process. For his inquiry he can examine such person who has not acquired the status of an "accused", though it may not pleasant to the test. The action of the Magistrate which has been challenged in this petition by learned Counsel on behalf of petitioner Mohan is improper keeping in view the provisions of Section 2(g) and 202 of CrPC though the Magistrate has not given the reason supporting his action, his action, cannot be treated to be giving pardon to an accused as indicated by Section 306 of CrPC. Therefore, I have no hesitation in coming to a conclusion that provisions of Code of Criminal Procedure have not been throttled and such an action cannot be treated to be something else than inquiry started by Magistrate for collecting the information enabling him to come to a correct conclusion in the spirit of relevant provisions of Code of Criminal Procedure. It is also apparent that when Shri J.P. Sharma was examined before the learned trial Court, the trial court has not taken cognizance against him and he was only proposed accused mentioned in the complaint. Hence, submission of learned counsel for the petitioners that proper procedure has not been adopted by learned Magistrate and proceedings are void *ab initio,* is worthless and cannot be accepted.

22. So far as contention that the learned trial court has erred in recording the statement of witnesses of complainant first and then recorded the statement of complainant is concerned, it is mere an irregularity and not illegality, hence it is not a ground to quash or hold that all the proceedings are void *ab initio.*

23. So far as the point of jurisdiction is concerned, it is apparent that in the statement recorded under Section 202 CrPC complainant in paragraph 4 has specifically stated that Cheque of Rs.39 lac was handed-over by petitioner Mohan at Gwalior in his house, hence Gwalior court has jurisdiction.

24. As far as other points raised by the learned counsel for the petitioners Sant Kumar and Mohan are concerned, they touch the merits of the case. The parties are to go for trial and all these points are to be decided after evidence is recorded in concerned trial court.

25. The provisions of Section 482 CrPC are to be used in the case where order challenged is against law, totally against material available on record, or perverse.

26. In *State of Haryana and other vs. Bhajan Lal and others,* 1992

Supp(1) S.C.C.335, in which following categories of cases are stated by Hon'ble Apex Court by way of illustration, wherein the extraordinary power under Article 226 or the inherent powers under section 482 Cr.P.C. can be exercised by the High Court either to prevent abuse of the process of any court or otherwise to secure ends of justice,

(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 in allegations in the first information report and other materials, if any, accompanying the FIR do not disclose 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 un-controverted 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 in 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 concerned Act (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 concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide 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.

On perusal of the record of learned trial court, it is apparent that case of complainant is not covered under any of the categories mentioned in above case, therefore, this is not a fit case to invoke the power under Section 482 of CrPC.

27. Resultantly, considering the above legal position so also the material available on record, no ground is made out for quashing the criminal proceedings at this stage while exercising the power conferred under Section 482 of CrPC. Accordingly, both the petitions are dismissed.

Petition dismissed.

I.L.R. [2011] M. P., 572

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.N. Aggarwal

M.Cr.C. No.2224/2010 (Gwalior) decided on 9 November, 2010

AKHILESH SARAF (DR.) ... Applicant

Vs.

SMT. USHA TIWARI ... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 190, Negotiable Instruments Act, 1881, Section 138 - Jurisdiction of cognizance **- Cheque issued by another person purporting himself to be the proprietor of the firm and the applicant has produced prima facie evidence before the Court to show that he had nothing to do with the business of firm who had issued the cheque in question to the complainant - The essential ingredients of Section 138 are not satisfied against the applicant and case u/s 138 cannot proceed - Order (taking cognizance) set aside.** (Para 6)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 190, परक्राम्य लिखत अधिनियम, 1881, धारा 138 – संज्ञान की अधिकारिता – अन्य व्यक्ति द्वारा स्वयं को फर्म का स्वामी होना जताते हुए चैक जारी किया गया तथा आवेदक ने न्यायालय के समक्ष प्रथम दृष्ट्या साक्ष्य यह दर्शाने के लिए प्रस्तुत की कि उसे फर्म के कारोबार से कोई वास्ता नहीं था जिसने परिवादी को प्रश्नगत चैक जारी किया था – धारा 138 के आवश्यक संघटक आवेदक के विरुद्ध पूरे नहीं होते तथा धारा 138 के अन्तर्गत मामले की कार्यवाही नहीं हो सकती – आदेश (संज्ञान लेने का) अपास्त।

Shishir Saxena, for the applicant.
Amit Lahoti, for the non-applicant/complainant.

ORDER

S.N. AGGARWAL, J. :–This petition is in second round of litigation. Respondent had filed a complaint case under Section 138 of the Negotiable Instrument Act, 1881 against the petitioner on accusation that he had business dealings with him and during the course of business dealings, he had given him an account payee cheque of Rs.3,70,000/- dated 15.05.2007 drawn on State Bank of Indore Branch purported to be signed by S.K. Saraf as proprietor of M/s Vinayak Herbal.

2. The petitioner, on being summoned by the trial Court, produced a copy of the bank statement to prima facie show that he was neither a signatory to the cheque in question nor he was the proprietor of the firm on whose behalf the cheque in question was issued in favour of the complainant. Since the Court below had taken cognizance against the petitioner, the petitioner challenged the said cognizance order in case being M.Cr.C. No. 8083/2009 which was disposed of by this Court vide its order dated 26.11.09 reserving opportunity for the petitioner to move a fresh application before the trial Court for review of cognizance order stating the details on the basis of which he claims that he has not committed any offence. The trial Court was directed by this Court vide its earlier order to pass fresh order on merits without being influenced with the fact of taking cognizance against the petitioner. Pursuant to the said earlier order of this court, the petitioner filed application before the trial Court for recall of cognizance order and this application has been dismissed by the trial court vide impugned order dated 20.03.2010. Aggrieved by the said order the petitioner has filed this petition.

3. I have heard the arguments of the learned counsel for the petitioner and also of Mr. Amit Lahoti appearing on behalf of the respondent/complainant.

4. The Court below has noted in the impugned order that the petitioner had produced before it the copy of statement of bank account from which the cheque in question was allegedly given to show that he has nothing to do with the business of the firm M/s Vinayak Herbal or with the issuance of cheque in question. It is further noted by the trial court in the impugned order that a perusal of the said bank statement shows that the petitioner was not the proprietor of the firm which had issued the cheque in question to the complainant.

5. Mr. Lahoti appearing on behalf of the respondent/complainant has argued that the court below can prosecute the petitioner for offence under section 420 of IPC, as according to him the petitioner has cheated him by issuing the cheque in question from the bank account of accused's brother. I do not find any merit in this contention of the learned counsel for the respondent/ complainant.

6. The fact of the matter is that the cheque in question on the basis of which complaint under section 138 of Negotiable Instrument Act was filed by the respondent against the petitioner was issued by one Shri S.K. Saraf purporting himself to be the proprietor of the firm M/s Vinayak Herbal. The petitioner has produced prima facie evidence before the court below to show that he had nothing to do with the business of the firm which had issued the cheque in question to the complainant. This Court is of the opinion that essential ingredients of Section 138 of Negotiable Instrument Act are not satisfied against the petitioner and therefore the case under section 138 of Negotiable Instrument Act cannot proceed against the petitioner.

7. In the opinion of this Court, the cognizance taken by the Court against the petitioner for offence under section 138 of Negotiable Instrument Act is without jurisdiction. The impugned order cannot stand the test of judicial scrutiny and is liable to be set aside. Accordingly, this petition succeeds. The impugned order is set aside. The respondent may take appropriate legal remedy against the concerned persons as may be available to him as per law. Needless to say private complaint filed by the respondent against the petitioner under section 138 of Negotiable Instrument Act is also quashed.

Petition succeeds.
