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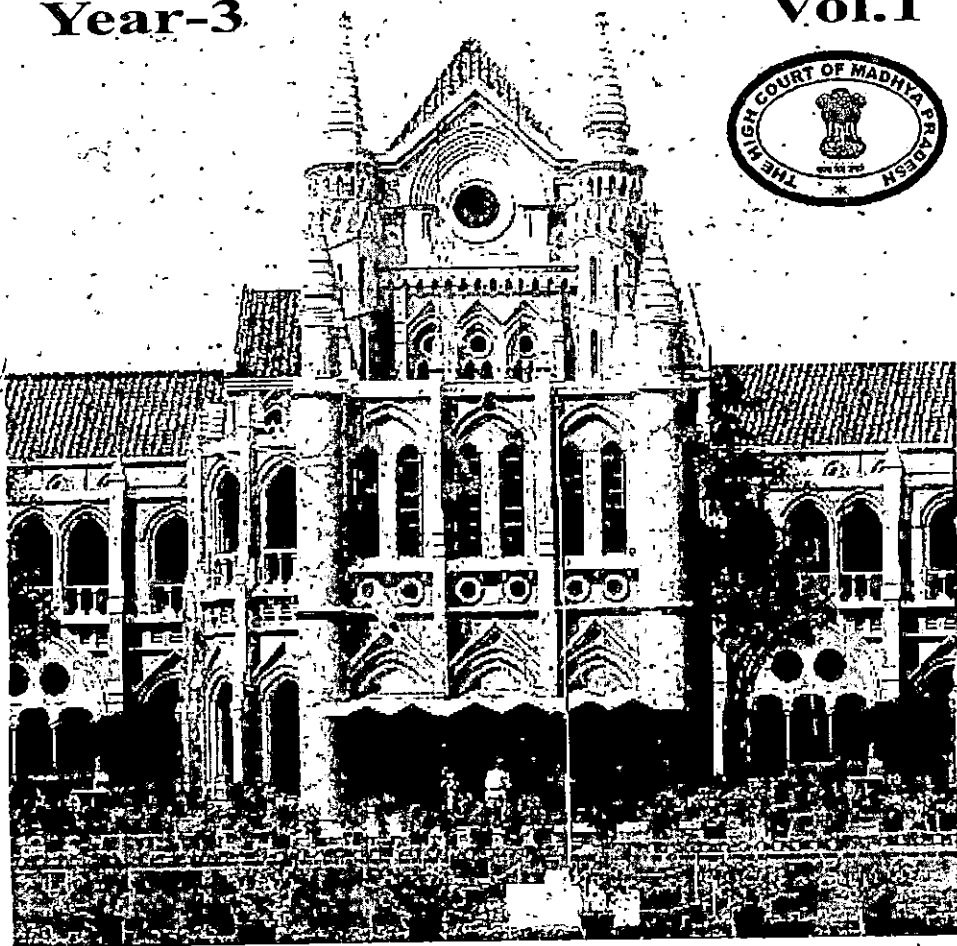
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CONTAINING

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2011

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Farewell



Mr. Justice R. K. Gupta

Born on January, 01. 1949. Joined the Bar at Jabalpur in the year 1971. Had extensive practice on civil side with vast experience and expertise in service laws. Offered valuable services as Deputy Advocate General for the State of M.P. from the year 2003 to 2005. Was designated as Senior Counsel on 20-06-2003. Was Senior Standing Counsel for Indian Railways, Food Corporation of India, Steel Authority of India, Hindustan Copper Limited Balaghat and Chhattisgarh Infrastructure Development Corporation.

Elevated as Addl. Judge of M.P. High Court on 18-10-2005. Took oath as permanent Judge on 2-2-2007 and demitted the Office of Judge of M.P. High Court on 30-11-2010, to join as Chairperson of the Debts Recovery Appellate Tribunal, Allahabad.

We congratulate his Lordship and wish him a healthy, happy, prosperous life and a successful tenure in the new office.

Hon'ble Mr. Justice S. Rafat Alam, Chief Justice, bids farewell to the demitting Judge :—

We have assembled here to bid an affectionate farewell to Hon'ble Justice Ram Kishore Gupta on his demitting office as Judge of the Madhya Pradesh High Court as he has been appointed as Chairman, Debts Recovery Appellate Tribunal, Allahabad.

Justice Ram Kishore Gupta was born on 1st January, 1949. He was a practising lawyer of this Court. He remained in the profession for about 33 years and had extensive practice in Labour, service, civil and constitutional branches of Law. He had conducted number of important cases. He was senior standing counsel for Indian Railways, Food Corporation of India, Steel Authority of India, Hindustan Coppers Limited, Balaghat and Chhattisgarh Infrastructure Development Corporation. Justice Gupta was designated as Senior Advocate on 20.06.2003.

Recognizing his merit, he was appointed as an Additional Judge of the Madhya Pradesh High Court on 18th October, 2005, and was appointed as Permanent Judge on 02.02.2007.

During his tenure as Judge of the Madhya Pradesh High Court, Justice Ram Kishore Gupta has disposed of as many as 18210 cases and delivered many landmark judgments. It may not be possible for me to mention all the judgments rendered by him. However, I would make a brief reference to some of them. In *Subhash Sona vs. State of Madhya Pradesh* reported in ILR (2010) M.P. 1114, his Lordship held that in absence of any justification to prescribe higher percentage of reservation for deputationists by reserving five posts out of eight posts the State Government has created class within the class which is not permissible.

Justice Gupta in *Mahendra Kumar vs. Amar Singh & others*, reported in ILR (2009) M.P. 2640, where a jeep driver stopped the vehicle and the claimant alighting from the jeep met with an accident by a tractor, held that it was the duty of the jeep driver to see that the vehicle was stopped at a safe place where from immediately after alighting there could have been no possibility of any accident. Thus, it was a case of contributory negligence of the jeep driver.

In another judgment in the case of *Executive Engineer vs. Smt. Kalawati & ors.*, ILR (2010) M.P. 1967, he held that in an incident occurred during the course and arising out of employment, the employer is liable to pay compensation under the provisions of Workmen's Compensation Act and

further held that the claim cannot be dislodged merely on the ground of negligence in obtaining treatment.

Justice Ram Kishore Gupta has decided many Civil and Criminal matters with equal proficiency. His large number of judgments recorded in law journals and Court's record demonstrate his deep knowledge of law and realistic approach in tackling complex problems.

Justice Gupta has been a Member of the Administrative Committees. His valuable suggestions were useful in deciding the matters.

Justice Gupta had respect for everyone, be it Judges or lawyers. Mr. Justice Gupta shall always be remembered as a Judge whose actions were always just, rational and reasonable.

He is workaholic, polite, calm and cool and because of his legal acumen, he earned respect both from the Bench and the Bar.

I am sure that his rich experience and understanding of human nature will make his tenure as Chairman of Debts Recovery Appellate Tribunal, Allahabad highly successful. I, on behalf of the Judges of this Court and on my behalf, wish Mr. Justice Ram Kishore Gupta and Mrs. Gupta happiness, peace and good health.

Shri Naman Nagrath, Addl. Advocate General of M. P., bids farewell :-

We have assembled here to bid farewell to Hon'ble Shri Ram Kishore Gupta who is demitting office as a Judge of this Court today.

Born on 1 day of the year 1949, Shri Gupta practiced as a lawyer at Jabalpur for over 30 years. His Lordship had extensive practice and expertise mainly in the field of labour, service and constitutional matters. As a lawyer Shri Gupta appeared in number of important cases and also worked as Dy. Advocate General of the State, and had represented several organizations and government bodies. His Lordship was eventually designated as a Senior Advocate on 20.06. 2003.

Shri Gupta was elevated as additional Judge of this court on 18th of October 2005 and took oath as permanent Judge on 2nd of February 2007.

Hon'ble Shri R. K. Gupta has been a friend and guide to one and all. His Lordship has been one of the very few who has been completely at ease, be it on the board as a judge or even outside the court, as a good human being with a great sense of humour.

It is often said about Hon'ble Shri Gupta that it is not difficult to locate him in any informal function or gathering for he would always be seen surrounded by several lawyers, sharing some joke or some lighter moments of life.

We have all known His Lordship to be a hard worker as a lawyer also who reached this position through sheer hard work and labour coupled with merit. These qualities continued with His Lordship even after his elevation as a Judge. His Lordship had always been fast, decisive and result oriented while hearing cases as a Judge.

With the new responsibility assigned to His Lordship on his appointment as Chairperson of the Debts Recovery Appellate Tribunal, Allahabad we all continue to hope and expect that His Lordship will discharge his duties with the same conviction, and will have a successful tenure as Chairperson of the DRAT also.

I, on behalf of Govt. of Madhya Pradesh, Law Officers of the State, on behalf of the Advocate General and my own behalf while bidding farewell to His Lordship as a Judge of this Court, also at the same time congratulate Hon'ble Shri Gupta for the new assignment and wish Your Lordship successful tenure, good health and all happiness in life.

Shri Anil Khare, President, M. P. High Court Bar Association, Jabalpur, bids farewell :-

This is a moment where the members of the Bar are full of emotion when My Lord after so many years with us is departing for a new journey as the Chairperson of the Debts Recovery Appellate Tribunal, Allahabad. On such a heart felt moment, I on behalf of the M.P. High Court Bar Association, Jabalpur stand here to bid adieu to Hon'ble Shri Justice R.K. Gupta.

My Lord Hon'ble Shri Justice R. K. Gupta was born on 1st January 1949. He was a practising lawyer at Jabalpur for more than 33 years, He had extensive practice in Labour and Service, Civil and Constitutional matters and appeared in number of important cases, He was senior standing Counsel for Indian Railways, Food Corporation of India. Steel Authority of India, Hindustan Copper Limited, Balaghat and Chhattisgarh Infrastructure Development Corporation. My Lord was designated as a Senior Advocate on 20/06/03. My Lord was elevated as Additional Judge of M.P. High Court on 18/10/05 and took oath as Permanent Judge on 02/02/07.

The Bar witnessed the qualities of leadership in My Lord Shri Justice R.K. Gupta when he adorned the office of President of this prestigious Bar Association. He was always concerned with the welfare of the Bar and was committed to the cause of justice.

Our hearts are full of sorrow to even imagine that from today My Lord would not be with us. I with all sense of responsibility can say that erudition and perspicuity were the hallmark of My Lord's actions. The character we see today has emanated from the gamut of experiences which he acquired during his voyage from one legal harbour to another.

The imprints of knowledge, courage and commitment left by My Lord will always remain in the hearts of the members of the Bar. The perception of the world as a stage is proverbial and a conspectus may prompt us to define the roles and tenures as ephemeral but the transient can not and must not baulk us from adorning ourselves with new robes and commence fresh acts. The farewell ovation is in fact a beginning of a new era where My Lord is being assigned new responsibilities, new duties, and new rights. We all know that the appointment of my Lord as Chairperson of the Debts Recovery Appellate Tribunal, Allahabad is not the culmination of a stage. Many more journeys lie ahead with him. Venerated and loved by all, we shall always remember Hon'ble Shri Justice R.K. Gupta as a man of adjuring demeanor.

The commitment of My Lord Justice R.K. Gupta can be expressed by a saying which is as follows :

"To the Romans, Justice was a goddess whose symbols were a throne that tempests could not shake, a pulse that passion could not stir, eyes that were blind to any feeling of favour or ill will and the sword that fell on all offenders with equal certainty and with impartial strength."

On behalf of the M.P. High Court Bar Association I avail this opportunity to express my gratitude for My Lord's deep concern for the Bar Association and pray to Almighty for a successful tenure as the Chairperson of the Debts Recovery Appellate Tribunal, Allahabad. I express all best wishes and good health for his future.

Shri T. S. Ruprah, President, High Court Advocates' Bar Association, Jabalpur, bids farewell :-

My Lords, this assembly bids farewell to Hon'ble Shri Justice R.K.Gupta, who is demitting the office of the Judge of the High Court of Madhya Pradesh on his appointment as Chairperson, Debts Recovery Appellate Tribunal, Allahabad.

Your Lordship started your professional journey by practicing as an Advocate under the able guidance of an eminent lawyer Shri Gulab Gupta who was later appointed as Chief Justice of Himanchal Pradesh High Court. As an Advocate Shri R.K.Gupta depicted intimidating skills as a labour lawyer and showed professional dexterity and competence as a civil and constitutional advocate. On 18th of October 2005, we all witnessed one of the boldest lawyer being elevated to this Hon'ble Court. Law Journals truly reflect the qualities of judgments Justice R.K.Gupta has delivered.

Independence of Judiciary is the corner stone in the dispensation of justice and I deeply feel that Justice Gupta comfortably demonstrated independence in dispensation of justice while functioning as a Judge of this Hon'ble Court.

It has been aptly said; Dispensation of justice is an attribute of God; Blessed are those on whom that godly assignment has fallen; and still blessed are those who acquit themselves of the assignment with pride, dignity and honour. Shri Justice Gupta has shown us what pride, dignity and honour is all about.

I, on behalf of the High Court Advocates' Bar Association and my own behalf extend good wishes to Your Lordship and hope that you will successfully discharge your duties as Chairperson of the Debts Recovery Appellate Tribunal, Allahabad. I extend my good wishes to you and your family members for a healthy, peaceful and happy active long life.

Shri Rameshwar Neekhara, Chairman M. P. State Bar Council, bids farewell :-

आप संस्कारधानी के विधि जगत में एक सफल विधि व्यवसायी के रूप में लगभग 35 वर्षों तक विभिन्न उच्चस्तरीय न्यायालयों में व्यवसायरत रहे हैं, एवं इस बीच आपकी मेधा, कुशाग्रता, लोकप्रियता, के आपने अनेक कीर्तिमान स्थापित किये हैं, इसी तारतम्य में वर्ष 2005 में आप इस महान् न्यायमंदिर में न्यायाधिपति के रूप में नियुक्त किये गये । आपने न्यायदान

की इस अवधि में अनेक कानूनी जटिलताओं से भरे प्रकरणों में सबका हृदय जीतने वाले न्याय निर्णय दिये । आप सदैव युवा अधिवक्ताओं के लिये प्रेरणा स्रोत के रूप जाने जाते रहे हैं, और वे आत्म विश्वास के साथ न्यायालय में अपने पक्षकारों की ओर से पैरवी कर सकें इसके लिये आपने हमेशा उन्हें प्रोत्साहित किया ।

एक न्यायाधिपति के रूप में अनेक तनावग्रस्त क्षणों में दायित्व निर्वाह के साथ आपने अपनी कार्यशैली और व्यवहार से न्यायालय के वातावरण को सदैव सामान्य बनाये रखा, इसके साथ ही आपकी जीवन्त कार्यशैली तथा अपनत्व भरे व्यवहार से बार से आपके संबंध समान रूप से घनिष्ठ और मधुर रहे हैं । मुझे अपेक्षा है, कि आपकी यह मौलिकता का लाभ हमें भविष्य में भी मिलता रहेगा । इलाहाबाद में डी. आर.टी. अपीलेंट ट्रिब्यूनल के अध्यक्ष के रूप में भी आपका कार्यकाल सफल हो इस हेतु हम आपको शुभकामनायें देते हैं ।

**Shri Radhelal Gupta, Assistant Solicitor General of India,
bids farewell :-**

With heavy heart we are bidding Farewell to My Lord Hon'ble Shri Justice R.K.Gupta who is demitting the Office on 30th Nov. 2010 and shall be gracing the Office of Debt Recovery Appellate Tribunal as Chairman, Allahabad.

My Lord's date of birth, educational qualifications and other analogous qualities are not the matter of repetition so let me proceed directly to other dimensions of your Lordships personality.

The extra ordinary but pertinent queries coming from the other corner of the division bench very soon attracted the attention of the bar and my Lord's extra ordinary legal acumen and knowledge was noticed by Bar immediately. Then bar expected that this gentleman known as Mr. Justice R.K.Gupta would be an asset to the judicial system.

The Members of the legal fraternity are greatly influenced with Lordships deep wisdom and experience. Despite, jolly nature of my Lord, no member of the Bar could enjoy any adjustment because of the strict command of my Lord. Your Lordships remarkable performance as Hon'ble Judge of High Court will be remembered in the history. Your Lordships judgements were fully rational and above and away from sentimental considerations.

Today your Lordships one part of voyage of career is over and in this journey beginning as lawyer and ending as a Judge, the image of my Lord has traveled from 'North Pole to South Pole'.

Undoubtedly after demitting your Lordships Office, we the members of the legal fraternity will be deprived of your Lordships association.

I, on behalf of Govt. of India all the Law Officers of Central Govt. and on my own behalf, express my best wishes for good health, happiness and peace for the days to come to your Lordship and also wish that your Lordships tenure as Chairman, Debt Recovery Tribunal would be a remarkable one.

Shri S. C. Datt, President, Senior Advocates' Council, bids farewell :-

We have assembled here to part with Hon'ble Justice Ramkishore Gupta who is demitting office of Judge of this High Court and joining as Chair Person of Debts Recovery Appellate Tribunal Allahabad.

Mr. Justice Ramkishore Gupta though remained as a Judge for a short time yet he left mark of his working style.

I on behalf of Senior Advocate's Council and my self wish a happy peaceful and successful future.

Wish you and Mrs. Gupta good luck.

Farewell Speech delivered by Hon'ble Shri Justice R. K. Gupta :-

Today is a day to be thankful to all of you. On 18th October, 2005 i.e. more than five years ago I was associated with this august institution as a Judge. It was just like a small drop had joined the large Ocean to cater to the legal needs of the society, through the noble profession of judicial system, which is rated above all public servants.

As you all know, before joining this great institution as a Judge, I practised in the High Court at Jabalpur for many years. When I became Judge, there were enough expectations from me by my friends, relatives, seniors, colleagues and all & sundry whether they knew me from before or not. I also had an uphill task ahead of me to come upto the expectations of those who deposed confidence in me, that I can be the one who they were looking for to contribute through the judicial system. It has been a short journey since then and during this course

I was presented with many ups and downs but thanks to the Almighty, my friends and family members who supported me all along the way. Needless to say; I had many shortcomings but still the members of the Bar treated me as a good Judge. It is all due to the greatness of the members of the Bar for which I shall always remain thankful.

People do compliment when one does good but the compliment is not the thing for which I worked because of late it has become a tradition to still say good words on the face even if one has not come close to the expectations. Some are scared of criticism, therefore, hardly want to improve or break the tradition which renders them to flow with the current. True it is, the expectations know no bounds, therefore, it is difficult to cope up with them but that does not mean that one should not make efforts. Everyone here on this Earth, has a role to play. All of you present here must have heard from the stalwarts of law on this side of the judicial system, expressing their concern over the quantity of the cases heaping up day by day. I personally feel that it is a major concern as the victims have been facing a lot of delay or denial of justice due to the pendency of the cases for a long time. I was regarded as specialist of service law and in that branch also I saw the cases of senior citizens who are fighting the battle in the old age for their retiral dues. It is good to see that the arrangement has been made to list their cases up in the order of the cause list so that their cases are taken up on priority basis. This concern often made me to be little harsh on the Bar for their presence in the Court. It was not difficult though and in the end they all started to realize their duties.

The Bar at Jabalpur has a great potential. My Lord the Chief Justice has just told that I have decided some number of cases during my tenure and some of my cases have also been quoted by My Lord. Though I have decided the cases but I still feel that I have not delivered reportable judgments, therefore, Law Journals have not thought it proper to report my judgments but I never bothered to the situation as to why my judgments are not reported. I continued to decide the cases without any botheration.

However, I think nobody will disagree that in these past few years we have had a high degree of judicial excellence from all of us and every one has been benefited from what is learned here. I hope that even better landmark decisions would come and a new bar of excellence will be raised.

It cannot be denied that the appointment of the Judge is made by His Excellency the President of India. It is easy to become a Judge but a real Judge is made by the Bar. The senior members of the Bar had been affectionate to me. There is still a lot to be learned from them and on many occasions their arguments enlightened me and helped me to reach a well reasoned judgment. The young members of the Bar were respectful in spite of the fact that I was not mild with them. To be frank, all this was done with an intention. I always wished that they should grow and develop and lap up whatever opportunity they get of arguing the matters in the absence of their seniors. There is every chance of getting knowledge by remaining attentive in the Court.

I remember the holy words from Srimad Bhagwad Geeta which always enlighten me that being knowledgeable will help to perform the right Karma and not worry about the fruit of action. If this is borne in mind then the days are not far when the success will lick your feet. I always feel that I am still being a member of the Bar Association as is learning. I request all the members of the Bar to forgive me if at any time I hurt their feelings and respect. I am younger to few and elder to more. I hope whatever little contribution I have made so far would last a lifetime.

I have much to be thankful for as I received a huge cooperation from all corners. I am grateful to my present Chief Justice who deposed confidence. I always enjoyed the confidence and cooperation of all the Judges of this Court. May I also take this opportunity to remember the blessings of Hon'ble Shri Justice R.V. Raveendran presently the Judge of Supreme Court and Hon'ble Shri Justice Dipak Misra, presently the Chief Justice of Delhi High Court with whom I was in the Bench for nearly about 18 months continuously. He taught me enough and his valuable advice and guidance will help me to perform my duties to the new office. Many thanks to all the members of the Bar for lending their support and cooperation. I am also thankful to the officers of the Registry and my staff members who gave their fullest cooperation as always. Thanks to my family too. Without their love and support I would not have been at the place where I am today.

Finally, we can be thankful to each other as in the same way we have helped each other. I hope, the support that all of you have given me, will continue to be there with all the Judges here. Thank You ! & Jai Hind.

NOTES OF CASES SECTION

Short Note

*(1)

Before Mr. Justice P.K. Jaiswal

M.Cr.C. No.3156/2010 (Indore) decided on 14 September, 2010.

AADHAR TRADING (M/S) & anr.

... Applicants

Vs.

M/S AMBICA REFINERY

... Non-applicant

Negotiable Instruments Act (26 of 1881), Sections 138 & 142 - Cause of action & limitation - Cheque of Rs. 5 Lacs issued by applicant returned back by Bank on the ground of 'Stop Payment' - Non-applicant issued notice on 12.09.2007 demanding refund of Rs. 7,50,000 deposited in the account of applicant through M/s Bharat Thacker - No demand of Rs. 5 Lacs payable under the cheque was made - Non-applicant again deposited the cheque and issued another notice after the same was dishonoured complaint filed on the basis of the second notice - Held - First notice was not in conformity of the provisions of S. 138 proviso (b) of the Act - Unless the notice served is in conformity with proviso (b), no complaint is maintainable - Complaint filed on the basis of second notice maintainable and within limitation - Petition dismissed.

परक्राम्य लिखत अधिनियम (1881 का 26), धाराएँ 138 व 142 - वाद हेतुक एवं परिसीमा - आवेदक द्वारा जारी 5 लाख रुपये का चैक बैंक द्वारा 'मुग्तान पर रोक' के आधार पर वापस लौटाया गया - अनावेदक ने आवेदक के खाते में मैसर्स भारत ठक्कर के माध्यम से जमा कराये गये 7,50,000 रुपये लौटाने की माँग करते हुए तारीख 12.09.2007 को सूचना पत्र जारी किया - चैक के अधीन संदेय 5 लाख रुपये की कोई माँग नहीं की गयी - अनावेदक ने चैक पुनः जमा किया तथा उसके अनादृत होने के बाद दूसरा सूचना पत्र जारी किया - परिवाद द्वितीय सूचना पत्र के आधार पर फाइल किया गया - अभिनिर्धारित - प्रथम सूचना पत्र अधिनियम की धारा 138 परन्तुक (बी) के उपबंधों के अनुरूप नहीं था - जब तक तामील किया गया सूचना पत्र परन्तुक (बी) के अनुरूप न हो, कोई परिवाद पोषणीय नहीं है - द्वितीय सूचना पत्र के आधार पर फाइल किया गया परिवाद पोषणीय तथा परिसीमा के भीतर - याचिका खारिज।

Cases referred :

(1998) 6 SCC 514, (2005) 4 SCC 417, (2000) 2 SCC 380, (2008) 2 SCC 321.

Ajay Asudani, for the applicants.

Vivek Dalal, for the non-applicant.

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Short Note

*(2)

Before Mr. Justice Rajendra Menon

W.P. No.97/2007(S) (Jabalpur) decided on 28 August, 2010

AJIT NARAYAN

... Petitioner

Vs.

UNION OF INDIA & ors.

... Respondents

A. Service Law - Fundamental Rules - FR 56(J) is applicable to the employees of Maulana Azad National Institute of Technology.

क. सेवा विधि - मूलभूत नियम - मूलभूत नियम 56(जे) मौलाना आजाद राष्ट्रीय प्रौद्योगिकी संस्थान के कर्मचारियों को लागू है।

B. Service Law - Compulsory retirement - Is neither a punishment nor does it cast a stigma on the employee concerned - However, before taking a decision to compulsory retire an employee, his entire service record, character roll etc. are to be placed before the appropriate screening committee and on scrutiny of the same the committee has to decide as to whether the employee is useful to the department or is a deadwood.

ख. सेवा विधि - अनिवार्य सेवानिवृत्ति - न तो दण्ड है और न ही यह संबद्ध कर्मचारी पर कलंक लगाती है - फिर भी किसी कर्मचारी को अनिवार्य सेवानिवृत्त करने का निर्णय लेने से पूर्व, उसका सम्पूर्ण सेवा अभिलेख, चरित्रावली इत्यादि को समुचित छानबीन समिति (स्क्रीनिंग कमेटी) के समक्ष रखना चाहिए और उसके संवीक्षण पर समिति को यह विनिश्चित करना चाहिए कि क्या कर्मचारी विभाग के लिये उपयुक्त है अथवा अनुपयुक्त है।

C. Service Law - Compulsory retirement - Decision to compulsorily retire the petitioner is taken on the basis of the enquiry report and there is no scrutiny of the service record of the petitioner to find out as to whether he is a deadwood - The enquiry report in question, is based on an enquiry conducted ex parte, behind the back of the petitioner and without granting him any opportunity of hearing - The action of the respondents in compulsorily retiring the petitioner is illegal, contrary to the principles of law and has to be quashed - Petition allowed.

स. सेवा विधि - अनिवार्य सेवानिवृत्ति - याची को अनिवार्य रूप से सेवानिवृत्त करने का निर्णय जाँच प्रतिवेदन के आधार पर लिया गया और यह पता लगाने के लिए कि वह अनुपयुक्त है याची के सेवा अभिलेख की कोई संवीक्षा नहीं की गई - प्रश्नगत जाँच प्रतिवेदन, याची की पीठ पीछे और उसे सुनवाई का कोई अवसर दिये बिना

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एकपक्षीय रूप से की गयी जाँच पर आधारित है — याची को अनिवार्य रूप से सेवानिवृत्त करने का प्रत्यर्थियों का कृत्य अवैध, विधि के सिद्धांतों के प्रतिकूल है और अभिखंडित किया जाना चाहिए — याचिका मंजूर।

Cases referred :

(2001) 2 SCC 305, (2001) 3 SCC 314, (2003) 4 SCC 59, (2004) 2 SCC 105, (1993) 4 SCC 288, AIR 1984 SC 984, (2002) 3 SCC 641, 2002(3) MPLJ 147, ILR (2009) MP 959, AIR 1984 SC 984, (1996) 5 SCC 331, (1995) 1 SCR 26, (1971) 1 SCR 791, (1992) 2 SCC 299, (1998) 4 SCC 92, (2005) 6 SCC 224, 2009(4) MPHT 250.

Ajit Narayan, petitioner in person.

Vikram Singh, for the respondent No.1.

R.N. Singh with Arpan Pawar, for the respondent No.2.

Brian D'Silva with Kanak Gaharwar, for the respondent No.3.

R.G. Mahajan, for the respondent No.4.

Short Note (DB)

*(3)

Before Mr. Justice S.K. Gangele & Mr. Justice Piyush Mathur

W.P. No.2974/2009(I) (Gwalior) decided on 19 February, 2010

ALKA SHARMA

... Petitioner

Vs.

AJAYKANT SHARMA

... Respondent

Hindu Marriage Act (25 of 1955), Sections 12 & 13, Evidence Act, 1872, Section 45 - Annulment of marriage / Divorce sought on ground of mental disorder of wife - Appliation by husband for subjecting wife to medical examination by Medical Board - Held - It would certainly offend the fundamental human values, which would be demeaning the personality of an individual and the dignity of a person, who would be unnecessarily subjected to such an examination/test, for which she had not consented or volunteered herself - Order passed by trial Court allowing the application set aside.

Petitioner was married with respondent on 16.05.2005. A male child was born out of the wedlock, in the Year 2006, sudden disputes arose between the spouse, which resulted in filing of a variety of proceedings before the Family Court; which include Wife's petition seeking maintenance under Section 125, Cr.P.C. and the present proceeding initiated by the Husband.

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Family Court has not taken into account a very important aspect of the matter that there exists no previous history of the alleged ailment/mental disorder of the wife and no medical prescription or medical record was produced by the husband and, in absence of these documents, merely on the strength of the plain averments of the reply/written-statement of the husband, it was difficult for the Court to draw inferences about the correctness of the allegations of the husband, for prima-facie reaching a conclusion about the necessity of ordering for the medical examination of the wife, more particularly when no affidavits of independent witnesses were filed, in support of the aforesaid allegations/submissions on behalf of the husband, but it seems that in view of the solitary conduct of shouting by the wife in Court, at the time of the recording of the statement had influenced the mind of the Family Court for drawing an impression that the lady is suffering from some mental disorder. Had this been the impression of the Court, the Family Court could itself should have felt the necessity of collecting the evidence, with a view to satisfy itself about the mental condition of the wife, but a perusal of the order nowhere strengthen this belief that the Court has permitted the medical examination of the wife for satisfying itself about the mental disorder of the petitioner.

The pleadings of the parties demonstrate that the husband has made oral averments about the self administration of drugs by the wife and concealment of the factum of she being suffering from some disease (not known or disclosed to the husband at the time of the marriage) which had strengthened the belief of the husband that the wife is undergoing some medication which has direct connection with her mental condition, whereas the wife has denied about taking any such medicines relating to the mental disorder, while admitting the fact that she was consuming some medicines relatable to minor ailments like cold and cough and certainly this cannot be treated to be a circumstance creating an impression in the mind of the Court, to warrant appointment of a Medical Board for subjecting the wife to the medical examination, for no known ailment/disorder.

This is not a case where the Wife is an illiterate, uneducated or rustic lady, who does not understand the fineries of life as she has very categorically understood and answered the question put to her during the course of the examination before the Family Court and if her answers are making her Husband uncomfortable or even making the Court (or the Presiding Officer of the Court) slightly uncomfortable, it cannot by itself become an illustration, adequate enough to show that the Wife is suffering from a mental disorder which requires her examination by the Medical Experts.

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From a perusal of the entire statement, it emerges that when the Lady was subjected to a lengthy cross-examination, she very frankly gave answers to the incriminating questions clarifying her perception about her life, therefore, it could not be inferred that the Wife was, in any manner, unable to understand the nature of the question or the nature of the proceedings, however, she could, at best, be labelled as a bold witness, who was having no fear in her heart, at the time when she was examined and cross-examined, before the Family Court, therefore, a person cannot be punished or subjected to a Medical Examination merely on account of his/her boldness or promptness in giving answers in a Court of Law. This demeanour of the witness was wrongly appreciated by the Family Court when the Court recorded its proceedings on Date 05.09.2009 that the Petitioner/Wife was shouting loudly in the Court. Therefore, the observation of the Family Court, based upon enraged conduct of the Wife, after stressful cross-examination in the Court, could not be treated to be such aberration, which could warrant appointment of a Medical Board for examining the Wife against the charge of suffering from "mental disorder".

Since the wife in the present proceedings happens to be a Science Post-Graduate in Botany and from a perusal of her statement, she could be treated to be well educated lady, who knows the implications of life, whereas there is a husband on the other side, who remained silent for a long one year after solemnization of the marriage and started complaining about the mental derailment of his wife only after the birth of his baby boy, it nowhere suggests even on a prima-facie perusal of the entire evidence that the wife is suffering from such mental disorder, which warrant her examination by the Medical Board or Psychiatrist, before the collection of independent and reliable oral evidence, suggesting its initial existence.

Since the husband has made an application under Section 45 of the Indian Evidence Act for subjecting his wife to the medical examination by the Medical Board (which may consists of Medical Expert and Psychiatrist), it may certainly offend the legal right of an otherwise capable wife, (so proved during her examination/cross-examination), who is of sound mind and capable to understand the nature of question and the effect of giving correct/incorrect answers and if some of the demeanour of the witness has been found to be unworthy of a quiet and subdued wife, this aberration deserves pardon and not punishment by way of subjecting the wife to an unnecessary examination by the Medical Board.

Therefore we are of the view that there was no requirement or necessity in the present case for the Family Court to have ordered for the wife to undergo the medical examination, for ascertainment of the

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existence of the mental disorder or even for ascertainment of the "extent or degree" of the mental disorder, as in both the proceedings, the wife has ably demonstrated that she is a lady of sound mind, having complete knowledge and control of the delicacies of the life and she could not even be labelled as a person, suffering from such disorder of mind, which could warrant even examination by the Medical Board.

हिन्दू विवाह अधिनियम (1955 का 25), धाराएँ 12 व 13, साक्ष्य अधिनियम, 1872, धारा 45 – पत्नी के मानसिक विकार के आधार पर विवाह का बातिलीकरण/विवाह विच्छेद चाहा गया – पति द्वारा चिकित्सा बोर्ड से पत्नी का चिकित्सीय परीक्षण कराये जाने हेतु आवेदन – *अभिनिर्धारित* – ऐसा करना निश्चित रूप से मूलभूत मानवीय मूल्यों का उल्लंघन होगा और उस व्यक्ति के व्यक्तित्व और व्यक्ति की प्रतिष्ठा को नीचा करना होगा, जिसे अनावश्यक रूप से ऐसे किसी परीक्षण/जाँच के आधीन रखा जाएगा, जिसके लिए उसने सहमति नहीं दी अथवा स्वेच्छा नहीं दर्शाई थी – विचारण न्यायालय द्वारा पारित, आवेदन मंजूर किये जाने का आदेश अपास्त।

The Judgment of the Court was delivered by :
PIYUSH MATHUR, J.

Cases referred :

1981(I) MPWN 12, 2001(II) MPWN 147 (SC), AIR 1975 Madras 285, AIR (36) 1949 Allahabad 449, (2003) 4 SCC 493, C.A. No.5077/2009, 2004(3) MPHT 40(DB), (2009) 9 SCC 1.

Sudha Dwivedi, for the petitioner.

V.K. Bharadwaj with A.V. Bharadwaj, for the respondent.

Short Note

*(4)

Before Mr. Justice Abhay M. Naik

E.P. No.48/2009 (Gwalior) decided on 17 September, 2010

BHAGIRATH PRASAD (DR.)

... Petitioner

Vs.

ELECTION COMMISSION OF INDIA & ors.

Respondents

A. Representation of the People Act (43 of 1951), Section 117 - Security for costs - Security amount duly deposited at the time of presentation of election petition - No requirement in Act or rules that receipt of security deposit must be annexed to the election petition.

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क. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 117 - खर्चों के लिए प्रतिभूति - निर्वाचन याचिका प्रस्तुत करते समय प्रतिभूति राशि सम्यक् रूप से जमा की गई - अधिनियम या नियमों में कोई अपेक्षा नहीं कि प्रतिभूति जमा करने की रसीद निर्वाचन याचिका के साथ संलग्न की जानी चाहिए।

B. Representation of the People Act (43 of 1951), Sections 81(3) & 83(1)(c) - Presentation and contents of petition - True copy of election petition - Copy of petition served upon respondent No.5 does not bear signatures of election petitioner with regard to attestation - Held - Respondent No. 5 unable to point out any material or substantial defect of vital nature which could have mislead a reasonable person to understand and meet the allegations contained in election petition - Election Petitioner has also served another copy of election petition along with annexures - No defect pointed out in such copy - Objection not liable to be accepted.

ख. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 81(3) व 83(1)(सी) - याचिका का प्रस्तुतिकरण और अन्तर्वस्तु - निर्वाचन याचिका की सत्य प्रतिलिपि - प्रत्यर्थी क्र. 5 पर तामील की गई याचिका की प्रतिलिपि पर अनुप्रमाणन के संबंध में निर्वाचन याचिका के हस्ताक्षर नहीं हैं - अभिनिर्धारित - प्रत्यर्थी क्र. 5 महत्वपूर्ण प्रकृति की ऐसी कोई तात्त्विक या सारवान त्रुटि दर्शाने में असमर्थ रहा जो किसी युक्तियुक्त व्यक्ति को निर्वाचन याचिका में अंतर्विष्ट अभिकथनों को समझने और पूर्ति करने में भ्रमित कर सकती थी - निर्वाचन याचिका ने उपाबंधों के साथ निर्वाचन याचिका की दूसरी प्रतिलिपि भी तामील कर दी - इस प्रतिलिपि में कोई त्रुटि नहीं दर्शाई गई - आक्षेप स्वीकार किये जाने योग्य नहीं।

C. Representation of the People Act (43 of 1951), Section 82 - Parties to petition - Corrupt practice alleged to have been committed on the basis of a document - Independent candidate was author of this document who has not been made a party - No corrupt practice alleged against independent candidate - Instead document is said to have been published at the behest of BJP - Non-joinder of such candidate not fatal.

ग. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 82 - याचिका के पक्षकार - दस्तावेज के आधार पर भ्रष्ट आचरण किये जाने का अभिकथन - स्वतंत्र प्रत्याशी इस दस्तावेज का लेखक था, जिसे पक्षकार नहीं बनाया गया - स्वतंत्र प्रत्याशी के विरुद्ध भ्रष्ट आचरण का कोई अभिकथन नहीं - बल्कि दस्तावेज कथित रूप से भा.ज.पा. के कहने पर प्रकाशित किया गया - ऐसे प्रत्याशी का असंयोजन घातक नहीं।

D. Representation of the People Act (43 of 1951), Section 86 - Trial of election petition - No material or substantial defect which

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could have prejudiced the respondents in taking appropriate defence pointed out - Objections not going to the root of the matter - *Held* - Opportunity to rectifying most of the defects on an appropriate application may be provided - Dismissal of petition u/s 86 not warranted.

घ. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 86 - निर्वाचन याचिका का विचारण - कोई तात्त्विक या सारवान त्रुटि जिससे प्रत्यर्थी को उचित बचाव लेने में पूर्वाग्रह हो सकता था, नहीं बतायी गई - आक्षेप मामले की तह तक नहीं जाते - अभिनिर्धारित - अधिकांश त्रुटियों को उचित आवेदन पर सुधारे जाने का अवसर प्रदान किया जा सकता है - धारा 86 के अंतर्गत याचिका की खारिजी समर्थनीय नहीं।

Cases referred :

1978 J.L.J. 850, 2008(III) MPWN 92, AIR 2007 Uttarakhand 69, AIR 1998 MP 31, AIR 1984 SC 305, AIR 1984 SC 956, AIR 1980 SC 303, (1999) 4 SCC 274, (1999) 2 SCC 205; (2004) 11 SCC 196, (2005) 2 SCC 188, (2008) 11 SCC 740, (2003) 1 SCC 289.

Manish Vashishtha with *J.P. Saxena*, for the petitioner.

Rameshwar Bhargava, for the respondent No.5.

Short Note

*(5)

Before Mr. Justice S.C. Sharma

W.P. No.1498/2010 (Indore) decided on 14 September, 2010

GAURAV TIWARI

... Petitioner

Vs.

INDIAN OIL CORPORATION LTD. & anr.

... Respondents

A. Distributorship of LPG - Selection process - Petitioner and respondent No.2 applied for grant of distributorship - Application of respondent No.2 was wrongly rejected by Level-1 Committee - On application by respondent No.2, mistake in wrongly rejecting the application of respondent No.2 was found - Entire selection process was set aside and fresh selection process was initiated - *Held* - Petitioner has not challenged the eligibility of respondent No.2 nor any doubt has been raised - As respondent No.2 was wrongly not considered in selection process therefore, entire selection process was scrapped - Procedure adopted by IOCL proper - Petition dismissed.

क. एल.पी.जी. की वितरकता - चयन प्रक्रिया - याची एवं प्रत्यर्थी क्र. 2 ने

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वितरकता के अनुदान के लिए आवेदन किया — प्रत्यर्थी क्र. 2 का आवेदन स्तर-1 समिति द्वारा गलत तौर पर नामंजूर कर दिया गया — प्रत्यर्थी क्र. 2 के आवेदन पर, प्रत्यर्थी क्र. 2 का आवेदन गलत तौर पर नामंजूर किये जाने में त्रुटि पायी गयी — सम्पूर्ण चयन प्रक्रिया निरस्त की गयी तथा नयी चयन प्रक्रिया प्रारम्भ की गयी — अभिनिर्धारित — याची ने प्रत्यर्थी क्र. 2 की पात्रता को चुनौती नहीं दी और न ही कोई संदेह किया गया — चूँकि चयन प्रक्रिया में प्रत्यर्थी क्र. 2 को गलत रूप से विचार में नहीं लिया गया, इसलिए सम्पूर्ण चयन प्रक्रिया बेकार हो गयी — आई.ओ.सी.एल. द्वारा अपनायी गयी प्रक्रिया उचित — याचिका खारिज।

B. Distributorship - False information - Petitioner mentioned in application that he is unmarried - Whereas in affidavit the marital status was shown to be married - Held - Marital status of candidate effects the evaluation in process of selection - Rejection of candidature of petitioner by IOCL proper - Petition dismissed.

ख. वितरकता — मिथ्या सूचना — याची ने आवेदन पत्र में उल्लिखित किया कि वह अविवाहित है — जबकि शपथ पत्र में वैवाहिक स्थिति विवाहित होना दर्शाया गया — अभिनिर्धारित — अभ्यर्थी की वैवाहिक स्थिति चयन प्रक्रिया के दौरान मूल्यांकन को प्रभावित करती है — आई. ओ.सी.एल. द्वारा याची की अभ्यर्थिता की नामंजूरी उचित — याचिका खारिज।

Cases referred :

W.P. No.2947/2006, W.P. No.7738/2006, W.P. No.999/2004.

B.A. Chitale, for the petitioner.

B.L. Pavecha, for the respondent/IOCL.

A.K. Sethi with R.Sethi, for the intervenor.

Short Note (DB)

*(6)

Before Mr. Justice Shantanu Kemkar &

Mr. Justice Prakash Shrivastava

W.P. No.631/2003 (Indore) decided on 31 August, 2010

GHANSHYAMDAS & CO. (M/S)

... Petitioner

Vs.

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

A. Commercial Tax Act, M.P. 1994 (5 of 1995), Sections 9 & 9B - Section 9B is not a part & parcel of Section 9, but is a separate Section applicable to the separate class of dealers covered by it.

The State can provide different rate of tax for different class of dealers depending upon their turn over and the rate of tax on the sale of goods can vary with the turn over of the dealer and, therefore, it is well within

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the competence of the State to reduce the rate of tax applicable to the particular class of dealers without altering the rate of tax payable by another class of dealers.

Under the Scheme of the Act, State can charge different rate of tax from the dealers under Section 9 and 9B and it is well within the power of the State to grant exemption to either dealers under Section 9 or 9B or both.

क. वाणिज्यिक कर अधिनियम, म.प्र., 1994 (1995 का 5), धाराएँ 9 व 9बी - धारा 9बी धारा 9 का अभिन्न अंग नहीं है, बल्कि इसके अन्तर्गत आने वाले व्यापारियों के पृथक् वर्ग को लागू एक पृथक् धारा है।

B. Notification - Exemption notification - Is to be read literally - For the purpose of satisfying the eligibility criteria nothing can be read into the exemption notification which is not provided therein.

The object and purpose of the exemption notifications dated 9th May, 1997 & 14th May, 1997 appear to be to give tax exemption to the class of dealers covered by Section 9 only and not to the class of dealers covered by Section 9 B.

ख. अधिसूचना - छूट अधिसूचना - को अक्षरशः पढ़ा जाना चाहिए - पात्रता मापदण्ड पूरे करने के प्रयोजन के लिए छूट अधिसूचना के भीतर ऐसा कुछ नहीं पढ़ा जा सकता जो उसमें उपबंधित न हो।

The Order of the Court was delivered by :
PRAKASH SHRIVASTAVA, J.

Cases referred :

TLD Vol. (2) 2002 page 25, (2009) 12 SCC 735, (2009) 2 SCC 90, (1990) 4 SCC 256, (2005) 4 SCC 272, (2006) 4 SCC 57, (2008) 12 SCC 440.

P.M. Choudhary, for the petitioner.

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

Short Note (DB)

*(7)

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

W.P. No.7348/2010 (Jabalpur) decided on 29 July, 2010

GLODYNE TECHNOSSERVE LTD.

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

A. Tender documents and bidders information sheet - Sections 3 & 7 of tenders documents were amended - However, no

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corresponding amendment in bidders information sheet - *Held* - Sections 3 & 7 of tenders document have to prevail and merely because there is no amendment in bidders information sheet, is not going to come to the rescue of petitioners.

क. निविदा प्रलेख एवं बोली लगाने वाले का सूचना पत्र - निविदा प्रलेखों की धारा 3 एवं 7 संशोधित की गयीं - तथापि, बोली लगाने वाले के सूचना पत्र में तदनुरूप कोई संशोधन नहीं किया गया - *अभिनिर्धारित* - निविदा प्रलेख की धारा 3 एवं 7 अभिभावी होंगी तथा मात्र इस कारण कि बोली लगाने वाले के सूचना पत्र में कोई संशोधन नहीं है, याचियों के बचाव में काम नहीं आने वाली है।

B. *Tender - Term of - Mandatory or directory* - Whether a condition is essential or collateral could be ascertained by reference to the consequence of non-compliance thereto - If non-fulfillment results in rejection of tender, then it would be an essential part of tender otherwise, it is only a collateral term.

ख. निविदा - के निबंधन - आज्ञापक या निदेशात्मक - कोई शर्त मर्मभूत है अथवा सांपार्श्विक है इसका निश्चय उसके अपालन के परिणाम के संदर्भ से किया जा सकता है - यदि अपालन का परिणाम निविदा का नामंजूर किया जाना हो तब यह निविदा का मर्मभूत अंग होगी अन्यथा यह सिर्फ एक सांपार्श्विक निबंधन है।

C. *Tender - Bid documents - Negligent mistakes* - Mistakes cannot be permitted to be corrected where facts indicate that (i) it was beyond the control of the bidder to correct, (ii) that he was not vigilant, (iii) he did not seek to make corrections at the earliest opportunity.

ग. निविदा - बोली प्रलेख - नगण्य त्रुटियाँ - त्रुटियों के सुधार करने की अनुज्ञा नहीं दी जा सकती जहाँ तथ्यों से यह उपदर्शित होता हो कि (i) सुधार किया जाना बोलीकर्ता के नियंत्रण के बाहर था (ii) वह सतर्क नहीं था (iii) उसने सर्वप्रथम अवसर पर सुधार करने की माँग नहीं की।

D. *Rejection of Bid/Tender - Judicial review* - Judicial review cannot be denied but it is intended to prevent arbitrariness or favouritism and is exercised in large public interest or if it is brought to the notice of the Court that contract power has been exercised for any collateral purpose - Only decision making process is open to judicial review - Court cannot act as an Appellate Authority.

घ. बोली/निविदा का नामंजूर किया जाना - न्यायिक पुनर्विलोकन - न्यायिक पुनर्विलोकन को अस्वीकार नहीं किया जा सकता किन्तु यह मनमानेपन एवं पक्षपात को रोकने के

NOTES OF CASES SECTION

लिए आशयित है तथा यह विस्तृत लोक हित में अथवा यदि न्यायालय के ध्यान में यह लाया जाए कि निवेदा शक्ति किसी सांपाष्विक उद्देश्य के लिये प्रयोग की गयी है, प्रयोग किया जाता है — केवल निर्णयन प्रक्रिया ही न्यायिक पुनर्विलोकन के लिए खुली है — न्यायालय अपीलीय प्राधिकारी के रूप में कार्य नहीं कर सकता।

E. Rejection of Bid/Tender - Judicial review - Section 3.1 of Request for Proposal provides that bidder must possess an active ISO 9001:2000 certification at the time of submission of bid - Petitioner enclosed ISO 9001:2000 certificate which had already expired, however, the said certificate was renewed and was valid upto 18.11.2000 - Bid of petitioner rejected for want of active ISO 9001:2000 certificate - Held - It was necessary to submit active certificate along with the bid - Final decision was already taken on 09.04.2010 whereas confirmation by QA International that certificate is valid upto 18.11.2010 was made on 12.04.2010 - Petitioner thereafter also did not try to submit a valid certificate under its signatures or signatures of its authorized representative - Respondents No.1 & 2 have acted on due consideration of Sections 3, 7 of tender documents and no case for interference is made out.

इ. बोली/निवेदा का नामंजूर किया जाना - न्यायिक पुनर्विलोकन - प्रस्ताव के लिए निवेदन की धारा 3.1 उपबंधित करती है कि बोलीकर्ता के पास बोली प्रस्तुत करते समय प्रमाणी आई.एस.ओ. 9001:2000 प्रमाण पत्र होना चाहिए - याची ने ऐसा आई.एस.ओ. 9001:2000 प्रमाण पत्र प्रस्तुत किया जिसकी अवधि पूर्व में ही समाप्त हो चुकी थी फिर भी उक्त प्रमाण पत्र का नवीनीकरण किया गया तथा वह दिनांक 18.11.2000 तक विधिमान्य था - याची की बोली प्रमाणी आई.एस.ओ. 9001:2000 प्रमाण पत्र के अभाव में नामंजूर कर दी गयी - अभिनिर्धारित - बोली के साथ प्रमाणी प्रमाण पत्र प्रस्तुत करना आवश्यक था - अन्तिम निर्णय पूर्व में ही दिनांक 09.04.2010 को ले लिया गया जबकि क्यू.ए. इंटरनेशनल द्वारा यह पुष्टिकरण कि प्रमाण पत्र दिनांक 18.11.2010 तक विधिमान्य है, दिनांक 12.04.2010 को किया गया - तत्पश्चात् प्रार्थी ने भी अपने हस्ताक्षरी अथवा अपने प्राधिकृत प्रतिनिधि के हस्ताक्षर से विधिमान्य प्रमाण पत्र प्रस्तुत करने का प्रयत्न नहीं किया - प्रत्यर्थी क्र. 1 एवं 2 ने निवेदा प्रलेखों की धारा 3, 7 पर उचित विचार करके कार्य किया और हस्तक्षेप के लिए कोई मामला नहीं बनाया।

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

Cases referred :

(2003) 10 SCC 681, (2002) 6 SCC 315, AIR 1979 SC 1628, (2001) 2 SCC 451, (2009) 11 SCC 9, AIR 2009 SC 1204, (1990) 3 SCC 280, AIR 1978 SC 851, (1990) 2 SCC 488, (1994) 6 SCC 651, (2000) 2 SCC 617, AIR 2007 SC 437, (1993) 1 SCC 445, AIR 2001 SC 343, (1986) 4 SCC 566.

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S. Ganesh, R.N. Singh, Shobha Menon and Vikram Mehta, Amal Pushp Shrotri, Vikash Mehta & N. Singh, for the petitioner.

Ravindra Shrivastava, Samdarshi Tiwari, G.A. & Vinay Jain, for the respondent Nos.1 & 2.

Atul Sreedharan, for the respondent No.3.

Brian D'Silva & Kishore Shrivastava and Parag Chaturvedi, Pancham Surana & Suryanarayana Singh, for the intervenor.

Short Note

*(8)

Before Mr. Justice S.K. Gangele

W.P. No.6131/2006(S) (Gwalior) decided on 6 October, 2010

HARI CHARAN SONI

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

A. Municipal Employees (Recruitment and Conditions of Service) Rules, M.P. 1968, Rules 2, 4, 15 & 16 - Once, a person is appointed to or borne on the cadre of the Municipal staff other than a member of the State Municipal Service (Executive), he has to be treated an employee of the particular Municipality and his seniority has to be counted in the aforesaid Municipality.

The aforesaid rules are applicable to Nagar Panchayat also because subsequently the Municipalities have been renamed as Nagar Panchayats.

Seniority of petitioner, who was appointed by the respondent No.4, has to be maintained in the cadre of L.D.C. of the respondent No.4. May be, he was transferred to any other Nagar Panchayats.

क. नगरपालिका कर्मचारी (मर्ती तथा सेवा की शर्तें) नियम, म.प्र., 1968, नियम 2, 4, 15 व 16 - कोई व्यक्ति जब राज्य नगरपालिका सेवा (कार्यकारी) के सदस्य से भिन्न नगरपालिका कर्मचारी संवर्ग में नियुक्त होता है या धारित करता है तब उसे नगरपालिका विशेष का कर्मचारी माना जायेगा तथा उसकी वरिष्ठता की गणना उक्त नगरपालिका में की जावेगी।

उपर्युक्त नियम नगर पंचायत को भी लागू होते हैं क्योंकि बाद में नगर पालिकाओं को नगर पंचायत के रूप में पुनः नामित किया गया है।

याची, जिसको प्रत्यर्थी क्र. 4 द्वारा नियुक्त किया गया था, की वरिष्ठता प्रत्यर्थी क्र.

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4 के निम्न श्रेणी लिपिक के संवर्ग में बनी रहेगी। हो सकता है कि उसका स्थानांतरण किसी अन्य नगर पंचायत में कर दिया गया हो।

B. Constitution, Article 16 - Reservation - If there is only one post, the same could not be reserved for a reserved candidate.

In present case, the post of U.D.C. is a single post and it has been reserved for a single candidate, hence, it is contrary to law.

ख. संविधान, अनुच्छेद 16 - आरक्षण - यदि केवल एक ही पद है तो उसे आरक्षित उम्मीदवार के लिये आरक्षित नहीं रखा जा सकता।

वर्तमान मामले में उच्च श्रेणी लिपिक का पद एक ही है तथा यह किसी एक ही उम्मीदवार के लिये आरक्षित किया गया है, अतः यह विधि के विरुद्ध है।

C. Constitution, Article 226 - Delay & laches - Petitioner came to know about the promotion of the respondent No.5 in the year 2006 - He submitted an application dated 11.08.2006 to the Municipal Council for supply of certain documents - Thereafter he filed the present petition - The petition could not be dismissed on the ground of delay and laches.

स. संविधान, अनुच्छेद 226 - विलम्ब एवं उपेक्षा - याची को प्रत्यर्थी क्र. 5 की पदोन्नति के बारे में वर्ष 2006 में पता लगा - उसने कतिपय दस्तावेज प्रदाय करने के लिए नगर पालिका परिषद में आवेदन पत्र दिनांक 11.08.2006 प्रस्तुत किया - उसके पश्चात् उसने वर्तमान याचिका प्रस्तुत की - याचिका विलम्ब एवं उपेक्षा के आधार पर खारिज नहीं की जा सकती।

Cases referred :

(1988) 2 SCC 214, 2010(1) MPHT 360, (1998) 4 SCC 1, (2009) 1 SCC 1, (2009) 6 SCC 791.

Prakash Braru, for the petitioner.

Sangeeta Pachori, G.A., for the respondent Nos.1 to 3.

Anil Sharma, for the respondent No.4.

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Short Note (DB)

*(9)

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

W.P. No.10963/2009 (Jabalpur) decided on 6 September, 2010

ISPAT KHADAN JANTA MAZDOOR UNION

... Petitioner

Vs.

THE DIRECTOR, STEEL AUTHORITY

OF INDIA LTD. & anr.

... Respondents

A. Contract Labour (Regulation and Abolition) Act (37 of 1970), Section 10 - Regularization of services of contract labour - Relationship of employer and employee - To ascertain relationship, multiple factors are required to be taken into consideration - Control, interrogation, power to select & dismiss, to pay remuneration, deduct insurance contributions, organize work, supply tools & material, mutual obligations between them are relevant factors.

क. ठेका श्रम (विनियमन और उत्सादन) अधिनियम (1970 का 37), धारा 10 — ठेका श्रम सेवाओं का नियमितीकरण — नियोक्ता एवं कर्मचारी का सम्बन्ध — सम्बन्ध अभिनिश्चित करने के लिए बहुविध कारकों को विचार में लिया जाना आवश्यक है — नियंत्रण, परिप्रश्न करना, चयन एवं बर्खास्त करने की शक्ति, पारिश्रमिक भुगतान करना, बीमा योगदान की कटौती करना, कार्य संचालन करना, औजारों और सामग्री की पूर्ति करना, उनके मध्य पारस्परिक दायित्व सुसंगत कारक हैं।

B. Contract Labour (Regulation and Abolition) Act (37 of 1970) Section 10 - Prohibition notification - Agreements entered into between Management and Union to the effect that industry shall not employ labour through contractors or engage contractor's labour in jobs of permanent and perennial nature - Whether binding on contract labours as they were not party to agreement - Held - Contract labours were not supposed to be party to such agreement - Mandate of agreement binding on management is not to engage workers on contract basis in jobs of permanent and perennial nature.

ख. ठेका श्रम (विनियमन और उत्सादन) अधिनियम (1970 का 37), धारा 10 — निषेध अधिसूचना — प्रबंधन और संघ के मध्य इस आशय के करार हुए कि उद्योग स्थायी एवं बारहमासी प्रकृति के कार्यों में ठेकेदारों के माध्यम से श्रमिकों को नियोजित नहीं करेगा अथवा ठेकेदार के श्रमिकों को काम में नहीं लगायेगा — क्या संविदा श्रमिकों पर बंधनकारी है क्योंकि वे करार के पक्षकार नहीं थे — अभिनिर्धारित — संविदा श्रमिकों को ऐसे करार का पक्षकार नहीं माना जा सकता — प्रबंधन पर बन्धनकारी करार का प्रादेश

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स्थायी एवं बारहमासी प्रकृति के कार्यों में सविदा आधार पर श्रमिकों को नियोजित न करना है।

C. Contract Act (9 of 1872), Section 23 - Opposed to public policy
- Any contract prohibited by enactment is also against public policy.

ग. सविदा अधिनियम (1872 का 9), धारा 23 - लोक नीति के विरुद्ध - अधिनियम द्वारा प्रतिषिद्ध कोई करार लोक नीति के विरुद्ध भी है।

D. Contract Labour (Regulation and Abolition) Act (37 of 1970), Section 10 - Regularization of services of contract labour - In spite of notification, management continued to employ contract labour - Engineers/Mines Manager having full power to issue instructions during progress of work for proper and adequate execution of works - Management having full control over contract labour - Contract between Management and Contractors was sham and bogus considering the functioning of mines and there was no justification to continue with contract labour after 17.3.1993 - Contract labours are to be treated as employees of principal employer - Workers who were in employment from 1993 till 1996 directed to be reinstated without back wages.

घ. ठेका श्रम (विनियमन और उत्सादन) अधिनियम (1970 का 37), धारा 10 - ठेका श्रम सेवाओं का नियमितीकरण - अधिसूचना के बावजूद, प्रबंधन ने ठेका श्रमिकों को नियोजित रखा - इंजीनियरों/खदान प्रबंधक को कार्य के उचित एवं उपयुक्त निष्पादन हेतु कार्य की प्रगति के दौरान अनुदेश जारी करने की पूर्ण शक्ति है - प्रबंधन का ठेका श्रमिकों पर पूर्ण नियंत्रण होता है - खदानों के परिचालन को देखते हुए प्रबंधन एवं ठेकेदारों के मध्य सविदा झूठी एवं छद्म थी तथा 17.3.1993 के बाद ठेका श्रमिकों को रखे जाने का कोई औचित्य नहीं था - ठेका श्रमिकों को प्रधान नियोजक का कर्मचारी माना जाना है - श्रमिक जो कि 1993 से 1996 तक नियोजन में थे, उन्हें पिछले वेतन के बिना बहाल किये जाने का निदेश।

E. Contract Labour (Regulation and Abolition) Act (37 of 1970), Sections 23, 24 & 25 - Penalties and offences by Companies - Aforesaid provisions cannot be said to be exhaustive of the remedies available.

इ. ठेका श्रम (विनियमन और उत्सादन) अधिनियम (1970 का 37), धाराएँ 23, 24 व 25 - शास्त्रियों एवं कम्पनी द्वारा अपराध - उक्त प्रावधानों को उपलब्ध उपचारों का निःशेषकारी नहीं कहा जा सकता।

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

NOTES OF CASES SECTION

Cases Referred :

(2001) 7 SCC 1, (1997) 9 SCC 377, (2004) 1 SCC 126, (2006) 12 SCC 233, (2002) 4 SCC 609, (1974) 3 SCC 498, (1983) 4 SCC 464, (1986) 1 SCC 32, 2004 (101) FLR 137, (2000) 6 SCC 493, AIR 1978 SC 1409, 2009 AIR SCW 317, AIR 1995 SC 1666, AIR 1995 SC 1893, AIR 1999 SC 1160, AIR 2000 SC 1518, AIR 2001 SC 3348, AIR 2001 SC 3527, AIR 2003 SC 3024, AIR 2004 SC 969, AIR 2004 SC 1639, AIR 2006 SC 845, AIR 1959 SC 689, AIR 1986 SC 1571, (2005) 3 SCC 224, (2005) 3 SCC 193, (2004) 8 SCC 195, (2000) 6 SCC 554, (1969) 2 SCC 319, (1983) 4 SCC 293, 1979(1) LLJ 60, AIR 1980 SC 1896, (2003) 6 SCC 675, (1999) 3 SCC 601, (2009) 2 SCC 606, (2007) 13 SCC 343, (2004) 3 SCC 514, AIR 1960 SC 1960, AIR 1960 SC 1258, (1979) 2 SCC 80, (1980) 4 SCC 443, (1981) 3 SCC 225, (1993) 2 SCC 259, (2007) 1 SCC 566, (2007) 2 SCC 112, (2009) 3 SCC 124, (1984) 1 SCC 509, (1984) 3 SCC 316, (1982) 1 LLJ 330.

P.S. Nair with Sishir Dixit & Rajas Pohankar, for the petitioner.

J. Dhankar with R.C. Shrivastava, for the respondent.

K.C. Ghildiyal & Vivek Rusia, for the intervenors.

Short Note

*(10)

Before Mr. Justice Piyush Mathur

F.A. No.463/2006 (Gwalior) decided on 26 April, 2010

LAXMI DEVI (SMT.)

... Appellant

Vs.

STATE OF M.P. & ors.

... Respondents

Law of Torts - Medical negligence - In absence of culpable negligence, no Doctor/Surgeon could be penalized or declared guilty of committing negligence.

Plaintiff had undergone a Tubectomy (T.T.) Operation at the E.S.I.S. General Hospital, wherein respondent No. 4 had performed the operation on 29.04.1994 and the plaintiff was discharged from the Hospital on 05.05.1994, but inspite of the Sterilization Operation, the plaintiff had exhibited symptoms of pregnancy, when on 23.05.1995 she contacted respondents No. 3 & 4 at the Hospital, but it was expressed by the respondents that the Hospital or Surgeon is not responsible, as there are some chances of failure of the Sterilization Operation.

NOTES OF CASES SECTION

The surgical intervention in Sterilization Operation was undertaken under General Anesthesia but it was not a surgery over any part or organ of the human body as in Sterilization Operation the right and left fallopian tubes are closed and they are not completely cut which can always have a possibility of opening of the knot of fallopian tube for facilitating spermatozoa to grow as embryo into the womb/ovary.

If the closure of the fallopian tube has resulted in opening of the knot, the same can not be classified as "negligence" or "gross negligence" as the same appears to be a subsequent development beyond the control of the Operating Surgeon and for the accidental opening of the knot of the fallopian tube, the Operating Surgeon could not be held guilty of committing negligence, much less gross negligence.

It goes without saying that the success of an operation depend upon the competence and experience of the Surgeon/Doctor and the effect of the treatment/surgery is experienced by the person on whom the surgical intervention is made and when the treatment or the surgery fails, a natural reaction appears in the shape of a dissatisfaction or complaint against the operating Surgeon/Doctor.

The negligence on the part of the treating Doctor or Operating Surgeon has to be necessarily established as falling under one such category of "negligence" which can be classified as 'Gross Negligence' because it is expected from the Professional Medical Doctors and Surgeon that they would perform their duty well and upto the best of their ability on being professionally trained in their respective specialities and since in the present case there exist no negligence in performing the Sterilization Operation upon the Plaintiff, it would not be justified to Award any compensation.

अपकृत्य विधि - चिकित्सीय उपेक्षा - सदोष उपेक्षा के अभाव में, किसी चिकित्सक/शल्य चिकित्सक को दण्डित अथवा उपेक्षा करने का दोषी घोषित नहीं किया जा सकता।

Cases referred :

(2005) 7 SCC 1, 2008(4) MPLJ 126, 2007(4) MPLJ 516, AIR 2005 SC 3180, AIR 2005 SC 3280, (2009) 1 SCC (Cri) 958, AIR 2010 SC 1050, (2005) 6 SCC 1, (2005) 7 SCC 22, (2009) 3 SCC 1:

Pramod Gohadkar, for the appellant.

Praveen Newaskar, Dy.G.A., for the respondent Nos.1 to 3.

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

NOTES OF CASES SECTION

Short Note (DB)

***(11)**

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

W.P. No.1687/2010 (Indore) decided on 30 August, 2010

MUKESH

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

Constitution, Article 21 - Handcuffing of prisoners - Permission has to be obtained from concerned Magistrate before putting fetters or handcuffs to convict or undertrial prisoners - When person is arrested without warrant, the concerned police officer may handcuff him till taking to police station and thereafter to Magistrate if it is necessary to do so - After production before Magistrate, handcuff can be used only after obtaining orders from the Magistrate.

संविधान, अनुच्छेद 21 - बंदियों को हथकड़ी डालना - दोषसिद्ध या विचाराधीन बंदियों को बेड़ियाँ अथवा हथकड़ियाँ डालने से पूर्व संबंधित मजिस्ट्रेट से अनुमति अभिप्राप्त करनी होगी - जब व्यक्ति को वारंट के बिना गिरफ्तार किया जाता है, तब संबंधित पुलिस अधिकारी उसे पुलिस थाना और तत्पश्चात् मजिस्ट्रेट के समक्ष ले जाने तक उसे हथकड़ी डाल सकता है, यदि ऐसा करना आवश्यक हो - मजिस्ट्रेट के समक्ष प्रस्तुत करने के पश्चात्, केवल मजिस्ट्रेट से आदेश अभिप्राप्त करने पर ही हथकड़ी का प्रयोग किया जा सकता है।

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

Cases referred :

AIR 1997 SC 1675, AIR 1980 SC 1535, AIR 1996 SC 2193, 1996 CrLJ 2969.

S.N. Saxena, for the petitioner.

G. Desai, Dy.A.G., for the respondents.

NOTES OF CASES SECTION

Short Note (DB)

*(12)

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

W.P. No.3790/2010(PIL) (Jabalpur) decided on 29 September, 2010

NEPAL SINGH RAJPUT

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

A. Public Interest Litigation - Delay and Laches - Allotment of foreign liquor shop challenged - Foreign liquor shop notified in the area as per resolution was passed by Gram Sabha - Tenders were invited for allotment of foreign liquor shop - Resolution passed by Gram Sabha not challenged - No objection raised with regard to opening of foreign liquor shop in the area - Country liquor shop is already running in the area and no objection with regard to running of that shop taken - Allotment of shop in favour of respondent No.5 - Petitioner is guilty of delay and laches and by his conduct he has permitted creation of third party interest - Petition suffers from delay and laches

क. लोकहित वाद - विलम्ब एवं उपेक्षा - विदेशी मदिरा की दुकान के आवंटन को चुनौती - ग्राम सभा द्वारा पारित प्रस्ताव के अनुसार क्षेत्र में विदेशी मदिरा की दुकान अधिसूचित - विदेशी मदिरा की दुकान के आवंटन के लिए निविदाएँ आमंत्रित की गयीं - ग्राम सभा द्वारा पारित प्रस्ताव को चुनौती नहीं दी गयी - क्षेत्र में विदेशी मदिरा की दुकान खोले जाने के संबंध में कोई आपत्ति नहीं उठायी गयी - देशी मदिरा की दुकान क्षेत्र में पूर्व से ही चल रही है और उस दुकान के संबंध में कोई आपत्ति नहीं उठायी गयी - दुकान का आवंटन प्रत्यर्थी क्र. 5 के पक्ष में - याची विलम्ब एवं उपेक्षा का दोषी है एवं उसने अपने आचरण से तृतीय पक्ष के हित के सृजन को अनुमत किया है - याचिका विलम्ब और उपेक्षा से ग्रसित।

B. Public Interest Litigation - Alternative remedy - Public Interest Litigation should not be entertained where ordinarily a person aggrieved should approach the forum created under the statute.

ख. लोकहित वाद - वैकल्पिक उपचार - लोकहित वाद वहाँ ग्रहण नहीं किया जाना चाहिये जहाँ साधारणतया व्यथित व्यक्ति को कानून के अन्तर्गत सृष्ट फोरम की शरण लेनी चाहिए।

The Order of the Court was delivered by :
ALOK ARADHE, J.

NOTES OF CASES SECTION

Cases referred :

AIR 2006 SC 2382, 2005(2) MPLJ 353, (2005) 5 SCC 598, (2000) 2 SCC 465, 1990(2) JT 34, 2010 AIR SCW 1029, (1982) 3 SCC 235, (1988) 4 SCC 226, (1992) 4 SCC 605, (2003) 7 SCC 546, (2004) 3 SCC 349, (2010) 3 SCC 402, (2006) 3 SCC 434, (2003) 7 SCC 546.

K.C. Ghildiyal, for the petitioner.

Kumaresh Pathak, Dy.A.G., for the respondent No.1 to 4.

Short Note (DB)

*(13)

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

W.P. No.1156/2002 (Jabalpur) decided on 14 October, 2010

PRANI RAKSHA SANGH

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

A. Public Interest Litigation - Petitioner an unregistered society sought a direction (1) to prevent slaughter of animals, (2) to take measures to prevent illegal felling of trees, and (3) to prevent manufacture, sale and consumption of liquor in the vicinity of temple - Held - (1) Petition is maintainable, (2) Appropriate directions to respondents issued.

क. लोकहित वाद - याची, एक अपंजीकृत सोसायटी ने निदेश चाहा कि (1) पशुओं का बध रोका जाए, (2) वृक्षों का अवैध रूप से गिराया जाना रोकने के लिए उपाय किये जाएँ, और (3) मंदिर के सामीप्य में शराब का विनिर्माण, विक्रय और उपभोग रोका जाए - अभिनिर्धारित - (1) याचिका पोषणीय है, (2) प्रत्यर्थियों को समुचित निदेश जारी किये गये।

B. Prevention of Cruelty to Animals Act (59 of 1960), Section 11 - Practice of sacrifice of animals which even otherwise has no sanction of religion cannot be permitted to be continued.

We see no good reason to permit the custom of sacrifice of animals in the temple in question by the 'Banjara' community, specially in absence any material on record to indicate that killing of animal is required by the religion the aforesaid community and in view of our finding that manner in which animals is sacrificed brings the act of sacrifice within purview of Section 11 of the Act.

ख. पशुओं के प्रति क्रूरता का निवारण अधिनियम (1960 का 59), धारा 11 -

NOTES OF CASES SECTION

पशुओं की बलि की प्रथा जिसे अन्यथा भी धर्म की कोई मंजूरी न हो, जारी रखने की अनुज्ञा नहीं दी जा सकती।

The Order of the Court was delivered by :
ALOK ARADHE, J.

Cases referred :

AIR 1981 SC 298, AIR 1981 SC 344, 1993 (Suppl.) 4 SCC 46.

Ashok Lalwani & Satish Singh, for the petitioner.

Kumaresh Pathak, Dy.A.G., for the respondent Nos.1 to 6.

Sameer Seth, for the respondent No.7.

Short Note

*(14)

Before Mr. Justice Sanjay Yadav

M.A. No.219/2006 (Jabalpur) decided on 5 March, 2010

PUSHPA BERRY (SMT.)

... Appellant

Vs.

SHRI MAHILA GRIH UDYOG LIJJAT PAPAD

... Respondent

A. Civil Procedure Code (5 of 1908), Section 10, Order 39 Rule 1 & 2 - Even when there is a stay of proceeding u/s 10, the trial Court will not be precluded from exercising its power under Order 39 Rule 1 & 2.

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 10, आदेश 39 नियम 1 व 2 - जब धारा 10 के अंतर्गत कार्यवाही स्थगित भी हो, तो भी विचारण न्यायालय आदेश 39 नियम 1 व 2 के अंतर्गत अपनी शक्तियों का प्रयोग करने से प्रवारित नहीं होता।

B. Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 - Temporary injunction restraining appellant using trade mark - Appellant has not independent right to use trade mark which is owned by respondent - Use of trade mark is permissive - Order of trial Court justified - Appeal dismissed.

ब. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 - व्यापार चिह्न का प्रयोग करने से अपीलार्थी को रोके जाने हेतु अस्थायी व्यादेश - अपीलार्थी को उस व्यापार चिह्न का प्रयोग करने का स्वतन्त्र अधिकार नहीं है जो प्रत्यर्थी के स्वामित्व का है - व्यापार चिह्न का प्रयोग अनुज्ञेय है - विचारण न्यायालय का आदेश न्यायसंगत - अपील खारिज।

Case referred :

AIR 1998 SC 1952.

NOTES OF CASES SECTION

*J.P. Sanghi with Rakesh Chaurasia, for the appellant.
Ashok Lalwani, for the respondent.*

Short Note

*(15)

Before Mr. Justice Abhay M. Naik

S.A. No.304/1999 (Gwalior) decided on 23 September, 2010

RAMESHCHANDRA & anr.

... Appellants

Vs.

KAMAL KISHORE & ors.

... Respondents

A. Civil Procedure Code (5 of 1908), Order 6 Rule 2 - Material facts and material particulars - Distinction - If material facts are omitted, party should not be allowed to raise - If material facts are pleaded and full particulars are not given, the Court may permit the points to be raised on the basis of evidence, unless opposite party is thereby materially prejudiced - First relate to question of jurisdiction and second to one of procedure.

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 2 - तात्त्विक तथ्य और तात्त्विक विशिष्टियाँ - विवेक - यदि तात्त्विक तथ्यों का लोप कर दिया जाता है, तो पक्षकार को उन्हें उठाने की अनुमति नहीं देनी चाहिए - यदि तात्त्विक तथ्यों का अभिवचन किया जाता है और पूर्ण विशिष्टियाँ नहीं दी जाती हैं तो न्यायालय साक्ष्य के आधार पर बिंदुओं को उठाने की अनुज्ञा दे सकती है जब तक कि तद्वारा विरोधी पक्षकार पर तात्त्विक रूप से प्रतिकूल प्रभाव न पड़ता हो - पहला अधिकारिता के प्रश्न से संबंधित है और दूसरा प्रक्रिया से।

B. Civil Procedure Code (5 of 1908), Order 6 Rule 5, Order 11 Rule 16 - Better particulars - Plaintiff pleaded that agreement of resale was executed in favour of plaintiff - The fact that said agreement was taken back by defendant at the time of fresh agreement is a material particular - Defendant could have taken steps under Order 11 Rule 16 to produce it - He further could have submitted application seeking discovery on oath of said agreement - He could have submitted application under Order 6 Rule 5 for obtaining further and better particulars.

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 5, आदेश 11 नियम 16 - अधिक अच्छी विशिष्टियाँ - वादी ने अभिवचन किया कि पुनः विक्रय का करार वादी के पक्ष में निष्पादित किया गया - यह तथ्य कि उक्त करार प्रतिवादी द्वारा नये करार के समय वापस ले लिया गया, तात्त्विक विशिष्टि है - प्रतिवादी आदेश 11 नियम 16 के

NOTES OF CASES SECTION

अंतर्गत उसे पेश करने के लिए कदम उठा सकता था — इसके अतिरिक्त वह उक्त करार का शपथ पर प्रकटीकरण चाहते हुए आवेदन प्रस्तुत कर सकता था — वह अतिरिक्त और अधिक अच्छी विशिष्टियाँ अभिप्राप्त करने के लिये आदेश 6 नियम 5 के अंतर्गत आवेदन प्रस्तुत कर सकता था।

C. Specific Relief Act (47 of 1963), Section 12 - Specific performance of contract - Registered sale deed dated 11.04.69 for consideration of Rs. 4000 with contemporaneous agreement of resale for the same amount executed - Plaintiff paid Rs. 3000 and fresh agreement executed on 11.09.72 with condition that plaintiff would pay balance of Rs. 1000 within a year and get registered sale deed executed - **Held** - Agreement dated 11.09.72 is a complete agreement - Non-production of agreement dated 11.04.69, inconsequential - More so, when the same is found to have been returned by plaintiff to defendant.

ग. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 12 — संविदा का विनिर्दिष्ट पालन — 4000 रुपये के प्रतिफल के लिए रजिस्ट्रीकृत विक्रय विलेख तारीख 11.04.69 उसी राशि के लिए पुनः विक्रय के समकालीन करार के साथ निष्पादित किया गया — वादी ने 3000 रुपये का भुगतान किया और 11.09.72 को नया करार इस शर्त के साथ निष्पादित किया कि वादी शेष 1000 रुपये की राशि एक वर्ष के भीतर अदा करेगा और रजिस्ट्रीकृत विक्रय विलेख निष्पादित कराएगा — अभिनिर्धारित — करार तारीख 11.09.72 पूर्ण करार है — करार तारीख 11.04.69 प्रस्तुत न करना महत्वहीन है — इसके अतिरिक्त, जब वह वादी द्वारा प्रतिवादी को लौटाया जाना पाया गया हो।

D. Transfer of Property Act (4 of 1882), Section 58 - Mortgage - Sale deed, rent note and document of reconveyance executed on the same day - Transactions are akin to mortgage if not 'mortgage proper'.

घ. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 58 — बंधक — विक्रय विलेख, भाड़ा नोट तथा पुनः हस्तांतरण दस्तावेज एक ही दिन निष्पादित किये गये — यद्यपि संव्यवहार 'समुचित बंधक' नहीं हैं, वह बंधक के समान हैं।

E. Specific Relief Act (47 of 1963), Section 16 - Specific performance of contract - Readiness and willingness - No pleading and proof about readiness and willingness on the part of plaintiff - **Held** - No objection in written statement - No issue raised in the trial Court - Defendants did not move any application to frame any issue on this point - Parties were not at issue on the question of readiness and willingness.

ड. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16 — संविदा का

NOTES OF CASES SECTION

विनिर्दिष्ट पालन – तैयारी और रजामंदी – वादी की ओर से तैयारी और रजामंदी के बारे में कोई अभिवचन तथा सबूत नहीं – अभिनिर्धारित – लिखित कथन में कोई आक्षेप नहीं – विचारण न्यायालय में कोई विवाद्यक नहीं उठाया गया – प्रतिवादियों ने इस बिंदु पर कोई विवाद्यक विरचित करने के लिए कोई आवेदन प्रस्तुत नहीं किया – तैयारी और रजामंदी के प्रश्न पर पक्षकारों का वाद नहीं था।

F. Accommodation Control Act, M.P. (41 of 1961), Section 12 - Eviction - Question of title - Question of title cannot be decided in a suit for eviction - However, it may be gone into incidentally in such a suit for the purpose of deciding relationship of landlord and tenant.

च. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12 – बेदखली – स्वत्व का प्रश्न – बेदखली के वाद में स्वत्व का प्रश्न विनिश्चित नहीं किया जा सकता – तथापि भूस्वामी और भाड़ेदार का संबंध विनिश्चित करने के लिए ऐसे वाद में प्रसंगवश इसमें प्रवेश किया जा सकता है।

Cases referred :

AIR 2004 SC 348, AIR 1963 SC 1182, AIR 1960 SC 301, AIR 1954 SC 345, AIR 1976 SC 744, AIR 2006 SC 713, 1999(1) MPLJ 436, 1998(1) JIJ 1 (SC), AIR 1996 SC 1724, AIR 1989 All 133, 2008(2) Supreme 752, (2006) 4 SCC 432, 2006 (4) Supreme 684, AIR 1971 SC 1238, AIR 1999 SC 1047, 1985 MPWN 46, AIR 1988 SC 1074.

K.S. Tomar with Arshad Ali, for the appellants.

Ramji Sharma, for the respondents.

Short Note

*(16)

Before Mr. Justice P.K. Jaiswal

M.Cr.C. No.3948/2010 (Indore) decided on 31 August, 2010

RASJKLAL MANIKCHAND

... Applicant

Vs.

KISHORE WADHWANI

... Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Sections 204, 252 & 482 - Issue of summons in summons case - Remedy - Once the plea of accused u/s 252 is recorded, same cannot be reviewed or reconsidered by Magistrate - Petition u/s 482 of Cr.P.C. challenging substance of accusation is maintainable.

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 204, 252 व 482 – समन मामले में समन जारी करना – उपचार – एक बार जब धारा 252 के अन्तर्गत अभियुक्त

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का अभिवाक् अभिलिखित कर लिया जाता है तब मजिस्ट्रेट द्वारा उसकी समीक्षा या पुनर्विचार नहीं किया जा सकता — द.प्र.स. की धारा 482 के अन्तर्गत अभियोग के सार को चुनौती देने वाली याचिका पोषणीय है।

B. Criminal Procedure Code, 1973 (2 of 1974), Sections 179 & 188, Penal Code, 1860, Section 500 - Offence committed outside India - Sanction - Section 179 of Cr.P.C. empowers a Court to try an offence either at a place where the offence is committed or the consequences ensued - Defamatory statement given at Dubai - Complaint filed at Indore - *Held* - On the allegations in the complaint, the act or omissions were committed in India.

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 179 व 188, दण्ड संहिता, 1860, धारा 500 — भारत से बाहर किया गया अपराध — मंजूरी — द.प्र.स. की धारा 179 न्यायालय को किसी अपराध का विचारण, या तो उस स्थान पर जहाँ अपराध किया गया अथवा जहाँ परिणाम निकले, करने के लिए सशक्त करती है — मानहानिकारक कथन दुबई में दिया गया — परिवाद इन्दौर में फाइल किया गया — अभिनिर्धारित — परिवाद के अभिकथनों पर कार्य या लोप भारत में किये गये।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 188 - Sanction of Central Government - It is not necessary that sanction of Central Government should be obtained before taking cognizance - It may be obtained before the trial begins.

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 188 — केन्द्रीय सरकार की मंजूरी — यह आवश्यक नहीं है कि केन्द्रीय सरकार की मंजूरी संज्ञान लेने से पूर्व अभिप्राप्त की जानी चाहिये — यह विचारण प्रारम्भ होने के पूर्व अभिप्राप्त की जा सकती है।

D. Criminal Procedure Code, 1973 (2 of 1974), Section 202 - Examination of witnesses - Examination of all the witnesses cited in the complaint is not a condition precedent for taking cognizance and issue of process.

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 202 — साक्षियों की परीक्षा — परिवाद में वर्णित सभी साक्षियों की परीक्षा संज्ञान लेने एवं आदेशिका जारी करने के लिए पुरोभाव्य शर्त नहीं है।

E. Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Quashing of proceedings - Where there is sufficient evidence against the accused, which may establish the charge, the proceedings cannot be quashed.

NOTES OF CASES SECTION

इ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – कार्यवाहियों का अभिखंडित किया जाना – जहाँ अभियुक्त के विरुद्ध पर्याप्त साक्ष्य है जो कि आरोप सिद्ध कर सकती है, वहाँ कार्यवाहियाँ अभिखंडित नहीं की जा सकती।

F. Penal Code (45 of 1860), Section 500 - Defamation - There must be an imputation and such imputation must have been made with an intention of harming, or knowing or having reason to believe that such imputation will harm, the reputation of the person about whom it is made.

च. दण्ड संहिता (1860 का 45), धारा 500 – मानहानि – कोई लांछन अवश्य होना चाहिये एवं ऐसा लांछन हानि पहुँचाने के आशय से लगाया जाना चाहिये या यह जानते हुए या विश्वास करने का कारण रखते हुए लगाया जाना चाहिए कि ऐसे लांछन से उस व्यक्ति की ख्याति की अपहानि होगी, जिसके बारे में यह लगाया गया है।

Cases referred :

2005 SCC (Cri) 242, 1992 SCC (Cri) 88, 2004 SCC (Cri) 1927, AIR 2010 SC 2261, (2009) 14 SCC 466, (1998) 5 SCC 749, 1992 Suppl (I) SCC 335.

S.K. Vyas with Amit Mishra, for the applicant.

A.S. Garg with G.S. Yadav, for the non-applicant.

Short Note

*(17)

Before Mr. Justice S.K. Gangele

S.A. No.272/2001 (Gwalior) decided on 21 September, 2010

SANTOSH KUMAR & anr.

... Appellants

Vs.

HACHCHU & ors.

... Respondents

Civil Procedure Code (5 of 1908), Order 23 Rule 3-A - If a person is not a party to the decree and the decree is void, then certainly a suit is maintainable and the bar of Order 23 Rule 3-A would not be applicable in that case.

In the present case, it is clear that 'A' was minor at the time of passing of the decree of civil suit No.393-A/1980. No guardian was appointed on behalf of him. Hence, it could be held that 'A' was not a party to the decree. In such circumstances, the judgment and decree passed by the trial court in Civil Suit No.393-A/1980 is not binding on 'A'. The Provision of Order 23 Rule 3-A is applicable only to the persons, who are parties to the compromise;

NOTES OF CASES SECTION

however, the persons, who were not party to the compromise, can institute a suit. The decree passed in Civil Suit No.393-A/1980 is a decree against all the four persons including 'A'. If it is not executable against 'A', then the decree is also not executable against the other defendants. Hence, the decree was void and in that circumstances, the suit filed by the plaintiffs-respondents was maintainable.

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 23 नियम 3-ए - यदि कोई व्यक्ति डिक्री का पक्षकार नहीं है और डिक्री शून्य है, तब निश्चित रूप से वाद पोषणीय है और आदेश 23 नियम 3-ए का वर्जन उस मामले में लागू नहीं होगा।

Cases referred :

AIR 2007 (NOC) 841 (MP), 2007(2) MPHT 228 (DB), 2009(3) MPLJ 168, AIR 1981 Bom 357, AIR 1982 Cal 12, AIR 1983 Cal 180, AIR 1985 Kart 270, AIR 1991 Bom 185, AIR 1992 Pat 153, 1995(2) AIHC 1348 (DB), 1995(4) AIHC 3270 (DB), 1996 AIHC 3184, AIR 2003 Kart. 407 (DB), AIR 2004 Raj 264 (DB), AIR 1968 SC 954, AIR 1961 SC 790, (2004) 1 SCC 287, (2009) 6 SCC 194.

V.K. Bhardwaj with Raja Sharma & Anand Bhardwaj, for the appellants.

J.D. Suryavanshi, for the respondent Nos.1 & 2.

None, for other respondents.

Short Note

*(18)

Before Mr. Justice Sanjay Yadav

M.A. No.220/2009 (Jabalpur) decided on 26 February, 2010

SAROJ GAUTAM (SMT.)

... Appellant

Vs.

LAXMI PRASAD

... Respondent

Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2, Contract Act, 1872, Section 55 - Suit for specific performance of agreement of sale of land - Entire consideration amount received by defendant - Agreement no where records the specific time within which sale deed was to be executed - Suit filed within limitation of refusal of performance of contract - Held - Time was not essence of contract - Plaintiff being in possession and plea of limitation being raised, the status quo as was existing on the date of institution of suit ought to have been ordered by trial Court - Order rejecting application under Order 39 Rule 1 & 2 set aside - Appeal allowed.

NOTES OF CASES SECTION

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2, संविदा अधिनियम, 1872, धारा 55 – भूमि विक्रय के करार के विनिर्दिष्ट पालन के लिए वाद – प्रतिवादी द्वारा सम्पूर्ण प्रतिफल प्राप्त कर लिया गया – करार में कहीं भी विनिर्दिष्ट समय अभिलिखित नहीं जिसके भीतर विक्रय विलेख निष्पादित किया जाना था – वाद संविदा के पालन से इनकारी से परिसीमा के भीतर दाखिल किया गया – अभिनिर्धारित – समय संविदा का सार नहीं था – वादी के कब्जे में होने और परिसीमा का अभिवचन उठाये जाने से विचारण न्यायालय द्वारा वाद संस्थित किये जाने की तारीख को विद्यमान यथास्थिति आदेशित की जानी चाहिए थी – आदेश 39 नियम 1 व 2 के अन्तर्गत आवेदन नामंजूर करने वाला आदेश अपास्त – अपील मंजूर।

Case referred :

AIR 1977 SC 1005.

Ajay Sen, for the appellants.

None, for the respondent.

Short Note (DB)

*(19)

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

Cr.R. No.5/2008 (Indore) decided on 25 August, 2010

STATE OF M.P.

... Applicant

Vs.

D.K. ROKDE & ors.

... Non-applicants

A. Prevention of Corruption Act (49 of 1988), Section 13(1)(d)
- **Remedy of civil suit** - Merely because remedy by way of civil suit is available, is not an impediment in maintaining a criminal complaint provided the complaint discloses the ingredients of offence alleged.

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – सिविल वाद का उपचार – सिविल वाद के रूप में उपचार उपलब्ध होना मात्र ही दण्डिक परिवार चलाने में बाधा नहीं है बशर्ते कि परिवार से तथाकथित अपराध के संघटक प्रकट होते हों।

B. Prevention of Corruption Act (49 of 1988), Section 13(1)(d), Criminal Procedure Code, 1973, Sections 227 & 228 - Framing of charges
- High Court decided contractual/civil dispute between the parties in writ petition - Does not mean that respondents have been exonerated by High Court if prima facie criminal case on the basis of material available on record is made out - Order discharging respondent set aside.

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी), दण्ड प्रक्रिया

NOTES OF CASES SECTION

संहिता, 1973, धाराएँ 227 व 228 – आरोप विरचित करना – उच्च न्यायालय ने रिट याचिका में पक्षकारों के मध्य संविदात्मक/सिविल विवाद का विनिश्चय किया – इसका तात्पर्य यह नहीं है कि उच्च न्यायालय द्वारा प्रत्यर्थियों को दोषमुक्त कर दिया गया है, यदि अभिलेख पर मौजूद सामग्री के आधार पर प्रथम दृष्ट्या दाण्डिक मामला बनता हो – प्रत्यर्थी को उन्मोचित करने का आदेश अपास्त।

C. Prevention of Corruption Act (49 of 1988), Section 13(1)(d), Criminal Procedure Code, 1973, Section 173(8) - Delay in filing charge sheet - Steps were taken to collect several evidence during investigation - S.P.E. waited for filing charge sheet till the retirement of respondent No.1 - Investigating agency cannot be held responsible for delay in investigation - Delay simplicitor not sufficient to quash the criminal proceedings.

ग. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी), दण्ड प्रक्रिया संहिता, 1973, धारा 173(8) – आरोप पत्र प्रस्तुत करने में विलम्ब – अन्वेषण के दौरान कई साक्ष्य एकत्रित करने हेतु कार्यवाही की गयी – विशेष पुलिस स्थापना ने आरोप पत्र प्रस्तुत करने के लिये प्रत्यर्थी क्र. 1 की सेवानिवृत्ति तक प्रतीक्षा की – अन्वेषण अभिकरण को अन्वेषण में विलम्ब के लिये उत्तरदायी नहीं ठहराया जा सकता – सादा विलम्ब दाण्डिक कार्यवाहियों को अभिखंडित करने के लिए पर्याप्त नहीं।

D. Prevention of Corruption Act (49 of 1988), Section 13(1)(d) - Respondent No.1 on the day of his joining issued notice to contractor to complete the work as per terms and conditions and as per specifications - On the next day issued work completion order entitling the contractor to collect toll tax - Work was found to be of inferior quality and incomplete - Prima facie case u/s 13(1)(d) r/w 13(2) made out.

घ. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – प्रत्यर्थी क्र. 1 ने अपने कार्यभार ग्रहण करने के दिन ठेकेदार को निबंधनों एवं शर्तों के अनुसार तथा विनिर्देशों के अनुरूप कार्य पूर्ण करने का सूचना पत्र जारी किया – अगले दिन ठेकेदार को पथंकर एकत्रित करने हेतु अधिकृत करने वाला कार्य समाप्ति आदेश जारी किया – कार्य निम्न स्तर का एवं अधूरा पाया गया – धारा 13(1)(डी) सहपठित धारा 13(2) के अन्तर्गत प्रथमा दृष्ट्या मामला बनता है।

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

Cases referred :

AIR 2005 SC 359, AIR 1987 SC 773, AIR 2008 SC 1903, (2009) 10 SCC 674, 2010(1) JT SC 459, 1996 SCC (Cri) 897, 2008 CrLJ 3944, (1979) 3 SCC 4, (2009) 8 SCC 617, (2006) 6 SCC 736.

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L.N. Soni with Mukesh Kumawat, for the applicant.

C.R. Joshi, for the non-applicant No.1.

A.S. Garg with Rakesh Yadav, for the non-applicant Nos.2 &3.

Short Note

*(20)

Before Mr. Justice U.C. Maheshwari

C.R. No.304/2010 (Jabalpur) decided on 31 August, 2010

YOGRAJ INFRASTRUCTURE LIMITED

... Applicant

Vs.

SSANGYONG ENGINEERING &
CONSTRUCTIONS CO. LTD.

... Non-applicant

A. Arbitration and Conciliation Act (26 of 1996) - Jurisdiction of Indian Courts with regard to arbitration under an international agreement - Arbitration agreement provided for settlement of dispute by Arbitration at Singapore International Arbitration Centre - **Held -** If there is a specific contract/provision between the parties stating that they will be governed by the law of some specific country then the law of such country shall be applicable to them - Where the parties have not chosen any specific enactment in that regard then law of such country where the arbitration proceedings is being conducted shall govern the parties.

क्र. माध्यस्थम् और सुलह अधिनियम (1996 का 26) - किसी अन्तर्राष्ट्रीय करार के अन्तर्गत माध्यस्थम् के सम्बन्ध में भारतीय न्यायालयों की अधिकारिता - माध्यस्थम् करार विवाद का निपटारा सिंगापुर अन्तर्राष्ट्रीय माध्यस्थम् केन्द्र में माध्यस्थम् द्वारा किये जाने का उपबन्ध करता है - **अभिनिर्धारित -** यदि पक्षकारों के मध्य यह कथन करने वाली विनिर्दिष्ट संविदा/उपबन्ध हो कि वे किसी विनिर्दिष्ट राष्ट्र की विधि द्वारा शासित होंगे, तब ऐसे राष्ट्र की विधि उनको लागू होगी - जहाँ पक्षकारों ने किसी विनिर्दिष्ट अधिनियमन को उस संबंध में नहीं चुना है तब उस स्थान की विधि, जहाँ माध्यस्थम् कार्यवाहियाँ संचालित की जा रही हैं, पक्षकारों को शासित करेगी।

B. Arbitration and Conciliation Act (26 of 1996) - Arbitration under an international agreement - Rules and procedure to be followed in such a proceedings - Arbitration agreement provided for settlement of dispute by Arbitration at Singapore International Arbitration Centre - **Held -** After referring the matter to the arbitrator under Singapore International Arbitration Centre Rules (SIAC Rules) such rules being curial law, the arbitrator has to pass the award under

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such SIAC Rules and till passing of the award by the arbitrator the proceedings is to be conducted in accordance with such curial law - Any party aggrieved by any order of the arbitrator then according to their terms of agreement may resort and exhaust the remedy by virtue of Rule 32 of such SIAC Rules under the International Arbitration Act.

ख. माध्यस्थम् और सुलह अधिनियम (1996 का 26) – अन्तर्राष्ट्रीय करार के अन्तर्गत माध्यस्थम् – ऐसी कार्यवाहियों में अनुसरित किये जाने वाले नियम एवं प्रक्रिया – माध्यस्थम् करार विवाद का निपटारा सिंगापुर अन्तर्राष्ट्रीय माध्यस्थम् केन्द्र में माध्यस्थम् द्वारा किये जाने का उपबन्ध करता है – अभिनिर्धारित – सिंगापुर अन्तर्राष्ट्रीय माध्यस्थम् केन्द्र नियम (एसआईएसी नियम) के अंतर्गत मध्यस्थ को मामला निर्देशित करने के पश्चात् ऐसे नियम कुरिअल विधि होने के कारण, मध्यस्थ को ऐसे एसआईएसी नियमों के अधीन अवार्ड पारित करना होगा और मध्यस्थ द्वारा अवार्ड पारित किये जाने तक, कार्यवाहियों का संचालन ऐसे कुरिअल विधि के अनुसार करना होगा – मध्यस्थ के किसी आदेश द्वारा कोई पक्षकार व्यथित होता है तब उनके करार के निबंधनों के अनुसार अन्तर्राष्ट्रीय माध्यस्थम् अधिनियम के अंतर्गत ऐसे एसआईएसी नियमों के नियम 32 के आधार पर उपचार का प्रयोग और निःशेष कर सकता है।

Cases referred :

(2003) 9 SCC 79, (1998) 1 SCC 305, (2002) 4 SCC 105, AIR 2008 SC 1061, AIR 1989 SC 1239, (2008) 1 SCC 618.

R.K. Pancholi, for the applicant.

R.S. Jaiswal with Manoj Kushwaha, for the non-applicant.

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FULL BENCH

*Before Mr. Justice A.K. Shrivastava, Mr. Justice Abhay M. Naik &
Mr. Justice S.S. Dwivedi*

S.A. No.154/2001 (Gwalior) decided on 30 August, 2010

RANVEER SINGH (DEAD) THROUGH L.R.S. & anr. ... Appellants
Vs.

STATE OF M.P. ... Respondent

A. Land Revenue Code, M.P. (20 of 1959), Section 50 - Revision

- The suo motu powers can be exercised by the revisional authority envisaged u/s 50 of the Code within a period of 180 days from the date of the knowledge of illegality, impropriety and irregularity of the proceedings committed by a revenue officer subordinate to it even if the immovable property is government land or having some public interest. [Majority View (Mr. Justice A.K. Shrivastava & Mr. Justice S.S. Dwivedi)] (Para 38)

क. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 50 - पुनरीक्षण - संहिता की धारा 50 के अन्तर्गत परिकल्पित पुनरीक्षण प्राधिकारी द्वारा स्वप्रेरणा शक्तियों का प्रयोग, उसके अधीनस्थ किसी राजस्व अधिकारी द्वारा की गयी कार्यवाहियों की अवैधता, अनौचित्यता तथा अनियमितता की जानकारी की तारीख से 180 दिन की अवधि के भीतर किया जा सकता है भले ही अचल सम्पत्ति शासकीय भूमि हो अथवा उसमें कोई लोकहित हो। (बहुमत दृष्टिकोण-मि. जस्टिस ए.के. श्रीवास्तव एवं मि. जस्टिस एस.एस. द्विवेदी)

B. Maxim - Vigilantibus noa dormientibus jura sub veniunt - Means - Laws come to the assistance of those who are vigilant and not those who sleeps upon their rights - We can extend this maxim to the revisional authority who has to exercise his suo motu power. (Para 34)

ख. सूत्र - विधि जागरूक की सहायता करती है न कि सुषुप्त की - अर्थात् - कानून उनकी सहायता करता है जो अपने अधिकारों के प्रति सजग हैं न कि उनकी जो सचेत नहीं हैं - हम यह सूत्र पुनरीक्षण प्राधिकारी, जिसे अपनी स्वप्रेरणा शक्ति का प्रयोग करना है, तक विस्तृत कर सकते हैं।

C. Words & Phrases - Irreparable loss - What should be - It should be considered on the facts and circumstances of each case as no definite yardstick in that regard can be drawn. (Para 38)

ग. शब्द और वाक्यांश — अपूरणीय क्षति — क्या होनी चाहिए — यह प्रत्येक मामले के तथ्यों एवं परिस्थितियों पर विचारित किया जाना चाहिए क्योंकि उसके सम्बन्ध में कोई निश्चित मापदण्ड नहीं बनाया जा सकता है।

D. Land Revenue Code, M.P. (20 of 1959), Section 50 - Revision - Suo motu - When a person against whom suo motu exercise of power is being made is not put to an irreparable loss, period of one year from the date of detection of illegality, impropriety or irregularity in the order/ proceedings would be reasonable period for exercise of suo motu powers of revision u/s 50 of Code for protection of the government land or public interest. [Minority View (Mr. Justice Abhay M. Naik)] (Para 13)

घ. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 50 — पुनरीक्षण — स्वप्रेरणा से — जब किसी व्यक्ति को, जिसके विरुद्ध स्वप्रेरणा शक्ति का प्रयोग किया जा रहा है, अपूरणीय क्षति न पहुँचती हो, तब आदेश/कार्यवाहियों में अवैधता, अनौचित्यता अथवा अनियमितता का पता लगने की तारीख से एक वर्ष की अवधि शासकीय भूमि अथवा लोक हित की सुरक्षा के लिए संहिता की धारा 50 के अन्तर्गत पुनरीक्षण की स्वप्रेरणा शक्ति का प्रयोग करने के लिये युक्तियुक्त अवधि होगी। (अल्पमत दृष्टिकोण—मि.जस्टिस अभय एम. नायक)

Cases referred :

AIR 1969 SC 1297, (2007) 1 SCC 584; (2009) 9 SCC 352, (1994) 1 SCC 44, 2006 RN 167, 2008 RN 99, 1990 MPLJ 353, 1990 RN 407, 1996 RN 80, 1997 RN 129, 1999 RN 82, 2009 RN 1, 1998(I) MPWN 26, (2003) 7 SCC 667, (2007) 11 SCC 363, AIR 2010 SC 744, JT 2009(1) SC 104, 1994 MPLJ 378, 2007(1) MPLJ 60, 2002(I) MPJR 351, AIR 2007 SC 2414, (1998) 2 SCC 242, 2000 RN 161, AIR 1996 SC 1623, AIR 1988 SC 897, (2005) 3 SCC 752.

Sanjay Kumar Mishra, A.K. Kaushik & Raghvendra Bhargava, for the appellants.

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

K.B. Chaturvedi, H.D. Gupta, S.B. Mishra and S.K. Bajpai, R.D. Sharma & Sameer Kumar Jain, as amicus curiae.

ORDER

The Order of the Court was delivered by **A.K. SHRIVASTAVA, J.** :—On bare perusal of the order of reference dated 20/4/2010, we find that the learned Single Judge felt it necessary to refer the

following question either to be decided by the Division Bench or Full Bench and, hence, referred the matter to Hon'ble the Chief Justice. Eventually, Hon'ble the Chief Justice referred the following question to answer by constituting this Full Bench. It would be germane to quote the question which has been referred to us :-

"Whether in the case wherein an individual is not put to suffer any irreparable loss, exercise of suo motu powers after any length of period is justifiable in law, more so, for protection of Govt. land or public interest.?"

2. Indeed, the question which has been referred to this Full Bench is in two parts; the first part pertains to an individual who is not put to irreparable loss and the second part is that what should be the justifiable period within which suo motu powers should be exercised by the revisional authority.

3. We have heard Sarvshri Sanjay Kumar Mishra, A.K. Kaushik and Raghvendra Bhargava, learned counsel for appellants and Shri M.P.S. Raghuvanshi, learned Additional Advocate General and Shri Vivek Khedkar, learned Government Advocate for respondent/State. Since the question referred to this Full Bench is of general importance and further because several cases would be effected and the revisional authority who would exercise suo motu powers shall also be guided, hence, we have also heard Sarvshri K.B. Chaturvedi, H.D. Gupta and S.B. Mishra, learned senior counsel. Sarvshri S.K. Bajpai, R.D. Sharma and Sameer Kumar Jain, learned counsel have also addressed us.

4. Learned counsel for the appellants as well as learned amicus curiae have highlighted various provisions of M.P. Land Revenue Code, 1959 (hereinafter referred to as the Code), Land Acquisition Act, 1894 (in short the Acquisition Act), M.P. Ceiling on Agricultural Holdings Act, 1960 (for brevity the Ceiling Act) and other similar provisions enacted in other statutes and by focusing Section 50 of the Code, which speaks about the exercise of revisional power by the Board or Commissioner or / Settlement Commissioner or Collector or the Settlement Officer, have contended that the suo motu powers cannot be exercised at any point of time. In this context heavy reliance has been made on some decisions of Supreme Court they are *State of Gujarat v. Patel Raghav Natha and others*, AIR 1969 SC 1297, *ESI Corpn v. C.C. Santhakumar*, (2007) 1 SCC 584 and *Santoshkumar Shivgonda Patil and others v. Balasaheb Tukaram Shevale and others*; (2009) 9 SCC 352.

5. Shri H.D. Gupta, learned senior counsel, by inviting our attention to Section 57 of the Code particularly sub-section (2) and (3) has submitted that if dispute arises between the State Government and any person in respect of any right under sub-section (1), such dispute shall be decided by the Sub Divisional Officer and has further submitted that sub-section (3) provides remedy to any person aggrieved by any order passed under sub-section (2) to institute a Civil Suit to contest the validity of that order within a period of one year from the date of such order and, hence, submitted that in order to surpass any order of Sub Divisional Officer and to get it somersaulted after the expiry of prescribed period of limitation of one year, revisional jurisdiction should not be exercised so that sub-section (3) of Section 57 may not become otiose. Learned senior counsel has placed reliance on the decision of Supreme Court *Ram Chand and others v. Union of India and others*, (1994) 1 SCC 44 and also on the Single Bench decisions of this Court *State of M.P. and another v. Board of Revenue and others*, 2006 RN 167 and *Kashiram v. Hariram and others*, 2008 RN 99.

6. Shri K.B. Chaturvedi, learned senior counsel has also submitted that suo motu powers cannot be exercised after indefinite period. Learned senior counsel has placed heavy reliance on a Full Bench decision of this Court *Ushadevi and others v. State of M.P. and others*, 1990 MPLJ 353 and has also placed reliance on the Division Bench decision of this Court *Rammulal and others v. State of M.P.*, 1990 RN 407 wherein it has been held that the suo motu powers should be exercised within few months. Learned senior counsel by inviting our attention to Section 50 of the Code, which pertains to revisional power, has contended that since the Legislature has fixed 90 days to file revision application before the Revenue Board and 60 days when it is to be exercised by the Commissioner or / Settlement Commissioner or the Collector or the Settlement Officer and, therefore, looking to the scheme of this Section powers should not be exercised after more than 90 days from the date when it came into the knowledge of the revisional authority that illegality has been committed by any revenue officer subordinate to it.

7. Shri S.B. Mishra, learned senior counsel, has also addressed us on the same proposition. Shri R.D. Sharma and Shri S.K. Bajpai, learned counsel, have also submitted that it should not be exercised after lapse of several years and should be exercised within few months. Learned counsel have placed reliance on Single Bench decision of this Court *Hamir Singh v. State of M.P. and others*, 1996 RN 80, *Pratap Singh and another v. State of M.P.*,

1997 RN 219, *Sitaram v. State of M.P. and others*, 1999 RN 82, *Kashiram v. Hariram and others*, 2008 RN 99 and the decision of Supreme Court *M.P. Housing Board v. Shiv Shankar Mandil and others*, 2009 RN 1. Shri Sameer Kumar Jain, learned counsel, has also argued on the same line and has placed reliance on the decision of Supreme Court *Mohamad Kavi v. Fatmabai Ibrahim*, 1998 (1) MPWN 26.

8. On the other hand, Shri M.P.S. Raghuvanshi, learned Additional Advocate General and Shri Vivek Khedkar, learned Government Advocate for respondent/State, submitted that no upper limit should be fixed for exercising the suo motu powers of revision and it should be left for the authority to exercise the same looking to the facts and circumstances of each case. Learned State counsel have placed reliance on the decisions of Supreme Court *Ibrahimpatnam Taluk Vyavasaya Coolie Sangham v. K. Suresh Reddy and others*, (2003) 7 SCC 667, *State of Punjab and others v. Bhatinda District Cooperative Milk Producers Union Ltd.*, (2007) 11 SCC 363, *Mandal Revenue Officer v. Goundla Venkaiah and Anr.*, AIR 2010 SC 744, *State of A.P. and another v. T. Yadagiri Reddy and others*, JT 2009 (1) SC 104. They have also placed reliance on Division Bench decisions of this Court *Murarilal and others v. State of M.P. and others*, 1994 MPLJ 378, *Sarvan Kumar and another v. State of M.P. and another*, 2007 (1) MPLJ 60, *Mulayam Singh and another v. Budhuwa and others*, 2002 (1) MPJR 351.

9. What should be the meaning of irreparable loss, Shri H.D. Gupta, learned senior counsel, submits that this term is having very wide connotation and cannot be restricted in any manner. While considering what should be the irreparable loss, several factors are required to be seen including labour put by the agriculturist for a considerable long period, the land which has been developed by him, construction of boundary wall or trenching the boundaries of the field, digging of well etc. Learned Additional Advocate General, submits that irreparable loss would depend upon the facts and circumstances of each case.

10. Before dealing with the rival contentions put forth by learned counsel for the parties as well as learned amicus curiae we think it apposite to go through the power of revision which is to be exercised by the revisional authority under Section 50 of the Code. This section highlights the revisional power conferred to the Board or Commissioner or / the Settlement

Commissioner or the Collector or Settlement Officer and as per this Section, these authorities may at any time on its own motion or on an application made by any party for the purpose of satisfying itself as to legality or propriety of any order passed by or as to the regularity of the proceedings of any revenue officer subordinate to it may call and examine the record of any case pending or disposed of by such officer and may pass necessary orders as it thinks fit. For better understanding it would be condign to quote Section 50 of the Code, which reads thus :-

"50. Revision.-(1) The Board or the Commissioner / or the Settlement Commissioner or the Collector or the Settlement Officer may at any time on its/his motion or on the application made by any party for the purpose of satisfying itself/himself as to legality or propriety of any order passed by or as to the regularity of the proceedings of any Revenue Officer subordinate to it/him call for, and examine the record of any case pending before, or disposed of by such officer, and may pass such order in reference thereto as it/he thinks fit :

Provided that -

(i) no application for revision shall be entertained-

(a) against an order appealable under this Code;

(b) against an order of the Settlement Commissioner under section 210;

(c) against an order passed in revision by the Commissioner or / the Settlement Commissioner in respect of cases under S.170-B, nor shall any such order be revised by the Board on its own motion;

(ii) no such application shall be entertained unless presented within sixty days to the Commissioner or / the Settlement Commissioner or the Collector or the Settlement Officer, as the case may be, or within ninety days to the Board of Revenue from the date of the order and in computing the period aforesaid, time requisite for obtaining a copy of the said order shall be excluded;

(iii) no order shall be varied or reversed in revision unless notice has been served on the parties interested and opportunity given to them of being heard.

(2) Notwithstanding anything contained in sub-section (1)-

(i) where proceedings in respect of any case have been commenced by the Board under sub-section (1) no action shall be taken by the Commissioner or / the Settlement Commissioner or the Collector or the Settlement Officer in respect thereof;

(ii) where proceedings in respect of any case have been commenced by the Commissioner or / the Settlement Commissioner under sub-section (1), no action shall be taken by the Collector or the Settlement Officer in respect thereof;

(iii) where proceedings in respect of any such case have been commenced by the Commissioner, / Settlement Commissioner, Collector or Settlement Officer under sub-section (1), the Board may either refrain from taking any action under this section in respect of such case until the final disposal of such proceedings by the Commissioner or / the Settlement Commissioner or the Collector or the Settlement Officer, as the case may be, or may withdraw such proceedings and pass such order as it may deem fit;

(iv) where proceedings in respect of any such case have been commenced by the Commissioner or / the Settlement Officer under sub-section (1), the Commissioner or the Settlement Commissioner may either refrain from taking any action under this section in respect of such case until the final disposal of such proceedings by the Collector or the Settlement Officer, as the case may be, or may withdraw such proceedings and pass such order as it may deem fit.

Explanation. -For the purpose of this section all Revenue Officers shall be deemed to be subordinate to the Board."

11. We do not have any scintilla of doubt that the revisional authority mentioned in Section 50 of the Code may exercise suo motu power of revision at any time in order to satisfy itself about the legality or propriety of any order passed by any revenue officer subordinate to it or as to the regularity of the proceedings of any such officer and while exercising such powers the revisional authority may pass such order as it thinks fit. True, the Legislature has not fixed any upper limit of the period when this power should be exercised and Section is totally silent in this regard, although period of limitation has been

fixed by the Legislature when a revision application is filed by a party concerned. According to clause (II) of sub-section (1) to Section 50 of the Code, an aggrieved party can file revision application within 60 days before the Commissioner or / the Settlement Commissioner or the Collector or Settlement Officer or within 90 days to the Board of Revenue excluding the requisite time for obtaining copy of the order against which revision is filed. But merely because the Legislature has not fixed an upper limit for exercising suo motu powers by the revisional authority, according to us, it will not confer unfettered right to the revisional authority to exercise this power at any moment of time according to his whims because it would amount to give a sword having no scabbard. Indeed, after having an order in favour of a litigant he must be permitted to live in peace with an understanding that since the order passed in his favour has not been challenged for a considerable long period, now it cannot be challenged. His right, whatever he enjoys, may be on account of some illegal order in his favour should attain some finality so that his faith in the judicial system may not be ruined that although an order is in my favour, but it can be set aside at any moment of time even after passing of several years.

12. The Supreme Court in its key decision *Patel Raghav Natha* (supra) has thrown sufficient light when the suo motu power of revision should be exercised. On going through this decision, we find that permission to raise building was granted in that case and after having obtained permission by the person, the building was erected the Supreme Court in those circumstances held that if after lapse of several years the suo motu powers are exercised, it would amount to jeopardizing the rights of such person. In para 11 the Supreme Court held that the Commissioner cannot exercise powers conferred to it under Sections 65 and 211 of the Bombay Land Revenue Code at any time and it should be exercised within a reasonable period and what should be the reasonable period, it would depend upon the facts and circumstances of each case. In para 12 after analyzing powers conferred under Sections 65 and 211 of the said Bombay Land Revenue Code it was held by the Supreme Court that the Commissioner must exercise his revisional powers within few months from the date of granting permission because after the grant of permission for building purpose, the occupant may spent money in construction of the building.

13. Several decisions have been cited before us and we find that in some of the decisions the suo motu powers were exercised even after six years but in each and every decision it has been held by the Apex Court that what should be the reasonable period to exercise suo motu powers of revision will depend

upon the facts and circumstances of each case. Hence, the question would rest on the pivot that what should be the upper limit of this reasonableness.

14. The Supreme Court in *Pune Municipal Corporation v. State of Maharashtra and Ors.*, AIR 2007 SC 2414 while considering the same provisions of Sections 65 and 211 of the Bombay Land Revenue Code and by taking into consideration its earlier key decision *Patel Raghav Natha* (supra) in para 31 has held that in the facts and circumstances of the case the revisional authority was duty bound to take into account the length of delay, the intervening circumstances and subsequent events from 1977 to 1995 and to consider whether the powers should be exercised or not and it was held that no such exercise has been undertaken by the revisional authority and, hence, the order of revisional authority suffers from legal infirmity and is liable to be quashed.

15. Sub-section (1) of Section 257 of the Maharashtra Land Revenue Code, 1966 is more or less similar to sub-section (1) of Section 50 of our Code and we quote both the provisions as under :-

M.P. Land Revenue Code, 1959
Section 50 (1)

50. Revision.-(1) The Board or the Commissioner / or the Settlement Commissioner or the Collector or the Settlement Officer may at any time on its/his motion or on the application made by any party for the purpose of satisfying itself/himself as to legality or propriety of any order passed by or as to the regularity of the proceedings of any Revenue Officer subordinate to it/ him call for, and examine the record of any case pending before, or disposed of by such officer, and may pass such order in reference thereto as it/he thinks fit :

Provided that -

(i) no application for revision shall be entertained-

(a) against an order appealable under this Code;

Maharashtra Land Revenue Code, 1966. **Section 257 (1)**

257. Power of State Government and of certain Revenue and Survey Officers to call for and examine records and proceedings of subordinate officers.-(1) The State Government and any Revenue or Survey Officer, not inferior in rank to an Assistant or Deputy Collector or a Superintendent of Land Records, in their respective departments, may call for and examine the record of any inquiry or the proceedings of any subordinate Revenue or Survey Officer, for the purpose of satisfying itself or himself, as the case may be, as to the legality or propriety of any decision or order passed, and as to the regularity of the proceedings of such officer.

(b) against an order of the Settlement Commissioner under section 210;

(c) against an order passed in revision by the Commissioner or / the Settlement Commissioner in respect of cases under S.170-B, nor shall any such order be revised by the Board on its own motion;

(ii) no such application shall be entertained unless presented within sixty days to the Commissioner or / the Settlement Commissioner or the Collector or the Settlement Officer, as the case may be, or within ninety days to the Board of Revenue from the date of the order and in computing the period aforesaid, time requisite for obtaining a copy of the said order shall be excluded;

(iii) no order shall be varied or reversed in revision unless notice has been served on the parties interested and opportunity given to them of being heard.

16. The Supreme Court in *Santoshkumar Shivgonda Patil and others* (supra) while considering revisional power of Sub Divisional Officer under Section 257 of the Maharashtra Land Revenue Code ultimately held that the order which was not obtained by any fraudulence cannot be set aside after 17 years by exercising suo motu powers and, hence, is liable to be set aside and accordingly set aside the said order of the revisional authority. The Supreme Court further held that ordinarily the reasonable period within which such power is to be exercised should be not more than three years but ofcourse only in the exceptional circumstances.

17. The Supreme Court in another decision *Mohamad Kavi* (supra) while considering Section 84-C of the Bombay Tenancy and Agricultural Lands Act, 1948 also held that the suo motu powers should be exercised within a reasonable period and looking to the transfer which took place during intervening period in the year 1972 the suo motu powers exercised in September 1973 was found to be unreasonable because by that time investments were made by the purchasers and the key decision of *Patel Raghav Natha* (supra) was placed reliance as well as another decision *Ram Chand and others* (supra)

was also relied upon and the suo motu power which was exercised under Section 84-C of the said Act by Mamlatdar was quashed and set aside.

18. The Supreme Court in *C.C. Santhakumar* (supra) while considering its earlier decision *Hindustan Times Ltd. v. Union of India*, (1998) 2 SCC 242 which pertains to the power to recover the damages under Section 14-B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, by putting emphasis that what should be the period of limitation in absence of any specific provision under the said Act, in para 35 came to hold that a reasonable period would depend upon the factual circumstances of the case concerned and there cannot be any empirical formula to determine that question. The Court/authority considering the question whether the period is reasonable or not has to take into account the surrounding circumstances and relevant factors to decide that question. Again the key decision of *Patel Raghav Natha* (supra) was relied upon.

19. According to Advanced Law Lexicon by P. Ramanatha Aiyar, Third Edition, 2005, page 3971 reasonable time means as follows:-

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

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

It is proper to attempt any definition of the words 'reasonable time', as applied to completion of a contract, the distinction given by **Chief Baron Pollock** may be suggested, *namely, that a 'reasonable time' means as soon as circumstances will permit*.

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

A reasonable time, looking at all the circumstances of the case; a reasonable time under ordinary circumstances; as soon as circumstances will permit; so much time as is necessary under the circumstances, conveniently to do what the contract

requires should be done; some more protracted space that *'directly'; such length of time as may fairly, and properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances; all these convey more or less the same idea.*

Reasonable time always depends on the circumstances of the case. *(Kinney)"*

The meaning of 'reasonable period' highlighted in Advanced Law Lexicon also finds place in para 36 of the said decision of *C.C. Santhakumar* (supra) and in para 38 the Supreme Court decided the appeals by giving certain directions. According to us, direction No.(3) is relevant in the present case which reads thus :-

"(3) The ESI Court shall determine the quantum of contribution, if any, payable and consider the question as to whether demands were raised within a reasonable period of time or not after considering the question of prejudice, if any, for the delayed action taken by the Corporation."

(Emphasis supplied)

The Supreme Court has categorically held that the reasonable period should be computed after considering the question of prejudice, if any, for the delayed action taken by the ESI Corporation. Hence, according to us, before action of suo motu power is required to be taken and any order is to be passed while exercising those powers, the prejudice part against a person against whom such power is to be exercised should also be taken into consideration and this part is one of the determining factor in order to come to a conclusion that suo motu powers should be exercised or not. We have already held hereinabove that within a reasonable time the suo motu powers should be exercised by the revisional authority and it is also very much necessary for another reason that the law never expect a settled thing, which had already taken place, may be by some illegal order, to get it altogether somersaulted or unsettled after long lapse of period and we may further add that the factum not to exercise such power in those circumstances is inherent in the authority exercising suo motu powers of revision.

20. In another decision of Supreme Court *Shiv Shankar Mandil and others* (supra) which has been placed reliance by Shri R.D. Sharma and Shri S.K.

Bajpai, learned counsel, it was argued before the Apex Court that Nistar rights or the grazing land cannot be transferred but when this point was confronted by putting a specific question by the Apex Court to the learned counsel who was addressing before it, as to whether the Government could have leased out the grazing land independently without transferring it to the Industrial Department, such powers of leasing out was not disputed and thus the Supreme Court held that even the grazing land can be leased out though the said land is owned by the State Government. The question which was raised before the Supreme Court was also raised before learned Single Bench of this Court hearing the case of *Shiv Shankar Mandil and others* (supra) but it was turned down by learned Single Bench in the like manner as it was not accepted by the Supreme Court and the order of learned Single Bench was affirmed by the Division Bench of this Court holding that power of review under Section 51 of the Code should be exercised within reasonable time and the key decision of *Patel Raghav Natha* (supra) was placed reliance. The Supreme Court affirmed the order of learned Single Bench which was affirmed by the Division Bench.

21. The Supreme Court in the case of *Ram Chand and others* (supra) in para 6 onwards by placing reliance on its earlier decisions mentioned in each paras between 6 to 9 ultimately in para 16 while considering various provisions of the Acquisition Act and putting emphasis on Section 6 came to the conclusion that the statutory authorities should perform their duties within a reasonable time and as such they are answerable to the Court why such duties have not been performed by them which has caused injury to claimants. The Supreme Court further held that by not questioning the validity of the acquisition proceedings for a long time since the declarations were made under Section 6, the relief of quashing acquisition proceedings has become inappropriate because in the meantime the lands notified have been developed and put to the public use.

22. In *Ibrahimpattam Taluk Vyavasaya Coolie Sangham* (supra) the Supreme Court while considering the scope of Section 50-B(4) of Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands Act, 1950 has held that the suo motu power cannot be exercised after long delay of 13 to 15 years because of the fraudulent acts of the non-official respondents and it should be exercised within reasonable time from the date of the coming into knowledge of the discovery of fraud. The Supreme Court in para 19 has held that the suo motu power which was exercised by the Joint Collector after 13

to 15 years was not within reasonable period. The High Court of Andhra Pradesh set aside the order of SDO suo motu exercising powers after 13-15 years by cancelling the validation certificates given by Tahsildar. The Supreme Court in para 22 and 23 upheld the decision of learned Single Judge which was affirmed by the Division Bench of Andhra Pradesh High Court. But, in one matter it was held that the fraud was played upon the Court in obtaining cancellation certificate and, hence, the SDO within the reasonable period from the date of the detection of the fraud set aside the cancellation certificate and, hence, held that the learned Single Bench of Andhra Pradesh High Court rightly upheld the action of SDO holding that suo motu powers were exercised within reasonable period. The order of learned Single Bench was affirmed by the Division Bench and the Apex Court affirmed the decisions of Single and Division Bench (see para 9, 29 and 30).

23. The decision of *Mandal Revenue Officer* (supra) placed reliance by learned Additional Advocate General is not relevant to answer the reference referred to us because in this decision when suo motu powers by the revisional authority should be exercised was not the point in issue.

24. In *T. Yadagiri Reddy and others* (supra) again the Supreme Court is putting emphasis that what should be the reasonable time to exercise suo motu power and held that it would depend upon the facts and circumstances of each case and further held that when the rights of the parties have been crystallized on the basis of certificates having been issued 25 years ago, the suo motu powers should not be exercised.

25. The Division Bench of this Court in *Rammulal and others* (supra) while considering various provisions of Ceiling Act and particularly Section 42, which speaks about the suo motu revision powers, has categorically held in para 5 that in between the period when the suo motu powers were exercised transfer of the land took place and, therefore, on account of vesting of interest of other persons in the land, the suo motu powers should not have been exercised after eight years and it should be within the reasonable period and the Division Bench by defining the reasonable period held that it should be within few months. If we keep Section 42 of the Ceiling Act in juxtaposition to Section 50 of the Code and both the provisions are read conjointly, it can be inferred that both the provisions are akin to each other. For better understanding, we would like to quote Section 42 of the Ceiling Act, which reads thus :-

"42. Revision.- The Board of Revenue or the Commissioner

may on its/his motion or on the application by any party at any

time for the purpose of satisfying itself/himself as to the legality or propriety of any order passed by or as to the regularity of the proceedings of any competent authority subordinate to it/him call for and examine the record of any case pending before or disposed of by such competent authority, and may pass such orders in reference thereto as it/he thinks fit.

Provided that it/he shall not vary or reverse any order unless notice has been served on the parties interested and opportunity given to them for being heard:

Provided further that no application for revision shall be entertained against an order against which an appeal is provided under this Act.

Provided also that the surplus land vested in the State Government shall not revert to the holder thereof as a consequence of remand of the case."

We have already quoted Section 50 of the Code hereinabove. On reading both the provisions conjointly, according to us, both these provisions are similar to each other, therefore, the analogy which has been taken by the Division Bench in the case of *Rammulal and others* (supra) can also be adopted for the purpose of elucidating the scope of Section 50 of the Code.

26. The Full Bench of this Court in *Ushadevi and others* (supra) while considering the suo motu powers under Section 42 of the Ceiling Act vis-a-vis Section 50 of the Code in para 16, 17 and 18 has held that these powers should be exercised within the reasonable time. In para 16 while placing reliance on certain decisions of the Supreme Court, the Full Bench has categorically held that the Courts are required to construe any particularly statutory provisions not only on its language and its setting because it is their inexorable duty to ensure that interpretation is not recognant to the scheme of the Act and not in derogation to the public policy or public interest relying the enactment.

27. In another decision *Murarilal and others* (supra) Division Bench of this Court has held that the land was recorded in the name of deity but the mutation was made in the name of individual, as a result of which, the Collector initiated the proceedings as soon as the alleged mutation was brought in his knowledge and in those facts and circumstances it was held that exercise of suo motu revisional powers was within reasonable time. In this decision although

the date of order of Naib Tahsildar mutating the name in the name of individual did not find place, but on going through para 2 and 3 of the order, we find that in the year 1985 an application was filed by individual to get the land mutated in his name. An appeal was filed on 16/10/1990 praying to the Collector to exercise suo motu powers and on 20/12/1991 the order was passed by Collector setting aside the order of Naib Tahsildar and in these circumstances it was held by the Division Bench that the suo motu powers were exercised within the reasonable period by the Collector as soon as the illegality came in its knowledge. The Single Bench of this Court in *Sarvan Kumar and another* (supra) held in para 24 that no limit has been prescribed for the exercise of suo motu powers to the Collector and such limit should depend upon the facts of each case, but no light has been thrown on the point that what should be the reasonable period.

28. The learned Single Bench of this Court in *Kashiram* (supra) in para 10 has held that suo motu powers have been exercised after 13 to 14 years without assigning any specific reason for such exercise is not sustainable in law. In *Hamir Singh* (supra) the learned Single Bench of this Court by placing reliance on the decision of Supreme Court *Patel Raghav Natha* (supra) and Full Bench decision of this Court *Ushadevi and others* (supra) held that the suo motu powers cannot be exercised after six years. In *Pratap Singh* (supra) the Single Bench of this Court held that suo motu power after seven years without any explanation for delay cannot be exercised and the Division Bench decision of *Rammulal and others* (supra) and that of Supreme Court *Patel Raghav Natha* (supra) were relied upon. In the decision of *Sitaram* (supra) the learned Single Bench held that the Patta which was granted cannot be cancelled after ten years when the house has been built on the land granted on Patta and the same principle has been reiterated by another Single Bench of this Court in *Ravi Narayan v. State of M.P.*, 2000 RN 161.

29. The purpose of quoting catena of decisions hereinabove is that the suo motu powers cannot be exercised by the revisional authority after the expiry of several years. It has been held in almost every decision that such powers should be exercised within the reasonable period and in the most of decisions it has been held that it should be exercised within few months. We are also of the view that the suo motu powers cannot be left at the whims and sweet will of the revisional authority to exercise whenever and wherever it wanted to exercise it. If this type of unfettered right to exercise such power is conferred to the authority under Section 50 of the Code, according to us, it would amount

to giving a naked sword without any scabbard to such authority which will not be beneficial to the welfare of the society at large. Indeed, at least it should be within a reasonable period from the date of knowledge of the revisional authority exercising such powers under Section 50 of the Code in respect of the illegality or impropriety of any order which has been passed by the Revenue Officer subordinate to it or irregularity of proceeding of any such officer.

30. Section 50 of the Code speaks for itself and, according to us, in the revisional authority exercise of suo motu power is inherent. Such revisional authority is not required to be guided by any other superior officer or authority above him. This provision is totally an independent provision enabling the revisional authority to exercise suo motu powers in reasonable cases and within reasonable time. Before us, various clauses of M.P. Law and Legislative Affairs Department Manual have been shown and our attention has been invited to Chapter IV clauses 83 and 84. Clause 83 speaks about the matters on which Principal Legal Remembrancer's advice may be sought and according to this clause the advice of Principal Legal Remembrancer may be sought on the following subjects:-

"(a) Interpretation of statutes, statutory rules, byelaws, deeds.

(b) cases in which disputes have arisen or likely to arise between Government and other persons or action in the Court of law is threatened against Government,

(c) Defamatory attacks on a Government servant."

But, clause 84 speaks about the matters in which the Principal Legal Remembrancer's advice is not at all required and they are :-

"(a) points arising for decision in judicial or quasi-judicial proceedings before any court or tribunal or any officer empowered to exercise jurisdiction in such proceeding under a statute.

(b) points arising before a revenue officer in the course of a revenue proceeding in which his order is subject to a revenue appeal.

(c) points arising before a Government Officer acting as an arbitrator or umpire in any disputes.

(d) hypothetical cases.

- (e) cases where the advice is for the benefit of a private individual or a local body.
- (f) ordinary departmental procedure of which the department itself has special knowledge."

(Emphasis supplied)

Looking to the powers given in clause (a) and (b), no legal advice of Principal Legal Remembrancer's is required and, therefore, if the revisional authority inclined to invoke suo motu revisional powers, he is not required to take any legal advice from the Principal Legal Remembrancer and he can act by exercising his powers conferred to it by the statute itself viz. Section 50 of the Code.

31. If we visualize the entire Code, we find that different periods of limitation have been provided under the Code for different subjects according to the scheme of the subject enacted in a particular chapter which we are categorizing at a glance as under :-

Chapter I, II and III

- (i). Chapter I pertains to preliminaries and includes Sections 1 and 2 only. Chapter II pertains to Board of Revenue and this chapter contains Sections 3 to 10. Chapter III relates to Revenue Officers, their Classes and Powers and contains Sections 11 to 26. In these chapters no particular period of limitation is prescribed to do a particular thing.

Chapter IV

- (ii). This chapter pertains to "Procedure of Revenue Officers and Revenue Courts".

Under this chapter Section 35 speaks for hearing in absence of party and sub-section (3) prescribes thirty days limitation from the date of order or knowledge to set aside the ex parte order passed by Revenue Officer or dismissing the case in default. The order which shall be passed under sub-section (3) to Section 35 is subjected to appeal and in that regard sub-section (4) is very much clear. Under this chapter the maximum period of limitation is thirty days.

Chapter V

- (iii). This chapter is in respect of Appeal, Revision And Review. Indeed, the provision of revision including the exercise of suo motu power by the revisional authority is included in this chapter only.

Section 44, under this chapter, pertains to appeal and appellate authorities; Section 47 prescribes the limitation of appeal and under this Section different periods of limitation have been prescribed to file appeal before different authorities subject to maximum period of ninety days. Under Section 50 (1) (ii) of the Code sixty days limitation has been prescribed for filing a revision to the Commissioner or the Settlement Commissioner or the Collector or the Settlement Officer and for the Board of Revenue it is ninety days from the date of the order. Under this chapter the maximum period of limitation is ninety days.

Chapter VI

- (iv). This chapter throws light in respect of Land and Land Revenue.

Under this chapter Section 57 is having its own importance because sub-section (3) to Section 57 gives right to a person aggrieved by any order passed under sub-section (2) to institute a Civil Suit to contest the validity of the order within a period of one year from the date of such order. Under this chapter the maximum period is one year for filing the suit by any aggrieved party against which an order is passed under Section 57(2).

Chapter VII

- (v). This chapter throws light on Revenue Survey and Settlement in Non-Urban Areas.

Under this chapter Section 83 pertains to introduction of settlement; Section 84 speaks about

the remission of enhancement to Bhumiswami who relinquishes and Section 85 has been enacted to settle the term of settlement. According to Section 85, the term of settlement shall be fixed by the State Government and shall not be less than 30 years. Under this chapter the maximum period of limitation is 30 years.

Chapter VIII

- (vi). This chapter is in respect of Assessment And Re-assessment of Land In Urban Areas.

According to Section 100, the Collector is empowered to assess plot at rate prescribed and Section 101 pertains to term of settlement and according to this provision, the assessment fixed under Section 100 shall remain in force for a period of 30 years or for such longer period as may elapse before re-assessment after that period and such period shall be deemed to be the term of settlement for all purposes. Under this chapter the maximum period of limitation is 30 years and even more.

Chapter IX

- (vii). This chapter speaks for Land Records.

Under this chapter Section 116 has been enacted which is in respect of disputes regarding entry in Khasra or in any other land records. According to this Section, if any person is aggrieved by an entry made in the land records prepared under Section 114 in respect of matters other than those referred to in section 108, he shall apply to the Tahsildar for its correction within one year of the date of such entry. Under this chapter the maximum period of limitation is one year.

Chapter X

- (viii). This chapter pertains to Boundaries and Boundary Marks, Survey Marks.

Section 125 has been enacted to resolve the disputes regarding boundaries of villages, survey numbers and plot numbers. Section 126 speaks for ejectment of persons wrongfully in possession and under this Section the Tahsildar may after holding summary enquiry may eject any such person who is wrongfully in possession of any land which has been found not to appertain to his holding or to the holding of any person through or under whom he claims. Sub-section (2) gives right to such person who has been ejected to file a Civil Suit within one year from the date of ejectment. Under this chapter the maximum period of limitation is one year.

Chapter XI

- (ix). This chapter has been enacted for Realisation of Land Revenue.
- (a). Under this chapter Section 143 has been enacted which speaks that there shall be a penalty for default of payment of land revenue and under this Section the penalty clause may be invoked if the land revenue is not paid within one month after the prescribed date and the penalty would not be exceeding ten per cent of the amount not so paid.
- (b). Under the same chapter Section 154-A has been substituted by M.P. Amendment Act 1 of 1971 and this provision is in respect of powers of Tahsildar to let out the holding in respect of which arrear is due or any other holding of the defaulter. Under this provision the Tahsildar may let out the holding on which arrear is due or any other holding belonging to the defaulter which is used for the purpose of agriculture to any person other than the defaulter for a period not exceeding 10 years commencing from the first day of agricultural year on such terms and conditions as the Collector may fix.

Under this Chapter the maximum period is ten years.

Chapter XII

- (x). This chapter is in respect of Tenure Holders.

- (a). Under this chapter Section 165 is in respect to rights of transfer having overriding effect. Under sub-section (6) to Section 165 there is restriction on transfer of the Bhumiswami right belonging to a tribe to other community without previous sanction of the Collector. Sub-section (6-b) is having non-abstante clause and overriding effect on the Limitation Act, 1963 and under this provision the Collector may on its own motion at any time or on an application made in this behalf within three years of such transaction in such form as may be prescribed, make an enquiry after giving reasonable opportunity of being heard all the persons affected by the transfer and may pass an order ratifying the transfer or refusing to ratify the transfer. Hence, under this clause although the period of limitation 3 years has been prescribed but the Collector may suo motu exercise powers under sub-section (6-b) on his own motion at any time. Sub-section (6-ee) has been inserted in its application to Scheduled Areas by Notification dated the 4th June, 1984 and according to this provision, the agricultural land transferred by the Bhumiswami other than a Bhumiswami belonging to an aboriginal tribe declared under sub-section (6) to a person not belonging to an aboriginal tribe shall not be diverted for any other purpose before the expiry of period of 10 years from the date of transfer.
- (b). Under the same chapter Section 168 provides for leases and a restriction has been made to Bhumiswami not to lease his holding for more than one year during any consecutive period of the three years. However, this provision is not made applicable to certain class of Bhumiswami referred in the proviso and the Bhumiswami belonging to any of the categories envisaged under sub-section (2) to this Section.
- (c). Section 169 of this chapter pertains to unauthorized lease etc. and according to this provision, two years' period has been prescribed to eject an unauthorized lessee, failing which occupancy rights would be conferred on him.

- (d). Section 170 of this chapter is in respect of avoidance of transfer in contravention of Section 165 and sub-section (2) speaks for setting aside the sale of any land which is in contravention of sub-section (3) to Section 165 subject to the rights conferred to the Bhumiswami or his heirs and the prescribed period of limitation is two years.
- (e). In the same chapter Section 170-A is in respect of certain transfer which is to be set aside. This provision is having overriding effect over the Limitation Act and by conferring power to Sub Divisional Officer to enquire whether transfer of agricultural land belonging to a tribe under sub-section (6) of Section 165 on or before 31st December, 1978 to a person not belonging to such tribe or transfer effected by way of right of occupancy tenant under Section 169 or of Bhumiswami under sub-section (2-A) of Section 190 at any time during the period commencing on the 2nd October, 1959 and ending on the date of commencement of Third Amendment made applicable to the Code to satisfy himself as to the bonafide nature of such transfer. Another provision 170-B has been enacted in respect of reversion of land of members of aboriginal tribe which was transferred by fraud and according to this provision, every person who on the date of commencement of the Madhya Pradesh Land Revenue Code (Amendment) Act, 1980 is in possession of the agricultural land which belonged to a member of a tribe which has been declared to be an aboriginal tribe under sub-section (6) of Section 165 between the period commencing on the 2nd October, 1959 and ending on the date of the commencement of Amendment Act, 1980 shall within two years of such commencement, notify to the Sub-Divisional Officer that all the information as to how he has come in possession of such land. In case such person who is in possession of the land fails to submit necessary information to the Sub-Divisional Officer within two years, it shall be deemed to be in unauthorized possession and has acquired the land without any lawful authority and the said land shall be reverted to the person to whom it originally belonged.

Whatever the order would be passed by the Sub-Divisional Officer shall be subjected to appeal, but Second Appeal is barred as per Section 170-D of the Code.

- (f). In the same chapter Section 176 has been enacted in respect of abandonment of holding and according to this provision, if a Bhumiswami fails to cultivate his holding for two years or does not pay land revenue, the Tahsildar after enquiry may pass necessary orders and may take possession of the land and arrange its cultivation by letting it out on behalf of Bhumiswami for a period of one agricultural year.
- (g). In this chapter Section 178 has been enacted which speaks for partition of holding and according to this provision, if a holding is of more than one Bhumiswami, any Bhumiswami may apply to Tahsildar for partition of his share in the holding subject to restriction that if any question of title is raised, the Tahsildar shall stay the proceeding before him for a period of three months and would direct the parties to file Civil Suit for declaration of the question of title and in case any Civil Suit is filed, the Tahsildar shall vacate the stay and proceed to partition the holding.

Under this chapter the maximum period of limitation is 10 years.

Chapter XIII

- (xi). This chapter is in respect of Government Lessees and Service Land.

Under this chapter Section 182 has been enacted which governs the rights and liabilities of a Government lessee and according to this provision, a Government lessee may be ejected from his land if he fails to pay the rent for the period of 3 months from the date when it became due. Hence, a maximum period of limitation 3 months has been prescribed.

Chapter XIV

- (xii). This chapter speaks about the occupancy tenants.

Under this chapter one year's period has been given to a person who is holding a land as occupancy tenant to make an application for the resumption of Bhumiswami right. Section 202 is in respect of reinstatement of wrongfully ejected occupancy tenant and as per this provision, any person who immediately before the coming into force of the Code was holding the land under any of the capacities mentioned in Section 185 has been ejected or dispossessed from the land during the three years immediately preceding the coming into force of the Code, may within two years from the date of coming into force of the Code apply to Tahsildar for his reinstatement on such land. In this chapter the maximum period of limitation is 3 years.

Chapter XV

(xiii). This chapter speaks about alluvion and diluvion.

Under this chapter there are only two Sections, but no limitation has been prescribed in these two Sections to do a particular thing.

Chapter XVI

(xiv). This chapter is in respect of Consolidation of Holdings.

Under this chapter no particular limitation has been prescribed to do a particular thing, but Section 210 speaks that the scheme of consolidation if it is to be confirmed by the Collector is subjected to revision under Section 50 of the Code by the Settlement Commissioner.

Chapter XVII

(xv). This chapter is in respect of Village Officers.

This chapter has been divided into three sub-chapters. 'A' is in respect of Patels while 'B' pertains to Kotwar and 'C' for the establishment of a Gram Sabha. Under this chapter the procedure of their

appointment and removal from the post has been enumerated, but no period of limitation has been prescribed for the same.

Chapter XVIII

- (xvi). This chapter has been enacted to demonstrate the rights in abadi and unoccupied land and its produce.
- (a). Under this chapter Section 242 has been enacted which speaks about the wajib-ul-arz and under sub-section (3) any person aggrieved by any entry made in wajib-ul-arz within one year from the date of the publication of such record can institute a Civil Suit to have such entry cancelled or modified.
- (b). Another Section under this chapter is Section 246 which pertains to right of persons holding house sites in abadi and according to clause (i) the allottee is required to build a house within five years from the date of allotment under Gramin Avas Yojna to a landless person and clause (ii) imposes restriction to transfer for ten years.
- (c). In the same chapter Section 250 has been enacted which is in respect of re-instatement of Bhoomiswami improperly dispossessed and according to this Section, if a Bhoomiswami of special category under sub-section (c) of Section 165 has been illegally dispossessed, he may file proceeding before Tahsildar within five years from the date of dispossession and in case of other class of Bhoomiswami two years' period of limitation from the date of dispossession has been prescribed.
- (d). In the same chapter another important provision is Section 257 which speaks about exclusive jurisdiction of revenue authorities and under this Section from clause (a) to (z-2) different type of matters have been enacted over which there shall be exclusive jurisdiction of the Revenue Court.

Under this chapter the maximum period of limitation is 10 years.

32. The purpose of quoting the various aforesaid provisions of the entire Code is that different type of periods of limitation have been prescribed for

different chapters so that the aim and object of a particular chapter for which it has been enacted may be achieved and, therefore, looking to the entire scheme of the Code different type of periods of limitation have been rightly enacted for a particular purpose in different chapters.

33. Coming to the point in question "what should be the reasonable period". We have at a glance demonstrated different type of periods of limitation in order to achieve the aim and object of a particular chapter and the provisions enacted in that chapter. Hence, according to us, in respect to Section 50 of the Code which comes under chapter V of the Code what should be the reasonable period for exercising suo motu powers, one should be guided with the aims and object of this chapter only and should not borrow the different type of periods of limitation which have been prescribed in other chapters to achieve the aim and object of the provisions prevailing in those chapters. Hence, the prescribed periods of limitation of 30 years, 10 years, 5 years, 3 years, 2 years or even 1 year prescribed in different chapters and the provisions enacted in that chapter cannot be made applicable for the purpose of achieving the aim and object of this chapter V in which Section 50 has been enacted which speaks about the exercise of suo motu powers of revision also. The chapter V of the Code contains Section 44 to 56 and the maximum period of limitation in this chapter is 90 days. Hence, according to us, the maximum period which has been envisaged in any of the provision of any other chapter of the Code cannot be made applicable for the purpose of this chapter because that particular period of limitation has been enacted by the Legislature to achieve the aim and object of that particular chapter and its provisions only. The maximum period of limitation of 90 days has been enacted for filing the revision, but since this restriction is not for exercising suo motu powers and to serve the purpose, the aim and object for which this provision has been enacted, according to us, within a period of 180 days the revisional authority should exercise suo motu powers from the date of the coming into the knowledge to it that any particular illegality, impropriety or irregularity of the proceeding has been exercised by any officer subordinate to it.

34. Apart from what we have held hereinabove, we have been reminded by the maxim *vigilantibus non dormientibus iura subveniunt* which means that laws come to the assistance of those who are vigilant and not those who sleep upon their rights. Why we cannot extend this maxim to the revisional authority who has to exercise his suo motu power despite having come to know that illegality and impropriety have been committed by any authority subordinate

to it or the subordinate authority has committed irregularity in the proceedings and is permitting to continue it for indefinite period, and therefore, it cannot be said that, one fine morning when the authority thinks it proper, he may exercise the said power.

35. It is the trite law that if no period of limitation has been prescribed, the statutory authority must exercise its jurisdiction within a reasonable period. What should be the reasonable period should be judged from this angle also that what is the nature of the statute itself, rights and liabilities thereunder and other relevant factors. The Supreme Court in *Bhatinda District Cooperative Milk Producers Union Ltd.* (supra) in para 19 has held that the reasonable period of limitation may be borne out from the statutory scheme of the Act. The Supreme Court while considering the various provisions of Punjab General Sales Tax Act, 1948 in para 19 has held that looking to the scheme of the said Act the maximum period of limitation provided in sub-section (6) of Section 11 of the Act is five years and, therefore, in those circumstances the Supreme Court has held that as per the scheme of the Act, the reasonable period should be three years. Since in the present case, as we have noticed hereinabove, different type of periods of limitation which are prescribed for exercising particular right and liability under different chapters, looking to the aim, object and the purpose of enacting the provisions of suo motu powers 180 days of the period of limitation would be the reasonable period and, according to us, for this another reason also the same period should be the reasonable period to exercise suo motu powers by the revisional authority from the date of coming into the knowledge of illegality, impropriety and irregularity of the proceeding having been done by the authority subordinate to it.

36. Ex consequenti we hereby hold that in order to exercise suo motu power of revision envisaged under Section 50 of the Code and looking to the scheme of Chapter V, it should be exercised by the revisional authority within 180 days from the date of the knowledge of the illegality or impropriety of any order passed or as to the irregularity of the proceedings of any revenue officer subordinate to it and it will not be justifiable to stretch it for any length of period even for protection of the Government land or public interest.

37. We shall now come to the second part of the question which has been referred to us that what is the "irreparable loss". Needless to say, dispossession itself amounts to irreparable loss although the possession should have basis of some right accrued in a person by some statute or the law or may be on

account of some order passed by an officer or authority under the statute. The term "irreparable loss" cannot be defined since it varies case to case. It may consist of so many factors which are required to be kept in mind. No exhaustive list can be given that what should be the irreparable loss, but some illustrations of irreparable loss we may quote hereinafter :-

- "(i) the possession of the immovable property in question for a considerable long period under some right or by virtue of some order passed by an authority or officer under a statute;
- (ii) the person having possession of only that particular land in question which has been given to him by an order of the authority under a statute;
- (iii) if the duties have not been performed by the authorities within reasonable time resulting into causing of the injuries to the effected party if he is dispossessed;
- (iv) accrual of right of the third party in the immovable property due to passage of considerable long time;
- (v) change of hands by subsequent bonafide transfers;
- (vi) an order under which a person is possessing the immovable property, has attained finality under a particular statute;
- (vii) putting hard labour by the person to whom possession of the immovable property has been given by his sweat to develop the land, boundaries, digging the well etc. in the field; and
- (viii) the immovable property has passed to the heirs of original person to whom land was given in possession by inheritance or survivalship."

38. Ab judicatio for the reasons stated hereinabove we hereby answer the question referred to us as under :-

"The suo motu powers can be exercised by the revisional authority envisaged under Section 50 of the Code within a period of 180 days from the date of the knowledge of illegality, impropriety and irregularity of the proceedings committed by any revenue officer subordinate to it even if the immovable

property is Government land or having some public interest. What should be the irreparable loss, it should be considered on the facts and circumstances of each case as no definite yardstick in that regard can be drawn.

We have already mentioned hereinabove certain instances which can be said to be the "irreparable loss."

39. Let the matter now be placed before the learned Single Bench.

Order accordingly.

ABHAY M. NAIK, J. -I have had the privilege to go through the order passed by the brother Shrivastava, J., which, indeed is a well considered and well reasoned order prescribing thereby the period of 180 days for exercise of suo-motu powers of revision after detection of illegality/impropriety in the order or irregularity in the proceedings committed by the officer sub-ordinate to it. In my opinion, this would be applicable when the person against whom exercise of suo-motu power is being made, establishes an irreparable loss. Brother Shrivastava, J. has rightly observed that the term "irreparable loss" can not be defined since, it varies from case to case and what would be the irreparable loss is to be considered on the facts & circumstances of each case. To this extent, I express my complete concurrence.

2. This Full Bench, in my opinion, is not required to dwell upon the question of irreparable loss or no irreparable loss in view of the language of the point of reference, which reads as under:-

"Whether in the case wherein an individual is not put to suffer any irreparable loss, exercise of suo motu powers after any length of period is justifiable in law, more so, for protection of Govt. land or public interest. ? "

It appears from the point of reference that the Full Bench is expected to answer the reasonable period for exercise of suo-motu powers of revision when an individual against whom such exercise is being made is not put to suffer an irreparable loss and secondly, when protection of government land or public interest is liable to be achieved by such exercise.

3. Though, brother Shrivastava, J. has mentioned certain illustrations of irreparable loss, I with great respect find myself unable to concur with him in totality. According to me, few of them may not necessarily depict the full proof cases of irreparable loss. Whether the person against whom suo-motu

powers is being exercised would be put to irreparable loss, would be a question depending upon facts required to be established by him. For an example, non-allotable land is granted by revenue officer without authority of law and is found so even after considerable period by revisional authority, there may not be a bar for exercise of suo-motu powers unless irreparable loss is established. Likewise, if an allottee under an order without jurisdiction or under void and non-est order retains possession and harvests the crops by making development of the land, constructing the boundaries, digging the well etc. in the field, he must have flourished by harvesting more crops. Such type of expenditure may be considered as investment for more profits. He by making such investment must have been more benefited, in the meantime, before detection of illegality, impropriety or irregularity in the order/proceedings sought to be revised under suo-motu exercise of powers. It is a different thing, when it is proved that for such development, construction of boundaries or well he has raised money by alienating his another property. In such cases, he may be said to have suffered irreparable loss. Otherwise, in normal cases, when no such factor is proved he may be treated as having flourished by undertaking various activities like development of land/boundaries and by making provision for water in order to flourish himself for taking more yields. Likewise, duties of the officers are expected to be discharged in the light of the order itself. If the order under suo-motu revision is illegal, improper or irregular, authorities cannot be blamed for not performing their duties within the reasonable time unless illegality, impropriety or irregularity is detected. Of course, the illustrations of the cases quoted at Sl.Nos.2, 4, 5 & 6 may be treated in particular set of facts and circumstances as the cases of irreparable loss, but I feel, that the question of irreparable loss shall be left open for being decided by the court which is required to deal with the evidence on record. Brother Shrivastava, J, has rightly observed in his conclusion that what would be irreparable loss, is to be considered on the basis of facts & circumstances of each case. This being so, in my considered opinion, all the illustrative cases by themselves may not be treated as cases of irreparable loss, more so, because in view of the language of point of reference, we are not required to dwell upon it.

4. Brother Shrivastava, J, has taken much pains by considering various judgments/citations in appreciable manner. Since, brother Shrivastava, J. has considered and discussed the point of irreparable loss, I express my concurrence at his conclusion in the manner that the question of irreparable loss should be considered in the facts and circumstances of each case, as

rightly observed by him and in such cases the exercise of suo-motu powers of revision under Section 50 of M.P. Land Revenue Code, 1959 may be made within 180 days from the date of detection of illegality, impropriety or irregularity of the proceedings of any revenue officer subordinate to the revisional authority which would be a reasonable period for such cases. I may add here that the period of 180 days would provide an upper-ceiling of limitation because if third party interest is created in the meantime on the basis of the order sought to be revised, the person against whom such power is being exercised would be within his rights to show that such power ought to have been exercised in lesser period as it would cause an irreparable loss.

5. I want to add little about the reasonable period for exercise of suo-motu powers when no irreparable loss is going to be caused and such exercise is required for protection of Govt. land and/or public interest. In my considered opinion when a person against whom exercise of suo-motu power is being made, is not put to suffer an irreparable loss due to such exercise, and there is involvement of government land or public interest such cases stand on a different footing. He cannot be equated with a person who would suffer an irreparable loss due to such exercise of powers. A person who by virtue of an illegal/improper/irregular order within the meaning of Section 50 of the code achieves flourishing by harvesting crops or by taking the benefits from such land and would not be put to suffer irreparable loss due to exercise of suo-motu power is not to be treated at par with the person suffering irreparable loss due to such exercise. We are liable to take into consideration instances, when at times orders are passed by the revenue officers ignoring their duties to protect government land or public interest. Non-seriousness or irresponsible approach of the revenue officers is not totally unknown.

6. Deliberate action of revenue officers despite involvement of government land or public interest is not unknown. Revisional authority, even after detecting illegality, impropriety or irregularity in the proceedings of an officer subordinate to it, may require more information before taking a concrete decision to exercise suo-motu powers. He may be required to collect more information by requisitioning various records which may take its own time, according to the functioning of the government. Hon'ble supreme Court of India has commented on the functioning of the Government/its officers in the case of *State of Haryana Vs. Chandra Mani and others*, AIR 1996 SC 1623, in the following words: -

".....it is common knowledge that on account of

impersonal machinery and the inherited bureaucratic methodology imbued with the note-making, file-pushing, and passing-on-the-buck ethos, delay on the part of the state is less difficult to understand though more difficult to approve, but the state represents collective cause of the community. It is axiomatic that decisions are taken by officer/agencies proverbially at slow pace and encumbered process of pushing the files from table to table and keeping it on table for considerable time causing delay – intentional or otherwise - is a routine....."

7. When public interest is involved, a different approach is required to be applied as observed by the Apex Court in the case of *G. Ramegowda, Major etc., Vs. The Special Land Acquisition Officer, Bangalore* and *Basavalingappa Vs. The Special Land Acquisition Officer, Bangalore*, AIR 1988 SC 897, in the following words:-

".....Government, like any other litigant must take responsibility for the acts or omissions of its officers. But a somewhat different complexion is imparted to the matter where Government makes out a case where public interest was shown to have suffered owing to acts of fraud or bad faith on the part of its officers or agents and where the officers were clearly at cross-purposes with it."

In the case of *State of Nagaland Vs. Lipok Ao and others*, (2005) 3 SCC 752, again while commenting on the functioning of the government, following observations have been made:-

".....The factors which are peculiar to and characteristic of the functioning of the governmental conditions would be cognizant to and requires adoption of pragmatic approach in justice-oriented process."

8. From the aforesaid, it is clear that when public interest is involved, a cognizant and pragmatic justice oriented approach is required to be adopted. Cases wherein, a person against whom exercise of suo-motu powers of revision is to be made would not be put to an irreparable loss and such exercise is necessary in order to protect the government land or public interest would form a different class than the cases wherein such persons would be put to an irreparable loss and therefore in my considered opinion, needs a higher period

of limitation as a reasonable period for exercise of suo-motu powers. In the nature of latter cases, period of 180 days as found proper by brother Shrivastava, J., is quite reasonable, however, in the nature of former cases, the same may be prescribed by keeping in mind the necessity to adopt a cognizant and pragmatic justice oriented approach as guided by the Apex Court in the case of *State of Nagaland* (supra).

9. It is true that reasonableness of the period is to be decided by considering the scheme and object of the various provisions of the act as observed by the Hon'ble Supreme Court of India in the case of *State of Punjab and others Vs. Bhatinda District Cooperative Milk Producers Union Ltd.* (2007) 11 SCC 363. It may be seen that various periods of limitations have been prescribed for different chapters contained in the M.P.L.R. Code. They vary from 30 days to 30 years as revealed in the discussion made by brother Shrivastava, J. It is true that Section 50 of the code which contains a provision for revision prescribes a period of 90 days, however, it cannot be lost sight off that the necessity to exercise the suo-motu powers of revision may arise in the cases arising from different chapters and various sections of the code. Considering it, a period of 1 year from the date of detection of illegality, impropriety or irregularity of the proceedings of the officer subordinate to the revisional authority would be reasonable when protection to government land or public interest is involved and persons against whom such power is being exercised would not be put to irreparable loss on account of such exercise.

10. In none of the cases cited at bar, question of reasonableness of the period for exercise of suo-motu power of revision with reference to cases involving Govt. land/public interest with no irreparable loss to a person against whom such exercise is being made, was considered, in specific. Length of reasonable period for exercise of suo-motu power of revision in the cases involving an irreparable loss and the cases involving not irreparable loss may be different in my opinion because they would form different classes of cases.

11. We are aware that a power to exercise suo-motu power is conferred by virtue of Section 50 of the M.P. L.R. Code yet with no limitation of time. Legislature has deliberately used the words "at any time" in the said provision. Powers to exercise suo-motu power of revision are conferred on the revisional authority in order to remove illegality, impropriety and irregularity of the order/proceedings of any revenue officer subordinate to it. Legislature was well aware that such illegality, impropriety and irregularity may not be known to

the revisional authority for any length of time and the authority may not be aware of it for a considerable length of time. Considering these, the words "at any time" seem to have been deliberately inserted in Section 50 of the M.P.L.R. Code so that the revisional authority may be able to take action by exercising suo-motu revisional powers whenever it comes to it's knowledge. The Supreme Court of India has repeatedly observed that even if no period of limitation is prescribed, statutory authority must exercise its jurisdiction within a reasonable period.

12. I may successfully refer to para 18 of the decision in the case of *State of Punjab and others Vs. Bhatinda District Cooperative Milk Producers Union Ltd.* (2007) 11 SCC 363.:

18. It is trite that if no period of limitation has been prescribed, statutory authority must exercise its jurisdiction within a reasonable period. What, however, shall be the reasonable period would depend upon the nature of the statute, rights and liabilities thereunder and other relevant factors."

I may also reproduce paragraph 11 of the decision in the case of *Santosh Kumar Shivgonda Patil and others Vs. Balasaheb Tukaram Shevle and others*, (2009) 9 SCC 352:

"11 It seems to be fairly settled that if a statute does not prescribe the time-limit for exercise of revisional power, it does not mean that such power can be exercised at any time; rather it should be exercised within a reasonable time. It is so because the law does not expect a settled thing to be unsettled after a long lapse of time. Where the legislature does not provide for any length of time within which the power of revision is to be exercised by the authority, suo motu or otherwise, it is plain that exercise of such power within reasonable time is inherent therein."

Thus, Section 50 (Supra) read in the context of the aforesaid law of land would mean that the exercise suo-motu power of revision may be made at any time from the date of impugned order/proceedings but within a reasonable time from the detection of illegality, impropriety or irregularity. What, however, shall be the reasonable period would depend upon the nature of the statute, rights and liabilities therein and other relevant factors as observed in the case of *State of Punjab and others* (supra).

13. In view of the aforesaid discussion, I concur with brother Shrivastava,

J, that what should be an irreparable loss is to be considered in the facts and circumstances of each case because as no definite yardstick in that regard can be applied. I further concur with him in the manner that in such cases a period of 180 days from the date of detection of illegality, impropriety and/or irregularity of the order/proceedings committed by revenue authority subordinate to revisional authority would be a reasonable period for exercise of suo motu powers despite involvement of Government land or public interest. I may further hasten to add that this would be upper-ceiling of limitation for exercise of such powers and the person suffering an irreparable loss would be within his rights to show that such power ought to have been exercised in lesser period in view of the attending facts and circumstances of the case, causing irreparable loss prior to such exercise.

However, when a person against whom suo motu exercise of power is being made is not put to an irreparable loss, period of one year from the date of detection of illegality, impropriety or irregularity in the order/proceedings would be a reasonable period for exercise of suo motu powers of revision under Section 50 of the M.P. Land Revenue Code for protection of the government land or public interest.

Order accordingly.

I.L.R. [2011] M. P., 36

FULL BENCH

*Before Mr. Justice S.K. Gangele, Mr. Justice Abhay M. Naik &
Mr. Justice Anil Sharma*

W.A. No.453/2009 (Gwalior) decided on 30 September, 2010

SURESH SINGH SIKARWAR

... Appellant

Vs.

STATE OF M.P. & ors.

... Respondents

High Court of Madhya Pradesh Rules, 2008, Chapter 4 Rule 10 - Formulation of point - Judges comprising of Division Bench differing on the point of admission - Matter was placed before Hon'ble the Chief Justice without formulating the point - Held - The Chief Justice acquires jurisdiction to nominate one or more of other Judge(s) only after such formulation of point(s) of difference - Unless such formulation is made, the Chief Justice may not even acquire the power under sub-rule (2) to nominate one or more of other Judge(s) to deliver the opinion - Matter to be placed before Hon'ble the Chief Justice for appropriate orders.

(Para 5)

मध्य प्रदेश उच्च न्यायालय नियम, 2008, अध्याय 4 नियम 10 – बिन्दु विनिर्मिति – खण्ड न्यायापीठ में समाविष्ट न्यायाधीशों में ग्रहण किये जाने के बिन्दु पर मतभेद – मामला बिन्दु विनिर्मित किये बिना माननीय मुख्य न्यायाधिपति के समक्ष रखा गया – अभिनिर्धारित – मुख्य न्यायाधिपति को मतभेद के बिन्दु (बिन्दुओं) की ऐसी विनिर्मिति के बाद ही एक या अधिक अन्य न्यायाधीश (न्यायाधीशों) को नामनिर्दिष्ट करने की अधिकारिता प्राप्त होती है – जब तक ऐसे मतभेद के बिन्दु विनिर्मित नहीं किये जाते तब तक मुख्य न्यायाधिपति को उप-नियम (2) के अन्तर्गत एक या अधिक अन्य न्यायाधीश (न्यायाधीशों) को राय देने के लिए नामनिर्दिष्ट करने की शक्ति भी प्राप्त नहीं हो सकती है – मामले को उचित आदेशार्थ माननीय मुख्य न्यायाधिपति के समक्ष रखा जाए।

Cases referred :

(2009) 8 SCC 1, 2007(2) JLJ 4, 1979 MPLJ 644, 1977 MPLJ 641.

K.N. Gupta with D.P. Singh, for the appellant.

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

J U D G M E N T

The Judgment of the Court was delivered by **ABHAY M. NAIK, J.** :—This matter has come up for consideration before the Full Bench in the following scenario: -

(A)Petitioner/appellant submitted Writ Petition No. 4635/09 (S) against respondents with allegations that the petitioner after having been promoted as Inspector on 10/7/2003 was subjected to frequent transfers within a period from the yr. 2005 to the yr. 2007, inasmuch, as he was , transferred eight times. On 27/5/07, he was transferred from district Guna to district Gwalior which was cancelled within a short span of two months, vide order dated 31/7/07. Thereafter, vide order dated 16/1/08, petitioner was transferred from district Guna to district Gwalior. Pursuant thereto, the petitioner had given joining on 26/4/08 where he was posted in Police Line. Vide order dated 24/8/08, the petitioner was ordered to be posted as Station House Officer at Police Station Kampoo. By the same order, one Mr. B.R. Dwivedi was ordered to be transferred from Police Station Kampoo to Police Line. Mr. B.R.Dwivedi challenged the said order in W.P.No.2923/08(S) whereupon the transfer order was quashed by this court on 17/10/08. On account of interim stay order passed by this

court in W.P.No.2923/08(S), the petitioner was ordered to be posted as SHO, Jhansi Road vide order dated 14/9/08. Within a short span, again the petitioner has been transferred from district Gwalior to district Balaghat vide order dated 8/7/09, issued by the Director General of Police, M.P., Bhopal. This order was challenged in W.P.No.4635/05(S) mainly with the allegations that the same has been issued under the teeth of arbitrariness which is also malafide and contrary to the law laid down by the Apex Court in the case of *Prakash Singh & others Vs. Union of India and others* [2009(8) SCC page 1].

(B) Respondents/State placed before the learned Single Judge, the relevant papers to demonstrate that the matter relating to transfer of the petitioner was placed before the Police Establishment Board and the Police Establishment Board in its meeting held on 30/6/09 recommended for transfer of the petitioner from Gwalior to Balaghat. The matter was subsequently placed before the State Govt. which approved the recommendation of the Police Establishment Board. Learned Single Judge found that it is reflected from the material placed before him that the Inspector General of Police Gwalior Zone vide letter dated 26/7/09 recommended for transfer of those Station House Officers who were found guilty of dereliction of duties or who were not competent to hold the post of Station House Officers and on the basis of such recommendations, the Police Establishment Board, took a decision in respect of the transfer of the petitioner. Resultantly, the learned Single Judge vide order dated 20/10/09 refused to interfere in the order of transfer.

(C) Aggrieved by the aforesaid, present writ appeal was preferred which came up for hearing before the Division Bench on 30/11/09. Brother S. Sanivatsar J. found that the impugned transfer order was fully in accordance with the judgment of the Apex Court in the case of *Prakash Singh* (supra). However, other constituent Judge of the Division Bench observed that the hearing is required in order to hold that as to whether the decision of *Prakash Singh* (supra) is applicable in the case or not and therefore admitted the writ appeal.

(D). Since, there was difference of opinion in the matter of admission of writ appeal as expressed by the Judges constituting the Division Bench, the matter was placed before Hon'ble the Chief Justice for kind perusal and orders. Accordingly, the matter came up for consideration before this Full Bench by virtue of his Lordship's order dated 20/9/10.

Shri K.N. Gupta, Sr. Advocate & Shri D.P. Singh, learned advocate made their submissions. Likewise, Shri M.P.S. Raghuvanshi, learned Additional Advocate General addressed this court in the matter of reference.

2. Rule 5 of Chapter IV of High Court of Madhya Pradesh Rules, 2008 specifies the matters, which are heard and decided by the Full Bench. They are:

- "(1) reference under Section 57 and 60 of the Indian Stamp Act, 1899;
- (2) matters which are required by any enactment to be heard and decided by a full bench;
- (3) any other matter as may be referred to a full bench."

3. Rule 8 & 10 of Chapter IV of the High Court of Madhya Pradesh Rules, 2008 may be relevant in this case which are reproduced below: -

"8.(1) A single bench or a division bench may refer any proceeding, pending before it, to the Chief Justice with a recommendation that it be placed before a larger bench where it involves a substantial question of law of general importance.

(2) In such proceeding, the referring Judge (s) may formulate question (s) and may either refer such question (s) for opinion or may request that entire proceeding be heard and decided by the larger bench.

(3) Where a Judge sitting alone while hearing a case is of the opinion that for the decision of that case, an earlier decision of coordinate or larger bench of this Court needs reconsideration, he may formulate question (s) and refer the same to the Chief Justice with a recommendation that it be placed before a larger bench.

10. Where, in a civil matter heard by a division bench, the Judges comprising the bench differ on any point (s) and -
 - (1) formulate such point (s); the proceeding shall be placed before the Chief Justice who shall nominate one or more of other Judge (s) to deliver the opinion on such point (s);
 - (2) do not formulate point (s); the Chief Justice may request the division bench to formulate point (s). After such formulation, the Chief Justice shall nominate one or more of other Judge (s) to deliver the opinion on such point (s);
 - (3) The referee Judge (s) may after hearing deliver his (their) opinion on the point (s) referred. Such opinion shall be placed before the division bench, which shall decide the case in accordance with the opinion of the majority of Judges who have heard the matter."

Thus, sub-rules (1) & (2) of Rule 8 empower a Single bench or a Division Bench to refer any proceeding pending before it to the Chief Justice with the recommendation that it be placed before a Larger Bench, where it involves a substantial question of law of general importance. By virtue of sub-rule (2), the referee Judge (s) may formulate question (s) and may either refer such question (s) or opinion or may request that the entire proceeding be heard and decided by the Larger Bench.

4. It may be seen that in the case in hand, Division Bench did not find that the matter involves substantial question of law of general importance, nor did it refer the writ appeal to Hon'ble the Chief Justice with a recommendation for being placed before a Larger Bench. Since, the dispute pertained to the transfer of an individual and the matter was to be examined on the anvil of the law laid down by the Apex Court in *Prakash Singh's case* (supra), it cannot be taken to have involved substantial question of law of general importance. This being so, Rule 8 (supra) does not get attracted.

5. Rule 10 (supra), has a wider field to operate. It is not restricted to the matter involving a substantial question of law of general importance. Rule 10 may be invoked when there occurs a difference between the Judges comprising the Bench on any point/points. The word "point (s)" seems to have been inserted in Rule 10 deliberately in order to give wider scope to Rule 10 and to provide proper forum for resolving the difference of opinion between the Judges comprising the Bench on any point (s). The word "point (s)" is not synonymous

to substantial question of law of general importance and may be construed as signifying the difference of opinion on any point. In Rule 8, Single Bench or Division Bench while making reference to Hon'ble the Chief Justice is not required to express its opinion except that the proceedings involve a substantial question of law of general importance. Mere involvement of substantial question of law of general importance in any proceeding is sufficient to request Hon'ble the Chief Justice for placing it before a Larger Bench. In such cases, the Judges comprising Division Bench are required to agree merely on the point of involvement of substantial question of law of general importance. This may be even at the outset without expressing their personal opinion on merits on such question. However, in the civil matter governed by Rule 10, the Judges comprising the Bench shall have to express their difference on any point. Difference on any point (s) is a condition precedent for invoking Rule 10 (supra). If there exists a difference on any point (s) between the Judges comprising the Bench, they may formulate such point (s), so that, the proceedings may be placed before Hon'ble the Chief Justice, who shall nominate one or more of other Judge (s) to deliver the opinion on such point (s). If they do not formulate point (s), the Chief Justice may request the Division Bench to formulate point. **After such formulation**, the Chief Justice shall nominate one or more of other Judge (s) to deliver opinion on such point (s). (underlined by us).

Words "after such formulation" are very significant and important. They go to demonstrate that the Chief Justice acquires jurisdiction to nominate one or more of other Judge (s) only after such formulation of point (s) of difference. Unless such formulation is made, the Chief Justice may not even acquire the power under sub-rule (2) to nominate one or more of other Judge (s) to deliver the opinion.

6. Now, coming to the case in hand.

While examining the applicability of sub-rule (2) of Rule 10, we feel it apposite to reproduce the relevant note-sheet of Writ Appeal No.453/2009: -

"Note-Sheet

Writ Appeal No.453/2009

2/12/2009

This Writ Appeal No.453/2009 (*Suresh Singh Sikarwar Vs. State of M.P. And others*) has been filed against the

order passed by Hon'ble Shri Justice S.C. Sharma in W.P.No.4635/09. This case was listed before Hon'ble the Division Bench comprising of Hon'ble Shri Justice Subhash Samvatsar and Hon'ble Shri Justice A.K. Shrivastava wherein different orders have been passed.

In the aforesaid Writ Appeal Hon'ble Shri Justice Subhash Samvatsar has been pleased to observe as under: -

"Considering all these facts, the learned writ court has refused to exercise its writ jurisdiction under Article 226/227 of the Constitution of India and held that the transfer order is fully in accordance with the judgment of the Apex Court in the case of *Prakash Singh* (supra).

Hence, we do not find any error in the impugned order to call for interference.

Writ appeal, therefore, stands dismissed.'

In the aforesaid Writ Appeal, Hon'ble Shri Justice A.K. Shrivastava has been pleased to observe as under: -

"Admit.

Issue notice to the respondents on payment of process fee within 3 days. Also issue notice of I.A.No.17163/2009, which is an application for the grant of interim relief. Let the notice be made returnable within 10 days.

Since I am only admitting the petition, the contentions in detail of appellant are not being dealt with at this juncture because on merit today the appeal is not being decided by me."

"Accordingly as difference of opinion has been expressed by the D.B. Of Hon. Shri Justice Subhash Samvatsar and Hon. Shri Justice A.K. Shrivastava in W.A.No. 453/2009, matter is submitted for being placed before Hon'ble the Chief Justice for kind perusal and orders".

sd/-

(B.D.RATHI)

PRINCIPAL REGISTRAR"

7. We feel it equally appropriate to reproduce further the relevant portions of the order of Division Bench dated 30.11.2009 to examine that whether there occurred a difference between the two Judges constituting the Division Bench and that what was exact sphere of difference.

Brother Samvatsar J. has observed: -

"..... From perusal of the record, it appears that Inspector General of Police, Gwalior Zone vide letter dated 26/7/2009 had recommended for transfer of the appellant as he was found guilty of dereliction of duty.

Considering all these facts, the learned writ court has refused to exercise its writ jurisdiction under Article 226/227 of the Constitution of India and held that the transfer order is fully in accordance with the judgment of the Apex Court in the case of *Prakash Singh* (supra).

Hence, we do not find any error in the impugned order to call for interference.

Writ Appeal, therefore, stands dismissed."

Brother Shrivastava, J. has observed: -

"..... By placing reliance on the decision of *Prakash Singh and others v. Union of India and others*, (2006) 8 SCC 1, the appellant has challenged his transfer order. According to me, a hearing is required in order to hold as to whether the decision of *Prakash Singh and others* (supra) is applicable in the case or not and therefore I am of the view that this appeal deserves to be admitted.

Admit."

8. It is clear from the order dated 30.11.2009 impugned in the writ appeal that the Division Bench did not formulate point of difference. One Judge observed that the impugned order of transfer was fully in accordance with the judgment of the Apex Court in the case of *Prakash Singh* (supra) whereas other Judge observed that hearing of the writ appeal is required in order to hold as to whether the decision of *Prakash Singh* (supra) is applicable in the case or not. He has nowhere found that the decision of *Prakash Singh* (supra) is not applicable in the case. He wanted to ascertain before taking a decision on the question of applicability of decision of *Prakash Singh's case* (supra)

which according to him could not have been decided except by providing an opportunity to advance arguments during final hearing. Thus, the sphere of difference centered round the question of applicability of *Prakash Singh's case* at the stage of admission alone, because the other Judge has nowhere given a specific observation/finding about applicability/inapplicability of the decision of *Prakash Singh's case* (supra).

9. An identical situation arose for consideration before the Full Bench of this Court in the case of *Savita Devi V. Sukhvinder Kaur*, 2007 (2) J.L.J. 4. In the case of *Savita Devi* (Supra) two differing opinions were expressed by the learned brother Judges. They did not choose to formulate point of difference yet the matter was placed before the Full Bench headed by Hon'ble the then Chief Justice, Mr. A.K. Patnaik (presently Judge of the Supreme Court of India). Rule 11 of Section 1 of Chapter I of High Court Rules and Orders (M.P.) was applicable at the relevant time, which is reproduced below: -

"11. When in any appeal or civil matter heard by a Bench of two Judges, the Judges composing the Bench differ on a point of law and state the point on which they differ the proceedings shall be placed before the Chief Justice for the purpose of nominating one or more of the other Judges to deal with the matter."

In the unanimous decision of the Full Bench in the case of *Savita Devi* (supra) it has been observed: -

"4. It will be clear from the provision of rule 10 of section 1, Chapter I of the High Court Rules quoted above that if a Judge sitting alone considers that the decision of the proceedings pending before him involves reconsideration of a decision of two or more Judges, he may refer it to the Chief Justice with a recommendation that it be placed before a Full Bench for a decision on a stated question or questions. Hence, it is only in a case where reconsideration of decision of two or more Judges is thought necessary that a reference may be made to the Chief Justice with the recommendation that it be placed before the two or more Judges. But the said provision in rule 10 of section 1, Chapter I of the High Court Rules does not contemplate reference to a Full Bench where two Judges composing of Division Bench differ on a point of law but have not stated the point on which they differ.

5. Rule 11 of section 1, Chapter I of the High Court Rules quoted above provides that where a Bench of two Judges differ on a point of law and state the point on which they differ, the proceedings shall be placed before the Chief Justice for the purpose of nominating one or more of the other Judges to deal with the matter. The aforesaid provision, therefore, confers a discretion on the Chief Justice to nominate either one Judge or more Judges to deal with the matter in case of a difference on a point of law between the two Judges composing the Division Bench. The aforesaid Rules nowhere provide that in a case where the Judges composing the Division Bench do not state the point of law on which they differ, the case has to be referred to a larger bench for decision. In such cases also, the matter has to be placed before the Chief Justice for an appropriate order."

10. It was held that when the Division Bench or the Judges constituting the Bench do not state the point of law on which they differ, though there is a provision for reference of the case to a Larger Bench for decision in such cases also, the matter is required to be placed before the Chief Justice for appropriate orders. On comparison with Rule 11 with sub-rule (1) & (2) of present Rule 10 of Chapter IV, it may be seen that sub-rule (1) is more or less identical to earlier rule, whereas sub-rule (2) empowers the Chief Justice to request the Division Bench to formulate the point of difference, in case, when no such formulation was made by the Division Bench while differing on any point. Power available with Hon'ble the Chief Justice by virtue of sub-rule (2) of Rule 10 to nominate one or more of other Judge (s) to deliver the opinion on the point may be exercised only after formulation of point(s) which is clear from the language of sub-rule (2) itself. Nominee Judge(s) would be required to deliver opinion on such point would mean the point which has been formulated. This is evident from the words 'after such formulation' and 'such points' employed in this sub-rule. Point on which opinion is to be delivered by the nominee Judge(s) is qualified by the word 'such'. Similarly, the power to nominate is made exercisable in the event of formulation by inserting the words 'after such formulation' in the sub-rule. It no where provided that even in the absence of formulation, the matter may be referred not to one or more of other Judges but directly to Full Bench. Thus, in our considered opinion the ratio of decision by the Full Bench in case of *Savita Devi* (supra) squarely covers the present case.

11. We will be doing great injustice, if we do not deal with the labour put by the arguing counsel for the appellant to express that the reference to Full Bench is in accordance with the High Court of Madhya Pradesh Rules, 2008 and the same is to be answered by the Full Bench by judicial order.

12. It has been contended on behalf of the appellant that this Full Bench itself is competent enough to formulate the point of difference and to decide thereafter the reference, in view of sub-rule (3) of Rule 5 and Rule 7 of High Court of Madhya Pradesh, 2008. Rule 7 reads as under: -

"7. Notwithstanding anything contained in these rules, the Chief Justice may direct that any case or class of cases be heard by a particular number of Judges, unless otherwise provided by any statute."

On reading of Rules 5 to 10 and Rule 11, it is clear that Rule 5 makes a provision for hearing and decision by a Division Bench whereas Rules 8 to 11 make provisions for manner of reference. Sub-rule (3) of Rule 5 makes a provision for reference to a Full Bench of any other matter which is not covered by sub-rule (1) or sub-rule (2). Manner of reference has been provided in Rules 8 to 11 in different situations. Rule 8 provides for a reference to a Larger Bench where any proceeding involves a substantial question of law of general importance. However, Rule 10 specifies that when there occurs a difference on any point in civil matter between the Judges comprising the Division Bench, the Bench may formulate such point of difference and may request the Chief Justice for nomination of one or more of other Judge(s) to deliver the opinion on such point. In case of absence of formulation of such point (s), the Chief Justice may request the Division Bench to formulate the point. After such formulation, the Chief Justice may nominate one or more of other Judge (s) to deliver opinion on such point. There is no provision in the High Court Rules, whereunder in case of difference of opinion between Judges comprising the Division Bench, the Chief Justice may refer the matter directly to the Full Bench. This was so observed by the Full Bench of this Court in Savita Devi's case (supra) while dealing with earlier High Court Rules when there was no such empowering provision. Presently also, Shri K.N. Gupta, learned Senior Advocate has been unable to point out any empowering provision in the High Court of Madhya Pradesh Rules, 2008, to refer the matter to Full Bench merely on difference of opinion between the Judges comprising Division Bench, merely, on the question of admission that, too, without specifying the question of law involved or without formulating the point of difference.

13. It has been further contended that Rule 7 contains a non-obstante clause and the matter having been referred to Full Bench is to be answered in view of this rule.

We are afraid that the said Rule has different field to operate. It empowers the Chief Justice notwithstanding any thing contained in these rules 2008 to direct that any case or class of cases be heard by a particular number of Judges, unless otherwise provided by the said rules. This rule seems to have been inserted to resolve important controversy of a particular case or class of cases involving important issues. It seems to have been inserted to empower Hon'ble the Chief Justice to direct for hearing of any case or class of cases by a particular number of Judges on consideration of nature and gravity of the case and class of cases. Rule 7 of Chapter IV reads as follows:-

"Notwithstanding anything contained in these rules, the Chief Justice may direct that any case or class of cases be heard by a particular number of Judges, unless otherwise provided by any statute."

Its perusal goes to show that it would apply when otherwise is not provided. Rule 10 makes a provision for reference when the Judges comprising the Division Bench differ on any point. Thus, a provision is contained in the High Court of Madhya Pradesh Rules, 2008 for resolving the controversy out of difference of opinion between the Judges comprising the Division Bench. In view of the specific provision, we have no hesitation to hold that Rule 7 cannot be invoked in the present set of facts and circumstances.

14. Further reliance is placed on Rule 22, which reads as under:-

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

This is a residuary power of Chief Justice empowering him to direct for listing of a particular case or particular class of cases before a particular Bench. It nowhere provides for making a reference to Full Bench in case of difference of opinion between the Judges comprising the Division Bench.

15. Reference to Full Bench is supported on behalf of the appellant in the light of the law laid down by the Full Bench in the case of *Balkishandas V. Harnarayan & Ors.* (1979, MPLJ, 644).

In the case of *Balkishandas* (supra), question referred for decision was formulated in specific whereas in the present case no such point is formulated,

at all. Thus, the situation is identical to that of *Savita Devi's case* (supra) 2007(2) JLJ 4, which would govern the present case.

Reliance has also been placed by the appellant on the Full Bench decision of this Court in the case of *Ladhuram Rameshwardayal Firm Vs. Krishi Upaj Mandi Samiti*, 1977 MPLJ 641.

In the case of *Ladhuram Rameshwardayal Firm* (supra), the matter on account of difference of opinion between the two Judges constituting the Division Bench was referred to a third Judge and not to the Full Bench. Moreover, Rule 10 of High Court of Madhya Pradesh Rules, 2008 which described a procedure for reference, was not in existence, inasmuch as, controversy involved herein was neither dealt with nor decided in the case of *Ladhuram Rameshwardayal Firm* (supra).

16. Lastly, it is contended that in view of Rule 2 of Chapter VI, reference to this Full Bench is well justified.

Rule 2 of Chapter VI makes a provision for roster. Rule 2 of Chapter VI reads as follows:-

"A bench comprising three or more Judges shall be notified by a special roster."

Aforesaid Rule 2 of Chapter VI merely makes a provision for special roster by issuing notification about the bench comprising three or more Judges. We are unable to understand how the said provision may be construed as a justification for reference without formulation of point of difference between the two Judges comprising the Division Bench in contravention of Rule 10 of Chapter IV. Aforesaid provision merely lays down that the notification of a bench comprising three or more Judges shall be by way of special roster, alone. There is no controversy in the present case that whether this Full Bench has been notified or not by the special roster. The real controversy herein is that in view of difference of opinion between the two Judges comprising the Division Bench, whether a reference could have been made to Full Bench without formulation of point of difference.

In the case of *Savita Devi* (supra), there was a difference of opinion between the two Judges comprising the Division Bench. The matter was referred to Full Bench without formulation of point of difference. The Full Bench of this Court instead of answering the reference directed to place the matter before Hon'ble the Chief Justice for appropriate orders. It would not

be out of place to mention that after the Full Bench decision in *Savita Devi* (supra), the case was referred to the third Judge and has been ultimately decided in accordance with the opinion of the majority of the Judges.

17. Ex consequenti, we hold that we are bound by the Full Bench decision of this Court in the case of *Savita Devi's case* (supra), and accordingly, the matter deserves to be placed before Hon'ble the Chief Justice for appropriate orders as directed by the Full Bench in the aforesaid case.

18. Accordingly, matter may now be placed before Hon'ble the Chief Justice for appropriate orders.

Order accordingly.

I.L.R. [2011] M. P., 49

WRIT APPEAL

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

W.A. No.269/2010 (Indore) decided on 10 August, 2010

RAMESHCHANDRA BHILALA

... Appellant

Vs.

BASHIR & ors.

... Respondents

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 122 - Recounting - Order of recounting passed by Sub Divisional Officer on mere asking and without there being any evidence necessitating passing of such order - Such order and the consequential order of recounting of votes was rightly quashed by writ Court - Appeal dismissed.

(Para 9)

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 122 - पुनर्गणना - पुनर्गणना का आदेश उपखण्ड अधिकारी द्वारा सिर्फ कहने पर एवं ऐसे आदेश के पारित किये जाने के लिए आवश्यक किसी साक्ष्य के बिना पारित किया गया - ऐसा आदेश एवं मतों की पुनर्गणना का पारिणामिक आदेश रिट न्यायालय द्वारा उचित रूप से अभिखंडित किया गया - अपील खारिज।

Cases referred :

(2009) 10 SCC 170, 1999(1) JLJ 342, 1999(1) JLJ 200.

Vivek Dalal, for the appellant.

A.S. Garg with Jitendra Verma, for the respondent No.1.

ORDER

The Order of the Court was delivered by **SHANTANU KEMKAR, J.** :—This intra Court appeal under Section 2 of the Madhya Pradesh Uchch Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 has been filed challenging the order dated 26.7.2010 passed by learned Single Judge of this Court in W. P. No.6598/2010.

2. Briefly stated the appellant and the first respondent contested election for the post of Sarpanch of Gram Panchayat Multhan, Tehsil Kasrawad, District— Khargone. In the said election the first respondent was declared elected as Sarpanch. Challenging his election the appellant preferred election petition under Section 122 of the Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 before the Sub Divisional Officer (Revenue), Tehsil Kasrawad. In the said election petition the appellant/election petitioner prayed for recounting of the votes. The Sub Divisional Officer without framing issues and recording evidence by a non-speaking order dated 20.4.2010 allowed the said prayer made by the appellant and directed recounting of votes. In terms of the said order the recounting of the votes was done and the election of the first respondent was set aside by the Sub Divisional Officer vide order dated 25.5.2010 and the appellant was declared elected having found to have secured one vote more than the first respondent.

3. Aggrieved by the order dated 20.4.2010 by which recounting of the votes was ordered as also the result of recounting dated 25.5.2010 declaring the appellant to be elected on the post of Sarpanch, the first respondent filed a writ petition No. 6598/10 before this Court. The said writ petition was allowed by learned Single Judge vide order dated 26.7.2010. The writ Court set aside both the orders, restored the status of the petitioner to the post of Sarpanch and directed the Sub Divisional Officer to decide the election petition in accordance with law preferably within three months. Aggrieved the appellant has filed this appeal.

4. Shri Vivek Dalal learned counsel for the appellant argued that the order of recounting passed by the Sub Divisional Officer on 20.4.2010 having been carried out and the appellant having been declared elected vide order dated 25.5.2010, the learned Single Judge could not have restored the status of the petitioner (first respondent herein) ignoring the result of the recounting in which the appellant secured more votes and declared elected.

5. Shri A. S. Garg, learned Senior Counsel for the first respondent on the other hand argued that the procedure adopted by the Sub Divisional Officer

in deciding the election petition being contrary to law laid down by this Court as also by the Supreme Court, the writ petition was rightly allowed and the matter has rightly been remanded to the Sub Divisional Officer for fresh decision in accordance with law. He also argued that in view of the judgment of Supreme Court in the case of *Udey Chand Vs. Surat Singh and another* – (2009) 10 SCC 170 and by this Court in the case of *Kailash Singh Vs. Narayan Singh and others* – 1999 (1) J.L.J. 342 as also in the case of *Uday Singh Vs. Himmat Singh and others* – 1999 (1) J.L.J. 200, the orders impugned in the writ petition could not have been sustained and as such they have rightly been quashed by the learned Single Judge and the first respondent's status has rightly been restored till fresh adjudication of the election petition.

6. Having heard learned counsel for the parties, we find no merit in this writ appeal.

7. On going through the order dated 20.4.2010 by which recounting has been ordered by the Sub Divisional Officer we find that the recounting has been ordered by a cryptic order, in violation of the law laid down by the Supreme Court in the case of *Udey Chand Vs. Surat Singh* (supra) as also by this Court in the cases of *Kailash Singh Vs. Narayan Singh* (supra) and *Uday Singh Vs. Himmat Singh* (supra). The supreme Court in the case of *Udey Chand Vs. Surat Singh* (supra) has held that since an order for inspection and re-count of the ballot papers affects the secrecy of ballot, and as in the entire election process, the secrecy of ballot is sacrosanct and inviolable except where strong prima facie circumstances to suspect the purity, propriety and legality in the counting are made out, such an order cannot be made as a matter of course. Before an Election Tribunal can permit scrutiny of ballot papers and order re-count, two basic requirements which must be satisfied are : (i) the election petition seeking re-count of the ballot papers must contain an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded, and (ii) on the basis of evidence adduced in support of the allegations, the Tribunal must be prima facie satisfied that in order to decide the dispute and to do complete and effectual justice between the parties, making of such an order is imperatively necessary.

8. In the case of *Kailash Singh Vs. Narayan Singh* (supra) it has been held by this Court that recounting of votes cannot be ordered on mere pleadings. There should be contemporaneous evidence to support order of recount. The order of re-counting of votes if passed without any evidence it can be interfered into by this Court in writ petition under Article 227 of the Constitution of India. In

the case of *Uday Singh Vs. Himmat Singh* (supra) it has been held by this Court that no re-counting can be ordered on mere asking, issue should have been framed and after recording the evidence the matter should have been decided.

9. On going through the order dated 20.4.2010 we find that the order of re-counting has been passed ignoring the aforesaid settled legal position by a cryptic order. The re-counting has been ordered on mere asking without there being any evidence necessitating passing of such order. In the circumstances, the said order and the consequential order of recounting of votes have rightly been quashed by learned Single Judge. The supreme Court in the case of *Uday Chand Vs. Surat Singh* (supra) has interfered into the order of recounting, even after recounting was carried out and the election petitioner was being declared elected. While negating the identical contention as advanced in this appeal by learned counsel for the appellant, the Supreme Court in the case of *Uday Chand Vs. Surat Singh* (supra) has observed in Paragraph No. 32 as under :-

"Before parting with the case, we may also deal with the contention urged on behalf of the election petitioner to the effect that re-counting having taken place in terms of the Tribunal's order, this appeal is rendered infructuous. The argument is noted to be rejected. An order of re-count of votes has to stand or fall on the nature of the averments made in the election petition and the material produced in support thereof before the order of re-count is made and not from the result emanating from the re-count of votes."

10. In the circumstances we are not inclined to accept the appellant's contention that the recounting as was ordered having been carried out and the appellant having been declared elected, in the said process of re-counting the writ petition could not have been allowed in favour of the first respondent. The order of re-counting itself being illegal and contrary to law laid down in the aforesaid cases, the same cannot be sustained as a result the consequential order dated 25.5.2010 is also not sustainable and as such the same have rightly been quashed by the writ Court. No case for interference in the order of learned Single Judge in this writ appeal is made out.

11. Accordingly, the appeal fails and is hereby dismissed. No order as to costs.

Appeal dismissed.

I.L.R. [2011] M. P., 53**WRIT APPEAL****Before Mr. S.R. Alam, Chief Justice & Mr. Justice Alok Aradhe**

W.A. No.560/2010 (Jabalpur) decided on 29 September, 2010

FOCUS ENERGY LTD (M/S)

... Appellant

Vs.

GOVT. OF INDIA and ors.

... Respondents

Mining Lease - Grant of - Delay and laches - Application of appellant for grant of mining lease after expiry of period of prospecting license rejected on 02.12.2006 - On 02.03.2007, notification issued making the area in question available for grant of mineral concession - Mining lease granted to respondent No.4 by order dated 19.06.2008 - After 1½ year of grant of mining lease, petitioner challenged the grant of mining lease - Held - Facts leads to irresistible conclusion that appellant is guilty of delay and laches - Writ Appeal dismissed. (Paras 9 & 10)

खनन पट्टा - का अनुदान - विलम्ब एवं उपेक्षा - खनन पट्टे के अनुदान के लिए अपीलार्थी का आवेदन पूर्वक्षण अनुज्ञप्ति की अवधि की समाप्ति के बाद 02.12.2006 को नामंजूर किया गया - तारीख 02.03.2007 को खनिज रियायत के अनुदान के लिए प्रश्नगत क्षेत्र उपलब्ध कराते हुए अधिसूचना जारी की, गयी - आदेश तारीख 19.06.2008 द्वारा प्रत्यर्थी क्र. 4 को खनन पट्टा अनुदत्त किया गया - खनन पट्टे के अनुदान के 1½ वर्ष बाद याची ने खनन पट्टे के अनुदान को चुनौती दी - अभिनिर्धारित - तथ्य इस अप्रतिरोध्य निष्कर्ष पर पहुँचाते हैं कि अपीलार्थी विलम्ब एवं उपेक्षा का दोषी है - रिट याचिका खारिज।

Cases referred :

(2010) 2 SCC 59, AIR 1970 SC 898, AIR 2007 SC 1365, (2000) 2 SCC 48, (1994) 4 SCC 450, (2008) 1 SCC 663, AIR 2010 SC 706, AIR 2007 SC 1365, (2000) 2 SCC 48, (2008) 1 SCC 663.

R.S. Jaiswal & R.M. Sharma, for the appellant.

R.L. Gupta, ASG, for the respondent No.1.

Sanjay Dwivedi, G.A., for the respondent Nos.2 & 3.

Ravishankar Prasad & R.K. Sanghi, for the respondent No.4.

Vikram Singh, for the caveater.

ORDER

The Order of the Court was delivered by **ALOK ARADHE, J.** :- In this intra-court appeal preferred under Section 2 of the M.P. Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam,

2005 appellant has challenged the legality and validity of the order dated 9.4.2010 passed by learned single Judge in Writ Petition No.2388/2010 by which writ petition preferred by appellant has been dismissed.

2. Facts giving rise to filing of the instant appeal are that appellant, a public limited company, was granted prospecting licence over an area of 2461.754 hectares for a period of two years commencing from 23.12.1993 to 22.12.1995. Appellant carried out prospecting work and thereafter applied for grant of mining lease on 17.4.1995 over an area admeasuring 1103.273 hectares. However, application submitted by appellant was rejected by the State Government vide order dated 2.12.2006.

3. Thereafter on 2.3.2007 the State Government issued a notification throwing open the area for grant of mining lease. Aforesaid notification was published in the official gazette by which applications were invited for grant of mining lease. In response to aforesaid notification dated 2.3.2007 various applicants including respondent No.4 submitted the applications. Appellant did not submit any application for grant of mining lease pursuant to aforesaid notification. The State Government vide order dated 16.9.2008 sanctioned an area admeasuring 2130 hectares for grant of mining lease in favour of respondent No.4. The aforesaid order was challenged by appellant in Writ Petition No. 15268/2008. The writ petition preferred by appellant was disposed of vide order dated 7.1.2009 with a liberty to appellant to avail the remedy of Revision available under Section 30 of the Mines and Mineral (Development and Regulation) Act, 1957 (hereinafter referred to as 'the Act') read with Rule 54 of the Mineral Concession Rules, 1960 (in short 'the Rules') It was further observed in the said writ petition that in case appellant prefers revision, the revisional authority shall consider the same on merits.

4. Appellant, in pursuance of liberty granted by this Court preferred revision before the Central Government. The Central Government vide order dated 7.9.2009 rejected the revision preferred by appellant on the ground that appellant has not assigned any cogent reason for delay and that appellant has not clarified its locus standi how M/s Phoenix Oversea Limited firm has changed into M/s Focus Energy Limited. Thus, the revision preferred by appellant was dismissed on the ground of delay and laches as well as on locus standi.

5. Thereafter appellant challenged the validity of aforesaid order passed in revision before learned single Judge in writ petition. Learned single Judge vide order dated 9.4.2010 while deciding the preliminary objections raised on

behalf of respondent No.4 with regard to maintainability of the writ petition dismissed the writ petition. Learned single Judge held that appellant did not challenge the order dated 2.12.2006 by which application for grant of mining lease was rejected. Learned single Judge further found that appellant did not submit any application in pursuance to the notification dated 2.3.2007 and allowed creation of third party right in favour of respondent No.4. Thus, learned single Judge held that no fault can be found with the order passed by revisional authority.

6. We have heard learned counsel for parties. Shri R.S. Jaiswal, learned senior counsel appearing for appellant contended that learned single Judge grossly erred in not appreciating that the order passed by revisional authority was in contravention of the order passed by this Court in Writ Petition No. 15268/2008 by which the revisional authority was directed to decide the revision preferred by appellant on merits. The revisional authority instead of deciding the revision on merits, has dismissed on the ground of limitation and locus standi. It was submitted that learned single Judge erred in holding that appellant had no locus standi to question the grant of mining lease in favour of respondent No.4. It was further submitted that learned single Judge has grossly erred in holding that any third party right has been created in favour of respondent No.4. It has been further contended that learned single Judge ought to have appreciated the order dated 19.9.2008 passed in favour of respondent No.4, is just a proposal for grant of mining lease subject to approval by the Central Government. It was also argued that learned single Judge erred in not appreciating that appellant had shown sufficient cause for condonation of delay in challenging the order dated 2.12.2006.

7. On the other hand Shri Ravishankar. Prasad, learned senior counsel appearing for respondent No.4 while opposing the submissions made by learned counsel for appellant, contended that the Central Government did not commit any illegality in rejecting the revision preferred by appellant on the ground of delay as well as locus standi. Issue of delay and laches has to be considered with reference to original cause of action and not with reference to date on which an order is passed in compliance with a court's direction. Neither a court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction will erase the delay and laches. In support of aforesaid proposition learned single Judge has relied on decision of the Supreme Court rendered in *Union of India and Others v. M.K. Sarkar*, (2010) 2 SCC 59. It has been further contended that prospecting licence issued in favour of appellant expired on 17.4.1995. Thereafter

vide notification dated 2.3.2007 applications were invited for grant of mining lease in respect of area in question. Appellant did not submit any application pursuant to aforesaid application. Contention of appellant that it is entitled to preference in the matter of grant of mining lease is misconceived. Appellant is guilty of delay and laches and by its conduct it has permitted creation of third party interest in favour of respondent No.4 therefore, no interference should be made.

8. It was further submitted that contention of appellant that the order of grant of mining lease in favour of respondent No.4 in fact is not a grant but only a proposal, is misconceived. The matter has been forwarded to the Central Government by the State Government for approval only in respect of area as the same exceeds 25 square kilometres. Limestone being minor mineral, the State Government is competent to grant mining lease in respect of the same. Learned senior counsel in support of his submission has referred to the decisions of the Supreme Court in *Tilokchand and Motichand and Others v. H.B. Munshi and Anr.* AIR 1970 SC.898, *New Delhi Municipal Council v. Pan Singh and Others*, AIR 2007 SC 1365, *Municipal Council v. Pan Singh and Others*, (2000) 2 SCC 48, *Hindustan Petroleum Corporation v. Dolly*, (1994) 4 SCC 450, *State of Haryana and Another v. Aravali Khanij Udyog and Another*, (2008) 1 SCC 663 and *Shiba Shankar Mohapatra v. State of Orissa*, AIR 2010 SC 706.

9. We have considered the submissions made by learned counsel for parties. From the material available on record, following facts emerge:

- (i) After expiry of the period of prospecting licence on 23.12.1995 appellant submitted an application for grant of mining lease which was rejected by the State Government vide order dated 2.12.2006.
- (ii) From perusal of paragraph 4 of the 'Notice of Demand of Justice' dated 17.9.2007 sent on behalf of appellant it is apparent that appellant was aware about the notification dated 2.3.2007 by which applications were invited for grant of mining lease.
- (iii) The notification dated 2.3.2007 itself states that mining lease application filed by appellant was rejected vide order dated 2.12.2006 and therefore, the area in question is being made available for grant of mineral concession.
- (iv) Appellant, being aware about the order of rejection of its mining lease application as well as gazette notification dated

2.3.2007 neither challenged the order dated 2.12.2006 by filing revision nor submitted any application for grant of mining lease pursuant to Gazette notification dated 2.3.2007.

(v) On 16.9.2008 the State Government granted an area admeasuring 2130 hectares on mining lease in favour of respondent No.4.

(vi) After a period of nearly one year and three months, on 18.12.2008 appellant instead of filing a revision filed a writ petition before this Court, namely, W.P. No.15268/2008 challenging the order dated 16.9.2008 granting mining lease in favour of respondent No.4.

(vii) On 18.3.2009 appellant filed revision under Rule 54 of the Mineral Concession Rules, 1960 before the Central Government inter alia, challenging the order dated 16.9.2008 by which mining lease was granted in favour of respondent No.4.

(viii) In the application for condonation of delay it is stated that appellant submitted an application on 24.10.2008 under the Right to Information Act, 2005 and the information supplied to appellant on 3.1.2009 and thereafter it learnt about the order rejecting application submitted by it for grant of mining lease as well as issuance of notification dated 2.3.2007 which is incorrect as is perceptible from paragraph 4 of the 'Notice of Demand of Justice' dated 17.9.2007 sent on behalf of appellant

10. Thus, facts stated supra leads to irresistible conclusion that appellant is guilty of delay and laches. Its conduct disentitles it to any relief. In *New Delhi Municipal Council v. Pan Singh and Others*, AIR 2007 SC 1365 the Supreme Court has held that delay and laches are relevant factors for exercise of equitable jurisdiction. In *Municipal Council, Ahmednagar v. Shah Hyder Beig*, (2000) 2 SCC 48 the Supreme Court has observed that discretionary relief can be provided to one who has not by his act or conduct given a go-bye to his rights. Equity favours a vigilant rather than an indolent litigant. In *State of Haryana v. Aravali Khanij Udyog*, (2008) 1 SCC 663 it has been held that where third party rights are created, the High Court should not interfere. Similarly, in *Shiba Shankar Mohapatra* (supra) it has been held that the Court exercising public law jurisdiction does not encourage agitation of stale claims where the right of third parties crystallises in the interregnum.

11. Thus, if the facts enumerated in the preceding paragraph are tested on the touchstone of aforesaid legal principles, we are of the considered opinion that the appellant is not entitled to any relief on account of delay and laches as well as its conduct.

12. It is also relevant to mention here that admittedly prospecting licence was granted to the appellant for an area admeasuring 2461.24 hectares but the appellant applied for grant of mining lease for a lesser area i.e. 1103.273 hectares out of 2461.74 hectares, which gives rise to presumption that appellant was not able to carry out prospecting work in entire area in respect of which prospecting licence was awarded to the appellant, which has ultimately resulted in loss of revenue to the State Government.

13. For aforementioned reasons, we do not find any merit in the writ appeal. The same deserves to and is hereby dismissed.

Appeal dismissed.

I.L.R. [2011] M. P., 58

WRIT APPEAL

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

W.A. No.1038/2010 (Jabalpur) decided on 6 October, 2010

RAMESH SINGH

... Appellant

Vs.

M.P.S.E.B.

... Respondent

Service Law - Fundamental Rules, Rule 54-B(3) - Appellant acquitted by the Court only by giving benefit of doubt - The period of suspension directed to be treated as on duty and his pay and allowances for the said period were restricted to the subsistence allowance already paid to him - The discretion conferred by the rule has rightly been exercised by the competent authority - Writ Appeal dismissed. (Para 5)

सेवा विधि - मूलभूत नियम, नियम 54-बी(3) - न्यायालय द्वारा अपीलार्थी को केवल सन्देह का लाभ देते हुये दोषमुक्त किया गया - निलम्बन काल को सेवा में रहना माने जाने तथा उक्त अवधि के वेतन एवं भत्तों को उसे पूर्व में दिये गये निर्वाह भत्तों तक सीमित रखने के निदेश दिये गये - सक्षम अधिकारी द्वारा नियम द्वारा प्रदत्त अपने विवेकाधिकार का उचित रूप से प्रयोग किया गया - रिट अपील खारिज।

Case referred :

(2007) 13 SCC 251.

Dilip Pandey, for the appellant.

ORDER

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

This intra-court appeal arises from the order dated 13.9.2010 passed by learned Single Judge in Writ Petition No. 5710/2010 (S).

Facts giving rise to filing of the appeal, briefly stated, are that the appellant challenged the validity of the order dated 31.3.2010 by which the period of suspension from 25.3.2000 to 22.9.2002 was directed to be treated as period spent on duty and it was directed that the pay and allowances for the said period shall be restricted to the subsistence allowance already paid to the petitioner. The appellant challenged the aforesaid order before the learned Single Judge.

2. The learned Single Judge dismissed the writ petition preferred by the appellant on the ground that under Fundamental Rule 54-B(3) the competent authority has formed an opinion that the period from 25.3.2000 to 22.9.2002 cannot be treated as unjustified because the appellant was suspended on the basis of a criminal case. Though in the said case the appellant was acquitted, yet the same was on the basis of benefit of doubt.

3. Learned counsel for the appellant submitted that the appellant was entitled to payment of salary and allowances from the date of his acquittal till the date of his joining i.e. for the period 08.5.2002 till 06.9.2002. It was further submitted that pay and allowances ought to have been granted to the appellant for the period of suspension as well. In support of his submissions, learned counsel for the appellant has placed reliance on the decision of Supreme Court in *General Manager, UCO Bank and another vs. M. Venu Ranganath*, (2007) 13 SCC 251.

4. We have considered the submissions made by learned counsel for the appellant. Rule 54-B(3) which is relevant for the purpose of controversy involved in the instant writ appeal is extracted below:-

“(3) Where the authority competent to order re-instatement is of the opinion that the suspension was wholly unjustified, the Government servant shall subject to the provisions of sub-rule (8) be paid the full pay and allowances to which he would have been entitled had he not been suspended:

Provided that where such authority is of the opinion that the termination of the proceedings instituted against

the Government servant had been delayed due to reason directly attributable to the Government servant it may , after giving him an opportunity to make his representation [within 60 days from the date on which the communication in this regard is served in him] and after considering the representation if any, submitted by him direct, for reasons to be recorded in writing that the Government servant shall be paid for the period of such delay only such [amount (not being the whole) of such pay and allowances as it may determine. ”

5. Thus, from perusal of F.R..54-B(3) of the Fundamental Rules it is apparent that the authority who is competent to pass order of reinstatement is required to form an opinion as to whether suspension was wholly unjustified. If the authority comes to the conclusion that suspension was wholly unjustified, then the incumbent would be entitled to full pay and allowances under sub-rule (8) of Rule 54-B. In the instant case, the competent authority vide order dated 31.3.2010 which was assailed in the writ petition by the appellant, has found that suspension of the appellant was mandatory as challan against him was filed in the Court for a criminal case. The appellant was acquitted by the court only by giving benefit of doubt, therefore, it cannot be said to be wholly unjustified. Accordingly, the period of suspension from 25.3.2000 to 22.9.2002 was directed to be treated as on duty and his pay and allowances for the said period were restricted to the subsistence allowance already paid to him. Thus, cogent reasons have been assigned by the competent authority while passing the order in terms of Rule 54-B(3) of the Fundamental Rules. The discretion conferred by the rule has rightly been exercised by the competent authority.

6. The reliance placed by the appellant on the decision of the Supreme Court, referred to above, is of no assistance to the appellant as while interpreting the Regulation 15(2) in the said case the Supreme Court held that regulations did not draw any distinction between the clear acquittal and the acquittal given on the basis of benefit of doubt. Accordingly, in the facts and circumstances of the aforesaid case it was held that the employee is entitled to payment of salary and allowances. However, in the instant case the relevant provision i.e. F.R.54-B(3) has been differently worded and not paramateria to Regulation 15(2) which was involved in the aforesaid case which was decided by the Supreme Court.

7. For the aforementioned reasons, we do not find any merit in the writ appeal. The same deserves to and is hereby dismissed.

Appeal dismissed.

I.L.R. [2011] M. P., 61

WRIT APPEAL

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

W.A. No.1806/2007 (Jabalpur) decided on 13 October, 2010

SADHNA CHOURASIA (SMT.)

... Appellant

Vs.

PUNJAB NATIONAL BANK & ors.

... Respondents

A. Constitution, Articles 226 & 227, Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M.P. 2005 (14 of 2006), Section 2(1) - Writ petition under Article 226 as well as 227 seeking the writ of certiorari for quashing of the order passed by Board of Revenue and a declaration that the auction of agricultural land by Tahsildar is illegal & invalid - Held - The order passed by the learned Single Judge is in exercise of powers under Article 226 and an appeal against the said order is maintainable. (Para 11)

क. संविधान, अनुच्छेद 226 व 227, उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, म.प्र. 2005 (2006 का 14), धारा 2(1) - अनुच्छेद 226 तथा 227 के अन्तर्गत रिट याचिका राजस्व मण्डल द्वारा पारित आदेश को अभिखण्डित किये जाने हेतु उत्प्रेषण की रिट और यह घोषणा चाहते हुए कि तहसीलदार द्वारा कृषि भूमि की नीलामी अवैध एवं अविधिमान्य है - अभिनिर्धारित - एकल न्यायाधीश द्वारा पारित आदेश अनुच्छेद 226 के अन्तर्गत शक्तियों के प्रयोग में है तथा उक्त आदेश के विरुद्ध अपील पोषणीय है।

B. Lok Dhan (Shodhya Rashiyon Ki Vasuli) Adhiniyam, M.P. 1987 (1 of 1988), Sections 2(i), 3(B) - Socially desirable scheme - The tractor trolley fall within the expression "inputs and implements for promotion of agriculture" - Therefore, the loan advanced would be under "socially desirable scheme" and the proceeding for recovery of amount can be initiated u/s 3(B) of the Adhiniyam. (Para 13)

ख. लोक धन (शोध्य राशियों की वसूली) अधिनियम, म.प्र. 1987 (1988 का 1), धाराएँ 2(i) व 3(बी) - सामाजिक दृष्टि से वांछनीय योजना - ट्रैक्टर ट्रॉली, शब्दावली "कृषि के उन्नयन के लिए उत्पादक सामग्री एवं उपकरण" के अन्तर्गत आते हैं - अतएव दिया गया ऋण "सामाजिक दृष्टि से वांछनीय योजना"

62 Sadhna Chourasia (Smt.) Vs. Punjab National Bank(DB)I.L.R.[2011]M.P., के अन्तर्गत होगा तथा राशि की वसूली के लिए अधिनियम की धारा 3(बी) के अन्तर्गत कार्यवाही की जा सकती है।

C. Land Revenue Code, M.P. (20 of 1959), Sections 44 & 50 - Order passed under the provisions of M.P. Lok Dhan (Shodhya Rashiyon Ki Vasuli) Adhiniyam, 1987 is not subject to appeal and revision under the provisions of Code. (Para 16)

ग. भू राजस्व संहिता म.प्र. (1959 का 20), धाराएँ 44 व 50 - म.प्र. लोक धन (शोध्य राशियों की वसूली) अधिनियम, 1987 के उपबंधों के अन्तर्गत पारित आदेश संहिता के उपबंधों के अन्तर्गत अपील एवं पुनरीक्षण के अध्यक्षीन नहीं है।

D. Land Revenue Code, M.P. (20 of 1959), Sections 147 & 165(9-b) - Land held by an agriculturist, which admeasures less than 6 hectares and is situated in scheduled area - Can be sold in an auction under the provisions of M.P. Lok Dhan (Shodhya Rashiyon Ki Vasuli) Adhiniyam, 1987, in view of Section 147 of the Code. (Para 17)

घ. भू राजस्व संहिता म.प्र. (1959 का 20), धाराएँ 147 व 165(9-बी) - कृषक द्वारा धारित भूमि, जो 6 हेक्टेयर से कम है और अनुसूचित क्षेत्र में स्थित है - संहिता की धारा 147 को दृष्टि में रखते हुए, म.प्र. लोक धन (शोध्य राशियों की वसूली) अधिनियम, 1987 के उपबंधों के अन्तर्गत नीलामी में विक्रय की जा सकती है।

E. Limitation Act (36 of 1963), Section 18 - Limitation - Property mortgaged with Bank - Limitation would be 12 years - Loan was sanctioned on 27.03.1992 - Appellant acknowledged the liability to repay the loan on 16.05.1996 - On 27.12.1996 Revenue Recovery Certificate was issued - The proceedings are not time barred. (Para 18)

ड. परिसीमा अधिनियम (1963 का 36), धारा 18 - परिसीमा - सम्पत्ति बैंक में बंधक - परिसीमा 12 वर्ष होगी - ऋण दिनांक 27.03.1992 को स्वीकृत - अपीलार्थी ने ऋण का प्रतिसंदाय करने का दायित्व दिनांक 16.05.1996 को अभिस्वीकृत किया - राजस्व वसूली प्रमाण पत्र दिनांक 27.12.1996 को जारी - कार्यवाहियाँ समय-वर्जित नहीं हैं।

Cases referred :

(2002) 7 SCC 657, AIR 1990 SC 119, (2009) 1 SCC 8, 1999 RN 223, 1978 MPLJ 113 (FB), 2002(5) MPLJ 462, ILR [2007] MP 1030, AIR 2008 MP 22, ILR [2008] MP 216, AIR 1965 SC 1718, (2007) 3 SCC 79, (2009) 1 SCC 516, (2009) 6 SCC 72, AIR 1979 SC 798, AIR 2007 SC 3180.

Vivek Rusia, for the appellant.

Rajesh Maindiretta, for the respondent No.1.

Ashok Lalwani, for the respondent No.4.

ORDER

The Order of the Court was delivered by **S.R. ALAM, CHIEF JUSTICE.** :—This intra-court appeal preferred under section 2(1) of the Madhya Pradesh Uchcha Nyaylyay (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 arises out of order dated 04.10.2007 passed by learned Single Judge in Writ Petition No.27997/2003.

2. Facts leading to filing of the instant appeal, briefly stated, are that the respondent No.1 sanctioned a loan to the tune of Rs.1.5 lacs to the appellant for purchase of Tractor & Trolley. The appellant mortgaged the land admeasuring 5.70 hectares situate at village Badikheri, District Mandla with the respondent No.1 by way of security for loan. The appellant committed default in repayment of the amount of loan as a result of which proceedings were initiated for recovery by the respondent No.1-Bank. Consequently, Revenue Recovery Certificate (RRC) was issued on 27.12.1996 under section 3 of the Madhya Pradesh Lokdhan (Shodhya Rashiyon Ki Vasuli) Adhiniyam, 1987 (hereinafter referred to as 'the 1987 Act') for recovery of amount of Rs.3,19,289/- together with interest. Aggrieved appellant filed an objection to RRC on the ground that proceedings in question since have been initiated beyond the period of limitation as loan was taken by the appellant on 27.3.1992 and RRC was issued on 27.12.1996 hence the same being time barred could not be initiated. The objection preferred by the appellant was rejected by Naib Tahsildar and warrant of attachment of the property was issued. The said order was challenged by the appellant by filing a revision before the Collector. The Collector vide order dated 30.1.2001 allowed the revision preferred by the appellant and remitted the matter to the Tahsildar to decide the objection afresh. In compliance of the order of remand passed by Collector, the Tahsildar once again decided the objection preferred by the appellant and rejected the same vide order dated 08.3.2001.

3. Being aggrieved by the aforesaid order the appellant preferred an appeal under section 44 of the M.P. Land Revenue Code, 1959 (hereinafter referred to as 'the Code') before the Sub Divisional Officer. The Sub Divisional Officer vide order dated 30.5.2001 rejected the appeal preferred by the appellant on the ground that the same is not maintainable. The order passed by the Sub

64 Sadhna Chourasia (Smt.) Vs. Punjab National Bank(DB) L.L.R.[2011] M.P., Divisional Officer was challenged by the appellant in an appeal before the Commissioner. The Commissioner vide order dated 24.8.2001 affirmed the order passed by the Sub Divisional Officer.

4. The appellant challenged the validity of the order dated 24.8.2001 passed by the Commissioner by filing a revision before the Board of Revenue. The Board of Revenue allowed the revision preferred by the appellant and set aside the sale conducted in pursuance of RRC on the ground that the same is violative of proviso to section 147 of the Code. The Board of Revenue further held that several irregularities were committed while conducting the sale of the land belonging to the appellant. Accordingly, the same was set aside.

5. The respondent No.1 challenged the order passed by the Board of Revenue in writ petition, namely, W.P.No.27997/2003. The learned Single Judge vide order dated 04.10.2007 allowed the writ petition preferred by the respondent No.1-Bank. It was held that 1987 Act is a complete Code in itself which provides for machinery of recovery of loan by adopting the procedure prescribed under Rule 5 of the 1988 Rules framed under the Act. Therefore, the provisions of section 147 of the Code will have no application to the proceeding initiated under the 1987 Act. It was further held that the proceedings for recovery were initiated against the appellant within a period of limitation. Accordingly, the order passed by the Board of Revenue was set aside.

6. Shri Vivek Rusia, learned counsel for the appellant contended that under Section 3(B) of the 1987 Act proceedings could be initiated for recovery only if the amount of loan was advanced under the State sponsored scheme or under socially desirable scheme. Since the loan advanced to the appellant does not fall in either of the aforesaid categories, the proceedings for recovery of the amount of loan could not have been initiated under the provisions of 1987 Act. It was further contended that Rule 5 of M.P. Lok Dhan (Shodhya Rashiyon Ki Vasuli) Niyam, 1988 (hereinafter referred to as 'the 1988 Rules'), the Recovery Officer is under an obligation to follow the same procedure for recovery of amount as laid down under the Code and, therefore, the provisions of the Code have been incorporated by reference and consequently the order passed in the proceedings for recovery of the amount under the 1987 Act is subject to appeal and revision under the provisions of the Code. Learned counsel has drawn our attention to section 56 of the Code and has contended that under Section 56 of the Code the expression "order" means the formal

expression of the decision given by the Board or a Revenue Officer in respect of any matter in exercise of his powers under this Code or any other enactment for the time being in force, as the case may be. It has further been contended that in view of Section 147 of the Code, since the appellant held less than 6 hectares of land the same could not have been auctioned. It has further been contended that proceedings for auction of land belonging to the appellant suffers from several irregularities. It was further argued that appeal under section 2(1) of the Madhya Pradesh Uchcha Nyaylyay (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 against the order is maintainable. In support of his submissions learned counsel has placed reliance on the decisions reported in *Nagpur Improvement Trust s. Vasantrao and others*, (2002) 7 SCC 657, *Ambati Narasayya vs. M.Subba Rao and another*, AIR 1990 SC 119 and *M.M.T.C. Limited vs. Commissioner of Commercial Tax and others*, (2009) 1 SCC 8 and *State of M.P. v. M/s Triyug Talkies and Another*, 1999 RN 223.

7. On the other hand Shri Rajesh Maindiretta, learned counsel for the respondent No.1 while opposing the submissions made on behalf of the petitioner submitted that in exercise of powers under section 2(1) of the 1987 Act the State Government has issued a notification dated 13.9.2000 by which several schemes have been declared as "Socially Desirable Schemes". A scheme under which any Banking Company or a Government Company/ Corporation advances loans for development of land, creation and use of irrigation and use of irrigation facilities and purchase of inputs and implements for promotion of agriculture, fisheries, poultry, dairy and allied sector, have been declared as "Socially Desirable Scheme" under the notification. Therefore, proceedings against the appellant were rightly initiated under section 3 of 1987 Act as the loan was advanced to the appellant under "Socially Desirable Scheme". It has been further contended that 1987 Act is a self contained Code and the orders passed therein are not subject to appeal and revision under the provisions of the Code. It has further been submitted that the loan was advanced to the appellant on 31.3.1993 and on 16.5.1996, the appellant acknowledged her liability to pay the loan. Since the property was mortgaged with the respondent No.1, therefore, period of limitation for initiating recovery proceeding is 12 years and the proceedings for recovery of the amount have been initiated within the period of limitation. Learned counsel while referring to section 165(9-b) of the Code has contended that the land held by the appellant could be auctioned for recovery of the amount which was advanced to the appellant. In support of his submissions, learned counsel has placed

66 Sadhna Chourasia (Smt.) Vs. Punjab National Bank(DB)I.L.R.[2011]M.P., reliance on the decisions of this Court reported in *Manharlal Uttamchand Awal vs. State of M.P. and others*, 1978 MPLJ 113 (FB), *Rewa Sidhi Gramin Bank vs. Ramniwas Agrawal*, 2002 (5) MPLJ 462.

8. Shri Ashok Lalwani, learned counsel for the respondent No.4 submitted that respondent No.4 is a bonafide purchaser for a valuable consideration. The appellant is a defaulter and did not deposit the amount of loan. Only the amount of Rs.1.96 lacs was deposited in view of the interim order passed by this Court in writ appeal. The order which has been impugned in the instant appeal has been passed by the learned Single Judge in exercise of powers under Article 227 of the Constitution of India and, therefore, appeal under section 2(1) of the Madhya Pradesh Uchcha Nyaylyay (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 is not maintainable.

9. We have considered the submissions made on both sides. In our view, in the facts of the case and the controversy involved following issues arise for consideration in the instant appeal: (i) Whether the instant writ appeal preferred by the appellant under section 2(1) of the Madhya Pradesh Uchcha Nyaylyay (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 is maintainable? (ii) Whether the provisions of 1987 Act can be invoked for recovery of an amount of loan against the appellant? (iii) Whether the order passed under the provisions of 1987 Act is subject to appeal and revision under the provisions of the Code? (iv) Whether the land held by the appellant, which admeasures less than 6 hectares and is situated in scheduled area, can be sold in an auction under the provisions of 1987 Act, in view of Section 147 of the Code? (v) Whether proceedings for auction are legal and valid?

10. We shall proceed to deal with the issues in seriatim. The Full Bench of this Court in *Dr. Jaidev Siddha and others vs. Jaiprakash Sidha and others*, I.L.R. [2007] M.P. 1030 after taking note of several decisions of the Supreme Court in paragraph 17 of the order held that while dealing with the question of maintainability of an appeal from an order passed by learned Single Judge, the pleadings in the writ petition, nature of order passed by the learned Single Judge, character and the contour of the order, directions issued, nomenclature given, the jurisdictional prospective in the constitutional context are to be seen. Merely because in a writ petition an order emerging from the inferior tribunal or subordinate courts is challenged it cannot be treated to be a petition under Article 227 of the Constitution of India. It has further been held that a writ of certiorari can be issued under Article 226 of the Constitution against an order

of a tribunal or an order passed by the subordinate court. Thus, it cannot be put in a straitjacket formula that any order of learned Single Judge that deals with an order arising from an inferior tribunal or the subordinate court is an order under Article 227 of the Constitution of India and not an order under Article 226 of the Constitution. It has further been held that it would not be an overemphasis to state that an order in a writ petition can fit into the subtle contour of Articles 226 and 227 of the Constitution in a composite manner and they can co-exist, overlap and imbricate. Similar view was expressed by the majority in a decision by the Special Bench reported in *Manoj Kumar vs. Board of Revenue and others*, AIR 2008 MP 22.

11. From perusal of the writ petition we find that it has been preferred under Articles 226 as well as 227 of the Constitution of India in which respondent No.1 had sought the writ of certiorari for quashing of the order dated 24.6.2003 passed by the Board of Revenue. The respondent No.1 had also sought a declaration that the auction of the agricultural land of the appellant by the Tahsildar be held as illegal and invalid. Learned Single Judge vide order dated 04.10.2007 quashed the order passed by the Board of Revenue. Thus, while deciding the writ petition the learned Single Judge has issued a writ of certiorari. A writ of certiorari can also be issued in exercise of powers under Article 226 of the Constitution of India. We are supported in our view by a Division Bench decision reported in *Ramanuj Tiwari vs. M.P. State Co-operative Tribunal*, I.L.R [2008] M.P. 216 wherein the Division Bench of this Court has held that an error of law made by the tribunal can be corrected by the High Court under Article 226 of the Constitution of India. The Division Bench while arriving at the aforesaid conclusion has placed reliance on the decision of the Special Bench of this Court in case of *Manoj Kumar* (supra). Thus, for the aforementioned reasons we hold that the order passed by the learned Single Judge in exercise of powers under Article 226 of the Constitution and, therefore, an appeal against the said order is maintainable under section 2(1) of the Madhya Pradesh Uchcha Nyaylyay (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005.

12. Now, we may advert to the second issue i.e. whether the provisions of 1987 can be invoked for recovery of amount of loan against the appellant. The Madhya Pradesh Lok Dhan (Shodhya Rashiyon Ki Vasuli) Adhiniyam, 1987 is an Act to provide for the speedy recovery of certain classes of dues payable to the State Government, Government Companies and certain categories of Corporations and Banking Companies, and for matters connected

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therewith. Section 2(i) of the Act defines the expression "socially desirable
scheme" to mean a scheme notified as such by the State Government under
which a banking company advances money to any person by way of loan. In
exercise of powers under section 2(i) of the Act the State Government has
issued a notification dated 13.9.2000 by which certain schemes have been
defined as "Socially Desirable Schemes". The relevant extract of the notification
is quoted below for the facility of reference:-

*"All Schemes under which any Banking Company or a
Government Company/ Corporation advance loans for/to-*

*(a) Development of land, creation and use of irrigation
facilities and purchase of inputs and implements for
promotion of agriculture, fisheries, poultry, dairy and allied
sector."*

13. Thus, in the instant case, admittedly the loan was advanced to the
appellant for purchase of a Tractor-Trolley. The Tractor-Trolley would fall
within the expression "inputs and implements for promotion of agriculture".
Therefore, in view of preceding analysis it can safely be held that the loan
was advanced to the petitioner under "socially desirable scheme" and, therefore
under Section 3(B) of the 1987 Act the proceedings for recovery of the amount
can be initiated against the appellant under the provisions of 1987 Act.

14. Now, we are coming to the third issue, as to whether the order passed
under the the provisions of 1987 Act is subject to appeal and revision under
the provisions of the Code. Under Section 3 of the 1987 Act the dues mentioned
therein can be recovered as arrears of land revenue. Section 3(1) provides
that where any person is a party to any agreement mentioned in clauses (A),
(B), (C) and (D) of Section 3 and if he fails to comply with the terms of the
agreement then a certificate in such form as may be prescribed may be sent to
the Collector and Collector may by an order specify in this behalf mentioning
the sum due from such person and requesting that such sum together with the
cost of proceedings and interest on the sum due at the rate specified in the
agreement upto the date of recovery, be recovered as if it were an arrear of
land revenue. Thus, for limited purpose of recovery of amount a legal fiction
has been created and scope and ambit of legal fiction has to be confined to
only for the purposes of recovery of amount. It is well settled in law that in
construing a legal fiction it is not to be extended beyond the purpose for which
it is created. Reference in this connection may be made to decisions of Supreme

Court in *Her Highness Maharani Mandalsa Devi and others vs. M.Ramnarain Private Limited and others*, AIR 1965 SC 1718, *Raymond Limited and another vs. State of Chhattisgarh and others*, (2007) 3 SCC 79, *R.Kalyani vs. Janak C. Mehta and others*, (2009) 1 SCC 516, *Raj Kumar vs. State of (NCT of Delhi) and another*, (2009) 6 SCC 72. Sub-section (2) of Section 3 of 1987 Act provides that the Collector or his subordinate officer specified under sub-section (1) on receiving the certificate shall take steps to recover the amount as arrears of land revenue under the Code. Thus, conjoint reading of provisions of sub-sections (1) and (2) of Section 3 of 1987 Act reveals that the amount due as provided under section 3(1) can be recovered in the manner as provided in Code as if it is an arrear of land revenue. Rule 2(e) of 1988 Rules defines the expression "Recovery Officer" to mean an official designated by the State Government or the Collector to recover the amounts mentioned in the Recovery Certificate in accordance with the provisions of sub-section (2) of section 3 of the Act. Rule 5 of 1988 Rules provides that Recovery Officer shall follow the same procedure for issue of process and conduct of distraint proceedings as laid down under the Code and the rules made thereunder. The 1987 Act is a special Act and is complete Code in itself.

15. Thus, only the procedure prescribed for recovery of the amount as arrears of land revenue under the provisions of Code has been incorporated by reference into the provisions of the 1987 Act. There is no reference to any other provision of Code in the 1987 Act. When certain provisions of the previous Act have been incorporated into the subsequent Act, no other provision can be deemed to be incorporated in the subsequent Act to which reference has not been made. Our view also finds support from the decision of the Supreme Court in *Mahindra and Mahindra Ltd. vs. The Union of India and another*, AIR 1979 SC 798. Similar view was taken in *M/s. Girnar Traders vs. State of Maharashtra and others*, AIR 2007 SC 3180. Thus, merely because the Recovery Officer is required to follow the procedure prescribed under the Code as arrears of land revenue it cannot be said that order passed by the Recovery Officer shall be subject to appeal and revision under the provisions of the Code.

16. There is yet another reason for holding that the provisions of appeal and revision as provided under the Code would not be applicable in case of an order passed under the provisions of the 1987 Act. The Full Bench of this Court in *Manoharlal Uttamchand Awal* (supra) held that "arrear of land

70 Sadhna Chourasia (Smt.) Vs. Punjab National Bank(DB) [L.R.[2011]M.P., revenue" is distinct and separate from "money recoverable as an arrear of land revenue". The learned Single Judge of this Court in *Ramniwas Agrawal* (supra) has also taken a view that 1987 Act is an special Act and no right of appeal or revision has been conferred under the 1987 Act and the order passed by the Recovery Officer is final. Reliance placed by learned counsel for appellant on decision of this Court in *Triyug Talkies* (supra) is of no assistance to the appellant. In aforesaid case this Court was dealing with the provisions of M.P. Entertainments Duty and Advertisement Tax Act, 1936. Section 4-D of the 1936 Act provided for an appeal to the Commissioner of Revenue decision against the order of penalty passed by an officer under Section 4-C of the 1936 Act. In that context by taking into account Section 56 of the Code, learned single Judge of this Court held that order passed by Commissioner in appeal, would be subject to revision under the Code. In the case at hand provisions of the 1987 Act do not provide for any appeal against order passed under the 1987 Act. Therefore, decision in *Triyug Talkies* (supra) is not applicable in obtaining factual matrix of the case. Thus, for the aforementioned reasons we hold that the order passed by the Revenue Officer under the 1987 Act is not subject to appeal and revision as provided under the provisions of Code.

17. The next issue which arises for consideration is whether the land held by the appellant which admeasures less than 6 hectares and is situated in scheduled area can be sold in an auction under the provisions of 1987 Act, in view of Section 147 of the Code. Second proviso to Section 147 of the Code provides that land admeasuring six hectares or less than six hectares of land in the scheduled area cannot be attached and sold for recovery of arrear of land revenue. However, section 165(9-b) of the Code reads as under:-

"(9-b) Nothing in this section shall prevent a Bhumiswami from transferring any right in his land to secure payment of an advance made to him by a Commercial Bank for purpose of agriculture or improvement of holding or shall affect the right of any such Bank to sell such right for the recovery of such advance."

Thus, from perusal of section 165(9-b) of the Code it is clear that nationalized bank can recover its dues by selling the mortgaged agricultural property. In view thereof, the issue no. IV has to be answered in the affirmative i.e. against the appellant.

18. Now, we may come to the last issue, i.e. whether the auction proceedings are legal and valid. Learned Single Judge has recorded finding that since the property was mortgaged with the bank, therefore, the limitation for initiation of proceeding for recovery would be 12 years. Admittedly, in the instant case the loan was sanctioned on 27.3.1992 and the appellant acknowledged the liability to repay the loan on 16.5.1996 and on 27.12.1996 Revenue Recovery Certificate was issued. Therefore, contention of the appellant that the proceedings were initiated beyond the period of limitation cannot be accepted. Similarly, the contention of the appellant that though warrant of attachment for movable property was issued yet immovable property held by the appellant was sold in the auction and, therefore, the contention that process of auction suffers from illegality cannot be accepted for the reason that while deciding the objection pursuant to the order passed by the Collector, the Tahsildar has directed to issue fresh warrant of attachment. Thus, the proceedings initiated for recovery of the amount of loan do not suffer from any infirmity.

19. For the aforementioned reasons, we do not find any merit in the writ appeal. The same deserves to and is hereby dismissed.

Appeal dismissed.

I.L.R. [2011] M. P., 71

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No.4674/2010 (Jabalpur) decided on 4 May, 2010

PRISM CEMENT LIMITED, SATNA

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

A. Stamp Act (2 of 1899), Sections 2(5) & 40 - Land of respondent acquired by petitioner - In furtherance of stipulations, contained in sale deed, a document called 'Ikrarnama' was executed - The document provides for payment of Rs.5000/- p.m. to dependants having undivided share till they attain 58 years of age - Held - The instrument does not acknowledge pre-existing liability because the circular of State Govt. referred to by petitioner lays down an employment in lieu of purchase of land - Instrument is a bond. (Paras 14 & 15)

क. स्टाम्प अधिनियम (1899 का 2), धाराएँ 2(5) व 40 - याची द्वारा प्रत्यर्थी की भूमि का अर्जन किया गया - विक्रय पत्र में अन्तर्विष्ट शर्तों के अग्रसरण में एक दस्तावेज 'इकरारनामा' निष्पादित किया गया - दस्तावेज में अविभाजित हिस्सा रखने वाले आश्रितों को उनके 58 वर्ष की आयु के होने तक 5000/- रुपये

Prism Cement Limited, Satna Vs. State of M. P. I.L.R.[2011]M.P., प्रतिमाह भुगतान करने का उपबंध था - अभिनिर्धारित - लिखत पूर्व विद्यमान दायित्वों को अभिस्वीकृत नहीं करता, क्योंकि याची द्वारा संदर्भित राज्य शासन का परिपत्र भूमि क्रय करने के एवज में रोजगार अधिकथित करता है - लिखत एक बंधपत्र है।

B. Stamp Act (2 of 1899), Section 29 - Liability to pay duty - Bond - Duty shall be borne by person drawing, making or executing such instrument.
(Para 15)

ख. स्टाम्प अधिनियम (1899 का 2), धारा 29 - शुल्क भुगतान करने का दायित्व - बंधपत्र - शुल्क का वहन ऐसी लिखत को लिखने, बनाने अथवा निष्पादित करने वाले व्यक्ति द्वारा किया जायेगा।

R.P. Agrawal with P.K. Sahu, for the petitioner.

Harish Agnihotri, G.A., for the respondent Nos.1 to 4.

ORDER

SANJAY YADAV, J. :-Petitioner calls in question the correctness of order dated 5.3.2010 passed by the Board of Revenue; whereby the order dated 13.1.2010 by Collector of Stamps, has been affirmed.

2. By order dated 13.1.2010, Collector of Stamps after impounding the document termed as "Ikrarnama dated 10.1.2007 (Annexure P/2) and in a proceeding drawn under Section 40 of the Indian Stamps Act, 1899 formed an opinion that the Ikrarnama being a Bond under Section 2 (5) of the Act of 1899 and not duly stamped required the petitioner to makeup the proper stamp duty by paying Rs.2,80,7000/- and Rs.300 penalty, i.e., total Rs.2,81,000/-.

3. The instrument, i.e., the Ikrarnama, between the petitioner and respondent No. 5, executed in furtherance of the stipulations contained in the sale-deed dated 27.12.2008; whereby, the respondent No. 3 sold his 5.875 acres of land in favour of the petitioner. Ikrarnama provided for that, the dependants having undivided share would be paid Rs.5000/- per month till they attain 58 years of age and in case of early death, their legal heirs would be entitled for the remaining amount. This arrangement, as per instrument, was in lieu of providing an employment which was a mandatory requirement of State Government' circular No. Bhu-Ar/2/92/2024-2131 dt. 22.3.1993, which mandated that the private companies, as the petitioner, acquiring private land were to provide employment to the dependant members of the land owner whose land is to be acquired. It further stipulated that in case of failure, this letter stipulates that the sanction for Unit shall be liable to be cancelled.

4. It appears that to come out of the rigours of the policy of State Government for providing employment the devise as find mention in the said instrument/Ikrarnama has been adhered.

5. Whether such an instrument is lawful or not is not the question. The issue is, whether the instrument can be construed as "Bond" under the Stamp Act or an agreement as the petitioner alleges.

6. The issue did not find favour with the authority concerned who construed the same as a bond as will be evident from the order by Stamps Collector (Order dt. 13.1.2010); Additional Commissioner, Rewa Division, Rewa (order dated 17.2.2010 in appeal) and the Board (Order dt. 5.3.2010 in Revision).

7. Correctness of the order by the authorities has been questioned on two counts, viz., (a) the instrument being a Ikrarnama in discharge of pre-existing liability has wrongly been construed as a bond and (b) the respondent No. 5 who is a signatory to the agreement his liability to the additional Stamp duty Co-exist as per Section 29 of the Act of 1899 with that of the petitioner in case if the instrument is construed to be a "bond".

8. The question under consideration has to be examined on the touchstone of the expression "Bond" as it appear under Section 2 (5) of the Act, 1899. If the instrument, i.e., Ikrarnama falls within the four walls of the definition then the opinion formed by the authorities does not warrant any interference and if not then converse would be true.

9. Section 2 (5) of the Act, 1899, defines the expression "Bond" in the following terms

"(5) **"Bond"** includes

- (a) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;
- (b) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another; and
- (c) any instrument so attested whereby a person obliges himself to deliver grain or other agricultural produce to another;

10. Thus, if an instrument satisfies any of the one condition stipulated under Section 2 (5) of the Act of 1899 would qualify it to be a bond.

11. Sub-clause (b) of clause (5) of Section 2 of the Act of 1899, lays down that for an instrument to be a bond: (i) it must be attested by a witness, (ii) a person obliges himself to pay money to another and (iii) money not payable to order or bearer. With these three ingredients an instrument can be construed as a "Bond".

12. In *Santsingh v. Madandas Panika and another* (AIR 1976 MP 144) (FB) the Full Bench of this Court was pleased to observe:

"14. As a result of the above discussion, we would answer the two questions set out in the beginning as follows:-

(1) An instrument is a promissory note if there are present the following elements:-

- (i) There should be an unconditional undertaking to pay;
- (ii) The sum should be a sum of money and should be certain;
- (iii) The payment should be to the order of a person who is certain, or to the bearer of the instrument; and
- (iv) The maker should sign it.

(2) An instrument is a bond within the meaning of Section 2 (5)(b) of the Stamp Act, if the following elements are present :-

- (i) There must be an undertaking to pay;
- (ii) The sum should be a sum of money but not necessarily certain;
- (iii) The payment will be to another person named in the instrument;
- (iv) The maker should sign it;
- (v) The instrument must be attested a witness; and
- (vi) It must not be payable to order bearer.

(3) A bond has two distinguishing features :-

- (i) Positive - it must be attested by a witness.
- (ii) Negative - it must not be payable to order or bearer.

(4) For the purposes of the Stamp Act, it is only the definition

as contained in Section 4 of the Negotiable Instruments Act which is to be read as if reproduced verbatim in Section 2 (22) of the Stamp Act, but no other provision of the Negotiable Instruments Act can be read Section 2 (22) of the Stamp Act, because of the restrictive words "as defined in."

(5) Explanation (1) of Section 13 of the Negotiable Instruments Act may have own its own effect and impact on a promissory note for the purposes of the Negotiable Instruments Act, but it has nothing to do with the "definition" of a promissory note and, therefore, that explanation is wholly relevant for the purposes of the Stamp Act. It cannot, therefore, be said that every promissory note must be excluded from the definition of Stamp Act, unless it contains an express prohibition within the meaning of the explanation to Section 3 of the Negotiable Instruments Act."

13. In *Tulsa Singh and others v. The Board of Revenue* (AIR 1971 All 430) (FB) it was observed:

"8. The learned Standing Counsel urged that the documents fulfilled the requirements of a bond as defined by cl. (5) of Section 2 and was as such chargeable to duty under Article 15. Section 2 (5) defines a bond. It has three sub-clauses. Sub-clauses (a) and (c) are not relevant for our purposes. Clause (c) says that a Bond

"includes any instrument attested by a witness and not payable to order or to bearer whereby a person obliges himself to pay money to another".

Under the indentures, the three purchasers obliged themselves to pay Rs. 32,175/- and Rs. 7525/- respectively to the Cantonment Board. These amounts were not payable to order or bearer. Both the documents are attested by witnesses. The documents fulfil all the ingredients of a bond, and prima facie, be chargeable to duty as such.

9. Learned counsel for the purchasers urged that the documents are wholly exempt from duty under Exemption (a) to Article 5, because they related to the sale of goods or merchandise exclusively. The submission is misconceived. In

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L. H. Sugar Factory, Pilibhit v. Moti, AIR 1941 All 243
 (FB) Iqbal Ahmad, Acting, C. J., held :-

"Agreements for the sale of goods or merchandise contemplated by Article 5 of Sch. I do not require attestation and, therefore, such agreements, if unattested, would remain mere agreements, even though there is a covenant as to the delivery of the goods agreed to be sold. But the moment such an agreement is attested it becomes a bond."

10. Relying upon this decision as well as the decisions of the Full Bench of the Madras High Court in reference under Section 46, Stamp Act, (1885) ILR 8 Mad 87, and of a Full Bench of the Bombay High Court in *Re. Ralli Bros.*, (1906) 8 Bom LR 234, a Full Bench of our Court in *Board of Revenue v. Padum Bahadur Singh*, AIR 1957 All 391 held that an agreement for the sale of trees in a forest containing an undertaking to pay money and being attested by witnesses was a bond and was chargeable to duty as such. It was not a simple agreement relating to the sale of goods or merchandise and was not entirely exempt from duty. Clause (a) of the Exemptions to Article 5 was not applicable. The document was liable to duty as a bond under Article 15. These decisions are on all fours with the facts of the present case. The two documents, in question, contained an undertaking to pay money, not to order or bearer. They are attested by witnesses. They are not mere agreements relating to the sale of goods. By the fact of attestation they have become bonds. In this view, it is unnecessary to decide the question whether the indenture related to the sale of future goods within the meaning of Sale of Goods Act, so as to be covered by Exemption A of Article 5."

14. Here in the case the Ikrarnama stipulates:

चूँकि दिनांक 27-12-2006 को द्वितीय-पक्ष द्वारा प्रथम-पक्ष के हक में द्वितीय-पक्ष के स्वामित्व की आराजी नम्बर कुल 32 किता कुल रकबा 5.875 एकड़ (जो रकबा 70.50 एकड़ का अंश भाग है) और जिसका विवरण विक्रय पत्र दिनांक 27-12-2006 में लिखा है, और जो ग्राम हिनौती, पोस्ट सिजहटा, तहसील रामपुर बघेलान, जिला सतना (म.प्र.) में स्थित है, का विक्रय पत्र निष्पादित हुआ है।

और चूँकि उक्त विक्रय पत्र के निष्पादन की एक शर्त के तहत द्वितीय पक्ष द्वारा अपने निम्नलिखित आश्रितों के भविष्य को ध्यान में रख कर प्रथम पक्ष से निम्नलिखित शर्तों पर समझौता कर रहा है, जो प्रथम पक्ष को स्वीकार है -

आश्रितों के नाम	पिता/पति का नाम	उम्र
1. श्री सुभाष कुमार मिश्र	श्री रामनिवास मिश्र	31 वर्ष
2. श्री जय प्रकाश मिश्र	श्री रामनिवास मिश्र	29 वर्ष
3. श्री संजय कुमार मिश्र	श्री रामनिवास मिश्र	25 वर्ष
4. श्रीमती रमा देवी मिश्र	पत्नी श्री अजय कुमार मिश्र	30 वर्ष
(पुत्रवधु श्री रामनिवास मिश्र)		

सभी निवासीगण ग्राम-हिनौती, पोस्ट-सिजहटा, तहसील- रामपुर बाघेलान, जिला-सतना (म.प्र.)

शर्तें

1. यह कि प्रथम-पक्ष, द्वितीय-पक्ष के उपरोक्त आश्रितों को उनके 58 वर्ष की उम्र तक उपरोक्त प्रत्येक को नौकरी के बदले 5000/- रूपया (पाँच हजार रूपया) प्रतिमाह अदा करेगा।
2. यह कि उपरोक्त आश्रितों में से यदि किसी की मृत्यु 58 वर्ष के पूर्व हो जाती है, तो उसको मिलने वाली 5000/- रूपये की राशि उसकी पत्नी या पुत्र या पुत्री को उपरोक्त समयावधि (यानि आश्रित के 58 वर्ष उम्र की समयावधि) के समाप्ति तक प्रथम-पक्ष द्वारा भुगतान किया जाता रहेगा।
3. यह कि उपरोक्त आश्रित व्यक्ति विक्रयशुदा आराजियात, पैत्रिक सम्पत्ति एवं अविभाजित होने से अंशधारक हैं, और चूँकि द्वितीय पक्ष रिकार्डेड भूमि स्वामी एवं मालिक है, इसलिए द्वितीय पक्ष उपरोक्त सम्पत्ति विक्रय करने हेतु अधिकृत है।
4. प्रथम-पक्ष (कम्पनी) के किसी दूसरी कम्पनी को बिक जाने/वसीयत/दान हो जाने की स्थिति में जो भी दूसरी कम्पनी, प्रथम-पक्ष (कम्पनी) को खरीदती है, उसे प्रथम-पक्ष इस इकरारनामे से अवगत करायेंगा और यदि प्रथम-पक्ष कम्पनी का नाम बदल जाता है, तो नये नामकरण होने वाली फ़ैक्ट्री या कम्पनी भी इकरार नामे का पालन करने के लिए बाध्य होगी।
5. यह कि उपरोक्त इकरार नामे की शर्तों का यदि प्रथम-पक्ष द्वारा पालन नहीं किया जाता एवं शर्त का उल्लंघन किया जाता है, तो द्वितीय-पक्ष के उपरोक्त उल्लेखित वारिसान/आश्रित अपने हक व उपरोक्त रकम प्राप्त करने के लिए व्यवहारवाद न्यायालय में दावा प्रस्तुत कर प्रथम-पक्ष की

चल/अचल सम्पत्ति से भुताबिक इकरार नामा डिग्री प्राप्त करने के अधिकारी होंगे, यानि व्यवहार न्यायालय को अधिकार होगा कि प्रथम-पक्ष के चल/अचल सम्पत्ति को नीलाम कर या कुर्क कर द्वितीय-पक्ष के आश्रितों को मिलने वाली रकम का भुगतान कराये।

यह इकरार नामा दोनों पक्षों ने पढ़, सुन व समझ लिया है, और इसकी समस्त शर्तों से सहमत होकर अपने स्वस्थ चित एवं मस्तिष्क से पूरे होशों-हवाश में इस पर अपने हस्ताक्षर कर रहे हैं, ताकि सनद रहे और वक्त जरूरत पर काम आवे। दिनांक 10-1-07

(हस्ताक्षर प्रथम-पक्ष)

(हस्ताक्षर द्वितीय-पक्ष)

The instrument does not acknowledge a pre-existing liability, because the circular of the State Govt. referred to by the petitioner lays down an employment in lieu of purchase of land. The nexus, therefore, as drawn by the petitioner, qua the Govt. circular, to establish a pre-existing obligation is out of context.

15. Having thus considered this Court is of the opinion that the opinion formulated by the Collector of Stamps and the orders thereon that the instrument in question is a bond does not warrant any interference. Regarding liability to pay the Stamps Duty Clause (a) of Section 29 of the Act, 1899 provides for, that, the expenses of providing the proper stamps shall be borne by the persons drawing, making or executing such instrument. It is, therefore, open for the Collector Stamps to recover the same from either of the parties and directed to be recovered from the petitioner, no illegality is perceived.

16. In the result petition fails and is hereby dismissed. No costs.

Petition dismissed.

I.L.R. [2011] M. P., 78

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No.2865/2000 (Jabalpur) decided on 21 June, 2010

JAHANGIR KHAN

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

Arms Act (54 of 1959), Section 17(3) - Cancellation of arms licence
- Petitioner's licence cancelled on the suspicion that he being a close relative of a hard core criminal had been internally helping him - Held
- Merely on the basis of suspicion raised by Superintendent of Police

that the petitioner was internally helping a criminal which formed the basis for arriving at a conclusion by the District Magistrate that the security of the public peace or public safety has been put to peril - There is no cogent material to substantiate the aforesaid suspicion drawn by the Superintendent of Police and the District Magistrate - Order of cancellation of licence quashed. (Para 17)

आयुध अधिनियम (1959 का 54), धारा 17(3) - आयुध लायसेंस का रद्दकरण - याची का लायसेंस इस संदेह पर रद्द किया गया कि वह किसी कट्टर अपराधी का नजदीकी रिश्तेदार होकर आन्तरिक रूप से उसकी मदद कर रहा था - अभिनिर्धारित - मात्र पुलिस अधीक्षक द्वारा किये गये संदेह के आधार पर कि याची आन्तरिक रूप से एक अपराधी की मदद कर रहा था, जिला मजिस्ट्रेट द्वारा इस निष्कर्ष पर पहुँचने का आधार बना कि लोक शांति की सुरक्षा या लोक सुरक्षा को खतरे में डाल दिया गया है - पुलिस अधीक्षक और जिला मजिस्ट्रेट द्वारा अंकित उपर्युक्त संदेह को प्रमाणित करने के लिए कोई तर्कपूर्ण सामग्री नहीं है - लायसेंस के रद्दकरण का आदेश अभिखंडित।

Cases referred :

AIR 1991 All 110, AIR 1992 All 10, (1989) 15 All LR 519, 1989 All LJ 1053.

Imtiaq Hussain with Ishtiaq Hussain, for the petitioner.

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

ORDER

SANJAY YADAV, J. :-With the consent of learned counsel for the parties the matter is heard finally.

2. The petitioner by way of present petition filed under Article 226 of the Constitution of India calls in question the legality of order dated 6.7.1998 passed by District Magistrate, Bhopal, whereby, the Arms License No. 17/89 held by the petitioner for 315 bore rifle has been revoked in exercise of power under Section 17 (3) of Arms Act, 1959.

3. The challenge is also to an order dated 23.2.2000 passed by respondent No. 3, the Commissioner, Bhopal division, Bhopal; whereby the appeal preferred by the petitioner against the order of revocation of Arms License has been dismissed.

4. Brief facts giving rise to the order of revocation are that, the petitioner, an agriculturist and resident of village Islam Nagar, Tahsil Huzur, District Bhopal was issued an Arms License bearing No. 17/89 to hold 315 bore rifle in 1989 which was renewed from time to time.

5. In the year 1992 the petitioner was served with an order dated 22.4.1992, whereby, the aforesaid license was cancelled and the petitioner was called upon to deposit the 315 bore rifle with the nearest police station. The petitioner alleging that the order dated 22.4.1992 was passed without affording any opportunity of hearing assailed the same in an appeal under Section 18 of the Act of 1959. The said appeal was, however, dismissed on 24.12.1992. The petitioner thereafter preferred a petition before this Court against the order of revocation of license and the appellate order vide M.P. No. 1059/1993. The said Writ Petition was allowed vide order dated 19.8.1994 and the order passed by appellate authority was set aside with a direction to decide the same after affording an opportunity of hearing to the petitioner.

6. In pursuance to order in M.P. No. 1059/1993, the appellate authority on 15.5.1995 passed an order after hearing the petitioner holding that, the revocation of license by the District Magistrate vide his order dated 22.4.1992 was not proper as the District Magistrate has not taken into consideration the entire factual aspect. The appellate authority by setting aside the order of revocation dated 22.4.1992 remitted the matter for reconsideration.

7. The District Magistrate in pursuance to the order passed by appellate authority on 15.5.1995 called for report from Superintendent of Police, Bhopal who vide his report dated 25.6.1996 informed that two cases against the petitioner under Section 107/1196 Cr. P.C. are pending and there are no other criminal cases registered against him. The Superintendent of Police, Bhopal further informed that the cousin of the petitioner, i.e., Massu @ Mushir is a dreaded criminal and the petitioner has been helping him internally. It is on the basis of aforesaid report the District Magistrate, Bhopal passed an order dated 6.7.1998 revoking the Armed License No. 17/89 of 315 bore rifle. An appeal preferred by the petitioner against said order also suffered dismissal by order dated 23.2.2000; feeling aggrieved, whereof, the petitioner has preferred this petition.

8. The sole ground on which the petitioner assails the order of revocation of Arm License is that the same is based on surmises and conjectures. It is urged that there being no material evidence on record to justify that the petitioner is involved in illegal activities and has misused the terms of license the order of revocation is erroneous in law. It is further urged that there is no evidence on record that the petitioner ever associated himself with the said Massu @ Mushir in illegal activities.

9. Learned counsel for the petitioner further contends that it is merely on suspicion that the arm license of the petitioner has been revoked. The order, it is urged, therefore, suffers from patent error of law. Learned counsel for the petitioner in support of his submission has placed reliance on the judgment rendered by High Court of *Allahabad Bench in Ram Bahadur Singh v. The District Magistrate, Deoria and others* (AIR 1991 All 110) *Heera Lal Verma v. Commissioner, Kumaun Mandal, Nainital and others* (AIR 1992 All. 10) and *Sita-Ram Dixit v. Divisional Commissioner, Allahabad Division and others* (AIR 1992 All 252) to bring home his submission that merely on the basis of suspicion an arm license duly issued under the Act of 1959 cannot be revoked.

10. The respondents on their turn has supported the action taken by District Magistrate in revoking the arms license of the petitioner. It is urged that there was ample material on record before the District Magistrate as also the report furnished by the Superintendent of Police, Bhopal regarding the antecedents of the petitioner which was sufficient ground for revocation of license of the petitioner under Section 17 (3) of the Act of 1959. It is further urged that, the appellate authority also duly considered the appeal preferred by the petitioner and rejected the same by reasoned order. It is further contended that since the petition is devoid of substance, it warrants no interference and is liable to be dismissed.

11. Considered the submissions put-forth by learned counsel for respective parties.

12. Admittedly, as is borne out from the record, on the date of consideration two cases under Section 107/116 Cr.P.C. were pending against the petitioner and there were no other criminal cases against him nor is there any material on record suggesting involvement of the petitioner in any criminal matter. On the contrary the Superintendent of Police categorically stated in his report dated 25.6.1996 that the petitioner has been acquitted in two criminal cases for offences under Sections 294, 506; 186, 34 IPC and Sections 451 and 323 IPC.

13. The Superintendent of Police; however, further observed in his report that the petitioner happens to be cousin of Massu @ Musheer Khan, a history-sheeter against whom 14 criminal cases are registered in various Police Stations, under Arms Act, riot, NDPS Act, The Explosive Act, 1884, Electricity theft, Forest as well as two cases under Section 302 IPC and that he was

apprehended in the year 1993 under National Security Act. The report further states that the petitioner being a close relative of said Massu @ Mashir has been internally helping him and because of the influence exerted by the petitioner, persons in the locality are afraid to speak against him. It is the aforesaid report on the basis whereof the District Magistrate in exercise of his power under Sub-section (3) of Section 17 of the Act has revoked the Arm license of the petitioner.

14. The question is whether in absence of cogent material on record the District Magistrate was justified in revoking the Arms License merely on the basis of suspicion and the assumption drawn by the Superintendent of Police vide his report dated 25.6.1996.

15. Section 17 of the Act of 1959 empowers the licensing authority to suspend the license for such period as it thinks fit or revoke a licence. The conditions whereon the license can be suspended or revoked are stipulated in sub-section (3) of Section 17, i.e., (i) if the licensing authority is satisfied that the holder of the licence is prohibited by this Act or by any other law for the time being in force, from acquiring having in his possession or carrying any arms or ammunition, or is of unsound mind, or is for any reason unfit for a licence under this Act; or (ii) if the licensing authority deems it necessary for the security of the public peace or for public safety to suspend or revoke the licence; or (iii) if the licence was obtained by the suppression of material information or on the basis of wrong information provided by the holder of the licence or any other person on his behalf at the time of applying for it; or (iv) if any of the conditions of the licence has been contravened; or (v) if the holder of the licence has failed to comply with a notice under sub-section (1) requiring him to deliver-up the licence.

16. Thus, only when any of the aforesaid five conditions are fulfilled that an arm license can be suspended or revoked under sub-section (3) of Section 17 of the Act of 1959.

17. In the case at hand admittedly only an offence under Section 107/116 of Cr.P.C was reportedly registered against the petitioner on the date of consideration. The antecedent fact revealed that the petitioner was acquitted of the offences under Sections 294, 506, 186, 34 IPC and Sections 451 and 323 IPC. It was merely on the basis of suspicion raised by Superintendent of Police that the petitioner was internally helping a criminal which formed the basis for arriving at a conclusion by the District Magistrate that the security of

the public peace or public safety has been put to peril; however, there is no cogent material to substantiate the aforesaid suspicion drawn by the Superintendent of Police and the District Magistrate.

18. In *Sita Ram Dixit* (supra) it was observed by His Lordship "even a criminal tendency or enmity by itself cannot be a ground for revocation." This Court is in complete agreement with the observation of His Lordship because, in the given facts of the present case there is no material available on record to suggest that the petitioner has misused the fire-arm licensed to him and an apprehension that the petitioner is a close relative of a criminal ipso factor cannot be a ground for revocation of a license.

19. In *Ram Bahadur Singh* (supra) it was observed by his Lordship:

"4. The second ground taken in the impugned order that there is likelihood of abuse of fire-arm by the son of the petitioner is also not tenable. In *Awadesh Kumar v. District Magistrate* (1989) 15 All LR 519 : (1989 All LJ 1053) it was held that mere suspicion or possibility of abuse of the fire arm by others without any positive evidence is not a ground for suspension of the license. In view of the law laid down by this Court the second ground for suspension of fire-arm licence also suffers from patent error of law."

20. In view of above the impugned order passed by District Magistrate Bhopal revoking the fire-arm licence No. 17/89 of the petitioner being not sustainable in the eyes of law deserves to be and is hereby quashed. Consequently, the order passed in appeal also crumbles.

21. In the result petition is allowed. The order dated 6.7.1998 and 23.2.2000 are set aside. However, no costs.

Petition allowed.

I.L.R. [2011] M. P., 84

WRIT PETITION

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

W.P. No.7352/2007 (Jabalpur) decided on 22 July, 2010

BHARTIYA ALTERNATIVE

MEDICAL FOUNDATION & ors.

... Petitioners

Vs.

STATE OF M.P. & ors.

... Respondents

A. *Chikitsiya Shiksha Sanstha (Niyanttran) Adhiniyam, M.P. (19 of 1973), Section 2(b) - Medicine - Electro Homeopathy - Words "any other medical qualification" includes medical qualification and system of medicine of Electro Homeopathy - Phrase "all other medicines, therapies or systems" is wide enough to take into its ambit Electro Homeopathy System of Medicine also.* (Para 20)

क. चिकित्सीय शिक्षा संस्था (नियंत्रण) अधिनियम, म.प्र. (1973 का 19), धारा 2(बी) - औषधि - इलेक्ट्रो होम्योपैथी - शब्द "कोई अन्य चिकित्सीय योग्यता" में चिकित्सीय योग्यता तथा इलेक्ट्रो होम्योपैथी की औषधि प्रणाली सम्मिलित है - शब्द समूह "समस्त अन्य औषधियाँ, रोग निदान और चिकित्सा अथवा प्रणालियाँ" इतना विस्तृत है कि इसकी परिधि में औषधि की इलेक्ट्रो होम्योपैथी प्रणाली भी आ सकती है।

B. *Constitution, Article 226 - Reasons given that why State has not considered to give recognition to such system of medicine (Electro Homeopathy) - Court cannot compel State Government to legislate to recognize particular system of medicine.* (Para 21)

ख. संविधान, अनुच्छेद 226 - कारण दिये गये कि राज्य ने ऐसी औषधि प्रणाली (इलेक्ट्रो होम्योपैथी) को मान्यता देने हेतु विचार क्यों नहीं किया - न्यायालय राज्य सरकार को विशेष औषधि प्रणाली को मान्यता देने हेतु विधि बनाने के लिए विवश नहीं कर सकता।

C. *Chikitsiya Shiksha Sanstha (Niyanttran) Sanshodhan Adhiniyam, M.P. (15 of 2006), Sections 7-C & 8 - Use of word 'Doctor' - Provisions are not ultra vires.* (Para 24)

स. चिकित्सीय शिक्षा संस्था (नियंत्रण) संशोधन अधिनियम, म.प्र. (2006 का 15), धाराएँ 7-सी व 8 - 'चिकित्सक' शब्द का उपयोग - उपबंध अधिकारातीत नहीं हैं।

Cases referred :

M.P. No.2018/1992, W.P. No.310/1998, W.P. No.3990/1995.

Parag Chaturvedi, Aditya Sanghi & Sameer Seth, for the petitioners.
Deepak Awasthi, G.A., for the State.

ORDER

The Order of the Court was delivered by **ARUN MISHRA, J.** :—In W.P. No. 7352/2007, prayer has been made for quashing order (P-4) dated 11.4.2007 passed by Principal Secretary, Department of Medical Education, Madhya Pradesh, Bhopal. Prayer has also been made to direct the respondents to permit the petitioner institution to practice and impart education in alternative system of Electro Homeopathy System of Medicine in accordance with law. Prayer has also been made to issue mandamus directing respondents State to formulate the rules and regulation as well as guidelines by bringing regulatory legislation for Electro-Homeopathy System as per direction of Delhi High Court passed in W.P. No. 4015 of 1996.

2. In W.P. No. 2242/2007 prayer has been made to quash order dated 22.1.2007 and communications dated 6.2.2007 and 3.2.2007 issued by the respondents. Further prayer has been made to permit the petitioner institution/ College established at Baihar, Balaghat to function and direct the respondents to grant registration to the petitioner institution.

3. In W.P. No. 7770/2007, prayer has been made to quash order dated 11.4.2007 passed by respondent No. 2. Further prayer has been made to direct the respondents to comply with order passed in W.P. Nos. 310/98 and 3990/95 to frame rules and regulations with respect to Electro Homeopathy System of Medicine.

4. In W.P. No. 7457/2007, prayer has been made to quash order dated 11.4.2007 and to permit petitioner institution to impart education in Electro Homeopathy System of Medicines.

5. In W.P. No. 8253/2007 prayer has been made to declare the provision of Section 7-C and 8 of M.P. Chikitsiya Shiksha Sanstha (Niyanttran) Adhiniyam, 1973 (hereinafter referred to as the Adhiniyam, 1973) as ultra vires.

6. The facts are being referred to from W.P. No. 7352/2007. It is averred in the petition that petitioner institutions are imparting instructions in electro homeopathy by using medicines of electro homeopathy, harmless, devoid of all chemicals, minerals and metals etc. The Electro Homeopathic System was invented in the year 1865 in the city of Bologna in Italy by Count Ceaser

Mattei. It has spread over and developed in various countries like Germany, Switzerland, United Kingdom, Pakistan, Ghana, United Arab Emirates, Poland, Russia etc. It is asserted that electro homeopathy is the most natural and harmless system of medicines. Same is dependent upon the vegetable kingdom. Electro homeopathic remedies generate greater power, restoring capacity, arresting organic changes than all the drugs mentioned in other pharmacopoeias. The Electro Homeopathic Medicines are essences, juices, extracts of various plants and its various organs prepared through cohobation/cold fermentation process propounded by Theophrastus Von Hahenheim and known as the 'Spagiric way'. It is submitted that High Court of Delhi vide order dated 18.11.1998 issued direction to the Central/State Government to make legislation prescribing: (i) the grant of licence to the existing and new institutes conducting courses in Electropathy and other alternative system of medicines, (ii) minimum standards of education and check on the functioning of such institutes, (iii) minimum qualifications for getting admission in such institutes and (iv) conditions entitling these institutes to issue diplomas and certificates and right to use the prefix 'Doctor' and to issue medical certificates to the patients by diploma/certificate holders from such institutes. The State of M.P. was bound to comply with the directions contained in order dated 18.11.1998 and to make legislation recognizing the Electro Homeopathic System of Medicine.

7. Several writ petitions were filed in this Court, one of which M.P. No. 2018/92 (*National Development Society of Electro Homeo. and others Vs. State of M.P. and others*) was allowed by this Court, which was decided along with several other writ petitions vide common order dated 19.3.1999. Another writ petition W.P. No. 3990/1995 was decided by this Court vide order (P-3) dated 2.1.2007. It is submitted that impugned order dated 11.4.2007 passed by the Principal Secretary, Department of Medical Education deserves to be set aside and State Government be directed to legislate regulatory measures governing Electro Homeopathic System of Medicine.

8. In W.P. No. 8253/2007, the petitioner has challenged the vires of amended Section 8 and Section 7-C of Adhiniyam, 1973. Section 7-C puts a fetter on use of title 'Doctor'. It is provided in Section 7-C that the title "Doctor" may be used with the name of a person who holds a recognised medical qualification and who is registered as a medical practitioner with the Board or Council or any other institution established by law for the time being in force and no other person shall use the title 'Doctor' with his name to express

I.L.R.[2011]M.P., Bhartiya Alter. Medical Founda. Vs. State of M. P.(DB) 87 himself as a medical practitioner. Section 8(1) of Adhiniyam, 1973 provides that whoever contravenes the provisions of Section 3 of Section 5-B or Section 7 or Section 7-B, or the terms and conditions subject to which permission is granted under Section 5 or Section 7, shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to one lakh rupees or with both. There is no prohibition to conduct and the use of Electro Homeopathic System of Medicines as such the aforesaid provisions be declared to be ultra vires.

9. Return has been filed in W.P. No. 7457/2007, which has been adopted in other writ petitions. It is contended in the return that a Division Bench of this Court in W.P. No. 3990/2005 has issued directions that the petitioner institution or the like institutions shall not award any Degree in the courses conducted by them till the legislative enactments are put in force and there after in case any enactment is enforced they shall act in accordance with the provisions contained therein. It was also directed that the Government shall particularly provide the law in relation to the system of medicine of Electropathy claimed by petitioner and whether such type of certificate is sufficient to use the prefix 'Doctor' against their name. It was also directed that adequate media publicity shall be given by the State Government to inform general public to be careful in relation to such courses of instructions in electro homeopathy till the legislature enacts the law and recognizes this system of medicine. Despite the aforesaid prohibitory orders issued by Division Bench of this Court, the petitioner institutions are imparting education in Electro Homeopathic System of Medicine. Adhiniyam, 1973 has been amended in the year 2006. The committee headed by the experts in medical field in its report (R-1) dated 25.11.2003 has specifically recorded negative findings about Electro Homeopathy etc. that there is absolutely no scientific support to the Electro Homeopathy discipline and such persons cannot prefix the word Doctor against their names. Meaning of the word Doctor has been changed by Amendment Act, 2006. Similarly the provisions of Sections 3, 5, 7, 7-A, 7-B, 7-C and 9 have also been amended. Under the aforesaid amended provisions, imparting instruction in Electro Homeopathic System of Medicine has been prohibited. Thus, it is not permissible to impart education until and unless permission is accorded by the State of M.P. in accordance with the provisions of Adhiniyam, 1973.

10. Shri Parag Chaturvedi, Shri Adhitya Sanghi and Shri Sameer Seth, learned counsel appearing for the petitioner institutions have submitted that in

88 Bhartiya Alter. Medical Founda. Vs. State of M. P.(DB)I.L.R.[2011]M.P., view of various decisions rendered by this Court and Delhi High Court, order dated 11.4.2007 passed by the Principal Secretary is illegal and arbitrary. It is also submitted that State is bound to legislate as per direction issued time to time in various cases and to recognize the Electro Homeopathic System of Medicine. The amendment made in the Adhiniyam, 1973 does not cast any fetter upon the petitioners to impart teaching, establishing and administering the institutions and to practice in the field of Electro Homeopathy.

11. Shri Deepak Awasthi, learned Government Advocate appearing on behalf of the State has submitted that Adhiniyam, 1973 has been amended so as to bring all the medical education being imparted within the State of M.P. under the purview of Adhiniyam, 1973. He has also submitted that by virtue of amended provisions of Section 3, 5-A, 5-B, 7, 7-C and Section 8, the prohibition is intended to be given effect to by enacting the penal provisions for imparting education except in accordance with the aforesaid Adhiniyam, 1973.

12. The main plank of the arguments of the petitioners' counsel is the decision of this Court rendered in M.P. No. 2018/92 decided along with several other writ petitions vide common order dated 19.3.1999. This Court opined that M.P. Ayurvigyan Parishad Adhiniyam, 1987 (hereinafter referred to as Adhiniyam, 1987) operates in the field of Allopathic System of Medicine not in the alternative system of medicine. This Court opined that the Electro Homeopathic System of Medicine is not regulated by the Adhiniyam, 1987. In the circumstances, it was held that prohibiting them to practice and impart education in the alternative system of medicine was impermissible.

13. Another Division Bench of this Court in W.P. No. 310/1998 (*Rajendra Prasad Medical Institute of Electro Homeopathy & others Vs. Union of India and others*) passed order dated 27.2.2001 to the effect that Central/ State Government shall consider making of the legislation prescribing minimum standards of education and check on the functioning of the institutions conducting courses in Electropathy and other alternative system of medicine and also minimum qualification for admission and right to use prefix 'Doctor'. It was directed that petitioner shall not make misleading claim in regard to having been recognized by the Medical Council of India and State Medical Council in the advertisement till enforcement of legislative enactments. General public shall be informed that the petitioner and other institutions are not recognized and affiliated. They shall not award any degree in the course conducted by them till the legislative enactments are put in force and in case

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enactments are in force, they shall act in accordance with the provisions contained thereunder. The following directions were issued by the Division Bench of this Court :-

(1) The central/State Government shall consider making the legislation prescribing the minimum standards of education and check on the functioning of the institute conducting courses in Electropathy and other alternative system of medicine on the line set out in Section 17, 18, 19 and 19 A of the medical council act, 1956.

(a) The minimum qualification for getting admission in such institute and the minimum qualification for getting admission therein.

(b) The right to use the prefix 'Doctor' and for the issue of medical certificates to the patients by Diploma/Certificate holders from the recognized institutes referred to here in above.

(2) The petitioners shall not make misleading claim in regard to having been recognized by the medical council of India or the state medical council in the advertisement till the enforcement of the legislative enactment.

(3) Adequate publicity through the media shall be given informing the general public about petitioners and other similar institute to be not having been not recognized and affiliated with any of the medical councils of the Central and State Government.

(4) The petitioners institution or the like institutions shall not award any Degree in the courses conducted by them till the legislative enactments are put in force and there after in case any enactment is enforced, they shall act in accordance with the provisions contained therein.

(5) The exercise in the matter relating to making of the legislation referred to here in above shall be undertaken expeditiously preferably within a year.

14. Thereafter Single Bench of this Court has passed order in W.P. No. 3990/1995 on 2.1.2007. Order of Division Bench has been quoted in extenso. The Single Bench of this Court directed that order of Division Bench shall prevail and respondents shall abide by the directions given by the Division Bench in W.P. No. 310/1998 (*Rajendra Prasad Medical Institute of Electro*

90 Bhartiya Alter. Medical Founda. Vs. State of M. P.(DB)I.L.R.[2011]M.P., *Homeopathy & others Vs. Union of India and others*). Thereafter impugned order has been passed by the Principal Secretary, Department of Medical Education on 11.4.2007, which has been assailed in the instant writ petitions.

15. Now we take note of certain amendments which have been made in the Adhiniyam, 1973. The object of the Adhiniyam indicates that same is enacted to provide for proper regulation of Institutions of Medical Education in the State and for matters concerned therewith.

16. Definition of Medicine and Medical Education has been amended vide Act No. 15/2006. The definition of 'Medicine' has been modified by addition of Clause (iv) in Section 2(b). Earlier 'Medicine' used to mean; (i) the medicine within the meaning of Clause (f) of Section 2 of the Indian Medical Council Act, 1956, (ii) medicine in Homeopathy and Biochemistry within the meaning of clauses (1) and (3) respectively of Section 2 of the Madhya Pradesh Homeopathic and Biochemic Practitioners Act, 1951 and (iii) medicine in Ayurvedic System, Naturopathy or Unani System within the meaning of clauses (b), (e) and (l) respectively of Section 2 of the Mahdya Pradesh Ayurvedic Unani Tatha Prakritic Chikitsa Vyavasayi Adhiniyam, 1970. By way of amendment, clause (iv) has been added to the effect that "all other medicines, therapies or systems". The definition of Medicine is quoted below :-

2(b) : "medicine" means-

(i) medicine within the meaning of clause (f) of Section 2 of the Indian Medical Council Act, 1956 (No.102 of 1956);

(ii) medicine in Homeopathy and Biochemistry within the meaning of clauses (1) and (3) respectively of Section 2 of the Madhya Pradesh Homeopathic and Biochemic Practitioners Act, 1951 (No. 26 of 1951);

(iii) medicine in Ayurvedic System, Naturopathy or Unani System within the meaning of clauses (b), (e) and (l) respectively of Section 2 of the Madhya Pradesh Ayurvedic Unani Tatha Prakritic Chikitsa Vyavasayi Adhiniyam, 1970 (No. 5 of 1971);

(iv) all other medicines, therapies or systems;

Definition of Medical Education has also been amended. Earlier Medical Education was confined to the aforesaid three aspects which were defined earlier in the medicine. Now Medical Education means 'any other medical qualifications', same is quoted below :-

2(c) : “medical education” means education in medicine for the purpose of preparing for -

(i) a medical qualification within the meaning of clause (h) of Section 2 of the Indian Medical Council Act, 1956 (No. 102 of 1956);

(ii) a medical qualification within the meaning of clause (g) of Section 2 of the Madhya Pradesh Homeopathic and Biochemic Practitioners Act, 1951 (No. 26 of 1951);

(iii) a medical qualification within the meaning of clause (h) of Section 2 of the Madhya Pradesh Ayurvedic, Unani Tatha Prakritic Chikitsa Vyavasayi Adhiniyam, 1970 (No.5 of 1971);

(iv) any other medical qualifications;

17. There is prohibition carved out by amended section 3. Embargo has been put now to the effect that no person shall establish or assist in establishment, administer or assist in administration of institution of medical education or shall advertise, it, and issue or assist in issuing any degree, diploma or certificate of medical education of such institution without obtaining prior permission in writing of the State Government, in accordance with the provisions of this Act. Section 3 is quoted below:-

3. Restriction on establishing, administration and advertisement of institution of medical education without permission.- Subject to the provisions of Article 30 of the Constitution, no person shall establish or assist in establishment, administer or assist in administration of institution of medical education or shall advertise, it, and issue or assist in issuing any degree, diploma or certificate of medical education of such institution without obtaining prior permission in writing of the State Government, in accordance with the provisions of this Act.

Section 4 deals with application of the Act. It is provided that the Act shall apply to all institutions of medical education except those which are established and administered or run by, or on behalf of, the Central Government or the State Government or sponsored by the Central Government or the State Government, whether singly or jointly. Thus exception has been carved out only with respect to institution or institutions run by them.

Section 5 provides that every person desirous of establishing and administering of running an institution of medical education shall, not less than one year before the commencement of the academic session apply with the particulars mentioned in sub-section (2) of Section 5. The sub-section (3) of Section 5 provides for enquiry into such applications and decision to be taken.

Section 7 has also been amended drastically to the effect that where an institution of medical education established, before Amendment Act was brought into force, and it has not obtained permission of the State Government, whether affiliated to any University or recognised by any Board or not, is being administered or run on such date, the person responsible for establishing or administering or running such institution for the time being in force shall make an application within 30 days from the date of commencement of the M.P. Chikitsiya Shiksha Sanstha (Niyantiran) Sanshodhan Adhiniyam, 2006. Sanshodhan Adhiniyam came into force w.e.f. 14.6.2006. Section 7 (1) is quoted below :-

7(1): Where an institution of medical education established prior to the date of commencement of the Madhya Pradesh Chikitsiya Shiksha Sanstha (Niyantiran) Sanshodhan Adhiniyam, 2006, which has not obtained permission of the State Government, whether affiliated to any University or recognised by any Board or not, is being administered or run on such date, the person responsible for establishing or administering or running such institution for the time being in force shall make an application within 30 days from the date of commencement of the Madhya Pradesh Chikitsiya Shiksha Sanstha (Niyantiran) Sanshodhan Adhiniyam, 2006 to the State Government in such form and together with such fee as may be prescribed for grant of permission or for continuance of such institution of medical education thereafter:

Provided that nothing in this sub-section shall apply to such institutions of medical education in respect of which applications were made before the date of commencement of the Madhya Pradesh Chikitsiya Shiksha Sanstha (Niyantiran) Sanshodhan Adhiniyam, 2006.”

18. By way of amendment Section 7-C has been inserted, which provides that the title 'Doctor' may be used with the name of a person who holds a recognised medical qualification and who is registered as a medical practitioner

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with the Board or Council or any other institution established by law for the
time being in force and no other person shall use the tile 'Doctor' with his
name to express himself as a medical practitioner. Section 7-C is quoted below :-

“7-C : Use of title “Doctor”.- The title “Doctor” may be
used with the name of a person who holds a recognised medical
qualification and who is registered as a medical practitioner
with the Board or Council or any other institution established
by law for the time being in force and no other person shall
use the title “Doctor” with his name to express himself as a
medical practitioner.”

19. Sub-section (1) and sub-section (2) of Section 8 have also been
substituted, same are quoted below :-

8(1) : Whoever contravenes the provisions of Section 3 or
Section 5-B or Section 7 or Section 7-B, or the terms and
conditions subject to which permission is granted under Section
5 or Section 7, shall be punishable with imprisonment for a
term which may extend to three years or with fine which may
extend to one lakh rupees or with both and whether the breach
is a continuing one with further fine which may extend to one
thousand rupees for every day after the day during which the
breach is proved to have been persisted in.

(2) Whoever contravenes the provisions of Section 7-C shall
be punishable with imprisonment for a term which may extend
to three years or with fine which may extend to fifty thousand
rupees or with both.

20. Amendment in the definition of Medicine in Section 2(b) is that “all
other medicines, therapies or systems” stands included within ken of Adhiniyam,
1973. Similarly “any other medical qualifications” has also been included in
Section 2(c) which defines medical education. The amended provision
obviously include medical qualification and system of medicine of Electro
Homeopathy. The phrase “all other medicines, therapies or systems” is wide
enough to take into its ambit Electro Homeopathy System of Medicine also.
Then Section 3 carves out a prohibition to establish, administer or assist in
administration of institution of medical education without prior permission in
writing of the State Government, thus it is the prerogative of the State
Government under Adhiniyam, 1973 to give permission to the institutions to

94 Bhartiya Alter. Medical Founda. Vs. State of M. P.(DB)I.L.R.[2011]M.P., impart any other medical qualification in all other system of medicines, therapies or systems which may be considered appropriate. As per Section 7, in case any institution established prior to coming into the force of Amendment Act, 2006, which has not obtained permission of the State Government to impart such course of instructions, it has to apply within 30 days from the date of commencement of Amendment Act. There is also a bar to use title 'Doctor' except by a person who holds recognized medical qualification and who is a registered medical practitioner with the Board or Council or any other institution established by law for the time being in force. The legislative intent is clear. By way of aforesaid amendment, penal provision in Section 8 has also been inserted which makes punishable any violation of Section 3 and 7. In case any institution is imparting instructions in all other forms of medicines, therapies or systems as provided in Section 2 (b) (iv) or for any other medical qualifications as defined in Section 2(c) of Adhiniyam, 1973 and has not obtained permission, it is running risk of being penalized under section 8 of Adhiniyam, 1973.

21. In view of the aforesaid, we find order (P-4) dated 11.4.2007 to be in accordance with law. Detailed reasons have been given why it has not been considered to give recognition to such system of medicine. Court cannot compel State Government to legislate to recognise particular system of medicine.

22. Decision of Division Bench of this Court in W.P. No. 310/98 is clear that State Government has to make legislation. Without permission if such instructions are imparted, there are penal consequences also. We find that the act of 1973 of the State does not violate Division Bench decision of this Court. No effective directions can be issued compelling the State legislature to legislate to recognize a particular system of medicine, on the contrary prohibition has been carved out by amending Act of 1973 not to impart medical education except the system of medicine recognized by the State Government. It was also made clear by Division Bench of this Court that petitioner shall not make any misleading claim and adequate publicity shall be given that such institutions are not recognized. There is prohibition carved out under the aforesaid Act, that the petitioners institution or the like institutions shall not award any Degree in the courses conducted by them till the legislative enactments are put in force and there after in case any enactment is enforced, they shall act in accordance with the provisions contained therein. In our opinion, no such institution, which is not recognized in accordance with the provisions of Adhiniyam, 1973, can function in view of the amendment which has been made.

23. The decision of Single Bench of this Court rendered in M.P. No. 2018/92 on 19.3.1999 stands nullified by the amendment made in the Adhiniyam, 1973. Now restriction has been imposed to establish the institution and to run it except with the permission granted by the State Government in all other systems of medicine etc. by amending definition of medicine and medical education as defined under Section 2(b) and 2(c) in said Adhiniyam, 1973. Thus legislative intent is clear that petitioner institutions cannot impart education as they are not recognized under Adhiniyam, 1973 neither prefix 'Doctor' can be used and nor degree or diploma can be distributed. Any violation of the provisions, attracts the penal provision of Section 8.

24. Coming to the order passed by Govt. of India, Ministry of Health and Family Welfare, Department of Health Research on 5th May, 2010; in the said order the decision rendered by this Court on 19.3.1999 has been reflected. As already discussed by us, there was yet another Division Bench decision rendered by this Court in W.P. No. 310/98 in which directions were issued to the State Government to make legislation recognizing the Electro Homeopathic System; the State Government has not chosen to legislate and we find other directions prohibitory in nature were issued by this Court, such institutions were debarred from awarding degree in the course conducted by them till legislative enactment is made and adequate publicity was required to be given by informing the general public that such institutions are not recognized one to impart education. In view of the amended provisions of Adhiniyam, 1973 by amendment Act No. 15/2006 w.e.f. 14.6.2006, the legislative intent is writ large, consequences are clear as discussed in the order. Provisions of Adhiniyam, 1973 have not been noted in the order of Central Government, that cannot hold the field with respect to State of M.P. in view of legislative changes brought out in the State of M.P.

25. Resultantly, we find no merit in the instant writ petitions. Writ petition being devoid of merit, deserve dismissal, they are hereby dismissed. However, we leave the parties to bear their own costs as incurred of these petitions.

Petition dismissed.

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WRIT PETITION

Before Mr. Justice Rajendra Menon

W.P. No.328/2009(S) (Jabalpur) decided on 29 July, 2010

RAJESH HENRY

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

A. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rules 29(1) & 31 - Non obstante clause in Rule 29(1) will have overriding effect over the provisions of Rule 31 and except for in cases falling under Rule 11, nothing in the Rule 31 will apply to a proceeding under Rule 29.

Principle laid down in the case of *Ashok Jayant Vs. State of M.P. & ors.* [2003(2) MPLJ 146] has to be held per incuriam and based on the facts & circumstances of that case and does not effect the present case at all. (Paras 14 & 21)

क. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 29(1) व 31 - नियम 29(1) के सर्वोपरि खंड का नियम 31 के उपबंधों पर अध्यारोही प्रभाव होगा और नियम 11 के अंतर्गत आने वाले मामलों के सिवाय नियम 29 के अंतर्गत कार्यवाही को नियम 31 में से कुछ भी लागू नहीं होगा।

अशोक जयंत विरुद्ध म.प्र. राज्य एवं अन्य [2003(2) एमपीएलजे 146] के मामले में प्रतिपादित सिद्धांत अनवधानता के कारण और उस मामले के तथ्यों एवं परिस्थितियों पर आधारित मानना होगा और वह प्रस्तुत मामले को थोड़ा भी प्रभावित नहीं करता।

B. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rules 29(1) & 31 - Review - The competent authority exercising power under Rule 29 has to take a decision for reviewing the matter within a period of six months from the date of passing of the order proposed to be reviewed and thereafter the proceedings for review can continue till finalization - The action for review taken after six months could be unsustainable - Particularly where no plausible explanation or justification is given for the delay warranting its relaxation or condonation.

ब. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 29(1) व 31 - पुनर्विलोकन - नियम 29 के अधीन शक्ति का प्रयोग करने वाले सक्षम प्राधिकारी को पुनर्विलोकन के लिये प्रस्तावित आदेश के पारित होने की तारीख से छः महीनों के भीतर मामले का पुनर्विलोकन करने का निर्णय लेना होगा

और तत्पश्चात् पुनर्विलोकन की कार्यवाहियाँ अंत तक जारी रह सकती हैं – पुनर्विलोकन के लिये छः माह बाद की गयी कार्यवाही अपोषणीय हो सकती है – विशिष्ट रूप से जहाँ विलम्ब में शिथिलता अथवा माफी देने के लिये विलम्ब का कोई व्यक्तिगत स्पष्टीकरण या न्यायोचित्य नहीं दिया गया हो।

Cases referred :

2001(2) MPLJ 690, 2007(2) MPLJ 273, 1984 SCC 106, 2003(2) MPLJ 146, (2005) 2 SCC 145, AIR 1952 SC 369, AIR 1954 SC 596, (1986) 4 SCC 447, (1964) 4 SCR 280, (1986) 4 SCC 447, (1998) 4 SCC 231, (1971) 1 SCC 85, (1992) 1 SCC 335, 1988(I) MPWN SN 113, (1991) 15 ATC 920.

R.N. Singh with Vipin Yadav, Arpan Pawar & Manish Nigam, for the petitioner

Vivek Agrawal, for the respondent Nos.1 & 2.

Sanjay K. Agrawal with Amit Seth, for the respondent No.3.

ORDER

RAJENDRA MENON, J. :-Challenging the orders – Annexure P/1 and P/2, by which promotion to the post of Assistant Commissioner Excise is granted to respondent No.3, superseding the petitioner and the order seeking suo motu review of a departmental proceeding closed against the petitioner, this writ petition has been filed.

2. Petitioner was initially appointed as a District Excise Officer on 1.9.1999. He claims to be a person belonging to the Scheduled Tribe community. In the year 2005, while petitioner was posted as District Excise Officer, Mandsaur a show-cause notice was issued to him on 5.11.2008, pointing out various irregularities in the matter of recovery of revenue. Petitioner is alleged to have filed reply denying the allegations. However, a charge-sheet was issued to the petitioner on 3.3.2006, to which the petitioner submitted his reply and pointed out his defence. Being satisfied with the reply submitted by the petitioner, the disciplinary authority exonerated the petitioner of all the charges and passed an order – Annexure P/4 on 11.4.2007, holding that the allegations levelled against the petitioner are not correct and, therefore, the proceedings be dropped. However, it was found that the predecessor of the petitioner one Shri Pratyush Kabra was responsible for certain irregularities and, therefore, vide order-dated 27.12.2007 – Annexure P/3, punishment was imposed upon Shri Kabra.

3. It is the case of the petitioner that while the departmental proceedings

were pending and just before he was exonerated of the charges on 11.4.2007, a DPC met on 7.4.2007 for considering the case of eligible persons for promotion on the post of Assistant Commissioner Excise. It is common ground that this DPC was infact a review DPC of an earlier DPC that was held for promotion to the said post. Be it as it may be, in the said review DPC due to pendency of the departmental proceedings sealed cover procedure was followed and the recommendations of the petitioner were kept in the sealed cover. However, inspite of the fact that petitioner was exonerated on 11.4.2007, the sealed cover was not opened in the case of the petitioner, instead by the impugned order-dated 18.4.2007 – Annexure P/1, respondent No.3 who was junior to the petitioner was promoted as Assistant Commissioner Excise. It is the case of the petitioner that once he was exonerated on 11.4.2007 and on 18.4.2007 when respondent No.3 was promoted and when no proceedings were pending, on the said date the sealed cover should have been opened and promotion granted to the petitioner. Accordingly, on the aforesaid consideration, challenge is made to the order-dated 18.4.2007 – Annexure P/1, granting promotion to respondent No.3. That apart, it is the case of the petitioner that when he represented against the supersession, when respondent No.3, who is junior to the petitioner as is evident from the Gradation List – Annexure P/5, was promoted, petitioner submitted representation on 15.5.2007 vide Annexure P/6. The Secretary in the Commercial Tax Department made certain queries with regard to the departmental enquiry of the petitioner vide Annexure P/7, on 25.7.2007. Respondent No.2 – Excise Commissioner furnished the information within two days vide Annexure P/8, on 27.7.2008, and it was pointed out that no departmental enquiry was pending and the petitioner has been exonerated. Thereafter, respondent No.1 again raised a query on 8.8.2007 and sought further details in the matter. These communications were followed by two more communications on 18.7.2007 and 5.10.2007 and finally all these were answered by respondent No.2 on 29.12.2007. Grievance of the petitioner is that even though with Annexure P/9 on 29.12.2007 it was already brought to the notice of the State Government that petitioner has been exonerated, but still when nothing was done petitioner filed a writ petition before the Indore Bench of this Court, being W.P.No.2745/2008(S), and this Court vide order-dated 13.5.2008 – Annexure P/10 directed the respondents to consider the representation of the petitioner for grant of promotion. Petitioner vide Annexure P/11 dated 18.8.2008, brought to the notice of the respondents the entire facts so also the order passed in the writ petition – Annexure P/10. It is the grievance of

the petitioner that instead of promoting him and granting him the benefit, by the impugned order-dated 16.12.2008 – Annexure P/12, State Government has decided to exercise the powers of suo motu revision conferred on it under section 29(1)(iii) of the M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 [hereinafter referred to as ‘Disciplinary Rules’] and by an order-dated 31.12.2008 ordered an enquiry under Rule 14, challenging this action, petitioner has filed this writ petition.

4. Shri R.N. Singh, learned Senior Advocate appearing for the petitioner, submitted that when the petitioner was exonerated on 11.4.2007 and when the promotion order was issued on 18.4.2007 vide Annexure P/1, then on the said date i.e., 18.4.2007, when nothing was pending against the petitioner, the sealed cover should have been opened and the recommendations implemented so far as the petitioner is concerned. It is argued by him that when the promotion was affected on 18.4.2007, petitioner was entitled for the benefit of opening the sealed cover and implementing its decision, as on the said date no disciplinary proceedings were pending against the petitioner. It was further argued by the learned Senior Advocate that the powers of review under Rule 29(1)(iii) exercised by the State Government is unsustainable. Referring to sub-clause (iii) of Rule 29(1) and the law laid down by two Division Benches of this Court, in the cases of *State of MP and others Vs. O.P. Gupta and another*, 2001(2) MPLJ 690, and *State of MP and others Vs. Brijesh Niboria*, 2007(2) MPLJ 273, learned Senior Advocate argued that the decision for review has to be taken by the State Government within six months and in this case as the decision to review is taken after a period of more than six months, the power exercised by the State Government is unsustainable. It was pointed out that the petitioner was exonerated on 11.4.2007 and the decision to review the said order was taken on 16.12.2008, which is beyond the period of six months from the date of exoneration and, therefore in the light of the law laid down by the Division Bench, in the cases of *O.P. Gupta* (supra) and *Brajesh Niboria* (supra), the entire action is unsustainable.

5. As an alternate submission, it was argued by Shri R.N. Singh, learned Senior Advocate, that even if for argument sake it is accepted that the State Government has power to condone the delay and exercise the powers of review beyond six months by virtue of the provisions of Rule 31 of the Disciplinary Rules, but as there is no reasonable and sufficient justification for the delay, it is argued by him that the power exercised is unsustainable. Learned

Senior Advocate pointed out that petitioner was exonerated vide Annexure P/4 on 11.4.2007 and initially when the petitioner submitted a representation on 15.5.2007 vide Annexure P/6, queries were called vide Annexure P/7 on 25.7.2007 by the State Government. This was replied to vide Annexure P/8 on 27.7.2007 and, therefore, on 27.7.2007 the State Government knew that the petitioner is exonerated. In spite there no decision was taken within a reasonable time. Thereafter further communications took place and finally on 29.12.2007 vide Annexure P/9, all the details sought for by the State Government were furnished. From 29.12.2007 the State Government kept quiet for a further period upto 16.12.2008 i.e.. for about one year and the decision for review was taken only on 16.12.2008. The reason for sleeping over the matter atleast from 29.12.2007 upto 16.12.2008 is not reasonably explained and, therefore, the action of the State Government is unsustainable.

6. It was finally argued by Shri R.N. Singh, learned Senior Advocate that the provisions of Rule 31 will not apply to a proceeding for review under Rule 29, because Rule 29(1) starts with a non obstante clause i.e... **'Notwithstanding anything contained in these rules'**. Accordingly, he argues that the provisions of Rule 31 will have no application to a proceeding under section 29 in view of the fact that the non obstante clause gives over-riding effect to Rule 29 over Rule 31 and by virtue of the over-riding provision conferred on the Rule by the non obstante clause, the power under section 31 cannot be exercised. In support of this contention he invites my attention to a judgment of the Supreme Court in the case of *Union of India and another Vs. G.M. Kokil and others*, 1984 (Supp) SCC 106, to contend that the power to condone the delay in exercising the power of review is not available to the State Government. Accordingly, on these counts Shri R.N. Singh, learned Senior Advocate, seeks for interference and quashing of the entire action of the State Government.

7. Shri Vivek Agrawal, learned counsel for the State, and Shri Sanjay Agrawal, learned counsel for respondent No.3, rebutted the aforesaid contentions. Learned counsel for State argued that the non obstante clause of Rule 29 does not come in the way of the State Government in exercising powers of review by condoning the delay in view of Rule 31. It was argued by him that the State Government has given reasonable justification for the delay and keeping in view the serious allegations against the petitioner, it is submitted by him that the action is justified and no interference is called for.

8. Shri Sanjay K. Agrawal, learned counsel for respondent No.3, argued that the non obstante clause of Rule 29 cannot be read in isolation, it has to be read in furtherance to the entire legislative scheme of the Disciplinary Rules and by referring to the Principles of Statutory Interpretation for advancing the cause of justice and applying the principle of harmonious interpretation to reconcile the conflict, if any, between the two statutory provisions, Shri Sanjay Agrawal argued that it has to be held in this case that inspite of the non obstante clause in Rule 29, the power under section 31 can be exercised by the State Government in a given case and by applying the harmonious construction, the situation can be reconciled. Further he points out that a Bench of this Court, in the case of *Ashok Jayant Vs. State of MP and others*, 2003(2) MPLJ 146, has already laid down the principle that the provisions of Rule 31 is applicable while considering the question of review under Rule 29 of the Disciplinary Rules and, therefore, in the light of the aforesaid settled legal principle Shri Agrawal submits that the contentions advanced by Shri R.N. Singh, learned Senior Advocate, cannot be accepted.

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

10. Before advertng to consider the rival contentions, it would be appropriate to take note of the statutory provisions involved in the matter i.e.. rule 29 and Rule 31 of the Disciplinary Rules. Rule 29, relevant for the present case, reads as under:

“29. (1) Notwithstanding any thing contained in these rules except Rule 11 –

- (i) the Governor, or
- (ii) the Head of a Department under the State Government, in the case of a Government servant serving in a department of office (not being the secretariat), under the control of such Head of a Department; or
- (iii) the appellate authority, within six months of date of the order proposed to be reviewed; or
- (iv) any other authority specified in this behalf by the Governor by a general or special order, and within such time as may be prescribed in such general or special order;

may at any time, either on his or its own motion or otherwise

call for the records of any inquiry and review any order made under these rules or under the rules repealed by Rule 34 from which an appeal is allowed, but from which no appeal has been preferred or from which no appeal is allowed, after consultation with the Commission where such consultation is necessary, and may –

- (a) confirm, modify or set aside the order; or
- (b) confirm, reduce, enhance or set aside the penalty imposed by the order, or impose any penalty where no penalty has been imposed; or
- (c) remit the case to the authority which made the order to or any other authority directing such authority to make such further inquiry as it may consider proper in the circumstances of the case; or
- (d) pass such other orders as it may deem it:”

Similarly, Rule 31 reads as under:

“31. Power to relax time-limit and to condone delay:- Save as otherwise expressly provided in these rules, the authority competent under these rules to make any order may, for good and sufficient reasons or if sufficient cause is shown, extend the time specified in these rules for anything required to be done under these rules or condone any delay.”

11. The first question warranting consideration is as to whether the non obstante clause in Rule 29 over-rides the provisions of Rule 31 and makes it non-applicable in cases of review under Rule 29. Rule 29 begins with non obstante clause, which reads as under:

“Notwithstanding any thing contained in these rules except Rule 11....”

12. It is a well settled principle of law that a non obstante clause is nothing but a legislative device employed to give over-riding effect to certain provisions, which may be contrary to certain other provisions that may be found either in the same enactment or any other enactment. The principle of law in this regard has been considered by the Supreme Court in the case of *G.M. Kokil* (supra) relied upon by Shri R.N. Singh, learned Senior Advocate. In the said case the question arose with regard to applicability of the Factories Act 1948 to certain

employees working in the Indian Security Press, Nasik. Section 59 of the Factories Act alongwith the rules framed therein contemplates a provision for payment of extra wages for over time. However, the aforesaid benefit was only available to certain class of employees who fell in the category of workmen or workers as defined in the Factories Act. Certain Supervisors and Executive Staff, who did not fall in the category of workers and who were not entitled to the benefit of overtime under the Factories Act claimed overtime on the ground that by virtue of Section 70, of the Bombay Shops and Establishment Act, 1948 and the non obstante clause contained therein, the Factories Act would become applicable to them. It was the case of the claimants therein that Section 70 contains a clause in its second part, which provided that the provisions of the Factories Act shall not, notwithstanding anything contained in that Act, apply to all persons employed in or in connection with the factory. It was argued that by virtue of this non obstante clause in Section 70 of the Bombay Shops and Establishment Act, the Factories Act, which was not applicable to the claimants would become applicable. The matter was considered by the Supreme Court and it was held in the aforesaid case that the non obstante clause is a legislative device which is employed to give over-riding effect to certain provisions over some contrary provisions that may be found either in the same Act or in some other enactment. It was finally held that the non obstante clause in Section 70 of the Bombay Shops and Establishment Act would give over riding effect and the provisions of the Factories Act would be applicable to the claimant. If the principle laid down by the Supreme Court in the case of *G.M. Kokil* (supra) is taken note of, it would be seen that by virtue of the non obstante clause contained in Rule 29(1) to the effect that **‘Notwithstanding anything contained in these Rules except Rule 11’**; it has to be held that except for the provisions of Rule 11, nothing contained in the Discipline Rules would apply in cases for review under Rule 29.

13. The aforesaid would be further clear and clarified if the principle laid down by the Supreme Court in the case of *Iridium India Telecom Limited Vs. Motorola Inc*, (2005) 2 SCC 145, are taken note of. In the aforesaid case the question was with regard to the provisions of the Bombay High Courts (Original Side) Rules 1959 and the effect of Order 8 Rule 1 CPC, as amended and the provisions of section 129 CPC. The power of the Bombay High Court to lay down its own rules and procedure for dealing with suits on the original side was protected by section 129 of the CPC. The question was as to whether this non obstante clause in section 129 CPC has over riding effect over the

provisions of Order 8 Rule 1 prescribing a time limit for filing of written statement introduced by the Amending Act to the CPC, in the year 2000. After taking note of the judgments rendered by the Supreme Court in the case of *G.M. Kokil* (supra) and various other cases, the principle is laid down by the Supreme Court, in paragraphs 34, 35 and 36 – in the following manner:-

“34. After noticing the observations made in *Aswini Kumar Ghosh*, AIR 1952 SC 369, and *Dominion of India v. Shrinbai A. Irani*, AIR 1954 SC 596, this Court in *Chandavarkar Sita Ratna Rao v. Ashalata S. Guram*, (1986) 4 SCC 447, observed thus, in the context of construction of a non obstante clause:

‘67. A clause beginning with the expression “notwithstanding anything contained in the Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract” is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non obstante clause. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment. See in this connection the observations of this Court in *South India Corporation (P) Ltd. v. Secretary, Board of Revenue, Trivandrum* (1964) 4 SCR 280.

68. It is well settled that the expression ‘notwithstanding’ is in contradistinction to the phrase ‘subject to’, the latter conveying the idea of a provision yielding place to another provision or other provisions to which it is made subject. This will be clarified in the instant case by comparison of sub-section (1) of Section 15 with sub-section (1) of

Section 15-A. We are therefore unable to accept, with respect, the view expressed by the Full Bench of the Bombay High Court as relied on by the learned Single Judge in the judgment under appeal."

35. Again in *Parayankandiyal Eravath Kanapraavan Kalliani Amma (Smt.) and Ors. v. K. Devi and Ors.* (1986) 4 SCC 447, this Court observed:

"77. Non obstante clause is sometimes appended to a section in the beginning, with a view to give the enacting part of the section, in case of conflict, an overriding effect over the provision or Act mentioned in that clause. It is equivalent to saying that in spite of the provisions or Act mentioned in the non obstante clause, the enactment following it will have its full operation or that the provision indicated in the non obstante clause will not be an impediment for the operation of the enactment. [See: *Union of India v. G.M. Kokil*; *Chandavarkar Sita Ratna Rao v. Ashalata S. Guram* (supra); *R.S. Raghunath v. State of Karnataka* (supra); *G.P. Singh's Principles of Statutory Interpretation*.]"

36. Reference was made to *A.G. Varadarajulu and Anr. v. State of Tamil Nadu and Ors.*, (1998) 4 SCC 231, at para 16. This judgment merely followed the observations made in *Aswini Kumar* (supra) and *Madhav Rao Scindia v. Union of India*, (1971) 1 SCC 85. There is no doubt that where the non obstante clause is widely worded, "a search has, therefore, to be made with a view to determining which provision answers the description and which does not". The historical development of the law suggests that the non obstante clause in Section 129 is intended to bypass the entire body of the Code so far as the rules made by the Chartered High Court for regulating the procedure on its Original Side are concerned.

(Emphasis supplied)

Thereafter, in paragraph 37, the principle of interpreting a statute and similar submissions as has been made by Shri Sanjay Agrawal in this case,

with regard to harmonious construction is taken note of in paragraph 37 and the principle laid down in the case of *G.M. Kokil* (supra) and other cases approved and it has been held as under:

"37. The observations of this Court in *R.S. Raghunath*, (1992) 1 SCC 335, in paragraphs 11 and 12 were pressed into service. These paragraphs merely reiterate and follow the observations made in *Aswini Kumar Ghosh* (supra), *The Dominion of India* (supra), *Union of India v. G.M. Kokil* (supra) as well as the observations made in *Chandavarkar Sita Ratna Rao* (supra). Finally, it is observed in Paragraph 12, in the words of Chinnapa Reddy, J:-

"33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

14. If the case in hand is examined in the light of the principles laid down by the Supreme Court, in the case of *G.M. Kokil* (supra) and the observations

reproduced hereinabove and made in the case of *Iridium India Telecom Ltd.* (supra), there is no doubt that the non obstante clause in Rule 29(1) will have over-riding effect over the provisions of Rule 31 and except for in cases falling under Rule 11, nothing in the Rule 31 will apply to a proceeding under Rule 29. To that effect the legal principle is crystal clear and there remains no iota of doubt.

15. There is another aspect of the matter as canvassed by Shri R.N. Singh, learned Senior Advocate, which has to be taken note of. Two Division Benches of this Court, in the cases of *O.P. Gupta* (supra) and *Brajesh Niboria* (supra), have considered the provisions of Rule 29 and after taking note of various provisions, including a judgment in the case of *State of MP Vs. Prahlad*, 1988 (1) MPWN SN-113, and a Full Bench judgment of the Central Administrative Tribunal in the case of *K.G. Mohanan Vs. General Manager, Telecommunication, Ernakulam and others*, (1991) 15 ATC 920, it has been held that the powers of review conferred in Rule 29(1) can be exercised by the competent authority by taking a decision to review the action within six months. It is held that the decision to review should only be taken within six months and further proceedings for completing the exercise of review can continue after the period of six months. That being so, the principle that emerges from the law laid down by the Division Bench is to the effect that the entire exercise of review is not to be completed and a final order passed within a period of six months. What is required under law is that within a period of six months from the date of passing of the order proposed to be review, the competent authority exercising powers under Rule 29 has to take a decision for reviewing the matter and thereafter the proceedings for review can continue till finalization. If the said principle is applied in the present case, it would be seen that the petitioner was exonerated on 11.4.2007 and the impugned action for review was taken on 29.12.2007 – Annexure P/9 i.e. ... beyond the period of six months as laid down by the Division Bench and, therefore, the action could be unsustainable.

16. While hearing the matter on 15.2.2010, this Court to consider this question had directed the State Government to file an affidavit and to indicate as to on which date the decision was taken to review and it is clear from the affidavit now filed that the decision was taken on 16.12.2008 vide Annexure P/2. That being so, the decision to review having been taken beyond six months the action is vitiated.

17. If the matter is taken note of in the light of alternate submissions also made by Shri R.N. Singh, learned Senior Advocate, I am of the considered view that the action of the State Government will have to be quashed. Even if it is assumed that the State Government has the power to proceed in the matter and exercise the powers of review conferred under Rule 29, by condoning the delay by applying the principles of Rule 31, then also Rule 31 contemplates that there should be 'good and sufficient' reason to show that the delay is liable to condoned and relaxed. In the present case, if the matter is examined in the light of this principle also, it would be seen that the order of exoneration was passed by the Disciplinary Authority on 11.4.2007 and after various communications made and explanation given on 29.12.2007 vide Annexure P/9, the entire position was explained by respondent No.2 to the State Government. The State Government from 29.12.2007 till passing of the impugned order on 16.12.2008 did not take any action. No plausible explanation or justification is given for the delay of about a year between 29.12.2007 to 16.12.2008. That being so, the delay in taking the action even beyond the period of six months is not properly and reasonably explained and there is no justification for this delay warranting its relaxation or condonation. On this count also, the action of the State Government is unsustainable.

18. Having so held and considered, at this point of time it would be appropriate to take note of the effect of the judgment rendered by Single Bench of this Court, in the case of *Ashok Jayant* (supra). It was argued by Shri Sanjay Agrawal, learned counsel for respondent No.3, that the question of law raised in this writ petition stands concluded by the judgment rendered in the case of *Ashok Jayant* (supra) and, therefore, nothing further survives for adjudication.

19. If the case of *Ashok Jayant* (supra) is taken note of and the facts analysed, it would be seen that Shri Ashok Jayant was a member of the District Level Vigilance and Monitoring Committee. Respondent No.4 in the said case was holding the post of Assistant Teacher/Superintendent in Adim Jati Harijan Kalyan Vibhag. Respondent No.4 was granted compassionate appointment on the basis of circular of the State Government dated 24.7.1980, because he was held to be a victimized and harassed backward class employee. Subsequently, it was found that appointment to respondent No.4 was granted incorrectly. Therefore, a charge-sheet was issued to him and a departmental enquiry was conducted under the M.P. Civil Services (Classification, Control and Appeal) Rules 1966 and vide order-dated 6.5.1999 he was removed

from service. He preferred an appeal and the Commissioner, Gwalior vide Annexure P/7 dated 30.12.1999 dismissed his appeal. The appeal was dismissed by the Commissioner on the ground that the State Government having already rejected his appeal on 6.5.1999, the Commissioner cannot entertain the appeal. Respondent No.4 challenged this action by filing an appeal under section 19 of the Administrative Tribunal's Act before MP State Administrative Tribunal in O.A.No.1750/2000 and simultaneously filed an application for review of the entire matter before the State Government within six months from the date of passing of the appellate order by the State Government on 12.11.1999 and by the Commissioner on 30.12.1999. This review application under Rule 29 of the Disciplinary Rules was allowed by the State Government and he was reinstated in service. Ashok Jayant filed a writ of quo warranto against respondent No.4 on the ground that he has no authority to hold office. It was while considering the case in this manner that this Court in paragraph 12 held that the power of review under Rule 29 read with Rule 31 has been exercised correctly by the State Government and Rule 31 empowers the appellate authority to review its earlier decision by relaxing the time limit.

20. Under such circumstances the question would be as to whether the findings recorded in paragraph 12 by a Bench of this Court, in the case of *Ashok Jayant* (supra) settles the principle correctly or the same warrants reconsideration or the matter can be decided again by this Court.

21. This Court is of the considered view that the principle laid down in the case of *Ashok Jayant* (supra) has to be held per incuriam and based on the facts and circumstances of that case and does not effect the present case at all for the following reasons:

- (i) In the case of *Ashok Jayant* (supra), the question involved was not as to whether powers of suo motu revision can be exercised by the appellate authority beyond the period of six months. That was a case where the competent authority had dismissed the appeal on 12.11.1999 and 30.12.1999 and within a period of six months the aggrieved delinquent employee himself had sought for a review before the competent authority under Rule 29 and it was decided after a period of more than six months vide order dated 4.9.2000. This was strictly in accordance to the principle laid down by a Division Bench of this Court in

the case of *O.P. Gupta* (supra) and it was in that context that the power to relax under Rule 31 was held applicable. The question that is involved in this writ petition was not considered in the case of *Ashok Jayant* (supra).

- (ii) That apart, after the judgment was rendered in the case of *Ashok Jayant* (supra), a Division Bench of this Court has clearly laid down the principle in the case of *Brajesh Niboria* (supra) and the earlier judgment of the Division Bench in the case of *O.P. Gupta* (supra) is also not referred to in the said case of *Ashok Jayant* (supra).
- (iii) The third reason is that, the principles of law, if any, laid down in the case of *Ashok Jayant* (supra) is without considering the law laid down with regard to applicability of the principle governing the interpretation of a non obstante clause and the judgments of the Supreme Court in this regard referred to in this judgment.
- (iv) In view of these circumstances, it has to be held that the observations made and the question as decided in case of *Ashok Jayant* (supra) has to be held to be per incuriam, based on the peculiar facts and circumstances of that case and will have no application as far as the present case is concerned. That being so, the contentions advanced by Shri Sanjay Agrawal and the State Government has to be rejected.

22. For the grounds and reasons as indicated hereinabove, this petition has to be allowed. Accordingly, respondents are directed to open the sealed cover of the petitioner and implement its decision and grant promotion to the petitioner to the post of Assistant Commissioner Excise, if he is found fit for promotion on the basis of the recommendations of the DPC. Even though petitioner has prayed for quashing the order of promotion – Annexure P/1 dated 18.4.2007, granted to respondent No.3, this Court directs the respondents to consider the case of the petitioner and to grant him promotion retrospectively with effect from the date it was granted to respondent No.3. In case additional posts are available, in such eventuality the promotion granted to respondent No.3 need not be disturbed. However, on grant of promotion petitioner should be kept above respondent No.3 in the Cadre of Assistant Commissioner Excise and all benefits granted to him with effect from the said

date. However, if this is not possible, State Government may either create a supernumerary post for adjustment of respondent No.3 and proceed without disturbing his promotion and ultimately if this is also not possible then the promotion of respondent No.3 be cancelled and in his place the promotion be granted to the petitioner.

23. As the initiation of departmental proceedings now by exercising power of review under Rule 29 is found to unsustainable, the order-dated 16.12.2008 – Annexure P/2, for review/revision of the order of exoneration dated 11.4.2007 – Annexure P/4, passed by the disciplinary authority is quashed and further the departmental enquiry initiated vide Annexure P/12 on 31.12.2008 is also quashed.

24. Petition stands allowed and stands disposed of.

Petition allowed.

I.L.R. [2011] M. P., 111

WRIT PETITION

Before Mr. Justice Rajendra Menon & Mr. Justice Sanjay Yadav

W.P. No.2099/2009(S) (Jabalpur) decided on 20 August, 2010

R.R. NIHARE & ors.

... Petitioners

Vs.

STATE OF M.P. & ors.

... Respondents

A. Service Law - Constitution, Article 226, Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jation Aur Anya Pichhade Vargon Ke Liye Arakshan) Adhiniyam, M.P. 1994, Section 2(b), Rajya Sahakari Bank Maryadit Employees (Terms of Employment and Working Conditions) Rules, M.P. 1976, Rules 15(b)(2) - Promotion subject to decision - Order of amendment in rules dated 06.03.1997 challenged and finally held ultra virus by the Supreme Court - During pendency of that writ petition, petitioners were promoted, with the direction that promotion shall be subject to decision of writ petition - Also Section 2(b) of Adhiniyam substituted w.e.f. 13.05.2002 with prospective effect - After decision of Supreme Court on 26.05.2009 petitioners were reverted to their substantive post - Held - Validity of order dated 06.03.1997 was examined in writ petition on the basis of un-amended provision and subsequent amendment had no bearing thereupon - Order reverting petitioners not illegal - Petition dismissed. (Paras 17 & 18)

क. सेवा विधि - संविधान, अनुच्छेद 226, लोक सेवा (अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्गों के लिये आरक्षण) अधिनियम, म.प्र. 1994, धारा 2(बी), राज्य सहकारी बैंक मर्यादित कर्मचारी (नियोजन के निबंधन और कार्य दशाये) नियम, म.प्र. 1976, नियम 15(बी)(2) - निर्णय की अध्यक्षीन पदोन्नति - नियमों में संशोधन के आदेश तारीख 06.03.1997 को चुनौती तथा अन्ततः उच्चतम न्यायालय द्वारा अधिकारातीत ठहराये गये - उस रिट याचिका के लम्बित रहने के दौरान, याचियों की पदोन्नति इस निदेश के साथ की गयी कि पदोन्नति रिट याचिका के निर्णय के अध्यक्षीन होगी - अधिनियम की धारा 2(बी) भी तारीख 13.05.2002 से भविष्यलक्षी प्रभाव के साथ प्रतिस्थापित - उच्चतम न्यायालय के निर्णय तारीख 26.05.2009 के बाद याचियों को उनके मूल पद पर लौटाया गया - अभिनिर्धारित - आदेश तारीख 06.03.1997 की विधिमान्यता रिट याचिका में असंशोधित उपबंध के आधार पर परीक्षित की गयी और पश्चातवर्ती संशोधन का उससे कोई संबंध नहीं था - याचियों को पूर्व पद पर लौटाने का आदेश अवैध नहीं - याचिका खारिज।

B. Maxim - Per incuriam - For a decision to be per incuriam, it must first be established that same is given in ignorance, forgetfulness or carelessness of some inconsistent statutory provisions, or some authority binding on Court - Judgement passed in Anand Beohar's case is not per incuriam. (Paras 17 & 18)

ख. सूत्र - अनवधानता के कारण - किसी निर्णय को अनवधानता के कारण होने के लिये प्रथमतः यह सिद्ध होना चाहिये कि वह कुछ असंगत कानूनी उपबंधों अथवा न्यायालय पर आबद्धकर किसी प्राधिकार की अनभिज्ञता, विस्मरणशीलता अथवा लापरवाही में दिया गया है - आनन्द ब्यौहार के मामले में पारित निर्णय अनवधानता के कारण नहीं है।

Cases referred :

(1988) 2 SCC 602, (1991) 4 SCC 139, AIR 2000 SC 1729.

Shobha Menon with M.P.S. Chuckal, for the petitioner.

Sheetal Dubey, for the respondent Nos.1 & 2.

R.N. Singh with Arpan Pawar, for the respondent No.3.

ORDER

The Order of the Court was delivered by **SANJAY YADAV, J. :-** This order shall lead to final disposal of W.P.No.2099/2009(S) and W.P.No.10017/2009.

2. The issue which crops up for consideration in both these writ petitions being similar, therefore were heard analogously and are decided by this common order.

3. In W.P.No.2099/2009(S) the petitioner seeks writ of mandamus directing the respondents to grant the benefit of reservation in the matter of promotion in accordance with law and for writ of prohibition restraining the respondents from taking any adverse action against the petitioner.

4. In W.P.No.10017/2009(s) the challenge is to respective orders passed on 26.5.2009; whereby the respondents cancelled with immediate effect the orders dated 14.7.1998 and 11.12.2001 consequent whereof the petitioners, who were respectively promoted as Divisional Accountant, Grade II, in Scale of Rs.4600-160-5560-190-6510-220-7610-250-8110 and as Inspection Officer Grade III, in scale of RS.6000-225-7800-250-9300 were reverted to the substantive post of Accountant.

5. Facts briefly are that, the petitioners are employees of the Madhya Pradesh Rajya Sahakari Bank, a body Corporate constituted under Madhya Pradesh Co-operative Societies Act, 1960 (hereinafter referred to as Act of 1960).

6. Service conditions of the petitioners are governed by the Rules, viz, M.P.Rajya Sahakari Bank Maryadit Employees (Terms of Employment and Working Conditions) Rules 1976 (hereinafter referred as Rules of 1976). These Rules of 1976 are framed by Registrar, Co-operative Societies in exercise of the powers conferred by Section 55 of the Act of 1960.

7. In the year 1997, Registrar Cooperative Societies on strength of the provisions in M.P.Lok Sewa (Anusuchit Jatiyon, Anusuchit Janjatiyon Aur Anya Picchade Vargon Ke Liye Arakshan) Adhiniyam, 1994 brought amendment in the Rules of 1976 by order dated 6.3.1997; whereby Rule 15(b) (2) in Chapter VI of the Rules of 1976 was amended by inserting following provisions:

“ The staff Sub-Committee shall decide the percentage of employee to be necessarily promoted from Scheduled Tribes and Scheduled Castes provided that a minimum percentage of the posts as may be ordered by the State Government from time to time shall be reserved for the candidates of Scheduled Tribes and Scheduled Castes”.

8. Constitutional validity of aforesaid amendment was questioned in W.P.No.1415/1997: *Anand Beohar and others V. State of M.P and others*. The said writ petition was decided on 11.3.2003; whereby, the order dated

6.3.1997 causing amendment in Rule 15(b) (2) of the Rules, 1976 was declared ultra vires.

9. The judgment in *Anand Beohar* (supra) was assailed before the Supreme Court in SLP (Civil (CC) 6768/2003: Civil Appeal No.2661/2004. Wherein, by interim order dated 12.9.2003 the operation of order date 11.3.2003 was stayed. However, later on, the said special leave petition was dismissed on merit on 22.2.2007.

10. That during pendency of writ petition i.e., W.P.No.1415/1997 two events took place, firstly, by order dated 29.9.1997 by way of interim relief it was directed that any promotion made during the pendency of the petition shall be subject to decision of petition. Consequent whereof, order dated 14.7.1998 was passed by the respondent employer promoting the petitioners as Divisional Accountant (Grade II) and thereafter by order dated 11.12.2001, the petitioners were further promoted as Inspection Officer (Grade III).

11. Secondly, the legislature substituted clause (b) section 2 of Adhiniyam 1994 by M.P. Act 10 of 2002 w.e.f 13.5.2002; whereby expression "establishment" took new definition as follows:

"(b) "Establishment means any office of the State Government of a local authority or statutory authority constituted under any Act of the State for the time being in force, or a University or a Company, Corporation or a Cooperative Society in which not less than fifty one percent of the paid up share capital is held by the State Government or the institutions receiving grant-in-aid or any cash grant from the State Government and includes a work charge or contingency paid establishments and such establishments in which casual appointments are made but does not include the establishments covered under Article 30 of the Constitution).

12. Prior the said amendment the expressions "establishment" was defined as"

"(b) "Establishment " means any office of the State Government or of a local authority or statutory authority constituted under any Act of the State for the time being in force, or a University or a Company, Corporation or a

Cooperative Society in which not less than fifty one percent of the paid up share capital is held by the State Government and includes a work charged or contingency paid establishment.”

13. Though the definition of “establishment” was substituted by M.P. Act 10 of 2002 w.e.f 13.5.2002, it was prospective in its application and not retrospective and therefore, had no bearing on the issue regarding validity of the amendment in Rule 15 (b) (2) of the Rules of 1976, which was tested on the anvil of the provision as it existed on 6.3.1997 in *Anand Beohar & others* (supra).

14. Though it is strenuously urged on behalf of the petitioners that, Division Bench in the case of *Anand Beohar* (Supra) while deciding it on 11.3.2003, ignored the amendment brought into effect in the definition of the expression “establishment” from 13.5.2002 and thus committed an error and therefore the judgment be treated as per in curiam.

15. Given facts of present case however does not lend any support to the submissions of the petitioner.

16. “Per in curiam”, as has been observed in plethora of cases “are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong” (to note few please see *A.R. Antulay V.R.S. Nayak*: (1988) 2 SCC 602 paragraph 42; *State of M.P. Synthetics and Chemicals Ltd.*: (1991) 4 SCC 139 paragraph 40; *Government of Andhra Pradesh & another V. B. Satyanarayana Rao (Dead) by L.Rs. & other*: AIR 2000 SC 1729 paragraph 8).

17. In *Anand Beohar*, the Court was called upon to examine the validity of the order dated 6.3.1997; whereby an amendment in Rule 15(b) (2) of the Rules of 1976 was effected, on the basis of the provisions of the Adhiniyam, 1994 as it exist when the said amendment was carried out. The definition of expression “establishment” which the petitioner now press in service came into existence w.e.f 13.5.2002 with no validating Act to protect the previous action which apparently was de hors the provisions then and rightly so. In other words with amendment in clause (b) of section 2 of the Act of 1994, the legislature did not make it effective from a retrospective date nor did it protect the past act; therefore, the validity of the order dated 6.3.1997 was examined on the basis of unamended provision and subsequent amendment

had no bearing thereupon. Thus when none of the orders viz, order dated 6.3.1997 and promotion orders dated 14.7.1998 and 11.12.2001 which admittedly were prior to the amended definition of the expression "establishment" (which was w.e.f 13.5.2002) and were not protected, by subsequent amendment we are of the considered opinion that judgment in Alok Beohar cannot be termed as per in curiam. Therefore, the contention of the petitioners that the said judgment deserves to be ignored is not sustainable and fails.

18. There is yet another way of looking at the issue. As observed, for a decision, to be per in curiam, it must first be established that the same is given in ignorance, forgetfulness or carelessness of some inconsistent statutory provisions or of some authority binding on the court. In *Anand Beohar* (Supra) the court was concerned with the order dated 6.3.1997 which ushered the amendment in Rule 15(b) (2) of the Rules of 1976 by introducing reservation by invoking provision of Adhiniyam, 1994. The validity of the amendment was required to and was in fact tested on the anvil of the definition of the expression "establishment" as it exist at the relevant point of time. The amendment of said expression w.e.f 13.5.2002 was not pressed in service and rightly so because the same was not effected from a retrospective date. Moreover, the cause of action having accrued prior to amendment, we do not perceive that a subsequent amendment when not made effective from a retrospective date was at all relevant in *Anand Beohar* (Supra).

19. The petitioners having thus failed to establish that the judgment in *Anand Beohar* (supra) being per incuriam and that their promotion which were by order dated 14.7.1998 and 11.12.2001 were subject to the decision in *Anand Beohar* (supra), are rightly been, in our considered opinion, set at naught by impugned order dated 26.5.2009.

20. However, we make it clear that since in the case of *Anand Beohar* (Supra) was confined to preamendment stage i.e. prior to 13.05.2002 and the orders which are subject matter of the impugned order dated 26.5.2009 were also pertaining to preamendment stage, the Registrar Cooperative Societies is at liberty to invoke his powers under section 55 of the Act of 1960 for the post-amendment period.

21. With these observation, the petitions are dismissed being sans substance. However no costs.

Petition dismissed.

LL.R. [2011] M. P., 117

WRIT PETITION

Before Mr. Justice S.K. Gangele

W.P. No.712/2010 (Gwalior) decided on 21 September, 2010

VIRENDRA TYAGI

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

Constitution, Article 226 - Writ of quo warranto - Can be issued by the Court when a person in a public office has been appointed in violation of statutory provisions - Availability of an alternative remedy is not a bar.

In the present case, the respondent No. 4 was disqualified to be elected as a Sarpanch of the Gram Panchayat on account of his conviction under Section 302 of IPC. The respondent No. 4 has been illegally holding the office of Sarpanch. (Para 15)

संविधान, अनुच्छेद 226 - अधिकार पृच्छा की रिट - न्यायालय द्वारा तब जारी की जा सकती है जब कोई व्यक्ति किसी लोक पद पर कानूनी उपबंधों के उल्लंघन में नियुक्त किया गया हो - वैकल्पिक उपचार की उपलब्धता वर्जन नहीं है।

Cases referred :

2009(1) MPJR 212, AIR 1999 SC 1723, AIR 1966 SC 828, 1995 JLJ 651, 1998(2) MPLJ 710, 1999(1) JLJ 200, (2009) 7 SCC 1.

D.S. Raghuvanshi, for the petitioner.

Vishal Mishra, G.A., for the respondent Nos.1 to 3/State.

D.K. Katare, for the respondent No.4.

ORDER

S.K. GANGELE, J. :-Heard.

The petitioner has filed this petition questioning the legality and validity of continuance of respondent No. 4 as a Sarpanch of Gram Panchayat Gaheli, Tahsil Mehgaon, District Bhind on account of disqualification to the post.

2. As per the petitioner, he is a voter of village Gaheli, Tahsil Mehgaon, District Bhind. An election to the post of Sarpanch of Gram Panchayat Gaheli was held in the year 2010 and the voting took place on 21st January, 2010. The respondent No. 4 contested the election to the post of Sarpanch, however, he has not disclosed the fact that he was convicted under Section 302 of IPC

and awarded a sentence of life imprisonment. It has further been stated that near about 24 cases were registered against the respondent No. 4 and without disclosing these facts, the respondent No. 4 contested the election and elected as a Sarpanch of Gram Panchayat Gaheli, Tahsil Mehgaon, District Bhind. The petitioner has further submitted that the respondent No. 4 lacks the qualification to be elected as a Sarpanch of the Gram Panchayat.

3. The respondent No. 4 in his return admitted the fact that he has been elected as a Sarpanch of Gram Panchayat Gaheli, Tahsil Mehgaon, District Bhind. However, the respondent No. 4 contended that the petition filed by the petitioner is not maintainable because there is a remedy available to the petitioner to file an election petition questioning the election.

4. The learned counsel for the petitioner submitted that respondent No. 4 lacks the qualification continuing as a Sarpanch of the Gram Panchayat under the provisions of Madhya Pradesh Panchayat Raj Adhiniyam, 1993 (hereinafter referred to as 'the Adhiniyam of 1993'), hence, a writ of quowarranto can be issued. In support of his contention, he has relied upon on the following judgments:

(i) 2009 (1) M.P.J.R., 212 (*Satya Prakash Agrawal vs. State of M.P. & Ors.*);

(ii) AIR 1999 SC 1723 (*K. Venkatachalam vs. A. Swamickan and another*);

(iii) AIR 1966 SC 828 (*Gadde Venkateswara Rao vs. Government of Andra Pradesh and others*);

5. Contrary to this, the learned counsel appearing for the respondent No. 4 raised a preliminary objection about the maintainability of the petition that there is a remedy of election petition available to the petitioner and an election petition is also pending in regard to legality of election of respondent No. 4. Hence, this petition is not maintainable. In support of the aforesaid contentions, he has relied upon the following judgments:

(i) 1995 J.L.J. 651 (*State Election Commissioner, M.P. vs. Ras Bihari Raghuwanshi and others*);

(ii) 1998 (2) M.P.L.J. 710 (*Bhushan Ramlal Kashyap vs. S.D.O Janjgir and others*); and

(iii) 1999 (1) J.L.J 200 (*Uday Singh vs. Himmat Singh and others*).

6. In the present case, the undisputed facts of the case are that the respondent No. 4 has been elected as a Sarpanch of the Gram Panchayat in an election held on 21st January, 2010. The respondent No. 4 was convicted and sentenced to life imprisonment by the Second Sessions Judge, Bindvid judgment dated 30/11/1998 in Sessions Trial Nos. 8/94 and 58/94 and his conviction has not been set aside by any Court. The respondent No. 4 was released from Jail after completion of jail sentence on 15/08/2009, copy of the certificate dated 06/02/2010 issued by the Deputy Jail Superintendent, Central Jail, Jabalpur to this effect has been filed by the petitioner. The petitioner has further submitted that the following criminal cases were registered against the respondent No. 4:

S.No.	Criminal Cases	Sections
1.	170/80	457, 380 IPC
2.	223/80	457, 380 IPC
3.	227/80	390 IPC
4.	230/80	454, 380 IPC
5.	231/80	25 Arms Act
6.	411/80	454, 380 IPC
7.	188/80	307, 34 IPC
8.	117/81	336 IPC
9.	288/81	457, 380 IPC
10.	262/82	147, 148, 149, 506-B of IPC
11.	448/82	380 IPC
12.	554/84	302, 307, 394 IPC
13.	236/83	224 IPC
14.	242/85	224 IPC
15.	88/83	364, 365, 386, 387, 401 IPC and 11, 13 of MPDVPA Act
16.	186/83	302, 24, 394 IPC and Section 11, 13 of MPDVPA Act
17.	237/85	380 IPC
18.	263/86	307 IPC, 25, 27 Arms Act
19.	99/87	294, 506B IPC

20.	148/87	341, 307, 34 IPC
21.	440/87	147, 506-B IPC
22.	0/87	110 Cr.P.C.
23.	499/89	392 IPC
24.	500/89	392 IPC
25.	36/90	392 IPC
26.	70/90	399, 400, 407 IPC
27.	211/92	307, 34 IPC
28.	203/97	224, 225, 120-B IPC

7. The State Government has framed rules namely the Madhya Pradesh Panchayat Nirvachan Niyam, 1995 in exercise of powers conferred by sub-section (1) of Section 95 read with Section 43 of the Madhya Pradesh Panchayat Raj Adhiniyam, 1993. Rule 31-A prescribes the eligibility for a candidate to be appointed on the post of Sarpanch. It is provided that a candidate shall submit a declaration in a prescribed form along with nomination paper including information about criminal cases pending/decided against him. The relevant provisions read as under:

"31-A Information of criminal record, properties, liabilities and educational qualifications etc. of candidates:

(1) Every candidate for the post of Panch shall submit a declaration in a form as prescribed by the State Election Commission along with nomination paper which shall include information about his educational qualification, criminal cases pending/decided, his/her assets and liabilities and that of his/her spouse and dependents, his/her number of living children and information about whether he/she is an encroacher on Government Land.

(2) Every candidate for the post of Sarpanch, member of Janpad Panchayat and Zila Panchayat shall submit an affidavit, in a form as prescribed by the State Election Commission along with nomination paper which shall include information about educational qualifications, criminal cases pending/decided, his/her assets and liabilities and that of his/her spouse and dependents, the number of his/her living children and whether he/she is an encroacher on Government

Land. The affidavit shall be sworn before competent Notary, Magistrate or Oath Commissioner.

(3) A copy of affidavit/declaration of candidates for the post of Panch, Sarpanch, Member of Janpad Panchayat and Zila Panchayat shall be exhibited on the notice board in the office of the Returning Officer. Its copy shall be made available to any citizen on demand on payment of prescribed fee."

8. Section 36 of the Adhiniyam of 1993 prescribes disqualification for being an office-bearer of Panchayat. The relevant portion of Section 36 read as under:

"36. Disqualification for being office bearer of Panchayat:

(1) No person shall be eligible to be an office-bearer of Panchayat who-

(a) has, either, before or after the commencement of this Act been convicted:

(i) of an offence under the Protection of Civil Rights Act, 1955 or under any law in connection with the use, consumption or sale of narcotics or any law corresponding thereto in force in any part of the State, unless a period of five years or such lesser period as the State Government may allow in any particular case has elapsed since his conviction; or

(ii) of any other offence and had been sentenced to imprisonment for not less than six months, unless a period of five years or such less period as the State Government may allow in any particular case has elapsed since his release."

9. As per the aforesaid Section 36 (a) (ii), a person shall be ineligible to be an office-bearer of the Panchayat, if he had been sentenced to imprisonment for less than six months. In the present case, the respondent No. 4 was sentenced and convicted for offence punishable under Section 302 of IPC and sentenced for life imprisonment. He has already undergone the aforesaid sentence. In such circumstances, the respondent No. 4 is disqualified to the post of Sarpanch. The respondent No. 4 has illegally suppressing the fact has been holding the post of Sarpanch, which is a public office.

10. The Hon'ble Supreme Court after considering the various judgments in

the case of (2009) 7 SCC 01 *N. Kannadasan vs. Ajoy Khose and others*, has held as under:

"129. The respondents herein filed the writ petitions inter alia for issuance of a writ of quo warranto. A writ of quo warranto can be issued when the holder of a public office has been appointed in violation of constitutional or statutory provisions.

130. Section 16 of the Act lays down the qualifications inter alia for appointment of the Chairman of the State Commission. Clause (a) of sub-section (1) of Section 16 provides that the candidate must be "is" or "has" been a Judge". The proviso appended thereto, however, mandates consultation by the State Government with the Chief Justice of the High Court concerned.

131. Concededly, judicial review for the purpose of issuance of writ of quo warranto in a case of this nature would lie:

(A) in the event the holder of a public office was not eligible for appointment.

(B) processual machinery relating to consultation was not fully complied.

The writ of quo warranto proceedings affords a judicial remedy by which any person who holds an independent substantive public office is called upon to show by what right he holds the same so that his title to it may be duly determined and in the event it is found that the holder has no title he would be directed to be removed from the said office by a judicial order. The proceedings not only give a weapon to control the executive from making appointments to public office against law but also tend to protect the public from being deprived of public office to which it has a right. It is indisputably a high prerogative writ which was reserved for the use of the Crown. The width and ambit of the writ, however, in the course of practice, have widened and it is permissible to pray for issuance of a writ in the nature of quo warranto.

132. *In Corpus Juris Secundum* [74 C.J.S. Quo Warranto 14], "Quo Warranto" is defined as under:

"Quo warranto, or a proceeding in the nature thereof, is a proper and appropriate remedy to test the right or title to an office, and to remove or oust an incumbent.

It is prosecuted by the State against a person who unlawfully usurps, intrudes, or holds a public office. The relator must establish that the office is being unlawfully held and exercised by the respondent, and the relator is entitled to the office".

133. In Law Lexicon by J.J.S. Wharton, Esq., 1987, "Quo Warranto" has been defined as under:

"QUO WARRANTO, a writ issuable out of the Queen's Bench, in the nature of a writ of right, for the Crown, against him who claims or usurps nature of a writ of right, for the Crown, against him who claims or usurps any office, franchise, or liberty, to enquire by what authority he supports his claim, in order to determine the right. It lies also in case of non-user, or long neglect of a franchise, or misuser or abuse of it; being a writ commanding the defendant to show by what warrant he exercises such a franchise having never had any grant of it, or having forfeited it by neglect or abuse.

134. Indisputably, a writ of quo warranto can be issued inter alia when the appointment is contrary to the statutory rules as has been held by this Court in *High Court of Gujarat v. Gujarat Kishan mazdoor Panchayat* and *R.K. Jain v. Union of India*. (See also *Mor Modern Coop. Transport Society Ltd. v. Govt of Haryana*.) In *Duyodhan Sahu (Dr.) v. Jitendra Kumar Mishra*, this Court has stated that it is not for the court to embark upon an investigation of its own to ascertain the qualification of the person concerned. (See also *Arun Singh v. State of Bihar*). We may further more notice that while examining if a person holds a public office under valid authority or not, the court is not concerned with technical grounds of delay or motive behind the challenge, since it is necessary to prevent continuance of usurpation of office or perpetuation of an illegality. [See *Kashinath G. Jalmi (Dr.) v. Speaker*]

135. Issuance of a writ of quo warranto is a discretionary remedy. Authority of a person to hold a high public office can

be questioned inter alia in the event an appointment is violative of any statutory provisions. There concededly exists a distinction in regard to issuance of a writ of quo warranto and issuance of a writ of certiorari. The scope and ambit of these two writs are different and distinct. Whereas a writ of quo warranto can be issued on a limited ground, the considerations for issuance of a writ of certiorari are wholly different."

11. It is clear from the aforesaid judgment of Hon'ble Supreme Court that a writ of quo warranto can be issued by the Court when a person in a public office has been appointed in violation of statutory provisions. In the present case, the respondent No. 4 was disqualified to be elected as a Sarpanch of the Gram Panchayat on account of his conviction under Section 302 of IPC. The respondent No. 4 has been illegally holding the office of Sarpanch. It is also well settled principle of law that for issuance of writ of quo warranto, availability of an alternative remedy is not a bar.

12. Consequently, the petition of the petitioner is allowed. By way of writ of quo warranto, the election of respondent No. 4 to the post of Sarpanch of the Gram Panchayat is hereby set aside. It is declared that respondent No. 4 is not entitled to hold the post of Sarpanch of the Gram Panchayat, Gaheli, Tehsil Mehgaon, District Bhind.

13. Looking to the facts of the case, the respondent No. 4 is also directed to pay a cost of Rs. 5000/- to the petitioner.

Petition allowed.

I.L.R. [2011] M. P., 124

WRIT PETITION

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

W.P. No.14233/2010 (PIL) (Jabalpur) decided on 6 October, 2010

KANHAIYALAL VISHWAKARMA

... Petitioner

Vs.

STATE OF M.P.

... Respondent

Constitution, Article 226 - Public Interest Litigation - Maintainability - Direction prayed for to take suitable action against the Tahsildar for alleged various financial irregularities - Held - The allegations made by the petitioner required to be enquired into in the appropriate forum by detailed enquiry and the petitioner has remedy,

at first instance, to agitate his grievance under the provisions of the M.P. Lokayukt and Up-Lokayukt Adhiniyam, 1981 - In such a case, the Public Interest Litigation should not be entertained - Petition dismissed. (Paras 8 & 9)

संविधान, अनुच्छेद 226 - लोकहित वाद - पोषणीयता - कथित विविध वित्तीय अनियमितताओं के लिए तहसीलदार के विरुद्ध उचित कार्यवाही किये जाने के निदेश के लिए प्रार्थना - अभिनिर्धारित - याची द्वारा लगाये गये आरोपों की विस्तृत जाँच उचित अधिकरण में करायी जानी अपेक्षित थी तथा याची के पास प्रथम बार में म.प्र. लोकायुक्त एवं उप-लोकायुक्त अधिनियम, 1981 के अन्तर्गत अपनी शिकायत प्रस्तुत करने का उपचार उपलब्ध है - ऐसे मामले में लोकहित वाद ग्रहण नहीं किया जाना चाहिये - याचिका खारिज।

Case referred :

(2003) 7 SCC 456.

S.K. Choubey, for the petitioner.

O R D E R

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

In the instant petition filed as Public Interest Litigation, the petitioner has alleged about various financial irregularities alleged to have been committed by the Tahsildar who is arrayed as respondent no.4 in the writ petition. The petitioner inter alia has prayed for a direction to respondents no.1 to 3 to take suitable action against the respondent no.4.

2. Learned counsel for the petitioner submitted that though complaints have been made against the respondent no.4 to various authorities, yet no action has been taken against him.

3. Having heard learned counsel for the petitioner, we are of the view that allegations made by the petitioner are required to be investigated before expressing any opinion on such allegations. In this regard it would be relevant to notice that the Government has created various authorities under the Special Act to investigate and also to suggest appropriate action against such public servant or officer who has misused or abused his position and as such is guilty of corruption. In this regard it would be relevant to take note of the provisions of the M.P. Lokayukt and Up-Lokayukt Adhiniyam, 1981, (hereinafter referred to as 'the Act') which is an Act to make provision for the appointment and functions of certain authorities for enquiry into the allegations against public

servants and for matters connected therewith. The Act was enacted with an object to constitute Lokayukt Organisation, which replaced the Vigilance Commission. Lokayukt Organisation is an organisation which is setup under an enactment made by the State legislature. Having received the statutory sanction, the Lokayukt Organisation is totally free from executive influence. The organisation functions as an instrument of control over the executive by the legislature as its annual reports are submitted to the Governor to be laid and discussed in the State Legislative assembly. Section 2(a) of the Act defines 'officer' which reads as under :

“2(a) ‘Officer’ means a person appointed to a public service or post in connection with the affairs of the State of Madhya Pradesh.”

Section 2(b) defines the expression ‘allegation’ which reads as under :

“2(b) ‘allegation’ in relation to a public servant means any affirmation that such public servant,-

- (i) has abused his position as such to obtain any gain or favour to himself or to any other person or to cause undue harm to any person;
- (ii) was actuated in the discharge of his functions as such public servant by improper or corrupt motives;
- (iii) is guilty of corruption; or
- (iv) is in possession of pecuniary resources or property disproportionate to his known source of income and such pecuniary resources or property is held by the public servant personally or by any member of his family or by some other person on his behalf.

Explanation – For the purpose of this sub-clause ‘family’ means husband, wife, sons and unmarried daughters living jointly with him”.

4. Section 9 of the Act deals with the provisions relating to complaints. Section 9 inter alia provides that every complaint involving an allegation shall be made in such form as may be prescribed and shall be accompanied by deposit of twenty-five rupees. In case a complaint is made against a public servant in relation to whom the Chief Minister is not the competent authority neither the deposit nor the affidavit shall be necessary. Section 10 of the Act

deals with the procedure in respect of enquiry. It empowers the Lokayukt or Up-Lokayukt to decide the procedure to be followed for making the enquiry and in so doing ensure that the principles of natural justice are satisfied. Section 11 of the Act makes the provision of the Evidence Act as well as the Code of Criminal Procedure applicable to the procedure of enquiry before the Lokayukt or Up-Lokayukt.

5. Section 12 of the Act provides that if after enquiry into the allegations the Lokayukt or an Up-Lokayukt is satisfied that such allegation is established, he shall by report in writing communicate his findings and recommendations along with the relevant document, materials and other evidence to the competent authority. The competent authority is under the obligation to examine the report and to initiate within three months of the date of receipt of the report, the action taken or proposed to be taken on the basis of the report.

6. Thus, from perusal of the provisions of the Act it is graphically clear that the Act has been enacted with the object to investigate cases of corruption in public life and provides for an inbuilt mechanism in respect of complaint with regard to corruption by an officer appointed to a public service or post in connection with affairs of the State of Madhya Pradesh. Since the provisions of the Act are a complete Code in itself and provide a remedy to an aggrieved person, he should at the first instance resort to the remedy provided to him under the Act. In such a case the public interest litigation should not be entertained.

7. The apex court in the case of *Guruvayoor Devaswom Managing Committee and another Vs. C.K.Rajan and others*, (2003)7 SCC 546, wherein the allegations were made regarding mismanagement of the affairs of the Guruvayoor temple by a devotee, found that the affairs of the temple are governed by the provisions of the Guruvayoor Devaswom Act, 1978, wherein forums have been created for ventilating the grievances of the affected persons. In that backdrop it was observed in para 60 of the judgment that ordinarily, therefore, such forums should be moved at the first instance. It was further held that the State Government should be asked to look into the grievances of the aggrieved devotees, both as *parens patriae* as also in discharge of its statutory duties.

8. In view of the aforesaid enunciation of law by the Supreme Court facts of the case in hand may be examined. The allegations made by the petitioner required to be enquired into in the appropriate forum, wherein detailed enquiry

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would be conducted as per provisions prescribed in the Act and an opportunity
of hearing would be afforded to the respondent no.5. Therefore, the petitioner
should avail the remedy provided under the Act.

9. For the aforementioned reasons, we are of the considered opinion that
the petitioner has remedy to agitate his grievance under the provisions of the
Act. We have no doubt that in the event the petitioner approaches the
appropriate authority, as indicated above, by making complaint as per the
prescribed procedure within a period of two weeks from the date of receipt
of certified copy of this order, the same would be examined and necessary
action would be taken in accordance with law expeditiously.

10. With the aforesaid observation, the writ petition stands dismissed.

Certified copy as per rules.

Petition dismissed.

I.L.R. [2011] M. P., 128

WRIT PETITION

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

W.P. No.4856/2006 (Jabalpur) decided on 13 October, 2010

S.P.M. EMPLOYEES UNION & ors. ... Petitioners

Vs.

UNION OF INDIA & ors. ... Respondents

**A. Sovereign Function - What amounts to - Whether transfer
of assets & liabilities of the nine industrial units of Government of
India, to the Security Printing and Minting Corporation of India Limited
(incorporated as fully owned Government Company w.e.f. 13.01.2006),
amounts to transfer of sovereign power and for such transfer sanction
of the Parliament is required - Held - No sovereign function has been
delegated or transferred to the Corporation, by such transfer - Further
there is no statutory provision which requires that approval of the
Parliament has to be obtained before transfer. (Paras 2, 16 & 17)**

क. प्रभुता सम्पन्न कार्य - की कोटि में क्या आता है - क्या भारत सरकार
की नौ औद्योगिक इकाईयों की आस्तियाँ और दायित्वों का सिक्यूरिटी प्रिंटिंग एण्ड
मिंटिंग कॉर्पोरेशन ऑफ इंडिया लिमिटेड (दिनांक 13.01.2006 से पूर्ण स्वामित्व की
सरकारी कम्पनी के रूप में निगमित) को हस्तान्तरण प्रभुता सम्पन्न शक्ति के
हस्तान्तरण की कोटि में आता है तथा ऐसे हस्तान्तरण के लिये संसद की मंजूरी
अपेक्षित है - अभिनिर्धारित - ऐसे हस्तान्तरण से निगम को कोई प्रभुता सम्पन्न

कार्य प्रत्यायोजित अथवा हस्तान्तरित नहीं किया गया है — इसके अतिरिक्त ऐसा कोई कानूनी उपबंध नहीं है जो यह अपेक्षित करता हो कि हस्तान्तरण से पूर्व संसद का अनुमोदन प्राप्त करना होगा।

B. Service Law - Transfer of staff to the Company - Office order / Memorandum dated 10.02.2006 issued by Central Government regarding transfer of staff of industrial units to the Company - Order/ Memorandum challenged on ground that service conditions of the employees have been altered to their detriment without affording any opportunity of hearing to them - Held - The memorandum provides that employees' remuneration, retirement benefits and other service conditions on absorption in the company shall not be in any manner inferior to existing one and their service condition in no manner would be altered to disadvantage of the employees, if they opt to serve in the Corporation - Further, the employees have been given the option either to opt for Government service or the services of the Corporation and majority of the employees have opted to serve in the Corporation which goes to show that their service conditions are in no way being altered to their disadvantage - Writ petition dismissed. (Para 22)

ख. सेवा विधि — कर्मचारियों का कम्पनी में स्थानान्तरण — केन्द्र सरकार द्वारा औद्योगिक इकाइयों के कर्मचारियों का कम्पनी में स्थानान्तरण करने के सम्बंध में कार्यालयीन आदेश/ज्ञापन दिनांक 10.02.2006 जारी किया गया — आदेश/ज्ञापन को इस आधार पर चुनौती दी गयी कि कर्मचारियों की सेवा शर्तें उन्हें सुनवाई का कोई अवसर दिये बिना उनके अहित में परिवर्तित कर दी गयीं — अभिनिर्धारित — ज्ञापन में उपबंधित है कि कम्पनी में संविलयन होने पर कर्मचारियों के पारिश्रमिक, सेवानिवृत्ति लाभ तथा अन्य सेवा शर्तें किसी भी प्रकार से मौजूदा से निम्न नहीं होंगे तथा यदि वे निगम में सेवा करने का चुनाव करते हैं तो उनकी सेवा शर्तें किसी भी प्रकार से कर्मचारियों के अहित में परिवर्तित नहीं की जायेंगी — इसके अतिरिक्त कर्मचारियों को या तो शासकीय सेवा का अथवा निगम की सेवाओं का चुनाव करने का विकल्प दिया गया तथा अधिकांश कर्मचारियों ने निगम में सेवा का चुनाव किया जिससे यह प्रकट होता है कि उनकी सेवा शर्तें किसी भी प्रकार से उनके अहित में परिवर्तित नहीं की जा रही हैं — रिट याचिका खारिज.

Cases referred :

(1998) 4 SCC 134, (2000) 8 SCC 61, (2003) 7 SCC 532, (2008) 2 SCC 672, AIR 1978 SC 597, (2008) 7 SCC 353, (1979) 2 SCC 409, (2005) 1 SCC 625, (1994) 6 SCC 205, (1996) 2 SCC 293, (2006) 10 SCC 66, AIR 2002 SC 350, AIR 2007 SC 1269, AIR 2008 SC 336, AIR 1960 SC 675, AIR 1996 SC 2898, AIR 1976 MP 164, (1883) 9 AC 61

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(HL), AIR 1994 SC 2663, AIR 1996 SC 2898, AIR 2000 SC 3116, (1998)
4 SCC 134, (1997) 6 SCC 573, (2000) 10 SCC 664, (2008) 9 SCC 242,
(2009) 4 SCC 753, AIR 2008 SC 336.

K.C. Ghildiyal, for the petitioners.

Shekhar Sharma, for the respondent No.1.

K.K.Trivedi, for the respondent No.2.

O R D E R

The Order of the Court was delivered by **S.R. ALAM, CHIEF JUSTICE.** :-As common questions of law and facts arise for consideration in the instant writ petitions and as agreed to by the learned counsel for the parties, the writ petitions were heard analogously and are being decided by this common order.

2. For the sake of convenience W.P.No.4856/2006 is taken as a leading case and its facts are being referred to. The petitioners of the said writ petition are registered trade unions of Security Paper Mills, Hoshangabad (hereinafter referred to as 'the SPM'). The SPM was set up in the year 1967 by the Union of India and has workforce of more than 2000 employees. It is under the administrative control of Ministry of Finance, Union of India. There are nine industrial units of the Government of India for minting coins and printing currency notes, namely, (i) India Government Mint, Noida, (ii) India Government Mint, Kolkata, (iii) India Government Mint, Hyderabad, (iv) India Government Mint, Mumbai, (v) Security Paper Mill, Hoshangabad, (vi) Bank Note Press, Dewas, (vii) Currency Note Press, Nashik, (viii) India Security Press, Nashik and (ix) Security Printing Press, Hyderabad. In pursuance of the decision of the Union Cabinet dated 2nd September, 2005, the Government of India decided to corporatise the functions of the aforesaid nine units. The petitioners immediately on coming to know about the proposal to transfer the units to the respondent no.2, issued a strike notice on 26.9.2005. Regional Labour Commissioner (C) issued a notice on 29.9.2005 to start conciliating proceedings. Thereafter, an office memorandum dated 10th February, 2006, (annexure P/1) was issued by which assets and liabilities of the aforesaid nine units were transferred to the respondent no.2, namely, Security Printing and Minting Corporation of India Limited which came into existence w.e.f. 13th January, 2006. The said Company has been incorporated as fully owned Government company with limited liability by shares under the Companies Act, 1956, with its registered and corporate office in New Delhi. By another office memorandum (annexure P/2) of even date existing and subsisting

contract and agreement of the said nine companies were transferred to the respondent no.2. Similarly, another office memorandum dated 10th February, 2006 (annexure P/3) was issued regarding transfer of staff of aforesaid nine units. The petitioners have filed the instant writ petition in which they have sought the relief of quashing of office memorandums dated 10th February, 2006 (contained in annexures P/1 to P/3).

3. On the other hand, the respondent no.1 in its return inter alia stated that Union Cabinet in its meeting held on 2nd September, 2005, has approved the proposal of corporatisation of security presses, mints, paper mill with the sole aim of improving efficiency and productivity by providing full operational autonomy. Joint Secretary (C & C) met all the representatives of the Union in the meeting held in I.G. Mint, Mumbai, on 16.9.2005 and also on 3.10.2005. After the meeting, the petitioners under an apprehension that their service conditions would be adversely affected approached the Regional Labour Commissioner, Bhopal/Chief Labour Commissioner, New Delhi, by giving a notice of strike intending to go on strike from 18.2.2005. Chief Labour Commissioner seized the matter into conciliation and held first meeting on 6.10.2005. Subsequent meetings were held on 11.11.2005, 21.12.2005 and 14.2.2006. The Government of India represented by the Joint Secretary, Ministry of Finance, Department of Economic Affairs, held meeting on 2.3.2006 and 3.3.2006 wherein it was decided to form a core group comprising Government, Management of the Company and representatives of recognized and registered Unions to draft a tri-partite agreement. Accordingly, a core committee was constituted by order dated 1.2.2006. After formation of core committee number of meetings were held and deliberations on various issues took place. As per draft agreement, employees of nine industrial units in question were required to exercise their option by 31st March, 2008, indicating their desire to continue as employees of the Government or the Corporation. It is further averred in the return that there would be no change in the service conditions of the employees. All the employees would be getting three advance increments with cumulative effect which would not be absorbed in future increments and lumpsum amount of Rs.35100/- would be paid and benefit of 6th Pay Commission would be given. A memorandum of settlement dated 5.2.2008 has also been prepared.

4. The respondent no.2 has filed the return inter alia reiterating the stand taken by the respondent no.1. It has been stated in the return that the petitioner no.2 representing the petitioner no.1, is a member of the core committee.

Petitioners no.3, 4 and 5 are not in the core committee as per the decision taken in the meeting held on 2nd and 3rd March, 2006, to the effect that where employees are already represented by recognized unions in respect of any unit, representatives of the registered unions would not be included in the core committee. It has further been submitted that there would be no change in the service conditions to the detriment of the workmen. It has further been contended that petitioners have not brought any material on record to show that policy decision taken by the Cabinet is in violation of any statutory provision or the provisions of the Constitution of India.

5. We have heard learned counsel for the parties at length.

6. Shri P.S.Nair, learned senior counsel and Shri K.C.Ghildiyal, learned counsel for the petitioners have contended that the aforesaid nine establishments of the Central Government are established in exercise of sovereign function of the Union of India. The establishment carrying on sovereign functions cannot be transferred to corporation which is an independent entity. In support of the aforesaid proposition reference has been made to the decisions of the Supreme Court in the cases of *S.K.Mathur and others Vs. Union of India and others*, (1998)4 SCC 134, *Agriculture Produce Market Committee Vs. Ashok Harikuni and another*, (2000)8 SCC 61 and judgment dated 18.9.2007 of Allahabad High Court in *Public Sector Employees Cooperative Housing Society Ltd. Vs. State of U.P.* It has further been submitted that transfer of an undertaking must have the sanction of Parliament. For this proposition reliance has been placed on the decision of Supreme Court in *Centre for Public Interest Litigation Vs. Union of India and another*, (2003)7 SCC 532.

7. It is also urged by the learned counsel for the petitioners that orders of the Central Government dated 10th February, 2006, are bereft of reasons. The action of the respondent no.1 in transferring the assets and liabilities of nine industrial units to the respondent no.2 amounts to violation of fundamental rights of the employees. The order passed by the Central Government dated 10th February, 2006, suffers from the vice of non-application of mind. It has further been contended that policy decision is not beyond the realm of judicial review. In this connection reference has been made to the decision of the Supreme Court in *D.D.A. Vs. Joint Action Committee, allottee of SFS Flats*, (2008)2 SCC 672. It has further been contended that impugned action has been taken in flagrant violation of the principles of natural justice inasmuch

as no opportunity of hearing was given to the employees who were affected by the decision. Reliance has been placed on the decision of the Supreme Court in *Maneka Gandhi Vs. Union of India*, AIR 1978 SC 597. It has also been contended that employees had a legitimate expectation that they would continue to serve the Government till they attain the age of superannuation. However, their legitimate expectation has been stifled in an arbitrary, unjust and unfair manner. Reliance has been placed on the decision of the Supreme Court in *Tamil Nadu Electricity Board and another Vs. Status Spinning Mills Limited and another*, (2008)7 SCC 353, *Motilal Padampat Sugar Mill Co. Ltd. Vs. State of U.P.*, (1979)2 SCC 409, *Olga Tellis Vs. BMC*, AIR 1986 SC 180 and *Bannari Amman Sugars Limited Vs. CTO*, (2005)1 SCC 625. It has further been contended that procedure adopted for corporatisation of nine units is not in accordance with law and while taking decision of corporatisation, welfare and service conditions of the employees have been taken care of inasmuch as service conditions of the employees have not been altered to their detriment. Respondents have not placed any material on record so as to justify the decision for corporatisation.

8. It has further been argued that transfer of employees on deputation to a corporation without their consent is legally not permissible and such a contract is violative of Section 23 of the Contract Act. The impugned action is violative of the provisions of Article 14 and 16 of the Constitution of India.

9. In sum and substance the contention made on behalf of the petitioners are that the functions which are being carried out by the nine units being of sovereign nature cannot be transferred to the respondent no.2 which is a corporation and has its separate entity in law. The decision for the corporation is arbitrary and suffers from the vice of non-application of mind and the service conditions of the members of the petitioners Union cannot be altered unilaterally without affording an opportunity of hearing.

10. On the other hand, Shri Shekhar Sharma, learned counsel for the Union of India submitted that decision has been taken by the Union Cabinet for corporatisation of the security presses, mints and paper mill with the sole object of improving the efficiency and productivity by providing full autonomy. It has further been contended that Government has not delegated any sovereign function. Government shall retain the functions of policy formulation regarding design and security features of and coins, administrative control of the company and issues relating to counterfeiting. Learned counsel has drawn our attention

to the statement of object and reasons of amendment incorporated in the Coinage Act, 1906, by way of amending Act No.33 of 1985 to contend that Section 6 of the Coinage Act was enacted to enable the Central Government to import coins from foreign countries. Thus, the statement of object and reasons of amending Act No.33 of 1985 clearly shows that function of minting the coins is not the sovereign function. Learned counsel while referring to the written statement filed before the Chief Labour Commissioner in conciliation proceeding has submitted that decision for corporatisation was taken after considering various recommendations and the reports. In support of his submissions learned counsel placed reliance on the decisions of the Supreme Court in *N.Nagendra Rao and Co. v. State of A.P.*, (1994) 6 SCC 205, *Chief Conservator of Forests and Another, etc. v. Jagannath Maruti Kondhare, etc.*, (1996) 2 SCC 293 and *All India ITDC Workers' Union Vs. ITDC*, (2006) 10 SCC 66.

11. Shri K.K. Trivedi, learned counsel for respondent No.2 has submitted that respondent No.2 – Corporation is fully owned by the Government of India and there is no intention of privatising the units through corporatisation. It has further been submitted that sovereign function of design, security features, production and issuing etc., of coins currency and other security documents has been retained by the Government of India and the respondent No.2 would function within the policy parameters as decided by the Government of India for the purpose of minting and printing of coins, currency and other security documents. It has further been submitted that service conditions of all the employees have been protected and there would be no change in the service conditions to their detriment. It is also submitted that the employees would be deemed to be on deputation in Corporation for a period of two years within which they can opt to be an employee of the Corporation. If an employee desires to continue in Government service he is at liberty to do so and would be absorbed in other Government department as per existing rules and regulations. Before formation of the Corporation the recognized employees' unions were taken into confidence. It has further been submitted that in Security Paper Mill, Hoshangabad, out of 1236 employees as many as 1172 employees have exercised the option in favour of the Corporation and 59 employees have opted to continue in the Government. In case of Bank Note Press, out of 2109 employees, 1202 have exercised their option in favour of Corporation and 901 employees have opted to continue in Government. It has further been submitted that allegation made by the petitioners that employees were

threatened to exercise their option is misconceived and baseless. It has further been submitted that the decision to corporatise nine industrial units is a policy decision and does not call for any interference by this Court in exercise of power under Article 226 of the Constitution of India. In support of his submissions learned counsel has placed reliance on the decisions of the Supreme Court in *Balco employees Union v. Union of India*, AIR 2002 SC 350, *Prasar Bharti v. Amarjeet Singh and Others*, AIR 2007 SC 1269 and *BCPP Mazdoor Sangh and Others v. NTPC*, AIR 2008 SC 336.

12: We have considered the submissions made on both sides. Looking to the submissions made on behalf of the parties and in the facts and circumstances of the case, in our view following issues arise for consideration:

- (i) what is a sovereign function
- (ii) whether sovereign function in the instant case is being transferred by the respondent No.1 to the respondent No.2
- (iii) whether for transfer of nine industrial units to the respondent No.2, sanction of parliament is required;
- (iv) whether orders dated 10.2.2006 passed by the Central Government are bereft of reasons and suffer from the vice of non-application of mind and are arbitrary and mala fide
- (v) whether service conditions of the employees have been altered to their detriment without affording any opportunity of hearing to them.

We shall proceed to deal with the issues in seriatim.

13. The expression 'sovereign power' has been defined in Black's Law Dictionary, 6th Edition, to mean the power in a State to which none other is superior or equal and which includes all the specific powers necessary to accomplish legitimate ends and purposes of the Government. The apex Court in *Corporation of the City of Nagpur vs. Employees*, AIR 1960 SC 675 while dealing with the question whether and to what extent activities of Corporation come within the definition of 'industry' and whether Corporation can be said to exercise regal functions observed that those functions which are primary and inalienable of a constitutional Government, can be held to be sovereign functions of the State. In paragraph 11 of the judgment their Lordships observed as under:

"11. Before considering the positive aspects of the

*definition, what is not an industry may be considered. However wide the definition of "industry" may be, it cannot include the regal or sovereign functions of State. This is the agreed basis of the arguments at the Bar, though the learned counsel differed on the ambit of such functions. While the learned counsel for the Corporation would like to enlarge the scope of these functions so as to comprehend all the welfare activities of a modern State, the learned counsel for the respondents would seek to confine them to what are aptly termed "the primary and inalienable functions of a constitutional Government". It is said that in a modern State the sovereign power extends to all the statutory functions of the State except to the business of trading and industrial transactions undertaken by it in its quasi-private personality. Sustenance for this contention is sought to be drawn from Holland's Jurisprudence, wherein the learned author divides the general heading "Public Law" into four sub-heads and under the sub-head "Administrative Law" he deals with a variety of topics including welfare and social activities of a State. The treatment of the subject "Public Law" by Holland and other authors, in our view, has no relevancy in appreciating the scope of the concept of regal powers which have acquired a definite connotation. Lord Watson, in *Richard Coomber v. Justices of the County of Berks* 5 describes the functions such as administration of justice, maintenance of order and repression of crime, as among the primary and inalienable functions of a constitutional Government. Isaacs, J., in his dissenting judgment in *Federated State School Teachers' Association of Australia v. State of Victoria* 6 concisely states thus at p. 585:*

"Regal functions are inescapable and inalienable. Such are the legislative power, the administration of laws, the exercise of the judicial power. Non-regal functions may be assumed by means of the legislative power. But when they are assumed the State acts simply as a huge corporation, with its legislation as the charter. Its action under the legislation, so far as it is not regal execution of the law is

merely analogous to that of a private company similarly authorised."

These words clearly mark out the ambit of the regal functions as distinguished from the other powers of a State. It could not have been, therefore, in the contemplation of the legislature to bring in the regal functions of the State within the definition of industry and thus confer jurisdiction on Industrial Courts to decide disputes in respect thereof. We, therefore, exclude the regal functions of a State from the definition of industry.

The above view was again endorsed by the apex Court in *Chief Conservator of Forests and another, etc. etc. vs. Jagannath Maruti Kondhare, etc. etc.*, AIR 1996 SC 2898.

14. A Division Bench of this Court in *The 'Ad Hoc' Committee, the Indian Insurance Company Association Pool, Bombay vs. Smt. Radhabai*, AIR 1976 MP 164 while considering the question of liability of the State in respect of the tortuous acts of the servants of the State where the plea of immunity based on employment referable to sovereign functions is raised observed in paragraph 12 by relying on *Corporation of the City of Nagpur vs. Employees* (supra) and an Australian judgment reported in (1883) 9 AC 61 (HL) [*Coomber vs. Justice of Berks*] held that traditional sovereign functions are the making of laws, the administration of justice, the maintenance of order, repression of crime, carrying on war, the making of treaties of peace and other consequential functions. Therefore, it can safely be held that those functions which are inalienable cannot be parted with by the State and all its sovereign functions.

15. In case of *N.Nagendra Rao and Co. v. State of A.P.*, AIR 1994 SC 2663, the Supreme Court held that distinction between the sovereign and non-sovereign powers were neither relevant either before or after the Constitution came into force. It was further held that the old and archaic concept of sovereignty does not now survive. Sovereignty now vests in the people. It was further held that in the modern sense distinction between sovereign and non-sovereign does not exist. It all depends on the nature of power and manner of its exercise. One of the tests which has been laid down by the Supreme Court in the aforesaid case to determine whether the legislative or executive function is sovereign in nature is whether the State is answerable

for its actions in the Court of Law. For instance, such as defence of the country, raising armed forces and maintaining it, making peace or war and power to acquire and retain territory are the functions which are indicative of sovereignty and are political in nature, therefore, they are not amenable to the jurisdiction of ordinary civil Courts. It has further been held that in welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, like educational, commercial, social, economic, political and even martial. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. Similar view was reiterated by the Supreme Court in *Chief Conservator of Forests and Another, etc. v. Jagannath Maruti Kondhare, etc.*, AIR 1996 SC 2898. In case of *Agriculture Produce Marketing Committee v. Ashok Harikuni and another*, AIR 2000 SC 3116, it was observed by the Supreme Court that sovereign function in the new sense may have very wide ramification but essentially sovereign functions are primary inalienable functions which only the State could exercise. Thus, from the exposition of law made by the apex court it could be held that though various functions of the State may have ramifications of 'sovereignty' but they all cannot be construed as primary inalienable functions. Broadly it is taxation, eminent domain and police power which cover its field. It may cover its legislative functions, administration of law, eminent domain, maintenance of law and order, internal and external security, grant of pardon. So, the dichotomy between sovereign and non-sovereign function could be found by finding which of the functions of the State could be undertaken by any private person or body. The one which could be undertaken cannot be sovereign function. In a given case even in subject on which the State has the monopoly may also be non-sovereign in nature. Mere dealing in subject of monopoly of the State would not make any such enterprise sovereign in nature.

16. In the backdrop of the aforesaid well settled legal principles, we may now examine whether sovereign function in the instant case is being transferred by the respondent No.1 to the respondent No.2. From perusal of Office memorandum dated 10.2.2006 it is clear that Management, control, operations and maintenance of production, printing, manufacturing of security papers, coins and medallions, currency and bank notes, stamps, non-judicial stamp papers, etc. have been transferred to the respondent No.2 Company with effect from 10th February, 2006. However, the Government has retained the

functions of policy formulation regarding design, and security features of currency and coins, administration control of the company, issues relating to counterfeiting etc. Perusal of paragraph 3 of office memorandum dated 10th February, 2006, further reveals that the respondent No.2 company will carry out the duties and responsibilities regarding production, supply and all issues pertaining to currency, coins, security documents, etc. in accordance with the rules and such other directions as may be given by the Central Government from time to time. Thus, if the test evolved by the Supreme Court is applied to the facts of the case at hand, then the inevitable conclusion is that production, printing, manufacturing of security papers, coins and medallions, currency and bank notes, stamps and non-judicial stamp papers cannot be held to be sovereign function as the State is answerable for its actions in respect of aforesaid matters in the Court of Law. Thus, for the aforementioned reasons, we hold that no sovereign function has been delegated to the respondent No.2. Reliance placed by learned counsel for petitioners in the case of *S.K. Mathur v. Union of India*, (1998) 4 SCC 134 to contend that printing of bank note is a sovereign function, is of no assistance to the petitioners. A careful reading of the aforesaid decision reveals that the Supreme Court has neither recorded a finding that printing of bank notes is a sovereign function nor the same is the ratio decidendi of the case. We may also refer to the provisions of the Coinage Act, 1906. The statement of object and reasons appended to the amending Act No.33 of 1985 reveals that section 6 was amended with a view to enable the Central Government to import coins from foreign countries. Section 6(2) of the Act empowers the Central Government to authorize the coining in like manner as it provided in that sub-section, of coins by any person, including Government of any foreign country, beyond the limits of India and to import such coins issued under its authority under that sub-section provided that it is necessary and expedient in the public interest so to do. Thus, our conclusion to the effect that sovereign function has not been delegated to the respondent No.2 also finds support from the provisions of the Coinage Act, 1906.

17. We may now advert to the third issue, namely, whether for transfer of nine industrial units to the respondent No.2, sanction of parliament is required. At the cost of repetition, we may state here that by office memorandum dated 10th February, 2006, only management, control, operations and maintenance of production, printing, manufacturing of security papers, coins and medallions, currency and bank notes, stamps, non-judicial stamp papers, etc. have been transferred to the respondent No.2 company with effect from 10th February,

2006. The Government has retained the functions of policy formulation regarding design and security features of currency and coins, administration, control of the company, issues relating to counterfeiting etc. Perusal of paragraph 3 of office memorandum dated 10th February, 2006, further reveals that The respondent No.2 company will carry out the duties and responsibilities regarding production, supply and all issues pertaining to currency, coins, security documents, etc. in accordance with the rules and such other directions as may be given by the Central Government from time to time. The respondent No.2 is a company owned by the Government of India and is a Government Company within the meaning of Section 617 of the Companies Act, 1956. Thus, parts of functions of aforesaid nine industrial units have been delegated to a Government company with a view to improve efficiency and productivity. Learned counsel for the petitioners failed to point out any statutory provision which requires the Central Government to obtain the sanction of the Parliament before transferring certain functions of nine industrial units to the respondent No.2. Reliance placed by the learned counsel for petitioners on the decision of the Supreme Court in *Centre for Public Interest Litigation* (supra) is of no assistance, as in the facts of that case the Supreme Court disapproved the method adopted by the Government in exercise of executive powers to disinvest Hindustan Petroleum Corporation Ltd. and Bharat Petroleum Corporation Ltd. without repealing or amending the law. As stated supra, in the instant case there is no statutory provision which requires that approval of the Parliament has to be obtained before transfer of certain functions of the nine industrial units to the respondent No.2.

18. Now, we may examine the next issue, i.e, whether the orders dated 10.2.2006 passed by the Central Government are bereft of reasons and suffer from the vice of non-application of mind and are arbitrary and mala fide. As is perceptible from the return filed on behalf of respondent No.1, the Union Cabinet in its meeting held on 2nd December, 2005, has approved the corporatisation of nine industrial units with the sole intention of improving efficiency and productivity by providing full autonomy. Joint Secretary (C & C) met representatives of all the unions in a meeting which was held in IG Mint, Mumbai, on 16.9.2005 and on 3.10.2005 by the Government. Thereafter, a core committee was also constituted consisting the representatives of the Government, Management of the companies and representatives of the recognized unions of the units of SPM vide order dated 17th March, 2006. From perusal of the written statement filed by the Government of India in

conciliation proceedings we find that salient features of the proposed corporatisation were informed to various registered and recognized unions of all the nine units and they were requested to submit specific comments about implementation of the cabinet decision. The subject was discussed at the level of each unit as well as at the level of Ministry on different occasions. Though during the discussions, corporatisation of the units was opposed by the unions, however, no substantial points were raised by them regarding implementation framework of the corporatisation. The decision to corporatise the nine industrial units was taken for improving productivity, costs and other related issues, the decision has been arrived at by the Cabinet after considering various earlier recommendations mentioned in the report of 5th Central Pay Commission, Economic Reform Commission, IFCI etc.

19. Thus, from the facts narrated supra, it is apparent that decision taken by the Cabinet to corporatise the nine industrial units is a well considered decision which has been taken after due deliberation. Therefore, the decision can neither be termed as arbitrary or mala fide nor can be said to suffer from the vice of non-application of mind. The scope of judicial review while examining the policy decision is well settled. While examining the policy, the Court has a duty to see that while taking a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution. In other words, the power of judicial review can be exercised only if the policy is shown to be contrary to the constitutional or statutory provisions, or is patently arbitrary or vitiated by mala fide. The apex Court in *Kanhaiya Lal Sethia vs. Union of India*, (1997) 6 SCC 573 while considering the scope or interference of judicial review in the matter of policy-decision observed that unless the policy so formulated either violates the mandate of the Constitution or any statutory provision or is otherwise actuated by mala fides, the same cannot be interfered with. Similar view has been taken by the Supreme Court in *Narmada Bachao Andolan v. Union of India*, (2000) 10 SCC 664, *Union of India v. Pushpa Rani and Others*, (2008) 9 SCC 242, and *Dilip Kumar Garg v. State of U.P. and others*, (2009) 4 SCC 753. In *Delhi Development Authority, N.D. & Anr Vs. Joint Action Committee, Allottee of SFS Flats & Ors.* (supra) it has been observed in paragraph 60 of the judgment that broadly, a policy decision is subject to judicial review on the grounds, viz. (i) if it is unconstitutional; (ii) if it is de hors the provision of the Act and the Regulations; (iii) if the delegate has acted beyond its power of delegation; and (iv) if the executive policy is contrary to the statutory or a larger policy.

20. The apex Court in *Balco Employees Union (Regd.)* (supra) in paragraph 45 observed that it is neither within the domain of the Courts nor within the scope of judicial review to embark upon the enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. The Courts, therefore, will not strike down a policy at the behest of a petitioner merely because other or different policy would have been fairer or wiser or more scientific or more logical. Their Lordships further observed that the workers of the companies have also to accept the decision of the employer which is taken bona fide and honestly and if the same is not contrary to law. We are, therefore, of the view that the workers who are the members of the petitioners' Employees' Union or Association have to accept the decision of the employer which is taken bona fide. In the instant case the decision to corporatise the nine industrial units and handover certain functions to the respondent No.2 while retaining the overall control cannot be held to be without any basis or reason nor the same could be said to be arbitrary or mala fide. The reason for corporatisation is rational and logical and, therefore, the same is neither arbitrary nor violative of any constitutional or statutory provisions or against the public policy. On the contrary, as stated above, the same being a well considered decision and bereft of vice of non-application of mind, cannot be held to be arbitrary or mala fide.

21. We may now come to the next issue, namely, whether service conditions of the employees have been altered to their detriment without affording any opportunity of hearing to them. In *H.L. Trehan and Others v. Union of India and Others*, (1989) 1 SCC 714 it has been held by the Supreme Court that there can be no deprivation or curtailment of any existing right, advantage or benefit enjoyed by government servant without complying the rules of natural justice. Similar view has been expressed in *B.C.P. P. Mazdoor Sangh v. NTPC*, AIR 2008 SC 336.

22. In the backdrop of the aforesaid well settled legal position, facts of the instant case may be examined. From perusal of office memorandum dated 10th February, 2006 it is clear that initially all the employees of the nine industrial units would be on deemed deputation to the company on existing terms and condition for the period of two years within which they will exercise their option for absorption in the company or redeployment through personnel and training. The aforesaid office memorandum in unequivocal terms provide that employees' remuneration, retirement benefits and other service conditions on absorption in the company shall not be in any manner inferior to existing

one. The memorandum further provides that pay-scale, salary and allowances, medical facilities, leave, etc. will continue to be governed by existing rules, regulations and orders till such time they are absorbed in the company and the relevant rules are framed by the company. However, none of the abovementioned benefits to the employees would be less beneficial to what they were currently enjoying. The employees who do not opt for absorption will be referred to re-training and redeployment division of Department of Personnel and Training for redeployment. Thus, the employees have been given the option either to opt for Government service or the services of the Corporation. The memorandum in unequivocal terms provides that service conditions in no manner would be altered to disadvantage of the employees if they opt to serve in the Corporation. Thus, for aforesaid reasons we hold that the service conditions of the employees have not been altered to their disadvantage. Our conclusion is fortified by the fact that out of 1236 employees of the Security Paper Mill, Hoshangabad, 1172 employees have exercised the option in favour of the Corporation and only 59 employees have opted to continue in the Government. Similarly, in the case of Bank Note Press out of 2109 employees, 1202 have exercised their option in favour of the Corporation and 901 employees have opted to continue in the Government. Thus, majority of the employees have opted to serve in the Corporation which goes to show that their service conditions are in no way being altered to their disadvantage.

23. So far as the contention of the petitioners that decision to corporatise the units has been taken in violation of principles of natural justice is concerned, as has been stated supra, Joint Secretary (C & C) in the meeting held in IG Mint, Mumbai, on 16.9.2005 and on 3.10.2005 met the representatives of the unions. Thereafter, the subsequent meetings were held on 2.3.2006 and 3.3.2006 wherein it was decided to form a core group comprising representatives of the Government, management of the company and recognized and registered unions, to draft a tri-partite agreement. Accordingly, a core committee was constituted vide order dated 17.2.2006, after formation of the core committee numbers of meetings were held and deliberation on various issues took place. Thus, from the facts stated supra it is apparent that opportunity of hearing was afforded to the recognized and registered unions. At this stage, we may refer to the decision rendered in *BALCO employees' Union* (supra) wherein the Supreme Court held that even though the workers may have interest in the manner in which the company is conducting the business inasmuch as its policy decision may have impact on workers' rights,

144 Shambhu Pd. Sharma Vs. Smt. Pushpa Badonya(DB) I.L.R.[2011]M.P., nevertheless it is an incidence of service of an employee to accept a decision of the employer which has been honestly taken and which is not contrary to law. Even a Government servant having the protection of not only Articles 14 and 16 of the Constitution but also of Article 311 has no absolute right to remain in service. It has further been held that in taking of policy decision in economic matters at length principles of natural justice have no role to play. In the instant case, the meeting as well as negotiation was held with the recognized and registered trade unions and, therefore, it cannot be said that the decision to corporatise the nine units has been taken against the principles of natural justice. For another reason, no fault can be found with the decision, as employees have been given the option either to remain in Government service or to serve in Corporation and their service conditions are not being altered to their disadvantage. Therefore, challenge to the decision on this ground also must fail.

24. Thus, for aforementioned reasons, we do not find any merit in the writ petitions. The same deserve to and are hereby dismissed. However, there shall be no order as to costs.

Petition dismissed.

I.L.R. [2011] M. P., 144

WRIT PETITION

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

W.P. No.14874/2010 (Jabalpur) decided on 22 October, 2010

SHAMBHU PRASAD SHARMA & ors.

... Petitioners

Vs.

SMT. PUSHPA BADONYA & anr.

... Respondents

Evidence Act (1 of 1872), Section 65 - Secondary evidence of Will

- Defendant after filing application under Order 11 Rule 12 CPC and getting admitted the fact of execution of Will by plaintiffs, sought permission to give secondary evidence - Held - Once the petitioners/ plaintiffs have admitted that there was a Will (which has been misplaced) and also a mutation proceeding in the Municipal Corporation on the basis of the copy of will, it is just and proper to allow the respondents/defendants to produce the secondary evidence of the original Will.

साक्ष्य अधिनियम (1872 का 1), धारा 65 - वसीयत का द्वितीयक साक्ष्य - प्रतिवादी ने सि.प्र.सं. के आदेश 11 नियम 12 के अन्तर्गत आवेदन फाइल करने और

वादियों द्वारा वसीयत के निष्पादन का तथ्य स्वीकार कर लेने के बाद, द्वितीयक साक्ष्य देने की अनुज्ञा चाही - अभिनिर्धारित - जब एक बार याचियों/वादियों ने स्वीकार कर लिया है कि एक वसीयत थी (जो खो गयी है) और वसीयत की प्रतिलिपि के आधार पर नगरपालिक निगम में नामांतरण कार्यवाही भी हुई थी, तब यह न्यायसंगत और उचित है कि प्रत्यर्थियों/प्रतिवादियों को मूल वसीयत का द्वितीयक साक्ष्य पेश करने की अनुमति दी जाए।

Cases referred :

AIR 1917 PC 197.

Sanjay K. Agrawal, for the petitioners.

ORDER

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

This petition, under Article 227 of the Constitution, is directed against the order dated 5.10.2010, Annexure P7, passed in Civil Suit No.46-A/2010 by the Second Additional District Judge to the Court of Seventh Additional District Judge (Fast Track Court), Sagar, whereby he has permitted the respondents to give secondary evidence relating to document will dated 30.10.1991.

2. The petitioners have filed a civil suit for declaration and permanent injunction against the respondents in respect of suit property marked in the plaint map with blue colour. The suit property is situated at Gandhi Chowk Ward, Sagar. According to the petitioners, the suit property belonged to their father Pandit Purushottam Lal Sharma which they inherited after his death on 14.11.1991. The respondents in their written statement have denied the claim of petitioners over the suit property. The respondents have also pleaded that Pandit Purushottam Lal Sharma had executed a will dated 30.10.1991 by which he bequeathed the suit property to his daughter Meera Sharma (sister of petitioners) and on the basis of that will the name of Meera Sharma has also been mutated in the record of Municipal Corporation.

3. On 7.9.2010 the respondents filed an application under Order 11 Rule 12 of the Code of Civil Procedure, 1908 seeking direction against the petitioners to produce the will dated 30.10.1991 contending that it is in their possession and the document is necessary for the just and proper decision of the suit. The petitioners, in reply on affidavit, admitted that Pandit Purushottam Lal Sharma did execute a will dated 30.10.1991 in their favour and Meera Sharma but it has been misplaced and they are not in possession of the same. On this reply the respondents filed an

146 Shambhu Pd. Sharma Vs. Smt. Pushpa Badonya(DB) I.L.R.[2011]M.P., application under section 65 of the Indian Evidence Act, 1872 seeking permission to give secondary evidence relating to will dated 30.10.1991. The respondents have obtained a copy of will dated 30.10.1991 which was produced by Meera Sharma before the Municipal Corporation for mutation of her name under the provisions of Right to Information Act, 2005. The petitioners objected to the prayer on the ground that in the absence of original will, a copy issued to them allegedly from the copy of will cannot be accepted as secondary evidence. The trial court, by the impugned order, has permitted the respondents to give secondary evidence of the existence of will dated 30.10.1991.

4. The learned counsel for petitioners, relying upon the decision of Supreme Court in *Smt. J. Yashoda v. Smt. Shobha Rani* AIR 2007 SC 1721 has argued that the impugned order deserves to be quashed as conditions enumerated in section 65 of the Evidence Act for giving secondary evidence are not satisfied.

5. We disagree with the submission made by the learned counsel for petitioners. Once the petitioners have admitted that there was a will and also a mutation proceeding in the Municipal Corporation on the basis of the copy of will, it is just and proper to allow the respondents to produce the secondary evidence of the original will. The best secondary evidence will be a copy of will kept in the record of Municipal Corporation which may be called by the trial court. In the fact situation of the case, there will be a presumption that the copy of will kept in the municipal record was made from the original by mechanical process or made from or compared with the original. Further, the copy of will supplied to the respondents by the Municipal Corporation from its record may be retained to prove the will as secondary evidence. Our this view also finds support from the decision of Privy Council in *Rai Bhaiya vs. Beni Mahto* (AIR 1917 P.C. 197) wherein Lord Parker writing the order for the Bench has held that where the original document is lost another document consisting of an official register, is admissible as evidence of the contents.

6. The decision of Supreme Court in *Smt. J. Yashoda* (Supra) does not help the petitioners because in that case permission to give secondary evidence was refused as conditions in section 65 (a) of the Evidence Act were held to be not satisfied whereas in the present case the petitioners after notice have declined to produce the will on the ground that it has been lost.

7. We find no merit in the petition. It is accordingly dismissed summarily.

Petition dismissed.

I.L.R. [2011] M. P., 147

WRIT PETITION

Before Mr. Justice Rajendra Menon

W.P. No.15616/2010(S) (Jabalpur) decided on 29 October, 2010

HIND KHADAN MAZDOOR FEDERATION

... Petitioner

Vs.

COAL INDIA LTD. & ors.

... Respondents

Constitution, Article 226, Payment of Wages Act, 1936, Sections 9(2) & 15 - Writ Petition - Challenging the orders proposing to make recovery of salary for the period, employees of the petitioners' union remained on strike and a further proposal to recover 8 days salary - Held - Petitioners have a efficacious statutory remedy available - No case is made out for interference - That apart enquiry into certain factual aspects of the matter are to be determined and Labour Court can deal in the matter more properly - Petition dismissed. (Paras 1 & 8)

संविधान, अनुच्छेद 226, मजदूरी संदाय अधिनियम, 1936, धाराएँ 9(2) व 15 – रिट याचिका – अवधि, जिस दौरान याची संघ के कर्मचारी हड़ताल पर रहे, के वेतन की वसूली करने के लिए प्रस्तावित आदेश और 8 दिनों के वेतन की वसूली के एक और प्रस्ताव को चुनौती देकर – अभिनिर्धारित – याचियों के पास प्रभावी कानूनी उपचार उपलब्ध है – हस्तक्षेप के लिए कोई मामला नहीं बनता – इसके अलावा मामले के कतिपय तथ्यात्मक पहलुओं पर जांच कर निर्धारण करना है और श्रम न्यायालय मामले को भली प्रकार निपटा सकता है – याचिका खारिज।

Cases referred :

1998(1) LLJ 884, 2002(1) LLJ 438, 1997 MPLSR 265, (2005) 8 SCC 264, (2006) 6 AIR SCW 5782, (2006) 5 SCC 469.

H.K. Upadhyay, for the petitioner.

ORDER

RAJENDRA MENON, J. :-Petitioner a registered trade union has filed this writ petition challenging the orders dated 20/10/10 and 19/10/10 issued by the respondents proposing to make recovery of salary for the period employees of the petitioners' union remained on strike and, the further proposal to recover 8 days salary by virtue of the powers conferred on the respondents under Section 9 (2) of the Payments of Wages Act, 1936.

2. Inter alia contending that the Payments of the Wages Act, 1936 does not apply on the members of the petitioner's union as they are drawing salary

148 Hind Khadan Mazdoor Federation Vs. Coal India Ltd. I.L.R.[2011]M.P., more than Rs. 10,000/- (Rs. Ten Thousand only) and further contending that the deduction of salary is illegal, petitioner seeks interference into the matter.

3. As the proposed action for recovery is in accordance with the provisions contemplated under Section 9(2) of the Payment of Wages Act on the ground that the deduction is illegal and contrary to the provisions of Payment of Wages Act and as it is the case of the petitioner's union that various members are drawing salary beyond the limit stipulated and, therefore, the Payment of Wages Act is not applicable, the petitioners have a remedy to challenge the aforesaid action by resorting to the remedy available under Section 15 of the Payment of Wages Act and, thereafter, to the remedy by filing of appeal under Section 17. As a statutory remedy for challenging the impugned action is available under the Payment of Wages Act itself, when this Court posed the question to the learned counsel as to why the petition be not dismissed. Learned counsel placing reliance on a decision of the Bombay High Court in the case of *Panther Power Kamgar Sanghatana and others Vs. Jhalani Y. C. and others*, 1998 (1) L. L. J. 884 contends that the writ petition is maintainable. Further, reliance is placed on a judgment of the Andhra Pradesh High Court in the case of *Tyre Retreading Shop Committee, Hyderabad Vs. A.P.S.R.T.C., Hyderabad and others* reported in 2002 (1) L. L. J. 438. Attention is also invited to an order passed by the Division Bench of this Court in the case of *Chhatisgarh Khadan Karkhana Mazdoor Union, Bilaspur Vs. Union of India and others*, 1997 M. P. L. S. R. 265 to contend that when the recovery itself is illegal, interference can be made by this Court directly in a writ petition.

4. Having heard learned counsel for the petitioner and on consideration of the facts that have come on record, I am of the considered view that the principle laid down by a Division Bench of this Court in the case of *Chhatisgarh Khadan Karkhan Mazdoor Union, Bilaspur* (supra) will not apply as that was a case where the question of availability of alternating remedy is not decided. It was a case where the Union was granted liberty to show cause to the notice and take all the defence. The question involved in the present writ petition is as to whether interference can be made in this writ petition when the statute itself provides for a remedy under the Payment of Wages Act. If an illegal deduction is made contrary to the provisions of Section 15, the section itself contemplates a remedy to challenge the action before the competent authority and in the State of Madhya Pradesh, the Labour Courts have been notified as the competent authorities for exercising powers under

Section 15 of the Payment of Wages Act. Thereafter, against the order passed by the Labour Court, petitioners have a further remedy by way of filing a further appeal to the Industrial Court which is the notified appellate authority under Section 17. The Supreme Court in various cases has laid down the principle that when the statute itself contemplates a detailed remedy for redressal of the grievance, interference by exercising the extra ordinary jurisdiction of the High Court is not warranted.

5. Supreme Court in the case of *U. P. State Spinning Co. Ltd. Vs. R. S. Pandey and another*, (2005)8 SCC 264 has considered the question of interference in a writ petition under Article 226 of the Constitution when alternate remedy is available and the matter has been considered in para 11 in the following manner:

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

6. Thereafter, again in the case of *Star Paper Mills Ltd. Vs. State of U. P. and others*, (2006)6 AIR SCW 5782, the matter is so considered in para 5 onwards :-

5. The issues relating to entertaining writ petitions when alternative remedy is available, were examined by this Court in several cases and recently in *State of Himachal Pradesh and others Vs. M/s Gujarat Ambuja Cement Ltd. and another* (2005)6 SCC 499 .

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

7. Constitution Benches of this Court in *K. S. Rashid and Sons Vs. Income Tax Investigation Commission and others* (AIR 1954 SC 207) ; *Sangram Singh Vs. Election Tribunal, Kotah and others* (AIR 1955 SC 425) ; *Union of India Vs. T. R. Varma* (AIR 1957 SC 882) ; *State of U. P. and others Vs. Mohammad Nooh* (AIR 1958 SC 86) ; and *M/s K. S. Venkataraman and Co. (P) Ltd. Vs. State of Madras* (AIR 1966 SC 1089) , held that Article 226 of the Constitution confers on all the High Courts a very wide power in the matter of issuing writs. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted.

8. Another Constitution Bench of this Court in *State of Madhya Pradesh and another Vs. Bhailal Bhai etc. etc.* (AIR 1964 SC 1006) held that the remedy provided in a writ jurisdiction is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny

defence legitimately open in such actions. The power to give relief under Article 226 of the Constitution is a discretionary power. Similar view has been reiterated in *N. T. Veluswami Thevar Vs. G. Raja Nainar and others* (AIR 1959 SC 422) ; *Municipal Council, Khurai and another Vs. Kamal Kumar and another* (A. I. R. 1965 SC 1321) ; *Siliguri Municipality and others Vs. Amalendu Das and others* (AIR 1984 SC 653) ; *S. T. Muthusami Vs. K. Natarajan and others* (AIR 1988 SC 616) ; *R. S. R. T. C. and another Vs. Krishna Kant and others* (AIR 1995 SC 1715) ; *Kerala State Electricity Board and another Vs. Kurien E. Kalathil and others* (AIR 2000 SC 2573) ; *A. Venkatasubbiah Naidu Vs. S. Chellappan and others* (2000(7) SCC 695) ; and *L. L. Sudhakar Reddy and others Vs. State of Andhra Pradesh and others* (2001 (6) SCC 634) ; *Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha and another Vs. State of Maharashtra and others* (2001(8) SCC 509) ; *Pratap Singh and another Vs. State of Haryana* (2002 (7) SCC 484) and *G. K. N. Driveshafts (India) Ltd. Vs. Income Tax Officer and others* (2003 (1) SCC 72) .

7. Finally, in the case of *A. P. Foods Vs. S. Samuel and others*, (2006) 5 SCC 469 the following principles are laid down by the Supreme Court :

“6. In a catena of decisions it has been held that a writ petition under Article 226 of the Constitution of India, 1950 (in short 'the Constitution') should not be entertained when the statutory remedy is available under the Act, unless exceptional circumstances are made out.

7. In *U.P. State Bridge Corporation Ltd. and Ors. v. U.P.Rajya Setu Nigam S. Karamchari Sangh* (2004 (4) SCC 268), it was held that when the dispute relates to enforcement of a right or obligation under the statute and specific remedy is, therefore, provided under the statute, the High Court should not deviate from the general view and interfere under Article 226 except when a very strong case is made out for making a departure. The person who insists upon such remedy can avail of the process as provided under the statute. To same effect

are the decisions in *Premier Automobiles Ltd. v. Kamlekar Shantarum Wadke* (1976 (1) SCC 496), *Rajasthan SRTC v. Krishna Kant* (1995 (5) SCC 75), *Chandrakant Tukaram Nikam v. Municipal Corporation of Ahmedabad and Anr.* (2002) (2) SCC 542) and *Scooters India and Ors. v. Vijai V. Eldred* (1998 (6) SCC 549).

8. In *Rajasthan SRTC case* (Supra) it was observed as follows:

"[A] speedy, inexpensive and effective forum for resolution of disputes arising between workmen and their employers. The idea has been to ensure that the workmen do not get caught in the labyrinth of civil courts with their layers upon layers of appeals and revisions and the elaborate procedural laws, which the workmen can ill afford. The procedure followed by civil courts, it was thought, would not facilitate a prompt and effective disposal of these disputes. As against this, the courts and tribunals created by the Industrial Disputes Act are not shackled by these procedural laws nor is their award subject to any appeals or revisions. Because of their informality, the workmen and their representatives can themselves prosecute or defend their cases. These forums are empowered to grant such relief as they think just and appropriate. They can even substitute the punishment in many cases. They can make and re-make the contracts, settlement, wage structures and what not. Their awards are no doubt amenable to jurisdiction of the High Court under Article 226 as also to the jurisdiction of this Court under Article 32, but they are extraordinary remedies subject to several self-imposed constraints. It is, therefore, always in the interest of the workmen that disputes concerning them are adjudicated in the forums created by the Act and not in a civil court. That is the entire policy underlying the vast array of enactments concerning workmen. This legislative policy and intendment should necessarily weigh with the courts in interpreting these enactments and the disputes arising under them".

9. In *Basant Kumar Sarkar and Ors. v. Eagle Rolling Mills Ltd. and Ors.* (1964 (6) SCR 913) the Constitution Bench of this Court observed as follows:

"It is true that the powers conferred on the High Courts under Art. 226 are very wide, but it is not suggested by Mr. Chatterjee that even these powers can take in within their sweep industrial disputes of the kind which this contention seeks to raise. Therefore, without expressing any opinion on the merits of the contention, we would confirm the finding of the High Court that the proper remedy which is available to the appellants to ventilate their grievances in respect of the said notices and circulars is to take recourse to Section 10 of the Industrial Disputes Act, or seek relief, if possible, under Sections 74 and 75 of the Act."

10. The inevitable conclusion, therefore, is that both learned Single Judge and the Division Bench have failed to consider the basic issues. In the normal course we would have left it to the respondent to avail appropriate remedy under the Act.

11. The above aspects were highlighted in *Hindustan Steel Works Construction Ltd. and Anr. v. Hindustan Steel Works Construction Ltd. Employees Union* (2005 (6) SCC 725).

12. A bare reading of Section 22 of the Act makes the position clear that where the dispute arises between an employer and employees with respect to the bonus payable under the Act or with respect to the application of the Act in public sector then such dispute shall be deemed to be an industrial dispute within the meaning of ID Act.

13. As disputed questions of fact were involved, and alternative remedy is available under the ID Act, the High Court should not have entertained the writ petition, and should have directed the writ-petitioners to avail the statutory remedy."

8. Keeping in view the aforesaid principle laid down by the Supreme Court and considering the fact that petitioners have a efficacious statutory remedy available, merely because under certain circumstances, the Bombay High Court and the Andhra Pradesh High Court have interfered in the matter in the cases relied upon by Shri Upadhyay, no case is made out for interference.

9. That apart for the purpose of adjudicating the dispute in question, enquiry into certain factual aspects of the matter, with regard to particulars of the employees from whom the deduction is effected, the working conditions of

the employees, the salary etc are to be determined and as this warrants enquiry into factual aspects of the matter, the Labour Court can deal in the matter more properly in a proceeding U/s 15 of the Payment of Wages Act.

10. Considering the totality of the circumstances and the principles as detailed hereinabove, the petition is accordingly dismissed.

Petition dismissed.

I.L.R. [2011] M. P., 154

WRIT PETITION

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

W.P. No. 2431/2004 (Jabalpur) decided on 9 November, 2010

AMBIKA PRASAD & ors.

... Petitioners

Vs.

SHRI RAM SHIROMANI @

CHANDRIKA PRASAD DWIVEDI & anr.

... Respondents

Court Fees Act (7 of 1870), Section 7(iv)(c) - Ad valorem Court fees - Where the executant of the sale deed wants it to be annulled, he has to seek cancellation of that deed for which ad valorem court fee on the consideration stated in the sale deed is payable.

Plaintiff No.1 was admittedly an executant of the sale deed sought to be declared as void. The sale deed also bears his thumb impression and the sale consideration is clearly mentioned therein. The plaintiffs in their suit for declaration have prayed that the sale deed be declared as void by alleging that it was executed by playing fraud and misrepresentation. The relief claimed implies a relief for cancellation of sale deed because plaintiff no.1 (now dead) was an executant of the same. The sale deed, in our considered opinion, is voidable as the apparent state of affairs is a real state of affairs and the plaintiffs, who have alleged otherwise, are obliged to prove it as void. The plaintiffs, therefore, have to pay ad-valorem court-fee on the consideration stated in the sale deed. (Para 9, 11)

न्यायालय फीस अधिनियम (1870 का 7), धारा 7(iv)(सी) - मूल्यानुसार न्यायालय फीस - जब विक्रय विलेख का निष्पादक इसे निष्प्रभावी कराना चाहता है तब उसे उस विलेख को रद्द करवाना होगा जिसके लिये विक्रय विलेख में उल्लिखित प्रतिफल पर मूल्यानुसार न्यायालय फीस देय है।

Cases referred :

W.P. No.14679/2006 (Sunil Radhelia Vs. Awadh Narayan) (F.B.), 2010 AIR SCW 3308, (2002) 9 SCC 28.

A.K.Choubey, for the petitioners.

Harvinder Singh, for the respondent No.1.

ORDER

The Order of the Court was delivered by **AJIT SINGH, J.** :-This petition, under Article 227 of the Constitution, is directed against the order dated 28.4.2004 passed in Civil Suit No.33-A/2004 by the Fifth Additional District Judge, Rewa, whereby he has directed the petitioners to pay ad-valorem court-fee on the sale consideration mentioned in the sale deed dated 21.10.1998.

2. The petitioners are plaintiffs in the civil suit filed against the respondents in the year 1999. In the civil suit, Bhuar Rai was plaintiff no.1 and after his death the name of his widow Sitrajia was substituted in the plaint in the year 2001. The plaint contains the relief that the sale deed dated 21.10.1998 executed by plaintiff no.1 be declared inoperative, void and illegal as his thumb impression was obtained by misrepresentation. Another relief sought is that respondent no.1 be permanently enjoined from interfering with the plaintiff's possession over the suit property. The sale consideration mentioned in the sale deed is Rs.1,49,000/-. The plaintiffs have paid court-fee of Rs.60/- for the relief of declaration and Rs.30/- for the relief of permanent injunction i.e. total Rs.90/-.

3. The trial court, after hearing the petitioners, held that prayer relating to sale deed amounted to seeking its cancellation and, therefore, ad-valorem court-fee was payable on the sale consideration shown therein. Aggrieved, the plaintiffs have filed the present petition.

4. It is argued on behalf of petitioners that the suit was not for cancellation of sale deed and, therefore, the court fee paid by them was proper. Relying upon the recent Full Bench judgment dated 8.9.2010 of this High Court in Writ Petition No.14679/2006 (*Sunil Radhelia vs. Awadh Narayan*) the petitioners have argued that since an allegation has been made that the sale deed is void, ad-valorem court-fee is not payable. The learned counsel for respondent no.1, on the other hand, cited the decision of the Supreme Court in *Suhrid Singh vs. Randhir Singh* 2010 AIR SCW 3308 and argued that the order passed by the trial court is legal and proper.

5. We have perused the plaint wherein the plaintiffs have not denied the fact that sale deed dated 21.10.1998 bears the thumb impression of plaintiff

no.1. Their main contention is that the thumb impression of plaintiff no.1 on the sale deed was obtained by misrepresentation. It is, therefore, an admitted fact that the sale deed does bear thumb impression of the executant/plaintiff no.1 (now dead).

6. The payment of court-fee is governed by the provisions of the Court Fees Act, 1870 (in short, "the Act"). According to section 6, no document of the kinds specified as chargeable in the first or second schedule to the Act shall be filed, exhibited or recorded in any court of justice unless the fee indicated therein is paid. Entry 17 (iii) of second schedule requires payment of court-fee of Rs.60/- on plaint in suit to obtain a declaratory decree where no consequential relief is prayed. However, where the suit is for declaration and consequential relief, the court-fee is to be paid as provided under section 7(iv)(c) which reads as under:

"7. Computation of fees payable in certain suits.- The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows-

(iv) In suits-

(c) for a declaratory decree and consequential relief.- to obtain a declaratory decree or order, where consequential relief is prayed,

according to the amount at which the relief sought is valued in the plaint or memorandum of appeal with a minimum fee of forty rupees. In all such suits the plaintiff shall state the amount at which he values the relief sought."

7. The question required to be addressed in this petition is that whether the plaintiffs are liable to pay ad-valorem court-fee on the sale consideration stated in the sale deed of which plaintiff no.1 is the executant when they have made an allegation in the plaint that it is void.

8. In *Suhrid Singh* (Supra) the Supreme Court dealt with an identical issue and resolved the same by giving an illustration of two brothers. We find it useful to reproduce the relevant portion of para 6 of the order. It is as under:

"6. Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non est, or illegal or that it is not binding

on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/ conveyance, can be brought out by the following illustration relating to 'A' and 'B' - two brothers. 'A' executes a sale deed in favour of 'C'. Subsequently, 'A' wants to avoid the sale. 'A' has to sue for cancellation of the deed. On the other hand, if 'B', who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by 'A' is invalid/void and non est/illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court-fee is also different. If 'A', the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court-fee on the consideration stated in the sale deed. If 'B', who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court-fee of Rs.19.50 under Article 17(iii) of Second Schedule of the Act."

9. Thus, by the above illustration of 'A' and 'B' brothers the Supreme Court has answered the issue in a very simple manner that where the executant of the sale deed wants it to be annulled, he has to seek cancellation of that deed for which ad-valorem court-fee on the consideration stated in the sale deed is payable.

10. The Supreme Court earlier in *Government of Orissa vs. Ashok Transport Agency* (2002) 9 SCC 28 explained the distinction between the meaning of void and voidable acts. In this case, it held that one type of void acts, transactions, decrees are those which are wholly without jurisdiction, ab-initio void and for avoiding the same, no declaration is necessary as law does not take any notice of the same and they can be disregarded in collateral proceeding. According to the Supreme Court, the other type of void act like transaction against a minor without being represented by a next friend is a good transaction against the whole world but if the minor decides to avoid the same and succeeds in avoiding it by taking recourse to appropriate proceeding, the transaction becomes void from the very beginning. In this case, the Supreme Court referred to yet another type of void act which may be not a nullity but for avoiding the same a declaration has to be made. It observed that voidable act is that which is a good act unless avoided for instance if a suit is filed for

declaration that a document is fraudulent and/or forged and fabricated, it is voidable as the apparent state of affairs is the real state of affairs and a party who alleges otherwise is obliged to prove it.

11. In the case at hand, plaintiff no.1 was admittedly an executant of the sale deed sought to be declared as void. The sale deed also bears his thumb impression and the sale consideration is clearly mentioned therein. The plaintiffs in their suit for declaration have prayed that the sale deed be declared as void by alleging that it was executed by playing fraud and misrepresentation. The relief claimed implies a relief for cancellation of sale deed because plaintiff no.1 (now dead) was an executant of the same. The sale deed, in our considered opinion, is voidable as the apparent state of affairs is a real state of affairs and the plaintiffs, who have alleged otherwise, are obliged to prove it as void. The plaintiffs, therefore, have to pay ad-valorem court-fee on the consideration stated in the sale deed. As held by the Supreme Court in *Suhrid Singh* (Supra) had plaintiff no.1 been a non-executant the plaintiffs could have merely paid a fixed court fee provided in Entry 17 (iii) of second schedule of the Act.

12. It is true that in *Sunil Radhelia* (Supra) the Full Bench has held that ad-valorem court-fee is not payable when the plaintiff makes an allegation that the instrument is void and not binding on him even if he be the executant of the document. But it is equally true that the decision of the Supreme Court in *Suhrid Singh* (Supra) was not placed before the Full Bench and, therefore, it is not referred therein. Had the decision of *Suhrid Singh* been brought to the notice of the Judges of Full Bench, in all probability they too would have taken the same view which we have taken.

13. For these reasons, we decline to interfere with the impugned order of the trial court. The petition fails and is dismissed. No order as to costs.

Petition dismissed.

I.L.R. [2011] M. P., 159

APPELLATE CIVIL

Before Mr. Justice N.K. Mody

S.A. No.316/2009 (Indore) decided on 20 July, 2010

MOHANLAL

... Appellant

Vs.

SUBHASH & ors.

... Respondents

A. Accommodation Control Act, M.P. (41 of 1961), Section 12 - Suit for eviction - Partition - Appellant inducted as tenant by father of respondent - Respondent/Plaintiff filed suit for eviction on the ground of Section 12(1)(a) & (f) with a claim that suit shop has fallen to his share in family partition - Held - It is always open to tenant to show that partition was not bona fide and was a sham transaction to overcome rigours of rent control laws. (Para 7)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12 - बेदखली के लिए वाद - विभाजन - प्रत्यर्थी के पिता द्वारा अपीलार्थी को किरायेदार के रूप में प्रतिष्ठित किया गया - प्रत्यर्थी/वादी ने इस दावे के साथ कि पारिवारिक विभाजन में वादग्रस्त दुकान उसके हिस्से में आयी है, धारा 12(1)(ए) व (एफ) के आधार पर बेदखली के लिए वाद दाखिल किया - अभिनिर्धारित - किरायेदार के लिये यह दर्शित करने की सदैव गुज़ाईस है कि विभाजन सद्भाविक नहीं था तथा वह किराया नियंत्रण विधियों की सख्तियों से पार पाने के लिये एक छद्म संव्यवहार था।

B. Accommodation Control Act, M.P. (41 of 1961), Section 12 - Suit for eviction - Partition - There is no right in the tenant to prevent the joint owners or co-lessors from partitioning the tenanted accommodation among themselves - It is the exclusive right of lessor that whether the tenanted premises shall be retained jointly by all the lessors or they would partition it among themselves - No objection can be raised by tenant particularly when from the very beginning the property was jointly owned by several persons. (Para 7)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12 - बेदखली के लिए वाद - विभाजन - किरायेदार के पास संयुक्त स्वामिओं अथवा सह-पट्टादाताओं को, किराये पर दिये गये स्थान को उनके मध्य विभाजित किये जाने से रोकने का कोई अधिकार नहीं है - पट्टादाता का यह अनन्य अधिकार है कि या तो किराये पर दिया गया परिसर सभी पट्टादाताओं द्वारा संयुक्त रूप से प्रतिधारित किया जाएगा अथवा वे उसे आपस में विभाजित करेंगे - किरायेदार द्वारा कोई आपत्ति नहीं

उठायी जा सकती विशेषकर जब प्रारम्भ से ही सम्पत्ति अनेक व्यक्तियों के संयुक्त स्वामित्व की रही हो।

Cases referred :

(1996) 6 SCC 373.

D.S. Kale, for the appellant.

Lokesh Mehta, for the respondent No.1.

ORDER

N.K. MODY, J. :-Being aggrieved by judgment dated 2.4.2009 passed by V Addl.District Judge, Khargone, West Nimar in Civil Appeal No.6-A/2009, whereby judgment dated 10.2.2006 passed by Addl.Civil Judge Class II, Khargone, West Nimar in Civil Suit No.18-A/2005, whereby suit filed by the respondents against the appellant for eviction under Section 12(1)(a) and (f) of the M.P.Accommodation Act (which shall be referred to as the Act) was decreed on the ground under Section 12(1)(f) of the Act was maintained, present appeal has been filed.

2. The appeal was admitted for hearing by this Court on 19.7.2010 on the following substantial questions of law :-

“1) Whether in the facts and circumstances of the case learned Courts below committed error in decreeing the suit against the appellant under Section 12(1)(f) of M.P.Accommodation Control Act ?

2) Whether in the facts and circumstances of the case learned Courts below committed error in holding that being a tenant appellant is no one to object the partition which has taken place between respondent and his brother ?”

3. Short facts of the case are that respondent filed a suit for eviction on 1.9.2001 alleging that respondents are real brother and sons of Kanhaiyalal. It was alleged that respondent No.1 is the owner of the shop situated at M.G.Road, Khargone having width of 6 feet and length of 22 feet. It was alleged that eight months before filing of the suit partition has taken place between the respondent No.1 and his brothers and as per the partition suit shop has come into the share of respondent No.1 in which appellant is in occupation as tenant @ Rs.30/- per month w.e.f.1.5.70 from the father of respondent No.1. It was alleged that appellant is in arrears of rent w.e.f.1.1.2000, which was not paid inspite of notice of demand. It was alleged

that after death of father of respondent No.1 suit was filed by respondent No.1 alongwith other respondents, which was numbered as Civil Suit No.118-A/80 and was pending in the Court of Civil Judge Class II, Khargone and was dismissed against which appeals were filed and Second Appeal was numbered as S.A.No.405/85 and was dismissed by this Court vide order dated 24.2.86. It was alleged that in the said proceedings the appellant was held as tenant of respondents. It was alleged that at the time of filing of the earlier suit respondent and his brothers, who are respondents herein were living jointly but eight months before filing of the suit partition has taken place. It was alleged that respondent No.1 requires suit accommodation bonafidely for carrying on business of sweet shop. It was alleged that for this purpose respondent No.1 is having no alternative suitable accommodation. It is prayed that decree of eviction be passed against the appellant under Section 12(1)(a) and (f) of the Act. The suit was contested by the appellant by filing the written statement, wherein all the plaint allegations were denied. It was denied that any partition has taken place between the parties and respondent No.1 was the sole owner of the property. It was alleged that after the death of Kanhiyalal all the respondents are the owners of the suit property, who are living jointly. It was denied that appellant was in default of payment of rent. It was also denied that respondent No.1 requires the suit accommodation for carrying on the business. It was alleged that respondent No.1 is in occupation of one more shop having the same area adjoining to the suit shop, which is in occupation of respondent No.1. It was alleged that there is one more shop towards the western side of the suit shop, which belongs to the joint family of respondent No.1 from where respondent No.1 is carrying on the business. It was also alleged that respondent No.1 is having one shop at Pragati Complex. It was prayed that suit be dismissed. The written statement was also filed by the respondents No.2 to 5, wherein plaint allegations were not disputed. It was also not disputed that in the partition between the respondents the suit accommodation has come into the share of respondent No.1. On the basis of pleadings of the parties trial Court framed the issues, recorded the evidence and decreed the suit under Section 12(1)(f) of the Act, which was maintained by dismissing the appeal, hence this appeal.

4. Shri D.S.Kale, learned counsel for the appellant, submits that impugned judgment passed by the learned Court below is illegal, incorrect and deserves to be dismissed. Learned counsel submits that in fact no partition has taken place between the respondent and a trick was played that oral partition has

taken place as the respondents lost the battle in first round of litigation. Learned counsel submits that to prove the case appellant has examined two witnesses Ayajuddin PW-2 and Ajay Bhat PW-3. Learned counsel submits that PW-3 Ajay Bhat submits in his statement that at the time when oral partition took place he was only the person outside the family. While in the statement of PW-2 Ayajuddin, it has come that at the time of partition both of them were present. It is submitted that in the facts and circumstances of the case learned Courts below committed error in holding that partition has taken place between the members of the family. Learned counsel submits that appellant is having right to challenge the partition. For this contention reliance is placed on a decision of Apex Court in the matter of *S.K. Sattar SK. Mohd. Choudhari Vs. Gundappa Amabadas Bukate*, reported in (1996) 6 SCC 373, wherein Hon'ble Apex Court observed that tenancy cannot be split up either in estate or in rent or any other obligation by unilateral act of one of the co-owners. It will be open to the tenant to show that the partition was not bona fide and was a sham transaction to overcome the rigours of Rent Control Laws which protected eviction of the tenants except on specified grounds set out in the relevant statute.

5. Learned counsel further submits that ample evidence is on record to show that the respondent No.1 is having other suitable accommodation. Learned counsel further submits that the fact that partition was reduced in writing was admitted by respondent No.1 but that memorandum was also not brought before the Court. It is submitted that in the facts and circumstances findings recorded by the learned Courts below are perverse and deserves to be set aside.

6. Shri Lokesh Mehta, learned counsel for the respondent No.1, submits that findings recorded by the learned Courts below are based on due appreciation of evidence, which requires no interference. Learned counsel submits that respondents are real brothers. It is submitted that as per the partition, which took place between the respondents, respondents No.2 and 4 did not get any share and they voluntarily relinquished their respective shares as they were in service while each of the respondents No.1, 3 and 5 got one shop. It is submitted that the shop, which is in occupation of appellant fall into the share of respondent No.1. It is submitted that respondents No.2 to 5 has submitted the written statement, wherein this fact has not been disputed that oral partition has taken place between the parties. It is submitted that in the facts and circumstances of the case learned Courts below committed no error

in holding that partition took place between the parties and respondent No.1 is the sole owner of the property. It is further submitted that from the evidence adduced by the respondent No.1 it is amply proved that respondent No.1 requires the suit accommodation bonafidely. It is submitted that findings relating to bonafide requirement are concurrent findings of fact, which requires no interference. It is submitted that appeal be dismissed.

7. From perusal of the record it is evident that to prove the case respondent No.1 has examined himself as PW-1, Ayajuddin PW-2 and Ajay Bhat PW-3. While the appellant has submitted documentary evidence Ex.D/1, which is Sahmatipatra, which is executed by Ramesh Chandra respondent No.2 and has also examined himself as DW-1. So far as the partition has taken place or not it is always open to the tenant to show that partition was not bonafide and was a sham transaction to overcome the rigours of rent control laws, which protected eviction of the tenants except on specified grounds set out in the relevant statute as is held by the Hon'ble Apex Court in the matter of *S.K.Sattar* (supra). In the said judgment it is also observed by the Hon'ble Apex Court that all the co-owners or co-lessors agree among themselves and split by partition the demised property by metes and bounds and come to have definite, positive and identifiable shares in that property, they become separate individual owners of each severed portion and can deal with that portion as also the tenant thereof as individual owner/lessor. The right of joint lessors contemplated by Section 109 comes to be possessed by each of them separately and independently. There is no right in the tenant to prevent the joint owners or co-lessors from partitioning the tenanted accommodation among themselves. It was also observed by Hon'ble Apex Court that whether the premises, which is in occupation of a tenant, shall be retained jointly by all the lessors or they would partition it among themselves, is the exclusive right of the lessor to which no objection can be taken by the tenant, particularly where the tenant knew from the very beginning that the property was jointly owned by several persons and that, even if he was being dealt with by only one of them on behalf of the whole body of the lessors, he cannot object to the transfer of any portion of the property in favour of a third person by one of the owners or to the partition of the property. In the present case it is not a unilateral act of respondent No.1 on the basis of which it can be held that respondent No.1 is the owner of the suit accommodation. On the contrary all the five brothers, who are respondents, has divided the property between themselves. Respondents No.2 to 5 has filed written statement, wherein they

have not disputed the partition. In the said oral partition respondents No.2 and 4 did not get any property and they have also agreed in their written statement for the said partition. The admissions made by respondents No.2 and 4 in their written statement is self harming and there is no reason to disbelieve it. No prudent co-lessor will relinquish his rights in the joint family property in which suit accommodation is situated, just to get rid of from a tenant. In the facts and circumstances of the case even if there are some discrepancies regarding the alleged oral partition, then too, it cannot be said that the alleged partition is a sham transaction to come out from the rigour of Accommodation Control Act.

8. So far as bona fide requirement of the respondent is concerned, respondent No.1 has stated that he wants to start business of sweet-meat from the suit shop. It was alleged that business of sweet-meat is the family business of respondent No.1. In his cross-examination respondent No.1 has further stated that respondent No.1 is not having any other business. He has further stated that his brother Suresh is also in the trade of sweet-meat. Both the Courts below after due appreciation of evidence has come to the conclusion that the need of respondent No.1 is bonafide. So far as alternative accommodation is concerned, appellant himself has admitted in para 21 of his cross-examination that the shop towards eastern side of the suit shop, which was closed since long time was started before 2-3 years. He has also admitted that this shop has been started by Suresh respondent No.3. He has also admitted that it is the son of respondent No.3, who is sitting on the shop. He has further stated that he has not produced any record about other alternative shops situated at Tagore Park near Maharashtra Bank. He has also admitted that respondent No.1 is having no shop at Pragati Complex. He has further stated that in the written statement respondent No.1 has stated that respondent No.1 is having shop at Pragati Complex and that part of the written statement is not correct.

9. Considering all the facts and circumstances of the case this Court is of the view that learned Courts below committed no error in decreeing the suit filed by the respondent No.1 under Section 12(1)(f) of the Act. This Court is also of the view that the objection that the alleged partition is sham transaction, can be raised by the tenant but the objection has to be decided on the basis of evidence on record. In this case this Court is of the view that learned Courts below committed no error in holding that partition has taken place between the parties and suit shop has fell into the share of respondent No.1. In view of

this appeal stands dismissed. However, the order of eviction shall not be executable on or before 31.7.2011 on the condition that the appellant herein files an undertaking before the learned trial Court within six weeks to the following effect namely :-

1) That, the appellant herein shall not induct any other person in the suit premises and shall handover vacant and peaceful possession of the said premises to the respondent/landlord on or before the date mentioned hereinabove.

2) That, the appellant herein shall pay to the respondent/landlord arrears of rent, if any, within one month from today and shall pay to the respondent/landlord future compensation for use and occupation of the suit premises month by month before the 10th day of every month.

10. With the aforesaid observations, appeal stands disposed of. No order as to costs.

Appeal disposed of.

I.L.R. [2011] M. P., 165

APPELLATE CIVIL

Before Mr. Justice Abhay M. Naik

M.A. No.719/2004 (Gwalior) decided on 10 September, 2010

SAVITA DEVI (SMT.)

... Appellant

Vs.

SMT. SUKHWINDER KAUR & ors.

... Respondents

A. Motor Vehicles Act (59 of 1988), Section 166, Civil Procedure Code, 1908, Section 2(11) - Legal representative - Entitlement - A claimant though may not a legal heir but is a legal representative may be held entitled to compensation by the Claims Tribunal in a set of particular/peculiar facts and circumstances of case - Merely on account of being not a legal heir, a person applying u/s 166 of M.V. Act does not ipso facto stand excluded from description of claimant.
(Para 7)

क. मोटर यान अधिनियम (1988 का 59), धारा 166, सिविल प्रक्रिया संहिता, 1908; धारा 2(11) - विधिक प्रतिनिधि - हकदारी - कोई दावेदार भले ही विधिक वारिस नहीं हो सकता, किन्तु विधिक प्रतिनिधि है, तो दावा अधिकरण द्वारा मामले के विशेष तथ्यों एवं परिस्थितियों के समूह में प्रतिकर के लिए हकदार

ठहराया जा सकता है — विधिक वारिस न होने मात्र से मोटर यान अधिनियम की धारा 166 के अन्तर्गत आवेदन करने वाला व्यक्ति स्वमेव ही दावेदार के अभिवर्णन से अपवर्जित नहीं हो जाता।

B. Motor Vehicles Act (59 of 1988), Section 166 - Amount of compensation - Apportionment of compensation between widow and mother - In case of availability of proof about additional factors like age, degree of dependency, size of family, financial potential of individual claimant etc., the ratio or proportion may be varied depending upon the facts and circumstances of the case - Where no material available on record fully and sufficiently to make just and proper apportionment, the ratio of 9:4 may be maintained. (Paras 9, 14 & 19)

छा. मोटर यान अधिनियम (1988 का 59), धारा 166 — प्रतिकर की रकम — विधवा और माता के मध्य प्रतिकर का प्रभाजन — अतिरिक्त कारकों जैसे उम्र, आश्रितता की कोटि, परिवार का आकार, दावेदार की व्यक्तिगत वित्तीय क्षमता आदि के सम्बंध साक्ष्य उपलब्ध होने की दशा में अनुपात मामले के तथ्यों एवं परिस्थितियों के आधार पर परिवर्तित हो सकता है — जहाँ न्यायसंगत और उचित प्रभाजन करने के लिए पूर्ण और पर्याप्त कोई सामग्री अभिलेख पर उपलब्ध न हो, वहाँ 9:4 का अनुपात रखा जा सकता है।

Cases referred :

1987 ACJ 561 (SC), (2009) ACC 740 (SC), 2008 ACJ 906, 2008 ACJ 816, 2008(1) ACCD 247, 2000 ACJ 426, 2000 ACJ 489, 1993 ACJ 87, 2010 ACJ 1199.

Meena Singhal, for the appellant.

Anand V. Bhardwaj, for the respondent Nos. 4 to 7.

OPINION

ABHAY M. NAIK, J. :- This matter has come up before me as a third judge for deciding the following point of law due to difference of opinion between the constituent judges of Division Bench :-

"What should be the ratio of apportionment of amount of compensation between the legal heirs of the deceased, whether under the law any straight-jacket formula can be adopted or whether the question of determination of ratio would depend upon the various other facts and circumstances of a particular case like; age, dependency, size of the family and the need ?

2. Relevant facts, in short, are that the husband of claimant No.1/appellant,

namely, Mukesh Singh died at the age of 26 in an accident with tanker number DN09/9433. He received severe injuries and consequently died. Claimants, who were widow [Claimant No.1], parents [Claimants no.2 and 3] and brothers of the deceased [Claimants No.4 and 5], submitted a joint claim petition under Section 166 of the Motor Vehicles Act, 1988. Despite opposition, the Claims Tribunal on the basis of the evidence on record passed the award to the tune of Rs.5,52,000/- in favour of the claimants in equal proportion.

3. Claimant No.1/appellant being widow of the deceased submitted an appeal under Section 173 of the Motor Vehicles Act, 1988 for enhancement as well as for disputing the ratio of apportionment fixed by the Claims Tribunal. According to her, she is entitled to at least 75% of the amount of compensation. Appeal came up for consideration before the Division Bench constituted by brothers Abhay Gohil, J & S. Samvatsar, J. During hearing, learned counsel for the appellant did not choose to press the question of enhancement of compensation. Only objection raised was in respect of apportionment.

4. Brother Gohil, J, observed that widow was about 22 years of age and the mother was about 50 years of age. According to him, the deceased was residing with the parents and was also contributing for the household expenses of the family and was also looking after the parents. He was young and the parents have lot of expectations from young son to help them in time of need, particularly, in old age and to contribute for the family. Parents may also have debts. Therefore, brother Gohil J, held that the apportionment of the amount of compensation in the ratio of 50:50 would be just, appropriate and proper between the widow and mother/father of the deceased.

Brother S. Samvatsar, J, held that father is not a Class I heir and so long as widow and mother, who are Class I heirs are alive, father is not entitled to any compensation. The direction of disbursement of 50% amount to mother/father was found to be contrary to the provisions of Hindu Succession Act and, accordingly, as per S. Samvatsar, J, father was not found entitled to any compensation. He held that mother and the widow of the deceased alone are entitled to compensation. As regards the ratio of apportionment, he further observed that the widow and mother cannot be equated in the matter of disbursement because remaining life span of the mother is less than the remaining life span of the widow. Considering the multiplier applicable to the mother, he held that mother is not entitled to equal share and apportionment in the ratio of 60% and 40% would be proper to widow and mother respectively.

5. In view of the aforesaid difference of opinion, the question of law mentioned hereinabove has been referred to me as third judge.

6. Smt. Meena Singhal and Shri Anand V. Bhardwaj, learned counsel for the parties, argued at length in support of their respective plea.

7. At the outset, I may point out that though the question referred is only about ratio of apportionment, a difference of opinion is also reflected in respect of persons entitled to compensation. Brother Gohil, J, has apportioned the amount of compensation between widow and mother/father whereas brother Samvatsar, J, has made apportionment between widow and mother alone.

(i) Sub-section 1 of Section 166 of the Motor Vehicles Act, 1988, enables a claimant to submit an application for compensation arising out of an accident of the nature specified in sub-section (1) of Section 165. Such an application, in case where death has resulted from the accident, may be submitted by all or any of the legal representatives of the deceased. It would be appropriate to reproduce the relevant portion of Section 166 of the Motor Vehicles Act, 1988 :-

Section 166. Application for compensation.-(1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made-

(a) XX XX XX

(b) XX XX XX

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorized by the person injured or all or any of the legal representatives of the deceased, as the case may be.

Thus, the legislature has not deliberately made merely the legal heirs of the deceased entitled to claim compensation under the Motor Vehicles Act. Instead, legal representatives of the deceased have been made entitled to claim compensation under the Act. The term legal representative is not synonymous to legal heir. The term legal representative has not been defined in the Motor Vehicles Act, 1988 though it has been defined in Section 2(11) of the Code of Civil Procedure as follows :-

"2.Definitions.- In this Act, unless there is anything repugnant in the subject or context,-

(1) XX XX XX

(2) XX XX XX

(3) XX XX XX

(4) XX XX XX

(5) XX XX XX

(6) XX XX XX

(7) XX XX XX

(8) XX XX XX

(9) XX XX XX

(10) XX XX XX

(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."

The word "heir" is defined in clause (f) of sub-section (1) of Section 3 of the Hindu Succession Act, 1956 as any person, male or female, who is entitled to succeed to the property of an intestate under the said Act.

(ii) Section 168 of the Motor Vehicles Act, 1988, empowers the Claims Tribunal to make an award determining the amount of compensation, which appears to it to be just and specifying the person or persons to whom compensation shall be paid. Thus, looking to the scheme of the Act of 1988, it may be said that the claimant, who though, is not a legal heir but is a legal representative, may be held entitled to compensation by the Claims Tribunal in a set of particular/peculiar facts and circumstances of the case. I may quote here successfully the following paragraph from Supreme Court's decision in the case of *Gujarat State Road Transport Corpn., Ahmedabad Vs. Ramanbhai Prabhatbhai and another*, 1987 ACJ 561 (SC), paragraph 14 of which is reproduced below:-

"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."

Thus, merely on account of being not a legal heir, a person applying under Section 166 does not ipso facto stand excluded from the description of claimant within the ambit of Motor Vehicles Act. In cases, when there is no proof on record about legal representation within the meaning of Section 2(11) CPC, the Claims Tribunal may be guided for deciding entitlement of claimant(s) by provisions of the Hindu Succession Act by invoking the analogy of legal heir but the same cannot be treated as absolute in view of the language of Section 166 of the Act of 1988 which enables a legal representative to make an application for compensation. Of course, in such cases, the legal representativeship of the deceased with reference to special facts and circumstances of the case requires to be proved. In cases, when no special facts and circumstances with respect to legal representation by non-legal heir are proved, the Claims Tribunal may be guided by the provisions of Hindu Succession Act and may accept the claim of the legal heir alone for compensation awarded under the provisions of Motor Vehicles Act, 1988.

Though in the judgment of the Division Bench, brother Gohil, J, observed

that the apportionment of the amount of compensation in the ratio of 50:50 between the widow and mother/father of the deceased would be just, appropriate and proper, brother Samvatsar, J, while differing on the issue, clearly observed that during the lifetime of mother, father is not entitled to compensation. However, while formulating the point of law to be decided by this Court, only question with reference to apportionment alone is included. This being so, it has been referred that what should be the ratio of apportionment of amount of compensation between the legal heirs of the deceased. In view of this, I do not feel that further discussion on the issue of entitlement to amount of compensation under the provisions of Motor Vehicles Act, 1988 of legal representatives vis-à-vis legal heirs is required at the present juncture.

8. Smt. Meena Singhal, learned counsel for the appellant, cited following rulings to substantiate that the widow of the deceased would be entitled to more compensation by way of apportionment in comparison to mother of the deceased:-

(a) In the case of *D. Shanmukha Sundaramma Vs. D. Suneetha & Others*, 1 (2009) ACC 740 (SC), widow was 20 years of age. Out of the total amount of compensation of Rs.4,22,438/-, mother has been awarded Rs.1,25,000/- whereas the balance amount i.e. 2,97,438/- is awarded to the widow of the deceased. The ratio applied between the widow and the mother of the deceased is 70:30 (approx.).

(b) In the case of *Nalini and others Vs. Mukhtyarsingh and others*, 2008 ACJ 906 [M.P. High Court], widow was 21 years of age while mother of the deceased was 46 years of age. The amount of compensation of Rs. 15,00,000/- was apportioned in the ratio of 80:20. In this case, father of the deceased was an industrialist and mother was not found financially dependent upon the deceased. Therefore, the apportionment was made in the ratio of 80:20.

(c) In the case of *Vimla Vs. Dinesh Kumar Sharma and others*, 2008 ACJ 816 [M.P. High Court], the amount of compensation was apportioned in the ratio of 70:30 and the widow was held entitled to compensation despite remarriage because she was living with her husband at the time of accident and her in-laws and other members were residing separately.

(d) In the case of *Smt. Rambai Vs. Santosh Kumar Pandeya and others*, 2008(1) ACCD 247 (M.P. High Court), compensation of Rs.3,80,000/- was apportioned in the ratio of 75% to the widow and 25% to the parents.

(e) In the case of *New India Assurance Co. Ltd. and another Vs. Sandhya Jain and others*, 2000 ACJ 426 (High Court of Himachal Pradesh), widow was held entitled to Rs.3,61,960/- whereas minor son and daughter of the deceased were held entitled to Rs.3 lacs each towards compensation. Mother of the deceased was held entitled to Rs.20,000/- towards compensation.

(f) In the case of *Govind Sao and another Vs. Surjit Singh Mahal alias Bhola Babu and others*, 2000 ACJ 489 (Patna High Court), widow alone was found entitled because parents were living separately from the deceased and had sufficient income to maintain themselves whereas the widow was solely dependent upon the income of the deceased.

(g) In the case of *Anju Behal and others Vs. Rajasthan State Road Transport Corporation*, 1993 ACJ 87, out of compensation of Rs.6,20,000/-, Rs. 5,95,000/- was awarded to the widow and daughters and a sum of Rs.25,000/- was awarded to the mother of the deceased on the ground that mother was not dependent on the deceased.

On perusal of the aforesaid rulings, it is clear that the ratio of apportionment in the case of widow and mother of the deceased has varied on higher side in favour of the widow looking to her age and other attending facts and circumstances. It has not been held in any of the cases in the ratio of 50:50. However, no specific formula or equation has been applied in any of the abovementioned cases.

9. Cases for claims arising out of the motor accidents often involve illiterate persons and members belonging to downtrodden classes. They may not be able to prove their cases with reference to other factors relevant for the purpose of apportionment. In such cases, certain criteria is required to be evolved. Of course, other factors like age of the claimants, their financial status/potential, degree of dependency, availability of other means with the claimants for survival etc. are to be taken into consideration while making apportionment. It is not

always necessary that the Claims Tribunal may find proof about all such factors on record to make a proper apportionment. Question before this Court is that when there is no material on record fully or sufficiently to make proper apportionment what should be the criteria liable to be applied for just and proper apportionment.

10. In the considered view of this Court, one of such criteria may be that suppose a deceased, aged 30 years, with annual income of Rs.48,000/- left behind him his widow 'A', aged 26 years and mother 'B', aged 56 years. Thus, there would be a dependency to the extent of 2/3rd i.e. Rs.32,000/-.

Had there been 'A' alone, she would have been entitled to Rs.32,000 X 18 (Multiplier) = 5,76,000/-. Similarly, had there been 'B' alone, she would have been entitled to Rs.32,000 X 8 (Multiplier) = 2,56,000/-. While apportioning the amount of compensation ratio of 5,76,000:2,56,000 i.e. 9:4 may be maintained which would be just and proper according to the schedule for compensation prescribed under the Motor Vehicles Act. No claimant in such a case may complain about lesser share in the amount of compensation.

11. My aforesaid view seems fortified by the decision of Calcutta High Court in the case of *Pampa Banik and others Vs. New India Assurance Co. Ltd. and another*, 2010 ACJ 1199. Paragraphs 19 and 20 of it are reproduced below for convenience:

"19. The victim was aged 29 years and had businesses of jute and bakery and it appears that at a comparative young age, he well established himself in the business and was an income tax assessee and had shown his annual net income to be Rs. 1,20,000/-. It is expected that in course of time, he would flourish in his business and the income from the business would not remain static even after the lapse of 10 or 20 years. In such a situation, when we find that the victim at this young age used to earn Rs.10,000/- a month, for the purpose of calculating the loss of dependency of the widow, we should double the income as after 30 years, when the victim would have become aged 59, the amount of income would not be the same and the value of the money in the present economic background would definitely diminish and thus, we propose to treat his income to be Rs. 20,000/- per month after deduction of income tax which comes to Rs. 2,40,000/- annually. After

deducting one-third of the said income towards his personal expenses, the amount of dependency will come to Rs. 1,60,000/- per annum. Having regard to the present days bank interest, which we treat as 10 per cent per annum for a longer period, the multiplier applicable should be 10 and the amount of compensation payable to the widow would be Rs. 16,00,000/- if she were the sole heir. But as she had $\frac{1}{2}$ share in the estate left by the victim, the amount should come down to Rs. 8,00,000/- which should be the amount payable to the widow.

20. So far the mother is concerned, her dependency being for a shorter period, we propose to treat income of the victim to be Rs. 1,50,000/-. After deducting $\frac{1}{3}$ rd from that amount, the loss of dependency would come to Rs. 1,00,000/-. However, having regard to the age of the mother which was 45, we propose to apply the multiplier of 6 and the amount of compensation would come to Rs. 6,00,000/-. The mother having $\frac{1}{2}$ share in the estate left by the victim, the actual compensation payable should be Rs. 3,00,000/- for the mother. Therefore, the total amount of compensation would come to Rs. 8,00,000/- payable to the widow + Rs. 3,00,000/- payable to the mother = Rs. 11,00,000/- with interest at the rate of 8 per cent per annum from the date of filing the application till actual payment. It is needless to mention that the running of interest would stop on the amount already paid by the insurance company from the date of such payment."

Kolkata High Court has worked out individual entitlement and has added them together while arriving at a total amount of compensation.

12. In the case in hand, the amount of compensation is not under challenge. It is less than the total entitlement of widow and mother worked out separately as per preceding paragraph no.10. Therefore, in such cases, the ratio of apportionment may be worked out by maintaining the ratio of individual's entitlement arrived at separately in the aforesaid manner. In the present case, had there been widow alone as a claimant, she would have been entitled to Rs.32,000 X 18 (Multiplier-deceased being 26 years aged) = 5,76,000/-. Similarly, had there been mother aged 50 years alone as a claimant, she would have been entitled to Rs.32,000 X 13 (Multiplier-in view of the mother's age)

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= 4,16,000/-. Hence, the proportion or ratio between these two figures in the present case may be 18:13.

13. It may further be seen that father of the deceased is aged 51 years. There is nothing on record to show that he is not able to look after himself. It is equally true that the mother is not found to be fully dependent on the deceased son. Considering the same, it is held that the apportionment made by brother Samvatsar, J, is near about in the ratio worked out by applying the abovementioned criteria/formula and is just and proper, in my considered opinion in the facts & circumstances of the case.

14. In view of the aforesaid discussion, the point of law referred to this Court is answered in the following manner:-

When there is no material available on record fully or sufficiently to make just and proper apportionment, this Court is of the view that at least the ratio worked out in the manner provided in paragraph 10 above or near about it ought to be maintained while making apportionment of the amount of compensation amongst the persons found entitled thereto. In case of availability of proof about additional factors like age, degree of dependency, size of family, financial potential of individual claimant etc, the ratio may be varied depending upon the facts and circumstances of each case.

Matter may further be placed before the regular Division Bench for delivery of judgment.

Order accordingly.

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APPELLATE CIVIL

Before Mr. Justice N.K. Mody

M.A. No.2206/2008 (Indore) decided on 28 September, 2010

LIFE CARE INTERNATIONAL

... Appellant

Vs.

MAHINDRA & MAHINDRA LTD.

... Respondent

***Contract Act (9 of 1872), Section 28, Civil Procedure Code, 1908,
Section 20 - Ouster of jurisdiction - Head Office of respondent situated
at Bombay and Branch Office at Indore - Agreement entered into
between parties at Bombay and contract was to be performed at Indore
- Agreement containing clause that "agreement shall be subject to***

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jurisdiction of Court at Bombay" - Ouster of jurisdiction of Court at
Indore - Held - Intention to exclude Court's jurisdiction should be
reflected in clear, unambiguous, explicit and specific terms - Import of
use of words 'only', 'alone', 'exclusive' in exclusion clause would reflect
the intention to exclude the jurisdiction - There was no ouster clause in
the agreement such as words 'alone', 'only', 'exclusive' is not used -
Court at Indore has jurisdiction - Appeal allowed. (Paras 5 to 7)

संविदा अधिनियम (1872 का 9), धारा 28, सिविल प्रक्रिया संहिता, 1908,
धारा 20 - अधिकारिता से बेदखली - प्रत्यर्थी का प्रधान कार्यालय मुम्बई में तथा
शाखा कार्यालय इंदौर में स्थित - पक्षकारों के मध्य करार मुम्बई में हुआ तथा
संविदा का पालन इंदौर में किया जाना था - करार में खण्ड अन्तर्विष्ट कि "करार
मुम्बई न्यायालय की अधिकारिता के अध्यधीन होगा" - इंदौर न्यायालय की
अधिकारिता से बेदखली - अभिनिर्धारित - न्यायालय की अधिकारिता अपवर्जित
करने का आशय स्पष्ट, निश्चित अर्थवाले, सुव्यक्त एवं विनिर्दिष्ट शब्दों द्वारा प्रकट
होना चाहिये - अपवर्जन खण्ड में शब्द 'केवल', 'मात्र', 'अनन्य' के उपयोग का
तात्पर्य अधिकारिता अपवर्जित करने का आशय प्रकट करेगा - करार में कोई
अपवर्जन खण्ड नहीं था जैसे ऐसे किन्ही शब्दों का जैसे 'केवल', 'मात्र', 'अनन्य'
का उपयोग नहीं किया गया - इन्दौर न्यायालय को अधिकारिता है - अपील मंजूर।

Cases referred :

AIR 1992 SC 1514, (1971) 1 SCC 286, (1989) 2 SCC 163, (1995)
4 SCC 153, (2004) 4 SCC 671, (2004) 4 SCC 677.

Sitaram Saraf, for the appellant.

R.S. Chhábra, for the respondent.

ORDER

N.K. Mody, J. :-Being aggrieved by the judgment dated 28/04/08
passed by VIII Additional District Judge, Indore in Civil Suit No.1-B/07
whereby the suit filed by the appellant was returned to the appellant with a
liberty to file the same before the Court at Mumbai on account of want of
jurisdiction, the present appeal has been filed.

2. Short facts of the case are that the appellant filed a suit against the
respondent alleging that appellant is a registered Partnership Firm having its
business in partnership at Indore. Respondent is a Company registered under
the provisions of Indian Companies Act having its registered office at Mumbai
and is having its Branch Office at Royal Ratan Building-7, MG. Road, Indore.
It was alleged that Branch of the respondent is carrying on the business of
procuring the vehicles on rent. It was alleged that division of the respondent

which is in the trade of taking the vehicles on rent is known as Transport Solution Group. It was alleged that in the transaction which took place between the parties appellant was to pay a sum of Rs.26,50,447/- to the respondent, but instead of that appellant paid a sum of Rs.42,20,943.61. It was alleged that appellant is entitled for refund of Rs.15,70,496.61, which was paid by the appellant in excess alongwith interest of Rs.5,37,050/-. In the suit it was alleged that since transaction took place at Indore and the branch office of the respondent is at Indore, therefore, the Court at Indore is having jurisdiction to hear and decide the suit.

3. The suit was contested by the respondent on various grounds, including on the ground that the agreement took place between the parties in writing, which is dated 01/04/2000. It was alleged that as per the said agreement it is only the Court at Mumbai having the jurisdiction to hear and decide the suit. Other allegations of the plaint were also denied. It was alleged that since the Court at Indore having no jurisdiction to entertain the suit, therefore, the suit be dismissed. Learned trial Court framed the issues, recorded the evidence and while deciding the suit came to the conclusion that the Court at Indore is having no territorial jurisdiction to decide the suit, therefore, the same is returned to the appellant for filing the same before the Competent Court at Mumbai, against which present appeal has been filed.

4. Learned counsel for the appellant argued at length and submits that the impugned judgment passed by the learned Court below is illegal, incorrect and deserves to be set aside. It is submitted that undisputedly registered Office of the respondent is at Mumbai and the Branch Office is at Indore. It is submitted that the whole transaction which took place under the alleged agreement between the parties is at Indore. It is submitted that in the facts and circumstances of the case, Court at Indore was having jurisdiction to hear and decide the suit. It is submitted that though genuineness of the agreement Ex.D/4 is not admitted to the appellant as each of the page of agreement is not containing the signature of the appellant, then too, as per article-14 of the said agreement parties agreed that the agreement shall be subject to jurisdiction of Court at Bombay. It is submitted that even if this clause has taken into consideration, then too, it can not be said that the jurisdiction at Indore was ousted by the parties. For this contention reliance is placed on a decision in the matter of *M/s Patel Roadways Ltd. Bombay Vs. M/s Tropical Agro Systems Pvt. Ltd.*, AIR 1992 SC 1514 wherein in a suit for damages against Corporation and Corporation having subordinate office in place where cause

of action arose, Hon'ble Apex Court held that where the defendant does not have a sole office but has a principal office at one place and also a subordinate office at another place, it is not the Court within whose jurisdiction principal office of the defendant is situate but the Court within whose jurisdiction it has a subordinate office which alone shall have a jurisdiction in respect of any cause of action arising at any place where it has also a subordinate office. Learned counsel submits that appeal be allowed and impugned order passed by learned trial Court be set aside and case be remanded with a direction to decide the suit on merits.

5. Learned counsel for respondent submits that right from beginning appellant has not came with clean hand. It is submitted that in the suit it is no where pleaded that there was an agreement between the parties. It is submitted that as per the agreement parties agreed that in case of any dispute jurisdiction shall be at the Court at Bombay. It is submitted that since the principal office of the respondent is situated at Bombay and parties also agreed that in case any dispute arises, then it will be the Court at Bombay who shall have jurisdiction, therefore, learned Court below rightly returned the suit to the appellant for filing the same before appropriate Court. Learned counsel placed reliance on a decision in the matter of *Hakam Singh Vs. M/s Gammon (India) Ltd.*, 1971(1) SCC 286 wherein Hon'ble Apex Court has held that where two Courts or more have under the Code of Civil Procedure jurisdiction to try a suit or proceeding an agreement between the parties that the dispute between them shall be treated in one of such Courts is not contrary to public policy. Further reliance is placed on a decision in the matter of *A.B.C. Laminart Pvt. Ltd. Vs. A.P. Agencies, Salem*, (1989) 2 SCC 163 wherein Hon'ble Apex Court held that where more than one Court has jurisdiction, agreement to submit to one, to the exclusion of the others valid. It was further held that even in absence of express exclusionary words in the clause, maxim 'expressio nnius est exclusio alterius' may be applied in appropriate cases, where the clause only specifies one of the two Courts having jurisdiction without specifically excluding jurisdiction of the other Court, both the Courts have jurisdiction. Further reliance is placed on a decision in the matter of *Angile Insulations Vs. Davy Ashmore India Ltd.*, (1995) 4 SCC 153 wherein Hon'ble Apex Court held that where two Courts having jurisdiction consequent upon a part of the cause of action arising therewith, if parties stipulate in the contract to vest jurisdiction in one such Court to try the disputes arising between themselves and if the contract is unambiguous, explicit and clear and is not pleaded to be void and opposed to Section 23 of the Contract Act, then suit

would lie in the Court agreed to by the parties and the other Court will have no jurisdiction even though cause of action arose partly within the territorial jurisdiction of that Court. Reliance is also placed on a decision *Hanil Era Textiles Ltd. Vs. Puromatic Filters (P) Ltd.*, (2004) 4 SCC 671 wherein Hon'ble Apex Court held that where two or more Courts have jurisdiction under CPC and agreement restricts place of suing to any one of them, such an agreement is not contrary to public policy and does not contravene under Section 28 of Contract Act, 1872. Lastly reliance is placed on a decision in the matter of *New Moga Transport Co. Vs. United India Insurance Co. Ltd.*, (2004) 4 SCC 677 wherein Hon'ble Apex Court has held that import of use of words 'only', 'alone', 'exclusive' in exclusion clause, the intention to exclude a Court's jurisdiction should be reflected in clear, unambiguous, explicit and specific terms. On the strength of aforesaid position of law, learned counsel submits that the learned trial Court committed no error in returning the suit to the appellant to file before competent Court, hence the appeal be dismissed.

Section 20 of CPC reads as under:-

"S.20. Other suits to be instituted where defendants reside or cause of action arises.- Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction -

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

[Explanation.] - A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place."

The alleged agreement is Ex.D/2. Article 14 of the agreement Ex.D/2 reads as under :-

"This Agreement shall be subject to the Jurisdiction of Courts at Bombay."

6. In the matter of *Hakam Singh* (supra) in clause 13 of the agreement, which was binding between the parties it was agreed that the Courts in Bombay **alone** had jurisdiction to advert upon the contract. In the matter of *Angile* (supra) the agreement between the parties was to the effect that the work order issued subject to the jurisdiction of High Court situate at Bangalore in the State of Karnataka. Therefore, fall within the jurisdiction of above Court **only**. In the matter of *New Moga Transport Co.* (supra) the clause relating to the jurisdiction was to the effect that the Court at head office city shall only have the jurisdiction in respect of all claims and matters arising under the consignment at the goods entrusted for transport. In the matter of *Hanil Era Textiles Ltd. Vs. Puromatic Filters (P) Ltd.*, (2004) 4 SCC 671, wherein the Hon'ble Apex Court had a occasion to consider the import of word "alone", "only", "exclusive" in ouster clause. It was further held by the Hon'ble Apex Court that when ouster clause is clear, unambiguous and specific, accepted notions of contract would bind parties and unless absence of ad idem can be shown Courts should avoid exercising jurisdiction. In all the cases cited by the learned counsel for respondent the judgment is passed by a Division Bench of Hon'ble Apex Court, while in the matter of *M/s Patel Roadways Ltd. Vs. M/s Prasad Trading Company*, AIR 1992 SC 1514 cited by the counsel for appellant, the judgment has been passed by a Bench consisting of three Hon'ble Judges of the Supreme Court. It also appears that this judgment was not placed before the Hon'ble Supreme Court in the subsequent judgment submitted by the counsel for respondent except in the matter of *New Moga Transport Co.* Normally, under clauses (a) to (c) of Section 20 the plaintiff has a choice of forum and cannot be compelled to go to the place of residence or business of the defendant and can file a suit at a place where the cause of action arises. If the defendant desires to be protected from being dragged into a litigation at some place merely because the cause of action arises there it can save itself from such a situation by an exclusion clause. In the matter of *Patel Roadways* (supra), wherein contract entered into between the parties was the jurisdiction to decide any dispute between them would be only with the Courts at Bombay and defendant was having its principal office at Bombay and branch office at other place, the Hon'ble Apex Court has observed that

the words "at such place" occurring at the end of the Explanation and the word "or" referred to above which is disjunctive clearly suggest that if the case falls within the latter part of the Explanation, it is not the Court within whose jurisdiction the principal office of the defendant is situate but the Court within whose jurisdiction it has a subordinate office which alone shall have jurisdiction "in respect of any cause of action arising at any place where it has also a subordinate office". Hon'ble Apex Court has also considered the intention of legislature and observed that, "we would also like to add that the interpretation sought to be placed by the appellant on the provision in question renders the explanation totally redundant. If the intention of the legislature was, as is said on their behalf, that a suit against a corporation could be instituted either at the place of its sole or principal office (where or not the corporation carries on business at that place) or at any other place where the cause of action arises, the provisions of clauses (a), (b) and (c) together with the first part of the Explanation would have completely achieved the purpose. Indeed the effect would have been wider. The suit could have been instituted at the place of the principal office because of the situation of such office (whether or not any actual business was carried on there). Alternatively, a suit could have been instituted at the place where the cause of action arose under clause (c) (irrespective of whether the corporation had a subordinate office in such place or not). This was, therefore, not the purpose of the Explanation. The Explanation is really an explanation to clause (a). It is in the nature of a clarification on the scope of clause (a) viz. as to where the corporation can be said to carry on business. This, it is clarified, will be the place where the principal office is situated (whether or not any business actually is carried on there) or the place where a business is carried on giving rise to a cause of action (even though the principal office of the corporation is not located there) so long as there is a subordinate office of the corporation situated at such place. The linking together of the place where the cause of action arises with the place where a subordinate office is located clearly shows that the intention of the legislature was that, in the case of a corporation, for the purposes of clause (a), the location of the subordinate office, within the local limits of which a cause of action arises, is to be the relevant place for the filing of a suit and not the principal place of business. If the intention was that the location of the sole or principal office as well as the location of the subordinate office (within the limits of which a cause of action arises) are to be deemed to be placed where the corporation is deemed to be carrying on business, the disjunctive "or" will not be there. Instead, the second part of the Explanation

would have read "and", in respect of any cause of action arising at any place where it has a subordinate office, also at such place". Law laid down by the Hon'ble Apex Court in the matter of *Patel Roadways* (supra) has been followed by the Hon'ble Apex Court in the matter of *New Moga Transport* (supra).

7. Since there was no ouster clause in the agreement such as words "alone", only", "exclusive" is used and as per the plaint allegations the transaction has taken place between the parties at Indore, therefore, this Court is of the view that learned trial Court committed error in returning the suit to the appellant to file before competent Court at Mumbai. In view of this appeal filed by the appellant is allowed and impugned order passed by the trial Court is set aside and the matter is remanded to the learned trial Court with a direction to proceed with the case and decide the suit on merits. Parties are directed to remain present before the learned trial Court on 15.11.2010. No order as to costs.

Appeal allowed.

I.L.R. [2011] M. P., 182

APPELLATE CIVIL

Before Mr. Justice U.C. Maheshwari

S.A. No.742/2010 (Jabalpur) decided on 8 October, 2010

MOHD. ASHRAF & anr.

... Appellants

Vs.

M.P. HOUSING BOARD & ors.

... Respondents

A. Civil Procedure Code (5 of 1908), Section 9, Land Acquisition Act, 1894, Sections 4 & 6 - Maintainability of civil suit - Civil Court has no jurisdiction to go into the question of validity or legality of notification u/s 4 and declaration u/s 6 of the Act. (Para 12 to 15)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 9, भूमि अर्जन अधिनियम, 1894, धाराएँ 4 व 6 - सिविल वाद की पोषणीयता - सिविल न्यायालय को अधिनियम की धारा 4 के अंतर्गत अधिसूचना और धारा 6 के अंतर्गत घोषणा की विधिमान्यता या वैधता के प्रश्न पर विचार करने की अधिकारिता नहीं है।

B. Civil Procedure Code (5 of 1908), Section 9 - Decree without jurisdiction - Land of respondent No.3 was already acquisitioned for respondent No. 1 & 2 for implementation of their schemes and it's compensation was also paid - Held - A civil suit for perpetual injunction by respondent No.3 or his transferee is not entertainable and a decree

for perpetual injunction, if passed, shall not be binding against the respondent No.1 & 2, being ab initio void. (Para 16)

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 9 - बिना अधिकारिता की डिक्ली - प्रत्यर्थी क्र. 3 की भूमि पहले से ही प्रत्यर्थी क्र. 1 व 2 के लिए, उनकी योजनाओं के कार्यान्वयन के लिए अर्जित की गई और उसका मुआवजा भी अदा किया गया - अभिनिर्धारित - प्रत्यर्थी क्र. 3 या उसके अंतरिती द्वारा शाश्वत व्यादेश के लिए सिविल वाद ग्रहण किये जाने योग्य नहीं है और शाश्वत व्यादेश की डिक्ली, यदि पारित की गई हो, आरम्भ से शून्य होने के कारण प्रत्यर्थी क्र. 1 व 2 के विरुद्ध बाध्यकारी नहीं होगी।

C. *Specific Relief Act (47 of 1963), Section 38* - After acquisition of land and receiving the compensation, the person whose land was acquisitioned does not have any right or authority to file the suit for perpetual injunction or to sale the same - Purchasers on the strength of such defective title of their predecessor also do not have any right or authority to file a suit for perpetual injunction stating that they are in settled possession of the property. (Para 18)

ग. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 38 - भूमि के अर्जन और मुआवजा प्राप्त करने के पश्चात् वह व्यक्ति, जिसकी भूमि अर्जित की गई थी, को शाश्वत व्यादेश के लिए सिविल वाद प्रस्तुत करने अथवा उसका विक्रय करने का कोई अधिकार या प्राधिकार नहीं है - क्रेता को भी उनके पूर्वाधिकारी के ऐसे त्रुटियुक्त हक के आधार पर, यह कथन करते हुए पौव संपत्ति के व्यवस्थापित कब्जे में है, शाश्वत व्यादेश के लिए वाद दाखिल करने का कोई अधिकार या प्राधिकार नहीं है।

D. *Land Revenue Code, M.P. (20 of 1959), Section 108 - Revenue Entry - Title* - Revenue entries in record of right are not sufficient to hold the title and possession of the property unless title is proved by admissible documents. (Para 21)

घ. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 108 - राजस्व प्रविष्टि - हक - अधिकार अभिलेख की राजस्व प्रविष्टियाँ सम्पत्ति का स्वत्व एवं कब्जा मानने के लिये पर्याप्त नहीं हैं जब तक कि ग्राह्य दस्तावेजों द्वारा स्वत्व साबित नहीं कर दिया जाता है।

Cases referred :

2000 MPACJ 27, 1982 MPWN 173, AIR 1995 SC 1955, AIR 1977 SC 2076, 2000(3) MPLJ 244, 2005(4) MPLJ 146, (1994) 5 SCC 686, 2000(2) MPHT 467, 2000(2) MPHT 60 (NOC), (2009) 8 SCC 339, 1999 AIR SCW 1284, AIR 1983 SC 742, 1986(1) MPWN 116.

Y.K. Munshi with J.A. Shah, for the appellants.

ORDER

U. C. MAHESHWARI J.:—This order shall govern the question of admission of above mentioned both the appeals, as the same have been arisen out of a common judgment passed by the appellate court in two different appeals arising out of a judgment and decree passed by the trial court in Civil Original Suit No.25-A/08 filed on behalf of the appellants.

2. These appeals are directed by the appellants/ plaintiffs under Section 100 of CPC being aggrieved by the common judgment and decree dated 21.4.2010 passed by 17th Additional District Judge (FTC), Jabalpur in Civil Regular Appeal No.44-A/08 filed by the appellants and Civil Regular Appeal No.45-A/08 filed on behalf of the respondent No.1 and 2 whereby dismissing their appeal No.44-A/08, the findings of the judgment and decree dated 22.9.2008 passed by 15th Civil Judge, Class-II, Jabalpur in Civil Original Suit No.25-A/08 dismissing their suit in part for perpetual injunction with respect of land bearing survey No.99/21 (Old No.) area 0.029 hector (4307.33 Sq. Ft.) situated at village Khairi, Tahsil and District Jabalpur, has been affirmed while allowing the appeal of respondent No.1 and 2 the findings of such judgment of trial court whereby the suit of the appellants was decree for perpetual injunction with respect of land bearing survey No.99/26 (Old No.) area 0.040 hector (2153.66 Sq. Ft.) situated in the same village has been set aside and accordingly the appellants suit was dismissed in its entirety.

3. Herein after in this Order the appellants of both the appeals are being said to be plaintiffs while the respondent No.1 to 3 are being said to be the defendant No.1 to 3 respectively.

4. The facts giving rise to these appeals in short are that the appellants/ plaintiffs filed the above mentioned suit for perpetual injunction against the defendant No.1 to 3/ respondents contending that they being Bhoomi-swami of the above mentioned land bearing survey No.99/26 and 99/21 area 0.040 and 0.029 hector respectively are in possession of the same. The same was purchased by them from its earlier Bhoomiswami/ the defendant No.3 Ashok Kumar Jain, vide registered sale deed dated 24.8.1998. Pursuant to that after recording their names in the Revenue Record the requisite Bhoo-Adhikar Pustika were also issued to them. Subsequent to purchase the land the Revenue Department has changed the Survey number of those land, the same has become survey No.214/4. The respondent No.1 and 2 without having

any title, right or authority are interfering in their possession of such land. It is also stated that on earlier occasions also such respondents tried to interfere in possession of their predecessor in title the defendant No.3. On which the defendant No.3 filed a Civil Original Suit No.302-A/94 for perpetual injunction against the defendant No.1, 2 and some other official of the State. The same was decreed and respondents along with other official of the State were restrained to interfere with respect of said land in possession of the defendant No.3, Ashok Kumar Jain. It is further stated that defendant No.1 being established by the State government under Section 3 of the Madhya Pradesh Grah Nirman Mandal Act 1972 is functioning through defendant No.2 and by virtue of Section 48 of Land Acquisition Act they had power to purchase and acquisition of the land. The disputed land was never acquisitioned in accordance with the provision of Section 48 and 49 of Land Acquisition Act. In spite of it, without having any title, right or authority on 24.8.2006 the defendants have collected some construction material on such land. On receiving such information from some contractor that the defendant No.1 and 2 are going to construct the road on such land. In order to protect the possession of the land the appellants filed the suit for perpetual injunction restraining the respondent No.1 and 2 from any interference in their possession of such land.

5. In the written statement of defendant No.1 and 2 by disputing the averments of the plaint, it is stated that the plaintiffs are not the Bhoomi-swami of such land. In accordance with the prescribed procedure through State of Madhya Pradesh some land of private sector of village Maharajpur and Khairi was acquisitioned by them to implement the scheme for construction the houses of Transport Nagar. For the purpose of such acquisition the requisite notifications were issued and the same were published in the gazette as well as in daily news papers and pursuant to that the disputed land along with others was acquisitioned in accordance with the prescribed procedure it's possession was also delivered to the defendant No.1 and 2 on 1.6.1989, since then such defendants being Bhoomi-swami are coming in possession of the same, the name of defendant No.1 was also recorded in the record of rights. In further averments it is stated that in the aforesaid acquisition of land the defendant No.3 Ashok Kumar Jain, the then recorded Bhoomi-swami had taken the compensation of it in the year 1992. Subsequently under the false pretext the defendant No.3, Ashok Kumar Jain without having any right, title or authority by filing the suit for perpetual injunction got the decree with

respect of the disputed land. It is also stated that during subsisting the acquisition proceeding the land Acquisition Officer demanded Rs.12,00,000/- vide notice dated 18.5.1989 from the defendants No.1, on which a cheque of aforesaid sum was delivered to such authority. Thereafter compensation of the land was received by defendant No.3 Ashok Kumar Jain. Therefore, the plaintiffs who are claiming the rights and title under the authority of defendant No.3 Ashok Kumar Jain did not have any authority to claim the possession over the disputed land or to file the suit for perpetual injunction. With these pleadings, the prayer for dismissal of the suit with compensatory cost of Rs.5,000/- is made.

6. The defendant No.3 filed his written statement by admitting all the facts of the plaint stated by the plaintiffs.

7. In view of the pleadings of the parties after framing the issues and recording the evidence, on appreciation of the same taking into consideration that although the total area of the acquisitioned land was rightly mentioned in the notification issued under Section 4 and 6 of Land Acquisition Act but in such notification survey No.99/26 has not been specifically mentioned only survey No.99/21 was mentioned, the trial Court decreed the suit in part for perpetual injunction till the extent of survey No.99/26 for area 0.040 hector while the same was dismissed with respect of survey No.99/21, area 0.029 hector. Being dissatisfied with such decree of the trial court against dismissal part of the suit, the plaintiffs filed their Regular Civil Appeal bearing No.44-A/08 while against the decree of perpetual injunction with respect of survey No.99/26, defendant No.1 and 2 filed the Civil Regular Appeal bearing No.45-A/08 in the subordinate appellate Court. After hearing both the parties in such appeals on consideration by allowing the appeal of the defendant No.1 and 2 the decree of perpetual injunction passed by the trial Court with respect of survey No.99/26 area 0.040 hector has been set aside while by dismissing the appeal of the plaintiffs the decree regarding dismissal of such suit in part has been affirmed and in such premises, the entire suit of the plaintiffs/ appellants has been dismissed. On which the appellants have come forward with this appeal to this Court.

8. Shri Y. K. Munshi, learned Senior Advocate assisted by Shri J. A. Shah, after taking me through the pleadings of the parties, evidence available on record and also the exhibited documents argued that in the available fact and set of evidence the appellate Court by dismissing the appeal of the respondent

No.1 and 2 and allowing their appeal ought to have decreed their suit in toto but under the wrong premises by allowing the appeal of the defendant No.1 & 2 and setting aside the decree of the trial court dismissed their appeal. In continuation he said that the objections of the defendant, on which their suit was dismissed are not sustainable under the law as under the notification of Section 4 and 6 of Land Acquisition Act, out of aforesaid two numbers, one number i. e. 99/26 was not mentioned in the notification and besides this in compliance of Section 11, 11-A of the Land Acquisition Act within two years from the date of aforesaid notification under Section 6 of Such Act, the award of compensation was not passed, hence, the entire proceeding of such acquisition had been lapsed and lost its sanctity. He further said that defendant No.1 and 2 had utterly failed to prove that in the aforesaid land acquisition proceeding the physical possession of the land was taken over from the defendant No.3 and handed over to the defendant No.1 and 2. In such premises he said that there is sufficient evidence in the matter to draw the inference that such land was remained in possession of the defendant No.3 Ashok Kumar Jain even after holding the acquisition proceeding. In continuation he said that it has not been proved on record by any cogent and reliable evidence that compensation of aforesaid both the land was given to defendant No.3 and the same was received by him on the contrary on entering into the witness box defendant No.3 had categorically stated that he did not receive any such compensation of the land. Besides this, he further argued that defendant No.1, 2 and their officials tried to interfere in the possession of such land when the same was in possession of defendant No.3 Ashok Kumar Jain, the predecessor in title of the plaintiffs. On which the defendant No.3 filed earlier suit for perpetual injunction against the respondent No.1, 2 and some other person, the same was decreed. So in view of such earlier decree of perpetual injunction in favour of the predecessor in title of the plaintiffs, they had right to protect their possession and therefore, on the strength of such earlier decree on a subsequent cause of action being purchaser of the land, the plaintiffs were entitled for the decree of the perpetual injunction and courts below ought to have decreed the entire suit but the appellate court committed error in dismissing the suit in toto by ignoring the factum of aforesaid earlier decree. It was also argued that in view of fresh mutation of defendant No.3 on the strength of the above mentioned decree of perpetual injunction over the disputed land in revenue record, subsequently on purchasing the same from such defendant No.3 by the appellants their names were mutated in the Revenue Records and pursuant to that also the appellants being in settled

possession of such land the courts below ought to have decreed the suit and protect their possession till they are dispossessed by the defendant No.1 and 2 by following the prescribed procedure of law and prayed for admission of both the appeals on the proposed substantial question of law mentioned in paragraph 16 of the appeal memo. He has also placed his reliance on some reported cases of the Apex Court as well as of this Court the same shall be taken up for consideration at the appropriate stage of this order.

9. Having heard the counsel, keeping in view the arguments after going through the records of the courts below and the impugned judgment, I have found the findings of the appellate court, for allowing the appeal of defendant No.1 and 2 and also for dismissing the appeal of the appellants as well as their suit, in consonance with the available evidence and the existing legal position.

10. The appellate court has dismissed the suit of the appellants in its entirety holding that prior to 24.8.98, on which the sale deed Ex.P.1 was executed by defendant No.3 in favour of the plaintiffs/ appellants, the disputed land was already acquired for respondent No.1 and 2 for implementation of their some schemes and its compensation was also paid to the respondent No.3. Thereafter defendant No.3 did not have any right or authority to transfer or sale such land with possession or otherwise to the plaintiffs/ appellants and in such premises they did not had any better right on such land then the right of Ashok Kumar defendant No.3. It is settled proposition of law that where the seller did not have any right in the questionable property then even on execution of sale deed by him regarding such property, such document does not confer any title in favour of the purchaser. Such question is answered by this Court in the matter of *Omprakash Soni Vs. Rajmal Jain* reported in 2000 MPACJ page No.27 and also in the matter of *Bapulal Vs. Bhanwarlal* reported in 1982 MPWN 173.

11. In the record I have found the notification issued by the Collector, Jabalpur under Section 4 and 6 of Land Acquisition Act published in the gazette of State of Madhya Pradesh in which besides other land survey No.99/21 is also mentioned for acquisition and in such notification the area of such land is mentioned 0.069 hector while as per case of the plaintiffs the land bearing survey No.99/21 is having the area 0.029 hector while survey No.99/26 is having the area 0.040 hector. As such the total area of the land was rightly mentioned in such notification. Thus, in such premises the approach of

the appellate court holding that looking to the area of both the survey number the acquisition appears to be correct. Such approach is also based on other connected papers of notification exhibited on the record from Ex.D.1-C to Ex.D.22-C. The award of the compensation was also passed by the Collector/Land Acquisition Officer vide dated 21.9.1992, in such award the name of defendant No.3 the predecessor in title of the plaintiffs is mentioned and as per further averments of it in compliance of the award the sum of compensation was paid to defendant No.3. Besides this, the papers for taking over the possession of the property and handing over the same to defendant No.1 and 2 (Ex.D.9-C) also placed on record in which also the same area of the land as stated in the notification is mentioned. Apart this Ex.D.19-C amended compensation sheet of Form No.13 is also placed and marked on record, according to which defendant No.3 Ashok Kumar Jain had been paid the compensation for the land bearing survey No.99/21 area 0.029 hector and survey No.99/26 area 0.040 hector. I have also found a letter dated 28.7.1989 sent by the Collector, Land Acquisition Officer, Jabalpur to the official of defendant No.1 and 2 contending that possession of the acquisitioned land of village Maharajpur and Khairi had been handed over to the authority of defendant No.1 and 2 on 1.6.1989.

12. Under the above mentioned circumstance the courts below had to examine the matter with this angle that subsequent to acquisition of the disputed land under the provision of Land Acquisition Act for defendant No.1 and 2 whether the Civil Court had any jurisdiction to entertain any Civil Suit either for declaration or/and for perpetual injunction at the instance of the person from whom the land was acquisitioned with possession and the compensation has also been paid to him. In other words whether such dispute could be entertained and adjudicated by the Civil Court. Such question was answered by the Apex Court in the matter of "*State of Bihar v. Dharendra Kumar*" reported in AIR 1995 S. C. 1955, in which it was held as under :

2. A. We are, therefore, inclined to think, as presently advised, that by necessary implication the power of the civil Court to take cognizance of the case under S.9 of C.P.C. stands excluded, and a civil Court has no jurisdiction to go into the question of the validity or legality of the notification under S.4, and declaration under S.6, except by the High Court in a proceeding under Article 226 of the Constitution. So, the civil suit itself was not maintainable. When such is the

situation, the finding of the trial Court that there is a prima facie triable issue is unsustainable.

13. This question is also answered by the Apex Court in the matter of "*S. P. Subramanya Shetty v. Karnataka State Road Transport Corporation*" AIR 1997 S. C. 2076, in which it was held as under:

4. In view of the settled legal position that the notification had become final and the proceedings had attained finality, the Civil Suit was not maintainable. This Court has repeatedly held that a Civil Suit relating to acquisition proceedings is not maintainable and by implication, cognizance under Section 9, CPC, is barred. The Court cannot issue mandatory injunction against the State to denotify the acquisition under Section 48. Therefore, the question of granting an injunction against the authority from proceedings in accordance with the law does not arise. The High Court, therefore, was right in refusing to grant injunction. The Court cannot compel the Government to withdraw the notification under Section 4 (1) of the Act. It is for the Government to consider the same on merits and it keeping in mind subservience of public interest. In view of the fact that notification was upheld by this Court and has become final, the Government cannot retract from the steps taken.

14. On arising the occasion, this Court has also answered this question in the matter of *Pashu Chikitsa Vibhagiya Shahkari Narman Samiti Maryadit Bhopal Vs. State of M. P.* reported in 2000 (3) MPLJ 244 in which it was held as under:

"4. We are in agreement with the contention so raised by the learned counsel for the State. The Civil Court has no jurisdiction to go into the question of validity and legality of Notification under Section 4 and the declaration under Section 6 of the Act except by the High Court in a proceeding under Article 226 of the Constitution of India. By a necessary implication, the power of Civil Court to take cognizance under Section 9 of the Civil Procedure Code stand excluded. With this background, the suit was not maintainable. Consequently, the view taken by the District Judge is correct and is confirmed."

15. Subsequent to aforesaid decisions such question is further answered by the Division Bench of this Court in the matter of *Dev Kunwar Ben Shah Vs. State of Madhya Pradesh* reported in 2005 (4) MPLJ 146, in which it was held as under :

11. In this case, notification is not under challenge, but declaration is sought that acquisition proceedings have lapsed on the expiry of period of two years after acquisition of land. In the relief clause, plaintiffs has prayed that it be declared that after publication of notification under Section 4 of the Act on 15.12.1995 entire proceedings had lapsed as the award was not passed within two years and fresh notification under Section 6 of the Act on 13.8.1998 without publication of notification under Section 4 is void and contrary to law and is unenforceable against the plaintiff.

12. in this case, proceedings under Section 4 of the Act have not been challenged. What is under challenge is the fresh notification under Section 6 of the Act dated 13.8.1998. therefore, in such a situation, whether such suit will be maintainable. Apex Court in the case of *State of Bihar Vs. Dharendra Kumar* (Supra) has held that the Act being a complete Code in itself, jurisdiction of Civil Court is excluded by necessary implication and jurisdiction under Article 226 of the Constitution of India can be invoked. Thus, in view of the judgment of the Apex Court in the aforesaid case which has been following by the Division Bench of this Court in the case of *Pashu Chikitsa* (Supra), covering the question of law has been delivered in the matter of the Act, therefore, judgment referred in the case of *Dhulabhai* (Supra) will not be applicable to the present case. Therefore, the suit as filed itself is not maintainable. Even otherwise, since the proceedings are under Section 17 of the Act and emergency clause was invoked, therefore in the light of the judgment in the case of *Satendra Prasad Jain* (Supra), provisions of Section 11-A of the Act will not be applicable. Therefore, the suit has rightly been dismissed by the trial Court.”

16. In view of the aforesaid legal position in the available circumstance of

the case at hand neither the earlier suit COS No.302-A/94 filed for perpetual injunction by defendant No.3 and decided on 22.7.1996 nor the impugned suit filed by the appellants under the rights acquired from defendant No.3 were entertainable and in such premises the aforesaid decree for perpetual injunction passed in COS No.302-A/94 being ab-intio void was not binding against the defendant No.1 & 2 and in such premises also the approach of the appellate court dismissing the suit of the plaintiffs/ appellants does not appear to be perverse or contrary to law. Therefore, in such premises this appeal is not involving any substantial question of law requiring any consideration under Section 100 of CPC at this stage.

17. In view of the aforesaid, when the suit of the appellants itself is not maintainable other questions raised by the appellants' counsel do not require any consideration on other merits of the case but for the shake of argument, I deem fit to examine such grounds also to consider the question of admission.

18. After selling the property the seller did not have any right, authority or title in such property. In other words it could be said that after acquisition of land and receiving the compensation the person like defendant No.3 whose land was acquisitioned did not have any right or authority to file the suit for perpetual injunction or to sale the same to the appellants or other person and in such premises, the appellants being purchaser on the strength of such defective title of their predecessor did not have any right or authority to file the impugned suit for perpetual injunction stating that they are in settled possession of the property.

19. Besides the above in view of the provision of Section 48 of Transfer of Property Act every previous transfer of the property had over ride effect over the subsequent transfer of such property by the same person. In such premises in view of earlier concluded proceedings of Land Acquisition the appellants' sale deed did not confer any title to the appellants, hence this appeal does not involve any substantial question of law.

20. In the lack of any proved circumstance by any admissible document showing that after acquisition of the aforesaid land and payment of compensation to defendant No.3, at later stage the same was given back to such defendant No.3, it could not be deemed that on the date of the sale deed executed by the defendant No.3 in favour of plaintiffs, the land was in possession of defendant No.3 and was handed over to appellants. So in such premises also the impugned judgments are not giving rise to any substantial question of law.

21. The aforesaid earlier decree of perpetual injunction passed in favour of the defendant No.3 being ab-initio void had not given any right to such defendant No.3 to get mutated such land in his name in the Revenue Record and on the strength of such illegal mutation on selling such land by defendant No.3 to the plaintiffs if they got mutated their names in such record, then such entries could not be deemed to confer the title or possession of the plaintiffs over the disputed land. Even otherwise revenue entries in the record of right could not be deemed to be sufficient to hold the title and possession of the property with the appellants, unless the title is proved by admissible documents. So on the ground of such earlier decree also this appeal is not involving any substantial question of law.

22. At this juncture, I would like to mention here that as per the case of the plaintiffs their predecessor in title defendant No.3 got mutated such land on his name on the basis of aforesaid earlier decree, if such earlier decree was passed for perpetual injunction in favour of the defendant No.3 then on the strength of such decree in the lack of any declaration of title in favour of the defendant No.3 he did not have any authority or right to get it mutated in his name in the record of rights from the Revenue Authority. So also the Revenue Authority did not have any authority or jurisdiction to mutate the name of the defendant No.3 on the strength of such decree or under his right on the strength of the sale deed executed by defendant No.3 to mutate in the names of the plaintiffs. From the available circumstance it appears that under some conspiracy with defendant No.3 and subsequently with plaintiffs/ appellants the concerning Revenue Officer mutated the name of the defendant No.3 in the Revenue Record and thereafter on the strength of sale deed executed by the defendant No.3 in the name of plaintiffs/ appellants. Such act of the Revenue Authority in the available circumstance could not be deemed to be a bona-fide as on the strength of any decree for perpetual injunction the disputed land could not be recorded by such authority in the revenue record in the name of defendant No.3 Bhoomi-swami as the same is not permissible under the law unless some declaration was made in such decree. In such premises while considering the question of admission of this appeal, I do not want to pass any operative direction against such Revenue Authority, defendant No.3 and all concerned but in the available circumstance, I deem fit to direct the Chief Secretary of State of Madhya Pradesh as well as the Principal Secretary of Revenue Department to take appropriate action against the concerning person individually the delinquent officers/ officials who permitted the mutation in the

revenue record only on the strength of the decree of perpetual injunction. I hope and trust that such authorities shall proceed to take such action within three months from the date of this order under intimation to this Court.

23. In view of the aforesaid legal position the Civil Court did not have any jurisdiction to entertain the Civil Original Suit either for perpetual injunction or for other relief with respect of the matter relating to the land acquisition proceeding then the other questions raised on behalf of the appellants that on acquisition of the land from defendant No.3 the physical possession of the same was never handed over to the defendants under the land acquisition proceedings or the sum of the compensation as per the award was not received by defendant No.3 or the award passed by the Land Acquisition Officer under the acquisition proceedings was beyond the limitation of two years from the date of notification of Section 6 of Land Acquisition Act and its impact over the right of the parties could neither be considered by the sub-ordinate trial and appellate court nor the same could be considered by this court under Section 100 of CPC in this appeal.

24. Coming to consider the case laws cited by the appellants' counsel, the same are being taken into consideration one by one.

(A) *State of U. P. Vs. Rajiv Gupta* reported in (1994) 5 SCC 686 is concerned, such case was arisen from some writ petition in which the procedure adopted by the Land Acquisition Officer and the question of limitation about passing the award was challenged and such W. P. was decided by the competent court having jurisdiction to decide such petition but the present case being arisen from the Civil Original Suit in view of the principle laid down by the Apex Court in the matter of *Dhirendra Kumar* (Supra), the cited case is not helping to the appellants for framing any substantial question of law in the matter.

(B) *Mohd. Arif Vs. State of M. P.* reported in 2000(2) MPHT 467 is concerned, this case being based on said decision of the Apex Court in the matter of *Rajiv Gupta* (Supra), for the reasons on which such case is not helping to the defendants/ appellants, this case is also not helping to them.

(C) *Chaurshila Poharker Vs. Collector Jabalpur* reported in 2000 (2) MPHT 60 (NOC) is concerned, the same being

based on Urban Land (Ceiling and Regulation) Act is decided in some different circumstances, thus it being distinguishable on fact, in the available circumstance is not helping to the plaintiffs/ appellants. It is made clear that in the cited case the question of land acquisition or it's any proceedings was not under challenge.

(D)*National Thermal Power Corporation Ltd. Vs. Mahesh Dutta and others* reported in (2009) 8 SCC 339, is concerned, this case was decided taking into consideration that physical possession of the entire land even after payment of 80% sum of the compensation, was not taken over by the Authority under the Land Acquisition Act, which is not the situation here, on the contrary in the present case there is sufficient evidence for holding that the physical possession of the land was taken from the Bhoomiswami defendant No.3 and handed over to the defendant No.1 and 2, therefore the cited case is not helping to the plaintiffs/ appellants.

(E)*Prataprai N. Kothari Vs. John Braganza* reported in 1999 AIR SCW 1284 is concerned, such case was decided taking into consideration the position that both the parties could not prove their title over the property and in such circumstance on the strength of the long possession of one party the case was decided while in the case at hand it has been established that after Acquisition of the disputed land it's title and possession remained with the defendant No.1 and 2. So in such premises also this cited case is not helping to the appellants on the contrary in view of the observation made by the Apex Court in the matter of "*Gangubai Babiya Chaudhary v. Sitaram Bhalchandra Sukhtankar*" AIR 1983 S.C.742 and also by this Court in the matter of *Kamal Singh Vs. Jairam Singh* reported in 1986 (1) MPWN 116, unless the legal possession is proved by the party like plaintiffs/ appellants their suit for perpetual injunction could not be decreed.

25. In view of the aforesaid long discussion and legal position I have not found any perversity, infirmity, illegality in the impugned judgment of the appellate court giving rise to any question of law rather than substantial question of law requiring any consideration at the stage of Second Appeal under Section

100 of CPC. Hence both the appeals being devoid of any such question deserves to be and are hereby dismissed at the stage of motion hearing. However, the Chief Secretary of State of Madhya Pradesh as well as the Principal Secretary of Revenue Department is directed to take appropriate action/ steps against the concerning Revenue Officer(s) and the person(s) as directed in paragraph 22 of this order under intimation to this Court. Let a copy of this order be sent to the Chief Secretary of State of Madhya Pradesh and the Principal Secretary of Revenue Department immediately for it's compliance.

26. As this order has been passed jointly in S. A. No.742/10, hence a copy of this order be kept with the record of S. A. No.834/10.

27. Both the appeals are dismissed as indicated above. There shall be no order as to costs.

Appeal dismissed.

I.L.R. [2011] M. P., 196

APPELLATE CRIMINAL

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

Cr.A. No.1024/2005 (Indore) decided on 24 June, 2010

SANTOSH

... Appellant

Vs.

STATE OF M.P.

... Respondent

A. Penal Code (45 of 1860), Section 302 - Murder - Appellant/ husband picked up quarrel with deceased/wife and pour kerosene oil on her and lit fire by match box - Appellant arrested after 7 days of incident - Doctor found old burn injuries on the tip of his fingers, thumb and teeth biting injury on left fore arm - Held - Appellant did not take his wife to hospital for treatment - Appellant failed to account for his absence for about 7 days - Deceased was taken to hospital by neighbors and brother-in-law - Appellant guilty of offence u/s 302 of IPC. (Para 7)

क. दण्ड संहिता (1860 का 45), धारा 302 - हत्या - अपीलार्थी/पति ने मृतक/पत्नी से झगड़ा किया तथा उस पर मिट्टी का तेल डालकर माचिस से आग लगा दी - घटना के 7 दिन बाद अपीलार्थी गिरफ्तार - चिकित्सक ने उसकी उंगलियों के पोरों, अंगूठे पर जलने की पुरानी क्षतियाँ तथा बायें अग्रभुजा पर दांत से काटने की क्षति पायी - अभिनिर्धारित - अपीलार्थी अपनी पत्नी को इलाज के लिये अस्पताल नहीं ले गया - अपीलार्थी 7 दिनों तक की अपनी अनुपस्थिति का

कारण बताने में असमर्थ रहा - मृतक को पड़ोसियों एवं देवर द्वारा अस्पताल ले जाया गया - अपीलार्थी भा.द.स. की धारा 302 के अन्तर्गत अपराध का दोषी।

B. Evidence Act (1 of 1872), Section 32 - Dying Declaration - Dying declarations recorded by two medical experts and one Executive Magistrate - No reason for these independent witnesses to speak lie or concoct document against appellant - Dying declarations reliable.(Para 9)

छा. साक्ष्य अधिनियम (1872 का 1), धारा 32 - मृत्युकालिक कथन - मृत्युकालिक कथन दो चिकित्सा विशेषज्ञों एवं एक कार्यपालक मजिस्ट्रेट द्वारा अभिलिखित - इन स्वतंत्र साक्षियों द्वारा झूठ बोलने अथवा अपीलार्थी के विरुद्ध झूठे दस्तावेज गढ़ने का कोई कारण नहीं - मृत्युकालिक कथन विश्वसनीय।

Cases referred :

AIR 1989 SC 1543, 1993(II) MPWN 75

Ashish Gupta, for the appellant.

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

J U D G M E N T

The Judgment of the Court was delivered by **S.L. KOCHAR, J. :-** The appellant has filed this appeal against the judgment dated 30.8.2005 passed by the learned First Additional Sessions Judge Mhow, in S.T. No.416/2004, whereby appellant Santosh has been convicted under Section 302 of the IPC and sentenced to undergo imprisonment for life with fine of Rs.2000/-, in default of payment of fine to suffer additional rigorous imprisonment for six months.

2. Briefly stated the prosecution case as unfolded before the Trial Court is that deceased Seema was married with the appellant and they were having three children. Appellant was liquor addict and after consuming liquor, used to beat his wife. P.W.16 Kaloo father of the appellant had sold his land and deposited the sale proceed in the Bank in the name of his wife and children. On 21.8.2004 in the night at 8 PM appellant demanded money for purchasing liquor from his wife deceased Seema which was refused by her thereafter appellant picked up a quarrel and while saying that he will kill her poured kerosene oil on her person and lit fire by match stick. On hearing out cry, cousin brother of appellant P.W.11 Ramchandra, P.W.3 Madanlal and P.W.14 Shakuntala wife of Ramchandra reached on the spot and took the deceased to M.Y. Hospital Indore. Seema was admitted in burn unit of the Hospital. Telephone Operator of the Hospital sent information to Police about admission of deceased which was recorded in daily diary vide Ex. P/16 and its copy is

Ex.P/16-C. P.W. 30 Station House Officer Indramani Patel of Police Station Simrol after receiving information from Hospital, reached to the Hospital, along with P.W.21 Head Constable Ajab Singh and recorded Dehati Nalishi Ex.P/36 at the instance of deceased. On the basis of this Dehati Nalishi in Police Station FIR Ex.P/27 was recorded by P.W.26 Head Constable Moorad Khan. Police registered the Crime No. 255/2004 for offence under Section 307 of the IPC. On 22.8.2004 her dying declaration Ex.P/29 was recorded by Executive Magistrate P.W.24 Rajkumar Haldhar. During the course of treatment she died in the Hospital on 25.8.2004. After receiving information of death, Police of Police Station Sanyogitaganj registered Merg No. 0/281/2004 vide Ex.P/35 and also sent intimation to concerned Police Station where offence under Section 302 of the IPC was also added. On completion of inquest enquiry vide Ex.P/2, the dead body was sent for post mortem examination and the same was conducted by Dr. S.K.Dadoo P.W.17. The post mortem report is Ex.P/15. Investigating Officer seized various articles from the spot coupled with clothes of the deceased and also prepared spot map Ex.P/4. Appellant was arrested on 29.8.2004 through arrest memo Ex. P/5. He was sent for medical examination and examined by P.W.25 Dr. H.R. Verma, who gave MLC Report Ex.P/32. The bed head ticket and other documents relating to admission and treatment of deceased were seized by the Police. Investigating Officer recorded statements of the witnesses who were acquainted with the facts of the case and on completion of the investigation, filed the charge sheet against the appellant for the offence under Section 302 of the IPC. Appellant refuted the charges and his defence was that his deceased wife was not willing to live with her in Village Datoda Tehsil Mhow, and wanted to shift in Indore Town. On this issue she was issuing threat to him that if they will not shift to Indore, she will do something and ultimately in the night of 21st August, 2004 ablazed herself after pouring kerosene oil. He also stated in his statement that he tried to save his wife wherein he sustained burn injuries. Appellant has not examined any witness in defence whereas prosecution has examined as many as 34 witnesses and adduced in all 46 documents to prove its case. Learned Trial court finding the appellant guilty convicted and sentenced him as mentioned hereinabove.

3. We have heard the learned Counsel for the parties and also perused the entire record carefully.

4. It is borne out from the record that conviction of the appellant is mainly based on Dehati Nalishi Ex.P/36 which has rightly been considered as dying

declaration by the learned Trial Court because it relates to the cause of death of deceased and admissible under Section 32(1) of the Evidence Act, dying declaration Ex.P/29 recorded by Executive Magistrate and oral dying declaration by deceased before P.W.1 Debubai, P.W.6 Mangilal and P.W.8 Rakesh Chouhan. Learned Trial Court has also placed reliance on report Ex.P/28 lodged by deceased on 11.8.2003 at 11 AM against her husband/appellant about consuming of liquor and thereafter abusing, beating and ill-treating her. On this report Police had not taken any cognizance because offences under Section 405 and 323 of the IPC were non-cognizable. This report has been proved by P.W.21 Head Constable Ajab Singh. Learned Trial Court has sought corroboration to written and oral dying declarations by contents of document Ex.P/26 the admission ticket of the deceased proved by P.W.20 Dr. Manish Kumar wherein it is mentioned that she was brought in the Hospital by Mukesh P.W.15 brother-in-law of deceased/brother of the appellant. Deceased gave history to doctor that she was burnt by her husband/appellant on 21.8.2004 at 8 PM. It is also clear from this document that there was no history of any unconsciousness/vomiting meaning thereby deceased was conscious at the time of admission.

5. Learned Counsel for the appellant has vehemently submitted that appellant himself sustained injury while saving her and if he was a perpetrator of the crime, he would not have tried to save the deceased by putting himself in danger and that contents of both the dying declarations Ex.P/36 and P/29 are contradictory to each other. In Ex.P/29 she has deposed that after consuming liquor appellant poured kerosene on her person and lit fire whereas in Dehati Nalishi Ex.P/36 she has stated that at 8 PM in the night of incident appellant came to the house and demanded money for purchasing liquor and on refusal, he poured kerosene on her person and ablazed her. It is also argued that looking to the percentage and nature of burn injuries, deceased could not be in a condition to speak and Investigating Officer prepared false Dehati Nalishi as well as dying declaration. Therefore, no reliance should have been placed by the Trial Court on both dying declarations. It is also pointed out that according to Bank Manager P.W.31 Satish Prasadji Shukla, the bank account was in joint name of appellant, deceased and their son and daughter and the account can be operated by both, therefore, question of demanding money by the appellant from his wife would not arise.

6. Per contra, learned Counsel for the State has supported the impugned judgment and finding arrived at by learned Trial Court. Learned Prosecutor

has also submitted that in the dying declaration substance of the statement of the deceased is clear that appellant by pouring kerosene oil lit fire, therefore, the minor contradiction whether at the time of incident he was under the influence of liquor or he was demanding money is not very material. According to learned Prosecutor it is not a case where in one statement deceased had disclosed that she sustained injuries accidentally or by commission of suicide and in second, she has stated about causing of injuries by the accused.

7. First of all we would like to deal with the argument of learned Counsel about conduct of the appellant for which he placed reliance on two Supreme Court judgments passed in case of *State of U.P. v. Chet Ram and Meera v. State of Rajasthan* (AIR 1989 Supreme Court 1543 and AIR 2004 Supreme Court 1879) and Division Bench judgment of this High Court passed in case of *State of M.P. v. Phulchand* 1993 (II) MPWN Short Note 75. We have perused the statement of the appellant recorded under Section 313 of the Cr.P.C. by learned Trial Court and medical evidence of P.W.25 Dr. H.R. Verma. It is clear from the statement of Dr. Verma, that on 30.8.2004 in the noon at 3 PM Constable Diwakar Prasad No.2718 brought the appellant in Civil Hospital Mhow, for his examination and on examination he found old burn injury on tip of the right fore fingers and thumb and teeth biting injury on left fore arm. Dr. Verma, proved MLC Ex.P/32 and also gave prescription for treatment vide Ex.P/33. He has specifically opined that the injuries were simple in nature and could be caused between 7 to 14 days from the date of examination of the appellant. Dr Verma, has no where stated about disclosure of sustaining injury by the appellant while saving his wife. In accused statement appellant has not explained as to how he sustained teeth biting injury on his left fore arm. Appellant was arrested by Station House Officer P.W.30 Indramani Patel on 29.8.2004 and he sent the appellant with medical requisition vide Ex.P/37 for his examination with Constable. On this requisition, nothing is mentioned as to how appellant sustained injuries on his person. There is absolutely no evidence on record that the appellant was available to the Police right from the time of admission of his wife to the Hospital and disclosed about sustaining of injury while saving her. Shri Patel proved arrest memo Ex.P/5 and there is no cross-examination about delay in arrest if appellant was available to the Police. It is also clear from the medical evidence of Dr. Verma that injuries were in healing process and Dr. Verma has no where stated about any kind of infection. That shows that appellant must had taken some treatment or used medicine for healing the burn injuries. In all the above

mentioned decisions, there was positive evidence in favour of the accused about taking of the deceased immediately after the incident to the Hospital and provide medical treatment, therefore, the ratio decided in these cases about conduct of the accused is not at all applicable in the instant case as there is no evidence that appellant took the deceased immediately to the Hospital and got her admitted for the purpose of treatment. On the contrary, appellant failed to account for his absence for about 7 days. This shows that he was absconding immediately after the incident which is also clear from the contents of the dying declarations Ex.P/29 and Ex.P/36 wherein it is mentioned that deceased was brought to the Hospital from the spot by neighbours and her brother-in-law. The medical document Ex.P/26 is also disclosing this fact that deceased was brought by Mukesh P.W.15 brother-in-law of deceased and brother of appellant. This witness has also admitted this fact in paragraph 3 of the cross-examination by defence Counsel. Though brother of the appellant Mukesh deposed in favour of the appellant and gave the story of self emulation by the deceased but same has been given for the first time in Court and if it was true, why Mukesh as well as appellant Santosh did not immediately lodged the report in the Police Station or recourse to the Authority for bringing these facts to their knowledge. No such steps were taken by them shows that this story was concocted one and disclosed for the first time in Court, after lapse of long time.

8. Appellant has not disputed his arrest on 29.8.2004 meaning thereby he was free but he had not lodged any report about the incident before any Authority informing that deceased committed suicide and falsely implicated him.

9. We have gone through the Dehati Nalishi Ex.P/36, dying declaration Ex.P/29 and document of admission in Hospital Ex.P/26, and in all these documents it is mentioned that deceased was ablazed by appellant after pouring kerosene oil. The author of all these documents P.W.30 SHO Indramani Patel, Executive Magistrate P.W.24 Rajkumar Haldhar and P.W.20 Dr. Manish Kumar Verma have proved all these documents and given detailed statement. From their statement, it is clear that deceased was conscious and able to give statement. Before recording the dying declaration Ex.P/29 Executive Magistrate obtained certificate of fitness from P.W.34 Dr. M. Vadhvani who proved his hand writing and signature on the dying declaration and also deposed that during the course of recording the statement deceased was conscious and able to give statement. There is absolutely no reason for these

independent witnesses, out of which two are medical experts and one is Executive Magistrate, to speak lie or concoct a document against the appellant. Before reaching of the Police in the Hospital at the time of admission Dr. Verma P.W.20 had taken history of the patient and mentioned the same on admission document of the deceased Ex.P/26 that deceased gave history about lighting fire to her by her husband after pouring kerosene oil.

10. The aforesaid written dying declarations are also duly corroborated by evidence of oral dying declaration given by P.W.1 Debubai, P.W.6 Mangilal and P.W.8 Rakesh Chouhan the mother, father and brother of the deceased. Prosecution had also examined other independent witnesses of oral dying declaration P.W.11 Ramchandra, P.W.14 Shakuntala both were neighbour of the deceased but they have turned hostile.

11. Appellant was not having cordial relations with his wife/deceased and ill-treating her is also clear by the report lodged by deceased vide Ex.P/28 proved by P.W.21 Head Constable Ajab Singh. This was the report about the incident occurred on 11.8.2003 much before the death of deceased.

12. For the foregoing discussions, in our considered view the learned Trial Court has rightly placed reliance on written and oral dying declarations hence, there is no merit in this appeal, therefore, the same is, hereby, dismissed.

Appeal dismissed.

I.L.R. [2011] M. P., 202

APPELLATE CRIMINAL

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

Cr.A. No.282/2000 (Indore) decided on 22 July, 2010

GANGADHAR & ors.

... Appellants

Vs.

STATE OF M.P.

... Respondent

A. Evidence Act (1 of 1872), Section 3 - Interested witness - Testimony of interested and related witness cannot be discarded only on this count but Court is required to scrutinize his testimony with great care and caution. (Para 6)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 - हितबद्ध साक्षी - हितबद्ध एवं नातेदार साक्षी की परिसाक्ष्य केवल इसी कारण अमान्य नहीं की जा सकती, परन्तु उसकी परिसाक्ष्य की अत्यधिक सतर्कता एवं सावधानी से संवीक्षा करना न्यायालय से अपेक्षित है।

B. Evidence Act (1 of 1872), Section 134 - Number of witnesses - Quality of evidence is required and not quantity - Parties are not required to examine particular number of witnesses to prove their case. (Para 7)

खा. साक्ष्य अधिनियम (1872 का 1), धारा 134 - साक्षियों की संख्या - साक्ष्य की गुणवत्ता अपेक्षित है न कि संख्या - पक्षकारों से अपना मामला साबित करने के लिये विशिष्ट संख्या में साक्षियों की परीक्षा कराना अपेक्षित नहीं है।

C. Evidence Act (1 of 1872), Section 3 - Medical and ocular evidence - Where evidence of solitary witness is in complete variance with medical evidence, the witness cannot be held to be fully reliable - Appeal allowed. (Paras 8, 11 & 12)

ग. साक्ष्य अधिनियम (1872 का 1), धारा 3 - चिकित्सीय और प्रत्यक्ष साक्ष्य - जहाँ एकमात्र साक्षी की साक्ष्य चिकित्सीय साक्ष्य से पूर्ण भिन्न हो, वहाँ साक्षी को पूर्णतः विश्वसनीय नहीं ठहराया जा सकता - अपील मंजूर।

D. Penal Code (45 of 1860), Section 149 - Unlawful assembly - Appellant No.1 caused injury to deceased and thereafter remaining 9 accused persons came one after another and joined appellant No.1 - Held - It cannot be said that it was an unlawful assembly whose common object was to commit murder. (Para 16)

घ. दण्ड संहिता (1872 का 1), धारा 149 - विधिविरुद्ध जमाव - अपीलार्थी क्र. 1 ने मृतक को क्षति कारित की और तत्पश्चात् शेष 9 अभियुक्त एक के बाद एक आये और अपीलार्थी क्र. 1 से संयुक्त हो गये - अभिनिर्धारित - यह नहीं कहा जा सकता कि वह एक विधिविरुद्ध जमाव था जिसका सामान्य उद्देश्य हत्या कारित करना था।

Cases referred :

AIR 2003 SC.854, AIR 1957 SC 614, AIR 1976 SC 951.

Ashish Gupta, for the appellant No.1.

Yogesh Purohit, for the appellant Nos.2 & 3.

None, for the appellant Nos.4 to 7.

Ashish Gupta, Amicus Curiae, for the appellant Nos.4 & 7.

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

JUDGMENT

The Judgment of the Court was delivered by S.L. KOCHAR, J.:- The appellants have filed the aforesaid Criminal Appeal against the impugned judgment and order of conviction and sentence passed against them in ST No.92/1992 dated 15/2/2000 by learned Addl. Sessions

Judge, Shujalpur, District Shajapur whereby convicted appellants U/S.302/149, 323/149 and 148 of the IPC, sentenced each of them to undergo RI for life with fine of Rs.300/-, with defaulting clause to undergo further RI of six months, six months RI and two years RI, respectively. However, the substantive jail sentences have been directed to run concurrently.

2. Laconically, the prosecution case as narrated before the trial Court is that on 17/11/1991 complainant Samandarsingh (PW.6) and his cousin brother deceased Mangilal were transporting in a bullock-cart soyabean husk from the well of Hemraj in the morning at about 6.30-7.00 a.m. When they reached on the way of forest towards village Uchhod they were intercepted by appellant No.1 Gangadhar. Gangadhar objected taking of bullock-cart. At that moment other appellants also reached over there having farsis and lathis. Present appellants and other three acquitted co-accused persons had started assaulting Mangilal by their respective weapons. When Samandarsingh tried to save his brother he too was assaulted by Gangadhar, causing injury on his back and left arm. Mangilal sustained injuries on his head, hands, palm, right and left knee and calf. At the time of incident, one Kamal Gadri and Dilipsingh (PW.9) had reached over there. After assault, accused persons fled away. PW.6 Samandarsingh took Mangilal in bullock-cart to Police Station Akodia, District Shajapur and lodged the report (Ex.P.16) recorded by Probationary Sub Inspector U.S. Tomar (PW.8). Mangilal was sent for medical examination to Civil Dispensary and examined by Dr.R.C. Kuril (PW.1). Dr. Kuril also medically examined and treated Samandarsingh (PW.6), appellant No.1 Gangadhar and acquitted co-accused Radheshyam. He issued MLC report Ex.P.3 of deceased, Ex.P.2 of PW.6 Samandarsingh, Ex.D.1 and D.2 of appellant No.1 Gangadhar and Radheshyam. Mangilal died on the same day during the course of treatment. After completion of inquest enquiry, the dead body was sent for postmortem examination which was conducted by Dr.Kuril (PW.1). Postmortem report is Ex.P.1. Investigating Officer seized the blood stained and controlled earth from the spot, also prepared spot map. 10 accused persons were arrested and on their disclosure statements, farsis and lathis were seized. Investigating officer recorded the statements of witnesses who were acquainted with the facts of the case and on completion of investigation, filed the charge sheet against 10 accused persons for the offence U/Ss.148, 302, 302/149 and 323 of the IPC.

3. The accused persons denied the charges and their defence was that because of inimical term, they all were falsely implicated. They have also

contended that in fact Gangadhar and Radheshyam were assaulted by the complainant party and complainant party to save themselves lodged a false report implicating as many as 10 persons. In cross examination, they got proved MLC report of both the accused vide Ex.D.1 and Ex.D.2 from Dr.Kuril (PW.1). They have not examined any witness in defence whereas prosecution has examined as many as nine witnesses and got proved 34 documents to prove its case. Learned trial Court, while acquitting three accused persons, convicted the present appellants as described herein above.

4. Learned counsel for appellants have submitted that the conviction of the appellants is mainly based on solitary testimony of Samandarsingh (PW.6) who is the brother of the deceased and his testimony is contradicted by medical evidence on material particulars, therefore, it would be hazardous to place implicit reliance on his testimony without there being corroboration by other substantive piece of evidence. Learned counsel has placed reliance on Supreme Court judgment passed in case of *Lallu Manjhi and another Vs. State of Jharkhand* [AIR 2003 SC 854].

5. On the other hand, learned counsel for State has supported the impugned judgment and finding arrived at by the learned trial Court and also submitted that when several persons had assaulted the deceased by various weapons it was practically not possible for a witness to describe specific overtact and if there is some contradiction on this issue, the entire testimony cannot be thrown over the board.

6. Having heard the learned counsel for parties and on perusal of the entire record, the core question emerged before us to visualise whether Samandarsingh (PW.6) is a reliable witness or not ?. It is settled legal position that testimony of interested and related witness cannot be discarded only on this count but Court is required to scrutinize his testimony with great care and caution. Close relative of deceased would not leave the real culprit by implicating innocent persons, at the same time he would not be immune to implicate innocent person/persons along with real culprit.

7. **It is trite legal position that quality of evidence is required and not the quantity.** U/S.134 of the Evidence Act, to prove the case, the parties are not required to examine the particular number of witnesses. Keeping in mind these principles, now we proceed to appreciate the statement of Samandarsingh. In the instant case, the evidence of Samandarsingh would be strengthened because he was an injured witness and his presence on spot is established.

8. Samandarsingh (PW.6) has deposed that on the date of incident he and his brother Mangilal had gone to well of Chattarsingh in the morning at 6-7 a.m for bringing soyabean husk. When they were returning back on the road appellant No.1 Gangadhar stopped their bullock-cart and started abusing. He called other appellants and on arrival of all the appellants they surrounded Mangilal and also started assaulting by lathi and farsi. In para three he has assigned specific overtact causing injury by farsi on head by appellant No.1 Gangadhar and appellant No.2 Gajju @ Gajrasingh on backside of the neck but on head as well as neck medical expert Dr.Kuril (PW.1) had not found even a single injury caused by any sharp heavy object or sharp object. On head Dr.Kuril found two lacerated wound, one on left side of temporal region and another on left parietal region. Apart from these two injuries and specific overtact attributed to Gangadhar and Gajju, Samandarsingh has deposed that all the 10 accused persons started assaulting conjointly to deceased by their respective weapons and in cross examination, he has deposed in para 20 that each accused had struck 2-3 blows by their weapons but his this statement is contradictory to the medical evidence of Dr.Kuril. Dr. Kuril found in all seven injuries on the person of deceased out of which two were lacerated wounds on head and rest five incised injuries were simple in nature on right and left legs and one on right little finger. In the opinion of Dr.Kuril, all the five incised injuries were simple in nature. It is clear from the statement of Dr.Kuril that incised injuries were on non vital part of the body ie. left arm, left knee, lower third of right leg and right little finger. Deceased died because of fracture of left parietal bone and damage to brain membrane as well as left parietal and temporal lobe.

9. The statement of Samandarsingh is completely at variance with the medical evidence. Supreme Court in case of *Lallu Manjhi and another Vs. State of Jharkhand* relying on the judgment of *Vadi Velu Thevar Vs. State of Madras* [AIR 1957 SC 614] held in para 10 as under:-

"The Law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony into three categories, namely (I) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third

category of cases. The Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon testimony of a single witness."

10. Applying this principle in the facts and circumstances of the case, it was further held in para 11 which is reproduced herein below:-

"In the case at hand, we can neither place implicit reliance on nor totally discard the testimony of Mannu (PW.9) as it can neither be called wholly reliable nor wholly unreliable. Mannu is a witness who could have been naturally present with his brother while ploughing the field. However, we find his testimony to have been substantially improved at the trial than what it was to begin with when the First Information Report of the incident was lodged. Though at the trial Mannu alleges all the 10 accused persons to have dealt blows with their respective weapons on the body of his brother Suphal Hansda, but that is certainly not correct. If 10 accused persons had dealt even one blow each, there would have been a minimum of 10 injuries on the person of the deceased. It is the specific case of Mannu that so far as the chest injuries (fracture of ribs) are concerned, it was the result of the accused Gurua having climbed upon the body of the deceased after he had fallen down and then pressed him against the ground. As the fracture of ribs is not accompanied by any apparent injury on the body, in all probability such injuries were not caused by any weapon. The injuries could have been caused either by pressing hard as alleged or even by forcefully pushing the deceased during the course of any scuffle. The deceased has suffered only two other injuries, which obviously were not caused by three persons. So far as the assault on the deceased is concerned, there is so much of chaff collected by Mannu (PW.9) in his deposition that it becomes very difficult, almost impossible, to sift the grains of truth from out of the mass of chaff of falsehood and exaggerations."

11. In the case at hand if 10 accused had assaulted the deceased, at least 10 injuries would have been found by Doctor on the person of deceased but

in all seven injuries were found and specific overtact attributed to appellant No.1 Gangadhar and appellant No.2 Gajju causing injury by sharp edged weapon farsi on the head and neck of deceased is demonstrably false in the light of medical evidence of Dr.Kuril who did not find even a single injury on neck and head.

12. In view of the aforesaid Supreme Court verdict, Samandarsingh cannot be put in the category of fully reliable witness and for relying him in part there is no corroboration available in the case by any independent material particulars or substantive piece of evidence. It is the duty of this Court to separate the grain from the chaff but in the instant case same are so inextricably mixed to separate. Apart from specific overtact of Gangadhar and Gajju, the general and omnibus statements have been given by Samandarsingh that all the 10 accused thereafter assaulted the deceased by their various weapons and each had caused 2-3 blows meaning thereby deceased should have suffered atleast 20-30 injuries on his person but the total injuries were 7 in number.

13. In case of *Nachhattar Singh and others Vs. The State of Punjab* [AIR 1976 SC 951] the Supreme Court has taken into consideration the major medical conflict with the ocular account and observed in para 15 as under:-

"A big question mark arises. How is it that 3 empty cartridges of 8 mm said to have been recovered from the place of occurrence were found by the Expert to have been fired from Nachhattar's rifle and yet no rifle injury was found to have been caused on any of the victims although the rifle was used on two according to the First Information Report and on all the 3 according to the evidence in Court ? There being no answer to this questions mark, it could not but shake the foundation of the whole prosecution case and shake it to an irreparable extent. Principles of criminal Jurisprudence which govern the trial of criminal cases in our country do not permit the ignoring of or brushing aside such a big jerk given to the prosecution evidence. Neither the trial Court nor the High Court was justified in law in brushing aside such a serious infirmity and coming to the conclusion that even if this part of the prosecution story was not correct, still all the three appellants had committed the crime in furtherance of their common intention. In such a situation it is not safe to say that the death of Chhota Puri

was caused only by the gun shots of Dalip Gir. One could find all the appellants guilty with the aid of Section 34 of the Penal Code for the three murders if the prosecution would have merely proved the participation in general of the persons armed with fire-arms in the commission of the crime. But it chose to give the details of the story of assault with the different fire-arms by the appellants. It cannot escape the consequence when a vital part of the details is demonstrably found to be wrong".

14. In view of the aforesaid legal pronouncement, the prosecution cannot urge in the instant case before this Court to convict the appellant with the aid of Sec.149 of the IPC.

15. Apart from the above, in our considered view on the basis of the evidence of Samandarsingh it cannot be said that all the accused had formed unlawful assembly whose common object was to commit murder of deceased Mangilal and assault Samandarsingh in prosecution of their common object. Samandarsingh had deposed that at the first instance appellant No.1 Gangadhar had already assaulted the deceased by farshi thereafter he reached on the spot and then other nine appellants reached on the spot. Sec.149 of the IPC is reproduced as under:-

Sec.149:-Every member of unlawful assembly guilty of offence committed in prosecution of common object.

If an offence is committed by any member of an unlawful assembly in members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence".

16. In the light of this evidence, Section 149 of the IPC is not at all applicable in the present case. First of all the prosecution has failed to establish that Gangadhar had called other accused persons with an intention to assault the deceased. They reached on the spot one after another and joined Gangadhar, therefore, it cannot be said that it was an unlawful assembly whose common object was to commit murder of Mangilal and in prosecution of the common object of the assembly they assaulted Mangilal or the members of the assembly were knowing that there was likelihood of commission of murder of Mangilal.

17. In the light of aforesaid legal and factual discussion, in our considered view

the prosecution has failed to prove its case beyond reasonable doubt against the appellants, therefore, this appeal is allowed. Conviction and sentence as passed by the learned trial Court against all 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., 210
APPELLATE CRIMINAL

Before Mr. Justice I.S. Shrivastava

Cr.A. No.499/2007 (Indore) decided on 26 August, 2010

DINESH

... Appellant

Vs.

UNION OF INDIA

... Respondent

A. *Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8 & 21(c) - Weight - Difference* - Samples sent to FSL were said to be containing 5 gms of Heroin - FSL found 4.46 and 4.47 gms in samples - Held - When weight is taken in a covered place by sensitive balance, then measurement of weight is very accurate and if weight is taken by ordinary balance in air, the weight of sample will be different - Difference in weight of samples not of much importance. (Para 11)

क. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराएँ 8 व 21(सी) - वजन - अन्तर - न्यायालयिक प्रयोगशाला को प्रेषित नमूनों में 5 ग्राम हेरोइन होना बताया गया - न्यायालयिक प्रयोगशाला ने नमूनों में 4.46 ग्राम एवं 4.47 ग्राम होना पाया - अभिनिर्धारित - जब बन्द स्थान पर संवेदनशील तराजू द्वारा वजन लिया जाता है तब वजन का मापन बहुत शुद्ध होता है तथा यदि वजन साधारण तराजू द्वारा हवा में लिया जाता है तो नमूनों का वजन अलग होगा - नमूनों के वजन में अन्तर बहुत महत्वपूर्ण नहीं है।

B. *Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8 & 21(c) - Seizure of Heroin - Samples - Colour of contraband* - Grey powder was sealed at the time of sealing whereas at the time of chemical analysis brown and white powder was found - Difference in colour not explained - As samples were doubtful, therefore, seizure memo was not proved. (Para 11)

ख. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराएँ 8 व 21(सी) - हेरोइन का अभिग्रहण - नमूने - विनिश्चय पदार्थ का रंग - सीलबंद करते समय धूसर रंग का चूर्ण सील किया गया जबकि रासायनिक

विश्लेषण के समय भूरा एवं सफेद चूर्ण पाया गया — रंग की भिन्नता को स्पष्ट नहीं किया गया — चूंकि नमूने संदेहास्पद थे अतएव अभिग्रहण पत्रक साबित नहीं हुआ।

C. *Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 55 - Re-sealing - Samples should be handed over to the officer-in-charge of Malkhana and he should re-seal it with his seal and then property shall be deposited in Malkhana - If the samples are prepared after the deposit of property in Malkhan, then they shall also be re-sealed in the same way.* (Paras 12 to 16)

ग. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 55 — पुनः सील किया जाना — नमूनों को मालखाना प्रभारी को सौंपा जाना चाहिये और उसे अपनी सील से उसको पुनः सील करना चाहिए और तब सम्पत्ति मालखाना में जमा की जायेगी — यदि नमूनों को सम्पत्ति के मालखाना में जमा होने के बाद तैयार किया जाता है तब उन्हें भी उसी ढंग से पुनः सील किया जायेगा।

D. *Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 57 - Report to arrest and seizure - Provisions of Section 57 not complied with - Conviction is bad in law and cannot be sustained.* (Paras 17 & 18)

घ. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 57 — गिरतारी और अभिग्रहण की सूचना — धारा 57 के उपबंधों का अनुपालन नहीं — दोषसिद्धि विधि विरुद्ध है तथा उसका समर्थन नहीं किया जा सकता।

E. *Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 35 & 54 - Presumption of culpable mental state - Seizure Panchnama not proved - Hence possession of contraband also not proved - Presumption would not arise.* (Paras 20 & 21)

इ. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराएँ 35 व 54 — आपराधिक मनःस्थिति की उपधारणा — अभिग्रहण पंचनामा साबित नहीं — अतएव विनिषिद्ध पदार्थ का कब्जा भी साबित नहीं — उपधारणा उत्पन्न नहीं होगी।

Cases referred :

2000 SCC (Cri) 189, CrLR 2008 page 655, (2007) 1 SCC (Cri) 744, (2010) 4 SCC 402.

A.K. Saraswat with Zaheer Khan, for the appellants.

Manoj Soni, for the CBN.

J U D G M E N T

I.S. SHRIVASTAVA, J. :- These appeals have been preferred being ag-

grieved by the judgment dt. 20/03/2007 passed by the Court of Shri Abhay Kumar, Special Judge, N.D.P.S. Act, Ratlam, in Special Case No.40/2003, by which the appellants Chhaganlal and Dinesh have been convicted under Section 8/21 (c) of the N.D.P.S. Act and sentenced to R.I. of ten years along with fine of Rs.1,00,000/- and in default of payment of fine further directed to undergo R.I. of one year to each of the appellant.

2. According to prosecution case on 02/07/2003 Shri Satyendra Kumar Tugnawat, Sub Inspector, CBN, Ratlam, received information through informer that two persons Chhaganlal and Dinesh, travelling in a Maruti Car bearing registration No.RJ-09-5018, will carry Heroine from Ratlam to Indore. Hence, on this information panchnama of the information of the informer was prepared. Thereafter in the supervision of Shri J.C. Shrivastava raid party was arranged and reached with the witnesses to spot. At about 12.00 P.M. a new Maruti Car came from the side of Ratlam and it was intercepted and two persons were found in the Car. Chhaganlal was Driver of the Car and other person told his name Dinesh. They were apprised with the information of the informer and after obtaining their due consent for search the police party took the search of the person. On search of the Car two bags of Jute were found in the Dicky of the Car which contained Heroine and they were marked as Article A and B. Article-A contained 6 Kg. 200 Gram and Article B which contained 10 Kg. 200 Gram Heroine. Thereafter two samples 5 Gram of each was prepared from each bag and marked as article A-1, A-2 and B-1, B-2. In a canvas bag 4 Trousers, 4 Shirts and a Loongi was found which was also sealed and marked as Article C. Panchnama impression of seal and spot map was prepared. All the articles and sample were sealed and all the samples and packets were seized on the spot. Other panchnamas were prepared. The accused persons were arrested. Thereafter police party returned to the office and seized property was presented along with report under Section 57 of the N.D.P.S. Act before the Superintendent. On his direction the property was deposited in the departmental Malkhana. The samples were sent to Government Opium & Alkaloid Factory, Neemuch and from the report it was confirmed as Heroine.

3. On interrogation Chhaganlal in his statement stated that he received Heroine from Ramnarayan for which they paid Rs. 3 lac to him, hence raid was made at the house of the Ramnarayan and Rs.2,90,000/- was seized from his house in his absence. Ramnarayan was called for interrogation, but he did not appear on 24.09/2005. On second summon he appeared on

25/09/2005. He also admitted that Chhaganlal came to his house to purchase the Heroine. Ramnarayan was also added as an accused in the offence and after investigation supplementary challan was filed against Ramnarayan and after trial he has been acquitted vide judgment dated 20/09/2007, and the appellants have been convicted as mentioned above, hence this appeal.

4. It has been argued on behalf of the appellants that independent witnesses of the seizure memo Ex.P.5 and other panchnama Ex.P.2 to Ex.P.15 were hostile and not supported the proceedings taken-up by the Investigating Officer. There was difference of weight of samples which was received in the F.S.L.. At the time of packing of the sample colour was brown and in the F.S.L. white powder was found, hence samples were changed and tampered. Those samples which were seized on the spot were not sent for chemical analysis, there was non compliance of Section 55 of the N.D.P.S. Act. Shri N.P.Ojha, Investigating Officer and members of raiding were not examined. The panchnamas were not prepared as per procedure. The statement of Chhaganlal and Dinesh recorded under Section 67 did not contain the place and time when it was recorded and it was concoctated. The information under Section 57 of the N.D.P.S. Act was suspicious as it did not contain the out ward number on it. Original letter has been filed with the challan, while the original copy was to be sent to the superior officer. Hence, the appellants were not liable to be convicted on the basis of the evidence produced, hence, the appeal should be allowed.

5. It has been argued on behalf of the respondent that the case was rightly proved on the basis of the evidence produced before the trial Court, the minor discrepancies are not important and on the basis of it trial is not vitiated. The appeal being devoid of merit be dismissed accordingly.

6. Considered the arguments and the record of the trial Court perused.

7. The panchnama Ex.P.2 to Ex.P.10 were prepared before the independent witnesses Devendra (P.W.2) and Arvindsingh (P.W.3). The independent witnesses were hostile and they have not supported the prosecution case. According to Devendra (P.W.2) about two and half years before he went to C.B.N. Office to repair Cable. Narcotics people got his signature and nothing was seized before him. He did not went to Dosigaon with the Narcotics party. He does not know the accused persons. Panchnamas Ex.P.2 to Ex.P.10 bears his signature. He has denied the proceedings step by step taken-up by the Seizing Officer.

8. Arvindsingh (P.W.3) has deposed that two and half years before he went to the office of the Narcotics because in that Office he has given Cable connection. There on the call of the officers he signed some papers. Nothing was seized before him and he was not brought to Dosigaon Naka by the people of the Narcotics Department. He has accepted his signatures on Ex.P.2 to Ex.P.10, but has denied the step by step proceedings taken-up by the Seizing Officer and has not supported the prosecution case. In this way both these independent witnesses have not supported the prosecution case and panchanma Ex.P.2 to Ex.P.10. Hence the fact of seizure was not supported by the evidence of independent witnesses.
9. As regards the preparation of samples and their identity is concerned, according to the statement of Seizing Officer Shri Satyendra Kumar Tugnawat (P.W.4), he prepared the samples A-1, A-2 and B-1, B-2 from the bulk quantity of sacks of Heroine and marked as Article A and B. According to his statement in both the sacks Article A and B grey color powder was sealed. According to statement of B.M.Goyal (P.W.6), Assistant Chemical Examiner, he found the samples intact. On opening Article A-1 he found brown colour powder and in sample B-1 he found white colour powder which was tasted by him. He has not given any explanation that how the colour of the powder was changed. In this way the grey colour powder which was sent to F.S.L. in Article A-1 and B-1 was not found in the F.S.L. hence it was doubtful whether the same powder was sent for chemical analysis to F.S.L. which was seized on the spot. It has also been argued that there was difference of weight in the samples Article A-1 and B-1 contained 5 Gram of Heroine, while on weightment in the F.S.L. weight of Article A-1 was 4.46 Gram and Article B-1 was 4.47 Gram. It has been argued by the appellants that the samples were changed and quantity was also changed.
10. In reply it has been argued by respondent counsel that first weightment was at the place of incident, while in the F.S.L. its weight is taken by chemical balance or electronic balance which is accurate, even if at the time of weightment on spot air is blowing then the weight of the sample may vary.
11. Considered the arguments. It is correct that when wight is taken in a covered place or room by sensitive balance then measurement of weight is very accurate and if weight is taken by ordinary balance in air then the weight of sample will be different from that weight taken by sensitive balance. Same situation is in this case the measurement is taken in the F.S.L. by sensitive

balance in close place and while on the spot the weight was taken in the open space and the difference weight is in the fraction of Gram which is negligible, hence the difference of weight is not of much importance in this case. In this way independent witnesses of the seizure memo were hostile and they have not supported the fact of seizure of Heroine. The samples were doubtful. At the time of the sealing of sample grey powder was sealed in it while at the time of chemical analysis in Article A-1 brown powder and in Article B-1 white powder was found, for which no explanation has been given therefore, under the circumstances it was doubtful that whether the sample Article A-1, B-1 which were received in the F.S.L. were of the same powder which was seized. Under these circumstances the samples were doubtful on the basis of the evidence produced, hence the seizure memo was not proved.

12. As regards compliance of Section 55 of the N.D.P.S. Act is concerned, it has been argued that Satyendra Kumar Tugnawat (P.W.4) in his cross examination in para 7 has admitted that Article A, B, C, were not re-sealed in the office. According to Section 55 of the N.D.P.S. Act, it is required that the samples should be handed over to the officer incharge of the Malkhana and he should re-seal it with his seal and then property shall be deposited in the Malkhana. In the Malkhana according to Shri J.C. Shrivastava (P.W.5) there was no double lock system.

13. It has been argued on behalf of the respondent that the re-sealing of the sample is only required whenever the sample is prepared by any officer after the deposit of the property in the Malkhana then the such sample has to be sealed by the seal of the incharge of the Malkhana if it is drawn at the police station.

14. In reply it has been argued by the appellant that under Section 55 of the Act, it is obligatory for the incharge of the Malkhana to take custody of the property seized by the Seizing Officer and re-seal with the seal of the incharge of the Malkhana and then deposit the property in the Malkhana.

15. Considered the arguments. Shri J.C. Shrivastava (P.W.5) Superintendent, C.B.N., has admitted that there is no double lock system in the Malkhana. In the case of *R.D. Makwana Vs. State of Maharashtra* 1994 CR.L.J. 1987, it has been held that if the specialized authority conducts a raid such as Narcotics Control Bureau or for that matter the Customs, Central Excise etc. that they would not be precluded from retaining the contraband in safe custody at their own headquarters. Hence, if the property is kept in the

Malkhana of the office of the C.B.N. then in compliance of Section 55 of the N.D.P.S. Act, it was to be re-sealed with the seal of the in-charge of the Malkhana and he has to procure the property to ensure that all the material is kept in safe custody and that there is no scope of its being lost or tampered with. This provision is a reasonable and necessary one in so far as since the consequences of a prosecution under this Act are serious, it is equally incumbent that safeguards be taken to ensure that there is no scope for any accident or for that matter negligence or even tampering.

16. A bare reading of Section 55 of the Act reveals that the property to be deposited in Malkhana shall be resealed with the seal of the in-charge of the Malkhana. If the samples have been prepared after the deposit of the property in the Malkhana then they shall also be resealed in the same way. Hence the arguments of the respondent is not acceptable.

17. As regards compliance of Section 57 of the N.D.P.S. Act is concerned, it has been argued that the original report under Section 57 of the N.D.P.S. Act, Ex.P.15 has been filed with the challan. It bears no in ward or out ward number, and was not sent to Superintendent, CBN, while the Investigating Officer should have sent it. Hence compliance of Section 57 of N.D.P.S. Act, is not proved.

18. Considered the arguments. Shri Satyendra Kumar Tugnawat (P.W.4) has deposed that he presented the report under Section 57 of the N.D.P.S. Act to the Superintendent. In cross examination in para 22 he has admitted that on Ex.P.15 report under Section 57 of N.D.P.S. Act, no out ward number has been mentioned and signature of Superintendent for receipt has not been obtained. On this report Shri Shrivastava has appointed N.P.Ojha as Investigating Officer of the case. On perusal of Ex.P.15 it reveals that on back side of the last page Shri Shrivastava, Superintendent, has ordered that on 02/07/2003 that N.P.Ojha is appointed as the Investigating Officer and Shri S.K.Tugnawat (P.W.4) should deposit the property. Hence this report was not proved to be in the possession of Shri J.C. Shrivastava, Superintendent. Therefore, it reveals that on Ex.P.15 no in ward or out ward number has been mentioned, there is no receipt of Shri J.C. Shrivastava, Superintendent, and this report has been filed with the challan, hence it is not proved that report under Section 57 of the Act was sent to Superintendent, hence there is non compliance of Section 57 of the N.D.P.S. Act. In the case of *Thandiram Vs. State of Haryana* 2000 SCC(Crl) 189 and in the case of

Noor Aga Vs. State of Punjab Cr.L.R. 2008 page 655, it has been held that the provisions of Section 55 and 57 of the N.D.P.S. Act, not complied with the conviction is bad in law and cannot be sustained. In the case of *Ritesh Chakarvarti Vs. State of M.P.*, (2007)1 SCC (Cri) 744, it has been held that offence under the N.D.P.S. Act is a grave one and hence procedural safeguards provided to the accused requires strict compliance.

19. Hence there was non compliance of Section 55 and 57 of the N.D.P.S. Act, therefore the appellant was not liable to be convicted.

20. It has also been argued by the respondent that the possession of contraband with the appellant was proved, therefore, the appellant was rightly convicted. In this respect reliance has been placed on the case of *State of Punjab Vs. Lakhwinder Singh and another*, (2010) 4 SCC 402.

21. Considered the arguments as has been discussed in the above paragraphs that the seizure panchnama has not been proved and hence it was not proved that the appellant was in possession of the Heroine, therefore, the question of presumption does not arise.

22. Therefore, on the basis of the above discussion, I conclude that independent witnesses were hostile. Samples A-1, B-1 was not the same and a different colour was found in the F.S.L. for which no explanation has been given and there is tampering of samples. Compliance of Section 55 and 57 of the N.D.P.S. Act was not proved. Therefore, the appellants were not liable to be convicted, hence this appeal deserves to be allowed.

23. Therefore, on the basis of above discussion, this appeal is allowed and the appellants are acquitted from the charge under Section 8/21 (c) of the N.D.P.S. Act, they be released from custody, if not required in any other offence. Hence ordered accordingly.

Appeal allowed.

I.L.R. [2011] M. P., 218

APPELLATE CRIMINAL

Before Mr. Justice R.C. Mishra

Cr.A. No.2280/2009 (Jabalpur) decided on 7 September, 2010

HARIGOPAL MAURYA

... Appellant

Vs.

STATE OF M.P.

... Respondent

A. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8 & 20(b)(ii)(B) - Appellants were apprehended carrying contraband / Ganja (cannabis/hemp) in separate Potlies - Contents of bundles (Potlies) were converted into one homogenous mixture wherefrom two samples of 25 gms each were drawn - Held - It was not possible to conclude with certainty that contents of each Potlies comprised of contraband/Ganja. (Paras 7 & 8)

क. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराएँ 8 व 20(बी)(ii)(बी) - अपीलार्थी को पृथक पोटलियों में गांजा (गांजा/भांग) ले जाते हुए गिरतार किया गया - बंडलों (पोटलियों) की अंतर्वस्तु को एक समरूप मिश्रण में रूपांतरित किया गया जिसमें से 25 ग्राम प्रत्येक के दो नमूने निकाले गये - अभिनिर्धारित - निश्चित रूप से यह निष्कर्ष निकालना संभव नहीं था कि प्रत्येक पोटली की अंतर्वस्तु में विनिषिद्ध/गांजा समाविष्ट था।

B. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8 & 20(b)(ii)(B) - Detecting Officer contradicting his own statement - Joint and common notice (about search) was given to appellants - Appellants were entitled to benefit of doubt. (Paras 5 & 9)

ख. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराएँ 8 व 20(बी)(ii)(बी) - जाँच अधिकारी ने स्वयं के कथन का खंडन किया - अपीलार्थी को संयुक्त और सामान्य सूचना (तलाशी के बारे में) दी गई - अपीलार्थी शंका के लाभ के हकदार।

Cases referred :

2001 CrLJ 4886, 2008 AIR SCW 5964.

G.P. Patel, for the appellant.

Ajay Tamrakar, Panel Lawyer, for the respondent/State.

J U D G M E N T

R.C. MISHRA, J. :-These appeals are interlinked as preferred against a common judgment dated 24/11/2009 passed by Special Judge (under Nar-

cotic Drugs and Psychotropic Substances) Act, 1985 [for short 'the Act'] in Special Case No.13/08, whereby each one of the appellants was convicted under Section 8 read with 20(b)(ii)(B) of the Act and sentenced to undergo R.I. for 8 years and to pay fine of Rs.1,00,000/- and in default, to suffer R.I. for 1 year.

2. For the sake of convenience, the appellants shall be referred to by their respective names only.

3. Prosecution story, in short, may be narrated thus -

(i) On 19/09/2008 at about 3.20 p.m., Sher Singh Baghel (PW3), posted as Sub Inspector at Kotwali Khandwa, received credible information to the effect that appellant Harigopal and his companions were proceeding towards the City and were carrying Ganja. After recording the information in the Rojnamcha and communicating the same to City Superintendent of Police, he along with other members of the police force and panch witnesses Anil (PW7) and Dileep (PW8) rushed to spot where the appellant Harigopal and his companions were expected to arrive. After a while, all the three appellants, carrying potlies (small bundles) in their hands, were seen coming from the side of Bamangaon. They were apprehended and were apprised of the legal rights under which they could require presence of a Gazetted Officer or a Magistrate for the purpose of search. Waiving the right, they permitted the police officer to search the potlies. The search revealed appellants' joint possession of a total quantity of 1.600 Kgs of Ganja as per the following details -

Packet being carried by -	Found to contain -
Harigopal	440 gms
Chandrashekar	550 gms
Sabulal	610 gms

(ii) Contents of the bundles were converted into one homogenous mixture wherefrom two samples of 25 gms. each were drawn. One of the samples was forwarded to Forensic Science Laboratory, Sagar. Corresponding report (Ex.P-31) indicated that the sample contained Ganja.

4. The appellants denied the charge and pleaded false implication at the instance of police constable Dinesh (PW2) and Surendra. According to them, in the midnight intervening 18th and 19th of September, 2008, both the police officials had belaboured gardner and watchman employed by Harigopal as the contractor for maintenance of the cremation ground known as Raja Harishchandra Muktidham, Khandwa. One Yogendra Gangrade (DW1), a Sub-Engineer of Municipal Corporation, Khandwa was also produced to prove the aforesaid status of Harigopal.

5. Although, Detecting Officer Shersingh Bhagel (PW3) substantially reiterated the facts as recorded in the FIR (Ex.P-22) and the Roznamcha report (Ex.P-20) immediately after conclusion of the proceedings relating to raid, search & seizure of the contraband and arrest of the appellants, yet none of the panch witnesses namely Anil (PW7) and Dileep (PW8) came forward to support his testimony. Moreover, in paragraph 26 after clearly asserting that the potlies were found hidden under the clothes worn by the appellants, he had taken a sudden yet complete somersault only after perusing the relevant report (Ex.P-20) and deposed that the appellants were openly carrying the potlies. This self-contradiction assumed significance in view of the safeguards contemplated in Section 50 of the Act. To elucidate, in case, *Shersingh Bhagel's* first version is accepted to be true, the joint and common notice (Ex.P-10) would have been sufficient to vitiate the proceedings relating to search and seizure of Ganja (See. *Dharmaveer Lekhram Sharma v. State of Maharashtra* 2001 CRI.L.J. 4886).

6. There is yet another significant aspect of the matter that relates to the effect of omission to take sample from each one of the bundles containing the contraband. It is true that the Act as well as Narcotic Drugs and Psychotropic Substances Rules, 1985 are silent with regard to the manner of taking sample of contraband being carried by more than one accused in the course of same transaction but before a person can be held guilty of being found in possession of contraband, it must be established beyond a reasonable doubt that the sample analyzed was a representative one.

7. Accordingly, the Detecting Officer ought to have seized the contents of potlies being brought by each individual accused separately and drawn representative sample thereof for the purpose of chemical examination. However, the sample forwarded to the FSL was, admittedly, taken from the homogenous mixture.

8. This factual scenario enabled each one of the accused to contend that the Ganja was kept in the potlies held by the co-accused. It was, therefore, not possible to conclude with certainty that contents of each potlies comprised of Ganja i.e. cannabis/hemp within the meaning of Section 2(iii)(b) of the Act. Further, non-production of the wrapping clothes/paper also provided a ground to throw doubt on the evidence as to recovery of the contraband (See. *Noor Aga v. State of Punjab* 2008 AIR SCW 5964).

9. For these reasons, the appellants were certainly entitled to benefit of doubt. As such, learned trial Judge committed serious illegality in holding the appellants guilty of the offences charged with.

10. Consequently, the appeals stand allowed. The impugned convictions and the consequent sentences are hereby set aside. Instead, the appellants are acquitted of the offences. Fine amount, if deposited, be refunded.

11. Appellants are in custody. They shall be released forthwith if not required in any other case.

12. Copy of the judgment be retained in the connected criminal appeals.

Appeals allowed.

Appeal allowed.

I.L.R. [2011] M. P., 221
APPELLATE CRIMINAL
Before Mr. Justice I.S. Shrivastava

Cr.A. No.1245/2008 (Indore) decided on 15 September, 2010

HUJUL AKBAR & anr.

... Appellants

Vs.

STATE OF M.P.

... Respondent

A. *Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 42 - Seizure - One independent seizure witness not examined and another did not turn up for cross examination - Seizure memo not proved - Panchnamas were also could not be proved - Seized contraband also not produced before the trial Court - Held - Seizure Panchnamas not proved.* (Para 9)

क. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 42 - अभिग्रहण - एक स्वतन्त्र अभिग्रहण साक्षी की परीक्षा नहीं की गयी तथा दूसरा

प्रतिपरीक्षा के लिये उपस्थित नहीं हुआ — अभिग्रहण पत्रक साबित नहीं — पंचनामा भी साबित नहीं किया जा सका — जब्त प्रतिषिद्ध पदार्थ को भी विचारण न्यायालय के समक्ष प्रस्तुत नहीं किया गया — अभिनिर्धारित — अभिग्रहण पंचनामा साबित नहीं।

B. *Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 50 - Notice - Language - Appellants knowing Tamil language - Not conversant with Hindi language - Consent for personal search not proved - Panchnamas are also to be recorded in the same language which was understandable to accused persons - Mandatory provision not followed.* (Para 13)

खा. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 50 — सूचना पत्र — भाषा — अपीलार्थियों को तमिल भाषा का ज्ञान — हिन्दी भाषा से परिचित नहीं — व्यक्तिगत तलाशी की सम्मति साबित नहीं — पंचनामों को भी उसी भाषा में अभिलिखित करना होगा जो कि अभियुक्त व्यक्तियों द्वारा समझने योग्य हो — आज्ञापक प्रावधान का पालन नहीं।

C. *Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 55 - Re-sealing of property - Property is to be re-sealed by the incharge of the Malkhana with his personal seal - It is not required that seizing officer shall re-seal it - Mandatory provision of Section 55 not followed.* (Para 14)

ग. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 55 — सम्पत्ति का पुनः सील किया जाना — मालखाना प्रभारी द्वारा सम्पत्ति को अपनी व्यक्तिगत मुद्रा द्वारा पुनः सील किया जाना चाहिए — यह अपेक्षित नहीं है कि अभिग्रहण अधिकारी इसे पुनः सील करेगा — धारा 55 के आज्ञापक उपबंधों का पालन नहीं।

D. *Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 55 - Deposit of seal in Malkhana - Property sent to Court after 5 months - No entry in Malkhana register about the deposit of seal and the impression of the seal - Provision of Section 55 not followed - Possibility of tempering not ruled out.* (Para 15)

घ. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 55 — मालखाना में सील जमा करना — सम्पत्ति 5 माह बाद न्यायालय में भेजी गयी — मालखाना रजिस्टर में सील जमा करने एवं सील की छाप बाबत कोई प्रविष्टि नहीं — धारा 55 के उपबंधों का पालन नहीं — हेरफेर किये जाने की संभावना खारिज नहीं।

Cases referred :

ACR-II (2006) 362, 2001(1) ERF 160, (2004) 10 SCC 562, 2008(iv) AD-Cri (SC) 337, 2009(2) JIJ 148, AIR 1996 SC 3033, 2001(1) EFR 6, 2005(1) MPHT 276, 2005(1) MPHT 233.

Sanjay Sharma with Anil Ojha, for the appellants.

Suraj Sharma, for the respondent/State.

J U D G M E N T

I.S. SHRIVASTAVA, J. :- This appeal has been preferred by the appellants being aggrieved by the judgment dated 01.09.2008 passed by the Court of Shri P.S.Patidar, Special Judge (N.D.P.S. Act), Ratlam, Distt. Ratlam in Special S.T.No.22/2002 by which the appellants Hujul Akbar and Yusuf have been convicted under Section 8/21(c) of the N.D.P.S. Act. and sentenced to rigorous imprisonment of ten years with fine of Rs.1,00,000/- to each and in default of payment of fine to undergo further rigorous imprisonment of one year to each.

2. According to the prosecution story, Shri Sanjay Mane S.P. Distt. Ratlam received an information on 13.04.2002 on telephone that Truck No.TN60/Z/2840 on which "Jaylaxmi" word is written in English is coming from the side of Mandsaur along with Heroin. It is due to be delivered to smuggler Mohd. Riyal and Nandsen at Indore, hence he prepared a panchanama about information of the informer in presence of Constable Yogesh Pandey and Sainik Ajay Sharma. They were apprised with the information of the informer and a copy of this panchanama was sent to Station Incharge of Police Station Station Road, ratlam. Thereafter Sanjay Mane also sent the report to I.G.,Ujjain. Shri K.K.Upadhyay, Incharge of the Police Station Station Road, Ratlam on receipt of information from the S.P. sent the panchanama Ex.P/1 to C.S.P.,Ratlam for information and he also sent the copy of the information sent by S.P. to I.G. through Constable Ismail. Thereafter Shri K.K.Upadhyay (PW-28) along with force reached the spot near Salakhedi Police Chowki on Mhow Neemuch Highway Road. On arrival of the Truck No.TN60/Z/2840, it was intercepted. In this Truck, driver Yusuf, Liyaqat and Hujul Akbar resident of Tutikoran(Tamil Nadu) were found. They were apprised with the information of the informer and notice under Section 50 of the N.D.P.S. Act was served on them and after obtaining their consent for search the Truck was searched. In the Truck a secret cavity was found behind the seat of the driver. It was containing three chambers in which 6 polythene bags of Heroin

were found. Each bag was containing 3Kg. Heroin. In all 18Kg. Heroin was found. The polythene bag was marked as Article A to Article F. Two samples each of 5gm. was prepared from each polythene bag. All the 12 samples were marked as Article A1A2 to F1F2. The property was sealed and seized on the spot. Other panchanamas were prepared and the appellants were arrested. During investigation it was found that accused Mohd. Shakir was in the Indore Jail. He has conspired in this respect. He was brought to court by Constable Sohanlal, Kailash and Rakesh. The guard of the jail Saiyad Israr Ali was also indulged in conspiracy with accused persons. He used to provide the mobile and allowed the accused appellants to talk on mobile set with other accused persons and the other guards of the jail Constable Sohanlal, Kailash and Rakesh were also found involved in this conspiracy. Hence, challan against all these persons was filed. Accused Liyaqat was declared absconding from 05.04.2003. The samples Article A1 to F1 were sent to FSL, Indore by the report of which the presence of Heroin was confirmed. Hence after completion of the investigation the challan was filed against the appellants and other accused persons.

3. After trial the appellants Hujul Akbar and Yusuf have been convicted under Section 8/21(c) of the N.D.P.S. Act and the other accused persons were acquitted. Hence, this appeal.

4. It has been argued on behalf of the appellants that the case was not proved against them. Out of the independent witnesses Sanjay Singh was not examined and Virendra Singh(PW-2) was partially examined and he did not turn up for cross-examination. Hence, his statement was not read in evidence. The conscious and exclusive possession of the appellants with the seized property was not proved. The appellants were resident of Tamil Nadu and they were not conversant with the Hindi language and the notice under Section 50 of the N.D.P.S. Act was given in Hindi language. All the proceedings were taken up in the Hindi Language. There was non-compliance of Section 55 of the N.D.P.S. Act. It was not proved that which accused entered in the Truck and discovered the Heroin for seizure. The property was deposited in the court after a delay of 5 months. There were serious contradictions in the statement of K.K.Upadhyay(PW-28) Seizing Officer and R.R.S.Parihar(PW-36) C.S.P., hence the appeal be allowed.

5. It has been argued on behalf of the respondent that the appellant has been found guilty for heinous offence on the basis of the evidence produced

before the trial court, therefore, the appeal being devoid of merit be dismissed accordingly.

6. Considered the arguments. Record of the trial court perused.

7. The proceedings were taken up by Shri K.K.Upadhyay(PW-28) vide panchanama Ex.P/2 to Ex.P/16 before the independent witnesses Virendra Singh(PW-2) and Sanjay Singh. Sanjay Singh has not been examined at the time of the trial. Virendra Singh was examined as PW-2 but after the partial cross-examination he did not turn up for further cross-examination, despite repeated opportunities and after issuance of warrants his presence could not be ascertained, hence vide order dated 18.07.2008 it was ordered that his statement shall not be read in evidence. In this way, the proceedings taken up by the Seizing Officer vide panchanama Ex.P/2 to Ex.P/16 was not proved by the independent witnesses. Seizure memo Ex.P/12 was also not proved. Therefore, the appellants were not liable to be convicted.

8. It has been held in the case of *Ritesh Chakarvarti V/s. State of M.P.* {ACR-II (2006) 362} and *Bholaram Kushwah V/s.State of M.P.* {2001 (1) ERF 160}, that the independent witnesses of the seizure memo have not supported the fact of seizure, hence the seizure panchanama has not been 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 under the NDPS Act".

The same view has been adopted by the Apex Court in the case of *Noor Aga V/s. State of Punjab* {2008 (iv) AD-Cri. (SC) 337}. In *Abdul Gani V/s. State of M.P.* 2005 (2) JLJ 363 as well as in the case of *Laxminarayan V/s. State of M.P.* {2009 (2) JLJ 148} the same view has been adopted.

Therefore, I conclude that the seizure panchanamas were not proved.

10. From perusal of the seizure memo Ex.P/12 it reveals that the seizure was made from all the 3 accused persons Liyaqat, Yusuf and Hujul Akbar. It has been argued that the statement of K.K.Upadhyay(PW-28) and R.R.S.Parihar(PW-36) are discrepant with each other. Considered the arguments. Shri R.R.S.Parihar(PW-36) has deposed in para No.4 that at the time of the search of the Truck accused Liyaqat after consultation with other accused said that he will recover the goods and then he by lifting the long seat behind the driver seat took out and handed over the six packets to police which contained Heroin. He has further deposed that it is correct to say that two other accused persons were standing near the police peoples. Shri K.K.Upadhyay(PW-28) in this respect has deposed in para 27 of his cross-examination that at the time when C.S.P. reached on the spot two persons were with him below the vehicle and one person perhaps Liyaqat was sitting in the vehicle. He does not remember today that who was sitting and who was standing with him below the truck. The procedure of seizure started after the arrival of C.S.P. In this way, the statement of both these witnesses, who are members of the raid party is discrepant in this manner but one thing is confirmed that two persons were standing below the Truck with the police and one person entered the cabin of the Truck where the secret cabin was opened and then

the contraband article was recovered from it. Since, the cabin behind the seat of the Truck was a secret cabin hence caution was to be taken by the police that really who was the person who was knowing the secret cabin where the Heroin was hidden. The person from the possession it was recovered was the actual culprit but in seizure memo Ex.P/12 the seizure has been wrongly shown in the name of all the three accused persons against the real position. From the statement of Shri R.R.S.Parihar (PW-36) it is clear that it was the Liyaqat, who handed over the Heroin to police was in the conscious possession of the Heroin. He is absconding. Under these circumstances, it was not proved that the seizure was made from the appellants Hujul Akbar and Yusuf. Hence, in the light of law laid down in *Mohd. Aslam Khan V/s. NCB*, AIR 1996 SCC 3033 and *Ismile Khan V/s. State of Gujrat* 2001 Vol.1 EFR Page 6, appellants were not liable to be convicted.

11. It has also been argued by the appellants that appellants were not knowing Hindi and they are South Indians. The whole of the proceedings were taken up in Hindi language, hence the appellants have wrongly been roped in this case.

13. Shri R.S.Parihar (PW-36) C.S.P. has deposed in cross-examination in para 12 that Shri K.K.Upadhyay told him that they are Madrasi (South Indians) and the Translator was not called. At that time accused Hujul Akbar and Yusuf were not understanding Hindi or they were not speaking in it. Liyaqat was speaking Hindi. Shri K.K.Upadhyay (PW-28) in para 29 has deposed that Liyaqat and Hujul were knowing Hindi speaking. They were not knowing writing in Hindi. Their consent for personal search under Section 50 of the Act was recorded through Sanjay with the help of Liyaqat. The consent of Yusuf was received through Liyaqat and which was written by Sanjay on the dictation of Liyaqat. He put the question in Hindi to Yusuf then Liyaqat asked it in Tamil from Yusuf and he replied in Tamil and then Sanjay wrote the consent. This shows that all the persons were not knowing the writing of Hindi. Sanjay was not examined in this respect, hence the consent for the personal search of accused persons was not proved. The investigation in this respect was defective. The panchanamas were to be prepared in the same language which was understandable to the accused persons and their true translation in Hindi or English must have also been attached to it. Under these circumstances, in view of the law laid down in *Ramaswami V/s. State of M.P.* 2005 (1) MPHT 276 and *Uma V/s. State of M.P.* 2005 (1) MPHT 233 the appellants were not liable to be convicted.

14. It has been argued that there is non-compliance of the Section 55 of the N.D.P.S. Act. The property was not resealed at the time of its deposition in the Malkhana of the Police Station. Considered the arguments. Shri Ramnarayan(PW-5) Head Constable deposited the property in the Malkhana. He has not deposed that the property was resealed before its deposition. Shri K.K.Upadhyay(PW-28) has deposed that on returning to the Police Station he again sealed the property and then handed over it to Head Constable Mohrir for its deposition in the Police Station. But this procedure has wrongly been adopted. The property was to be resealed by the Incharge of the Malkhana with his personal seal which was not done. It is not required that Seizing Officer shall reseat it. Hence, there was non-compliance of Section 55 of the N.D.P.S. Act. Hence, the possibility of tempering cannot be ruled out.

15. It has also been argued that the property was sent to court with a delay of 5 months which has not been explained. It is also notable that in the Malkhana Register Ex.P/19 there is no entry that the panchanama impression seal was deposited in the malkhana. In this respect Shri Ramnarayan (PW-5) has deposed that there is no entry in the Malkhana Register about the deposition of the seal and the impression of the seal. He has further deposed that the property was deposited on 18.09.2002 in the court. Why there is delay of 5 months, no explanation has been given. Under these circumstances, there was non-compliance of Section 55 of the N.D.P.S. Act and the possibility of tempering cannot be ruled out.

16. Therefore on the basis of the above discussion, I am of the view that at the time of the evidence before the trial court the seizure memo and other panchanamas were not supported by the independent witnesses. The conscious possession of the appellants over the contraband item Heroin was not proved. For personal search there was non-compliance of Section 50 of the N.D.P.S. Act. The appellants were South Indians and not knowing Hindi language but no Translator was procured to complete the proceedings and on the basis of the papers prepared in Hindi the appellants cannot be roped in the case. There was non-compliance of Section 55 of the Act and there is no explanation of 5 months delay in sending the seized property to court. The impression of seal was not deposited in the Malkhana. Under these circumstances, the appellants are not liable to be convicted. Hence, the appeal deserves to be allowed.

17. Therefore, the appeal is allowed and the appellants Hujul Akbar and

Yusuf are acquitted from the charges under Section 8/21(c) of the N.D.P.S. Act. They be released, if not required in any other offence. Fine if deposited be returned to them.

Appeal allowed.

**I.L.R. [2011] M. P., 229
APPELLATE CRIMINAL**

Before Mr. Justice Rakesh Saxena & Mr. Justice G.S. Solanki

Cr.A. No.2137/2004 (Jabalpur) decided on 23 September, 2010

LAXMAN SINGH

... Appellant

Vs.

STATE OF M.P.

... Respondent

Penal Code (45 of 1860), Section 302 - Murder - Circumstantial evidence - Deceased died unnatural death by rupture of spleen - Appellant/accused (husband of deceased) who was last resided together with wife/deceased in his dwelling house did not offer satisfactory explanation as to how deceased received fatal injury on her body - The explanation offered by appellant/accused that deceased committed suicide by hanging herself was found to be false - All these circumstances cumulatively establish that appellant only is responsible of homicidal death of deceased - Conviction affirmed. (Paras 15 to 18)

दण्ड संहिता (1860 का 45), धारा 302 - हत्या - परिस्थितिजन्य साक्ष्य - मृतक की पत्नीहा फटने के कारण अस्वाभाविक मृत्यु - अपीलार्थी/अभियुक्त (मृतक का पति), जो आखिरी बार पत्नी/मृतक के साथ अपने निवास गृह पर रहा था, ने मृतक के शरीर पर घातक चोटें आने के सम्बन्ध में संतोषजनक स्पष्टीकरण नहीं दिया - अपीलार्थी/अभियुक्त द्वारा दिया गया स्पष्टीकरण कि मृतक ने स्वयं फाँसी लगाकर आत्महत्या की थी, मिथ्या होना पाया गया - यह सभी परिस्थितियाँ संचयी रूप से सिद्ध करती हैं कि केवल अपीलार्थी ही मृतक की मानववध संबंधी मृत्यु के लिये उत्तरदायी हैं - दोषसिद्धि की पुष्टि की गयी।

Case referred :

JT 2006(9) SC 50.

Madan Singh, for the appellant.

Prakash Gupta, for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by
G.S. SOLANKI, J. :- Second Additional Sessions Judge, Damoh has passed

the impugned judgment dated 30.11.2004 in S.T.No. 272 of 2002 by which appellant/accused has been convicted under Section 302 of Indian Penal Code and sentenced to life imprisonment. Being aggrieved, appellant has preferred this appeal under Section 374(2) of the Code of Criminal Procedure.

2. Prosecution case in short is that on 2.5.2002 at about 6 O'clock in the morning Lachhi Bai (mother of the appellant/accused) informed Inder Singh that her daughter-in-law Uma Bai (wife of appellant) hanged herself in the cattle house. Inder Singh, his father Gulab Singh and appellant took her off the string thinking that she was alive. Inder Singh lodged Marg intimation Ex.P/17 at Police Station, Raneh, during Marg inquiry, Sub Inspector S.P. Shukla (PW16) prepared the spot map Ex.P/10 and inquest Panchnama Ex.P/4. Dead body of Uma Bai was sent for post-mortem examination.

3. Dr. S.K. Jain (PW14) performed the autopsy on the body of Uma Bai. He found contusion of 6 cm. x 6 cm. over left lateral part of lower chest and upper abdomen. He also found a foetus of about 24 weeks of a female child in her uterus and opined death by shock due to extensive hemorrhage due to the rupture of spleen and prepared post-mortem report Ex.P/14. During Marg inquiry, it was found that Uma Bai was married with appellant three years before dawnik bhaskar the incident. After some time of marriage, appellant, his mother, father and other relatives tortured Uma Bai and subjected her to cruelty, in relation to demand of dowry of Rs. 20,000/-. Due to aforesaid cruelty, she committed suicide. Therefore, the offence under Sections 304-B, 498-A, 201 and 334 of the Indian Penal Code was registered against the appellant, his mother, father and other relatives.

4. After usual investigation, accused were charge-sheeted. The appellant and co-accused abjured their guilt and pleaded false implication.

5. On appraisal of the evidence on record, learned Additional Sessions Judge acquitted the co-accused but convicted the appellant/accused as mentioned hereinabove.

6. Learned counsel for the appellant submitted that the trial Court had committed error in not appreciating the evidence in its proper perspective. Despite the fact that the witnesses examined by the prosecution turned hostile, trial Court wrongly recorded conviction against the appellant/accused, therefore, conviction recorded by trial Court is liable to be set aside.

7. On the other hand, learned counsel for the State justified and supported

the impugned judgment: He contended that though prosecution witnesses turned hostile yet there is sufficient circumstantial evidence against the appellant/accused, to establish alleged offence against him.

8. We have heard the counsel for the parties and perused the impugned judgment, the evidence and the other material on record.

9. Prosecution examined as many as 16 witnesses. It is true that Manohar Singh (PW1) {brother of deceased}, Challu Singh (PW2) {father of deceased}, Parwati Bai (PW3) {mother of deceased} and Gopal Singh (PW9) {another brother of deceased}, all turned hostile in regard to the facts of cruelty and demand of dowry.

10. Prosecution mainly rests on four circumstances: (i) deceased Uma Bai was married to said bhaskar appellant/accused; (ii) she died in the dwelling house of appellant/accused; (iii) she died unnatural death; and (iv) appellant remained unable to offer satisfactory explanation as to how deceased received injuries.

11. Manohar Singh (PW1), Challu Singh (PW2), Parwati Bai (PW3) and Gopal Singh (PW9) categorically deposed that Uma Bai was married to appellant. Though they did not support the case of prosecution regarding the facts of cruelty and demand of dowry, but said bhaskarey are consistent regarding the fact of marriage. In these circumstances, their testimonies can be believed to that extent only. It is not disputed that Uma Bai died in her matrimonial house.

12. S.P. Shukla, Investigating Officer, who prepared the spot map Ex.P/10 and inquest panchnama Ex.P/4, categorically deposed that Uma Bai was found dead in the dwelling house of the appellant/accused. This fact was further supported by Marg report Ex.P/17, which was recorded by Inder Singh.

13. Circumstances No. (iii) and (iv): Dr. S.K. Jain (PW14) performed the autopsy on the body of Uma Bai and found contusion of 6 cm. x 6 cm. over left lateral part of lower chest and upper abdomen. Injury was caused by hard and blunt object and was ante-mortem in nature. He further deposed that on internal examination he found that spleen was ruptured and peritoneal cavity was filled with blood. He further opined that deceased carried an embryo of about 24 weeks. In his opinion, Uma Bai died by shock due to extensive hemorrhage due to rupture of spleen. There is nothing in cross-examination of Dr. S.K. Jain to disbelieve his testimony. He is an independent witness. It is

established by his evidence that deceased Uma Bai was pregnant at the time of incident. She died a homicidal death due to rupture of spleen. Though this witness admitted that injury found on the person of deceased Uma Bai could be caused by forceful collusion with hard and blunt object but such a situation was not brought on record by defence. On the contrary, explanation put forth by defence that Uma Bai committed suicide by hanging herself, is belied by medical evidence on record.

14. In *Trimukh Moroti Kirkan Vs. State of Maharashtra*, {JT 2006 (9) SC 50}, Hon'ble Apex court observed that unnatural death of wife in the dwelling house where the husband normally resided and did not offer satisfactory explanation as to how the deceased/wife received the injuries or offered an explanation which is found to be false, is a strong circumstance which indicates that he is responsible for commission of the crime.

15. The facts of the case in hand are also similar to the facts of *Trimukh Moroti Kirkan's case* (supra). In this case also deceased Uma Bai died unnatural death by rupture of spleen and appellant/accused did not offer satisfactory explanation as to how the deceased received such injury. In this case primarily it was reported to police vide Marg intimation Ex.P/16 that Uma Bai had committed suicide by hanging herself. It reveals from Ex.P/16 that appellant/accused, informed Inder Singh, author of Ex.P/17 that at about 5 O'clock in the morning deceased Uma Devi went to answer the natural call. In these circumstances, it is established that appellant/accused Laxman Singh was at home and being a husband he was duty bound to explain the circumstances in which deceased Uma Bai got ante-mortem injury on her body which resulted in rupture of her spleen, which was the cause of her death.

16. In above mentioned circumstances, it is established that appellant/accused was last resided together with wife in his dwelling house and he was unable to offer satisfactory explanation as to how deceased (Uma Bai) received the fatal injury on her body. It is further established from record that explanation offered by appellant/accused that deceased Uma Bai committed suicide by hanging herself was found to be false, because it was belied by the medical evidence.

17. Dr. S.K. Jain (PW14) categorically stated that he did not find any ligature mark on the neck of the deceased. In these circumstances, it becomes an additional link in the chain of circumstances to make it complete.

18. All these circumstances, cumulatively establish that appellant/accused only is responsible for commission of homicidal death of Uma Bai.

19. In view of above mentioned circumstances, we are of the opinion that trial Court has not committed any error in recording the conviction of appellant/accused and we affirm it.

20. In the result, we find no force in this appeal, same is liable to be dismissed and is hereby dismissed.

Appeal dismissed.

I.L.R. [2011] M. P., 233
APPELLATE CRIMINAL
Before Mr. Justice R.C. Mishra

Cr.A. No.1753/2007 (Jabalpur) decided on 12 October, 2010.

BABUJI @ SHYAM

... Appellant

Vs.

STATE OF M.P.

... Respondent

Penal Code (45 of 1860), Section 307, Arms Act, 1959, Section 25(1-B)(a) & 27 - Charge of attempt to murder by firing at police personnel - Incident narrated by Head Constable sought to be supported by police personnel only, whose presence at the spot located in the vicinity of residential quarters was shrouded with doubt and not by any public witness - The probability of the defence that the appellant was apprehended while staying in the quarter allotted to co-accused and was shot at while being taken to the police station stood duly substantiated - The appellant was required to be given the benefit of doubt - Appeal allowed. (Para 14)

दण्ड संहिता (1860 का 45), धारा 307, आयुध अधिनियम, 1959, धारा 25(1-बी)(ए) व 27 - पुलिस कर्मचारी पर गोली चलाकर हत्या करने के प्रयत्न का आरोप - प्रधान आरक्षक द्वारा बताई गयी घटना का समर्थन सिर्फ पुलिस कर्मचारी, जिसकी नैवासिक आवासों के समीपस्थ घटना स्थल पर उपस्थिति संदेहास्पद थी, द्वारा कराया जाना चाहा गया न कि किसी लोक साक्षी द्वारा - बचाव की संभाव्यता कि अपीलार्थी को सह-अभियुक्त को आवंटित मकान में रहने के दौरान गिरतार कर लिया गया था तथा पुलिस स्टेशन ले जाये जाने के दौरान गोली मारी गयी, सम्यक रूप से समर्थित होता है - अपीलार्थी को संदेह का लाभ दिया जाना आवश्यक था - अपील मंजूर।

Cases referred :

AIR 1994 SC 1349, (1926) 242 NY 13, 24:150 NE 585, 589.

V.K. Rishi, for the appellant.

Ajay Tamrakar, Panel Lawyer, for the respondent/State.

J U D G M E N T

R.C. MISHRA, J. :- This appeal has been preferred against the judgment dated 20/7/2007 passed by Additional Sessions Judge, Jabalpur in S.T. No.346/01 whereby the appellant was convicted and sentenced as under with the direction that the jail sentences shall run concurrently-

Convicted under Section	Sentenced to
307 of the IPC	undergo R.I. for 10 years and to pay fine of Rs.2000/- and in default, to suffer R.I. for 2 years.
25(1-B)(a) of the Arms Act, 1959 (for short 'the Act')	undergo R.I. for 7 years and to pay fine of Rs.1000/- and in default, to suffer RI for 1 year.
27 of the Act	undergo R.I. for 7 years and to pay fine of Rs.1000/- and in default, to suffer RI for 1 year.

2. Prosecution story, in short, may be narrated thus -

(i) On 11/3/2001, with a view to nabbing the absconding accused, Vinod Pathak (PW5), a Head Constable attached to Police Lines at Jabalpur, was deputed to perform patrolling duty along with Arjun Singh (PW4) and Jay Prakash Tiwari (PW3), posted as Constables in Police Station Ranjhi. As they reached West Lines, Rajesh Verma (PW6), a Constable in Hanumantal Police Station, who was discharging the same duty, also joined them.

(ii) While moving in the areas falling under territorial jurisdiction of Police Station Khamaria, at about 6.00 p.m., near Gurudwara, located in N-Type Quarters in Khamaria, they received a credible information to the effect that two offenders

viz. the appellant namely Babu alias Shyam and co-accused Satpal Tiwari, who were involved in the murder of Gudda Kachhi, were hiding themselves in P-type Quarter No.337. On reaching the quarter, police personnel surrounded it. After a while, Satpal opened the door and came out of the house along with the appellant. Observing that both were literally besieged by the police party, they fled away on a scooter driven by the appellant. Vinod started chasing them on a motorcycle whereon Arjun was sitting as the pillion rider. As they reached the culvert situated near the water tank, Satpal fired a shot through a .32 bore revolver at Vinod, who was able to save himself. In the meanwhile, Rajesh and Jay Prakash also arrived there on another motorcycle. Vinod then asked the appellant to stop and throw the firearm but Satpal fired another shot at him. Ultimately, a few yards ahead of the culvert, the scooter went in to a skid and both the riders fell down. After getting up, they tried to run away. When they were challenged, the appellant also opened fire through a 12-bore katta at the police personnel. One of the bullets ultimately hit mudguard of the motorcycle belonging to Vinod. Acting in self-defence, Vinod fired two shots through his service revolver. Sustaining gunshot injuries, the appellant fell down and Satpal also suffered a fall. They were immediately apprehended and katta and revolver with spent & live cartridges were recovered from their possession.

(iii) Upon a report (Ex.P-9) submitted by Vinod, H.B. Dwivedi, the SHO of P.S. Khamaria registered a case under Section 307 read with 34 of the IPC and Section 25 read with 27 of the Act. During investigation, he - (a) inspected the spot and recovered one Bajaj Scooter bearing registration No.MP-20-C-4674 and a cover of a spent cartridge therefrom, (b) seized Hero-Honda motorcycle, having registration no.MP20-P-5678, one 9 mm service revolver and 8 live cartridges from Head Constable Vinod. All the seized articles were sent to FSL, Sagar for ballistic examination. The corresponding report (Ex.P-14) indicated that the firearms were in working condition.

3. On being charged with the offences, the appellant abjured the guilt and pleaded false implication. According to him, the police personnel concocted

the entire case after firing at him unnecessarily at the time when he was staying in the quarter allotted to co-accused Satpal.

4. The prosecution sought to prove the charges by examining 7 witnesses including four members of the police party, Anil Agnihotri (PW1), the Arms Clerk and Dr. Subhash Pathak (PW2), the Senior Scientific Officer of FSL, Sagar. The defence also called in three witnesses namely Chandra Shekhar (DW1), Ravindra Singh Thakur (DW2) and Dr. Girish Bajpai (DW3). However, at the stage of final arguments, both the accused absconded and, thereafter, only appellant could be arrested under the permanent warrant issued against him.

5. Legality and propriety of the impugned convictions have been challenged on the following grounds -

(i) Non-examination of any independent witness to the incident in question.

(ii) Non-communication of the information relating to presence of the appellant and Satpal in the quarter to the officer-in-charge of the concerning police station viz. P.S. Khamaria.

(iii) Mis-appreciation of evidence of Vinod (PW5), Jayprakash (PW3), Arjun Singh (PW4) and Rajesh (PW6).

(iv) Probability of the defence as the case was based on a report written by Vinod, the author of gunshot injuries found on the person of the appellant.

In response, learned Panel Lawyer, while making reference to the incriminating piece of evidence, has submitted that the convictions are well founded.

6. In order to appreciate the merits of the rival contentions in a proper perspective, it is necessary to first advert to the medical evidence on record.

7. Girish Bajpai (DW3) proved existence of following injuries - **on the body of appellant** (as described in report Ex.D-4) -

(i) Lacerated wound on the forearm 2 cm x 2 cm in size with bleeding on the left forearm

(ii) Lacerated wound on the left leg 2 cm x 2 cm, right leg lower end internally midline sharp exist wound as lacerated

wound 3 cm x 2 cm, anterior aspect of lower end of leg.

on the body of Satpal (as described in the report Ex.D-3) –

Lacerated wound on the foot, right side 4 cm x 2 cm x 2 cm in size

According to the medical expert, he had referred the case of appellant to the Medical College Hospital for further examination and treatment.

8. Head Constable Vinod Pathak (PW5) substantially reiterated the contents of the report (Ex.P-9) scribed by himself immediately after the incident resulting into the aforesaid injuries to the appellant and the co-accused. Constables Jayprakash (PW3), Arjun Singh (PW4) and Rajesh (PW6) named as his companions in the report also came forward to corroborate the respective versions. However, no documentary evidence was adduced to prove that -

- (i) the appellant and Satpal were wanted in connection with murder of Gudda Kachhi.
- (ii) Vinod was deputed by a competent police officer to perform patrolling duty with a view to apprehending the absconding criminals found concealing their presence at any place in the city of Jabalpur.
- (iii) conduct of Arjun Singh (PW4) and Jay Prakash Tiwari (PW3), who were posted as constables at P.S. Ranjhi as to their movement within the area attached to P.S. Khamaria was validated by the competent officer.
- (iv) conduct of Rajesh, who was posted as constable at P.S. Hanumantal, as to his movement in the territories falling within the local jurisdictions of P.S. Ranjhi and P.S. Khamaria, was subsequently legalized by the competent officer.

9. This apart, the investigation officer H.B. Dwivedi (PW7) did not seize the control and bloodstained earth from the spot where the appellant and Satpal had sustained the injuries. Further, no trail of the blood on the corresponding path was reflected in the spot map (Ex.P-3) prepared by him only. The absence of evidence as to availability of blood that oozed out from the injury no.(i) [above] received by the appellant was indicative of the fact

that he was shot at an altogether different place. According to H.B. Dwivedi, he was able to collect only one case of spent cartridge whereas in all, three shots were fired by co-accused Satpal and the appellant. Strangely enough, he did not record statement of any inhabitant of the neighbouring quarters of the ordnance factory. Complainant Vinod also failed to explain satisfactorily as to why the information regarding traceability of the appellant was not communicated to the officer-in-charge of P.S. Khamaria within whose area, the place to be searched was situated.

10. It is true that the first part of Section 307 of the IPC does not contemplate receipt of any injury by the victim and, therefore, his testimony if corroborated by a promptly lodged FIR and other evidence on record, would be sufficient to bring home the charge of attempt to murder, provided it is free from all taints which tend to render the same open to suspicion.

11. Law is well settled on the point that the burden on an accused person to establish the plea of defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution witnesses or by adducing defence evidence.

12. In *Joginder Kumar v. State of U.P.* AIR 1994 SC 1349, the Supreme Court had the occasion to deal with the rights of arrestee. Making reference to the question, as posed by Justice Benjamin Cardozo in *People v. Defore*, (1926) 242 NY 13, 24:150 NE 585, 589, -

“as to whether protection for the individual would not be gained at a disproportionate loss of protection for society as on the one side is the social need that crime shall be repressed and on the other, the social need that law shall not be flouted by the insolence of office”,

the Court made the following illuminating observations -

“No arrest can be made because it is lawful for the Police Officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so”.

13. In the wake of the abovementioned facts and circumstances, probability of the defence that the appellant was apprehended while staying in the quarter allotted to co-accused Satpal and was shot at while being taken to the police station stood duly substantiated.

14. To sum up, learned trial Judge completely misdirected himself in holding the appellant guilty of the offences charged with despite the fact that veracity of the incident narrated by Head Constable Vinod was sought to be supported by police personnel only whose presence at the spot located in the vicinity of residential quarters, was shrouded with doubt and not by any public witness. Since the probability of the defence version could not be totally ruled out, the appellant was required to be given the benefit of doubt.

15. In the result, the appeal is allowed. The impugned convictions and consequent sentences are hereby set aside. Instead, the appellant is acquitted of all the offences. The fine amounts, if deposited, be refunded.

16. The appellant is in custody. He shall be released forthwith if not required in any other case.

Appeal allowed.

I.L.R. [2011] M. P., 239

APPELLATE CRIMINAL

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

Cr.A. No.573/2001 (Jabalpur) decided on 12 October, 2010

PRAKASH WAGH

... Appellant

Vs.

STATE OF M.P.

... Respondent

A. Evidence Act (1 of 1872), Section 32 - Dying declaration - Fitness certificate of deceased - Not necessary, where the person who recorded the statement is himself a doctor.

Executive Magistrate, though started, but could not complete the statement of deceased due to her drowsiness. Merely because deceased became drowsy at 3.50 a.m., it cannot be presumed that she was not able to make statement at 1:30 a.m. also. (Para 10)

क. साक्ष्य अधिनियम (1872 का 1), धारा 32 - मृत्युकालिक कथन - मृतक का स्वस्थता प्रमाण पत्र - आवश्यक नहीं है, जहाँ वह व्यक्ति जिसने कथन अभिलिखित किया स्वयं चिकित्सक हो।

B. Penal Code (45 of 1860), Section 302, Evidence Act, 1872, Section 32 - Dying declaration - (1) recorded by doctor, (2) recorded by Inspector, Police as Dehati Nalishi, and (3) Dying declaration written as statement u/s 161 Cr.P.C. were found true and voluntary - There appeared no reason for the deceased to have made false statement accusing her husband/accused - By the fact that accused tried to extinguish the fire, it cannot be presumed that the deceased committed suicide - It stands proved that accused set fire to deceased and as a result of it she died. (Para 13)

ख. दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम, 1872 धारा 32 - मृत्युकालिक कथन - (1) चिकित्सक द्वारा अभिलिखित, (2) पुलिस निरीक्षक द्वारा देहाती नालिशि के रूप में अभिलिखित, और (3) द.प्र.स. की धारा 161 के अंतर्गत कथन के रूप में लिखित मृत्युकालिक कथन सत्य एवं स्वेच्छापूर्ण पाये गये - मृतक द्वारा अपने पति/अभियुक्त पर आरोप लगाते हुए मिथ्या कथन करने का कोई कारण प्रकट नहीं हुआ - इस तथ्य से कि अभियुक्त ने आग बुझाने का प्रयास किया, यह उपधारित नहीं किया जा सकता कि मृतक ने आत्महत्या की - यह साबित होता है कि अभियुक्त ने मृतक को आग लगाई और उसके परिणामस्वरूप उसकी मृत्यु हुई।

C. Penal Code (45 of 1860), Sections 302, 304 Part I or 304 Part II - Murder or culpable homicide - When deceased asked the accused not to consume liquor, he became violent and poured kerosene and set fire to deceased - The act of pouring kerosene and setting fire, is so imminently dangerous that it must in all probability, cause death or such bodily injury as is likely to cause death - It cannot be held that the case of accused falls within the ambit of Section 304-I or 304-II - Conviction u/s 302 is affirmed. (Para 19)

स. दण्ड संहिता (1860 का 45), धाराएँ 302, 304 भाग I व 304 भाग II - हत्या या आपराधिक मानव वध - जब मृतक ने अभियुक्त से मदिरापान न करने के लिए कहा तो वह हिंसक हो गया और मृतक पर मिट्टी का तेल उड़ेलकर उसे आग लगा दी - मिट्टी का तेल उड़ेलने और आग लगाने का कृत्य इतना आसन्न रूप से घातक है कि वह सभी संभाव्यताओं में, मृत्यु कारित करेगा अथवा ऐसी शारीरिक क्षति कारित करेगा जिससे मृत्यु कारित होना संभाव्य है - यह अभिनिर्धारित नहीं किया जा सकता कि अभियुक्त का मामला धारा 304-I या 304-II की परिधि के भीतर आता है - धारा 302 के अंतर्गत दोषसिद्धि की पुष्टि की गई।

Cases referred :

Cr.A. No.2116/1997, AIR 1968 SC 881, (2003) 6 SCC 443, (1998) 8 SCC 355.

Durgesh Gupta, for the appellant.

Prakash Gupta, Panel Lawyer, for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by **RAKESH SAKSENA, J.** :— Appellant has filed this appeal against the judgment dated 27th March, 2001 passed by Sessions Judge, Bhopal in Sessions Trial No. 358/2000, convicting the appellant under Section 302 of the Indian Penal Code and sentencing him to imprisonment for life with fine of Rs. 500/-. In default of payment of fine, further imprisonment for one month.

2. In short, the prosecution case is that Nanda Bai, the deceased, was married to accused/appellant about 9-10 months before the occurrence which took place on 13.7.2000. In the night of 13.7.2000, Nanda Bai suffered severe burn injuries in her house. She was taken to Hamidiya Hospital, Bhopal, where, on her report Dehati Nalshi Ex. P/8 was recorded by the police. Her dying declaration Ex. P/10 was also recorded by Dr. R.S.Raikwar. In both the aforesaid statements, Nanda Bai disclosed that when she insisted accused to not to consume liquor, he poured kerosene and set fire to her. During treatment, on the same day, she died. After inquest proceedings, her dead body was sent for postmortem examination. Dr. V.K.Athwal (PW6), Assistant Professor of Gandhi Medical College, Bhopal performed the postmortem examination of the body and found that deceased died due to 95% burn injuries. Postmortem report is Ex. P/12.

3. After investigation, charge sheet was filed and the case was committed for trial. According to accused, he did not commit the offence. At the time of occurrence, he was strolling out side his house and deceased was cooking inside the house. While cooking, deceased got burnt. He extinguished the fire and took her to hospital. Trial Court relying on the evidence of dying declaration Ex. P/10 recorded by Dr. R.S. Raikwar (PW10), evidence of Dehati Nalshi Ex. P/8 recorded by Sub Inspector S.K.Verma (PW4) and the medical evidence of Dr. V.K. Athwal (PW6) held the accused guilty and convicted and sentenced him under Section 302 of the Indian Penal Code.

4. Learned counsel for the appellant submitted that the appellant was falsely implicated by the deceased. He had tried to save the deceased when she caught fire; in that course he had also suffered injuries. Counsel submitted that the evidence of dying declaration was not reliable because deceased had suffered 95% burn injuries, therefore, she was not in a position to make any dying declaration. It was also possible that deceased might have committed

suicide. Learned counsel further submitted that since the appellant was under intoxication and suddenly a quarrel had erupted between him and his wife when she asked him to not to consume liquor, trial Court committed error in holding that accused intended to commit murder of his wife. Conviction of accused under Section 302 of the Indian Penal Code was, therefore, not justified. At the most, appellant could have been held liable under Section 304-Part-I or Part-II of the Indian Penal Code. Accused has been in custody since the date of his arrest i.e. 15.7.2000. She placed reliance on the decision rendered by Division Bench of this Court in the case of *Sharif Khan Vs. State of M.P.* in Criminal Appeal No. 2116/1997.

5. On the other hand, learned counsel for the State submitted that the dying declaration recorded by doctor and Dehati Nalshi Ex. P/8 recorded by Inspector S.K. Verma, which was treated as a dying declaration was reliable. Trial Court committed no error in placing reliance on the aforesaid dying declaration and holding the accused guilty under Section 302 of the Indian Penal Code. Placing reliance on the Apex Court decision *State of M.P. Vs. Ramprasad*-AIR 1968 SC 881, learned counsel submitted that in case of setting fire after pouring kerosene, it could not be held that accused had no intention to cause death of the victim. He, thus, supported and justified the judgment of conviction passed by the trial Court.

6. We have heard the learned counsel of both the parties and perused the impugned judgment and the evidence on record carefully.

7. It has not been disputed that deceased suffered burn injuries and died as a result of such injuries. Accused admitted in his statement recorded under Section 313 of the Code of Criminal Procedure that deceased suffered injuries by burning. Dr. R.S.Raikwar (PW10) deposed that on 14.7.2000 Nanda Bai was admitted in the burn ward of Hamidiya Hospital, Bhopal. According to Sub Inspector S.K. Verma (PW4), in the night of 13.7.2000 when he was posted in the police station Kamla Nagar, Bhopal he received information that Nanda Bai was admitted in the burn ward of hospital. He had gone to hospital and saw Nanda Bai in burnt condition. He recorded a report Ex. P/8 given by Nanda Bai. After death of Nanda Bai, Dr. V.K.Athwal (PW6) conducted the postmortem examination and vide postmortem examination report Ex. P/12 found following injuries:

- (i) II-III degree burns over face and, all over except naso-labial fold and folds around eyes,

(ii) II-III degree burns over both upper limbs starting from shoulder tip up to finger tips,

(iii) II-III degree burns over both lower limbs starting from groin up to foot,

(iv) II-III degree burns over chest and abdomen starting from neck up to groin all over except at right iliac fossa and

(v) II-III degree burns over back starting from neck up to gluteal fold.

In his opinion, death was due to respiratory failure as a result of burns. Thus, it is clearly established that deceased had died due to burn injuries.

8. Now the question before us is whether the death of deceased was caused by the accused. Though, prosecution examined Ashok (PW1), Rajesh (PW2) and Anil (PW3), who were the neighbours of deceased and had reached at the spot immediately after the occurrence, but they did not support the prosecution case and were, therefore, declared hostile. They, however, stated that they saw Nanda Bai lying in the hut in burnt condition.

9. The prosecution case mainly rested on the evidence of dying declaration recorded by Dr. R.S.Raikwar (PW10) and police officer S.K. Verma (PW4).

10. Dr. R.S.Raikwar (PW10) was posted as R.S.O. in Hamidiya Hospital, Bhopal. According to him, Nanda Bai was got admitted in the burn ward of hospital on 14.7.2000. She had burn injuries and her condition was serious. At 1.30 A.M. he recorded the statement of Nanda Bai. She stated that her husband used to quarrel and beat her daily after consuming liquor. On the day of occurrence at about 11-11.30 P.M. he was drinking liquor. When she asked him to stop drinking, he got enraged and after taking kerosene out of stove poured it on her and ignited her. Dying declaration is Ex. P/10. Dr. Raikwar (PW10) categorically stated that when he recorded the above statement, Nanda Bai was in her full senses. We are unable to accept the submission made by learned counsel for the appellant that since doctor did not record any certificate about the physical and mental condition of the deceased before recording her statement, his evidence was unreliable. It is to be noted that the person who recorded this statement was himself a doctor, therefore, in our opinion, it was not necessary for him to have endorsed a certificate about the fitness of deceased. Learned counsel for the accused referring to document Ex. P/16 argued that when Executive Magistrate had

come to record dying declaration of Nanda Bai, Dr. Raikwar himself found that Nanda Bai was not able to make statement. Dr. Raikwar explained that initially when Executive Magistrate started recording dying declaration, he certified that patient could give statement and she was conscious, but she could only speak that she got burnt at about 11.30 P.M. on 13.7.2000, and thereafter, she went unconscious and could not answer then he again endorsed remark that she cannot give statement because of drowsiness. In our opinion, this conduct of Dr. Raikwar shows his fairness. No suggestion was put to Dr. Raikwar that he had any ill will or animus against the accused to record false dying declaration against him. As far as the fact that Nanda Bai could not give statement before Executive Magistrate, it is significant to note that the part of dying declaration Ex. P/16 was recorded by Executive Magistrate at about 3.45 A.M., whereas the dying declaration by Dr. Raikwar was recorded at 1.30 A.M.. Merely because at 3.50 A.M. Nanda Bai became drowsy, it cannot be presumed that she was not able to make statement at 1.30 A.M. also.

11. Another piece of evidence is Dehati Nalshi Ex. P/8 recorded by Inspector S.K.Verma (PW4). According to S.K.Verma, the intimation about burning of Nanda Bai and that she was admitted in the hospital was recorded in rojnamcha entry Ex. P/7 at police station Kamla Nagar, Bhopal. In consequence to this information, he went to hospital. At that time, Nanda Bai was able to speak. On his query, she informed that she lived with her husband in Hut No. 140 at Sudama Nagar. She was married to accused about nine months ago. Since she was deserted by her first husband, she had married accused. Her husband Prakash used to consume excessive liquor daily. On the day of occurrence when she asked him to not to consume liquor, he threatened her saying that she was no body to ask him and that he would dispose her of. He took out kerosene from the stove, poured it on her and set fire to her by matchstick. He burnt her with a view to kill her. Thumb impression of Nanda Bai was also taken on the said report. According to S.K.Verma, he also recorded her statement Ex. P/9 under Section 161 of the Code of Criminal Procedure, wherein she reiterated the same story. Since after giving these statements Nanda Bai expired, these statements could be treated as dying declaration under Section 32 of the Indian Evidence Act. On the basis of Dehati Nalshi, first information report Ex. P/8-A was recorded at police Station Kamla Nagar, Bhopal. Inspector S.K.Verma (PW4) recorded Ex. P/8 at 2.55 A.M. This report was recorded after the dying declaration Ex.

P/10 was recorded by Dr. Raikwar (PW10). It also reflects same version which was given by deceased to Dr. Raikwar in dying declaration Ex. P/10. There is absolutely no inconsistency between the aforesaid dying declarations. Inspector S.K. Verma also said that he had questioned the deceased in Hindi and she had answered in Hindi. He categorically denied that Nanda Bai did not know Hindi.

12. Inspector S.K. Verma (PW4) went at the spot and drew spot map Ex. P/2 and seized Nutan stove, burnt matchstick and burnt clothes from the spot vide seizure memo Ex. P/3. His evidence in this regard stands corroborated from the evidence of Jitendra (PW5).

13. After closely scrutinizing and appreciating the evidence of dying declarations Ex. P/8, Ex. P/9 and Ex. P/10, we find these statements genuine and reliable. There appeared absolutely no reason for Dr. Raikwar (PW10) and Inspector Verma (PW4) to have fabricated these documents. Further there appeared no reason for the deceased to have made false statement accusing her husband. Merely from the fact that accused tried to extinguish the fire, it cannot be presumed that he did not set fire to her or that she committed suicide. We are satisfied that the statements given by deceased were true and voluntary. In *P.V. Radhakrishna Vs. State of Karnataka*-(2003) 6 SCC 443, Apex Court observed as:

“12. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has not power of cross-examination. Such as power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.”

14. Applying the above principles to the facts of the case, in our opinion, Court below was right and fully justified in relying upon the dying declarations Ex. P/8 and Ex. P/10 recorded by Inspector S.K.Verma (PW4) and Dr. Raikwar (PW10).

15. Though, defence witness Vimal Bai (DW1) stated that when some people informed her, she went to the house of accused and saw Nanda Bai burning and accused extinguishing the fire, but we find her evidence not reliable in view of the trustworthy evidence of dying declarations made by the deceased. Evidence of Vimal Bai that deceased did not know Hindi and only spoke Marathi also appears not reliable in view of the evidence of Inspector S.K.Verma (PW4) and Dr. Raikwar (PW10), who categorically deposed that Nanda Bai spoke Hindi. Apart from it, Vimal Bai only saw Nanda Bai in burnt condition and accused extinguishing fire; she did not know about any dispute or altercation which might have occurred between them.

16. After sincerely appreciating the evidence of dying declaration, we are satisfied that accused/appellant set fire to deceased, as a result of which she died.

17. Learned counsel for the appellant argued that in the facts and circumstances of the case, conviction of appellant under Section 302 of the Indian Penal Code was not justified, as according to her, it could not be held that appellant intended to commit murder of deceased because the incident occurred on a sudden quarrel on spur of the moment without any premeditation when deceased asked the accused to not to consume liquor. She placed reliance on the case of *Sharif Khan* (supra) of this Court. In the case of *Sharif Khan*, this Court observed:

“20.....since the incident had occurred on the point of serving meals, the quarrel started all of a sudden and in a heat passion the appellant poured kerosene on the deceased and lit the fire, therefore, under Exception-1 of Section 300 IPC the present case would come because the appellant lost the power of self-control and on account of grave and sudden provocation, cause the death to the deceased. On going through the entire episode and the testimony of the prosecution witnesses and also examining the dying declaration, it is gathered that appellant was having knowledge that the act of pouring kerosene on the deceased and lighting the fire, death may be caused to the deceased and, therefore, according

to our considered view, the case would fall under Section 304-II, IPC. The case of *Hari Shankar* (supra) placed reliance by learned counsel for the appellant is squarely applicable in the present factual scenario.”

18. In our opinion, the facts and circumstances of the case of *Hari Shankar Vs. State of Rajasthan*-(1998) 8 SCC 355 were different. In that case accused threw burning stove on the deceased resulting in his death due to burn injuries. In those circumstances, Apex Court held that it could not be said that it was merely a rash and negligent act on the part of the appellant and he could be attributed the knowledge that his act was likely to cause death. He was, therefore, liable to be convicted under Section 304-Part-II of the Indian Penal Code and not under Section 302 of the Indian Penal Code.

19. In our opinion, in the present case when deceased asked the accused to not to consume liquor, he became violent and poured kerosene and set fire to deceased. The act of pouring kerosene and setting fire, in our opinion, is so imminently dangerous that it must in all probability, cause death or such bodily injury as is likely to cause death of deceased, therefore, it cannot be held that the case of accused falls within the ambit of Section 304-I or 304-II of the Indian Penal Code. We find support from the ratio of the decision rendered by the Apex Court in *State of M.P. Vs. Ram Prasad* (supra), facts whereof were almost similar to the case in hand. It observed as under:-

“8.....In the present case, Ram Prasad poured kerosene upon the clothes of Mst. Rajji and set fire to those clothes. It is obvious that such fire spreads rapidly and burns extensively. No special knowledge is needed to know that one may cause death by burning if he sets fire to the clothes of a person. Therefore, it is obvious that Ram Prasad must have known that he was running the risk of causing the death of Rajji or such bodily injury as was likely to cause her death. As he had no excuse for incurring that risk, the offence must be taken to fall within 4thly of S. 300 Indian Penal Code, in other words, his offence was culpable homicide amounting to murder even if he did not intend causing the death of Mst. Rajji. He committed an act so imminently dangerous that it was in all probability likely to cause death or to result in an injury that was likely to cause death. We are accordingly of the opinion that the High Court and the Sessions Judge were

both wrong in holding that the offence did not fall within murder.”

20. In view of the above enunciation of law, we find that the trial Court committed no error in convicting the accused/appellant under Section 302 of the Indian Penal Code. Accordingly, we affirm the finding of conviction and sentence recorded by the trial Court.

21. Appeal dismissed.

Appeal dismissed.

I.L.R. [2011] M. P., 248
APPELLATE CRIMINAL
Before Mr. Justice N.K. Gupta

Cr.A. No.602/1995 (Jabalpur) decided on 20 October, 2010

YASHWANT

... Appellant

Vs.

STATE OF M.P.

... Respondent

Penal Code (45 of 1860), Section 304(I) or 325 - Culpable homicide - Accused assaulted only once with a light weight bamboo stick to the deceased (72 year) ultimately causing his death - His intention was not to cause such bodily injury as was likely to cause death in normal or ordinary course - The conviction of accused converted from Section 304 Part I to 325, and punished with Jail sentence for the period already undergone - Appeal partly allowed.

दण्ड संहिता (1860 का 45), धारा 304(I) या 325 - आपराधिक मानव वध - अभियुक्त ने हल्के वजन की बांस की लकड़ी से केवल एक बार मृतक (72 वर्षीय) पर वार किया, जिससे अतंतः उसकी मृत्यु हो गयी - उसका आशय ऐसी शारीरिक क्षति कारित करना नहीं था जिससे कि सामान्य अथवा साधारण अनुक्रम में मृत्यु कारित होना संभाव्य था - अभियुक्त की दोषसिद्धि धारा 304 भाग-I से 325 में संपरिवर्तित की गयी तथा भुगंताई जा चुकी कारावास की अवधि से दण्डित किया गया - अपील अंशतः मंजूर।

Case referred :

AIR 2002 SC 3462.

Sanjay Patel, for the appellant.

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

J U D G M E N T

N.K. GUPTA, J. :-The appellant has preferred this appeal against the judgment dated 21.3.1995 passed by First Additional Sessions Judge, Mandla in S.T.No.77/1994 by which the appellant was convicted for offence punishable under Section 304 (1) of I.P.C. and was imposed with a sentence of rigorous imprisonment for five years.

2. Prosecution's case in short, is that, deceased Sonulal was the maternal grand father of the appellant/accused. On 21.4.1994 at about 5 p.m. in the evening, the appellant/ accused came to the house of the deceased and demanded for his claim. The deceased did not utter a single word in reply, then the appellant/ accused started shouting. He threatened that either his claim be given to him else, he will kill the deceased. He assaulted the deceased on his ribs by 'Bans ki fadi' (a portion of bamboo stick, which was broken in two parts from vertical direction). Deceased raised alarm for help, then Shanker Lal, who was also a grand son of the deceased, saved the deceased. The appellant also assaulted Shanker Lal on his back. He gave two slaps to Rajo Bai, sister of Shanker Lal. Then he also assaulted one Sukrati Bai, sister of the appellant/accused. At that time, since Sitaram and his wife entered the scene of occurrence, the appellant/accused left the house. Shanker Lal went to call the Kotwar, but when the Kotwar came to the house, deceased had already expired. Shankerlal, could not lodge an F.I.R. in the late night but he lodged the F.I.R. in Police Station Mawai, District Mandla in the next morning at about 7 a.m. Police referred the dead body of the deceased Sonulal for post-mortem. In the post-mortem report, Ex.P/6, Dr.K.C.Meshram (P.W.7) found that the body was badly decomposed. Skin from various parts of the body was found removed. Tenth and Eleventh left ribs were found broken. Spleen was also ruptured. There was blood collected in the left cavity of the abdomen. He opined that the deceased Sonu Lal died due to injuries caused to the spleen. After due investigation, police Mawai, district Mandla, had submitted a charge-sheet for offence punishable under Section 302 of I.P.C. before the Committal Court.

3. The appellant abjured his guilt. He did not take any specific defence in the case, he simply informed the trial Court that he was falsely implicated and therefore, he did not adduce any evidence in his favour.

4. Learned First Additional Sessions Judge, Mandla, after considering the evidence adduced by the prosecution, acquitted the appellant from the charge

of section 302 of I.P.C. but convicted him for offence punishable under Section 304 (1) of I.P.C. and inflicted the aforesaid sentence.

5. I have heard the learned counsel for both the parties in detail.

6. Learned counsel for the appellant has submitted that as per allegation, the appellant assaulted the deceased once by a very light object 'Bans ki fadi' and the deceased died due to rupture of his spleen, whereas spleen could have ruptured due to the deceased falling down and therefore, offence if any made out against the appellant, would only be an offence punishable under Section 325 of I.P.C. On considering the evidence adduced by the prosecution, Shanker Lal (P.W.1), Sukrati Bai (P.W.2) have stated that the appellant assaulted the deceased Sonu Lal by 'Bans ki fadi' on his ribs, there is allegation of only one stroke by that weapon. Although these two witnesses were related to the deceased, they were also related to the accused/appellant. However, their testimony is duly corroborated by Rajo Bai (P.W.5), who is the real sister of the appellant. She accepted that she saw the accused leaving the place of the incident. He slapped her twice, then she immediately approached the spot and found Sonulal to be dead. Although, she was declared hostile, she has corroborated the testimony of Shanker Lal and Sukrati Bai that after the assault, the accused ran away but, in the meantime, he gave two slaps to his real sister Rajo Bai and Sonu Lal was found dead just after the incident. No suggestion was given to Rajo Bai that someone else had assaulted the deceased. However, Rajo Bai accepted that she wanted to save the appellant/accused being his sister.

7. Looking at the corroborative statements of Rajo Bai, evidence of Shanker Lal and Sukrati Bai seems to be trustworthy and it is proved beyond doubt that the appellant/accused assaulted the deceased Sonu Lal by 'Bans ki fadi' once.

8. Dr. Meshram (P.W.7) did not say anything regarding any visible injury on the skin of the deceased but it is clear from the circumstances that the deceased died in the evening of 21.4.1994, whereas Shanker Lal lodged the F.I.R. on 22.4.1994 and dead body was produced before Dr. Meshram for post-mortem on 24.4.1994 i.e. three days after the death of the deceased. Dr. Meshram has stated in his report as well as in his evidence in the trial Court that skin from various parts of the body was missing as it had left its place and therefore, if the skin on ribs was not present then there was no opportunity for Dr. Meshram to examine the visible injury on that part.

Therefore, there is no consequence to the fact that Dr. Meshram did not find any visible injury on that portion of the body, where two ribs were found broken. Though Dr. Meshram has admitted that injuries of the deceased could be caused by falling with some force. But this was a hypothetical question asked to Dr. Meshram, there is no evidence adduced in the matter that the deceased fell with force, on an object which had any core. Therefore, looking at the evidence of the eye witnesses and the information given by Dr. Meshram, it is clear that due to the strike delivered by the appellant to the deceased by Bans ki fadi, deceased got two ribs broken and the spleen ruptured due to which he died.

9. Learned Additional Sessions Judge found that the accused had not intended to cause death of the deceased and therefore, the appellant/accused was not convicted for offence under Section 302 of I.P.C. and he was only convicted for offence under Section 304 Part 1 of the I.P.C. Learned counsel for the appellant has submitted that offence comes to the purview of section 325 of I.P.C. only and in his support, he has relied on a judgment rendered by Hon'ble the Apex Court in the case of "*Jagtar Singh Vs. State of Haryana*", [(2002) AIR 3462, in which it is held as under:-

"The intention to cause death or cause such bodily injury as was likely to cause death in the normal or ordinary course cannot be readily imputed to the accused. Taken individually or even jointly together, if at all the common intention could have been merely to commit an assault and inflict some injuries but not to cause such injuries as would or is likely to cause or result in death. Therefore, A1 and A3 could not be condemned to have committed the murder, though that seems to have been the unintended ultimate result. On the facts proved, the accused could only be safely convicted under Section 325 I.P.C. and not under section 302 I.P.C."

10. In the light of the view taken by the Hon'ble Apex Court, if the facts and circumstances of the present case are considered, then it would be clear that the weapon used by the appellant was a half portion of bamboo stick, which was broken in the vertical direction. Therefore, it was not so heavy an object by which a powerful assault could be done. He gave only one blow to the deceased, though two ribs were broken in result. He gave one such blow on the back of the witness Shankerlal also, but Shankerlal did not receive any visible injury. Thus, it seems that since the deceased was 72 years old, his

bones must have turned brittle and by a light assault he got his two ribs broken. The appellant was the grand son of the deceased, who did not have any enmity with the deceased. He was simply asking for his claim in the property and he was in such a agony that he gave one blow of that fadi to Shankerlal, then he gave two slaps to the witness Sukrati Bai and also some slaps to his real sister Rajo Bai. Therefore, it is clear that he did not intend to cause such a bodily injury, which could be fatal in normal course of life. His intention was not to cause such bodily injury as was likely to cause death in normal or ordinary course. He could not imagine even, that by his assault the spleen of the deceased could rupture and death of the deceased would occur. Therefore, his intention could have been merely to commit assault and to inflict injuries to the deceased. But not to cause such injuries as would or is likely to cause or result in death.

11. Looking at the entire evidence and circumstances of the case, relationship of the appellant and the deceased and to the fact that he assaulted only once with a light weight bamboo stick, which was broken in half in a vertical direction, the appellant cannot be convicted for offence punishable under Section 302 or section 304 of I.P.C., in the light of dictum laid in *Jagtar Singh's case* (Supra), the appellant was to be convicted for offence punishable under section 325 of I.P.C. only.

12. Learned counsel for the appellant has submitted that the appellant has undergone more than one year's period in custody and therefore, looking at the offence committed by him, he may not be sent to jail further. The incident took place in the year 1994 and therefore, it would not be proper to send the appellant to jail again. Looking at the circumstances of the event, date of incident and overt act of the appellant, twelve to fifteen months' jail sentence seems to be sufficient for offence punishable under Section 325 of I.P.C. to break two ribs of an old man.

13. On the basis of the aforesaid discussion, appeal of the appellant may be partly accepted. Therefore, appeal preferred by the appellant is hereby partly allowed. His conviction and sentence for offence punishable under Section 304 Part 1 of I.P.C. is hereby set aside but he is convicted for offence punishable under Section 325 of I.P.C. under the same charge. He is inflicted with a punishment of jail sentence for that period, which he has already undergone in the custody.

14. At present, the appellant is in custody, therefore, an appropriate warrant be issued forthwith to release him from jail.

Appeal partly allowed.

**I.L.R. [2011] M. P., 253
APPELLATE CRIMINAL**

Before Mrs. Justice Sushma Shrivastava

Cr.A. No.702/1996 (Jabalpur) decided on 22 October, 2010.

MIJAJILAL

... Appellant

Vs.

STATE OF M.P.

... Respondent

A. Penal Code (45 of 1860), Section 306 - Abetment of suicide - An oral allegation of theft made by appellant against deceased, even if followed by some amount of beating, does not amount to such circumstance that the deceased was left with no option except to commit suicide - No offence proved beyond peripheri of doubt - Appeal allowed.

(Paras 17 & 18)

क. दण्ड संहिता (1860 का 45), धारा 306 - आत्महत्या का दुष्प्रेरण - अपीलार्थी द्वारा मृतक के विरुद्ध किया गया चोरी का मौखिक अभिकथन, भले ही इसके बाद कुछ मारपीट किया जाना भी हो, ऐसी परिस्थिति की कोटि में नहीं आता है कि मृतक के पास आत्महत्या करने के सिवाय कोई विकल्प नहीं बचा था - संदेह की परिधि के परे कोई अपराध साबित नहीं - अपील मंजूर।

B. Evidence Act (1 of 1872), Section 32 - Dying declaration - Averment by deceased in FIR recorded by Head Constable that appellant, when the deceased sat on platform of witness (PW-11), came and asked him to eat sulphas and die - Neither supported by PW-11 nor by mother, father and uncle of deceased - The averment does not appear to be a truthful statement made by deceased. (Para 13)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 32 - मृत्युकालिक कथन - प्रधान आरक्षक द्वारा अभिलिखित प्रथम सूचना रिपोर्ट में मृतक द्वारा यह प्रकथन किया गया कि जब मृतक, साक्षी (अ.सा.-11) के चबूतरे पर बैठा हुआ था, तब अपीलार्थी आया और उसको सल्फास खाकर मरने को कहा - इसका समर्थन न तो अ.सा.-11 द्वारा और न ही मृतक की माँ, पिता एवं चाचा द्वारा किया गया - प्रकथन, मृतक द्वारा किया गया सत्य कथन प्रतीत नहीं होता है।

Cases referred :

AIR 1991 SC 1853, AIR 2005 SC 1473, AIR 2001 SC 3837(1), (2010) 1 SCC 750.

Rakesh Jain, for the appellant.

Akhilesh Jain, Dy.G.A., for the respondent/State.

J U D G M E N T

SUSHMA SHRIVASTAVA, J. :-Appellant has preferred this appeal challenging his conviction and order of sentence passed by Additional Sessions Judge, Panna in S.T. No.49/94, decided on 26.03.96.

2. Appellant has been convicted under Section 306 of IPC and sentenced to rigorous imprisonment for three years with fine of Rs.1000/-, in default further rigorous imprisonment for three months, by the impugned judgment.

3. According to prosecution, on 27.06.94 at village Kamalpura, District Panna deceased Mangaldeen @ Hakke Patel had gone to the place of appellant to collect the price of wheat sold to him, but the appellant did not make payment. Deceased Mangaldeen (hereinafter to be referred as 'deceased') then came back and sat on the platform of Jhurree Patel. After sometime, appellant came there, abused the deceased and alleged that he had stolen his Rs.2150/- and asked back for his money. Deceased denied to have taken his money, but the appellant said that he was making lie and he should eat Celphos and die. Appellant also gave beating to the deceased, then Jhurree Patel, Mohan and Baiju Patel intervened and came to his rescue. Deceased came to his house and narrated the whole incident to his father and mother. Next day, on 28.6.94 about 10 'O'clock in the morning appellant again came to his house and made false allegation of theft of his Rs.2150/- against the deceased and asked for this amount from his father. The father and uncle of the deceased kept the money before the appellant and said that if any theft has taken place, he can pick up the money. Appellant then picked up Rs.2150/- saying if the deceased had any prestige, he should consume Celphos and die. Being harassed by all this, deceased consumed Celphos tablet; when he felt pain in his stomach he went to the Police Station alongwith his father, uncle and other members of his family, lodged the FIR, on the basis of which an offence was registered against the appellant and was investigated. Deceased was sent for medical examination; he was admitted in the hospital, but he died during treatment. The intimation of his death was sent to the Police by the hospital authorities, whereupon merg intimation was recorded and merg inquest report was prepared. The dead body of deceased was sent for postmortem examination. His viscera was preserved and sent for chemical examination. After due investigation, appellant was prosecuted under Section 306 of IPC and was put to trial.

4. Appellant denied the charge levelled against him and pleaded false

implication due to enmity. Appellant also took a plea that he was not present in the village at the time of incident.

5. Learned Additional Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, found the appellant guilty under Section 306 of IPC, convicted and sentenced him as aforesaid, by the impugned judgment, which has been challenged in this appeal.

6. Learned counsel for the appellant and learned counsel for the State were heard.

7. It was no longer disputed that deceased Mangaldeen died as a result of consuming Celphos. It is also evident from the testimony of Bhagwandas (P.W-5) that deceased had consumed one Celphos tablet and had begun vomiting. The FIR (Ex.P-9) lodged by the deceased and recorded by Head Constable Sahab Lal Pyasi (P.W-7) also mentions that deceased himself had consumed a tablet of Celphos. The evidence of Baldu (P.W-2), the uncle of deceased and Rambhuvan (P.W-12) also indicates that after consuming Celphos, the condition of the deceased deteriorated and he died in the hospital same day. The evidence of Head Constable Virendra Kumar Tiwari (P.W-6), who recorded the merger intimation (Ex.P-8) on the basis of intimation (Ex.P-7) received from District Hospital, Panna, also indicates that deceased Mangaldeen had died in the hospital on 28.6.94 at 3:45 P.M. As per FSL report (Ex.C-1) Aluminium Phosphide (Celphos Pesticide) was found in the viscera of the deceased. Thus, it was clearly established that deceased committed suicide by consuming Celphos.

8. The next question that emerges for consideration is whether the appellant abetted the commission of suicide by the deceased?

9. Learned counsel for the appellant submitted that there was no cogent and dependable evidence on record that the appellant instigated, aided or in any manner abetted the commission of suicide by the deceased and the facts of the case did not justify his conviction under Section 306 of IPC.

10. Learned counsel for the State, on the other hand, submitted that there was a dying declaration of the deceased in the form of FIR lodged by him indicating that appellant instigated the deceased to consume Celphos and to commit suicide, and he was rightly convicted under Section 306 of IPC.

11. Perused the evidence on record. The evidence of Bhupat Prasad (P.W-

9), the father of the deceased, his mother Ramrati (P.W-10) and his uncle Baldu (P.W-2) as well as the evidence of Jhurre Prasad (P.W-11) and Uttara Bai (P.W-13) indicates that appellant Mijajilal had made an allegation of theft of Rs.2150/- against the deceased. According to Bhupat Prasad (P.W-9) and Ramrati (P.W-10), when their son Mangaldeen had gone to the place of appellant to ask for the money for wheat sold to him, appellant made an allegation of theft against their son and also gave him beating. As per the evidence of Bhupat Prasad (P.W-9), the father of the deceased, he did not himself witness the incident of marpeet, but he had seen the marks of beating by lathi, shoe and 'Gatuka' etc. on his body. According to Uttara Bai (P.W-13), she had seen the appellant pulling, beating, abusing the deceased and saying that deceased had taken his Rs.2150/-, whereas according to Jhurre Prasad (P.W-11), appellant had simply pulled the deceased and asked him why he went to his house in his absence and took out Rs.2150/- from the purse of his daughter, to which the deceased denied. It is however, significant to note that Dr. Sharad Dwivedi (P.W-8), who medically examined Mangaldeen (deceased) after the incident and before his death, admittedly did not find any injury on his body. The evidence of the parents of deceased and few witnesses that appellant subjected the deceased to beating, while levelling the allegation of theft against him, is thus not found to be reliable. However, there is ample evidence that appellant made allegation of theft of Rs.2150/- against the deceased; but mere allegation of theft or making a complaint in this behalf by the appellant, if he suffered theft of considerable amount, would not imply that appellant by such an act or allegation really meant or intended that deceased should commit suicide.

12. Apposite to add that none of the aforesaid witnesses including the parents and uncle of the deceased as well as other witnesses examined by the prosecution ever deposed that appellant had asked the deceased to consume Celphos and die. Per contra, all of them, even Bhupat Prasad (P.W-9), father of the deceased, Ramrati (P.W-10), the mother of deceased, Baldu (P.W-2), uncle of the deceased as well as Jhurre Prasad (P.W-11), Rambhuvan Patel (P.W-12) and Uttara Bai (P.W-13) categorically stated that appellant, while making an allegation of theft against the deceased never asked or instigated him to eat Celphos and die. Although, these witnesses were declared hostile by the prosecution, but their evidence cannot be discarded for this reason. As reiterated by the Apex Court in the case of *Khujji @ Surendra Tiwari Vs. State of Madhya Pradesh* reported in AIR 1991 Supreme Court Page

1853, the evidence of a hostile witness cannot be treated as effaced or washed off from the record altogether, but the same can be accepted to the extent the version of such witness is found to be dependable on a careful scrutiny thereof.

13. No doubt, the FIR lodged by the deceased can be treated as a dying declaration after his death, but the fact cannot be lost sight of that it was recorded by a Police Personnel and the possibility of making addition of certain facts while jotting down the FIR cannot be totally ruled out. There is no dying declaration of deceased recorded by Naib Tahsildar or Executive Magistrate in the instant case. As per averments made in the FIR (Ex.P-9) recorded by Head Constable Sahab Lal Pyasi (P.W-7), when deceased sat on the platform of Jhurre Patel (P.W-11), appellant came there, made an allegation of theft of Rs.2150/- against him saying that he should die by consuming Celphos; appellant also asked him to eat Celphos and die in the following words “नाक लगाये फिरता है अगर पानीवाला है तो सल्फास की गोली खाकर मर जाना चाहिये”. Strangely enough, neither Jhurre Prasad (P.W-11), nor the father and uncle of the deceased, namely, Bhupat Prasad (P.W.9) and Ramrati (P.W-10) in whose presence such words or remarks were alleged to have been made by the appellant, testified that appellant had made such remarks and asked the deceased to consume Celphos. Had it been a fact, at least the mother, father and uncle of the deceased, who deposed against the appellant about his making false allegation of theft against deceased with exaggeration of giving him good beating, would not have withheld the aforesaid words allegedly used by the appellant. Therefore, the averment made in the FIR in this behalf about asking the deceased to eat Celphos and die, does not appear to be a truthful statement made by the deceased.

14. Although, the dying declaration of the deceased can be acted upon without any corroboration, yet the Court should be satisfied that it is true and voluntary statement made by the deceased. As observed by the Apex Court in the case of *Muthu Kutty and another Vs. State by Inspector of Police, Tamilnadu* reported in AIR 2005 Supreme Court page 1473 the dying declaration is only a piece of untested evidence and must like any other evidence, satisfy the Court that what is stated therein is unalloyed truth and that it is absolutely safe to act upon it.

15. Besides, even if it is assumed that appellant uttered aforesaid words while making allegation of theft against the deceased, it cannot be safely inferred in the facts and circumstances of the case, as brought on record, that appellant

intended to provoke, urge or goad the deceased to go and commit suicide. It is well settled, as held by the Apex Court in its three Judges' Bench judgment rendered in the case of *Ramesh Kumar Vs. State of Chhattisgarh* reported in AIR 2001 Supreme Court page 3837 (1) that a word uttered in a fit of anger or emotion without intending the consequences to actually follow cannot be said to be an instigation. If the appellant suffering or suspecting theft of his money by the deceased, made an allegation of theft against the deceased and even if he uttered aforesaid words in a fit of anger or emotion, it cannot be said that appellant really meant or intended that deceased should go and commit suicide.

16. The Apex Court in the case of *Gangula Mohan Reddy Vs. State of Andhra Pradesh* reported in 2010(1) Supreme Court Cases page 750 after considering the dictum laid down in its various earlier decisions held as under:-

“Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The intention of the Legislature and the ratio of the cases decided by this court is clear that in order to convict a person under section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he committed suicide.”

17. In the instant case when the entire evidence is thoroughly and closely examined, it is revealed, that appellant made an allegation of theft of his Rs.2150/- against the deceased because he suspected that deceased had taken his money, the stolen amount was also paid to the appellant by the uncle and father of the deceased, namely, Baldu (P.W-2) and Bhupat Prasad (P.W-9), as evident from their testimony, which lends weight to his suspicion; but the evidence on record falls short to conclude that appellant really intended that the deceased should commit suicide. An oral allegation of theft made by the appellant against the deceased, even if followed by some amount of beating, does not amount to such circumstance that the deceased was left with no option except to commit suicide.

18. Thus, in the facts and circumstances of the instant case, no offence under

Section 306 of IPC was proved against the appellant beyond periphery of doubt. His conviction under Section 306 of IPC, therefore, cannot be sustained and deserves to be set aside.

19. Appeal is accordingly allowed. The conviction of appellant and sentence awarded to him under Section 306 of IPC are hereby set aside and appellant is acquitted of the charge.

Appellant is on bail. His bail bonds shall stand discharged.

Appeal allowed.

I.L.R. [2011] M. P., 259

APPELLATE CRIMINAL

Before Mrs. Justice Sushma Shrivastava

Cr.A. No.1091/1995 (Jabalpur) decided on 19 November, 2010

RAMAN SINGH

... Appellant

Vs.

STATE OF M.P.

... Respondent

A. Penal Code (45 of 1860), Sections 306 & 498-A - Abetment of suicide - Cruelty - Parents and other witnesses proving that Rs.5000/- was settled to be given at the time of marriage, but only a sum of Rs.4000/- could be given - It is also proved that the deceased when returned from matrimonial home, she used to tell that appellant used to beat her and torture her on account of demand of remaining amount - The death of deceased by hanging herself at the place of appellant (her husband) is also proved - Held - It can be safely concluded that appellant by his willful acts and continued course of conduct, as aforesaid, created such circumstances that the deceased was left with no option but to commit suicide and she was compelled to take the extreme step of putting an end to her life by hanging herself - Conviction u/s 306 & 498-A do not suffer from any infirmity. (Paras 29 to 31)

क. दण्ड संहिता (1860 का 45), धाराएँ 306 व 498-ए - आत्महत्या का दुष्प्रेरण - क्रूरता - माता-पिता तथा अन्य साक्षियों द्वारा यह साबित किया गया कि विवाह के समय 5000/- रुपये दिया जाना तय हुआ, किन्तु केवल 4000/- रुपये की राशि ही दी जा सकी - यह भी साबित किया गया कि मृतक जब अपने ससुराल से लौटी तो वह यह बताया करती थी कि शेष राशि की माँग को लेकर अपीलार्थी उसके साथ मारपीट करता है तथा प्रताड़ित करता है - मृतक की अपीलार्थी (उसके पति) के घर पर स्वयं को फाँसी लगाकर मृत्यु होना भी साबित - अभिनिर्धारित -

सुरक्षित रूप से यह निष्कर्ष निकाला जा सकता है कि अपीलार्थी ने अपने जानबूझकर किये गये कार्यों एवं लगातार आचरण से जैसा कि उपरोक्त वर्णित है, इस प्रकार की परिस्थितियाँ उत्पन्न कीं कि मृतका के पास आत्महत्या करने के सिवाय कोई विकल्प नहीं बचा था तथा उसे फाँसी लगाकर अपने जीवन का अन्त करने का उग्र कदम उठाने के लिये विवश किया गया - धारा 306 तथा 498-ए के अन्तर्गत दोषसिद्धि किसी अशक्तता से ग्रसित नहीं।

B. Evidence Act (1 of 1872), Section 32(1) - Oral statements made by the deceased to her parents and near relatives prior to her death relating to the cause of her death are admissible in evidence after her death. (Para 26)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 32(1) - मृतक द्वारा अपनी मृत्यु से पूर्व अपनी मृत्यु के कारण के संबंध में अपने माता-पिता तथा करीबी नातेदारों से किये गये मौखिक कथन उसकी मृत्यु के पश्चात् साक्ष्य में ग्राह्य हैं।

Cases referred :

AIR 1991 SC 1532, (2009) 16 SCC 605, AIR 2001 SC 3837(1).

Surendra Singh, for the appellant.

Samdarshi Tiwari, G.A., for the respondent/State.

J U D G M E N T

SUSHMA SHRIVASTAVA, J. :-Appellant has preferred this appeal challenging his conviction and order of sentence passed by Xth Additional Sessions Judge, Jabalpur in S.T. No.297/87, decided on 4.08.95.

2. Appellant has been convicted under Section 498-A, 306 of IPC and sentenced to rigorous imprisonment for two years with fine of Rs.500/-, in default rigorous imprisonment for three months, and rigorous imprisonment for five years with fine of Rs.1000/-, in default rigorous imprisonment for six months, for the respective offences, by the impugned judgment. Both the sentences were directed to run concurrently.

3. According to prosecution, deceased Kesar Bai (hereinafter referred to as 'deceased') was married to appellant Raman Singh six-seven years prior to the occurrence. Appellant Raman Singh and other co-accused persons, namely, Mangal Singh, Sudha Bai and Rakesh, being father-in-law, mother-in-law and brother-in-law of the deceased, used to harass her for bringing less dowry from her parents. Appellant and other co-accused persons also subjected the deceased to 'marpeet' and cruelty in order to fulfill their demand of dowry. As a result of harassment and cruelty meted out to the deceased by the

appellant and other co-accused persons, deceased Kesar Bai committed suicide on 10.3.87 by hanging herself by means of a rope at the house of appellant. The intimation of her death was given to the Police by the father of the appellant, on the basis of which merger intimation was recorded and merger inquest report was prepared. The dead body of deceased was sent for postmortem examination. As per postmortem report, death of deceased Kesar Bai occurred due to asphyxia as a result of hanging. Her viscera was preserved and sent for forensic examination. The rope used in the commission of suicide was also seized by the Police and was sent for the opinion of doctor. After merger inquiry, an offence was registered against the appellant and other three co-accused persons. After due investigation, appellant and other co-accused persons were prosecuted under Section 498-A and 306 of IPC and were put to trial.

4. Appellant and other co-accused persons abjured the guilt and pleaded false implication.

5. Learned Additional Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, acquitted the three co-accused persons of the charges levelled against them, but found appellant Raman Singh guilty under Section 306 and 498-A of IPC, convicted and sentenced him as aforesaid, by the impugned judgment, which has been challenged in this appeal.

6. Arguments of both the sides were heard. Record of the lower court perused.

7. It was not disputed that deceased Kesar Bai was married to appellant Raman Singh. It was also no longer disputed that deceased Kesar Bai died as a result of hanging in her nuptial home. The merger intimation (Ex.P-5) recorded by S.H.O. B.S. Parihar (P.W-11) at the instance of father of the appellant also indicated that deceased Kesar Bai had hanged herself by means of a rope in the house of appellant and died on 10.3.87 at village Babaiya. It is also reflected from the testimony of Laxmi Prasad (P.W-1), Talsa Bai (P.W-2), Shambhu Singh (P.W-3) and Rama Bai (P.W-8) that on being informed of the incident, they had gone to village Babaiya and found the deceased hanging in her matrimonial home at village Babaiya.

8. Dr. A. P. Neel (P.W-12), who conducted the postmortem on the dead body of deceased Kesar Bai, found that saliva was dribbling through left angle of mouth, face was cyanosed and tongue was congested and was caught

between teeth, eyes were closed and congested; there was also a ligature mark present extending from right side of neck to the front and left side and back of the neck interrupted at sub mastoid region below the ear on right side and it was oblique in direction, contused and dry, width $\frac{3}{4}$ " x $\frac{1}{2}$ " deep. It was between chin and cricoid cartilage at sub-mandibular region. According to Dr.A.P. Neel (P.W-12), ligature mark was antemortem and was caused by a rope. In his opinion, the cause of death of deceased Kesar Bai was asphyxia as a result of hanging. The postmortem report of the deceased (Ex.P-10) is also placed on record.

9. It was thus clear from the aforesaid evidence, which remained virtually unchallenged, that deceased Kesar Bai died due to asphyxia as a result of hanging at the place of appellant. There was no such case, nor any material to show that the death of deceased was homicidal in nature. Therefore, it could be safely concluded that deceased Kesar Bai committed suicide by hanging herself at the place of the appellant .

10. The next crucial question that emerges for consideration is whether the appellant abetted the commission of suicide by the deceased ?

11. Learned Senior Counsel appearing on behalf of the appellant submitted that there was no such positive evidence on record that deceased died or committed suicide within seven years of her marriage, the trial court also recorded a finding that her death occurred after a period of seven years of her marriage; as such, the provisions of Section 113-A of the Evidence Act were not applicable and no presumption could be drawn against the appellant under Section 113-A of the Evidence Act that he abetted the commission of suicide. Learned Senior Counsel for the appellant further submitted that the trial court gravely erred in convicting the appellant under Section 306 of IPC without there being any direct or cogent evidence that he abetted the commission of suicide by the deceased. Learned Senior Counsel, however, did not challenge the finding of guilt of the appellant under Section 498-A of IPC.

12. Learned counsel for the State, on the other hand, justified and supported the conviction of the appellant both under Section 498-A and 306 of IPC.

13. On perusal of the entire evidence, it is revealed that there is no such positive evidence on record that deceased Kesar Bai died within seven years of her marriage. None of the witnesses examined by the prosecution including

the parents of the deceased, namely, Shambhu Singh (P.W-3), Rama Bai (P.W-8) and her uncle Laxmi Prasad (P.W-1), aunt Tulsa Bai (P.W-2) have given a specific date or year of the marriage of deceased with the appellant. On the other hand, P.W-8 Rama Bai, the mother of the deceased categorically deposed in her evidence that her daughter Kesar Bai was married to appellant Raman Singh seven-eight years back. The other witnesses like Laxmi Prasad (P.W-1), Tulsa Bai (P.W-2) and Buddhu Singh (P.W-5) and Ramkumari (P.W-7) also deposed that the marriage of deceased with appellant Raman Singh had taken place six-seven years back. Actually it does not clearly transpire from their evidence that deceased was married to the appellant within a period of seven years from the date of occurrence and she committed suicide within seven years of her marriage. In fact, the general statement given by the aforesaid witnesses about the period of the marriage of the deceased, does not rule out the possibility of her being married to the appellant seven years prior to the date of occurrence. Although Shambhu Singh (P.W-3) stated in his cross-examination that his daughter was married five-six years before the occurrence, but in his chief-examination he made a statement that his daughter, Kesar Bai was married to the appellant six-seven years back, and he never gave the actual date, time and year of the marriage of his daughter Kesar Bai. Moreover, in view of the clear statement of Rama Bai (P.W-8), the mother of deceased that her daughter was married to the appellant seven-eight years back, it could not be safely concluded that the deceased was married to the appellant within a period of seven years from the date of occurrence, nor it could be held, in absence of clear and cogent evidence, that deceased Kesar Bai died and committed suicide within seven years of her marriage.

14. There is, however, ample evidence on record that deceased Kesar Bai used to complain to her parents and other relatives that appellant used to beat and ill-treat her on account of demand of rupees one thousand towards dowry. There is also ample evidence on record that an amount of rupees five thousand was settled to be given at the time of the marriage of the deceased with the appellant, but only four thousand rupees were paid to the family of the appellant and remaining one thousand could not be paid by the parents of the deceased till the date of occurrence. Laxmi Prasad (P.W-1), the uncle of deceased, his wife Tulsa Bai (P.W-2), Shambhu Singh (P.W-3), the father of deceased and Rama Bai (P.W-8), the mother of deceased as well as Rameshwar (P.W-9) have consistently stated that an amount of rupees five thousand was settled to be given at the time of marriage of deceased Kesar Bai with the appellant, but

only a sum of rupees four thousand could be paid and remaining one thousand rupees could not be paid by the father of deceased, which had led to the displeasure of 'Barat' at the time of marriage itself and the demand for remaining one thousand rupees on the part of appellant's family members persisted even after the marriage.

15. Although, a few witnesses like Roop Singh (D.W-1), Bihari Singh (D.W-2) and Ramadheen (D.W-3) were examined in defence to show that no incident or dispute regarding payment of dowry ever occurred at the time of marriage of the deceased, but the presence of these witnesses at the time of marriage was never suggested during cross-examination of any of the prosecution witnesses; as such their evidence in this behalf is not found to be trustworthy. On the other hand, an independent witness like Buddhu Singh (P.W-5) also supported the factum of dispute as to payment of certain amount at the time of marriage of the deceased. In fact, there are no reasons to disbelieve the bulk of evidence on record that an amount of Rs.5000/- was settled to be given in the marriage of the deceased, but the parents of the deceased could pay four thousand rupees and failed to pay remaining one thousand, which led to the displeasure of the in-laws of the deceased.

16. Rama Bai (P.W-8), the mother of the deceased also deposed in her evidence that even after three years of the marriage and Gauna (गौना) of her daughter, the remaining amount of rupees one thousand could not be paid. She further deposed that after Gauna (गौना) whenever her daughter used to come to her place, she told her that appellant Raman Singh used to beat her, threat her and tell her to bring rupees one thousand, else he would not keep her. According to Rama Bai (P.W-8), her daughter then lived at her place for few months and thereafter she was sent to her matrimonial home alongwith her brother-in-law on his responsibility that she would not be ill-treated anymore, but after ten-fifteen days her daughter sent a massage to take her back; her son also went to take her back, but she was not sent back by her in-laws and thereafter an information was received after ten-fifteen days that her daughter had expired, then she went to village Babaiya and found her hanging.

17. Tulsa Bai (P.W-2), the paternal aunt of the deceased also deposed that after gauna (गौना) and on return from her matrimonial home, Kesar Bai had told her that her husband and in-laws used to beat her, starve her and ask her to bring one thousand rupees, else they would kill her. According to Tulsa Bai (P.W-2), whenever deceased came to her village twice and thrice she made similar complaints.

18. Shambhu Singh (P.W-3), the father of the deceased also stated in his evidence that after return from her in-laws' place, deceased used to complain that her husband and in-laws asked for money and ill-treated her. According to Shambhu Singh (P.W-3), the deceased had gone to her matrimonial home ten-eleven days prior to her death and he had sent her alongwith her brother-in-law Rakesh on his responsibility, but he again received a message from his daughter (deceased) that she was being ill-treated, then he had sent Kesu to bring her back, but she was not sent by the father of the appellant, then he alongwith his brother Laxmi Prasad went to village Babaiya and complained to the father of the appellant about the ill-treatment meted out to the deceased, but she was not sent back. Next day, thereafter he received a message that his daughter had hanged herself. Again he went to village Babaiya and found his daughter hanging. The aforesaid facts are also borne out from the evidence of Laxmi Prasad (P.W-1), the brother of Shambhu Singh, who had accompanied him to village Babaiya.

19. Ramkumari (PW-7), another paternal aunt of the deceased, also deposed that whenever Kesar Bai used to come back from her matrimonial home, she told that appellant used to beat her and tortured her demanding the remaining amount of one thousand rupees. According to Ramkumari (P.W-7), last time the deceased was sent to her matrimonial home alongwith Rakesh on his responsibility, but after ten days she received an information that the deceased had hanged herself. According to Rameshwar (P.W-9) also, the deceased had told him that appellant used to beat her for one thousand rupees and she was not given sufficient food.

20. The aforesaid witnesses were elaborately cross-examined, but their evidence, as referred above, was not dislodged in any manner. The mere fact, as put forth in the cross-examination, that the parents and the relatives of the deceased did not report or called any Panchayat against the ill-treatment meted out to the deceased, cannot be a ground to disbelieve their evidence. Generally, the parents and the relatives of the victim do not take recourse to the Police etc. and try to patch up the things so that the married life of the girl is not ruined. In fact, there are no reasons to doubt or disbelieve the evidence of the parents, uncle and aunt of the deceased, namely Shambhu Singh (P.W-3), Rama Bai (P.W-8), Laxmi Prasad (P.W-1) and Talsa Bai (P.W-2) that the deceased used to tell them that appellant ill-treated her, subjected her to marpeet in order to fulfill the demand of one thousand rupees. Per contra, the evidence of defence witnesses, namely, Roopsingh (D.W.-1), Bihari Singh (D.W-2) and Ramadheen (D.W-3) to the effect that deceased never

complained to them of any ill-treatment by the appellant and her in-laws and she was happy at her matrimonial home, has no significance, as they themselves admitted that Kesar Bai never talked to them.

21. The main thrust of the submission of learned Senior Counsel for the appellant has been that the provisions of Section 113-A of Evidence Act regarding presumption as to abetment of suicide by a married woman are not attracted to the facts of the present case, as the deceased was married to the appellant beyond the period of seven years and there was no direct evidence on record that appellant in any manner instigated, aided or abetted the commission of suicide by the deceased.

22. No doubt, as it was not established that deceased Kesar Bai died and committed suicide within a period of seven years of her marriage, the provisions of Section 113-A of the Evidence Act remained inapplicable in the instant case, yet as said hereinabove, there is ample evidence on record that deceased always made oral complaints to her parents and near relatives that appellant used to beat her and starve her in order to fulfill the demand of remaining one thousand rupees settled at the time of her marriage with the appellant. It was also clearly established from the evidence on record that deceased Kesar Bai died and committed suicide at the place of appellant by hanging herself soon after she last went to her in-laws place. Therefore, the question would be, whether the act of the appellant, as orally complained by the deceased oft and on, to her parents, would tantamount to the abetment of commission of suicide by the deceased?

23. 'Abetment' is defined under Section 107 of IPC as under :-

“A person abets the doing of a thing, who- First-Instigates any person to do that thing; or Secondly- Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or Thirdly- Intentionally aids, by any act or illegal omission, the doing of that thing.”

Explanation 2 to Section 107 of IPC reads as under:-

“Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act.”

24. The Apex Court in its three Judges' Bench decision rendered in the case of *The State of Punjab Vs. Iqbal Singh and others* reported in AIR 1991 Supreme Court Page 1532 observed that since such crimes are generally committed in the privacy of the residential home and in secrecy, independent direct evidence is not easy to get. It would also be profitable to refer to the following observation made by their Lordships in the aforesaid case :-

“Where the husband or his relative by his willful conduct creates a situation which he knows will drive the woman to commit suicide and she actually does so, the case would squarely fall within the ambit of Section 306, I.P.C. In such a case the conduct of the person would tantamount to inciting or provoking or virtually pushing the woman into a desperate situation of no return which would compel her to put an end to her miseries by committing suicide.”

25. In another case of *Chitresh Kumar Chopra Vs. State (Govt. of NCT of Delhi)* reported in (2009) 16 Supreme Court Cases page 605, the Apex Court reiterating the legal position laid down in its earlier three Judges' Bench judgment in the case of *Ramesh Kumar Vs. State of Chhattisgarh* reported in AIR 2001 Supreme Court page 3837(1), held that where the accused by his acts or continued course of conduct creates such circumstances that the deceased was left with no other option except to commit suicide, an instigation may be inferred. Their Lordships in the aforesaid case of *Chitresh Kumar* (supra) summed up the legal position as under:-

“In order to prove that the accused abetted commission of suicide by a person, it has to be established that: (i) the accused kept on irritating or annoying the deceased by words, deeds or willful omission or conduct which may even be a willful silence until the deceased reacted or pushed or forced the deceased by his deeds, words or willful omission or conduct to make the deceased move forward more quickly in a forward direction; and (ii) that the accused had the intention to provoke, urge or encourage the deceased to commit suicide while acting in the manner noted above. Undoubtedly, presence of mens rea is the necessary concomitant of instigation.”

26. In the backdrop of the legal position, as enunciated in various aforesaid decisions of the Apex Court, when the facts of the instant case are examined,

it is apparent, as discussed hereinabove, that there is clear, cogent and reliable evidence of the parents of the deceased, namely, Shambhu Singh (P.W-3), Rama Bai (P.W-8) and her other near relatives, namely, Tulsa Bai (P.W-2), Ramkumari (P.W-7) and Rameshwar (P.W-9) that whenever deceased Kesar Bai returned to the village from her matrimonial home, she used to tell them that appellant Raman Singh used to beat her and torture her on account of demand of remaining amount of one thousand rupees settled at the time of her marriage, which could not be paid by her parents. Needles to emphasize, that such oral statements made by the deceased to her parents and near relatives prior to her death relating to the cause of her death are admissible in evidence after her death under Section 32(1) of Evidence Act.

27. As discussed above, there was also bulk of evidence that amount of rupees five thousand was settled at the time of marriage of the deceased with the appellant, out of which an amount of rupees one thousand remained unpaid till the date of occurrence and that demand for rupees one thousand from the side of appellant's family persisted long and continued even after her marriage. There is specific evidence of Tulsa Bai (P.W-2), Ramkumari (P.W-7), Rama Bai (P.W-8) and Rameshwar (P.W-9) that appellant Raman Singh used to beat the deceased and torture her on account of the aforesaid amount of rupees one thousand, which remained unpaid by her parents. It also transpires from the evidence of the aforesaid witnesses and the other witnesses like Shambhu Singh (P.W-3) and Laxmi Prasad (P.W-1) that the parents and the near relatives of the deceased were not willing to send the deceased to her matrimonial home on account of the ill-treatment and cruelty meted out to her at her in-laws place, but she was sent back to her matrimonial home on the responsibility of one Rakesh, a relative of the appellant; yet soon after, the parents of the deceased received message from the deceased of her being ill-treated with the result that the father and uncle of the deceased, namely, Shambhu Singh (P.W-3) and Laxmi Prasad (P.W-1) went to village Babaiya to take the deceased back, but she was not sent with them and shortly thereafter deceased committed suicide by hanging herself at the place of appellant.

28. According to Shambhu Singh (P.W-3), as deposed by him in para 11 in his cross-examination, when he went to Mangal Singh, the father of appellant, Mangal Singh asked him for the money and refused to send back the deceased with him and at that time appellant Raman Singh was also present there, which indicates that appellant Raman Singh was also tacitly involved in the whole

affair, and thus his complicity in demanding the unpaid money and not sending back the deceased till the remaining amount was paid, as also his torturing and beating her for money, cannot be viewed with suspicion, else appellant Raman Singh, being the husband of the deceased, would have intervened when his father demanded money and refused to send back the deceased; his apparent silence at such a juncture appears to be willful. It is also clearly evident that shortly after this episode deceased committed suicide by hanging herself at the place of the appellant. Needles to repeat that there was clear and cogent evidence on record that deceased used to make oral complaints to her parents and near relatives oft and on whenever she returned from her in-laws place that appellant Raman Singh used to beat her, starve her and torture her on account of demand for one thousand rupees, which remained unpaid. Such willful and continued course of conduct on the part of appellant in demanding the unpaid money since the time of marriage, and continuously subjecting the deceased to physical and mental torture on that count would obviously tantamount to instigating or provoking and virtually pushing the deceased into such a situation, which compelled her to commit suicide.

29. Thus, it can be safely concluded that appellant by his willful acts and continued course of conduct, as aforesaid, created such circumstances that the deceased was left with no option but to commit suicide and she was compelled to take the extreme step of putting an end to her life by hanging herself.

30. In the wake of aforesaid, the conviction of appellant under Section 306 of IPC, as recorded by the trial court, does not suffer from any infirmity so as to call for any interference in appeal.

31. In view of evidence, as available on record and discussed hereinabove, as to cruelty meted out to the deceased by the appellant, his conviction under Section 498-A of IPC also calls for no interference.

32. As regards the sentence, it was submitted that the appellant had already undergone imprisonment for more than one year and the incident related to the year 1987, appellant should not be sent back to jail after such a long lapse of time and his impugned sentence of imprisonment should be reduced to the period already undergone by him. However, looking to the gravity of the offence, the sentence of one year or so would not be justified for an offence under Section 306 of IPC. Yet, considering the facts and circumstances of the case, especially the fact that the incident occurred way back in the year

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1987, interest of justice would be subserved if the impugned sentence of imprisonment of five years imposed on the appellant under Section 306 of IPC is reduced to a period of rigorous imprisonment for three years. The impugned sentence of imprisonment under Section 498-A of IPC, however, does not call for any interference. Likewise, the sentence of fine imposed by the trial court on the appellant for both the offences also calls for no interference.

33. Accordingly, the appeal is partly allowed. The conviction of appellant under Section 306 and 498-A of IPC is maintained. His sentence of imprisonment for two years with fine of Rs.500/- for the offence under Section 498-A of IPC is also maintained. However, the impugned sentence of imprisonment for five years awarded to the appellant under Section 306 of IPC is reduced to a period of rigorous imprisonment for three years; but the sentence of fine of Rs.1000/-, as imposed by the trial court, on the appellant for the offence under Section 306 of IPC is affirmed. The substantive sentence of imprisonment for the two offences shall, as directed by the trial court, be concurrent. The period of imprisonment already undergone by the appellant shall be set off against his substantive term of imprisonment.

34. Appellant is on bail. He shall forthwith surrender to his bail bonds to serve out the remaining part of his sentence. Appeal stands allowed to the extent indicated above.

Appeal partly allowed.

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CIVIL REVISION

Before Mr. Justice Abhay M. Naik

C.R. No.54/2008 (Gwalior) decided on 17 September, 2010

ARVIND SINGH BHADORIYA

... Applicant

Vs.

SMT. KUNTI BHADORIYA

... Non-applicant

Family Courts Act (66 of 1984), Sections 7 & 8 - Exclusion of jurisdiction and pending proceedings - Family Court constituted in 2002 - Ex parte decree of dissolution of marriage obtained by applicant in the year 2000 from the Civil Court - Non-applicant filed application under Order 9 Rule 13 CPC for setting aside ex parte decree before Civil Court - Held - To bring the dispute within the jurisdiction of Family Court, the suit or proceeding must be for declaration as to validity of a

marriage or as to matrimonial status of any person - By application under Order 9 Rule 13 CPC, non-applicant did not seek any declaration as to validity of their marriage or matrimonial status - Court was only obliged to consider the question of validity or effectivity of service of summons on non-applicant - Not required to be transferred to Family Court - Revision dismissed. (Paras 9 to 11)

कुटुम्ब न्यायालय अधिनियम (1984 का 66), धाराएँ 7 व 8 - अधिकारिता का अपवर्जन तथा लम्बित कार्यवाहियाँ - कुटुम्ब न्यायालय 2002 में गठित हुआ - आवेदक द्वारा विवाह विच्छेद की एकपक्षीय डिक्री वर्ष 2000 में सिविल न्यायालय से अभिप्राप्त की - अनावेदक ने एकपक्षीय डिक्री अपास्त करने हेतु सि.प्र.सं. के आदेश 9 नियम 13 के अंतर्गत आवेदन सिविल न्यायालय के समक्ष फाइल किया - अभिनिर्धारित - विवाद को कुटुम्ब न्यायालय की अधिकारिता के भीतर लाने के लिये, वाद या कार्यवाही, विवाह की विधिमान्यता या किसी व्यक्ति की वैवाहिक स्थिति के संबंध में घोषणा के लिये होनी चाहिए - सि.प्र.सं. के आदेश 9 नियम 13 के अंतर्गत आवेदन द्वारा, अनावेदक ने, उनके विवाह की विधिमान्यता या वैवाहिक स्थिति के संबंध में कोई घोषणा नहीं चाही - न्यायालय केवल अनावेदक पर समन की तामील की विधिमान्यता अथवा प्रभाव कारिता के प्रश्न पर विचार करने के लिए बाध्य था - कुटुम्ब न्यायालय को अंतरित किया जाना अपेक्षित नहीं - पुनरीक्षण खारिज।

P.K. Chaturvedi, for the applicant.

K.L. Gupta, for the non-applicant.

O R D E R

ABHAY M. NAIK, J. :- This Civil Revision has been preferred to challenge the impugned order dated 25.01.08 passed by the court of VII Additional District Judge, Gwalior, allowing thereby an application under Order IX Rule 13 CPC of the non-applicant.

2. Revisionist got married to non-applicant on 04.02.95 at village Lona, District Jalaun (U.P.). They resided together at Station Road, Gohad Chauraha, Dist. Bhind (M.P.) up to 06.08.05. Revisionist submitted an application for dissolution of marriage by divorce on ground under Section 13(1)(a) and (b) of Hindu Marriage Act, on 08.06.99 wherein address of the non-applicant was shown as 34, Gandhi Nagar, Lashkar, Gwalior. Process Server submitted a report that the non-applicant was not residing at the said address. Similarly, the notice sent by registered post came back unserved on account of incomplete address. Thereafter, service was got effected under Order V Rule 17 CPC and ex-parte decree for dissolution of marriage by divorce in favour of the revisionist was passed on 14.01.2000. Non-applicant came to know about it

272 Arvind Singh Bhadoriya Vs. Smt. Kunti Bhadoriya I.L.R.[2011]M.P., on 04.02.2006 during the proceedings before the Court of Sessions Judge, Jalaun, Camp Orai. Non-applicant, thereafter submitted an application under Order IX Rule 13 CPC on 14.02.2006 alongwith an application under Section 5 of the Limitation Act mainly with the allegations that her address was wrongly shown as 34, Gandhi Nagar, Lashkar, Gwalior. There was a clear report of the process server that there was no residence of non-applicant at the said address. Notice issued by registered post came back unserved on account of incomplete address. Thereafter, service was got effected by way of affixation under Order V Rule 17 CPC. It is stated that the non-applicant used to reside with the applicant himself which was suppressed. Revisionist used to insist for dowry which could not be accepted, therefore, the non-applicant was beaten badly and was brought to her father in an unconscious condition by the revisionist as well as her brother-in-law Gyanveer Sikarwar. She was, thus, left at her father's place in Orai on 07.08.05. A complaint was lodged by the non-applicant with the Police Station Jalaun. After due investigation, case was registered against the revisionist and challan has already been submitted in the Court. Revisionist and other co-accused were served with the notices. Thereafter, the revisionist submitted a Criminal Revision before the court of Sessions Judge, Jalaun, Camp at Orai which was fixed to 04.02.2006. When the non-applicant appeared before the said Court she came to know, for the first time, that an ex-parte judgment and decree for divorce has been obtained by the revisionist on 14.01.2000. Thereafter, the non-applicant contacted her lawyer who after due inspection of the record of case no.108A/99 HMA submitted an application under Order IX Rule 13 CPC for setting aside the ex-parte judgment and decree. Another application under Section 5 of the Limitation Act was also submitted for condonation of delay.

3. Revisionist submitted his replies refuting thereby the contentions made in the application under Order IX Rule 13 CPC as well as application under Section 5 of the Limitation Act.

4. Learned Trial Judge vide its order dated 05.09.2006 allowed the application under Section 5 of the Limitation Act and condoned the delay. Thereafter, the learned Trial Judge allowed the application under Order IX Rule 13 CPC by the impugned order dated 25.01.2008 setting aside thereby the ex-parte judgment and decree dated 14.01.2000. Hence, the present revision is submitted.

5. Shri Chaturvedi and Shri Gupta, learned counsel, made their submissions in support of their respective stands.

6. Civil Suit No.108A/99 HMA was instituted by the revisionist against the non-applicant for dissolution of marriage by divorce on ground under Section 13(1)(a) and (b) of the Hindu Marriage Act, 1955, in which address of the non-applicant was given as House No.34, Gandhi Nagar, Gwalior. Learned Trial Judge, on the basis of evidence on record, found that the notice issued to the non-applicant in ordinary manner came back with an endorsement that the house no.34 belonged to one "Sharma". Process Server had asked for providing block number of Gandhi Nagar in order to ascertain the house. Similarly, notice issued by registered post came back unserved with an endorsement on account of incomplete address. Revisionist submitted an application under Order V Rule 17 whereupon it was directed on 01.07.99 by the Trial Court that notice be issued to the non-applicant in ordinary manner. In case if she does not accept the notice, the same may be effected by affixation. On 21.08.99, the process-server put a note that owner of the property informed him that the non-applicant was not available. Thereafter, the notice was affixed on the said house. Learned Trial Judge observed that the process server was directed to affix the notice only in case of refusal on the part of the non-applicant to receive the summons. Since non-applicant was not available and there was no refusal on her part, it is observed by the learned Trial Judge that notice could not have been effected in pursuance of the order dated 01.07.99. Accordingly, it is held that there was no due service on the non-applicant of the summons. It is further observed that the revisionist failed to adduce the evidence to the effect that non-applicant was in fact residing at 34, Gandhi Nagar, Lashkar, Gwalior and was aware of the suit for divorce. This being so, ex-parte proceedings drawn on 01.07.99 against the non-applicant have been set aside and consequently ex-parte judgment and decree dated 14.01.2000 have also been set aside.

Learned counsel for the revisionist failed to point out consideration of any inadmissible evidence or non-consideration of any material piece of evidence so as to warrant interference in the findings of facts recorded duly by the learned Trial Judge on the basis of material on record. This being so, findings returned by the learned Trial Court are hereby affirmed.

7. It has been submitted by the learned counsel for the revisionist that the Court of VII Additional District Judge, Gwalior, has no jurisdiction to decide the application under Order IX Rule 13 CPC in view of the establishment of the Family Courts with effect from the year 2002. He contended that in view of Section 7 and 8 of the Family Courts Act, 1984, MJC No.6/06 ought to

have been transferred to the Family Court and the impugned order, therefore, being without jurisdiction, is unsustainable in law.

8. - The Family Courts Act, 1984, is made applicable in the State of Madhya Pradesh with effect from 14th September, 1984. Family Courts at Gwalior were set up, according to the learned counsel for the revisionist, in the year 2002. Civil Suit No.108A/99 HMA was instituted by the revisionist for a decree of divorce by dissolution of marriage which was decreed ex-parte on 14.01.2000 by the Court of VII Additional District Judge, Gwalior. Thus, obviously, Family Courts were not established until grant of ex-parte decree of divorce. Application under Order IX Rule 13 CPC for setting aside the aforesaid judgment and decree was submitted on 14.02.2006 in the court of VII Additional District Judge, Gwalior which passed the ex-parte judgment and decree. At this juncture, I feel it proper to reproduce Section 7 and 8 of the Family Courts Act, 1984. Section 7 speaks about jurisdiction whereas Section 8 speaks about exclusion of jurisdiction and pending proceedings which are as follow:

"7. Jurisdiction.- (1) Subject to the other provisions of this Act, a Family Court shall -

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation.- The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:-

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitu-

tion of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise -

(a) the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.

8. Exclusion of jurisdiction and pending proceedings.-

Where a Family Court has been established for any area,-

(a) no district court or any subordinate civil court referred to in sub-section (1) of section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section;

(b) no magistrate shall, in relation to such area, have or exercise any jurisdiction or power under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);

(c) every suit or proceeding of the nature referred to in the Explanation to sub-section (1) of section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974),-

(i) which is pending immediately before the establishment of such Family Court before any district court or subordinate court referred to in that sub-section or, as the case may be, before any magistrate under the said Code; and

(ii) which would have been required to be instituted or taken before or by such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established.

Shall stand transferred to such Family Court on the date on which it is established.

Perusal of Section 8 makes it clear that after the establishment of Family Court, District Court or any subordinate court ceased to have jurisdiction in respect of any suit or proceeding of the nature referred to in the explanation to Section 7(1) of the Family Courts Act. This being so, revisionist is required to establish that the proceedings under Order IX Rule 13 CPC arising from an ex-parte judgment and decree which was passed by the VII Additional District Judge, Gwalior, before establishment of Family Courts are covered by the explanation to Section 7(1) (Supra).

9. Faced with this, learned counsel for the revisionist submitted that such proceedings would be covered by clause (b) and (d) of the explanation.

At the cost of repetition, this Court may, first, deal with clauses (b) and (d) which are reproduced below:

"(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) XXX

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship"

On perusal of the aforesaid two provisions, it is clear that the suit or proceedings referred to in clause (b) must be for declaration as to the validity of a marriage or as to the matrimonial status of any person. If we examine the nature of the proceedings under Order IX Rule 13 CPC, it is clear that the non-applicant did not seek any declaration as to the validity of their marriage or as to the matrimonial status of any person. Application under Order IX Rule 13 CPC was submitted for getting the ex-parte judgment and decree set aside on account of absence of due service.

10. Dominant nature of the suit or proceedings in order to fall the same within the ambit of clause (b) must be a declaration about the validity of a marriage or about matrimonial status. For deciding an application under Order IX Rule 13 CPC, the Trial Court was not required to go into the question of validity of marriage or into the question of matrimonial status of any of the parties. It was obliged to go merely into the question of validity or effectivity of service of summons on the non-applicant.

11. As regards clause (d), purpose of the suit or proceedings must be to seek an order or injunction in the circumstances arising out of a marital relationship. For deciding application under Order IX Rule 13 CPC, the marital relationship of the non-applicant and the revisionist was immaterial. Only question before the Trial Court while passing an order under Order IX Rule 13 CPC was about the validity of the service of summons. Marital relationship between the parties had no role in the proceedings under Order IX Rule 13 CPC because the same will not have any bearing on the question of valid and effective service of summons on the non-applicant against whom ex-parte judgment and decree for divorce was passed by the learned Trial Court. If the Court, in such proceedings, finds that there was no valid and effective service of summons on the defendant, neither existence of marital relationship nor absence thereof would have made an impact on such finding. Since the ex-parte judgment and decree was passed by the VII Additional District Judge, Gwalior, before establishment of the Family Courts, application under Order IX Rule 13 CPC submitted prior to establishment of Family Courts was not required to be transferred and the same did not stand transferred to the Family Court by virtue of Section 8 of the Family Courts Act.

12. Consequently, it is held that no interference is warranted in the impugned order. Civil Revision being devoid of substance is hereby dismissed. Revisionist would bear the cost of non-applicant and lawyer's fee to the tune of Rs.3000/-, if pre-certified.

Revision dismissed.

I.L.R. [2011] M. P., 278

CIVIL REVISION

Before Mr. Justice U.C. Maheshwari

C.R. No.370/2010 (Jabalpur) decided on 1 October, 2010

NETLAL

... Applicant

Vs.

THAGI BAI (DEAD) THROUGH L.R. MAROTIRAO

...Non-applicant

A. Civil Procedure Code (5 of 1908), Section 47 - Application filed by judgment debtor with averments that possession of disputed property was handed over to decree holder in 1995 and now another person is in possession - However, it does not appear from the proceeding of the Execution Court that at any point of time such decree was executed and possession of decreetal property was made available to the decree holder - Held - Executing Court has not committed any error in dismissing the application of the applicant on such count. (Paras 2 & 10)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 47 - निर्णीत ऋणी द्वारा इन प्रकथनों के साथ आवेदन प्रस्तुत किया गया कि विवादित सम्पत्ति का कब्जा डिक्रीदार को वर्ष 1995 में सौंपा गया था तथा अब अन्य व्यक्ति के कब्जे में है - तथापि निष्पादन न्यायालय की कार्यवाही से यह प्रतीत नहीं होता कि किसी समय ऐसी डिक्री निष्पादित की गयी तथा डिक्रीत सम्पत्ति का कब्जा डिक्रीदार को उपलब्ध कराया गया - अभिनिर्धारित - निष्पादन न्यायालय ने इस आधार पर आवेदक का आवेदन पत्र खारिज कर कोई त्रुटि नहीं की।

B. Limitation Act (36 of 1963), Article 136 - After passing the decree by the trial Court if the same was remained sub-judice before the appellate Court then the limitation for filing the execution proceeding should be counted from the date of the judgment & decree passed by the appellate Court. (Para 8)

ख. परिसीमा अधिनियम (1963 का 36), अनुच्छेद 136 - विचारण न्यायालय द्वारा डिक्री पारित किये जाने के बाद यदि वह अपीलिय न्यायालय में विचाराधीन

रहती है तब निष्पादन कार्यवाही फाइल करने के लिए परिसीमा की गणना अपीलीय न्यायालय द्वारा पारित निर्णय एवं डिक्री की तारीख से की जानी चाहिए।

Cases referred :

AIR 2001 SC 279, AIR 1992 Raj 3, AIR 1974 SC 1380, AIR 1990 Bom 361.

Umesh Trivedi, for the applicant.

ORDER

U.C. MAHESHWARI J.:—This revision is directed by the applicant/ judgment debtor under Section 115 of CPC being aggrieved by the order dated 23.8.2010 passed by 3rd Civil Judge, Class-II, Balaghat in Execution Case No.280-A/87, whereby the application of the applicant filed under Section 47 of CPC has been dismissed.

2. The fact necessary to consider the question of admission of this revision in short are that the predecessor in title of the respondent/ decree holder namely Thagi Bai had filed a Civil Suit bearing No.280-A/87, against the applicant for possession and perpetual injunction with respect of the disputed land bearing survey No.138/1 & 185/2 area 2.17 Decimal. Such suit was decreed by 3rd Civil Judge, Class-II, Balaghat for possession and perpetual injunction vide judgment and decree dated 30.4.1990. On challenging such decree by the applicant in Civil Regular Appeal No.25-A/90, by affirming the judgment and decree of the trial court such appeal was dismissed by 1st Additional District Judge, Balaghat vide judgment and decree dated 17.3.1998. Subsequent to affirming such decree on 10.11.2009 the respondent herein (legal representative of Thagi Bai) has filed Execution Proceeding of aforesaid decree in the court of 3rd Civil Judge, Class-II, Balaghat. In pendency of the same on behalf of the applicant/ judgment-debtor an application under Section 47 of CPC was filed. As per averments of such IA, the possession of the disputed property was handed over to the decree-holder in the year 1995 and at present the same is in possession of Orilal and in such premises the respondent/ decree-holder is not in possession of the same. It is further stated that under execution of the impugned decree the appellant is going to execute the decree with respect of other property of the applicant while the decretal property is not in possession of the applicant. Such Execution Proceeding is also challenged on the ground of limitation, as the same is filed beyond 12 years from the date of the decree passed by the trial court i. e. on 30.4.1990 and in such premises the prayer for dismissal of the Execution Proceeding was made.

3. In reply of the respondent by denying the averments of IA, it is stated that the present application has been filed with intention to create obstruction in Execution of the decree as alleged the possession of the disputed property was never handed over to the respondent/ decree-holder or his predecessor in title. It is also denied that Execution Proceeding is filed barred by limitation.

4. The Executing Court taking into consideration the aforesaid entire circumstances held that the decree was not executed earlier in the year 1995. It is also held that Execution Proceeding is filed within limitation as the decree passed by the trial court on 30.4.1990 was sub judice before the lower appellate court and such appeal was decided on 17.3.1998. In such premises, the limitation for filing the execution proceeding has been started from the date of dismissal of the appeal, hence the aforesaid application of the applicant has been dismissed, on which the applicant has come forward to this Court.

5. The applicant's counsel after taking me through the above mentioned earlier judgment passed in the original civil suit and in regular appeal along with the impugned order and other papers placed on the record said that once the possession of the disputed property was taken over by the decree-holder in the year 1995 and the disputed property is not in the possession of the applicant then without making inquiry in that regard, the execution court could not have dismissed the application filed under Section 47 of CPC. In continuation he said that it is apparent fact on record that no opportunity to adduce the evidence has been extended to the applicant in this regard. He also argued that in the available circumstances, the limitation for filing the execution proceeding is to be counted from the date of decree of the trial Court as on filing the appeal the terms of the interim stay was not complied with by the applicant. Hence, the limitation to file the execution is not available to the respondent/ decree-holder from the date of passing the judgment and decree by the appellate court. In support of this contention he placed his reliance on the provision of Section 9 r/w Article 136 of Limitation Act r/w Order 41 Rule 5 of CPC and he also placed his reliance on a case of Apex Court in the matter of "*Ratansingh v. Vijaysingh*" AIR 2001 S.C.279 and prayed for admission and allowing this revision.

6. Having heard the counsel I have carefully gone through the impugned order along with the aforesaid earlier judgments of the Civil Original Suit and Civil Regular Appeal and also perused other papers placed on the record. In the available circumstance, I am of the considered view that Execution Court

had not committed any error in dismissing the application of the applicant filed under Section 47 of CPC.

7. It is undisputed fact on record that initially the suit of the respondent was decreed by the trial court vide dated 30.4.1990 and such decree was challenged on behalf of the applicant before the appellate Court and such appeal was decided on 17.3.1998. As per Article 136 of Limitation Act, the execution proceeding can be filed within 12 years from the date of the passing the decree. In such situation the Executing Court had to consider from which date the limitation for filing the execution should be counted either from the date of decree of the trial court or from the date of decree passed by the appellate court. It is undisputed fact on record that after filing the aforesaid civil regular appeal by the present applicant, during pendency of the same no proceeding for execution was filed on behalf of the respondent decree-holder. As per submission of the applicant's counsel the conditional stay was granted in such appeal but due to non-compliance of such condition such stay order was not remained operative. By referring the aforesaid case in the matter of *Ratansingh* (Supra), it was argued that taking into consideration the provision of Section 9 and Article 136 of Limitation Act along with Order 41 Rule 5 of CPC, in the case at hand the limitation for filing the execution proceeding ought to have been counted from the date of the decree of the trial court i. e. 30.4.1990 and on counting the limitation from such date the execution proceeding filed on 10.11.2009 was hopelessly barred by time and in such premises it could neither be entertained nor proceeded further for execution of such decree. After going through the aforesaid case law cited by the applicant, the same appears to be distinguishable on fact from the case at hand, hence the same is not helping to the applicant.

8. I am of the considered view that after passing the decree by the trial court if the same was remained sub-judice before the appellate court then on adjudication of such appeal the judgment and decree of the trial court is merged in the judgment and decree of the appellate court and appeal being continuation of the suit, the limitation for filing the execution proceeding should be counted from the date of the judgment and decree passed by the appellate court. My aforesaid view is fully fortified by the decision of Rajasthan 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-replaces 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 latter 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.

The aforesaid case was decided by such High Court taking into consideration the 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. In such circumstance the case of Ratansingh "Supra" cited on behalf of the applicant is not helping to the applicant and in such premises, there is no option with this court except to dismiss this revision at the stage of motion hearing by holding that Executing Court has not committed any error of jurisdiction or perversity in passing the impugned order holding the limitation to file the Execution Proceeding shall be counted from the date of judgment and decree of the appellate Court. .

9. Aforesaid view is also supported by a decision of the Bombay High Court in the matter of *Ramkrishna Bajirao Gotmare, Applicant v. Kanhaiyalal Tribhuvanlal Shah*, 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.

10. So far other question raised by the applicant's counsel that in the year 1995 the possession of the decreetal property was taken over by the decree holder and now the decree is not executable is concerned, it is suffice to say that it does not appear from the proceeding of the Execution Court that at any point of time such decree was executed and possession of decreetal property was made available to the decree-holder. In the lack of such circumstance the Executing Court has not committed any error in dismissing the application of the applicant on such count also.

11. In view of the aforesaid discussion, I have not found any perversity, infirmity, illegality or anything against the propriety of law in the impugned order, resultantly, this revision being devoid of any merits, deserves to be and is hereby dismissed at the stage of motion hearing. There shall be no order as to costs. However, taking into consideration that the execution proceeding is pending since long, the executing court is directed to conclude the execution proceedings on or before 31.3.2011 under intimation to this Court.

Revision dismissed.

**I.L.R. [2011] M. P., 284
CRIMINAL REVISION**

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

C.R. No.1126/2010 (Jabalpur) decided on 13 October, 2010

KISHORE SAMRITE

... Applicant

Vs.

SHIVRAJ SINGH CHAUHAN & ors.

... Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 156(3)
- Magistrate/Special Judge in exercise of jurisdiction u/s 156(3), can monitor the investigation and issue direction for proper investigation.
(Para 18)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2) धारा 156(3) - मजिस्ट्रेट/विशेष न्यायाधीश धारा 156(3) के अन्तर्गत अधिकारिता के प्रयोग में अन्वेषण को मॉनीटर कर सकता है और उचित अन्वेषण के लिए निदेश जारी कर सकता है।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 156(3)
- Investigation of offence - Locus standi - Special Judge directed S.P.E. to file a report after enquiry on an application of complainant - Another application filed by applicant who was stranger to the earlier proceedings requesting that S.P.E. to conclude the investigation within reasonable time - Held - Criminal proceedings have already been set in motion - Applicant was stranger to said proceedings - Cannot be allowed to intervene by filing an application u/s 156(3). (Para 14)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) - अपराध का अन्वेषण - सुने जाने का अधिकार - विशेष न्यायाधीश ने परिवादी के आवेदन पर विशेष पुलिस स्थापना को जाँच उपरान्त रिपोर्ट फाइल करने के लिए निदेशित किया - आवेदक, जो पूर्व की कार्यवाहियों से अपरिचित था, के द्वारा विशेष पुलिस स्थापना से यह निवेदन करते हुए भिन्न आवेदन फाइल किया गया कि युक्तियुक्त समय के भीतर अन्वेषण पूर्ण किया जाए - अभিনিर्धारित - दण्डिक कार्यवाहियों पहले ही आरंभ कर दी गयीं - आवेदक उक्त कार्यवाहियों के लिए अपरिचित था - उसे धारा 156(3) के अन्तर्गत आवेदन फाइल करके हस्तक्षेप करने के लिए अनुमत नहीं किया जा सकता।

Cases referred :

AIR 2001 SC 2637, 2003 CrLJ 3117 SC, (2008) 11 SCC 409, (1984) 2 SCC 500, AIR 2001 SC 1820, (2009) 6 SCC 576, (2004) 4 SCC 158, AIR 2000 SC 870, (2009) 5 SCC 313, AIR 2010 SC 93, AIR 2004 SC 524, (2009) 1 SCC 441.

Shobha Menon with Rahul Choubey, for the applicant.

R.D. Jain, A.G. with Naman Nagrath, Addl.A.G., for the non-applicant/ State.

Aditya Adhikar, for Lokayukta.

O R D E R

The Order of the Court was delivered by **RAKESH SAKSENA, J.** :— Aggrieved by the order dated 3.6.2010, passed by the Special Judge (Prevention of Corruption Act), Bhopal, in case of *State of Madhya Pradesh Vs. Shri Shivraj Singh Chauhan and others*, whereby application under Section 156 (3) of the Code of Criminal Procedure, filed by the petitioner, was dismissed, the petitioner has filed this revision.

2. Briefly stated facts of the case are that complainant Ramesh K. Sahu filed a complaint (Annexure A/11) against Shri Shivraj Singh Chauhan, Chief Minister of State of Madhya Pradesh, his wife and some other persons in the Court of Special Judge, Bhopal, alleging illegal and corrupt practices being adopted by them and other persons and amassing huge property by them. According to complainant, to bring facts to light, he submitted a report to the Superintendent of Police, Special Police Establishment (Lokayukta), Bhopal (for brevity 'SPE [Lokayukta]') requesting it to register a case, but SPE did not register the FIR. Therefore, he filed the aforesaid complaint before the Court of Special Judge, Bhopal. He also filed an application under Section 156(3) of the Code of Criminal Procedure requesting the Court that the facts narrated by him in the complaint and documents annexed to it established that a case of cognizable nature punishable under Sections 13(1)(d), 13(1)(e) and Section 32 of the Prevention of Corruption Act read with Section 120-B, 420, 467 and 471 of the Indian Penal Code was committed. The matter required detailed investigation including seizure of documents from various offices, recording of statement, making Panchnamas and recovery of accumulated disproportionate assets etc. This entire process could be done only by police in exercise of its power of investigation. He, therefore, requested the Court to exercise its power under Section 156(3) of the Code of Criminal Procedure and direct the Superintendent of Police, SPE (Lokayukta), Bhopal to investigate the matter.

3. Learned Special Judge, by order dated 14.11.2007, in exercise of powers under Section 156(3) of the Code of Criminal Procedure, sent the complaint and annexed documents to SPE (Lokayukta), Bhopal, and ordered

it to file a report after enquiry. In compliance of the aforesaid order, SPE (Lokayukta), Bhopal, registered the First Information Report No.41/2007 (Annexure A/12) under the aforesaid Sections.

4. Since no charge-sheet was filed, on 2.6.2010, the petitioner, a stranger to the pending criminal proceedings, filed an application under Section 156 (3) of the Code of Criminal Procedure, requesting that SPE (Lokayukta), Bhopal was not taking further steps and was not filing charge-sheet with a view to favour accused persons, therefore, State of M.P. through D.S.P., Special Police Establishment (Lokayukta), Bhopal, be directed to conclude the investigation within a reasonable time of three months and that an explanation be called from it about the progress of investigation.

5. Learned special Judge, by order dated 3.6.2010, placing reliance on the decisions of the Supreme Court in *T.T. Antony vs. State of Karnataka*-AIR 2001 SC 2637 and *Union of India vs. Prakash Chand Hinduja*-2003 Criminal Law Journal 3117 SC, dismissed the aforesaid application holding that the Court was not empowered to interfere in the investigation and to direct SPE (Lokayukta) to file charge-sheet within some prescribed period. Aggrieved by this order, petitioner has filed this revision.

6. Learned Advocate General Shri R.D. Jain, Senior Advocate, and Shri Aditya Adhikari, learned counsel for SPE (Lokayukta) raised a preliminary objection about the maintainability of this revision contending that the petitioner had no locus-standi to file any application under Section 156 (3) of the Code of Criminal Procedure before the Special Judge, as he was not a party to the proceeding; he was neither complainant nor an aggrieved person. The proceedings before the Special Court were instituted by complainant Ramesh K. Sahu, who did not make any grievance. Therefore, the application filed by the petitioner before the Special Judge was not maintainable. Learned counsel further submitted that once the application filed by complainant under Section 156(3) of the Code of Criminal Procedure was entertained by the Court and an order was passed, in response of which a first information report was registered and investigation was started, no further application under Section 156 of the Code of Criminal Procedure was maintainable. Apart from it, learned counsel contended that petitioner had also filed a Writ Petition No.4480/2010 before the High Court seeking the same relief, but when the question of his locus-standi was raised, he withdrew the said petition on 12.4.2010.

7. Smt. Shobha Menon, learned Senior Counsel for the petitioner,

contended that the objection about the locus-standi of the petitioner raised by learned counsel for the State had no merit as the concept of locus-standi was unknown in the Criminal Jurisprudence and anybody could put the criminal machinery in motion except where the statute enacting or creating an offence indicated to the contrary. She contended that since no objection about the locus-standi of the petitioner was raised before the Special Judge, now it could not be raised, especially when learned Special Judge had entertained the application filed by petitioner and rejected it on the wrong notion of law. Learned counsel argued that in view of the law laid down by the Apex Court in *Sakiri Vasu vs. State of Uttar Pradesh and others*-(2008) II SCC 409 the learned Special Judge committed error in holding that the Court was not empowered to issue any direction to SPE-Lokayukta in the investigation and to file the charge sheet within certain time limit.

8. We have heard learned counsel of both the sides at length.

9. Since the question of locus-standi of the petitioner and the maintainability of the application under Section 156(3) of the Code of Criminal Procedure, filed by him before the Special Judge, is the main ground of objection taken by the respondent/State, we will take it up first.

10. Learned Advocate General argued that since the case before the Special Court was instituted on a private complaint filed by the complainant Ramesh K. Sahu and on his application under Section 156(3) of the Code of Criminal Procedure FIR was registered against the accused persons, the petitioner being altogether a stranger had no locus-standi to file another application under Section 156(3) of the Code of Criminal Procedure in the said complaint and even otherwise second application under Section 156(3) of the Code of Criminal Procedure was not maintainable. The petitioner could not be said to be an aggrieved person. Therefore, neither application filed by him before the Special Court was maintainable nor the present revision is maintainable. In reply, learned counsel for the petitioner argued that the question of locus-standi cannot be raised in criminal law because an act or omission made punishable by any law for the time in force is not merely an offence committed in relation to the person, who suffered harm, but is also an offence against the society. The society for its orderly and peaceful development is interested in the punishment of the offender. Right to initiate proceedings cannot be whittled down, circumscribed or fettered by putting it into a straight jacket formula of locus-standi unknown to criminal jurisprudence, save and except specific

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statutory exception. Learned counsel in support of her arguments cited *R.S. Nayak v. A.R. Antulay*-(1984) 2 SCC 500, *Manohar Lal v. Vinesh Anand and others*-AIR 2001 SC 1820, *Dharmeshbhai v. Vasudevabhai and others*-(2009) 6 SCC 576 and *Zahira Habibulla H. Sheikh and another v. State of Gujrat and others*-(2004) 4 SCC 158 .

11. In *R.S. Nayak* (supra) Apex Court held that “it is a well recognized principle of criminal jurisprudence that anyone can set or put the criminal law into motion except where the statute enacting or creating an offence indicates to the contrary. The scheme of the Code of Criminal Procedure envisages two parallel and independent agencies for taking criminal offences to court. Even for the most serious offence of murder, it was not disputed that a private complaint can, not only be filed but can be entertained and proceeded with according to law. Locus standi of the complainant is a concept foreign to criminal jurisprudence save and except that where the statute creating an offence provides for the eligibility of the complainant, by necessary implication the general principle gets excluded by such statutory provision.” Apex Court in case of *Manohar Lal v. Vinesh Anand and others*-AIR 2001 SC 1820 reiterated that “to pursue an offender in the event of commission of an offence, is to sub-serve a social need. Society cannot afford to have a criminal escape his liability, since that would bring about a State of social pollution, which is neither desired nor warranted and this is irrespective of the concept of locus – the doctrine of locus-standi is totally foreign to criminal jurisprudence.” In *Dharmeshbhai v. Vasudevabhai and others*-(2009) 6 SCC 576 the Supreme Court held that “it is well settled that any person may set the criminal law in motion subject of course to the statutory interdicts. When an offence is committed, a first information report can be lodged under Section 154 of the Code of Criminal Procedure (for short “the Code”). A complaint petition may also be filed in terms of Section 200 thereof. However, in the event of some reasons or the other, the first information report is not recorded in terms of sub-section (1) of Section 156 of the Code, the Magistrate is empowered under sub-section (3) of Section 156 thereof to order an investigation into the allegations contained in the complaint petition. Thus, power to direct investigation may arise in two different situation- (1) when a first information report is refused to be lodged; or (2) when the statutory power of investigation for some reason or the other is not conducted.”

12. Placing reliance on *Zahira Habibulla H. Sheikh and another v. State of Gujrat and others*-(2004) 4 SCC 158 learned counsel for the petitioner

contended that when an ordinary citizen makes a grievance against the mighty administration, any indifference, inaction or lethargy shown in protecting his right guaranteed in law will tend to paralyse by such inaction or lethargic action of courts and erode in stages the faith inbuilt in the judicial system ultimately destroying the very justice-delivery system of the country itself.

13. In *State of Madhya Pradesh and others v. Shri Ram Singh*-AIR 2000 SC 870 Apex Court observed that procedural delays and technicalities of law should not be permitted to defeat the object sought to be achieved by the Act. The overall public interest and the social object is required to be kept in mind while interpreting various provisions of the Act and decided cases under it.

14. There is no dispute about the ratio of the aforementioned decisions of the Apex Court that any person may set the criminal law in motion, but in our opinion, the fact situation in the case in hands is different. Criminal Proceeding in the case has already been instituted by the complainant Ramesh K. Sahu, and the petitioner who is a stranger to said proceedings has sought intervention by filing an application under Section 156(3) of the Code of Criminal Procedure, which in our opinion cannot be permitted. He cannot be held to be an aggrieved person. There is vast difference between the terms “setting the criminal law in motion” and “intervention” in the pending proceedings. In these circumstances, decisions cited by the learned counsel which pertain to locus-standi of a person to set the criminal law in motion render no help to petitioner. Apex Court in number of cases held that every judgment must be read as applicable to particular facts proved, or assumed to be proved, since generality of expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. (See *Bank of India v. Mohandas* (2009) 5 SCC 313 and *State of Bihar v. Suresh Prasad Sinha*-AIR 2010 S.C. 93.

15. In *K. Anbazhagan v. Superintendent of Police and others*-AIR 2004 SC 524 Supreme Court while dealing with the petition filed under Section 406 of the Code of Criminal Procedure for transfer of case from one High Court to another High Court explained the meaning of word “party interested” with reference to the provisions of sub-section (2) of Section 406 of the Code of Criminal Procedure, when an objection about locus-standi of the petitioner was raised. According to counsel for respondent in that case, it was the “party

interested” and not the ‘person interested’ and, therefore, only a “Attorney General” or a “party interested” had locus-standi to file application and the petitioner not being a party to the proceeding was not a “party interested” and had no locus-standi to file the transfer petition. The Apex Court held that the word “party interested” was not defined under Cr.P.C.. The word “party interested” is of wide import and, therefore, it has to be given a wider meaning. If it was the intendment of the Legislature to give restricted meaning then they would have used the word to the effect, “party to the proceedings”. The Legislature, keeping in view the larger public interest involved in a criminal justice system, purposely used the word of wider import in Section 406. It was held that the petitioner being a political opponent, was vitally interested in administration of justice in the State and was, therefore, a “party interested” within the meaning of sub-section (2) of Section 406 of Cr.P.C.. It was also observed that Mr.Subramaniam Swami, who was the original complainant, also supported the the transfer petitions. In our opinion, the factual position in the case in hand is different. The Apex Court interpreted the scope of word “party interested” in reference to the provisions of Section 406 (2) OF Cr.P.C.. In the present case, the aggrieved person Ramesh K.Sahu, who filed the private complaint, did not raise any objection about the investigation. In our view if a stranger is allowed to intervene and file application in the criminal proceedings in which he is not a party, it may create complications and affect the interests of aggrieved person as well as accused. It will, in fact, render a criminal case to become a private combat between any number of persons. In *Rajiv Ranjan Singh 'Lalan' v. Union of India*, Apex Court while considering the scope of interference at the instance of strangers, observed that “25..... It is already noticed that the petitioners had no direct connection with the case. They were absolutely strangers as regards the criminal cases against respondents 4 and 5 which were pending before the special judge. This unnecessary interference in the criminal case may cause, sometimes, damage to the prosecution case and at times may cause serious prejudice to the accused also. In any view of the matter, this sort of interference in the criminal prosecution would only deny a fair trial to accused.”

16. It is undisputedly true that anyone can set the criminal law into motion except where there is statutory bar. In the case in hand also the case before the Special Court was instituted on a private complaint by complainant Ramesh K.Sahu, and an order under Section 156(3) of the Code of Criminal Procedure was passed. In compliance of the said order, first information was registered,

but the petitioner before us, was neither the complainant nor an aggrieved party in the criminal case pending before the Special Court. The Criminal Law Machinery has already been set in motion by the complainant. Permitting anybody, who is stranger to a criminal case to intervene and interfere in the proceedings, may adversely affect to the parties to the criminal proceedings. There was no bar for the petitioner to have filed a complaint or lodged a report with the police against the accused persons, if he felt that an offence was committed by the accused persons and he was aggrieved, but when already a complaint was filed and the police had already registered a FIR, it would be against the procedure provided under law to permit him to intervene like a public interest litigation in the investigation into the allegations. Apart from it once an application under Section 156 (3) of the Code of Criminal Procedure was filed before the Court by the complainant and on the order of Magistrate the first information report was registered, no further application under Section 156(3) of the Code of Criminal Procedure would be maintainable because the effect of an order being passed under Section 156(3) of the Code of Criminal Procedure would only be the registration of first information report and investigation into the allegations.

17. We are unable to accept the argument advanced by the learned counsel for the petitioner that since the question of locus-standi of the petitioner and maintainability of the application under Section 156 of the Code of Criminal Procedure was not raised before the court below, it could not be raised in this revision filed by the petitioner because, in our opinion, the court below acted beyond jurisdiction in entertaining the application filed by the petitioner. In case of *Dharmeshbhai* (supra) the Apex Court held that when an order passed by the Magistrate, which was wholly without jurisdiction, was brought to the notice of the High Court, it could have interfered therewith even suo-motu.

18. The next question before us is whether Magistrate/Special Judge, in the exercise of jurisdiction under Section 156(3) of the Code of Criminal Procedure, could monitor the investigation and/or issue direction for proper investigation. In case of *Sakiri Vasu* (supra) Hon'ble Supreme Court observed:

"11. In this connection we would like to state that if a person has a grievance that the police station is not registering his FIR under Section 154 CrPC, then he can approach the Superintendent of Police under Section 154(3) Cr.P.C. by an application in writing. Even if that does not yield any

satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application under Section 156(3) CrPC before the learned Magistrate concerned. If such an application under Section 156(3) is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation.”

“15. Section 156 (3) provides for a check by the Magistrate on the police performing its duties under Chapter XII CrPC. In cases where the Magistrate finds that the police has not done its duty of investigating the case at all, or has not done it satisfactorily, he can issue a direction to the police to do the investigation properly, and can monitor the same.”

“16. The power in the Magistrate to order further investigation under Section 156(3) is an independent power and does not affect the power of the investigating officer to further investigate the case even after submission of his report vide Section 173(8). Hence, the Magistrate can order reopening of the investigation even after the police submits the final report, vide *State of Bihar v. J.A.C. Saldanha* (SCC:AIR para 19).”

“17. in our opinion Section 156(3) CrPC is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation, and it includes the power to order registration of an FIR and of ordering a proper investigation if the Magistrate is satisfied that a proper investigation has not been done, or is not being done by the police. Section 156 (3) CrPC, though briefly worded, in our opinion, is very wide and it will include all such incidental powers as are necessary for ensuring a proper investigation.”

“29. In *Union of India v. Prakash P. Hinduja* (SCC vide para 13) it has been observed by this Court that a Magistrate cannot interfere with the investigation by the police. However, in our opinion, the ratio of this decision would only

apply when a proper investigation is being done by the police. If the Magistrate on an application under Section 156(3) CrPC is satisfied that proper investigation has not been done, or is not being done by the officer in charge of the police station concerned, he can certainly direct the officer in charge of the police station to make a proper investigation and can further monitor the same (though he should not himself investigate himself).”

19. In view of the fact that Supreme Court in the above case clarified that the ratio of the decision rendered in *Prakash P. Hinduja* (supra) would apply only when Magistrate is satisfied that on application under Section 156 (3) of the Code of Criminal Procedure proper investigation has been done, or is being done, and if proper investigation is not done he can direct the officer incharge of the police station to make proper investigation and can further monitor the same, we find that the learned special judge was not justified in holding that he was not empowered to give direction to DSP-SPE for proper investigation. We are unable to accept the submission made by learned Advocate General that since in decision rendered in *Nirmal Singh Khalon v. State of Punjab*-(2009) 1 SCC 441 my lords of the Supreme Court observed that the correctness of observation made in *Sakiri Vasu* (supra) was open to question, Magistrate had no jurisdiction to supervise or ensure fair investigation. In our opinion, ratio of *Sakiri Vasu* (supra) is binding on all subordinate courts and High Courts. Therefore, we hold that Special Judge or a Magistrate on being satisfied that there has been no proper investigation by the concerned police is empowered to issue necessary directions to it to make proper investigation. However, this can be done, in our opinion, only when application under Section 156(3) of the Code of Criminal Procedure has been moved by the complainant or an aggrieved person.

20. For the reasons stated above, we accept the preliminary objection raised by the respondents/State and hold that the petitioner had no locus-standi to move application under Section 156 (3) of the Code of Criminal Procedure before the Special Court and that the said application was not maintainable in the case as the Special Court had already passed order on earlier application under Section 156 (3) of the Code of Criminal Procedure filed by the complainant Ramesh K. Sahu. However, in view of the ratio of *Sakiri Vasu* (supra) we set aside the impugned order passed by the learned Special Judge on 3.6.2010.

21. Since we have found that the petitioner has no locus-standi, we need not to answer other questions raised by the petitioner or the State in this revision.

22. Revision disposed off.

Revision disposed of.

I.L.R. [2011] M. P., 294
MISCELLANEOUS CRIMINAL CASE
Before Mrs. Justice Indrani Datta

M.Cr.C. No.6429/2010 (Gwalior) decided on 29 September, 2010

BHARAT SINGH & ors.

... Applicants

Vs.

STATE OF M.P.

... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 468 & 470

- In computing the period of limitation, time during which accused is prosecuted in good faith in a Court which from defect the jurisdiction is unable to entertain it is to be excluded. (Para 6)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 468 व 470 – परिसीमा-काल की संगणना करने में उस समय का अपवर्जन करना होगा, जिसके दौरान अभियुक्त का उस न्यायालय में सद्भावपूर्वक अभियोजन किया जाता है जो अधिकारिता की त्रुटि से उसे ग्रहण करने में असमर्थ है।

Case referred :

AIR 2004 SC 4286.

J.P. Kushwah, for the applicant.

T.C.Bansal, P.P., for the non-applicant/State.

ORDER

INDRANI DATTA, J. :-With the consent of parties, matter is finally heard.

Petitioners have filed this petition under Section 482 of Cr.P.C for quashing FIR concerning Crime No.196/2010 registered at P.S. Karera District Shivpuri against the petitioners under Section 498-A IPC and 3/4 of Dowry Prohibition Act so also for quashing proceedings of Criminal Case No.528/2010 pending in the Court of JMFC Karera District Shivpuri.

2. Facts in a nutshell are that written complaint was made by one Shashi Devi wife of petitioner No.2 Ajay to Police Station Digoda District Tikamgarh. As per that complaint, the complainant was married with petitioner No.2 in

the year 2004 and after marriage petitioners started harassing and torturing her with respect to demand of dowry. On the day of Raksha-Bandhan complainant was kicked out from matrimonial house with a demand of Motorcycle. On that report Police Station Digoda has registered FIR No.90/06 under Section 498-A/34 IPC and Section 3/4 of Dowry Prohibition Act. The matter was investigated and challan was submitted before the JMFC Tikamgarh as per Annexure-A/3. In that case prosecution produced evidence and statements were recorded before the JMFC Tikamgarh and date was fixed for final hearing on 10.05.2010. On that date the petitioners raised objection with respect to territorial jurisdiction of the Court. That application was allowed as per Annexure-A/4 and the learned Court of JMFC Tikamgarh directed Police Station Digodha to file charge-sheet in competent Court. Thereafter challan has been referred to Police Station Karera and Police Station Karera on 2.6.2010 registered an FIR. Thereafter charge-sheet was filed in the Court of JMFC Karera. Copy of the FIR and Final Report are AnnexureA/5 and A/6. The learned JMFC Karera without considering the matter rejected the objection filed by the petitioners as per Annexure-P/7 that the charge-sheet is barred by limitation under Section 468 CrPC, giving rise to this petition.

3. It is contended by learned counsel for the petitioners that as per the provisions of Section 468 CrPC incident is dated 01.06.2006 and charge-sheet is submitted on 30.06.2010. Hence the charge-sheet is barred by limitation as contemplated under Section 468 CrPC. It is further submitted that Police Station Karera did not investigate the matter and charge-sheet was filed, which is contrary to provisions. Hence all the proceedings concerning Crime No.196/2010 deserve to be quashed.

4. Learned Public Prosecutor has opposed the petition and prayed for its rejection.

5. It is alleged that the petitioners made demand of dowry at Karera District Shivpuri and allegations with respect to cruelty and torture were also committed at matrimonial home at Karera, therefore, case falls within the territorial jurisdiction of Karera District Shivpuri where alleged offence was committed. Hence, the learned JMFC Tikamgarh by order dated 10.05.2010 has rightly directed to file charge-sheet within territorial jurisdiction of the Court where alleged act of cruelty happened. The Hon'ble Apex Court in *Y.Abrahim Ajiith and Others Vs. Inspector of Police Chennai and Others* reproted in AIR

2004 (SC) 4286 has held that ordinary venue for trial of a crime is the area of jurisdiction in which, on evidence, facts occur and which alleged to constitute the crime. Continuing offence as distinguishable to one which is committed once for all.

6. As the charge-sheet has been filed before the concerned Court of Tikamgarh within limitation and then by order dated 10.05.2010 of that Court as the alleged offence is committed at Karera charge-sheet was filed on 21.07.2010 before JMFC Karera. In computing the period of limitation, time during which petitioners have been prosecuted in Court of Tikamgarh is to be excluded under Section 470 CrPC during which charge-sheet was filed before the JMFC Tikamgarh.

7. Considering the facts of the case, I find no reason to quash the FIR as well as criminal proceedings in Criminal Case No.528/2010 pending before the JMFC Karera, District Shivpuri. Accordingly, this petition is dismissed.

Petition dismissed.

I.L.R. [2011] M. P., 296
MISCELLANEOUS CRIMINAL CASE
Before Mrs. Justice Indrani Datta

M.Cr.C.No.5944/2010 (Gwalior) decided on 30 September, 2010

MALKIT SINGH

... Applicant

Vs.

STATE OF M.P. & anr.

... Non-applicants

Penal Code (45 of 1860), Sections 420, 467, 468, 471 & 472 - Cheating - False Caste Certificate - Only allegation against the applicant is with respect to obtaining false certificate concerning his caste - As per the law laid down by Apex Court, such matter is to be inquired into by Caste Scrutiny Committee / State Level Committee constituting in each State - Proceedings concerning Crime No.261/2010 registered against the applicant deserve to be quashed. (Para 10)

दण्ड संहिता (1860 का 45), धाराएँ 420, 467, 468, 471 व 472 - छल - मिथ्या जाति प्रमाण पत्र - आवेदक के विरुद्ध अपनी जाति के संबंध में मिथ्या प्रमाण पत्र अभिप्राप्त करने के सम्बन्ध में सिर्फ अभिकथन - शीर्ष न्यायालय द्वारा प्रतिपादित विधि के अनुसार, ऐसे मामले की जाँच जाति संवीक्षा समिति/प्रत्येक राज्य में गठित राज्य स्तरीय समिति द्वारा की जानी चाहिए - आवेदक के विरुद्ध दर्ज अपराध क्र. 261/2010 से संबंधित कार्यवाहियाँ अपास्त किये जाने योग्य हैं।

Case referred :

2002(3) MPLJ 417.

H.D. Gupta with Amit Lahoti, Rajeev Upadhyay & Santosh Agrawal,
for the applicant.

T.C. Bansal, P.P., for the non-applicant No.1./State.

Shailendra Dwivedi, for the non-applicant No.2.

ORDER

INDRANI DATTA, J. :-With the consent of parties, matter is finally heard.

Invoking the inherent powers of this Court enshrined under Section 482 of Cr.P.C. the petitioner has filed this petition for quashing FIR in connection with Crime No.621/2010 registered at Police Station Kotwali, District Ashoknagar for offence punishable under Section 420, 467, 468, 471 IPC.

2. Facts in compendium are that respondent No.2 Babulal filed a complaint against the petitioner in the Court of CJM Ashoknagar under Sections 420, 467, 468, 471, 472 IPC as per Annexure-P/5. As per averments of complaint, the petitioner filled nomination form for contesting the election for the post of Chairman, Jila Panchayat Ashoknagar and that post was reserved for a member of Scheduled Caste Category and the petitioner filled the form showing himself as member of Scheduled Caste while in a Sessions Case No. 165/2002 which was pending against him under Sections 452, 323, 506-B, 341, 34 IPC and Section 3 (1) (x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 at the time when petitioner/accused was examined under Section 313 of Cr. P. C. he had expressed himself to be a member of general category. He has suppressed the fact that Session Case No. 165/2002 was pending at the time when he filled the nomination form. As such he has filed false affidavit and on the basis of forged certificate, he has committed cheating. In some other documents mentioned in the complaint, petitioner has shown himself of Sansi caste and Sansi caste does not come in Scheduled Caste category. On these grounds complaint was filed before the learned CJM. The learned CJM directed the concerning Police-Station Kotwali District Ashoknagar for investigation and FIR was lodged concerning Crime No-621/2010 under the above-mentioned Sections. Hence, this petition for quashing the FIR concerning Crime No-621/2010 registered at P.S. Kotwali District Ashoknagar.

3. It is contended by the learned counsel for the petitioner that such criminal

proceedings cannot be initiated against the petitioner on the legal ground. The petitioner belongs to Sansi caste which is one of the recognized Scheduled Castes so he applied before the SDO for granting of caste certificate on his application, Tehsildar caused an inquiry and after due inquiry issued a temporary caste certificate in favour of the petitioner as per Annexure-P/2. Thereafter, SDO Ashoknagar issued permanent caste certificate as per Annexure-P/3. In the election of Jila Panchayat the petitioner being Scheduled Caste candidate contested the election and has been elected as Chairman of Jila Panchayat of Ashoknagar as per Annexure-P/4. Complainant has falsely implicated the petitioner by filing complainant Annexure-P/5. It is further submitted that there is no allegation against the petitioner with respect of making forgery in preparation of caste certificate in question. He has not obtained the caste certificate by showing his incorrect caste. Caste Certificate is issued by the competent authority after due enquiry. It is further submitted that petitioner has not suppressed any fact while filling the nomination form of election as criminal case was not pending on that date and he was already acquitted, therefore, in that column he has mentioned that no criminal case is pending and that was a right information.

4. Learned Counsel drew this Court's attention to Annexure-P/7 which is notification issued by the State Government constituting a High Level Committee / Scrutiny Committee for holding an enquiry in accordance with law concerning issuance of false caste certificate.

5. It is further submitted by learned counsel for the petitioner in view of the law laid down by the Apex Court in the case of *Ku. Madhuri Patil and another v. Addl. Commissioner, Tribal Development and others*, AIR 1995 SC 94, in which the Apex Court has mandated that all the State Government shall constitute a caste scrutiny committee headed by Additional or Joint Secretary or any officer higher in rank of the Director of the concerned department to inquire into such matters. On receiving any complaint with regard to such certificate, the matter is to be inquired into by a caste scrutiny committee/ State level Committee constituted in each State and after its final decision, if it is found that the certificate obtained or social status claimed is found to be false, the parents/ guardian/ candidates shall be prosecuted for making false claim. Without report of the committee, the police has no jurisdiction to take cognizance on such complaints.

6. Further reliance is placed in the case *Vikas Jagdish Shipuriya and*

another vs. State of M.P., 2002(3) MPLJ 417 in which a bench of this Court has held that concerning issuance of false caste certificate relating to ST, SC or OBC police has no jurisdiction to investigate the matter. Only caste scrutiny committee can enquire and if social status claim is found to be false concerned person shall be prosecuted for making false claim. Investigation by the police and thereafter filing charge-sheet and framing of charge-sheet was found to be illegal and without jurisdiction.

7. Placing reliance on these citations it is urged by learned counsel for the Petitioner that investigation in the matter of caste certificate is to be made by only High Level Committee and the proceedings initiated against the petitioner concerning Crime No.621/2010 deserve to be quashed.

8. Per contra, learned counsel for the respondents opposed the petition and submitted that FIR is rightly registered against the petitioner and no ground for quashing FIR is made out.

9. Heard the rival contention of the parties and perused the documents on record.

10. It is apparent that complaint is based on the fact that the petitioner not being a member of Scheduled Caste by falsely representing to be a member of Scheduled Caste has filled nomination form for election on the post of Chairman, Jila Panchayat, Ashoknagar. Hence the only allegation against the petitioner is with respect to obtaining forged certificate concerning his caste. As per the law laid down by Apex court in *Kumari Madhuri Patil* (supra), such matter with respect to obtaining false certificate is to be inquired into by Caste Scrutiny Committee / State Level Committee constituting in each State. Hence the proceedings concerning Crime No.261/2010 registered against the petitioner deserve to be quashed. The State/complainant may refer the matter to State Level Committee for holding an inquiry in accordance with law and guidelines set-up by Supreme Court in *Kumari Madhuri Patil* (supra). It is further directed that in case of such reference, Committee shall inquire into the matter and final verdict be delivered as early as possible keeping in view the guidelines/directions in the afore-quoted judgment/ order.

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

Petition disposed of.

I.L.R. [2011] M. P., 300

MISCELLANEOUS CRIMINAL CASE*Before Mr. Justice Rakesh Saxena*

M.Cr.C. No.5326/2009 (Jabalpur) decided on 1 October, 2010

ASHOK NANDA & anr.

... Applicants

Vs.

STATE OF M.P. & anr.

... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Inherent powers of Court - Applicants were charge sheeted for the offence u/ss. 387, 507, 115 & 120-B of IPC and Ss. 25 & 27 of Arms Act on the grounds that (1) Applicants could have a motive against complainant because he had published article in his magazine highlighting the corruption done by applicant, (2) A memorandum u/s 27 of Evidence Act given by co-accused without any other incriminating piece of evidence, and (3) Confessional statement said to have been made to police - Held - There is absolutely no legal evidence against the applicants and the continuation of the criminal proceeding against the applicants would be the abuse of process of Court - Petition allowed. (Paras 11 to 14)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 - न्यायालय की अन्तर्निहित शक्तियाँ - आवेदकों पर भा.द.सं. की धारा 387, 507, 115 एवं 120-बी तथा आयुध अधिनियम की धारा 25 एवं 27 के अन्तर्गत अपराध के लिए आरोप इन आधारों पर लगाये गये कि (1) आवेदकों का परिवादी के विरुद्ध हेतु हो सकता है क्योंकि उसने अपनी पत्रिका में आवेदक के द्वारा किये गये भ्रष्टाचार पर बल देते हुए लेख प्रकाशित किया था, (2) सह-अभियुक्त द्वारा साक्ष्य अधिनियम की धारा 27 के अन्तर्गत ज्ञापन अपराध में फँसाने वाले साक्ष्य के किसी अन्य अंश के बिना दिया गया, और (3) संस्वीकृति कथन पुलिस से करना बताया गया - अभिनिर्धारित - आवेदकों के विरुद्ध आत्यंतिक रूप से कोई वैध साक्ष्य नहीं है तथा आवेदकों के विरुद्ध दण्डिक कार्यवाही जारी रखना न्यायालय की प्रक्रिया का दुरुपयोग होगा - याचिका मंजूर।

Cases referred :

(2005) 1 SCC 122, 1992 Supp (1) SCC 335, 1994 Supp (2) SCC 707, (2005) 3 SCC 169, AIR 2005 SC 716, AIR 1960 SC 866.

Surendra Singh with Manish Mishra, for the applicants.

J.K. Jain, Dy.A.G., for the non-applicant No.1.

Mrigendra Singh with Hitendra Singh, for the non-applicant No.2.

ORDER

RAKESH SAKSENA; J. :- Petitioners have filed this petition under Section 482 of the Code of Criminal Procedure for quashing the charge sheet and the criminal proceedings against them in respect of Crime No. 462/2008, registered by Police Station, M.P.Nagar, Bhopal under Sections 387, 507, 115 and 120-B of the Indian Penal Code and Sections 25 & 27 of the Arms Act against them and three other accused persons. In respect of above charge sheet, R.T.No. 5817/2009 (State of M.P. Vs. Pradeep Shrivastava) is pending in the Court of Chief Judicial Magistrate, Bhopal.

2. In short, the prosecution case is that complainant Rajendra Agal, a Journalist by profession, who had published an article in his fortnightly magazine 'Aks' and had made number of complaints against the petitioners to Lokayukta and other high Officers, lodged a report with the police that on 7th August, 2008, some unknown person purporting himself to be Vikram Singh made a telephone call to him saying that since he had highlighted the scam of Rs. 15 crore, those persons had given him contract to eliminate him. But, since he knew that he was very good man and belonged to a very good family, he did not want to kill him, however he was bound to do it, because he had received 5 lakhs from that person. He wanted to meet the complainant and suggested him that he should take precaution. He further suggested that if he met and talked him, he will solve his problem and instead eliminate the person, who gave contract for his killing. It is said that complainant recorded the said conversation and at that time switched on the speaker of phone whereby other persons namely Mohar Singh, Brijesh Sahu, Bhuvneshwar Dayal Sharma & Constable Laxman Yadav, P.S.O. could also hear the same. According to complainant, it was a real threat because he had published big scams in which petitioner Dr. Yogiraj Sharma, the then Director of Health and Family Welfare and Ashok Nanda, a close friend of Yogiraj Sharma were involved. According to him, he suspected the hands of these persons behind this deal.

3. Receiving this information police registered the First Information Report as Crime No. 462/2008. During investigation statements of complainant Rajendra Agal, Mohar Singh, Bhuvneshwar Dayal Sharma and Constable Laxman Yadav, who was appointed complainant's Personal Security Officer were recorded. Script of the tape recorded conversation was seized by the police. Statements of the aforesaid witnesses and the script repeated the same narration which was mentioned in the written report submitted by the complainant and in the F.I.R. recorded by the police. Call details of Mobile

No. 9009119303 from which call was made were obtained from the concerned Company and was found that the said mobile stood in the name of accused Mohar Singh. Mohar Singh was arrested and the said mobile was recovered from him. Record of Aman Palace Hotel, M.P. Nagar, Bhopal was seized which disclosed that Mohar Singh had stayed in the hotel from 24.7.2008 to 2.8.2008. Accused Pradeep Shrivastava was also arrested and from his possession a country made 315 bore Katta and two cartridges were seized. In a memorandum under Section 27 of the Evidence Act recorded on an information by Pradeep Shrivastava, it was disclosed by him that accused Veerkant Nigam had offered him Rs. 5 lakhs for killing complainant Rajendra Agal and Veerkant Nigam had obtained Rs. 2 lakhs from petitioner Ashok Nanda (Contractor) and had given Rs. 40,000/- to him. Since he could not commit murder of Rajendra Agal, Veerkant Nigam demanded his money back, therefore, he gave a cheque of Rs. 30,000/- to him from his account. He also disclosed that the mobile with which he talked to Rajendra Agal was with Mohar Singh. Another memorandum under Section 27 of the Evidence Act was recorded by accused Veerkant Nigam in which it was disclosed that contractor Ashok Nanda had given a contract of Rs. 5 lakhs for eliminating the complainant. He had received Rs. 2 lakhs and out of that he paid Rs. 40,000/- to Pradeep Shrivastava, but since he could not kill the complainant, he demanded his money back and Pradeep Shrivastava gave him a cheque of Rs. 30,000/-. The said cheque was seized from the possession of accused Veerkant Nigam.

4. Police also seized a report lodged by complainant on 22.8.2007 against petitioner Dr. Yogiraj Sharma accusing him that on that day in the premises of J.P. Hospital he abused and intimidated him, however, no offence was registered on the said report. Copies of number of complaints made by complainant to Lokayukta against Dr. Sharma disclosing his corrupt practices were also seized. All these documents were filed with the charge sheet.

5. In addition to above evidence, police also recorded statements of Udaybhan Singh and Radheshyam Agrawal, who disclosed that two boys were inquiring whereabouts of complainant.

6. Learned senior counsel for the petitioners submitted that there is absolutely no legal evidence against the petitioners. At the most, the complaints made by Rajendra Agal to Lokayukta and the article published by him against the petitioners could indicate a motive on the part of petitioners, but merely motive could not be a sufficient ground for their prosecution. In the conversation

between said Vikram Singh and the complainant there was nothing to indicate that petitioners were involved in the case. The involvement of the petitioners was indicated by prosecution only on the basis of confessional statements of accused Pradeep Shrivastava and Veerkant Nigam, but that cannot form part of the legal and admissible evidence in view of the provisions of Section 25 of the Indian Evidence Act and Section 162 of the Code of Criminal Procedure. Recovery of Katta from Pradeep Shrivastava and a cheque of Rs. 30,000/- from Veerkant Nigam which was issued by Pradeep did not make out any evidence against the petitioners. He submitted that since there was absolutely no iota of evidence against the petitioners, criminal proceeding and the charge sheet filed against them being abuse of the process of the Court deserves to be quashed. In support of his contention he placed reliance on the case of *Zandu Pharmaceutical Works Ltd. and others Vs. Mohd. Sharaful Haque and another*-(2005) 1 SCC 122, *State of Haryana Vs. Bhajan Lal*-1992 Supp (1) SCC 335, *State of U.P. Vs. Dr. Sanjay Singh*-1994 Supp (2) SCC 707 and *State of M.P. Vs. Paltan Mallah and others* -2005 (3) SCC 169.

7. Per contra, Shri J.K.Jain, learned Dy. Advocate General, for the State and Shri Mrigendra Singh, learned counsel for the respondent no.2, submitted that the involvement of the petitioners was clear from the information furnished by accused Pradeep Shrivastava and Veerkant Nigam in memorandum recorded under Section 27 of the Evidence Act and that the evidence of strong motive on the part of petitioners furnished enough material against them for filing the charge sheet. At the stage of taking cognizance or even framing the charge, the evidence adduced by the prosecution cannot be appreciated, therefore, this petition filed by the petitioners deserved to be dismissed. He placed reliance on the case of *Jayendra Saraswathi Swamigal Vs. State of T.N.*-AIR 2005 SC 716.

8. We have heard the learned counsel of the parties at length, and have perused the material and evidence filed with the charge sheet.

9. In the case of *Zandu Pharmaceutical Works Ltd.* (supra), the Apex Court in great detail considered the scope of powers under Section 482 of the Code of Criminal Procedure for quashing the criminal proceeding relying on the earlier decision rendered by the Apex Court in the Case of *R.P.Kapur Vs. State of Punjab* -AIR 1960 SC 866 and *State of Haryana Vs. Bhajan Lal* (supra), it was held:

"9. In *R.P.Kapur v. State of Punjab* this Court summarized some categories of cases where inherent power can and should be exercised to quash the proceedings:

- (i) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;
- (ii) where the allegations in the first information report or complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;
- (iii) where the allegations constitute an offence, but there is not legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

10. In dealing with the last case, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations. When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry where the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. Judicial process should not be an instrument of oppression, or needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death.

11. The scope of exercise of power under Section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by this Court in *State of Haryana v. Bhajan Lal*. A note of caution was, however, added that the power should be exercised sparingly and that too in rarest of rare cases. The illustrative categories indicated by this Court are as follows:

"102. (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face

value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with malafides and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

10. From the above proposition, it is apparent that the powers possessed by the High Court under Section 482 of the Code of Criminal Procedure are very wide, but it requires great caution in its exercise. The inherent powers should not be exercised to stifle a legitimate prosecution particularly where the entire facts are incomplete and hazy and the evidence has not been collected and produced before the Court.

11. In the case in hand, the investigation of the case has been completed

and the charge sheet has been filed in the Court. In the light of above enunciation of law, when the factual or legal aspects of the case are examined it is evident that petitioners could have a motive against complainant because he had published article in his magazine highlighting the corruption done by petitioner Dr. Yogiraj Sharma, but motive by itself does not furnish sufficient material to constitute a prima facie case for prosecution. In the case of *State of U.P. Vs. Dr. Sanjay Singh* (supra), the Supreme Court held that "mere suspicion of motive cannot serve as a sufficient ground for framing the charges in the absence of any material, prima facie showing that the particular motive has passed into action and that the accused is connected with that action in question." Similarly *State of M.P. Vs. Paltan Mallah* (supra), it was held that "motive by itself is not sufficient to prove the guilt of the accused." Thus, it is apparent that merely on the suspicion of motive, petitioners cannot be prosecuted.

12. As far as the evidence of memoranda given by the co-accused persons under Section 27 of the Evidence Act is concerned, their confessional statements to police cannot be accepted as legal evidence against petitioners in the absence of any other incriminating piece of evidence. Except the above circumstances, absolutely no other evidence has been collected and produced by the prosecution prima facie to indicate that petitioners hatched conspiracy with other accused persons to commit murder of complainant Rajendra Agal.

13. The facts of the case of *Jayendra Saraswathi* (supra) are altogether different. In that case there was the evidence of confession of co-accused disclosing the conspiracy between them. The said confession was recorded by the Magistrate under Section 164 of the Code of Criminal Procedure, but in the present case the confessional statement is said to have been made to police which is hit by Section 25 of the Indian Evidence Act.

14. Apparently, the case of petitioners is such which is covered by the illustrative Category No.3 as indicated in the case of *Bhajan Lal* (supra). It has been held by the Apex Court repeatedly that the judicial process should not be an instrument of oppression, or needless harassment. Since without embarking upon an enquiry whether the evidence in question is reliable or not and whether the accusation would or would not end in conviction, prima facie it appears that there is absolutely no legal evidence against the petitioners and the continuation of the criminal proceeding against the petitioners would be the abuse of process of Court, this petition deserves to be allowed and the above prosecution as well as the charge sheet filed against the petitioners deserve to be quashed.

15. Accordingly, this petition is allowed. Charge sheet as far as it relates to petitioners in R.T.No. 5187 of 2009 pending in Court of Chief Judicial Magistrate, Bhopal and the criminal proceeding against them arising out of the Crime No. 462/2008 of police M.P.Nagar, Bhopal are quashed. It is however made clear that nothing contained in this order shall affect the case of prosecution against other accused persons.

Petition allowed.

I.L.R. [2011] M. P., 307
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice R.C. Mishra

M.Cr.C. No.7244/2010 (Jabalpur) decided on 25 October, 2010

IN REFERENCE

Vs.

VIJAY KESHARWANI

.... Noticee

A. *Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 36A(4) & 54* - Three inmates accused of private vehicle who were known to each other, found with contraband - The quantity of the contraband was also in same form - Presumption of conscious possession u/s 54 of the Act was available against each one of the accused. (Para 8)

क. *स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराएँ 36ए(4) व 54* - निजी वाहन के तीन सहयात्री अभियुक्त, जो एक दूसरे को जानते थे, प्रतिषिद्ध पदार्थ के साथ पाये गये - प्रतिषिद्ध पदार्थ की मात्रा भी एक ही रूप में थी - प्रत्येक अभियुक्त के विरुद्ध अधिनियम की धारा 54 के अन्तर्गत सचेतन कब्जे की उपधारणा उपलब्ध होगी।

B. *Criminal Procedure Code, 1973 (2 of 1974), Section 439(2) - Cancellation of Bail* - Concept of setting aside the unjustified, illegal or perverse order is totally different from the concept of cancelling the bail on the ground that the noticee has misconducted himself or because of some new facts requiring such cancellation. (Para 9)

ख. *दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439(2)* - जमानत का रद्दकरण - अन्यायपूर्ण, अवैध या विपर्यस्त आदेश को अपास्त करने की अवधारणा, जमानत को इस आधार पर कि नोटिसी ने स्वयं अवचार किया है अथवा ऐसे रद्दकरण की अपेक्षा करने वाले कुछ नये तथ्यों के कारण, रद्द करने की अवधारणा से पूर्णतः अलग है।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 439(2) - Cancellation of Bail - Where ignoring material and evidence on record a perverse order granting bail is passed in a serious crime of this nature involving commercial quantity of contraband - Such an order would be against principles of law - Interest of justice would also require that such a perverse order be set aside and bail be cancelled. (Para 9)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439(2) - जमानत का रद्दकरण - जहाँ अभिलेख पर मौजूद सामग्री एवं साक्ष्य की अवहेलना करते हुये गंभीर प्रकृति के अपराध में जिसमें प्रतिषिद्ध पदार्थ की व्यापारिक मात्रा अन्तर्गृस्त थी, जमानत अनुदत्त करने का विपर्यस्त आदेश पारित किया जाता है - ऐसा आदेश विधि के सिद्धान्तों के विपरीत होगा - न्यायहित भी अपेक्षित करता है कि ऐसा विपर्यस्त आदेश अपास्त किया जाए और जमानत रद्द की जाए।

Cases referred :

AIR 1971 SC 1444, AIR 1976 SC 2263, AIR 2002 SC 3343, (2004) 3 SCC 582, 2010 AIR SCW 5533, (2001) 6 SCC 338.

Surendra Singh with Manish Mishra, for the noticee.

Akhilendra Singh, G.A., for the State.

ORDER

R.C. MISHRA, J. :- This MCrC for cancellation of bail has been registered in pursuance of order-dated 13/7/10 passed in MCrC No.1715/10, rejecting bail application moved on behalf of co-accused Sonu alias Ashish. By that order only, direction was given to issue notice to Vijay Kesharwani to show cause as to why the bail granted to him, by Sessions Judge, Mandla as In-charge Special Judge (under the Narcotic Drugs and Psychotropic Substances Act 1985) [for short 'the Act'] vide order-dated 27/6/09 by extending advantage of the proviso appended to sub-section (2) of Section 167 of the Code of Criminal Procedure (hereinafter referred to as 'the proviso'), should not be cancelled.

2. In reply, the noticee has submitted that the bail does not deserve to be cancelled for the following reasons -

- (i) Benefit of the proviso was rightly extended to him.
- (ii) There is no allegation as to misuse of the privilege.

3. Facts leading to issuance of the notice may be summarized as under -

After being arrested in connection with Crime No.34/09 registered at P.S. Karanjija, District Dindori, in respect of the offence

under Section 8 read with S.20 of the Act, the noticee was produced before the Magistrate having jurisdiction on 26/4/09. Taking note of the fact that charge sheet was not presented before expiry of 60 days from the date of the order authorizing his detention in judicial custody, learned Judge, vide order-dated 27/6/09, proceeded to release the noticee on compulsive bail under the proviso. While doing so, he also placed reliance on the following bail orders passed by the co-ordinate Benches of this Court in -

- (i) *Ramdevi v. State* MCRC No.4721/2006 on 19.07.2006
- (ii) *Annu v. State* MCRC No.11022/2007 on 08.01.2008
- (iii) *Suresh v. State* MCRC No.11361/2007 on 22.01.2008
- (iv) *Ganesh Prasad v. State* 2001 (2) MPHT 379.

4. Allegations against the noticee, in substance, are that he was found conjointly involved in transporting Ganja in a Maruti Van bearing registration No.MP-20-HA-3816. As per the relevant account, -

in the night intervening 25th and 26th of April 2009 at about 1 p.m., upon a credible information that as many as 3 persons were carrying Ganja in the Maruti Van, T.K. Soni, the SHO of P.S. Karanjiya, intercepted the vehicle at Bazar Tola Main Road. However, co-accused Guddu, who was sitting in the front seat by the side of the driver, was able to flee away but the noticee, who was driving the vehicle and co-accused Sonu alias Ashish, who was sitting on the rear seat of the vehicle, were apprehended. A total quantity of 32.770 Kgs. of Ganja in the form of 7 Sillis (compact blocks) were recovered from the Van. Out of these, 2 Sillis weighing 10.570 Kgs. were found under the driver's seat whereas the other 5 were recovered from beneath the seat whereon co-accused Sonu was sitting. Accordingly, the detecting officer prepared two seizure panchnamas suggesting that quantity of 10.570 Kgs of Ganja was found in the possession of noticee whereas possession of the remaining quantity of the contraband was attributable to the co-accused Sonu.

5. Observing that the order granting bail did not contain any discussion on the point as to whether the case related to persons accused of an offence involving commercial quantity within the meaning of sub-section (4) of section 36A of the Act, this Court initiated this proceeding for cancellation of bail. The sub-section reads -

"In respect of persons accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity the references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974) thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days": Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days"

[Emphasis supplied]

6. Learned Senior Counsel, making reference to the decisions of the Apex Court in *Devilal v. State of Rajasthan* AIR 1971 SC 1444 and *Lakshmi Singh v. State of Bihar* AIR 1976 SC 2263, has strenuously contended that it is not open for the Court or to the prosecution to make a new case pertaining to commercial quantity as against the noticee so as to imperil the defence. According to him, it is not possible to presume that as driver, the noticee was in conscious possession of the entire quantity of the contraband found in the vehicle. To buttress the contention, following precedents have been cited -

- (i) *Avtar Singh v. State of Punjab* AIR 2002 SC 3343
- (ii) *State of Punjab v. Balkar Singh* (2004) 3 SCC 582.

7. However, scope of this proceeding lies in a narrow compass as the point for consideration is that whether, for the purpose of bail under the proviso, it can be presumed that the noticee was in conscious possession of the entire quantity of the contraband recovered from the vehicle driven by him? In this view of the matter, the apprehension that substratum of the prosecution case would undergo a change is apparently misconceived.

8. In *Balkar Singh's case* (supra), the accused persons who belonged to different villages were found sitting on the bags of poppy husk while, as per the prosecution version in *Avtar Singh's case* (above), amongst the five inmates of the truck, the one sitting by the side of the driver and the other sitting on the back side of the Truck, were able to run away whereas the driver of the Truck and other two accused sitting on the bags kept in the back side of the truck were apprehended. However, facts of the instant case are apparently

distinguishable as the corresponding investigation has revealed that the noticee as well as co-accused Sonu had gone in the same vehicle from Jabalpur to a place near Guriella, Chhattisgarh picking up Guddu on the way from Phoolsagar, District Mandla and the black bag containing 2 Sillis and the gunny bag comprising 7 Sillis of Ganja were loaded there in the vehicle at the instance of Guddu for transportation to Jabalpur. Thus, all the three inmates of the vehicle were known to each other and further it was not a Public Transport Vehicle. This apart, the quantity of the contraband as mentioned in the respective seizure memo was also in the same form. Under these circumstances, presumption of conscious possession under Section 54 of the Act was available against each one of the accused. For this, reference may be made to a recent decision of the Supreme Court in *Dehal Singh v. State of H.P.* 2010 AIR SCW 5533. As such, benefit of Section 167(2) could be extended to the noticee only in the event of non-filing of the charge sheet within a period of 180 days simply because it was a case relating to commercial quantity of the contraband. Learned Judge, therefore, completely misdirected himself in extending the benefit of the proviso to the noticee on the ground that the investigation was not completed within a period of 60 days.

9. Needless to say that a bail order cannot be cited as a precedent as it does not contain any discussion as to the point in issue. Moreover, the assertion that the noticee has not misused the liberty granted to him is also of no consequence as the concept of setting aside the unjustified illegal or perverse order is totally different from the concept of canceling the bail on the ground that the noticee has misconducted himself or because of some new facts requiring such cancellation. Accordingly, one of the grounds for cancellation of bail would be where ignoring material and evidence on record a perverse order granting bail is passed in a serious crime of this nature involving commercial quantity of contraband. Such an order would be against principles of law. Interests of justice would also require that such a perverse order be set aside and bail be cancelled (*Puran v. Rambilas* (2001) 6 SCC 338 referred to).

10. On a conspectus of the factual scenario and the relevant provision of law, the order granting compulsive bail deserves to be set aside.

11. Consequently, the order-dated 27/6/09 (supra) is hereby cancelled.

12. Noticee Vijay Kesharwani is directed to surrender before the Special Court at Dindori on or before 8/11/10 and in case of failure, the Special Judge shall issue warrant of arrest against him. It is, however, made clear that

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nothing contained in this order shall affect the right of the noticee to move the
Special Court for grant of bail after his surrender in the light of subsequent events.

Order accordingly.

I.L.R. [2011] M. P., 312
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice S.C. Sinho

M.Cr.C. No.1969/2010 (Jabalpur) decided on 13 October, 2010

SSANGYONG ENGINEERING &
CONSTRUCTION CO. LTD. & anr.
Vs.

... Applicants

M/S YOGRAJ INFRASTRUCTURE LTD.

... Non-applicant

Penal Code (45 of 1860), Sections 403, 406, 418, 420/34 - Cheating - Civil dispute - Contract to applicant for National Highway Section II Project by National Highway Authority of India - Respondent was persuaded by applicant to take part of project as a sub-contractor, whereas sub-contractor was not approved by NHAI - Applicant also violated terms and conditions of contract entered into with respondent - Held - Respondent was aware of fact that he was not fully approved sub-contractor by NHAI - Subsequently NHAI approved respondent as sub-contractor - Normally breach of trust/cheating is essentially a civil dispute unless it shows the intention of applicant to cheat from very inception - Dispute is a case of simple breach of contract and the same has already been referred to the Arbitrator - Order taking cognizance against applicants quashed - Petition allowed. (Para 20)

दण्ड संहिता (1860 का 45), धाराएँ 403, 406, 418, 420/34 - छल - सिविल विवाद - भारतीय राष्ट्रीय राजमार्ग प्राधिकरण द्वारा राष्ट्रीय राजमार्ग खण्ड-द्वितीय परियोजना का ठेका आवेदक को - आवेदक द्वारा प्रत्यर्थी को उप-ठेकेदार के रूप में परियोजना में भाग लेने हेतु कहा गया, जबकि उप-ठेकेदार भा.रा.रा.प्रा. द्वारा अनुमोदित नहीं था - आवेदक ने प्रत्यर्थी के साथ किये गये करार के निबन्धन एवं शर्तों का भी उल्लंघन किया - अभिनिर्धारित - प्रत्यर्थी इस तथ्य से अवगत था कि वह भा.रा.रा.प्रा. से पूर्णतः अनुमोदित उप-ठेकेदार नहीं था - तत्पश्चात् भा.रा.रा.प्रा. ने प्रत्यर्थी को उप-ठेकेदार के रूप में अनुमोदित किया - समान्यतः विश्वास भंग/छल आवश्यक रूप से एक सिविल विवाद है जब तक कि यह आवेदक का प्रारम्भ से ही छल करने का आशय नहीं दर्शाता - विवाद साधारण संविदा भंग का मामला है और इसे पूर्व में ही मध्यस्थ को निर्दिष्ट किया जा चुका है - आवेदकों के विरुद्ध संज्ञान लेने का आदेश अभिखंडित - याचिका मंजूर।

Cases referred :

2007 AIR SCW 4816, (2009) 4 SCC 439, (2009) 3 SCC 789, (2003) 3 SCC 264, AIR 1960 SC 866, (1999) 8 SCC 688, AIR 1999 SC 1216, AIR 1972 SC 2639, AIR 1963 SC 1572, AIR 1967 SC 986, AIR 1957 SC 340, 2007(4) MPLJ 80, 1998 CrLJ 463, 2010(2) MPHT 177, (2006) 6 SCC 736, (2005) 10 SCC 336.

R.S. Jaiswal with *Manoj Kushwaha*, for the applicants.

R.K. Pancholi, for the non-applicant.

ORDER

S.C. SINHO, J. :-The applicants have filed this petition under Section 482 of Cr.P.C for quashment of complaint case no. 274/2010 passed by JMFC, Narsinghpur whereby cognizance u/s 406, 403, 418, 420, 34 of IPC is taken against them vide impugned order dated 5/02/2010.

2. The respondent/complainant Yograj Infrastructure Limited (hereinafter shall be referred as YIPL) filed a complaint case against applicant Ssangyong Engineering and Construction Co. Ltd (hereinafter shall be referred as 'SSY') a multinational company before the Court of JMFC, Narsinghpur u/s 406, 403, 418, 420, 34 of IPC. It is alleged in the complaint that National Highway Authority of India, New Delhi (hereinafter shall be referred as 'NHAI') had awarded a contract for the National Highway Section II Project, (Package Four Lining of Jhansi-Lakhnadon Section KM 297 to KM 351 of NH 26) in the State of Madhya Pradesh. The total contract amount for aforesaid project was more than Rs.750 crores. The accused no.1 SSY approached the complainant YIPL and persuaded it to take the part of the project as a sub-contractor for Rs.2,19,01,16,805/- and enticed the respondent/complainant by stating that it will give 92% of all payment for the work done and will retain only 8% as profit and incidental charges. As per written agreement dated 13/08/06 (Ex.P-2) the work order for the aforesaid project was granted by the accused SSY to the respondent no.1/complainant YIPL, on the terms settled as per aforesaid agreement. Subsequent to execution of the agreement and during work, some dispute between the parties arisen.

3. The main allegations levelled by the complainant/respondent YIPL against the accused SSY that it was necessary for accused to obtain prior permission of NHAI and the respondent YIPL was kept in dark and was informed that permission has already been obtained, therefore, he performed the work, it appears that employing of an agency under subcontract was

objected by NHAI and warned SSY/accused to discontinue the subcontract otherwise main contract was threatened to be terminated, thus fraud/cheating was committed with the respondent/complainant YIPL who performed the work of many crores and petitioner had not made payment of Rs.166 Crores to him and made false promises with ulterior motive to grab the plants, machinery and equipments of YIPL under the threat of invocation of bank guarantee worth Rs.11.5 crores. Thereafter the agreement of subcontract was terminated on 29.12.2009 and relying on the clause 27 respondent moved an application under Section 9 of the Arbitration and Conciliation Act for injunction restraining the Bank from making the payment of the amount covered under bank guarantee and trial Court after recording the statement of complainant registered the complaint case against the applicant under Sections 406, 403, 418, 420, 34 IPC and summons were issued to the applicant.

4. Shri Jaiswal, Senior Advocate with Shri Manoj Kushwaha, Advocate for applicant submitted that allegations with respect to cheating and criminal breach of trust are specifically denied, it is mentioned in the agreement Ex. P-2 itself that the main contract has been given by NHAI of which the respondent/complainant is well aware and responsibility to correspondent with the NHAI was that applicant/SSY will sought permission from NHAI for approving the subcontract which was not approved by the NHAI as apparent from the correspondence due to non-performance of the work in stipulated period by YIPL, thus applicant has not committed any cheating/fraud etc with respondent.

5. Shri Jaiswal, learned Senior Advocate has placed reliance on 2007 AIR SCW 4816, *Veer Prakash Sharma vs. Anil Kumar* and submitted that there was no intention of the applicant to cheat the respondent/ complainant from very inception and even on the basis of statement of complainant Yogendra Singh, no offence u/s 403, 406, 418, 420, 34 of I.P.C. is made out. Learned counsel has relied upon clauses 3.1, 3.2 and 23 of the agreement of subcontract. Learned advocate has also relied upon the various correspondences with the YIPL in which various reasons have been culled out for termination of contract. Learned counsel further submitted that it is a purely contractual matter and no case of criminal breach of trust, dishonest misappropriation of property, cheating is made out in the facts and circumstances of the complaint case, all facts were to the knowledge of the respondent. Respondent was aware that permission had also been applied to the NHAI and it had not granted the permission because there was no progress of work consequently sub contract was terminated hence the continuation of complaint case is abuse

of process and the same be quashed. Learned Advocate of the applicant has submitted that respondent had received advances of more than Rs.30 crores and have been overpaid Rs.55 crores which amount has to be recovered. No case of criminal offence is made out.

6. Shri R. Pancholi, learned counsel appearing for respondent submitted that applicant has committed serious kind of cheating with respondent. They know well that subcontract was prohibited and prior permission of NHAI ought to have been obtained which was not obtained. Applicant made false promises with respondent with ulterior motive to grab the plants, machinery and equipments and further invoked the bank guarantee of Rs.11.5 crores.

7. Learned counsel for respondent has placed reliance on 2009(4) SCC 439, *Mahesh Chaudhary vs. State of Rajasthan*, 2009(3) SCC 789, *Ashabai Machindra vs. State of Maharashtra*, 2003(3) SCC 264, *State (Govt. of NCT of Delhi) vs. DAM Prabhu*, AIR 1960 SC 866, *R.P. Kapur vs. State of Punjab*, 1999(8) SCC 688, *Trisuns Chemical Industry vs. Rajesh Agrawal*, AIR 1999 SC 1216, *Rajesh Bajaj vs. State NCT of Delhi*, AIR 1972 SC 2639, *Nirmaljit Singh Hoon vs. The State of West Bengal*, AIR 1963 SC 1572, *Dr. Vimala vs. The Delhi Administration*, AIR 1967 SC 986, *Shivnarayan Kabra vs. The State of Madras*, AIR 1957 SC 340 *S. Swamiratham vs. State of madras*, 2007(4) MPLJ 80 *Goyal M.G. Gases Pvt. Ltd. vs. Kamaljeet Singh Bhatia*, 1998 Cri.L.J. 463, *Arvindbhai Ravjibhai Patel vs. State of Gujarat*, where it is held that interference under the inherent power of this Court is to be exercised sparingly, in rarest of rare cases and only when on bare perusal of the contents of the complaint no prima facie offence is disclosed.

8. Now the crucial question is before me that whether the offences under Sections 406, 403, 418, 420, 34 of I.P.C. are prima facie made out or it is a purely contractual matter and parties have already approached the Arbitrator.

9. At the outset, I may point out that a similar challenge had been raised earlier in 2010(2) MPHT 177, *B.C. Biyani Projects Pvt. Ltd (M/s) vs. SSY* in an arbitration appeal. It will be proper to reproduce para 9 of aforesaid judgment:

"9. Clause 4.21 of the agreement is quoted below:-

4.21. Biyani shall not correspond with NHAI in any capacity not even as a representative of Ssangyong. All letter correspondence in connection with work order shall be done by Ssangyong only. Default in any respect will be treated as

breach of condition of this Agreement. Biyani's responsibilities described under this clause are not to be constructed as limiting in any manner.

It is apparent from the aforesaid clause that the main contract with Ssangyong Engineering Constructions Company Ltd. was to the knowledge of appellant right from beginning and they had undertaken not to correspond with NHAI even as representative of Ssangyong Engineering Construction Company Ltd. thus, they knew it full well that permission of NHAI was necessary for subcontract. Prima facie it cannot be said that they were not aware of the existence of agreement. The mentioning of the aforesaid condition was enough to put at guard the appellant to make enquiry as to the nature of main agreement. In case they were not aware of the terms and condition of main agreement, it cannot be said that they had exercised reasonable and due diligence. Thus, the knowledge of the existence of the terms and conditions of the main agreement can be imputed. It was incumbent upon the appellant to gather information as to terms and conditions of the main agreement while they entered into sub contract with Ssangyong Engineering Constructions Company Ltd. It cannot be said that any fraud was played as agreement was to the knowledge of the appellant."

10. On going through the agreement dated 13.08.2006 (Ex.P-2) in this case it is replica of para 4.21 of agreement reads as under except the name of the respondent:

4. YIPL shall not correspond with NHAI in any capacity not even as a representative of Ssangyong. All letter correspondence in connection with work order shall be done by Ssangyong only. Default in any respect will be treated as breach of condition of this Agreement. YIPL's responsibilities described under this clause are not to be constructed as limiting in any manner.

11. This Court has already held in the case of B.C. Biyani (supra) on the basis of agreement respondent/YIPL had knowledge from beginning, and they had undertaken not to correspond with NHAI even as representative of SSY. Thus they knew it full well that the permission of NHAI was necessary for sub-contract. Thus no fraud/cheating is committed by the applicant-SSY with the respondent-YIPL.

12. Further clause 23(1) deals with termination of agreement.

- (a)
- (b)
- (c)
- (j)
- (k) Fails to maintain confidentiality of this agreement.
- (l)

Thus it is clear that from day one respondent was duly aware of the fact that he was not fully approved sub-contractor by NHAI and further on the request of applicant NHAI had approved the YIPL as sub-contractor vide letter dated 19.06.2006, 30.08.2007, 29.09.2007, 09.08.2007 (Ex.P-3, 4, 5, 6) for the value of 3045 Crores as the respondent did not fulfill the criteria of being approved as a subcontractor for a higher value.

13. Thus it is clear that respondent YIPL was well aware with the terms and conditions of the agreement. It is settled position that normally breach of trust/cheating is essentially a civil dispute unless it shows the intention of the applicant to cheat from very inception. Section 405 of the I.P.C. runs as follows:-

"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

Neither any allegation has been made to show existence of the ingredients of the aforementioned provision nor any statement in that behalf has been made by Yogendra Singh (CW-1) before J.M.F.C.

14. I am, therefore, left with the question as to whether in a situation of this nature any offence of cheating can be said to have been made out. Section 415 of the Indian Penal Code defines cheating to mean:

"Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do

or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

In *Hridaya Ranjan Prasad Verma and Others v. State of Bihar and Another* [(2000) 4 SCC 168], Apex Court held in para 14 as under:

"14. On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.

15. Hon'ble Apex Court in *Veer Prakash Sharma* (supra) has held in para 15 as under:

"15. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time to inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."

[See also *Indian Oil Corpn. v. NEPC India Ltd. and Others* (2006) 6 SCC 736]

The ingredients of Section 420 of the Indian Penal Code are as follows :

- i) Deception of any persons;
- ii) Fraudulently or dishonestly inducing any person to deliver any property; or
- iii) to consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit.

No act of inducement on the part of the appellant has been alleged by the respondent. No allegation has been made that he had an intention to cheat the respondent from the very inception."

16. Similar is the position in *Uma Shankar Gopalika v. State of Bihar & Anr.*, 2005 (10) SCC 336 where in para 15 it has been held thus:

".....It is well settled that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating. In the present case it has nowhere been stated that at the very inception there was any intention on behalf of the accused persons to cheat which is a condition precedent for an offence under Section 420 IPC."

17. Further to appreciate the fact of the case it is necessary to consider the provisions of Section 403 and 405 of the I.P.C. wherein the offence of dishonest misappropriation of movable property or converting it to one's own use and criminal breach of trust have been defined. As per these provisions, anybody whoever, being in any manner dishonestly misappropriates movable property or any other property being in any manner entrusted with property, or with any dominion over that property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of the property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".

18. The definitions clearly show that for the purpose of establishing an offence of criminal breach of trust, following facts are required to be proved:

1. That the accused must be entrusted with property or with dominion over property.

2. The person so entrusted must--

(a) dishonestly misappropriate or convert to his own use that property; or

(b) dishonestly use or dispose of that property or willfully suffer any person to do so--

(i) In violation of any directions of law prescribing the mode in which such property is to be discharged;

(ii) any legal contract made touching the discharge of such trust.

19. What has been alleged in the complaint as also in the statement of complainant witness Yogendra Singh relate to their subsequent conduct terms and conditions of the contract was agreed between the parties and duly written in the agreement it will be really unjust to opine that applicant who had taken only this contract for Rs.750 Crores on the cost of contract and reputation will do such an act/offences with the respondent/subcontractor.

20. Keeping in view of the aforesaid decisions of various courts on examining the case at hand it is apparent that the dispute between the parties has already been referred to the arbitrator as per terms and conditions of the agreement. It is a dispute of civil nature. Respondent was well aware of the fact while executing the contract applicant had to take permission from the NHAI for appointing respondent as sub-contractor and applicant had also applied for the permission to NHAI. Applicant/SSY is claiming that respondent had received advance of more than Rs.30 Crores and have been overpaid Rs.55 Crores. It has to be recovered from the respondent/complainant where respondent/YIPL is claiming in the complaint that SSY/applicant had not made payment of Rs.166 Crores to them.

21. There cannot be any doubt or dispute that this is a case of simple breach of contract, a case involving pure civil dispute and dispute is already referred to the Arbitrator.

22. In the result this petition is allowed. For the reasons aforesaid mentioned the impugned order dated 05.02.2010 passed by J.M.F.C. regarding taking of cognizance against the applicants are quashed.

Petition allowed.
