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

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M. P. SERIES

CONTAINING
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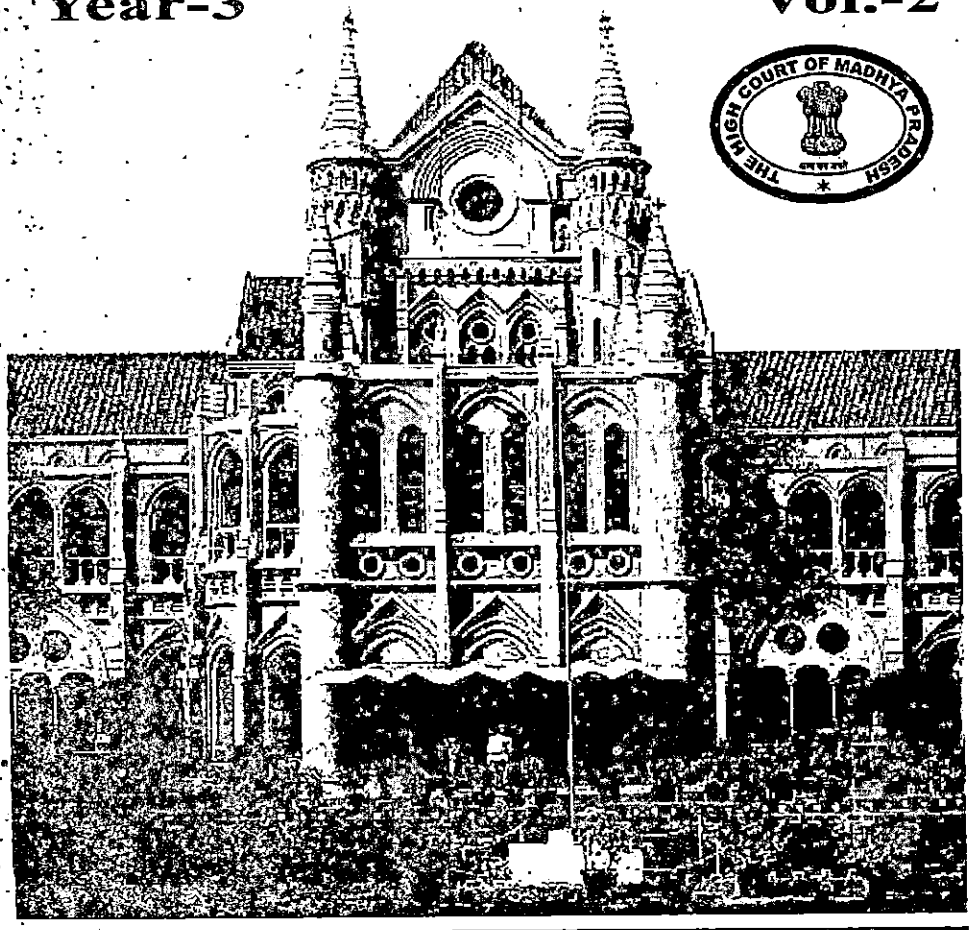
THE HIGH COURT OF MADHYA PRADESH

Year-3 **Vol.-2**



May **(Single copy ₹40)** **2011**
(pp. 1119 to 1432)

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TABLE OF CASES REPORTED

(Note An asterisk (*) denotes Note number)

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

Cases referred :

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

Sheel Nagu, for the petitioner.

Avinash Zargar, for the respondent.

Short Note

****(58)***

Before Mrs. Justice Indrani Datta

M.Cr.C. No. 6773/2010 (Gwalior) decided on 12 January, 2011

JALIL KHAN ...Applicant

Vs.

SADAR MUTABALLI ...Non-applicant

Wakf Act (43 of 1995), Sections 68 & 90 - Notice - Proceedings - **Section 90 relates only to civil proceeding in a suit or proceeding relating to a title or possession of wakf property - Before initiating proceedings before a Magistrate under Section 68, no notice under Section 90(1) of the Act is required.** (Para 6)

वक्फ अधिनियम (1995 का 43), धाराएँ 68 व 90 – नोटिस – कार्यवाहियाँ – धारा 90 केवल वाद में सिविल कार्यवाहियों से या वक्फ सम्पत्ति के हक या कब्जे की कार्यवाही से संबंधित हैं – धारा 68 के अंतर्गत मजिस्ट्रेट के समक्ष कार्यवाहियाँ आरंभ करने के पूर्व, अधिनियम की धारा 90(1) के अंतर्गत कोई सूचना अपेक्षित नहीं।

Vivek Mishra, for the applicant.

S.B. Mishra with *Anshu Gupta,* for the non-applicant.

NOTES OF CASES SECTION

Short Note

**(59)*

Before Mr. Justice Alok Aradhe

W.P. No.803/2011 (Gwalior) decided on 3 February, 2011

MAKHANO KORI (SMT.) ...Petitioner

Vs.

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

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 40 **- Collector issued a direction to the Sub-Divisional Officer to take action against the petitioner for her removal as petitioner not taking interest in the work of Gram Panchayat and for implementation of various welfare schemes on account of personal dispute - Sub-Divisional Officer registered the proceeding against the petitioner - *Held* - Initiation of proceeding at the instance of the Collector amounts to abdication and surrender of its discretion - Can not be sustained in the eye of law.** (Para 9)

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 40 – कलेक्टर ने याची को हटाने के लिए उपखंड अधिकारी को उसके विरुद्ध कार्यवाही करने का निदेश जारी किया क्योंकि याची व्यक्तिगत विवाद के कारण ग्राम पंचायत के कार्य एवं विभिन्न कल्याणकारी योजनाओं को लागू करने के लिए अभिरुचि नहीं ले रही है – उपखंड अधिकारी ने याची के विरुद्ध कार्यवाही दर्ज की – अभिनिर्धारित – कलेक्टर के कहने पर कार्यवाही आरम्भ करना, उसके विवेकाधिकार का त्याग एवं समर्पण हैं – विधि के दृष्टिकोण से अविरत नहीं रखा जा सकता।

Cases referred :

(1995) 2 SCC 474, (1997) 7 SCC 622, (1989) 2 SCC 505, AIR 1995 SC 2390, (2008) 7 SCC 117.

Shivendra Singh, for the petitioner.

M.P.S. Raghuwanshi, Addl. A.G., for the respondents.

NOTES OF CASES SECTION

Short Note

****(60)***

Before Mrs. Justice Sushma Shrivastava

Cr. A. No. 10/1996 (Jabalpur) decided on 25 February, 2011

MAUJILAL ...Appellant

Vs.

STATE OF M.P. ...Respondent

A. Evidence Act (1 of 1872), Section 3 - Appreciation of Evidence - **In F.I.R. and Police statement, it was stated that appellant used a 'tabal' in assaulting while in deposition in court witnesses deposed about use of 'farsa' by the appellant - Held - The inconsistency losses significance in view of the fact that the incident occurred at night and 'tabal' as well as 'farsa' are more or less same type of sharp cutting objects - The evidence of three eyewitnesses can not be overthrown for such discrepancy.** (Para 16)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्ष्य का मूल्यांकन – एफ.आई. आर. तथा पुलिस कथन में यह कथन किया गया कि आक्रमण करने में अपीलार्थी ने तबल का उपयोग किया, जबकि न्यायालय में अभिसाक्ष्य में अपीलार्थी द्वारा फरसे के प्रयोग के बारे में साक्षी ने कथन दिया – अभिनिर्धारित – यह असंगति महत्व खो देती है इस दृष्टि से कि घटना रात में घटी और तबल एवं फरसा भी न्यूनाधिक रुप से समान प्रकार के धारदार काटने की वस्तुएँ हैं –ऐसी असंगति के लिए तीन प्रत्यक्षदर्शी साक्षियों की साक्ष्य को हटाया नहीं जा सकता।

B. Penal Code (45 of 1860), Section 307 - Attempt to murder - **Intention can be formed then and there on the spur of moment - When the appellant gave a forceful blow on the vital part like scalp of injured by means of sharp edged weapon, it cannot be said that requisite intent was lacking.** (Paras 20 & 21)

ख. दण्ड संहिता (1860 का 45), धारा 307 – हत्या का प्रयत्न – किसी अकस्मात क्षण, उसी समय उसी जगह, आशय की निर्मिती हो सकती है – जब अपीलार्थी ने आहत के मस्तिष्क जैसे कोमल अंग पर धारदार शस्त्र द्वारा शक्तिशाली प्रहार किया गया, यह नहीं कहा जा सकता कि अपेक्षित आशय की कमी थी।

C. Penal Code (45 of 1860), Section 307 - Attempt to murder - Single blow - **Appellant gave a blow by sharp edged weapon on the vital part like scalp with such force that it also caused a depressed fracture in his parietal bone, resulting in paralysis of left upper arm -**

The injured was found unconscious and had to be treated and remained hospitalized for a period of more than twenty one days - There are no reasons to doubt the opinion of Doctor that the injuries caused to injured were dangerous to life. (Para 20)

ग. दण्ड संहिता (1860 का 45), धारा 307 – हत्या का प्रयत्न – एकल आघात – अपीलार्थी ने धारदार शस्त्र द्वारा मस्तिष्क जैसे कोमल अंग पर इतनी शक्ति के साथ प्रहार किया कि उससे उसके उपरी बांए हाथ में भी डिप्रेस्ड अस्थिभंग कारित हुआ – आहत अचेत अवस्था में पाया गया और उसका उपचार कराना पड़ा तथा इक्कीस दिनों की अवधि से ज्यादा समय चिकित्सालय में भर्ती रहा – चिकित्सक के अभिमत पर संदेह करने का कोई कारण नहीं कि आहत को कारित क्षतियाँ जीवन के लिए घातक थीं।

Cases referred :

2006 AIR SCW 4143, 2005(3) MPLJ 21.

B.P. Sharma, with *Shobhana Sharma,* for the appellant.

R.N. Yadav, P.L., for the respondent/State.

Short Note

****(61)***

Before Mrs. Justice Indrani Datta

Cr.R. No. 957/2010 (Gwalior) decided on 8 February, 2011

RAMBABU ...Applicant

Vs.

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

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Quashing of charges **- No eyewitness has stated against applicant - Only witness stating against applicant is not an eye witness but a hearsay witness - Held - Facing a trial is a tedious and expensive ordeal - When evidence collected by investigating agency is very weak, there is no point in sending a person to such tedious and expensive ordeal where he is likely to be acquitted - Order framing charge quashed.** (Para 6)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – आरोपों को खंडित किया जाना – आवेदक के विरुद्ध किसी प्रत्यक्षदर्शी साक्षी ने कथन नहीं किया – एक मात्र साक्षी जिसने आवेदक के विरुद्ध कथन किया है, वह प्रत्यक्षदर्शी साक्षी नहीं है, बल्कि अनुश्रुत साक्षी है – अभिनिर्धारित – विचारण का सामना करना थकाने वाला एवं खर्चीली परीक्षा है – जब जाँच एजेंसी द्वारा एकत्रित की गई साक्ष्य अति दुर्बल है, व्यक्ति को ऐसे थकाने वाली एवं खर्चीली परीक्षा से गुजारने का कोई

औचित्य नहीं जब उसे दोषमुक्त किये जाने की संभावना हो – आरोप विरचित करने वाला आदेश अभिखंडित।

D.S. Tomar, for the applicant.

T.C. Bansal, P.P., for the non-applicant/State.

Short Note (DB)

****(62)***

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

W.P. No. 6234/2009(O)(Jabalpur) decided on 8 November, 2010

SUMAN SINGHAI ...Petitioner

Vs.

DIRECTOR OF INCOME TAX (Inv), ...Respondent

Income Tax Act (43 of 1961), Section 132-A **- Information, having reason to believe that cash and silver seized represent the assets which would not have been disclosed for purpose of Income Tax, may be sufficient to establish a rational connection and relevant bearing on the formation of belief leading to issuance of warrant of authorization - There is a direct nexus between material coming notice of the authority and formation of belief for issuance of warrant u/s 132-A of the Act - Petition dismissed.** (Para 6)

आयकर अधिनियम (1961 का 43), धारा 132–ए – सूचना, विश्वास करने का कारण होते हुए कि जब्तशुदा नकद एवं चांदी, वह परिसम्पत्ति दर्शाती है जिसे आयकर हेतु प्रकट नहीं किया जाता, प्राधिकृत करने का अधिपत्र जारी करने हेतु अग्रसर होने के लिए विश्वास के सृजन पर युक्तिसंगत सम्बंध एवं सुसंगत अभिप्राय स्थापित करने हेतु पर्याप्त हो सकती है – प्राधिकारी की जानकारी में आने वाले तत्व और अधिनियम की धारा 132–ए के अंतर्गत अधिपत्र जारी करने हेतु विश्वास के सृजन के मध्य प्रत्यक्ष सम्बंध है – याचिका खारिज।

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

Cases referred :

137 ITR 456, 139 ITR 1043, 194 ITR 32, 242 ITR 302, 260 ITR 80, 224 ITR 614 (SC), 276 ITR 182, 74 ITR 836, 148 ITR 567, 281 ITR 247 (1976) 103 ITR 437 (SC), (2003) 260 ITR 80 (SC), (2006) 281 ITR 247 (MP).

G.N. Purohit with *Abhishek Oswal,* for the petitioner.

Rohit Arya with *Sanjay Lal,* for the respondent.

I.L.R. [2011] M. P., 1119

SUPREME COURT OF INDIA

Before Mr. Justice G.S. Singhvi & Mr. Justice Surinder Singh Nijjar

Civil. Appeal No. 899/2011, decided on 24 January, 2011

ARCHANA CHOUHAN PUNDHIR (Dr.) ...Appellant

Vs.

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

***Medical and Dental Post-Graduate Course Entrance Examination Rules 2007 (M.P.) - Rules 2(d).1 & 9.1(a)* - A Medical Officer serving on contract basis was not eligible to apply as an in-service- candidate, but if the services of such an appointee were regularized, then the experience gained by him/her by working on contractual basis was required to be taken into consideration for the purpose of selection.** (Para 9)

चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम 2007 (म.प्र.) – नियम 2(डी).1 व 9.1(ए) – संविदा आधार पर कार्यरत चिकित्सा अधिकारी सेवा–में– अभ्यर्थी के रुप में आवेदन करने के लिए पात्र नहीं था, परन्तु यदि ऐसे नियुक्त व्यक्ति की सेवाएँ नियमित की गई थी, तब चयन-हेतु उसके द्वारा संविदा आधार पर कार्य करते हुए प्राप्त किये गये अनुभव को विचार में लेना अपेक्षित था।

Cases referred :

(2006) 9 SCC 597, (2005) 9 SCC 779, (2003) 4 SCC 276.

JUDGMENT

The Judgment of the Court was delivered by : **G.S. SINGHVI, J.** :–Leave granted.

Whether the appellant, who joined service under the Government of Madhya Pradesh as Assistant Surgeon on contract basis in November, 1999 and whose services were regularised with effect from 31.12.2005 under the Madhya Pradesh Regularisation of Public Health and Family Welfare Medical Cadre Contract Appointment Rules, 2005 (for short, "the 2005 Rules") was eligible to appear in Pre-P.G. Examination held in 2007 under the Madhya Pradesh Medical and Dental Post-Graduate Course Entrance Examination Rules, 2007 (for short, "the 2007 Rules") is the question which arises for consideration in this appeal.

2. The appellant was appointed as Assistant Surgeon in District Hospital, Raisen on contract basis vide order dated 26.10.1999. The term of her contractual appointment was extended from time to time.

After about four years, she filed Writ Petition No.2158 of 2004 for issue of a mandamus to respondent Nos. 1 and 2 to regularise her service. The same was disposed of by the learned Single Judge vide order dated 21.4.2004, the relevant portion 'of which (as contained in Annexure P-1) is extracted below:

> "Having heard Mr. Shroti, learned senior counsel for the petitioners and learned Government Advocate, I am inclined to direct the respondent No.1 to consider the cases of the petitioners for the purpose of regularization. If any intervention of higher authority.is sought the same shall be taken recourse to by the respondent No. 1. The entire exercise shall be completed by end of July, 2004. At the time of regularization the authority shall also keeping view the spectrum of salary. I may hasten to add I have not adverted to the merits of the case. All other aspects relating to merits are kept open. If there are a set of rules the State Government shall keep in view the same while deciding the case of regularization."

3. Although, in terms of the High Court's order the concerned authorities were required to consider the appellant's case for regularisation of service within next three months, it took them almost three years to do the needful and by an order dated 10.4.2007, her services were regularised with effect from 31.12.2005.

4. In the meanwhile, the appellant applied for admission to Post-Graduate course as an "in-service candidate". Her application was accepted by the concerned authorities and she was allowed to appear in the Entrance Examination, 2007. She secured 98.50 marks out of 200 but was not given admission because of non-award of marks in lieu of her 7 years' service.

5. Apprehending that she may not get admission in Post Graduate course, the appellant Filed Writ Petition No.5157 of 2007 with the prayer that Rule 9.1 (a) and (b) of the 2007 Rules may be struck down and the respondents be directed to admit her against the quota of "in-service candidates". By an interim order dated 26.4.2007, the Division Bench of the High Court directed the respondents to allow the appellant to participate in the counselling as an "in-service candidate". In

compliance of that order, the appellant was allowed to take part in counseling and she appears to have been admitted in the Post-Graduate course as an "in-service candidate". This inference is being drawn from the contents of last paragraph of the impugned order wherein it has been mentioned that the appellant has spent two years in her education as an "in-service candidate".

6. The respondents contested the writ petition by asserting that the appellant was not eligible to apply as an "in-service candidate" because at the relevant time, she was serving on contract basis. In support of this assertion, the respondents relied upon Rules 2(d) and 9.1 (a) and (b) of the 2007 Rules. They also pleaded that regularization of the appellant's service with effect from 31.12.2005 was inconsequential because order for that purpose was issued one day after declaration of the result of entrance examination.

7. The Division Bench of the High Court dismissed the writ petition by observing that the appellant was not eligible for admission in Post Graduate course because the result of entrance examination was declared on 9.4.2007 and order for regularisation of her service was issued on 10.4.2007. The Division Bench referred to the judgments of this Court in *Aman Deep Jaswal v. State of Punjab* (2006) 9 SCC 597, *Dolly Chhanda v. Chairman, JEE* (2005) 9 SCC 779 and *Paramjeet Gambhir v. State of M.P.* (2003) 4 SCC 276 and held that even though the 2007 Rules were superseded by the Madhya Pradesh Medical and Dental Post-Graduate Course Entrance Examination Rules, 2008, the appellant cannot take advantage of the same because the new rules were not given retrospective effect.

8. We have heard learned counsel for the parties. Rules 2(d). 1 and 9.1 (a) of the 2007 Rules, which have bearing on the decision of this appeal read as under:

> **"2(d)** "In-Service Candidate" means,
>
> 1. Medical officer of Public Health and Family Welfare Department, who is serving under the Government of Madhya Pradesh and not serving on contract basis;
>
> XX XX XX XX
>
> XX XX XX XX

XX XX XX XX

9. Selection Criteria:- (In Service Candidate)

9.1 Medical Officer

(a) Only those candidates, who have completed 5 years service on 30th April of year of examination as Medical Officer, in the Public Health and Family Welfare Department will be eligible. If a candidate was working on contractual basis in Public Health and Family Welfare Department of the State Government and has come in regular services while working on contractual basis, then experience of such contract service will also be considered."

9. A conjoint reading of the above reproduced rules makes it clear that only those candidates were eligible to apply for admission as "in-service candidates", who had completed 5 years service as Medical Officer in the Public Health and Family Welfare Department as on 30th April of the year of examination i.e. 2007. A Medical Officer serving on contract basis was not eligible to apply as an "in-service candidate", but if the services of such an appointee were regularised, then the experience gained by him/her by working on contractual basis was required to be taken into consideration for the purpose of selection.

10. It is not in dispute that as on 30th April, 2007, the appellant had completed more than 7 years' service as Medical Officer in the Public Health and Family Welfare Department of the Government of Madhya Pradesh. Although, the appellant's initial appointment was on contract basis but in the purported compliance of order dated 21.4.2004 passed by the learned Single Judge of the High Court in Writ Petition No.2158 of 2004, the State Government regularised her services with effect from 31.12.2005.

11. While deciding the second writ petition filed by the appellant, the Division Bench of the High Court completely overlooked that the concerned authorities of the Government of Madhya Pradesh were guilty of committing contempt of the order passed by the learned Single Judge and declined relief to her despite the fact that her services had been regularized with effect from 31.12.2005.

12. In our view, the date on which the order for regularisation was issued was purely fortuitous and the same could not be made basis for depriving the appellant of her legitimate right to get admission as an "in-service candidate". At the cost of repetition it needs to be emphasized that in terms of the order passed by the learned Single Judge in writ petition No. 2158 of 2004, the concerned authorities were required to consider the appellant's case for regularisation of service and pass appropriate order within three months, but the needful was done after a long time gap of almost three years. Even after framing of the 2005 Rules, the State Government took two years to complete the exercise for regularisation of the services of Medical Officers appointed on contract basis. If the State Government had issued order of regularisation before 5.3.2007 i.e. the last date fixed for receipt of application, the appellant would have been saved of the harassment, mental agony and financial loss suffered by her on account of unwarranted and forced litigation. In any case, no premium could be given to the respondents for their contumacious conduct of not complying with the High Court order and unexplained delay in issuing the order for regularization of the 'appellant's service.

13. We are also of the view that the Division Bench of the High Court committed serious error by dismissing the writ petition and denying relief to the appellant despite the fact that she had completed more than 7 years' service as on 30th April of the year of examination i.e., 2007.

14. In the result, the appeal is allowed. The impugned order is set aside, the writ petition filed by the appellant is allowed and it is declared that the decision of the respondents to treat the appellant ineligible for admission to Post Graduate course as an "in service candidate" was illegal and violative of her Fundamental Right to Equality. If the concerned authorities have so far not declared result of the appellant's examination, then the needful shall be done within a period of four weeks' from the date of receipt/production of copy of this judgment. If, on the other hand, the result of the appellant has already been declared and she has been admitted to Post-Graduate course, then she shall be allowed to complete the course and take examination.

Appeal allowed.

I.L.R. [2011] M. P., 1124
WRIT APPEAL
Before Mr. S.R. Alam, Chief Justice & Mr. Justice R.S. Jha
W.A. 1404/2010(Jabalplur) decided on 3 January, 2011

ARVIND SHROTI ...Appellant
Vs.
STATE OF M. P. & ors. ...Respondents

Constitution of India - Article 16 - Filling up of vacancy which was not advertised **- 7 posts of Deputy Director advertised - Appellant placed at serial No. 1 in waiting list - Appellant prayed for direction to fill up 8th post which was never advertised - Held - Post which was not subject matter of advertisement cannot be filled up from the waiting list as the same would be denial and deprivation of constitutional rights enshrined under Articles 14, 16 of Constitution of India.** (Para 10)

भारत का संविधान – अनुच्छेद 16 – विज्ञापित न की गई रिक्ती को भरना – उप निदेशक के 7 पदों को विज्ञापित किया गया – अपीलार्थी को प्रतीक्षा सूची में अनुक्रमांक 1 पर रखा गया – अपीलार्थी ने कमी न विज्ञापित किये गये 8वें पद को भरने के निदेश के लिए प्रार्थना की – अभिनिर्धारित – पद जो विज्ञापन की विषय वस्तु नहीं थी, उसे प्रतीक्षा सूची से नहीं भरा जा सकता क्योंकि ऐसा करना भारत के संविधान के अनुच्छेद 14,16 के अंतर्गत अंतर्विष्ट संवैधानिक अधिकारों से वंचित करना एवं प्रत्याख्यान करना होगा।

Cases referred :

AIR1994 SC 765, (2008) 2 SCC 161, (2007) 5 SCC 572, (2009) 1 SCC 386, (2009) 14 SCC 734, (2010) 2 SCC 637.

Vivek Rusia, for the appellant.
Kumaresh Pathak, Dy. A.G. for the respondent No. 1.
K.S. Wadhwa, for the respondent No. 2.

O R D E R

The Order of the Court was delivered by **S.R. ALAM, CHIEF JUSTICE. :–I.A. No. 15011/2010**

This is an application seeking condonation of delay in filing the appeal.

Learned counsel appearing for the respondents does not propose to

give reply to the application for condonation of delay. He, however, opposed the prayer by making oral submissions.

Having heard the learned counsel for the parties, we find that there is sufficient cause for condonation of delay of three days in filing the instant appeal Accordingly, the delay in filing the appeal is condoned.

I.A. No. 15011/2010 is accordingly allowed.

W.A.NO. 1404/2010

Heard on the question of admission.

This Intra-court appeal has been preferred against the order dated 25-10-2010 passed by the learned Single Judge by which the W.P. No. 16754/2006 preferred by the appellant has been dismissed.

It appears that the appellant being aggrieved by the order of the State Government, dated 21 -7-2006 contained in Annexure-P/13 rejecting his representation for considering his claim for appointment against the 8th vacant post of Deputy Director, Public Instructions, filed W.P. No. 16754/ 2006 before the learned Single Judge. The learned Single Judge found that the appellant was not included in the waiting list as his name was subsequently deleted from the list for the reason that the experience certificate furnished by him was found forged and illegal. The writ petition was, therefore, dismissed. Hence, this appeal before us.

Learned counsel for the appellant vehemently contended that there were 8 vacancies of Deputy Director, Public Instructions, but only 7 posts were advertised. However, since the appellant was at Sr. No. 1 in the waiting list, the respondents should have considered his claim for appointment against the 8th vacant post.

On the other hand, stand of the respondents-State is that the 8th vacant post is reserved for the Scheduled Caste candidate as per roster and thus, the appellant cannot be appointed against the said post.

We do not find any force in the submissions made on behalf of the appellant for the reason that the question as to whether a vacancy which was not the subject-matter of advertisement can be filled up from the waiting list or not is concluded by series of judgments of the apex Court wherein their Lordships have held that appointments in excess of

advertised post cannot be sustained, as the same would be a denial and deprivation of constitutional rights enshrined under Articles 14 and 16(1) of the Constitution of India which ensure equal protection of laws and equality of opportunity to all citizens in the matter relating to employment or appointment to any office under the State. Thus, if any appointment is made in excess of advertised post that would tantamount to denial and deprivation of the constitutional right of its citizens guaranteed under Articles 14 and 16(1) of the Constitution of India of those citizens who acquired eligibility for the post in question.

In *State of Bihar and another vs. Madan Mohan Singh and others.* AIR 1994 SC 765 the apex Court did not approve filling-up of the vacancy beyond the post advertised. Their Lordships were of the view that after filling-up of the vacancies advertised which was the subject-matter of selection got exhausted and came to an end. It has further been held that if the same list is allowed to subsist for the purpose of filling-up other vacancies that would amount to deprivation of rights of other candidates who have become eligible subsequent to the said advertisement and selection process. This view was reiterated by the apex Court in *Jitendra Kumar vs. State of Haryana,* 2008(2) SCC 161: *State of U.P. vs. Nidhi Khanna,* (2007)5 SCC 572; *Mukul Saikia vs. State of Assam,* (2009)1 SCC 386; *High Court of Judicature Vs. Veena Verma,* (2009)14 SCC 734; and *Rakhi Ray vs. High Court of Delhi,* (2010) 2 SCC 637.

In the instant case 7 posts were advertised for direct selection to the post of Deputy Director, Public instructions, in the year 1994. M.P. Public Service Commission conducted the examination to recommend the names of successful candidates for the aforesaid posts. The appellant herein, also applied, however, he was placed at Sr. No. 1 in the waiting list and hence, he could not be appointed. The appellant being aggrieved with the action of the respondents in not giving him appointment filed the writ petition on the ground, inter alia, that 69 posts of Deputy Director, Public Instructions were sanctioned and as per Recruitment Rules 75% posts of Deputy Director, Public Instructions is to be filled-up by promotion and 25% posts are to be filled-up by direct recruitment. It is the case of the appellant that sanctioned posts are 69 in the cadre of Deputy Director, Public Instructions, and 25% of 69 posts would be 17 posts which are meant for direct recruitment out of which 9 posts since

were already filled up in the year 1992, and therefore, 8 posts were available for direct recruitment. However, the Department advertised only 7 posts instead of 8 posts which were available and, therefore, the petitioner being at Sr. No. 1 of the waiting list should be given appointment against the 8th post.

It is not in dispute that the 8th post which was alleged to have been vacant, was not the subject-matter of advertisement nor the selection process was meant to fill up the same. Hence, in view of the exposition of law made by the apex Court the same cannot be filled up from the candidates of waiting list, as issuance of any direction to fill up the post in excess of advertised post would be violative of Articles 14 and 16 of the Constitution of India.

The contention of the appellant that since the 8th post is vacant and, therefore, he being at Sr. No. 1 in the waiting list, should be appointed, if accepted, it would amount to permitting the respondents to fill-up the vacancy which was never advertised. It is pointed out by the learned counsel for the respondents as is apparent from. the order of the learned Single Judge that the name of the appellant was subsequently deleted from the waiting list as he had submitted a false experience certificate which on enquiry conducted by the Collector, East Nimad Khandwa and the Collector, Hoshangabad, was found to be forged. The Public Service Commission therefore, relying on the aforesaid report deleted his name from the waiting list. Admittedly, the aforesaid order deleting his name from the waiting list has not been challenged by the appellant. It further appears that the memo of charges has been served on the appellant and the enquiry is yet to be conducted and, therefore, no opinion with regard to submission of forged experience certificate can be expressed in this appeal, as the matter is still under enquiry by the Department. However, It would be open to the appellant to raise all objections before the concerned authority and to adduce evidence in respect of his claim showing the genuineness of the experience certificate furnished by him.

Besides that, even if name of the appellant is included in the waiting list then also no relief can be granted in this appeal in view of the settled legal proposition that any appointment made beyond the number of vacancies advertised is without jurisdiction as it is in violation of Articles

14 and 16 of the Constitution of India and once notified vacancies are filled up the process of selection comes to an end.

In view of the above, we do not find any error in the order of the learned Single Judge and the appeal, being devoid of merit, stands dismissed. However, liberty is granted to the appellant to defend the charges of furnishing false and forged experience certificate before the departmental authorities. In the result, the appeal fails and is dismissed, but without costs.

Appeal dismissed.

I.L.R. [2011] M. P., 1128
WRIT APPEAL

Before Mr. Justice S.N. Aggarwal & Mrs. Justice Indrani Datta
W.A. No. 599/2010 (Gwalior) decided on 11 February, 2011

STATE OF M.P. & ors. ...Appellants
Vs.
SURESH KUMAR UPADHYAYA ...Respondent

***Service - Exemption from posting in "Working Plan"* - By notification dated 22.03.1995 exemption was granted to Forest Ranger from posting in "Working Plan" - Said benefit withdrawn by order dated 5.10.2005 - Respondent posted in working plan - Held - Order dated 5.10.2005 withdrawing benefit of exemption would not apply to those to whom exemption stands already granted prior to issuance of amended guidelines.** (Paras 6 &7)

सेवा – 'कार्य आयोजना' में पदस्थापना से छूट – अधिसूचना दिनांक 22.03.1995 द्वारा 'कार्य आयोजना' में पदस्थापना से वनरेंजर को छूट प्रदान की गई – उक्त लाभ आदेश दिनांक 5.10.2005 द्वारा वापिस लिया गया – प्रत्यर्थी कार्य आयोजना में पदस्थ – अभिनिर्धारित – आदेश दिनांक 5.10.2005 जिसके द्वारा छूट का लाभ वापिस लिया गया, उन पर लागू नहीं होगा, जिन्हें संशोधित निर्देशों को जारी किये जाने के पूर्व ही छूट का लाभ प्रदान किया जा चुका है।

Cases referred :

AIR 2007 SC 1640, AIR 1995 SC 705.

Vivek Khedkar, G.A, for the appellants.
Brijesh Sharma, for the respondent.

JUDGMENT

The Judgment of the Court was delivered by : **S.N. AGGARWAL, J.** :–This writ appeal under section 2 (I) of the M.P.Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005 preferred by the appellants is directed against the impugned order of the learned Single Judge dated 27/9/2010 in Writ Petition No.1720/10 (s) allowing the writ petition in favour of the respondent by quashing the impugned orders (Annexures P-1 and P-2 to the writ petition) pertaining to the respondent.

2. Briefly stated, the facts of the case relevant for the disposal of this writ appeal are that the respondent is working as Forest Ranger in Lok Vaniki Mission under the Forest Department of the State of Madhya Pradesh. He was granted exemption from his posting in the 'working plan' by virtue of order of the appellants dated 11/8/1999, Annexure P-7 to the writ petition at page 43 of the paper book. This exemption from his posting in the 'working plan' was granted to him in terms of policy of the appellants contained in office memorandum No.F-3-428/94/10-1 dated 22/3/1995. Lateron, the appellants vide office order dated 5/10/2005, Annexure A/2 at page 13 of the paper book, withdrew the benefit of exemption granted to the forest rangers from their posting in the 'working plan' in terms of their earlier policy dated 22/3/1995, referred above. Pursuant thereto, the appellants vide orders (Annexures P-1 and P-2 to the writ petition) posted the respondent in the 'working plan', aggrieved wherefrom the respondent had filed a writ petition being W.P.No. 1720/ 10 (s) which was allowed by the learned Single Judge vide impugned order mainly for the reason that the exemption from posting in the 'working plan' already granted to the forest rangers cannot be withdrawn retrospectively and the policy of the appellants not to grant exemption to the forest rangers in terms of their earlier policy dated 22/3/1995 would apply only prospectively.

3. The learned Single Judge at the Main Seat relying on the impugned order of the learned Single Judge of the Bench at Gwalior dated 27/9/ 2010 allowed two writ petitions of two other similarly situated forest rangers namely Sudheer Singh and Ram Lal Sharma being Writ Petitions bearing numbers 7121 and 7672 of 2010 respectively vide order dated 12/10/2010. The appellants aggrieved by the said order of the learned

Single Judge at the Main Seat preferred a writ appeal bearing W.A.1320/10 which was dismissed by the Division Bench headed by Hon'ble the Chief Justice vide order dated 5/1/2011. While dismissing the said writ appeal of the appellants the Division Bench took note of the orders passed by the appellants in the cases of forest rangers S/s Anoop Parashar and P.K.Khatri in whose cases the appellants themselves have recalled their order of posting in the 'working plan' on the ground that their Policy of 5/10/2005 withdrawing the exemption from posting in 'working plan' would not govern cases where exemption from posting in 'working plan' has already been granted by the Department to the forest rangers. Relevant portion of the order of the Division Bench at the Main Seat is extracted below :

> "The learned counsel appearing for the State submits that the representation of the respondent No. 1 had rightly been rejected by the authorities as the exemption from posting in the working plan had subsequently been withdrawn by a policy decision of the State Government dated 05.10.2005 and, therefore, the petitioner cannot claim any exemption from posting in the working plan area. However, on a specific query being made, the learned Government Advocate appearing for the appellant/State, does not deny the fact that Shri Anoop Parashar and Shri P.K Khatri have been granted exemption from posting in the working plan subsequent to the policy decision of the State dated 05.10.2005 on the ground that it does not have a retrospective effect. The learned counsel for the appellant/State has failed to point out as to how the cases of Shri Anoop Parashar and Shri P.K.Khatri are different from that of the petitioner. Therefore, on the ground of parity the petitioner/respondent is entitled to receive the same and similar treatment which has been extended to other similarly placed persons/employees. The appellant/State cannot now contend after extending the benefits to other persons that the same cannot be applicable in the case of petitioner/respondent without showing any reasonable basis for such differential treatment. We, therefore, do not find any error in the order of the learned Single Judge."

4. Shri Khedkar, learned Government Advocate appearing on behalf of the appellants/State has vehemently argued that the above referred judgment of the Division Bench in Writ Appeal No.1320/10 is distinguishable and would not govern the decision of the present appeal. Relying on two judgment of Hon'ble the Supreme Court in *Directorate of Film Festivals vs. Gaurav Ashwin Jain,* AIR 2007 SC 1640 and *Chandigarh Administration and another vs. Jagjit Singh and another,* AIR 1995 SC 705 he has argued that the respondent could not have been granted benefit of an illegal or unwarranted orders in the cases of S/s Anoop Parashar and P.K.Khatri passed by the appellants. According to Mr. Khedkar, in view of the above judgments of the Hon'ble Supreme Court, the High Court cannot compel the appellants to repeat the illegality over again and again since orders passed by the administrative authorities do not constitute precedents for their application to the similarly situated persons.

5. We have perused both these judgments of the Hon'ble Supreme Court and have given our thoughtful consideration to the arguments advanced on behalf of the appellants, but we are sorry we cannot persuade ourselves to agree with the submissions of Shri Khedkar, learned Government Advocate appearing on behalf of the appellants/State for the reasons to follow hereinafter.

6. It is true that the respondent cannot be granted any relief by the Court on the basis of an illegal or unwarranted order passed by the appellants in cases of other similarly situated employees. However, the question that arises for our consideration in this appeal is whether orders in cases of S/s Anoop Parashar, P.K.Khatri and Radhacharan Sharma on which reliance is placed by the respondent can be said to be illegal or unwarranted. It is not disputed by Shri Khedkar, learned Government Advocate appearing on behalf of the appellants that orders in cases of S/s Anoop Parashar, P.K.Khatri and Radhacharan Sharma, who all three are forest rangers working in the Forest Department with the appellants, were passed subsequent to coming into force of their policy dated 5/10/2005. Order in case of Annop Parashar is dated 15/1/2008 and was annexed as Annexure P-3 to the writ petition; in case of Shri Radhacharan Sharma is dated 29/3/2008 and was annexed as Annexure P-4 to the writ petition and order in case of P.K.Khatri is dated 1/8/2009 and has been

placed before us at the time of hearing of the appeal. It is suffice to refer to only one of these three orders as they all are verbatim the same. Order dated 15/1/2008 in case of Anoop Parashar (Annexure P-3 to the writ petition at page 38 of the appeal paper book) is extracted below :

> कमांक एफ 3–125/2004/10–1 प्रधान मुख्य वन संरक्षक कार्यालय के आदेश कमांक/स्था/स/759 दिनांक 11.12.2007 के सरल कमांक 5 पर अंकित श्री अनूप पाराशर, परिक्षेत्र अधिकारी बुढ़ेरा सामान्य श्यौपुर सामान्य वन मण्डल की कार्य आयोजना वृत्त बैतूल में पदस्थापना की गई हैं । पूर्व नीतियों के आधार पर यदि किसी को कार्य आयोजना करने के दायित्य से छूट दे दी गई है तो उनके नाम कार्य आयोजना में भूतलक्षी प्रभाव से प्रस्तावित नहीं होगें । श्री पाराशर को कार्य आयोजना में छूट दी जा चुकी है, जो जारी रहेगी । कार्य आयोजना नीति वर्ष–2005 भूतलक्षी प्रभाव से लागू नहीं होगी ।
>
> अतः राज्य शासन एतद् द्वारा श्री अनूप पाराशर का वन क्षेत्रपाल का कार्य आयोजना बैतूल की गई पदस्थापना आदेश निरस्त करता है ।

7. It is not the case of the appellants that the above referred orders in the cases of S/s Anoop Parashar, P.K.Khatri and Radhacharan Sharma are illegal or unwarranted orders. There is no ground taken by the appellants in the present appeal to allege that these orders passed by them subsequent to the policy dated 5/10/2005 are in any manner unwarranted or illegal. It may be noticed from the above extracted order in case of Shri Anoop Parashar that the appellants themselves have taken a policy decision that their policy dated 5/10/2005 pursuant to which exemption from posting in the 'working plan' was withdrawn shall apply prospectively and not retrospectively. Admittedly, in the present case, the respondent was already granted exemption from his posting in the 'working plan' prior to the guidelines issued by the appellants vide their policy circular dated 5/10/2005 referred above. We are informed that orders passed by the appellants in the cases of S/s Anoop Parashar, P.K.Khatri and Radhacharan Sharma on 15/1/2008, 29/3/2008 and 1/8/2009 respectively have already been implemented by them. We fail to understand that if the appellants themselves have taken a decision, the in cases of S/s Anoop Parashar, P.K.Khatri and Radhacharan Sharma to apply their policy dated 5/10/2005 prospectively and not retrospectively, how they can treat the respondent differently. We are of the considered view that the appellants are liable to extend the same and similar treatment

which has been extended by them to S/s Anoop Parashar, P.K.Khatri and Radhacharan Sharma who all three are similarly situated like him. In our opinion, the judgments of the Hon'ble Supreme Court in the cases of *Gaurav Ashwin Jain's case* and in *Jagjit Singh's case* (supra) are not at all applicable to the facts and circumstances of the present case.

8. In view of the foregoing, we do not find any merit in this appeal which fails and is hereby dismissed but with no order as to costs.

Appeal dismissed.

I.L.R. [2011] M. P., 1133
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice Prakash Shrivastava
W.P. No.7346/2008 (Indore) decided on 1 October, 2010

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

A. Constitution of India - Article 226 - Investigation by C.B.I. - **Brother of petitioner taken away by ATS Mumbai in connection with investigation of Malegoan Bomb Blast Case - ATS Mumbai also admitted that brother of petitioner was taken by them to Mumbai - Brother of petitioner missing and did not return back - However, ATS Mumbai alleged that he was released for bringing his I.D. proof - No co-operation is being extended by ATS Mumbai to the local police for search of missing person inspite of various directions - Held - Fit case for handing over the investigation regarding disappearance of brother of petitioner to CBI.** (Paras 19 & 21)

क. भारत का संविधान – अनुच्छेद 226 – सी.बी.आई. द्वारा जाँच – मालेगांव बम विस्फोट के मामले की जाँच के संबंध में ए.टी.एस. मुंबई द्वारा याची के भाई को ले जाया गया – ए.टी.एस. मुंबई ने भी स्वीकार किया कि उनके द्वारा याची के भाई को मुंबई ले जाया गया था – याची का भाई लापता है और वापिस नहीं लौटा – तथापि, ए.टी.एस. मुंबई का अभिकथन है कि उसका आई. डी. प्रमाण लाये जाने हेतु उसे मुक्त कर दिया गया था – विभिन्न निर्देशों के बावजूद लापता व्यक्ति की खोज में ए.टी.एस. मुंबई ने स्थानीय पुलिस को कोई सहयोग नहीं दिया – अभिनिर्धारित – याची के भाई के लापता होने से संबंधित जाँच सी.बी.आई. को सौंपे जाने योग्य मामला।

***B. Constitution of India - Article 21 - Personal Liberty* - Not only takes within its fold enforcement of the rights of an accused but also the rights of the victim.**

Right to life and personal liberty is paramount. Being protectors of Civil liberties of the citizens, the Supreme Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly. (Para 20)

ख. भारत का संविधान – अनुच्छेद – 21 – दैहिक स्वतंत्रता – इसके भीतर न केवल अभियुक्त के अधिकारों का प्रवर्तन आता है किन्तु पीड़ित के अधिकारों का भी आता है।

Cases referred:

W.P. No. 11986/2008, (2010) 3 SCC 571, AIR 2002 SC 2225, (2008) 2 SCC 409.

Ritu Bhargava & Bhuwan Deshmukh, for the petitioner.
Girish Desai, Dy. A.G., for the respondents No. 1 & 2 .
Vaibhav Bagade, for the respondents No. 3 & 4.
Vivek Sharan, Asst. Solicitor General, for respondent No. 5.

ORDER

The Order of the Court was delivered by **Shantanu Kemkar, J.** :–Heard learned counsel for the parties on I. A. No.2775/10.

2. Through this application a prayer has been made by petitioner for issuance of directions to the Central Bureau of Investigation (for short CBI) or other independent agency to conduct investigation into the disappearance of Dilip S/o Devising Patidar, from the custody of the Anti Terrorism Squad (for short ATS), Mumbai.

3. The petitioner has filed this Writ Petition under Article 226 of the Constitution of India for production of his brother Dilip Patidar and for further direction to set him free from the custody of ATS, Mumbai.

4. Brief facts necessary for disposal of this I.A. are as under :

5. According to the petitioner in the intervening night of 10-11th November, 2008 the members of ATS, Mumbai with the assistance of

Sub Inspector of Police Station Khajrana, Indore of M.P. Police had taken petitioner's brother Dilip Patidar, to Mumbai in connection with the investigation of 'Malegaon Bomb Blast Case'. The petitioner has alleged neither the Police Officers of ATS Mumbai nor Sub Inspector of Police Station Khajrana, Indore informed the petitioner or the family members of said Dilip as to for what purpose and at which place he is being taken. It has been further alleged that it is only on 20.11.2008 when Dilip contacted his cousin Alkesh at Indore and informed him that he is being kept in the custody of ATS, Mumbai, his whereabouts were came to the knowledge of the petitioner. When his phone call to his cousin revealed that he is under some undue pressure from the ATS, Mumbai the family members of Dilip became worried. It has been alleged that on 21.11.2008 the present petitioner (brother of Dilip Patidar) received a call from the ATS Mumbai on Dilip's wife mobile phone asking them to send Dilip to Mumbai for recording of his statement. The petitioner and Dilip's wife Padma were shocked to hear the message as Dilip had not returned since the intervening night of 10-11th November, 2008, after he was being taken by the ATS, Mumbai. All these circumstances led to filing of the present habeas corpus petition against the respondents on 24.11.2008.

6. On being noticed the returns have been filed by the State of Madhya Pradesh and by ATS Mumbai.

7. On going through the averments made in the petition, the return and the various reports submitted from time to time it is revealed that undisputedly a team of ATS, Mumbai had taken Dilip from his house at Indore to Mumbai in the intervening night of 10 - 11th November 2008. It is also revealed that he was taken to Mumbai as he was one of the witnesses sighted in the 'Malegaon bomb blast case'. As per the stand taken by the ATS, Mumbai after taking Dilip to Mumbai his statement was recorded in their office at Mumbai on 13.11.2008. Thereafter he attended the office of ATS Mumbai upto 18.11.2008. According to ATS, Mumbai Dilip was required to give his statement before Metropolitan Magistrate at Mumbai and for that proof about his identity was necessary. Therefore, the ATS, Mumbai asked him to bring his identity proof from Indore and come back to Mumbai. He left the office of ATS on 18.11.2008 and thereafter he did not come back. Thus the stand of the ATS is that he was never in their custody and at his own he left the office of ATS on

18.11.2008. It is their stand that Dilip being not in their custody no question of his production arises.

8. On 2.4.2009 this Court taking note of the mobile phone call details produced before it directed Superintendent of Police, Indore to make investigation with a view to find out the whereabouts of the alleged detenu Dilip Patidar. The ATS, Mumbai was also directed to extend full support and co-operation as may be demanded by the M. P. State Police and supply all necessary documents and information which are in their possession to the Superintendent of Police, Indore to facilitate the investigation in finding out the whereabouts of Dilip Patidar. The Superintendent of Police, Indore was directed to submit a detailed report alongwith affidavit within a period of one month.

9. Thereafter, the case was adjourned from time to time for submission of the report. Ultimately on 13.7.2009 the report submitted by the Superintendent of Police, Indore was taken on record. Additional report to show what steps were taken by the M.P. Police and what assistance was solicited from ATS, Mumbai was directed to be submitted by this Court vide order dated 13.7.2009.

10. On 19.8.2009 the Senior Superintendent of Police, Indore filed reply and affidavit. Alongwith affidavit documents have been filed by the SSP, Indore to show that umpteen attempts have been made by the officers of the State Government to find out the whereabouts of missing person namely Dilip Patidar. On that date in the presence of Nitin Thakre, Assistant Inspector of ATS, Mumbai the Additional Advocate General appearing for the State of Madhya Pradesh made a categorical statement that information regarding all these issues was sought from ATS, Mumbai vide letter dated 1.7.2009, but no information was sent by the ATS, Mumbai. It was stated by him that Sub inspector, Ajay Markam and D. S. Parmar were sent to collect the information, but ATS, Mumbai resources reveal that they had no knowledge of the issue. A further categorical statement was made by Additional Advocate General for State of Madhya Pradesh that despite directions of this Court Mumbai Police specially the ATS, Mumbai is not helping them. A prayer was made that the third and fourth respondents be summoned or they be asked to file detailed affidavit.

11. On the basis of the aforesaid submissions made by Additional

Advocate General of State of M.P., Shri Nitin Thakre, Assistance Inspector from ATS, Mumbai was put to notice and Respondents No. 3 and 4 were directed to make search about whereabouts of Dilip and they were also directed to file the affidavit in relation to the efforts made by them. The Commissioner of Police, ATS, Mumbai was also directed to be informed that in case appropriate steps are not taken by him then this Court may direct his personal appearance.

12. Thereafter since no effective steps were found to have been taken by the respondents, the Division Bench keeping in view the previous orders passed by it from time to time deemed it proper to constitute a committee in the interest of all parties concerned for the purpose of making investigation about the inquiry from probing the whereabouts of missing person Dilip. On the basis of suggestions of counsel appearing for ATS, Mumbai and the Additional Advocate General for the State of M.P. the Division Bench constituted a committee for the said purpose vide order dated 5.11.2009 consisting of Senior Superintendent of Police, Indore, a local representative of ATS, Indore (not below the rank of Additional S. P.), one representative of ATS, Mumbai (not below the rank of ACP) and Superintendent of Police, Bhopal. The Committee was directed to make the inquiry/investigation to the best of their ability, sincerity and devotion and was directed to submit its detailed report to enable this Court to pass appropriate orders in the light of report so submitted.

13. It is revealed from the record that committee so constituted submitted a report dated 5.11.2009 giving some call details about the mobile phone of the missing person. Thereafter the matter was adjourned from time to time enabling the respondents to make sincere efforts about the search and production of the missing person. However, all attempts were found to be futile.

14. Ms. Ritu Bhargava, learned counsel for the petitioner argued that in view of the stand taken by the respondents in their reply and the reports about the investigation submitted by them from time to time it is clear that there are no sincere efforts on the part of the police of State of Madhya Pradesh and also on the part of ATS, Mumbai and the State of Maharashtra. She submitted that undisputedly Dilip Patidar was picked up from his residence by ATS, Mumbai with the assistance of the local

police. In the circumstances the Committee constituted by this Court consisting of ATS, Mumbai and the local police officers will not bring any result. She submits that from the facts as have been emerged a very strong prima facie case and involvement in the disappearance of Dilip exists against the ATS, Mumbai. She argued when ATS, Mumbai has taken Dilip to Mumbai it is for them to answer where the petitioner's brother is. She submitted that the petitioner and the wife of Dilip are entitled to know the circumstances which led to the disappearance of Dilip and as to whether he is alive or dead. She also argued when the action of ATS, Mumbai is under clouds it would be hardly expected from local police and by the Committee consisting of ATS Officers to investigate the matter freely and fairly. She submitted that this is a fit case for ordering investigation by an independent agency like CBI, which is not under control or influence of the two State Governments and ATS, Mumbai. To support the prayer for CBI investigation she placed reliance on the order passed on 11.11.2008 by a Division Bench of this Court at Principal Seat, Jabalpur in the case of *Ram Vilas Jat Vs. Central Bureau of Investigation and others* W. P. No.11986/2008 as also the judgment of the Supreme Court in the case of *State of West Bengal and others Vs. Committee for Protection of Democratic Rights, West Bengal and others* - (2010) 3 SCC 571.

15. On the other hand learned counsel appearing for the respondents have argued that the investigation is being going on effectively and there is no need to direct the CBI to investigate into the matter.

16. Shri Vaibhav Bagade, learned counsel for the State of Maharashtra and ATS, Mumbai has argued that the petitioner and the wife of missing person Dilip are having full knowledge about the whereabouts of the missing person and in order to divert the ATS, Mumbai from making further investigation in the "Malegaon Bomb Blast Case" in which the missing person may also be involved, this habeas corpus petition has been filed. Placing reliance on the mobile phone call details he argued that Dilip Patidar made mobile phone calls to his wife and as such she has knowledge as to where her missing husband is.

17. Refuting the said allegations learned counsel for the petitioner submitted that the call details on the basis of which it has been alleged that the petitioner or Padma wife of missing person are in contact with

missing person are baseless and cannot be relied upon. She argued that the calls on which reliance has been made were not received from mobile of missing person, but it was the attempt made by the missing persons' wife Padma to contact her husband. She further argued that if the petitioner or the wife of the missing person were any having any intention to hide Dilip they would not have filed the habeas corpus petition or at least they would not have made a request for investigation through CBI in the matter. She further argued that the ATS, Mumbai in order to cover up its misdeeds is avoiding CBI investigation. She further submitted that in view of the involvement of ATS, Mumbai the police of State of Madhya Pradesh and the Committee consisting officers of ATS, Mumbai is not making the investigation in proper way.

18. On 9.9.2010 we had directed learned Dy. Advocate General of the State of M.P. to make available the case diary in regard to the complaint made by the petitioner about the missing person, but very surprisingly he on instructions stated that no FIR about the complaint of missing person has been registered as yet. He submitted that on the basis of a request made by ATS, Mumbai seeking assistance for taking Dilip with them for making inquiry from him the Rojnamcha entries (Annexure R-1 and R-2) were recorded in the intervening night of 10-11th November 2008. He submitted that even though no FIR has been registered, the matter is being investigated as per the directions issued by this Court from time to time.

19. Having gone through the order sheets recorded by this Court from time to time, the progress reports submitted by the M.P. Police and by the ATS, Mumbai we are of the view that there is no proper investigation regarding disappearance of Dilip and no proper efforts being found to be made to search him. Admittedly, Dilip Patidar was taken by ATS, Mumbai being witness to 'Malegaon Bomb Blast Case. The stand taken by the ATS, Mumbai that on 18.11.2008 he was asked to bring his identity card and for that he left Mumbai and thereafter he did not return, prima facie does not appear to be plausible. As would be clear from the order sheet dated 19.8.2009 recorded by this Court the ATS, Mumbai was reported to be not cooperating in the investigation conducted by the Senior Superintendent of Police, Indore. In view of the allegation against the ATS, Mumbai it may not be possible for the Committee which also consists of ATS, Mumbai Officers to make a proper inquiry about the whereabouts of the missing person.

20. In the case of *Ram Vilas Jat* (supra) Division Bench of this Court considering the judgment of Supreme Court in the case of *Secretary, Minor Irrigation and Rural Engineering Services, U.P. Vs. Sahngoo Ram Arya* - AIR 2002 SC 2225 and in the case of *Sakiri Vasu Vs. State of U.P.* - (2008) 2 SCC 409 has observed that it is now well settled by the Supreme Court that under Article 226 of the Constitution the High Court has the power to direct an investigation by the C.B.I. but the power can be exercised only in cases where there is sufficient material to come to a prima facie conclusion that there is a need for such investigation. In the case of *State of West Bengal and others* (supra) the Supreme Court has held that the High Courts are authorized under Article 226 of the Constitution of India to issue directions, orders or writs to any person or authority including any Government to enforce fundamental rights and for any other purpose. It has been held that the words "life" and "personal liberty" are used in Article 21 as compendious terms to include within themselves all the varieties of life which go to make up the personal liberties of a man and not merely the right to the continuance of a person's animal existence. All those aspects of life, which make a person live with human dignity are included within the meaning of the word "life". The State has duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers. Article 21 in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. In certain situations even a witness to the crime may seek for and shall be granted protection by the State. The right to life and personal liberty is paramount. Being protectors of civil liberties of the citizens, the Supreme Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly. Therefore, a direction by the High Court in exercise of its jurisdiction under Article 226 of the Constitution, to CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law.

21. In view of the aforesaid pronouncement of this Court as well as of Supreme Court and having regard to the poor progress, the fact that the

allegations are against the ATS, Mumbai, the stand taken by the Additional Advocate General of Madhya Pradesh as would be clear in the interim order of this Court passed on 19.8.2009 about non-cooperation in the investigation by the ATS, Mumbai, we are satisfied that this is a fit case for issuing directions to the CBI to take over the investigation.

22. We accordingly direct the fifth respondent CBI to conduct investigation regarding disappearance of Dilip Patidar S/o Devi Singh Patidar who was taken by ATS, Mumbai to Mumbai. We also direct the State of M.P., State of Maharashtra and the ATS Mumbai to cooperate fully with the CBI in the investigation of the matter.

23. The case be listed for further orders after eight weeks.

C.c. today.

Order accordingly.

I.L.R. [2011] M. P., 1141
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice Prakash Shrivastava
W.P. No.2131/2010 (Indore) decided on 20 October, 2010

BIAORA INFRASTRUCTURE PVT. LTD., INDORE (M/S.)... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. ***Bank Guarantee - Interference by Court*** **- In case of unconditional bank guarantee, the Court will not interfere unless there is fraud and irretrievable damages are involved in the case - Encashment of bank guarantee does not depend upon adjudication of disputes.** (Para 12)

क. बैंक गारंटी – न्यायालय द्वारा हस्तक्षेप – बिना शर्त बैंक गारंटी की दशा में न्यायालय तब तक हस्तक्षेप नहीं करेगा जब तक कि मामले में कपट और अप्राप्य नुकसानी अन्तर्ग्रस्त न हो – बैंक गारण्टी का नकदीकरण विवाद के न्यायनिर्णयन पर निर्भर नहीं होता।

B. ***Bank Guarantee - Encashment of*** **- The terms of bank guarantee are unequivocal and unconditional and recite that amount would be paid without demur or objection and shall be conclusive as regards the amount due and payable by reason of any breach of Contract - *Held* - Encashment of unconditional bank guarantee**

furnished by petitioner will not depend upon adjudication of dispute - Contract of bank guarantee is independent of main contract - MPRRDA is sole judge regarding question as to whether any breach of the terms of contract was occurred - Petition dismissed. (Para 15)

ख. बैंक गारंटी – का नकदीकरण – बैंक गारंटी के निबंधन असंदिग्ध और बिना शर्त और यह कहते हैं कि धनराशि बिना विरोध या आपत्ति के अदा की जायेगी और किसी संविदा भंग के कारण देय एवं शोध्य धनराशि के संबंध में निश्चायक होगी – अभिनिर्धारित – याची द्वारा प्रस्तुत बिना शर्त बैंक गारंटी का नकदीकरण विवाद के न्यायनिर्णयन पर निर्भर नहीं होगा – बैंक गारंटी की संविदा मुख्य संविदा से स्वतंत्र है – एमपीआरआरडीए इस प्रश्न कि क्या संविदा के निबंधनों का कोई भंग हुआ, के संबंध में एकमात्र निर्णायक है।

Cases referred :

2007(4) MPLJ 610, AIR 2007 MP 266, (1999) 8 SCC 436, (2003) 4 SCC 690, (1995) 6 SCC 76, (1997) 6 SCC 450, (2000) 6 SCC 385.

Ajay Bagadiya, Subodh Abhyankar, Sumeet Samvatsar, for the petitioner.

L.N. Soni, Addl.A.G. with *Anjali Jamkhedkar, Panel Lawyer,* for the respondent/State.

Prakash Verma, for M.P.R.R.D.A..

V.P. Khare, for the respondent/Bank.

ORDER

The Order of the Court was delivered by **Shantanu Kemkar, J. :**–This order shall govern the disposal of W.P. Nos.1391,1491, 2131, 2902 and 3349 of 2010, as all these petitions involve common question of fact and law.

2. For the sake of convenience, facts are taken from W.P. No.2902 of 2010.

3. The petitioner claims to be a registered contractor of the respondents the State Government and the Madhya Pradesh Rural Development Authority (for short, MPRRDA) and is engaged in construction work. According to the petitioner, a works contract was awarded to it by the MPRRDA in respect of construction / up-gradation of Rural roads under the Pradhan Mantri Gram Sadak Yojana Package No.MP-3911 vide agreement No. 15 dated 1.03.2004. The case of the petitioner is that

immediately after receipt of the work order its staff reached to the site and mobilised all the resources, as per the requirement of the work which was to be completed within the specified period of nine months as per the agreement. The petitioner alleged that the authorities of the second respondent MPRRDA who in terms of the agreement were bound to provide the site without there being any hurdle or obstacle failed to provide the site and also to take necessary steps for ensuring handing over of the possession of the site to the petitioner. The petitioner further alleged that due to the inaction and lapses on the part of the authorities of the MPRRDA, the work allotted to it could not be completed within the time fixed, in the circumstances a prayer was made by it to the MPRRDA to extend the time limit fixed in the agreement for the completion of the said work. However, the said prayer for extension of time was not allowed by the MPRRDA and instead attributing the cause of delay in performance of the work on the petitioner, its contract was terminated vide order dated 16.01 2006.

4. The petitioner averred that the said order dated 16.01.2006 by which its contract was terminated was challenged by it before the competent authority of the MPRRDA by way of an appeal as provided under the terms of contract, however the said appeal was dismissed vide order dated 24.12.2009 (Annexure P-l). Aggrieved by the order of termination of the contract and the order of dismissal of its appeal the petitioner claims that it had filed an arbitration petition under section 7 of the M.P. Madhyastham Adhikaran Adhiniyam 1983 (for short, the Adhiniyam) before the M.P. Arbitration Tribunal, Bhopal (for short the Tribunal). It is the case of the petitioner that the said arbitration petition is still pending before the Tribunal. The grievance of the petitioner is that though the aforesaid petition is pending before the Tribunal, the MPRRDA without waiting for the outcome of it, is proceeding to encash the Bank Guarantees furnished by the petitioner towards Performance Security.

5. Aggrieved by the action of the MPRRDA in proceeding to encash the Bank Guarantees, the petitioner has filed this petition under Article 226 of the Constitution of India for issuance of a writ restraining the authorities of the MPRRDA from encashing Bank Guarantees with a prayer to issue directions to the MPRRDA and to the Bank not to proceed further in terms of the letter dated 13.01.2010 (Annexure P-3) and 22.01.2010 (Annexure P-4) for encashing the Bank Guarantees.

6. The contention of the petitioner is when the reference under section 7 of the Adhiniyam filed by the petitioner challenging the order of termination of contract and the order passed in appeal is pending consideration before the Tribunal, the action of the MPRRDA in proceedings for encashment of the Bank Guarantees is illegal and is contrary to law laid down by Full Bench of this Court in the case of *BB Verma vs. State of M.P.* (2007 (4) MPLJ 610). It is the case of the petitioner in view of clause 24 and 25 of the agreement entered into between the petitioner and the MPRRDA the petitioner having taken recourse of the "Dispute Redressal System" and "Arbitration" till the matter is decided by the Tribunal, the encashment of the Bank Guarantees by the MPRRDA is not permissible. It has been submitted by learned counsel for the petitioner of W.P. No.3349 of 2010 that in his case the contract has not yet been terminated and as such the petitioner has not taken recourse of clause 24 and 25 of the agreement. He however submits that during the subsistence of the contract, the respondents are proceedings to encash the Bank Guarantees on the basis of delay in performance of work, which according to him is not on account of the petitioner but occurred due to in action and non co-operation of the officers of the MPRRDA.Thus according to him unless the liability is decided, the Bank Guarantees cannot be encashed.

7. The respondents no.2 and. 3 (MPRRDA) have filed return and have justified the action taken by them for encashing the Bank Guarantees. The respondents have placed reliance on the various clauses of the Bank Guarantee furnished by the petitioner. The respondents have also placed reliance on the. order passed by this court in the case of *M/s Jagdish Constructions Ltd. vs. MPRRDA and others* (AIR 2007 MP 266).

8. Heard learned counsel for the parties and perused documents filed by them. It has been stated by learned counsel appearing for the parties that the clauses of the bidding documents, agreement and the Bank Guarantees which have been filed in W.P. No.2902 of 2010 being identical in all the cases the said documents as have been filed in W.P. No.2902 of 2010 be considered and be treated to be the documents in all the connected cases.

9. Before dealing with issue raised in this petition it would be appropriate to consider the law laid down by the Supreme Court in the

cases of unconditional Bank Guarantees. In case of *Hindustan Steel Workers Construction Ltd. vs. State of Bihar and others* (1999) 8 SCC 436, the Supreme Court has observed thus :-

> **"A Bank Guarantee is the common mode of securing payment of money in commercial dealings as the beneficiary, under the guarantee, is entitled to realise the whole of the amount under that guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the guarantee was given and the beneficiary. It contracts awarded to private individuals by the Government, which involve huge expenditure, as, for example, construction, contracts. Bank Guarantees are usually required to be furnished in favour of the Government to secure payments made to the contractor as "advance" from time to time during the course of the contract as also to secure performance of the work entrusted under the contract. Such guarantees are encashable in terms thereof on the lapse of the contractor either in the performance of the work or in paying back to the Government "advance", the guarantee is invoked and the amount is recovered from the bank. An unconditional Bank Guarantee could be invoked in terms thereof by the person in whose favour the Bank Guarantee was given. It is for this reason that the courts are reluctant in granting an injunction against the invocation of Bank Guarantee, except in the case of fraud, which should be an established fraud, or where irretrievable injury was likely to be cause to the guarantor."**

10. In the case of *Daewoo Motors India Ltd. vs. Union of India and others* (2003) 4 SCC 690 it has been held by the Supreme Court :-

> **"For encashment of Bank Guarantee the bank cannot have any valid resistance, except of course, in a case of fraud. The Bank Guarantee furnished by the Bank is an unconditional and absolute Bank Guarantee. The clause in the Bank Guarantee specifically provides that the demand made by the President of India shall**

be conclusive as regards the amount due and payable by the Bank under this guarantee and the liability under the guarantee is absolute and unequivocal. In the face of the clear averments, it is trite to contend that the Bank Guarantee is a conditional Bank Guarantee. Therefore, the Bank has no case to resist the encashment of the Bank Guarantee. It is true that the Bank Guarantee has to be read in conjunction with the terms of the contract but when the Bank Guarantee itself is in absolute terms, the agreement between the company and the first respondent would be of no avail to the Bank."

11. In the case of *Jagdish Constructions Ltd. vs. M.P. Rural Road Development Authority & ors.* (AIR 2007 MP 266) (supra) it has been observed by Single Bench of this court as under :-

"An unconditionat Bank Guarantee is encashable on the very demand of the beneficiary and the demand according to the terms of guarantee is conclusive. In such type of guarantee, the beneficiary is the sole judge as to whether there is any breach of underlying or primary contract and the bank is not concerned with the underlying contract unless otherwise expressly provided for. In present case, performance guarantee furnished in favour of respondent no.1 beneficiary, is unconditional one without any strings attached to it as is clear from perusal of performance guarantee furnished in favour of respondent No.1. Neither a prior notice nor determination or quantification of loss would be necessary for invoking the performance guarantee such as the one furnished by the petitioner. No doubt, it is true that in exceptional cases, such as fraud of which the bank has the notice, Court may issue injunction but otherwise it is open for the parties to settle their disputes as per the mode provided under the contract. In the present petition, it is not the case of the petitioner that fraud of which the bank had notice."

12. In view of the aforesaid legal position we find that it has now been well settled that in the case of unconditional Bank Guarantees the court will not interfere with the same unless there is fraud and irretrievable damages are involved in the case and fraud has to be an established fraud. If the guarantees furnished by the Bank are unconditional, the employer is the sole judge regarding the question as to whether any breach of contract has occurred and if so, the amount of loss to be recovered. It is not necessary that before invoking the performance guarantee the employer should assess the quantum of loss and damage and mention the ascertained figure, when the Bank Guarantee is unconditional one. The encashment of unconditional Bank Guarantee does not depend upon adjudication of disputes. This view also find support from the judgments of the Supreme Court in the case of *Hindustan Steel Workers Construction Ltd. vs. GS Atwal & Co. (Engineers) Pvt. Ltd.* (1995) 6 SCC 76, *Dwarikesh Sugar Industries Ltd. vs. Prem Heavy Engineering Works (P) Ltd. And another* (1997) 6 SCC 450 and in the case of *Oil & Natural Gas Corporation Ltd. vs. SBI. Overseas Branch, Bombay* (2000) 6 SCC 385)].

13. Now coming to the facts of the case. The relevant provisions of the agreement entered into between the petitioner and the MPRRDA and the relevant clauses of the Bank Guarantee furnished by the petitioner are extracted below. Clause 32 of the bidding document provides for performance security. Clause 24 of the agreement provides for dispute redressal system and clause 25 of the agreement provides for arbitration.

> **"32. - Performance Security**
>
> 32.1 - Within 10 (ten) days after receipt of the Letter of acceptance, the successful Bidder shall deliver to the Employer a Performance Security of five percent of the Contract Price, for the period of five years and the time for completion of works plus additional security for unbalanced Bids in accordance with Clauses 27.3 and 27.4 of ITB and Clause 46 Part I General Conditions of Contract and sign the contract.
>
> 32.2 - The performance security shall be either in the form of a Bank Guarantee or fixed deposit Receipts, in the name of the Employer, from a Scheduled commercial bank.
>
> **"24. Dispute Redressal System.**

If any dispute or difference of any kind what-so-ever shall arises in connection with or arising out of this Contract or the execution of Works or maintenance of the Works thereunder, whether before its commencement or during the progress of Works or after the termination, abandonment or breach of the Contract, it shall, in the first instance, be referred for settlement to the competent authority, described along with their powers in the Contract Data, above the rank of the Engineer. The competent authority shall, within a period of forty-five days after being requested in writing by the Contractor to do so, convey his decision to the contractor. Such decision in respect of every matter so referred shall, subject to review as hereinafter provided, be final and binding upon the Contractor. In case the Works is already in progress, the Contractor shall proceed with the execution of the Works, including maintenance thereof, pending receipt of the decision of the competent authority as aforesaid, with all due diligence.

25. Arbitration

Either party will have the right of appeal against the decision of the competent authority, nominated under Clause 24, to the Madhya Pradesh Arbitration Tribunal constituted under Madhya Pradesh Madhyastham Adhikaran Adhiniyam 1983 provided the amount of claim is more than Rs.50,000/-."

14. The Bank Guarantee for performance security in terms of aforesaid clause 32.1 and 32.2 of the bidding document which has, been executed by the petitioner contains various clauses. Clauses 1, 2 3 and 6 of the Bank Guarantee which are relevant are extracted below which reads thus:-

Clause 1, 2, 3 and 6 of the Bank Guarantee :-

"1. In consideration to the Chief Executive Officer/ General Manager Madhya Pradesh Rural Road Development Authority (hereinafter called "the Authority) having agreed to exempt.....(Herein after called "the said Contractor(s)") from the demand, under the terms and

conditions of an Agreement dated.....made between.....And, for.....(hereinafter called "the said Agreement") security deposit for the due fulfillment by the said contractor (s) of the terms and conditions contained in the said agreement on production of Bank Guarantee for (Rupees.....only). We.....Bank Limited (hereinafter referred to as "the Bank") do hereby undertake to pay to Authority an amount not exceeding Rs.....Against any loss or damage caused to be suffered or would be caused to or suffered by Authority by reason of any breach by the said Contractor(s) of any terms of conditions contained in the said agreement.

2. We.....Bank Limited, do hereby undertaken to pay the amount due and payable under this guarantee without any demure merely on demand from the Authority starting that the amount claimed is due by way of loss or damage caused to or suffered by the Authority by reason of any breach by said Contractor(s) of any of the terms or conditions Contained in the said agreement or by reason of the Contractor(s) failure to perform the said agreement. Any such demand made on the bank shall be conclusive as regard the amount due and payable by the Bank under this guarantee. However, our liability under this guarantee shall be restricted to an amount not exceeding; Rs.....

3. We Bank.....further agree that the guarantee herein contained shall remain in full force and effect during the period that would be taken for the performance of the said agreement and that it shall continue to be enforceable till all dues of the Authority under or by virtue of the said Agreement have been fully paid and its claim satisfied or till Authority certifies that the terms of the said agreement have been fully and properly carried out by the said Contractor (s) and accordingly discharges the guarantee. Unless a demand or claim under this guarantee is made on in writing on or before the 15.02.2010 we shall be discharged from all liability under this guarantee thereafter.

4. .....

5. .....

6. We bank..... hereby unequivocally undertake that if the Authority invokes the guarantee the bank (issuing branch)..... will make the payment to the Authority without any reference and demur."

15. As noted above clause 24 and 25 of the agreement provides for a dispute redressal system and also provides for arbitration. According to these clauses in case of any dispute or difference between the contractor and the MPRRDA in connection with or arising out of the contract the same shall be referred to the competent authority of the MPRRDA. The decision of the competent authority has been made appealable at the instance of either party by way of arbitration before the Tribunal if the claim is of more than fifty thousand. Clause 32 of the bidding document requires furnishing of performance security of 5% of the contract price, which shall be either in the form of a Bank Guarantee or fixed deposit receipts. Failure to comply with the furnishing of Bank Guarantee or fixed deposit was to be treated as sufficient cause for cancellation of the award of contract and forfeiture of the earnest money. On going through the terms of the Bank Guarantee furnished by the petitioner as extracted above, we find that the Bank Guarantee is unconditional Bank Guarantee as the same is encashable on the very demand of the MPRRDA. It provides an undertaking by the Bank to pay to the MPRRDA the amount due and payable under the guarantee without any demur merely on a demand from the authority of the MPRRDA on stating that the amount claimed is due by way of loss or damage caused to or suffered by the authority by reason of any breach by the petitioner of any of the terms or conditions contained in the said agreement or by the reasons of petitioner's failure to perform the said agreement. The Bank Guarantee also provides that any such demand made on the Bank shall be conclusive as regards the amount due and payable by the Bank under the guarantee. It also provides unequivocal undertaking by the Bank that if the MPRRDA invokes the guarantee, the Bank will make the payment to the MPRRDA without any reference and demur. The terms of the Bank Guarantee are unequivocal and unconditional and recite that the amount would be paid without demur or objection and shall be conclusive as regards the amount due and payable

by reason of any breach of the contract or any terms or conditions contained in the agreement. In the circumstances in our considered view, the contention of the petitioner that in view of the fact that the matter is pending consideration before the Tribunal or the contention of the learned counsel for the petitioner in W.P. No.3349 of 2010 that the contract has not been terminated and merely on the basis of delay in work the Bank Guarantee is sought to be encashed and the same cannot be encashed, cannot be accepted. The Bank Guarantees being unconditional, the MPRRDA is the sole Judge regarding the question as to whether any breach of the terms of the contract was occurred. The encashment of the unconditional Bank Guarantees furnished by the petitioner towards performance security will not depend upon the adjudication of dispute. The contract of the Bank Guarantee by way of Performance Security entered into between the parties is independent of the main contract. In the circumstances the petitioner's prayer to restrain the respondents from encashing the Bank Guarantees is misconceived and cannot be accepted. This view find support from the law laid down in *Hindustan Steel Workers Construction Ltd. vs. State of Bihar* (supra), *Daewoo Motors India Ltd., Dwarikesh Sugar Industries Ltd.* (supra), *Hindustan Steel Workers Company vs. G.S. Atwal* (supra) and *Oil and Natural Gas corporation Ltd.* (supra).

16. Reliance of the learned counsel for the petitioner on the Full Bench judgment of this Court in the case of *BBVerma* (supra), is mis placed. The case of *BB Verma* (supra) is based upon entirely different footing. In that case, the Full Bench has held that a claim against the contractor for payment of sum or money under the contract cannot be recovered by the Government from the contractor as arrears of land Revenue invoking the provisions of M.P. Land Revenue Code, 1959 without a decision of Superintending Engineer or the Tribunal under the Adhiniyam where the contractor disputes the amount before the SE or the Tribunal. In the case of *BB Verma* (supra), question about encashment of the unconditional Bank Guarantee furnished as Performance Security on account of allegation of the breach of the terms of agreement or on termination of contract for such breach was not referred to and has not been decided. However in the present case as observed above, the petitioner having furnished the unconditional Bank Guarantees as Performance Security, the MPRRDA is entitled to encash the same for the alleged breach of the

conditions of the contract. In view of the terms of the Bank Guarantee the law laid down by the Supreme Court, the invocation of the Bank Guarantee cannot be ordered to be withheld till the matter is finally decided under the Dispute Redressal System provided under the contract.

17. In view of the aforssaid, we find no merit in the writ petition. The petition fails and is hereby dismissed with no orders as to costs.

Petition dismissed.

I.L.R. [2011] M. P., 1152
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice S.K. Seth
W.P. No. 12437/2010(Indore) decided on 9 November, 2010

SHRI RAM SWITCH GEAR PVT. LTD. ...Petitioner
Vs.
UJJAIN DEVELOPMENT AUTHORITY & anr. ...Respondents

***Tender - Judicial Review* - Petitioner failed to submit tender within time although he had sufficient time to get himself acquainted with system of e-tendering - Due to his own negligence he did not make proper and timely efforts firstly in getting its registration renewed and secondly in getting the DSC compatible with system adopted by respondent - *Held* - Petitioner itself being negligent in not getting itself informed at the earliest - No interference is called for - Petition dismissed.** (Paras 15, 16 & 17)

निविदा – न्यायिक पुनर्विलोकन – याची समय के भीतर निविदा प्रस्तुत करने में असफल रहा, यद्यपि ई– टेन्डरिंग (इन्टरनेट के जरिये निविदा) की प्रणाली से परिचित होने का उसके पास पर्याप्त समय था –स्वयं उसकी लापरवाही के कारण, उसने उचित एवं समय पर प्रयास नहीं किया, प्रथमतः अपना पंजीयन नवीनीकरण कराने और द्वितीयतः प्रत्यर्थी द्वारा अपनाई गई प्रणाली के साथ डी.एस.सी. का तालमेल बिठाने का – अभिनिर्धारित – शीघ्रता से स्वयं जानकारी प्राप्त न करके याची स्वयं असफल रहा – कोई हस्तक्षेप नहीं किया जा सकता – याचिका खारिज।

Case referred:

(2001) 2 SCC 451.

S.C. Bagadiya with *V.K. Jain,* for the petitioner.
A.K. Sethi with *Rahul Sethi,* for the respondent No.1.
Anand Pathak, for the respondent No. 2.

ORDER

The Order of the Court was delivered by SHANTANU KEMKAR, J. :–Petitioner, a company, engaged in the manufacturing of electrical equipments and in execution of electrical works contract, has filed this petition under Article 226 of the Constitution of India, seeking quashment of process of tender No. 13 and 14 (Annexure P-4 and P-5) issued by the first respondent with a further direction to the respondents to commence a fresh tendering process.

2. Brief facts necessary for disposal of this petition are stated as under :

3. The Government of M.P. has constituted an Agency namely - M.P. Agency for Promotion of Information Technology (for short, MAP_IT) which deals in the realm of information technology. The Agency is undertaking initiatives towards implementiing e-Governance in the State of M.P. One of the components of e-Governance for achieving transparency and increased competition in the tendering process is e-tendering. The said Agency MAP_IT in order to implement e-tendering service for the State Government, floated tender for selection of service provider of Electronic Tendering Services to the Government of M.P., its departments and its undertakings. The consortium of Wipro and second respondent - NEX Tenders (India) Pvt. Ltd. stood successful bidder. As a result, an agreement was entered into between MAP_IT and consortium of Wipro and NEX Tenders (India) Pvt. Ltd. for providing Electronic Tendering System and also to provide related training and support services to the users.

4. The first respondent - Ujjain Development Authority (for short, UDA) through the said consortium of Wipro and the second respondent NEX Tenders floated open tenders for execution of external electrification work at its Kshipra Vihar Scheme, Ujjain (tender No.13) and for the work of External Electrification at its Triveni Vihar Scheme, Ujjain (tender No. 14). For the said two tenders, those contractors, who were registered with the Portal of the Government of Madhya Pradesh and were having valid registrations, were entitled to participate in the tenders and submit their bids. As per the said NITs issued on 14.09.2010 (Annexures P-4 and P-5), the tenders were made available for downloading from 15.09.2010 till 6.10.2010. The last date for submitting the tender on-line was fixed to be 8.10.2010.

5. According to the petitioner company, it being eligible for submitting the tender, its representative contacted the second respondent on 4.10.2010 for procurement of tender document which was issued to the petitioner on 4.10.2010. Thereafter on 7.10.2010, when the petitioner tried to submit e-tender, an error was shown on its computer screen. In the circumstances, the petitioner's representative contacted the second respondent, who informed to the representative of the petitioner that the format of its digital signatures is not in accordance with the format, which was compatible with the working of the system of the second respondent. Thereafter on 8.10.2010 the petitioner submitted necessary documents for issuance of appropriate Digital Signature Certificate (for short, DSC) which was promptly issued to the petitioner on 8.10.2010 itself, however in the process before tie petitioner could submit its tender, the time for submission of e-tender was over and the petitioner could not submit its tender. Aggrieved, the petitioner has filed this petition.

6. The petitioner alleged that the respondents, though were informed about the technical difficulties faced by the petitioner in submitting the e-tender, wilfully avoided and delayed to assist the petitioner thereby, deprived the petitioner to submit the tender in time. It is a case of the petitioner that its DSC was a token based DSC, which was also an accepted system of DSC, in the circumstances, the second respondent should have accepted the petitioner's tender on the basis of DSC available with it and should not have insisted for DSC compatible to their system.

7. The respondents have filed replies. According to respondents, the DSC is an important means for encrypting data and authenticating electronic records and transactions as per Information Technology Act, 2000. As per the agreement entered into between MAP_IT and the consortium of Wipro and NEX Tenders (India) Pvt. Ltd., any person interested in submitting an on-line bid on an e-tendering system has to obtain the DSC. Prior to that the bidder has to register himself / itself with the Portal of the State Government which is required to be renewed on yearly basis for participating in e-tendering process.

8. It has been averred by the respondents that the petitioner was registered with the Portal of the State Government upto 31.07.2010. After expiry of the date of the registration on 31.07.2010, the petitioner was required to renew its registration / enrollment for a further period w.e.f. 1.08.2010. As

per the tenders invited by the first respondent UDA, those contractors, who were registered with the Portal of the State Government and having valid registrations, were entitled to participate in the tenders. The tenders were made available from 15.09.2010 to 6.10.2010. The last date for submitting on-line tender form was 8.10.2010. The petitioner did not renew its registration / enrollment till 4.10.2010. Thereafter, on 4.10.2010 the petitioner's representative visited the office of the second respondent at Bhopal and sought information regarding e-tendering and regarding DSC. The said Representative of the petitioner was informed by the representatives of the second respondent to submit proper set of documents along with Demand Draft of Rs.4,500/- for getting the DSC, which is compatible with the working of the system of the second respondent. It was made known to the said representative of the 'petitioner on 4.10.2010 itself that as per the system deployed by the second respondent, the petitioner is required to have Browser Based DSC. It was made known to the petitioner's representative that it has Token Based DSC which was not compatible with the system deployed by the second respondent. Thereafter, the petitioner got renewed its registration with the Portal of the Government of M.P. and down loaded the tender forms on 5.10.2010 and 6.10.2010 in respect of tender nos.13 and 14 respectively after purchasing the tender documents.

9. Thereafter, on 8.10.2010 at 11.25 am. the second respondent was informed by the petitioner through e-mail that the petitioner is facing problem in submission of the tender documents. At 11.54 am. the petitioner informed the second respondent that it has DSC from n-Code Solutions from Baroda (Gujarat) and the second respondent's system is not accepting the DSC. The petitioner at 3.21 p.m. sent the necessary documents required for getting DSC which is compatible with the system of the second respondent. After receipt of all the necessary documents from petitioner for getting DSC compatible with the system of the second respondent, though for issuance of DSC the period mentioned and needed is 7 days, but acting in the matter with great speed issued the requisite DSC to the petitioner on that day itself at 5.23p.m.

10. After receipt of the appropriate DSC. the petitioner attempted to submit the bids, but by that time, it was more than 5.30 p.m. and as such, the system did not accept the bids, as the time for submitting of the bid was up to 5.30 p.m., which was the time feeded in the system.

11. The petitioner has filed rejoinder and has re-iterated its stand taken in the petition.

12. Having considered the contentions raised by the learned counsel for the parties and. after perusal of the pleadings and the documents, we find no merit in this writ petition.

13. It is revealed from the submissions made by the parties that the second respondent has been authorised through government agency MAP__IT for undertaking the service of electronic tendering to government departments and agencies. The consortium of Wipro and second respondent - NEX Tenders (India) Pvt. Ltd. is working with the State Government since 2006 as would be clear from Annexure R-2/2. It is also revealed from the pleadings that the second respondent for proper functioning and understanding of the process of on-line tendering has conducted more than 1268 training sessions for the contractors and 1115 training sessions for department users. It is also revealed that the training sessions are being held by the respondent no.2 in their office at Bhopal every Saturday. It is also revealed from the pleadings that the Call Centres / Help Line number is available on the Portal for contractors to contact if any clarification is required of e-tendering process.

14. There is no denial to the contention raised by the respondents that prior to the present tender process, the petitioner did not participate in any e-tender process conducted by the second respondent. In the circumstances, on issuance of the NIT on 14.09.2010 the petitioner was supposed to have got itself acquainted with the process and procedure for e-tendering system adopted by the second respondent. The tenders were made available on-line from 15.09.2010. The petitioner had enough time from 15.09.2010 to 6.10.2010 to seek the aid and advice of the second respondent for the said purpose as was made known to all concerned. However, the petitioner was not vigilant; and it woke up at the fag end of the time for submission of tender. It is also revealed that the representative of the second respondent helped the petitioner so as to enable it to get the DSC compatible with the system of the second respondent, but as there was already delay on the part of the petitioner the time feeded in the system was over and as a result, the petitioner could not submit the bids.

15. Thus, we find that the petitioner though was having enough time to get itself acquainted with the system of e-tendering adopted by the second respondent, but due to its \ own negligence, in not making proper and timely efforts firstly in getting its registration renewed and secondly in getting the DSC compatible with the system adopted by the second respondent, failed to submit the bids within time fixed for the same.

16. In the case of *West Bangal State Electricity Board v. Patel Engineering Co. Limited and others* [(2001) 2 Supreme Court. Cases 451] the Supreme Court has carved out except ons to the general principle of seeking relief in equity on the ground of mistake by pointing out that (i) where the mistake might have been avoided by the exercise of ordinary care and diligence on the part of the bidder, but where the offeree of the bid has or is deemed to have knowledge of the mistake, he cannot be permitted to take advantage of such a mistake, (ii) Where the bidder on discovery of the mistake fails to act promptly in informing to the authority concerned and request for rectification, withdrawal or cancellation of bid on the ground of clerical mistake is not made before opening of all the bids. Keeping in view this principle, laid down by the Supreme Court, we find that the petitioner itself being negligent in not getting itself informed at the earliest, no case is made out to interfere into the matter. The petitioner should have acted with due diligence in getting the DSC compatible with the system of the second respondent.

17. Having regard to the aforesaid, in our considered view, no case is made out to interfere into the matter.

18. Accordingly, the petition fails and is hereby dismissed.

Petition dismissed.

I.L.R. [2011] M. P., 1158
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice S.K. Seth
W.P. No. 666/2003(Indore) decided on 10 November, 2010

JAIDEEP GLASS WORKS PVT. LTD.(M/S) ...Petitioner
Vs.
COMMISSIONER OF COMMERCIAL TAX,
INDORE & ors. ...Respondents

***Commercial Tax Act, M.P. 1994 (5 of 1995), Section 22 - Exemption - modus operandi* - Whether facility of exemption can be availed in respect of such quantum of goods which is in excess of 100% of original installed capacity - *Held* - Commercial Deptt. itself has taken a view that in case of expansion of unit the base production capacity and expanded capacity has to be taken into consideration - Order Cancelling registration of certificate quashed.** (Paras 7, 8 & 10)

वाणिज्यिक कर अधिनियम, म.प्र. 1994 (1995 का 5), धारा 22 – छूट – कार्य प्रणाली – क्या ऐसे माल की मात्रा के संबंध में छूट की सुविधा उपभोगी जा सकती है, जो मूल प्रतिष्ठापित क्षमता के 100 प्रतिशत से अधिक है – अभिनिर्धारित – वाणिज्यक विभाग ने स्वयं यह दृष्टिकोण अपनाया है कि इकाई के विस्तार के मामले में मूल उत्पादन क्षमता एवं विस्तारित क्षमता को विचार में लेना होता है – प्रमाणपत्र के पंजीयन को रद्द करने वाला आदेश अभिखंडित।

Cases referred :

(2007) 10 VST 656 SC, (2006) 9 STJ 337 SC, AIR 1993 SC 2414.

G.M. Chaphekar with P.B.S. Nair, for the petitioner.
Vivek Patwa, Dy. G.A., for the respondents.

ORDER

The Order of the Court was delivered by SHANTANU KEMKAR, J. :–The petitioner, a company, having a polyester viscose blended yarn manufacturing unit at Pithampur has filed this petition, challenging the order dated 31.03.2003 (Annexure P-12) passed by the second respondent -Commercial Tax Officer, Indore, cancelling its registration certificate issued under M.P. Commercial Tax Act, 1994 (for short, Commercial Tax Act) and the Central Sales Tax Act, 1956 (for short, CST Act) the Circular dated 30.09.2002 (Annexure P-5), 28.02.2003 (Annexure P-7) and 11.03.2003 (Annexure P-8) issued

by the first respondent - Commissioner, Commercial Tax and also orders dated 30.04.2003 (Annexure P-15), 30.04.2003 (Annexure P-16) passed by the Deputy Commissioner of Commercial Tax (Division II), Indore by which the order dated 31.03.2003 (Annexure P-12) passed by the second respondent has been affirmed.

2. Briefly stated, a notice dated 27.03.2003 (Annexure P-3) was issued to the petitioner to show cause as to why its registration as dealer under the Commercial Tax Act and CST Act, be not cancelled. The petitioner submitted its reply (Annexure P-10) dated 31.03.2003 and filed a Writ Petition No.518 of 2003 before this Court challenging the said show cause notice. On 8.04.2003, the said writ petition was dismissed with following directions :-

> **"In this petition petitioner is challenging Annexure P/9, a show cause notice dated 27.03.2003. The submission of Shri Chaphekar is that he has already filed the reply but his apprehension is that the authority even without passing an order will take action against him.**
>
> **Learned counsel Shri Mukati submitted that it is not possible for the authority to take any action even without passing order on the show cause notice. Therefore, at this stage, the petitioner cannot say that the authority is taking any action against him without passing any order. Therefore, the submission of Shri Chaphekar, L/C for the petitioner appears to be pre-mature. It is expected from the authority concerned to decide the show cause notice in accordance with law within a reasonable time. With the observation as aforesaid, this petition is dismissed without 'any order as to costs."**

3. However, the second respondent Commercial Tax Officer without considering the petitioner's reply vide impugned order dated 31.03.2003 (Annexure P-12) cancelled the petitioner's registration as dealer. Aggrieved, the petitioner filed revisions challenging the said order dated 31.03.2003 and also filed the present writ petition.

4. During the pendency of the writ petition the petitioner's revisions

have been dismissed. The petitioner has brought on record the orders AnnexureP-15 and P-16 passed in the revision by way of an application dated 1.05.2003 for taking additional documents on record and has also challenged the said orders Annexures P-15 and P-16 by way of amendment. 5. The petitioner has also filed yet another application on 6.10.2010 for taking additional documents on record to bring to the notice of this Court that now during the pendency of this petition the respondent department has already taken a view in favour of the petitioner and contrary to the circulars (Annexures P-7 and P-8) and also contrary to the orders (Annexures P-15 and P-16). All the three applications have been allowed and the matter has been heard with consent of the parties on merits taking into consideration the orders which are challenged and the orders which are brought on record.

6. Undisputedly, the petitioner established a unit at Pithampur in the year 1991 with installed capacity of 12400 spindles (1272 MT) and is eligible for exemption from payment of sales tax in view of notification dated 6.10.1994 (Annexure P-l) issued under section 12 of M.P. General Sales Tax Act, 1958. On the basis of the expansion project implemented by the petitioner, it installed additional high capacity of 6969 spindles (1178 MT) with project cost of approximately Rs.365.80 Lakhs. On the basis of the expansion an eligibility certificate (Annexure P-2) dated 9.11.2000 was issued to the petitioner to the effect that the unit will be eligible for exemption of capacity 6960 spindles and 1178 MT and the facility will be available to the unit after achieving 100% original installed capacity i.e. 12400 spindles and 1272 MT.

7. The dispute in the present matter is relating to modus operandi to avail the exemption on the basis of the said certificate dated 9.11.2000 (Annexure P-2) issued to the petitioner after expansion. There is no dispute about the original installed capacity or about expanded capacity. The stand of the respondent is that as per the circulars (Annexures P-5, P-7 and P-8) issued by the Commissioner, Commercial Tax Department of the Government of M.P., from time to time the facility of exemption can be availed in respect of such quantum of goods which is in excess of 100% of the original installed capacity and unless a dealer having an existing industrial unit with a particular production capacity exceeds such production capacity and produces goods over and above 100% of its original installed capacity, facility of exemption cannot be availed in

respect of expanded capacity unless first the manufacture process achieves production equal to 100% of its original installed capacity. It is the case of the respondents that the petitioner did not submit correct returns as the facility of exemption in respect of expansion of unit was available to the petitioner only after crossing the production equivalent to its original annual installed capacity, in the circumstances its registration was cancelled vide order dated 31.03.2003 (Annexure P-12) and the said order has been rightly affirmed in revision by the revisional authority vide orders dated 30.04.2003 Annexures P-15 and P-16.

8. Learned Senior Counsel for the petitioner placed reliance on the judgments of the Supreme Court in the case of *Commissioner of Trade Tax, U.P. vs. Malviya Chemical and Pharmaceutical Private Limited* [2007] 10 VST 56 (SC) and also in the case of *Commissioner of Trade Tax, U.P. v. Modipan Fibres Company* (2006) 9 STJ 337 (SC) in which it has been held that :-

> **"Purpose of granting exemption under the notification dated 27.07.1999 was to promote the development of certain industries in the State. By the said notification exemption from payment of tax or reduction in rate of tax was granted to new units as also to the units which had undertaken expansion, diversification or modernization. The units of dealers in all the revisions are units, which had undertaken expansion / modernization. The units of the dealers (respondents) are covered by clause (l-B)(a) of the notification. Exemption granted is on the turnover of sales of quantity of goods manufactured in excess of base production. Under clause 6(a) of the said notification, turnover of sale of goods in any assessment year to the extent of quantity covered by the base production of that year and balance stock of base production of previous years, shall be deemed to be turnover of the base production. Under clause 6(b) of the notification, the facility of exemption can be availed on the turnover of goods in 'any assessment year' in excess of the quantity referred to in sub-clause (a) of clause 6. A conjoint reading of clause (l-B)(a), clause**

6(a) & (b) makes it clear that the dealer is entitled to claim exemption in respect of the turnover of sale of goods of an assessment year in excess the base production. 'Assessment year has been defined in Section 3(j) to mean the twelve months ending on March, 31. If that be the case then the extent of entitlement of exemption will depend on the sale of goods in the assessment year minus the base production determined under the Act. Simply because dealer has to file returns from month to month and deposit the admitted tax at the time of filing of the return does not mean that question of exemption on the turnover of the production in excess of the base production can be considered only after the base production is achieved. Returns filed every month and the tax paid would be subject to adjustment at the time of the finalization of the assessment. Intention of the notification is to give exemption on the turnover of sale of goods in an assessment year in excess of the base production. We do not find any substance in the submission advanced on behalf of the appellants."

He pointed out that the respondent Commercial Tax Department itself has taken a view in consonance with the judgment of the Supreme Court and vide orders Annexures P-18 and P-19 which have been passed during the pendency of this writ petition has held that the petitioner is entitled to exemption on the turnover of sale of goods of an assessment year in excess of the base production by holding thus :-

माननीय सर्वोच्च न्यायालय के उपरोक्त निर्णय के संदर्भ में कर निर्धारण अधिकारी द्वारा मूल क्षमता का उत्पादन तिथि निश्चित करते हुए निर्धारित करना उचित नहीं है । माननीय सर्वोच्च न्यायालय कि उपरोक्त निर्णय में करदाता को विस्तारित क्षमता पर कर मुक्ति की सुविधा प्राप्त थी । कर निर्धारण अधिकारी द्वारा इस छूट का लाभ मूल क्षमता के बराबर उत्पादन होने के पश्चात ही दिया गया । माननीय सर्वोच्च न्यायालय द्वारा यह निर्णित किया गया कि नवीन इकाई एवं विस्तार अंतर्गत छूट की सुविधा उद्योगों के विकास के उद्देश्य से दी गई है । इस उद्देश्य को ध्यान में रखते हुए करदाता को अपने विस्तार के संबंध में कर निर्धारण वर्ष में उत्पादित कुल माल में से मुल उत्पादन क्षमता कम करने के पश्चात् छूट

का लाभ मिलना चाहिये । किंतु सिर्फ इस वजह से कि करदाता को मासिक विवरण पत्र दाखिल करना है एवं मासिक कर जमा करना है, विस्तार अंतर्गत छूट का लाभ मूल उत्पादन क्षमता होने के बाद दिया जाना सही नहीं है । करदाता द्वारा भरे गये मासिक विवरण पत्र एवं जमा किया गया कर, कर निर्धारण के समय वास्तविक देय कर के विरुद्ध समायोजित किया जा सकता है । उद्देश्य यह है कि वर्ष में मूल उत्पादन क्षमता से अधिक उत्पादित माल पर छूट प्राप्त होना है । अतः विभाग की इस आपत्ति में काई बल नहीं है कि विस्तार अंतर्गत छूट का लाभ मूल क्षमता के बराबर उत्पादन होने के पश्चात् ही प्राप्त होगा ।

अतः सर्वोच्च न्यायालय के उपरोक्त निर्णय अनुसार इसमें भी अन्तर्राज्यीय विकय जो कि मूल क्षमता एवं विस्तारित क्षमता में एक साथ हुआ है, को विचार में लिया जाना चाहिए ।

9. Having regard to the aforesaid law laid down by the Supreme Court and the subsequent orders passed by the respondents in the petitioner's case itself, we are of the view that the impugned order of cancellation of the registration (Annexure P-12) and the orders passed in Revision (Annexures P-15 and P-16) maintaining the said order of cancellation are liable to be quashed. Similarly, the circulars. (Annexures P-5, P-7 and P-8) issued by the respondents being contrary to the law laid down by the Supreme Court in the case of *Commissioner of Trade Tax, U.P. v. Modipan Fibres Company* (supra) and *Commissioner of Trade Tax U.P. vs. Malviya Chemical and Pharmaceutical Private Limited* (supra) the same cannot be sustained in view of the observations of the Supreme Court in the case of *Bengal Iron Corporation and another vs. Commercial tax Officer and others* (AIR 1993 SC 2414) which reads thus :-

> **"Clarifications / Circulars issued by the Central Government and / or State Government regarding taxability of certain item represent merely their understanding of the statutory provisions. They are not binding upon the Courts. Though those clarifications and circulars were communicated to the concerned dealers but even so nothing prevents the State from recovering the tax, if in truth such tax was leviable according to law. There can be no estoppal against the statute. The understanding of the Government, whether in favour or against the assessee,**

is nothing more than its understanding and opinion. It is doubtful whether such clarifications and circulars bind the quasi-judicial functioning of the authorities under the Act. While acting in quasi-judicial capacity, they are bound by law and not by any administrative instructions, opinions, clarifications or circulars. Law is what is declared by Supreme Court and the High Court - to wit, it is for Supreme Court and the High Court to declare what does a particular provision of statute say, and not for the executive. Of course, the Parliament / Legislature never speaks or explains what does a provision enacted by it means."

10. Accordingly, the impugned orders Annexure P-12, P-15 and P-16 and the impugned circulars Annexures P-5, P-7 and P-8 are liable to be and are hereby quashed. The petition is allowed. No order as to the costs.

Petition allowed.

I.L.R. [2011] M. P., 1164
WRIT PETITION
Before Mr. Justice S.C. Sharma
W.P. No.6626/2010(S) (Indore) decided on 25 November, 2010

RAJMAL RATHORE & ors. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

A. Service Law - Recruitment - **Executive Instructions - Executive Instructions cannot override statutory rules.** (Para 8)

क. सेवा विधि – भर्ती – कार्यपालिक अनुदेश – कार्यपालिक अनुदेश कानूनी नियमों के अभिभावी नहीं हो सकते।

B. Service Law - Recruitment - Jan Shiksha Adhiniyam, M.P. 2002, Section 2(k), Jan Shiksha Niyam, M.P. 2003 - Rule 13 - Eligibility criteria - Whether can be modified by executive instructions - **Rules, 2003 providing qualifications for the post of Jan Shikshaks - By executive instructions dated 24-5-2010 only a particular class of teachers permitted to participate in the process of selection leaving petitioners who are otherwise eligible under Rules, 2003 -*Held* - Directions contrary to**

the provisions of Act, Rules cannot be issued - Condition introduced by Executive Instructions set aside. (Paras 10 & 11)

ख. सेवा विधि – भर्ती – जन शिक्षा अधिनियम, म.प्र. 2002, धारा 2(के), जन शिक्षा नियम, म.प्र. 2003 – नियम 13 – पात्रता मानदण्ड – क्या कार्यपालिक अनुदेशों द्वारा उपांतरित किया जा सकता है – नियम 2003, जन शिक्षकों के पद के लिए अर्हता उपबंधित करता है – दिनांक 24.05.2010 के कार्यपालिक अनुदेशों द्वारा केवल विशिष्ट वर्ग के शिक्षकों को चयन प्रक्रिया में सम्मिलित होने की अनुमति, याचियों को छोड़कर जो कि नियम 2003 के अंतर्गत अन्यथा पात्र हैं – अभिनिर्धारित – अधिनियम, नियम के उपबंधों के विपरीत, निर्देश जारी नहीं किये जा सकते – कार्यपालिक अनुदेशों द्वारा पुरः स्थापित शर्तें अपास्त।

Cases referred :

(2009) 12 SCC 49, (2007) 13 SCC 606, (2008) 8 SCC 765.

P.R. Bhatnagar, G.P. Singh, Akash Sharma, Sanjay Zamindar, K. Bhargava, for the petitioners.

Anjali Jamkhedkar, G.A., for the respondent/State.

ORDER

S.C. SHARMA, J. :–Regard being had to the similarity in the controversy involved in the present bunch of cases they were heard analogously together and by a common order all the writ petitions are being disposed of by this court. Facts of WP NO. 9301 / 2010 are stated as under :

2. The petitioner before this court has filed this present petition being aggrieved by an advertisement dt. 24/5/10. The contention of the petitioner is that they are working as Samvida Shala Shikshak, Grade III and they were appointed after facing a process of selection as provided under the provisions of M.P. Panchayat Shiksha Karmi (Recruitment & Conditions of Service) Rules, 1998. Petitioners have further stated that they were confirmed also on the post of Shiksha Karmi and later on the designation of Shiksha Karmi was changed to Sahayak Adhyapak. It is pertinent to note that some of the teachers in other identical cases are Asstt. Teachers working in the School Education Department of the State of MP. The contention of the petitioner is that the State Government has enacted M.P. Jan Shiksha Adhiniyam, 2002 and thereafter Rules have been framed under the Adhiniyam of 2002 known as MP JanShiksha Niyam, 2003. The petitioners have further stated that Rule 13 of the aforesaid Rules

provides for appointment of Jan Shikshak and the following qualifications have been prescribed for the post of Jan Shikshak under the Rules of 2003.

13. Jan Shikshak :

(1) A teacher of one of the schools of Jan Shiksha Kendra shall be designated as Jan Shikshak, to act as coordinator between the schools and the Jan Shiksha Kendra, Jan Shiksha Prabhari shall send a list of names of three persons to the Janpad Shiksha Kendra. A committee comprising of the Education Programme Officer – I, Block In Charge from the District Institute of Education and Training and the Janpad Shiksha Kendra Coordinator shall select one person from the list. The Janpad Shiksha Kendra shall nominate the Jan Shikshak on the recommendation of the committee.

(2) Following points shall be considered while nominating the Jan Shikshak :

(a) Names of assistant teachers, Upper Division Teacher and Shiksha Karmi grade-2 or 3 (regular) shall be proposed for the post of Jan Shikshak.

(b) Only D. Ed., and B. Ed., trained persons shall be proposed for the nomination of Jan Shikshak.

(c) Age of the person, recommended for the post of Jan Shikshak should normally be below 50 years.

(d) The person proposed for the nomination of Jan Shikshak must have 5 years of teaching experience in school.

(3) The Jan Shikshak shall be nominated for a minimum period of 3 years. After the stipulated period of 3 years the Jan Shikshak may continue to hold the post till the nomination of his successor.

(4) The Janpad Shiksha Kendra can remove the Jan Shikshak with the permission of the Zila Shiksha Kendra if he / she is irresponsible towards his / her duties, found incompetent to perform the expected activities and due to other administrative reasons.

3. The petitioners grievance is that the aforesaid statutory provisions of law permits the Asstt. Teacher, Upper Division Teacher, Shiksha Karmi Grade II and III to participate in the process of selection for the post of Jan Shikshak. However, the impugned advertisement only permits teachers in the pay scale of Rs. 5000 – 8000 and teachers in the pay scale of Rs. 4000 – 6500 to participate in the process of selection. Learned counsel for the petitioner has argued before this Court that the State Government cannot modify the eligibility criteria prescribed under the Rules of 2003 by issuing an executive instructions without amending the recruitment Rules of 2003 or the Act of 2002. A reply has been filed on behalf of respondent State and the contention of the respondents is that the State Government has amended the MP Jan Shikshak Adhiniyam 2002 by enacting M P Jan Shikshak Sanshodhan Adhiniyam 2010 and the Rules have also been amended and a notification to that effect has been issued on 23/6/10. The contention of the respondent State is that by virtue of the aforesaid amendment the teachers or Adhyapaks are only entitled to participate in the process of selection. It has also been argued before this court that executive instructions were issued by the State Education Centre and as per the executive instructions dt. 24/5/10 teachers in the pay scale of Rs.5000 – 8000 and teachers in the pay scale of Rs.4000 – 6500 are alone entitled to participate in the process of selection. The respondents have prayed for dismissal of the writ petition.

4. Heard learned counsel for the parties at length and perused the record. The matter is being disposed of with the consent of the parties at the admission stage itself.

5. In the present case the MP Jan Shiksha Adhiniyam 2002 has been enacted to translate the Constitutional vision of the right of every child to access elementary education of quality and to provide for decentralised planning and participatory management of elementary and adult education redefining roles and creating institutions sensitive to the needs of quality education for all. The State Government has established various Jan Shiksha Kendra under the Adhiniyam of 2002. The Adhiniyam also defines a Teacher u/S. 2(k) and the same reads as under :

> 2. (k)"Teacher" means any member of the teaching staff of a school known by any name as approved by Government and duly appointed to teach in that school.

6. The Rules have been framed under the Adhiniyam of 2002 known as MP Jan Shiksha Adhiniyam 2002 and a procedure has been prescribed for appointing Jan Shikshaks in respect of Jan Shiksha Kendra. Rule 13 of the aforesaid Rules prescribes qualification for the post of Jan Shikshak and the same reads as under :

जन शिक्षकः–

(1) जनशिक्षा केन्द्र के स्कूलों में से एक स्कूल का शिक्षक, स्कूलों तथा जन शिक्षा केन्द्र के बीच समन्वयक के रूप में कार्य करने के लिए जनशिक्षक के रूप में अभिहित किया जाएगा। जन शिक्षा प्रभारी तीन व्यक्तियों के नाम की एक सूची जनपद शिक्षा केन्द्र को भेजेगा। शिक्षा कार्यकम अधिकारी–1 जिला शिक्षा तथा प्रशिक्षण संस्थान के प्रभारी और जनपद शिक्षा केन्द्र समनव्यक से मिलकर बनने वाली समिति की सिफारिश पर एक व्यक्ति का चयन करेगी। जनपद शिक्षा केन्द्र, समिति को सिफारिश पर जनशिक्षक नाम निर्देशीत करेगा।

(2) जन शिक्षक को नामनिर्देशीत करते समय निम्नलिखित बातों पर विचार किया जाएगा।

(क) सहायक शिक्षक, उच्च श्रेणी शिक्षक तथा शिक्षा कर्मी श्रेणी–2 अथवा 3(नियमित) के नाम जन शिक्षक के पद के लिए प्रस्तावित किए जाएंगे।

(ख) केवल डी एड तथ बी एड प्रशिक्षित व्यक्ति, जन शिक्षक के नाम निर्देशन के लिए प्रस्तावित किए जाएंगे।

(ग) जन शिक्षक के पद के लिए सिफारिश किए गए व्यक्ति की आयु सामान्यतः 50 वर्ष से कम होनी चाहिए।

(घ) जन शिक्षक के नाम निर्देशन के लिए प्रस्तावित व्यक्ति को स्कूल में अध्यापन का 5 वर्ष का अनुभव होना आवश्यक है।

(3) जनशिक्षक 3 वर्ष की न्यूनतम कालावधि के लिए नामनिर्देशीत किया जाएगा। जनशिक्षक 3 वर्ष की नियत कालावधि के पश्चात् उसके उत्तराधिकारी के नाम–निर्देशन तक पद पर बना रहेगा।

(4) जनपद शिक्षा केन्द्र, जनशिक्षक को यदि वह अपने कर्तव्यों के प्रति गैर–उत्तराधिकारी है, उससे अपेक्षित गतिविधियों को पूरा करने में अक्षम पाया गया है अथवा अन्य प्रशासनिक कारणों से जिला शिक्षा केन्द्र की अनुज्ञा से हटा सकेगा।

7. The M P Jan Shikshak Adhiniyam 2002 was amended by enacting M P Jan Shikshak Sanshodhan Adhiniyam 2010 and the MP Jan Shikshak Niyam 2003 were also amended and notified vide notification dt. 23rd

June 2010. Rule 13 relating to qualifications for the post of Jan Shikshaks has also been amended and it provides that the Jan Shikshaks shall be selected from amongst teachers or Adhyapaks. It is pertinent to note that the amendment under the Rules also does not provide for a particular pay scale. It only provides for selecting Jan Shikshaks from teachers or Adhyapaks. The petitioners are certainly teachers as they were working on the post of Asstt. Teacher, Shikshak Grade I, II and III keeping in view the definition as contained u/S. 2(k) of the Adhiniyam of 2002. The qualification for holding a particular pay scale was introduced for the first time by way of an executive instruction dt. 24/5/10 and the executive instruction issued by the Commissioner, Rajya Shiksha Kendra does mention for an amendment under the Rules. However, no amendment as on date has been made in the Rules of 2003 incorporating the qualification of having a particular pay scale ie., Rs.5000 – 8000 and Rs.4000 – 6500, meaning thereby the aforesaid qualification for the first time was introduced by way of an executive instruction. The apex court in the case of *State of Rajasthan and others Vs. Jagdish Narain Chaturvedi* (2009) 12 SCC 49 in para 8 has held as under :

> 8. It needs to be noted that there is no scope for raising an issue that executive instructions can override the Rules. The law is to the contrary. The Notification dated 3-4-1993 speaks of "in accordance with recruitment rules". Clarification was necessary because of doubts regarding regular appointment. It is made clear that the period rendered in the existing cadre before regular employment in accordance with the relevant recruitment rules to the post is because of change of cadre the previous period is not counted so there is no question of giving the benefit to ad hoc employees and the appointment letters which were illustratively filed indicate that the appointments were till regular appointment was made.

8. The apex court in the aforesaid case has held that the executive instructions cannot over ride statutory rules and therefore the executive instructions issued by the Commissioner cannot certainly over ride the Rules framed under the Adhiniyam of 2002 namely; Jan Shiksha Rules 2003. The apex court in the case of *State of Haryana Vs. Mahender Singh and others* (2007) 13 SCC 606 in paragraph 39 has held as under :

39. It is now well settled that any guidelines which do not have any statutory flavour are merely advisory in nature. They cannot have the force of a statute. They are subservient to the legislative Act and the statutory rules. (See *Maharao Sahib Shri Bhim Singhji v. Union of India, J.R. Raghupathy v. State of A.P. and Narendra Kumar Maheshwari v. Union of India)*

9. The apex court in the case of *New Delhi Municipal Council and others Vs. Tanvi Trading and Credit Private Ltd., and others* (2008) 8 SCC 765 in para 35 has held as under :

35. Even assuming that the LBZ guidelines are not relatable to the DD Act or the NDMC Act, the Central Government undoubtedly could, in exercise of executive power introduce these guidelines. At this stage, it would be instructive to refer to the extent of executive power of the Union as provided in Article 73 of the Constitution. Article 73 inter alia provides that, subject to the provisions of the Constitution, the executive power of the Union extends to the matters with respect to which Parliament has power to make laws. Parliament has enacted the Delhi Development Act, 1957 and the New Delhi Municipal Council Act, 1994. Article 73 does not define what an executive function is, neither does it mention the matters over which the executive power is exercised. The extent defined in Article 73 is not exhaustive. The Union Government has power to issue executive directions relating to the matters dealt with under the DD Act, 1957 and the NDMC Act, 1994, though the directions contrary to the provisions of those Acts cannot be issued. The executive power of the Union, under Article 73 extends to the matters with respect to which Parliament has power to make laws and hence, the field in which law could have been made, executive instructions may be issued in the absence of legislation in the field or if there is existing legislation, then to supplement it.

10. In the aforesaid case it has been held that the Union Government

was having the power to issue executive direction relating to the matters dealt with under Delhi Development Act, 1957 and NDMC Act 1994. However, the directions contrary to the provisions of the Act could not have been issued. In the present case the respondents have framed Rules under the Adhiniyam of 2002 providing qualifications for the post of Jan Shikshaks and by issuing executive instructions dt. 24/5/2010 only a particular class of teachers are being permitted to participate in the process of selection who are otherwise eligible under the Adhiniyam of 2002 and under the Rules of 2003.

11. Resultantly the condition introduced by way of executive instructions is set aside. The petitioners if they are otherwise eligible shall be permitted to join the post of Jan Shikshaks in case they are selected on merits. It is needless to mention that the respondents while considering the cases of the petitioners and while finalising the list, shall strictly adhere to the qualifications prescribed under the Rules of 2003 read with the provisions of Adhiniyam of 2002 and the respondents shall not incorporate any new condition relating to appointment on the post of Jan Shikshaks or shall not impose any restrictions in the matter of appointment of Jan Shikshaks disqualifying a particular candidate which is not in existence under the Rules of 2003 and under the Adhiniyam of 2002.

12. With the aforesaid writ petition stands allowed. No order as to costs.

13. This order be retained in WP No. 6626/10(s) and a copy each be placed in the record of connected petitions.

Petition allowed.

I.L.R. [2011] M. P., 1171
WRIT PETITION

Before Mr. Justice Abhay M. Naik & Mr. Justice S.N. Aggarwal
W.P. No.2128/2007(S) (Gwalior) decided on 1 December, 2010

NATIONAL FERTILIZERS LIMITED & anr. ...Petitioners
Vs.
RAJVENDRA SINGH CHAUHAN & ors. ...Respondents

A. ***Industrial Relations Act, M.P. (27 of 1960), Section 31(3), Schedule II - Promotion*** **- Maintainability of application filed before**

Labour Court challenging his non-promotion without seeking quashment of order of promotion of juniors - *Held* - Section 31(3) enables an employee to make application not only to challenge the propriety/legality of an order but also enables him to dispute the proprietary/legality of action taken by his employer acting or purporting to act under Standing Orders or rules or regulations governing service conditions of employees - Application submitted by respondent no.1 maintainable. (Para 10)

क. औद्योगिक संबंध अधिनियम, म.प्र. (1960 का 27) धारा 31(3), अनुसूची *II* – पदोन्नति – कनिष्ठों की पदोन्नति के आदेश का अभिखंडन-चाहे बिना अपनी पदोन्नति न किये जाने को चुनौती देते हुए, श्रम न्यायालय के समक्ष प्रस्तुत आवेदन की पोषणीयता – अभिनिर्धारित – धारा 31(3) कर्मचारी को आवेदन करने की समर्थता प्रदान करता है, न केवल आदेश के औचित्य/वैधता को चुनौती देने के लिए बल्कि कर्मचारियों की सेवा शर्तों को शासित करने वाले स्थायी आदेशों या नियमों या विनियमनों के अंतर्गत कार्य करते हुए अथवा तात्पर्यित कार्य करते हुए उसके नियोक्ता द्वारा की गई कार्यवाही के औचित्य/वैधता को विवादित करने के लिए भी समर्थता प्रदान करता है – प्रत्यर्थी क्रं 1 द्वारा प्रस्तुत आवेदन पोषणीय।

***B. Industrial Relations Act, M.P. (27 of 1960), Section 31* - Direction for promotion - Petitioners failed to adduce evidence with regard to unsuitability of respondent no.1 for promotion - Direction for promotion could have been legally given.** (Paras 14 &15)

ख. औद्योगिक संबंध अधिनियम, म.प्र. (1960 का 27) धारा 31 – उन्नति के लिए निदेश – पदोन्नति के लिए प्रत्यर्थी क्रं. 1 की अनुपयुक्तता के संबंध में याची साक्ष्य पेश करने में असफल रहे – पदोन्नति के लिए विधितः निदेश दिया जा सकता था।

Cases referred:

1982 SCC (L&S) 42, 1979 SCC (L&S) 126.

Prashant Sharma, for the petitioners.

Ravi Jain, for the respondent No.1.

ORDER

The Order of the Court was delivered by ABHAY M. NAIK, J. :– This petition under Article 227 of the Constitution of India has been preferred against the order dated 30th October 2006 passed by the M.P. Industrial Court Bench at Gwalior in C.A.No.52/2004

2. Respondent No.1, who was working on the post of Technician Grade

I in the services of the petitioners, submitted an application under Sections 31,61, and 62 of the Madhya Pradesh Industrial Relations Act 1960 (for brevity "M.P.I.R.Act) mainly with allegations that respondents No.2 and 3 despite being junior to him were promoted as Senior Technician. He prayed that the action on the part of the petitioners in promoting respondents No.2 and 3 on the post of Senior Technician and further inaction on their part in not promoting respondent No.1 on the said post may be declared illegal. Consequential prayer has also been made for promotion as well as higher pay grade from the date when respondents No.2 and 3 were promoted.

3. Aforesaid was opposed mainly on the ground that the application under Section 31 of M.P.I.R.Act 1960 is not maintainable; secondly, respondent No.1 was not found suitable for promotion by the Departmental Promotion Committee.

4. Labour Court No.3, Gwalior vide its order dt. 20th October 2000, allowed the application and directed the petitioner to promote respondent No.1 from the date prior to the promotion of respondents No.2 and 3 and further to pay the difference of pay.

5. Petitioner preferred appeal No.28/MPIR/2001, which was partly allowed vide order dt. 16th May 2002. Matter was remitted back to the Labour Court with the direction to raise additional issue and to decide it thereafter in accordance with law. Thereafter, the Labour Court No.3, Gwalior vide order dt. 23.2.2004 again allowed the application of respondent No.1 and directed for his promotion prior to the promotion of respondents No.2 and 3. Additionally, it was directed that respondent No.1 may be paid the difference of salary from the date of promotion.

6. Aggrieved by the aforesaid, petitioner submitted C.A.No.52/2004, which having been dismissed, the present Writ Petition is preferred under Article 227 of the Constitution of India.

7. Shri Prashant Sharma, learned counsel for the petitioners submitted that the application under Section 31 (3) of the M.P.I.R. Act submitted by respondent No.1 is not maintainable and the same ought to have been dismissed.

8. Section 31 of M.P.I.R. Act reads as under :-

"**31. Notice of change.**-(1) An employer intending to effect any change in respect of an industrial matter specified in Schedule I shall give notice of such intention in the prescribed form and manner to the representative of employees and to such other persons as may be prescribed.

(2) A representative of employees desiring a change in respect of an industrial matter, which is neither covered by standing orders nor is specified in Schedule II, shall give notice thereof in the prescribed manner to the employers concerned and to such other persons as may be prescribed.

(3) A representative of employees or an employee desiring a change in respect of an industrial matter specified in Schedule II or any other matter arising out of such change may make an application to Labour Court in such manner as may be prescribed."

A perusal of the aforesaid goes to show that sub section (1) and (2) obliges an employer and representative of employees respectively to give notice in case if they intend or desire to effect any change in respect of an industrial matter in a situation enumerated therein, whereas sub section (3) enables an employee also desiring a change in respect of an industrial matter specified in Schedule II or any other matter arising out of such change to make an application to Labour Court in such manner as may be prescribed. For the purpose of sub section (3), Schedule II becomes significant, which is reproduced below :-

SCHEDULE II

(Section 31)

1. The propriety or legality of an order passed or action taken by an employer acting or purporting to act under the standing orders or any rules or regulations governing the conditions of service of the employees.

2. Adequacy and equality of materials and equipment supplied to the employees.

3. Health, safety and welfare of employees (including water, dining sheds, rest sheds, latrines, urinals, creches, restaurants and such other amenities).

4.Matters relating to trade union organisation, membership and levies.

5.Construction and interpretation of awards, agreements and settlements.

6.Employment including -

(i) reinstatement and recruitment;

(ii) unemployment of persons previously employed in the industry concerned.

7.Payment of compensation for closure, lay-off and retrenchment.

8.Assignment of work and transfer of employees within the undertaking.

9. Shri Prashant Sharma, learned counsel appearing for the petitioner contended that respondent No.1 in his application submitted before the Labour Court did not seek the relief of quashment of the order of promotion of respondents No.2 and 3. In the absence of such prayer, it has been submitted that the application under Section 31 of M.P.I.R.Act was and is liable to be rejected. It has been further contended by the learned counsel that the question of promotion is not covered by any of the items contained in Schedule II, therefore also the application was and is liable to be rejected.

10. After considering the submissions in the light of Section 31 (3) of M.P.I.R.Act and Schedule II as well, we are of the opinion that the contentions raised on behalf of the petitioner are not liable to be accepted. Sub section 3 of Section 31 (supra) clearly enables an employee desiring a change in respect of an industrial matter specified in Schedule II or any other matter arising out of such change to make an application to Labour Court in such manner as may be prescribed. Item No.1 of schedule (supra) read with sub section (3) of Section 31 of M.P.I.R. Act, enables an employee to make application not only to challenge the propriety or legality of an order but also enables him to dispute the proprietary or legality of an action taken by his employer acting or purporting to act under the standing orders or any rules or regulations governing the conditions of service of the employees. Case of respondent No.1 is that he was entitled to the next higher pay scale after completion of five years

of service. It was completed in the month of February 1993, however, the higher pay scale was not given to him. According to him, he was victimized due to his participation in the union activities. Though the allegations levelled against the employer (i.e. the petitioner) were denied, respondents No.2 and 3 despite being juniors to respondent No.1 were given higher pay scale. Labour Court after recording the evidence found respondent No.1 to be entitled to higher pay scale from the date prior to promotion of respondents No.2 and 3. This order was set aside in an appeal on 16.5.2002 and the case was remanded to the Labour Court for deciding it afresh after framing fresh issues. The labour court again vide its order dt. 23.2.2004 held that respondent No.1 was entitled to promotion prior to respondents No.2 and 3. It is the action of the petitioner of promoting respondents No.2 and 3 prior to respondent No.1, which was challenged before the Labour Court. Similarly, inaction on its part in not promoting respondent No.1 is also under challenge. Both the challenges are permissible at the instance of an employee under Item No.1 of Schedule II. This being so, contentions of the petitioner in this respect are hereby repelled and the application submitted by respondent No.1 before the Labour Court is found maintainable.

11. Further contention of petitioner's learned counsel is that there ought not to have been a direction for promotion. Instead, a direction for consideration for promotion ought to have been issued.

Countering the aforesaid, Shri Ravi Jain, learned counsel for respondent No.1 placing reliance on 1982 SCC (L & S) 42 *(Workmen v. M/s Williamson Magor & Co. Ltd. & another)* submitted that direction for promotion is justified in the peculiar facts and circumstances of the present case.

12. In the aforesaid decision, Hon'ble Apex Court has observed:-

> "15. Even if promotion may not be a condition of service in a private company and promotion may be the function of the management, it may be recognised that there may be occasions where the Tribunal may have to cancel the promotions made by the management where it is felt that persons superseded have been so superseded on account of legal mala fide or victimisation. Although in spite of the allegations of mala fide, the Union has not been able

to prove factual mala fide, in this case malice in law and effectual victimisation are obvious due to the fact that unjustified promotions of some junior persons were made superseding, without any reason or necessity, the cases of a large number of senior persons."

It has also been observed in para 12 :

"12. Mr. Pai, learned counsel appearing for the management, made two submissions before us. Firstly, he submitted that unlike in public sector undertakings, promotion is not a condition of service in a private company. We are unable to accept the submission of Mr Pai in toto. If there is no scope of any promotion or upgradation or increase in salary in a private undertaking, the submission of the learned counsel may be justified but if there are grades and scopes of upgradation/ promotion and there are different scales of pay for different grades in a private undertaking, and, in fact, promotion is given or upgradation is made, there should be no arbitrary or unjust and unreasonable upgradation or promotion of persons superseding the claims of persons who may be equally or even more, suitable. The second submission of Mr.Pai is that although there were no norms, the promotions of the persons in question were not arbitrary and that the findings of the Tribunal in this regard were incorrect. He led us through the material evidence of the witnesses examined. We are unable to agree with learned counsel and do not find any reason to differ from the findings of the learned Tribunal that the promotions of the 15 persons were arbitrary and unjustified. Mr. Pai also submitted that unless victimisation was proved by the Union, the management's action should not be disturbed. The word 'victimisation' has not been defined in the statute. The term was considered by this Court in the case of *Bharat Bank Ltd v. Employees*. This Court observed, "It (victimisation) is an ordinary English word which means that a certain person has become a victim, in other words, that he has been unjustly dealt with". A submission was made on behalf of

the management in that case that 'victimisation' had acquired a special meaning in industrial disputes and connoted a person who became the victim of the employer's wrath by reason of his trade union activities and that the word could not relate to a person who was merely unjustly dismissed. This submission, however, was not considered by the Court. When, however, the word 'victimisation' can be interpreted in two different ways, the interpretation which is in favour of the labour should be accepted as they are the poorer section of the people compared to the management."

13. Hon'ble Apex Court in the case of The *Distt. Registrar, Palghat and others v. M.B.Koyakutty and others* (1979 SCC (L & S) 126 has observed :

"30. The last point for consideration is, whether it was proper for the High Court to issue a positive direction requiring the appellant to promote the respondent to the Upper Division and thereafter to determine his rank in the cadre of Upper Division Clerks. Ordinarily, the court does not issue a direction in such positive terms; but the peculiar feature of this case is that it has been disputed that Koyakutty respondent satisfies the two-fold criterion for promotion laid down in the statutory Rule 28(b)(ii). Indeed, the District Registrar, Palghat, who was impleaded as respondent 3 in the writ petition, expressly admitted in paragraph 8 of his counter-affidavit filed before the High Court, "that the seniority of service is the basis of promotion from the ranks of Lower Division Clerks to the ranks of Upper Division Clerks provided they are fully qualified by passing the departmental tests for the purpose". It was never the case of the Registrar that Koyakutty was not otherwise fit for promotion. Indeed, even in the grounds of appeal to this Court, incorporated in the Special Leave Petition, it is not alleged that Koyakutty did not satisfy the criterion of seniority-cum-fitness prescribed by Rule 28(b)(ii). The position taken by the appellant, throughout was that this rule should be deemed to have been "supplemented" by the impugned government notification.

It is not correct that the impugned notification merely "supplements" or fills up a gap in the statutory rules. It tends to supersede or superimpose by an Executive fiat on the statutory rules something inconsistent with the same. Since the existence of both the criteria viz., seniority and fitness for promotion to the Upper Division prescribed, by the statutory Rule 28(b)(ii), in the case of Koyakutty was not disputed, the High Court was justified in issuing the direction it did."

14. On perusal, it is found that the learned Industrial Court in para 8 has clearly observed that the petitioners have not examined any witness to prove unsuitability of the applicant for promotion. Despite remand, no evidence was produced by them to justify supersession of respondent No.1. It is further found on perusal that the lower court framed additional issue on 28.10.2002 and granted opportunity to the petitioners to adduce evidence. Despite this, it was expressed on behalf of the petitioners on 14.1.2003 that they did not wish to lead evidence. Thus, in the present case, the petitioners have failed to adduce relevant evidence to establish unsuitability of respondent No.1 despite a plea to this effect having been raised. Thus, we do not find any material on record to find any infirmity in the impugned order.

15. On perusal of the entire material on record in the light of law governing the situation, we hold that the victimization of respondent No.1 was made by promoting respondents No.2 and 3 prior to respondent No.1 and in order to impart justice, direction for promotion could have been legally given, which alone would subserve the purpose of law.

16. Resultantly, there being no force in the writ petition, the same is hereby dismissed summarily, however, with no order as to costs.

Petition dismissed.

I.L.R. [2011] M. P., 1180
WRIT PETITION
Before Mr. Justice Ajit Singh & Mr. Justice Sanjay Yadav
W.P. No.16696/2010 (Jabalpur) decided on 17 January, 2011

ORIENT PAPER MILL LTD. (M/S) ...Petitioner
Vs.
M/S BANG LIME INDUSTRIES ...Respondent

***Micro, Small and Medium Enterprises Development Act (27 of 2006), Section 19* - Requirement of depositing 75% of the amount in terms of the decree, award or other order as the case may be is mandatory - The court can only direct the manner in which the amount has to be deposited - Appeal would be entertained or admitted for hearing only when total 75% of the amount is deposited.** (Para 6)

सूक्ष्म, लघु और मध्यम उद्यम विकास अधिनियम (2006 का 27), धारा 19 – डिक्री, पंचाट या अन्य आदेश जैसी भी स्थिति हो, की शर्तों में राशि का 75 प्रतिशत जमा करने की आवश्यकता, आज्ञापक है – न्यायालय केवल किस रीति से राशि जमा की जाना है, यह निर्देश कर सकती है – अपील केवल तब सुनवाई के लिए ग्रहण या स्वीकृत की जाएगी, जब सम्पूर्ण राशि का 75 प्रतिशत जमा किया जाएगा।

Cases referred :
2009(5) MPHT 380.

R.P. Agrawal with *Sanjay Agrawal, Anuj Agrawal & Rajneesh Gupta,* for the petitioner.

Ankur Shrivastava, for the respondent.

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 29.7.2010, Annexure P6, passed in Arbitration Case No.22/2009 by the Sixth Additional District Judge, Bhopal, whereby he has dismissed the petitioner's application for exemption from payment of 75% of the amount awarded.

2. The respondent filed an application against the petitioner for recovery of Rs.16,26,678/- as interest before the Madhya Pradesh Micro, Small Enterprises Felicitation Council, Bhopal. The amount claimed was in respect of interest for the delay in payment of the lime supplied to the

petitioner. The Felicitation Council, after hearing the parties, passed an award dated 28.11.2008 directing the petitioner to pay Rs.59.08 lac to the respondent. The petitioner has challenged the award before the VIth Additional District Judge, Bhopal, by filing an application under section 34 of the Arbitration And Conciliation Act, 1996. The petitioner also filed an application for exemption from payment of 75% of the amount awarded as provided under section 19 of the Micro, Small and Medium Enterprises Development Act, 2006 (in short, "the Act"). This application was objected by the respondent. The court below, after hearing both the parties and relying upon the Division Bench decision of this court in *M/s. R. S. Avtar Singh vs. M/s. Vindyachal Air Products* 2009 (5) M.P.H.T. 380 by the impugned order has dismissed the application.

3. It is to be noted that section 19 of the Act came up for consideration before the Division Bench in *M/s. R. S. Avtar Singh* (Supra) wherein it has been held that the requirement to deposit 75% of the amount in terms of the decree, award or the order, as the case may be, is mandatory before entertaining an application for setting aside that decree, award or order.

4. It is argued by the learned senior counsel appearing for petitioner that section 19 of the Act has not been correctly interpreted in *M/s. R. S. Avtar Singh* and it requires reconsideration. According to him, the words "or, as the case may be, the other order in the manner directed by such Court" indicates that the court is empowered with the discretion to do away with the requirement of depositing 75% of the amount in terms of the decree, award or the other order. The learned counsel for respondent, on the other hand, submitted that the view taken in M/s. R. S. Avtar Singh is correct and does not require any further consideration.

5. Section 19 of the Act reads as under:

> **"19. Application for setting aside decree, award or order.-** No application for setting aside any decree, award or other order made either by the Council itself or by an institution or centre providing alternative dispute resolution services to which a reference is made by the Council, shall be entertained by any Court unless the appellant (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such Court:

Provided that pending disposal of the application to set aside the decree, award or order, the Court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case subject to such conditions as it deems necessary to impose."

6. A bare reading of the above quoted section makes it clear that the expression "or, as the case may be, the other order" refers to the words "any decree, award or the other order" occurring in the beginning of section. The requirement of depositing 75% of the amount in terms of the decree, award or other order as the case may be is, therefore, mandatory and the court can only direct the manner in which the amount of 75% has to be deposited. The court may, in suitable cases, give the appellant time for depositing the amount after filing of the appeal but the appeal would be entertained or admitted for hearing only when total 75% of the amount of any decree, award or the other order, as the case may be, is deposited. Thus, we also agree with the interpretation of section 19 given in the case of *M/s. R. S. Avtar Singh.* Deposit of 75% of the amount awarded being the mandatory requirement, we hold that the court below has rightly dismissed the petitioner's application for exemption from depositing the amount.

7. The petition has no merit. It is accordingly dismissed.

Petition dismissed.

I.L.R. [2011] M. P., 1182

WRIT PETITION

Before Mr. Justice A.K. Shrivastava

W.P. No. 9747/2010 (Jabalpur) decided on 20 January, 2011

NATTHULAL ...Petitioner

Vs.

SMT. SHAKUNTALABAI & anr. ...Respondents

*A. **Evidence Act (1 of 1872), Section 114 Illus. (g) - Evidence -*** **Party having the best evidence in his power and possession, is duty bound to produce it in the court in order to resolve the controversy and that party should not place reliance on the abstract doctrine of onus of proof that it was not of his duty to produce it.** (Para 12)

क. साक्ष्य अधिनियम (1872 का 1), धारा 114 दृष्टांत (जी) – साक्ष्य – जिस पक्षकार की शक्ति में एवं कब्जे में सर्वोत्तम साक्ष्य है, वह उसे न्यायालय के समक्ष विवाद विनिश्चित करने हेतु प्रस्तुत करने के लिए कर्तव्यतः बाध्य है और उस पक्ष को सबूत का भार के संक्षिप्त सिद्धांत पर विश्वास नहीं रखना चाहिए कि उसे प्रस्तुत करना उसका कर्तव्य नहीं था।

***B. Panchayats (Election Petition, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995 - Rule 3, 8 - Requirement of verification of copy of election petition* - Copy of election petition supplied to respondent before Election Petition Tribunal - Copy of election petition was not required to be signed and verified by election petitioner.** (Para 14)

ख. पंचायत (निर्वाचन याचिका, भ्रष्ट आचरण और सदस्यता के लिए निर्हता) नियम, म.प्र. 1995 – नियम 3, 8 – निर्वाचन याचिका की प्रति के सत्यापन की आवश्यकता – निर्वाचन याचिका अधिकरण के समक्ष निर्वाचन याचिका की प्रति प्रत्यर्थी को उपलब्ध कराई गई – निर्वाचन याचिका की प्रति निर्वाचन याची द्वारा हस्ताक्षरित एवं सत्यापित होना अपेक्षित नहीं।

Cases referred:

2008(1) MPLJ 388, 1996(1) MPWN 109, 1998(1) MPWN 90, AIR 1953 SC 225, AIR 1968 SC 1413, AIR 1970 SC 2025, AIR 1917 PC 6.

P.C. Paliwal, for the petitioner.

A.D. Mishra, for the respondent No. 1.

Sheetal Dubey, for the respondent No. 2.

ORDER

A.K. Shrivastava, J. :–By this petition under Article 227 of the Constitution of India, the petitioner/election petitioner (hereinafter referred to as election petitioner) has challenged the validity of the impugned order dated 31/05/2010 by which the election tribunal has dismissed the election petition of the election petitioner on account of non-compliance of Rule 3(2) and 8 of Madhya Pradesh Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995 (hereinafter referred as the rules).

3. The facts leading to this petition lie in a narrow compass. Suffice it to say that the petitioner who is a voter has filed an election petition before the Election Tribunal praying to declare the election of respondent no.1 on the post of Sarpanch of Gram Panchayat, Bharatpur to be illegal

since she was not having requisite qualification to contest the election of the said gram panchayat.

4. The election petition was filed on 18/02/2010. On bare perusal of the order sheet of that date, it is gathered that the respondent no.1 was directed to be summoned on payment of process fee. Accordingly, summons were issued but returned back unserved. On 15/03/2010, the election tribunal directed to issue fresh notice to respondent no.1 for the date of hearing 23/03/2010. On this date counsel for respondent no.1 appeared and made a demand to supply one copy of the petition which was supplied to her counsel. On 19/04/2010 an application was submitted by the returned candidate/respondent no.1 raising an objection that the copy of the memorandum of election petition which has been supplied to her is neither signed nor verified by election petitioner which is in contravention to rule 3 of the Rules and hence, prayed that the election petition be dismissed. This application was opposed by election petitioners by filing a written reply. The learned tribunal allowed the application upholding the objection raised by the returned candidate and held that there is non-compliance of rule 3 of the Rules. Eventually, the election petition has been dismissed by the impugned order.

5. In this manner, this petition has been filed by the petitioner assailing the impugned order.

6. It has been put forth by Shri P.C. Paliwal, learned counsel for petitioner that impugned order is ex-facie, illegal and contrary to the provisions of law for the simple reason that copy of memorandum of election petition which was supplied to learned counsel for the returned candidate after she was served in the Court on 23/03/2010 was not required to be signed and verified by the petitioner. Learned counsel further submits that copy of memorandum of election petition duly signed and verified by the election petitioner was submitted along with the memorandum of election petition in the court at the time of the presentation of the election petition.

7. Learned counsel by inviting my attention to Rule 9 of the said rules has contended that if a copy is given to counsel for respondent no.1 later on before the Election Tribunal, the same is not required to be signed and verified by the election petitioner. In support of his contention, learned

counsel has placed reliance on Division Bench decisions of this Court in *Lata Patle Vs. Smt. Kamlesh Gautam,* 2008 (1) MPLJ, 388.

8. Learned counsel for petitioner submits that it was imperative on the part of the returned candidate/respondent no.1 either to show to the Election Tribunal that copy of memorandum of election petition which was served on him along with summons was not duly singed and verified by the election petitioner or that copy which was sent to her along with summons should have been filed before the Election Tribunal in order to substantiate the objection raised by her in terms of Rule 3. Since this has not been done, it cannot be said that there is non compliance of Rule 3 of the said Rule.

9. On the other hand Shri A.D.Mishra, learned counsel appearing for respondent no.1 submitted that first order sheet of Election Tribunal dated 18/02/2010 does not indicate that election petition has been filed along with the copy of memorandum of election petition duly signed and verified by election petitioner although other requirements in respect of filing challan of Rs. 500/- and filing of documents etc have been mentioned in the said order sheet and therefore, for no rhyme or reason it should be held that election petitioner submitted memorandum of election petition duly signed and verified by her and hence, there is total non compliance of the rule 3 of said Rules and if that would be the possession, learned Election Tribunal, did not err in passing the impugned order. In support of his contention learned counsel has placed heavy reliance on two decisions of this Court they are 1996(1) MPWN 109 *Chironjilal Vs. SDO, Vijaypur and* 1998 (1) MPWN 90, *Rama Banjara Vs. Kanchhedilal.*

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

11. The moot question to be decided in this petition is whether there is compliance of rule 3 of the said Rules or not. If it was complied with, then this petition has to be allowed with a further direction to the Election Tribunal to proceed with election petition on its own merit.

12. The objection in respect of non-compliance of rule 3 which was raised by the respondent no.1/returned candidate before the Election Tribunal by filing an application dated on 10/04/2010 (Annexure-P-2) and which has also been substantiated by learned counsel Shri A.D. Mishra in this Court appears to be quite attractive but on deeper scrutiny found to be devoid

of any substance. Indeed, the said application which has been filed by respondent no.1 before the Tribunal does not indicate that the summon which was served on her was not accompanied by memorandum of election petition duly verified and signed by the election petitioner. According to me, if there was non-compliance of rule 3 of the said Rules, certainly this fact must have been mentioned in the application. The summons were directed to be issued on returned candidate vide order sheet dated 15/03/2010 for the date of hearing 23/03/2010 and indeed respondent no.1 was served. Hence, the memorandum of election petition which was accompanied along with summons would have been the best evidence in order to substantiate the objection raised by the returned candidate/respondent no.1. I do not find any merit in the contention of Shri Mishra, learned counsel for respondent no.1 that the burden of proof to prove this fact that the memorandum of election petition which was sent alongwith the notice to respondent no.1 was duly signed and verified by the election petitioner was on the election petitioner. According to me, if a party is having the best evidence in his power and possession he is duty bound to produce it in the court in order to resolve the controversy and that party should not place reliance on the abstract doctrine of onus of proof that it was no part of his duty to produce it. According to me respondent no.1 should have filed the copy of election petition served upon her alongwith the summons in the Court in order to resolve the dispute. In this context, I may profitably place reliance on *Hiralal and others Vs. Badkulal and others,* AIR 1953 SC 225, *Gopal Krishnaji Ketkar Vs. Mohamed Haji Latif and others* AIR 1968 SC 1413 and *Goswami Shri Mahalaxmi Vahuji Vs. Shah Ranchhodda Kali Das (Dead) and others* AIR 1970 SC 2025.

13. Nearly about a century ago the Privy council in *T.S. Murugesam Pillai Vs. M.D. Gnana Sambandha Pandara Sannadhi and others,* AIR 1917 PC 6 has laid down the same preposition which has been later on followed by the Apex Court in different decisions, in all these decisions it has been further held that if a party is having best evidence in his power and possession and he fails to submit it in the Court, an adverse inference should be drawn against that party. Hence, it was incumbent on the part of returned candidate/respondent no.1 to file the copy of the memorandum of election petition which was sent to her along with summons in the Court in order to substantiate her objection.

14. So far as the supply of another copy of memorandum of election petition which was given to respondent no.1 before Election Tribunal on 13/03/2010 is concerned, according to me it was not required to be singed and verified by the election petitioner. In this context much has been said by the Division Bench of this Court in *Lata Patle* (supra). Hence, I have no scintilla of doubt in order to hold that the extra copy which was supplied to the returned candidate/respondent no.1 before Election Tribunal on the date of hearing was not required to be verified and signed by the election petitioner.

15. The decisions of *Rama Banjara* (Supra) and *Chironjilal* (supra) placed reliance by the learned counsel for the respondent no.1 are distinguishable on facts.

16. For the reasons stated herein above, I have no hesitation in holding that learned Election Tribunal erred in dismissing the election petition by holding that there is non-compliance of rule 3 of the Rules and I have no option except to allow this petition and to set aside the impugned order passed by learned election tribunal and I accordingly do it.

17. Resultantly, this petition succeeds and is hereby allowed with costs, the impugned order dated 31/05/2010 is hereby set aside by giving further direction to Election Tribunal to decide the election petition on its merit. Counsel fee Rs. 2,000/- if pre certified.

Petition allowed.

I.L.R. [2011] M. P., 1187
WRIT PETITION
Before Mr. Justice J.K. Maheshwari
W.P. No. 841/2010 (S) (Gwalior) decided on 21 January, 2011

VED PRAKASH SHARMA & ors. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

A. Service law - Recruitment - Minimum Qualification **- Notification of various Universities established in State of Chhattisgarh quashed by Apex Court after declaring the provisions of Section 5 and 6 of Chhattisgarh Niji Kshetra Vishwavidyalaya, Sanshodhan Adhiniyam, 2002 as ultra vires - Standards of Universities are**

required to be maintained but at the same time the fate and fortune of students is not required to be astonished. (Para 23)

क. सेवा विधि – भर्ती – न्यूनतम अर्हता – छत्तीसगढ़ निजी क्षेत्र विश्वविद्यालय संशोधन अधिनियम, 2002 की धारा 5 व 6 के उपबंधों को अधिकारातीत घोषित किये जाने के पश्चात, छत्तीसगढ़ राज्य में स्थापित विभिन्न विश्वविद्यालयों की अधिसूचना उच्चतम न्यायालय द्वारा अभिखंडित की गई – विश्वविद्यालयों के स्तर को बनाए रखे जाना अपेक्षित है परन्तु उसी समय विद्यार्थियों के भाग्य एवं भविष्य को विस्मित करना अपेक्षित नहीं।

B. Recruitment - Minimum Qualification **- Candidature of Petitioners rejected only on the ground that they have obtained diploma from Universities which are not affiliated/registered/recognized by UGC - Certificates of Diploma in Computer Application issued by Universities established under Central, Provincial or State Act, prior to judgment in Yashpal's case - Order derecognizing such certificates quashed - Respondents may examine the genuineness of such certificates.** (Para 23)

ख. भर्ती – न्यूनतम अर्हता – याचियों की अभ्यर्थिता केवल इस आधार पर अस्वीकार की गई कि उन्होंने ऐसे विश्वविद्यालयों से डिप्लोमा अभिप्राप्त किया जिन्हें यू.जी.सी. द्वारा सम्बद्ध/पंजीबद्ध/मान्यता नहीं है – यशपाल वाले मामले में निर्णय से पूर्व, केन्द्रीय, प्रान्तीय या राज्य अधिनियम के अंतर्गत स्थापित विश्वविद्यालयों द्वारा कप्यूटर एप्लीकेशन में डिप्लोमा के प्रमाणपत्र जारी किये गये – ऐसे प्रमाणपत्रों की मान्यता रद्द करने का आदेश अभिखंडित – प्रत्यर्थी ऐसे प्रमाणपत्रों की प्रमाणिकता परीक्षण कर सकते हैं।

C. Prospective Operation - Judgment of Apex Court **- Judgment passed in Yashpal's case shall be applicable prospectively only on those certificates which were issued after the date of judgment i.e. 11-2-2005.** (Para 23)

ग. भविष्यलक्षी प्रवर्तन – उच्चतम न्यायालय का निर्णय – यशपाल वाले मामले में पारित निर्णय भविष्यलक्षी प्रभाव से केवल उन प्रमाणपत्रों पर लागू होगा, जो निर्णय दिनांक अर्थात 11.2.2005 के पश्चात जारी किये गये।

D. Recruitment - Requirement of valid registration in Employment Exchange **- Treating the petitioners as ineligible on account of not having valid registration in employment exchange cannot sustain in the light of judgment passed by Apex Court in Kishore K. Pati's case - Order quashed.** (Para 23)

घ. भर्ती – रोजगार कार्यालय में वैध पंजीयन की आवश्यकता – रोजगार कार्यालय में वैध पंजीयन न किये जाने के कारण याचियों को अपात्र मानना, उच्चतम न्यायालय द्वारा किशोर के. पती. वाले मामले में पारित निर्णय के आलोक में अखंडित नहीं रह सकता – आदेश अभिखंडित।

Cases referred :

W.P. No. 8802/2009 Ajay Awasthy & ors. Vs State of M. P. & ors., W.P. No. 6906/2010 (S) I.K. Borban & anr. Vs. State of M.P. & ors., (2000) 9 SCC 405, (2005) 5 SCC 420, AIR 2005 SC 3959, (2001) 1 SCC 534, AIR 2001 SC 1723.

R.B.S. Tomar, for the petitioners.

Praveen Newaskar, Dy. G.A., and *Devendra Choubey, Dy. G.A.,* for the respondents.

ORDER

J.K. MAHESHWARI, J. :–In all the connected writ petitions common questions relate to having one year Computer Diploma course from the Institute run by a registered/recognized/affiliated with the University recognized by the UGC as required under the eligibility criteria for Patwari Selection Examination of year 2008, along with the issue of necessity of registration in Employment Exchange of the concerned District within the time as prescribed in the advertisement are involved. The petitioners have appeared in the Patwari Selection Examination 2008 conducted as per the Rules known as Bhu Abhilekh Evam Bandobast, Rajasva Vibhag Ke Antargat Patwari Ke Samanya Evam Backlog Bharti Ke Pad Hetu Chayan Pariksha - 2008 (hereinafter referred to as 'the Rules of 2008'). The petitioners have been selected in the examination conducted by the Professional Examination Board, and sent the selection list to the respective districts commensurate to available vacancies. , On receiving the list and at the time of counselling, even on found place in the merit list their candidature were rejected denying them to send for Patwari training on the pretext that the diploma certificate obtained by them from BarkatullahVishwavidyalaya, Bhopal (M.P.) or Bhoj University, Bhopal (M.P.) or Makhanlal Chaturvedi Vishwavidyalaya Bhopal (M.P.) or Chhattisgarh University Raipur, or Dr. C.V. Raman University Bilaspur or University, of Technical Science Raipur (Chhattisgarh) or Doon International University Raipur (Chhattisgarh) cannot be accepted for want of affiliation/registration/

recognition by the UGC. Some of the petitioners have not been included in the said list because of non-availability of the employment exchange registration, in the concerned district. Being aggrieved by the communication Annexure P/1 dated 15.1.2010 or to deny the selection on the said pretext the petitioners have come before this Court seeking relief to quash such communication and to direct, the registration in employment exchange is not necessarily required, however, the petitioners may be held entitled to send for Patwari training in lieu of their selection in the Patwari Examination'2008.

2. In the cases, wherein the certificates of aforementioned Universities have not been accepted the facts are taken from W.P.No.841/2010 (S) while in the cases wherein the petitioners have been denied the selection due to non-availability of the employment exchange registration the facts are taken from W.P.No.648/2010(S).

3. It is the case of the petitioners that they have passed the Diploma/ Post Graduate Diploma in Computer Application from the recognized Universities like Barkatullah Vishwavidyalaya, Bhopal (M.P:), Bhoj University, Bhopal (M.P.), Makhanlal Chaturvedi Vishwavidyalaya Bhopal (MP.), Chhattisgarh Umversity Raipur, Dr. C.V. Raman University Bilaspur, University of Technical Science Raipur (Chhattisgarh) and Doon International University Raipur (Chhattisgarh) and those are valid for their appointment on the post of Patwari as recognized by the UGC. It is said that in Writ Petition No.1283/2010 (S) dated 11.2.2010 the Indore Bench of this Court has decided the said issue and held that the computer diploma certificate obtained from Dr. C.V. Raman University, Bilaspur is recognized. In such a circumstance the letter Annexure P/1 as issued by the respondents of not having recognition/registered/ affiliated with the University recognized by the UGC of the aforesaid Universities is arbitrary, hence, it is liable to be quashed. Referring the document Annexure P/4 it is contended that all the aforementioned Universities have been established or incorporated by or under the Central Act, Provincial Act or State Act and having powers under section 22 of the UGC Act to grant degrees. However, the refusal of inclusion of the name of the petitioners in the merit list/selection panel by the district authorities at the time of counselling to the said pretext is unsustainable in law. Therefore, the order impugned is liable to be quashed and the respondents be directed to accept the certificates issued

by the aforementioned Universities as recognized by the UGC, and appropriate direction to send them for Patwari training may be issued

4. In the bunch of another cases the petitioners were denied to send them in Patwari training because of non-availability of the registration in the employment exchange of the district concerned within the time as specified in the advertisement. In those petitions filing various documents an attempt is made to demonstrate that the petitioners are having valid registration in the employment exchange, even then they have been expelled from the merit list/selection panel by the district authorities. It is contended that not having the registration in the employment exchange may not be impediment for inclusion of their names in the selection list in view of the law laid down by the Apex Court in this regard, however, by virtue of the said condition they cannot be deprived from the patwari training after qualifying eligibility test after following due process of selection.

5. The respondents by filing their reply contends that under the Rules of 2008 clause 1.8 specifies educational qualification, whereby the candidate who possessed Higher Seccodary or High School (10+2) is in addition required 'O' Level certificate from DOEACC/I-ETE or one year diploma in Computer Application (DCA) from an institute run by a registered/recognized/ affiliated wth the University recognized by the UGC or higher education in computer. As the petitioners are not possessing the degree/certificate from the registered/recognized/affiliated with the University recognized by the UGC or Higher Education in computer, therefore, their names have rightly been expelled from the merit list/selection panel by the respondents. It is contended that the UGC has issued a public notice on13th November, 2009 Annexure R/1 whereby the aforesaid position has been clarified. It is further said that this Court in W.P.No. 8802/2009 *(Ajay Awasthy and others Vs. State of M.P. and others)* has considered the issue regarding issuance of the degree/ certificate by the institution who are not recognized and the several writ petitions have been dismissed by this Court. However, accepting the said enunciation of law the rejection of the candidature by the respondents is inconformity to law, therefore, the petitioners are not entitled to claim any relief in the facts of the present case.

6. On the point of non-availability of the registration from

employment exchange, it is contended by the respondents that as per clause 1.12 of the Rules of 2008 it is necessary to have a valid registration in the employment exchange office of the concerned district, however, on non-availability of the said registration certificate which is one of the requisite condition, the petitioners have rightly been refused to include in the merit list/selection panel at the time of counselling by the officers at district level. In view of the aforesaid, prayer is made to dismiss these petitions.

7. Learned counsel appearing on behalf of the petitioners laid emphasis on the judgment delivered by the Indore Bench in W.P.No.1456/2010(s) and also placed reliance upon the judgment of the Principal Seat, Jabalpur in the case of *Indra Kumar Borban and another vs. State of M.P. and others.* W.P.No. 6906/2010 (S) wherein it has been held, the diploma certificate issued by Dr. C.V. Raman University, Bilaspur of Computer Applications is valid as it has been established either under the Central Act or Provincial Act or State Act as defined under section 2 (f) of the UGC Act, 1956. The said Universities having right to issue the degree or certificate in view of section 22 of the said Act. It is submitted that the respondents have not contended that the certificates issued by the Universities are fake or forged document. In absence of the said pleadings, the petitioners fulfill the educational qualification as specified under clause 1.8 of the Rules of 2008, therefore, the order impugned Annexure P/1 or the action of the respondents to not to accept the degree and certificate issued from the aforementioned Universities is unsustainable in law.

8. Shri K.N. Gupta, learned Senior counsel appearing in the bunch of the cases wherein the petitioners have been denied to include in the merit list/selection panel by the district authorities due to non-availability of the valid registration in employment exchange, it is urged that in view of the law laid down by the Apex Court in the case of *Kishore K. Pati Vs. Distt. Inspector of Schools, Midnapore and others,* (2000) 9 SCC 405, held that it was wrong view that a candidate not sponsored by employment exchange could not be interviewed and the judgment of the Division Bench of the High Court was found unsustainable in law. However, the action of the respondents to not to include the petitioners on the said pretext is illegal and arbitrary.

9. A preliminary objection to adjourn all these cases have been raised, by Shri Newaskar, learned Deputy Govt. Advocate, in view of the order of reference passed on 13.1.2011 in W.P.No. 1925/2010 (S) by the Principal Seat of this Court. After going through the said order, in the opinion of this Court the scope of the said reference is limited to the candidates who are graduate in Commerce, Arts and Science with Computer as one of the subject and they are claiming appointment to the post of Patwari and whether such degree/course is within the purview of eligibility as prescribed underclause 1.8 of the Rules of 2008. For ready reference the question as posed is reproduced as under:

> "The question as to whether the qualification prescribed in the advertisement can be said to be fulfilled by a candidate, who is a Graduate in Arts, Science of Commerce with Computer Science as one of the subject, is an important question, which arises for consideration not only in the matter of recruitment of 'Patwari', but also in various other cases that are pending."

Thus, the preliminary objection as raised by Shri Niwaskar, learned Deputy Govt. Advocate is accordingly spelled out.

10. Per contra, on merit, Shri Praveen Niwaskar, learned Deputy Govt. Advocate placing reliance on a judgment of the Apex Court in the case of *Prof. Yashpal and another Vs. State of Chhattisgarh and others,* (2005) 5 SCC 420 contends that the notifications of various Universities established in the State of Chhattisgarh has been quashed declaring the provisions of section 5 and 6 of Chhattisgarh Niji Kshetra Vishwavidhyalaya (Sthapana Aur Viniyaman) Sanshodhan Adhiniyam, 2002 as ultra vires and struck down. The UGC has issued a public notice in this regard on 13.11.2009 as apparent from Annexure R/1 notifying the private universities wherein Dr. C.V. Raman University has also been specified. In view of the said notification the order de-recognizing the certificates from the said Universities have rightly been passed. Therefore, the certificates issued by the various Universities of the State of Chhattisgarh cannot be validated in view of the said judgment. Placing reliance on the judgment passed in the case of *Ajay Awasthi* (supra), it is submitted that the educational qualification as prescribed under clause 1.8 of the Rules of 2008 was found justifiable and reasonable and the

varies of the said Rules has been upheld, therefore, in absence of the qualification as specified in the said clause the petitioners cannot be held eligible for the merit list/selection panel, therefore, the order impugned Annexure P/1 has rightly been passed.

11. On the point of non-availability of the valid registration from the employment exchange of the concerned district, it is contended that it is the requirement of the clause 1.12 of the Rules of 2008, however, if the valid registration in the employment exchange is not available the petitioners are not entitled to claim the appointment or selection in the merit list/selection panel. Therefore, the orders have rightly been issued by the respondents.

12. After having heard learned counsel on behalf of the parties and on perusal of the record, it is seen that an advertisement was issued inviting applications for appointment to the post of patwari conducting the examination through M.P. Professional Examination Board (VYAPAM). The Rules of 2008 have been made for the said selection. Clause 1.8 prescribes the educational qualification which reads thus:-

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

Clause 1.9 specifies the process of selection on the basis of written objective type examination of certain subjects, clause 1.10 specifies places of holding the examination. As per clause 1.11 the candidate must be the bonafide residence of the concerned district and as per clause 1.12 the candidate is required to have valid registration in the employment exchange on the date of the application, which reads as under:

> "1.12 रोजगार कार्यालय में पंजीयन
>
> आवेदक का संबंधित जिले के रोजगार कार्यालय में जीवित पंजी में पंजीयन दर्ज होना चाहिये ।"

After submission of the application forms the candidates are required to appear in the eligibility test and on having passed, and found place in the list prepared by the Professional Examination Board their names are required to be send to the district heads as per their respective merit and

in proportion to the vacancies available in the said district. On receiving the merit list in proportion to the vacancies the district authorities are required to hold a counselling under the supervision of the Collector of the district, and to verify the certificates of the educational qualifications, bonafide residence, valid registration in employment exchange and thereafter they were required to place them in merit list/selection panel in proportionate to the available vacancies. On found place in the said merit -list their names may be recommended for the Patwari training.

13. In the present case undisputedly the petitioners have appeared in the eligibility test conducted by the Professional Examination Board and on found place in the eligibility list, their names have been recommended to the district authorities for verification of their documents and for further action to recommend and send for patwari training. At the time of counselling or in some of the cases after recommendation their names for Patwari training and their candidature have been rejected on account of having the diploma in Computer Application/Post Graduate Diploma from the aforementioned Universities by passing the order Annexure P/1 or by issuing oral instructions. Assailing the said order or the action of the respondents the petitioners have filed these petitions. As per clause 1.8 which deals with the educational qualification it is clear that the petitioners must passed out Higher Secondary or High School (10+2) examination along with '0' Level certification from DOEACC/IETE or one year diploma in Computer Application (DCA) from an institute run by a registered/recognized/affiliated with the University recognized by the UGC or higher education in computer. Meaning thereby in addition to the necessary qualification of Higher Secondary or High School '0' level certificate from DOEACC/ IETE or one year diploma in Computer Application (DCA) from an institute run by a registered/recognized/ affiliated with the University recognized by the UGC or higher education in computer is necessary. Undisputedly considering the validity of the certificate of computer application issued by Dr. C.V. Raman University, Bilaspur the Principal Seat of this Court in W.P.No.6906/2010 (S) found it valid and also in conformity to clause 1.8 of the Rules of 2008. Relying upon the said decision the Indore Bench of this Court in W.P.No. 1456/2010 (S) and the Gwalior Bench of this Court in W.P.No.879/2010(S). The order passed by the Main Seat at Jabalpur in W.P. No. 6906/2010 (S) reads as under:

"As common questions are involved in all these writ petitions and as the question involved stands decided by various orders passed by the Indore Bench of this Court on 11.10.2010, all these petitions are being heard and decided by this common order. For the sake convenience, documents and pleadings of the parties available in the record of W.P.No.6906/2010 - *Indra Kumar Borban and another Vs. State of MP and others,* is referred to in this order.

2- Petitioners in all these cases were candidates, who had participated in the process of selection for appointment to the post of Patwari. After submitting their candidature, petitioners' claim were rejected by the Dy. Commissioner, Land Revenue by the impugned action/orders and the Collectors of each and every district were directed to cancel the candidature of the petitioners on the ground that the certificates, namely, the Diploma Certificates or the Degree Certificates with regard to passing the Computer Application Examination, in the case of each of the petitioner is issued by, Dr. C.V. Raman University, Bilaspur. It was pointed out in the impugned communication that the said University is not entitled to issue the Certificates and, therefore, the candidature of each of the petitioners be cancelled.

3- Contending that Dr. C.V. Raman University, Bilaspur is a recognized University, which is approved and affiliated to the University Grants Commission (hereinafter referred to as 'UGC') and the University is entitled to impart education and issue the Certificates and Diploma in the subject in question, petitioners seek interference into the matter.

4- Even though various grounds are raised in the writ petition and the same is refuted by the rival parties, but the question involved in the writ petitions and the question with regard to entitlement of Dr. C.V. Raman University to confer the Diploma or Degree Certificate and the right of the candidates, who had obtained the Diploma or Degree

from the said University, to participate in the process of selection has been considered by the Indore Bench of this Court in various writ petitions and by a common order passed on 11.10.2010, inW.P.No.1465/2010(s) *[Vijay Saudal and others Vs. State of MP and others],* the learned Bench after considering the judgment rendered by a Division Bench of this Court in the case of *Ajay Awasthi and another Vs. State of MP and others,* W.P.No.8802/2009, decided on 5.10.2009, has decided the controversy in the following manner:

" The respondents relying upon the judgment of the Division Bench of this Court have not stated that the certificate is a forged certificate or the petitioners have not qualified the examination in question from a recognized University and, therefore, the present writ petition is allowed. The impugned communication dated January 15, 2010 is hereby quashed. However, the respondent-State shall be at liberty to verify the certificate issued by the respondent-university, in accordance with law.

Needless to mention that if such an examination of verifying the certificate issued by the University is undertaken by the State Government, the petitioners shall also be granted an opportunity of hearing in the matter before passing any final order. The Writ Petition stands allowed with the aforesaid. No order as to costs"

5- Even though Shri P.K. Kaurav, learned Dy. Advocate General, during the course of hearing tried to emphasize that in the aforesaid judgment, UGC was not a party and the say of UGC has not been taken note of, I have perused the pleadings of the UGC as is available on record and it is seen that UGC's reply does not materially affect the final outcome. In the reply filed by the UGC, in this case and the connected cases, it is specifically stated in paragraphs 9 and 10, that Dr. C.V. Raman University, Bilaspur, Chhattisgarh is a Private State University established by the State Legislature of Chhattisgarh in terms of Section 2(f) of the UGC Act, 1956 and is empowered to award

undergraduate degrees and certificates. In the light of the reply filed by respondent UGC, the contention of Shri P.K. Kaurav cannot be accepted. In that view of the matter, I find no difference in the present cases and the cases decided by the Indore Bench. As far as the objection of the State Government is concerned, the objection of the State Government in this writ petition is same as was canvassed before the Indore Bench and is already considered in the order referred to hereinabove. Now, as far as respondent AICTE is concerned, in their reply they have stated that their approval or sanction is not necessary and it is only the UGC, which has to recognize the degree or diploma.

6- Apart from the fact that the objections raised by the State Government are similar to the one which is considered by the Indore Bench, in paragraph 4 of the reply, it is stated by the State Government that it is for the UGC and the AICTE, which is the apex body, to clarify the position with regard to the degree and certificate granted by Dr. C.V. Raman University. In paragraph 4 of the reply, it is so stated by the State Government:

"4. .... The authenticity of letter dated 24.6.2008 is disputed. The UGC has to clarify the fact that without approval of AICTE, which is the Apex body empowered to grant recognition in the field of Technical Education whether degree granted by Dr. C.V Raman University is valid. In view of the aforesaid facts without issuing any specific instructions from the UGC or from AICTE the, respondent University is not empowered to grant the degree and hence the petitioner is not entitled to any relief."

7- As far as UGC is concerned, they specifically say that Dr. C.V. Raman University is empowered to issue the degree certificate and AICTE says that it is for the UGC to recognize the University and the AICTE has no role to play in the matter.

8- In view of the totality of the circumstances as indicated hereinabove and the order passed by the Indore Bench, this petition is also allowed. The impugned communication

made by the respondent State Government is quashed and the State is directed to proceed to verify the certificates issued by the University in accordance with law and grant opportunity of hearing to the petitioners in case required. Respondent State shall proceed in the matter in identical terms, as has been ordered by the Indore Bench in the order as has been reproduced hereinabove.

9- All these petitions are allowed and disposed of in identical terms and the State Government is expected to take action in the same manner, as is ordered by the Indore Bench.and is reproduced hereinabove.

10- Such of the petitioners, who have not been permitted to participate in the process of training, shall now be sent for training in accordance with the requirement of the statutory provisions and if required, special training course be held.

11- Petitions stand allowed and disposed of with the aforesaid."

14. In the case of *Ajay Awasthi* this Court has considered the scope of the executive instructions issued for educational qualifications in the context of the Rules and it has emphasis that the rules contemplates the educational qualification, while the circular contemplates regarding seal and signature of the University which may validate those certificates. In this context it has been held that the certificates must be issued by the recognized universities and not by the institutions. The Court further held that issuance of the certificate by the institution may not be acceptable, but, if those certificates have been issued by the seal and signature of the University may be accepted. However, in the case of *Ajay Awasthy* the validity of the certificate issued by a particular University was not a issue for consideration. The said issue governs the field from the judgment of the Principal Seat as well as the Indore and Gwalior Bench of this Court. In this context it may be referred profitably that the Universities have been established under the UGC Act, Vishwavidyalaya Adhiniyam or under the State enactment. The said recognition found place in section 2 (f) of the UGC Act which reads as under: -

> "Section 2 (f) "University" means a University established or incorporated by or under a Central Act, a Provinicial Act or a State Act, and includes any such institution as may, in consultation with the University concerned be recognized by the Commission in accordance with the regulations made in this behalf under this Act."

As per section 22 the said University enables the power for grant of degree or the certificates. Section 23 deals with issuance of the certificate by the Institution or the Corporate body established under the Central Act, and violation of the provisions of section 22 and 23 has been made punishable as per section 24. In the present case nothing has been brought to the notice of this Court that the Universities from which the certificates have been issued and not found valid, by the respondents, as it has not been established under the Central Act, Provincial Act or the State Act. It is said, the certificates issued by the aforesaid Universities and produced with the seal and signature of the Universities and issued prior to the pronouncement of the judgment of the Apex Court in the case of *Prof. Yashpal* (supra) i.e. 11th February, 2005. It has also not been brought to the notice of this Court that in respect of the various universities of Chhattisgarh State the notification of those Universities have been quashed in pursuance to the said judgment. The Apex Court in the case of *Prof. Yashpal* (supra) in para 64 and 65 has held as thus:

> "64. As a consequence of the discussion made and the findings recorded that the provisions of Sections 5 and 6 of the Act are ultra vires and the gazette notifications notifying the universities are liable to be quashed, all such universities shall cease to exist. Shri Amarendera Sharan, learned Additional Solicitor General has submitted that UGC had conducted an inquiry and it was found that the most of the universities were non-existent, but the report was not placed before the Court as the complete exercise had not been done. Learned counsel for the universities have seriously disputed this fact and have submitted that the universities are functioning. We have not gone into this question as it is purely factual. In order to protect the interests of the students who may be

actually studying in the institutions established by such private universities, it is directed that the State Government may take appropriate measures to have such institutions affiliated to the already existing State universities in Chhattisgarh. We are issuing this direction keeping in mind the interest of the students and also Sections 33 and 34 of the Act, which contemplate dissolution of the sponsoring body and liquidation of a university whereunder responsibility has to be assumed by the State Government. It is, however, made clear that the benefit of affiliation of an institution shall be extended only if it fulfils the requisite norms and standards laid down for such purpose and not to every kind of institution. Regarding technical, medical or dental colleges, etc. affiliation may be accorded if they have been established after fulfilling the prescribed criteria laid down by All India Council of Technical Education, Medical Council of India, Dental Council of India or any other statutory authority and with their approval or sanction as prescribed by law.

65. In view of the discussions made above, Writ Petition (C) No. 19 of 2004. *(Prof. Yashpal Vs. State of Chhattisgarh)* and Writ Petition (C) No.565 of 2003 *(Gopalji Agarwal Vs. Union of India)* are allowed and provisions of Sections 5 and 6 of the Chhattisgarh Niji Kshetra Vishwavidhyalaya (Sthapana Aur Viniyaman) Adhiniyam, 2002 are declared to be ultra vires and are struck down. As a consequence of such declaration, all notifications issued by the State Government in the gazette in the purported exercise of power under Section 5 of the aforesaid Act notifying the universities (including Respondents 3 to 94) are quashed and such universities shall cease to exist. If any institutions have been established by such universities, steps may be taken for their affiliation to already existing. State universities in accordance with the direction contained in para 64 above. Parties would be at liberty to approach the High Court if any dispute arises in implementation of this direction. All

writ petitions, civil appeals and transferred cases filed by the private universities are dismissed."

The said judgment of *Prof. Yashpal* (supra) has been clarified by the Apex Court in the judgment of *Rai University Vs. State of Chhattisgarh and others,* AIR 2005 SC 3959, wherein the Apex Court has held thus:

"8. The Second Schedule to the Act gives the territorial jurisdiction of Pt. Ravishankar Shukla Vishwavidyalaya. Raipur and Guru Ghasidas Vishwavidyalaya, Bilaspur, which are the two State universities functioning in Chhattisgarh. The territorial jurisdiction of these universities is confined to districts which are within the State of Chhattisgarh. In view of this clear provision of the Adhiniyam, no statute can be made which may permit affiliation of any institution or college to a State university in Chhattisgarh if the said institution or college is situate outside the State of Chhattisgarh. The validity of the impugned statute, therefore, cannot be assailed on the ground urged by learned counsel for the petitioner.

10. At the time of hearing of the writ petition filed by Prof. Yashpal, it was not brought to the notice of the Court that the private universities had established large number of study centres at various laces all over the country. We, therefore, consider it proper to clarify that while making the aforesaid observation, it was not meant that affiliation must necessarily be sought only with an already existing State university in Chhattisgarh. The institutions of the erstwhile private universities, if otherwise eligible, may apply and seek affiliation with any other university which has jurisdiction over the area where the institution is functioning and is empowered under the relevant Rules and Regulations and other provisions of law applicable to the said university to grant affiliation. The decision on the application may be taken expeditiously in the interest of student community and there should be no prolonged uncertainty about their future"

15. Bare reading of the aforesaid, it is apparent that the notification

establishing all the Universities under the said Act have been quashed. It is further apparent that the arguments with respect to non-existence of the various universities which were enlisted in the said case have not been answered as it is purely a factual issue. The Apex Court in order to protect the interest of the students actually studying in the Institute established under such private Universities have directed the State Government to take appropriate measurement to have such institutions affiliated to the already existing State Universities in the Chhattisgarh. A direction for further affiliation on fulfilling the requisite norms and standards laid down have also been issued. In order to understand the aforesaid, it is apparent that the Apex Court has taken care of the standards and the students who are studying in those Universities at the time of pronouncement of such judgment. The judgment has been pronounced on 11.2.2005. The said judgment do not throw any light on the degrees or the certificates obtained by the students on prior dates.

16. In this context the arguments advanced relying upon the document Annexure R/1 is required to be taken into consideration. As per Annexure R/1 i.e public notice issued by the UGC on 13.11.2009 requires to take note off, whereby it is said that as many as 49 Universities are the Private Universities established by the Act of the Legislatures of different States. In the State of Chhattisgarh Dr. C.V. Raman University, Kargi Road, Kota, Bilaspur has been enacted as a Private University. Bare reading of the aforesaid notice, it is crystal clear that the said public notice has been issued in view of the pronouncement of the judgment of the Apex Court in the case of *Prof. Yash Pal and others Vs. State of Chhattisgarh and others*. The University Grants Commission by way of an abandoned caution issued public notice that the 49 Universities have specified in the said list are the private Universities and they have affiliated the colleges and started off campus centres beyond the territorial jurisdiction of their State in violation of the UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003. In the said notification itself it is not said that Dr. C.V. Raman University, Kargi Road, Kota, Bilaspur being a private university is not recognized merely it is said that the aforesaid 49 Universities are competent to award the degrees as specified by the UGC under section 22 of the UGC Act and with the approval of the statutory councils, wherever required through their main campus. It has further been explained that if the

approval of the statutory council is not a pre-requisite to start a programme, in such a cases the universities ought to have maintained the minimum standards regarding academic and physical infrastructure as laid down by the council. It has further been explained that the private universities cannot affiliate any institution/college. They cannot establish off campus centres beyond the territorial jurisdiction of the concerned State, meaning thereby they can establish off campus centres within the territorial jurisdiction of the State, but such establishment must be after the existence of the said University for five years with the prior approval of the UGC. It has also been made clear therein that the UGC has not approved any off campus centres of any of the Private University, meaning thereby that if the certificates issued by any of the off campus institution beyond the territorial jurisdiction of the State wherein the said University is situated such certificate cannot be recognized for all purposes. But, if the students studies within the State and the University situated thereat in their main campus then in such a case they may issue a certificate. In the present case a common reply has been filed denying the eligibility of issuance of the certificates by those Universities without explaining the position whether the certificates have been received from the main campus of the University or the same have been issued by off campus institute or the institute situated beyond the territorial limits of the State wherever the University is situated.

17. Although, it is not contended that the certificates obtained by some of the petitioners from Chhattisgarh University Raipur, Dr. C.V. Raman University Bilaspur, University of Technical Science Raipur (Chhattisgarh) and Doon International University, Raipur (Chhattisgarh) have ceases its existence in view of the judgment of *Prof. Yashpal* (supra). But, it is a matter of scrutiny. It is also submitted that in such cases principle of prospective overruling may be made applicable. In this context as per the General Clauses Act the effect of repealing of any of the provision may not be retrospective, unless and until a different intention appears by such repeal. The right, privilege, obligation or liability, acquired, accrued or incurred under any enactment so repealed may be saved. The Apex Court in the case of *Raymond Ltd. and another Vs. M.P. Electricity Board and others,* (2001) 1 SCC 534 in para 23 has held as under.

"23. So far as the challenge made to the judgment of

the Full Bench of the High Court, in confining its operation and applicability only for future period is concerned, Shri G.L. Sanghi, learned counsel, followed by the others have strongly contended that the High Court as such cannot apply the principle of prospective overruling. Reliance in this regard has been placed upon the decision reported in *State of H.P. v. Nurpur Private Bus Operators' Union* to which one of us (B.N. Kirpal, J.) was a party. Passing reference has been made to the decision in *Golak Nath v. State of Punjab* and the observation contained therein that the doctrine of prospective overruling can be invoked only in matters arising under the Constitution and that it can be applied by the Supreme Court of India. The decision in *Golak Nath case* as such was subsequently overruled by the decision reported in *Kesavananda Bharati v. State of Kerala* though not specifically on this point. Reliance has also been placed upon the decision reported in *K.S. Venkataraman & Co. (P) Ltd. v. State of Madras* even to contend that if the High Court had no such power, this Court while hearing an appeal from such judgment of the High Court, equally cannot exercise such powers. This submission of the learned counsel overlooks the vital fact in that case that not only was the High Court found to exercise under Section 66 of the Income Tax Act, 1922 a special advisory jurisdiction the scope of which stood limited by the section conferring such jurisdiction but even the appeal to the Supreme Court having been made only under Section 66-A (2) of the said Act was noticed to hold that the jurisdiction of this Court also does not get enlarged and that the Supreme Court can also only do what the High Court could do. Apart from the fact that the writ jurisdiction conferred upon High Courts under Article 226 of the Constitution does not carry any restriction in the quality and content of such powers, this Court could always have recourse to the said doctrine or principle or even dehors the necessity to fall back upon the said principle pass such orders under powers which are inherent in its being the highest court in the country whose dictates, declaration and

mandate run throughout the country and bind all courts and every authority or persons therein and having regard to Articles 141 and 142 of the Constitution of India. The appellate powers under Article 136 of the Constitution itself would also be sufficient to pass any such orders. This Court has been from time to time exercising such powers whenever found to be necessary in balancing the rights of parties and in the interests of justice (vide: *Union of India V. Mohd. Ramzan Khan, Managing Director, ECIL, Hyderabad V. B. Karunakar* and *India Cement Ltd v. State of T.N.)*. The decision reported in Nurpur Private Bus Operators Union at any rate is no authority for any contra position to deny such powers to this Court."

18. Similarly in the case of *M/s Somaiya Organics (India) Ltd. Vs. State of UttarPradesh,* AIR 2001 SC 1723 the Apex Court by majority judgment held as under:

"37. It is true that the effect of a legislation without legislative competence is that it is non est. (See *Behram Khurshed Pesikaka v. State of Bombay* (1955) 1 SCR 613 at pp.652, 653 : (AIR 1955 SC 123 at pages 145, 146 : 1955 Cri LJ 215); *R.M.D. Chamarbaugwalla v. Union of India,* 1957 SCR 930 at page 940: (AIR 1957 SC628 at page 633); *M.P.V. Sundararamier& Co. v. State of Andhra Pradesh* (AIR 1958 SC 468 at 489) (supra) at 1468 (of SCC) and *Mahendra. Lal Jaini v. State of Uttar Pradesh* (1963) Supp (1) SCR 912 at pages 937- 941, (AIR 1963 SC 1019 at pages 1029 to 1031). Nevertheless a law enacted without legislative competence remains on the statue book till a court of competent jurisdiction adjudicates thereon and declares it to be void. When the Court declares it to be void it is only then that it can be said that it is non est for all purposes. In *Synthetics and Chemicals case* (AIR 1990 SC 1927) the invalidity of the provisions was a declaration under Art. 141 of the Constitution. It was for doing complete justice that the Court in exercise of its jurisdiction under Art. 142 moulded the relief in such a way as to give effect, to its declaration

prospectively. It is not possible to accept tat such an order of prospective overruling is contrary to law. An invalid law has not been held to be valid. All that has happened is that the declaration of invalidity of the legislation was directed to take effect from a future date.

38. The principle of prospective, overruling is too well enshrined in our jurisprudence for it to be disturbed. Therefore, by reason of the decision in second Synthetics case (AIR 1950 SC 1927) what has actually happened is collection and non-collection of vend fee prior to 25th October, 1989 is left untouched. However, the Court in the second Synthetics case did not specifically deal with the question of deposits made pursuant to interim orders of Courts. The word used there was 'realisation'. It might have been arguable that the 'deposits' were not 'realisations' in the sense the word has been used in taxation statutes in general and the U.P. Excise Act, 1910 in particular. However, the interim orders passed by the High Court show that deposits were made of vend fee and the purchase tax. Although these 'deposits' were to be kept in a separate account, nevertheless in the circumstances of this case, it would be mere sophistry to hold that the monies so deposited were not 'realisations' for the purposes of the U.P. Excise Act. Therefore, what was deposited by the appellants with the State would remain with the notwithstanding, the interim orders which required the State to keep it in a separate account but, at the same time, what has not been collected by the State cannot be realised by it, even in those cases where a bank guarantee had been furnished.

19. In view of the foregoing it is to be made clear here that by the judgment of *Prof. Yashpal* (supra) the standards of the Universities are required to be maintained, but at the same time as observed the fate and fortune of the students is not required to be astonished. As aforementioned the details of the Universities are not with the Court, however, the scrutiny is required to be made by the authorities with respect to the certificates issued by those Universities who were party to the *Prof. Yashpal's case.* It is .further made clear, here that the

certificates issued by those Universities prior to the date of the judgment of Prof. Yashpal may not be made the subject of scrutiny on the ground of quashment of notification while the genuineness of those certificates may be looked into. It is also made clear here that if the certificates of the Universities produced by the students is after the said cut off date i.e. 11.2.2005 then it may be required to be examined in view of the observations made in the said judgment by the Apex Court.

20. In view of the foregoing discussion in the opinion of this Court the certificate issued by Barkatullah Vishwavidyalaya, Bhopal (M.P.), Bhoj University, Bhopal (M.P.), Makhanlal Chaturvedi Vishwavidyalaya Bhopal (M.P), Chhattisgarh University Raipur, Dr. C.V. Raman University Bilaspur, University of Technical Science Raipur (Chhattisgarh) and Doon International-University Raipur (Chhattisgarh) are hereby made valid subject to observations made hereinabove and the order issued contrary to the said observation Annexure P/1 is hereby quashed.

21. Now coming to the issue of non-availability of the valid registration in the employment exchange is concerned the said issue has been duly considered by the Apex Court in the case of *Kishore K. Pati* (supra). The Apex Court has held as thus:-

> "4. Mr. Banerjee, learned counsel appearing for Respondent 7 contended that in the writ appeal filed by him before the Division Bench, he has raised several questions which have not been answered and therefore it would be appropriate for this Court to remit the matter to the Division Bench for redisposal. On going through the counter-affidavit and the impugned judgment of the High Court, we do not find any contention raised not being answered by the Division Bench. On the other hand, the Division Bench has disposed of the appeal on the ground that the consideration of the case of the appellant and Respondent 7 whose case has not been sponsored by the employment exchange is not sustainable in law and as we have said earlier, the said view is not correct. In that view of the matter, we set aside the impugned judgment of the Division Bench and allow this appeal."

22. It is to be observed that condition no. 1.12 is not the mandatory condition pertaining to eligibility, but it is directory to regulate the process of selection. In the present case the selection on the post of Patwari has been made after issuing the advertisement and holding' the eligibility test. On found eligible in the test and possessing the other requisite qualification merely on the ground of . non-availability of valid registration in the employment exchange of the concerned district may not be a ground to reject the candidature of the petitioners, on qualifying the eligibility test. Non-availability of the certificate may term as irregularity, but thereby eligible candidate cannot be held ineligible only for the said reason. Therefore, the order passed by the respondents rejecting the candidature of the selected candidates is wholly arbitrary and unreasonable and such orders or instructions or action by the respondents taken by the oral orders is hereby quashed.

23. In view of the foregoing discussion in the opinion of this Court the action taken by the respondents to pass the order Annexure P/1 rejecting the candidature of the petitioners on account of possessing the diploma in Computer Application or Post Graduate course from the aforementioned Universities is hereby quashed. If the petitioners possess the certificate from the aforementioned Universities it may be examined in the light of the observations made by this Court in the aforementioned paragraphs and if they found place in the merit list the petitioners be sent for training. Similarly the orders passed by the authorities rejecting the candidature of the petitioners or hold them ineligible on account of not having valid registration in the employment exchange is also quashed. Accordingly all these petitions are allowed and disposed of with the following directions:

> (1). The order passed by the respondent no.1 vide Annexure P/1 dated 15.1.2010 and the orders issued in this respect derecognizing the certificates issued by the by Barkatullah Vishwavidyalaya, Bhopal (M.P.):Bhoj University, Bhopal (M.P:), Makhanlal Chaturvedi Vishwavidyalaya Bhopal (M.P.), Chhattisgarh University Raipur, Dr. C.V. Raman University, Bilaspur, University of Technical Science Raipur (Chhattisgarh) and Doon International University Raipur (Chhattisgarh) and do not have the educational qualification as per clause 1.8 is hereby quashed.

(2) The respondents may examine the genuineness of the certificates issued by the various Universities of the State of Madhya Pradesh and they may ascertain the fact that those Universities have been established under any of the Act as specified under Section 2(f) of the University Grants Commission Act, 1956. If it is found that those Universities have been established under the said Act, the certificates issued by the various Universities in the State of Madhya Pradesh be treated as valid.

(3) The respondents are directed to scrutinize the cases of those petitioners whose certificates have been issued by various Universities at Chhattisgarh State after 11.2.2005 in the light of para 64 and 65 of the judgment of *Prof. Yashpal* (supra) and the appropriate orders be passed in this regard.

(4) The judgment of *Prof. Yashpal* (supra) shall be applicable prospectively only on those certificates issued by the universities after the date of the said judgment i.e. 11.2.2005

(5) The impugned order issued by the authorities treating the petitioners to be ineligible on account of not having the valid registration in the employment exchange in the district concerned is hereby quashed.

(6) The, district authorities shall be at liberty to examine and to verify the genuineness of the documents of the educational and other qualifications.

(7) It is also made clear here that the respondents shall take appropriate steps in view of the foregoing direction within a period of two months from the date of communication of this order along with the representation, if any.

(8) In view of the foregoing directions and on scrutiny if the petitioners find placed in the merit list/selection panel then they be sent for patwari training irrespective to the availability of posts.

(9) It is further made clear here that if the posts have

been filled up by the person below in the merit on account of passing the order impugned then appropriate orders may be passed in this regard by giving an opportunity to those candidates who have already sent for training or otherwise, it is the discretion of the respondents to adjust them by creating the posts, if any.

(10) In the facts and circumstances of the case, parties are directed to bear their own costs.

Petition allowed.

I.L.R. [2011] M. P., 1211
WRIT PETITION
Before Mr. Justice A.K. Shrivastava
W.P. No. 465/2002 (Jabalpur) decided on 25 January, 2011

BHARAT PETROLEUM CORPORATION ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. Transfer of Property Act (4 of 1882), Section 112 - Waiver of forfeiture - **Period of lease came to end in the year 1970 - Lessee continued to remain in possession even thereafter and lessor accepted the rent deposited by the lessee - *Held* - Its status would still remain as a lessee unless and until the lease is determined in accordance with law.** (Para 21)

क. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 112 – समपहरण का अधित्यजन – वर्ष 1970 में पट्टे की अवधि समाप्त हो गई – उसके पश्चात भी पट्टेदार ने कब्जा बनाए रखा और पट्टाकर्ता ने पट्टेदार द्वारा जमा किया गया भाड़ा स्वीकार किया – अभिनिर्धारित – उसकी हैसियत पट्टेदार के रूप में बनी रहेगी जब तक कि विधिनुसार पट्टे का निर्धारण नहीं किया जाता।

B. Transfer of Property Act (4 of 1882), Section 105 - Lease - Fixation of Rent - **Lease rent payable w.e.f. 1971 fixed by lessor by order dated 11-1-1995 on the basis of the guidelines of the year 1993-1994 - *Held* - Rent and premium should have been fixed in accordance with the norms of respondents prevailing from time to time from the year 1971 to 1995.** (Para 23)

ख. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 105 – पट्टा – भाड़ा निर्धारण – आदेश दिनांक 11.01.1995 द्वारा वर्ष 1993–1994 के दिशानिर्देशों के आधार पर पट्टाकर्ता द्वारा 1971 से प्रभावशील देय पट्टा भाड़ा नियत किया गया – अभिनिर्धारित – वर्ष 1971 से 1995 तक समय–समय पर प्रत्यर्थियों के विद्यमान मानकों के अनुसार भाड़ा एवं प्रीमियम नियत किया जाना चाहिए था।

C. Transfer of Property Act (4 of 1882), Section 102 - Lease - Possession - **7000 sq. ft. given on lease however, certain portion in possession of encroachers and nothing on record that possession of entire area has been given to petitioner - Held - As possession of entire leased area not handed over to petitioner, apportionment of premium and yearly rent is to be made by State Govt. by keeping in mind that how much actual area the petitioner is possessing.** (Para 24)

ग. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 102 – पट्टा – कब्जा – 7000 वर्ग फीट पट्टे पर दिया गया, किन्तु कतिपय हिस्सा अतिक्रामकों के कब्जे में और अभिलेख पर कुछ नहीं कि संपूर्ण क्षेत्र का कब्जा याची को दिया गया है – अभिनिर्धारित – चूंकि पट्टे पर दिये गये संपूर्ण क्षेत्र का कब्जा याची को हस्तांतरित नहीं किया गया प्रीमियम और वार्षिक भाड़े का प्रमाणन, राज्य सरकार द्वारा किया जाना चाहिए, यह ध्यान में रखते हुए कि याची के कब्जे में वास्तविक क्षेत्र कितना है।

V.R. Rao with *Kapil Jain,* for the petitioner.

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

ORDER

A.K. Shrivastava, J. :–By this petition under Article 226/227 of the Constitution of India the petitioner has sought quashment of the order dated 16.2.2001 passed by Collector, Sagar (document No.10); quashment of demand raised by Tahsildar, Sagar dated 22.12.2001 (document No.11); commanding renewal of lease for a period of 30 years commencing from 1976; computation of lease rent on the basis of cost of land as it existed in the year 1976 and computation of lease rent and premium based on memorandum dated 3.3.1994.

2. The facts, in nutshell are that a lease of 0.27 acre (140' x 50') out of Khasra No.279 of Mouza Rajakhedi, Sagar was granted to M/s Burmah Shell Oil & Storage Company by the Governor of Central Provinces and Berar represented by Deputy Commissioner, Sagar for establishing a retail outlet of petrol pump for a period of five years with effect from 4.11.1955 to 3.11.1960 on a yearly rent of Rs.21=4 annas (document No.1). Later

on, the said Company applied for renewal of lease and rent of permanent lease to Collector and Naib Tahsildar, Sagar on 15.9.1966. The Company was communicated by Collector, Sagar that permanent lease has been granted on annual rent of Rs.490/- and premium of Rs.160/-. The Company was asked to pay the rent and arrange to execute document of permanent lease. A copy of the intimation has been filed as document No.2.

3. It is the further case of the petitioner that Bharat Petroleum Corporation is successor of Burmah Shell Oil & Storage Company. Since the period of renewed lease was going to be lapsed, the petitioner applied for renewal of the lease period which was registered as Case No.22A/ 20(1)76-77 by the Nazul Officer, Sagar. According to the petitioner, the decision to renew the lease period was pending on the table of the respondents. The senior officers of the Company were called by Collector, Sagar on 17.12.1999 and discussed in respect of renewal of lease period and in this regard letter dated 23.11.1991 (document No.4) has been filed by the petitioner, but the lease period was not renewed. Nevertheless, the retail outlet of the petitioner was continued.

4. The record of the proceedings relating to renewal of the lease period was shuttling between the Tahsildar, Nazul Officer, Collector, Commissioner and the office of the Secretariate at Bhopal. Ultimately, it was lost, with the result it took lessor nearly 19 years to convey to the petitioner that State Government has consented to renew lease for the period 1971 to 2001. Copy of the intimation in this regard has been filed by the petitioner as document No.5. However, during the intervening period, since the decision to renew lease was taking much time, lease rent was demanded by the respondents and the same was deposited by the petitioner till the year 2001. The receipts acknowledging payment collectively have been filed as document No.6.

5. On renewing the lease period vide document No.5 dated 11.1.1995 with effect from 1971 to 2001 the State of Madhya Pradesh directed to provide area 7000 square feet to the petitioner for a premium of Rs.5,60,000/- on yearly rent @ Rs.42,000/- for the period 1971 to 2001 and granted permanent lease on the conditions which are referred in document No.5 dated 11.1.1995. One of the condition which is embodied in this document is that within six months from 11.1.1995 the petitioner

shall be obliged to deposit the requisite premium or else the allotment order shall stand rejected automatically. It is the further case of the petitioner that although an area 7000 square feet has been directed to be provided, but, in fact the respondents were having possession of 3375 square feet only which was given to the petitioner and rest of the portion was in the possession of the trespassers and in this regard petitioner submitted respondents to remove the encroachment but the land was not got vacated and vacant possession of the encroached land was never given to the petitioner, hence, on the basis of land which was given in the possession of the petitioner the premium and yearly rent should have been fixed.

6. The petitioner submitted an application/representation to Secretary, Revenue Department of the State of Madhya Pradesh that the premium and the rate of rent which has been fixed is based on the guidelines of market rate prevailing in the year 1994-95 and not in terms of the circular F-6-34 Nazul-94, Bhopal dated 3.3.1994 which says that the premium and the yearly rent of the government land provided to public sector should be nominal and not according to the market rate. Since the petitioner is a Government of India undertaking and is serving under the different schemes of the State Government, therefore, the exorbitant premium @ Rs.160/- and yearly rent @ Rs.490/- which has been fixed at the market rate be reconsidered in terms of the circular of the Government on the subsidised premium and yearly rent and it may accordingly be ordered and in this regard document No.8 has been filed but this representation was never decided.

7. Since the petitioner did not deposit the premium and the yearly rent as demanded by the respondents vide document No.5 dated 11.1.1995, the Additional Collector, Sagar vide its order dated 16.2.2001 cancelled the permanent lease of petitioner and in this regard a letter was sent by Nazul Officer, Sagar to petitioner on 13/15th March, 2001 (document No.9). The Additional Collector, Sagar vide order dated 16.2.2001 also directed to take possession of the land on which the retail outlet of the petitioner has been installed.

8. Hence, the petitioner by filing this petition under Articles 226 and 227 of the Constitution of India has prayed the reliefs which I have mentioned hereinabove.

9. The respondents have filed return and submitted that the State Government allotted the lease in question in favour of the petitioner subject to deposit the premium and lease rent prescribed under the guidelines prevailing in the year 1993-94 vide order dated 11.1.1995 (document No.5) by imposing a specific condition in para 2 that the allottee should deposit the premium and lease rent within a period of six months from the date of allotment, failing which the order of allotment will stand automatically cancelled. However, for about seven years the petitioner did not deposit any amount, hence, a decision was taken to cancel the lease and eventually rightly it has been cancelled.

10. Further stand of the respondents in the return is that the land in question was given to predecessor Company of the petitioner M/s Burmah Shell Oil & Storage Company by the Governor of Central Provinces and Berar with effect from 4.11.1955 for a period of five years and subsequently the lease was renewed by the Collector vide order dated 9.4.1963. The nature of the aforesaid lease was temporary and which was liable to be renewed after each five years on the terms of premium and lease rent fixed by the Government. The Company was later on asked to execute a formal lease agreement by Naib Tahsildar vide order dated 27.6.1966, but, the Company did not turn up to execute the lease deed and remained in actual possession of the land. Subsequently, an application on behalf of the petitioner was moved in the year 1976 for the grant of permanent lease in respect of the same land. The petitioner for all practical purposes remained in possession of the said land since 1955 whereas no renewal was allowed after the year 1970. In para-4 of the return it has been admitted that certain encroachments were reported in the year 1979 on the aforesaid land and Tahsildar initiated action against the encroachers and imposed fine against them. The said order was assailed by filing appeal before the Sub-Divisional Officer, Sagar who concluded the proceedings in the year 1984 and during this period the application of petitioner to renew and provide permanent lease was pending.

11. In para-5 of the return it has been pleaded that Collector, Sagar recommended the matter to the Divisional Commissioner, Sagar for allotment of permanent lease on 4.4.1992 who later on forwarded the matter to the State Government for the grant of lease. The State Government being competent authority decided to allot the land on per-

manent lease subject to deposit the premium and lease rent prevailing in the year 1993-94 and directed Collector, Sagar on 23.9.1994 (Annexure R-1) to make the computation of premium and lease rent in respect of the land in question.

12. It has been admitted in the return that the decision was taken only in the year 1995 to allot the permanent lease in favour of the petitioner and accordingly computation of premium and lease rent was determined on the basis of rate which was prevailing in the year 1993-94 and now the petitioner is estopped to question the fixation of the premium and lease rent. According to the respondents since the petitioner did not pay the requisite premium amount as well as annual rent, therefore, rightly the lease has been terminated and petitioner is not entitled for any relief as prayed in this petition.

13. The contention of Shri Rao, learned senior counsel for the petitioner is that repeatedly the petitioner was requesting the respondents to renew the lease as well as to provide permanent lease but they took near about two decades to pass order and it appears that the concerned file which was made pendulum in between the different offices of the respondents viz. Nazul Officer, Collector, Commissioner and ultimately office of the Secretariate at Bhopal and the same was not traceable and was lost and ultimately a decision was taken on 11.1.1995 (document No.5) by the Revenue department of the State Government to grant a lease in favour of petitioner retrospectively with effect from 1971 to prospective period of 2001 and therefore, fixing the premium at a higher rate retrospectively with effect from 1971 is not only arbitrary.

14. By inviting my attention to different receipts of the deposit of annual rent (collectively filed as document No.6) it has been submitted that regularly the yearly rent has been deposited in the Government Treasury in compliance to the demand which was being made by the respondents, therefore, the petitioner is not at all at fault at any point of time and therefore, the action of respondent directing to pay the amount of premium as well as annual rent with compound interest and that too with retrospective effect with effect from 1971 is not only illegal but is also arbitrary in nature and therefore, the impugned order dated 16.2.2001 passed by the Additional Collector, Sagar and in pursuance to that order the demand of Rs.20,44,700/- dated 22.12.2001 (document No.11) be quashed.

15. On the other hand, Shri Harish Agnihotri, learned Government Advocate justified the action of the respondents making the said demand and submitted that this petition be dismissed.

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

17. On bare perusal of the first order-sheet of this Court dated 31.1.2002 this Court finds that while issuing notice on the question of admission to the respondents an interim order was passed that no coercive steps shall be taken against the petitioner, in case, petitioner deposits a sum of Rs.4.00 Lacs with the Collector, Sagar. It is not in dispute that said amount has been deposited by the petitioner.

18. On going through the pleadings of the parties the gist whereof I have already mentioned in the facts narrated herein-above it is gathered that although the petitioner was throughout possessing the land for retail outlet of the petrol pump and after the expiry of the lease period he was also requesting the authorities to get the lease period renewed and further to grant permanent lease to the petitioner with effect from 1976 but no concrete action was taken for a very long period of 19 years (near about two decades) and ultimately the decision was taken by the respondent No.1 directing to renew the lease as well as for the grant of permanent lease with effect from 1970 to 2001 only on 11.1.1995 (document No.5). Admittedly, during this period throughout the retail outlet of the petrol pump of the petitioner was permitted to be continued and the lease was never cancelled. Only vide order dated 16.2.2001 an order was passed by the Additional Collector passing an order that the lease is determined on account of not depositing the premium and annual rent and ultimately directed to take possession of the land in which retail outlet of the petitioner is established.

19. On going through the letter dated 15th September 1966 issued by the Naib Tahsildar, Sagar to the then predecessor of petitioner the Burmah Shell Oil & Storage Company in respect of grant of permanent lease this Court finds that an application to grant permanent lease was submitted to the concerning officer on 27.8.1961 since the reference of this application has been given in document No.2. On bare perusal of the letter it is further gathered as an area 7000 square feet has been granted by Collector, Sagar vide its order dated 9.4.1963 in Revenue Case No.12-1/(A) 1963-66 on the

annual rent of Rs.490/- and a premium of Rs.180/-, the petitioner's predecessor was directed to deposit rent with effect from 4.11.1960 to 3.11.1967 and to get the document of the permanent lease executed and was further directed to make the payment of the rent by 1.10.1966 with a further stipulation to get the document of permanent lease executed. In pursuance of this document the petitioner on 27th September 1966 submitted cheque of Rs.3430/- and the letter of thanks in that regard was given by Naib Tahsildar, Sagar. However, the lease deed was not got executed. But, the predecessor of the petitioner deposited the premium as well as was depositing the yearly rent. The Naib Tahsildar, Sagar was requested to send the copy of receipt of challan for the record of petitioner's predecessor.

20. The respondents have not filed any document along with the return that the petitioner's predecessor was at fault in not getting the document of lease executed. No correspondence in that regard has been filed along with the return.

21. On bare perusal of the document No.6 containing the collective receipts of the yearly rent this Court finds that earlier the petitioner's predecessor and after merger of the said company, yearly rent was being deposited by the petitioner. Therefore, it appears that the petitioner was not at fault and he was depositing the yearly rent at the rate of Rs.490/- per year as directed by the respondents to petitioner's predecessor company and later on at the rate of Rs.735/- per month. The bald statement in the return that petitioner's predecessor company did not turn up to execute lease deed will not be sufficient in order to hold that at any point of time the said company was at fault in absence of any correspondence submitted along with the return indicating that the said company was at fault. Even otherwise, no action was taken by the respondents terminating the lease of the petitioner in default of executing the lease deed. On the contrary they were accepting the yearly rent which was being deposited by the petitioner. In the return in para-4 it has been admitted by the respondents that again in the year 1976 the petitioner requested to grant a permanent lease in respect of the land to run the retail outlet. Further it is admitted in the return that no renewal of lease period was allowed after 1970. According to me, if by the efflux of the period of lease the petitioner continued as a lessee and was depositing yearly rent which was being accepted by the respondents, its status would still remain as a lessee un-

less and until the lease is determined in accordance with law in terms of the provisions of the Transfer of Property Act. Undisputedly regularly the yearly rent was being deposited by the petitioner and which was being accepted by the respondents.

22. It has been pleaded in the return in para-3 that in the year 1976 again the petitioner applied to get the lease deed renewed but no order was passed by the respondents in this regard, although the petitioner was pursuing to get the lease period extended. On bare perusal of document No.4 dated 23rd December, 1991 this Court finds that again a request was made by the petitioner to Collector, Sagar to grant the permanent lease mentioning the fact in this document that permanent lease was granted with effect from 4.11.1960 to 3.11.1967 by reminding and inviting to the letter of Naib Tahsildar dated 15th September, 1976 in that regard acknowledged by the petitioner's predecessor company vide its letter dated 27th September, 1966 (document NO.3). In this letter dated 23rd December, 1991 (document No.4) specifically it has been mentioned that rent has been paid upto 1989-90 and copy of the rent receipt was also enclosed and under these circumstances it was requested to grant the permanent lease but nothing was done by the respondents.

23. Hence, for the reasons which I have stated herein-above I am not having any scintilla of doubt in holding so that the petitioner was not at fault at any point of time and he was again and again requesting the respondents to grant permanent lease. Ultimately, the respondent No.1 vide order dated 11.1.1995 (document No.5) directed to allot patta of 7000 square feet land with effect from 1971 to 2001 fixing the premium of Rs.5,60,000/- and yearly rent of Rs.42,000/- by giving further direction that the entire amount be deposited within a period of six months from the date of issuance of the order. On bare perusal of the averments made in the return this Court finds that by allotting the land in question on permanent lease basis the rent prevailing in the year 1993-94 was taken into consideration and in this regard the circular of the Government dated 2nd August, 1994 was taken into consideration. According to me, if the decision was taken on 11.1.1995 vide document No.5 on the basis of the guideline of the year 1993-94, it should not have been applied retrospectively with effect from 1971 because the petitioner was not at fault at any point of time. On the contrary, he was repeatedly requesting the respondents to provide the permanent lease and continued to deposit

the yearly rent. Hence, according to me the demand to pay the yearly rent as well as fixing the premium on the guidelines of the year 1993-94 is arbitrary so far as fixing the annual rent and the premium from 1971 to 11.1.1995 and indeed, the yearly rent and the premium should have been fixed in accordance to the norms of the respondents prevailing from time to time from the year 1971 to 1995. The said action of the respondents is arbitrary and hence that part of the order of respondent No.1 dated 11.1.1995 (document No.5) directing to pay the premium and yearly rent with effect from 1971 to 11.1.1995 is set aside and quashed with a direction to respondent No.1 that guideline of the Government which was prevailing during these years from time to time and on the basis of those guidelines the premium and the yearly rent be fixed with effect from 1971 to 11.1.1995.

24. As pointed out hereinabove that in the return it has been admitted by the respondents that certain portion of land has been encroached by the encroachers and the proceedings are initiated against them but there is nothing on record whether vacant possession of the entire area 7000 square feet has been given to the petitioner or not and therefore, by taking into account this aspect of the matter that although it was directed to provide 7000 square feet of land to the petitioner, the possession of this area was not provided to him and therefore, accordingly apportionment of the premium and yearly rent is to be made by the State Government by keeping in mind that how much actual area the petitioner is possessing.

25. However, I do not find any illegality in the order of the respondent No.1 dated 11.1.1995 (document No.5) in determining the premium and the rate of yearly rent on the guidelines of 1993-94 because it is in the domain of the Government to fix the rate. Why such rate has been fixed, it has been mentioned in the circular dated 2nd August, 1994 (Annexure R-1) assigning reasons for fixing the premium and the yearly rent. It is, however, made clear that in case the premium and the yearly rent has not been fixed in terms of the said circular dated 2nd August, 1994 (Annexure R-1), it may be fixed in pursuance to the said circular which shall be paid by the petitioner with effect from 11.1.1995 in terms of document No.5. The impugned order dated 16.2.2001 (document No.10) which is the order of Collector, Sagar in pursuance of which the Tahsildar issued letter dated 22.12.2001 making demand of Rs.20,44,700/- along with 15% interest is hereby set aside and quashed. According to me, because the petitioner

was not at fault any time, therefore, he cannot be saddled with the interest and therefore, interest part is also set aside.

26. Resultantly, this petition succeeds in part. The impugned orders Annexure P-10 dated 16.2.2001 of Additional Collector, Sagar and the order of Tahsildar dated 22.12.2001 are hereby set aside and quashed. The order of State Government (respondent No.1) dated 11.1.1995 (document No.5) is set aside in part and that part of order by which the premium and the yearly rent has been fixed with effect from 1971 on the basis of the guideline of 1993-94 is hereby quashed and respondent No.1 is hereby directed to fix the premium as well as yearly rent from the year 1971 to 11.1.1995 on the basis of guidelines prevailing from time to time in different years for that period by taking into account that out of 7000 square feet the possession of how much area has been given to the petitioner and accordingly by apportioning the area which was in actual possession of the petitioner, the premium and the yearly rent may be fixed. From 11.1.1995 the premium and the yearly rent be fixed on the basis of the guidelines prevailing in the year 1993-94 as mentioned in the circular dated 2.8.1994 (Annexure R-1) to the area which the petitioner is actually possessing w.e.f. 11.1.1995. The respondents are further directed to adjust Rs.4.00 Lacs which were deposited by the petitioner vide order dated 31.1.2002.

27. This petition is accordingly partly allowed to the extent indicated hereinabove with no order as to costs.

Petition partly allowed.

I.L.R. [2011] M. P., 1221

WRIT PETITION

Before Mr. Justice S.N. Aggarwal

W.P. No.3134/2009(S) (Gwalior) decided on 8 February, 2011

CHITRALEKHA SHAKYA (SMT.) ... Petitioner

Vs.

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

A. ***Service Recruitment - Local Resident*** **- Petitioner born in an area which upon bifurcation came under the jurisdiction of Chhattisgarh - Her father was a resident of Chhattisgarh for last more than 50 years - Merely because the petitioner had her educa-**

tion in Madhya Pradesh or because she was married in Madhya Pradesh would not confer upon her the status of 'original resident' of State of Madhya Pradesh - She was rightly denied appointment on a post reserved for reserved candidate belonging originally to State of Madhya Pradesh - 'Local residence certificate' issued by the Naib Tehsildar is of no legal consequence - The local residence of a person cannot be equated with 'original residence'. (Para 10)

क. सेवा भर्ती – स्थानीय निवासी – याची का जन्म उस क्षेत्र में हुआ जो द्विभाजन होने पर छत्तीसगढ़ की आधिकारिता के अंतर्गत आ गया – उसके पिता पिछले 50 वर्षों से अधिक समय से छत्तीसगढ़ के निवासी थे – मात्र इसलिए कि याची का शिक्षण मध्य प्रदेश में हुआ या इसलिए कि उसका विवाह मध्यप्रदेश में हुआ, उसे मध्यप्रदेश राज्य की मूल निवासी का दर्जा प्रदान नहीं होता – उसे उचित रूप से, मूलतः मध्यप्रदेश राज्य के निवासी आरक्षित अभ्यर्थी के लिए आरक्षित पद पर नियुक्ति देने से इंकार किया गया – नायब तहसीलदार द्वारा जारी 'स्थानीय निवासी प्रमाणपत्र' का कोई विधिक औचित्य नहीं – व्यक्ति के स्थानीय निवास को 'मूल निवास' के समतुल्य नहीं माना जा सकता।

***B. Service Law - Minimum qualification - Local Resident - Meaning of* - A person may originally belong to 'A' State but because of certain contingencies, he may migrate to 'B' State and become a local resident of that 'B' State - Would it confer a status of 'original resident' of 'B' State on such a person? The answer to this is plain 'No' - When the condition in the advertisement, pursuant to which the petitioner had applied for her appointment, prescribes a condition of 'original resident' which condition she admittedly does not fulfills, she has no right to claim appointment against a post reserved for reserved category originally belonging to State of Madhya Pradesh.** (Para 10)

ब. सेवा विधि – न्यूनतम अर्हता – स्थानीय निवासी – के अर्थ में – कोई व्यक्ति मूलतः 'ए' राज्य का निवासी हो सकता है, किन्तु कतिपय आकस्मिकता के कारण वह 'बी' राज्य में प्रवजन कर सकता है और उस 'बी' राज्य का स्थानीय निवासी बन सकता है – क्या यह ऐसे व्यक्ति को 'बी' राज्य का 'मूल निवासी का दर्जा प्रदान करता है? इसका स्पष्ट उत्तर है 'नहीं' – जब विज्ञापन जिसके अनुसरण में याची ने उसकी नियुक्ति हेतु आवेदन किया था, में दी गई शर्तें, 'मूल निवासी' की शर्त विहित करता है, जिस शर्त को वह स्वीकृत रूप से पूर्णतः नहीं करती, मध्यप्रदेश राज्य के मूल निवासी की आरक्षित श्रेणी के लिए आरक्षित पद पर नियुक्ति का दावा करने का उसे कोई अधिकार नहीं।

Prashant Sharma, for the petitioner.
Vishal Mishra, G.A., for the respondent No.1/State.
R.D. Jain, A.G., for the respondent No.2.

O R D E R (ORAL)

S.N. AGGARWAL, J. :–Briefly stated the facts of the case relevant for the disposal of this writ petition are that the petitioner belongs to a reserved category and was born in Chhattisgarh. She got married in Jaura under the jurisdiction of district Morena, Madhya Pradesh. She has done her degree of Bachelor of Engineering in Electronics Engineering from MITS College, Gwalior. She was an aspirant for her appointment to the post of lecturer advertised by M.P. Public Service Commission in 2005. She applied her appointment against a post reserved for schedule caste. She was not fd eligible for her appointment against a reserved seat as she did not originally belong to State of Madhya Pradesh. She has, therefore, filed the present writ petition seeking following reliefs :-

> i. Respondent No. 2-M.P. Public Service Commission may kindly be directed to re-constitute the interview Board and conduct a afresh interview for the petitioner and award her requisite marks.
>
> ii. After conducting interview of the petitioner her name be included in the merits list upon being finding fit she be declared as successful candidate.

2. In response to the notice of this writ petition, reply has been the present writ petition have been opposed by respondent no. 2 mainly on the ground that in terms of advertisement, the petitioner was not eligible for her appointment against a reserved seat as she did not originally belong to State of Madhya Pradesh.

3. The only short question that arises for consideration in the present writ petition is whether the petitioner on the basis of her marriage in the State of Madhya Pradesh can claim appointment against a post reserved for schedule caste candidate who originally belongs to State of Madhya Pradesh.

4. Mr. Prashant Sharma, learned counsel appearing on behalf of the petitioner has strenuously argued that prior to carving out a separate State of Chhattisgarh in the year 2002, all residents of Chhattisgarh and

Madhya Pradesh were treated as part of one common State i.e. State of Madhya Pradesh and, therefore, according to him, the petitioner cannot be denied appointment on the ground that she does not originally belong to Madhya Pradesh. The learned counsel has further argued that the petitioner has done her entire education starting from High school upto Bachelor degree in engineering from Madhya Pradesh and that according to him is also an additional ground to consider her as originally belonging to Madhya Pradesh. Mr. Prashant Sharma has placed heavy reliance on a document being Annexure-P/6 at page 25 of the paper book, which is a certificate dated 2-6-2009 issued by the Naib Tehsildar, Jaura, District Morena, certifying that the petitioner is a local resident of Jaura. On the strength of this certificate, learned counsel has argued that petitioner fulfills all the eligibility criteria prescribed in the advertisement for appointment against a post reserved for schedule caste candidate originally belonging to State of Madhya Pradesh.

5. Per-contra, Mr. R. D. Jain, learned Advocate General, appearing on behalf of the MPPSC has argued that after bifurcation and carving out a separate State of Chhattisgarh, petitioner cannot claim that she originally belongs to Madhya Pradesh merely because she was married in Jaura under the jurisdiction of district Morena in Madhya Pradesh. The contention of learned Advocate General is that petitioner cannot acquire original residency of State of Madhya Pradesh by virtue of her marriage in Madhya Pradesh as she was admittedly born in an area which upon bifurcation was allotted to the State of Madhya Pradesh. Learned Advocate General has prayed for dismissal of this writ petition.

6. I have given my anxious thought to the above rival arguments advanced by the learned counsels for both the parties but I am sorry, I could not persuade myself to agree with the submissions made on behalf of petitioner, for the reasons to follow hereinafter.

7. The relevant clause in the advertisement pursuant to which petitioner had applied for her appointment to the post of lecturer against a post reserved for schedule caste candidate originally belonging to State of Madhya Pradesh is extracted below :-

> "6. अनुसूचित जाति एवं अनुसूचित जनजाति के लिये आरक्षित पद केवल मध्य प्रदेश के मूल निवासी अनुसूचित जाति एवं अनुसूचित जनजाति के लिये आरक्षित है । छत्तीसगढ सहित अन्य प्रदेशों के मूल निवासी ऐसे

आवेदक जो अपने मूल निवास के राज्य में अनुसूचित जाति एवं अनुसूचित जनजाति वर्ग के रूप में मान्य हों, अनारक्षित श्रेणी के उम्मीदवारों के लिये विज्ञापित पदों के विरुद्ध ही विचारित किये जावेंगे, आरक्षित पद के विरुद्ध नहीं ।"

8. It may be seen from the above condition contained in the advertisement that there are two prerequisites for eligibility for appointment against a post reserved for schedule caste candidate and those two prerequisites are; (i) that a candidate must belong to schedule caste or schedule tribe category and (ii) that such a schedule caste or schedule tribe candidate must also originally belong to State of Madhya Pradesh.

9. It may also be seen from the above clause contained in the advertisement that the advertisement does not bar a schedule caste or schedule tribe candidate belonging to Chhattisgarh from applying for consideration but in that case, the consideration of such a reserved category candidate belonging to State of Chhattisgarh can only be against an unreserved post.

10. In the present case, the petitioner was admittedly born in an area which upon bifurcation and carving out a separate State of Chhattisgarh came under the jurisdiction of Chhattisgarh. Her father was a resident of Chhattisgarh for last more than 50 years. Merely because the petitioner had her education in Madhya Pradesh or because she was married in Madhya Pradesh would not confer upon her the status of 'original resident' of State of Madhya Pradesh. Since, the petitioner was not 'original resident' of Madhya Pradesh, she was rightly denied appointment by the respondents against a post reserved for reserved candidate belonging originally to State of Madhya Pradesh. The 'Local residence certificate' Annexure-P/6 at page 25 of the paper book relied upon by the petitioner is a certificate issued by the Naib Tehsildar, Jaura, certifying that the petitioner is a 'local resident' of Jaura under the jurisdiction of district Morena in Madhya Pradesh and this certificate of local residence, in the opinion of this court, is of no legal consequence. The local residence of a person cannot be equated with 'original residence'. A person may originally belong to 'A' State but because of certain contingencies, he may migrate to 'B' State and become a local resident of that 'B' State. Would it confer a status of 'original resident' of 'B' State on such a person? The answer to this is

plain 'No'. When the condition in the advertisement, pursuant to which the petitioner had applied for her appointment, prescribes a condition of 'original resident' which condition she admittedly does not fulfills, she has no right to claim appointment against a post reserved for reserved category originally belonging to State of Madhya Pradesh.

11. Before parting with this order, I would like to note that the petitioner in the present petition has not challenged the constitutionality or vires of twin conditions prescribed in the advertisement for appointment against a post meant for reserved category originally belonging to State of Madhya Pradesh.

12. In the facts and circumstances of the case stated hereinabove, I do not find any merit in this petition which fails and is hereby dismissed but with no order as to costs.

Petition dismissed.

I.L.R. [2011] M. P., 1226

WRIT PETITION

Before Mr. Justice Rajendra Menon

W.P. No. 3653/2009 (Jabalpur) decided on 21 February, 2011

ASHISH SINGH ...Petitioner

Vs.

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

A. Service Law - Age Limit - **Neither in the policy nor in the advertisement the cut-off date is appointed - The cut-off date has to be determined to be last date by which the applications were to be received by the competent authority.** (Para 9)

क. सेवा विधि – आयु सीमा – कट ऑफ दिनांक ना तो नीति में और न ही विज्ञापन में नियत है – उस तिथि को कट–ऑफ दिनांक निर्धारित करना होगा जो कि आवेदनों को सक्षम प्राधिकारी द्वारा प्राप्त किये जा सकने की अंतिम तिथि है।

B. Qualification - **Minimum educational qualification prescribed is Class 10th pass under the 10+2 High School Examination Pattern - Petitioner is 10th Class pass and is more meritorious than respondent No. 5 - Merely because respondent No. 5 is more qualified and is 12th Class pass that cannot be a ground for ignoring the merit of the petitioner, who is qualified for appointment and giving preference to**

respondent No. 6 only because he is 12th Class pass, the decision taken by the Gram Panchayat by referring to Clause 3.3 of the policy dated 12.09.95 is nothing but an arbitrary decision. (Para 11)

ख. अर्हता – न्यूनतम शैक्षणिक अर्हता, 10+2 हाई स्कूल परीक्षा पैटर्न के अंतर्गत 10वी कक्षा उत्तीर्ण, विहित है – याची 10वीं कक्षा उत्तीर्ण है और प्रत्यर्थी क्रं. 5 से अधिक उत्कृष्ट है – मात्र इसलिए कि प्रत्यर्थी क्रं. 5 अधिक अर्हता रखता है एवं 12वीं कक्षा उत्तीर्ण है, यह नियुक्ति के लिए अर्हित याची की योग्यता की उपेक्षा करने का आधार नहीं हो सकता, और प्रत्यर्थी क्रं. 6 को प्राथमिकता देना केवल इसलिए कि वह 12वीं कक्षा उत्तीर्ण है, ग्राम पंचायत द्वारा नीति दिनांक 12.09.95 के खंड 3.3 का हवाला देकर लिया गया निर्णय और कुछ नहीं बल्कि मनमाना निर्णय है।

Cases referred :

(2003) 9 SCC 519, (1997) 4 SCC 18, (2000) 5 SCC 262, (2002) 1 SCC 124.

Sanjay Patel, for the petitioner.

S.S. Bisen, G.A., for the respondent Nos. 1 to 5.

S.S. Tiwari, for the respondent No. 6.

ORDER

RAJENDRA MENON, J. :–Challenging the order-dated 28.2.2009 passed by the Collector, and the order-dated 23.3.2009 passed by the Commissioner in the matter of appointment of Panchayat Karmi, to the Panchayat in question, petitioner has filed this writ petition.

2. In pursuance to a policy formulated by the State Government on 25.6.2007, for appointment of Panchayat Karmis, Gram Panchayat Nagda under Janpad Panchayat Khurai issued an advertisement on 5.7.2007 calling for desirable candidates to submit their application on or before 20.7.2007 as per the terms and conditions stipulated therein. The advertisement dated 5.7.2007 is Annexure P/1. In all 20 applications were received and on 21.8.2007, meeting was called for and a merit list was prepared. In accordance to merit, petitioner having received 71% marks in Class X Examination was kept at Serial No.1. However, respondent No.6, who had secured 64.2% marks, was directed to be appointed by resolution of certain Panchas on 21.8.2007 - Annexure P/2. As the resolution passed was not correct and as the merit was being ignored, petitioner submitted a representation to the Collector vide Annexure P/3. On this being done, the Panchayat again called for meeting and the Nodal Officer was directed to be present in the Meeting. In the presence

of the Nodal Officer again when the Gram Panchayat recommended for appointment of respondent No.6, the Nodal Officer did not agree and objected to the resolution-dated 25.9.2007 - Annexure P/4. Due to this, the Collector exercising powers under section 86(2) directed the CEO to take action in the matter and on the same the petitioner was appointed as Panchayat Karmi vide order-dated 10.3.2008 and thereafter petitioner was notified as the Panchayat Secretary. The order of appointment of the petitioner is Annexure P/5, which was issued on 24.3.2008. Petitioner joined the post and while he was so working respondent No.6 filed a petition before this Court and raised an objection to the effect that petitioner was a minor and, therefore, could not be appointed. This Court disposed of the Writ Petition vide Annexure P/6 and directed the Collector to look into the matter. The Collector taking into consideration the totality of the circumstances and the requirement of paragraph 3.3 of the Scheme dated 12.9.95 found that respondent No.6 had passed the 12th Examination and, therefore, the Panchayat was entitled to give preference to respondent No.6 and, therefore, approved the appointment of respondent No.6. Aggrieved thereof petitioner preferred an appeal and the same having been dismissed by the Commissioner, petitioner has filed this writ petition.

3. That apart, it was pointed out that the Gram Panchayat has taken note of the fact that as on 1.1.2007 petitioner would be less than 18 years of age and, therefore, he cannot be appointed. Emphasizing that no cut-off date for determining the age with reference to 1.7.2007 is prescribed and the petitioner was more than 18 years and 2 months on 21.8.2007, which was the last date for submission of the application, challenge is made to the action impugned.

4. Shri Sanjay Patel, learned counsel for the petitioner, argued that the petitioner was more than 18 years and 2 months as on 21.8.2007, as his date of birth is 2.6.1989 and the respondents having arbitrarily fixed the cut-off date as 1.1.2007, which was neither indicated in the advertisement nor in the Policy-dated 12.9.95, Annexure P/10, the action of the respondents in holding the petitioner to be ineligible on this count is said to be illegal. That apart, he points out that the petitioner being more meritorious having received 71% marks in the Class X Examination cannot be ignored and his merit given a go by, by selecting respondent No.6, who had only received 64.2% marks in the Class X Examination, by giving him preference on the ground that he had passed the Class 12th

Examination. Contending that the only requirement is that a candidate should be Class X pass under the 10+2 Pattern of Education, Shri Sanjay Patel seeks for interference into the matter.

5. Respondents have resisted the claim of the petitioner and submit that the order passed by the Collector and the Commissioner is reasonable, the Gram Panchayat has a right to lay down further conditions for appointment and if in view of the aforesaid powers of the Gram Panchayat preference is given to respondent No.6, who is Class 12th pass, no illegality is committed in the matter. Accordingly, on this count respondents contend that there is no merit in the petition and the same be dismissed.

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

7. Two grounds are to be considered in this writ petition. The first is with regard to eligibility of the petitioner to seek appointment with reference to his age. Admittedly, the date of birth of the petitioner is 2.6.1989 and if the cut-off date for considering the eligibility is taken as 20.7.2007 i.e... the last date for submission of the application form, then the petitioner is qualified being 18 years and 2 months old as on date. However, if the eligibility date is calculated with reference to the cut-off date as 1.1.2007 then the petitioner would be ineligible. In the advertisement issued, it is only stated vide Annexure P/1, on 5.7.2007, that the candidate should not be less than 18 years of age. In this advertisement, no cut-off date for assessing the qualification or other criteria is mentioned. Even in the policy formulated by the State Government it is only stated that the candidate should be less than 18 years of age. Nothing is stipulated in the policy also with regard to the cut-off date fixed for determining the various criteria. The policies are Annexure P/10 dated 12.9.1990 and 13.8.2007. In both these policies, the conditions stipulated are that the candidate should have passed the 10th Class Examination under the 10+2 Pattern or should have passed the High School Certificate Examination. Thereafter, it is stated that the candidate should not be less than 18 years of age.

8. The question, therefore, would be as to what should the cut-off date for determining the age of the candidate in the absence of the cut-off date being fixed either in the policy or in the advertisement.

9. The answer to the said question is available in the judgment

rendered by the Supreme Court in the case of *Shankar K. Mandal and others Vs. State of Bihar and others,* (2003) 9 SCC 519. After relying upon the earlier judgments of the Supreme Court in the case of *Ashok Kumar Sharma Vs. Chander Shekhar,* (1997) 4 SCC 18; *Bhupinderpal Singh Vs. State of Punjab,* (2000) 5 SCC 262; and, *Jasbir Rani Vs. State of Punjab* (2002) 1 SCC 124. It is laid down by the Supreme Court that the cut-off date, by reference to which the eligibility requirement imposed must be determined for seeking public appointment is the date appointed in the relevant recruitment Rules. Thereafter, it is stated that if no cut-off date is appointed by the Rules, then such date shall be appointed for the purpose in the advertisement issued calling for applications. Finally, it is laid down by the Supreme Court that if no such date is appointed either in the Recruitment Rules or in the advertisement, then the eligibility criteria shall be applied by reference to the last date appointed by which the applications were to be received by the competent authority. The aforesaid three principles are laid down by the Supreme Court for determining the cut-off date and if the aforesaid principle is applied in the present case, it would be seen that neither in the policy nor in the advertisement the cut-off date is appointed. That being so, the cut-off date has to be determined to be last date by which the applications were to be received by the competent authority and the said date would be 20.7.2007 as is evident from the advertisement - Annexure P/1 and if that be so, then on 20.7.2007 the petitioner would be more than 18 years of age and therefore, he is qualified.

10. Accordingly, the findings of the Gram Panchayat and the authorities to the effect that the petitioner was not qualified being below the age for recruitment is not correct and the same cannot be accepted.

11. The second question would be with regard to determination of merit. The minimum educational qualification prescribed is Class 10th pass under the 10+2 High School Examination Pattern. Admittedly, the petitioner is 10th Class pass and is more meritorious than respondent No.5. Merely because respondent No.5 is more qualified and is 12th Class pass that cannot be a ground for ignoring the merit of the petitioner, who is qualified for appointment and giving preference to respondent No.6 only because he is 12th Class pass, the decision taken by the Gram Panchayat by referring to Clause 3.3 of the policy dated 12.9.95 is nothing but an arbitrary decision. The provisions of Clause 3.3 contem-

plates that apart from the aforesaid criteria laid down, the Gram Panchayat can lay down further criteria in the advertisement. The provisions of Clause 3.3 does not mean that the Gram Panchayat can lay down such condition which is arbitrary in nature. The conditions to be laid down by the Gram Panchayat under Clause 3.3 has to be rational, reasonable and should be in conformity with the reasons for which it is laid down. The condition now laid down for giving preference to respondent No.6 is nothing but an arbitrary condition, as preference is given to him only because he has some extra qualification than the one prescribed, but if the minimum qualification is taken into consideration the petitioner is more meritorious than respondent No.6.

12. In that view of the matter, finding a more meritorious candidate to have been ignored for appointment and a less meritorious candidate appointed in his place, the action of the respondents is found to be unsustainable.

13. Accordingly, this petition is allowed. Order-dated 28.2.2009 passed by the Collector, and the order-dated 23.3.2009 passed by the Commissioner are quashed and it is directed that petitioner, who is more meritorious than respondent No.6 be appointed to the post in question.

14. Petition stands allowed and disposed of.

Petition allowed.

I.L.R. [2011] M. P., 1231
WRIT PETITION

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

W.P. No. 3418/2001 (Jabalpur) decided on 22 March, 2011

SENIOR REGIONAL MANAGER ...Petitioner

Vs.

C.G.I.T. JABALPUR & anr. ...Respondents

*A. **Service Law - Disciplinary Proceedings - Disagreement with report of Enquiry Officer -Natural Justice** -* **Disciplinary Authority dissented with the finding of exoneration recorded by Enquiry Officer - Workman dismissed from service by the Disciplinary Authority -** ***Held*** **- Absence of notice by Disciplinary Authority tantamounts to vitiating of decision of dismissal from service.** (Para 12)

क. सेवा विधि – अनुशासनात्मक कार्यवाहियाँ – जाँचकर्ता अधिकारी के प्रतिवेदन से असहमति – नैसर्गिक न्याय – जाँचकर्ता अधिकारी द्वारा अभिलिखित दोषमुक्ति के निष्कर्ष के साथ अनुशासनिक प्राधिकारी की विसम्मति – अनुशासनिक प्राधिकारी द्वारा कर्मकार को सेवा से हटा दिया गया – अभिनिर्धारित – अनुशासनिक प्राधिकारी द्वारा नोटिस की अनुपस्थिति, सेवा से हटाने के निर्णय को दूषित करता है।

B. Service Law - Disciplinary Proceedings - Remand - **Disciplinary Authority dismissed the workman without issuing notice - Workman was dismissed from service in the year 1984 - He has also retired during proceedings - Matter not remanded back to the stage at which the D.E. was found to be vitiated.** (Paras 13 & 14)

ख. सेवा विधि – अनुशासनात्मक कार्यवाहियाँ – प्रतिप्रेषण – अनुशासनिक प्राधिकारी ने कर्मकार को बिना नोटिस जारी किये सेवा से हटा दिया – कर्मकार को वर्ष 1984 में सेवा से हटा दिया गया था – वह कार्यवाहियों के दौरान सेवानिवृत्त भी हो गया – जिस प्रक्रम पर जहां डी.ई. दूषित हो जाना पाई गयी उसी प्रक्रम पर मामला प्रतिप्रेषित नहीं किया गया।

C. Service Law - Back Wages - Gainfully Employed - **Burden of proof to show that workman was not gainfully employed is not on the employer.** (Para 16)

ग. सेवा विधि – पिछला वेतन – लाभकारी नियुक्त – यह साबित करने का भार कि कर्मकार लाभकारी नियुक्त नहीं था, नियोक्ता पर नहीं है।

Cases referred :

AIR 1998 SC 2713, AIR 2003 SC 1100, AIR 2006 SC 3685, (2009) 2 SCC 288.

Mukesh Agarwal, for the petitioner.

Dharmendra Soni, for the respondent No. 2.

ORDER

The Order of the Court was delivered by **SANJAY YADAV, J. :**–This petition under Article 226/227 of the Constitution of the India is directed against the award dated 9.1.01, passed by Central Government Industrial Tribunal 'cum Labour Court, Jabalpur, (hereinafter to be referred as 'the Tribunal'), whereby, the reference as to 'whether the action of the management of Senior Regional Manager, Food Corporation of India, Bhopal, in removing from service of Shri S.L. Bakoria, A.G.I. (D) vide order No. V&S/4(6/83) dated 12.4.84, is

justified ? If not, what relief the workman concerned is entitled to ?', has been answered in favour of the respondent/workman who is being directed to be reinstated with entire back wages and monetary benefits attached to his post.

2. Facts which lead to raising of industrial dispute briefly are that, respondent No.2 while working as Assistant Grade-I (D) and as a Depot In charge at Itarsi, was charge sheeted for alleged shortage of sugar from the store. Denial of charges led to holding of a departmental enquiry wherein after considering the material and the .evidence brought on record by the workmen and the management, the enquiry officer exonerated respondent No.2 from the charges. The disciplinary authority however, while disagreeing with the finding recorded by the enquiry officer passed an order of dismissal on 12.4.84.

3. Being aggrieved respondent No.2 herein raised the industrial dispute and after failure of conciliation, the same was referred to for adjudication to the Tribunal vide Government of India, Ministry of Labour Order No. L-22012(310)/F-90 dated 19.2.90. The Tribunal on the basis of statement of claim by the workman and the denial thereof, by the management framed five issues namely-

(1)- whether the inquiry is just, proper and legal?

(2)- whether the management is entitled to lead evidence before this Tribunal ?

(3)- whether the charges of mis-conduct proved on the facts of the case?

(4)- whether the punishment award is a proper or illegal?

(5)- Relief and costs?

4. While dwelling upon issue No.1 and 2 the Tribunal recorded a finding that the respondent No.2 workman was dismissed from service on the basis of a finding recorded by the disciplinary authority, who dissented with the finding of exoneration by the enquiry officer. The Tribunal, relying upon; the judgment in *Punjab National Bank and others v. Kunj Behari Mishra*; AIR 1998 SC 2713; held that since no opportunity of hearing was given to the respondent no.2 before passing of order of dismissal by Disciplinary Authority, entire departmental enquiry got vitiated. The tribunal further held that, since the order of punishment passed

by disciplinary authority was illegal and not sustainable in the eyes of law, the management was not entitled to prove the alleged mis-conduct of the workman. The Tribunal after recording such a finding observed that, the punishment of dismissal awarded to the respondent workman was unjust and illegal and accordingly, directed his reinstatement with all back wages and monetary benefits attached to his post.

5. Assailing the award it is urged by learned counsel for the petitioner that the Tribunal was not justified in holding that the enquiry was vitiated because the disciplinary authority has not extended any opportunity of hearing after recording the dissenting finding. It is contended that there were ample material on record which could justify the dismissal of respondent No.2, as, the charges leveled against him were found proved. It is further submitted that, the Tribunal erred in directing the workman with all back wages and other consequential benefits. Instead it is urged that, the Tribunal ought to have remitted the matter to the stage at which the enquiry was found to be vitiated.

6. To substantiate the aforesaid proposition has placed reliance is placed on the judgment rendered in *Kunj Behari* (supra).

7. It is further contended that the Tribunal also grossly erred in granting full back wages to respondent No.2/workman without there being any evidence on record by him regarding the fact that after 1984 he was not gainfully employed. It is urged that there is no iota of evidence on record to substantiate the grant of full back wages and other monetary benefit. In substance it is urged on behalf of the petitioner that the award passed by the Tribunal is liable to be set aside.

8. The respondent No.2 on his turn supports the award. It is urged that since the enquiry was vitiated for non adherence to principle of natural justice, the Tribunal was justified in quashing the dismissal order and directing the reinstatement with full back wages and other consequential benefits.

9. Heard learned counsel for the parties at length and gave thoughtful consideration to the submissions put forth.

10. The issue which crops up for consideration, is as to whether the Tribunal was justified in holding that the departmental enquiry was vitiated for non-compliance of principle of natural justice because no notice

was issued to the respondent/workman by disciplinary authority who dissented with the finding of exoneration recorded by the enquiry officer.

11. With the catena of judgments in row since *Kunj Behari* (supra), above issue has come to settle that "it will, therefore, not stand to reason that when the finding in favour of delinquent officers is proposed to be over turned by the disciplinary authority then no opportunity should be granted."*[Kunj Behari Mishra* (supra)]. It was further observed therein that-

> "19..... whenever the disciplinary authority itself disagrees with the enquiry authority on any article of charge then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officers an opportunity to represent before it records its finding." absence whereof, the entire proceeding gets vitiated.

(Also please see *State Bank of India v.K.P. Narayan Kutty:* AIR 2003 SC 1100; and in *Ranjit Singh v. Union of India:* AIR 2006 SC 3685).

12. In view of above we do not perceive any illegality in the finding recorded by the Tribunal that the absence of a notice by the disciplinary authority tantamounts to vitiating of decision of dismissal from service.

13. Question at this stage arises as to whether the matter ought to have been remitted to the stage at which the departmental enquiry was found to be vitiated. In our opinion the proposition of law as laid down in *Kunj Behari Mishra* (spura), supports the contention of the petitioner that the matter ought to have been remitted. Whether the case as the present one warrants such remitting? In the instant case the respondent No.2 was dismissed from service way back in the year 1984 by order dated 12.4.84 and it is stated at bar that during pendency of the proceedings, respondent No.2 has retired on attaining the age of superannuation.

14. In the context we are guided by the observation in *Kunj Behari Mishra* (supra) wherein it was held-

> "21- Both the respondents superannuated on 31st December, 1983. During the pendency of these appeals Misra died on 6th January, 1995 and his legal representatives were brought on record. More than 14 years have elapsed since the delinquent officers had superannuated. It will, there-

fore, not be in the interest of justice that at this stage the cases should be remanded to the disciplinary authority for the start of another innings. We, therefore, do not issue any such directions and while dismissing these appeals we affirm the decisions of the High Court which had set aside the orders imposing penalty and had directed the appellants to release the retirement benefits to the respondents. There will, however, be no order as to costs."

15. Therefore, taking into consideration the the entire facts as analyzed and while not disputing the proposition of law as laid down in *Kunj Behari Mishra* (supra) and the contention of learned counsel for the petitioner that the Tribunal ought to have remitted the matter for fresh consideration by the disciplinary authority to the stage at which the enquiry was found being vitiated, we are not inclined to remand the matter.

16. Instead, keeping in view the fact that there is no iota of evidence on record as would justify the award of full back wages and other monetary benefits of the post (in the context that it is the workman who has to prove that he was not gainfully employed reference can be had of the judgment in *Managing Director, Balasaheb Desai Sahakari S.K. Limited v. Kashinath Ganpati Kamble:* AIR (2009) 2 SCC 288; wherein it is observed in paragraph 13 that-

17. 13- It is now well settled by catena of decisions of this Court that having regard to the principles contained in Section 106 of the Evidence Act, the burden of proof to show that the workman was not gainfully employed is not on the employer), we therefore, modify the award to the extent that the respondent No.2/ workman is reinstated and the entire service period from 12.4.84 till his age of superannuation shall be treated as duty for the purpose of pension. He will however, not be entitled for any back wages or monetary benefits of the said period.

18. The petition is allowed to the extent above. However, there shall be no costs.

Petition allowed.

I.L.R. [2011] M. P., 1237
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
S.A. No. 1163/2010 (Jabalpur) decided on 14 December, 2010

BABU SINGH ... Appellant
Vs.
GORAKH SINGH & anr. ... Respondents

A. Civil Procedure Code (5 of 1908), Section 100 - Second Appeal - **Concurrent findings given by the Courts below on interpretation of Khasra entries - Being finding of fact can not be interfered in Second Appeal.** (Para 10)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – द्वितीय अपील – निचले न्यायालयों द्वारा खसरा प्रविष्टियों की व्याख्या पर समवर्ती निष्कर्ष दिये गये – तथ्य के निष्कर्ष होने के कारण द्वितीय अपील में हस्तक्षेप नहीं किया जा सकता।

B. Civil Procedure Code (5 of 1908), Section 100 - Second Appeal -**Concurrent findings of Courts below on the question of adverse possession based on appreciation of evidence holding the person like appellant is not in legal possession of the disputed property - Being findings of fact could not be interfered in Second Appeal.** (Para 11)

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – द्वितीय अपील – प्रतिकूल कब्जे के प्रश्न पर निचले न्यायालयों के समवर्ती निष्कर्ष, अपीलार्थी जैसे व्यक्ति को विवादित सम्पत्ति के कब्जे में नहीं मानकर की गयी साक्ष्य की विवेचना पर आधारित हैं – तथ्य के निष्कर्ष होने से द्वितीय अपील में हस्तक्षेप नहीं किया जा सकता।

Cases referred:
2004 AIR SCW 4205, 2000 (2) MPLJ 316, 1986 (I) MPWN Note 87, 1997 RN 195, 2010 (4) MPLJ 311

K.B. Bhatnagar, for the appellant.

ORDER

U. C. MAHESHWARI, J.:–This appeal is directed on behalf of appellant/plaintiff under Section 100 of the CPC being dissatisfied with the judgment and decree dated 14.10.2010 passed by Ist Additional District Judge, Raisen in Civil Regular Appeal No.06-A/10 affirming the judgment and decree dated 1.5.2010 passed by Ist Additional Judge to the Court of Ist Civil Judge Class-II, Raisen in Civil Original Suit No.

21-A/10 dismissing his suit against the respondent no.1 filed for declaration and perpetual injunction with respect of the land bearing survey no.12 and 44 area 12 acares situated at village Navli tahsil and District Raisen.

2. The facts giving rise to this appeal in short are that the appellant herein filed the abovementioned suit against the respondent No.1 for declaration and perpetual injunction with respect of the abovementioned land, stating that he being title holder, is coming in possession of the land since long. As per further averments, the respondent No.1 his elder brother, having the nature of saint (Sanyasi) had not carried out any agricultural work in such land and in the year 1982, the respondent no.1 by leaving the village had become the missing person. Since then, the appellant within the knowledge of the respondent no.1 being in possession of such land as owner of it cultivating the same and taking the crops peacefully without any interruption from the side of the respondent No.1. Accordingly on completion of 12 years, he has perfected the title as Bhoomiswami over such land in the year 1993. The appellant came to know long before that the respondent no.1 had gone to Bharatpur and thereafter, he shifted to Kota where he resided, from where he came to village Neoli, in the year 2001, during that period he did not object the title and possession of the appellant. It is also stated that since 1982 to 1991 when the respondent No.1 was not traced then, the appellant got mutated his name on such land in the revenue record. The same was never objected at any point of time before 2.7.2008. As per further averments, on enhancing the value and prices of the land in the market, the respondent no.1 with bad intention had given a criminal threat on dated 2.7.2008 to the appellant to dispossess him from the aforesaid land on which the appellant has filed the impugned suit against the respondent no.1 for declaration and perpetual injunction, declaring him to be Bhoomiswami of such land and also for issuing perpetual injunction restraining the respondent No.1 from any interference in possession of the appellant with respect of the disputed land.

3. In the written statement of the respondent No.1, by denying the averments of the plaint, it is stated that the appellant was never remained in possession of the disputed land in the capacity of it's Bhoomiswami. The appellant was remained a person of checkered history of criminal activities like threat, dacoity and beating etc. In that connection, various criminal cases at different places of State of Madhya Pradesh and

Rajasthan are pending against him. Due to such activities of the appellant, the respondent/defendant no1 was feeling himself to be unsafe that is why he started to reside at Kota for his livelihood, but simultaneously he was cultivating his land either by himself or under his observation through a person on share basis, his sons were also assisting him in his business as well as in the agriculture. It is further stated that appellant by practicing a fraud, forged and fabricated some documents with respect of the aforesaid land, and on the strength of such documents by giving some wrong information to the revenue Officers stating that the respondent No.1 had expired got mutated such land in his name. It is also stated that suit is filed barred by time. With these averments the prayer for dismissal of the suit is made.

4. The respondent No.2 being formal party, was remained ex-parte through out and no written statement was filed on his behalf.

5. It is apparent from the record that the appellant and the respondent No.1 being sons of Gokaran Singh are real brothers in relation and the disputed land upto the alleged mutation in the year 1991, was remained in the name of respondent No.1 as recorded Bhoomiswami in the record of rights in his absence at the instance of appellant such disputed land was mutated in the name of appellant without extending any opportunity of hearing to him.

6. In view of the pleadings of the parties, after framing the issues the evidence was recorded. On appreciation of the same holding the appellant has failed to prove his title and possession over the disputed land either as perfecting the title by adverse possession or otherwise along with an observation that the appellant has got mutated his name on such land in the year 1990-91 showing the respondent No.1 to be a dead person in his life time and dismissed the suit. On challenging such decree by the appellant before the subordinate appellate Court, after extending the opportunity of hearing to the parties on re-appreciation of the evidence by affirming the decree of the trial Court, the appeal was dismissed on which the appellant has come forward to this Court with this appeal.

7. Shri K.B. Bhatnagar, learned appearing counsel of the appellant after taking me through pleadings of the parties, recorded evidence and the exhibited documents, said the appellant has successfully proved that after leaving the village in the year 1982 the respondent No.1 was never

returned to such village upto the year 2006 and since the year 1982 the appellant is coming in continuous possession of such land as Bhoomiswami for more than 12 years without any interruption from any source in the knowledge of the respondent No.1 and thereby he had perfected his title over the land as Bhoomiswami by adverse possession. Such aspect was not taken into consideration by both the Courts below while dismissing his suit. It was also argued that in any case, after leaving the village by the respondent No.1, only the appellant was the person who while remaining in possession of the land was cultivating the same. So in such premises, in any case he being in settled possession of such land could not be dispossessed by the respondent no.1 without adopting the recourse and procedure prescribed under the law. In such premises, to protect his possession the Courts below ought to have decreed his suit for perpetual injunction against the respondent No.1 till some extent but the same has been dismissed with respect of such prayer also and prayed for admission of this appeal on the proposed substantial questions of law mentioned in para 4 of the appeal memo. In support of his argument he placed reliance on a decision of the apex Court in the matter of *Rame Gowda (D) by L.Rs. vs. M. Varadappa Naidu (D) by L.Rs. and another* reported in 2004 AIR SCW 4205 and of the Division Bench of this Court in the matter of *Gajendra Singh vs. Mansingh and others,* reported in 2000(2) MPLJ 316.

8. Having heard the counsel, keeping in view the arguments advanced by him, after perusing the records of both the Courts below along with the impugned judgments and the aforesaid case laws, I am of the considered view that at this stage this appeal is not involving any question of law rather than the substantial question of law requiring any consideration under Section 100 of the CPC., even for admission of this appeal.

9. As per concurrent findings of the Courts below, the appellant and the respondent No.1 both being real brothers in relation had their separate properties and accordingly the disputed land was remained to be exclusively property of the respondent No.1. The same was recorded in the name of respondent No.1 as Bhoomiswami in the revenue record, but in the year 1991, the name of the appellant was mutated over the land at the place of respondent no.1 without giving any opportunity of hearing to such respondent No.1. As per further findings the appellant by fabricating the false and forged document showing the respondent No.1

had dead and by placing the same in the Office of the revenue authority, the appellant got mutated such land in his name. I have not found any circumstance or documents on the record showing that at any point of time the respondent No.1 recorded Bhoomiswami handed over the possession of such land to the appellant for any purpose either to cultivate or to look after the same. It could not be inferred by the Courts below that the appellant has perfected his right either by adverse possession or otherwise contrary to the right and title of the respondent No.1. So, it could not be said that the appellant had any legal title or the possession over the land. Mere on the basis of some entries in the revenue record, it could not be inferred that the appellant has perfected his right over the disputed land against the respondent No.1 by adverse possession. As such revenue record does not confer any title to any one. The same is kept only for fiscal purposes as laid down by the apex Court in the matter of *Corporation of the City of Bangalore vs. M. Papaiah and another* reported in AIR 1989 SC 1809 in which it was held as under:-

> "The High Court has reversed the finding saying that the interpretation of the first appellate court was erroneous. It is firmly established that the revenue records are not documents of title, and the question of interpretation of a document not being a document of title is not a question of law. These errors have seriously vitiated the impugned judgment of the High Court which must be set aside."

In the aforesaid case it was also held that the concurrent findings given by the Courts below on interpretation of the khasara entries being finding of fact could not be interfered under Section 100 of the CPC.

11. In view of the aforesaid discussions, it has been revealed that the appellant has neither acquired nor perfected his title over the disputed land. Such question was not left open by any of the Courts below. On the contrary on appreciation of the evidence concurrently it is held by both the Courts below that the appellant has neither perfected his title over the land nor is in settled possession of the same. Accordingly the question of title has also been answered by the Courts below, therefore, the case law in the matter of *Rame Gowda (D) by L.Rs.* (supra) cited by the appellant's counsel is not helping him, as such case was decided by the apex Court taking into consideration the circumstances that the concerning

plaintiff was found in settled possession and the question of title was left open by the Courts below between the parties, which is not a situation here. Although, this Court did not have any dispute with respect of the principle laid down in the aforesaid cited case. In such premises, the another case law of this Court in the matter of *Gajendra Singh* (supra) is also not helping to the appellant. Even otherwise, in view of the settled principle of law, the concurrent findings of the Courts below on the question of adverse possession based on appreciation of the evidence holding the person like appellant is not in legal possession of the disputed property, being findings of fact could not be interfered under Section 100 of the CPC as laid down by the apex Court in the matter of *Seeganram vs. Magna* reported in 1986 MPWN-I Note 87, in the matter of *Ram Singh vs. Kashiram* reported in 1997 Revenue Nirnay Page 195 and in the matter of *Gaya Prasad and others vs. Pradumn Prasad and others* reported in 2010 (4) M.P.L.J. 311, in which it was held as under:-

> "..... Apart this taking into consideration the circumstance that in spite having possession of the property since long at any point of time the appellants or their predecessor in title in the knowledge of the respondents or their predecessor had not declared themselves to be the owner of the property. So, in the lack of any specific date or time on which the appellants declared themselves to be the owner of the property in the knowledge of the respondents the Courts below after taking into consideration the principle laid down by the Apex Court in the matter of *Roop Singh vs. Ramsingh,* 2003(3) SCC 708 held the appellants being in permissible possession of the property had not perfected their title on it by adverse possession. Such approach of the Courts below appears to be in consonance with the evidence led by the parties and such concurrent findings of the Courts below or on the question of adverse based on appreciation of evidence being finding of fact could not be interfered under section 100 of Civil Procedure Code at the stage of Second Appeal as laid down by this Court in the matter of *Seeganram vs. Magnia,* reported in 1986 MPWN (Vol.1) 87 and *Ram Singh vs. Kashiram,* reported in 1997 RN 159.

The cited subsequent decision is also based on some Supreme Court decision. In such premises, this appeal is not involving any question of law rather than the substantial question of law on the ground of adverse possession requiring any consideration of law on the ground of adverse possession requiring any consideration at this stage."

11. In view of the aforesaid discussions, I have not found any perversity, infirmity or any circumstance in the mater giving rise to any substantial question of law requiring consideration at this stage under Section 100 of the CPC. Pursuant to, this appeal being devoid of such question, is hereby dismissed at the stage of motion hearing.

12. There shall be no order as to the costs.

Appeal dismissed.

I.L.R. [2011] M. P., 1243

APPELLATE CIVIL

Before Mr. Justice U.C. Maheshwari

S.A. No. 527/1999 (Jabalpur) decided on 15 December, 2010

SABIR MOHD. ...Appellant

Vs.

MAGANLAL ...Respondent

A. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(c), Evidence Act, 1872, Section 116 - Challenge as to title of landlord - **Defendant after admitting the relationship as tenant is estopped from challenging the title of the landlord.** (Para 11)

क. स्थान नियंत्रण अधिनियम, म.प्र.(1961 का 41), धारा 12(1)(सी), साक्ष्य अधिनियम 1872, धारा 116 –भूमिस्वामी के हक को चुनौती – किरायेदार के रूप में संबंध स्वीकार करने के पश्चात भूमिस्वामी के हक को चुनौती देने से प्रतिवादी विबंधित।

B. Accommodation Control Act, M.P. (41 of 1961) - Section 12(1)(a) - Arrears of rent - **Appellant did not deposit the rent while it was known to him that he was the tenant in the disputed accommodation - Decree on the ground of arrears of rent cannot be said to be illegal.** (Para 12)

ख. स्थान नियंत्रण अधिनियम, म.प्र.(1961 का 41) – धारा 12(1)(ए) – किराये

का बकाया – अपीलार्थी ने किराया जमा नहीं किया, जब उसे ज्ञात था कि वह विवादित स्थान में किरायेदार था – किराये का बकाया के आधार पर डिक्री अवैध नहीं मानी जा सकती।

C. Accommodation Control Act, M.P. (41 of 1961) - Section 12 - Decree for eviction - **In the lack of proof of relationship as landlord and tenant, on the strength of the title, the decree for eviction could be passed in favour of landlord.** (Para 14)

ग. स्थान नियंत्रण अधिनियम, म.प्र.(1961 का 41) – धारा 12 – बेदखली के लिए डिक्री – भूमिस्वामी और किरायेदार के रूप में संबंध होने के सबूत के अभाव में, हक के बल पर, भूमिस्वामी के पक्ष में बेदखली के लिए डिक्री पारित की जा सकती है।

Cases referred:

(2000) 4 SCC 380, AIR 1966 SC 735, AIR 1966 SC 109.

Adil Usmani, for the appellant.

Sonal Das, for the respondent.

ORDER

U. C. MAHESHWARI, J.:–The appellant/defendant has directed this appeal under Section 100 of the CPC being aggrieved by the judgment and decree dated 23.2.99 passed by the District Judge, Sagar in regular civil appeal No.24-A/97 reversing the judgment and decree dated 17.3.98 passed by III Civil Judge Class-I Sagar in original civil suit No. 98-A/97, dismissing the suit of the respondent filed against him for eviction on the grounds enumerated under Section 12(1)(a),(c)and (i) of the M.P. Accommodation Control Act, 1961 (In short 'the Act'),by allowing the appeal of the respondents, such suit has been decreed on all the aforesaid grounds.

2. The facts giving rise to this appeal in short are that initially one Babulal Shrivastava, the predecessor-in-title of the respondent filed the impugned suit against one Noor Mohammad, the father of the appellant for eviction with respect of the disputed premises situated in H.No.329, Krishnaganj ward, Sagar contending that said Noor Mohammad, being monthly tenant of the principal plaintiff Babulal, was in occupation of the disputed premises for residential purpose at the rate of Rs.20/- per month. Subsequent to death of Noor Mohammad, his son, the appellant, has become the tenant of said Babulal on the same terms. As per initial

pleading, Noor Mohammad being defaulter in payment of the rent, even on making the demand, had not paid the same for the period between 1.11.75 to 30.4.78 near about 30 months, on which, after giving the demand notice dated 13.5.78 the tenancy of said Noor Mohammad was also terminated on expiry of the tenancy month on dated 31.5.78. Inspite service of such notice, neither the arrears of rent was paid nor the premises was vacated, on which, initially the suit was filed on the ground of arrears of rent under section 12(1)(a) of the Act. It is also pleaded that said notice was also given to the present appellant as he was also residing in such premises with the Noor Mohammad since 1974.

3. In the initial written statement filed with the signature of the Noor Mohammad, the relationship of the landlord and tenant between the parties along with the other averments of the pleading are denied. In special pleading it is stated that before 4-5 years from the date of filing the written statement, the defendant was in possession of three rooms of some house of the appellant as tenant, at the rate of Rs.25/-per month. In such house he was inducted before 15 years. Before 4-5 years as stated above, said Babulal asked him to vacate the premises as he was selling the same, on which, immediately it was vacated by the defendant and started to reside in some other house. It is also stated that the defendant is neither in possession of the disputed premises nor the tenant of the appellant, in fact, some Mohd. Sabir, the driver, is residing in the disputed premises. The suit has been filed with the false averments and the prayer for dismissal of the same was made with cost of Rs.200/-.

4. After death of Noor Mohammad, the present appellant was substituted as defendant on the record, thereafter he also filed the additional written statement, in which, by denying the relationship of the landlord and tenant between the respondent and him, all the terms and condition of the tenancy were also denied. The averments regarding demand notice are also denied. In the special pleadings it is stated that said Noor Mohammand, before 4-5 years from the date of filing the impugned suit, was in possession of three rooms of the House of the respondent at the rate of Rs.25/- per month in which he was inducted as tenant before 20 years but, on asking by the respondent before 4-5 years from the date of filing the impugned suit, to vacate the premises, the same was vacated by the appellant, thereafter such part of the house was sold by the respondent. It is also stated that as per contention of the

respondent/plaintiff when Late Noor Mohammad was the tenant of the respondent in the disputed premises till his death then according to the provision of the Muslim Personal Law, the appellant being his heir and legal representative has become the tenant in the premises. In continuation it is stated that without impleading all the legal representatives of Noor Mohammad, the impugned suit is not maintainable. As such the same is liable to be dismissed on account of non-joinder of the necessary parties and prayer for dismissal of the suit was made.

5. In pendency of the suit, the principal plaintiff Babulal also died, on which, his widow Brijrani and the present respondent MaganLal were substituted as his legal representatives at his place and at subsequent stage said Brijrani also died, on which, her name was also deleted from the record.

6. In view of the pleadings of the parties, as many as five issues were framed on dated 17.4.82, on which, the evidence was recorded. On appreciation of the same in the first inning of the case, the suit was dismissed by the trial court vide dated 18.7.94, on which, the respondent and his mother went up in Civil Regular Appeal No.37-A/94 before the Ivth Add. District Judge, Sagar. On consideration, vide judgment dated 28.10.96, by allowing some amendment application of the respondents/ plaintiffs for inserting the grounds of eviction available under section 12(1)(c) and (i) and, also by setting aside the aforesaid judgment of the trial court, the case was remitted back to the trial court with a direction to decide afresh after extending the opportunity of hearing to the parties. In view of the aforesaid amendment in the plaint, the appellant/defendant also amended his written statement and denied the averments of amended grounds of eviction enumerated under section 12(1)(c) and (i) of the Act the denial of title and appellant/defendant has acquired his own suitable accommodation for his residential need. After remitting back the matter, in view of such subsequent amendment in the pleadings, the additional two issues bearing No.6 and 7 were framed by the trial court vide dated 16.2.1998 and after extending the opportunity of hearing and recording the evidence, in compliance of the aforesaid appellate court order, on appreciation of the evidence, by holding that respondent and his widow mother has failed to prove the relationship between them and the appellant as landlord and tenant and, in such premises dismissed the suit on all the grounds raised by the respondent/plaintiff. Being aggrieved by

such impugned judgment and decree of the trial court, the respondent/ plaintiff again approached the subordinate appellate court with the appeal under section 96 of the CPC. On consideration, by re-appreciating the evidence available on the record including the ex-parte statement of Babulal recorded before passing the ex-parte decree which was later set aside by holding the relationship between the respondent and the appellant as landlord and tenant, decreed the suit of the respondent on all the aforesaid grounds enumerated under section 12(1)(a),(c) and (i) of the Act, on which, the appellant has come forward to this court with this appeal.

7. It is noted that this appeal is pending before this court for admission since the year 1999. At the initial stage of the appeal, the interim stay was granted on 23.4.99. Subsequent to this, the case was listed on 5.5.99 and 6.10.99 and thereafter it was listed for admission only on 1.12.2010, on which, the arguments on admission has been heard.

8. The appearing counsel of the appellant, after taking me through the pleadings, available evidence and the exhibited documents said that in the available circumstances, the appellate court has committed grave error in allowing the suit and passing the decree of eviction against him on the grounds available under section 12(1)(a),(c) and (i) of the Act. On proper appreciation of the available evidence and the circumstances, the appellate court ought to have affirm the findings of the trial court by dismissing the appeal of the respondents. In continuation he said that in the lack of any legal and admissible evidence proving the relationship between the parties as landlord and tenant, the appellate court has held such relationship on the basis of the deposition of the principal plaintiff Babulal which was recorded, ex-parte at the initial stage of the case, on which, some ex-parte judgment and decree was passed which was later-on set aside. Such statement was taken into consideration by the appellate court under the garb of section 33 of the Evidence Act when in the available circumstances by virtue of such section of the Evidence Act after setting aside the ex-parte judgment in the matter such deposition of Babulal could not be read for any purpose unless in the lifetime of the deceased Babulal, the same was confronted with him on his examination. So, firstly he prayed for admission of this appeal on the question that in the lack of any admissible and reliable evidence, the appellate court has wrongly held the relationship between him and the appellant as

landlord and tenant. He further argued that in the lack of such relationship, even on denying the title and the payment of the arrears of rent and also on acquisition of the sufficient suitable accommodation by the appellant for his residence, the suit could not be decreed on the grounds enumerated under section 12(1)(a),(c) and (i) of the Act. With these averments, he prayed for admission of this appeal on the proposed substantial questions of law mentioned in the appeal memo.

9. Having heard the counsel, keeping in view his argument, after perusing the record of the courts below along with the impugned judgment, I am of the view that the appellate court has not committed any error in setting aside the judgment and decree of the trial court and decreeing the suit of the respondent against the appellant on the grounds available under section 12(1)(a),(c) and (i) of the Act by holding the relationship between them as landlord and tenant.

10. True it is that the appellate court holding such relationship between the parties, taking into consideration the ex-parte deposition of the principal plaintiff Babulal, on which, at the initial stage of the suit some ex-parte judgment and decree was passed but later-on the same was set aside and case was proceeded bi-parte. In pendency of the suit, the principal plaintiff Babulal died and he was not available at subsequent stage for his examination and, therefore, it appears that the appellate court has taken into consideration his deposition keeping in view his last version with respect of the disputed premises in his lifetime and, in such premises section 33 of the Evidence Act was also referred by the appellate court. In any case in the available circumstances and, in view of the admission of the principal defendant in his initial written statement as well as the admission of the present appellant in his written statement in which they categorically stated that before 4-5 years from the date of the suit they were residing as tenant in three room of the principal plaintiff and at the request of the principal plaintiff they have vacated the same and shifted to some other house of the principal plaintiff. So as tenant, the appellant and his predecessor-in-title were shifted by Babulal in some other premises as tenant. When the other accommodation, in which, according to case of the appellant, they were the tenant of the respondent then in view of such admission on behalf of the appellant there was no occasion before both the courts below holding that there was no relationship between the principal plaintiff and the principal defendant and subsequent to them

between their respective legal representatives, the appellant and the respondent. Besides this, on recording the deposition of Mohd. Sabir (D.W.1) he categorically admitted that the house in which the disputed premises is situated, is a property of the respondent and his father. He also admitted the tenancy of the aforesaid three rooms with the respondent and on vacating the same in continuation of such tenancy the appellant and his father were shifted in some other house. The disputed accommodation was claimed by the appellant as owner of it. According to him, the same was given by Babulal to him as owner in consideration of vacating the earlier tenanted premises of three rooms. It is apparent on record that in support of such contention to prove the ownership of the appellant over the disputed premises no admissible evidence is available on the record. In the lack of it, it could not be deemed that the appellant or his father were remained in possession of the disputed premises as owner or other wise. In any case, in the available circumstances, it could be deemed that the appellant through his father was either the tenant of the respondent in the disputed premises or he was in permissive possession of the principal plaintiff as licensee. There is no any other circumstance on the record to draw the inference that appellant was remained in possession of the same as owner of it.

11. The aforesaid admissions of the principal defendant in his written statement and also the admission by Mohd. Sabir in his deposition admitting the tenancy of the appellant,by virtue of the provision of section 21 and 58 of the Evidence Act, is binding against him, therefore, in any case, after admitting, the relationship as tenant of the respondent or his father the appellant is estopped to challenge the title of such respondent landlord but it is apparent from the written statement and the deposition of the appellant that inspite having knowledge of the aforesaid relationship and right of the respondent, the appellant had denied the same and thereby challenging the title of the respondent, the appellant has become nuisance in such premises for the respondent. Therefore the impugned decree under section 12(1)(c) could not be held to be contrary to law.

12. It is also apparent on record that, at any point of time, either before filing the suit or in pendency of the suit, in both the innings, as per findings of the subordinate appellate court, no dues of the rent was deposited by the appellant while it was known to him that he was the tenant at the rate of Rs.20/- per month in the disputed accommodation inspite it he has

committed default in that regard therefore, in view of the law laid down by the Apex Court in the matter of *Jamnalal and others Vs. Radheshyam* (2000) 4 SCC 380, the impugned decree on the ground under section 12(1)(a) of the Act could not be said to be illegal or contrary to any law. There is sufficient evidence on the record showing that in pendency of the suit, the appellant has acquired the alternate houses for his residence in the same town. In such premises the impugned decree passed on the ground of section 12(1)(i) of the Act could not be termed to be faulted.

13. In view of the aforesaid discussion, the ultimate approach of the appellate court in setting aside the decree of the trial court and decreeing the suit of the respondent on the aforesaid grounds by holding the relationship as landlord and tenant between them, do not appear to be perverse or contrary to any existing law. In such premises, I have not found any question of law rather than substantial question of law for admission of this appeal.

14. Apart the above, for the sake of the argument, if it is deemed that the respondent could not establish the relationship of the landlord and tenant between him and the appellant and only admitted the title and the ownership of the respondent with respect of the disputed property even then in view of the principle laid down by the Apex Court in the matter of *Bhagwati Vs. Chandramaul*-AIR 1966 SC 735, in the lack of proof of relationship as landlord and tenant, on the strength of the title, the decree for eviction could be passed in favour of the landlord. Such principle was laid down by the Apex Court in the following manner :-

> " In a suit for ejectment the defendant admitted the title of the plaintiff in regard to the plot and pleaded that he was to remain in possession of the house until the amount spent by him in its construction was returned by the plaintiff. The plaintiff led evidence about the tenancy set up by him and the defendant led evidence about the agreement on which he relied. Both the pleas were clear and specific and the common basis of both the pleas was that the plaintiff was the owner and the defendant was in possession by his permission. In such a case the relationship between the parties would be either that of a landlord and tenant, or that an owner of property and a person put into possession of it by the owner's licence. No other alternative was logically or legitimately possible.

Held that in absence of proof of tenancy and of defendants agreement the conclusion of the High Court in first appeal that the defendant was in possession of the suit premises by the leave and licence of the plaintiff, did not cause prejudice to defendant. There was no error of law if the decree for ejectment was passed F. A. No: 564 of 1958 dated 14-12-1962 (All). Affirmed"

15. In the aforesaid premises also the impugned judgment of the appellate court is not giving rise to any substantial question of law in the matter for consideration under section 100 of the CPC. I would like to mention here that in the course of argument, appellant's counsel cited the case law in the matter of *V. M. Mathew Vs. V. S. Sharma and others*-AIR 1996 SC 109. On going through the same, I have found that the same is based on some different facts and circumstances and some different law is laid down in that case, therefore, the same is not helping to the appellant.

16. In the aforesaid premises, I have not found any perversity, infirmity or any substance or circumstance in the impugned judgment of the appellate court giving rise to any substantial question of law requiring any consideration at this stage under section 100 of the CPC. Consequently, this appeal being devoid of such question, deserves to be and is hereby dismissed at the stage of motion hearing.

Appeal dismissed.

I.L.R. [2011] M. P., 1251

APPELLATE CIVIL

Before Mr. Justice U.C. Maheshwari

S.A. No. 470/1992 (Jabalpur) decided on 16 December, 2010

SHALIG RAM & ors. ...Appellants

Vs.

ANANT RAM & ors. ...Respondents

Adverse Possession **- Unless the requisite ingredients of the adverse possession as per requirement of law are proved, mere on account of long possession of the property under some misconception, the person could not have been declared to be the Bhumiswami of disputed land holding that he has perfected the title of the property by adverse possession.** (Para 11)

प्रतिकूल कब्जा – जब तक कि विधि की अपेक्षानुसार प्रतिकूल कब्जे के अपेक्षित घटक साबित नहीं किये जाते, किसी भ्रम के अधीन सम्पत्ति का दीर्घ कब्जा मात्र होने के कारण उस व्यक्ति को विवादित भूमि का भूमिस्वामी घोषित नहीं किया जा सकता यह मानकर कि उसने प्रतिकूल कब्जे द्वारा सम्पत्ति का हक पूर्ण कर लिया है।

Cases referred :

(2003) 7 SCC 481, (2004) 1 SCC 769.

Pranay Verma, for the appellants.

None, for respondents No. 1, 2(a) to 2(d) & 3, although represented.

N.K. Agrawal, G.A., for the respondent No.4/State.

JUDGMENT

U.C. MAHESHWARI, J. :–The appellants – defendant nos. 1, 3 (a) and 3 (d) have directed this appeal under Section 100 of Code of Civil Procedure being aggrieved by the judgment and decree dated 15th October 1992 passed by Additional Judge to District Judge Panna in Civil Regular Appeal No. 50-A/92 dismissing their appeal by affirming the judgment and decree dated 21.3.1991 passed by Civil Judge, Class-II, Panna in Civil Original Suit No. 202/84, decreeing the suit of the respondent no. 1 for perpetual injunction against the appellant no. 1 and late Gaya Prasad (Principal defendant No.3) the predecessor in interest of the appellant no. 2, 3 and respondent no. 2 (a) 2 (d) and 3.

2. The facts giving rise to this appeal in short are that respondent no. 1 Anantram filed the suit for perpetual injunction against the appellant no. 1 – Shalig Ram and the Gaya Prasad, (the principal defendant no. 3) by impleading the State of M.P. as formal party with respect of the revenue paid land bearing survey no. 2067/1 situated in village Dwari, tahsil and district Panna with a prayer restraining the applicant no. 1 and said Gaya Prasad from any interference in his title and possession of such land. As per further averments of the plaint, the defendant/respondent no. 1, being in possession of such land since last fifty years has been cultivating the same. During this period in the year 1953-1954, a well was also dug by him towards the southern side of this land. Besides this some trees of lemon and guava were also planted by him. The same are in existence on such land. The appellant no.1 and said Gaya Prasad being the agriculturist of adjoining land bearing survey no. 2066, on dated 21.9.1984 accompanied with some of their relatives entered in the field of the respondent no. 1 and after giving him the beating had snatched his

agricultural implements. After reporting such incident to Police, Amanganj to protect the possession of the land, respondent no. 1 filed the impugned suit for perpetual injunction.

3. On the other hand on behalf of the appellant no. 1 and said Gaya Prasad their separate identical written statements were filed in which by disputing the averments of the plaint, in addition, it is stated that the disputed land on which the alleged well and trees are situated, being part of their land of survey no. 2066, they are in possession of the same and the respondent no. 1 – plaintiff did not have any title or possession over the same. By denying the allegation of beating, it is stated that they were beaten by the respondent no. 1, on which they reported the matter to the Police. It is also stated that the sign of demarcation made and fixed by the Revenue Inspector had been removed by the respondent no. 1 and thereafter on wrong pretext, he is claiming the disputed land to be a part of his land bearing survey no. 2067/1. While infact such land being part of above mentioned survey no. 2066, they are in possession of the same as Bhumiswami. Some averments regarding map of the settlement of Samvat 2012 are also stated by them. As per further averments under the garb of the impugned suit, the respondent no. 1 is trying to take possession of their land forcefully. With these averments the prayer for dismissal of the suit is made.

4. In view of the pleadings of the parties after framing the issues the evidence was recorded. On appreciation of the same, by holding that the respondent no. 1 being Bhoomiswami of the disputed land is in possession of the same, his suit was decreed against the appellants and the respondent no. 2 (a) to 2 (d) and 3 for perpetual injunction.

5. Being dis-satisfied with such decree, the appellants herein filed the appeal under Section 96 of the CPC in which taking into consideration the demarcation proceedings and its report prepared by the Revenue Authorities at the instance of the respondent no. 1 before filing the suit contending that on demarcation, the disputed land was found to be part of survey no. 2067/1 recorded in the name of appellants in the record of rights but on appreciation of evidence its long possession was found with the respondent no. 1 - plaintiff and in such premises, by holding the respondent no. 1 had perfected the title on such land by adverse possession, by modifying the findings

of the trial court in such manner affirmed the decree of such court and accordingly such appeal has been dismissed, on which the appellants have come forward to this court with this appeal.

6. On earlier occasion, vide order dated 5.3.1993 this appeal was admitted on following substantial question of law:-

> "Whether the courts below have correctly applied the doctrine of adverse possession and passed a decree in favour of the plaintiff – respondent no. 1 on the assumption that he has perfected his title by adverse possession in respect of the suit land?"

7. Shri Pranay Verma, learned appearing counsel for the appellants, after taking me through the pleadings, evidence and the exhibited documents said that according to demarcation proceeding carried out by the revenue authorities at the instance of the respondent no. 1 before filing the suit the disputed land alongwith the disputed well and trees were found to be the part of the land of survey number belonging to the appellant no.1 and Gaya Prasad and as per available evidence pleadings and evidence, the ingredients of the adverse possession had neither been pleaded nor proved on behalf of the respondent no. 1, therefore, firstly mere by holding the long possession of the respondent no. 1 over the disputed land, the appellate court did not have any authority to hold that the respondent no. 1 has perfected his title over the disputed land by adverse possession. In continuation he said that for the sake of the arguments if it is deemed that respondent no. 1 was remained in long possession of such land of the appellants but during that period by declaring himself to be the owner of the property in the knowledge of the appellant, if he did not take any steps for conferring such right, then mere on account of possession of respondent no.1 under some misconception and for want of knowledge of the appellant it could not be deemed that respondent no. 1 has perfected the title on it by adverse possession by extinguishing the right and title on the true owner-the appellants. In support of this contention, he placed his reliance on a reported case of the Apex Court in the matter of *Deva (dead) through L.Rs. Vs. Sajjan Kumar (dead) by L.Rs.* reported in (2003) 7 SCC 481. He further said that the respondent no. 1 has filed the impugned suit for perpetual injunction on the basis of his possession only, therefore, in any

case the courts below did not have any authority to decide the title of the disputed property. Contrary to this, the appellate court has decided the suit by modifying the findings of the trial court and holding the respondent no. 1 had perfected his title over the land by adverse possession. So such findings of the courts below on the question of title is not sustainable in any manner and in such premises prayed to answer the aforesaid question accordingly in favour of the appellants by allowing this appeal.

8. No one has appeared on behalf of respondent no.1 to assist the court for adjudication of this appeal.

9. Keeping in view the arguments, advanced, I have carefully gone through the records of both the courts below, also perused the impugned judgments. It is undisputed fact on record that before filing the suit at the instance of the respondent no. 1 some demarcation proceeding of the disputed land was carried out by the revenue authorities. According to such proceeding the disputed land, well and the trees were found to be the part of the land bearing survey no. 2066 recorded in the name of appellant no. 1 – defendant no. 1 and the deceased defendant no.3 – Gaya Prasad. As per further averments of such report the disputed part of the land was found in possession of the respondent no. 1 – plaintiff. After recording the evidence, on appreciation, the trial court by ignoring such demarcation report taking into consideration the endorsement of some khasra entries decreed the suit of the respondent no. 1 for perpetual injunction holding him to be in possession of the land but the appellate court, on re-appreciation of the evidence by modifying such findings of the trial court affirmed the decree of perpetual injunction in favour of the respondent no. 1 by holding that he being in long possession of such land has perfected his title over the same by adverse possession and affirmed the decree of the trial court accordingly.

10. After perusing the record and both the judgments, I am of the considered view that in view of the prayer of perpetual injunction, made by the respondent no. 1 - plaintiff, in the suit the courts below had not any authority to consider the matter and decide the same by holding the title of the property so both the courts below have committed error in deciding the matter beyond the pleadings and the prayer made in the plaint, I do not have any dispute regarding principle that while deciding the issue of perpetual injunction, the court can consider the question of title

incidentally but the manner in which the question of title was considered and adjudicated specifically by the appellate court, the same does not appear to be considered and decided incidentally. On the contrary, it is apparent that in the lack of any pleadings and the prayer, such question was elaborately decided by both the courts below. So in such premises, the findings of the courts below on the question of title could not be said to be legal and binding against either of the parties.

11. In any case in the available set of facts and the evidence it is apparent that the aforesaid earlier demarcation report was not properly considered by either of the courts below. Mere on account of long possession of the respondent no. 1 over the disputed land, in the available circumstances, he could not be declared to be the Bhumiswami of the disputed land. Nowadays the law is well settled that unless the requisite ingredients of the adverse possession as per requirement of law are proved mere on account of long possession of the property under some misconception the person like respondent no. 1 could not have been declared to be the Bhumiswami of disputed land holding that he has perfected the title of the property by adverse possession. Besides this in the lack of any positive evidence showing that on which date the respondent no.1 declared himself to be the owner and Bhumiswami of the disputed property in the knowledge of the appellant no.1 and said Gaya Prasad and on which date by completing twelve years in uninterrupted possession of the property he has perfected his title over the property. In fact the same has not been proved by cogent, admissible and reliable evidence. In such premises, the approach of the appellate court holding the respondent no. 1 had perfected his title over the disputed land by adverse possession could not be held to be sustainable under the existing and trite law.

12. In the case of *Deva (dead) through L.Rs.* (supra) cited by the appellants' counsel the Apex Court has held as under:-

> 11. The deposition extracted above, in any case, negatives the defendant's case of having prescribed title by adverse possession from the year 1940. The animus to hold the land adversely to the title of the true owner can be said to have started only when the defendant derived knowledge that his possession over the suit land had been alleged to be an act of encroachment on plaintiffs survey number.

12. The above-quoted admission contained in the defendant's deposition, does not make out a case in his favour of having acquired title by adverse possession. Mere long possession of defendant for a period of more than 12 year without intention to possess the suit land adversely to the title of the plaintiff and to latter's knowledge cannot result in acquisition of title by the defendant to the encroached suit land.

13. The plaintiff's suit is not merely based on his prior possession and subsequent dispossession but also on the basis of his title to Survey No. 452. The limitation for such a suit is governed by Article 65 of the Limitation Act of 1963. The plaintiff's title over the encroached land could not get extinguished unless the defendant had prescribed title by remaining in adverse possession for a continuous period of 12 years.

13. So in view of the principle laid down in the cited case, on examining the case at hand, the same appears to be applicable here and in such premises, it could not be deemed that the respondent no. 1 had perfected his title over the disputed land by adverse possession.

14. So aforesaid question is answered accordingly and pursuant to it, the approach of the appellate court holding the respondent no. 1 has perfected his title over the disputed land by adverse possession being non sustainable under the law is hereby set aside.

15. After setting aside the aforesaid finding of the appellate court, the findings of the trial court has been restored, according to which the respondent no. 1 was held to be the Bhumiswami of the disputed land as same was found by such court as part of his land. So in the available circumstances in order to resolve the dispute of the parties under the authority of the provision of Order 41 Rule 33 of the CPC, this court has to consider the case in that respect also.

16. Firstly in the suit for perpetual injunction the appellate court was not having the authority to decide the question of title of the disputed property. Besides this, in the lack of any such pleadings and the prayer, the trial court has committed grave error in holding the disputed land to be the part of the land belonging to the respondent no. 1 as Bhumiswami.

So till this extent the findings of the trial court is also set aside. Apart this on perusing the evidence available on record and exhibited documents, it is revealed that on the date of the suit the respondent no. 1 was in settled possession of the disputed land and under the law as laid down by the Apex Court in the matter of *Rame Gowda (dead) by L.Rs. Vs. M. Varadappa Naidu (dead) by L.Rs. and another* reported in (2004) 1 SCC 769, he could not dispossessed by the appellants or the respondent no. 2 (a) to 2 (d) or 3 without taking recourse of prescribed procedure of law. So till this extent the suit of the respondent no. 1 ought to have been decreed by the trial court for a limited perpetual injunction. But the trial court committed error in decreeing the suit in toto. Therefore, after answering the question framed accordingly in the aforesaid manner by allowing this appeal in part the judgment and decree of the courts below are modified in the following manner:-

(a) The parties shall be at liberty to initiate an appropriate proceeding before the appropriate forum to get declared their title over the disputed land in accordance with the prescribed procedure and existing legal position.

(b) The decree of the perpetual injunction passed by the trial court is modified in the manner that the appellants and the respondent no. 2 (a) to 2 (d) and 3 or any other person claiming such property under their rights shall not dispossess the respondent no. 1 from the disputed property described in the plaint without following or taking the recourse of the existing law.

17. Till this extent the decree is modified.

18. In the available circumstances, there shall be no order as to the costs.

19. Let the decree be drawn up accordingly.

Order accordingly.

I.L.R. [2011] M. P., 1259
APPELLATE CIVIL
Before Mr. Justice Alok Aradhe
S.A. No. 507/2001 (Jabalpur) decided on 18 January, 2011

JAGDISH PRASAD & ors. ...Appellants
Vs.
SMT. MEERA DEVI & ors. ...Respondents

A. Civil Procedure Code (5 of 1908) Order 3 Rule 1- By power of attorney - **The plaintiff authorised her son to conduct the suit and to do all other acts which are necessary - *Held* - An attorney can appear as a witness as well.** (Para 10)

क. सिविल प्रक्रिया संहिता (1908 का 5) आदेश 3 नियम 1 – मुख्त्यारनामा द्वारा – वाद संचालित करने के लिए एवं सभी अन्य कार्य जो आवश्यक हैं करने के लिए, वादी ने अपने पुत्र को प्राधिकृत किया – अभिनिर्धारित – अटर्नी साक्षी के रुप में भी उपस्थित हो सकता है।

B. Evidence Act (1 of 1872), Section 114(g) - **Presumption which may be raised, is discretionary - The Court may or may not raise such a presumption.** (Para 10)

ब. साक्ष्य अधिनियम (1872 का 1), धारा 114 (जी) – उपधारणा जो निकाली जा सकेगी, वह वैवेकिक है – न्यायालय ऐसी उपधारणा बनायेगा अथवा नहीं भी बनायेगा।

C. Evidence Act (1 of 1872), Section 114(g) - Presumption - **A presumption must be drawn against a party who having knowledge of the fact in dispute does not go into the witness box, particularly when a prima facie case is made out against him - The question of drawing an adverse inference on account of non-examination of a party has to be decided in the facts of the each case.** (Para 10)

स. साक्ष्य अधिनियम (1872 का 1), धारा 114 (जी) – उपधारणा – उस पक्षकार के विरुद्ध उपधारणा बनाई जानी चाहिए जिसे विवादित तथ्य का ज्ञान होते हुए वह साक्षी कठघरे में नहीं गया, विशिष्टतः जब उसके विरुद्ध प्रथम दृष्ट्या मामला बनता है – पक्षकार के परीक्षण न कराये जाने के कारण प्रतिकूल निष्कर्ष निकालने का प्रश्न प्रत्येक मामले के तथ्यों पर निर्धारित करना होगा।

Cases referred :

2005 (1) MPLJ 421, (2007) 10 SCC 564, AIR 1990 SC 1153, AIR

1999 SC 1441, AIR 1988 SC 514, AIR 1989 SC 1809, AIR 1992 SC 115, JT 2007 (11) SC 116, 2000 (1) MPJR 151, (2006) 11 SCC 587, (2007) 1 SCC 546, (2009) 5 SCC 264.

P.R. Bhave with *Bhanu Yadav,* for the appellants.
M.L. Jaiswal with *K.P. Gupta,* for the respondent No.1.
Ashok Chourasiya, G.A., for the respondent No. 5.

JUDGMENT

ALOK ARADHE, J. :–This is an appeal by the defendants. This Court vide order dated 22.11.2001 had formulated the following substantial questions of law:-

> *"(1) Are both the courts' below in the facts and circumstances of the case right in holding that the deed of relinquishment dated 15.1.1985 in favour of Jagdish Prasad A-l was valid or without consent of Smt. MeeraDevi R-l?*
>
> *(ii) Are the findings of the courts below perverse and arbitrary?*

2. Thereafter, vide order dated 13.1.2011 following substantial questions of law were framed:-

> *"(a) Whether adverse inference can be drawn against the plaintiff, as the plaintiff has failed to examine herself as witness?*
>
> *(b) Whether the lower appellate Court has rejected the application under Order 41 Rule 27 of the Code of Civil Procedure without conforming to the requirements laid down in clauses (a) to (b) of Order 41 Rule 27(1) of the Code of Civil Procedure?"*

3. Facts giving rise to filing of this appeal are that the plaintiff purchased the suit lands vide registered sale-deed dated 09.10.1984 for a consideration of Rs.25,000/- from the original defendant No.l- Jagdish Prasad, and was placed in possession. However, subsequently Late Jagdish Prasad sold part of the suit lands admeasuring 0.092 hectares to defendant No.2 vide registered sale-deed dated 12.7,1991. Thereafter, the defendant No.l also conveyed the land admeasuring 0.092 hectares forming part of suit lands to defendant No.3 by registered sale-deed dated

19.6.1992. The defendant No.3, in turn, conveyed the land sold to him to defendant No.4 by another sale-deed dated 30.11.1992. The plaintiff sought the decree for declaration that sale-deeds in question are null and void, as well as the decree for permanent injunction, restraining the defendants from either alienating the suit lands or creating any third party interest. The defendant No.1 filed the written statement, in which, inter alia it was pleaded that the plaintiff's husband, namely, Devi Prasad had relinquished the plaintiff's title in the suit lands by executing the relinquishment deed dated 15.1.1985 (Exhibit-D-I) for a consideration of Rs.32,183/-. It was agreed that the plaintiff would execute the sale-deed later on in favour of the defendant no.1's wife. It was also pleaded that the husband of the plaintiff had executed the relinquishment deed in the capacity of an attorney and, therefore, the relinquishment deed binds the plaintiff. It was further pleaded that the plaintiff's husband is the necessary party and suit is barred by limitation. The defendant No.2 did not file the written statement. The defendant No.3 & 4 filed written statement, in which, it was pleaded that they are in possession of the suit lands by virtue of sale-deeds executed in their favour.

4. The Trial Court vide judgment and decree dated 02.11.1999, inter alia, held that the plaintiff is the owner of the suit lands in view of the sale-deeds executed in her favour. It was also held that the plaintiff's husband neither had authority nor had relinquished the plaintiff's share in the suit lands in favour of Late Jagdish Prasad. The suit was found to be within limitation and subsequent sales in respect of the suit lands were held to be illegal.

5. In appeal, appellate Court vide judgment and decree dated 02.5.2001 held that the relinquishment deed dated 15.1.1985 (Exihibit-D-1) does not show that the sale has been executed by the husband of the plaintiff in his capacity as an attorney of the plaintiff. It was also held that the plaintiff never authorized her husband to relinquish the right, title or interest of the plaintiff in the suit lands in favour of defendant No. 1. The alleged power of attorney executed by plaintiff in her husband's favour was not produced by defendants. No receipt has been filed on behalf of the defendants to show that a sum of Rs.32,183/- was paid to the plaintiff's husband. The plaintiff is the owner of the suit lands and is in possession of the same. Accordingly, decree passed by the trial Court was affirmed.

6. Shri P.R.Bhave, learned senior counsel submitted that the plaintiff has not entered the witness box. Her son has been examined on her behalf as her attorney. The power of attorney was given for the limited purpose i.e. for filing the suit. Therefore, an adverse inference ought to have been drawn against the plaintiff on account of her non-examination. It was further submitted that the lower appellate Court erred in rejecting the application under Order 6 Rule 17 of the Code of Civil Procedure. The documents annexed with the application showed that the plaintiff is not in possession of the suit lands and, therefore the suit was barred by proviso to section 34 of the Specific Relief Act, 1963. In support of his submissions learned senior counsel has placed reliance on the decisions in *Janki Vashdeo Bhojwani vs. Indusind Bank Limited and others,* 2005 (1) MPLJ 421, *Bandhu Mahto (Dead) by LRs. and another vs. Bhukhii Mahatain and others,* (2007) 10 SCC 564, *Dina Ji and others vs. Daddi and others,* AIR 1990 SC 1153 and *Vidhvadhar vs. Mankikrao and another.* AIR 1999 SC 1441.

7. On the other hand, Shri M.L.Jaiswal, learned senior counsel for respondent No.1, submitted that the courts below on the basis of meticulous appreciation of record have recorded findings of fact which are not open to interference in the second appeal. No substantial question of law arises for consideration. It was further submitted that non-examination of the plaintiff is of no relevance in view of section 120 of the Evidence Act, 1872. In support of his submissions learned senior counsel placed reliance on the decisions in the cases of *Ram Singh vs. Ajay Chawala,* AIR 1988 SC 514, *Corporation of the City of Banaglore vs. M.Papaiah and another,* AIR 1989 SC 1809, *Ramaswamy Kalingaryar vs. Mathayan Padayachi,* AIR 1992 SC 115, *Boodireddy Chandraiah and others vs. Arigela Laxmi and another,* JT 2007 (11) SC 116 and *Smt.Prabha Devi Goyal vs. Laxmikant,* 2000 (1) MPJR151.

8. I have considered the submissions made on both sides. The trial Court has taken into account the testimony of Defendant Witness No.2-Babulal and Defendants Witness No.3-Awadhesh. After taking into account the statements made by aforesaid witnesses who are witnesses to the relinquishment deed (Exhibit-D-1) the trial Court has discarded the testimony of Defendants Witness No.2-Babulal on the ground that suit lands have been subsequently transferred to his son and, therefore, his testimony is not worthy of reliance as he is an interested witness. Similarly, the trial Court

has found that Defendants Witness No.3, another witness to Exhibit-D-I, is unable to disclose as to who was the scribe of the document. It has further been found that Defendants Witness No.3 is not a witness to the transaction contained in Exhibit-D-I. No receipt of payment of an amount of Rs.32,183/-, which was allegedly made to plaintiff's husband has been produced. The signature of Devi Prasad has been denied on Exhibit-D-I, yet the defendants have neither led any evidence to prove the signature of Devi Prasad on the sale-deed, nor to show that Devi Prasad had the authority to execute the document (Exhibit-D-I) as attorney, except the document (Exhibit-D-4) i.e. the power of attorney dated 19.8.1983 executed by the plaintiff in favour of her husband which is in relation to the proceedings pending before Tahsildar. By aforesaid document (Exhibit-D-4) the plaintiff's husband was not. authorized to execute the relinquishmentdeedin favour of the defendant No. 1. It has further been held that the relinquishment deed requires registration under Section 17(l)(b) of the Indian Registration Act, 1908. Thus, on meticulous appreciation of evidence on record the trial Court has recorded the Finding that the relinquishment deed is neither valid nor executed with the consent of the plaintiff. The aforesaid finding has been affirmed in appeal. Both the courts below on meticulous appreciation of evidence on record recorded a finding that relinquishment deed is neither valid nor has been executed with the consent of the plaintiff and, therefore, does not bind the same. The aforesaid findings of fact are pure findings of fact, which are based on appreciation of evidence on record. While recording the aforesaid findings the courts below have neither omitted to consider the admissible evidence nor have considered the evidence, which was inadmissible. The findings of fact recorded by the courts below can neither be said to be perverse nor erroneous. The findings, also cannot be said to be based on no evidence. The learned counsel for the appellants was unable to demonstrate that the findings of fact which have been recorded by the courts below are either perverse or based on no evidence.

9. The jurisdiction of this Court to interfere with findings of fact is well defined by catena of decisions of Supreme Court and this Court in exercise of powers under Section 100 of C.P.C. can interfere with findings of fact only if the same is shown to be perverse or based on no evidence, which is not the case here. {See: *Sugani (mst.) Vs. Rameshwar Das and another,* (2006) II SCC 587, *Gurdev Kaur Vs. Kaki* (2007) I SCC 546 and *Narayanan Rajendran and another Vs. Lekshmy Sarojini and others,*

(2009) 5 SCC 264. Thus, for the aforementioned reasons the first substantial question of law framed by this Court has to be answered in the affirmative, whereas the second substantial question of law has to be answered in the negative.

10. On behalf of the plaintiff her son, namely, Pradeep Gupta has been examined as Plaintiff's Witness No. 1. The power of attorney has been produced as Exhibit-P-1. From perusal of the power of attorney, it is apparent that the plaintiff had authorized her son to conduct the suit and to do all other acts which are necessary. Thus, it cannot be said that the power of attorney does not authorize the plaintiff's son to depose on her behalf. Plaintiff's Witness No.1-Pradeep Kumar Gupta, the son of the plaintiff, has stated in paragraph 2 of his deposition that he has the information about the case. In cross-examination, the statement of Plaintiff's Witness No.1 that he has the information about the case has not been rebutted. An attorney can appear as a witness as well. The burden to prove the plea vide Exhibit-D-1 dated 15.1.1985 that plaintiff had relinquished her right, title or interest in favour of the defendant No.1, was on the defendants which they failed to discharge. Under section 114 of the Evidence Act, presumption which may be raised, is discretionary. The Court may or may not raise such a presumption. A presumption must be drawn against a party who having knowledge of the fact in dispute does not go into the witness box, particularly, when a *prima facie* case is made out against him. The question of drawing an adverse inference on account of non-examination of a party has to be decided in the facts of the each case. The decision relied upon, on behalf of the appellants, in *Bandhu Mahto (Dead) by LRs.* (supra) does not apply as it was a case where witness though present in the court, was not examined. Similarly, decision of Supreme Court in *Vidhyadhar* (supra) is of no assistance, as the defendant in that case did not appear to prove the plea taken by him, which is not the case here. In the instant case no adverse inference can be drawn on account of non-production of the plaintiff. Thus, third substantial question of law has to be answered in the negative.

11. The jurisdiction of the Court to receive additional evidence is circumscribed by the conditions mentioned in Order 41 Rule 27(1) of the Code of Civil Procedure. The lower appellate Court has rejected the application under -Order 41 Rule 27(1) vide order dated 2.5.2001. Alongwith an application under Order 41 Rule 27 of the Code of Civil

Procedure, the appellants had filed certified copy of 'khasrapanchsala'of the year 1998-99 to show that one Virendra, Brijesh and Prempuri are shown to be in possession of the suit lands. The lower appellate Court vide order dated 02.5.2001 has rejected the application for impleadment of Virendra and Brijesh Richhariya on the ground that they have failed to produce the documents to show that they have purchased the suit lands in question. The lower appellate Court while dealing with the application under Order 41 Rule 27 of the Code of Civil Procedure has held that the documents produced by the appellants by way of additional evidence are not relevant. Thus, the order dated 02.5.2001 rejecting application has been passed within the parameters fixed by the provisions contained in Order 41 Rule 27(1) of the Code of Civil Procedure and cannot be said to suffer from any infirmity. Thus, for the aforementioned reasons, the fourth substantial question of law has also to be answered in the negative.

12. In the result, the appeal fails and is hereby dismissed with costs.

Appeal dismissed.

I.L.R. [2011] M. P., 1265
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
M.A. No. 3444/2005 (Jabalpur) decided on 01 February, 2011

NATIONAL INSURANCE COMPANY LTD. ...Appellant
Vs.
RAGHUNATH SAHU & ors. ...Respondents

Motor Vehicles Act (59 of 1988), Section 149 - Liability of Insurer **- Tractor was driven by the respondent No. 4 contrary to the terms of the insurance policy and the risk of respondent No. 1 travelling on the trolley was not covered under the policy - In such premises, it is further held that after exonerating the appellant from the liability the tribunal did not have any authority to direct the appellant to pay the awarded sum and recover the same from respondents No. 3 & 4.** (Para 10)

मोटर यान अधिनियम (1988 का 59), धारा 149 – बीमाकर्ता का दायित्व – बीमा पॉलिसी की शर्तों के विरुद्ध, प्रत्यर्थी क्रं. 4 द्वारा ट्रेक्टर चलाया गया और ट्राली पर यात्रा कर रहे प्रत्यर्थी क्रं. 1 का जोखिम, पॉलिसी के अंतर्गत समाविष्ट नहीं था – इस स्थिति में आगे यह अभिनिर्धारित किया जाता है कि अपीलार्थी को दायित्व से

विमुक्त किये जाने के पश्चात् अधिनिर्णीत राशी का भुगतान करने के लिए और प्रत्यर्थी क्रं. 3 व 4 से उस राशी को वसूल करने के लिए अपीलार्थी को निदेशित करने का अधिकरण को कोई प्राधिकार नहीं।

Cases referred :

2004 ACJ 1909, 2003(4) MPLJ 546.

S.K. Rao with *Ajit Agrawal,* for the appellant.

None, for the respondents.

ORDER

U. C. MAHESHWARI, J.:–This appeal is directed on behalf of appellant/Insurer under Section 173 of the Motor Vehicles Act 1988 (In short 'the Act') being aggrieved by the award dated 12.8.2005 passed by IIIrd Additional Motor Accident Claims Tribunal Rewa, in Claim Case No. 42/05 whereby, holding the offending vehicle being driven by respondent No.4 under the employment of respondent No.3, the registered owner of the same contrary to the terms of the insurance policy, without having any driving licence, the appellant insurer is not liable to bear the claim and pursuant to it the claim of the respondent No.1 regarding the injury sustained by him in the alleged vehicular accident, was awarded against the respondent no.3 & 4 for the sum of Rs. 29,000/- with interest at the rate of 6% per annum from the date of filing the claim petition i.e. 16.7.2004. Simultaneously while passing such award it is also directed that the awarded sum shall be paid by the appellant first and thereafter, the same could be recovered by it from the respondents No.3 and 4, the registered owner and the driver of the offending vehicle. The appellant has preferred this appeal being aggrieved by the aforesaid condition directing it to pay and recover the awarded sum from the respondents No.3 & 4.

2. The facts giving rise to this appeal in short are that the respondent No.1 herein filed the impugned claim contending that on dated 13.4.2004 at about 7 O'clock in the evening, while sitting in the trolley bearing registration No. MP/53/M/1714 which was carrying by tractor bearing registration no.MP/53/M/1713, was going to village Rampur Naikin. Such tractor was being driven by respondent No.4 under the authority and employment of respondent No.3 in a rash and negligent manner resultantly, on the way the respondent No.1 fell down from such tractor-trolley and

become unconscious. After the incident, the respondent No.4 fled away from the place of incident. The respondent No.1 was taken to the hospital by Ram Karan and Mahaveer present on the spot, where his MLC report was prepared and it was revealed that he sustained the fractures in the bone of waist and of hips and also sustained some grievous injuries on his left hand. On receiving the information, of the alleged incident a criminal offence was also registered against the respondent No.4/Driver at Police Station Rampur Naikin. Looking to the nature of the injuries sustained by the respondent No.1, after providing preliminary treatment at Primary Health Center, he was referred to Medical College Hospital, Rewa for further treatment. As per further averments, the aforesaid tractor was duly insured with the appellant. With these pleadings, the respondent No.1/Raghunath Sahu has preferred his claim for the sum of Rs. 5,50,000/- and also claimed interest @ 18% per annum on such sum.

3. In reply of respondent Nos. 2 to 4, it is stated that on the date of incident, the respondent No.3, the registered owner of the tractor, while sitting on the same, was going to some place. On the way, without knowledge of respondents No.3 & 4 the respondent No.1 hanged at the back side of the trolley carrying by such tractor consequently, he fell down and sustained the injuries in such alleged incident. In such premises, no negligence was committed by respondent No.4 in driving the tractor. In the alleged accident the respondent No.1 had sustained only simple injuries. Subsequent to incident under persuasion of the villagers, the respondent No.1 has lodged a false report against the respondent No.4. Looking to the nature of the injuries sustained by respondent No.1 the claim is also preferred on higher side. The respondent No.1 has spent only Rs.1,000/- for the treatment of the alleged injuries. In alternate it is stated that on holding any liability to indemnify the claim of respondent no.1 on them then, the vehicle being duly insured with the appellant the same be saddled against it. With these pleadings, the prayer for dismissal of the claim is made.

4. In reply of appellant/insurer by denying the averments of the claim petition, it is stated that such tractor was driven by respondent No.4 without having any legal and effective driving license. In the alleged insurance of the tractor only risk of the accident which would be happened while using the tractor for agricultural purposes was covered. The other risk was neither covered nor any additional premium was taken in that

regard. It is also stated that as per insurance policy, only risk of driver was covered. The risk of any passenger sitting on the tractor or trolley, was not covered under such policy. It is also stated that the respondent No.1 had not sustained any fracture, he sustained only simple injuries. With these submissions, the prayer for exonerating the appellant to indemnify the alleged claim of the respondents No.1 with a further prayer for dismissal of the same are made.

5. In view of pleadings of the parties, after framing the issues and recording the evidence, on appreciation of the same it was held by the Tribunal that the aforesaid tractor was driven by respondent no.4 in a rash and negligent manner due to that, on the way respondent no.1 traveling over the loaded chaff on trolley, carried by such tractor, fell down and sustained the alleged injuries. And taking into consideration the terms of the insurance policy of the tractor issued by the appellant, it was also held that the risk of third party and it's driver having the effective driving licence while using the same for agricultural purposes was covered. While the risk of other person sitting on the tractor or traveling in the trolley was not covered. Pursuant to that by holding the alleged tractor was driven by respondent No.1 contrary to the policy without having any driving license, exonerating the appellant to bear the liability of the claim awarded the claim of respondent No.1 for the abovementioned sum only against the respondent No.3 & 4 with a further direction to the appellant to pay the awarded sum first to the claimant/ respondent no.1 and thereafter, it shall recover the same from the respondents No.3 & 4, the registered owner and driver of the offending vehicle. Being dissatisfied with this condition to pay and recover the appellant, has come forward to this Court with this appeal.

6. Shri S.K. Rao, learned Senior Advocate assisted by Shri Ajit Agrawal counsel for the appellant, after taking me through the pleadings, evidence adduced by the parties and the exhibited documents including the insurance policy of the offending tractor argued that in the available circumstances, after holding the offending tractor was insured with the appellant under agricultural policy in which the risk of only driver was covered, and the additional premium covering the risk of passengers or the persons traveling or sitting on the tractor or trolley was not taken. In such premises, after exonerating the appellant to bear the liability of awarded sum, the Tribunal did not have any authority to direct the

appellant/insurer to pay the awarded sum to the respondent No.1/claimant first and then recover the same from the respondents No.3 & 4, the registered owner and driver. According to his submission when according to the terms of the policy, the risk of the person traveling on the trolley, by charging the additional premium, was not covered and secondly, as per finding of the Tribunal, the tractor was driven by respondent No.4 without having any driving licence, no such direction could be given by the Tribunal to the appellant. In support of his contention, he placed his reliance on the decision of the apex Court in the matter of *National Insurance Co. Ltd. V. V. Chinnamma and others,* reported 2004 ACJ 1909 and prayed to modify the impugned award by deleting the aforesaid condition directing the appellant to pay and recover the sum from the respondents No.3 & 4, by allowing this appeal.

7. Inspite service of the notice on the respondents No.1 to 4, no one appeared on behalf of any of them to assist the Court to adjudicate this appeal.

8. Having heard, keeping in view the arguments advanced by the learned Senior counsel, I have carefully gone through the record as well as the impugned award. It is undisputed findings of the Tribunal based on appreciation of the evidence that the alleged accident/incident was the cause and consequence of rash and negligent driving of such tractor by respondent No.4. As per further findings due to such act of respondent no.4, the respondent no.1, who was traveling in the trolley loaded with the chaff and carrying by the offending tractor, fell down from the trolley and sustained the alleged injuries. Besides this there is undisputed finding that on the aforesaid date of the incident, the respondent no.4 was not having any driving license to drive the alleged vehicle. In such premises, this Court has to answer the question whether the liability to pay and recover the awarded sum has been rightly saddled against the appellant by the Tribunal.

9. True it is that on the date of incident, the aforesaid tractor was duly insured with the appellant for agricultural purposes along with covering the risk of driver with a condition if the same is driven by a person having duly and effective driving license, but the risk of other person, sitting on the tractor or traveling in the trolley was not covered and in that regard, no additional premium was taken by the appellant/insurer. I have

not found any evidence showing that the respondent No.1/claimant was traveling as owner of chaff or the goods in the alleged trolley. So, it could not be said that the respondent No.1 was traveling along with his goods in such trolley. Even otherwise, for the sake of argument, even if it is deemed that the respondent No.1 was traveling along with his goods in such trolley, even then, it could not be said that such trolley was in used for agricultural purposes for which, the same was insured or secondly, in the lack of any premium covering the risk of passengers sitting on the trolley or on the tractor, in view of provision of Section 147 (1) read with Section 149 (2) (a) (i) (c) of the Act, and also in view of the law laid down bythe apex Court in the matter of *National Insurance Co.Ltd. v. V. Chinnamma and others* (supra) the alleged risk could not be saddled against the appellant in any manner. Under the premises of the aforesaid cited case after holding the risk of respondent no.1 was not covered under the policy and the tractor was driven by the respondent No.4 without having any driving license, the appellant could not be held liable even to pay the awarded sum to the respondent no.1 first and lateron, recover the same from the respondents No.3 & 4. In the aforesaid cited case the apex Court held as under:-

> "13. An insurance for an owner of the goods or his authorized representative traveling in a vehicle became compulsory only with effect from 14.11.1994, i.e., from the date of coming into force of the Amending Act 54 of 1994
>
> 15. A tractor fitted with a trailer may or may not answer the definition of 'goods carriage' contained in section 2 (14) of the Motor Vehicles Act. The tract was meant to be used for agricultural purposes. The trailer attached to the tractor, thus, necessary is required to be used for agricultural purposes, unless registered otherwise. It may be, as has been contended by Mrs.K. Sharda Devi, that carriage of vegetables being agricultural produce would lead to an inference that the tractor was being used for agricultural purposes but the same by itself would not be construed to mean that the tractor and trailer can be used for carriage of goods by another person for his business activities. The deceased was a businessman. He used to deal in vegetables. After he purchased the vegetables, he was to transport the

same to market for the purposes of sale thereof and not for any agricultural purpose. The Tractor and trailer, therefore, were not being used for agricultural purposes. However, even if it be assumed that the trailer would answer the description of the 'goods carriage' as contained in section 2 (14) of Motor Vehicles Act, the case would be covered by the decision of this Court in *Asha Rani,* 2003 ACJ 1 (SC) and other decisions following the same, as the incident had taken place on 24.11.1991, i.e., much prior to coming into force of 1994 amendment.

16. For the reasons aforementioned, the impugned judgments cannot be sustained which are set aside accordingly. This appeal is allowed. In the facts and circumstances of this case, there shall be no order as to costs."

10. It is apparent from the policy that the alleged trolley carrying by offending tractor was neither insured nor any additional premium was paid to the appellant for covering the alleged risk involved in the case at hand. In such premises, the liability even to pay the awarded sum to the claimant and to recover the same later from the registered owner and driver, could not be saddled against the appellant. Therefore, it is held that tractor was driven by the respondent No.4 contrary to the terms of the insurance policy and the risk of respondent no.1 traveling on the trolley was not covered under the policy. In such premises, it is further held that after exonerating the appellant from the liability the tribunal did not have any authority to direct the appellant to pay the awarded sum and recover the same from respondents No.3 & 4. In such premises, the approach of the Tribunal in this regard being perverse, is not sustainable hence, by allowing this appeal in part, the direction of the Tribunal to the appellant that it shall pay the awarded sum first to the respondent No.1/claimant and then, recover the same from the respondents No.3 & 4, is hereby set aside. Till this extent, the impugned award is modified while, remaining findings of the same are hereby affirmed.

11. I deem fit to mention here that the Tribunal directed the appellant to pay and recover the awarded sum from the respondents No.3 & 4 keeping in view the principle laid down by the Full Bench of this Court in the matter of *Jugal Kishore and another vs. Ramlesh Devi and others*

reported in 2003 (4) M.P.L.J. page 546, but in view of the abovementioned subsequent decision of the apex Court, the approach of the Tribunal could not be sustained under the law.

12. It is directed that, any sum of the impugned award if deposited by the appellant in compliance of any interim award, or the other order, then the appellant shall be at liberty to recover the same from the respondent No.3 & 4 by filing the execution proceedings against them on the basis of this order. It shall not be necessary for the appellant to file any fresh claim for recovery of such sum, the Tribunal is also directed to comply this condition.

13. In the available circumstances, there shall be no order as to the costs.

Order accordingly.

I.L.R. [2011] M. P., 1272
APPELLATE CRIMINAL

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

Cr.A. No. 549/2002 (Gwalior) decided on 11 November, 2010

JUGGAN ALIAS SABIR KHAN ...Appellant

Vs.

STATE OF M.P. ...Respondent

A. Evidence Act (1 of 1872), Section 32- Dying Declaration - **Doctor who recorded dying declaration not examined - Doctor who signed as attesting witness examined by prosecution - Attesting witness admitted in evidence that earlier deceased had told that she caught fire by accident but later on she retracted from her statement and alleged that appellant poured kerosene oil on her and burnt her - Factum of burning by accident not mentioned in Dying Declaration - *Held*- It appears that entire dying declaration was not recorded - Appellant is entitled for benefit.** (Paras 13 & 14)

क. साक्ष्य अधिनियम (1872 का 1), धारा 32 –मृत्युकालिक कथन – मृत्युकालिक कथन अभिलिखित करने वाले चिकित्सक का परीक्षण नहीं किया गया – अनुप्रमाणक साक्षी के रुप में हस्ताक्षर करने वाले चिकित्सक का परीक्षण अभियोजन द्वारा किया गया – अनुप्रमाणक साक्षी ने साक्ष्य में स्वीकार किया कि पूर्व में मृतक ने कहा था कि उसे दुर्घटना वश आग लगी, परन्तु बाद में वह अपने बयान से पीछे हटी और आरोप

लगाया कि अपीलार्थी ने उस पर मिट्टी का तेल डालकर उसे जलाया – मृत्युकालिक कथन में दुर्घटना वश जलने के तथ्य का उल्लेख नहीं – अभिनिर्धारित – यह प्रतीत होता है कि सम्पूर्ण मृत्युकालिक कथन अभिलिखित नहीं किया गया – अपीलार्थी लाभ के लिए हकदार।

***B. Evidence Act (1 of 1872), Section 32 - Multiple Dying Declaration* - When there are more than one dying declaration and on the material points they are contradictory to each other, the benefit will go to the accused.** (Para 16)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 32 – अनेक मृत्युकालिक कथन – जब एक से अधिक मृत्युकालिक कथन हैं और तात्विक बिन्दुओं पर वे एक दूसरे से विरोधात्मक है, लाभ अभियुक्त को जायेगा।

Case referred:

AIR 1993 SC 374.

Ankit Saxena, for the appellant.

C.S.Dixit, P.P., for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by :

A.K. Shrivastava, J. :– Feeling aggrieved by the judgment of conviction and order of sentence dated 29th August,2002 passed by the learned Additional Sessions Judge, Gohad, District Bhind in Sessions Trial No.43 of 2000, convicting the appellant under Section 302 of the IPC and thereby sentencing him to suffer life imprisonment and fine Rs.1,000/, in default further rigorous imprisonment of three months, this appeal has been filed by the appellant under Section 374(2) of the Code of Criminal Procedure, 1973.

2. In brief, the case of the prosecution is that at 2.00 A.M., on 18th May, 1999, appellant after sprinkling kerosene on his wife, Sameena (hereinafter referred to as the deceased) lit the fire. The deceased was admitted in the hospital where Dr. Dinesh Doshi recorded her dying declaration (Exhibit P/19) and Dr. Kanti Batham (P.W.12) attested the dying declaration as witness. This dying declaration was recorded on 21st May, 1999 and later on, another dying declaration (Exhibit P/11) was recorded by A.S.I., Lakhan Singh Sharma (P.W.8) on 22nd May, 1999. The deceased succumbed to the burn injuries on 23rd May, 1999.

3. After the investigation was over, a chargesheet was submitted in the

committal Court, which on its turn, committed the case to the Court of session, from where it was received by the Trial Court for the trial.

4. The learned Trial Judge on the basis of the material placed in the charge sheet framed the charges punishable under Sections 302 and 304B of the IPC. Needless to say, that the appellant denied the charges and requested for the trial.

5. The prosecution thereafter examined its witnesses and also proved the documents. The defence of the appellant is that the deceased was not in a position to speak and, therefore, the dying declarations cannot be relied upon and further he has been falsely implicated and in support of his defence, he has examined Shaheed (D.W.1) and Bilkis (D.W.2).

6. The learned Trial Judge on the basis of the evidence came to hold that charge under Section 304B of the IPC is not proved against the appellant as well as against the other co-accused persons, eventually, acquitted them from this charge.

7. The learned Trial Judge further came to hold that the charge under Section 302/34 of the IPC is not proved against the other coaccused and also acquitted them from the said charge. However, the learned Trial Judge came to hold that the charge under Section 302 of the IPC is proved against the appellant and, therefore, he has been convicted and passed the sentence which we have mentioned hereinabove.

8. In this manner, this appeal has been filed by the appellant assailing the judgment of conviction and order of sentence.

9. The contention of Shri Aniket Saxena, learned counsel for the appellant is that the Trial Court has based its judgment on two dying declarations, they are Exhibit P/19 and Exhibit P/11 which have been recorded by Dr. Dinesh Doshi and A.S.I., Lakhan Singh Sharma (P.W.8), respectively. The submission of learned counsel is that Dr.Dinesh Doshi who has recorded the dying declaration (Exhibit P/19) has not been examined although Dr. Kanti Batham (P.W.12) who attested the dying declaration (Exhibit P/19) recorded by Dr.Doshi, has been examined. Further, it has been contended by him that from the dying declaration (Exhibit P/19) as well as in the statement of Dr. Kanti Batham (P.W.12), it is borne out that firstly the deceased stated that on account of accident since a chimney (lamp) fell over her, she sustained burn injuries. But, that statement of

her was not recorded by Dr.Doshi and therefore no reliance be placed on the dying declaration, Exhibit P/19 recorded by Dr.Doshi.

10. By putting a deep dent on later dying declaration (Exhibit P/11) which was recorded on 22nd May, 1999, it has been argued by learned counsel that the factum of accidental fire has not at all been stated in it and, therefore, the two dying declarations are contradictory to each other on the material point and if that is the position, the benefit would go to the appellant and, hence, it has been prayed that the appellant who is languishing in the jail for the last 11 years be acquitted by allowing this appeal.

11. On the other hand, Shri C.S.Dixit, learned Public Prosecutor has argued in support of the impugned judgment.

12. Having heard learned counsel for the parties, we are of the considered view that this appeal deserves to be allowed.

13. True, the incident had taken place in the house of the appellant and the deceased was his wife. It is equally true that the incident had taken place in the late night at 2.00 A.M., On bare perusal of the dying declaration (Exhibit P/19) which was recorded by Dr. Dinesh Doshi on 21st May, 1999, we find that while answering the question No.3, specifically, the deceased is saying that the appellant after pouring kerosene over her, lit the fire. But a specific question No.6 was put to her by Dr. Dinesh Doshi (not examined) that earlier deceased told that on account of accident since a chimney (lamp) fell over her, she received burn injuries and why she stated so. In reply, the deceased told that in order to save her own life, she gave a false statement earlier. We fail to understand that why Dr. Dinesh Doshi who recorded the dying declaration (Exhibit P/19) was not examined. As a matter of fact, he should have been examined by the prosecution. On the dying declaration (Exhibit P/19) recorded by Dr.Dinesh Doshi, Dr.Kanti Batham (P.W.12) who was present through out when it was being recorded, has put his signature as attesting witness on the document of dying declaration and this witness specifically in paragraph 4 had admitted that Dr. Dinesh Doshi put a question to the deceased that how she had received injuries and in reply, she told that on account of accident as chimney (lamp) fell over her, she had been burnt. But this reply of the deceased and the question put to her by Dr.Doshi is totally missing from Exhibit P/19. It appears that Dr.Dinesh Doshi has not recorded the entire version of the deceased as it transpires

from the statement of Dr.Kanti Batham (P.W.12). We would like to quote that piece of statement in paragraph 4 of the cross-examination of this witness, which reads thus:

> " डाक्टर साहब ने सवीना को यह पूछा था कि तुम कैसे जल गयी तो सवीना ने कहा कि वो चिमनी से जल गयी है।"

We would like to quote question number 6 put by Dr.Doshi to the deceased and answer given by her which reads as follows:

> " पहले तुमने कहा था कि तुम चिमनी से जल गई? ऐसा क्यों कहा? मैने अपनी जान बचाने के लिए झूठ बोला था।".

On close scrutiny of the evidence of Dr.Kanti Btham (P.W.12), we find that it poses a big question mark on the authenticity and hallmark on the dying declaration (Exhibit P/19) and it is borne out from the evidence of Dr.Kanti Batham that the entire version of the deceased was not recorded by Dr.Doshi and in that situation the benefit will go to the accused.

14. Indeed, the dying declaration should be taken down in the language in which it is made using as far as possible the exact words of the declarant and if it is not a continuous statement but was elicited in answer to questions, the exact questions and answers should be noted. For placing reliance on the dying declaration, a strict screening of the statement is required to be made because it is not a statement made on oath and its veracity can not be tested on cross-examination. Before acting on the dying declaration it should, therefore, be ensured that the dying declaration made by the deceased should be of such a nature as to inspire confidence of the Court regarding its correctness and further that it is not a result of tutoring or prompting. When it is borne out from the statement of Dr.Kanti Batham (P.W.12) that firstly deceased told that on account of accidental fire, the incident took place, why this answer was not written by Doctor Doshi. In these state of affairs, it is difficult to place any reliance on the dying declaration, Exhibit P/19.

15. The second dying declaration of the deceased was recorded on the next date, i.e., 22nd May, 1999 (Exhibit P/11) which was recorded by A.S.I., Lakhan Singh Sharma (P.W.8) and in this dying declaration, there is complete omission of the factum that the deceased received burn injuries on account of accident since chimney (lamp) fell over her.

16. If there are more dying declarations than one and on the material

points they are contradictory to each other, certainly, the benefit will go to the accused and authenticity could not be attributed to the said dying declarations. In this regard, we may profitably place reliance on the decision of the Supreme Court in the case of *Smt. Kamla Vs. State of Punjab,* AIR 1993 SC 374. Hence, we hold that no reliance can be placed upon the two abovesaid dying declarations of the deceased.

17. No doubt, it is true that the deceased had died on account of burn injuries but how the incident had taken place and whether the appellant is responsible for the same, there is no cogent evidence on record. We have already held hereinabove that no reliance can be placed on the dying declarations of the deceased.

18. Resultantly, this appeal succeeds and is hereby allowed. The order of conviction and sentence passed against the appellant is hereby set aside. The appellant is acquitted from all the charges. The appellant is in jail, he be set at liberty forthwith, if not required in any other case.

Appeal allowed.

I.L.R. [2011] M. P., 1277
APPELLATE CRIMINAL

Before Mr. Justice A.K. Shrivastava & Mr. Justice Brij Kishore Dube
Cr.A. No. 557/2002 (Gwalior) decided on 16 November, 2010

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

A. Evidence Act (1 of 1872), Section 3 - Child Witness - **If there is no inherent defect in testimony of child witness, merely because the witness is child, her testimony cannot be disbelieved - Evidence of daughter of appellant duly corroborated by medical evidence - No material to show that she was tutored by any person - Evidence of child witness worth reliance.** (Paras 14 & 15)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – बाल साक्षी – यदि बाल साक्षी की परिसाक्ष्य में कोई स्वाभाविक दोष नहीं है, मात्र इसलिए कि साक्षी बालक है, उसकी परिसाक्ष्य पर अविश्वास नहीं किया जा सकता – अपीलार्थी की पुत्री की साक्ष्य की चिकित्सीय साक्ष्य द्वारा सम्यक् पुष्टि होती है – यह दर्शाने वाला कोई तत्व नहीं कि उसे किसी व्यक्ति द्वारा सिखाया गया था – बाल साक्षी की साक्ष्य विश्वास योग्य।

***B. Penal Code (45 of 1860), Section 302 - Murder* - Appellant having illicit relations with wife of his younger brother which was objected by deceased wife - Appellant killed his wife by pressing her neck and thereafter burning her - Medical evidence shows that cartilage of cornea of neck was broken and lungs were found to be congested - No carbon particles found in trachea or in lungs of deceased - Dead body was lying on ground and front portion of the body was found burnt but on turning the body, back was not found burnt - No scintilla of doubt that deceased was first killed by pressing neck and thereafter dead body was burnt - Appellant rightly convicted under Section 302/34 - Appeal dismissed.** (Paras 16-19)

ख. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – अपीलार्थी के उसके छोटे भाई की पत्नी के साथ अवैध संबंध, जिसका मृतक की पत्नी द्वारा विरोध किया गया – अपीलार्थी ने अपनी पत्नी को गला दबाकर और बाद में जलाकर मार डाला – चिकित्सीय साक्ष्य दर्शाती है कि गले के कार्निया की कोमलास्थि भंग थी और फेफड़े कन्जेस्टेड पाये गये थे – मृतक की स्वांस नली अथवा फेफड़े में कार्बन के कण नहीं पाये गये – शव जमीन पर पड़ा था और शरीर का सामने का हिस्सा जला हुआ पाया गया, परन्तु शरीर पलटाने पर, पिछला हिस्सा जला हुआ नहीं पाया गया – निःसंदेह मृतक को पहले गला दबाकर मार दिया गया और उसके बाद शव को जलाया गया – अपीलार्थी उचित रूप से धारा 302/34 के अंतर्गत दोषसिद्ध किये गये – अपील खारिज।

Cases referred:

(2004) 1 SCC 64, (2009) 3 SCC 585.

V.S. Chauhan, for the appellant.

C.S. Dixit and *P.N. Gupta, P.P.,* for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by :

A.K. SHRIVASTAVA, J. :– The judgment passed in this appeal shall also govern the disposal of connected Criminal Appeal No.547/2002 *(Brindawan Vs. State of M.P.)* since both the appellants have been convicted by common judgment of conviction and order of sentence passed by learned Trial Court.

2. Feeling aggrieved by the judgment of conviction and order of sentence dated 27/9/2002 passed by learned Sessions Judge, Bhind in Sessions Trial No. 162/2000 convicting appellants under Sections 302/34 and 201 of IPC and thereby sentencing them to suffer imprisonrnent as mentioned in the impugned judgment, this appeal as well as connected Criminal

Appeal No.547/2002 has been preferred by the appellants under Section 374 (2) of the Code of (Criminal Procedure), 1973.

3. Sans unnecessary detail, the facts lie in narrow compass. Suffice it to say that as alleged by the prosecution, appellant Ramkishun was having illicit relationship with the wife of his brother Harisingh which was being highly objected by the deceased Guddi (hereinafter referred to as the deceased), who had been his wife. Making this allegation as a point, the appellant Ramkishun was cruel some against her and was causing marpeet to her. Earlier to the night of the incident, on 17/12/1999 in the evening appellant Ramkishun brought the deceased alongwith his children from her parental house to village Achalpura. In the same night of 17/12/1999 at 4:00 AM with the help of co-appellant Brindawan he first murdered his own wife and to hide his crime, he poured kerosene and set the fire on the dead body.

4. The matter was reported by village chowkidar Ajbel Singh in the police station and on the basis of such report, a marg was registered and investigation was conducted by the investigating agency. During the investigation it was found that appellant with the help of co-appellant Brindawan committed murder of the deceased and in order to hide the crime, set the dead body to fire.

5. After the investigation was over, a charge-sheet was submitted in the committal Court, which committed the case to the Court of Session where the appellants were tried.

6. The learned Trial Judge on the basis of the allegation made in the charge-sheet, framed charges under Sections 302/34 and 201 of IPC against the appellants, which both the appellants denied and requested for the trial.

7. In order to prove the charges, prosecution examined as many as eleven witnesses and placed Ex.P/1 to Ex.P/9, the documents on record. The defence of the appellants is of false implication and the same defence they set forth in their statements recorded under Section 313 of Cr.P.C. and in support of their defence they examined one Gopal Singh as DW-1.

8. Learned Trial Judge after appreciating and marshalling the evidence placed on record, came to hold that charges are proved against the appel-

lants, eventually convicted them and passed the sentence, as mentioned in the impugned judgment.

9. In this manner, this appeal as well as connected Criminal Appeal No.547/2002 have been preferred by the appellants assailing their judgment of conviction and order of sentence passed by learned Trial Court.

10. Vehemently it has been contended by Shri Chauhan, learned counsel for the accused persons, that if the totality of facts and circumstances of the case as well as the evidence placed on record is taken to be true in its true perspective and spirit, it would reveal that the sole eye-witness Pramila (PW-8) is not a reliable witness and because the appellant was making demand of Rs.10,000/- from his in-laws, therefore, he has been falsely roped. It has also been put forth by him that all the witnesses are highly interested being the relatives from the paternal side of the deceased and, therefore, their evidence should not be relied upon.

11. On the other hand, Shri Gupta and Shri Dixit, learned Public Prosecutors for the respondent/State, argued in support of the impugned judgment and submitted that looking to the unimpeachable testimony of Pramila (PW-8), who is the daughter of the deceased and appellant Ramkishun, there cannot be any hair escape to hold that appellant is an innocent person. Further it has been propounded by them that looking to the conduct of the appellants that after killing the deceased, her dead body was brought in the open courtyard where it was burnt, but the doctor did not find that the hair were burnt as well as on the back side of her body there was no burn injury. Learned counsel has also invited our attention to Panchayatnam (Ex.P/4) of the deceased and submitted that the deceased was lying dead and the anterior portion of the deceased from chest downwards was found to be burnt but the rest portion as well as the posterior region of the deceased was intact. Learned counsel further submitted that looking to the postmortem report (Ex.P/1) as well as the testimony of the Autopsy Surgeon, Dr. K.D. Singh (PW-1) since the deceased died on account of asphyxia due to throttling, therefore, learned Trial Court rightly convicted the appellants under Section 302/34 as well as under Section 201 of IPC.

12. Further it has been canvased by learned Public Prosecutor that it is borne out from the testimony of the prosecution witnesses that appellant was having illicit relations with his brother's wife, which was being highly

objected not only by the deceased, but by her parents also, this made a cause to the appellant to kill her. On these premised submissions it has been argued by learned Public Prosecutors that this appeal as well as connected Criminal Appeal No. 547/2002 being sans .substance, be dismissed.

13. Having heard learned counsel for the parties, we are of the considered view that this appeal as well as connected Criminal Appeal No. 547/2002 deserve to be dismissed.

14. True, Pramila (PW-8), who is the star witness, is a child and there is solitary statement of this child witness. But it is equally true that she is the daughter of deceased and appellant Ramkishun and, therefore, so far as the love and affection and the relationship of this witness with them is concerned, it is equal on both the sides. This witness is a child witness and is totally illiterate which is borne out from her testimony. On bare perusal of her testimony, we find that appellant Ramkishun went to his nuptial house and requested the deceased's parents to accompany the deceased with him. Thereafter, in the evening appellant Ramkishun alongwith deceased and his children came to village Achalpura and in the night appellant with the help of co-appellant Brindawan by throttling the neck of the deceased by pressing it by his leg killed her and thereafter set the fire on the body of the deceased. Specifically, this witness is saying that in the light of the electric bulb she visualized the entire episode. This witness was cross-examined at length, but she remained embedded in her earlier version despite there being a roving cross-examination over her. The defence unsuccessfully tried to dismantle her testimony by suggesting that she is a tutored witness and has been tutored by the parents of the deceased as well as her maternal uncle. From every angle the suggestions were put, but firmly she denied that she has been tutored by any person and, therefore, we do not find any merit in the contention of learned counsel for the appellants that this witness cannot be relied upon.

15. The Supreme Court in *Ratansinh Dalsukhbhai Nayak v. State of Gujarat,* (2004) I SCC 64 has held that if there is no inherent defect in the testimony of a child witness, merely because the witness is a child, her testimony cannot be disbelieved. According to us, in order to rely the testimony of a child witness it is to be gathered by. scrutinizing his or her

testimony as to whether he or she is a tutored witness and is concealing the reality or not and if on both the tests the hallmark of the testimony of child witness is proven, there is no bar under the law to disbelieve his or her statement on account of the fact that the witness is a child, in this context rightly reliance has been placed by Shri Gupta, learned Public Prosecutor, on the latest pronouncement *Rameshbhai Chandubhai Rathod v. State of Gujarat,* 2009 (3) Supreme 585 wherein in para 12 and 13 it has been held as under:-

> "12. Even earlier than that, this Court in *Dattu Ramrao Sakhare and Others Vs. State of Maharashtra* (1997) 5 SCC 341, has hetd that there is no rule of practice that the evidence of a child witness needs corroboration in order to base conviction on it. However, as a rule of prudence, the Court insists it is desirable to have corroboration from other dependable evidence.
>
> 13. in *Suryanarayana Vs. State of Karnataka* (2001) 9 SCC 129, this Court held that corroboration of the testimony of a child witness is not a rule but is a measure of caution and prudence.".

16. On bare perusal of the testimony of the mother of the deceased, namely, Mainibai (PW-9), we find that deceased told her that appellant is having illicit relationship with the wife of his younger brother which is being objected by the deceased; as a result of which, the appellant Ramkishun was causing marpeet to her. Similar type of statement has also been stated by Lalsingh (PW-2) who is the uncle of the deceased. We do not find any merit in the contention of learned counsel for the appellants that merely because these witnesses are having blood relations with the deceased, their evidence should not be relied upon. The law in this regard is well settled that if the witnesses are thickly related through blood and are highly interested, their testimony cannot be thrown iike a waste paper in the dustbin, but; it should be scrutinized with great care and caution. By keeping all these principles in our mind we have closely scrutinized the statements of the witnesses and we find that from the evidence it is borne out that appellant Ramkishun was having illicit relationship with the wife of his younger brother Harisingh, which was being objected by the deceased and this made a cause to appellant Ramkishun

to kill the deceased and co-appellant Brindawan shared his common intention to kill the deceased alongwith appellant Ramkishun.

17. It is borne out from the unimpeachable testimony of eye-witness Pramila (PW-8) that appellant Ramkishun pressed the neck of the deceased by his leg and thereafter she was burnt. At this juncture, it would be condign to go through the statement of Autopsy Surgeon Dr. K.D. Singh (PW-1), who has categorically stated that cartilage of cornea of the neck was broken and the lungs were found to be congested. It is gathered from the testimony of Autopsy Surgeon that no carbon particles were found in the trachea or in the lungs of the deceased because if they would have been in the trachea or lungs, it would have been so stated in the postmortem report. Hence, it can be inferred that after killing the deceased, her dead body was burnt. We would like to quote the injuries which the deceased sustained and which was noticed by the Autopsy Surgeon during the postmortem which reads thus:-

> "Body of an young female laying supine in position over PM examination Table wearing blouse half burnt, shari blackish yellowish shadows burnt peticoat yellowish. Golden ring in the nose and ear ring silver. Rigor mortise present PM staining over back. Burn over anterior part of chest and abdomen present. Burn over Rt arm and forearm and palm anteriorly present 1 degree burn over Lt upper (antearm present) Burn over anterior aspect neck and chin present. Burn & charring over anterior aspect Rt thigh present scalp hair not burnt. Lip cynosid tongue between teeth, eye open and congested-Neck swallow on cut subcutaneous blood clot present on Rt side of the level of adm. about 1½" length & similarly on Lt side subcutaneous blood clot present over neck below mandible. On cut trachea congested and cricuid cartilage ruptured (cornea) containing bloody froth, further on dissecting hyoid bone also present in broken stage chest and abdomen thigh healthy on cut of uterus 22-24 weeks a dead female fetus found."

18. One important fact which cannot be marginalized and blinked away is that not only the Autopsy Surgeon has opined that firstly the

deceased was killed and thereafter her body was burnt, but if we visualize the seizure memo. (Ex.P 4)of the dead body which has been proved by Brijendra Singh (PW-5), we find that the dead body of the deceased was lying, her mouth was open and teeth were exposed. Right hand was folded and was lying on the chest while left hand was bent from elbow region. Both the legs were folded from the knee towards interior side. Pace, neck chest, abdomen and thigh region were found to be burnt, but hair were not burnt. On turning the dead body, it was not found to be burnt. Hence, we have no scintilla of doubt in holding that firstly the deceased was killed by pressing her neck with the aid of leg by appellant Ramkishun and co-appellant Brindawan shared his common intention to kill the deceased and thereafter the dead body of the deceased was burnt.

19. We have gone through the reasonings assigned by learned Trial Court convicting the appellants under Sections 302/34 and 201 of IPC and we do not find any illegality in it and further we do not want lo deviate ourselves from the reasonings assigned by learned Trial Court.

20. For the reasons stated hereinabove we do not find any merit in this appeal as well as connected Criminal Appeal No. 547/2002. The same are hereby dismissed.

Appeal dismissed.

I.L.R. [2011] M. P., 1284
APPELLATE CRIMINAL

Before Mr. Justice Abhay M. Naik & Mr. Justice Brij Kishore Dube
Cr.A.No. 52/2006 (Gwalior) decided on 16 December, 2010

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

*A. **Prevention of Corruption Act (49 of 1988), Section 13(1)(e) - Known Sources of Income** -* **Disclosure of receipt of money in income tax return is of no assistance in case of disproportionate income unless it is established that provisions contained in Rules 14, 17 and 19 of M.P. Civil Services Conduct Rules, 1965 were duly complied with.** (Para 10)

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13 (1)(इ) –आय के ज्ञात स्रोत – अनुपातहीन आय के मामले में आय कर रिटर्न राशी की प्राप्ति के

प्रकरण से कोई सहायता नहीं जब तक कि यह स्थापित नहीं किया जाता है कि म.प्र. सिविल सेवा, आचरण नियम, 1965 के नियम 14,17 व 19 में अंतर्विष्ट उपबंधों का सम्यक रुप से पालन नहीं किया गया।

***B. Prevention of Corruption Act (49 of 1988), Section 13(1)(e) - Known Sources of Income* - Intimation about receipt of gift sent to superior officer of department cannot be treated as report to the Govt. within the meaning of Rule 14 of M.P. Civil Services Conduct Rules, 1965 unless it was addressed to Govt. or was given to Superior Officer with a request to forward it to the government pursuant to said Rule.** (Para 15)

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49),धारा 13 (1)(इ) –आय का ज्ञात स्रोत – उपहार की प्राप्ति के संबंध में विभाग के वरिष्ठ अधिकारी को दी गई सूचना को म.प्र. सिविल सेवा आचरण नियम, 1965 के नियम 14 के अर्थान्तर्गत सरकार को दी गई रिपोर्ट नहीं माना जा सकता, जब तक कि वह सरकार को संबोधित न हो अथवा वरिष्ठ अधिकारी को उक्त नियम के अनुसरण में इस प्रार्थना के साथ न दिया गया हो कि उसे सरकार को अग्रेषित किया जाए।

***C. Prevention of Corruption Act (49 of 1988), Section 13(1)(e) - Known Sources of Income* - Loan received by Government employee in violation of Rule 17(4) and (5) of Rules, 1965 cannot be treated as a known source of income.** (Para 16)

ग. भ्रष्टाचार निवारण अधिनियम (1988 का 49),धारा 13 (1)(इ) – आय का ज्ञात स्रोत – नियम 1965 के नियम 17(4) व (5) के उल्लंघन में सरकारी कर्मचारी द्वारा प्राप्त किया गया ऋण, आय के ज्ञात स्रोत का होना नहीं माना जा सकता।

***D. Prevention of Corruption Act (49 of 1988), Section 13(1)(e) - Benami Property* - There is no presumption in law that a property standing in the name of a woman must have been purchased by stridhan.** (Para 19)

घ. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13 (1)(इ) – बेनामी सम्पत्ति – विधि में ऐसी कोई उपधारणा नहीं कि महिला के नाम की सम्पत्ति, स्त्रीधन द्वारा ही क्रय की गई हो।

Cases referred :

2005 AIR SCW 6208, 2000 (1) JLJ 377, 2007 ILR 137, (2007) 7 SCC 358, (1999) 6 SCC 559, AIR 1964 SC 464, AIR 1960 SC 7, (2002) 9 SCC 639, (2005) 5 SCC 272, (1992) 4 SCC 45, (2009) 15 SCC 533,

(2007) 12 SCC 139, AIR 2005 SC 1406, AIR 1977 SCC 796.

Sameer Shrivastava, for the appellant.

J.D. Suryavanshi, Spl.P.P., for the Lokayukta.

JUDGMENT

The Judgment of the Court was delivered by : **ABHAY M. NAIK, J. :–** This appeal has been preferred by the appellant against the judgment dated 30th December 2005 convicting thereby the appellant under section 13 (1)(e) read with Section 13 (2) of The Prevention of Corruption Act, 1988.

2. Facts relevant for the purpose of this appeal are that the appellant was holding the post of Sub Engineer and Assistant Engineer in the Public Health Engineering Department of Madhya Pradesh during the check period from 15.7.1978 to 9.2.1994. Case of the prosecution is that he earned during this period in all Rs.3,86,966/- from the known sources of income, whereas he was found to have possessed Rs.7,95,243/- and was thus found to have acquired disproportionate income to his known sources. Accordingly, he was found guilty and was convicted for the aforesaid offence.

3. This case depicts an extremely sorry state of affairs that the prosecution has virtually examined all the defence witnesses as witnesses of prosecution. Most of the witnesses of prosecution have virtually supported the accused on facts. Illustratively, Kapoorchand (P.W.1), who happened to be brother-in-law of the accused, has stated in chief examination on behalf of the prosecution that he had advanced Rs.10,000/- to the accused for the purchase of gun. Ramgopal (P.W.4) is brother of the accused, who has stated in chief examination that he had advanced Rs.20,000/- and Rs.50,000/- in the year 1988/1989 for construction of house. Gopal Agrawal (P.W.5), who is the relative of accused, has stated in his chief examination that he had provided Rs.75,000/- to the accused without interest in the year 1989 for construction of house. Similarly, Ramjilal Agrawal (P.W.6) has stated that he had advanced Rs.20,000/- in 1987 as loan to the accused, which has been repaid. These are all versions in the chief examination itself. Brajesh Pradhan (P.W.7) happened to be younger brother of the accused, who, too, has been examined by the prosecution. This witness in the chief examination has stated that he had advanced Rs.20,000/- on 9.9.1998 and Rs.15,000/- on

1.4.1999 to the accused in cash for construction of house. Out of this, Rs.20,000/- were provided as financial assistance for construction. This witness has further stated that there occurred a family partition in the year 1987, wherein Rs.1,45,000/- was allotted in the share of the accused. Out of this, Rs.60,000/- was immediately paid by their father to the accused. Remaining amount was paid by bank draft of Rs.40,000/- and Rs.45,000/-. These witnesses despite their support to the accused were not declared hostile and were not cross examined by the prosecution after obtaining due permission from the court. It is not understandable from the record that why did the prosecution examine all such witnesses, who otherwise might have been produced in defence. It is also un-understandable that why they were not declared hostile in view of their support to the accused and why they were not cross examined. In the light of their conduct in the absence of declaration of such witnesses as hostile, obviously, the chief examinations of such witnesses are binding on the prosecution and the evidence on record is liable to be appreciated accordingly.

4. Main defences of the appellant are :

(i) Entire income of the appellant from the known sources was not properly worked out. His salary from Aug. 1980 to Aug. 83 was not counted and thus was not included in Rs.3,86,966/-, which is mentioned as the income from known sources.

(ii) Appellant had complied with the provisions of M.P.Civil Services (Conduct) Rules, 1965. Intimation was duly given and sanction was duly obtained as required.

(iii) While assessing the value of assets possessed by the appellant during the check period, over estimation was made in various items.

(iv) *'Stridhan'* of appellant's wife was also included in his assets, whereas the same was exclusive property of his wife.

(v) 10% of the variation to the income from known sources is permissible and such variation does not lead to an inference that the accused is possessed of disproportionate assets to the known sources of income.

(vi) Learned trial Judge has committed a mistake in reject-

ing 50% of his income as personal expenditure during bachelorhood of the appellant.

5. Shri S.K.Shrivastava and Shri J.D.Suryavanshi, learned counsel appearing for the parties made their respective submissions at length, which have been considered in the light of the evidence on record as well as the provisions of law governing the situation.

6. Learned counsel Shri Shrivastava contended that a sum of Rs.3,86,966/- was treated as income of the appellant from the known sources and the salary of the accused for the period from Aug. 1980 to April 1983 was not counted in total earnings of the accused.

On perusal, this submission is not found to be correct. Salary of August 1980 is mentioned at page No.537 of Paper Book. Similarly, salary from Sept. 1980 to April 1983 is mentioned at pages 230 and 231 of the Paper Book. Learned trial Judge has taken the aforesaid into consideration in paragraph 23 of the impugned judgment.

7. After going through the material on record as well as paragraph 23 of the impugned judgment, learned counsel Shri Shrivastava further submitted that salary for the month of May and June 1983, May 1990 and December 1990, too, was not included in the income from the known sources of the appellant.

This, too, is not found to be correct. At page 539 of the Paper Book, salary of May-June 1983 is mentioned, whereas salary for the month of May 1990 and December 1990 is mentioned at pages 549 and 554 of the Paper Book respectively. This being so, it is not correct that the entire salary of the appellant was not calculated while arriving at a figure of income from known sources, more so in view of paragraph 23 of the impugned judgment, where labour has been put by the learned trial Judge to ensure that the income made from the salary should reflect the total earning of the appellant during the check period.

8. It has been further contended that the accused had given due intimation and/or had obtained due permission before acquiring the property by gift or the purchase, as the case may be.

9. Before entering into this question, we feel it proper to reproduce Rule 14, 17 and 19 of the M.P.Civil Services (Conduct) Rules, 1965 (hereinafter referred to as the Conduct Rules of 1965) :-

"**14. Gifts.**-(1) Save as otherwise provided in these rules, no Government servant shall accept or permit any member of his family or any other person acting on his behalf to accept, any gift.

Explanation.-The expression "gift" shall include free transport, boarding, lodging or other service or any other pecuniary advantage when provided by any person other than a near relative or personal friend having no official dealings with the Government servant.

Note.- a casual meal, lift or other social hospitality shall not be deemed to be a gift.

A Government servant shall avoid accepting lavish hospitality or frequent hospitality from any individual having official dealings with him or from industrial or commercial firms, organizations, etc.

(2) On occasions, such as weddings, anniversaries, funerals or religions functions, when the making of a gift is in conformity with the prevailing religious or social practice, a Government servant may accept gifts from the date of receipt of the gift to the Government if the value of any such gift exceeds :-

(i) Rs.1500.00 in the case of the Government servant holding any Class I or Class II post;

(ii) Rs.700.00 in the case of the Government servant holding any Class III post; and

(iii) Rs.250.00 in the case of the Government servant holding any Class IV post.

(3) On such occasions as are specified in sub-rule (2), a Government servant may accept gift from his personal friends having no official dealings with him, but he shall make a report (within a period of one month from the date of receipt of the gift to the Government if the value of any such gift exceeds :-

(i) Rs.500 in the case of the Government servant holding any Class I or Class II post;

(ii) Rs.200 in the case of the Government servant holding any Class III post; and

(iii) Rs.100 in the case of the Government servant holding any Class IV post.

(4) in any other case a Government servant shall not except, or permit any member of his family or any other person acting on his behalf, to accept any gift without the sanction of Government, if the value thereof exceeds :-

(i) Rs.200 in the case of the Government servant holding any Class I or Class II post and

(ii) Rs.50 in the case of the Government servant holding any Class IV post.

(5) No Government servant shall accept or permit any member of his family or any person acting on his behalf of any member of his family to accept, any gift in cash exceeding Rs.2000 except through a payee account cheque.

17. Investment, lending and borrowing.-(i) No Government servant shall speculate in any stock, share or other investment.

Explanation.-Frequent purchase or sale or both, of shares, securities or other investment shall be deemed to be speculations within the meaning of this sub-rule.

(2) No Government servant shall make, or permit any member of his family or any person acting on his behalf to make, any investment which is likely to embarrass or influence him in the discharge of his official duties.

(3) If any question arises whether any transaction is of the nature referred to in sub-rule (1) or sub-rule (2), the decision of the Government thereon shall be final.

(4) (i) No Government servant shall, save in the ordinary course of business with a bank or a firm of standing duly authorised to conduct banking business, either himself or through any member of his family or any other person acting on his behalf,-

(a) lend or borrow money, as principal or agent to or from

any person within the local limits of the authority with whom he is likely to have official dealings, or otherwise place himself under any pecuniary obligation to such person, or

(b) lend money to any person at interest or in a manner whereby return in money or in kind is charged or paid:

Provided that a Government servant may, give to, or accept from, a relation of a personal friend, a purely temporary loan of a small account free of interest, or operate a credit account with a bona fide tradesman or make an advance of pay to his private employee:

Provided further that nothing in this sub-rule shall apply in respect of any transaction entered into by a Government servant with the previous sanction of the Government.

Provided further that nothing contained in this sub-rule shall apply to any transactions done by any Government servant with the prior approval of the Government.

(ii) When a Government servant is appointed or transferred to a post of such nature as would involve him in the breach of any of the provisions of sub-rule (2) or sub-rule (4), he shall forthwith report the circumstances to the Government and shall thereafter act in accordance with such orders as may be made by the Government.

(5) No Government servant shall borrow money exceeding Rs.2000 except through a payee account cheque.

19. Movable, immovable and valuable property.(1) Every Government servant shall on his appointment to any service or post and thereafter at such intervals as may be specified by the Government, submit a return of his assets and liabilities, in such form as may be prescribed by the Government, giving the full particulars regarding :-

(a) the immovable property inherited by him, or owned or acquired by him or held by him on lease or mortgage, either in his own name or in the name of any member of his family or in the name of any other person;

(b) share, debentures and cash including bank deposits inherited by him or similarly owned, acquired or held by him;

(c) other movable property inherited by him or similarly owned acquired or held by him; and

(d) debts and other liabilities incurred by him directly or indirectly.

Note.- Sub-rule (1) shall not ordinarily apply to Class IV servants but the Government may direct that it shall apply to any such Government servant or class of such Government Servants.

In all returns, the value of items of movable property worth less than Rs.1,000.00 may be added and shown as a lump sum. The value of articles of daily use such as clothes, utensils, crockery, books, etc., need not be included in such return.

Every Government servant who is in service on the date of commencement of these rules shall submit under this sub-rule on or before such date as may be specified by the Government after such commencement.

(2) No Government servant shall, except with the previous knowledge of the prescribed authority, acquire or dispose of any immovable property by lease, mortgage, purchase, sale, gift or otherwise either in his own name or in the name of any member of his family:-

Provided that the previous sanction of the prescribed authority shall be obtained by the Government servant, if any such transaction is with a person having official dealings with him.

(2a)If a Government servant or, with his consent, tacit or otherwise during the term of his employment, any member of his family :-

(1) purchases any immovable property or gets any house owned by him whether in his own name or benami in the name of any other person erected, or re-erected, or

(2) makes any alternation or repairs exceeding Rs.5,000/- in any of the immovable property already owned by him, whether in his own name or benami in the name of any other person or as the case maybe, by way member of his family: such Government servant shall give prior intimation of such erection, re-erection, alteration or repairs, as the case may be, to the prescribed authority, disclosing the total amount estimated for the said acquisition, erection, re-erection, alteration or as the case may be, repairs and also disclose the source from which he, or as the case may be, the member of his family, proposes to raise the required funds for the purpose. He shall further give prior intimation if during erection, re-erection, alteration or as the case may be, repairs, the revised estimates are likely to exceed by more than 10% of the original estimates. At the completion of the work, the Government servant shall furnish the final cost of such work and the source from which the funds were actually raised, with copies of documents, if any, in support thereof.

(3) Every Government servant shall report to the prescribed authority every transaction entered into by him either in his own name or in the name of a member of his family in respect of movable property, if the value of such property exceeds Rs.10,000.00 in the case of a government servant holding any Class I or Class II post or Rs.5,000.00 in the case of a Government servant holding any Class III or Class IV post :

Provided that the previous sanction of the prescribed authority shall be obtained by the government servant, if any, such transaction is with a person having official dealings with him.

(3A) If a Government servant either fails to file a return prescribed in sub-rule (1) or files a return for any year which does not fully disclose all the property that is required to be indicated or otherwise conceals any such property it would amount to misconduct.

(3B) In a disciplinary proceeding on account of misconduct under sub-rule (3A) it shall be presumed that the property not included in the return or the value of which is incorrectly shown was acquired through means in contravention of these rules. In such proceedings the burden of proof of establishing that the property was acquired legitimately shall lie on the government servant.

4(i) The Government or the prescribed authority may, at any time, by general or special order, require a Government servant to furnish, within a period specified in the order, a full and complete statement of such movable or immovable property held or acquired by him or on his behalf or by any member of his family as may be specified in the order. Such statement shall, if so required by the government or by the prescribed authority, include the details of the means by which, or the source from which such property was required.

(ii) If the movable and immovable property is, or at any time was found to be beyond his known sources of income, it shall be presumed, unless the contrary is proved by the Government servant, that the acquisition was from a corrupt source.

(5)The Government may except any category of Government servants belonging to Class III or Class IV from any of the provisions of this rule except sub-rule (4). No such exemption shall, however, be made without the concurrence of the Government in the General Administration Department.

Explanation.- For the purpose of this rule :-

(1) the expression "movable property "includes :-

(a) Jwellary insurance polices the annual premia of which exceeds Rs.1,000.00 or one-sixth of the total annual emoluments share, securities and debentures; received from Government whichever is less;

(b) loan advanced by such Government servants secured or not;

(c) motor cars, motor cycles, horses or any other means of conveyance; and

(d) refrigerators, radios and radiograms.

(e) Television sets and other electronic items.

(2) "Prescribed authority" means :-

(a)(i) the Government, in the case of a Government servant holding any Class I post, except where any lower authority is specifically specified by the Government for any purpose.

(ii) Head of Department, in the case of a Government servant holding any Class II post;

(iii) Head of office, in the case of a Government servant holding any Class III or Class IV post;

(b) In respect of a Government servant on foreign service or on deputation to any other Government, the parent department on the cadre of which such Government servant is borne of the administrative department of Government to which he is administratively subordinate as member of that cadre."

10. Crucial question before this Court is that what is meant by the term "known sources of income". Much emphasis has been put on the fact that most of the amounts taken into consideration by the prosecution were already shown in the returns of income tax. Few of them have also been intimated to the superior officers of the department of the appellant. This being so, it has been contended that all such amounts were disclosed duly and they ought to have been taken into consideration within the ambit of "known sources of income" since the sources were disclosed. We do not agree with this contention in view of the existing provisions contained in Rules 14, 17 and 19 of the Conduct Rules of 1965. These rules permit a public servant to accept a gift or loan only in specific situation. They prohibit a government servant from accepting the gift or loan except in the manner prescribed therein. Similarly, they prohibit a government servant from making the purchase except in accordance with the provisions contained therein. A public servant, who contravenes any of the provisions of the Conduct Rules of 1965, may be answerable in departmental proceedings, in case, if, he is

found to have possessed at any time during the period of office of the property disproportionate to his known sources of income. He may be also prosecuted under the provisions of the Prevention of Corruption Act 1988. If a public servant receives money without making compliance of the aforesaid rules and acquires the property with the aid of such money, the money received in contravention of the Conduct Rules of 1965 would not be treated as "known sources of income" for the purpose of Section 13 (1)(e) of the Prevention of Corruption Act, 1988, which is also evident from the explanation to Section 13 (1)(e), which reads as follow :-

> "Explanation.-For the purposes of this section, "known sources of income" means income received from any lawful source and such receipt has been intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant."

This being so, disclosure of receipt of money in the income tax return is of no assistance in the present case, unless it is established that the provisions contained in Rules 14, 17 and 19 of the Conduct Rules of 1965 were duly complied with and the receipts by the appellant were duly intimated in accordance thereof. On these parameters, this court is now required to examine the case.

11. Kapoorchand (P.W.1), at page 565 of Paper Book, has stated that he had given a sum of Rs.10,000/- without interest to the accused in cash for the purchase of gun. In the cross examination, this witness has stated that the said amount was not liable to be refunded. Obviously, such an amount was in the nature of 'gift'.

It is submitted on behalf of the appellant that intimation of the aforesaid amount was given vide Ex.D/18 (Page 292 of Paper Book).

Ex.D/18 is a letter dated 15.3.1993 informing thereby by the appellant to the Executive Engineer of Public Health Engineering Department Shivpuri about having received Rs.10,000/- in cash from Kapoorchand Agrawal for purchase of gun. Sub rule (5) of Rule 14 (supra) prohibits a government servant from accepting any gift in cash exceeding Rs.2,000/-, except through a payee account cheque. Since the sum of Rs.10,000/- was not liable to be refunded, it ought to be treated as a 'gift'. By virtue of sub rule (4) of Rule 14 (supra), the said gift ought not to have been accepted without the sanction since it was in excess of Rs.2000/-. From the perusal of sub rule (4)

Rule 14 (supra), it is clear that a government servant was required to obtain sanction of the Government before accepting the gift. No prayer was made vide Ex.D/18 to seek the sanction of Government. Intimation vide Ex.D/18 was not sufficient at all because such intimation by virtue of sub rule (2) Rule 14 (supra) was required in the case of 'gift' at the time of weddings, anniversaries, funerals and religious functions, when the making of a gift is in conformity with the prevailing religious or social practice. Accordingly, the amount of Rs.10,000/- received from Kapoorchand can not be said to be the income from known sources.

12. It is evident from Ex.P/1 that the appellant purchased a plot situated at Gram Chhavni, Tahsil Shivpuri for consideration of Rs.45,000/-. However, he obtained a sanction vide Ex.D/14 at page 275 of Paper Book to make a purchase for stipulated cost of Rs.30,000/- only. This being so, extra sum of Rs.15,000/- can not be treated as "known sources of income" being in contravention of sub rule (2) of Rule 19 of the Conduct Rules of 1965.

13. Appellant vide Ex.D/4 has admitted that he was paid in all a sum of Rs.2,49,535.35 as net pay for the check period from 15.7.1978 to 9.2.1994 after the deduction of HRA, water charges, GPF, conveyance allowance etc. Besides this, it is stated in Ex.D/4 that he is in receipt of following money during the check period :-

(i) Rs.60,000/-	As his share allotted to him on family partition on 4.4.1987.
(ii) Rs.20,000/-	By way of amount received from M/s Harnarayan Ramjilal, Shivpuri vide cheque No.419148 dt.25.6.1987.
(iii) Rs.20,000/-	By way of gift from brother Ramgopal on 3.12.1988.
(iv) Rs.20,000/-	By way of gift from brother Brijnarayan on 9.9.1988.
(v) Rs.75,000/-	By way of loan from M/s Radhavallabh Dal Mill vide cheque No.900140.
(vi) Rs.15,000/-	By way of loan from brother Brijnarayanon 1.4.1989.

(vii) Rs.15,000/-	By way of loan from brother Ramgopal on10.9.1989.
(viii)Rs.50,672/-	Received as per wishes of mother late Smt.Gabbo Bai in 1990-91.
(ix) Rs.45,000/-	By way of balance amount of his share vide bank draft No.798443 dated 26.8.1991asper family partition.
(x) Rs.40,000/-	By way of balance amount of his share vide bank draft No.798459 dated 1.10.1991 asper family partition.
(xi) Rs.10,000/-	By way of gift from brother in law Kapoorchand Agrawal on 15.3.1991.

14. Items at Sl.No.(iii), (iv) and (xi) are in the nature of gift as per the appellant himself, as revealed in Ex.D/4 at pages 210-211 of the Paper book.

Such gifts from near relatives as per sub rule (2) of Rule 14 of the Conduct Rules of 1965 is permissible on occasions such as wedding, ceremonies, funeral when the making of gift is in conformity with the prevailing religious or social practice. Brothers and brothers-in-law were obviously near relatives of the appellant, however, it is nowhere on record that such gifts were made on occasions contemplated in sub rule (2) of Rule 14 (supra). It is nowhere on record that the gifts were in conformity with the prevailing religious or social practice. Accordingly, it is held that the aforesaid receipts were not in accordance with the provisions of Conduct Rules 1965 and would not fall within the ambit of "known sources of income" of the appellant for the purpose of Section 13 (1)(e) of the Prevention of Corruption Act,1988 read with its explanation.

15. Besides this, the appellant was required to make report within one month from the date of the receipt of the gift to the Government. No such report is established to have been made to the Government. Intimation sent to the superior officer of the department at pages 560 and 564 can not be treated as report to the Government within the meaning of sub rule (2) of Rule 14, unless it was addressed to the Government or was given to the superior officer with a request to forward it to the Government pursuant to the said sub rule.

Learned counsel for the appellant has been unable to point out any memorandum or circular of the Government requiring the Government servant to make the report merely to the higher officer and not the Government, as required under the aforesaid sub rule. Government is obviously represented by the Principal Secretary or Secretary of the department and not merely by superior officers. Vide page 560 of the paper book, intimation is shown to have been given merely to the Assistant Engineer, who was not even a class I officer of the department. Neither such officer nor E.E. at District level can be treated to have represented the State Government within the meaning of the aforesaid sub rule. This being so, such intimation does not fall within the definition/description of the word "report" appearing in the aforesaid sub rule. Accordingly, the amount received by way of gift by the appellant can not be said to have been received from known sources of income within the meaning of Section 13 (1)(e) of the Prevention of Corruption Act, 1988 read with its explanation.

16. Items at Sl.No.(ii), (v), (vi) and (vii) are shown to be in the nature of loan.

Sub rule (4) of Rule 17 of the Conduct Rules of 1965 permits a government servant to borrow money in the ordinary course of business with a bank or a firm of standing duly authorised to conduct banking business. By virtue of the proviso to the sub rule, a government servant is not prohibited from transaction of lending or borrowing money with anyone with the previous sanction of the Government. Sub rule (5) prohibits a Government servant from borrowing money exceeding Rs.2,000/- except through a payee account cheque. Items at S.Nos. (vi) and (vii) reveal that the appellant borrowed money in cash in violation of sub rule (5). Therefore, this sum of Rs.30,000/- can not be treated as a known source of income being in violation of Rule 17 (5) of the Conduct Rules of 1965. Clause (3) of sub rule (2a) of Rule 19 lays down that every Government servant shall report to the prescribed authority every transaction entered into by him either in his own name or in the name of a member of his family in respect of movable property, if the value of such property exceeds Rs.10,000.00 in the case of a government servant holding any Class I or Class II post or Rs.5,000.00 in the case of a Government servant holding any Class III or Class IV post.

17. Items at S.No.(i), (ix) and (x) are shown to have been received as share on account of family partition.

Intimation with regard to receipt of Rs.60,000/- is shown to have been given to the Assistant Engineer (Paper Book Page No.558) and intimation regrading receipt of Rs.85,000/- is shown to have been given to the Executive Engineer, Public Health Engineering Department, Dhar (Paper Book Page No.562).

Learned counsel for the appellant on 7.9.2010 placed on record memorandum No.1933-1505-1(3)/60 dated 27th August 1960 and Memorandum F.No.C5-1/94/3/One–One Bhopal dt.5.1.94 issued by the General Administrative Department, Govt. of M.P., which as per the subject cited therein are in relation to the Madhya Pradesh Government Servants (Conduct) Rules, 1959 - Rule 18(3) - Immovable property form part of return and instruction regarding the same. These memorandums are in relation to the immovable property and do not relate to the acquisition of movable property. They were issued under the M.P. Government Servants (Conduct) Rules, 1959, which ceases to be in force after enforcement of M.P.Civil Services (Conduct) Rules, 1965. Thus, the appellant has been unable to establish that the receipt of money by him on account of his share in the family partition was duly reported to the prescribed authority in accordance with Clause (3) of sub Rule (2a) of Rule 19 of the Conduct Rules 1965.

18. As regards sum of Rs.50,672/- received pursuant to the wishes of late mother Smt.Gabbo Bai, it may be seen that it would be in the nature of gift and the same is not found to have been reported to the Government within one month from the date of it's receipt as required under sub rule (2) of rule 14. Intimation about it vide paper book page 562 is not shown to have been given to the Government. Moreover, the same was not through account payee cheque and was thus in violation of sub rule (5) of rule 14 of the Conduct Rules 1965.

19. Learned counsel for the appellant further submitted that the immovable property vide registered sale deed Ex.P/3 was purchased in the name of appellant's wife with the aid of Stridhan. Therefore, the same could not have been considered as a property of the appellant. Reliance has been placed on 2005 AIR SCW 6208 *(D.S.P. Chennai v. K.Inbasagaran)* to buttress this submission that wife's assets can not be considered for the purpose of offence under Section 13 (1)(e) of Prevention of Corruption Act, 1988.

It is true that the registered sale deed (Ex.P/3) is in favour of Smt.Sangita alone, who happens to be the wife of the appellant. However, there is no presumption in law that a property standing in the name of a woman must have been purchased by Stridhan. Smt. Sangita was/is not in employment and is not shown to have possessed Stridhan. She has not been examined by the appellant to establish that the consideration of sale deed (Ex.P/3) was paid by her from her Stridhan. Her parents or any other relatives have also not been examined to show that she possessed Stridhan and the purchase was made by her with the aid of Stridhan alone.

In the case of *D.S.P. Chennai* (supra), the wife was running certain companies and was an income tax payee. In the present case, wife is not shown to have earned individual earning from any profession, occupation or otherwise.

Relying upon 2000(1) JLJ 377 *(Subhash Kharate v. State of M.P.)* it has been contended that the prosecution has failed to prove that purchase vide Ex.P/3 in the name of wife was made by the accused himself. Accordingly, learned trial Judge has acted illegally in treating it as the assets of appellant.

Said purchase is stated to have been made during the check period. Though the purchase was made in the name of wife, but it ought to have been established by the appellant, which could have been proved by the appellant that the same the same was made by Stridhan of the wife himself or his wife. This fact also could have been proved by any person, who might have gifted money to her as Stridhan to the exclusion of her husband.

20. Coming to the evidence, it is found that P.W.1 (Kapoorchand) has stated that he had advanced a sum of Rs.10,000/- without interest to the appellant for purchase of a gun. P.W.2 has stated that he had sold a plot for a consideration of Rs.45,000/- to the appellant vide registered sale deed dated 15.3.1997 (Ex.P/1). P.W.4 (Ramgopal) is the brother of the appellant, who has stated that he had paid a sum of Rs.20,000 and Rs.15,000 on different occasions in the year 1988-89 for the purpose of construction of house. He has also stated that father of him as well as of appellant made a payment of Rs.60,000/- in cash to the appellant. He has

further stated that two bank drafts of Rs.40,000/- and Rs.45,000/- were issued by his father in favour of the appellant. Similarly, he has stated that as per the wishes of the mother, a sum of Rs.49,407/- was also paid to the appellant. Other witnesses have also equally supported about the money transactions mentioned in Ex.D-4, a letter issued by the appellant. However, as observed herein above that there was no intimation/report about having received the said money in accordance with the Conduct Rules, 1965. The money so received by the appellant did not pertain to the character of known sources of income within the meaning of Section 13 (1)(e) of the Prevention of Corruption Act, 1988 read with its explanation. Land purchased vide Ex.P/1 is shown to have made for consideration of Rs.45,000/- Appellant himself admitted that he has spent a sum of Rs.2,50,000/- in construction of the house.

21. Learned counsel for the appellant submitted vehemently that the appellant during his bachelorhood was in a position to save more money. Accordingly, 40% of his monthly ought to have been treated as having been spent on himself. Reliance for this purpose is placed in the case of *Bhogilal Saran v. State of M.P.* (2007 ILR 137)

In (2007) 7 SCC 358 *(N.P.Jharia Vs. State of M.P.),* it has been held that saving of the person during bachelorhood may be 50%. In the aforesaid case, Hon'ble Supreme Court of India has observed :-

> "3. Corruption as such has reached dangerous heights and dangerous potentialities. The word "corruption" has wide connotation and embraces almost all the spheres of our day-to-day life the world over. In a limited sense it connotes allowing decision sand actions of a person to be influenced not by rights or wrongs of a cause, but by the prospects of monetary gains or other selfish considerations. Avarice is a common frailty of mankind, and while Robert Walpole's observation that every man has a price, may be a little generalised, yet it cannot be gainsaid that it is not far from truth. Burke cautioned "Among a people generally corrupt, liberty cannot last long."
>
> "16. The High Court noted that salary earned cam to about Rs.24,000/- and since had to maintain the family there was hardly scope for any saving and therefore any

availability of funds at the beginning of the check period has not been established. We find no infirmity in this conclusion. The trial court had estimated the appellant's income from agricultural land at Rs.1,49,000 from about 10 to 15 acres of land. The High Court rightly observed that the trial court has been rather liberal in accepting the income of the accused in the share of the joint family property on the basis of mere assertion without any supporting material. Same could not have been accepted. But since the State had not questioned the computation there was no scope for any further relief. The total income was taken to be Rs.2,38,561.95 which was also not disputed by the appellant. The trial court had noted that even by most liberal standards the appellant and his family consisting of five persons could not have saved more than 50% of the earnings of the salary and must have spent Rs.44,500. Therefore, the savings of the appellant from salary and agriculture was taken at Rs.1,94,061. Ms. Pushpa Jharia, DW 1 had deposed that she was doing the work of knitting. The trial court without any supporting material fixed the income at Rs.68,000. The High Court rightly noted that the computation was on the liberal side. Only a small knitting machine was found during search. DW 1 accepted that she had not employed any other person for knitting, from which she used to fetch between Rs.15 to Rs.35 per sweater. Since the finding of the trial court was not challenged by the prosecution the High Court accepted the amount fixed and held that the appellant and his wife have satisfactorily accounted for Rs.2,62,061 from the known sources. Though a claim was made that DW 1 used to cultivate land, same was found to be totally un acceptable plea by the trial court, and therefore the claim that Rs.32,000/- had been earned from the said source was rejected. Similarly, the plea relating to availability of a sum of Rs.80,000/- on the basis of the appellant's father's will was found to be unacceptable as the "will" itself was not produced and the availability of Rs.80,000/ -with the appellant's father was not established. Similarly, the plea that the appellant had Rs.75,000/- from the property of his father

after his death was unacceptable. There was no material to substantiate the plea. Similarly, plea of having availed loans from relatives was not pursued before the High Court."

This submission is accepted. During the check period, the appellant was bachelor for certain earlier period, however, there is no material on record to deviate from the observations of the apex court as stated hereinabove.

22. Hon'ble Apex Court in the case of *P.Nallammal v. State* (1999) 6 SCC 559) has observed :-

"As per the Explanation the "known courses of income" of the public servant, for the purpose of satisfying the court, should be "any lawful source". Besides being the lawful source the Explanation further enjoins that receipt of such income should have been intimated by he public servant in accordance with the provisions of any law applicable to such public servant at the relevant time. So a public servant cannot now escape from the tentacles of Section 13 (1)(e) of the PC Act by showing other legally forbidden sources, albeit such sources are outside the purview of clauses (a) to (d) of the sub-section."

Hon'ble Supreme Court of India in the case of *Sajjan Singh v. State of Punjab* (1964 SC 464) has observed:-

"(9) We shall first consider the question whether on the record a presumption under S.5 (3) of the Prevention of Corruption Act arise. It is useful to remember that the first sub-section of S.5 of the Prevention of Corruption Act mentions in the four Cls. (a), (b),(c) and (d), the acts on the commission of which a public servant is said to have committed an offence of criminal misconduct in the discharge of his duties. The second sub-section prescribes the penalty for that offence. The third sub-section is in these words :

"In any trial of an offence punishable under sub-section (2) the fact that the accused person or any other person on his behalf is in possession, for which the accused person can-

not satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the court shall presume, unless the contrary is proved, that the accused person is guilty of criminal misconduct in the discharge of his official duty and his conviction therefor shall not be invalid by reason only that it is based solely on such presumption."

(10) This sub-section thus provides an additional mode of proving an offence punishable under sub-s.(2) for which any accused person is being tried. This additional mode is by proving the extent of the pecuniary resources or property in the possession of the accused or any other person on his behalf and thereafter showing that this is disproportionate to his known sources of income and that the accused person cannot satisfactorily account for such possession. If these facts are proved the section makes it obligatory on the Courts to presume that the accused person is guilty of criminal misconduct in the discharge of his official duty, unless the contrary, i.e., that he was not so guilty is proved by the accused. The section goes on to say that the conviction for an offence of criminal misconduct shall not be invalid by reason only that it is based solely on such presumption.

(11) This is a deliberate departure from the ordinary principle of criminal jurisprudence, under which the burden of proving the guilt of the accused in criminal proceedings lies all the way on the prosecution. Under the provision of this sub-section the burden on the prosecution to prove the guilt of the accused must be held to be discharged if certain facts as mentioned therein are proved; and then the burden shifts to the accused and the accused has to prove that in spite of the assets being disproportionate to his known sources of income, he is not guilty of the offence. There can be no doubt that the language of such a special provision must be strictly construed. If the works are capable of two constructions, one of which is more favourable to the accused then the other, the Court will be justified in accepting the one which

> is more favourable to the accused. There can be no justification however for adding any words to make provisions of law less stringent than the legislature has made it.

Long back, it has been held by the Apex Court in the case of *C.D.S.Swamy v. The State* (AIR 1960 SC 7) :-

> "The expression 'known sources of income' must have reference to sources known to the prosecution on a thorough investigation of the case and that it could not be contended that known courses of income meant known to the accused."

23. Case of the appellant in the present matter is that he was having salary as well as different amounts having been received by him as gifts, loans and share in the partition. According to him, all such amounts formed part of known sources of income and after taking them into consideration his assets can not be legally treated as disproportionate within the meaning of Section 13 (1)(e) of the Prevention of Corruption Act, 1988. Thus, it was obligatory on the part of the appellant to show that the other amount received by him fall within the ambit of known sources of income within the meaning of said Section read with companying explanation.

24. Much emphasis has been put on (2002) 9 SCC 639 *(Jagan M.Sheshadri v. State of T.N.)*, wherein it has been observed that if witnesses of the prosecution are not declared hostile, prosecution can not wriggle out of the statement of such witnesses even though the witnesses may relative of the accused. Reliance was also placed on 2005 (5) SCC 272 *(Raja Ram v. State of Rajasthan)*, wherein it has been held that if the witnesses of the prosecution are not declared hostile, evidence of such witnesses if relied upon by the defence would bind the prosecution.

It has already been held keeping in mind the statement of the prosecution witnesses that the money transactions as disclosed by the accused/appellant can not be doubted, however, the question before this Court is whether the amounts received by the appellant as proved by the prosecution witnesses themselves would form part of the income from known sources within the meaning of Section 13 (1)(e) of the Prevention of Corruption Act, 1988 read with its explanation. This court has found that in view of the provisions contained in the Conduct Rules of 1965,

that the amount disclosed by the appellant as having been received do not fall within such ambit being in contravention of the Conduct Rules 1965, as held by the Hon'ble Apex Court in the case of *M.Krishna Reddy. State Dy.Supdt. of Police* (1992) 4 SCC 45, wherein it has been observed :-

> "To substantiate a charge under Section 5(1)(e) of the Act, the prosecution must prove the following ingredients, namely, (1) the prosecution must establish that the accused is a public servant, (2) the nature and extent of the pecuniary resources or property which were found in his possession (3) it must be proved as to what were his known sources of income, I.e. known to the prosecution and (4) it must prove, quite objectively, that such resources or property found in possession of the accused were disproportionate to his known sources of income. Once the above ingredients are satisfactorily established, the offence of criminal misconduct under Section 5(1)(e) is complete, unless the accused is able to account for such resources or property. In other words, only after the prosecution has proved the required ingredients, the burden of satisfactorily accounting for the possession of such resources or property shifts to the accused."

25. It is contended by the learned counsel for the appellant that department had declined to proceed against the appellant. However, in view of (2009) 15 SCC 533 *(State of M.P. v. Virender Kumar Tripathi)*, sanction for prosecution may be granted even without concurrence by the department. I may successfully refer to para 8 of the aforesaid decision, wherein it is observed :-

> "8. So far as the defect in sanction aspect is concerned, the circular on which the High Court has placed reliance needs to be noted. The Circular in question is dated 9.2.1988 the relevant portion reads as follows :
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> > "The Government also decided that before giving approval of prosecution, the Principal Secretary, Law and Legal Department will obtain the advice of department concerned."
>
> A bare perusal of the paragraph shows that before giving

approval for prosecution, advice of the department concerned was necessary. The question arises whether the absence of advice renders the sanction inoperative. Undisputedly the sanction has been given by the Department of Law and Legislative Affairs. The State Government had granted approval of the prosecution. As noted above, the sanction was granted in the name of the Governor of the State by the Additional Secretary, Department of Law and Legislative Affairs. The advice at the most is an interdepartmental matter."

26. It has been contended that while granting the sanction for prosecution, there was no complete material before the sanctioning authority.

In the absence of specific evidence about the absence of record, this court finds it not possible to draw adverse inference against sanctioning authority in view of the decision in the case of *Central Bureau of Investigation v. Edwin Devasthayam* (2007) 12 SCC 139. I may successfully refer to Supreme Court's decision in the case of *Hindustan Petroleum Corporation Ltd. v. Sarvesh Berry* AIR 2005 SC 1406, wherein it has been observed :-

"It is to be noted that in cases involving Section 13 (1)(e) of the P.C. Act, the onus is on the accused to prove that the assets found were not disproportionate to the known sources of income. The expression 'known sourses of income' is related to the sources known to the authorities and not the accused. The Explanation to Section 13 (1) of the P.C. Act provides that for the purposes of the Section, "known sources of income" means income derived from any lawful source and such receipt has been intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant. How the assets were acquired and from what source of income is within the special knowledge of the accused. Therefore, there is no question of any disclosure of defence in the departmental proceedings. In the criminal case, the accused has to prove the source of acquisition. He has to satisfactorily account for the same. Additionally issues covered by charges 2 and 3 cannot be the

subject matter of adjudication in the criminal case."

27. Relying upon AIR 1977 SCC 796 *(Krishnanand Agnihotri v. State of M.P.),* it has been contended that if the excess assets possessed by the accused is less than 10% of the total income, he can not be found guilty of the offence under Section 13 (1)(e) of the Prevention of Corruption Act, 1988. This principle can not be doubted, however, in the case in hand, the extent of excess assets being more than 10%, the appellant does not get any benefit from this ruling.

28. Even if the objections of the appellant's learned counsel for over estimation about the value of the property possessed by the appellant is accepted, it is observed that the appellant is not entitled to treat the money mentioned in para 13 as having been earned by known sources of income as discussed hereinbefore. This being so, the property of the appellant is found disproportionate to his known sources of income.

29. Resultantly, we do not find any kind of infirmity in the appreciation of the evidence on record. Consequently, the appeal fails and is hereby dismissed. The appellant is on bail. His bail bonds and surety bonds are hereby cancelled. He is directed through his counsel to surrender on or before 25th January 2011 before the concerning C.J.M. for undergoing remaining part of his jail sentence. In case of failure, the CJM is directed to issue arrest warrant for taking him into custody.

Registrar is directed to send a copy of the judgment to Lokayukta with a request to examine the role of officers of Lokayukta office, who virtually examined the defence witnesses as prosecution witnesses and further did not declare them hostile with a view to cross examine them.

Appeal dismissed.

I.L.R. [2011] M. P., 1310
APPELLATE CRIMINAL

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

Cr.A. No. 1976/2003 (Jabalpur) decided on 19 January, 2011

MUNNALAL RAJAK ...Appellant

Vs.

STATE OF M.P. ...Respondent

A. Evidence Act (1 of 1872), Section 3 - Witness - Police officer - **Evidence of police officer cannot be rejected solely on the ground that he was concerned with success of trap - Presumption that every person acts honestly applies as much in favour of a police officer as any other person.** (Para 18)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्षी – पुलिस अधिकारी – पुलिस अधिकारी की साक्ष्य मात्र इस आधार पर अस्वीकार नहीं की जा सकती, कि वह ट्रेप की सफलता के साथ संबद्ध था – उपधारणा कि, प्रत्येक व्यक्ति ईमानदारी से कार्य करता है, उतनी ही पुलिस अधिकारी के पक्ष में लागू होती है, जितनी कि किसी अन्य व्यक्ति पर।

B. Evidence Act (1 of 1872), Section 3 - Witness - Panch Witness - **Merely because panch witness has already acted as panch witness in other 4 cases is not sufficient to dub him to an accomplice per se or even as an interested witness.** (Para 18)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 3 –साक्षी – पंच साक्षी – मात्र इसलिए कि पंच साक्षी ने पहले ही अन्य 4 मामलों में पंच साक्षी के रूप से कार्य किया है, उसे प्रत्यक्ष रूप से सह अपराधी या हितबद्ध साक्षी भी मानने के लिए पर्याप्त नहीं है।

C. Prevention of Corruption Act (49 of 1988), Section 20 - Presumption - **Tainted money recovered from the possession of appellant - Appellant not able to furnish even a plausible explanation for receiving the tainted money - Presumption rightly drawn.** (Paras 27-30)

ग. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 20 – उपधारणा – अपीलार्थी के कब्जे से दूषित पैसा बरामद हुआ – अपीलार्थी दूषित पैसा अभिप्राप्त करने का कोई स्वीकार्य स्पष्टीकरण भी प्रस्तुत नहीं कर पाया – उपधारणा उचित रूप से बनाई गई ।

Cases referred:

AIR 1968 SC 1323, 1993 Supp (3) SCC 745, (2009) 15 SCC 200, (2002) 5 SCC 86, (2006) 1 SCC 401,(1980) 2 SCC 390, AIR 2007 SC

3106, AIR 1976 SC 449, (2001) 10 SCC 103, AIR 1964 SC 575, AIR 1966 SC 1762, AIR 2001 SC 147, AIR 2001 SC 318.

Vijay Nayak, for the appellant.

Aditya Adhikari, Spl. P.P., for the respondent/SPE Lokayukt.

JUDGMENT

The Judgment of the Court was delivered by : **R.C. MISHRA, J. :**–This appeal has been preferred against the judgment-dated 12.11.2003 passed by Special Judge (under the Prevention of Corruption Act, 1988) [hereinafter referred to as the 'Act'], Jabalpur in Special Criminal Case No.07/2002 whereby the appellant was convicted and sentenced as under with the direction that the jail sentences shall run concurrently -

Convicted under Section	Sentenced to
7 of the Act	undergo R.I. for 1 year and to pay a fine of Rs.1000/- and in default, to suffer R.I for 1 month.
13(1)(d) read with 13(2) of the Act	undergo R.I. for 2 years and to pay a fine of Rs.1000/- and in default, to suffer R.I. for 1 month.

2. At the relevant point of time, the appellant was posted as Constable at Police Station Majhgawan, Distt. Jabalpur whereas the complainant Rooplal Patel (PW7), an agriculturist by occupation, was residing at village Junwani.

3. The prosecution story, in short, may be narrated thus -

(i) On 1.6.2001 Rohani Prasad (PW3), a co-villager, submitted an application (Ex.P-5) before SHO, Majhgawan for initiating action against Rooplal Patel (PW5), the complainant in this case. It contained allegations to the effect that being enraged by the act of his son Ramsingh Patel of getting Rooplal's oxen, who had caused damage to the crops standing in his field, impounded, Rooplal had not only hurled abuses but had also threatened to settle scores with Ramsingh as also with him.

(ii) On 3.6.2001, the appellant, to whom the application

was marked for an inquiry, proceeded to village Junwani and after showing the application to Rooplal, demanded a sum of Rs.2,000/- as illegal gratification for letting him off and also gave a threat that in case the amount was not paid till Thursday falling on 7.6.2001, he would be sent to jail.

(iii) Not being inclined to pay the bribe, Rooplal, on 7.6.2001 only, made a complaint (Ex.P-7) to the Superintendent of Police, Special Police Establishment (Lokayukta) Jabalpur who, in turn, directed Inspector Naresh Kumar Agrawal (PW10) to arrange a trap. The Inspector, accordingly, recorded the First Information Report (Ex.P-23); registered a case under Section 7 of the Act and completed necessary formalities for laying the trap in presence of Panch witnesses Ramchandra Shukla (PW4) and Shushant Kumar Bhadrarai (PW6). The Inspector took into possession 20 currency notes each in denomination of Rs.100/- brought by Rooplal and after noting the details thereof, got them duly treated with phenolphthalein and kept in his pocket with the assistance of Santosh Kumar (PW11). At about 11:10 a.m., the trap party, led by Inspector Naresh Kumar, started for police station Majhgawan in a Government Jeep bearing registration No.MP-02-2145.

(iv) The trap party reached Majhgawan at about 12:15 pm. The Jeep was parked at bus stand wherefrom the party proceeded to the police station. Panch witness S.K. Bhadrarai and Constables Shrikrishan Gautam and Makhanlal were deputed to witness the passing of bribe money from the complainant to the appellant at betel shop cum tea stall run by Munnalal Patel (PW5) whereas S.K. Bhadrarai and constable Shrikrishan Gautam were made to stay near a kirana shop located affront. Inspector Naresh Kumar Agrawal (PW10) and other members of the party witnessed the proceedings by remaining stationed at nearby places. After a while, the appellant came there in civil dress and as per his demand, the complainant handed over the bribe money that was put by the appellant into right pocket of his trousers. Complainant then gave the appointed sig-

nal to the trap party. Constables Makhanlal and Shrikrishan Gautam caught hold of the hands of the appellant. As the fingers of the appellant were dipped in colourless solution of Sodium Carbonate, it indicated presence of phenolphthalein by turning pink. During search, all the currency notes treated with the chemical were recovered from the right pocket of appellant's trousers. Ramesh Chandra Shukla (PW4) not only tallied their numbers with the details recorded in the pre-trap panchnama (Ex.P-10) but also counted them. The trousers worn by the appellant was also seized and he was made to wear another trousers brought from his residence situated in the premises of the police station.

(v) Hands of Ramesh Chandra Shukla as well as right pocket of the appellant's trousers were washed with the solution of Sodium Carbonate and the resultant solutions indicated presence of Phenolphthalein. Samples of the solutions were kept in separate bottles and sealed. A positive report (Ex.P-27) from the Forensic Science Laboratory was also received regarding hand wash and pant pocket wash.

4. While denying the charges, the appellant pleaded false implication in the wake of animosity. According to him, -

Rooplal had taken his agricultural land having an area of 2 acres on lease as a 'Shikmi' (sub-tenant) but failed to pay the contractual amount even after giving assurance before the Panchayat. In such a situation, he had taken possession of the land from Rooplal and had given the same to another person for cultivation as Shikmi. On the date of the incident, Rooplal had come to the hotel where he was sitting and asked about a home guard posted at the police station and while they were talking to each other, other members of the raiding party came there and asked as to whether he had received the money whereas he had neither demanded nor received any amount.

5. The prosecution sought to prove the charges by examining as many as 11 witnesses. To support the plea of defence, the appellant produced 3

witnesses namely Rajendra Patel (DW1), Ravi Shankar (DW2) and Murat Singh Patel (DW3). Upon consideration of the entire evidence on record, learned trial Judge, for the reasons assigned in the judgment, concluded that on one hand, recovery of the tainted money from the possession of the appellant was proved beyond a reasonable doubt and on the other, he was not able to rebut the statutory presumption under Section 20(1) of the Act.

6. Legality and propriety of the impugned convictions have been challenged inter alia on the following grounds -

(i) The prosecution version was apparently shrouded with doubt in view of the non-supportive evidence of Rohani Prasad (PW3).

(ii) The application (Ex.P-5) said to have been submitted by Rohani Prasad was neither entered in the corresponding register nor in the Rojnamcha and further, it did not contain any endorsement made by the then SHO of P.S. Majhgawan, authorizing the appellant to make an enquiry into the allegations contained therein.

(iii) In the official capacity of Constable, the appellant was not competent to deal with the application.

(iv) There was no cogent evidence as to demand of illegal gratification.

(v) Evidence regarding acceptance of bribe suffered from serious infirmities..

(vi) Since the probability of defence was established, the statutory presumption under Section 20(1) of the Act was not attracted to the facts of the case.

In response, learned Special Public Prosecutor, while making reference to the incriminating pieces of evidence, has submitted that the convictions are well founded. According to him, probability of the defence that was categorically ruled out by the complainant Rooplal, was rightly rejected in absence of relevant revenue records or other cogent evidence.

7. Before proceeding to advert to the merits of the rival contentions, it may be observed that the question whether there was any offence reg-

istered or yet to be registered which the appellant could have investigated in relation to which the bribe was allegedly offered would be irrelevant. The reason is that to establish an offence under S.7 of the Act, that corresponds to Section 161 of the Indian Penal Code (since omitted), the prosecution must establish that accused was public servant and that he obtained illegal gratification for showing or forbearing to show, in exercise of official function' favour or disfavour *(Bhanuprasad Hariprasad Dave v. State of Gujarat* AIR 1968 SC 1323 referred to). Accordingly, the mere fact that the appellant, being Constable, was not competent to investigate or inquire into the contents of the application (Ex.P-5) made by Rohani Prasad against complainant Rooplal as well as non-corroborative evidence of Rohani Prasad would not assume any significance. As an obvious corollary, the fact that the information contained in the application was not recorded in the Rojmancha or any other book required to be kept in the police station under Section 155(1) of the Criminal Procedure Code (for short 'the Code')was also of no consequence.

8. The other contentions may be dealt with under the following sub-heads -

DEMAND OF BRIBE

9. Complainant Rooplal (PW7) substantially reiterated the background facts leading to submission of application (Ex.P-5) by Rohani Prasad against him. As per his statement, non-availability of the bell worn by one of his bullocks taken by Rohani's son to the cattle pond had led to an altercation between him and Rohani Prasad. He clearly deposed that it was the appellant only who, while informing that the complaint made by Rohani Prasad was entrusted to him for inquiry, had demanded an amount of Rs.2000/- as illegal gratification for closing the case.

10. However, while contending that the factum of demand was not proved, learned counsel for the appellant has submitted that it was in answer to the leading questions put by the Public Prosecutor after declaring Rooplal hostile that the corresponding facts were brought on record but since the public prosecutor was able to elicit the incriminating answers during the cross-examination of the complainant, the decision in *Varkey Joseph v. State of Kerala,* 1993 Supp (3) SCC 745 is of no avail to the appellant.

11. As pointed out already, the admission made by the Inspector Naresh Kumar Agrawal (PW10) to the effect that the application (Ex.P-5) was not found recorded in the Rojnamcha or any other register did not assume any significance. Further, the contention that no date or time or place was fixed for meeting the demand is also not acceptable in view of a categorical statement of Rooplal (PW7) that demand of the bribe was made on 03.06.2001 that happened to be a Sunday under a threat that if the same was not paid up to 07.06.2001, he would be sent to jail.

12. To buttress the contention that in view of the aforesaid facts, the demand of bribe was not proved, attention has been invited to the decision of Supreme Court in *State of Maharashtra v. Dnyaneshwar Laxman Rao Wankhede* (2009) 15 SCC 200 wherein it was re-affirmed that demand of illegal gratification is a sine qua non for constituting the offence under Section 7 of the Act and, therefore, for arriving at the conclusion as to whether all the ingredients of the offence viz. demand, acceptance and recovery of the amount of illegal gratification have been satisfied or not, the Court must take into consideration the facts and circumstances brought on record in their entirety. In that case, appeal against acquittal of the accused-a Head Constable who, allegedly, on the first occasion, had demanded Rs.2000/- for releasing complainant and his brother on bail for an offence under Section 448 of the IPC and on the second occasion, had demanded Rs.1500/- for releasing complainant's brother and his servant on bail for taking cow of one Dhanraj to the cattle pond, was dismissed on the following grounds -

> (i) One of the panch witnesses namely Ashok had died whereas the second one, who was not a witness of demand, was sought to be examined by the prosecution to prove the demand purported to have been made by the accused through him.
>
> (ii) The accused enquired about the correctness or otherwise of the FIR lodged by the complainant after a long time.
>
> (iii) Two attempts were made to nab the accused red-handed. The first on 08.08.1995 and the second on 22.08.1995.
>
> (iv) If the accused intended to take the amount, he would have accepted the same in his house itself and there was

no reason to ask the complainant and the witness to meet him at a public place i.e. near the Veterinary Hospital.

(v) Even the details of the said purported raid viz. time of the complainant's visit to the police station, the residence of the accused and the Veterinary Hospital, had not been disclosed.

Thus, the decision in *Dnyaneshwar's case* (supra), being distinguishable on facts, does not render any assistance to the appellant.

ACCEPTANCE OF ILLEGAL GRATIFICATION

13. Learned counsel for the appellant has contended that the acceptance and payment of the bribe were also not proved beyond a reasonable doubt in view of the following facts -

(i) Munnalal Patel (PW5), the sole independent witness of payment of bribe, did not support the corresponding version.

(ii) In Para 21 of his statement, complainant Rooplal (PW7) candidly admitted that handing over of the tainted money was not preceded by any conversation.

(iii) Ravi Shankar (DW2), a Constable posted at the same police station, came forward to support the defence by stating that he had seen the complainant while attempting to give a packet to the appellant.

(iv) Evidence of panch witnesses Ramchandra Shukla (PW4) and S.K. Bhadrarai (PW6) who, admittedly, were not able to witness passing of the tainted money, suffered from serious infirmities.

14. In support of the contention, reference has been made to the following decisions of the Supreme Court -

(i) *Subash Parbat Sonvane v. State of Gujarat*, (2002) 5 SCC 86.

(ii) *T. Subramanian vs. State of T.N.* (2006) 1 SCC 401.

15. In *T. Subramanian's case,* the explanation given by accused immediately after being trapped that the money was given by the complainant

towards lease rent and not as bribe for securing patta in favour of complainant was found to be plausible and, therefore, sufficient to rebut the statutory presumption but the case in hand reflects a different factual scenario altogether. Here, none of the panch witnesses Ramesh Chandra (PW4) and S.K. Bhadrarai (PW6) admitted that immediately after being trapped, the appellant had termed the tainted money as part of the outstanding amount of rent. Besides this, S.K. Bhadrarai contradicted the statement of Ramesh Chandra that on being apprehended, the appellant had denied even taking of money. As such, the ratio laid down in *T. Subramanian's case* is not applicable to the facts of the instant case.

16. In *Subash's case,* the complainant did not support the prosecution version of demand and acceptance of the amount but in the present case, the complainant Rooplal (PW7) was emphatic in stating that the amount was paid as against the demand made by the appellant. Moreover, non-supportive evidence of Munnalal (PW5) was insignificant since it is not necessary that the passing of money should be proved by direct evidence *(Hazari Lal v. State (Delhi Administration)* (1980) 2 SCC 390 referred to).

17. According to the complainant Rooplal (PW7), after taking the currency notes from him, the appellant had kept the same in the right pocket of his trousers. As reflected in the post-trap panchnama (Ex.P-15), Ramesh Chandra Shukla (PW4) took out the tainted currency notes from the right pocket of appellant's trousers. This witness corroborated the aforesaid recital of the panchnama and other panch witness S.K. Bhadrarai and Detecting Officer Naresh Kumar Agrawal (PW10) were unanimous in saying that it was Ramesh Chandra only, who had taken the notes out of the appellant's pocket; counted the same and tallied their numbers with the details recorded in the pre-trap panchnama (Ex.P-10). The corresponding memo (Ex.P-18) was also tendered in evidence.

18. Further, Inspector Naresh Kumar (PW10) not only substantially reiterated contents of the pre-trap panchnama (Ex.P-10) but also corroborated the circumstances leading to recovery of tainted currency notes from the right pocket of appellant's trousers as reflected in the post-trap panchnama (Ex.P-15). Nothing could be elicited in his cross-examination so as to suggest that he was, in any way, interested in securing the convictions of the appellant on absolutely false grounds. His evidence could not be rejected solely on the ground that he was concerned with the

success of the trap. The presumption that every person acts honestly applies as much in favour of a Police Official as any other person (See. *Girja Prasad v. State of M.P.* AIR 2007 SC 3106). Admission made by S.K. Bhadrarai (PW6) that he had already acted as a panch witness in as many as 4 other cases was also not sufficient to dub him to be an accomplice per se or even as an interested witness because there is no rule of law that even if a witness is otherwise reliable and independent his association in a pre-arranged raid about which he had become acquainted, makes him an accomplice or a partisan witness *(Maha Singh v. State (Delhi Administration)* AIR 1976 SC 449 relied on).

19. Although, the statements of Inspector Naresh Kumar and panch witnesses Ramesh Chandra Shukla and S.K. Bhadrarai suffered from inconsistency on the point as to whether the passing of money was within their view yet, their testimony as to substratum of the case that the tainted currency notes were recovered from appellant's possession remained unaffected. They also corroborated the fact that another trousers was brought from the house of appellant so as to facilitate washing of the trousers pocket wherein the currency notes were kept. No serious dispute was raised on the point that the hands of Rooplal as well as those of the appellant were also washed with the colourless solution of sodium carbonate and the respective parts of the solution turned pink.

20. In the light of direct evidence of the complainant Rooplal as well as clinching circumstantial evidence given by members of the raiding party, learned trial Judge did not commit any illegality in holding that the currency notes treated with phenolphthalein were recovered from the right pocket of appellant's trousers.

PROBABILITY OF THE DEFENCE

21. While denying the factum of recovery of the currency notes from his possession, the appellant had asserted that he was apprehended while conversing with complainant Rooplal who had approached him to know the whereabouts of a home guard posted at the same police station. However, he was not able to disclose the name of the home guard. Moreover, his conduct of not demanding the amount said to have been payable to him as rent as per the agreement or award of the panchayat after seeing the complainant was obviously unnatural and improbable. Further, he did not specify the outstanding amount. There is nothing on record to

suggest that he had received any installment payable against the amount settled between him and Rooplal or awarded by the panchayat. It is relevant to note that the complainant, even after admitting that the appellant possessed 2 acres of land, emphatically denied the suggestion that the land was taken by him for cultivation as Shikmi.

22. As rightly pointed out by learned trial Judge, no suggestion was made to the complainant that the matter was referred to and decided by the panchayat or that the agricultural land was handed over to another Shikmi namely Dayaram in view of his default in payment of the rent.

23. Coming to the evidence of defence witnesses, it may be observed that constable Ravi Shankar (DW2), while admitting the veracity of the trap, asserted that Rooplal was trying to hand over a packet presumably containing the currency notes to the appellant but this fact was not even disclosed by the appellant in his examination under Section 313 of the Code. Other defence witnesses viz. Rajendra Patel (DW1) and Murat Singh (DW3), though residents of village Tighra, claimed to hold agricultural lands near the appellant's field in village Junwani but no supportive document was placed on record. They came forward to corroborate the facts as stated by the appellant that (a) Rooplal had taken the land belonging to the appellant for cultivation as Shikmi, (b) Rooplal had failed to pay the amount outstanding as rent, (c) Panchayat had directed Rooplal to pay the outstanding amount in installments and (d) the appellant, after evicting the complainant from the land, had inducted Dayaram as Shikmi thereof. However, they could not answer the following queries -

(i) In which year Rooplal had taken the appellant's land for cultivation.

(ii) When the appellant had given the land to Dayaram.

This apart, neither Dayaram nor Mahadeo, the Sarpanch, who headed the panchayat, was examined by the defence. Non-examination of these material witnesses was the strongest possible circumstance to discredit the defence version.

24. In such a situation, the defence was rightly rejected by learned trial Judge as inherently improbable in view of the background facts and circumstances leading to the trap.

STATUTORY PRESUMPTION UNDER S.20(1) OF THE ACT

25. While contending that the presumption stood rebutted from the evidence brought on record, learned counsel for the appellant has placed implicit reliance on a decision of the Apex Court in *M. Abbas v. State of Kerala* (2001) 10 SCC 103. In that case, the appellant was able to explain that the amount had not been received by him as bribe but for the purpose of giving the same to another contractor who had completed the work of removing the bumps from the road, which otherwise was required to be done by the complainant who was later declared hostile and confirmed the explanation given by the accused.

26. Mudholkar, J., speaking for a four-judge Bench of the Apex Court in *Dhanvantrai Balwantrai Desai v. State of Maharashtra* AIR 1964 SC 575, observed that when an accused is shown to have accepted money, which was not legal remuneration, the presumption can be raised and the rebuttal must be by explanation which must be true and not merely plausible. However, as further explained in *V. D. Jhingan v. State of U.P.* AIR 1966 SC 1762 and reiterated in *M. Abbas's case* (supra), it is not necessary that the accused should establish his case by the test of proof beyond a reasonable doubt and he has to establish his case by a preponderance of probability as is done by a party in civil proceedings.

27. But, as discussed already, the appellant was not able to furnish even a plausible explanation for receiving the tainted money and as such, the defence did not stand even the test of preponderance of probability. In this view of the matter, the decision in *M. Abbas's case* is of no help to the appellant.

28. As observed by the Supreme Court in *Madhukar Bhaskarrao Joshi v. State of Maharashtra* AIR 2001 SC 147 -

> "the premise to be established on the facts for drawing the presumption is that there was payment or acceptance of gratification. Once the said premise is established the inference to be drawn is that the said gratification was accepted "as motive or reward" for doing or forbearing to do any official act."

29. Re-affirming the aforesaid principle in *M. Narsinga Rao v. State of Andhra Pradesh* AIR 2001 SC 318, a three judge Bench of the Apex Court has further opined -

> When the expression 'shall be presumed' is employed in S. 20(1) of the Act it must have the same import of compulsion. When the sub-section deals with the legal presumption it is to

be understood as in terrorum i.e. in tone of a command that it has to be presumed that the accused accepted the gratification as a motive or reward for doing or forbearing to do any official act etc., if the condition envisaged in the former part of the section is satisfied. The only condition for drawing such a legal presumption under S. 20 is that during trial it should be proved that the accused had accepted or agreed to accept any gratification. The section does not say that the said condition should be satisfied through direct evidence. Its only requirement is that it must be proved that the accused has accepted or agreed to accept gratification. Direct evidence is one of the modes through which a fact can be proved. But that is not the only mode envisaged in the Evidence Act.

30. Accordingly, we are of the opinion that learned trial Judge did not commit any illegality in invoking the statutory presumption for convicting the appellant in respect of the offences charged with.

31. For these reasons, none of the contentions raised against legality and propriety of the convictions under challenge deserves acceptance.

32. This brings us to the question of sentence. Taking into consideration the nature of allegations found proved, social impact of the crime and other relevant circumstances of the case, interests of justice would be met if the term of custodial sentence only for the offence under Sections 13(1)(d) read with 13(2) of the Act is reduced to the minimum prescribed under the statute.

33. In the result, the appeal is allowed in part. The impugned convictions and the fine sentences are hereby affirmed. However, the term of consequent sentence of imprisonment for the offence under Section 7 of the Act is also maintained but the period of corresponding custodial sentence for the offence under Sections 13(1)(d) read with 13(2) is reduced from 2 years to 1 year.

34. Appellant is on bail. He is directed to surrender to his bail bonds before the trial Court on or before 08th March 2011 for being committed to custody for undergoing remaining part of the sentence.

Appeal partly allowed.

I.L.R. [2011] M. P., 1323
APPELLATE CRIMINAL
Before Mr. Justice S.N. Aggarwal
Cr. A. No. 284/2003 (Gwalior) decided on 20 January, 2011

RAJENDRA ...Appellant
Vs.
STATE OF M.P. & anr. ...Respondents

A. Penal Code (45 of 1860), Section 195 - **Giving or fabricating false evidence with intent to procure conviction - Appellant initially supported the prosecution case in examination in chief, however, took U-turn and supported defence version - *Held* - Finding of Trial Court that false evidence given by appellant was either to secure conviction or acquittal - Appellant could not have been convicted by Trial Court unless convincing evidence was produced by prosecution before it that false evidence during Trial under Section 304-B IPC was given with an intention to procure conviction of accused persons - Appellant could not have been convicted under Section 195 I.P.C.** (Para 4)

क. दण्ड संहिता (1860 का 45), धारा 195 – दोषसिद्धि उपाप्त करने के आशय से मिथ्या साक्ष्य देना या गढ़ना – प्रारंभ में अपीलार्थी ने मुख्य परीक्षण में अभियोजन मामले का समर्थन किया परन्तु वह पलट गया और बचाव कहानी का समर्थन किया – अभिनिर्धारित – विचारण न्यायालय के निष्कर्ष कि अपीलार्थी द्वारा दी गई मिथ्या साक्ष्य या तो दोषसिद्धि या दोषमुक्ति प्राप्त करने के लिए थी – अपीलार्थी को विचारण न्यायालय द्वारा दोषसिद्ध नहीं किया जा सकता था जब तक उसके समक्ष अभियोजन द्वारा विश्वासजनक साक्ष्य प्रस्तुत नहीं की जाती कि धारा 304–बी भा.दं.सं. के अंतर्गत विचारण के दौरान मिथ्या साक्ष्य, अभियुक्तगण की दोषसिद्धि उपाप्त करने के आशय से दी गयी – अपीलार्थी धारा 195 भा.दं.सं. के अंतर्गत दोषसिद्ध नहीं किया जा सकता था।

B. Penal Code (45 of 1860), Sections 193 & 195 - Lesser offence - **Offence under Section 193 is lesser offence of Section 195 - Conviction for a larger offence can be converted into conviction for a lesser offence, if larger offence takes within its sweep the ingredients of lesser offence also - Giving false evidence in judicial proceedings is a common factor in both Sections 193 and 195 IPC - Appellant convicted for sentence already undergone with fine of Rs. 10,000/.** (Paras 5 & 8)

ख. दण्ड संहिता (1860 का 45), धाराएँ 193 व 195 – छोटा अपराध – धारा 193 के अंतर्गत अपराध, धारा 195 के अपराध से छोटा अपराध है – यदि बड़े अपराध के भीतर छोटे अपराध के भी घटक सम्मिलित है, तो बड़े अपराध के लिए दोषसिद्धि को छोटे अपराध के लिए दोषसिद्धि में परिवर्तित किया जा सकता है – न्यायिक कार्यवाहियों में मिथ्या साक्ष्य देना, धारा 193 एवं 195 भा.दं.सं. दोनों के सामान्य घटक हैं – भुगताए गये दण्ड के साथ रु. 10,000/– के अर्थदण्ड से अपीलार्थी दोषसिद्ध।

V.K. Saxena with *Aditya Singh*, for the appellant.
Mukund Bharadwaj, P.P., for the respondents.

JUDGMENT (ORAL)

S.N. AGGARWAL, J. :–The appellant is an unfortunate father who lost his married daughter, who died an unnatural death within four years of her marriage. A case under Section 304-B IPC was registered against the husband of his daughter and other members of his family on the complaint of the appellant. In that case, the accused persons being in-laws of the daughter of the appellant were acquitted by the trial Court vide judgment dated 26.09.2001 in Sessions Trial case No. 229/2000. While acquitting the accused persons, the trial Court ordered for registration of a criminal case against the appellant under Sections 193, 194 & 195 IPC for giving false evidence to procure conviction of the accused persons in a case registered against them under Section 304-B IPC. The appellant on being tried for the offence under Sections 193, 194 & 195 IPC has been convicted by the Sessions Court for the offence under Section 195 IPC vide impugned judgment dated 01.05.2003 in Sessions Trial case No. 180/2002. Aggrieved from his conviction, the appellant has filed this appeal seeking setting aside of his conviction.

2. Heard learned counsel for both the parties for final disposal of this appeal.

3. Mr. V.K. Saxena, learned senior counsel appearing on behalf of the appellant has argued that the appellant initially supported the case of the prosecution on 22.02.2001 as advised to him by the police/investigating officer, but later on, when his conscience did not permit him to get the accused persons falsely convicted, gave evidence whatever according to him was the truth and this he did when he was cross-examined on 11.04.2001. Learned counsel further argued that even the trial Court in its judgment was not sure whether the false evidence given by the appellant was to procure conviction of the accused persons or to secure their

acquittal. It is submitted that the appellant could not have been convicted by the trial Court for offence under Section 195 IPC since there was no intention on his part to procure conviction of the accused persons for offence under Section 304-B IPC.

4. A perusal of the judgment dated 26.09.2001 pertaining to the acquittal of the accused persons in a case under Section 304-B IPC would show that even the trial Court was of the view that the false evidence given by the appellant was either to secure their conviction or acquittal. There is no challenge to this finding by the State/ respondent. In the opinion of this Court, the appellant could not have been convicted by the trial Court for offence under Section 195 IPC unless convincing evidence was produced by the prosecution before it that the false evidence during the trial of the case under Section 304-B IPC given by the appellant was with an intention to procure conviction of the accused persons for offence under Section 304-B IPC. Though, the appellant could not have been convicted for offence under Section 195 IPC, but the question is whether he can be convicted for offence under Section 193 IPC which makes giving of false evidence punishable with imprisonment for a term upto seven years and also to fine. It may be noted that the appellant was also charged for offence under Section 193 IPC.

5. Section 195 IPC is a larger offence and takes within its sweep the offence under Section 193 IPC. Giving false evidence in judicial proceedings is a common factor in both Sections 193 and 195 IPC. In the present case, it is not disputed that the appellant had taken shifting stand during his evidence. Initially, he supported the case of the prosecution on 22.02.2001, but later on, in his cross-examination recorded on 11.04.2001 he took complete u - turn and supported the defence version of the accused persons. The evidence given by him on either of these two dates was false to his own knowledge. He can not be heard to say that he gave false evidence to support the case of the prosecution on 22.02.2001 at the behest of the police people. The responsibility of the statement given by a witness lies on him and he cannot escape its consequences. In the opinion of this Court, the appellant got fullest opportunity during trial to explain his position relating to charge of giving false evidence in judicial proceedings made punishable under Section 193 IPC and therefore, since the offence under Section 193 IPC is a species of an offence under Section 195 IPC, the conviction of the appellant can safely

be converted from Section 195 IPC to Section 193 IPC. No prejudice is going to be caused to him by conversion of his conviction from a larger offence to a lesser offence. Accordingly, the conviction of the appellant is converted from Section 195 IPC to Section 193 IPC.

6. I have also heard Mr. V.K. Saxena, learned senior counsel appearing on behalf of the appellant and Mr. Mukund Bharadwaj, learned Public Prosecutor for the State/respondent on the question of quantum of sentence.

7. Mr. V.K. Saxena, learned senior counsel for the appellant submits that the appellant has already undergone imprisonment of five months and has suffered the agony of protracted trial for eight long years, which according to him, by itself is a sufficient punishment to the appellant for giving false evidence in a case of unnatural death of his married daughter within four years of her marriage. Learned senior counsel further submits that the appellant is a petty vegetable vendor and is hardly able to sustain himself and his family by selling vegetables on rehri/thela. He therefore, request that the Court may take a lenient view in the matter of sentence. On the other hand, Mr. Mukund Bharadwaj, learned Public Prosecutor for the State/ respondent has opposed the prayer made by learned senior counsel for the appellant for interference in the sentence awarded to the appellant by the trial Court. The contention of Mr. Mukund Bharadwaj, learned Public Prosecutor for the State is that the Court should not take a lenient view with a person who had given false evidence in judicial proceedings.

8. On giving my anxious thought to the above rival submissions advanced by the learned counsel for the parties on the question of quantum of sentence, this Court is of the opinion that having regard to the facts and circumstances of the case and also having regard to the fact that the appellant is a first time offender and earn his livelihood by selling vegetable and also the fact that he has already undergone imprisonment for five months in this case and has faced the agony of protracted trial for eight long years by now and has lost his married daughter in unnatural death within four years of her marriage in which case he allegedly gave false evidence, ends of justice will be adequately met by suitably modifying the impugned sentence and sentencing him to imprisonment already undergone by him with additional fine of **Rs. 10,000/-**. Accordingly, the impugned conviction of the appellant is converted from Section 195 to

Section 193 IPC and the impugned order of sentence is modified to the extent that instead of sentence of imprisonment of seven years awarded to him, he is let off on the sentence already undergone by him subject to his paying additional fine of **Rs. 10,000/- (Rs. Ten Thousand Only)** to be paid within four weeks. This appeal stands disposed of accordingly.

Appeal disposed of.

I.L.R. [2011] M. P., 1327

APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saksena & Mr. Justice T.K. Kaushal

Cr. A. No. 1249/2003 (Jabalpur) decided on 8 February, 2011

KAMLA BAI & anr. ...Appellants

Vs.

STATE OF M.P. ...Respondent

A. Evidence Act (1 of 1872), Section 32 - Dying Declaration - Recorded by Executive Magistrate **- Endorsement and certificate of doctor about the fitness of deceased for making the dying declaration, proved by Executive Magistrate - None of the doctors examined in the court stated about making of the certification about the fitness of deceased for making the dying declaration, but from the evidence of Executive Magistrate, it was proved that doctor examined the patient and certified that she was fit to give statement - *Held* - There appears no valid reason to suspect that deceased was not in a position to give the statement when Executive Magistrate himself felt satisfied about the fitness of the deceased.** (Para 8)

क. साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – कार्यपालक मजिस्ट्रेट द्वारा अभिलिखित किया गया – मृत्युकालिक कथन देने के लिए मृतक की समर्थता के बारे में चिकित्सक का पृष्ठांकन एवं प्रमाणपत्र को कार्यपालक मजिस्ट्रेट द्वारा साबित किया गया – न्यायालय में परीक्षण कराए गये किसी भी चिकित्सक ने मृत्युकालिक कथन देने के लिए मृतक की समर्थता के बारे में प्रमाणन करने के संबंध में नहीं कहा, परन्तु कार्यपालक मजिस्ट्रेट की साक्ष्य से यह साबित हुआ था कि चिकित्सक ने मरीज का परीक्षण किया और प्रमाणित किया कि वह कथन करने में समर्थ थी – अभिनिर्धारित – यह संदेह करने के लिए कोई वैध कारण प्रकट नहीं होता कि मृतक कथन करने की स्थिति में नहीं थी, जब कार्यपालक मजिस्ट्रेट स्वयं मृतक की समर्थता के बारे में संतुष्ट था।

B. Evidence Act (1 of 1872), Section 32 - Dying Declaration - Statement recorded by Police **-- After receiving intimation from the hospital, the A.S.I. immediately went there and recorded the statement after obtaining certificate from the doctor about the fitness of deceased - There is absolutely no material on record that A.S.I. was in any way interested in securing prosecution or conviction - He had also sent a requisition to Executive Magistrate for recording a regular dying declaration - The statement could be treated as a dying declaration of deceased.** (Para 10)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – पुलिस द्वारा अभिलिखित कथन – अस्पताल से सूचना प्राप्त करने के पश्चात, ए.एस.आई. तत्काल वहां पहुंचा और मृतक की समर्थता के बारे में चिकित्सक से प्रमाणपत्र अभिप्राप्त करने के पश्चात कथन अभिलिखित किये – अभिलेख पर आत्यांतिक रुप से कोई सामग्री नहीं कि ए.एस.आई. अभियोजन अथवा दोषसिद्धि सुनिश्चित करने में किसी प्रकार से हितबद्ध था – उसने नियमित मृत्युकालिक कथन अभिलिखित करने के लिए कार्यपालक मजिस्ट्रेट को मांग पत्र भी प्रेषित किया – कथन को मृतक का मृत्युकालिक कथन माना जा सकता है।

C. Evidence Act (1 of 1872), Section 32 - Two Dying Declaration - Evidentiary Value **- The evidence of dying declaration against mother-in-law (A-1) consistent, however, it appeared inconsistent and doubtful about the act attributed to A-2 - The conviction of Mother-in-law (A-1) by the trial court was justified - It would not be safe to uphold the conviction of A-2 on the basis of evidence of dying declarations - Appeal partly allowed.** (Para 12)

ग. साक्ष्य अधिनियम (1872 का 1), धारा 32 – दो मृत्युकालिक कथन – साक्ष्यिक मूल्य – सास (ए–1) के विरुद्ध मृत्युकालिक कथन की साक्ष्य संगत, किन्तु वह ए–2 के आरोपित कृत्य के बारे में असंगत व संशायास्पद है – विचारण न्यायालय द्वारा (ए–1) की दोषसिद्धि न्यायोचित – मृत्युकालिक कथनों की साक्ष्य के आधार पर ए–2 की दोषसिद्धि मान्य ठहराना सुरक्षित नहीं होगा – अपील अंशतः मंजूर।

Cases referred :

AIR 2006 SC 3221, AIR 1993 SC 374.

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

Yogesh Dhande, Penal Lawyer, for the respondent.

JUDGMENT

The Judgment of the Court was delivered by : **RAKESH SAKSENA, J. :**–This appeal has been filed by the appellants against the judgment dated 25th July, 2003, passed by Additional Sessions Judge, Burhanpur in Sessions Trial No. 161/2002, convicting the appellants under Section 302 read with Section 34 of the Indian Penal Code and sentencing them to imprisonment for life with fine of Rs. 1000/-, in default further rigorous imprisonment for one month.

2. In short, prosecution case is that Bharti, the deceased was married to Kanahiya, the son of appellant no.1 Kamla Bai on 4.5.2001. Appellant No.2 Samadhan is younger brother of Kanahiya. On 11.7.2002, at about 3 P.M., deceased suffered burn injuries. She was carried to hospital, where during treatment on 12.7.2002, she expired. It is alleged that appellants and two accused persons namely Shanta Bai and Pawan used to harass her by making demand of cash and ornaments in dowry and on not meeting the demand, subjected her to cruelty. When deceased was taken to hospital, she was found to have suffered 100% burn injuries. An intimation about deceased being brought to hospital was sent to police. A.S.I. Santosh Pathak (PW8) went to hospital and recorded the statement Ex. P/25 of the deceased under Section 161 of the Code of Criminal Procedure. Executive Magistrate/Naib Tehsildar Ramesh Pandey (PW9) also recorded dying declaration Ex. P/15 of the deceased. In the aforesaid statements, it was disclosed that accused persons poured kerosene and set fire to deceased. Accordingly, the first information report under Sections 307 and 498-A/34 of the Indian Penal Code was registered by Police Kotwali, Burhanpur. After the death of deceased, inquest proceedings were conducted and memorandum Ex. P/3 was drawn. Dead body of deceased was sent for postmortem examination to Nehru Hospital, Burhanpur where Dr. R.C.Dalal (PW4) conducted autopsy and found 100% burn injuries on the body of deceased. Hands, legs and face of the deceased were found burnt. Smell of kerosene was emanating from the body. Cause of death was burn injuries by kerosene flame. Postmortem examination report is Ex. P/9.

3. After completion of the investigation, charge sheet was filed under Sections 498-A, 304-B and 302/34 of the Indian Penal Code. All the accused persons including the appellants abjured their guilt. According to them, they were falsely implicated. They lived separate after the marriage of deceased.

4. During trial, prosecution examined Jagannath (PW1), the father, Sunil (PW2), the brother, Chaya Bai (PW3), the sister and Vitthal (PW6), a neighbour of the deceased to substantiate the fact that accused persons subjected deceased to cruelty for not meeting the demand of dowry. However, these witnesses did not support the prosecution case and turned hostile. Relying mainly on the evidence of dying declaration Ex. P/15 recorded by Naib Tehsildar Ramesh Pandey (PW9) and the statement Ex. P/25 recorded by Inspector Santosh Pathak (PW8) and the medical evidence of Dr. Ashok Pagare (PW7), Dr. Umesh Vyas (PW11) and Dr.R.C.Dalal (PW4), learned trial Judge held the appellants guilty of offence under Section 302/34 of the Indian Penal Code. Finding the evidence insufficient against accused Shanta Bai, she was acquitted. Accused Pawan being juvenile, was sent for trial before the Juvenile Court. Appellants were also acquitted of the charge under Sections 498-A and 304-B of the Indian Penal Code. Aggrieved by the impugned judgment, appellants have filed this appeal.

5. We have heard the learned counsel for the parties.

6. It was no longer disputed that deceased Bharti died of burn injuries. It is also reflected from the evidence of Dr. Umesh Vyas (PW11) that deceased Bharti was brought to Govt. Nehru Hospital, Burhanpur on 11.7.2002 by her husband in burnt condition. She had sustained about 100% burn injuries. Smell of kerosene was emanating from her body. She was given primary treatment by him. His report is Ex. P/17. Dr. Ashok Pagare (PW7), who was posted as Assistant Surgeon in Nehru Hospital deposed that he had examined the deceased Bharti. She was under shock and her pulse was weak. Her body had around 100% burns. On 12.7.2002, at about 4.25 P.M., she expired. Bed head ticket of the deceased was recorded by him is Ex. P/30. According to Dr. Ashok Pagare (PW7), he sent information to police vide letter Ex. P/14. Dr. R.C.Dalal (PW4) conducted the postmortem examination of the body of deceased Bharti on 13.7.2002 and found smell of kerosene present over her body and ante mortem burns over her face, hands, legs and other parts of her body. Her skin was burnt and was peeling off. In his opinion, deceased had died due to 100 % i.e. excessive burn injuries by kerosene flame. Her postmortem examination report Ex. P/9 written and signed by Dr. R.C.Dalal (PW4) is also placed on record. It was thus clearly evident that deceased Bharti died of burn injuries.

7. Learned counsel for the appellants, however, submitted that the trial Court gravely erred in placing implicit reliance on the dying declaration Ex. P/15 recorded by Naib Tehsildar Ramesh Pandey (PW9) and the statement recorded under Section 161 of the Code of Criminal Procedure by Inspector Santosh Pathak (PW8). According to him, learned trial Judge failed to consider that the aforesaid dying declarations were doubtful and appellants were falsely implicated. Learned counsel for the State, on the other hand, justified and supported the conviction of the appellants.

8. We have also gone through the entire evidence on record. The dying declaration Ex. P/15 was recorded by Executive Magistrate Ramesh Pandey (PW9). He categorically stated that on 11.7.2002, he had received a requisition from police station for recording the dying declaration of deceased Bharti in Govt. Nehru Hospital, Burhanpur. When he reached, he asked the treating doctor to give a certificate about capability of deceased about giving her statement. After examining, doctor certified that she was fit to give her statement. The doctor signed the certificate. After recording the statement, doctor again certified that she was in full senses. The dying declaration recorded by him is Ex. P/15. He had also obtained her thumb impression. According to dying declaration Ex. P/15, deceased told that her mother-in-law, sister-in-law and sister-in-law's son burnt her. All these persons poured kerosene kept in a 'Dibbi' and ignited her by match stick. When she shouted, no body turned up. They used to quarrel with her insisting that she should go for work on the fields, but she did not go. When a question was put to deceased as to what were the names of her relatives, she answered mother-in-law was Kamla, elder mother-in-law was Shanta Bai, husband's younger brother was Samadhan and sister-in-law's son was Pawan. She added that all these persons ignited her and that she had no quarrel with her husband. The dying declaration bore the thumb impression of deceased and also the endorsement of doctor that patient was conscious and oriented at the time of making dying declaration. Ramesh Pandey (PW9) was subjected to lengthy cross examination, but nothing could be elicited out to indicate that he had concocted or fabricated the dying declaration Ex. P/15. It is true that none of the doctors examined in the Court stated about making of the certification about the fitness of deceased for making the dying declaration, but from the evidence of Ramesh Pandey (PW9), it was proved that doctor examined the patient and certified that she was fit to give statement. The endorsements and

certificates of doctors were proved by Ramesh Pandey (PW9). There appears no valid reason to suspect that deceased was not in a position to give the statement when Executive Magistrate himself felt satisfied about the fitness of the deceased. Dr. Umesh Vyas (PW11) also deposed that when deceased was admitted in the hospital, he had talked to her. He firmly denied the suggestion that deceased was not in a position to speak. We are also unable to accept the arguments advanced by learned counsel for the appellants that deceased did not know 'Hindi' language and she spoke only 'Marathi'. In view of the evidence of Ramesh Pandey (PW9) that since deceased was speaking 'Hindi', he did not feel it necessary to enquire whether she was unable to understand 'Hindi'. In our opinion, the dying declaration Ex. P/15, recorded by Naib Tehsildar Ramesh Pandey (PW9) was truly and correctly recorded and was a genuine document.

9. There is yet another statement of deceased Ex. P/25 recorded by A.S.I. Santosh Pathak (PW8). According to him, on 11.7.2002, he received information from Nehru Hospital that Bharti, the deceased was brought to hospital in burnt condition. After recording information in general diary, he went to hospital and enquired from Dr. Umesh Vyas (PW11) about the condition of deceased. When doctor gave in writing that deceased was fit to give her statement, he recorded her statement Ex. P/25 as narrated by her. He did not add or subtract anything into it. According to him, he had issued a requisition for getting the dying declaration of deceased recorded by Tehsildar and had also recorded the first information report Ex. P/24. It is true that no certificate was endorsed by the doctor on the statement Ex. P/25 about the fitness of deceased for making the statement, but it is significant to note that Santosh Pathak (PW8) had obtained opinion of doctor Ex. P/26, in which doctor opined that she was fit to give statement. Merely, because no mental or physical condition of the deceased was recorded in Ex. P/26, in our opinion, it cannot be held that deceased was not in such a condition that she could have made the statement. In Ex. P/25, deceased stated that her mother-in-law Kamla Bai, elder mother-in-law Shanta Bai, Dewar Samadhan and sister-in-law's son Pawan used to quarrel with her. At about 3 O' clock in the noon, when she arose after sleep, these persons began to quarrel with her saying that she used to eat four breads, but did not use to go to field. Her mother-in-law Kamla had a 'Ken' of kerosene and Samdhan had 'match stick'. Shanta and Pawan caught hold of her

hands. Kamla poured kerosene on her and Samadhan ignited her by match stick. She shouted and ran out side the house.

10. The statement Ex. P/25 recorded by Santosh Pathak (PW8) was not technically the dying declaration, it was a statement of deceased recorded by police officer under Section 161 of the Code of Criminal Procedure. However, since it had been recorded by the police officer before acting upon it, its genuineness is necessary to be tested. From the evidence of Santosh Pathak (PW8), it is apparent that after receiving intimation from the hospital, he immediately went there and recorded the statement after obtaining certificate Ex. P/26 from the doctor about the fitness of deceased for making statement. There is absolutely no material on record or even a suggestion from the side of accused persons that Santosh Pathak (PW8) was in any way interested in securing their prosecution or conviction. His fairness is indicated from the fact that he had sent a requisition to Executive Magistrate for recording a regular dying declaration. It is true that though Santosh Pathak (PW8) obtained the thumb impression of deceased in Ex. P/25, but he did not get it attested by some other witnesses, however, in our opinion, this lapse on his part is not sufficient to discard his evidence. We feel satisfied that Santosh Pathak (PW8) recorded the statement Ex. P/25 correctly. Since the deceased died after making the statement and the statement pertained to the transaction in which her death was caused, this statement could be treated as a dying declaration of deceased under Section 32 of the Indian Evidence Act. (See *Balbir Singh and another Vs. State of Punjab*-AIR 2006 SC 3221.)

11. Learned counsel for the appellants strenuously urged that the aforesaid two dying declarations were inconsistent, therefore, it was not safe to rely on them. Even the trial Court did not find its safe to rely on them against accused Shanta Bai and acquitted her. He placed reliance on the decision of the Apex Court rendered in *Smt. Kamla Vs. State of Punjab*-AIR 1993 SC 374, wherein it has been held that the dying declaration should satisfy all the necessary tests and one such important test is that if there are more than one dying declaration they should be consistent particularly in material particulars.

12. On perusal of dying declaration Ex. P/15 recorded by Executive Magistrate Ramesh Pandey (PW9), it is revealed that in earlier portion of it deceased stated that her mother-in-law, sister-in-law, and her sister-in-law's son burnt her. All of them poured kerosene and set fire to her, but in

later part of it, she stated that the name of her mother-in-law was Kamla, elder mother-in-law was Shanta Bai, Dewar was Samadhan and her sister-in-law's son was Pawan. All these persons had set fire to her. On examining this statement critically, it appears that in earlier portion of it, she did not name appellant Samadhan, whereas in later part making the general statement. She stated that all these persons set fire to her. In the statement Ex. P/25, recorded by Santosh Pathak (PW9), she stated that her mother-in-law Kamla, elder mother-in-law Shanta Bai, her Dewar Samadhan and sister-in-law's son Pawan used to quarrel with her. On the day of occurrence, appellant Kamla poured kerosene on her, Shanta Bai and Pawan caught hold of her hands and appellant Samadhan set fire to her. No specific statement was made against appellant Samadhan in the dying declaration Ex. P/15. It was not stated that Samadhan set fire to her. On the contrary, in the earlier part of it, it was stated that her mother-in-law, sister-in-law and sister-in-law's son set fire to her. The evidence of dying declaration, therefore, against mother-in-law i.e. appellant Kamla Bai appears consistent. However, it appears inconsistent and doubtful about the act attributed to appellant Samadhan. Under the similar circumstances, Supreme Court in *Balvir Singh Vs. State of Punjab* (supra), keeping in view the inconsistencies between the two dying declarations extended benefit of doubt to one of the appellants. In our opinion, therefore, it would not be safe to uphold the conviction of appellant Samadhan on the basis of evidence of dying declarations. However, after having appreciated the two dying declarations, we find it established beyond doubt that appellant Kamla Bai actively participated in causing death of the deceased and, therefore, her conviction under Section 302 read with Section 34 of the Indian Penal Code by the trial Court was justified.

13. For the aforementioned reasons, we are of the opinion that there is no merit in the appeal of appellant No.1 Kamla Bai. Her conviction is affirmed. The conviction and sentence of appellant no.2 Samadhan under Section 302/34 of the Indian Penal Code, however, is set aside. He shall be released forthwith if, not required in any other case.

14. Appeal is allowed in part to the extent mentioned hereinabove.

Appeal partly allowed.

I.L.R. [2011] M. P., 1335
APPELLATE CRIMINAL
Before Mr. Justice S.N. Aggarwal
Cr.A. No. 671/2006 (Gwalior) decided on 9 February, 2011

SAGAR SINGH ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. Penal Code (45 of 1860), Section 373 - Abduction - Age Determination **- In absence of any direct evidence regarding age of prosecutrix, only option available with Court is to get her age determined by ossification test.** (Para 10)

क. दण्ड संहिता (1860 का 45), धारा 373 –अपहरण – आयु निर्धारण – अभियोक्त्री की आयु के संबंध में किसी प्रत्यक्ष साक्ष्य के अभाव में, ओसीफिकेशन टेस्ट द्वारा उसकी आयु निर्धारित करने का न्यायालय को एक मात्र पर्याय उपलब्ध है।

B. Penal Code (45 of 1860), Section 376 - Rape - Consenting Party **- Appellant alleged to have taken the prosecutrix to his house where several family members including ladies were there who were alleged to have collected there - Prosecutrix did not inform any body and kept quite - House of appellant surrounded by several houses - On the next day she had gone along with niece of appellant for easing herself where she met with several women but did not raise any protest of alleged rape committed by appellant - Prime conduct of prosecutrix proves that she was a consenting party - In cases where prosecutrix remains silent and does not raise any protest/hue and cry despite ample opportunities, she is presumed to be a consenting party unless there are circumstances on record to rebut the said presumption.** (Para 13)

ख. दण्ड संहिता (1860 का 45), धारा 376 – बलात्संग – सम्मत पक्षकार – अपीलार्थी कथित रुप से अभियोक्त्री को अपने घर ले गया जहां परिवार के कई सदस्य, जिसमें महिलाएँ सम्मिलित थी, वहाँ पर मौजूद थे, जो कथित रुप से वहाँ एकत्रित हुए थे – अभियोक्त्री ने किसी को सूचित नहीं किया और मौन रही – अपीलार्थी का मकान कई मकानों से घिरा हुआ – अगले दिन वह अपीलार्थी की मतीजी के साथ शौच के लिए गई थी, जहाँ पर वह कई महिलाओं से मिली परन्तु अपीलार्थी द्वारा कथित रुप से कारित बलात्संग का कोई विरोध प्रकट नहीं किया – अभियोक्त्री का मूल आचरण साबित करता है कि वह सम्मत पक्षकार थी – ऐसे

मामले में जहाँ अभियोक्त्री मौन रहती है और पर्याप्त अवसरों के बावजूद कोई विरोध/कोलाहल नहीं किया, उसे सम्मत पक्षकार होना उपधारित किया जाएगा जब तक कि उक्त उपधारणा का खंडन करने वाली परिस्थितियाँ अभिलेख पर मौजूद न हो।

Dharmendra Garg, for the appellant.

Vishal Mishra, P.P., for the respondent/State.

J U D G M E N T (ORAL)

S.N. AGGARWAL, J. :– This appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 filed by the appellant is directed against his conviction under Sections 376 (1) and 373 IPC vide impugned judgment of the trial court dated 14-8-2006 in Sessions Trial Case No. 59/04. The appellant has been sentenced to undergo RI for 10 years for offence under Section 376 (1) IPC and 7 years for offence under Section 373 IPC and fine with default stipulation.

2. I have heard the arguments of Mr. Dharmendra Garg, learned counsel appearing on behalf of the appellant and also of Mr. Vishal Mishra, learned Public Prosecutor appearing on behalf of the respondent / State. I have also perused the record of the trial court.

3. Briefly stated the facts of the prosecution case giving rise to this appeal are as follows :-

There were seven persons implicated as accused persons by the prosecution in crime no. 298/03 registered at Police station Jamner, District Guna. The appellant was one of them. Initially the crime was registered against the unknown persons on the basis of 'merg report' of the mother of the prosecutrix. The case was registered under sections 302 and 201 read with section 34 of IPC. It was during inquest proceedings the name of the appellant and six co-accused persons had surfaced and it was revealed that co-accused Mohan and Seema who were related to each other as husband and wife had brought the prosecutrix and her mother with them on the pretext of returning of loan amount telling them that the loan amount would be returned at village Jharpai. The prosecutrix and her mother were resident of Bhopal and they accompanied co-accused Mohan and Seema for Jharpai on 2-11-2003 but the above mentioned two accused persons in stead of taking them to Jharpai detained her at a well on the way where another co-accused Rajkumar is alleged to have committed repeated rape on the person of the prosecutrix at gun point

and from there the prosecutrix is alleged to have been sold to the appellant for Rs.10,000/- and on being sold, it is alleged that the appellant had brought the prosecutrix to his own house around 1 a.m. in the night intervening 5th and 6th of November, 2003 where he also committed rape with the prosecutrix under threat. The further case of the prosecution is that while the prosecutrix was being taken away by the appellant on being sold to him, the remaining co-accused persons had committed murder of her mother by giving beatings to her and setting her ablazed. After the investigation into the case was completed, challan under Section 173 of Cr.P.C. was filed by the prosecution against all the seven accused persons including the appellant. Co-accused Malthu, Santosh and Savitri Bai were charged by the trial court for offences under Sections 302, 302/149, 201, 343, 376 (2) (g) and 372 IPC, whereas the appellant was charged for offences under Sections 302, 302/149, 201, 343, 376 (2) (g) and 373 IPC.

4. Out of total seven persons involved in the crime in question, three of them namely Mohan, Seema and Rajkumar had absconded the trial and were declared absconders. The trial court after completing the requisite procedural formalities separated the trial of these three co-accused persons who had absconded the trial and held trial against the remaining four accused persons including the appellant.

5. In order to prove its charges against the appellant and his other co-accused persons, the prosecution had examined total 28 witnesses, out of whom, the prosecutrix is the most important witness and she is PW-24.

6. The trial court vide its impugned judgment has convicted the appellant's co-accused Malthu for offence under section 372 IPC and to the knowledge of the appellant, no appeal has been preferred by him against his said conviction. The appellant's two co-accused persons namely Savitri Bai and Santosh have been acquitted of all the charges by the trial court and there is no appeal against such acquittal by the State.

7. The appellant has been convicted by the trial court only for offences under sections 376 (1) and 373 IPC and has been acquitted of the remaining charges for which he was charged. The State has not preferred any appeal against the acquittal of the appellant by the trial court of charges other than his conviction under sections 376 (1) and 373 IPC.

8. Mr. Dharmendra Garg, learned counsel appearing on behalf of the appellant has vehemently argued that the impugned conviction of the appellant both under sections 376 (1) and 373 IPC cannot be sustained either on facts or in law. He has taken the Court through the evidence produced by the prosecution and the findings regarding age of the prosecutrix contained in the impugned judgment and by reference to the same, he has contended that the conclusion arrived at by the trial court regarding age of the prosecutrix to be less than 18 years at the time of incident is based only on surmises and conjectures and not supported from evidence on record.

9. It is an admitted case of the prosecution that no documentary evidence regarding age of the prosecutrix was either collected during investigation or was produced before the trial court. However, the prosecution had attempted to prove the age of the prosecutrix by getting her ossification test done. PW-8 Dr. Sitaram Singh, Radiologist, had carried out the ossification test on the prosecutrix and had given his report which is Ex.P-ll, according to which the age of the prosecutrix at the time of incident which took place between 2-11-2003 and 6-11-2003 was more than 17 years but less than 19 years. PW-8 Dr. Sitaram Singh has proved his report Ex.P-ll in his testimony before the court and rather he in his testimony has referred to medical jurisprudence by Mody to state that the age of the prosecutrix at the time of incident could be even around 21 years. This fact has been noticed by the learned trial court in para 35 of the impugned judgment. A perusal to the finding of the trial court regarding age of the prosecutrix contained in para 35 of the impugned judgment would show that there was no legal basis for the trial court to hold that the orosecutrix was under 18 years of age at the time of incident. Para 35 of the impugned judgment is relevant and is extracted below :-

> (35) अभियोत्री की उम्र अभियोजन के अनुसार घटना के समय 17 वर्ष की दर्शाई गई है और घटना दिनांक को उसकी उम्र 17 वर्ष होना साक्षी डॉ. निधि जैन (अ.सा.28) में भी दर्शित किया गया है, जिसमें अभियोत्री का परिक्षण किया था । यद्यपि अभियोजन की ओर से इस बिन्दु पर अभियोत्री का रेडियोलॉजिकल ऑसीफिकेशन टेस्ट भी कराया गया है । इस संबंध में डॉ. सीताराम सिंह (अ.सा.8) ने अपने कथन में उल्लेखित किया है कि उसने अभियोत्री के परिक्षण में अभियोत्री की उम्र 17 वर्ष से अधिक किन्तु 19 वर्ष से कम होना पाया था और और उसकी रिपोर्ट प्र.पी.–11 है । साक्षी ने यह

भी स्वीकार किया कि मोदी के मेडिकल ज्युरिसपूडन्स के आधार पर अभियोत्री की उम्र 21 वर्ष भी होना संभव थी । इस प्रकार साक्षी का अभिमत अभियोत्री का संभाव्य आयु वर्ग दर्शित करता है और घटना के समय इस साक्षी द्वारा पायी गयी न्युनतम उम्र 17 वर्ष से कम भी उम्र अभियोत्री की हो सकती थी । अभियोत्री (अ.सा.24) के कथनों के समय उसकी प्रकट उम्र 20 वर्ष दर्शित की गयी है, जो उसके कथनों विशेष में उल्लेखित की गई है । किन्तु इस साक्षी के कथन घटना के दो वर्ष से कुछ अधिक समय पश्चात् न्यायालय में हुए हैं । अतः इस दर्शित उम्र के अनुसार भी वह घटना के समय 18 वर्ष से कम उम्र की होना प्रकट होती है । फिर मृतिका की उम्र 35 वर्ष दर्शित की गयी है जो शव परिक्षण रिपोर्ट में भी उल्लेखित है । उस अनुसार भी अभियोत्री की उम्र घटना के समय 18 वर्ष से कम होना अस्वाभाविक या अपर्याप्त नहीं है । उम्र के बिन्दु पर अभियोत्री से कोई जिरह भी नहीं की गयी है ।

10. This Court in a recently decided case being Criminal Appeal No. 70/03 titled *Ajab Singh and others vs. State of Madhya Pradesh* (decided on 01-02-2011), has already taken aview that when there is no direct evidence regarding age of the prosecutrix available with the Court, the only option available is to get her age determined by the ossification test. I do not find any reason to take a view on this aspect different than what I have already taken in the aforementioned case. Since in the present case the age of the prosecutrix at the time of incident, in terms of ossification report Ex.P-ll, was found to be between 17 and 19 years of age, extending benefit of 2 years on either side of her age, the prosecutrix has to be treated more than 18 years of age on the date of incident.

11. As this Court has found that the age of the prosecutrix was more than 18 years at the time of incident, the conviction of the appellant under section 373 IPC cannot be sustained because the offence under section 373 IPC can be committed only with a person under the age of 18 years.

12. Whether the prosecutrix was a consenting party to rape or not is a relevant question that has to be decided by careful scrutinisation of the prosecutrix evidence in the light of surrounding circumstances. On this aspect of the rftatter, the testimony of the prosecutrix being PW-24 is most relevant and needs a close look by reading the same in between the lines so as to separate the chaff from the grain. On a careful scrutiny of the testimony of the prosecutrix (PW-24), it may be seen that she has

given some details with regard to alleged rape committed with her by appellant's co-accused Rajkumar but when it came to role of the appellant, her testimony of alleged rape by him appears to be far from truth. To support this view, the reference can conveniently be made to paras 14, 15 and 16 of her testimony as this is the only evidence given by her pertaining to appellant with regard to alleged rape. Paras 14, 15 and 16 of the testimony of the prosecutrix are extracted below:-

14– मोहन के हाथ सागर और मोहन के पिता को बुलवाया और सागर को राजकुमार और मोहन ने कहा कि पूजा को ले जाओ तो सागर मुझे ले जाने लगा । इस पर मैने कहा कि मैं मम्मी के साथ रहूँगी हम तुम्हें मम्मी के साथ भोपाल पहुँचा देंगे यह बात प्रदर्श डी. 1 में लिखा दी थी अगर उल्लेखित न हो तो कारण नहीं बता सकती । मैं रात को एक बजे सागरसिंह के यहाँ पहुँची थी । सागरसिंह का बड़ा मकान है उसके परिवार में बहुत लोग हैं भाई, भाभी बहिनें हैं उस समय बहुत से लोग एकत्रित हो गये थे मैंने वहां औरतों से कुछ नहीं कहा । यह कहना गलत है कि उस दिन औरतों के पास सो गयी ।

15– सागरसिंह मुझे रात में एक बजे ले गया था यह बात प्रदर्श डी. में बता दी थी । अगर न लिखी हो तो कारण नहीं बता सकती । पुलिस ने घर की औरतों के बयान नहीं लिये । मैंने पुलिस को बता दिया था कि सागरसिंह की घर की औरतें रात में एकट्ठी हो गयी थी । राम मैंने कोई चिल्ला चोट नहीं की थी । मेरे शारीर पर इतनी चोटें थीं कि मुझसे लेटते नहीं बन रहा था । रात में मेरी चोटों का इलाज किसी ने नहीं किया । रात में मुझे और छिलने की चोट आयी और खून निकल आया कपड़ों पर खून के दाग लग गये थे । सागरसिंह के बिस्तरों पर खून के दाग लग गये थे । पुलिस वालों को मैंने बता दिया था वे लोग मुझसे गाली–गलोंच करने लगे थे "स्वतः कहा"

16– जिनने बयान लिये उन्हें उक्त बात बता दी थी । मेरे कपड़े पुलिस ने पेटीकोट पुलिस ने जप्त किया था । सागरसिंह के घर से साड़ी, ब्लाउज भी जप्त किया था उसमें भी खूँन लग रहा था । जिस बिस्तर में खून लग रहा था वह जप्त नहीं किये । मेरे सामने कोई पैसों का लेन–देन नहीं हुआ । मेरे सामने मेरी मम्मी से पैसों की बातचीत नहीं हुयी थी । ऐसा नहीं हुआ कि मैं दूसरे दिन भी कुएँ पर रही । प्रदर्श डी. 1 में ऐ से की बात दूसरे दिन .....ही उक्त बात मैंने पुलिस बयान में प्रदर्श डी. 1 में नहीं लिखायी थी । यह कहना गलत है कि मैं उस रात्री में एक बजे सागरसिंह के याहं नहीं गयी । यह कहना गलत है कि मैं असत्य कथन कर रही हूँ । यह कहना गलत है कि मेरे साथ जो भी बुरा काम किया वह राजकुमार ने किया है स्वतः कहा कि सागरसिंह ने भी किया है । यह सही है कि सागरसिंह के मकान के

आस–पास और मकान हैं और लोग रहते हैं मैं सुबह लेट्रिंग करने गयी थी मैं सागरसिंह की भतीजी को लेकर बाहर लेट्रिंग करने गयी थी । मैं जहां लेट्रिंग करने गयी वहां पर और गांव की महिलायें कर रही थी । मैंने वहां किसी से बात नहीं की । और न ही चिल्लाई थी ।

13. A careful reading of the above testimony of the prosecutrix pertaining to alleged rape committed by the appellant with her would show that the prosecutrix had reached the house of the appellant around I a.m. in the night intervening 5th and 6th of November, 2003 and at that time according to her, many persons were present in the house of the appellant including his brother, sisters-in-law and sisters. She has testified that when she reached at his house many people had collected there including several females but she did not raise any protest regarding why she was brought to the house of the appellant at dead of night. Her testimony that the appellant had committed rape with her during the night of 5th and Sth of November, 2003 appears to be unbelievable having regard to the manner in which the offence is alleged to have been committed by him. The prosecutrix was confronted with her statement under section 161 Cr.P. C. by the defence which does not contain the details of the manner in which the offence is alleged to have been committed by the appellant testified by her for the first time before the court. It may be noted that the prosecutrix in her cross-examination done on behalf of the appellant has admitted the suggestion that the house of the appellant was surrounded by several other houses inhabited by lot of people. She has deposed that on the next morning of the date of incident she had gone for easing alongwith the niece of the appellant where she had met several other women also easing but did not raise any protest of the alleged rape committed with her by the appellant. Even if the version of the prosecutrix that the appellant had committed rape with her is believed for a moment, still the appellant cannot be convicted on charge of rape because the post crime conduct of the prosecutrix proves that she was a consenting party to rape with her. I am of the view that the prosecutrix is presumed to be a consenting party to rape with her, unless there are circumstances on record to rebut the said presumption, in cases where she remains silent & does not raise any protest / hue & cry despite ample opportunities for the same.

14. In the present case, the prosecutrix has given only a single instance of rape by the appellant with her during night of 5th and 6th of November,

2003. She had ample opportunities to raise a protest or her voice if she was raped against her consent. Her silence, in the opinion of this court, amounts to consent on her behalf. In the peculiar facts and circumstances of the case, it is difficult for me to swallow that the appellant had committed rape on the prosecutrix against her consent.

15. This court is quite conscious of the legal position that normally the Courts should not discard the version of the prosecutrix because she does not gain anything in putting her own honour at stake by false implication of an accused person, but at the same time, the Courts should also bear in mind that in the changed values of our society, false charges of rape also cannot be ruled out. There may be some rare instances where parents might persuade their gullible or obedient daughter to make a charge of rape against an accused to wrap him in a false case either to take revenge or extort money or to get rid of financial liability.

16. In the present case, the defence of the appellant throughout had been that he has been falsely roped by the prosecutrix in the present crime. In the opinion of this court, the appellant, if not entitled to clear acquittal on charge of rape, is at least entitled to get benefit of doubt in view of the nature of evidence regarding his alleged culpability in the crime on record. Hence, the conviction of the appellant even for offence under Section 376 (1) IPC cannot be sustained.

17. In view of the foregoing, this appeal is allowed. Impugned judgment of conviction and order on sentence passed by the trial court quo the appellant is hereby set-aside. The Jail Superintendent is directed to release the appellant forthwith, if not required in any other case. His release warrant be dispatched by the Registry immediately. Fine, if any, deposited by the appellant be returned to him.

Appeal allowed.

I.L.R. [2011] M. P., 1343
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena & Mr. Justice T.K. Kaushal
Cr. A. No. 2669/2000 (Jabalpur) decided on 1 March, 2011

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

A. Evidence Act (1 of 1872), Section 118 -Child witness - **Evidence should be scrutinized with care and caution especially when she claimed to be an eyewitness, but it can be accepted if it otherwise appears to be trustworthy.** (Para 12)

क. साक्ष्य अधिनियम (1872 का 1), धारा 118 – बाल साक्षी – साक्ष्य की संवीक्षा सतर्कता और सावधानी के साथ करनी चाहिए, विशेषतः जब वह प्रत्यक्षदर्शी साक्षी होने का दावा करती है, परंतु उसे स्वीकार किया जा सकता है यदि अन्यथा वह विश्वसनीय प्रतीत होती है।

B. Evidence Act (1 of 1872), Section 25 - Confession -- **Section covers a confession made when accused was free and not in police custody, as also the one made before any investigation has begun - F.I.R. being a confessional statement of accused would not be admissible in evidence being hit by the Section.** (Para 16)

क. साक्ष्य अधिनियम (1872 का 1), धारा 25 – संस्वीकृति – अभियुक्त जब मुक्त था और पुलिस अभिरक्षा में नहीं था तब की गई संस्वीकृति एवं कोई जाँच आरंभ होने से पूर्व की गई संस्वीकृति को धारा समाविष्ट करती है – एफ.आई.आर. अभियुक्त का संस्वीकृति कथन होने के कारण धारा द्वारा आघात होने से साक्ष्य में स्वीकार्य नहीं होगा।

Durgesh Gupta, for the appellant.
Prakash Gupta, P.L., for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by : RAKESH SAKSENA, J. :–Appellant has filed this appeal against the judgment dated 4th October, 2000 passed by Sessions Judge, Chhindwara in Sessions Trial No.10/2000 convicting him under section 302 of the Indian Penal Code and sentencing him to imprisonment for life.

2. In short, facts of the case are that appellant was the son-in-law of

Rukhma Bai, the deceased. Rukhma Bai, along with her four children resided in village Noniya Karbal. Appellant resided in the neighbouring house of deceased. His wife namely Radha Bai had already died. Since appellant frequently used to come drunk and quarrel with other family members, deceased used to ask her to leave the house. On 1.12.1999 in the morning at about 10:30 o'clock when Rukhma Bai was coming back to her house after answering the call of nature, when she passed from front of the house of appellant, he dealt blows by pointed spear like iron rod to her. She shouted and fell down. When her daughter Maya Bai (PW-1) went to save her, appellant ran after her to assault with the iron rod. On Maya Bai's crying, Bhagrathi Bai (PW-2), Parwati Bai (PW-4), Subi Bai and other people of the neighborhood reached there. Appellant taking his son and the iron rod ran away on his bicycle. Maya Bai narrated the incident to other persons.

3. Appellant himself went to police station, Chhindwara on the same day and lodged first information report Ex.P/1 at 11:30 a.m. On his report, marg intimation Ex.P/2 was also recorded. Police reached at the spot, conducted inquest proceedings and recorded memorandum Ex.P/5. There were injuries on the head, neck and the hand of deceased. On the same day, police arrested the appellant and on his information Ex.P/3 recovered and seized a ballam vide seizure memo Ex.P/4 from the drain of the field of Chokhe Jain. Blood stained earth, clothes of deceased and appellant were seized from the spot and sent to Forensic Science Laboratory, Sagar.

4. Autopsy of the dead body was conducted by Dr. Chandrashekhar (PW-6) in district hospital, Chhindwara, who vide his postmortem examination report Ex. P/12 found five injuries on the body. He also examined the pointed iron rod sent to him, which was recovered from the appellant and opined that injuries found on the body of deceased could have been caused by it. After completion of investigation, charge sheet was filed and the case was committed for trial.

5. During trial, appellant abjured his guilt and pleaded false implication. According to him, when he came back to his house, he saw Rukhma Bai lying on the passage in front of his house.

6. Learned Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, found appellant guilty of intentionally

causing death of Rukhma Bai, convicted and sentenced him under section 302 I.P.C. as aforesaid by the impugned judgment, which has been challenged in this appeal.

7. We have heard the learned counsel for the parties.

8. It was no longer disputed that deceased Rukhma Bai died of injuries found on her body. It is also reflected from the evidence of Dr. Chandrashekhar (PW-6) that dead body of Rukhma Bai was brought to district hospital, Chhindwara by police constable. On postmortem examination, he found following injuries on her body:-

> (i) Incised wound 3" x ½"x bone deep on scalp placed obliquely over fronto parietal plane on head. On removal of scalp skull bone was found fractured. Fracture was about 7" long of fronto parietal bone of skull, obliquely placed, corresponding to incised wound line of scalp.
>
> (ii) Abrasion with incised wound over front of right upper arm.
>
> (iii) Contusion ½" x ¼", ½" x ½" on right side of neck.
>
> (iv) Two contusions ½" x 1" and ¼" x ¼" on left side of neck.
>
> (v) Incised wounds were spindle in shape. Their edges were sharp cut. These injuries were caused by hard and sharp object. Injuries were sufficient to cause death of deceased and were homicidal in nature.
>
> In the opinion of doctor, death was caused due to shock and haemorrhage as a result of fracture of skull bone caused by hard and sharp pointed object.

9. Apart from above evidence, Maya Bai (PW-1), Bhagrathi Bai (PW-2), Ramesh (PW-3) and Parwati Bai (PW-4) deposed that they saw injuries on the body of Rukhma Bai which were caused by the appellant. Inspector Mithlesh (PW-5) went at the spot, prepared inquest memo randum Ex.P/5 and recorded the injuries found on the body of deceased. He sent the dead body for postmortem examination to district hospital. Postmortem examination report Ex.P/12 written and signed by Dr.Chandrashekhar (PW-6) is also placed on record. It was, thus, clearly evident that deceased Rukhma Bai died of homicidal injuries caused by sharp edged weapon.

10. Learned counsel for the appellant, however, submitted that the trial Court gravely erred in placing implicit reliance on the evidence of Maya Bai (PW-1), Bhagrathi Bai (PW-2) and Parwati Bai (PW-4). Maya Bai being a child of about 12 years of age, was not a reliable witness. Trial Court failed to consider that appellant was falsely implicated. Learned counsel for the State, on the other hand, justified and supported the conviction of the appellant.

11. We have gone through the entire evidence on record. Maya Bai (PW-1) categorically stated that deceased was her mother and appellant was her brother-in-law. He lived in the neighborhood in the house which belonged to her father. On the day of occurrence at about 11:00 a.m. when she was standing in her courtyard and her mother was coming after answering the call of nature, as soon as her mother reached near the door of the house, appellant brought a spear like weapon and dealt its blows on her hand, head and neck. Her mother fell down and blood oozed out from the wound. When she rushed to save her, appellant ran after her to assault. Hearing her cries, Subi Bai, Bhagrathi Bai and Parwati Bai also reached at the spot. Appellant taking his son with him ran away on a bicycle. Her mother died at the spot. According to her, she also narrated the incident to Bhagrathi Bai and Parwati Bai. Evidence of this witness was virtually not challenged. Only suggestion was put that deceased fainted and died because of falling. Appellant did not assault her.

12. It is true that Maya Bai (PW-1) is a young girl of about 12 years of age, but her evidence is clear, cogent and consistent. It was not seriously challenged by the defence. Even no suggestion was put to this witness that she was tutored by anybody. Evidence of child witness should be scrutinized with care and caution especially when she claimed to be an eyewitness, but it can be accepted if it otherwise appears to be trust-worthy.

13. Bhagrathi Bai (PW-2) deposed that when she was going to work in the house of Ajay Patel, she saw deceased going to her house. Appellant suddenly came out of his house and assaulted her with a spear on her hand, head and neck. She fell down and died. Appellant along with his son went away on the bicycle. Evidence of this witness was also not seriously challenged. In cross-examination, she denied the suggestion that she did not see appellant assaulting deceased.

14. Evidence of Maya Bai (PW-1) finds corroboration from the evidence of Parwati Bai (PW-4), who deposed that when she was tying her goat in the courtyard, hearing hue and cry of Maya, she went to her house and saw deceased lying in front of the house of appellant. Blood was oozing out of her head. Maya informed her that appellant assaulted deceased.

15. Evidence of Maya Bai (PW-1) and Bhagrathi Bai (PW-2) finds support from the evidence of Dr. Chandrashekhar (PW-6), who performed the postmortem examination of the body of deceased and found incised and other injuries on her body. Dr. Chandrashekhar categorically stated that injuries found on the body of deceased could have been caused by the weapon which was sent to him for examination. In the opinion of Dr.Chandrashekhar, injuries found on the body of deceased were homicidal and sufficient to cause death.

16. Trial Court rightly held that the first information report Ex.P/1 which was a confessional statement of accused was not admissible in evidence being hit by section 25 of the Evidence Act. The expression "accused of any offence" covers a person accused of an offence at the trial whether or not he was accused of the offence when he made the confession. This section covers a confession made when accused was free and not in police custody, as also the one made before any investigation has begun.

17. After close analysis of the evidence on record, we find that prosecution was successful in establishing that appellant caused the death of deceased with intention to commit her murder. The finding of conviction recorded by the trial Court does not suffer from any illegality or infirmity calling for any interference.

18. Thus, we find no merit in this appeal. We uphold the conviction of the appellant and sentence of life imprisonment awarded to him under section 302 I.P.C.

19. Appeal fails and is dismissed.

Appeal dismissed.

I.L.R. [2011] M. P., 1348
APPELLATE CRIMINAL
Before Mrs. Justice Sushma Shrivastava
Cr. A. No. 185/1996 (Jabalpur) decided on 4 March, 2011

SADAN @ NANHU ...Appellant
Vs.
STATE OF M.P. ...Respondent

***Penal Code (45 of 1860), Section 376 - Consent* - Stray suggestions made in cross-examination of the Prosecutrix, which were denied by her, would not imply any consent on her part.** (Para 20)

दण्ड संहिता (1860 का 45), धारा 376 – सम्मति – अभियोक्त्री के प्रति परीक्षण में भटके हुए सुझाव दिये गये, जिन्हें उसके द्वारा अस्वीकार किया गया, उसकी ओर से कोई सम्मति विवक्षित नहीं करेगा।

Cases referred :
AIR 2000 SC 1812, AIR 2004 SC 2884, AIR 2005 SC 1248, AIR 1991 SC 1853, 2005 AIR SCW 6009, AIR 2004 SC 85, AIR 2007 SC (SUPP.) 847, AIR 1998 SC 2694, AIR 2005 SC 203, AIR 2003 SC 1639.

Siddharth Datt, with *G.P. Patel,* for the appellant.
Prabhat Singh, P.L., 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 First Addl. Sessions Judge, Balaghat in S.T. No.96/93, decided on 04.01.96.

2. Appellant has been convicted under Section 450, 376 of IPC and sentenced to rigorous imprisonment for seven years for each of the offences, by the impugned judgment. Both the sentences were directed to run concurrently

3. According to prosecution, on 16.1.93 about 12 'O'clock in the noon at village Parsatola, when prosecutrix was all alone in the house, her parents and other family members having gone to work in the field, appellant Nanhu, who lived in the neighbouring house, came to the house of the prosecutrix and caught hold of her. Appellant proposed her for sex, but she declined, then he forcibly dragged her inside the house, prosecutrix pushed him, but he overpowered her and bit her on her cheeks,

fell her on the ground, undressed her and committed forcible sexual intercourse with her. On her screaming, the uncle and cousin sister of the prosecutrix, namely, Bhandari and Sevanta came there, then appellant fled away. Prosecutrix went to the Police Station alongwith her parents, uncle and sister Sevanta and lodged the FIR at Police Station Kirnapur, District Balaghat. On the basis of her report, an offence was registered against the appellant and was investigated. Prosecutrix was sent for medical examination. On being arrested, appellant was also sent for medical examination. The saree, and vaginal slide of the prosecutrix collected during her medical examination as well as the underwear and blood stained shirt of the appellant, and his pubic hair were seized by the Police. The broken bangles and earthen pot broken at the time of incident were also seized by the Police. The seized articles were sent for forensic examination. After due investigation, appellant was prosecuted under Section 376, 324 and 448 of IPC and was put to trial.

4. Appellant denied the charges framed against him under Sections 450, 376 and 324 of IPC, and pleaded false implication.

5. Learned Additional Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, acquitted the appellant of the charge under Section 324 of IPC, but found him guilty under Sections 450 and 376 of IPC for committing rape with the prosecutrix in her house, convicted and sentenced him as aforesaid, by the impugned judgment, which has been challenged in this appeal.

6. Learned counsel for the appellant submitted that the trial court did not appreciate the evidence properly and erroneously convicted the appellant on the basis of unreliable testimony of the prosecutrix without any medical corroboration. Learned counsel for the appellant further submitted that the trial court failed to consider that the prosecutrix was a major girl, as also married, and her conduct revealed that she was a consenting party.

7. Learned counsel for the State, on the other hand, justified and supported the conviction of the appellant.

8. Perused the evidence on record. Prosecutrix (P.W-1) deposed in her evidence that at the relevant time she had come to her house after working in the field, gave food to her niece and after leaving her for

playing when she came back to her house and tried to close the doors, appellant caught hold of her from the back and dragged her; prosecutrix pushed the appellant, as a result, he dashed against an earthen pot, which was broken into pieces, but he again used force to her and committed forcible sexual intercourse with her. According to prosecutrix (P.W-1), at the time of incident she was all alone in her house, her parents having gone to the field, and when she screamed her uncle Bhandari and cousin Sevanta Bai had come to her, but by that time, appellant had already ravished her.

9. Prosecutrix (P.W-1) further deposed that after the incident, her cousin sister had called her parents and she had gone to the Police Station with them about 2 'O'clock in the noon and had lodged the report with the Police. Her report (Ex.P-5) was recorded by S.K. Maravi (P.W-7), S.H.O. Kirnapur on 16.1.93.

10. Bhandari (P.W-2), the uncle of the prosecutrix, who lived in the neighbouring house, also corroborated this fact that about 11 'O'clock in the noon, while he was passing by the side of the house of prosecutrix, he saw that her she-goat was bleating; he, therefore, went inside the house and saw that appellant was pulling the saree of the prosecutrix, and she told him that appellant had committed rape with her. Sevanta Bai (P.W-3), the cousin sister of the prosecutrix also stated in her evidence that she had heard the screams of the prosecutrix and her uncle sent her for calling the parents of the prosecutrix.

11. Medical evidence also lends corroboration to the version made by the prosecutrix. Dr. Archana Shukla (P.W-9), who medically examined the prosecutrix on 17.1.93 at 6 'O'clock in the evening, found three small linear abrasions of about 1 mm size over her right lower jaw, which was located 3-4 cm away from her mid of the chin. According to Dr. Archana Shukla (P.W-9), these injuries were caused by rough and sharp object within 24 to 48 hours. Her medical report (Ex.P-12) is also placed on record.

12. Dr. N.P. Tamrakar (P.W-6), who medically examined the appellant on 18.1.93, also found the following injuries on his person:-

> "(i) Abrasion 4 cm x ½ cm over upper 1/3rd at back of the left forearm.
>
> (ii) Abrasion 2 cm x ¼ cm over upper 1/3rd at back of the left forearm.

(iii) Linear abrasion 4 cm over lower 1/3rd at back of the left forearm.

(iv) Abrasion 3 cm x ½ cm over left side of the chest in mid axillary line at 6th rib level.

13. According to Dr. N.P. Tamrakar (P.W-6), the above injuries found on the person of appellant were caused due to hard, blunt and rough object and were of 48 hours' duration. He also found that appellant was well built young male adult and his external genital organs were well developed. His medical report (Ex.P-4A) is also placed on record.

14. The broken pieces of bangles and earthen pot were also seized by Police Officer N.K. Shrivastava (P.W-4) from the place of occurrence as corroborative evidence vide seizure memo (Ex.P-2).

15. Learned counsel for the appellant, however, submitted that the evidence of the prosecutrix (P.W-1) was not at all reliable for want of corroboration from the medical evidence. According to learned counsel for the appellant, the prosecutrix alleged use of force and sexual violence, but Dr. Archana Shukla (P.W-9), who medically examined the prosecutrix did not find any external or internal injury over her body except very few small and minor abrasions, which could also be self inflicted. It was further submitted that the absence of injuries on her body revealed that the prosecutrix, who was admittedly more than sixteen years of age, was a consenting party and the description of the incident as narrated by her in para 16 of her deposition regarding undressing her etc. could not have been possible without her consent. Learned counsel for the appellant also submitted that though the prosecutrix made allegations of rape against the appellant, yet she did not try to escape, nor she shouted for help, though her uncle lived in the neighbouring house. Learned counsel for the appellant also submitted that her niece Sangeeta, who was a key witness, was not examined by the prosecution, nor her uncle Bhandari (P.W-2) and cousin sister Sevanta had seen the appellant committing rape with the prosecutrix.

16. In view of the aforesaid submissions made by learned counsel for the appellant, the evidence of the prosecutrix is closely examined. Upon careful scanning of the entire testimony of the prosecutrix, her evidence is found to be cogent and trustworthy and it inspires confidence. Prosecutrix (P.W-1) categorically deposed that she was all alone in the

house at the time of occurrence and had left her niece outside for playing, as such there was no question of her niece being a witness to the occurrence or to be examined by the prosecution. Prosecutrix (P.W-1) categorically deposed that when she was trying to close the doors of her house, appellant caught hold of her from the back and dragged her. Her evidence also reveals that she tried to push the appellant, as a result of which appellant dashed with an earthen pot, the broken pieces of which were also subsequently seized by the Police from the place of occurrence. This fact is also clearly mentioned in the FIR (Ex.P-5) promptly lodged by the prosecutrix on the same day. Prosecutrix (P.W-1) also deposed that appellant sustained injury in his hands while falling on the earthen pot. The various injuries and abrasions found by Dr. N.P. Tamrakar (P.W-6) on the body of appellant, also lends corroboration to this fact. The injuries and abrasion found on the chest of the appellant indicates that the prosecutrix offered resistance at the time of commission of rape. That also nullifies the submission made on behalf of the appellant that prosecutrix was a consenting party.

17. It is pertinent to mention that the appellant was admittedly examined by the doctor on 18.1.93 and the injuries found on his person were said to have been caused before 48 hours, which also corresponds to the date and time of the occurrence, which took place on 16.1.93 in the day time. There are no reasons to doubt or discard the evidence of Dr. N.P. Tamrakar (P.W-6) that as many as four simple injuries like abrasion were found on the person of appellant. Needless to repeat that three linear abrasions were also found on the person of prosecutrix (P.W-1) by Dr. Archana Shukla (P.W-9), who examined the prosecutrix on 17.1.93, and her injuries were also said to have been caused within 24 to 48 hours. There are no reasons to infer that the prosecutrix would herself cause such injuries on her face in order to make false allegations of rape against the appellant.

18. The mere fact that Dr. Archana Shukla (P.W-9) did not find any other external or internal injury on the body or private part of the prosecutrix, does not belie the evidence of the prosecutrix given against the appellant regarding sexual assault on her. It is evident from the testimony of Dr. Archana Shukla (P.W-9) that the vagina of the prosecutrix easily admitted two fingers and she was found habitual to sexual intercourse, therefore, in

such a situation any injury on the private part of the prosecutrix was hardly expected during sexual violation. Moreover, the mere absence of injuries on the person of the prosecutrix does not by itself falsify the case of rape. The Apex Court in the case of *State of Rajasthan Vs. N.K.* reported in AIR 2000 Supreme Court Page 1812 has held that the absence of visible mark of injuries on the person of prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any injuries or that she had not offered any resistance at the time of commission of crime; and absence of injury on the person of prosecutrix is not necessarily an evidence of falsity of allegation of rape or an evidence of consent on the part of the prosecutrix. It was also reiterated by the Apex Court in the case of *Dastagir Sab & another Vs. State of Karnataka* reported in AIR 2004 Supreme Court page 2884, that the absence of injury on the person of prosecutrix would not by itself be sufficient to discard the prosecution case. More so, in the instant case, small abrasion found on the face of the prosecutrix as well as the abrasions and scratch marks found on the body of appellant by Dr. N.P. Tamrakar (P.W-6) are also indicative of struggle and strengthen the version of the prosecutrix regarding sexual assault by the appellant.

19. The mere fact that the prosecutrix (P.W-1) was found habitual to sexual intercourse by Dr. Archana Shukla (P.W-9) is not a ground to suspect her testimony against the appellant. Even if the girl is habitual to sexual intercourse, as observed by the Apex Court in the case of *State of U.P. Vs. Pappu alias Yunus and another* reported in AIR 2005 Supreme Court page 1248, each and every person has no right or licence to intrude upon her privacy without her consent and to ravish her.

20. The vivid description given by the prosecutrix (P.W-1) in para 2 as well as in para 16 of her deposition unequivocally reveals that the prosecutrix was subjected to forcible sexual intercourse. The submission of learned counsel for the appellant that the sexual act, as described by the prosecutrix would not have been possible without her consent and the prosecutrix did not try to escape or scream, are devoid of substance, in view of description of the occurrence given by the prosecutrix that despite her resistance and push, the appellant used force to her and overpowered her by holding her hands, and gagged her mouth. The stray suggestions made in her cross-examination, that the prosecutrix came back to the

house in order to meet the appellant, which were denied by her, would not imply any consent on her part. Prosecutrix (P.W-1) also denied any acquaintance or relations with the appellant in para 13 of her deposition. Nothing of the sort transpires from her evidence that prosecutrix was familiar with the appellant or had any contact or affair with him so as to be consenting party in the incident. Moreover, had it been a case of consent, the prosecutrix would not have left her doors open, nor she would have screamed for help, as evident from her testimony that on hearing her screams, her uncle Bhandari (P.W-2) had come to her house, which is also borne out from the evidence of Bhandari (P.W-2) himself. It is also evident from the testimony of Sevanta (P.W-3), who is her cousin sister, that she had heard the screams of the prosecutrix and then she was called by Bhandari (P.W-2). Though Sevanta (P.W-3) has been declared hostile by the prosecution, but there are no reasons to disbelieve her statement that she had heard the screams of the prosecutrix. Needless to emphasize, as held by the Apex Court in the case of *Khujji @ Surendra Tiwari Vs. State of Madhya Pradesh* reported in AIR 1991 Supreme Court Page 1853, that 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. Although Bhandari (P.W-2), the uncle of the prosecutrix and her cousin sister Sevanta (P.W-3) have not actually witnessed the appellant committing rape with the prosecutrix, but that by itself cannot be a ground to reject the version of rape given by the prosecutrix (P.W-1) herself, which also stands corroborated by the promptly lodged FIR (Ex.P-5). It needs no emphasis, as reiterated by the Apex Court in the case of *State of Himachal Pradesh Vs. Asharam* reported in 2005 AIR SCW page 6009 that the testimony of the prosecutrix alone can form the basis of conviction, if it inspires confidence and is found to be reliable.

21. In the instant case, there are no reasons to doubt or suspect the version of the prosecutrix (P.W-1) made against the appellant that he subjected her to forcible sexual intercourse inside the house. It has come in the evidence of the prosecutrix that she was a married woman, and as her 'gauna' was not performed, she was staying in her parent's house. In such a situation it can hardly be presumed that prosecutrix would make a false allegation of rape against the appellant at the cost of

her honour and dignity and would take the risk of ostracization by her husband and in-laws. Thus, in view of the evidence as available on record, that the appellant subjected her to forcible sexual intercourse without her consent and against her will at her residential house, the conviction of the appellant as recorded by the trial court under Section 450 and 376 of IPC does not call for any interference.

22. The citations referred to and relied upon by learned counsel for the appellant as reported in AIR 2004 SC page 85, AIR 2007 SC (Supp) page 847, AIR 1998 SC page 2694, AIR 2005 SC page 203 and AIR 2003 SC page 1639 have turned on the peculiar and different set of facts of those cases and are of no avail to the appellant in the instant case.

23. As regards the sentence, there are no special or adequate reasons to reduce the sentence of seven years' rigorous imprisonment awarded to the appellant, which is minimum prescribed under Section 376(1) of IPC. There are also no reasons to reduce the sentence of seven years' rigorous imprisonment under Section 450 of IPC in the facts and circumstance of the case. No interference in the impugned sentence of imprisonment is thus called for.

Appeal has no merit, the same is hereby dismissed.

Appellant is on bail. He shall surrender forthwith to his bail bonds to serve out the remaining part of his sentence.

Appeal dismissed.

I.L.R. [2011] M. P., 1355
APPELLATE CRIMINAL

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

Cri. A. No. 865/2008 (Gwalior) decided on 8 March, 2011

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

Penal Code (45 of 1860), Section 364A, Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, M.P. 1981, Section 13, Evidence Act, 1872, Section 9 - Test Identification Parade - No Test Identification Parade of accused persons conducted during

investigation - Dock Identification for the first time in Court not reliable as abductees have specifically stated that accused persons were not known to them and they even could not identify the appellants by their names in Court - Hazardous to place reliance on the evidence of Dock Identification - Appeal allowed. (Paras 13 to 17)

दण्ड संहिता (1860 का 45), धारा 364ए, डकैती और व्यपहरण प्रभावित क्षेत्र अधिनियम, म.प्र. 1981, धारा 13, साक्ष्य अधिनियम 1872, धारा 9 – शिनाख्त परेड – अन्वेषण के दौरान अभियुक्तगण की कोई शिनाख्त परेड नहीं कराई गई – प्रथम अवसर पर न्यायालय में कठघरे में शिनाख्त विश्वसनीय नहीं, क्योंकि अपहर्तों ने विनिर्दिष्ट रुप से कथन किया है कि वे अभियुक्त गण को नहीं जानते थे और यहां तक कि वे न्यायालय में अपीलार्थियों को उनके नाम से पहचान नहीं सके – कठघरे में शिनाख्त की साक्ष्य पर विश्वास करना खतरनाक है – अपील मंजूर।

Cases referred :

AIR 1979 SC 1127, AIR 1982 SC 839,AIR 1980 SC 1382, AIR 1944 FC 38,AIR 2002 SC 3325, AIR 2007 SC 1729.

V.K. Saxena, with *Ashish Saraswat,* for the appellants.

C.S. Dixit, P.P., for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by : **Brij Kishore Dube, J. :**–Feeling aggrieved by the judgment of conviction and order of sentence dated 15th August,2008, passed in Special Case No.24 of 2007 by the Special Judge, Datia convicting appellants under Section 364-A, IPC read with Section 13 of the Madhya Pradesh Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981 and thereby sentencing each of them to suffer rigorous imprisonment for life and fine of Rs.50,000/, in default, further rigorous imprisonment for three years, the appellants have filed this appeal under Section 374 (2) of the Code of Criminal Procedure, 1973.

2. Prosecution story, in brief, may be narrated as under:

(i) That, on 10th November, 2006 at about 9.00 A.M., Lakhan Singh (P.W.3) and Puran Singh (P.W.4) went to forest of Maunda (Bharkuan) for grazing their goats but they had not returned back till the evening, therefore, their family members went to the forest in search of them but they were untraceable. Therefore, P.W.2, Ratiram father

of Lakhan Singh went to the Police Chowki Mangarol (Police Station, D. Paar) on 11th November,2006 at 11.30 A.M., and lodged a Gumshudgi report (Exhibit P/6). The criminal law was triggered and set in motion;

(ii) That, on 27th November,2006, the missing persons, Lakhan Singh and Puran Singh escaped from the custody of the accused persons and reached the Police Station, D. Paar and stated that the accused persons have abducted them for ransom, therefore, Sub Inspector, Devlal Dhanole (P.W.6) has prepared recovery panchnama (Exhibit P/3) and recorded their statements. They were sent to Government Hospital, Seonda for medical examination; and

(iii) That, the Investigation Officer after recording the statements of the witnesses who were acquainted with the facts of the offence, arrested the accused persons including the appellants. On completion of the investigation, a charge sheet was filed against six accused persons including the appellants before the Special Court.

3. The learned Special Judge on the basis of the material placed on record framed charge punishable under Section Section 364A, IPC read with Section 13 of the Madhya Pradesh Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981 and under Section 323 read with Section 149 of IPC against all the accused persons including the appellants. The appellants denied the charge and claimed to be tried. The defence of the appellants is of false implication and the same defence set forth in her statement recorded under Section 313 of the Code of Criminal Procedure, 1973.

4. To bring home the charge, the prosecution has examined as many as 6 witnesses and placed Exhibits P/1 to P/16, the documents on record. The accused/appellants have not examined any witness in their defence.

5. The learned Trial Judge on the basis of evidence placed on record came to hold that charge under Section Section 364A, IPC read with Section 13 of the Madhya Pradesh Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981 has been proved against the accused/appellants

as a result of which they have been convicted and passed the sentence as mentioned hereinabove, however, they have been acquitted from the charge under Section 323/149 of the IPC. The learned Trial Court after close scrutiny of the evidence came to hold that the charge under Section 364A, IPC read with Section 13 of the Madhya Pradesh Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981 and under Section 323/149 of the IPC are not proved against the coaccused, Kallu, Balveer Singh and Nandu alias Nandkishore and, eventually, acquitted all of them from the aforesaid charges.

6. In this manner, this appeal has been preferred by the appellants assailing their judgment of conviction and order of sentence passed by the learned Trial Court. The State of Madhya Pradesh did not file any appeal against the acquittal of the coaccused persons as well as the acquittal of the appellants, hence the case has attained finality in respect of the acquittal of the coaccused persons as well as under Section 323/149 of the IPC against the appellants.

7. Legality and propriety of the impugned judgment of conviction has been challenged by the appellants on the ground of misappreciation of the evidence on record. Learned senior counsel for the appellants has submitted that there was no cogent evidence to establish the ingredients of offence under Section 364A, IPC read with Section 13 of the Madhya Pradesh Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981, two abductees, namely; Lakhan Singh and Puran Singh are saying that demand of ransom was made but this fact did not find place in their case diary statements. No test identification has been conducted by the Investigating Officer. Identification of the accused made for the first time in Court by abudctees after 15 months from the date of the incident, therefore, conviction cannot be based upon such identification. Learned senior counsel has placed reliance on the case of *Dana Yadav alias Dahu and others Vs. State of Bihar,* AIR 2002 SC 3325 and *Babloo Vs. State of Madhya Pradesh,* 2009 Cr.L.J. NOC 652 MP, Gwalior ench.

8. On the contrary, Shri C.S.Dixit, learned Public Prosecutor has supported the impugned judgment and finding arrived at by the learned Trial Court and submitted that the conviction in question is well merited.

9. In order to appreciate the merits of the rival contentions in a proper perspective, it would be necessary to advert to the evidence available on record.

10. According to Ratiram (P.W.2) in the morning on the fateful day, his son, Lakhan Singh and his nephew, Puran Singh went to the jungle Maunda for grazing goats. In the evening, the goats were returned back but his son and nephew had not come back then he went to the jungle in search of them but finds that they were untraceable. Thereafter, he went to the Police Chowki, Mangarol with his brother Kunji (P.W.1) and lodged Gumshudgi report (Exhibit P/6). Thereafter after 18 days his son, Lakhan Singh and nephew, Puran Singh came back, they narrated that they were abducted by the dacoits and when the dacoits were sleeping they escaped from their custody but they never stated their names as well as identity of the dacoits who had abducted them. Similar facts were stated by Kunji (P.W.1). Both of them have not supported the prosecution case and, therefore, they were declared hostile.

11. So far as the testimony of abductees, Lakhan Singh (P.W.3) and Puran Singh (P.W.4) is concerned, they have stated that on the fateful day they were grazing the goats in Maunda jungle. At that juncture, 04 miscreants; including the accused, Mohar Singh, Prakash alias Ram Prakash and Pappu alias Ramsiya who were present in the Court armed with weapons (guns) came there and asked to show the path-way of Maunda jungle and Ratangarh Mata. While they went along with them to show pathway, they were abducted by them for ransom. The miscreants/ accused persons caused marpeet and demanded Rs.10.00 lacs for each abductee and they were detained for 17-18 days and during that period the miscreants used to beat them and tied. One day in the night when the miscreants were sleeping, they managed to escape from the custody of the accused persons and reached to the Police Station in the morning about 04-05 hours where police has prepared their recovery panchnama (Exhibit P/5). On account of non-identification of the accused, Kallu, Balveer Singh and Nandu alias Nandkishore., these witnesses were declared hostile and were crossexamined by the Public Prosecutor.

12. On going through the testimony of both the abudctees, Lakhan Singh (P.W.3) and Puran Singh (P.W.4), this Court finds that the statements of Lakhan Singh (P.W.3) and Puran Singh (P.W.4) which were recorded firstly on 27th November, 2006 by the Police under Section 161 of the Cr.P.C., did not find place the names of the present appellants. Another statements of both the abductees were recorded on 07th January, 2007 in which they have stated that they were abducted by Anup Singh Gurjar,

Mohar Singh @ Lambu Dayu Dhimar, Jakhad @ Jakhar @ Atmaram Dhimar, Sarpanch @ Ramprakash @ Prakash Dhimar, Pappu @ Pathak Dhimar, Nandu @ Nanda Kishore Dhimar. In this regard, P.W.4, Puran Singh specifically pointed out that the names of the accused were told by the Police as well as his family members then only he stated their names in the police statement. P.W.3 Lakhan Singh and P.W.4, Puran Singh admitted that they did not know the appellants/ accused by their names.

13. So far as the identification of the accused persons/appellants by the abductees, P.W.3 Lakhan Singh and P.W.4 Puran Singh in the Court is concerned, they have very specifically stated that the appellants were not known to them, they even could not identify the appellants by their names in the Court. Though P.W.3, Lakhan Singh deposed that he identified the appellants in the test identification parade conducted by the Police in Sub Jail, Seondah but as per the prosecution case, no such test identification parade was conducted. The Investigating Officer, Devlal Dhanole (P.W.6) has specifically stated that no test identification parade was conducted to identify the accused persons by P.W.3, Lakhan Singh and P.W.4, Puran Singh. Similar statement was given by P.W.4, Puran Singh in paragraph 8 of his crossexamination. It is apposite to mention here that P.W.3, Lakhan Singh and P.W.4, Puran Singh had identified the appellants for the first time in the Court at the time of their evidence after about 09 months (on 02nd August, 2007) and 15 months (on 06th February,2008) of the incident respectively, therefore, the evidence of P.W.3, Lakhan Singh and P.W.4, Puran Singh in regard to the dock identification of the appellants cannot be relied upon. In this context, the Apex Court in the case of *Kanan and others Vs. State of erala,* AIR 1979 SC 1127 has held as under:

> "Where a witness identifies an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has been a previous T.I parade to test his powers of observations. The idea of holding T.I parade under Section 9 is to test the veracity of the witness on the question of capability to identify an unkown person whom the witness may have seen only once. It no T.I parade is held then it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused or the first time in Court."

14. In *Mohanlal Gangaram Gehani Vs. State of Maharashtra,* AIR 1982 SC 839, the Apex Court relying upon the decision in the case of *[V.C.Shukla Vs. State (Delhi Administration)* AIR 1980 SC 1382] and *Sahdeo Gosain Vs. The King Emperor,* AIR 1944 FC 38 has held that if the appellant was not known to the witness before the incident and was identified for the first time in the Court, in the absence of the test identification parade, the evidence of the witness was valueless and could not be relied upon.

15. The Apex Court in the case of *Dana Yadav alias Dahu and others Vs. State of Bihar* A.I.R. 2002 S.C. 3325 has held as under:

> "Failure to hold test identification parade does not make the evidence of identification in court inadmissible rather the same is very much admissible in law, but ordinarily identification of an accused by a wetness for the first time in court should not form basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check valve to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law. In exceptional circumstance only, evidence of identification for the first time in court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction."

16. In the case of *Ravi @ Ravichandran Vs. State Rep. by Inspector of Police,* AIR 2007 SC 1729, the Apex Court has observed in paragraphs 17 and 18 as under:

> "It is no doubt true that the substantive evidence of dentification of an accused is the one made in the court, a judgment of conviction can be arrived at even if no test identification parade has been held. But when a First Information Report has been lodged against unknown persons, a test identification parade in terms of Section 9 of the Evidence

Act, is held for the purpose of testing the veracity of the witness in regard to his capability of identifying persons who were unknown to him. The witnesses were not very sure as to whether they had seen the appellant before. Had the accused been known, their identity would have been disclosed in the First Information Report. PW-1 for the first time before the Court stated that he had known the accused from long before, but did not know their names earlier, although he came to know of their names at a later point of time.

In a case of this nature, it was incumbent upon the prosecution to arrange a test identification parade. Such test identification parade was required to be held as early as possible so as to exclude the possibility of the accused being identified either at the police station or at some other place by the concerned witnesses or with reference to the photographs published in the newspaper. A conviction should not be based on a vague identification."

17. For the reasons stated hereinabove and the decisions of the Apex Court referred to hereinabove, it would be hazardous to place reliance on the evidence of dock identification of P.W.3, Lakhan Singh and P.W.4, Puran Singh. Therefore, we are unable to upheld the finding of the learned Trial Court convicting the appellants under Section 364A, IPC read with Section 13 of the Madhya Pradesh Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981 and we set aside the same.

18. Resultantly, this appeal succeeds and is hereby allowed. The judgment of conviction and order of sentence passed by the learned Trial Court is set aside and the appellants are acquitted from the charges. The appellants are in jail, they be set at liberty forthwith, if not required in any other case. The amount of fine if deposited, be refunded to the appellants.

Appeal allowed.

I.L.R. [2011] M. P., 1363
CIVIL REVISION
Before Mr. Justice N. K. Mody
C.R. No. 221/2010 (Indore) decided on 23 November, 2010

AMIT KUMAR SHARMA ...Applicant
Vs.
MADANLAL & ors. ...Non-applicants

A. ***Civil Procedure Code (5 of 1908) Order VII Rule 11, Municipalities Act, M.P. (37 of 1961), Sections 20 & 22 - Election Petition*** **- Application of provisions of C.P.C. - Provisions of C.P.C. are applicable to election petition - Application under Order 7 Rule 11 C.P.C. maintainable.** (Paras 4 & 5)

क. सिविल प्रक्रिया संहिता (1908 का 5) आदेश *VII* नियम 11, नगरपालिका अधिनियम, म.प्र. (1961 का 37), धाराएँ 20 व 22 – निर्वाचन याचिका – सि.प्र.सं. के उपबंधों का लागू होना – सि.प्र.सं. के उपबंध निर्वाचन याचिका को लागू होते हैं – आदेश 7 नियम 11 सि.प्र.सं. के अंतर्गत आवेदन पोषणीय।

B. Municipalities Act, M.P. (37 of 1961), Sections 20, 22 & 26 - Corrupt Practice **- Allegations are in the nature of criminal charges - There should be no vagueness in the allegations - if allegations are vague and general and particulars are not pleaded, election petition cannot be proceeded for want of cause of action - Names of persons and place where voters were influenced not mentioned - Names of voters who were transported in govt. vehicles not disclosed - Particulars of vehicles also not disclosed - Sufficient particulars not stated for making out a case for corrupt practice - Grounds with regard to corrupt practice directed to be deleted - Election Petition shall proceed on other grounds.** (Paras 11 to 14)

ख. नगरपालिका अधिनियम, म.प्र. (1961 का 37), धाराएँ 20, 22 व 26 – भ्रष्ट आचरण – अभिकथन दाण्डिक आरोपों की प्रकृति के हैं – अभिकथनों में कोई अस्पष्टता नहीं होनी चाहिए – यदि अभिकथन अस्पष्ट एवं साधारण हैं और विशिष्टियों का अभिवाक् नहीं है, वाद हेतुक के अभाव में निर्वाचन याचिका पर कार्यवाही नहीं की जा सकती – व्यक्तियों के नाम एवं स्थान जहां मतदाताओं को प्रभावित किया गया था, उल्लेखित नहीं – मतदाता जिन्हें सरकारी वाहनों में परिवहन किया गया, उनके नाम प्रकट नहीं किये गये – वाहनों की विशिष्टयाँ प्रकट नहीं की गई – भ्रष्ट आचारण का मामला बनाने के लिए पर्याप्त विशिष्टियों का कथन नहीं किया गया –

भ्रष्ट आचरण से संबंधित आधारों को हटाने का निदेश दिया गया – अन्य आधारों पर निर्वाचन याचिका अग्रेषित होगी।

Cases referred :

AIR 1986 SC 1253, AIR 2010 SC 1227, 1999(2) MPLJ 364, AIR 1993 HP 84, AIR 1997 SC 1311.

Vandana Kasrekar with *Pratha Moitra,* for the applicant.

Sunil Jain, for the Non-applicant No. 1.

ORDER

N. K. Mody, J. :–Being aggrieved by the order dated 13/07/10 passed by District Judge, Neemuch in Election Petition No.02/10 whereby the application filed by the petitioner under Order VII Rule 11 CPC for dismissing the Election Petition filed by respondent No.1 was dismissed, present petition has been filed.

2. Short facts of the case are that the respondent No.1 filed an Election Petition under Section 20 of M.P. Municipalities Act, 1961 (which shall be referred hereinafter as an "Act") on 02/02/10 alleging that the election of Councilor of Ward No.30 at Neemuch was solemnized on 11/12/09, in which respondent No.1 and petitioner were the candidates alongwith others. It was alleged that in the said Election respondent No.1 secured 153 votes, while petitioner secured 211 votes. It was alleged that the petitioner has won the election by adopting the corrupt practice, therefore, the Election of the petitioner be declared void. After services, an application was filed by the petitioner under Order VII Rule 11 CPC, wherein it was alleged that since the Election Petition filed by the respondent No.1 does not disclose the material fact relating to the corrupt practice adopted by respondent No.1, therefore, the petition be dismissed. The said application was opposed by the petitioner. After hearing the parties, the said application was dismissed, against which present petition has been filed.

3. A preliminary objection was raised by respondent No.1 about the maintainability of the application filed by petitioner under Order VII Rule 11 CPC alleging that since the Election Petition is being filed under the provisions of the Act and the complete procedure is laid down under the Act itself, therefore, the application under Order VII Rule 11 CPC is not maintainable. It is submitted that on this ground only the petition be dismissed.

4. In the matter of *Azhar Hussain Vs. Rajiv Gandhi,* AIR 1986 SC 1253 Hon'ble Apex Court has held that an election petition can be and must be dismissed under the provisions of CPC, if the mandatory requirement enjoined by Section 83 to incorporate the material facts and particulars relating to alleged corrupt practice in the election petition are not complied with. The CPC applies to the trial of an election petition by virtue of Section 87 of the Act. Since CPC is applicable, the Court trying the election petition can act in exercise of the powers of the Code including Order 6 Rule 16 and the Order 7 Rule 11(a). In the matter of *Ram Sukh Vs. Dinesh Aggarwal,* AIR 2010 SC 1227 Hon'ble Apex Court held that election petition can be rejected at threshold by High Court in exercise of its powers under Order 6 Rule 16 or Order 7 Rule 11 of CPC. In the matter of *Ashok Khemchand Bajhal Vs. Mohd. Yakub Mubeen Baksh,* 1999(2) MPLJ 364 wherein while dealing with the election petition under the provisions of Municipalities Act, this Court held that if election petitioner fails to make out a ground for declaring the election or nomination to be void under Section 22 of the Act election petition must be dismissed at the threshold.

5. In view of the aforesaid position of law, objections raised by the respondent No.1 regarding maintainability of the application filed by petitioner under Order VII Rule 11 CPC can not be allowed to sustained and the same stands rejected.

6. Heard on merits.

7. Ms. Vandana Kasrekar, learned counsel for the petitioner argued at length and submits that the allegations made in the election petition filed by respondent No.1 relates to corrupt practice. It is submitted that full and complete particulars were not stated by the respondent No.1 about the alleged corrupt practice, therefore, the learned Court below committed error in dismissing the application filed by petitioner under Order VII Rule 11 CPC. It is submitted that in the facts and circumstances of the case, petition filed by the petitioner be allowed and the impugned order passed by the learned Court below and also the Election Petition filed by respondent No.1 be dismissed.

8. Mr. Sunil Jain, learned counsel for respondent No.1 submits that in the election petition filed by respondent No.1 full facts which were in the knowledge of respondent No.1 were clearly stated by respondent No.1.

It is submitted that the application filed by the petitioner is nothing but an application to delay the process. It is submitted that in the facts and circumstances of the case, learned trial Court committed no error in dismissing the application filed by the petitioner. It is submitted that the petition filed by the petitioner be dismissed.

9. Election Petitions are being filed under Section 20 of the Act, according to which no election can be called into question except by a petition presented in accordance with the provisions of this section. As per Sub-section (2) of Section 20 of the Act petition can be presented on one or more of the grounds specified in Section 22 of the Act. As per Sub-section (5) of Section 20 an election petition shall contain a concise statement of the material facts on which the petitioner relies. As per Sub-section (b) of Sub-section (5) of Section 20 of the Act petitioner shall set forth with sufficient particulars, the ground on grounds on which the election called in question. Section 22 of the Act lays down the grounds for declaring election to be void. As per Sub-clause (b) of Sub-section (1) of Section 22 of the Act if the Court is of the opinion that any corrupt practice has been committed by returned cancidate or his agent or by any other person with the consent of a returned candidate or his agent, Court shall declare the election of the returned candidate to be void. Section 28 of the Act deals with corrupt practices, according to which bribery, undue influence, publication of facts which is false are the corrupt practices.

10. In the present case in the petition filed by respondent No.1 the corrupt practices which were adopted by the petitioner are mentioned in para-4 and a gist of it is as under:-

i. Ward No.30 for which election took place is mainly a ward of CRPF Camp and cantonment area and all the voters are in the employment of CRPF. Father of the petitioner is Assistant Commandant and is posted in CRPF at Neemuch. Quarter No.T-4/1 in Ward No.30 has been alloted to the father of the petitioner, which belongs to CRPF, Neemuch and the petitioner is also residing with his father in the said quarter. Entire election was conducted by the petitioner alongwith his father from the said quarter, which amounts to corrupt practice and which has affected the voters.

ii. Since ward No.30 at Neemuch is in the cantonment area, therefore, stranger is required to seek permission for entering in the said ward. Since respondent No.1 was outsider and was not member of the said ward, therefore, respondent No.1 was required to obtain the permission which is being given by CRPF between 9:00 AM to 5:00 PM. It was further alleged that the permission is being cancelled if the person to whom the permission is granted violates the timings. It was alleged that since the petitioner was residing in quarter which was alloted to the father of the petitioner in the same ward, therefore, petitioner was not required to obtain any permission and there was no time constraint for the petitioner for the purpose of canvassing, while respondent No.1 was having limited time for canvass between 9:00 AM to 5:00 PM.

iii. Father of the petitioner who was in employment of CRPF misused his position to impress the voters, who were employees of CRPF. It was alleged that because of misusing the position which father of the petitioner was enjoying corrupt practice was adopted by the petitioner.

iv. Father of the petitioner called his subordinates at his residence and pressurized them to vote for the petitioner, with the result petitioner got undue advantage. It was alleged that this action of father of petitioner amounts to corrupt practice.

v. In the document submitted by the petitioner before Returning Officer residential address of the petitioner was shown as Type-4, Quarter No.1, CRPF-Neemuch, which was alloted to the father of petitioner who is a High Officer in CRPF. Since election was conducted from the said house and the father of the petitioner was posted in CRPF, Neemuch, therefore, employees of CRPF who were also voters were under influence of the father of the petitioner and casted their votes in favour of petitioner. Thus, petitioner was elected by adopting corrupt practice.

vi. Higher Officers of CRPF also did not restrain the petitioner from conducting the election from the quarter of CRPF, with the result voters were influenced adversely against respondent No.1.

vii. There are number of voters from Christian community. To impress the voters of Christian community petitioner published the false publication which was pasted on the Church for which false case was also got registered against respondent No.1, though the same is dismissed. With the result of publication of false statement which was pasted on 09/12/09 while the election took place on 11/12/09 respondent No.1 could not get the votes of Christian community.

viii. Father of the petitioner also participated in the false voting for which one of the employee of the petitioner was also arrested.

ix. Government conveyance were provided by the petitioner for carrying the voters to the poling station. An effort was made by the respondent No.1 to take the photographs from his Mobile, but by using his position by the father of the petitioner, Mobile of the respondent No.1 was got seized which is still lying with the concerned Police.

x. Mr. Chandra Sekhar Sharma father of the petitioner also got included new voters in the voter list by submitting the forms, for which purpose the Government Machinary was used and the fact can be verified from handwriting of the applications submitted by the voters for inclusion their name in the voter list.

xi. In the nomination form submitted by the petitioner it is alleged that criminal case was registered against the petitioner, but its result was not disclosed, however because of influence of the father of the petitioner such a incomplete form was accepted.

xii. Complaint was lodged by the respondent No.1 to the

Collector, Neemuch to the effect that the Government quarter is being misused for the election purpose by the petitioner, but because of undue influence of the father of the petitioner no action was taken by Collector, Neemuch on the complaint made by respondent No.1.

xiii. Estate Officer of CRPF also did not take any action because of influence of father of the petitioner and allow the petitioner to carry on the election from the Government residence.

11. In the matter of *Azhar Hussain* (Supra) the election petition filed by Azhar Hussain was dismissed on the ground that on a scrutiny of the averments made in the election petition it is evident that it is not pleaded as to who has distributed the pamphlets, when they were distributed, where they were distributed and to whom they were distributed, in whose presence they were distributed etc. etc. Pleading is ominously silent on these aspects. It has not even has pleaded that any particular person with the consent of the respondent or his election agent distributed the said pamphlets. The pleading therefore does not spell out the cause of action. So also on account of the failure to mention the material facts, the Court could not have permitted the election petitioner to adduce evidence on this point. It would therefore attract the doctrine laid down in *Nihal Singh's case* (1970(3) SCC 239) and there would be nothing for the respondent to answer.

12. In the matter of *Narain Chand Prashar Vs. Prem Kumar Dhumal,* AIR 1993 Himachal Pradesh 84 Himachal Pradesh High Court has observed that an election petition normally deserves to be and should be tried on merits, provided it discloses cause of action, but when on a closer scrutiny, material facts of the alleged corrupt practice are not furnished and it does not disclose any cause of action, the other allegations in the absence of complete cause of action pleaded may be of a serious nature, it must be dismissed in limine. It was further held that upon close scrutiny entire petition discloses no cause of action. It suffers from lack of material facts and the cause of action pleaded is totally incomplete with respect to the various grounds. In the matter of *Bashir Musa Patel Vs. Satyawan Ganpat Jawkar,* AIR 1997 SC 1311 Hon'ble Apex Court has

held that directions issued by High Court to furnish particulars relating to corrupt practice as a election petition which would gravely prejudice the returned candidate at trial. In the matter of *Ashok Khemchand Bajhal* (Supra) this Court has held that allegation of corrupt practice are in the nature of criminal charges. It is necessary that there should be no vagueness in the allegations so that the returned candidate may know the case which he has to meet. It was further observed that if the allegations are vague and general and the particulars are not pleaded, the election petition cannot be proceeded for want of cause of action. It cannot be left to time, chance or conjecture for the Court to draw an inference by adopting an involved process of reasoning.

13. Now this Court has to examine in view of the aforesaid position of law whether the facts stated by the respondent No.1 in the election petition are containing concise statement of material fact. In sub-para (v) of election petition it is alleged that father of petitioner misused his office by influencing his subordinates/employees of CRPF, but the name of those persons who were subordinate and voters have not been mentioned. Similarly the date and place on which they were influenced is not mentioned. In sub-para (vi) it is alleged that father of the petitioner called his subordinates who were also the voters at his residence and pressurized for casting the votes in favour of his son who is petitioner. The date on which meeting was called, name of the voters/subordinates who were called and pressurized is not mentioned in this sub-para. In sub-para (ix) it is alleged that father of the petitioner was involved in forged voting and the alleged voter was also arrested, who is subordinate of the father of the petitioner, but the name of the person and the date and time when he was arrested is not disclosed. In sub-para (x) it is alleged that Government vehicles were used for carrying on the voters, but the name of these voters who were transported is not mentioned. Particulars of the vehicle which was involved for transporting the voters have also not been mentioned. In sub-para (xi) it is alleged that by misusing his position father of the petitioner got filled in the applications for inclusion the name in the voter list, which can be verified from the application forms, but the name of those persons who were got included in the voter list has not been disclosed.

14. However, in the opinion of this Court so far as other grounds are

concerned sufficient particulars have been stated by the respondent No.1 for making out a case of corrupt practice. In view of this, this Court is of the opinion that the learned trial Court committed error in dismissing the application in to to filed by the petitioner. In the facts and circumstances of the case, petition filed by the petitioner is allowed in part with a direction to the respondent No.1 to delete the grounds for alleged corrupt practice mentioned in sub-para (v), (vi), (ix), (x) (xi) (xii) & (xiii) of the election petition. Learned trial Court is directed to proceed with the case to decide the election petition on merits in accordance with law.

15. With the aforesaid observations, petition stands disposed of. No order as to costs.

Petition disposed of.

I.L.R. [2011] M. P., 1371
CIVIL REVISION
Before Mr. Justice N.K. Mody
C.R. No.274/2008 (Indore) decided on 23 November, 2010

UNITED INDIA INSURANCE CO. LTD. ...Applicant
Vs.
RAMLAL & ors. ...Non-applicants

Motor Vehicles Act (59 of 1988), Section 166, Income Tax Act (43 of 1961), Section 194A **- TDS on interest awarded by Tribunal - Claimant was awarded compensation with interest - Applicant deducted Rs. 6,571 as T.D.S. while releasing interest amount on the ground that amount of interest is more than Rs. 50,000 -** ***Held*** **- Interest awarded has to be spread over in number of years from the date of filing of claim petition till the date of payment - If the interest for the financial year payable exceeds Rs. 50,000/- only then the question of TDS would arise - Claimant shall be required to submit affidavit to the effect that he has furnished a declaration on Form No. 15G of Rule 29C of Income Tax Rules for each financial year in the office of Insurance Company so that concerned Company is relieved of its obligation of payment of TDS.** (Para 14)

मोटर यान अधिनियम (1988 का 59), धारा 166, आयकर अधिनियम (1961 का 43), धारा 194ए –अधिकरण द्वारा अवार्ड किये गये ब्याज पर टी.डी.एस. – दावाकर्ता

को ब्याज के साथ क्षतिपूर्ति अवार्ड की गई – ब्याज की राशि मुक्त करते समय आवेदक ने रुपये 6,571/– टी.डी.एस. के रुप में कटौती की, इस आधार पर कि ब्याज की राशि रुपये 50,000/– से अधिक है – अभिनिर्धारित – दावा याचिका प्रस्तुत करने के दिनांक से भुगतान के दिनांक तक के अनेक वर्षों तक, अवार्ड किये गये ब्याज का फैलाव करना होगा – यदि वित्तीय वर्ष के लिए देय ब्याज रुपये 50,000/– से अधिक होता है केवल तभी टी.डी.एस. का प्रश्न उठेगा – दावाकर्ता से इस आशय का शपथपत्र प्रस्तुत करना अपेक्षित है कि उसने प्रत्येक वित्तीय वर्ष के लिए आयकर नियम के नियम 29सी के प्रपत्र क्र. 15जी पर घोषणा बीमा कम्पनी के कार्यालय में प्रस्तुत की है, जिससे कि सम्बंधित कम्पनी टी.डी.एस. के भुगतान के अपने दायित्व से मुक्त हो सके।

Cases referred :

2004 ACJ 1996, 270 ITR (Vol.270)394, (1986) 157 ITR 711, C.R. No. 251/2006, 2003 ITR (Vol. 260) 284, 2007 ACJ 1897, 181 ITR 408.

S.V. Dandvate, for the applicant.

R.L. Jain, with *Vandana Mandlik,* on behalf of Income Tax Department as amicus curie.

ORDER

N.K. Mody, J. :–Being aggrieved by order dated 12.8.2008 passed by MACT Shajapur in Misc. Claim Case No.17/2006 whereby the petitioner/Company was directed to pay a sum of Rs.6571/- which was deducted by the petitioner/Company out of the amount of compensation payable to respondent No.2 was set aside with a direction to the petitioner/Company to pay the said amount to the respondent No.1, present petition has been filed.

2. Short facts of the case are that claim petition filed by respondent No.1 which was numbered as 02/2001, was allowed and compensation of Rs. 82000/- was awarded vide award dated 5.11.2001 against which appeal was filed by the respondent No.1 for enhancement which was numbered as MA No. 205/2002. Vide order dated 3.01.2006 this Court remanded the case back as certain documents were filed by the respondent No.1 alongwith an application under Order 41 rule 27 CPC. After remand, vide award dated 31.3.2006 learned tribunal enhanced the amount awarded to Rs.1,43,000/- in addition to the amount already awarded as Rs.82,000/-. Being aggrieved by the remanded award, appellant and respondent No.1 filed appeals which were numbered as MA Nos. 206/2006 and 2220/2006. Appeals were disposed of by this Court by

reducing the amount from Rs.1,43,000/- to Rs.60,000/-. While disbursing the amount a sum of Rs. 6571/- was deducted by the petitioner/ Company towards TDS as per Section 194A of the Income Tax Act. An objection was raised by the respondent No.1 before the learned tribunal alleging that said amount could not have been deducted as interest amount is not exceeding Rs.50000/- in one year. The objection was decided by the impugned order whereby action of the petitioner/company deducting a sum of Rs. 6571/- towards TDS was quashed with a direction to the petitioner/ Company to disburse the amount which is payable and a right was given to get back deducted amount of Rs.6571/- from the Income Tax Department against which present petition has been filed.

3. Mr. SV Dandvate, learned counsel for the petitioner argued at length and submits that since the amount of interest was more than Rs. 50000/- which was payable to the respondent No.1, therefore, it is the statutory duty of the petitioner to deduct the amount under Section 194A of the Income Tax. Reliance is placed on a decision in the matter of *Union of India Insurance Co.Ltd. v/s Mitaben Dharmeshbhai Shah and others* reported in [2004 ACJ 1996] Gujarat High Court had an occasion to take into consideration Section 194A(3)(ix) of the Income Tax Act wherein Insurance Company deducted income tax at source on amount payable as interest on the awarded amount. The tribunal found that amount of interest awarded to claimants has become judgment debt and lost character as interest and Insurance Company was duty bound to deposit the entire amount of judgment debt. It was further held that clause (ix) of Sub Section (3) has been inserted with effect from 1.06.2003 by the Finance Act,2003. The amount of interest has been deposited by the Insurance Company on 2.7.2003. It was held that in view of specific provisions contained in Income Tax Act, 1961, the Insurance Company was duty bound to deduct the amount of Income Tax from the amount of interest paid by it. It is submitted that in view of the aforesaid provisions of law, learned tribunal committed error in passing the impugned order. It is submitted that the petition be allowed and the impugned order be set aside.

4. Since the matter relates to the revenue, therefore, this Court thought it proper to request Mr. R.L.Jain, Standing counsel for the Income Tax Department to assist the Court. Learned counsel of the Income Tax Department has drawn the attention of this Court to Section 2(28A) of the Income Tax Act which defines "interest" which reads as under:-

"interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit,claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized."

5. Leaned counsel further has drawn my attention to Section 194A of the Income Tax Act which deals with interest other than 'interest on securities', which reads as under:-

"S.194A. (1)Any person not being an individual or a Hindu undivided family, who is responsible for paying to a resident any income by way of interest other than income by way of interest on securities shall at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force."

2) xxx xxx

3) The provisions of sub-section (1) shall not apply-

ix) to such income credited or paid by way of interest on the compensation amount awarded by the Motor Accidents Claims Tribunal where the amount of such income or, as the case may be, aggregate of the amounts of such income credited or paid during the financial year does not exceed fifty thousand rupees.

6. Learned counsel submits that since the amount of interest was more than 50000/- in the financial year in which it was disbursed therefore, it is statutory duty of the petitioner/Company to deduct TDS and deposits the same with Income Tax Department. It is submitted that in case petitioner/Company fails to discharge its duty then the petitioner/Company is also liable for panel provisions. Reliance is placed on a decision in the matter of *New India Assurance Co. Ltd. v/s Mani and Ors.* {270 ITR (Vol.270)394 wherein compensation amount which earned interest because of delayed payment,Madras High Court held it liable to be taxed and because of the amended provisions, when the interest amount exceeding Rs. 50000/- has been paid by the Insurance Company, during

financial year, they are bound to deduct the Income Tax at source under Section 194A of the Income Tax Act,1961.It is submitted that in the facts and circumstances of the case, impugned order passed by the tribunal cannot be allowed to sustain. Thus the learned counsel supported the contention of petitioner Insurance Company.

7. Shri P.M. Choudhari, advocate for the assessee appeared as amicus curie submits that the amount payable towards interest is to be spread over in number of years for which such interest has been awarded. For his contention learned counsel placed reliance on a decision of the Supreme Court in the matter of *Rama Bai v/s CIT* reported in [1919 181 ITR 400] and Reliance is also placed on a Full Bench decision of Kerala High Court in the matter of *Peter John v/s CIT* Reported in [(1986) 157 ITR 711 wherein Full Bench of Kerala High Court determined and decided the question regarding accrual of interest with reference to the right to receive compensation and have linked the right to receive interest with the right of compensation and have finally held that the interest on compensation awarded with respect to land acquired under the Land Acquisition Act would run from day to day, accruing from the date on which Government took possession of the land, that being the date on which the land owners right to receive entire compensation arose, though determined and paid later and only interest accruing in each year was assessable in that year.

8. It is submitted that in the facts and circumstances of the case, impugned order passed by the tribunal whereby Petitioner/Company was directed to pay the amount to the respondent No.1/claimant which has been deducted on account of TDS is in accordance with law.

9. In the matter of *National Insurance Co.Ltd. v/s Smt. Pratibha @ Rashmi Pandit and ors.*(CR No.251/2006 decided on 8.2.2007) after placing reliance on a decision in the matter of *Mitaben* (Supra) this Court has held that since the amount of interest was more than Rs.50000/- therefore, the Insurance Company was bound to deduct TDS. In the matter of *Shankar and Ors v/s Union of India and Ors.* {ITR (Vol.260)2003 Pg. 284] wherein interest was payable on delayed payment of compensation relating to Acquisition of land. The Delhi High Court held that a person entitled to compensation would be entitled to spread over of the income for the period for which payment can be made so as to compute the income for assessing tax for the relevant accounting year.

10. In the matter of *Hansaguri Prafulchandra Ladhani v/s Oriental Insurance Co. Ltd.*[2007 ACJ 1897] wherein the Insurance Company deposited Rs. 11,78,000 as the awarded amount payable to 6 claimants and interest of Rs. 15,47,902/-for 179 months deducting Rs. 1,70,269/- as TDS which has been deposited with the Income Tax Department in discharge of statutory obligations, Gujarat High Court has held that interest on compensation cannot be taken to have accrued on the date of award of the tribunal or the date of judgment of appellate Court granting enhanced compensation but has to be taken as having accrued year after year from the date of filing of claim application till date of deposit. It was further held that the Insurance Company was not justified in making deduction to take on lump-sum amount as interest accrued has to be calculated on yearly basis and apportioned amongst the 6 claimants; the Income Tax liability of each claimants to pay tax on interest accrued on his/her share of compensation. It was further held that if such interest income in each financial year together with his/her other income in that year exceeds the taxable limit for that year; claimants may seek necessary refund from the Income Tax Department.

11. Thus the question for consideration in the present case before this Court is regarding the position of law in regard to the deduction of tax at source u/s 194A from the amount of interest awarded on the amount of compensation under the provisions of Motor Vehicles Act by the Motor Accident Claims Tribunal and particularly whether such interest awarded by the Tribunal is to be spread over from the date from which it is payable to the date of actual payment.

12. Section 194A obliges a person responsible for paying 'to a resident' any income by way of interest to deduct Income Tax from such payment of interest at the time of credit of such amount to the account of the payee or at the time of payment thereof in cash or by cheque or draft or by any other mode which ever is earlier. Sub section (3) of said section is in the nature of an exemption provision and it provides that the provisions of sub section (1) regarding the deduction of tax at source will not apply in the cases falling under the said provision. Sub clause (ix) of the said sub section (3) provides that the provisions of TDS do not apply to the income credited or paid by interest on the compensation amount awarded by Motor Accidents Claims Tribunal where such amount of

income or, as the case may be, the aggregate amount of such income credited or paid during the Financial Year does not exceeds Rs.50,000/-. Thus, if the amount of interest payable to the claimant in particular financial year does not exceed Fifty Thousand rupees then the person responsible for payment is not required to deduct tax at source. Since the deduction is to be made at the time of payment to ' a resident', the said limit of Rs.50000/- will apply separately in case of each individual resident i.e. if the payment of interest is being made to more than one claimant then unless the interest payable to each claimant separately exceeds Rs. 50000/- in each case, the person responsible for payment is not required to deduct tax.

13. As to the question whether the interest awarded is to be spread over for the number of years for which such interest has been awarded, the position of law appears to be fairly well settled by the decision of Supreme Court rendered in connection with award of interest on the amount of compensation under the provisions of Land Acquisition Act. In the case of *Ramabai v/s CIT* reported in (1919) 181 ITR 400, where their Lordships', following the earlier decisions have been held and clarified that the interest cannot be taken to have accrued on the date of order of court granting enhanced compensation but has to be taken as having accrued year after year from the delivery of the possession of the land till the date of such order. The same position has been reiterated by the Apex Court again in the case of *KS Krishna Rao v/s CIT* reported in 181 ITR 408 and it has been held that where a compensation awarded under the Land Acquisition Act is enhanced by the order of the Court on a reference u/s 18 of that Act or on further appeals, interest on enhanced compensation cannot be taxed all in a lump sum as having accrued on the date on which the Court passes order for enhanced compensation; the interest has to be spread over on annual basis right from the date of delivery of possession till the date of order on a time basis.

14. Keeping in view the principles laid down in various cases mentioned hereinabove which would apply with equal force to the claim cases this Court is of the view that the interest awarded has to be spread over in number of years from the date of filing of claim petition till the date of payment because the right to receive compensation arises immediately on occurrence of accident and the interest is awarded by the Tribunal or the Courts for the delay that occurs due to the delay in determination of the compensation and if the interest for the financial year

payable to each of individual claimant exceeds Rs.50000/- then only question of TDS will arise. So far as obligation of petitioner/Insurance Company responsible for the payment is concerned, it is made clear that before releasing the amount of interest claimant shall be required to submit an affidavit to the effect that claimant has furnished a declaration on form No.15-G of rule 29-C of the Income Tax Rules in terms of Section 197-9(1-A) of the Income Tax Act for each financial year in the office of Insurance Company so that concerned Insurance Company is relieved of its obligation of payment of TDS.

15. With the aforesaid, appeal stands disposed of.

Appeal disposed of.

I.L.R. [2011] M. P., 1378

CIVIL REVISION

Before Mr. Justice Abhay M. Naik

C.R. No. 94/2005 (Gwalior) decided on 14 December, 2010

UNION OF INDIA ...Applicant

Vs.

M.P. STATE ELECTRICITY BOARD ...Non-applicant

A. Civil Procedure Code (5 of 1908), Section 11 - Res Judicata - Inherent lack of jurisdiction - **Judgment and decree passed by a Court which lacks jurisdiction is a nullity and same would never operate as res-judicata.** (Para 11)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – पूर्व न्याय – अधिकारिता की अंतर्निहित कमी –अधिकारिता विहीन न्यायालय द्वारा पारित निर्णय और डिक्री शून्य है और वह कमी भी पूर्व न्याय के रुप में प्रवर्तित नहीं होगी।

B. Civil Procedure Code (5 of 1908), Section 47 - Questions to be determined by Executing Court - Illegal or erroneous decree - **An erroneous or illegal decree, which is not void cannot be objected in execution or collateral proceedings.** (Para 13)

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 47 – प्रश्न जिन्हें निष्पादन न्यायालय द्वारा निर्धारित करना होगा – अवैध या त्रुटिपूर्ण डिक्री – अवैध या त्रुटिपूर्ण डिक्री जो शून्य नहीं है, उस पर निष्पादन या सांपश्विर्क कार्यवाहियों में आक्षेप नहीं लिया जा सकता।

C. Civil Procedure Code (5 of 1908), Section 47 - Questions to be determined by Executing Court - Question of Jurisdiction - **Suit for recovery of freight money barred by virtue of Sections 13 & 15 of Railway Claims Tribunal Act, 1987 - Civil Court granting decree for it, is a nullity for want of inherent jurisdiction - Objection may be raised about inexecutability of decree on such ground under Section 47 of C.P.C.** (Para 16)

ग. सिविल प्रक्रिया संहिता (1908 का 5), धारा 47 – प्रश्न जिन्हें निष्पादन न्यायालय द्वारा निर्धारित करना होगा – अधिकारिता का प्रश्न – भाड़ा राशि की वसूली के लिए वाद, रेल दावा अधिकरण अधिनियम, 1987 की धारा 13 व 15 द्वारा वर्जित है –उसके लिए सिविल न्यायालय ने प्रदान की गई डिक्री, अंतर्निहित अधिकारिता के अभाव में शून्य है – सि.प्र.सं. की धारा 47 के अंतर्गत ऐसे आधार पर डिक्री निष्पादित न किये जा सकने के बारे में आक्षेप उठाये जा सकते हैं।

Cases referred :

AIR 1966 SC 634, (2007) 2 SCC 481, (2004) 8 SCC 706, AIR 1994 Bombay 132.

N.K. Gupta, for the applicant.

K.N. Gupta,Sr. Adv., for the Non-applicant.

ORDER

ABHAY M. NAIK, J. :–This Civil Revision has been preferred by the revisionist against the order dated 16.03.05 passed by the Court of III Additional District Judge, Gwalior in Execution Case No.117-B/94X04 rejecting thereby its application under Section 47 read with Section 151 of the Code of Civil Procedure dated 03.11.04.

2. Briefly stated relevant facts are that M.P. State Electricity Board instituted a suit against revisionist for recovery of Rs.40054/- with allegations that it purchased cement bags from M/s Diamond Cement Factory, Damoh which were transported by Railways vide railway receipts [R.R.No.134340-134343]. They reached destination at Gwalior on 27.07.86. Railway freight to the tune of Rs.92,222/- was already paid at the time of booking of cement bags, however, railway receipts were not received by the plaintiff due to postal delay. Consequently, the plaintiff could get the delivery on payment of freight to the tune of Rs.74,175/- as per the order of Chief Goods Supervisor. Accordingly, delivery of cement bags was obtained on 23.07.86 by making payment and furnishing I-bond.

Plaintiff after receiving the original railway receipts through postal services came to know that the payment of freight was already made. This being so, plaintiff vide letter dated 26.11.86 asked the defendant to refund Rs.74,175/-. Demand was repeatedly made by various letters. Ultimately, plaintiff issued notices dated 15.7.88 and 25.02.89 demanding thereby refund of Rs.74,175/- and interest to the tune of Rs.40,054/-. Defendant made the payment of Rs.74,175/-. According to the plaintiff, accrued interest to the tune of Rs.40,054/- was adjusted by the plaintiff from the amount of Rs.74,175/- which was received by way of refund. Resultantly, the plaintiff sued for a sum of Rs.40,054/- with interest from the date of suit at the rate of 18% per annum.

3. Defendants/revisionists submitted their written statement stating therein that the plaintiff was not having the original railway receipts when the cement bags reached the destination at Gwalior. Therefore, it was asked to make payment of freight to the tune of Rs.74,175/- with an I-bond. Railway freight was liable to be refunded on submission of original railway receipts. Since there was no agreement with regard to interest on the amount of freight deposited by the plaintiff at the time of obtaining delivery, no interest was and is liable to be paid. This being so, the sum of Rs.74,175/- was liable to be refunded as has already been duly refunded to the plaintiff. This apart, it was stated in specific that the Civil Court has no jurisdiction because it does not act as a railway claims tribunal and the suit is liable to be dismissed for want of jurisdiction.

4. Learned Trial Judge by the judgment and decree dated 26.09.01 granted a decree in favour of the plaintiff/respondent for interest on a sum of Rs.74,150/- @ 9% p.a. with effect from 06.11.86.

5. The decree was put into execution.

6. Judgment debtor/revisionist submitted an application under Section 47 read with Section 151 CPC that the Civil Court had no jurisdiction to grant a decree by virtue of Section 13 and 15 of the Railway Claims Tribunal Act, 1987. Accordingly, the impugned decree being nullity, the execution case is liable to be dismissed. It was opposed by the decree holder/respondent.

7. Learned Executing Judge by the impugned order held that an objection about jurisdiction was raised by the judgment debtor/ revisionist in

the trial court which was decided as issue no.4 in favour of the decree-holder/ respondent. No appeal was preferred against such judgment and decree and therefore it has attained finality. Accordingly, the decree in question has been found to be executable. Hence, the present revision.

8. Shri N.K. Gupta, learned counsel for revisionists and Shri K.N. Gupta, learned senior counsel for respondent made their respective submissions, which have been considered in the succeeding paragraphs.

9. It is contended on behalf of the respondent as a preliminary submission that objection about jurisdiction was already raised in the form of issue no.4 before the trial court which was decided in favour of the respondent. In view of this, it is not now open to the revisionist to raise such an objection again.

10. On perusal, it is observed that the issue deciding jurisdiction was not decided on merits but the same was decided in favour of the respondent on account of having been not pressed. Learned Trial Judge while rendering the judgment and decree dated 26.09.01 has observed in paragraph 13 that the defendant has raised objection in paragraph 7 of its written statement about territorial jurisdiction. Copy of written statement is on record which shows that the revisionist had clearly objected the competence of the Civil Court for want of jurisdiction on the ground that it does not act as railway claims tribunal. Objection about the jurisdiction with reference to place of suing [i.e. territorial jurisdiction] or pecuniary jurisdiction may be raised under Section 21 of CPC. Section 21 and Section 21A of CPC are reproduced for convenience:

> **"21. Objections to jurisdiction.**-(1) No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.
>
> (2) No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and, in all cases where issues

are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(3) No objection as to the competence of the executing Court with reference to the local limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the executing Court at the earliest possible opportunity, and, unless there has been a consequent failure of justice.

21-A. Bar on suit to set aside decree on objection as to place of suing.- No suit shall lie challenging the validity of a decree passed in a former suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, or any ground based on an objection as to the place of suing.

Explanation.- The expression "former suit" means a suit which has been decided prior to the decision in the suit in which the validity of the decree is questioned, whether or not the previously decided suit was instituted prior to the suit in which the validity of such decree is questioned."

Since the objection raised by the defendant/revisionist was not with reference to territorial jurisdiction or pecuniary jurisdiction, it cannot be said that it is not open for judgment debtor to challenge the decree on the ground of lack of inherent jurisdiction. Learned Executing Judge has, thus, committed an error in not understanding the nature of objection at all. Section 21 and 21A would apply only in case of objection about territorial jurisdiction or pecuniary jurisdiction and not in the case of lack of inherent jurisdiction.

In *Bahrein Petroleum Co. Ltd. Vs. P.J. Pappu and another* [AIR 1966 SC 634], it has clearly been observed in paragraph 3:-

"3 .....As a general rule, neither consent nor waiver nor acquiescence can confer jurisdiction upon a Court, otherwise incompetent to try the suit....."

11. It has further been contended that issue no.4 pertaining to jurisdiction was already decided by the Trial Court while passing the judgment and decree in favour of the plaintiff. Therefore, it would operate as res judicata at execution stage.

Suffice it to say that a judgment and decree passed by the Court which lacks inherent jurisdiction is a nullity and the same would never operate as res judicata. I may successfully refer to the following observation of the Hon'ble Supreme Court of India in the case of *National Institute of Technology Vs. Niraj Kumar Singh* [2007(2) SCC 481]:

> "22. .....It is well known that where an order is passed by an authority which lacks inherent jurisdiction, the principles of res judicata would not apply, the same being a nullity."

12. There is a marked distinction between a decree, which is void and the decree which is wrong. A Court having jurisdiction is empowered to pass a decree right or wrong, legal or illegal. However, if a Court lacks inherent jurisdiction, it is powerless and a decree passed by such a Court is nullity being void. The Apex Court has also clarified this distinction in the case of *Balvant N. Viswamitra and others Vs. Yadav Sadashiv Mule (Dead) Through Lrs and others* [2004(8) SCC 706] in following words:-

> "9. The main question which arises for our consideration is whether the decree passed by the trial court can be said to be "null" and "void". In our opinion, the law on the point is well settled. The distinction between a decree which is void and a decree which is wrong, incorrect, irregular or not in accordance with law cannot be overlooked or ignored. Where a court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such court would be without jurisdiction, non est and void ab initio. A defect of jurisdiction of the court goes to the root of the matter and strikes at the very authority of the court to pass a decree or make an order. Such defect has always been treated as basic and fundamental and a decree or order passed by a court or an authority having no jurisdiction is a nullity. Validity of such decree or order can be challenged at any stage, even in execution or collateral proceedings."

13. Crucial question in the case is whether the judgment and decree put into execution in the present case is merely illegal and irregular or is null and void. An erroneous or illegal decree, which is not void cannot be obviously objected in execution or collateral proceedings. Objection

about the decree in question being nullity has been raised in the light of Sections 13 and 15 of the Railway Claims Tribunal Act, 1987, which are reproduced below:

> **13. Jurisdiction, powers and authority of Claims Tribunal.**-(1) The Claims Tribunal shall exercise, on and from the appointed day, all such jurisdiction, powers and authority as were exercisable immediately before that day by any civil court or a Claims Commissioner appointed under the provisions of the Railways Act,-
>
> (a) relating to the responsibility of the railway administration as carriers under Chapter VII of the Railways Act in respect of Claims for-
>
> (i) Compensation for loss, destruction, damage, deterioration or non-delivery of animals or goods entrusted to a railway administration for carriage by railway;
>
> (ii) compensation payable under section 82A of the Railways Act or the rules made thereunder; and
>
> (b) in respect of the claims for refund or fares or part thereof or for refund of any freight paid in respect of animals or goods entrusted to a railway administration to be carried by railway.
>
> (IA) The Claims Tribunal shall also exercise, on and from the date of commencement of the provisions of section 124A of the Railways Act, 1989 (24) of 1989), all such jurisdiction, powers and authority as were exercisable immediately before that date by any civil court in respect of claims for compensation now payable by the railway administration under section 124A of the said Act or the rules made thereunder.
>
> (2) The provisions of the Railways Act, 1989 (24 of 1989) and the rules made thereunder shall, so far as may be, be applicable to the inquiring into or determining, any claims by the Claims Tribunal under this Act.
>
> **15. Bar of jurisdiction.-** On and from the appointed day,

no court or other authority shall have, or be entitled to, exercise any jurisdiction, powers or authority in relation to the matters referred to in sub-sections (1) and (1A) of section 13."

Section 13 (supra) describes the jurisdiction, powers and authority of the claims tribunal whereas Section 15 excludes the jurisdiction of the Court or other authority in the matters referred to in sub-sections 1 and 1A of Section 13 of the Act.

14. It has been contended on behalf of the respondent that the suit by the respondent was instituted for recovery of interest and was not covered in any of the clauses enumerated in Section 13. This Court is required to examine the nature of the claim in order to adjudge the applicability of Sections 13 and 15. This Court feels it proper to reproduce paragraphs 6, 7 and 8 of the plaint:-

"6. यह कि, वादी ने प्रतिवादी से दिनांक 26.11.86 व 27.2.87 व 10.11.87 व 27.12.87 व 15.7.88 व 19.11.88 व 31.1.89 व 25.2.89 व 9.5.89 रकम वापिसी की मांग की लेकिन प्रतिवादी ने वादी की रकम वापिस नहीं की। लेकिन प्रतिवादी ने वादी की रकम वापिस नहीं की। तथा विना कोई सन्तोषजनक कारण विला वजह वादी को रकम वापिस नहीं की जिसके कारण वादी को आर्थिक क्षति उठानी पडी व वादी की रकम प्रतिवादी द्वारा अनुचित रूप से रोके रहने के कारण वादी प्रतिवादी से 74,175.00 रूपया सूद 18 रूपये प्रतिशत प्रतिवर्ष के हिसाब से सूद प्राप्त करने का अधिकार है ।

7. यह कि वादी द्वारा नोटिस दिनांक 15.7.88 दिनांक 25.2.89 द्वारा प्रतिवादी से 74,175.00 रूपया तथा बैंक की दर से सूद की मांग की गई । प्रतिवादी ने वादी को चेक नम्बर 006543/सी.654208 दिनांक 14.6.89 तादादी 74,175.00 रूपया भेजा जो वादी को दिनांक 20.6.89 को प्राप्त हुआ जबकि उक्त दिनांक को वादी प्रतिवादी से 74,175.00 रूपया असल व 40,054.00 रूपये सूद जुमला 1,15,229.00 रूपये प्राप्त करने का अधिकारी था ।

8. यह कि प्रतिवादी द्वारा वादी को 74,175.00 रूपये अदा किये गये उसमें से वादी ने 40,054.00 रूपये मुताबिक कानून व रिवाज बाजार सूद में एडजेस्ट किये । इस प्रकार वादी को प्रतिवादी से असल रकम में 40,054.00 रूपये वसूल करना शेष है जो वादी प्रतिवादी से वसूल करने का अधिकारी है।"

On perusal of the aforesaid, it is clear that a sum of Rs.74,175/- was paid by the plaintiff while obtaining delivery of cement bags from Railway Station, Gwalior. Since the freight was prepaid at the time of booking of consignment, the plaintiff/respondent on receipt of original railway receipts produced the same before the defendant/revisionist and made a request for refund of the said amount with interest @ 18% per annum. Defendant/ revisionist made the refund of the entire sum to the tune of Rs.74,175/-. Plaintiff/respondent appropriated/adjusted Rs.40,054/- towards interest from the money paid to him [i.e. Rs.74,175/-] and sued for balance principal amounting to Rs.40,054/- [obviously the balance freight money]. It has expressly and specifically been so pleaded in paragraph 8 of the plaint. Since the defence of the defendant/revisionist was that there was no agreement for payment of interest, it seems that the plaintiff/respondent in order to avoid the responsibility of proving the agreement about interest, unilaterally appropriated the amount of interest at its own from the refunded money and sued for the refund of the balance freight amount. This is also clear from the Trial Court's judgment wherein no issue was raised on the question of rate of interest allegedly payable by the defendant according to the agreement or as per market practice. There was no adjudication by the Trial Court about the plaintiff's entitlement to recover the sum of Rs.40,054/ - as interest from the defendant/revisionist. Accordingly, in view of the specific paragraphs 6, 7 and 8 of the plaint it is found that the suit of the plaintiff was for the refund of balance freight amount to the tune of Rs.40,054/- and the learned Executing Judge has committed an illegality in deciding the objection under Section 47 without considering the aforesaid specific plaint averments.

15. Clause (b) of sub-section 1 of Section 13 of the Railway Claims Tribunal Act, 1987 clearly empowers the claims tribunal to entertain the claim in respect of the refund of any freight paid in respect of animals or goods entrusted to the railway administration to be carried by the Railway. This being so, the jurisdiction of Civil Court to entertain the suit for refund of freight stands excluded by virtue of Section 15 of the said Act. The Executing Court has passed the impugned order without even considering Sections 13 and 15 of the said Act and further without considering the decree in question as nullity for want of inherent jurisdiction. Such a decree being nullity, objection may be indeed raised in execution proceedings.

16. Reliance has been placed on *Ratnakar Tanbaji Itankar* [AIR 1994 Bombay 132] which deals with a claim arising out of an accident which was not found to have fallen within the ambit of Section 13(1) of the Railway Claims Tribunal Act, 1987. Present case being distinguishable on facts, plaintiff/respondent does not get any assistance from it.

In the result, it is observed that the plaintiff/respondent had instituted a suit for refund of freight money after making appropriation/adjustment of the interest unilaterally and the Civil Court had no jurisdiction to entertain such a claim in view of Section 13 (1)(b) read with Section 15 of the Railway Claims Tribunal Act, 1987. This being so, the decree in question was void. The same being nullity cannot be executed against the revisionist. Consequently, the objection under Section 47 CPC raised by the revisionist is accepted and, thus, the Civil Revision stands allowed. Impugned order is hereby set aside. Execution proceedings are accordingly quashed.

No order as to costs.

Revision allowed.

I.L.R. [2011] M. P., 1387

CIVIL REVISION

Before Mr. Justice Abhay M. Naik

C.R. No. 37/2008 (Gwalior) decided on 1 February, 2011

TRIVENI BAI (SMT.) ...Applicant

Vs.

SMT. VIMLA DEVI & ors. ...Non-applicants

***Accommodation Control Act, M.P. (41 of 1961), Section 10(4) - Execution of order fixing standard rent* - Civil suit is only remedy to recover rent fixed by R.C.A. - Application under Section 10(4) of Act, 1961 do not empower the R.C.A to execute its order fixing standard rent - Application not maintainable.** (Paras 6 & 7)

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 10(4) – मानक भाड़ा निश्चित करने के आदेश का निष्पादन – आर.सी.ए. द्वारा निश्चित भाड़े की वसूली के लिए उपचार केवल सिविल वाद है – अधिनियम 1961 की धारा 10(4) के अंतर्गत आवेदन, आर.सी.ए. को उसके द्वारा मानक भाड़ा निश्चित करने के आदेश का निष्पादन करने के लिए शक्ति प्रदान नहीं करता – आवेदन अपोषणीय।

Case referred :

1973 MPLJ 632.

N.K. Gupta, for the applicant.

P.K. Chaturvedi, for the non-applicants.

ORDER

ABHAY M. NAIK, J.:– This civil revision has been preferred by the revisionist for setting aside the impugned order dated 16.01.2008 passed by the Sub Divisional Officer, Vidisha in Case No.2/A-90/07-08.

2. Briefly stated relevant facts are that Dr. Chiranjilal, predecessor of respondents No.1 to 6 submitted an application under Section 10 (4) of the M.P. Accommodation Control Act, 1961 for fixation of standard rent against the revisionist in respect of the premises occupied by the latter. The Rent Controlling Authority-cum-Sub Divisional Officer, Vidisha vide his order dated 26.08.1989 made the fixation @ Rs.75/-PM per room and Rs.50/-PM for Varanda. Revisionist, who was in occupation of three rooms and one Varanda was held liable to pay the rent in all to the tune of Rs.275/PM with effect from 16.08.1984. The Rent Controlling Authority issued a letter to the Court of Civil Judge Class-I, Vidisha for execution of the said order. Execution proceeding No.5x86x87x90 was initiated by the said Court. Said proceedings were stayed in Civil Revision No.465/2001 by this Court. It was finally held by this Court vide order dated 03.01.2003 that the Civil Court has no jurisdiction to execute the order passed by the RCA. The Court of Civil Judge Class-I, Vidisha while dismissing the execution case in pursuance of this Court's order dated 03.01.2003 granted a liberty vide his order dated 03.02.2003 to the respondent to move an appropriate application before the RCA for recovery of the arrears of rent as per earlier order dated 26.08.1989 passed by the RCA. Pursuant thereto, the respondent submitted an application before the Sub Divisional Officer for execution of the order dated 26.08.1989. Learned SDO passed an order on 16.01.2008 directing thereby the revisionist to deposit the rent or submit receipts in case if he has already deposited the rent. The revisionist has challenged the order dated 16.01.2008 as without jurisdiction and against the law.

3. It has been contended on behalf of the revisionist that the order of fixation of rent passed under Section 10 of the MP Accommodation

Control Act is not executable. The aforesaid has been countered on behalf of the respondents on the ground that by virtue of the powers available to the Rent Controlling Authority under Section 35 of the said Act, the Rent Controlling Authority-cum-Sub Divisional Officer, Vidisha has rightly passed the impugned order and no interference is warranted in the present revision.

4. Considered the arguments and perused the record.

5. It may be seen that Rent Controlling Authority vide his earlier order dated 26.08.1989 made fixation of rent at the rate of Rs.275/-PM in respect of the premises in question. The revisionist was found liable to pay rent, in all, to the tune of Rs.275/-PM with effect from 16.08.1984. A letter was issued by the Rent Controlling Authority-cum-Sub Divisional Officer, Vidisha to the Civil Judge, Class-II, Vidisha for execution of the said order. Execution proceedings were initiated by the Civil Court vide Case No.5x86x87x90. These proceedings were challenged in Civil Revision No.465/2001 before this Court. This Court allowed revision application vide order dated 03.01.2003, holding that the order fixing the standard rent cannot be executed as a decree. The Civil Court was found to have acted without jurisdiction. I may prefer to quote paragraph 4 of the said order:

> "4. A bare reading of the said section will make it clear that the interpretation made by the learned Judge of the said section is on the face of it erroneous, firstly because section 35 applies to the orders passed under Chapter III-A of the Act, which deals with the application for ejectment. Moreover, the said section provides that the orders passed by the Rent Controlling Authority are executable as a decree of the Civil Court. No procedure is laid down under the Act, which empowers the Civil Court to execute the orders passed by the Rent Controlling Authority. The only remedy available to the landlord in such cases for recovery of the rent fixed by the Rent Controlling Authority is to file a civil suit for arrears of rent on the basis of rent fixed by the Rent Controlling Authority. The order fixing the standard rent cannot be executed as a decree."

The aforesaid order was passed in favour of the revisionist against the respondents, which was not further challenged before the Apex Court. Thus, it was allowed to attained finality and would obviously operate as res judicata.

6. This Court in the case of *State of Madhya Pradesh v. Mulamchand* 1973 MPLJ 632 has held in paragraph 26:

> "26. The above discussion leads to the following conclusions:
>
> (1) The bar of res judicata operates also as between two stages in the same litigation.
>
> (2) A decision in a writ proceeding operates as res judicata in a subsequent suit based on the same cause of action between the same parties.
>
> (3) The principle of res judicata is based on the need of giving finality to a judicial decision. Once a res judicata, it shall not be adjudged again. The underlying principle is that the parties should not be vexed twice over.
>
> (4) Even where section 11, Civil Procedure Code, does not apply, the principle of res judicata may apply for the purposes of achieving finality in litigation.
>
> (5) A question of law is as much in issue as a question of fact. The expression "matter in issue" is not confined to issues of fact; it includes issues of law as well.
>
> (6) But, for the purposes of the rule of res judicata, the issue of law must not be an abstract question of law, it must be one relating to its applicability or non-applicability to the facts and circumstances of the particular case.
>
> (7) Even an erroneous decision on an issue of law operates as res judicata. Exceptions to this rule are (i) where by a subsequent legislation, the law, as applied in the earlier decision, is altered. However, a different interpretation of the law as given in a subsequent binding precedent is not the same thing as altering the law. (ii) Where the question of law is one purely relating to the jurisdiction of the Court. (iii) Where the decision of the

Court sanctions something which is illegal. 'Illegality' in this context refers to an act prohibited by law.

(8) As between a decision which operates as res judicata and another which is a binding precedent, though not res judicata, the former prevails.

(9)A decision of the Supreme Court is binding on all Courts by virtue of Article 141 of the Constitution, but it is not the same thing as to say that a decision of the Supreme Court alters the law. Article 141 does not confer on the Supreme Court any legislative function. The Supreme Court declares the law; it does not alter the existing law, or make a new law."

Since it was already held in Civil Revision No.465/2001 that the only remedy available to the landlord for recovery of the rent fixed by the Rent Controlling Authority was to file a civil suit for arrears of rent on the basis of rent fixed by the Rent Controlling Authority, it is not now open for the respondents to execute the order of fixation of rent. Such a recourse would be barred by the principle of res judicata, in view of *Mulamchand's* decision (supra) of this Court.

7. Even on merit, this Court is of the opinion that Section 35 of the MP Accommodation Control Act, 1961 does not empower civil Court to execute the order of Rent Controlling Authority, fixing thereby standard rent. Section 35 may be reproduced below for convenience:

> **"35. Rent Controlling Authority to exercise powers of Civil Court for execution of other order.** -Save as otherwise provided in section 34, an order made by the Rent Controlling Authority or an order passed in appeal under this Chapter or in a revision under Chapter III-A shall be executable by the Rent Controlling Authority as a decree of a Civil Court and for this purpose, the Rent Controlling Authority shall have all the powers of a Civil Court."

Perusal of the aforesaid goes to show that an order made by the Rent Controlling Authority or an order passed in appeal under Chapter V or in a revision under Chapter III-A shall be executed by the Rent Controlling Authority as a decree of a Civil Court. The respondents have

put the order dated 26.08.1989 passed by the Rent Controlling Authority in exercise of powers under Section 10 (4) of the said Act into execution. Section 10 of the Act empowers the Rent Controlling Authority to fix standard rent in respect of any accommodation. Sub section (4) of it, empowers him to fix such rent, as would be reasonable, having regard to the situation, locality and condition of the accommodation and the amenities provided therein. It merely empowers him to make fixation of rent and not to command the tenant to make payment at such rate of rent, which is fixed by him. This apart, it may be seen that the Rent Controlling Authority vide his order dated 26.08.1989 fixed the rent at the rate of Rs.75/-PM per room and Rs.50/-PM in respect of the Varanda. He further held that the rent would be payable with effect from 16.08.1984. There was no order to the revisionist to make the payment to respondents at the rate on which the rent was fixed by the Rent Controlling Authority. The said order did not contain any command to the revisionist to make the payment to the present respondents. Executability of an order is adjudged from the language of the order itself. Order of the Rent Controlling Authority dated 26.08.1989 was merely about fixation of rent and was not executable, in view of the language employed in it.

8. In view of the aforesaid discussion, the impugned order is not found sustainable in law. The same is hereby set aside. The revision petition accordingly stands allowed with no order as to costs.

C. c. as per rules.

Revision allowed.

I.L.R. [2011] M. P., 1392

CIVIL REVISION

Before Mr. Justice Alok Aradhe

C.R. No. 334/2010 (Jabalpur) decided on 24 February, 2011

SATYANJAY TRIPATHI & anr. ...Applicants

Vs.

SMT. BANARSI DEVI ...Non-applicants

A. ***Accommodation Control Act, M.P. (41 of 1961), Section 23-B* - The Section of the Act is mandatory in nature.** (Para 9)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23–बी – अधिनियम की धारा आज्ञापक स्वरुप की है।

***B. Accommodation Control Act, M.P. (41 of 1961), Section 15 -Notice Under* - Notice does not mention that the applicants are required to appear and to obtain leave of the Rent Controlling Authority to contest the application for eviction on the ground and the default thereof within a period of fifteen days failing which the landlady would be entitled to order of eviction - The notice also does not mention that the aplicants are required to move an application before the RCA which is duly supported by an affidavit - *Held* - The notice has been issued to the tenants in violation of the mandatory provisions of Second Schedule of the Act.** (Para 10)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 15 – के अंतर्गत सूचना – सूचना में उल्लेख नहीं कि आवेदकों को उपस्थित होना और पन्द्रह दिनों की अवधि के भीतर बेदखली के लिए आवेदन पर, उसके आधारों एवं त्रुटि पर प्रतिवाद हेतु भाड़ा नियंत्रक प्राधिकारी की अनुमति अभिप्राप्त करना अपेक्षित है, ऐसा न करने पर भू–स्वामिनी बेदखली के आदेश के लिए हकदार होगी – सूचना में यह भी उल्लेख नहीं कि आवेदकों को आर.सी.ए. के समक्ष आवेदन करना अपेक्षित है जो शपथ पत्र द्वारा सम्यक् रुप से समर्थित है – अभिनिर्धारित – किराएदारों को सूचना, अधिनियम की दूसरी सूची के आज्ञापक उपबंधों के उल्लंघन में जारी की गई है।

Cases referred :

2007(4) MPHT 91 (CG), 2004(1) MPHT 456, AIR 1980 SC 303, AIR 2000 SC 3076, 1997(1) MPLJ 72, AIR 1957 SC 912, AIR 1976 SC 263, (2009) 7 SCC 658, (2002) 8 SCC 351, (1991) 2 SCC 382, (1995) 5 SCC 440, (1996) 6 SCC 634.

Prakash Upadhaya, for the applicants.

Amitabh Gupta, for the Non-applicant.

ORDER

ALOK ARADHE, J. :–This revision under Section 23-E of the M.P. Accommodation Control Act, 1961 (hereinafter referred to as the Act), has been filed by the applicants/tenants in which they have called in question the legality and validity of the order dated 25.6.2010 passed by the Rent Controlling Authority (hereinafter referred to as RCA) by which the application preferred by the non-applicant/ landlady under Section 23-A(b) of the Act has been allowed by the RCA on the ground that the tenants have failed to file the application seeking leave to contest the prayer for eviction as provided under Section 23-C(1) of the Act within the prescribed time limit.

2. Facts giving rise to filing of the revision lie in a narrow compass. The non-applicant claiming herself to be a widow, filed an application under section 23-A(b) of the Act on the ground that, she bonafide needs the suit accommodation for her grandson who wants to run the business of clothes in the accommodation in question. The notice of the proceedings before the RCA was served on the applicants/tenants on 4.2.2010. The applicants/ tenants entered appearance through their counsel on 31.3.2010 and filed the written statement, without filing any application under Section 23-C(1) of the Act seeking leave to contest the prayer for eviction. Thereafter, the proceedings before the RCA were fixed for 9.4.2010. On 9.4.2010 the proceedings were adjourned to 23.4.2010. However, the case was adjourned to 7.5.2010 for filing reply to the application filed under Section 13(6) of the Act. On 7.5.2010, reply to application under Section 13(6) of the Act was filed and the case was fixed for arguments on aforesaid application on 11.5.2010. On 11.5.2010 the applicants filed an application under Section 23-C on the ground that since the applicants/tenants failed to move any application seeking to contest the prayer for eviction, therefore, the order of eviction be passed in favour of the landlady. The case was fixed for consideration of the issue of non-compliance with the mandatory provisions as well as arguments and was adjourned to 13.5.2010. On 13.5.2010, the arguments were heard and thereafter, vide order dated 25.6.2010, the RCA passed an order of eviction. The RCA held that on 26.2.2010, the applicants/tenants were served with the summons of the proceedings however, within a period of 15 days, i.e. upto 15.3.2010 and thereafter on 31.3.2010 even when the non-applicant entered appearance through the counsel, no application seeking leave to contest the prayer for eviction was filed and, therefore, the right of the applicants to contest the prayer for eviction is closed. The RCA on the basis of the affidavit which was filed by the non-applicant as well as her witness Anurag Jain and the documents, held that grand-son of the non-applicant is unemployed and wants the accommodation bonafide for carrying on the business of clothes. Accordingly, the order of eviction was passed.

3. Learned counsel for the applicants submitted that the proceedings under Section 23-A(b) of the Act were not maintainable before the RCA as the non-applicant had set up the need of accommodation in question for her grandson. Learned counsel for the applicants also submitted that under section 23-A(b) of the Act, an order of eviction could be sought

only for the requirement of a major son or an unmarried daughter. It was further submitted that Section 23-B of the Act provides that RCA has to issue the summons in relation to every application under Section 23-A of the Act in the form specified in second schedule. However, in the instant case, no notice in the prescribed format as required under sub-section (1) of Section 23-B of the Act was served on the tenants. It was further submitted that provisions of Section 23-B are mandatory in nature and, therefore, the RCA grossly erred in holding that the tenants have lost the right to contest the prayer for eviction. In support of his submissions, learned counsel for the applicants has placed reliance on *Uttam Rajak Vs. Smt. Shanti Bai Chouksey,* 2007(4) M.P.H.T. 91 (CG) and *Dheerajbai Vs. Ushabai,* 2004(1) M.P.H.T. 456.

4. On the other hand Shri Amitabh Gupta, learned counsel for the non-applicant/landlady vehemently submitted that the provisions of Section 23-B of the Act are directory in nature. It was further submitted that on 31.3.2010, the applicants had appeared through their counsel. It was also argued that the object of issuance of notice under Section 23-B of the Act in the prescribed format is to apprise the other side with regard to nature of proceedings which has been instituted in the instant case. It was further submitted that applicants have entered appearance through their counsel on 31.3.2010 and thereafter on several dates i.e. 9.4.2010, 23.4.2010, 7.5.2010, 11.5.2010 and 13.5.2010, the proceedings were adjourned. In the proceedings before the RCA, the applicants did not raise any objection that they have not been served with the notice of the proceedings in the prescribed format as required under section 23-B of the Act and, therefore, they are precluded from raising such an objection. Apart from this, since the applicants/ tenants had entered appearance through their counsel, therefore, no prejudice has been caused since the provisions of Section 23-B of the Act are directory in nature and its substantial compliance having been made, no fault can be found with the order passed by the RCA. It was further submitted that since the accommodation in question is held for the benefit of the grandson, therefore, the RCA did not commit any illegality in granting the decree on the ground of bonafide need of the grandson. It was further submitted that provisions of Section 23-C of the Act have been held to be mandatory as they provide for a consequence. It was further submitted that the decision relied upon by the learned counsel for the applicant reported in 2007(4)

M.P.H.T. 91 (CG) supra, is of no assistance to the learned counsel for the applicants. While drawing the attention of this Court to the facts of the case, it was contended that tenant in that case had appeared in person and on the date when he appeared before the RCA, copy of the application was supplied to him whereas, in the instant case, along with the summons, copy of the application for eviction filed by the non-applicant/landlady under Section 23-A(b) of the Act, was served on the tenants who had appeared through his counsel on 31.3.2010. It was also submitted that the written statement was filed on 31.3.2010 itself. It was further submitted that the landlady/non-applicant filed an application under Section 23-C of the Act before the RCA on 11.5.2010 in which a prayer was made that since the applicants/tenants have failed to file the application seeking to contest the prayer for eviction, therefore, the order of eviction should be passed in favour of the landlady. Despite receipt of the aforesaid application, the tenants neither filed any application under Section 23-C(1) of the Act, nor raised any objection with regard to non-receipt of the notice in mandatory form, therefore, the objection in this regard is deemed to have been waived. The order passed by the RCA is perfectly just and legal and does not warrant any interference by this Court in exercise of power under Section 23-E of the Act. In support of his submissions, learned counsel for the non-applicant has placed reliance on the decisions of Supreme court in *Sharif-ud-Din Vs. Abdul Gani Lone,* AIR 1980 SC 303, *J.Chatterjee Vs. Mohinder Kaur Uppal and another,* AIR 2000 SC 3076 and *Tilakraj Sharma Vs. Shyamabai Tiwari,* 1997(1) MPLJ 72.

5. I have considered the submissions made on both the sides. Chapter III-A of the Act has been inserted in the statute book by way of amendment Act namely M.P. No.27 of 1983. Chapter III-A deals with eviction of tenants on the ground of bonafide need and contains special provision for eviction of tenant on the ground of bonafide requirement. Section 23-A(b)of the Act provides that the accommodation let for non-residential purposes if required by the landlord for the purpose of starting the business or for any of his major sons or unmarried daughters and for any other person for whose benefit the accommodation is held and that the landlord has no other reasonably suitable non-residential accommodation of his own in the city or town can be got vacated under Section 23-A(b) of the Act. Section 23-A(b) of the Act reads as under:-

> "23-A(b) - that the accommodation let for non-residential purposes is required "bona fide" by the landlord for the

purpose of continuing or starting his business or that of any of his major sons or unmarried daughters, if he is the owner therefore or for any person for whose benefit the accommodation is held and that the landlord or such person has no other reasonably suitable non-residential accommodation of his own in his occupation in the city or town concerned."

Section 23-B(1) mandates the RCA to issue to the tenant a summons in relation to every application referred to in Section 23-A in the form specified in Second Schedule. Second Schedule prescribes the form of summons. Relevant extract of the form reads as under:

"You are hereby summoned to appear before the Rent Controlling Authority within fifteen days of the service for hearing and to obtain the leave of the Rent Controlling Authority to contest the application for eviction on the grounds aforesaid; in default whereof the applicant will be entitled at any time after the expiry of the said period of fifteen days to obtain an order for your eviction from the said accommodation. Subject as aforesaid the date for further proceeding shall be.....

Leave to appear and contest the application may be obtained on an application to the Rent Controlling Authority supported by an affidavit as is referred to in Section 23-C. Given under my hand and seal".

Thus, by this notice, the tenant is apprised that he is required to appear before the RCA within a period of fifteen days from the date of service of notice and to obtain the leave of the RCA to contest the application for eviction. He is further apprised that in case he fails to move an application within the period of fifteen days, the landlord is entitled to seek an order of eviction. The tenant by the aforesaid notice is also informed that he is required to move an application to the RCA supported by an affidavit.

6. Section 23-C of the Act reads as under:-

"23-C. Tenant not entitled to contest except under certain circumstances-

(1) The tenant on whom the summons is served in the form specified in the Second Schedule shall not contest the prayer for eviction from the accommodation unless he files within

fifteen days from the date of service of the summons, an application supported by an affidavit stating the grounds on which he seeks to contest the application for eviction and obtains leave from the Rent Controlling Authority as hereinafter provided, and in default of his appearance in pursuance of the summons or in default of his obtaining such leave, or if such leave is refused, the statement made by the landlord in the application for eviction shall be deemed to be admitted by the tenant. The Rent Controlling Authority shall in such a case pass an order of eviction of the tenant from the accommodation:

Provided that the Rent Controlling Authority may, for sufficient cause shown by the tenant, excuse the delay of the tenant in entering appearance or in applying for leave to defend the application for eviction and whereas "ex-parte" order has been passed, may set it aside.

(2) The Rent Controlling Authority shall, within one month of the date of receipt of application, give to the tenant, if necessary, leave to contest the application, if the application supported by an affidavit filed by the tenant discloses such facts as would disentitle the landlord from obtaining an order for the recovery of possession of the accommodation on the ground specified in Section 23-A."

7. Thus, from perusal of Section 23-C(1) of the Act, it is apparent that in case of failure to comply with the requirement mentioned in sub-section (1) of Section 23-C of the Act, the statement made by the landlord in the application for eviction shall be deemed to be admitted by the tenant and the Rent Controlling Authority in such a case shall pass an order of eviction of the tenant from the accommodation. Thus, the consequence of non-compliance of requirement contained in Section 23-C(1) of the Act is provided in sub-section(1) itself.

8. It is well settled in law that in order to decide the question as whether a particular provision contained in the Statute is mandatory or directory, the intention of the Legislature has to be gathered. For ascertaining the real intention of the Legislature, the Court has to consider the nature and design of the Statute and the consequence which would follow from

construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely that the Statute provides for a contingency of the non-compliance with the provisions; the fact of non-compliance with the provisions is or is not visited by some penalty; the serious or trivial consequences, that flow therefrom; and above all, whether the object of the Legislature would be defeated. See: *State of U.P. Vs. Manbodhal Lal Shrivastava,* AIR 1957 SC 912, *Govind Lal Chaggan Lal Patel Vs. The Agriculture Produce Market Committee and others,* AIR 1976 SC 263 and *Sarla Goel and others Vs. Kishan Chand,* (2009) 7 SCC 658.

9. In the backdrop of well settled legal position, the provisions in question may be seen. Section 23-B as well as Section 23-C(1) of the Act have to be read in conjunction. No doubt, the Legislature while drafting the provision of Section 23-B(1) of the Act has employed affirmative words and has cast an obligation on the Rent Controlling Authority to issue summons to the tenant in the format specified in Second Schedule. The object of requirement of notice is to apprise the tenant that in case on receipt of notice within a period of fifteen days, if he fails to enter appearance and files an application seeking leave to defend, an order of eviction shall be passed against him. The notice contains sufficient particulars to apprise the landlord with regard to its non consequence. The non-compliance of procedural requirement contained in Section 23-1(c) of the Act is drastic in nature and entails an order of eviction against the tenant that too without affording any opportunity of hearing to him. Thus, if the provisions of Section 23-B and 23-C(1) of the Act are read in conjunction, it is apparent that non-compliance with the requirement contained in Section 23(1) of the Act is visited with the penalty which is mentioned therein namely the order of eviction. The consequence which is provided by the Statute is drastic in nature. Thus, for the aforementioned reasons and applying the well settled legal principles referred to above for adjudging whether the statutory provision is mandatory or directory in nature, this Court has no hesitation in holding that Section 23-B of the Act is mandatory in nature.

10. In the instant case, the notice which has been annexed is admittedly not in the format which has been prescribed in Second Schedule to the

Act. The notice which has been issued is the general notice which is issued in the revenue cases and requires the applicants/ tenant to appear on 31.3.2010 at 11.30 a.m. The notice does not mention that the applicants are required to appear and to obtain leave of the Rent Controlling Authority to contest the application for eviction on the ground and the default thereof within a period of fifteen days failing which the landlady would be entitled to order of eviction. The notice also does not mention that the applicants are required to move an application before the RCA which is duly supported by an affidavit. Thus, the notice has been issued to the tenants in violation of the mandatory provisions of Second Schedule of the Act. Apart from this, it is well settled legal proposition that in case of violation of mandatory provision, no prejudice need be shown and in such a case necessary benefit should be given to the delinquent. See: *Vinod Vs. State of Maharashtra*, (2002) 8 SCC 351 and *Major G.S. Sodhi Vs. Union of India*, (1991) 2 SCC 382. It is equally well settled legal principle that when a Statute prescribes a mode of doing an act in a particular manner, that act has to be done in that manner alone and other modes of its performance are forbidden. See: *Bhagwant Rai and others Vs. State of Punjab and others*, (1995) 5 SCC 440 and *I.T.C. Bhadrachalam Paper Boards and another Vs. Mandal Revenue Officer, A.P. and others*, (1996) 6 SCC 634.

11. For the aforementioned reasons, the order passed by the RCA dated 25.6.2010 cannot be sustained in the eye of law. The same is hereby quashed. The applicants/tenants are directed to appear before the RCA on 1.3.2011 along an application under Section 23-C(1) of the Act as also an application for condonation of delay. The RCA shall consider and decide the application within a period of one week thereafter. Learned counsel for the applicants assures this Court that the applicants shall not seek any unnecessary adjournment and will cooperate for the early proceedings before the RCA. In view of aforesaid statement made by learned counsel for the applicants, it is directed that the RCA shall conclude the proceedings positively by 31.5.2011. With the aforesaid direction, the civil revision stands disposed of.

Revision disposed of.

I.L.R. [2011] M. P., 1401
ARBITRATION APPEAL
Before Mr. Justice Alok Aradhe
Arbitration Appeal No. 24/2010 (Jabalpur) decided on 23 February, 2011

UNION OF INDIA ...Appellant
Vs.
AMARLAL WADHWANI ...Respondent

Arbitration and Conciliation Act (26 of 1996), Section 9 **- The Court has no power to stay the arbitral proceeding or to entertain the question with regard to jurisdiction of the arbitral tribunal - All such challenges have to be made before the arbitral tribunal under the Act and the remedy of an aggrieved party is to challenge the award in accordance with Section 34 of the Act.** (Para 7)

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 9 – माध्यस्थम कार्यवाही को रोकने अथवा माध्यस्थम अधिकरण की अधिकारिता से संबंधित प्रश्न को ग्रहण करने की न्यायालय को कोई शक्ति नहीं – ऐसी सभी चुनौतियों को अधिनियम के अंतर्गत माध्यस्थम अधिकरण के समक्ष प्रस्तुत करनी होगी और पीड़ित पक्षकार के लिए उपचार है कि अधिनियम की धारा 34 के अनुसरण में अवार्ड को चुनौती दे।

Cases referred :

AIR 2009 SCW 6659, (2005) 8 SCC 618, AIR1999 SC 463, AIR 1999 SC 565, AIR 1975 MP 152, (2002) 4 SCC 105.

S.K. Menon, for the appellant.
R.C.Sobhani, for the respondent.

JUDGMENT

ALOK ARADHE, J. :–In this appeal preferred under Section 37 (1) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the 1996 Act') the appellant has called in question the validity of the order dated 24.10.2009 passed by the trial Court by which the application preferred by the appellant under Section 9 of the 1996 Act has been rejected.

2. Facts giving rise to filing of the appeal in nutshell are that the appellant awarded a contract to the respondent vide agreement No.66/ EE/BCD-1/2006-2007 for construction of building of Rashtriya Sanskrit Sansthan Bhawan, Bhopal. However, on account of slow progress of the work, the contract awarded to the respondent was rescinded. Therefore, in accordance with clause 25 of the agreement between the parties, the

dispute was referred for adjudication by the sole arbitrator. The respondent submitted a statement of claim before the arbitrator. The appellant filed the written statement of claim to the statement of claim filed by the respondent in which inter alia, an objection was raised that in view of clause 25 of the agreement executed between the parties, the dispute pertaining to rescission of the contract and the dispute whether or not the respondent had received payment of final bill under duress and coercion had not been referred to for adjudication of the arbitrator. The arbitrator vide order dated 24.10.2009 held that aforesaid issues have been referred for adjudication.

3. Being aggrieved by the order dated 24.10.2009 passed by the arbitrator, the appellant filed an application under Section 9 of the 1996 Act in which a prayer was made that the order dated 24.10.2009 passed by the arbitrator be stayed and it be held that arbitrator has no jurisdiction to decide the issue of rescission of contract and the question of duress and coercion as alleged by the non-applicant. The respondent filed a reply to the aforesaid application and opposed the prayer in which inter alia it was pointed out that by way of interim relief under Section 9 of the 1996 Act the proceeding or order passed by the arbitrator cannot be stayed as the arbitrator under Section 16 of the 1996 Act has the authority to decide its jurisdiction. The trial Court vide order dated 11.5.2010 held that under Section 16 of the 1996 Act, the arbitral tribunal has competence to rule on is jurisdiction. A party shall be at liberty to raise plea that arbitral tribunal has exceeded the scope of its authority and thereupon the arbitral tribunal shall decide the plea in this regard and continue with arbitral proceeding. A party being aggrieved by such an arbitral award may make an application for setting aside the award passed by the arbitral tribiunal under Section 34 of the 1996 Act. Accordingly, the application preferred by the appellant was rejected.

4. Shri S.K. Menon, learned counsel for the appellant submitted that in view of clause 25 of the agreement the issue of rescission of contract and the question of duress and coercion could not have been referred to arbitration and, therefore, the order passed by 24.10.2009 is per se without jurisdiction. No cogent reasons have been assigned by the arbitrator while rejecting the objection raised by the appellant in this regard. The trial Court grossly erred in rejecting the application preferred by the appellant under Section 9 of the 1996 Act and in not

granting the stay of the order passed by the arbitrator. In support of his submissions, learned counsel for the appellant has placed reliance on the decisions in AIR 2009 SCW 6659, *SBP & Co. v. Patel Engineering Ltd. and Another,* (2005) 8 SCC 618, *Rajinder Krishan Khann v. Union of India,* AIR 1999 SC 463, AIR 1999 SC 565 as well as *Chief Administrator,Dandakaranya Project v. M/s Prabartak Commerical Corporation,* AIR 1975 MP 152 on the other hand, while opposing the submissions made by learned counsel for the appellant, learned counsel for the respondent submitted that once the arbitral tribunal decides the scope of its authority he should be allowed to proceed with the arbitration proceeding and his decision cannot be interdicted by the court in view of Section 16 (6) of the 1996 Act. An aggrieved person is at liberty to file an application under Section 34 of the 1996 Act. In support of his submissions, learned counsel for the respondent placed reliance in *Bhatia International v. Bulk Trading S.A. And Antoher,* (2002) 4 SCC 105.

5. I have considered the submissions made by learned counsel for the parties. The Arbitration and Conciliation Act, 1996 has been enacted inter alia, with an object to make the provisions of arbitral proceeding which is fair, efficient and capable of meeting the needs of specific arbitration and to minimise the supervisory role of the Courts in arbitral proceedings. Section 9 of the Act provides that a party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36 apply to the court in respect of appointment of guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings or for an interim measure in respect of the following matters:

> (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
>
> (b) securing the amount in dispute in the arbitration;
>
> (c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid pruposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to

be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient"

Section 16 of the Act deals with the competence of the arbitral tribunal to rule on its jurisdiction. Section 16 (2) of the 1996 Act provides that a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party shall not be precluded from raising such a plea merely because that he has appointed or participated in the appointment of an arbitrator. Sub-section (3) of Section 16 provides that a plea that arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. Sub-section (4) of Section 16 empowers the arbitral tribunal to admit a later plea if it considers the delay justified. Under Section 16 (5), the arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) or where the arbitral tribunal takes a decision rejecting the plea, it shall continue with the arbitral proceedings and shall make an arbitral award. Sub-section (6) provides that a party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34 of the 1996 Act.

6. In *Bhatia International* (supra) the Supreme Court while considering the scope and ambit of Section 9 of the 1996 Act held that Section 9 does not permit any or all applications. It only permits the applications for interim measures mentioned in clauses (i) and (ii) thereof. Thus, there cannot be an application under Section 9 for stay of arbitral proceeding or to challenge the existence or validity of arbitration agreement or jurisdiction of the arbitral tribunal. All such challenges would have been made before the arbitral tribunal under the said Act. Thereafter the issue with regard to power and jurisdiction of the arbitral tribunal to rule on its jurisdiction and remedy of an aggrieved party came up for consideration before the Supreme Court in *SBP & Co. v. Patel Engineering Ltd. and Another,* (2005) 8 SCC 618 in which the supreme Court has held as under:

"142..... (iv) The Arbitral Tribunal has power and jurisdiction to rule "on its own jurisdiction" under sub-section (1) of Section 16 of the Act.

(v) Where the Arbitral Tribunal holds that it has jurisdiction, it shall continue with the arbitral proceedings and make an arbitral award.

(vi) A remedy available to the party aggrieved is to challenge the award in accordance with Section 34 or Section 37 of the Act."

7. Thus, in view of the aforesaid enunciation of law by the Supreme Court it is apparent that under Section 9 of the 1996 Act, the Court has no power to stay the arbitral proceeding or to entertain the question with regard to jurisdiction of the arbitral tribunal. All such challenges have to be made before the arbitral tribunal under the Act and the remedy of an aggrieved party is to challenge the award in accordance with Section 34 of the 1996 Act. Thus, the application for grant of interim measure filed by the appellant was rightly rejected by the trial Court. No infirmity can be found with the order of the trial Court which warrants interference by this Court.

8. For the aforementioned reasons, I do not find any merit in the appeal. The same fails and is hereby dismissed.

Appeal dismissed.

I.L.R. [2011] M. P., 1405

MISCELLANEOUS INCOME TAX APPEAL

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

M.A.I.T. No. 54/2007 (Jabalplur) decided on 8 November, 2010

ASHOK ANAND ...Appellant

Vs.

COMMISSIONER OF INCOME TAX ...Respondent

A. ***Income Tax Act (43 of 1961), Section 143(2), 158 BC - Non issuance of Notice within prescribed time*** **- Additional ground with regard to non-issuance of notice within prescribed time as per Section 143(2) of Act, 1961 is a question of law - It can be raised for the first time in appeal - Question of law can be raised at any stage of proceedings.** (Para 7)

क. आयकर अधिनियम (1961 का 43), धारा 143(2), 158बीसी – विहित समय के भीतर नोटिस जारी न किया जाना – अधिनियम 1961 की धारा 143(2) के अनुसार विहित समय के भीतर नोटिस जारी न किये जाने से संबंधित अतिरिक्त आधार, विधि का प्रश्न है – उसे सर्वप्रथम अपील में उठाया जा सकता है – विधि का प्रश्न कार्यवाहियों के किसी भी प्रक्रम पर उठाया जा सकता है।

***B. Income Tax Act, (43 of 1961) - Section 144 - Remand whether open or partial* - Assessment order passed under Section 144 set aside by appellate authority and remanded the matter for re-framing the assessment proceedings -*Held* - Order of Income Tax Officer merges with appellate order only to the extent it was considered and decided by appellate authority - Matter which is not covered by appellate order is left untouched and to that extent assessment order survives - As order was set aside, it is wiped of from its existence.** (Para 8)

ख. आयकर अधिनियम (1961 का 43), धारा 144 – प्रतिषेषण खुला है अथवा आंशिक है – धारा 144 के अतंर्गत पारित निर्धारण आदेश, अपीलीय प्राधिकारी द्वारा अपास्त किया गया और निर्धारण कार्यवाहियों को पुनः विरचित करने हेतु मामला प्रतिप्रेषित किया गया – अभिनिर्धारित – आयकर अधिकारी का आदेश, अपीलीय आदेश के साथ केवल उस सीमा तक विलीन होगा जहां तक अपीलीय प्राधिकारी द्वारा उस पर विचार किया गया एवं निर्धारित किया गया – अपीलीय आदेश द्वारा जो विषय समाविष्ट नहीं, उसे अनछुआ छोड़ा गया और उस सीमा तक निर्धारण आदेश बचा रहेगा – चूंकि आदेश अपास्त किया गया था, उसे उसके अस्तित्व से मिटा दिया गया।

Cases referred :

(2010) 3 SCC 259, (1987) 164 ITR 197, (1998) 229 ITR 383, (1988) 170 ITR 41, (1983) 139 ITR 1064, (1981) 129 ITR 554, (1990) 88 CTR (SC) 66, (1998) 229 ITR 383, (1992) 3 SCC 1.

G.N. Purohit, with *Abhishek Oswal,* for the appellant.

Rohit Arya, with *Sanjay Lal,* for the respondent.

ORDER

The Order of the Court was delivered by **S.R. ALAM, CHIEF JUSTICE.** :–This is an appeal under Section 260-A of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'] against the order of the learned Income Tax Appellate Tribunal, dated 13-10-2006 passed in I.T.(SS)A No.50/IND/2003 for the block period 1987-88 to 1997-98. The appeal was admitted by a Bench of this Court vide order dated 5-9-2007 on the following substantial questions of law:

(a) "Whether the Income Tax Appellate Tribunal is justified by expressing an opinion that the assessee appellant was not entitled under law to raise a contention that the notice issued by the assessing officer under Section 143(2) was impermissible because of the proviso attached to the said provision on the ground that such an issue was not raised on the first round of appeal before the CIT(A) was barred by doctrine of merger (wrongly typed as 'and the doctrine of CIT(A)?"

(b) Whether in the facts and circumstances of the case it can be held that the order passed by the assessing officer on the first occasion had merged in absolute terms in the order passed by the CIT(A) on the first occasion and further the order passed by the CIT(A) does not tantamount to open remand but a partial remand?"

2. The relevant admitted facts, in brief, are that a search was conducted under Section 132 of the Act by the Income Tax Department in the residential premises of the appellant. Thereafter, a notice dated 10-7-1997 (Annexure-A/1) was issued under Section 158 BC of the Act. Pursuant to the aforesaid notice, assessee furnished block return on 30-9-1997 for the period 1-4-1986 to 5-2-1997 declaring an undisclosed income to the tune of Rs.29,44,546/. Notice of hearing under Section 143(2) of the Act was issued on 13-01-1998 (Annexure-A/3) which was served on the appellant on 16-10-1998. Thereafter, assessment was completed ex parte under Section 144 of the Act vide order dated 26-2-1999 (Annexure-A/4). The aforesaid order was set aside by the Commissioner of Income Tax (Appeals) vide order dated 9-02-2001 (Annexure-A/5) for re-framing the assessment proceeding.

3. Thereafter, the assessment was re-framed by the Assessing Officer and an order was passed on 28-3-2002 (Annexure-A/6). Against the aforesaid order, the assessee once again preferred an appeal whereby vide order dated 26-9-2003 (Annexure-A/11), the Commissioner of Income Tax decided the appeal in favour of the assessee. He held that proviso to Section 143(2) of the Act is applicable also to proceedings under Section 158 BC of the Act and since statutory notice was not issued within a period of one year as laid down in proviso to Section 143(2) of the Act,

the block assessments made by the Assessing Officer were barred by limitation. The Commissioner of Income Tax further held that since entire block assessment has been set aside and has been re-framed from the return stage and since the Commissioner of Income Tax (Appeals) has not adjudicated any of the grounds, therefore, the appellant has right to raise fresh or additional ground when the assessment has been re-framed afresh. Accordingly, it was held that it is permissible for the assessee to raise an additional ground with regard to validity of the notice under Section 143(2) of the Act.

4. Being aggrieved by the aforesaid order, the revenue preferred an appeal before the Income Tax Appellate Tribunal. Vide order dated 13-10-2006, the Tribunal allowed the appeal preferred by the revenue. The Income Tax Appellate Tribunal relying on the decision rendered by the Commissioner of Income Tax (Appeals) of ITAT Ahmedabad Bench as well as Chennai Bench and Pune Bench held that the Commissioner of Income Tax (Appeals) was not justified in quashing the assessment orders on the ground that no notice under Section 143(2) of the Act was issued within the prescribed time limit. It was further held that the Commissioner, Income Tax (Appeals) was not justified in holding that the earlier order of assessment dated 26-2-1999 is without jurisdiction. The order dated 26-2-1999 was subject-matter in appeal before the Commissioner of Income Tax (Appeals) which was set aside vide order dated 19-02-2001 and directed the Assessing Officer to re-frame the assessment after giving an opportunity to the assessee. The assessment order dated 26-02-1999, therefore, merged with the order of CIT, dated 19-02-2001. The Tribunal further took the view that though the earlier order dated 19-02-2001 was not under challenge by any party before the Tribunal yet by the impugned order the Tribunal virtually set aside the earlier order dated 19-02-2001 by quashing the block assessment order 26-02-1999.

5. The learned Senior Counsel appearing for the assessee-appellant relying on the decision of the apex Court rendered in *Assistant Commissioner Income Tax and another vs. M/s. Hotel Blue Moon,* (2010)3 SCC 259 contended that issuance of notice under Section 143(2) of the Act within the prescribed time for the purpose of block assessment under Chapter XIV-B of the Act is mandatory. It was submitted that the Income Tax Appellate Tribunal was not justified in holding that it was impermissible for the appellant to raise additional ground with regard to

validity of notice under Section 143(2) of the Act. Learned Senior Counsel further contended that a question of law can be raised at any stage. Learned Senior Counsel has also assailed the finding recorded by the ITAT in para 16 of the order to the effect that order of assessment dated 26-02-1999 stood merged with the order dated 19-02-2001 and, therefore, the Commissioner Income Tax (Appeals) was not justified in virtually setting aside the order dated 19-02-2001, on the strength of Full Bench decision of this Court rendered in the case of *CIT vs. K.L. Rajput,* [1987] 164 ITR 197 (MP) wherein it has been held that the order of the Income-Tax Officer merges with the appellate order only to the extent it was considered and decided by the appellate authority but the matter which is not covered by the appellate order of the appellate authority are left untouched and to that extent assessment order survives. He has also relied on the decisions rendered in the cases of *National Thermal Power Co. Ltd. vs. CIT,* [1998] 229 ITR 383; *Kanhiram Ramgopal vs. CIT,* [1988] 170 ITR 41 (MP); and *Alok Paper Industries vs. CIT,* [1983] 139 ITR 1064 (MP) in support of his contention.

6. Learned counsel for the revenue, on the other hand, has supported the order passed by the Income Tax Appellate Tribunal. He has fairly stated that in view of law laid down by the Supreme Court in the matter of *Assistant Commissioner Income Tax and another vs. M/s. Hotel Blue Moon* (Supra), notice under Section 143(2) of the Act ought to have been issued within a period of one year in respect of block assessment. However, counsel for the revenue has placed reliance on paragraphs 14 and 16 of the order passed by the ITAT and has stated that order is based on cogent reasons and does not call for interference. It is urged by him that it was not permissible for the petitioner to raise a contention with regard to validity of notice under Section 143(2) of the Act. It was contended by the learned counsel for revenue that issue with regard to validity of notice was impliedly decided. In support of his contention, learned counsel has referred to the decisions reported in *CIT vs. Indian Auto Stores,* [1981] 129 ITR 554 and *CIT vs. City Palayacot Co.,* [1980] 122 ITR 430.

7. As stated supra, an order of assessment was passed on 26.02.1999. The aforesaid order of assessment was set aside by the Commissioner of Income Tax (Appeals) vide order dated 19.02.2009. By order dated 19.02.2009, the Commissioner of Income Tax (appeals) directed the

Assessing Officer to examine the case in the light of memoranda, accounts books, different balance sheets and the cash flow statements already on record after providing due opportunity to the appellant to file the explanation towards material gathered by the Assessing Officer and the statement recorded in the absence of the appellant. The order of assessment dated 26.02.1999 was set aside. Thereafter, again an order of assessment was passed on 28.03.2002 which was subject-matter of appeal before the Commissioner of Income Tax (appeals). The aforesaid order was set aside by the Commissioner of Income Tax (Appeals) vide order dated 26.09.2003. In the Appeal, Counsel for the assessee raised the issue with regard to validity of notice under Section 143(2) of the Act on the ground that same was not issued within the prescribed time limit. From perusal of paragraph 8.2 of the order passed by the Commissioner of Income Tax (Appeals), we find that it was not disputed before the Commissioner of Income Tax (appeals) that the additional ground which was raised is a legal ground and can be raised at any time if no enquiry on facts was necessary. It is well settled in law that a question of law can be raised at any stage of the proceedings. In view of well settled legal position, revenue also did not dispute the aforesaid position and in our view rightly so before the Commissioner of Income Tax (Appeals) that additional ground with regard to validity of the notice under Section 143(2) of the Act could be permitted to be raised for the first time. In this connection, reference may be made to decision of Supreme Court in the case of *Jute Corporation of India Ltd. V. CIT,* [1990] 88 CTR (SC) 66 as well as in the case of *National Thermal Power Company Ltd. V. Commissioner of Income Tax* [1998] 229 ITR 383 (SC) wherein it has been held that a new plea can be permitted to raised, provided the appellate authority is satisfied that ground raised was bonafide. It has further been held that the appellate authority should exercise discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. From perusal of the paragraphs 8 to 8.6 of the order passed by the Commissioner of Income Tax (Appeals) dated 26.09.2003, we find that discretion to permit the assessee to raise an additional ground has been exercised by him in accordance with law and is based on reasons. The question whether notice under Section 143(2) of the Act was issued within prescribed time limit is a question of law and arose for consideration before the Commissioner, Income Tax (Appeals) on admitted facts. Besides that the issue whether or not the notice under Section 143(2) of the Act

ought to be issued within a period of one year in respect of block assessment is no longer res integra and is concluded by the judgement of the Apex Court rendered in *Assistant Commissioner Income Tax and another vs. M/s Hotel Blue Moon* (supra). Since in the instant case notice has not been issued within a period of one year, therefore, the same vitiates the proceedings under Section 158 BC of the Act. We, therefore, are of the view that the said issue since goes to the root of the matter was rightly allowed to be raised before the Commissioner, Income Tax (Appeals). In view of our preceding analysis, the first substantial question of law formulated by this Court has to be answered in the negative and in favour of the assessee.

8. Let us now examine the second substantial question of law framed by this Court which is in two parts. First part of the second substantial question of law deals with the question of merger and the second part is with regard to the fact whether the order passed by the Commissioner of Income Tax (Appeals) dated 19.02.2001. was an open remand or partial remand. Full Bnech of this case in the case of *Commissioner of Income Tax v. K.L.Rajput* (supra) has held that order of the Income Tax Officer merges with the appellate order only to the extent it was considered and decided by the appellate authority but the matter which is not covered by the appellate order of the appellate authority is left untouched and to that extent assessment order survives. From perusal of the order of remand dated 19.02.2001, we find that order passed by the Assessing Officer in the first instance i.e. the order dated 26.02.1999 was set aside. Once an order is set aside, it is wiped of from its existence. [See: *Shree Chamundi Mopeds Ltd. V. Church of South India Trust Association CIS Cinod Secretariat, Madras,* (1992) 3 SCC 1]. Therefore, in the facts of present case, the question of merger does not arise. Apart from this, it is clear from perusal of order dated 26.02.1999 passed by the Assessing Officer and order dated 19.02.2001 by the Commissioner of Income tax (Appeals), that both the authorities have not adjudicated issue of validity of notice under Section 143(2) of the Act. Therefore, the first part of the second substantial question of law formulated by this court has to be answered in the negative. So far as second part of the substantial question of law is concerned, from perusal of paragraphs 9 and 10 of the order dated 19.02.2001, it is clear that in paragraph 9, only parameters have been indicated by the Commissioner of Income Tax (Appeals) on the basis of

which the Assessing Officer had to re-examine the case. From paragraph 10 of the order passed by the Commissioner of Income Tax (Appeals), it is apparent that order dated 26.02.1999 has been set aside in its entirety. Therefore, we answer second part of the substantial question of law by stating that the order dated 19.02.2001 was an open remand.

9. In view of the above discussions, we are of the view that the order of the Income Tax Appellate Tribunal, dated 13.10.2006 cannot sustain. In the result, the appeal succeeds and is hereby allowed. The order under appeal is accordingly set aside. However, there shall be no order as to costs.

Appeal allowed.

I.L.R. [2011] M. P., 1412

MISCELLANEOUS CRIMINAL CASE

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

M.Cr.C.No. 2526/2010 (Jabalpur) decided on 13 January, 2011

ASHOK NANDA ...Applicant

Vs.

STATE OF M.P. & anr. ...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Prevention of Corruption Act (49 of 1988), Section 13(1)(d) - Quashing of F.I.R. **- Recitals of F.I.R. do disclose offences, yet investigating agency not able to collect any cogent evidence during considerable period of nearly one year - Mere fact that allegations levelled against applicant have not been found to be substantiated so far, would not afford a ground to quash the F.I.R. or a part thereof - However, continuance of investigation against applicant deserves interference under inherent powers - Recitals of F.I.R. so far as they are related to applicant shall not be acted upon - However, Investigating agency not precluded from carrying out further investigation into offences and whereupon such investigation, evidence, oral or documentary is collected against applicant, agency shall be free to take action against applicant.** (Paras 8 to 12)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) –प्रथम सूचना रिपोर्ट का अभिखंडित

किया जाना – प्रथम सूचना रिपोर्ट के उपकथन अपराधों को प्रकट करते हैं, तथापि लगभग एक वर्ष की पर्याप्त अवधि के दौरान भी; जाँच एजेंसी किसी प्रबल साक्ष्य को एकत्रित करने में असमर्थ – मात्र तथ्य कि आवेदक के विरुद्ध लगाए गये अभिकथनों को प्रमाणित होना अभी तक नहीं पाया गया, प्रथम सूचना रिपोर्ट अथवा उसके भाग को खंडित करने का आधार नहीं बनेगा – किन्तु आवेदक के विरुद्ध जाँच जारी रखना अंतर्निहित शक्तियों के अंतर्गत हस्तक्षेप योग्य है – प्रथम सूचना रिपोर्ट के उपकथन, जहां तक वे आवेदक से संबंधित हैं, पर कार्यवाही नहीं होगी – अपितु अपराधों की अतिरिक्त जाँच करने से जाँच एजेंसी प्रभावित नहीं और जहां ऐसी जाँच उपरांत, आवेदक के विरुद्ध मौखिक या दस्तावेजी साक्ष्य एकत्रित की जाती है, जाँच एजेंसी आवेदक के विरुद्ध कार्यवाही करने के लिए स्वतंत्र रहेगी।

Cases referred :

(2005) 13 SCC 540, AIR 1960 SC 866, (2006) 7 SCC 296, AIR 2008 SC 2778, AIR 2010 SC 201, AIR 2010 SC 3196, (2008) 5 SCC 791.

Surendra Singh with *Manish Mishra,* for the applicant.

Aditya Adhikari, Spl. P.P., for the non-applicant No. 1/SPE Lokayukt.

None, for the non-applicant No. 2, though served.

ORDER

The Order of the Court was delivered by **R.C. Mishra, J. :**–This is a petition, under Section 482 of the Code of Criminal Procedure (for short 'the Code') for having the FIR leading to registration of Crime No.11/2010 at SPE (Lokayukt), Bhopal, in respect of the offences punishable under Sections 13(1)(d) read with 13(2) of the Prevention of Corruption Act, 1988 and Section 120-B of the IPC, so far at it relates to the petitioner, quashed.

2. The FIR, in turn, is based on a complaint made by respondent no.2 namely Sushil Kumar on or before 29.01.2010. Recitals of the complaint may be summarized thus -

> In the year 2006-2007, Department of Health, Government of M.P. through Laghu Udyog Nigam was required to purchase drug kit 'A', drug kit 'B' and the drug kits to be used for Asha workers. Co-accused Dr. Rajesh Rajora, the then Health Commissioner, Dr. Yogiraj Sharma, the then Director of Health, some officers of the M.P. Laghu Udyog Nigam and the petitioner, who was the proprietor of M/s Malwa Drug House, a local pharmaceutical firm, hatched

a conspiracy in pursuance of which drug kits were purchased at excessive rates and further, an amount of Rs.9.50 crores was paid as advance against Rs.11.99 crores, the total value of drug kits to be supplied whereas payment of such a huge amount even before supply of the kits, was apparently a serious financial irregularity.

3. While contending that continuance of investigation against the petitioner is an abuse of process of the Court, learned Senior Counsel has invited attention to the following facts -

(i) The complainant/respondent no.2 is a journalist by profession.

(ii) The petitioner was not at all involved in supply of the drug kits to the Department.

(iii) M/s Malwa Drug House had ceased to exist with effect from 1.4.2003 consequent to its merger in M/s Hindustan Institute of Pharmakon Ltd., a company registered under the Companies Act, 1956.

(iv) As per the conditions specified in the Notice Inviting Tender, only public sector companies were eligible to participate in the tender process.

(v) The contract to supply the drug kits was awarded to M/s Karnataka Antibiotics and Pharmaceuticals Ltd. Bangalore, a public sector company (hereinafter referred to as 'M/s KAPL') and the amount of Rs.9.50 crores was paid to the company as 30% of the total price of the kits to be supplied as per the tender conditions.

(vi) Two supply orders were placed and the drug kits were supplied as per the requirements. However, in view of State Government's disinclination to pay the remaining amount, M/s KAPL moved this Court by filing a writ petition under Article 226 of the Constitution of India.

4. According to the learned Senior Counsel, the events subsequent to supply of the drug kits also ruled out complicity of the petitioner in the matter. For this, reference has been made to the contents of -

(a) order-dated 20.3.2010, passed in W.P. No.8537/2009

by a Division Bench of this Court, directing the State Government to pay a sum of Rs.10 crores to M/s KAPL as against its claim of Rs.22,16,51,642/- and

(b) order-dated 6.4.2010, passed by the Supreme Court in SLP (Civil) No.10479/2010, declining to interfere with the order-dated 20.3.2010 (supra).

It has also been pointed out that neither in reply to the Writ Petition nor in the Special Leave Petition, any role attributable to the petitioner or M/s Malwa Drug House or M/s Hindustan Institute of Pharmacon Ltd in supply of the drug kits, was highlighted. He is further of the view that sequence of events undoubtedly suggests that the petitioner was maliciously named in the FIR with an ulterior motive due to some personal grudge.

5. While opposing the prayer, learned Special Public Prosecutor has submitted that the case registered in the year 2010 is yet to be investigated into fully. According to him, at this juncture, it would be premature to conclude that the petitioner was not, in any way, involved in the offences. To buttress the contention, reliance has been placed on the decision of the Apex Court in *State of Orissa v. Saroj Kumar Sahoo* (2005) 13 SCC 540, which is an authority for the proposition that, for quashing of proceedings under Section 482 of the Code, where the investigation was not completed, it would be impermissible for the High Court to look into the materials, the acceptability of which is essentially a matter for trial and further, the allegations of mala fides against the petitioner are inconsequent.

6. Learned Special Public Prosecutor has pointed out that search of the premises, belonging to Dr. Yogiraj Sharma and other related persons, conducted by the Income Tax Authorities, has revealed that the petitioner had acted as one of the close associates of Dr. Yogiraj Sharma in amassing huge wealth and acquiring properties disproportionate to his known sources of income by taking recourse to large scale corruption in procurement of drugs to be supplied to the various health centers in the State. He has also drawn attention to the fact that the tender conditions were relaxed subsequently so as to enable the supplier M/s KAPL to include drugs, manufactured by other pharmaceutical companies or firms in the drug kits subject to guarantee as to their genuineness. In the light

of these facts and circumstances of the case, he has contended that a reasonable suspicion exists as to involvement of the petitioner in supply of the drug kits but no further evidence could be collected in this regard due to non co-operation of M/s KAPL.

7. In response, learned Senior Counsel has pointed out that during a considerable period of more than 11 months, the prosecution agency has not been able to collect any cogent evidence suggesting complicity of the petitioner in the offences. In his opinion, case of the petitioner is covered by category (iii) as enumerated in *R. P. Kapur v. State of Punjab* AIR 1960 SC 866 Reference has also been made to the following precedents explaining scope and ambit of interference under Section 482 of the Code -

(i) *Papular Muthiah v. State* (2006) 7 SCC 296 wherein it has been reiterated that power under Section 482 overrides other provisions of the Code and cannot be exercised in violation/contravention of a statutory power created under any other enactment.

(ii) *Baijnath Jha v. Sita Ram* AIR 2008 SC 2778, wherein it was pointed that Authority of the Court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the Court has power to prevent abuse.

(iii) *M. N. Ojha v. Alok Kumar Srivastav* AIR 2010 SC 201 wherein it has been observed that normally, the High Court would not intervene in the criminal proceedings at the preliminary stage/when the investigation/enquiry is pending ..... But, at the same time, the High Court cannot refuse to exercise its jurisdiction if the interest of justice so required where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no fair-minded and informed observer can ever reach a just and proper conclusion as to the existence of sufficient grounds for proceeding.

(iv) *S. Khushboo vs. Kanniammal & Anr.* AIR 2010 SC 3196, wherein the following observations made by the Apex Court in *Shakson Belthissor vs. State of Kerala &*

Anr. (2009) 14 SCC 466 were quoted with approval -

> "One of the paramount duties of the superior courts is to see that a person who is apparently innocent is not subjected to prosecution and humiliation on the basis of a false and wholly untenable complaint."

8. Adverting to the facts of the instant case, it may be observed that although, the corresponding recitals of the FIR do disclose offences yet, the investigating agency has not been able to collect any cogent evidence during a considerable period of nearly one year despite the fact that offences relate to the financial year 2006-07. The relevant observations made in *R.P. Kapur's case* (ibid), that was also referred to in *Saroj Kumar Sahoo's case* (above), may be reproduced as under -

> Some of the categories of cases where the inherent jurisdiction to quash proceedings can and should be exercised are:
>
> (i) ...
>
> (ii) ...
>
> (iii) Where the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases 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 manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question.
>
> (Emphasis supplied)

9. Accordingly, the ratio in *Saroj Kumar Sahoo's case* (above) is not applicable to the case against the petitioner in view of the absence of incriminating evidence.

10. As reaffirmed in *M. N. Ojha's case* (supra), saving of inherent power of the High Court in criminal matters is intended to achieve a salutary public purpose "which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution and if such power is

not conceded, it may even lead to injustice". Moreover, as observed in *Baijnath Jha's case* (above), it would be an abuse of the process of the Court to allow any action which would result in injustice and prevent promotion of justice and further, in exercise of the powers the Court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of Court or quashing of these proceedings would otherwise serve the ends of justice. This apart, the proceedings relatable to a particular accused named in the FIR may also be quashed under the inherent powers (See. *Reshma Bano v. State of U.P.,* (2008) 5 SCC 791).

11. However, taking into consideration the peculiar facts and circumstances of the case in totality, mere fact that the allegations levelled against the petitioner have not been found to be substantiated so far, would not afford a ground to quash the FIR or a part thereof. Still, we are of the opinion that continuance of investigation as against the petitioner deserves interference under the inherent powers.

12. In the result, the petition stands allowed in part and it is directed that the recitals of the FIR, so far as they relate to the petitioner, shall not be acted upon and he shall not be treated to be an accused on the basis of existing materials. However, nothing contained herein shall preclude the Investigating Agency from carrying out further investigation into the offences and whereupon such an investigation, evidence, oral or documentary is collected suggesting involvement of the petitioner, the Agency shall be at liberty to take action against him in accordance with law.

Petition partly allowed.

I.L.R. [2011] M. P., 1418

MISCELLANEOUS CRIMINAL CASE

Before Mrs. Justice Indrani Datta

M.Cr.C. No. 8264/2010 (Gwalior) decided on 31January, 2011

RAMCHARAN ...Applicant

Vs.

STATE OF MP. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 427(2) & 482 - Sentence to run concurrently - **Prayer for making sentences to run concurrently has to be made before Trial Court or before**

Appellate Court - No such prayer made - Application under Section 482 Cr.P.C. not maintainable. (Para 9)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 427(2) व 482 – दंड साथ–साथ भुगताया जाना – दंड साथ–साथ भुगताए जाने की प्रार्थना, विचारण न्यायालय के समक्ष या अपीलीय न्यायालय के समक्ष करनी होगी – ऐसी कोई प्रार्थना नहीं की गई – द.प्र.सं. की धारा 482 के अंतर्गत आवेदन अपोषणीय।

Cases referred :

2007 Cr.L.J. 763, ILR 2007 MP 1835.

Pawan Vijaywargiya, for the applicant.

Sangeeta Pachori, for the non-applicant/State.

ORDER

INDRANI DATTA, J. :–With the consent of learned counsel for the parties, heard finally.

1. Petitioner has filed this petition under Section 482 of Cr.P.C. praying for a direction that sentence passed against him in Criminal Case No.337/1993 by JMFC, Sheopurkalan, is to run concurrently with the sentence of life imprisonment awarded to him in Sessions Trial No.161/1997 by Additional Sessions Judge, Sheopurkalan.

2. In Criminal case No.337/1993, petitioner was convicted for the offence punishable under Section 25(1B)(a) of the Arms Act and sentenced to undergo R.I. of one year with a fine of Rs.100/- by judgment dated 28.9.2000 and thereafter the petitioner was convicted in Sessions Trial No.161/97 under Section 302 or in the alternative 302/34 of IPC and sentenced to life imprisonment with a fine of Rs. 1,000/- vide judgment dated 21.12.2000.

3. Learned counsel for the petitioner submits that in view of the provisions of Section 427 of Cr.P.C., petitioner, who was convicted under Section 25(1B)(a) of the Arms Act and was sentenced to suffer R.I. of one year, has to undergo that sentence first and subsequent sentence awarded by Additional Sessions Judge under Section 302 of IPC on 21.12.2000 would commence after expiry of previous sentence. Therefore, it is essential for securing the ends of justice that the sentences imposed upon him in both the cases be directed to run concurrently.

4. Learned Public Prosecutor for the State opposed the submissions

made by learned counsel for the petitioner and prayed for dismissal of the petition.

5. Perused the documents on record.

6. Section 427 of Cr.P.C. reads as follows :

> "427 : (1) When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the court directs that the subsequent sentence shall run concurrently with such previous sentence :
>
> Provided that where a person who has been sentenced to imprisonment by an order under s 122 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.
>
> (2) When a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence".

From bare perusal of Section 427 of Cr.P.C., it appears that there are two different situations. As per Section 427 (1), when a person already undergoing sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or to imprisonment for life, then his second sentence shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the court directs that subsequent sentence shall run concurrently with such previous sentence. In that condition, the accused has to take permission of the Court that subsequent sentence imposed upon him, shall run concurrently with his previous sentence.

7. Hon'ble Apex Court in par 11 of the case of *Kudva Vs. State of Andhra Pradesh* (2007 Cri.LJ 763) has held as under :

> "11. However, in this case, the provision of Section 427 of the Code was not invoked in the original cases or in the appeals. A separate application was filed before the High Court after the special leave petitions were dismissed. Such an application, in our opinion, was not maintainable. The High Court could not have exercised its inherent jurisdiction in a case of this nature as it had not exercised such jurisdiction while passing the judgment in appeal. Section 482 of the Code was, therefore, not an appropriate remedy having regard to the fact that neither the Trial Judge, nor the High Court while passing the judgments of conviction and sentence indicated that the sentences passed against the appellant in both the cases shall run concurrently or Section 427 would be attracted. The said provision, therefore, could not be applied in a separate and independent proceeding by the High Court. The appeal being devoid of any merit is dismissed".

In the light of above legal proposition, it is apparent that in above situation the prayer to the effect that subsequent sentence passed on subsequent conviction is to run concurrently with previous sentence, is to be made before the concerned Court or before the appellate Court as observed by bench of this Court in *Kamal Singh Vs. State of M.P.* ILR (2007) M.P 1835.

8. So far as Sub Section 2 of Section 427 of Cr.P.C. is concerned, the situation is different here. From bare perusal of Sub Section 2, it is apparent that when a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence. In that situation, there is no requirement for any direction of the Court as subsequent sentence will automatically run concurrently with previous sentence.

9. Taking into consideration the facts and circumstances of the case, it is apparent that provisions of Section 427(2) of Cr.P.C. are not applicable in the case at hand. Petitioner was convicted under Section 25(1B)(a) of the Arms Act by judgment dated 28.9.2000 in Criminal Case No.337/

1993 and thereafter he was convicted in another Sessions Trial and sentenced to life imprisonment which was confirmed by this Court in Criminal Appeal No.110/2001. Neither prayer for making the sentences concurrent was made by petitioner before Trial Court when he was sentenced in subsequent case, nor this prayer for making the sentences concurrent was made in Criminal Appeal No.110/2001 before High Court. As such, the inherent powers under Section 482 of Cr.P.C. can not be exercised in the present situation. Petition is therefore dismissed.

Petition dismissed.

I.L.R. [2011] M. P., 1422

MISCELLANEOUS CRIMINAL CASE

Before Mrs. Justice Indrani Datta

M.Cr.C. No. 855/2011 (Gwalior) decided on 4 February, 2011

DEVESH GUPTA ...Applicant

Vs.

SMT. SUDHA SHRIVASTAVA & ors. ...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) - Powers of Magistrate to order for investigation **- Magistrate is not debarred from sending the complaint disclosing offences exclusively triable by Court of Sessions for police investigation under Section 156(3) of Cr.P.C. at pre cognizance stage.** (Para 16)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) –जाँच का आदेश देने की मजिस्ट्रेट की शक्तियाँ –अनन्य रुप से सत्र न्यायालय द्वारा विचारणीय अपराधों को प्रकट करती शिकायत को, संज्ञान पूर्व प्रक्रम पर, द.प्र.सं. की धारा 156(3) के अंतर्गत पुलिस जाँच के लिए भेजने से मजिस्ट्रेट विवर्जित नहीं है।

Cases referred :

2008(4) Crimes 292 (MP), (2006) 1 SCC 627, AIR 2010 SCC 1877, ILR 2010 MP 707, (1977) 4 SCC 459. AIR 1976 SC 1672.

Y.S. Tomar, for the applicant.

Sangeeta Pachuari, P.P., for the non-applicant/State.

ORDER

INDRANI DATTA, J. :–This petition has been preferred by the petitioner under Section 482 Code of Criminal Procedure for setting aside the order dated 20.1.2011 passed by First ASJ, Gwalior affirming the

order passed by JMFC, Gwalior in unregistered case No. /2010 dated 20.1.2011 whereby, learned trial Court has directed police to investigate under section 156 (3) Cr.P.C concerning the complaint filed by respondent no.1 in that court.

2. Facts in nut-shell giving rise to this petition are that respondent no.1/ complainant has filed one complaint under section 420, 467, 468, 473, 504, 506, 193 and 189 IPC against petitioner in the Court of JMFC, Gwalior in which, learned trial Court directed police to investigate under section 156 (3) Cr.P.C. Against that order, revision was preferred on the ground that as the complaint filed against petitioner discloses the offences triable by Sessions Court, hence, the Magistrate has no power to order police to investigate under section 156 (3) Cr.P.C. Revision was preferred against that order. Revisional Court has dismissed the revision giving rise to this petition.

3. It is contended by learned counsel for the petitioner that as per allegations of complaint, the offences are exclusively triable by the Court of Sessions, hence, Magistrate should not have directed police to investigate under section 156 (3) Cr.P.C. The Magistrate should have considered the case as per the provisions of section 202 (2) Cr.P.C.

4. Learned counsel for the petitioner has relied upon the citation *Nanjiram Vs. State of M.P.* 2008 (4) Crimes 292 (MP). In that case, a bench of this court has held that in case of complaint in which allegations were for offence triable by Sessions Court, a Magistrate had no power to direct investigation under section 156 (3) Cr.P.C.

Placing reliance on this citation, learned counsel for the petitioner submits that the order of learned trial court as well as that of revisional court are improper, illegal and not sustainable and deserve to be set-aside.

5. Per contra, learned PP urged that there is no perversity in the impugned order. The order passed by learned trial Judge is correct and proper as learned trial court without taking cognizance has directed police to investigate under section 156 (3) Cr.P.C, hence, obstruction of 202 is not applicable in the case. As Chapter XII of Cr.P.C deals with pre-cognizance stage and Chapter XIV of Cr.P.C deals with post-cognizance stage. Hence, this revision being sans merit is to be dismissed.

6. Heard rival contention of both the counsels and perused the documents on record.

7. While exercising revisional powers, correctness, legality and propriety of order passed is to be examined.

8. In order to examine the scope of Section 156(3) and 202 Code of Criminal Procedure, these sections need to be quoted, the same read as under:-

"156. Police officer's power to investigate cognizable case:-

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under Section 190 may order such an investigation as above mentioned."

Sections 202 Code of Criminal Procedure reads as follows :

"202. Postponement of issue of process-(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance or which has been made over to him under section 192, may, if he thinks fit, (and shall, in a case where the accused is residing to a place beyond the area in which he exercises his jurisdiction) postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding;

Provided that no such direction for investigation shall be made -

(a). where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b). where the complaint has not been made by a court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2). In an inquiry under sub section (1), The Magistrate may, if he thinks fit, take evidence of witness on oath;

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3). If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant".

From bare perusal of Sections 156 and 202 of Cr. P. C, it is apparent that the power to order police investigation under Section 156(3) of Cr. P. C. is different from the power to direct investigation conferred by Section 202(1) of Cr. P. C. The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage and the second at post-cognizance stage.

9. In the case of *Mohd. Yousuf Vs. Smt. Afaq Jahan & Another* AIR (2006) 1 SCC 627, Hon'ble Apex Court has highlighted investigation envisaged under section 156 (3) and 202 Cr.P.C and difference between two is discussed.

10. Further in the case of *Rameshbhai Pandurao Hedau Vs. State of Gujrat* AIR 2010 SCC 1877, the apex court has held that the power to direct an investigation to the police authorities is available to the Magistrate both under section 156(3) Cr.P.C and under section 202 Cr.P.C. The only difference is the stage at which the said powers may be invoked. The power under section 156 (3), to direct an investigation by the police authorities is at the pre-cognizance stage while the power to direct a similar investigation under section 202 is at the post-cognizance stage.

11. Further more in the case of *Arun Kumar Jain Vs. Dinesh Tripathi & Ors,* I.L.R. [2010] M.P., 707, a Single Bench of this Court has held that even if the allegations alleged in the complaint shows that the

offences are triable by Court of Sessions, the Magistrate is empowered to pass an order to investigate the allegations alleged in complaint under Section 156(3) of Cr. P. C.

12. Yet in the case of *Tularam and Others Vs. Kishore Singh* (1977) 4 SCC 459, it is held by the apex Court that Sections 190 and 156(3) are mutually exclusive and work in totally different spheres. In other words, the position is that even if a Magistrate receives a complaint under Section 190 he can act under Section 156(3) provided that he does not take cognizance. The position, therefore, is that while Chapter 14 deals with post cognizance stage Chapter 12 so far as the Magistrate is concerned deals with pre-cognizance stage, that is to say once a Magistrate starts acting under Section 190 and the provisions following he cannot resort to Section 156(3). It is further held that when a Magistrate orders investigation under Section 156(3) the complaint disappears and goes out of existence. The provisions of Section 202 of the present Code debar a Magistrate from directing investigation on a complaint where the offence charged is triable exclusively by the Court of Session. It is further held that ***"the Magistrate's power under Section 156(3) of the Code to order investigation by the police have not been touched or affected by Section 202 because these powers are exercised even before cognizance is taken. In other words, Section 202 would apply only to cases where the Magistrate has taken cognizance and chooses to enquire into the complaint either himself or through any other agency".***

13. Yet in another case *D. Lakshminarayana Reddy and Others Vs. Narayan Reddy and others,* AIR 1976 SC 1672, the Hon. Apex Court has held that in view of first proviso to Section 202(1) of the Criminal Procedure Code, a Magistrate who receives a complaint disclosing offences exclusively triable by the Court of Session, is not debarred from sending the same to the police for investigation under Section 156(3) of the Code.

The power to order police investigation under Section 156(3) is different from the power to direct investigation conferred by Section 202 (1). The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage, the second at the post-cognizance stage when the Magistrate is in seisin of the case. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before

he takes cognizance of the offence under Section 190(1)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of Section 156(3). It may be noted further that an order made under sub-section (3) of Section 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with a report or charge sheet under Section 173. On the other hand, Section 202 comes in at a stage when some evidence has been collected by the Magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is empowered under Section 202 to direct, within the limits circumscribed by that section, an investigation "for the purpose of deciding whether or not there is, sufficient ground for proceeding." Thus the object of an investigation under Section 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him.

15. In view of the aforesaid position of law envisaged by apex Court in the judgments cited above which is law of land, the citation relied by learned counsel for the petitioner *Nanjiram* (Supra) is not helpful in this case.

16. Considering the facts and circumstances of the case coupled with the aforesaid position of law and reasons mentioned in foregoing paras of this order, I am of the considered opinion that even in complaint disclosing offences exclusively triable by Court of Sessions, Magistrate is not debarred from sending the same for police investigation under Section 156(3) of Cr. P. C, if he has opted to take recourse of section 156 (3) Cr.P.C at pre cognizance stage. Therefore, the order passed by learned trial court on 11.10.2010 and affirmed by the revisional court in Cr.Revision No.570 of 2010 vide order dated 20.1.2011 is legal and proper and requires no interference.

17. Hence, this petition sans merit and the same is hereby dismissed.

Copy to concerned Court as per rules.

Petition dismissed.

I.L.R. [2011] M. P., 1428
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice R.C. Mishra & Mrs. Justice Vimla Jain
M.Cr.C.No. 9098/2010 (Jabalpur) decided on 11 February, 2011

GAMBHIR SINGH PATEL & anr. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

A. ***Prevention of Corruption Act (49 of 1988), Section 2 (c)(ix), Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Section 64 - Public Servant - Vice-Chairman of Samiti* - Vice Chairman is a Public Servant within the meaning of Section 2(c)(ix) of Act, 1988.** (Para 6)

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 2 (सी)*(ix)*, कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धारा 64 – लोक सेवक – समिति का उपाध्यक्ष – अधिनियम, 1988 की धारा 2(सी)*(ix)* के अर्थान्तर्गत उपाध्यक्ष लोक सेवक है।

B. ***Prevention of Corruption Act (49 of 1988), Section 19 - Cognizance without sanction* - Applicant No.1 was public servant on the date of taking of cognizance therefore, order taking cognizance and all consequent proceedings including charge quashed - However, the Trial Court can decide the question of taking cognizance afresh on the basis of same charge sheet as now applicant No.1 ceases to be a public servant.** (Para 10)

ख. भ्रष्टाचार निवारण अधिनियम, (1988 का 49), धारा 19 – बिना मंजूरी के संज्ञान – संज्ञान लेने के दिनांक को आवेदक क्र. 1 लोक सेवक था, इसलिए संज्ञान लेने का आदेश एवं फलस्वरुप की गई सभी कार्यवाहियाँ, आरोप सहित, अभिखंडित – अपितु, उसी आरोप पत्र के आधार पर नया संज्ञान लेने के प्रश्न को विचारण न्यायालय निर्धारित कर सकता है, चूंकि अब आवेदक क्र. 1 लोक सेवक नहीं रहा।

Cases referred :
AIR 2005 SC 3606, (2005) 12 SCC 709, (2009) 11 SCC 424, AIR 1949 PC 264, (2006)9 SCC 601.

Satyam Agrawal, for the applicants.
Aditya Adhikari, Spl. P.P., for the non-applicant/State.

ORDER

The Order of the Court was delivered by **R.C. MISHRA, J.** :–This is a petition, under Section 482 of the Code of Criminal Procedure, for having the charge sheet and the corresponding proceedings pending as Special Case No.1/10 before Special Judge (under the Prevention of Corruption Act, 1988) [for brevity 'the Act'], Sehore, quashed. In that case, cognizance of various offences against the petitioners and the co-accused S.K. Bansal as can be tabulated hereinunder, was taken upon the charge sheet submitted by S.P.E. (Lokayukta) after due investigation into Crime No.29/10 registered in its office at Bhopal -

Name of the accused	Cognizance taken of the offences punishable under Section
Gambhir Singh, petitioner no.1 here	7 and 13(1)(d) read with 13(2) of the Act and 120 of the IPC
Gajanand @ Gajanan, petitioner no.2 here	12 of the Act
S.K. Bansal, co-accused	12 of the Act read with S.120 of IPC

2. Prosecution story, in short, may be narrated thus -

(a) At the relevant point of time, petitioner no.1 was holding the office of Vice-Chairman, Krishi Upaj Mandi Samiti, Nasrullaganj whereas co-accused S.K. Bansal was working as Secretary of the Samiti.

(b) Work of construction of Krishak Vishram Graha in the office premises of the Samiti was awarded to the complainant Santosh Joshi. Because of several factors, the work could not be completed within the stipulated period and the contract was ultimately rescinded with effect from 21.06.2008. However, a total amount of Rs.2,21,000/- remained unpaid and for clearance of the corresponding bills for payment, the petitioner no.1, in pursuance of a conspiracy hatched by him with co-accused S.K. Bansal, demanded a sum of Rs.90,000/- as illegal gratification.

(c) Not willing to pay the bribe, the complainant approached the office of Special Police Establishment

(Lokayukta) at Bhopal. Upon completion of usual formalities, a trap was arranged on 12.04.2010 in petitioner no.1's office where petitioner no.2 was also present. In the course of trap proceedings, the complainant, along with a signed cheque, bearing no.083858, for a sum of Rs.40,000/, handed over currency notes worth Rs.30,000/- smeared with phenolphthalein to the petitioner no.1 who, while demanding an additional cash amount of Rs.5000/-, substituted the cheque amount by Rs.45,000/- and entered the name of petitioner no.2 as bearer thereof. The petitioner no.1 kept the extra amount of Rs.5000/- given by the complainant in the left pocket of his shirt and entrusted the tainted money as well as the cheque to the petitioner no.2. Immediately thereafter, the complainant came out of the office and gave the appointed signal to the trap party led by Inspector Naveen Kumar Awasthy. Both the petitioners were apprehended and the respective incriminating articles were recovered from their possession. Hands of the petitioners and those of the complainant were washed with the solution of Sodium Carbonate and the corresponding parts of the solution indicated presence of phenolphthalein by turning pink.

3. After due investigation, on 27.07.2010, charge-sheet was submitted before the Special Court without obtaining sanction for prosecution of the petitioner no.1 as contemplated under Section 19(1) of the Act. However, cognizance of the offences was taken on 04.08.2010 whereas the petitioner no.1 continued to hold the office of Vice Chairman till 30.09.2010, the date on which he had tendered his resignation.

4. A bare perusal of the petition would reveal that it is based inter alia on the ground that petitioner no.1 is not a public servant and therefore, could not be proceeded against for the offences punishable under the Act. Nevertheless, learned counsel for the petitioners has raised an alternative contention that even if the petitioner no.1 is held to be a public servant, cognizance of the offences taken by the Special Judge against him was bad in law in absence of requisite sanction. Inviting attention to the decision of the Apex Court in *State of Goa v. Babu Thomas* AIR

2005 SC 3606, he has further contended that since the fundamental error on the part of the Special Judge invalidated the cognizance of all the offences as without jurisdiction, all the consequent proceedings deserve to be quashed as nullity. According to him, even on facts, the offence of abetment to commit the offence defined in Section 7 of the Act was not made out against the petitioner no.2.

5. In response, learned Special Public Prosecutor has submitted that taking cognizance and presentation of charge sheet are distinct things and the bar, under Section 19(1) of the Act, operates against taking of the cognizance only. Placing reliance on the decision of the Supreme Court in *Dilawar Singh v. Parvinder Singh* (2005) 12 SCC 709, he has urged that improper cognizance of the offences as against petitioner no.1 had no bearing on the legality of the proceedings against the petitioner no.2 or the co-accused S.K. Bansal.

6. At the outset, it may be observed that the argument that deeming provision contained in Section 64 of Madhya Pradesh Krishi Upaj Mandi Adhiniyam, 1972 does not make the office bearers enumerated therein as "public servants" within the meaning of Section 21 of the IPC is not acceptable in view of the definition of "public servant" as given under Section 2(c)(ix) of the Act (*State of M.P. v. Rameshwar,* (2009) 11 SCC 424 referred to). Accordingly, on the date of taking of cognizance, the petitioner no.1, in his capacity as a duly elected Vice-Chairman of the Samiti constituted under Section 11 of the Adhiniyam, was a "public servant", liable to be prosecuted for the offences under the Act.

7. As explained in *Dilawar Singh's case* (supra), since the provisions of Section 19 of the Act will have an overriding effect over the general provisions contained in Section 190 or 319 of the Code of Criminal Procedure, the contention that the Court takes cognizance of an offence and not of an offender does not hold good when cognizance of an offence under the Act is taken. Thus, the order-taking cognizance of the offences was without jurisdiction and wholly invalid, so far as it related to petitioner no.1 only. It was irrelevant that in the course of the proceedings, the Court has acquired competence to take cognizance of the offences against the petitioner no.1 after acceptance of his resignation from the office of Vice Chairman on 30.09.2010 (See. *Yosofalli Mulla Noorbhoy v. The King* AIR 1949 PC 264).

8. Still, even the ratio in *Babu Thomas's case* (above) does not provide any justification for quashing of the proceedings against the petitioner no.2 and co-accused S.K. Bansal as cognizance of the respective offences was valid in law. It is well settled that the inherent powers, under Section 482 of the Code, are to be exercised ex debito justitiae to prevent abuse of the process of Court but not to stifle a legitimate prosecution, when the issue involved, whether factual or legal, can not be decided without sufficient material.

9. For these reasons, it would not be desirable to quash the charge sheet itself or the consequent proceedings against the petitioner no.2 and the co-accused (*Narmada Prasad Sonkar v. Sardar Avtar Singh Chabara,* (2006) 9 SCC 601 relied on).

10. Consequently, the petition stands allowed in part. In the result -

(i) The prayer for quashment made on behalf of petitioner no.2 is rejected.

(ii) The order-dated 04.08.2010 taking cognizance of the offences, so far as it concerns the petitioner no.1 and all consequent proceedings including the charges as against him only, are hereby quashed as null and void. However, the Special Judge shall be at liberty to consider and decide the matter of taking of cognizance afresh in accordance with law on the basis of the same charge sheet in view of the fact that the petitioner no.1 ceased to be a public servant w.e.f. 01.10.2010.

Petition partly allowed.
